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South Australian Law Reform Institute

Surrogacy: A Legislative Framework

A review of Part 2B of the *Family Relationships Act 1975* (SA)

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address: SA Law Reform Institute
Adelaide Law School
University of Adelaide
North Terrace
Australia 5005

Telephone: (08) 8313 5582

Email: salri@adelaide.edu.au

Website: http://law.adelaide.edu.au/research/law-reform-institute

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Terms of reference

The South Australian Law Reform Institute (SALRI) was asked on 26 December 2017 by the former South Australian Attorney-General, the Hon John Rau MP, to inquire into and report on certain aspects of the present law regulating surrogacy in South Australia, contained in Part 2B of the *Family Relationships Act 1975* (SA), and to suggest a suitable regulatory framework for surrogacy for South Australia. The present South Australian Attorney-General, the Hon Vickie Chapman MP, supports SALRI undertaking this reference.

Participants

South Australian Law Reform Institute

Director

Professor John Williams

Deputy Director

Dr David Plater

Advisory Board

Professor John Williams (Chair)

The Hon David Bleby QC

Professor Melissa de Zwart

Mr Terry Evans

Mr Stephen McDonald

Mr Dini Soulio

The Hon Justice Tim Stanley

Ms Aimee Travers

Administrative Officer

Louise Scarman

Project Officers / Researchers

Dr Sarah Moulds

Ms Madeleine Thompson

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Louise Scarman and James Williams provided proofreading and editorial assistance.

SALRI acknowledges the valuable contribution of the Hon John Dawkins MLC to surrogacy law reform in South Australia, notably the *Family Relationships (Surrogacy) Amendment Act 2015* and the *Family Relationships (Surrogacy) Amendment Bill 2017*. SALRI builds on this work in this Report.

SALRI also acknowledges and relies upon the extensive previous research on this topic, and, in particular, upon the work of the Family Law Council, *Report on Parentage and the Family Law Act* (2013), and the work of and submissions 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* (2016).

SALRI is grateful for the many insightful submissions received in relation to this reference.

SALRI would also like to acknowledge the support of the Attorney-General's Department in providing funding to undertake this reference.

Disclaimer

This Report deals with the law as of 30 September 2018 and may not necessarily represent the current law.

Any views expressed in this Report are those of the South Australian Law Reform Institute and no other agency.

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Preface

On 26 December 2017, the South Australian Law Reform Institute (SALRI) was asked by the former South Australian Attorney-General, the Hon John Rau MP, to inquire into and report on certain aspects of the present law regulating surrogacy in South Australia, contained in Part 2B of the *Family Relationships Act 1975* (SA), and to suggest a suitable regulatory framework for surrogacy for South Australia. The present Attorney-General, the Hon Vickie Chapman MP, has also supported SALRI undertaking this reference.

SALRI's terms of reference were set out by the Hon John Rau MP as follows:

1. To review Part 2B of the *Family Relationships Act 1975* (SA), in particular the changes brought about by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) (the '2015 Act') and proposed by the Family Relationships (Surrogacy) Amendment Bill 2017 (SA) (the '2017 Bill').

2. To consult with relevant experts, and other interested parties as considered suitable by the Institute, and to consider best practice from other jurisdictions in relation to 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.

5. To consider the impact of the decision of 1 September 2017 of the Full Court of the Family Court of Australia in *Bernieres v Dhopal* (2017) 324 FLR 21; and make recommendations in respect of the issues identified in the decision if so necessary.

The option of a regulated system of commercial surrogacy favoured by some parties in consultation was not within SALRI's terms of reference. Equally the option of banning or precluding any form of surrogacy favoured by some parties in consultation was not within SALRI's terms of reference.

The rationale of the present law throughout Australia is to allow or facilitate lawful surrogacy within Australia and deter or discourage recourse to unlawful surrogacy within both Australia and overseas, especially offshore commercial surrogacy (though how effective the present law has proved in this regard is open to debate). SALRI notes and adopts the explanation of the Hon John Dawkins MLC in introducing the 2015 Act to the South Australian Parliament as an accurate rationale of the current law:

> 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.[1]

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

SALRI acknowledges the valuable contribution of the Hon John Dawkins MLC to surrogacy law reform in South Australia, notably the *Family Relationships (Surrogacy) Amendment Act 2015* and the Family Relationships (Surrogacy) Amendment Bill 2017. SALRI builds on this work in this Report.

SALRI also acknowledges and relies upon the extensive previous research on this topic, and, in particular, upon the work of the Family Law Council, *Report on Parentage and the Family Law Act* (2013) and the work of, and submissions 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* (2016).

SALRI has undertaken extensive research and consultation with interested parties and the community in relation to this reference. SALRI is grateful for the many insightful submissions it has received. SALRI acknowledges and thanks the many individuals who shared deeply personal and often painful accounts of their experiences. The submissions and accounts that SALRI received have been carefully taken into account in the drafting of this Report and its recommendations.

Surrogacy is a complex and sensitive subject that raises many ethical, legal and other issues and implications. It is a topic that attracts strong and often conflicting views. Much of the research into the effects of surrogacy is both incomplete and conflicting and the long-term effects of surrogacy on the parties are still not fully known. SALRI acknowledges the sincerity of the many and often conflicting views that it has received in this reference. SALRI has had careful regard to all the views it received in consultation, but it is ultimately impossible to reconcile these views. SALRI reiterates that both options of a commercial system of regulated surrogacy and banning or precluding any form of surrogacy in South Australia are not within its terms of reference. SALRI also notes that the result of both its consultation and research supports an intermediate approach within these two polarised views as the most appropriate way forward. SALRI does 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. Nor does SALRI support seeking to preclude or ban surrogacy in South Australia. Any such option is both inappropriate and unrealistic.

SALRI notes that the complexities and national and international implications of surrogacy are such that the preferable solution to this issue is a national and uniform scheme co-ordinated between the States and Territories and the Commonwealth and the referral of State power to the Commonwealth. This option has been supported by the Chief Magistrate, Judge Eldridge of the Youth Court of South Australia and Chief Justice Pascoe of Family Court (speaking in a personal capacity). However, this is likely to prove a long-term process and in the interim it is crucial that the State regulatory framework for surrogacy is as effective as possible. SALRI supports a suitable regulatory framework for South Australia that maintains the (admittedly often tenuous) distinction between commercial and non-commercial surrogacy and clarifies and improves the current system to most appropriately allow and facilitate lawful domestic surrogacy within Australia for South Australians but discourages and deters recourse to unlawful surrogacy, especially offshore commercial surrogacy. It is unrealistic, in light of the diversity of modern families and the dramatic advances in reproductive technology, to expect that the law can cover every conceivable surrogacy situation that might arise. Nevertheless, SALRI considers that the framework which it has recommended is the most effective and appropriate to recognise and respect the interests of all parties, but crucially to protect the best interests of a child born as a result of surrogacy. This must always be the primary or paramount factor of any scheme.

SALRI's findings and recommendations include:

1. The value of a uniform national framework for surrogacy and the potential future referral as part of such a scheme of the State's role with respect to surrogacy to the Commonwealth.
2. The Family Court is the preferable court to deal with surrogacy (both domestic and international) given its specialised role, expertise and processes.
3. The need for South Australia to have the most appropriate framework possible for a non-commercial system of surrogacy, whilst working towards national consistency (given that any national surrogacy framework will be a long-term process).
4. The benefit, for clarity and accessibility, of a standalone *Surrogacy Act*.
5. The current distinction between commercial and non-commercial surrogacy be retained and commercial surrogacy should remain prohibited in South Australia.
6. Any surrogacy framework must recognise the human rights and interests of all parties, namely the child, surrogate mother and the intending parents, but the best interests of the child (including the child's right to know their full history and family) is the primary or paramount factor. This should apply throughout the process at both the pre-birth and post-birth stages.
7. Any court order to transfer the parentage of a surrogate child to the intending parents should be based on the child's best interests.
8. Given the complexities in this area and emerging research and international developments, there should be a statutory review of the operation of any new *Surrogacy Act* five years after commencement.
9. The Surrogate Register, the State Framework and the Attorney-General's role with respect to surrogacy set out in the 2015 Act are well-intentioned but impractical and should be removed.
10. The existing offences against commercial surrogacy should be clarified to focus on commercial introduction or brokerage or commercial adverting but allow social online advertising and discussion so as not to impede the potential parties to a surrogacy arrangement getting in touch.
11. A specific extraterritorial application in respect of commercial surrogacy offences as exists in New South Wales, the Australian Capital Territory and Queensland is ineffective and inappropriate and should not be adopted.
12. The benefit of a website from the Commonwealth and/or State to provide comprehensive, reliable and impartial advice to the parties about surrogacy and its various implications.
13. Any new *Surrogacy Act* should contain various general principles to apply throughout the process at both the pre-birth and post-births stages. These general principles are designed to protect the interests of all parties but, above all, protect the best interests of the child. These general principles include protecting all parties from exploitation, the need for an early focus under any regulatory framework at the outset of the process and before any fertility treatment and certainly before the child is born and the entitlement of the surrogate mother to manage and maintain her own medical autonomy and that, as far as practicable, surrogacy arrangements should be a private matter between the parties without State involvement.
14. All parties to a lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) should have access to appropriate, high quality, specialist and independent counselling services prior to a lawful surrogacy arrangement (and the option to seek counselling during and after any arrangement). The role of this counsellor, an 'Accredited Independent Counsellor', includes assessing or screening the suitability of the parties (the surrogate mother, her partner and the intending parents) to enter into a lawful surrogacy arrangement and the counsellor must certify they have covered certain important areas with the party(s) as part of their role. This counsellor cannot be employed by a fertility provider.
15. Any surrogacy framework should be governed by public health principles of best practice and linked to the *NHMRC ART Guidelines*.

16. The surrogate mother and the intending parties must obtain appropriate, high quality and independent legal advice prior to entering into a lawful surrogacy arrangement and the lawyer, as part of such advice, must certify they have covered certain important areas with their client.
17. The surrogacy agreement must be signed and in writing and the part relating to costs should be legally enforceable.
18. Mediation is to be strongly encouraged for the parties to resolve any dispute, but it is not mandatory.
19. The threshold criteria to proceed with a lawful surrogacy agreement are that the intending parents are ordinarily resident in South Australia, the surrogate mother and the intending parents are 25 years or over, the intending parents are effectively infertile, and the surrogate mother is an Australian citizen or permanent resident.
20. There should be the full and frank exchange of information between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and with the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. As part of this process, each party should (if possible) obtain and provide to the other parties and the Accredited Independent Counsellor(s) either a Working with Children Check (though SALRI notes there may well be difficulties at this stage with such a requirement) or a national criminal history check.
21. The present restriction on single persons accessing lawful surrogacy is unsound and should be removed.
22. The concept of a 'team baby' (where there is no genetic link between the intending parents and the child) raises sensitivities (especially where the surrogate mother proposes to provide her own ovum) but the present approach in South Australia should be retained to permit such arrangements if the intending parent(s) are effectively infertile and the arrangement is approved by the Accredited Independent Counsellor.
23. A flexible and realistic approach to jurisdiction within Australia is necessary to recognise the interstate aspects of surrogacy whilst discouraging forum shopping. Part of this is a mutual recognition scheme to comparable surrogacy processes to South Australia within Australia.
24. The child's right to know his or her full family and birth history is, consistent with ART and donor conception, vital and changes to law and practice are appropriate so that a child is entitled to access such information at age 16 and that a neutral indication on the birth certificate will alert the holder that there is private material behind the public record to which they are entitled.
25. In relation to the allowable costs of a surrogate mother, greater clarity and content to the present law is necessary. The guiding principles should be that no valuable consideration should be provided for the act of becoming (or trying to become) pregnant and carrying a child for another person, a surrogate mother should not be financially disadvantaged as a result of taking part in a surrogacy arrangement and should be able to recover any costs actually incurred as a direct result.
26. The surrogate mother should remain the legal parent of the child unless, and until, legal parentage is transferred by an order from a court of competent jurisdiction to the intending parents.
27. Two incidental aspects in relation to paternity should be referred to the Commonwealth or recognised at a State level to diminish needless complexity and duplication.
28. It is 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 Full Court of the Family

Court of Australia's decision in *Bernieres v Dhopal* (2017) 324 FLR 21. This is an issue to be resolved at a national level.

29. SALRI proposes to complete a short spin off report into various consequential civil law issues and implications raised in a surrogacy context. Such a Report need not delay any new *Surrogacy Act* as any recommendations will relate to other Acts.

This has proved a major reference into a complex and sensitive area of modern law and practice and I would like to acknowledge the valuable contribution to the consultation, research and writing of this Report by Dr David Plater (SALRI Deputy Director), Ms Madeleine Thompson (SALRI Researcher), Dr Sarah Moulds (SALRI Senior Project Officer), Ms Anita Brunacci (a local family lawyer) and Mr Stephen McDonald of the Bar.

I would especially like to acknowledge the valuable contribution of students from the Law Reform classes at Adelaide University over the past three years who have contributed so much to the necessary research and background work for a Report of this magnitude and complexity.

I would also like to acknowledge the diligent contribution of Ms Louise Scarman (SALRI Admin Officer) in proofreading and editing this Report and the support of the Attorney-General's Department of South Australia in providing funding for this reference.

Professor John Williams
Director
South Australian Law Reform Institute
October 2018

Recommendations

PART 3 - TERMINOLOGY

Recommendation 1

SALRI recommends that any legislative reform to accompany a new surrogacy framework should use the opportunity to move towards national consistency and, as part of this process, that problematic terms such as 'commissioning parent' (to be replaced with 'intending parent') and, as far as practicable, the term 'altruistic', should be replaced or avoided.

PART 4 – STATE VS NATIONAL

Recommendation 2

SALRI recommends that, in light of the likely delay of uniform (or at least consistent) national laws being developed, South Australia should, as far as practicable, revise its laws in relation to surrogacy until national laws are formulated, to ensure the State's laws are as effective as possible.

Recommendation 3

SALRI recommends that South Australia, along with other States and Territories, resume efforts towards a national consensus on this issue and to formulate a national uniform scheme as a matter of the highest priority.

Recommendation 4

SALRI recommends that, where necessary to give effect to Recommendation 3 above, South Australia should refer the jurisdiction of its powers in respect of surrogacy to the Commonwealth and allow the Family Court to exercise jurisdiction in respect of all aspects of surrogacy at its earliest opportunity.

PART 5 – THE NEED FOR A STANDALONE SURROGACY ACT

Recommendation 5

SALRI recommends that, for ease of reference and application and accessibility, the current scheme for surrogacy contained in Part 2B of the *Family Relationships Act 1975* (SA) be excised and replaced with a standalone *Surrogacy Act* for South Australia.

Recommendation 6

SALRI recommends that any new *Surrogacy Act* should draw on Part 2B of the *Family Relationships Act 1975* (SA) and the Family Relationships (Surrogacy) Amendment Bill 2017, notably as to the provisions set out in Part 5 of this Report.

To this end, SALRI suggests that any new *Surrogacy Act* should be subject to the further recommendations set out below, namely recommendations 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 39, 40, 41, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66 and 69.

PART 6 – COMMERCIAL SURROGACY AND ITS IMPLICATIONS

Recommendation 7

SALRI recommends 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.

PART 7 – HUMAN RIGHTS IMPLICATIONS

Recommendation 8

SALRI recommends that, under any *Surrogacy Act* and surrogacy framework, the interests and human rights of all parties, namely the child born as a result of surrogacy, the surrogate mother and her partner and the intending parents must be recognised and respected, but confirms that the primary or paramount consideration, both before and after birth, should be the best interests of the child.

Recommendation 9

SALRI recommends that any *Surrogacy Act* should provide that the court must be satisfied that the making of any parentage order in respect of a child born as a result of surrogacy is in the best interests of the child and this should be a necessary precondition to the making of a parentage order.

Recommendation 10

SALRI recommends that there is 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).

PART 9 – SPECIFIC LAW REFORM ISSUES

Recommendation 11

SALRI recommends that any new *Surrogacy Act* should contain the following statutory guiding principles to apply in any decision in relation to surrogacy, at both a pre-birth and post-birth stage:

1. That the best interests of the child are paramount and should be protected (including the child's safety and well-being and the child's right to know about their family and origins).
2. That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate.
3. That sufficient regulatory protections are in place to protect the surrogate mother and the intending parents from exploitation.
4. That there is legal clarity about the parent-child relationships that result from the arrangement.
5. The intervention of the law and the State in people's private lives, with regards to surrogacy, should be kept to a minimum.
6. Any model should ensure that, at the outset, all parties are fully aware of their rights and responsibilities (particularly in relation to the child) and such a model should seek to avoid and resolve any legal dispute (if arising) between the parties.

7. That the surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.

PART 10 – HOW ACTIVE SHOULD THE STATE BE?

Recommendation 12

SALRI recommends that the current role of the State Attorney-General introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) with respect to surrogacy (including both the Framework and to approve individual surrogacy agreements (including international surrogacy agreements)) is inappropriate and should be removed.

Recommendation 13

SALRI recommends that the Framework introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) with respect to surrogacy be removed.

Recommendation 14

SALRI recommends that the State Register of potential surrogate mothers introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) be removed.

PART 11 – CONNECTING SURROGATES AND INTENDING PARENTS

Recommendation 15

SALRI recommends that the present law should be clarified to provide that any offence covering the act of commercial surrogacy itself should include offering, encouraging, inducing or assisting such an act. This would capture commercial introduction and brokerage and commercial advertising, but not frustrate communication and negotiation between the parties in a non-commercial aspect, which is essential.

Recommendation 16

SALRI recommends that the *Surrogacy Act* (or relevant Act) should include an offence that 'a person must not publish any advertisement, statement, notice or other material that seeks to introduce people for a reward or other inducement with the intention that those people might enter into a surrogacy arrangement (whether non-commercial or commercial)'.

PART 12 – EXTRATERRITORIAL OFFENCE

Recommendation 17

SALRI recommends that, in light of their ineffectual nature, the extraterritorial offences relating to commercial surrogacy as exist in the Australian Capital Territory, New South Wales and Queensland should not be introduced in South Australia.

PART 13 – AVAILABILITY OF SURROGACY-RELATED RESOURCES AND INFORMATION

Recommendation 18

SALRI recommends that a website should be developed which provides advice and information for Australians considering domestic surrogacy and should include:

1. Clear advice on the role of Commonwealth Government support and service provision for intending parents, surrogates and children including Medicare, social security and welfare payments, child support and paid parental leave;
2. Clear advice on the surrogacy legislation in each Australian State and Territory;
3. Clear advice on the support and services funded and provided for by each Australian State and Territory including relevant health, counselling and legal services available; and
4. Best practice guidelines and other information for health care providers including hospitals, obstetricians, paediatric care, employers and others dealing with surrogates.

In this context, SALRI encourages the Commonwealth to implement Recommendation 6 of 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* (2016) for the Commonwealth Government to develop such a website.

Recommendation 19

In the event that the Commonwealth does not set up such a website, in the alternative, or in addition to Recommendation 18 above, SALRI recommends that an appropriate agency or agencies in South Australia such as SA Health or the Legal Services Commission prepares a suitable page on their own site to provide reliable and impartial information.

PART 14 – THRESHOLD ISSUES

Recommendation 20

SALRI recommends that any *Surrogacy Act* should confirm that a surrogacy arrangement should not proceed or be undertaken in South Australia unless, and until, the parties have in place a legal agreement that satisfies the relevant legislative requirements such as legal and counselling advice.

Recommendation 21

SALRI recommends that the current concept of infertility to access lawful surrogacy in South Australia should be retained but that, to clarify and update the relevant terminology, the present definition of infertility in s 10HA(2a)(e) of the *Family Relationships Act 1975* (SA) should be removed and replaced in the new *Surrogacy Act* or other relevant Act with the following definition of medical or social need to access lawful surrogacy based on s 30(2) the *Surrogacy Act 2010* (NSW):

'(2) There is a medical or social need for a surrogacy arrangement if:

(a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or

(b) there are 2 intended parents under the surrogacy arrangement and the intended parents are:

(i) a man and an eligible woman, or

(ii) 2 men, or

(iii) 2 eligible women.

(3) An eligible woman is a woman who:

(a) is unable to conceive a child on medical grounds, or

(b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or

(c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or

(d) if she were to conceive a child:

(i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or

(ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.'

Recommendation 22

SALRI recommends that all references to 'husband' and their accompanying definitions in Part 2B of the *Family Relationships Act 1975* (SA) should be removed and replaced in any new *Surrogacy Act* with 'spouse' to be more inclusive of surrogate mothers and intending parents in same-sex relationships.

Recommendation 23

SALRI recommends that any *Surrogacy Act* should provide that a surrogate mother must be at least 25 years of age in order to be a party to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a woman under the age of 25 years acting as a surrogate mother.

Recommendation 24

SALRI recommends that any *Surrogacy Act* should provide that the intending parents must be at least 25 years of age in order to be a party to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a person under the age of 25 years acting as an intending parent.

Recommendation 25

SALRI recommends that there should be no legislative requirement for a surrogate mother to have previously carried a pregnancy and given birth to a live child in order to access a lawful surrogacy agreement in South Australia, on the basis that this consideration should be addressed as part of the counselling (and screening) process.

PART 15 – SINGLES ACCESS TO SURROGACY

Recommendation 26

SALRI recommends that the current prohibition in South Australia on single people accessing surrogacy is discriminatory and inappropriate and should be repealed.

PART 16 – TEAM BABY

Recommendation 27

SALRI recommends that any *Surrogacy Act* should clarify the present law regarding surrogacy arrangements involving a child with no genetic link to either of the intending parents, namely that the intending parents can enter into a lawful surrogacy agreement in South Australia but only if a medical practitioner is satisfied that both of the intending parents appear to be infertile or there is medical reason why it would be preferable not to use such human reproductive material to achieve the pregnancy. However, this aspect of the law should be reviewed in five years (or five years after commencement for any new *Surrogacy Act*) as further research is available about the development and implications of donor-conceived individuals in adolescence and adulthood.

PART 17 - JURISDICTION

Recommendation 28

SALRI recommends that South Australian law should recognise surrogacy related processes that occur in analogous and comparable Australian jurisdictions which contain key features and safeguards of the South Australian legislative regime.

Recommendation 29

SALRI recommends that any *Surrogacy Act* should provide that, for a lawful surrogacy arrangement in South Australia to be legally recognised, the intending parent(s) must ordinarily reside in South Australia prior to the agreement being entered into. SALRI recommends that where the surrogate mother resides and where the fertility treatment occurs should be irrelevant to any such agreement.

Recommendation 30

SALRI recommends that any *Surrogacy Act* should provide that the surrogate mother and an intending parent/s must be either an Australian citizen or an Australian permanent resident to be eligible to access a lawful surrogacy agreement in South Australia.

Recommendation 31

SALRI recommends that any *Surrogacy Act* (or other relevant Act) should allow the mutual recognition of interstate surrogacy orders.

PART 18 – RISK ASSESSMENT

Recommendation 32

SALRI recommends that any *Surrogacy Act* should require the full and frank exchange of information between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. As part of this process, each party should (if possible) obtain and provide to the other parties and the Accredited Independent Counsellor(s) either a Working with Children Check (though SALRI notes there may well be difficulties at this stage with such a requirement) or a National Criminal History Check. Any check must be obtained prior to accessing any surrogacy related fertility procedure AND prior to entering into a surrogacy agreement. The parties should be advised of this requirement as part of their independent legal advice obtained in the process of receiving their lawyer's certificate.

PART 19 – HEALTH BEST PRACTICE

Recommendation 33

The regulatory framework governing surrogacy arrangements in South Australia should be consistent with a public health approach and with the public health principles set out in sections 5 to 16 of the *Public Health Act 2011* (SA).

Recommendation 34

SALRI recommends that information about Chapter 8 of the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* should be accessible to all potential parties to surrogacy agreements and be provided as a matter of course to all clients of registered fertility clinics considering surrogacy as an option.

Recommendation 35

SALRI recommends that the relevant Chapters of the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* should be subject to public consultation and review on a regular basis, in addition to the existing processes for expert review by the NHMRC and its relevant committees.

Recommendation 36

SALRI recommends that practical information and guidance (for example in the form of Fact Sheets or Guidelines) should be developed by SA Health in consultation with surrogate mothers, intending parents, relevant South Australian hospitals, maternal health service providers, fertility providers, counsellors and obstetricians on how to provide high quality and sensitive care to surrogate mothers and intending parents in the context of a lawful surrogacy agreement.

Recommendation 37

SALRI recommends that fertility clinics should provide potential parties to a lawful surrogacy arrangement with information about the circumstances in which fertility treatment will be provided to either the surrogate mother or the intending parent/s prior to and during the surrogacy

arrangement. This would allow parties to a lawful surrogacy arrangement to consider including, in the surrogacy arrangement, an undertaking by the intending parent/s not to continue to receive fertility treatment once a viable pregnancy has been achieved by a surrogate mother in accordance with the surrogacy arrangement.

PART 20 – COUNSELLING

Recommendation 38

SALRI recommends that all parties to a lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) should have access to appropriate, high quality and specialist counselling services by an Accredited Counsellor as required prior to, during and following a lawful surrogacy arrangement.

Recommendation 39

SALRI recommends that any *Surrogacy Act* should provide that all parties to a South Australian lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) must obtain a counselling certificate (which includes screening as to the suitability of the parties to enter into a surrogacy agreement) by an Accredited Independent Counsellor prior to any lawful surrogacy arrangement or related fertility treatment.

Recommendation 40

SALRI recommends that, to give effect to Recommendation 39, the *Surrogacy Act* (or elsewhere) should include the following legislative changes to improve the present counselling (and screening) process:

1. Retaining the current requirements in s 10HA of the *Family Relationships Act 1975* (SA) for all parties to the surrogate agreement, and the surrogate mother's partner, to obtain counselling prior to the lawful surrogacy agreement by an Accredited Independent Counsellor.
2. Amending s 10HA(3)(ab) to require each person referred to in s 10HA(2a)(g) to receive *independent* counselling, whether provided by the same counsellor or not.
3. Amending s 10HA(3)(b)(i) to require a counselling certificate to be issued by an Accredited Independent Counsellor which states that the person to whom it relates has received counselling about the full range of relevant matters which includes:
    i. The potential long-term psychosocial implications for each individual and each family involved, including the surrogate child and any other child/ren within the family unit(s) who may be affected by that birth.
    ii. The reason(s) why the potential surrogate mother wants to become involved in a surrogacy agreement.
    iii. The need for the surrogate mother's free, voluntary and informed agreement to enter into a lawful surrogacy agreement.
    iv. The surrogate mother's right to make informed decisions about their own medical care, including before and during the pregnancy and birth.
    v. The possibility that the surrogate mother may need medical and/or psychological assistance during any attempts to become pregnant, during the pregnancy and following the birth and that the pregnancy may affect the surrogate mother's own health.
    vi. The potential significance of the gestational connection and the right of a child born as a result of surrogacy to know the details of their birth and background, and the benefits of early disclosure.

vii. The possibility that a child born as a result of surrogacy may learn about the circumstances of their birth from sources other than the intending parents (for example from other family members) and may independently access information about their birth.

viii. The possibility that a child born as a result of surrogacy may attempt to make contact with the surrogate mother in the future.

ix. The impact of the potential surrogacy agreement on the surrogate mother's partner and other children, and on the couple's relationship and/or the family unit.

x. The impact of the potential surrogacy agreement on the intending parents' other children, and on the couple's relationship and/or the family unit.

xi. The implications for all parties, if it is proposed that the surrogate mother will provide her own ovum for use within a surrogacy arrangement.

xii. The exceptional circumstances present, which would deem it allowable for any party (the surrogate mother and/or intending parents) to participate in a surrogacy arrangement under the age of 25 years.

xiii. The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the surrogate mother, her partner (if any) and/or the intending parents are suitable to take part in a lawful surrogacy agreement.

xiv. The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the proposed surrogacy agreement will be in the best interests of any child already existing and any child born as a result of the surrogacy agreement.

Recommendation 41

SALRI recommends that any *Surrogacy Act* (or accompanying Regulations) provide that full membership of, or eligibility for full membership of, the Australian and New Zealand Independent Counsellors Association, is a necessary prerequisite to act in South Australia as an Accredited Independent Counsellor and carry out the counselling (and screening) role in relation to a lawful surrogacy agreement.

Recommendation 42

SALRI recommends that registered fertility clinics should adopt internal processes to ensure that an individual providing the counselling (and screening) to each person referred to in Recommendations 39 and 40 (see also s 10HA(2a)(g) of the *Family Relationships Act 1975* (SA)) is in a position to provide independent counselling (and screening) to each client (though also note Recommendation 43 below).

Recommendation 43

SALRI recommends that any *Surrogacy Act* should make it clear that an Accredited Independent Counsellor responsible for the issue of a counselling certificate (including determining the suitability of a party or parties to enter into a lawful surrogacy agreement) cannot be employed by a fertility clinic or be a 'contractor' (in the sense of receiving a commission, bonus or any form of valuable consideration from the clinic as a result of the surrogacy arrangement).

Recommendation 44

SALRI recommends that it should not be mandatory for the parties to undergo counselling during the surrogate mother's pregnancy. Rather, SALRI recommends that any *Surrogacy Act* should require that a lawful surrogacy agreement states that the intending parents will take reasonable steps to ensure that the surrogate mother and her partner (if any) are offered

counselling (at no cost to the surrogate mother or her partner) during any attempts to become pregnant (even if a pregnancy is not achieved) and during any pregnancy to which the agreement relates.

Recommendation 45

SALRI recommends that any *Surrogacy Act* should provide that it is mandatory for the surrogate mother to undergo one session of counselling with an Accredited Counsellor of the surrogate mother's choice after the birth of a child (with any cost to be met by the intending parents). The counsellor (who need not be an Accredited Independent Counsellor) as part of this session should prepare a short post birth report to guide the court as to whether a more detailed report may be necessary to assist the court in determining if any order is in the best interests of the child. Any *Surrogacy Act* should include an express power for the court to order a more detailed report from an Accredited Counsellor or suitable other expert of the court's choice if the court considers it appropriate and/or in the best interests of the child.

PART 21 – LAWYERS ADVICE AND CERTIFICATE

Recommendation 46

SALRI recommends that any *Surrogacy Act* provide that both the surrogate mother and the intending parent(s) must have a certificate from an Australian lawyer certifying that they have received appropriate independent legal advice on the surrogacy agreement and its various implications.

Recommendation 47

SALRI recommends that more detail and clarity should be added by any *Surrogacy Act* to the type of legal advice that has to be provided to the parties.

In this regard, SALRI recommends that the form of a surrogacy agreement should meet certain legal requirements in order to be valid, and should include (at a minimum) the following criteria:

(a) the agreement is signed by all parties; and

(b) before signing the agreement, each party is to be provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

(c) either before or after signing the agreement, each party is to be provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

(d) a copy of the statement referred to in paragraph (c) be provided to the other party or to a legal practitioner for the other party; and

(e) the agreement is a contract of which the proper law of the contract is South Australian law; and

(e) the agreement has not been terminated and has not been set aside by a court.

Recommendation 48

For the purposes of Recommendation 47 above, SALRI recommends that the present law be extended in any *Surrogacy Act* to provide that the content of the legal advice provided to the parties should include information dealing with the rights and responsibilities for the child, particularly regarding the authority to make decisions relating to health care (both pre and post birth), and upon the making of an order as to parentage by a court of competent jurisdiction, the effects of the agreement on matters of succession and estate planning and the categories of costs recoverable (see Recommendations 51–54 below).

Recommendation 49

SALRI recommends that the Youth Court (or any other relevant court) should be provided with the counsellor's certificates, any initial counselling reports in respect of the parties, the Working with Children Checks (or the national criminal history checks) and the lawyers' certificates in respect of their advice to the parties. This material should be lodged with the Youth Court or any other relevant court prior to any order being made transferring the legal parentage of the child.

PART 22 - MEDIATION

Recommendation 50

SALRI, noting the value of mediation in a surrogacy context, recommends that:

(a) the parties have the right, although not compulsory, to access mediation services through an experienced family law mediator to assist in negotiating the surrogacy agreement between them and this should not constitute an offence by the mediator or facilitating service under the relevant provision (see Recommendations 15 and 16 above);

(b) in the event of a dispute about the terms of the surrogacy agreement during the life of the agreement, the parties can attend mediation to attempt to resolve the dispute and, if this fails, either party can request the mediator to act as arbitrator in order to resolve the dispute, following which, any decision of an arbitrator is binding on the parties.

Note: The aim of mediation should be to try to prevent any disputes arising. The use of mediation and/or arbitration is strictly voluntary, and the parties retain the right, in the alternative, to make an application to a court of competent jurisdiction, however, the aim should be to keep the costs of litigation as low as possible.

PART 23 – RECOVERABLE COSTS

Recommendation 51

SALRI recommends that any *Surrogacy Act* should provide that the part of the surrogacy agreement relating to costs and expenses should be legally enforceable.

Recommendation 52

SALRI recommends that, in relation to costs, the guiding principles should be set out in any *Surrogacy Act* and should be that:

(i) No valuable consideration should be provided for the act of becoming pregnant and carrying a child for another person; and

(ii) A surrogate mother should not be financially disadvantaged as a result of taking part in a surrogacy arrangement and should be able to recover any costs actually incurred as a direct result of the pregnancy and birth.

Recommendation 53

SALRI recommends that any *Surrogacy Act* should provide that all costs *'directly related'* to the lawful surrogacy agreement (including the process of getting pregnant, the pregnancy and birth of the child) should be recoverable by the surrogate mother under a lawful surrogacy arrangement. The scope of these costs should be set out in the parties' individual surrogacy agreements. However, such costs should be permitted to include:

(a) Medical costs related to a pregnancy (including any attempt to become pregnant) that is the subject of the agreement.

(b) The birth or care of a child born as a result of that pregnancy.

(c) Counselling provided in connection with the agreement (including after the birth of a child).

(d) Medical services provided in connection with the agreement (medical services provided prior to achieving a pregnancy, and medical care provided during the pregnancy and after the birth of a child).

(e) Legal services provided in connection with the agreement (including after the birth of a child).

(f) Any premium paid for health, disability or life insurance which would otherwise not have been taken out, but for the agreement;

(g) Loss of income of the surrogate mother as a result of leave during the pregnancy or immediately after the pregnancy when the surrogate mother was unable to work on medical grounds. Recoverable loss of income should be limited to a period of two months. Loss of income should be recoverable regardless of the surrogate mother's access to alternative sources of paid leave during the same period (such as paid parental leave), provided the leave was required on medical grounds.

(h) Travel and accommodation costs of the surrogate mother (and her dependents) related to the pregnancy (including any attempt to become pregnant).

(i) Reasonable out of pocket expenses (including childcare related expenses and loss of domestic services expenses) incurred by the surrogate mother in respect of the agreement.

(j) Any other costs directly related to the surrogacy agreement as prescribed by the Regulations.

Recommendation 54

SALRI recommends that the present law relating to recoverable costs should be amended in any *Surrogacy Act* to provide that:

(a) The scope of recoverable costs should be set out in the parties' individual surrogacy agreement, but must include all relevant medical costs and the provision of independent legal advice and counselling to the surrogate mother and her partner prior to, during and after the term of the surrogacy agreement;
(b) Costs recoverable are those that have been actually incurred by the surrogate mother; and
(c) The provisions in the lawful surrogacy agreement relating to costs are legally enforceable between the parties (for example through the small claims process).

Recommendation 55

SALRI recommends that information setting out the typical range of costs recoverable under a lawful surrogacy agreement be made publicly available, for example in the form of a Table or Schedule of Surrogacy Costs, or as a questionnaire, to prompt potential parties to surrogacy agreements to turn their mind to the full range of potential costs recoverable under a lawful surrogacy agreement in South Australia pursuant to Recommendations 52–54 above. Such information could be prepared with the assistance of legal experts and published by a relevant Government department or other body that currently disseminates general legal information on family law matters such as the Legal Services Commission or Relationships Australia.

Recommendation 56

SALRI recommends that any *Surrogacy Act* should include an express incidental power to enable the relevant court to determine any outstanding issue such as an unresolved dispute about costs under a surrogacy agreement when it considers transferring the legal parentage to the intending parents.

Section 24 of the *Surrogacy Act 2012* (Tas) is an example of such a provision in this context.

PART 24 – BIRTH CERTIFICATES

Recommendation 57

SALRI recommends that the process in South Australia for obtaining a birth certificate with respect to a child born as a result of a lawful surrogacy agreement includes mandatory requirements at the stage of notification of birth, registration of birth and issue of birth certificate for the collection of information about the child's intending parents and any donors of human reproductive material. The collection of such information should not affect the legal parentage of the child, which should remain with the surrogate mother (and her partner/spouse as is the current position under the *Family Relationships Act 1975* (SA)), unless, and until, an order for transfer of legal parentage is made by the Youth Court.

Recommendation 58

SALRI recommends that the current process for re-issuing a birth certificate upon a declaration of legal parentage by the Youth Court remain and that the Register of Births retains the name of the surrogate mother in its historical records.

Recommendation 59

SALRI recommends that a birth certificate for a child born as a result of a surrogacy arrangement should, upon any transfer of legal parentage, include a brief notation such as an asterix or the term 'reissue' to indicate that there are relevant historical records which can be sought. The note of the existence of the historical record should appear on the face of the birth certificate but it should not provide specific detail of the type of record held. The details as to the surrogate mother and/or any donors of genetic material should not appear on the face of the birth certificate given the privacy of such material and other legitimate concerns.

Recommendation 60

SALRI recommends that a child born as a result of a surrogacy arrangement should be formally entitled, under the relevant Act, to obtain a certificate (or similar documentary record) certifying all relevant entries in the Register of Births, including details of the surrogate mother and/or any donors of genetic material, once the child attains the age of 16 years.

In addition, provision should be made in the Registrar's Access Policy to allow the Registrar to exercise his or her discretion to grant a child born as a result of a surrogacy arrangement access to a certificate certifying all relevant entries in the Register of Births regardless of the child's age, provided that the Registrar is satisfied that such access would not be harmful to the welfare of the child. The Registrar may request that a counselling certificate or similar documentation be provided to assist in their assessment.

PART 25 – PARENTAGE ORDERS AND THE FAMILY COURT

Recommendation 61

SALRI recommends that, consistent with existing law and practice, legal parentage should remain with the surrogate mother until a court of appropriate jurisdiction makes a parentage order to the contrary.

Recommendation 62

SALRI recommends that any *Surrogacy Act* provide that a court should have the discretion to be able to extend the period in which an application to transfer legal parentage can be made. When exercising a discretion to extend, the court should consider all relevant circumstances as to the reason for the delay in making the application and determine whether an extension of time is in the best interests of the child.

Recommendation 63

SALRI recommends that any *Surrogacy Act* provide that a court should have a discretionary power to make a parentage order notwithstanding that one or more of the conditions otherwise applicable for the making of such an order is not satisfied. When exercising this discretion, the court should consider all relevant circumstances, including the nature and extent of the non-compliance with such conditions, the circumstances of non-compliance including whether the non-compliance was deliberate or inadvertent, and the best interests of the child.

Recommendation 64

SALRI recommends that South Australia should refer a power (consistent with the referrals from New South Wales, Queensland, Tasmania and Victoria) which provides that the Family Court may make a determination of parentage 'whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth' and upon receiving the referral of power from South Australia, the Commonwealth Government should amend s 69VA of the *Family Law Act 1975* (Cth) to reflect these referrals.

Recommendation 65

SALRI recommends that South Australia introduce a conclusive statutory presumption of parentage on the basis of a finding of parentage made by another State, Territory or Commonwealth court, as is the situation in the Australian Capital Territory, New South Wales and Queensland.

Recommendation 66

SALRI recommends that an interstate order relating to parentage of a child of a surrogacy arrangement be able to be given effect as if it was made in South Australia, in addition to recognising Commonwealth orders as to parentage.

PART 26 – INTERNATIONAL COMMERCIAL SURROGACY: THE *BERNIERES* GAP

Recommendation 67

SALRI recommends that it is an issue at the national level (whether for the Commonwealth or the Commonwealth, States and Territories jointly) to resolve the effect and implications of *Bernieres* in relation to both international commercial and non-commercial surrogacy arrangements.

PART 27 – INCIDENTAL ISSUES

Recommendation 68

SALRI recommends that it examine the various consequential civil law issues and implications such as succession law and medical care raised in a domestic surrogacy context as part of a short spin off Report.

Recommendation 69

SALRI recommends that the opportunity of formulating a new *Surrogacy Act* should be utilised to include a number of worthwhile provisions (drawing on interstate models such as the *Surrogacy Act 2010* (NSW) or the *Surrogacy Act 2012* (Tas)) lacking in the present law in South Australia (or not within the Family Relationships (Surrogacy) Amendment Bill 2017).

Glossary

SALRI is aware that the use of terminology in the context of surrogacy is a sensitive issue.[2] SALRI accepts that some parties may disagree with some of these terms and definitions.

The following key terms are used in this Report:[3]

1975 Act is the *Family Relationships Act 1975* (SA).

2015 Act is the *Family Relationships (Surrogacy) Amendment Act 2015* (SA).

2017 Bill is the Family Relationships (Surrogacy) Amendment Bill 2017.

Accredited Counsellor - a counsellor, social worker or psychologist who may provide surrogacy counselling services including support during fertility treatment, during any pregnancy or in relation to grief and loss but excluding issue of a counselling certificate to any or all of the parties, at any time, and who is:

a) a full member of, or eligible for full membership of, the Australian and New Zealand Independent Counsellors Association (ANZICA); and
b) is familiar with the *National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* and the *Australian New Zealand Infertility Counsellors Association Guidelines;* and
c) may be employed by or receive commission for services from the fertility provider providing the treatment.

Accredited Independent Counsellor– a counsellor, social worker or psychologist who is able to either solely issue a surrogacy counselling certificate,[4] and/or may provide additional surrogacy counselling services including support during fertility treatment, during any pregnancy or in relation to grief and loss, to any or all of the parties, at any time, and who is:

a) a full member of, or eligible for full membership of, the Australian and New Zealand Independent Counsellors Association (ANZICA); and
b) is familiar with the *National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* and the *Australian New Zealand Infertility Counsellors Association Guidelines;* and
c) must not be employed by or receive a commission, bonus or other form of valuable consideration for surrogacy services from the fertility provider providing the treatment.[5]

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[2] 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* (April 2016) 2 [1.6].

[3] See also below Part 3.

[4] A counselling certificate also includes 'screening', that is, assessing the suitability at the outset, of the parties (the surrogate mother, her partner and the intending parents) to take part in a lawful surrogacy agreement.

[5] There is a fundamental distinction between these two roles. As one Review noted: 'The Committee notes the distinction between counselling aimed at informing decision making and providing support (general counselling), as opposed to counselling aimed at assessing [screening] the suitability of parties for a surrogacy arrangement (assessment counselling). The Committee believes it is appropriate that general counselling be provided by ART clinics or a counsellor chosen by the parties involved. However, the Committee agrees with inquiry participants who argued strongly that assessment [screening] should be conducted by a counsellor operating independently of the ART clinic providing the services to facilitate a particular surrogacy arrangement': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 74 [5.34]–[5.35]. See further below Part 20.

altruistic surrogacy – see below definition of **'Non-commercial surrogacy'.**

ART means assisted reproductive technology.

BDM Act is the *Births, Deaths and Marriages Registration Act 1996* (SA).

CEDAW is the *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

commercial surrogacy is when a woman enters into an agreement or contract with a person or persons to become pregnant, carry the pregnancy and give birth to a child for the other person or persons and charges a fee, or accepts payment or other forms of valuable consideration for this act. This form of surrogacy agreement is prohibited in South Australia and elsewhere in Australia, New Zealand and the United Kingdom but not in certain overseas jurisdictions such as the Ukraine and California in the United States.

Commonwealth Committee means the 2016 Report of 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.*

CROC means the *United Nations Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Declaration of Parentage is an order obtained from the Federal Circuit Court of Australia or the Family Court of Australia which determines or declares the legal parentage of a child, pursuant to the *Family Law Act 1975* (Cth).

gestational surrogacy is when the surrogate mother is *not* genetically related to the child she carries. This arises when the child is conceived using assisted reproductive treatments, which can include, for example, using the eggs and sperm of the intending parents, or from a donor.

Human reproductive material means human semen or human ovum.

ICESCR is the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Intending parents or **'commissioning parents'** are the couple who engaged the services of the surrogate and who intend to be the legal parents of a child born under a surrogacy agreement. Section 10F of the *Family Relationships Act 1975* (SA) defines 'commissioning parents' as 'two persons to whom custody of any child to whom the [lawful surrogacy] agreement relates is, or is to be, surrendered'. This Report uses the term 'intending parents' in preference to 'commissioning parents'.[6]

IVF means In Vitro Fertilisation which is a medical procedure, used to overcome a range of fertility issues, by which an egg and sperm are joined together outside the body, in a specialised laboratory.

[6] SALRI notes that the present South Australian Act uses this term (as does the Victorian Act). The term 'commissioning parents' is also widely used in the literature. The term 'intending parents' is also widely used in both the literature and in the New South Wales, Tasmanian and Queensland Acts. The terms are often used interchangeably. Several parties, notably Mr Page (an experienced Queensland lawyer who practises in this area) and intending parents, pointed out to SALRI in consultation that the term 'commissioning parents' is inappropriate and 'intending parents' is preferable. Chief Justice Pascoe of the Family Court preferred the term 'commissioning parents'. SALRI accepts there is no one preferred term and uses the term 'intending parent' on the basis three other jurisdictions use it. See further below [3.3.1]–[3.3.6].

Non-commercial surrogacy, also called **'altruistic surrogacy',**[7] is when a woman agrees to become pregnant, carry the pregnancy and give birth to a child for another person or persons *without* charging a fee or accepting payment or other forms of valuable consideration for this act. This form of surrogacy agreement is lawful in South Australia and elsewhere in Australia if certain strict conditions are also satisfied. The reimbursement of reasonable medical and/or other costs incurred by the surrogate mother may be permitted under this model.

NHMRC ART Guidelines or ***NHMRC Ethical Guidelines*** refers to the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research.*

NSW Standing Committee Report or **NSW Standing Committee** refers to the Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009).

Orders as to parents of a child born under a recognised surrogacy arrangement is an order obtained from the Youth Court of South Australia under s 10HB of the *Family Relationships Act 1975* (SA) that transfers legal parentage of a child born as a result of a recognised surrogacy agreement from the surrogate mother to the intending parents. The Youth Court is a state court. If no application is made within six months of a child's birth the presumptions of parentage proscribed in the Commonwealth *Family Law Act 1975* (Cth) apply indefinitely and the surrogate (and her partner) remain the legal parents of the child with all of the rights and responsibilities that come from this status.

Parental Responsibility Order is an order that can be obtained from the Family Court of Australia or Federal Circuit Court of Australia pursuant to s 61D of the Commonwealth *Family Law Act 1975* (Cth) that confers parental responsibility for a child on a person. This type of order can confer all the duties, powers, responsibilities and authority which, by law, parents have in relation to children, but it does *not* confer or declare legal parentage. The federal courts do not have general power to confer parentage in relation to children born under a surrogacy agreement as this power is held by the States.[8]

Recent NSW Review refers to the Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018).

recognised surrogacy agreement means an altruistic or non-commercial surrogacy agreement that meets the conditions set out in s 10HA of the *Family Relationships Act 1975* (SA) and includes a surrogacy agreement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth, or of another State or Territory; and a prescribed international surrogacy agreement.

SALRI means the South Australian Law Reform Institute.

State Framework for Altruistic Surrogacy means a framework, to be established by the relevant Minister, namely the State Attorney-General, pursuant to s 10FA of the *Family Relationships Act 1975* (SA) which sets out the circumstances in which a person can be lawfully involved in helping other parties to make a surrogacy agreement, the conditions that must be satisfied before the Minister could approve of an international surrogacy agreement, and the circumstances in which a person can advertise for the services of a surrogate mother.[9]

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[7] This term is problematic. See further below [3.2.1]–[3.2.12].

[8] This emerges from the decision of the Full Court of the Family Court of Australia in *Bernieres v Dhopal* (2017) 324 FLR 21. See also further below Parts 25 and 26.

[9] See further below Part 10.

surrogacy contract is defined in s 10F of the *Family Relationships Act 1975* (SA) as a contract under which a person agrees to become pregnant and to surrender custody of, or rights in relation to, a child born as a result of the pregnancy. Such a contract is prohibited and should be distinguished from a recognised or lawful surrogacy agreement.

surrogate mother, in respect of a recognised surrogacy agreement, means the woman who will, or will seek to, become pregnant for the purposes of the agreement.

Surrogate Register means a register set up by the relevant Minister that lists South Australian adult women who are willing to act as a surrogate mother under the *Family Relationships Act 1975* (SA). The Register is not open for public inspection.[10]

traditional surrogacy can be used to describe an arrangement where the surrogate mother is genetically related to the child she carries. For example, when the child is conceived by sexual intercourse, self-insemination, or by medically supervised artificial insemination.[11]

valuable consideration means consideration consisting of money, or any other kind of property, that has a monetary value.[12]

[10] Ibid.

[11] This form of surrogacy has existed since Biblical times when Hagar, the maidservant of the infertile Sarah, acted as a surrogate to bear Sarah and her husband, Abraham, a son. See Tammy Johnson, 'Queensland's Proposed Surrogacy Legislation: An Opportunity for National Reform' (2010) 17 *Journal of Law and Medicine* 617.

[12] *Family Relationships Act 1975* (SA) s 10F.

Part 1 - Introduction

1.1 The South Australian Law Reform Institute

1.1.1 On 26 December 2017, the South Australian Law Reform Institute ('SALRI') was asked by the former South Australian Attorney-General, the Hon John Rau MP, to inquire into and report on certain aspects of the present law regulating surrogacy in South Australia, contained in Part 2B of the *Family Relationships Act 1975* (SA), and to suggest a suitable regulatory framework for surrogacy for South Australia. The present South Australian Attorney-General, the Hon Vickie Chapman MP, supports SALRI undertaking this reference.

1.1.2 SALRI is an independent non-partisan law reform body that conducts inquiries—also known as references—into areas of law. The areas of law are determined by the SALRI Advisory Board and may also be at the request of the Attorney-General of South Australia. SALRI examines how the law works in South Australia and elsewhere (both in Australia and overseas), conducts research and consults widely with the community and interested parties. Based on the research and consultation that it conducts during a reference, SALRI then makes reasoned recommendations to the State Government so that the Government and Parliament can make informed decisions about any changes to the relevant law. SALRI's recommendations may be acted upon and accepted by the Government and Parliament. However, any decision on accepting a recommendation from SALRI is entirely an issue for the Government and Parliament.

1.1.3 When undertaking its work, SALRI has a number of objectives. These include identifying law reform options that would modernise the law, fixing any problems in the law, consolidating areas of overlapping law, removing unnecessary laws, or, where desirable, bringing South Australian law into line with other States and Territories (an important aspect in the context of surrogacy).[13]

1.1.4 SALRI was established in December 2010 under an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the University of Adelaide Law School. SALRI is assisted by an expert Advisory Board. SALRI is based on the Alberta law reform model that is also used in Tasmania[14] and is linked to the Law Reform course at the University of Adelaide. The work of the Law Reform class plays a valuable role to inform and support SALRI's work (including this reference).

1.2 Consultation Process

1.2.1 SALRI is committed to inclusive and accessible consultation with the South Australian community and all interested parties, including but not confined to the legal profession and experts. Such genuine and inclusive consultation is integral to modern law reform. As Neil Rees has observed:

> Effective community consultation is one of the most important, difficult and time consuming activities of law reform agencies … community participation has two major purposes: to gain

[13] The importance and value of a national uniform, or at least consistent, approach is especially evident in a complex issue such as surrogacy that has interstate and international dimensions and involves overlapping and concurrent responsibilities of both the Commonwealth, States and Territories. See 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* (April 2016) 7 Rec 2. See further below Part 4.

[14] See Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55, 62–4, 68.

> responses and feedback and to promote a sense of public "ownership" over the process of law reform … consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter …[15]

1.2.2 This reference has involved extensive research and consultation. This Report draws on SALRI's extensive research and consultation, in person in Adelaide and Sydney, and via a range of online methods, traditional written submissions and in person meetings.

1.2.3 The preparation of this Report has involved several stages. SALRI conducted background research and initial consultation, following which plain English 'Fact Sheets' on the key issues and a supporting background paper were prepared.[16] SALRI conducted an Expert Forum with interested parties and individuals at the Adelaide Law School on 31 May 2018 to discuss some of the key issues in relation to this reference.[17] This meeting was attended by representatives of the legal and academic sectors, as well as representatives from the Law Society, the Attorney-General's Department (in an observer capacity), the Department of Health and other interested parties including the Commissioner for Children and Young People, the Office for Women, Health Consumers Alliance of SA, Child and Family Focus SA, Surrogacy Australia, Repromed, Fertility SA and a clinical psychologist. The May 2018 Expert Forum was conducted under Chatham House rules. This proved a helpful and constructive meeting and though complete consensus was not reached (unsurprisingly given the issues and views involved with surrogacy), broad agreement was expressed on many issues. SALRI is grateful to all parties who attended the forum, and, in particular, Mr Everingham of Surrogacy Australia and Dr Sonia Allan who travelled to Adelaide specifically for the meeting.

1.2.4 SALRI then utilised the Government's YourSAy platform[18] and other means (such as contacting potential interested parties directly) and invited any interested parties and members of the community to utilise the YourSAy website by providing online comments, taking part in an online survey, written submissions and/or request personal meetings or speak in person with SALRI about this reference. The plain English 'Fact Sheets' on the key issues and the supporting background paper were made available on the YourSAy website. The online survey was created on 17 May 2018 with assistance from the YourSAy team using Survey Monkey software. The online survey closed on 9 July 2018. It consisted of nine short questions covering some of the main issues that included links to further information in the Fact Sheets also available on the online consultation website. Interested parties could respond to the survey on an anonymous basis or provide contact details if they wished.

1.2.5 A total of 21 online responses were received with almost all respondents providing detailed answers to each of the nine questions. However, the YourSAy site and supporting material also proved helpful to inform many parties and individuals of this reference and the key issues and to

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[15] Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Paper presented at the Australasian Law Reform Agencies Conference, Vanuatu, 10–12 September 2008) <http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf>.

See also Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160–174; Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech delivered at the Conference on Law Reform on Hong Kong: Does it Need Reform?, The University of Hong Kong, Department of Law, 17 September 2011) <http://www.alrc.gov.au/news-media/2011/changing-fashions-and-enduring-values-law-reform >.

[16] See South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (6 July 2018) YourSAy <https://yoursay.sa.gov.au/decisions/surrogacy-a-legislative-framework/about>.

[17] Several of the parties who attended this meeting also provided follow up submissions and comments.

[18] See South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (6 July 2018) YourSAy <https://yoursay.sa.gov.au/decisions/surrogacy-a-legislative-framework/about>.

encourage them to get in touch with SALRI and request personal meetings. The online contributors to the YourSAy survey included both surrogate mothers and intending parents.

1.2.6 SALRI received subsequent submissions or comments from a total of 54 individuals, agencies or interested parties.[19] These submissions were received in the form of written submissions, email correspondence or meetings by phone, skype or in person (or a combination of these means). In light of the sensitivity of the subject and often personal issues, a number of parties understandably preferred to meet in person. SALRI met a number of interested parties and individuals on a one on one basis to discuss their experiences of the role and operation of the present law and views on law reform issues and options.

1.2.7 SALRI had the benefit of very helpful meetings with Chief Justice Pascoe of the Family Court[20] and Professors Jenni Millbank and Anita Stuhmcke at the University of Technology Sydney[21] in Sydney on 9 August 2018. SALRI also had the benefit of helpful input from the Law Society of South Australia (including its written submission to both SALRI[22] and its previous submission to the former Attorney-General).[23] SALRI also received helpful input from Dr Melissa Oxlad (a leading counsellor and clinical and health psychologist who practises in this area) and family lawyers who practice in this area such as Julie Redman, Anita Brunacci and Stephen Page. SALRI also liaised with the Hon John Dawkins MLC as an interested party, reflecting his longstanding interest in this area of the law. SALRI expresses its appreciation to all of these parties for their input.

1.2.8 SALRI is aware (as noted by the Hon John Dawkins and others)[24] that any considered effort at law reform in relation to surrogacy needs to particularly draw on the views and input of parties, whether intending parents or surrogate mothers, with direct experience of surrogacy. SALRI is particularly grateful for the insightful input to this reference of both intending parents and surrogate mothers who have shared personal and often painful accounts of their experiences.[25]

1.2.9 This reference was significant in that a number of further issues were identified in consultation and research. SALRI liaised with various parties and with relevant experts from South Australia and interstate in relation to certain follow up or technical issues that arose in the preparation of this Report. SALRI met with representatives of Repromed, a leading South Australian fertility provider on 26 October 2018.[26] SALRI is grateful for the further input of Repromed and others.

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[19] See List of Submissions Received at Appendix A.

[20] Any comment or submission from Chief Justice Pascoe to this Report are his own comments provided in a private capacity and do not represent the views or any position of the Family Court of Australia.

[21] They are currently undergoing a four-year Australian Research Council Project, 'Regulating Relations', with Professor Isabel Karpin. The project is examining the pathways of Australian patients into and out of Assisted Reproductive Technology domestically and will conclude in December 2018. See also below [17.2.2].

[22] Law Society of South Australia, Submission to South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[23] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[24] Jenni Millbank, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101, 103–104.

[25] SALRI made it clear throughout its consultation that it could not provide any legal advice or guidance and if any party in consultation had any doubt about their position, they should seek legal advice about their legal situation and any issues or implications.

[26] SALRI asked fertility providers on several occasions if they wished to provide any submission. No comments were received in time to be included in this Report but Repromed's helpful comments are set out at Appendix G.

1.2.10 SALRI notes the close interaction between donor conception and assisted reproductive treatment ('ART') law and practice and surrogacy law and practice (as highlighted in SALRI's consultation by various parties).

1.2.11 On 6 April 2018, the Victorian Minister for Health announced the appointment of Mr Michael Gorton AM to undertake a 12 month review of the Victorian regulatory framework for assisted reproductive treatment. In announcing the review, the Minister acknowledged that since the last review of laws governing assisted reproductive treatment in 2007, technology, community attitudes and supply and demand for treatment have evolved significantly.[27] SALRI spoke on 6 September 2018 to staff from the Victorian *Review of Assisted Reproductive Treatment* presently underway.

1.2.12 SALRI has had close regard to the 2017 *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) written by Dr Sonia Allan.[28] SALRI notes that Dr Allan is undertaking an independent review of the Western Australian *Human Reproductive Technology Act 1991 (HRT Act)* and the *Surrogacy Act 2008* (WA), with terms of reference covering such matters as access to information by donor conceived people, surrogacy, research on human embryos, eggs and sperm, pre-implantation genetic diagnosis/screening, posthumous use of sperm and eggs, the oversight system, data management, research and new technologies.[29] Dr Allan is due to present her Report to the Western Australian Government by October 2018. SALRI has liaised with Dr Allan in the preparation of the present Report and is grateful for her co-operation. New South Wales has also recently completed a review into the operation of its *Surrogacy Act*.[30]

1.2.13 SALRI has carefully considered all submissions and comments received as part of this reference as well as the role and operation of relevant law and practice in other jurisdictions (both in Australia and overseas), relevant law reform and government reports and academic research and commentary. SALRI acknowledges and relies upon the extensive previous work and research in relation to surrogacy, and, in particular, upon the work of the Family Law Council, *Report on Parentage and the Family Law Act* (2013), and the work of and submissions 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* (2016).

1.2.14 SALRI paid particular regard to the work (the timing of any Reports permitting) of other jurisdictions such as Western Australia and Victoria who are also currently reviewing their laws relating to surrogacy and assisted reproductive technology.[31] Careful consideration was given in this Report as

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[27] Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 3.

[28] Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017).

[29] In announcing this independent review, the Hon Roger Cook, the Western Australian Minister for Health, noted: 'these laws are outdated in parts and are arguably not meeting current needs and developments in practice occurring in other Australian States': Roger Cook, 'Independent Review of Assisted Reproductive Technology and Surrogacy Legislation' (Media Release, 13 January 2018) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/01/Independent-review-of-assisted-reproductive-technology-and-surrogacy-legislation.aspx>. See also Department of Health, Government of Western Australia, *Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* <https://ww2.health.wa.gov.au/Articles/S_T/Submissions-for-HRT-review>.

[30] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018).

[31] It should be noted that such work cannot be simply cut and pasted in a South Australian context. For example, Western Australian has a Family Court that combines State and Federal jurisdiction while in South Australia this jurisdiction is shared, often confusingly, between the State and Commonwealth courts.

to how any potential legislative reforms in South Australia will interact with developments in both Australia and overseas.

1.2.15 SALRI notes that the Australian Law Reform Commission ('ALRC') is presently undertaking a wide-ranging review of the family law system (which does not seemingly incorporate surrogacy as a major theme).[32] The ALRC is due to report by 31 March 2019. SALRI has had careful regard to any relevant development from the ALRC.

1.2.16 SALRI acknowledges the valuable contribution of the Hon John Dawkins MLC to surrogacy law reform in South Australia, notably the *Family Relationships (Surrogacy) Amendment Act 2015* (the 2015 Act) and the Family Relationships (Surrogacy) Amendment Bill 2017 (the 2017 Bill).[33] SALRI builds on this work in this Report. SALRI is aware, as reminded in consultation by Professors Isabel Karpin, Jenni Millbank and Anita Stuhmcke, that this is at least the 28th review to examine surrogacy in Australia over recent years.[34] SALRI expresses the hope that this Report may prove of greater value than perhaps some of the preceding 27 Australian reviews.

1.2.17 SALRI, in accordance with its terms of reference (as set out below) and the existing models across Australia,[35] has focussed on the model or framework of a suitably regulated non-commercial system of surrogacy in South Australia and, though various parties in consultation have raised these options, has not closely examined either a commercial system of surrogacy or seeking to preclude any form of surrogacy in South Australia.

1.2.18 In the preparation of this Report, SALRI has had careful regard to all the various views expressed to it in consultation. Though it is not possible, with a complex and sensitive topic such as surrogacy, to reconcile or accept all those views, SALRI has been struck by the generous participation and thoughtful contributions of the many individuals and organisations in the preparation of this Report. SALRI has heard many compelling and articulate accounts in its consultation, including the sharing of personal and often painful stories, and expresses its gratitude to all who contributed to this important reference.

1.2.19 SALRI is also grateful to the Attorney-General's Department for providing funding to undertake this reference

1.3 This Reference

1.3.1 SALRI's terms of reference, as set out on 26 December 2017 by the former South Australian Attorney-General, the Hon John Rau MP, are as follows:

1. To review Part 2B of the *Family Relationships Act 1975*, in particular the changes brought about by the *Family Relationships (Surrogacy) Amendment Act 2015*, and proposed by the Family Relationships (Surrogacy) Amendment Bill 2017.

2. To consult with relevant experts, and other interested parties as considered suitable by the Institute, and to consider best practice from other jurisdictions in relation to the regulation of surrogacy arrangements.

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[32] See Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (March 2018) 4–5 for the terms of reference. The Issues Paper has only passing reference to surrogacy.

[33] This Bill lapsed at the expiry of the last parliamentary session before the 2018 State election.

[34] One can forgive interested parties a certain degree of consultation fatigue.

[35] See below [2.2.1]–[2.2.9].

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.

5. To consider the impact of the decision of 1 September 2017 of the Full Court of the Family Court of Australia in *Bernieres v Dhopal* (2017) 324 FLR 21; and make recommendations in respect of the issues identified in the decision if so necessary.

1.3.2 The option of a regulated system of commercial surrogacy favoured by some parties in consultation was not within SALRI's terms of reference. Equally the option of banning or precluding any form of surrogacy favoured by some parties in consultation was not within SALRI's terms of reference.

1.3.3 Surrogacy is the practice of a woman (the **surrogate**) becoming pregnant with a child (that may or may not be genetically related to her), carrying the pregnancy and giving birth to the child for another family (the **intending** or **commissioning parents**) who then become the legal parents of the child. A simple definition of surrogacy is 'an understanding or agreement by which a woman—the surrogate mother—agrees to bear a child for another person or couple.'[36]

1.3.4 As the Family Law Council observes:

> Surrogacy arrangements may take a variety of forms. "Partial" or "genetic" surrogacy involves the use of the surrogate mother's egg and usually the intending father's sperm). "Full" or "gestational" surrogacy refers to arrangements where the surrogate mother does not contribute her own genetic material. Gestational surrogacy has been made possible as a result of IVF. In the case of gestational surrogacy, the intending parents may provide the genetic material (egg and sperm), or one or more donors may provide gametes. Thus a child born from a surrogacy arrangement may be genetically related to both, one, or neither[37] intending parent/s. Gestational surrogacy arrangements are far more common than genetic surrogacy and in some jurisdictions the laws regulating surrogacy arrangements require a gestational surrogacy.[38]

1.3.5 The basic law relating to surrogacy throughout Australia is clear. Commercial surrogacy (where a fee is charged for carrying the pregnancy and having the child) is prohibited. Altruistic or non-commercial surrogacy arrangements (where no fee is charged but various medical and other costs may be recovered) is permitted but will only be legally recognised if a range of strict conditions are satisfied.[39] Surrogacy contracts are generally unenforceable at present in Australia.[40]

1.3.6 The Australian systems require the intending parents to apply for a parentage order from the courts in the State or Territory in which they reside. Without such an order, the surrogate mother

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[36] Derek Morgan, 'Surrogacy: An Introductory Essay' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics and the Beginnings of Life* (Routledge, 1989) 55, 56.

[37] This raises the question of the 'team baby'. See further below Part 16.

[38] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 63–64.

[39] *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Family Relationships Act 1975* (SA); *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 in that jurisdiction, as it is throughout Australia. See National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017).

[40] See below Part 23.

and her partner are and remain the child's legal parents. In order to be eligible for such an order, the intending parents must comply with the various legislative requirements of the relevant State or Territory. These generally require the parties to show, for example, that they and the surrogate mother are of a certain age,[41] that the child was conceived as a result of an assisted reproductive technology procedure carried out within the relevant jurisdiction,[42] that all parties have undertaken psychological counselling (which includes certifying their suitability to enter into the surrogacy arrangement)[43] and have received independent legal advice,[44] and that the surrogate mother and her partner did not receive any material benefit or advantage from the arrangement (though allowing reimbursement of medical and other expenses).[45] The transfer of parentage must be in the best interests or welfare of the child.

1.3.7 The legal requirements in each Australian jurisdiction (excluding the Northern Territory) have a strong focus on protecting the best interests of children born under surrogacy arrangements and on protecting the rights and welfare of the surrogate mother. The rationale of the present law throughout Australia is to allow or facilitate lawful surrogacy within Australia and deter or discourage recourse to unlawful surrogacy within both Australia and overseas, especially offshore commercial surrogacy (though how effective the present law has proved in this regard is open to debate).[46] SALRI notes and adopts the explanation of the Hon John Dawkins MLC in introducing the 2015 Act to the South Australian Parliament as an accurate rationale of the current law:

> the [aim of the] current law in South Australia 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.[47]

1.3.8 This has proved a major reference into a complex and sensitive area that raises many ethical, legal and other issues and implications. Surrogacy is a topic that attracts strong and often conflicting views. SALRI notes that much of the research into the effects of surrogacy is both incomplete and conflicting and the long-term effects of surrogacy on the various parties is still not fully known.[48] SALRI acknowledges the sincerity of the many and often conflicting views that it has received in this reference. SALRI has had careful regard to all the views it has received in consultation, but it is ultimately impossible to reconcile these views.[49]

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[41] See below Part 14.

[42] This requirement, with the increasing mobility of the parties across state borders (notably to access specialised interstate fertility providers) has become problematic. See further below Parts 4 and 17.

[43] See below Part 20.

[44] See below Part 21.

[45] See below Part 23.

[46] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 99–100. 'It is plain from the many well-publicised events that the current State and Territory laws do not deter people from engaging in commercial surrogacy in order to become parents': 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, 5. See further below [6.1.17]–[6.1.26] and Part 12.

[47] South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597–1598 (John Dawkins).

[48] Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2016) 22 *Human Reproduction Update* 260. See further below Part 7.

[49] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 48 [3.147]; Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) iv [0.6].

1.3.9 SALRI received divergent views in consultation including support for a commercial system of surrogacy in Australia and opposing any form of surrogacy.[50] SALRI reiterates that both options of a commercial system of regulated surrogacy and banning or precluding any form of surrogacy in South Australia are not within its terms of reference. SALRI also notes that the result of both its consultation and research supports an intermediate approach within these two polarised views as the most appropriate way forward. SALRI does not support a system of regulated commercial surrogacy in South Australia in light of the well-documented concerns that commercial surrogacy gives rise to.[51] Nor does SALRI support seeking to preclude or ban non-commercial surrogacy in South Australia and any such option is both inappropriate and unrealistic. SALRI also reiterates the apparent rationale of the present law throughout Australia is to allow or facilitate lawful surrogacy within Australia and deter or discourage recourse to unlawful surrogacy within Australia and especially overseas commercial surrogacy. SALRI notes and adopts the explanation of the Hon John Dawkins MLC in moving the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) as an accurate rationale of the current law for the purpose of this reference.

1.3.10 SALRI notes that the complexities and national and international implications of surrogacy are such that the preferable solution to this issue is a national and uniform scheme co-ordinated between the States and Territories and the Commonwealth and the referral of the State's power in this area to the Commonwealth.[52] However, this is likely to prove a long term process and, in the interim, it is crucial that the State regulatory framework for surrogacy is as effective as possible. SALRI supports a suitable regulatory framework for South Australia that maintains the (admittedly often tenuous) distinction between commercial and non-commercial surrogacy and clarifies and improves the current system to most appropriately allow and facilitate lawful domestic surrogacy within Australia for South Australians but discourages and deters recourse to unlawful surrogacy, especially offshore commercial surrogacy. It is unrealistic, in light of the diversity of modern families and the dramatic advances in reproductive technology, to expect that the law can cover every conceivable surrogacy situation that might arise. Nevertheless, SALRI considers that the framework which it has recommended is the most effective and appropriate to recognise and respect the interests of all parties, but crucially to protect the best interests of the child. This must always be the primary or paramount factor of any system.[53]

[50] See also below [2.1.7]–[2.1.12].

[51] See below Part 6 and [26.1.1]–[26.1.11]. SALRI is further of the view that any such question cannot be considered in isolation at a State level and can only be considered at a national level between all Australian jurisdictions as part of any future potential national co-ordinated surrogacy system. See further below Part 4.

[52] See below Recs 2, 3 and 4. See further below Part 4.

[53] See below Rec 8. See also below [7.2.1]–[7.2.11].

Part 2 – Surrogacy: The wider picture

2.1 Law and Context

2.1.1 The practice of surrogacy (and the tensions and complications that it may give rise to) are not recent developments.[54] However, the modern law has increasingly struggled to adapt to the rapid advances in reproductive technology,[55] changing social attitudes to surrogacy,[56] the increasing acceptance and recognition of diverse family arrangements,[57] high rates of infertility,[58] the growing demand for surrogacy arrangements,[59] the shortage of surrogate mothers within Australia[60] and the significant and increasing number of Australians who travel overseas to utilise surrogacy

[54] Surrogacy has existed since Biblical times when Hagar, the maidservant of the infertile Sarah, acted as a surrogate to bear Sarah and her husband, Abraham, a son. This gave rise to acute tensions between the parties. See Tammy Johnson, 'Queensland's Proposed Surrogacy Legislation: an Opportunity for National Reform' (2010) 17 *Journal of Law and Medicine* 617.

[55] Mrs F in consultation powerfully described how, after prolonged, costly and highly stressful and unsuccessful efforts at ART and both domestic and international adoption, her cousin had ultimately volunteered to act as a surrogate mother for her and her husband. Mrs F likened the dramatic advances in reproductive technology over the last 20 odd years to contrasting the Wright Brothers biplane and a modern remote piloted commercial jet airliner.

[56] Deborah Constantinidis and Roger Cook, 'Australian Perspectives on Surrogacy: the Influence of Cognitions, Psychological and Demographic Characteristics' (2012) 27 *Human Reproduction* 1080; Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: the Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67, 86–87; Jenni Millbank, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101, 102. 'Recent years have seen a growing use of assisted conception processes and surrogacy arrangements by Australian families, increasing the number of potential parents a child may have, including a mix of genetic, gestational, social and intending parents': Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (March 2018) 47 [142].

[57] The belated recognition of same sex marriage by the Commonwealth (which came into effect on 9 December 2017) illustrates the diverse nature of modern family structures. As the Australian Law Reform Commission notes: '[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': Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (March 2018) 46 [140]. Many same sex couples, for example, utilise surrogacy to have a child. Monica, a potential surrogate mother involved with online surrogacy networks, in consultation kindly provided statistics, drawing on the online networks which show about 1/3 of intending parents come from same sex couples.

[58] Anita Scihmcke, 'For Love or Money? The Legal Regulation of Surrogate Motherhood' (1995) 3 *E Law - Murdoch University Electronic Journal of Law* 1, n 20. It 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: n 20.

[59] Millbank notes 'the marked and continual decline in availability of young children for both domestic and international adoption': Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135, 136. See also 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,* February 2016, 2–3; [16.4.15] below. This theme also emerged in SALRI's consultation. Mrs F described to SALRI the lengthy unsuccessful efforts her family took to adopt before as a 'last resort' turning to surrogacy. SALRI was often told in consultation that the stereotype that the couples who utilise offshore surrogacy are typically wealthy couples (whether gay or heterosexual) from Sydney and Melbourne is simplistic and the reality is far more complex. See further below [9.5.8].

[60] A strong theme to emerge in SALRI's consultation was the acute shortage of willing surrogate mothers within Australia. This in turn encourages recourse by Australians to offshore surrogacy. See also Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 22–25. 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.

arrangements[61] (far outnumbering the number of Australian parents who utilise domestic surrogacy arrangements).[62] The modern complexities of surrogacy are compounded by the fact that the practice does not stop at either state[63] or national borders, especially noting the ever more diverse and far flung international destinations that intending parents travel to.[64]

2.1.2 Surrogacy gives rise to complex legal and ethical issues; a 'legal and moral morass'[65] as one commentator recently noted or, as one party noted in consultation, 'a Pandora's box'. Chief Justice Pascoe described surrogacy to SALRI as 'a difficult and complex topic due to the myriad of legal and

[61] The precise number of Australians and South Australians who travel overseas for surrogacy are difficult to determine. See Jenni Millbank, 'Responsive Regulation of Cross-Border Assisted Reproduction' (2015) 23 *Journal of Law and Medicine* 346, 352–354. SALRI has been often told in this reference that many of the parents who utilise international surrogacy 'fly under the radar' and for various reasons are not anxious to publicise or highlight their situation. A regular figure that is provided is that up to 250 children born through overseas surrogacy arrangements are bought back to Australia each year. See 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* (April 2016) 22 [1.69]; Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333, 337. The Family Law Council citing Surrogacy Australia figures noted in 2011 the estimated numbers of births to Australians via surrogacy arrangements were 45 Australian babies born in the US, 45 in Thailand and 315 in India: Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 64 [3.2]. Chief Justice Pascoe noted to SALRI that there are up to 700 children born as a result of international surrogacy brought into Australia each year but only 5% seek some form of order in the Family Court. Mr Page noted to SALRI that in 'a normal year' there are 40 children born through surrogacy inside Australia and 250 overseas to Australian intending parents involving overseas surrogacy (though in 2016/2017 this figure dropped to 142). Mr Page estimates that in a 'normal year' there would be 18 children born to intending parents resident in South Australia who have utilised offshore surrogacy. On any view, recourse to international surrogacy dominates over domestic surrogacy.

[62] The number of children born to domestic surrogacy arrangements in Australia is unclear. 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. SALRI has been told in consultation that even domestic surrogacy inside Australia (especially involving family members of close friends) may 'fly under the radar'. Mr Page estimates that in a 'normal year' of the 40 children born through surrogacy in Australia, he would expect three children to be born in South Australia. Judge Eldridge of the South Australian Youth Court noted to SALRI that, to her awareness, the Youth Court had dealt with three surrogacy applications. The Acting Chief Magistrate noted that four applications were lodged with the State courts for declarations of parentage arising from domestic surrogacy in 2016/2017. Professors Karpin, Millbank and Stuhmcke noted that their research revealed that there had been the following number of applications in South Australia for parentage orders arising from domestic surrogacy, 2013/2014: 1, 2014/2015: 2, 2015/2016: 3 and 2016/2017: 0.

[63] Even within Australia, SALRI has heard from many parties that surrogacy arrangements routinely cross State borders and multiple Australian jurisdictions may be involved. Many parties travel outside their home State. Professors Millbank, Karpin and Stuhmcke highlighted the interstate mobility of parties in a surrogacy context. It is now routine for the intending parents and surrogate mother to live in different States and also for the parties to travel interstate to access a specialised fertility provider. The Law Society also noted that its members who practise in this area 'have noticed an increase in the number of interstate surrogacy arrangements: whereby the parties reside in different states' and the need for any scheme to reflect this fact and recognise interstate fertility processes: Law Society of South Australia, Submission to South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 4 [19]–[20], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>. See further below Parts 4 and 17.

[64] United Nations 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* (15 January 2018) 6 [18]. '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 in the relocation of the business to a more hospitable jurisdiction, where the regulatory regime may be weaker': Department of Foreign Affairs and Trade, quoted in 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* (April 2016) 27 [1.94].

[65] ABC Radio National, 'The People vs Surrogacy', *The People vs,* 12 August 2018 (Josh Szeps), <http://www.abc.net.au/radionational/programs/the-people-vs/the-people-vs-surrogacy/10043286>.

ethical issues' that arise. Professors Karpin, Millbank and Stuhmcke from the University of Technology Sydney described surrogacy as a 'very hot button issue'.

2.1.3 Professor Gillian Triggs aptly notes:

> The human desire to be a parent is fundamental to society and surrogacy offers the opportunity of parenthood to those unable to bear a child. But surrogacy is also fraught with legal, religious, ethical, practical and regulatory challenges.[66]

2.1.4 The complexities in this area were expressed by the House of Representatives Standing Committee on Social Policy and Legal Affairs (the 'Commonwealth Committee') which observed:

> For many Australians, having children and founding a family is an important and natural part of their lives. However, for some the dream does not come easily and when other avenues have been exhausted, options for surrogacy are considered. The concept of surrogacy raises challenging and complex ethical and legal issues.[67]

2.1.5 Over recent years, both Australian[68] and international[69] law reform bodies have often considered the issue of surrogacy.[70]

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[66] Gillian Triggs in Paula Gerber and Katie O'Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, 2015) i.

[67] 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* (April 2016) v.

[68] See, for example, Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018); 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* (April 2016); Department of Health, Government of Western Australia, *Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014); Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009); Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009); Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008); Legislative Council Select Committee, Parliament of Tasmania, *Report on Surrogacy* (2008); Legislative Council, Parliament of Western Australia*, Standing Committee on Legislation in Relation to the Surrogacy Bill 2007* (Report 12) (2008); Social Development Committee, Parliament of South Australia, *Inquiry Into Gestational Surrogacy* (2007); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Position Paper Three - Surrogacy* (2005). Dr Sonia Allan is presently reviewing surrogacy law and practice in Western Australia. There is a similar review under way in Victoria.

[69] See, for example, Margaret Brazier, Alastair Campbell and Susan Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation - Report of the Review Team* (October 1998) ('*Brazier Review*'); 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 (2009). The Law Commission of England has recently noted its intention to examine surrogacy. See United Kingdom Commission, *Surrogacy Laws set for Reform as Law Commissions get Government Backing*, (4 May 2018) <https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>.

[70] Professors Karpin, Millbank and Stuhmcke noted that this is at least the 28th review to examine surrogacy in Australia over recent years. 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 *Griffith Law Review* 101, 106.

2.1.6 Many academic,[71] legal[72] and judicial[73] commentators have also grappled with the many complex issues that surrogacy (especially international commercial surrogacy) gives rise to. The various issues and concerns associated with surrogacy are a regular topic of media discussion.[74]

[71] The literature is vast. See, for example, 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); Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13; Janice Ciccarelli and Linda Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 21 *Journal of Social Issues* 61; Yasmine Ergas, 'Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 *Emory International Law Review* 117; Elizabeth Ekberg, 'Ethical, Legal and Social Issues to Consider When Designing a Surrogacy Law' (2014) 21 *Journal of Law and Medicine* 728; Paula Gerber and Katie O'Bryne (eds) *Surrogacy, Law and Human Rights* (Routledge, 2015); Penne Janu, 'The Case for Discouragement of Surrogacy Arrangements' (1996) 4 *Journal of Law and Medicine* 72; Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 28; Mary Keyes, and Richard Chisholm, 'Commercial Surrogacy—Some Troubling Family Law Issues' (2013) 27 *Australian Journal of Family Law* 105; Shelby Llewellyn, 'Surrogacy Law Reform in South Australia: Are Surrogacy Registers a New Way Forward in Australia?' (2015) 34 *University of Tasmania Law Review* 130; Jenni Millbank, 'Responsive Regulation of Cross Border Assisted Reproduction' (2015) 22 *Journal of Law and Medicine* 346; Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35 *Melbourne University Law Review* 165; Jenni Millbank, 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477; Jenni Millbank, Anita Stuhmcke and Isabel Karpin, Submission No 7 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); Olivia Rundle, 'Transnational Surrogacy: Mapping the Issues' *Handbook of the 15th National Family Law Conference* (2012) 59–81; Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy, What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275; Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365; Kathleen Simmonds, 'Reforming The Surrogacy Laws Of Australia: Some Thoughts, Considerations and Alternatives' (2009) 11 *Flinders Journal of Law Reform* 97; Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: a Call for Review' (2011) 18 *Journal of Law and Medicine* 601; Anita, Stuhmcke, 'The Regulation of Commercial Surrogacy: the Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333; John Tobin, 'To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 317.

[72] See, for example, 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; Family Law Council, *Report on Parentage and the Family Law Act* (December 2013); Law Council of Australia, Submission No 69 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,* 18 February 2016; Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>; Julie McCrossin, 'Babies Without Borders' (2015) 9 *Law Society of New South Wales Journal* 40; Stephen Page and Alexandra Harland, 'Tiptoe through the Minefield: a State by State Comparison of Surrogacy Laws in Australia' (2011) 1 *Family Law Review* 198; Stephen Page, Submission No 27 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,* 10 February 2016; Julie Redman, 'If Baby Gammy Came To Live In Adelaide – Legal and Ethical Discussion on the Current State of Recognition of Children Born From Overseas Commercial Surrogacy' (Speech delivered at the Law Society of South Australia, 18 May 2016).

[73] Chief Justice Diana Bryant, Submission No 42 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; Chief Federal Magistrate Pascoe, 'Intercountry Surrogacy – A New Form of Trafficking?' (Paper presented at LegalWise 2nd Annual International Family Law Conference, Cambodia, 19 September 2012); 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; ABC Radio National, 'Retiring Chief Justice Reflects on Thirteen Years in the Family Court', *The Law Report*, 19 September 2017 (Damien Carrick) <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>.

2.1.7 Not only is surrogacy a complex topic, but it is one that arouses strong and often conflicting opinions. SALRI is aware that the issue of surrogacy is polarising and gives rise to sincere and divergent views that are difficult, if not impossible, to reconcile. As the recent Commonwealth Committee observed:

> In advocating for an improvement in how surrogacy is regulated in Australia, it was clear that a spectrum of views existed:
>
> - 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
> - those who consider that all forms of surrogacy[75] should be prohibited altogether.[76]

2.1.8 SALRI found a similar divergence of opinion in its consultation. SALRI heard from some parties that South Australia should adopt a regulated model of commercial surrogacy. Dr Ronli Sifris, for example, argued:

> To sum up, the anxiety surrounding the legalisation of compensated surrogacy is a furphy. The South Australian legal system has the framework and capacity to regulate compensated surrogacy so as to minimise the risk of exploitation and appropriately protect the rights and interests of all parties, most importantly that of the child. Doing so would presumably also minimise the extent to which South Australians would travel overseas to access compensated surrogacy arrangements as surrogacy would become more accessible in their home State.[77]

2.1.9 Other parties took a very different view and told SALRI that surrogacy in all forms is unethical and should be totally prohibited. One YourSAy correspondent declared: 'I don't agree with legalising surrogacy. It is contrary to nature.' Another stated: 'I disagree with the entire concept of surrogacy. Couples who are unable to have children have the opportunity of adoption, which is

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[74] See, for example, Heath Aston, 'It Was Like Going to a Supermarket To Pick Up Your Baby', *Sydney Morning Herald* (online), 2 September 2012, <https://www.smh.com.au/national/it-was-like-going-to-a-supermarket-to-pick-up-your-baby-20120901-25741.html>; Amy Corderoy, 'More Parents Defy Law with Overseas Surrogacy, *Sydney Morning Herald* (online), 14 September 2013, <https://www.smh.com.au/national/more-parents-defy-law-with-overseas-surrogacy-20130913-2tq94.html>; Madeleine Morris, 'Surrogacy laws: Legal tug-of-war highlights flaws of current system', *ABC News* (online), 19 April 2016 <http://www.abc.net.au/news/2016-04-18/surrogacybattle-laws-north-queensland-alexa/7334712>; Nicholas Perpitch, 'Gammy case: Commercial surrogacy should be legalised, lawyers say', *ABC News* (online), 12 August 2014, <http://www.abc.net.au/news/2014-08-12/advocates-call-for-commercial-surrogacy-to-belegalised/5666206>; ABC Radio National, 'The People vs Surrogacy', *The People vs,* 12 August 2018 (Josh Szeps), <http://www.abc.net.au/radionational/programs/the-people-vs/the-people-vs-surrogacy/10043286>.

[75] See, Kajsa 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>.

[76] 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* (April 2016) 6 [1.18]. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 21–50, especially 48 [3.147]; Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) iv [0.6].

[77] As Mr Page, a leading lawyer in this field has commented: 'I do agree that there ought to be commercial surrogacy in Australia. If we reduce the demand for Australians going overseas with a highly regulated commercial surrogacy here then it will work.' See Tim Barlass, 'When Altruistic Surrogacy goes Wrong', *Sydney Morning Herald* (online), 10 August 2014, <https://www.smh.com.au/national/when-altruistic-surrogacy-goes-wrong-20140807-101bo5.html>.

sufficient.' Another said: 'I don't agree with legalising surrogacy. It is contrary to fundamental and immutable laws of nature and biology.' Another person asserted: 'There are too many people in Australia already. Why enable the production of more? It is more humane to abolish surrogacy and enable immigration.'

2.1.10 Other more considered objections to any form of surrogacy were founded on policy (particularly concerns of exploitation and commodification of the parties) and the human rights implications, notably the best interests of the child, and what were seen as the adverse physical and psychological effects on the child and the surrogate mother. Dr Catherine Lynch, for example, argued that any form of surrogacy is both morally and legally wrong and a cruel practice that should be unlawful in all its forms.[78]

2.1.11 Many participants, including both intending parents and surrogate mothers, supported an intermediate approach and were of the view that South Australia should retain a non-commercial system of surrogacy that allows reimbursement of the surrogate mother's expenses, broadly in alignment with the current model throughout Australia (though there was some disagreement as to the types and level of costs to be reimbursed). Dr Bernadette Richards, Dr Melissa Oxlad and Simone Cureton (a surrogate mother), for example, opposed domestic commercial surrogacy as 'deeply disturbing' but strongly supported an effective and suitably regulated non-commercial domestic system that ensures surrogate mothers are not left out of pocket and encourages domestic surrogacy and discourages recourse to offshore surrogacy.

2.1.12 SALRI acknowledges the sincerity of the conflicting views that it has received in its consultation and YourSAy contributions and has also found in its research. SALRI had careful regard to all the views that it has received but it is ultimately impossible to reconcile these views.[79] SALRI reiterates that both options of a commercial system of regulated surrogacy and banning or precluding any form of surrogacy in South Australia are not within its terms of reference. SALRI also notes that the result of both its consultation and research supports an intermediate position within these two polarised approaches as being most appropriate.[80]

2.1.13 The options of a system of commercial surrogacy or banning or precluding any form of surrogacy are therefore *not* the subject or focus of this reference. Rather, this reference examines an intermediate approach to a suitable framework for surrogacy in South Australia, reflecting its terms of reference.

2.1.14 SALRI has examined a number of recent and proposed changes to Part 2B of the *Family Relationships Act 1975* (SA) to determine whether they are operating effectively or if they may need change in light of the rapid legal and other developments in this area. This included consideration of:

- the South Australian Surrogacy Framework, introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA), to provide a way for certain international surrogacy agreements that meet prescribed conditions to be recognised as lawful surrogacy agreements in South Australia;

[78] See further below Part 7.

[79] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 48 [3.147]; Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) iv [0.6].

[80] See further below [7.5.37]–[7.5.46].

- the Surrogate Register, introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) to provide a list of women who are prepared to act as surrogates in South Australia; and
- proposed changes to what type of expenses or 'reasonable costs' can be recovered or form part of a recognised surrogacy agreement under Part 2B of the *Family Relationships Act 1975* (SA), as set out in the Family Relationships (Surrogacy) Amendment Bill 2017 (SA).

2.1.15 The reference also includes consideration of the way the courts approach the question of who is the legal parent of a child born as a result of a surrogacy agreement (including in an international context), following the Full Court of the Family Court of Australia's decision in *Bernieres v Dhopal*.[81] This reference includes examination of the effect and complex legal, constitutional and other implications of that decision and if or how South Australia should respond.[82]

2.1.16 SALRI's terms of reference further provides that when considering these questions, SALRI should be guided by the general principle that, as far as possible, 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.[83] This theme also strongly emerged in SALRI's consultation. It was widely felt that surrogacy is largely a 'private affair' or 'a private matter' to be determined between the parties concerned and the role of the State should be to set the necessary safeguards and broad framework and not become overly involved.[84]

2.1.17 SALRI notes that a major reason why Australians resort to international (generally commercial) surrogacy arrangements is the difficulty in accessing lawful domestic surrogacy, especially in finding a surrogate mother.[85] This theme strongly emerged in SALRI's consultation.[86] SALRI considers that, reflecting the rationale of the present law, the premise of the law should be to allow and facilitate lawful domestic surrogacy whilst discouraging unlawful surrogacy, especially recourse to commercial overseas arrangements.[87]

2.1.18 The confusion and complexities regarding surrogacy in Australia are compounded by the fact that regulatory roles and powers are shared between the States and Territories and the

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[81] (2017) 324 FLR 21.

[82] See below Part 26.

[83] SALRI has therefore not considered a model such as the Victorian Assisted Reproductive Authority or the Western Australian Reproductive Technology Council, though several parties in consultation advocated for such models. See further below [10.1.6]–[10.1.35].

[84] See below [9.7.1]–[9.7.3].

[85] See also below [6.1.16]–[6.1.26]

[86] See below Part 11.

[87] This is consistent with the view of others such as the Human Rights Commission. 'The Commission notes that difficulties in accessing lawful altruistic surrogacy arrangements in Australia has contributed to a significant number of people travelling overseas for surrogacy. Almost all cases where Australians enter into a surrogacy arrangement overseas involve commercial arrangements. One issue to be considered is whether it is possible to make access to safe, well-regulated domestic surrogacy arrangements easier, so that there is less incentive for people to enter into potentially less well-regulated arrangements elsewhere': 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, 4 [12]. It is relevant that, as found by Professors Karpin, Millbank and Stuhmcke, overseas commercial surrogacy is the most common mode of surrogacy undertaken by Australian citizens and currently outnumbers domestic arrangements by around 15 to 1.

Commonwealth and the relevant laws differ from jurisdiction to jurisdiction. There is no one single uniform, or even consistent, surrogacy law.[88]

2.2 Legislative summary – Australia

2.2.1 The present legislative position within Australia to domestic surrogacy is summarised in the following paragraphs.

2.2.2 In the Australian Capital Territory, under the *Parentage Act 2004* (ACT), altruistic surrogacy is permitted while 'commercial substitute parent agreements' are prohibited. The ACT legislation allows for same-sex couples to be parents of a surrogate child provided one of these individuals is a genetic parent. The Australian Capital Territory prohibits single people from being a surrogate parent.

2.2.3 In Queensland, the *Surrogacy Act 2010* (Qld) allows altruistic surrogacy arrangements while prohibiting commercial arrangements. Intended parents may be married, a de-facto couple (including same-sex couples) or a single person.

2.2.4 The *Surrogacy Act 2010* (NSW) recognises certain surrogacy arrangements, prohibits commercial surrogacy arrangements, prohibits the advertising of surrogacy arrangements and provides for the status of children born as a result of surrogacy arrangements. The NSW Act allows same-sex couples to be parties to a non-commercial surrogacy.

2.2.5 In Victoria, surrogacy arrangements are regulated by the Victorian Assisted Reproductive Authority under the *Assisted Reproductive Treatment Act 2008* (Vic). Altruistic surrogacy arrangements are permissible and commercial surrogacy arrangements are prohibited. All surrogacy arrangements must be approved by a Patient Review Panel. In seeking approval, the intending (intended) parent must be infertile, unable to carry a pregnancy or give birth or there is a likely medical risk to the mother or baby if a pregnancy occurs. Single women and women in married, de facto or same-sex relationships who meet these criteria are eligible to apply to enter into an approved surrogacy arrangement.

2.2.6 In Tasmania, surrogacy arrangements are regulated under the *Surrogacy Act 2012* (Tas). This Act permits altruistic surrogacy arrangements and prohibits commercial surrogacy arrangements. There may be one or two intended parents under a surrogacy arrangement. Intended parents may be married, a de facto couple (including same-sex de facto couples) or a single person.

2.2.7 In Western Australia, surrogacy arrangements are regulated by the *Surrogacy Act 2008* (WA). The grant of a parentage order is contingent upon a surrogacy arrangement having been approved by the Western Australian Reproductive Technology Council. The arranged (intended) parent who may apply for parentage order must be infertile, unable to carry a pregnancy or give birth or there is a likely medical risk to the mother or baby if a pregnancy is carried out. A single woman or a woman who is married or in a de facto heterosexual relationship who satisfy these criteria are eligible to apply to enter into an approved surrogacy arrangement. Single men and same-sex couples are excluded from accessing surrogacy.[89]

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[88] 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* (April 2016) 6 [1.20]. See also below Parts 4 and 17.

[89] A regulatory body such as the Victorian or West Australian model received some support in consultation but SALRI has not considered such a model in detail as these models received little support and are outside SALRI's terms of reference that surrogacy should be largely a private affair between the parties and to avoid the State acquiring an onerous regulatory role. See below [9.7.1]–[9.7.3].

2.2.8 In the Northern Territory, there are no laws concerning surrogacy.

2.2.9 The National Health and Medical Research Council ('NHMRC') has issued ethical guidelines in relation to assisted reproductive technology ('ART').[90] Four States have enacted their own ART legislation - New South Wales, Victoria, South Australia and Western Australia. The NHRMC guidelines apply in jurisdictions without a legislative regime.

2.3 Recent developments in this area

2.3.1 Efforts have been made in recent years to harmonise the laws regulating surrogacy around Australia and move towards a national uniform, or at least consistent, approach.

2.3.2 For example, in January 2009, the Council of Australian Governments (COAG) released a Discussion Paper proposing a potential model to harmonise surrogacy laws across all Australian jurisdictions.[91] The COAG model was based upon the *Assisted Reproductive Treatment Act 2008* (Vic), the *Surrogacy Act 2008* (WA) and the *Parentage Act 2004* (ACT). The model was designed to allow prospective intending parents to be recognised as the legal parents of a child in the place of the birth parents throughout Australia, subject to prescribed pre-conditions being satisfied.[92]

2.3.3 In addition, it was intended that under this model, a surrogate mother could be compensated for reasonable expenses[93] and parentage orders would be made in the relevant State court if it was fundamentally in the best interests of the child.[94]

2.3.4 This model was again considered by the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs in its 2016 inquiry into domestic and international surrogacy. The Committee recommended that the Australian Law Reform Commission would be an appropriate body to examine and formulate a model national law to effectively regulate surrogacy in Australia.[95] SALRI notes that the terms of reference of the ALRC's current review of the family law system include reference to published reports relevant to surrogacy.[96] The ALRC is due to report by 31 March 2019.

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[90] National Medical Health and Research Council, *Assisted Reproductive Technology* (ART), <https://www.nhmrc.gov.au/health-ethics/ethical-issues/assisted-reproductive-technology-art>. The role and benefit of these Guidelines is explained further below; see Part 19.

[91] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy', January 2009.

[92] Ibid 2.

[93] Ibid 5.

[94] Ibid 8. The full set of COAG draft principles on surrogacy are set out at Appendix D.

[95] Ibid 8.

[96] Australian Law Reform Commission, *Terms of Reference: Review of the Family Law System* (27 September 2017) <https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>.

Part 3 - Terminology

3.1 Use of terminology

3.1.1 SALRI is aware that the use of terminology in the context of surrogacy is a sensitive issue.[97] SALRI accepts that some parties may disagree with some of the definitions of key terms as defined in the Glossary and used within this report.

3.2 'Altruistic' and 'Commercial' Surrogacy

3.2.1 Many interested parties and contributors have described to SALRI that the classification of 'altruistic' and 'commercial' surrogacy still contemplated by Part 2B of the *Family Relationships Act 1975* (SA) (and similar legislative schemes in Australia) is unhelpful and unproductive within the context of modern surrogacy. It was pointed out to SALRI that the term 'commercial' surrogacy brings up the unsettling images of exploitative Indian style 'baby factories' as often shown in media documentaries whilst an 'altruistic' surrogacy suggests a wholly selfless act without any financial consideration or even reimbursement.

3.2.2 A number of parties such as Dr Ronli Sifris, Professor Mary Keyes and Madison Forman and both intending parents and surrogate mothers commented to SALRI that such labels are in fact distracting and there is often no clear distinction between 'commercial' and 'altruistic' surrogacy. Dr Sifris described the notion that the two categories as somehow mutually exclusive as a 'flawed proposition'. Dr Olivia Rundle of the University of Tasmania told SALRI that the current distinction between altruistic and commercial surrogacy is 'artificial and arbitrary and, furthermore, these terms are unhelpful and distracting'. Madison Forman in her submission to SALRI argued that 'the distinction is artificial, arbitrary and unhelpful, and creates significant practical difficulty in determining what surrogacy expenses are validly compensable'.

3.2.3 This theme was expressed elsewhere. One participant in the YourSAy consultation commented that within the current legislative framework it is difficult to distinguish between arrangements that are 'commercial' and 'non-commercial' and elaborated:

> The law needs to clearly set the preferred terms and topics that can be the subject of a lawful surrogacy agreement. It is too vague at the moment. The purported distinction between commercial and non-commercial surrogacy is very tenuous.

3.2.4 Some of the intending parents who took part in SALRI's consultation shared this view. One anonymous intending parent referred to the often-confusing nature of the relevant terminology:

> There is no reason to think that the receipt of money changes everything. Most cases of "commercial" surrogacy are highly altruistic in nature, which is why the literature regarding surrogacy usually prefers to terminology "compensated" and "uncompensated" surrogacy rather than "commercial" and "altruistic". The designation of "commercial" seems mostly to be by those who wish to denigrate the practice of surrogacy in general for whatever personal or political reason. Does a doctor or a lawyer who has chosen their vocation due to its social benefit, and sometimes offers work pro-bono, suddenly lose all altruistic motivation as soon as they are being paid $1 for their service? It is demeaning to the wonderful women who choose to become surrogates to

[97] See also Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 2–3; 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* (April 2016) 2 [1.6].

> suggest that they would be influenced in such a way. We should respect the autonomy of women to decide how they use their own body, and respect their decisions to help others, even if money has also changed hands to support them in doing so.

3.2.5 The experiences of Alice, an intending parent who has participated in an 'altruistic' arrangement in South Australia and a 'commercial' arrangement overseas, accords with this view. In consultation, Alice described that the distinction between 'altruistic' and 'commercial' surrogacy is unhelpful and the distinction is often blurred. It also conveys misleading impressions and expectations.[98] Alice highlighted that she found the purportedly non-commercial and altruistic system in Australia more business focused and 'a money-making business enterprise' than the commercial system in the Ukraine. Other parties also told SALRI that the current 'altruistic' system in Australia is in fact anything but in practice. Alice noted that the cost of her surrogacy arrangement in Australia and her later arrangement in the Ukraine would have been closer in cost if it had been successful upon the first attempt. The main difference, Alice explained, being that in the Ukraine a greater proportion of the money goes to the surrogate mother, while in Australia more money is received by fertility providers, counsellors and lawyers. Alice highlighted the profound sense of wanting to help a childless couple that motivates surrogate mothers to volunteer their services, even in a commercial system.[99]

3.2.6 Many other parties agreed with this argument in consultation, emphasising that, although the surrogate mother does not receive compensation beyond her reasonable medical or other expenses in South Australia, it is 'everyone else' who is getting paid.[100] The incongruity of this was often noted to SALRI. Monica, a potential intending mother, emphasised that under the present system 'everybody else is making money out of surrogacy apart from the surrogates … People are there to make money.'

3.2.7 Sam Everingham, the Global Director of Families Through Surrogacy and the founder of Surrogacy Australia, submitted that 'commercial' and 'altruistic' are inapt expressions in the context of surrogacy as there can equally be exploitation in 'altruistic' and 'commercial' arrangements. Mr Everingham explained the terms are often unhelpful.

3.2.8 This view also emerges elsewhere. As one Australian fertility specialist observed:

> Everyone gets their knickers so much in a twist about commercial surrogacy, but … One of the things that we are starting to see is some really unpleasant pressure being put on close friends and relatives to act as surrogates because commercial surrogacy is banned.[101]

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[98] One issue is that the intending parents in an 'altruistic' system may misunderstand the nature of the arrangement and question a surrogate mother's entitlement to reimbursement of medical and other expenses. As Ms Forman said: 'Framing surrogacy as an altruistic act encourages parties to have unrealistic expectations of their surrogacy relationship. It encourages the assumption that surrogate mothers should not expect anything in return for their labour, which leaves surrogates unwilling to voice their expectations regarding reimbursement and encourages commissioning parents to underpay surrogate mothers (whether this is a conscious or subconscious reaction).' See also below [23.2.12].

[99] See also Helena Ragone, *Surrogate Motherhood: Conception in the Heart (Institutional Structures of Feeling)* (Westview Press, 1994); Vasanti Javda, et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18 *Human Reproduction* 2196; Olga Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy (2003) 21 *Journal of Reproductive and Infant Psychology* 145, 150–151; Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 55–59; 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 *Reproductive BioMedicine Online* 424, 425, 431.

[100] See further below Part 23.

[101] Denise Rice, 'Surrogacy a Legal Maze', *The Sunday Times* (Perth), 17 June 2007, 68.

3.2.9 Professors Karpin, Millbank and Stuhmcke also doubted the distinction between 'commercial' and 'altruistic' surrogacy and noted that payment is not an effective or accurate indication as to whether a surrogacy arrangement is beneficial to the parties involved.[102]

3.2.10 Some parties alternatively argued to SALRI that there is no distinction between altruistic and commercial surrogacy as all forms of surrogacy are ethically unacceptable. Dr Catherine Lynch, for example, said: 'All surrogacy is unethical - even what has deceptively been termed 'altruistic' surrogacy, as surrogacy is never altruistic towards neonates.' Mr Adams and Dr Renate Klein, a researcher and activist in this area, expressed a similar view.

3.2.11 Other parties did not hold any strong opinions on the distinction between commercial and altruistic surrogacy.

3.2.12 SALRI is conscious that no label in this sensitive area is ideal. However, it notes that that the terms 'commercial' and especially 'altruistic' surrogacy are problematic and, as such, has avoided, wherever possible, the term 'altruistic' in favour of 'non-commercial'. Another approach could be to avoid the unhelpful terms 'commercial' and 'altruistic' in favour of 'unlawful' and 'lawful'.

3.3 'Commissioning parents' and 'intending parents'

3.3.1 SALRI has heard widely in consultation that the use of the term 'commissioning parents' in Part 2B of the *Family Relationships Act 1975* (SA) is considered inappropriate by some parties as it imparts strong commercial undertones into a non-commercial family arrangement.[103] Mr Page, for example, stated:

> Commissioning parents sounds as though they have bought a baby in the same way they might have commissioned a ship or the purchase of a car or a refrigerator. It is in my view somewhat disrespectful of them and of the process, which at its best is magical. These people intend to be the parents, and hopefully with the making of an order, which should be termed a parentage order, become the parents as a matter of law.

3.3.2 Most if not all 'commissioning parents' referred to themselves as 'intending parents'. The surrogate mothers that SALRI spoke to also used the term 'intending parents' when describing their experiences with surrogacy. Some 'commissioning parents' SALRI spoke to in consultation were not particularly attached to either term and did not consider it to be an issue of great significance. Dr Melissa Oxlad preferred the term 'intending parent' (though noting neither was ideal).

3.3.3 In consultation, Chief Justice Pascoe of the Family Court, preferred the term 'commissioning parents' as he believes that 'intending' implies that parents merely have an intention to keep the child and can change their mind. The Chief Justice believes that 'commissioning parents' more accurately reflects the nature of surrogacy arrangements, namely, it is not a contract parents can withdraw from.

3.3.4 SALRI notes that many parties did not hold any strong opinions on the preferred usage of either term. In many instances, 'commissioning' parents and 'intending' parents was used interchangeably in SALRI's consultation (as they also are in the academic literature).

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[102] See also Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 22 *Journal of Law and Medicine* 333; Emily Jackson et al, 'Learning From Cross-Border Reproduction' (2017) *Medical Law Review* 1.

[103] See also Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 2 Rec 3.

3.3.5 SALRI notes that the present South Australian Act uses the term 'commissioning parent' (as does Victoria). The term 'commissioning parents' is also widely used in the academic literature. However, the term 'intending parents' is also widely used in both the academic literature and in the New South Wales, Tasmanian and Queensland surrogacy laws. The terms are often use interchangeably in practice. SALRI accepts there is no one preferred term and uses the term 'intending parent' on the basis three other jurisdictions use it. Given the desirability of moving to national uniformity or at least consistency in this area,[104] SALRI supports the usage of the term 'intending parent'.[105]

3.3.6 SALRI notes that various terms in the context of surrogacy are a sensitive issue and recommends that any legislative reform should use the opportunity to discard unhelpful or problematic terms and move towards national consistency.[106] As part of this SALRI supports in the interim replacing the term 'commissioning parent' with 'intending parent' and, as far as practicable, to avoid the problematic term 'altruistic' surrogacy.[107]

3.3.7 Recommendation

Recommendation 1

SALRI recommends that any legislative reform to accompany a new surrogacy framework should use the opportunity to move towards national consistency and, as part of this process, that problematic terms such as 'commissioning parent' (to be replaced with 'intending parent') and, as far as practicable, the term 'altruistic', should be replaced or avoided.

[104] See below Recs 2, 3 and 4. See also below Part 4.

[105] The terms in the Australian Capital Territory of 'substitute parent' or 'arranged parent' in Western Australia appear unsuitable. Dr Oxlad, for example, noted her objection to either term.

[106] See below Part 4.

[107] SALRI also suggests the term 'recognised surrogacy agreement' is replaced with 'lawful surrogacy agreement' and that 'welfare of the child' is replaced with 'best interests of the child'.

Part 4 - State vs National

4.1 Federalism and Australian Surrogacy Laws

4.1.1 Surrogacy is a complex issue that is not confined to State borders and has national and international implications. SALRI has heard the strong theme in consultation about the interstate mobility of parties in a surrogacy context and how many parties travel outside their home State. It is routine for the intending parents and surrogate mother to live in different States. It is also routine for the fertility provider to be located in a different State.

4.1.2 The Law Society of South Australia commented that its members who practise in this area 'have noticed an increase in the number of interstate surrogacy arrangements: whereby the parties reside in different states'.[108] Professors Millbank, Karpin and Stuhmcke told SALRI that their recent research has found that in the domestic context, 'it is more common than not that there is at least one element of domestic border crossing.' They noted that State border crossing in domestic surrogacy is 'the norm and not the exception'. They noted a particular theme for South Australian parties to travel to New South Wales to utilise fertility providers located in that State. They noted that it is not uncommon to find up to four Australian jurisdictions involved in a lawful domestic surrogacy arrangement as the intending parents, the surrogate mother, the fertility provider and the egg donor may all be located in different jurisdictions.[109]

4.1.3 The difficulties that this causes for the relevant parties in working out which laws apply when, are formidable. Indeed, one party described it to SALRI as an 'absolute nightmare'. Professors Millbank, Karpin and Stuhmcke pointed out the 'horrific' complications that may arise.

4.1.4 The legal complexities regarding surrogacy in Australia are compounded by the fact that regulatory roles and powers are shared between the States and the Commonwealth and the relevant laws differ from State to State. There is no single uniform, or even consistent, surrogacy law. The implications of this are profound and need to be addressed in the view of the Commonwealth Committee. It commented:

> the disparate nature of surrogacy legislation in Australian States and Territories does little to assist the many Australians who aspire to be parents. It simply adds to the confusion, lessens the protections available to all parties and creates a culture of "jurisdiction shopping" to find the most suitable arrangements.[110]

4.1.5 Efforts have been made over recent years to harmonise the laws regulating surrogacy around Australia and move towards a nationally uniform, or at least consistent, approach.

4.1.6 For example, in January 2009, the Council of Australian Governments (COAG) released a Discussion Paper proposing a potential model to harmonise surrogacy laws across all Australian jurisdictions.[111] The COAG model was based upon the *Assisted Reproductive Treatment Act 2008* (Vic),

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[108] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 4 [19], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[109] See also below Part 17.

[110] 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* (April 2016) 6 [1.20].

[111] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy', January 2009.

the *Surrogacy Act 2008* (WA) and the *Parentage Act 2004* (ACT). The model was designed to allow prospective intending parents to be recognised as the legal parents of a child in the place of the birth parents throughout Australia, subject to prescribed preconditions being satisfied.[112] A central premise is that parentage orders should be made in the best interests of the child.

4.1.7 In addition, it was intended that under the new model, surrogate mothers could be compensated for reasonable expenses[113] and parentage orders would be made in relevant State courts provided it was in the best interests of the child.[114]

4.1.8 This model was again considered by the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs in its 2016 inquiry into domestic and international surrogacy. The Committee recommended that the Australian Law Reform Commission would be an appropriate body to examine and formulate a model national law to effectively regulate surrogacy in Australia.[115] SALRI notes that the terms of reference of the ALRC's current review of the family law system include reference to published reports relevant to surrogacy.[116] The ALRC will report upon the review by 31 March 2019.[117] Other jurisdictions, including Victoria[118] and Western Australia,[119] are also currently reviewing their laws relating to surrogacy and assisted reproductive technology. New South Wales has recently completed a review into the operation of its *Surrogacy Act*.[120]

4.1.9 The Law Council of Australia has also highlighted the undesirability of the current fragmented and overlapping approach, noting 'the differing statutory schemes around the nation for altruistic surrogacy is not ideal' and 'supporting a harmonisation of laws as being an optimal outcome, whether that be by referral of powers, some sort of model legislation for consideration by States, or other mechanism creating consistency.'[121] The Human Rights Commission noted that, aside from the SCAG principles, there have been attempts by others to develop proposed models which bring together the various State and Territory laws.[122]

4.1.10 There were press reports of a meeting on 22 May 2015 between seven State and Territory Attorneys-General. Reports indicated that a working group was to be created to examine 'whether a

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[112] Ibid 2.

[113] Ibid 5.

[114] Ibid 8. The full set of COAG draft principles on surrogacy are set out at Appendix D.

[115] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy', January 2009, 8.

[116] Australian Law Reform Commission, *Terms of Reference: Review of the Family Law System* (27 September 2017) <https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>.

[117] Ibid.

[118] Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018).

[119] See further Department of Health, Government of Western Australia, *Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* <https://ww2.health.wa.gov.au/Articles/S_T/Submissions-for-HRT-review>. Dr Sonia Allan is conducting the Western Australian review of surrogacy and ART laws and practice. Her Report is due to be released in October 2018.

[120] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018).

[121] Law Council of Australia, Submission No 69 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,* 18 February 2016, 3 [8]. See also Department of Health, Government of Western Australia, *Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014) Rec 4, 16–17 [2.7].

[122] See, for example, Tammy Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in Paula Gerber and Katie O'Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, 2015) 45–59.

national legislative response to the issue of international surrogacy should be pursued, including any further work on harmonisation of surrogacy and parentage laws as they relate to international surrogacy'.[123] The Human Rights Commission in 2016 noted that it was unaware of any further work at the State and Territory level towards the harmonisation of surrogacy laws. A number of parties in consultation such as Mr Page and Chief Justice Pascoe have noted to SALRI the apparent lack of any appetite at a national level for surrogacy law reform.

4.1.11 These developments, coupled with SALRI's own terms of reference, demand that careful consideration be given to how any potential legislative reforms in South Australia interact with developments around Australia and overseas. SALRI considers that, whilst national uniform or consistent laws relating to surrogacy are a commendable – indeed desirable - option,[124] this will prove a complex and time consuming project and will certainly not happen immediately.[125] In the interim, it is desirable that South Australia's laws relating to surrogacy should be as effective as possible and serve to protect all parties, notably the best interests of any child born as a result of surrogacy. This is especially the case given families are regularly making decisions regarding parenting options and utilising surrogacy. This view also emerged in SALRI's consultation, including from Mr Dawkins.

[123] A Wood, 'States to Halt Paid Overseas Mothers' *Daily Telegraph* (Sydney), 25 May 2015, 15.

[124] See also 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* (April 2016) 7 Rec 2.

[125] SALRI is under no illusions in this context as the slow pace of such national law reform is well established. The Hon John Dawkins highlighted this point. SALRI notes the colourful remarks of the former Attorney-General, the Hon John Rau MP, about the slow pace of such law reform. The comments, though expressed about the National Consumer Affairs Council, have wider application for similar bodies such as SCAG. 'I have something very disturbing to report to the House. You may have seen stuff on television about the way glaciers move. It is reported that some of them move a matter of some centimetres per year and over the millennia they are capable of moving large boulders from point A to point B. This is considered quite good, but you have to work in geological time before you actually witness these marvels. There is a lot in common between a glacier and the National Consumer Affairs Council… What you do is wait for the Commonwealth to extract the digit and make legislative amendments. I can tell you that that can take a great deal of time and, in fact, in my experience, it takes forever. I want to wish the Attorney all the best in her endeavours to speed up the glacial movement of the national consumer forum because they are full of very fine intentions. They have lengthy meetings at which countless things are noted and sometimes even discussed and the agendas of those meetings roll over to the next meeting. I could spend time on the whole phenomenon of ministerial councils, but I will not burden everybody. This one is a particularly uneventful council. I am not necessarily speaking about the current minister, whoever that might be. It used to be Kelly O'Dwyer, but I am not sure who it is now. I have seen various colours of federal Ministers occupying this position and I can assure you that they are all exactly the same. The only thing they have in common is that nothing happens… that is not the Attorney's fault and it is not this Parliament's fault. If we want to have something that is across the board… then we need these characters over there, the wise men and women from the east, to actually do something for a change. I would invite any of the members here, particularly the newer members, that if you have nothing better to do, although The communiqué is always terrific because, as all of you would know, it has already been written before the meeting occurs, and usually the last two hours of the meeting have this spectacle of ministers from all around the country demonstrating the skills that they learnt or did not learn during their early years at primary school with respect to punctuation and grammar. It is fantastic! Of course, when you get a ministerial council with eight ministers or so plus all their senior executives, and they have all turned themselves into a drafting committee for a communiqué, sometimes whole hours can be consumed with people typing up changes that are being flicked up on screens. "No, let's move the comma there. What about a semicolon?" It is fabulous, really. It is terrific! That particular Council is very good at that sort of thing—punctuation, spelling and sometimes even nuance—but unfortunately it is not very good at doing anything, so my request is, aside from working their magic with this Bill, for the Government to work a bit of magic with the other characters on that council and get them to actually do something': South Australia, *Parliamentary Debates*, House of Assembly, 31 May 2018, 814–815.

4.2 Consultation Overview

4.2.1 Most of the parties in SALRI's consultation such as the Law Society of South Australia, Chief Justice Pascoe, Dr Oxlad, Ms Redman (an experienced South Australian family lawyer who practices in surrogacy law) and both surrogate mothers (notably Ms Cole) and intending parents who supported, or at least accepted, some form of regulated surrogacy in South Australia, saw strong benefit in a national consistent or uniform law for surrogacy in Australia.[126] Monica stated that she would 'love' to see uniformity in surrogacy laws across all Australian jurisdictions. Mrs F agreed with this view. The Law Society 'considers that the issue of surrogacy should be seen as a national issue and would be more appropriately regulated under the *Family Law Act* … It would be far more appropriate that all issues in relation to [such] children are determined in one Court. We therefore support at the appropriate time transferring the powers in relation to surrogacy to a Federal national framework.'[127]

4.2.2 Chief Justice Pascoe in discussion with SALRI also supported a national uniform approach to surrogacy in consultation, though noting that this should done be as part of a co-ordinated referral by the States to the Commonwealth as part of a uniform national scheme.[128] The Chief Justice said that the Family Court is the preferable court in this area as it has the national role and specialised expertise and processes. However, Chief Justice Pascoe noted that the Family Court can only assume this role as part of a national uniform scheme. The Chief Justice said that the State could refer part, or ideally all, of its role with respect to surrogacy to the Commonwealth and the Family Court and this makes sense, but it cannot be done on a piecemeal individual basis and can realistically only be done as part of a wider referral and national uniform surrogacy scheme.[129]

4.2.3 The strong theme that SALRI also received in consultation from both the Magistrates Court and the Youth Court (which strictly forms part of the Magistrates Court) is that surrogacy is better dealt with at national level by the federal courts, as the State courts lack the resources and specialised expertise and processes of the Family Court to effectively deal with surrogacy, not only international commercial domestic surrogacy[130] but also domestic lawful surrogacy (which is presently vested with the State courts). As the Acting Chief Magistrate observed: 'It is not appropriate that the Magistrates Court deals with surrogacy matters. These matters should remain in the Family Court.' The Chief Magistrate reiterated this view.

4.2.4 The Acting Chief Magistrate, in his letter dated 25 June 2018 to SALRI, explained that the Magistrates Court does not have the resources or expertise of the Family Court to effectively deal

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[126] See also 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* (April 2016) 7 Rec 2; Department of Health, Government of Western Australia, *Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014) Rec 4, 16–17 [2.7].

[127] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 9–10 [57], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[128] See also Judge Pascoe Federal Circuit Court of Australia, 'Parenting and Children's Issues: International Commercial Surrogacy and the Risk of Abuse' (Paper presented at the 3rd Annual Legalwise International Family Law Conference, Shanghai China, 17–20 September 2014) 23.

[129] Any comment or submission from Chief Justice Pascoe to this Report are his own comments provided in a private capacity and do not represent the views or any position of the Family Court of Australia.

[130] The Acting Chief Magistrate noted that there is a legislative gap as regards parentage and international commercial surrogacy, but this is an issue for the Commonwealth to resolve and the Family Court and not the State courts should approve international commercial surrogacy agreements. Judge Eldridge of the Youth Court expressed a similar view. See also below Part 26.

with the needs of children and families born to a surrogacy arrangement. The Acting Chief Magistrate stated that the Magistrates Court does not have such specialised roles within it such as Independent Children's lawyers, a Child Responsive Program or Family Consultants. The Acting Chief Magistrate and the Chief Magistrate highlighted that the Magistrates Court is unable to provide relevant mediation services,[131] even though such a service may be beneficial in a surrogacy context, as it has limited resources and lacks the necessary facilities and infrastructure.

4.2.5 Further, the Acting Chief Magistrate noted that, in the 2016-2017 year, there had been only four applications for declarations of parentage under the State legislation in relation to domestic lawful surrogacy arrangements. The Acting Chief Magistrate stated that the State Court is able to provide a swift and low-cost resolution for these applications but it is not resourced for an increase in this jurisdiction.

4.2.6 Continuing, the Acting Chief Magistrate's preferred scheme for any 'complex matters of surrogacy (both domestic and international)' relating to declarations of parentage would be for the Family Court to be granted or maintain that jurisdiction. The State court would continue to deal with non-complex surrogacy cases, where there is consent by all parties or where a set of criteria could be applied.

4.2.7 The Chief Magistrate also expressed her clear preference that surrogacy was better left to the Family Court to determine to resolve (including disputes between the parties as to costs under a lawful surrogacy arrangement).[132] The Chief Magistrate noted her view that 'the jurisdiction for disputes should not be divided depending on whether the child is born or not. Disputes [both] prior and after the child's birth should be dealt with by the Family Court.'

4.2.8 The Chief Magistrate reiterated her view that the Magistrates Court 'does not have the resources or expertise of the Family Court to deal with disputes arising from a surrogacy agreement, whether these occur before or after the child is born'.

4.2.9 Judge Eldridge of the Youth Court stated that she was aware that the Youth Court had dealt with three surrogacy applications. Judge Eldridge stated that the Youth Court does not have the necessary resources 'to deal with any disputed surrogacy agreement or those having an international component. In my view, the Family Court is better equipped to deal with these matters'. Judge Eldridge supported the proposal to allow the Family Court to deal with all surrogacy arrangements with an international component and the Youth Court to retain its present role with respect to domestic surrogacy arrangements not in dispute.

4.2.10 Further, Judge Eldridge noted that it would be inappropriate for the Youth Court to deal with costs disputes in a lawful domestic surrogacy context and the Small Claims jurisdiction of the Magistrates Court (which has a jurisdiction of up to $12,000) was the most appropriate body.[133]

4.3 SALRI's Reasoning and Conclusions

4.3.1 Professors Millbank, Karpin and Stuhmcke stated to SALRI their view that the current Australian regulatory schemes governing surrogacy are based upon outdated 20th century assumptions and 'nobody foresaw most arrangements would involve multi jurisdiction arrangements.' SALRI

[131] See below Part 22.

[132] See below Part 23.

[133] Ibid.

concurs with this view. Present law and practice are at odds with the interstate implications of contemporary domestic surrogacy. SALRI is of the view that the interstate nature of many domestic surrogacy arrangements, the overlapping roles in this area of the Commonwealth, States and Territories and the complexities and confusion that arises are such that it is preferable that uniform (or at least consistent) national laws should be developed.[134] However, SALRI accepts that, in light of the likely delay of such a difficult process, it is preferable that South Australia should, as far as practicable, revise its laws in relation to surrogacy until national laws are formulated to ensure the State's laws are as effective as possible.[135] Any South Australian regulatory framework should apply throughout a surrogacy process and protect the interests of all parties, especially the best interests of the child.

4.3.2 SALRI encourages South Australia, along with other States and Territories, to resume efforts towards a national consensus on this issue and to formulate a national uniform scheme for surrogacy as a matter of the highest priority.

4.3.3 SALRI notes that various parties, especially the Youth Court of South Australia and the Chief Magistrate have all supported referring part, or all, of the State court's role with respect to surrogacy to the Commonwealth and the Family Court on the basis that the State courts lack the resources and specialised expertise and processes in this area.

4.3.4 SALRI accepts the rationale of this suggestion and suggests that, where necessary to give effect to any uniform national scheme vested with the Family Court, South Australia, at its earliest opportunity, should refer the jurisdiction of its powers in respect of surrogacy to the Commonwealth and allow the Family Court to exercise jurisdiction in respect of all aspects of surrogacy. It makes little sense for surrogacy to be the subject of fragmented jurisdiction between different courts.

4.3.5 Further, the Family Court has the specialised expertise, experience and processes to be empowered to apply the principle of the best interests of the child and to resolve issues arising from complex family compositions.

4.3.6 It is inevitable that, if or until there is a national co-ordinated referral of surrogacy powers by States and Territories to the Commonwealth and the Family Court, the South Australian Youth Court will have to retain its present jurisdiction with respect to surrogacy (whether under the 1975 Act or any new *Surrogacy Act*). Given the lack of resources and specialised processes and expertise of the Youth Court in this area, this situation is perhaps less than ideal. Anything other than the occasional by consent agreement between the parties to a lawful surrogacy agreement to transfer legal parentage of the child raises real challenges for the Youth Court. It is also significant that any increase in the number and/or nature of surrogacy cases in the Youth Court raises real resource and other implications for the Youth Court.

4.3.7 Recommendations

Recommendation 2

SALRI recommends that, in light of the likely delay of uniform (or at least consistent) national laws being developed, South Australia should, as far as practicable, revise its laws in relation to surrogacy until national laws are formulated, to ensure the State's laws are as effective as possible.

[134] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 68 [4.96].

[135] See also ibid 68 [4.97]–[4.99].

Recommendation 3

SALRI recommends that South Australia, along with other States and Territories, resume efforts towards a national consensus on this issue and to formulate a national uniform scheme as a matter of the highest priority.

Recommendation 4

SALRI recommends that, where necessary to give effect to Recommendation 3 above, South Australia should refer the jurisdiction of its powers in respect of surrogacy to the Commonwealth and allow the Family Court to exercise jurisdiction in respect of all aspects of surrogacy at its earliest opportunity.

Part 5 – The need for a standalone 'Surrogacy Act'

5.1 Current Law

5.1.1 The present law in relation to surrogacy in South Australia is contained in Part 2B of the *Family Relationships Act 1975* (SA).[136] There is no standalone *Surrogacy Act* that exists in other jurisdictions such as Tasmania, Queensland and New South Wales.

5.2 Consultation Overview

5.2.1 SALRI heard in its consultation that many parties have difficulty navigating the role and contents of the legal requirements contained in Part 2B of the *Family Relationships Act 1975* (SA) and the *Family Relationships Regulations 2010* (SA). For example, SALRI heard in consultation that a fertility clinic offering surrogacy related services was unaware that single people are not able to be granted a parentage order in South Australia. It was noted that some aspects of the 1975 Act, as far as the residency requirements for eligibility to undergo surrogacy, are problematic in a surrogacy context.

5.2.2 Several parties, including Chief Justice Pascoe, supported a stand-alone *Surrogacy Act* for clarity. It was also noted to SALRI by Monica and others that parties considering surrogacy typically conduct their own background research and a standalone *Surrogacy Act* would assist. It was noted that several of the present provisions are lengthy and it would be easier to follow if they were shorter.

5.3 SALRI's Reasoning and Conclusions

5.3.1 A central premise of law reform is to promote the clarity, comprehension and accessibility of the law. SALRI adopts the view of Kirby J in this context: 'The right of citizens … to have the most modern, well-informed, efficient system of law that the state can reasonably provide.'[137]

5.3.2 SALRI makes no criticism of the previous surrogacy laws (indeed to the contrary given these laws were progressed as Private Members Bills without the input of a Government department or law reform agency with specialist legal and other input). However, SALRI considers that for clarity and accessibility a standalone *Surrogacy Act* is preferable.

5.3.3 It is unnecessary to 'go back to the drawing board' in formulating a new *Surrogacy Act* as many aspects of both the present Act and the 2017 Bill are sensible and should be retained (with any necessary modifications). SALRI does not wish to intrude into the specialised role and expertise of Parliamentary Counsel. However, SALRI suggests that, subject to the various changes recommended in this Report,[138] as well as any drafting and consequential amendments, any future *Surrogacy Act* can be based on the following provisions of the 1975 Act and the 2017 Bill:

[136] New South Wales, Queensland, Tasmania and Western Australia all have standalone *Surrogacy Acts*.

[137] Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech delivered at the Conference on Law Reform on Hong Kong: Does it Need Reform?, The University of Hong Kong, Department of Law, 17 September 2011).

[138] SALRI notes that any new *Surrogacy Act* should be subject to the further recommendations set out below, namely recommendations 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 39, 40, 41, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66 and 69.

1975 Act

Section	Details
s 10F	Interpretation (subject to deletion of references to 'prescribed international surrogacy agreement' and the 'State framework')
s 10G	Illegality of surrogacy contracts
s 10H	Offences (though see Part 12 below)
s 10HA	Recognised surrogacy agreements (it may be preferable to break this down into shorter sections; lawyer should be amended to a 'lawyer admitted in any Australian jurisdiction'; the threshold criteria such as age and 'infertility' (see Part 14 below), jurisdiction, 'legal agreement' and 'legal certificate' (see Part 21 below), counselling content and 'counselling certificate' (see Part 20 below) and costs (Part 23 below)
s 10HB	Orders as to parents of child born under recognised surrogacy arrangements (it may be preferable to break this down into shorter sections the paramount consideration should be the best interests of the child, the timing of application (see Part 25 below) and s 10HB(9) (suggest add the court must consider if the parties meet the eligibility criteria for lawful surrogacy agreement)
s 10HC	Ability to discharge an order (though clarify the paramount consideration should be the best interests of the child and suggest adding Child Protection Services to the parties who can seek discharge of an order)
s 10HD	Court to notify Registrar of Births, Deaths and Marriages (though see Part 24 below)
s 10HE	Access to Court records
s 10HF	Finality of orders
s 10HG	Power of court to cure irregularities
s 10HH	Ministerial power of delegation

2017 Bill

Section	Details
s 10G	Interaction with other Acts
s 10H	Rights of surrogate mother to manage pregnancy and birth
s 10K	Use of commissioning parent's human reproductive material not necessary in certain circumstances (see Part 16 below)
s 10N	Extent to which recognised surrogacy arrangements can be enforced (though not s 10N(2); see also Parts 23 and 25 below)

5.3.4 Recommendations

Recommendation 5

SALRI recommends that, for ease of reference and application and accessibility, the current scheme for surrogacy contained in Part 2B of the *Family Relationships Act 1975* (SA) be excised and replaced with a standalone *Surrogacy Act* for South Australia.

Recommendation 6

SALRI recommends that any new *Surrogacy Act* should draw on Part 2B of the *Family Relationships Act 1975* (SA) and the Family Relationships (Surrogacy) Amendment Bill 2017 (SA), notably as to the provisions set out in Part 5 of this Report.

To this end, SALRI suggests that any new *Surrogacy Act* should be subject to the further recommendations set out below, namely recommendations 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 39, 40, 41, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66 and 69.

Part 6 - Commercial Surrogacy and its Implications

6.1 Divergent views

6.1.1 The option of a system of commercial surrogacy for South Australia is not within SALRI's reference. However, SALRI notes that there have been suggestions for the introduction of a regulated system of commercial surrogacy in Australia.[139] The former Chief Justice of the Family Court[140] has publicly argued for this model. SALRI also received several submissions to this effect.

6.1.2 The Family Law Council also received a number of submissions regarding the regulation of commercial surrogacy in Australia. Many of its submissions noted that the present system of prohibition of commercial surrogacy has proved ineffective in preventing commercial surrogacy,[141] with some parties arguing that its illegality leads to couples being more secretive, with negative consequences for the child.[142] The apparent lack of interest in prosecuting people for entering such agreements was also noted to the Family Law Council, including by then Judge Pascoe.[143]

6.1.3 For these reasons, the Family Law Council noted that a number of submissions had suggested to it that, in the best interests of children, a proper system of commercial surrogacy should be introduced in Australia and was preferable to the current unsatisfactory 'not in my backyard' situation that now exists.[144] As Professor Millbank argued:

> Having overseas providers as the main avenue for surrogacy is unfair and unsafe. While I do not think that cross border surrogacy should be prevented and I understand why parents undertake it, it is far from ideal that this should be the main avenue in which Australian intended parents undertake surrogacy. Reproductive travel is not "tourism". It is stressful, expensive and risky. It exposes Australian intended parents and foreign born surrogates and egg donors to unsafe or less safe clinical practices, less desirable ethical practices, inadequate provision for children's possible future needs and uncertain legal regimes. If surrogacy is accepted as a valid option for treatment

[139] See, for example, Peter Gaffney, 'Why the "Widespread Agreement" is Wrong: Contesting the Non-Harm Arguments for the Prohibition of Full Commercial Surrogacy' (2009) 17 *Journal of Law and Medicine* 280; Barbara Miller, 'Commercial Surrogacy: Push to make Paid Pregnancies Legal, more accessible in Australia', *ABC News* (online), 1 December 2016, <http://www.abc.net.au/news/2016-12-01/commercial-surrogacy-legislation-push-the-price-of-life/8077862>; Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365; Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: the Wrong Answers to the Wrong Questions' (2015) 22 *Journal of Law and Medicine* 333; Kelton Tremellen and Sam Everingham, 'For Love or Money? Australian Attitudes to Financially Compensated (Commercial) Surrogacy' (2016) *56 Australian Journal of Australian and New Zealand Journal of Obstetrics and Gynecology* 558.

[140] Bridget Brennan, 'Commercial Surrogacy should be Legalised, Family Court Chief Justice Diana Bryant says', *ABC News* (online), 18 April 2015, <http://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>.

[141] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 86. Professor Jenni Millbank, the Law Institute of Victoria; Surrogacy Australia and Stephen Page expressed this view.

[142] Ibid. Professor Millbank, the Law Institute of Victoria; Surrogacy Australia and Stephen Page expressed this view.

[143] See also below Part 12.

[144] Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18 *Journal of Law and Medicine* 601.

> of infertility and family formation avenue, it should be possible for those who need it to undertake it domestically.[145]

6.1.4 The Family Law Council noted that some parties such as the Law Institute of Victoria and Surrogacy Australia recommended that commercial surrogacy 'be legalised, dealt with at a Commonwealth level, and regulated'. An alternative position proposed by the Family Law Section would require harmonisation of state and territory laws.[146]

6.1.5 The Joint Working Group of the Standing Committee of Attorneys-General, Australian Health Ministers' Conference and the Community and Disability Services Ministers' Conference released its *Proposal for a National Model to Harmonise Regulation of Surrogacy.*[147] That proposal maintained a policy position that commercial surrogacy should not be permitted in Australia. The proposed model would not permit commercial surrogacy, noting: 'That practice is already unlawful throughout Australia. It is judged that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones.'[148]

6.1.6 The 2016 Commonwealth Committee noted the divergent views in relation to surrogacy and that it had received submissions in favour of a regulated system of commercial surrogacy in Australia. The Committee concluded:

> In considering these divergent views, the Committee takes 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 strongly supports the current legislative position of Australian States and Territories that the practice of commercial surrogacy remains illegal in Australia.[149]

6.1.7 The recent NSW Review into the operation of the *Surrogacy Act 2010* (NSW) also received divergent views, including submissions for the introduction of a regulated system of commercial surrogacy in Australia,[150] but it reached a similar view on this issue as the Commonwealth Committee.[151]

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[145] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 87. See also at 86; Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18 *Journal of Law and Medicine* 601.

[146] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 87–88. See also 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, Rec 2: 'The Commission recommends that States and Territories renew their efforts to achieve consistency between their surrogacy laws and thereby increase the certainty for people considering surrogacy.'

[147] 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' (January 2009), <www.sclj.gov.au/sclj/standing_council_consultations/standing_council_pastconsultations.html>.

[148] Ibid 4–5. There is 'widespread agreement that commercial surrogacy (where the surrogate mother is remunerated for financial gain or reward) should be banned': at 2.

[149] 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* (April 2016) 6 [1.19].

[150] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 7–8 [2.22]–[2.25].

[151] Ibid 8 [2.26]–[2.28].

6.1.8 Concerns of exploitation are not confined to Third World countries. Such concerns have also been expressed in relation to the United States,[152] even California, notwithstanding its impressive health care system and apparent lower incidences of exploitation.[153]

6.1.9 Commercial surrogacy is said to 'commercialise an otherwise natural process'.[154] The practice is seen to commoditise the bodies of the surrogate mothers.[155] There are even concerns that the practice serves to facilitate 'the creation of an underclass of women who would become society's "breeders"'.[156]

6.1.10 Participants at SALRI's Expert Forum agreed that any reforms in South Australia should preserve the existing broad policy positions with respect to commercial surrogacy: namely that commercial surrogacy should be unlawful in Australia.

6.1.11 Many of the parties that SALRI heard from in both the YourSAy comments and in consultation, including Mr Adams, Dr Sonia Allan, Dr Patricia Fronek, Chief Justice Pascoe, the Anglican Archdiocese of Sydney, the Association of Relinquishing Mothers (Victoria) and some intending parents and surrogate mothers, shared the concerns about the dangers and implications of commercial surrogacy (especially in an international context).[157]

6.1.12 There was opposition from such parties to any form of commercial surrogacy in Australia.[158] Mr Adams, for example, argued, however, it may be presented: 'Commercial surrogacy is essentially the sale of children … It therefore cannot be classed as anything but the sale and commodification of children.' The Anglican Archdiocese of Sydney similarly outlined:

> We do not support commercial surrogacy in any context. It commodifies children. Second, it exploits financially needy women, who may engage in surrogacy for profit when they would not do so otherwise (1). Such concerns are evident in developing countries involved in the international surrogacy trade. The socio-economic disparity between commissioning parents and surrogates is often great, leading to unequal bargaining power between the two, and reports of unfair and dangerous treatment of vulnerable women in some overseas countries (2, 3). This has created an ethically problematic situation over which we have little control. To support such enterprises would amount to moral complicity.

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[152] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory Aspects of International and Domestic Surrogacy Arrangements* (April 2016) 25 [1.85].

[153] Ibid 24 [1.82]. See also 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, 46–47.

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

[155] See, for example, *Farnell v Chanbua* (2016) 56 Fam LR 84, 95 [57] (Thackray CJ). Thackray CJ 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'. See also Andrew Lu, 'Surrogacy and Parentage in Western Australia—Current Perspectives' (2016) 24 *Australian Health Law Bulletin* 78, 82.

[156] Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365, 367. See also Peter Gaffney, 'Why the "Widespread Agreement" is Wrong: Contesting the Non-Harm Arguments for the Prohibition of Full Commercial Surrogacy' (2009) 17 *Journal of Law and Medicine* 280, 295.

[157] Nishtha Lamba et al, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33 *Human Reproduction* 646, 653. See below [26.1.1]–[26.1.11] for discussion of the particular concerns about international surrogacy.

[158] See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 5–6 [2.15]–[2.21].

6.1.13 Dr Allan also outlined her objections to any system of commercial surrogacy in Australia. As she has previously argued:

> The current inquiry into surrogacy in Australia should not result in opening the door to commercial surrogacy. Commercial surrogacy is prohibited in every State and Territory in Australia for good reason: it contravenes international obligations regarding the sale of children,[159] there is the *potential* for women and children to be exploited; and there have been *actual* cases of such exploitation around the world, including in Australia … The argument that commercial surrogacy could be better regulated if it is allowed to occur here is unacceptable. The potential and real risk for exploitation of women and children would simply be opened up to include a greater number of women and children in Australia. The "better in our own backyard" argument does not hold up, it would simply create another market that should not exist.[160]

6.1.14 These views are not universally accepted. Some commentators view commercial surrogacy as an unobjectionable opportunity for women to freely exercise bodily and economic autonomy.[161]

6.1.15 Some parties in consultation similarly challenged the premises or arguments against commercial surrogacy in the Australian context and suggested that some form of compensated model of surrogacy should be adopted in South Australia.[162] Ms Forman pointed to the 'artificial, arbitrary and unhelpful distinction' between commercial and non-commercial surrogacy and 'rather than taking a band-aid approach, and suggesting reforms that make a flawed system more tolerable, SALRI should act proactively… and acknowledge that the system is inherently flawed [and] advocate for the elimination of the repugnant distinction between altruistic and commercial surrogacy.' Dr Ronli Sifris similarly argued:

> the assumption that compensated surrogacy correlates with exploitation whereas altruistic surrogacy is non-exploitative is misleading. While in certain circumstances compensated surrogacy may be exploitative, particularly in developing countries where a surrogate may be "poor, illiterate and uninformed of her rights", altruistic surrogacy may also raise questions relating to the extent to which a woman is exercising her own free will to become a surrogate. For example, undue pressure may be brought to bear on family members or friends of those desperate to have a child … While it is undeniable that surrogacy arrangements may be exploitative, there is no advantage to conflating compensation with exploitation; the question of compensation should be separated from the question of exploitation, particularly in a country like Australia which has a social safety net in place to protect those who are most vulnerable.

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[159] New South Wales actually lists its prohibition on commercial surrogacy in its response to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children*, 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, <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx>.

[160] Sonia Allan, Submission No 17 to Family Law Council, *The Family Law Act and Surrogacy Arrangements,* 2, <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/flc-submission-dr-sonia-allan-deakin-university-5august2013.pdf>.

[161] See, for example, Yasmine Ergas, 'Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 *Emory International Law Review* 117, 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 *Journal of Law and Medicine* 280, 292; Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) 30 *University of Pennsylvania Journal of International Law* 1429, 1459; Diksha Munjal-Shankar, 'Identifying the "Real Mother" in Commercial Surrogacy in India' (2014) 18 *Gender, Technology and Development* 387, 392.

[162] See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 7–8 [2.22]–[2.25].

6.1.16 Dr Olivia Rundle of the University of Tasmania noted that Australia's prohibition of commercial surrogacy represents a lost opportunity to create a system that has adequate safeguards for Australian participants. She told SALRI that the policy of prohibition has been ineffective in preventing Australians from engaging in commercial surrogacy arrangements and has created considerable legal problems for children born through those arrangements and adult participants.

6.1.17 The ineffectiveness of the current approach against commercial surrogacy has also been noted by Professor Millbank who argues:

> The domestic and extra-territorial criminalisation of paid surrogacy is a blunt and useless instrument if the goal is to protect the rights and interests of all parties involved in surrogacy arrangements. It arguably inhibits informed consent by preventing parents and surrogates from seeking professional assistance from lawyers and clinicians (who are themselves fearful of committing an offence through "facilitating" surrogacy in the provision of good faith professional advice) and leads to concealment of the circumstances of the birth from State agencies and, possibly as a result, also from children themselves.[163]

6.1.18 Chief Justice Pascoe said that 'it is plain … that the current State and Territory laws do not deter people from engaging in commercial surrogacy in order to become parents' and international commercial surrogacy is becoming increasingly common'[164] (though His Honour also commented: 'Commercial surrogacy violates the dignity of the female body and of the position of a child and should be prohibited in Australia').[165]

6.1.19 SALRI received a number of comments in YourSAy supporting commercial surrogacy in Australia. One party outlined:

> Commercial surrogacy is very difficult and can be extremely exploitative as in India. But let's be open and honest. Better allow it in Australia under tight regulation and ban it properly for overseas and not allow Australians benefit from it. We have worst of both worlds now.

6.1.20 Another YourSAy correspondent reasoned:

> the blanket ban on commercial surrogacy leads to a shortage of willing domestic surrogates and encourages Australian citizens to seek out commercial surrogacy arrangements abroad. Living through a pregnancy and birth is challenging even for women who strongly desire to keep their own child at the end of it and I cannot see why a surrogate willing to endure this process to provide an infertile couple with a child should not be adequately financially compensated for her labour.

6.1.21 SALRI notes that, as part of its consultation, it spoke to parties who had engaged in commercial surrogacy arrangements.

6.1.22 A number of parties told SALRI that an effective and accessible system of regulated surrogacy in Australia would encourage intending parents to stay at home rather than embark on costly and uncertain overseas commercial arrangements.[166]

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[163] Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry* 477, 488.

[164] 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, 5–6. See also Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 28, 42, 44–45.

[165] 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, 13.

[166] See also, for example, Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry* 477, 478.

6.1.23 Professors Karpin, Millbank and Stuhmcke observed to SALRI that the current Australian framework of regulation is complex, difficult and places obstacles in people's path to a child, leading them to explore and undertake international arrangements without any protection.

6.1.24 Alice, an intending parent, said a regulated and accessible system of surrogacy in Australia would encourage people to stay here and not travel overseas, but noted the shortage of surrogates in South Australia and elsewhere in Australia is a key reason why she would not be able to engage in an arrangement here in the future. She said it was likely parents would still travel overseas as there are 'hundreds' of intending parents in Australia but 'very few' potential surrogates.[167]

6.1.25 Some parties, including Simone Cureton, a surrogate mother, pragmatically observed that international commercial surrogacy will continue to be a feature of the Australian landscape as 'there is and will always be a place for international commercial surrogacy - there are quite simply not enough women in Australia who are prepared to undertake altruistic surrogacy.'[168]

6.1.26 Angela, another intending parent, outlined that the present surrogacy system in Australia encourages parties to travel overseas and if there was an effective and accessible system of surrogacy in Australia, this would reduce the temptation to travel overseas. Angela said she would have preferred to stay in Australia and avoid all the emotional and financial stress.[169]

6.2 SALRI's Reasoning and Conclusions

6.2.1 SALRI notes the divergent views it has received and, in particular, the various and cogent concerns that have been expressed by various parties in consultation (reflecting concerns in research) about commercial surrogacy, especially offshore. It may be inevitable that Australians will continue to travel overseas, however, given the strong human rights concerns and implications associated with international commercial surrogacy, SALRI agrees, at this stage, with the views of the Commonwealth Committee and the recent NSW Review[170] 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.

6.2.2 SALRI reiterates that any regulated system of commercial surrogacy in South Australia is not within its reference. SALRI, consistent with its recommendations above in favour of a national co-ordinated approach to surrogacy,[171] is further of the view that any such question cannot be considered in isolation at a State level and can only be considered at a national level between all Australian jurisdictions as part of any future national co-ordinated surrogacy system.[172] It is inappropriate for

[167] It was noted to SALRI that there may be up to 100 would be parents in Australia for every potential domestic surrogate mother.

[168] Mr Page made a similar point and noted that 'Australians undertake surrogacy overseas at a far greater rate than they do within Australia' and a main reason 'that they do so is because of a lack of local surrogates ... similarly there is a great shortage of egg donors.'

[169] Angela noted though she would not have used an Australian system unless it was legally enforceable about parentage and there was a means to require a surrogate to relinquish the child. See further below [25.4.1]–[25.4.13].

[170] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 8 [2.26]–[2.28], 9 [3.6].

[171] See above Recs 2, 3 and 4. See also above Part 4.

[172] SALRI notes the comments of the Family Law Council that commercial surrogacy in Australia has been also raised to it but that it was outside its reference but 'this is the responsibility of government and urges its consideration of this issue. In Council's view, any reform in this area will need to be preceded by broad community consultation and public debate': Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 109 [3.9]. See

South Australia to undertake such a drastic departure from existing national practice as seeking to 'go it alone' on such a major issue as introducing a system of domestic commercial surrogacy.

6.2.3 SALRI concurs in this context with the following observation of Chief Justice Pascoe:

> A consistent approach across all States and Territories regarding Australia's position on altruistic and commercial surrogacy and overseas surrogacy arrangements is desperately needed. Any legislation or amendments should focus on preserving human dignity and human rights of all parties involved. It is submitted that until a common position on surrogacy is achieved that all commercial surrogacy is banned with extra-territorial application.[173]

6.2.4 Recommendation

Recommendation 7

SALRI recommends 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.

also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 8 [2.28].

[173] 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, 23.

Part 7 - Human Rights Considerations

7.1 Fundamental human rights

7.1.1 The effects of surrogacy on the parties involved and the human rights issues and implications of surrogacy are complex and sensitive and gave rise, reflecting the research and academic commentary in this area, to very divergent views in SALRI's consultation.

7.1.2 Any reform to South Australia's surrogacy laws should protect internationally recognised fundamental human rights.[174] In any surrogacy arrangement, there are three interested parties, namely the intending parents, the surrogate mother (and her partner) and, crucially, the child. The relationship between these parties can thus be considered a 'triangulation of interests'. International human rights law, confirmed in the subsequent treatment of surrogacy proceedings before the Family Court,[175] requires that the 'best interests of the child' must be the paramount consideration.

7.2 Rights of the Child

7.2.1 The *United Nations Convention on the Rights of the Child* (the *CROC*) requires the best interests of the child to be the primary concern of all actions concerning children.[176] As Chief Justice Pascoe explained in consultation:

> It gives all children, no matter where they live or how they were conceived, or the family arrangement in which they happen to live, have the right to know their parents. Moreover, Government has an obligation to help them preserve their identity, including name, nationality, and family ties.[177]

7.2.2 The *CROC*, and the Optional Protocol to the *CROC* on the *Sale of Children, Child Prostitution and Child Pornography* prohibits the sale of children. The sale of children is defined 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'.[178] 'Any regulation of surrogacy,' as Chief Justice Pascoe notes, 'must protect these rights, prioritise the best interests of children and prevent anything that would amount to their sale.'

7.2.3 In any regime regulating surrogacy and subsequent determinations of parentage, the child's best interests must remain the primary factor.[179] There remains a 'basic interest' or 'welfare right'

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[174] See Mary Keyes, Submission No 54 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* (2016) 2. See generally Paula Gerber and Katie O'Bryan, *Surrogacy, Law and Human Rights* (Routledge, 2015).

[175] See, for example, *Re D and E* (2000) 26 Fam LR 310, 315 [21] (Bryson J); *Re A and B* (2000) 26 Fam LR 317, 320 [8] (Bryson J). Bryson J accepted in both cases that the best interests of the surrogate child should be the 'paramount' consideration in determining the rights and liabilities of each of the parties before the court.

[176] *Convention on the Rights of the Child* (20 November 1989) 15T/ UNTS 3 (entered into force 2 September 1990) art 3.1.

[177] *CROC*, arts 7.1, 8.1.

[178] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children: Child Prostitution and Child Pornography* (25 May 2000) 2l/1 lNTS 227 (entered into force 1 January 2002) art 2.

[179] *CROC* arts 3(1)–(2). See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 5 [2.5]–[2.8].

for each child to 'legal recognition for his or her parentage and family structure',[180] despite the fact that there is arguably no specific right to this effect. Any law regarding surrogacy must serve to ensure the family unit of the child is secure.[181] However, despite protecting the relationship between intending parents and a child born as a result of surrogacy, any framework should also protect the rights of children to know their origins (a strong theme emphasised by Chief Justice Pascoe and others in consultation),[182] through preserving information identifying the surrogate and the donor(s) of genetic material.[183]

7.2.4 There are associated rights for a child to be free from arbitrary dispossession from his or her parents,[184] to appropriate standards of living[185] and (significantly in the context of surrogacy) to be free from 'abduction', 'sale' or 'trafficking'[186] and other exploitative treatment.[187] Surrogacy procedures should also uphold the obligation imposed on Australia under international law to 'take measures to combat the illicit transfer and non-return of children abroad'.[188]

7.2.5 Many of these rights have received direct judicial acknowledgment in the context of parentage determinations in respect of surrogacy arrangements.[189]

7.2.6 An overwhelming theme to emerge in SALRI's consultation and research was that the best interests of the child must be the paramount or primary factor under any regulatory system.

7.2.7 The Chief Justice, in discussion with SALRI, drew attention to the fundamental fact that any system of surrogacy in Australia must entrench and confirm the best interests of the child as the paramount factor (including the child's right to know their full birth history).[190] This theme was widely

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[180] Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A Child-Centred Approach' (2015) 23 *Journal of Law and Medicine* 396, 405, 407, 409.

[181] Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333, 341.

[182] See also Margaret Ryznar, 'International Commercial Surrogacy and its Parties' (2010) 43 *Marshall Law Review* 1009, 1034–1035 and below [7.2.1]–[7.2.11], [9.3.4]–[9.3.5], [24.3.1]–[24.3.3].

[183] Louise Johnson, Eric Blyth and Karin Hammarberg, 'Barriers for Domestic Surrogacy and Challenges of Transnational Surrogacy in the Context of Australians undertaking Surrogacy in India' (2014) 22 *Journal of Law and Medicine* 136, 150; 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,* February 2016, 10–11 [38].

[184] *CROC* art 9(1).

[185] Ibid art 27(10).

[186] Ibid art 35. See also Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23 *Journal of Law and Medicine* 333, 340, quoting *Cowley & Yuvaves* [2015] FamCA 111 (2 March 2015) [24] (Thornton J); Andreas Schloenhardt and Jarrod Jolly, *Trafficking in Persons in Australia: Myths and Realities* (LexisNexis Butterworths, 2013) 77–78.

[187] *CROC* art 36.

[188] Ibid art 11(1).

[189] *Farnell v Chanbua* (2016) 56 Fam LR 84, 148 [335].

[190] See also 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, 19–22, 23–28. The ability of children born as a result of surrogacy to trace their genetic and family history is an important and previously often overlooked consideration. The former Chief Justice of the Family Court commented on the consequences of such a situation as 'we will have a generation of children who one day might say I really want to know who my mother was, and there's no way of finding out. I think we are morally responsible for doing something to control that': *ABC Radio National*, 'Retiring Chief Justice Reflects on Thirteen Years in the Family Court' *The Law Report*, 19 September 2017 (Damien Carrick), <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>. See also below [9.3.4]–[9.3.5], [24.3.1]–[23.3.3].

expressed to SALRI at the Expert Forum, in consultation and in the YourSAy contribution. As one YourSAy contributor, for example, stated: 'The absolute priority should be the best interests of the child. Children need to know where they come from.' Mr Adams made a similar point.

7.2.8 It is clear that, whilst any surrogacy framework should protect the fundamental human rights of all parties,[191] the paramount or primary consideration is the best interests of the child. Such an approach accords with existing law and practice at both a state and federal level practice as well as under international human rights law. Article 3 of the UN *Convention on the Rights of the Child* provides that in all actions concerning children, 'the best interests of the child shall be a primary consideration'.

7.2.9 It was widely agreed that any *Surrogacy Act* should contain explicit recognition of the best interests of the child as the primary or paramount factor (along with any other factors to be taken into account).[192] Mr Adams, for example, drawing on the *Assisted Reproduction Treatment Act* 1988 (SA),[193] suggested that there should be explicit statutory recognition of this proposition in the surrogacy context and 'any discussion regarding surrogacy and changes to the Act must therefore always treat the welfare of the child as THE paramount consideration rather than one which is subservient to the desires and needs of the adult undertaking the surrogacy agreement'. Dr Oxlad noted that the best interests of the child should be the paramount consideration of the arrangement rather than the 'welfare of the child'. She correctly noted that the term 'best interests of the child' more accurately reflects both Australian and international law and practice.

7.2.10 It was highlighted to SALRI that the best interests of the child must apply from the outset of the surrogacy process and not only arise or apply after the birth of any child. The Law Society, for example, in its written submission of 6 July 2018, submitted that 'the best interests of the child principle[194] should be paramount and be considered from the initial counselling session with parties and at every stage of the process' and through to any court order granting or declaring parentage.[195]

7.2.11 SALRI concurs with this approach. It is vital that any regulatory framework for surrogacy has the best interests of the child (rather than the child's welfare) as the paramount or primary consideration and this consideration should be made clear in any new *Surrogacy Act* and apply from the outset of the surrogacy process.[196] SALRI, in particular, notes that s 10HB (6) of the 1975 Act presently provides that in deciding an application under s 10HB to transfer legal parentage of a child born as a result of surrogacy, the 'welfare of the child' must be regarded by the Youth Court 'as the paramount consideration'. SALRI suggests that, as urged by Dr Oxlad and others, this provision requires

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[191] See Mary Keyes, Submission No 54 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, 2.

[192] See below Part 9.

[193] Section 4A of the *Assisted Reproduction Treatment Act 1988* (SA) provides:

'Welfare of child paramount

The welfare of any child to be born as a consequence of the provision of assisted reproductive treatment in accordance with this Act must be treated as being of paramount importance, and accepted as a fundamental principle, in respect of the operation of this Act.'

[194] The Law Society noted: 'Article 3 of the *United Nations Convention on the Rights of the Child*, requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.': Law Society of South Australia, Submission to South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, n 1 <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[195] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 1 [4], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[196] See also below [9.3.1]–[9.3.5].

clarification. Section 22 of the *Surrogacy Act 2010* (NSW) seems a suitable model. It should be clear that a court must be satisfied that the making of any parentage order in respect of a child born as a result of surrogacy is in the *best interests* of the child and this should be a necessary precondition to the making of any parentage order.

7.3 Rights of the Surrogate

7.3.1 The protection and human rights of the surrogate mother must be a major factor in any regulatory surrogacy framework.[197] The surrogate has the right to be free from 'inhuman' or 'degrading' treatment.[198] Additionally, she has a right to work,[199] which should be the subject of 'just and favourable conditions'.[200] Every woman has the right to access health care services.[201] Every woman also has the right to decide freely and responsibly on the number and spacing of their children.[202] The surrogate mother has the right to be treated with humanity and inherent dignity of the human person.[203]

7.4 Rights of the Intending Parents

7.4.1 Intending parent(s) have the right to found a family[204] and the right to determine freely and responsibly the number and spacing of their children.[205] Intending parents also enjoy a right to privacy[206] (or 'a right to respect for … private and family life').[207]

7.4.2 In *Re Jane*, the Family Court referred to the 'right to procreate or reproduce as being a basic human right recognised by the common law.'[208] The rights to privacy and to found a family under

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[197] The strong concern from international jurisdictions exposes the risks of exploitation if the rights of the surrogate mother are given inadequate attention. See *Farnell v Chanbua* (2016) 56 Fam LR 84, 148 [335] (Thackray CJ).

[198] ICCPR art 7. See also Yasmine Ergas, 'Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 *Emory International Law Review* 117, 176.

[199] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 6(1) ('*ICESCR*'); *CEDAW* art 11(1)(a), (c), (d), (f). Article 6(2) of the *ICESCR* imposes an obligation on States to implement strategies to 'achieve the full realization of this right', including through the development of 'polices and techniques to achieve steady economic, social and cultural development'. It has been raised that the right to work may extend to a right to engage in even paid surrogacy. For example, Ronli Sifris specifically acknowledges the argument that the right of women to work might reasonably extend to a 'right to provide this reproductive service for a fee': Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) *23 Journal of Law and Medicine* 365, 369.

[200] *ICESCR* art (7). This right includes, but is not limited to, the right to 'fair wages' and 'safe and healthy working conditions'. See also *CEDAW* art 11(1)(d).

[201] *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 16(1)(e).

[202] Ibid art 12.

[203] *International Covenant on Civil and Political Rights* (16 December 1966) 999 UTNS 171 (entered into force 23 March 1976) art 10.

[204] Ibid art 23; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16.

[205] *Declaration on Social Progress and Development*, UN Gen Ass Res 2542 (XXIV) (1969) art 4.

[206] *International Covenant on Civil and Political Rights* (16 December 1966) 999 UTNS 171 (entered into force 23 March 1976) art 17.

[207] United Nations 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* (15 January 2018) 15 [64].

[208] (1988) 94 FLR 1, 10, 419 (Nicholson CJ). See also *Re S* (1989) 13 Fam LR 660, 672.

the *European Convention on Human Rights* have been interpreted to include 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose'.[209]

7.4.3 Chief Justice Pascoe, drawing on the polarised views that often exist in relation to surrogacy, has previously noted the need to consider rights of the intending parents:

> the commissioning parents are either seen as saints or devils as their role is either to highlight the blessings of having a child to love, nurture, and protect as a result of surrogacy, or to exploit women and children. Their rights though need to be addressed. A couple or individual has the right to determine freely and responsibly the number and spacing of their children.[210]

7.4.4 However, any such rights of the intending parents do not extend to a 'right' for them to utilise surrogacy to have a child.[211]

7.4.5 As the UN Special Rapporteur outlined:

> it is recognised that there is no "right to a child" under international law. A child is not a good or a service that the State can guarantee or provide, but rather a rights bearing human being. Hence providing a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach should be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.[212]

7.4.6 Chief Justice Pascoe similarly outlined to the Commonwealth Committee that the rights of a couple or individual to start a family are limited in the surrogacy context.[213] As the Chief Justice explains:

> These are positive rights designed to prevent government control of family and human procreation. However, these rights do not extend to a right to access to assisted reproductive technologies or the right to engage in commercial surrogacy. These rights do not extend to the right to obtain or purchase a child if one is unable to naturally conceive.[214]

7.4.7 Several parties also made this point in consultation. As one YourSAy contributor stated:

> Three items loom large. The best interests of the surrogate child, their right to know their family, cultural and biological history and to avoid exploitation, notably of the surrogate mother. The desire of the commissioning parents to have children is not a right. It may be blunt but there is no

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[209] 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,* February 2016, 8 [24] quoting *SH v Austria* [GC], Application no 57813/00, 3 November 2011, [82] (dealing with art 8 of the *European Convention on Human Rights*, which is equivalent to art 17 of the *ICCPR*).

[210] Judge Pascoe Federal Circuit Court of Australia, 'Parenting and Children's Issues: International Commercial Surrogacy and the Risk of Abuse' (Paper presented at the 3rd Annual Legalwise International Family Law Conference, Shanghai China, 17–20 September 2014) 7.

[211] 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,* February 2016, 8 [24].

[212] United Nations 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* (15 January 2018) 15–16 [64].

[213] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 16.

[214] 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, 21.

human right to have a family by paying other people to do it for you. The strong desire to have children for couples or singles is NOT a human right.

7.4.8 However, SALRI also heard from various parties such as Mrs F, Dr Bernadette Richards and Dr Ronli Sifris in consultation that, reflecting the law (outlined above), whilst the best interests of the child are the primary consideration throughout the process, it is also important not to overlook and to include the interests or human rights of the other parties, namely the surrogate mother (and her partner) and the intending parents. More than one party such as Dr Melissa Oxlad and Mrs F (a parent with a child born to a domestic surrogacy agreement) noted to SALRI that the intending parents are often the 'forgotten parties' in the equation.[215] Mrs F told SALRI: 'We all need to be protected.'

7.4.9 Mr Page noted that 'both ART and surrogacy generally have a myriad of complex moral and ethical issues' but surrogacy, whilst usually involving ART, is not a medical process, but a legal process of transfer of parentage from the surrogate (and her partner if any) to the intended parent or parents.' SALRI agrees with the view of Mr Page in consultation that 'it is essential that there is appropriate regulation of surrogacy in South Australia within an appropriate human rights framework' and there is, and continues to be, appropriate regulation that respects the interests of all parties. SALRI accepts that any regulatory framework for surrogacy should explicitly recognise the interests or human rights of all parties (including the intending parents and the surrogate mother and her partner (who is sometimes overlooked)), whilst ensuring that, as Chief Justice Pascoe, Mr Adams and others have articulated, the paramount consideration is the best interests of the child born as a result of surrogacy.

7.4.10 Recommendations

Recommendation 8

SALRI recommends that, under any *Surrogacy Act* and surrogacy framework, the interests and human rights of all parties, namely the child born as a result of surrogacy, the surrogate mother and her partner and the intending parents must be recognised and respected, but confirms that the primary or paramount consideration, both before and after birth, should be the best interests of the child.

Recommendation 9

SALRI recommends that any *Surrogacy Act* should provide that the court must be satisfied that the making of any parentage order in respect of a child born as a result of surrogacy is in the best interests of the child and this should be a necessary precondition to the making of a parentage order.

7.5 Adverse human rights and other implications

7.5.1 As part of this reference, a number of individuals, both intending parents and surrogate mothers, have generously shared their personal experiences of surrogacy with SALRI. These personal accounts highlight the complex and often traumatic experiences faced by those exploring or utilising

215 It was also noted that the existing children of the surrogate mother should not be discounted. There are suggestions that surrogacy adversely effects the children of the surrogate mother: 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, 27–28 (though this is also disputed: see Vasanti Jadva and Susan Imrie, 'Children of Surrogate Mothers: Psychological Well-Being, Family Relationships and Experiences of Surrogacy' (2014) 29 *Human Reproduction* 90.

surrogacy as an option to begin a family. For example, SALRI has met in person with a number of intending parents who had experienced years, even decades, of invasive painful, expensive and ineffective fertility treatments in an effort to become pregnant. This experience had ongoing, negative impacts on many intending parents' relationships, finances and careers, and occurred prior to such couples exploring surrogacy as a 'last option'. For such couples, surrogacy was not seen as a 'choice', but as a necessary next step in a painful journey to overcome infertility. It was from this context that these couples approached the possibility of surrogacy, and it was in this vulnerable physical, emotional and financial position that they were negotiating a lawful surrogacy agreement with another party.

7.5.2 SALRI heard in its consultation (and supported in its research) from surrogate mothers who had previously experienced straightforward, low-impact pregnancies but who encountered significant physical, emotional and financial challenges during a surrogacy-related pregnancy. Some surrogate mothers described ongoing negative health impacts from the surrogacy pregnancy, along with ongoing implications for their relationships and financial stability following the surrogacy agreement. The rights and wellbeing of the siblings of children born as a result of surrogacy were also described as being negatively impacted by such arrangements.[216]

7.5.3 Various strong views were expressed in consultation about the negative effects of surrogacy and the adverse human rights implications for the parties involved. The Anglican Church of Sydney, for example, noted 'psychosocial research into surrogate mothers, commissioning mothers and offspring has shown that there are multiple areas of concern'.

7.5.4 A number of parties highlighted to SALRI the 'lifelong' (quoting Damian Adams) negative implications of surrogacy on the rights and wellbeing of both the surrogate mother and any child born as a result of surrogacy.

7.5.5 Several parties explained their views of the long terms effects of separating the surrogate mother and the child. The Association of Relinquishing Mothers (Victoria), for example, stated:

> In a surrogacy arrangement it is expected (in our view, wrongly) that there will be no emotional attachment, but the foetus that is growing is ultimately and irrevocably linked to the mother. The mother will bond with the child in utero, regardless of whether or not she has contributed genetic material. In any pregnancy there is cell transfer. These cells stay in baby and mother and the cell memory stays for their whole lives. The mother will grieve for the child. This reaction is life-long, as it is with adoption. No-one knows how they will cope with a situation until they've lived it. Early evidence shows that after the first warm glow of altruism wears off, women are missing their babies and do grieve. In surrogacy it is a hidden and socially unacceptable grief, because the carrying mother "chose" it.

7.5.6 Mr Adams pointed out the ill effects on both the children and surrogate mothers. Dr Klein similarly outlined the adverse physical and psychological effects of surrogacy on the participants.

7.5.7 Dr Catherine Lynch said: 'Permanent premature maternal separation causes short-term distress and long-term – even life-long and possibly intergenerational negative impacts on the wellbeing of human beings.'

7.5.8 SALRI also received various submissions to this effect citing research that points to the particular and ongoing negative implications of surrogacy on the rights as well as the physical and mental health outcomes of children born through surrogacy. Mr Adams, for example, submitted:

[216] Though other surrogate mothers SALRI spoke to had been less affected.

> those conceived with donated eggs [and children born as a result of surrogate arrangements] have worse outcomes than those conceived from IVF which we already knew were worse than the general population. Furthermore, those pregnancies involving donated eggs have increased incidences of preeclampsia … Not only is preeclampsia … life threatening to the mother and child during pregnancy, but in later life as the child becomes an adult it is associated with increased risks of hypertension, stroke, epilepsy, autism spectrum disorder, endothelial dysfunction, higher body mass index (BMI), increased hospitalisation due to disease.

7.5.9 The negative effects of surrogacy on the surrogate mother were also highlighted in consultation. Dr Lynch, for example, referred to evidence of long term and profound damage to the surrogate mother, drawing on the evidence of the impact of forced adoptions on the birth mother.[217] Dr Klein and the Association of Relinquishing Mothers (Victoria) made a similar point in their submissions to SALRI.[218]

7.5.10 Such concerns about the negative effects of surrogacy on the surrogate mother and/or child have been expressed elsewhere, notably before the Commonwealth Committee.

7.5.11 Chief Justice Pascoe, for example, outlined to the Commonwealth Committee some of the adverse physical or physiological implications that may arise for all the parties involved,[219] noting that children may feel 'objectified and a lack of self-worth' as a result of being born through commercial surrogacy and 'commodification of the child born through surrogacy is problematic as it can harm personhood and identity'.[220]

7.5.12 The Association of Relinquishing Mothers (Victoria) referred to the 'long-term emotional damage' of surrogacy and those 'intending parents who are really just driven by the desire to have a child—I call it baby lust—do not necessarily appreciate the long-term needs of their children.'[221]

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[217] Dr Lynch argued that: 'the belief that quick early removal of babies from their gestational mothers makes a "clean break" of the gestational mother/infant bond, without damage to either mother or child, cannot even remotely be sustained in the modern world. That neonates, especially, suffer from maternal separation, is undeniable and this simple fact alone means that all surrogacy is unethical - even what has deceptively been termed "altruistic" surrogacy, as surrogacy is never altruistic towards neonates … For testimonial evidence of the devastating long-term impact on neonates from the loss of their gestational mothers I suggest you read all the submissions to the Stolen Generations and Forced Adoptions Inquiries. In view of the available evidence and the testimony of adopted adults, adoptive parents, professionals and the donor conceived; in lieu of conclusive proof to the contrary, that is, proof that babies do not suffer in any way upon removal from the gestational mother at birth; and until thorough long-term studies are conducted on people who have suffered removal from their gestational mothers at birth to prove that there are no negative short- or long-term impacts upon them from their removal, the baby trade that is all forms of surrogacy should be immediately outlawed … I am utterly astounded that some law and policy makers appear to think "regulating" a human rights violation can somehow protect the people whose rights are being violated: babies. At every turn ALL forms of surrogacy violate the "best interests" principle and violates most of the principles in the UNCRC. Please do not support the entrenchment of the production and commodifying of human beings for third parties. It is absolutely disgusting.' See also Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press, 2017) 43. Others in consultation to SALRI noted that such objections to surrogacy are overstated. Kristopher Wilson of Flinders University, for example, said that to compare surrogacy and forced adoption and the Stolen Generation is misplaced and offensive to Indigenous communities and surrogacy and forced adoptions are wholly different.

[218] See also Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press, 2017).

[219] 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, 7–14.

[220] Ibid 7. See also 7–14.

[221] 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* (2015) 10.

7.5.13 Senator Jacinta Collins noted her alarm and deep concern and cited 'witnesses representing relinquishing mothers and donor-conceived and adopted children [who] warned that Australia risked repeating past mistakes by creating another generation of stolen children who will never know their genetic origins.'[222] Senator Collins quoted[223] Dr Sonia Allan speaking about a donor-conceived man 'who felt like such a commodity he had a barcode tattooed on the back of his neck' and speaking of a donor conceived lady who, 'every day, sits on a train, and scans the commuters, looking for somebody who has her nose, her ears, her hair. She does not know who her biological parents are.'[224]

7.5.14 Dr Daryl Higgins of the Australian Institute of Family Studies, drawing on the research from past adoption practices, urged caution to the Commonwealth Committee in relation to surrogacy. It was said that one of the 'very clear messages' from past adoption practices was 'in fact a strong focus, a preoccupation almost, on the needs of prospective parents at the expense both of the needs of vulnerable birth parents … and of the identity and connection needs of children.'[225] Dr Higgins elaborated: 'One of the really key messages are the issues around parents, or adults, wanting to be able to create a family and the degree to which, as a society, we think there might be some limits on that because it might have unintended consequences.'[226]

7.5.15 SALRI also had research drawn to its attention in consultation to indicate the detrimental physical and/or psychological effects suffered or potentially suffered by surrogate mothers and/or children born as a result of surrogacy.[227]

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[222] Jacinta Collins, Submission No 64 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, 3.

[223] Ibid.

[224] Sonia Allan, Roundtable Discussion on Surrogacy, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, 5 March 2015, 10.

[225] 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* (2015) 3.

[226] Ibid 5.

[227] See, for example, Claire Achmad, 'Contextualising a 21st Century Challenge: Part Two International Law Human Rights: Why are the Rights and Interests of Women and Children at Stake in International Commercial Surrogacy Arrangements?' [2012] *New Zealand Family Law Journal* 206; DH Adams et al, 'A Meta-Analysis of Neonatal Health Outcomes from Oocyte Donation' (2016) 7 *Journal of Developmental Origins of Health and Disease* 257–272; 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,* February 2016; Mary Keyes, Submission No 54 to the House of the Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements*, 2016, 10 [1.34]; 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 *Reproductive BioMedicine Online* 424, 431–432, 433–434 (for a 'minority' of the surrogate mothers); Renate Klein, *Surrogacy: a Human Rights Violation* (Spinifex Press, 2017); Nishtha Lamba et al, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33 *Human Reproduction* 646, 653; Seema Mohapatra, 'Stateless Babies and Adoption Scams: a Bioethical Analysis of International Commercial Surrogacy' (2012) 30 *Berkeley Journal of International Law* 412; Seema Mohapatra, 'Adopting an International Convention on Surrogacy—A Lesson from Intercountry Adoption' (2015) 13 *Loyola University Chicago International Law Review* 25; Usha Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India' (2008-2009) 39 *Cumberland Law Review* 15; Edwina Schneller, 'The Right of Donor Inseminated Children to know their Genetic Origins in Australia' (2005) 19 *Australian Journal of Family Law* 222, 223–224; Hoda Ahmara Tehran, et al 'Emotional Experiences in Surrogate Mothers: a Qualitative Study' (2014) 12 *Iran Journal of Reproductive Medicine* 471–480;

7.5.16 However, these views and findings were disputed by various parties in SALRI's consultation. Professors Karpin, Millbank and Stuhmcke observed to SALRI that 'everyone has an opinion' on surrogacy but 'very little of the literature is based on sound empirical research'. This view was also expressed by Dr Melissa Oxlad.

7.5.17 Professors Karpin, Millbank and Stuhmcke noted their awareness of reports of the negative physical and mental health outcomes of surrogate options but concluded that they have not come across evidence to support these views in their research. Indeed, their recent research in fact tends to suggest the opposite (reflecting British studies).

7.5.18 There is conflicting research as to the effects of surrogacy. Some studies doubt the negative implications of surrogacy arrangements on the physical and/or psychological welfare of the intending parents,[228] surrogate mothers[229] or children born as a result of surrogacy.[230]

7.5.19 Several studies suggest that many surrogates 'have reported high satisfaction with the process and report no psychological problems as a result of relinquishment'.[231] A number of studies have noted that surrogate mothers typically do not encounter problems or regret in the relinquishment of the child.[232] One long term study concluded that surrogacy itself is not harmful to children and was

United Nations 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* (15 January 2018).

[228] Fiona MacCullum et al, 'Children of Surrogate Mothers: Psychological Well-Being, Family Relationships and Experiences of Surrogacy' (2003) 18 *Human Reproduction* 1334.

[229] See, for example, Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13; Angelia Campbell, 'Law's Suppositions about Surrogacy against the Backdrop of Social Science' 43 *Ottawa Law Review* 29; Vasnati Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18 *Human Reproduction* 2196.

[230] See, for example, David Darbyshire, 'Surrogate Babies Suffer no ill-effects, says Study', *The Telegraph* (London), 1 July 2002, <https://www.telegraph.co.uk/news/uknews/1398916/Surrogate-babies-suffer-no-ill-effects-says-study.html>; Vasanati Jadva, 'Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27 *Human Reproduction* 3008; Susan Golombok et al, 'Children born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653.

[231] Elly Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 *Social Science and Medicine* 1104.

[232] See, for example, Vasanti Javda, et al, 'Surrogacy: the Experiences of Surrogate Mothers' (2003) 18 *Human Reproduction* 2196; Olga Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy (2003) 21 *Journal of Reproductive and Infant Psychology* 145, 152–153; Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 68–73; 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 *Reproductive Biomedicine Online* 424, 435. There have been only two reported cases in Australia of a surrogate mother refusing to relinquish a child, namely *Re: Evelyn* (1998) 145 FLR 90 (traditional surrogacy) and *Lamb and Anor & Shaw* [2017] FamCA 769 (21 September 2017) (gestational surrogacy). Mr Page in consultation noted that there have been two other unreported examples in Australia in 1988 and 1990, both significantly concerning traditional surrogacy. See further below [16.5.6]-[16.5.10]. Mr Page noted that this was at a time when reproductive technology was limited and traditional surrogacy was perhaps more common than now and there was also not the input of the legal and counselling (and screening) role of now. Mr Page also helpfully provided to both SALRI and the Victorian review the following from 'one of the leading surrogacy lawyers in the world, Mr Andy Vorzimer, a partner of Vorzimer Masserman in California' who said: 'The statistics have been compiled by our office since 1994. As of last month, we have calculated that since 1979 in the United States: More than 151,000 surrogate deliveries; 13 instances of gestational carriers manifesting an intent to keep custody of the child; 25 instances of traditional surrogates manifesting an intent to keep custody of the child and 91 instances of intended parents threatening not to take custody of their child.'

said to 'add to the growing body of research suggesting that biological relatedness between parents and children is not essential for positive child adjustment'.[233]

7.5.20 The Australian Human Rights Commission noted British studies suggesting that children born as a result of local non-commercial surrogacy arrangements generally grow up in loving families and are well-adjusted.[234] However, the Commission emphasised that these results were not in the context of international surrogacy arrangements.

7.5.21 The Family Law Council similarly noted British, United States and Canadian studies that challenge some of the broad concerns expressed about the potential negative consequences for surrogates and children of surrogacy arrangements and 'generally lend support to the practice of surrogacy as a method of family formation, at least where the surrogate can choose the commissioning couple and where there is a positive relationship between the surrogate mother and the intending parents.'[235] Other studies also observe an absence of adverse consequences amongst the participants.[236]

7.5.22 Mrs F highlighted to SALRI the well-adjusted nature of her child born to a non-commercial surrogacy arrangement. Mrs F, echoing a theme expressed to SALRI by other intending parents and Dr Oxlad, said it is important any child born of a surrogacy arrangement is taught openly about their history and there are 'no secrets'. Mrs F explained that it is crucial for all parties, especially

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[233] Susan Golombok et al, 'Children born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653, 660. 'There are a range of other matters that are more important for children's development in early childhood, including attachment and bonding with parents or other caregivers in a physically and emotionally safe environment': 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) 10 [34].

[234] 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 *Journal of Family Psychology* 443; Susan Golombok et al, 'Families Created Through a Surrogacy Arrangement: Parent-Child Relationships in the First Year of Life' (2004) 40 *Developmental Psychology* 400; Susan Golombok et al, 'Families Created by Gamete Donation: Follow-Up at Age 2' (2005) 20 *Human Reproduction* 286; Susan Golombok et al, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213; 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 *Human Reproduction* 1918; Susan Golombok et al, 'Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7' (2011) 25 *Journal of Family Psychology* 230; Susan Golombok et al, 'Families Created through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at Age 7' (2011) 47 *Developmental Psychology* 1579: Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653. Vasanati 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 *Human Reproduction* 3008. However, the Human Rights Commission emphasised that these results were not in the context of international surrogacy arrangements.

[235] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 89. See also 88–93.

[236] See, for example, Olga van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' (2007) 13 *Human Reproduction Update* 53; Olga van den Akker 'A Longitudinal pre-pregnancy to post-delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers' (2005) *26 Journal of Psychosomatic Obstetrics and Gynaecology* 277-284; Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 93; Susan Golombok et al, 'Children born through Reproductive Donation: a Longitudinal Study of Psychological Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653; Jenni Millbank, 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477, 480–481.

the best interests of the child, for there to be candour about the history of the child, as 'the truth will always come out eventually'.[237]

7.5.23 SALRI notes a comprehensive 2015 review into the existing research which commented on the apparent absence of adverse physical or psychological effects to either the child, the surrogate mother or the intending parents.[238] However, the authors emphasised the relative lack of research in some areas and the incomplete literature on the various effects of surrogacy:

> Most studies reporting on surrogacy have serious methodological limitations. According to these studies most surrogacy arrangements are successfully implemented, and most surrogate mothers are well motivated and have little difficulty separating from children born as a result of the arrangement. The perinatal outcome of the children is comparable to standard IVF and OD and there is no evidence of [physical or psychological] harm to the children born as a result of surrogacy. However, these conclusions should be interpreted with caution. We have not found any publications 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. Long-term follow-up studies on surrogacy children and families will be needed in the future.[239]

7.5.24 It is important to note that the research is incomplete, especially in relation to the international surrogacy context.[240] As the Family Law Council observes, 'lacking in the empirical evidence base is a longer-term perspective on the experience of surrogacy, from the viewpoint of all those involved; intending parents, surrogates, gamete donors, and most importantly, children.'[241]

7.5.25 SALRI reiterates that the research as to the effects of surrogacy on the participants is conflicting.[242]

7.5.26 SALRI is simply unable to express any findings upon the effects of surrogacy on the parties involved.

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[237] See Susan Golombok, 'Families Created by Reproductive Donation (2013) 7 *Child Development Perspectives* 61–65.

[238] Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—A Systematic Review' (2016) 22 *Human Reproduction Update* 260.

[239] Ibid 275–276. See also Janice Ciccarelli and Linda Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 21 *Journal of Social Issues* 61; 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 *Reproductive BioMedicine Online* 424, 434.

[240] As one study noted: 'there 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': Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 89.

[241] Ibid 93.

[242] Smerdon cites two contrasting cases. One fourteen-year-old girl born of a gestational surrogate remarked: 'I can't really remember how I felt about it when I was younger, but now that I'm older, I can see from my mother's point of view how much she wanted a daughter ... It helps me realise, it doesn't really matter how I was born and that my mother didn't actually carry me. But it does matter that I am here. I am born': Usha Renagachary Smerdon, 'Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India' (2008) 39 *Cumberland Law Review* 15, 60. Another nearly eighteen-year-old boy born of a traditional surrogate stated: 'How do you think we feel about being created specifically to be given away? **...** I don't care why my parents or my mother did this. It looks to me like I was bought and sold ... When you exchange something for [m]oney it is called a commodity. Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? ... Because somewhere between the narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids' needs. We, the children of surrogacy, become lost. That is the real tragedy': 60.

7.5.27 SALRI also received submissions highlighting what is said to be the irreconcilable conflict between the concept of surrogacy and international human rights principles designed to protect and promote the human rights of children (and the women who act as surrogate mothers).[243]

7.5.28 A number of parties argued that the practice of surrogacy (even if undertaken on a regulated and non-commercial basis) is at odds with the *Convention on the Rights of the Child*. Dr Renate Klein, for example, maintained surrogacy should be prohibited in all forms on moral, ethical and legal grounds. She asserted that surrogacy 'is unashamedly an adult or parent centred view, with the basic human rights of new born babies ignored' and 'under the *UN Convention on the Rights of the Child*, surrogacy is not permitted!' Dr Klein argues it is impossible to design a regulatory framework for surrogacy that complies with Australia's international obligations, particularly under the *CROC*.[244]

7.5.29 Dr Lynch similarly regards all forms of surrogacy to be ethically, morally and legally wrong. 'All forms of surrogacy are cruel to neonates and violate the moral rights, needs and desires of the human beings created.' Dr Lynch argued that it is impossible to reconcile even lawful non-commercial surrogacy with the *Convention on the Rights of the Child*. Mr Adams advanced a similar view to SALRI.

7.5.30 The Australian Christian Lobby contended that 'even without pecuniary pressure, altruistic surrogacy creates the circumstances for the objectification and commodification of women and future children to satisfy parental desires.' Other parties such as Dr Lynch and Dr Klein argued that it is impossible to formulate a regulatory framework for surrogacy that adequately protects the rights and interests of all parties (especially to protect the best interests of the child) and also successfully guards against potential long term harm and undesirable effects experienced by intending parents, surrogate mothers and especially the children born as a result of surrogacy. Dr Lynch, for example stated: 'I am utterly astounded that some law and policy makers appear to think "regulating" a human rights violation can somehow protect the people whose rights are being violated: babies.'

7.5.31 Such concerns and views raise real questions to at least some commentators about the wisdom of permitting any form of surrogacy in South Australia.

7.5.32 In contrast, other parties such as Mr Page, Mr Everingham, Dr Melissa Oxlad, Dr Ronli Sifris and Professor Keyes argued to SALRI that the present law either does (or can) effectively protect the rights and interests of all parties (notably to protect the best interests of the child) and also successfully guard against potential long term harm and undesirable effects experienced by intending parents, surrogate mothers and especially children born as a result of surrogacy. Dr Sifris, for example, noted to SALRI that the 'South Australian legal system has the framework and capability to regulate compensated surrogacy so as to minimise the risk of exploitation and appropriately protect the rights and interests of all parties, most importantly that of the child.'

7.5.33 Professors Millbank, Karpin and Stuhmcke similarly argued: 'Surrogacy is not a harmful practice to women who make an informed decision to undertake a pregnancy for a surrogacy arrangement and willingly relinquish a baby they do not regard as their own.' Indeed, they maintain that 'surrogacy, as a valid method of family formation, should be respected and supported through State action which enhances informed choice, encourages beneficial clinical and ethical standards and reduces demonstrably harmful practices.'

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[243] See, for example, Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press, 2017).

[244] See also ibid.

7.5.34 Dr Olivia Rundle's preferred solution would be to have an accessible and effective national system of regulated surrogacy in Australia with adequate and sensible safeguards. Dr Rundle believes that a thorough consideration of the needs, interests, rights and opportunities of children born through surrogacy, surrogates, genetic and intended parents must be explored in developing a sound legal, regulatory and practical framework. Relevant considerations, in Dr Rundle's view, include what information and relationships children have a right to and how those should be appropriately accessed. Dr Rundle concludes that, rather than focusing upon a relatively arbitrary distinction between costs and commercial remuneration, it would be preferable that all of the potential direct and indirect costs of conception, pregnancy and post-natal recovery be considered. Ms Forman advanced a similar view.

7.5.35 It was also noted to SALRI that it is unclear whether commercial surrogacy infringes the rights of the child.[245] Dr Sifris noted that whether commercial surrogacy arrangements amount to the sale of children under intentional human rights law 'has been the subject of passionate debate'. Dr Sifris also quoted Tobin's argument that, consistent with some views SALRI received, 'there is a strong argument to suggest that commercial surrogacy arrangements amount to the sale of a child, in which case, international human rights law requires that the practice be prohibited.'[246] Dr Sifris also quoted Gerber and O'Byrne who, in contrast, argue that properly regulated commercial surrogacy arrangements do not amount to the sale of a child[247] and Hanna who similarly asserts 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.[248] Indeed, Dr 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.'[249]

7.5.36 The Report of the UN Special Rapporteur was drawn to SALRI's attention by Chief Justice Pascoe. The 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, but this is not necessarily the case:

> commercial surrogacy may not constitute the sale of children if it's closely regulated in compliance with international human rights norms and standards and in a manner contrary to what exists in many commercial surrogacy regimes.[250] Altruistic surrogacy, too, must be appropriately regulated to avoid the sale of children.[251]

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[245] 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 *Journal of Law and Medicine* 275, 283–284.

[246] John Tobin, 'To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 318, 326.

[247] 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.

[248] Jason Hanna, 'Revisiting Child-Based Objections to Commercial Surrogacy' (2010) 24 *Bioethics* 341.

[249] Dr Sifris also noted that 'the CRC 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 but only those circumstances involving 'the misuse of surrogacy'.

[250] The Special Rapporteur expressed particular concern at the binding 'contractual basis' of US commercial surrogacy systems: United Nations 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* (15 January 2018) 16 [68].

[251] Ibid 12 [41].

7.5.37 SALRI is aware that surrogacy gives rise to complex and unresolved health and human rights implications. The various sincere views that have been expressed to SALRI in consultation cannot be reconciled.

7.5.38 SALRI is unable to express any findings on either the effects of surrogacy on the parties and the international human rights implications of surrogacy and, in particular, if the practice (at least in an Australian context) infringes international human rights law. SALRI notes the wide diversity of views expressed in consultation, reflecting the incomplete and conflicting research in the area, about the effect of surrogacy on the parties and the complex human rights and other implications arising.[252]

7.5.39 SALRI notes the concerns expressed by some researchers and in consultation by some parties as to the human rights and other implications of surrogacy. SALRI has been provided with submissions and sources raising concerns about the welfare and rights of the parties in a surrogacy context, notably the child (including the wellbeing of neonates born as a result of surrogacy agreements) but reiterates that the findings of the research in this area are conflicting and incomplete. However, the regulatory approach recommended by SALRI in this Report has regard to emerging medical and other research, for example, by the use of Guidelines to ensure best practice care is provided to neonates and surrogate mothers and their families.[253]

7.5.40 SALRI also notes the practical reality that some form of surrogacy is an established feature of all Australian jurisdictions (apart from the Northern Territory) and this reference is premised on the basis that a non-commercial and suitably regulated form of surrogacy will continue to be lawful in South Australia. It is unrealistic to 'seek to 'turn back the clock'. As Professors Millbank and Stuhmcke said to SALRI, the 'horse has already bolted' with IVF, adoption and surrogacy and the law cannot be wound back to preclude surrogacy. Both options of a commercial system of regulated surrogacy and banning or precluding any form of surrogacy in South Australia are not within SALRI's terms of reference. SALRI also reiterates that the result of its consultation and research supports an intermediate approach within these two polarised views as the most appropriate way forward and to protect the interests of all parties, notably the best interests of the child.[254]

7.5.41 The case for this intermediate approach to surrogacy within Australia was recognised by several parties in SALRI's consultation such as J (an intending father), Simone Cureton and Dr Oxlad.

7.5.42 SALRI draws on the comments in this context of Dr Bernadette Richards of the University of Adelaide, drawing on her background in medical law and ethics. Dr Richards outlined:

> The intersection of healthcare and the law can be complex, there is rarely a simple answer with regards to what is "right" in the circumstances. The issues that arise are often deeply personal in nature and there can be a sharp divide between different views. Surrogacy is an area that illustrates this divide with a breadth of views set out along a continuum. At the one extreme are those who believe that there should be a total prohibition and at the other, those who support an open market model where commercial surrogacy is legal. These two views cannot be reconciled, the split represents incompatible views regarding basic human rights, individual dignity and broad societal norms. Where opinions are so widely split there cannot be any regulatory regime that will satisfy everyone, therefore it is essential that care is taken to identify a respectful and appropriate middle ground … Regulation with respect to surrogacy must reflect the breadth of views, it must strike a

[252] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 48–49 [3.147]–[3.155].

[253] See further below Part 19.

[254] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 48–49 [3.147]–[3.155]; Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 10 [3.8]–[3.11].

balance between the extreme views and acknowledge that neither an open market nor an absolute prohibition is appropriate. The reality is that advocates at each end of the spectrum have some merit in their argument and are driven by deeply held convictions that warrant respect. How then can a balance be struck?

Human life should not be commoditised therefore we cannot move to commercialisation of surrogacy. But if we prohibit surrogacy we will drive vulnerable members of the population underground, and they will turn to the commercial market. The reality is that there is a well-established (and thriving) commercial surrogacy market available outside of this jurisdiction. Domestic prohibitions on accessing these markets are not a deterrent to desperate people who want to have a child, if they are willing to go offshore to access a market that is closed to them domestically then they will run the risk of legislative sanctions when they return with their child. The effect of an absolute prohibition will be an unregulated market where the "parents" are exposed to risk of predatory marketing and the child is exposed to risk of abandonment, poor health or being stateless.

Every human being warrants respect, individual values warrant respect and overarching respect for human dignity must sit at the base of any regulation of surrogacy. To be consistent with broad legal principles as they apply in the healthcare context any regime must:

- Avoid a market in humanity (prohibition on commercial surrogacy).
- Respect individual values (this would include legal recognition of conscientious objection).
- Protect the best interests of the future child (open recognition of their biological relationships and a positive duty to inform the child that they have a surrogate parent/s).
- Protect all parties to the surrogacy agreement (this may include uncoupling the relationship between counsellors and private clinics).
- Constructing a clear regulatory framework around surrogacy agreements.
- Introduction of specific legislation.
- Prohibition on commercial brokerage of surrogacy agreements...

In short, the legislation must balance the "helter-skelter" of human relationships in the surrogacy agreement and have a soft touch which enables protection of the interests of all parties.

7.5.43 SALRI notes the complex human rights issues and other implications raised by all forms of surrogacy, and in particular, by commercial forms of surrogacy, including rights and issues arising under the *CROC*. SALRI agrees with the comments of Dr Richards and adheres to its view that any regulatory framework for surrogacy must explicitly recognise the interests and human rights of all parties (including the intending parents and the surrogate mother and her partner), whilst ensuring that the primary or paramount consideration is the best interests of the child born as a result of surrogacy.

7.5.44 The rationale of the present law is to allow and facilitate non-commercial and suitably regulated surrogacy in Australia, whilst discouraging unlawful surrogacy, especially international commercial arrangements. It is from this perhaps pragmatic perspective that SALRI has approached this reference to examine the most appropriate regulatory framework for the types of regulated and non-commercial surrogacy arrangements that will be considered lawful in this State.

7.5.45 SALRI supports a suitable regulatory framework for South Australia that maintains the distinction between commercial and non-commercial surrogacy and clarifies and improves the current system to most appropriately allow and facilitate lawful domestic surrogacy within Australia for South Australians, but discourage and deter recourse to unlawful surrogacy, especially offshore commercial

surrogacy. The framework that SALRI has recommended in this Report is the most appropriate to recognise and respect the interests of all parties, but, crucially, to protect the best interests of the child.

7.5.46 This position can, and should, be re-evaluated in the future in the light of further research as to the long term effects of surrogacy and further international human rights developments and implications.[255] It is partly for these reasons that SALRI sees the strong value of a future review to determine the role and operation of any *Surrogacy Act*.[256] Given the complexities and rapid advances in this area (legally, research wise and internationally), SALRI suggests that there is a statutory review of the operation and effectiveness of any new *Surrogacy Act* five years after its commencement.[257]

7.5.47 Recommendation

Recommendation 10

SALRI recommends that there is a review of the operation and effectiveness of any new *Surrogacy Act* five years after its commencement, given the complexities and rapid advances in this area (both research wise and internationally).

[255] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 48–49 [3.147]–[3.155]. As already noted, the status of surrogacy under international human rights law remains to be resolved. There is ongoing work at the Hague Conference on Private International Law involving surrogacy and its various implications.

[256] See, for example, *Surrogacy Act 2010* (NSW) s 60.

[257] Such statutory reviews are a regular feature of South Australian legislation. See, for example, *Advance Care Directives Act 2013* (SA) s 62; *Assisted Reproductive Treatment Act* 1988 (SA) s 21; Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017).

Part 8 – Current South Australian Law

8.1 Part 2B of the *Family Relationships Act 1975* (SA)

8.1.1 In South Australia, surrogacy is regulated by Part 2B the *Family Relationships Act 1975* (SA).[258] The present law prohibits commercial surrogacy and sets out strict conditions for when 'altruistic' surrogacy agreements will be legally recognised in South Australia. In accordance with this, the law presumes that the woman who gives birth to a child is the child's legal mother[259] and sets out a range of offences for those involved in negotiating or being party to a commercial surrogacy contract.[260] This reflects the broadly held policy position across Australia that children should not be able to be 'bought and sold', which is balanced with the practical need to set out a legal framework to clarify the legal parentage of a child born to intending parents with the help of an altruistic surrogate, who does not charge any fee to carry and give birth to the child.

8.1.2 The key provisions of Part 2B include:

- Section 10F which defines the main terms in the Part, including 'recognised surrogacy agreement' which includes agreements that meet the criteria in s 10HA, as well as 'prescribed international surrogacy agreements'[261] and surrogacy agreements entered into interstate.
- Section 10FA which establishes the State Framework for Altruistic Surrogacy.[262]
- Section 10FB which establishes the Surrogate Register.[263]
- Section 10G which prohibits and invalidates 'surrogacy contracts' which are defined in s 10F as those involving valuable consideration. Such contracts are presently legally unenforceable.[264]

[258] There is a valid suggestion that for clarity and ease of reference there should be a standalone *Surrogacy Act* rather than seeking to include surrogacy within the already involved *Family Relationships Act*. See above Part 5.

[259] Any male partner of the surrogate mother is presumed to be the child's legal father unless and until the court transfers parentage to the intending parents.

[260] 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. There have been no prosecutions for offences under these laws and the practical effectiveness of such extraterritorial criminal laws to deter overseas surrogacy has been doubted. See 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* (April 2016) 23 [1.71], 31 [1.113]. See further below Part 12.

[261] See below [8.2.2].

[262] See below [8.2.1], [10.3.1]–[10.3.3].

[263] See below [8.2.3], [10.4.1]–[10.4.5].

[264] A recognised surrogacy agreement is generally unenforceable for public policy reasons in relation to the child. It is unclear whether a recognised surrogacy agreement is presently enforceable in relation to costs. See the Hon Diana Bryant AO, Submission No 42 to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements,* 11 February 2016, 3. Chief Justice Bryant in her submission noted: 'Surrogacy agreements are generally not enforceable — for example, for public policy reasons — except to the extent that they provide for the payment of the surrogate's pregnancy-related expenses. This means that a surrogate who refuses to give the baby to the intended parent(s) cannot be forced to under the agreement. In those circumstances, a remedy for the intended parent(s) would be to apply to the Family Court for a parenting order that the child live with them.' See further below [23.1.12]–[23.1.13], [23.4.1]. Ms Redman and Ms Brunacci suggested to SALRI that it is arguable that, at least, the costs aspect of a lawful surrogacy agreement may be legally enforceable.

- Section 10H which contains offences for those who negotiate, arrange or obtain the benefit of a surrogacy contract on behalf of another, or those who induce another to enter into a surrogacy contact.

- Section 10HA which sets out the conditions that must be met for a surrogacy agreement to be 'recognised'. These conditions require that:

    - The surrogate mother agrees to become pregnant and surrender custody of, and rights in relation to, a child born as a result of the pregnancy to another party to the agreement; and

    - The only parties to the agreement are the surrogate mother (and if she is married, her husband) and the commissioning parents, and that all parties are at least 18 years old and both commissioning parents live in South Australia; and

    - The commissioning parents are either legally married or in a registered relationship or meet certain cohabitation requirements, and

    - That at least one of the commissioning parents would be unlikely to become pregnant or carry a pregnancy or give birth (whether because of infertility, other medical reasons, risk to an unborn child or for some other reason); or there appears to be a risk of a serious genetic defect, serious disease or serious illness to the child or the commissioning parent if the commissioning parent was to try to become pregnant or became pregnant or give birth; and

    - The surrogate mother must have been assessed by, and approved as a surrogate by, an accredited counselling service and all parties have received counselling as set out in the provision; and

    - The pregnancy is to be achieved by the use of a fertilisation procedure carried out in South Australia[265] and generally should include reproductive material from at least one of the commissioning parents;[266] and

    - The agreement must state that no valuable consideration is payable other than for expenses connected with or consisting of: the pregnancy, the birth or care of a child born as a result of that pregnancy; counselling or medical services provided in connection with the agreement (including after the birth of a child); legal services provided in connection with the agreement (including after the birth of a child); reasonable out of pocket expenses incurred by the surrogate mother in respect of the agreement; or any other matter prescribed by the Regulations; and

    - The agreement must state that the parties intend that the commissioning parents will apply for an order under s 10HB after the child is born; and

    - The agreement must state that the commissioning parents will take reasonable steps to ensure that the surrogate mother and her husband or partner (if any) are offered counselling (at no cost to the surrogate mother or her husband or partner) after the birth of a child to which the agreement relates (including, to avoid doubt, a still-birth).

[265] The question of jurisdiction is important: see further below Part 17.

[266] This provision is not entirely clear: see further below Part 16.

- Section 10HB which sets out the process for obtaining orders as to parents of child born under recognised surrogacy arrangements. The parties to a recognised surrogacy agreement may apply under s 10HB to the Youth Court for a legal parentage order when the child is between the ages of four weeks and six months. This period cannot presently be extended.[267] When considering applications for orders under this provision, the welfare of the child must be regarded as the paramount consideration. The court must also be satisfied that the surrogate mother freely, and with a full understanding of what is involved, agrees to the making of the order. The court must also decide whether, in the opinion of the court, the commissioning parents are fit and proper persons to assume the role of parents of the child. If the court makes an order under this provision, the intending parents will then be treated as being the legal parents of the child.

8.2 Changes in 2015: *Family Relationships (Surrogacy) Amendment Act 2015* (SA)

The State Framework for Altruistic Surrogacy (s 10FA)

8.2.1 The 2015 Act allows the Attorney-General to set up a Framework containing information about a range of matters relevant to recognised surrogacy agreements including: details about the type of counselling parties to a surrogacy agreement should have, the circumstances in which a person can advertise the services of a surrogate mother, and the conditions the Attorney-General must be satisfied of to approve a prescribed international arrangement.[268] It was intended that the Framework would make it easier for prospective intending parents to access surrogacy in South Australia so they are not 'forced' to engage in arrangements overseas.[269] The changes were designed to make lawful surrogacy and the provisions of the Act 'much more accessible to many people'.[270]

Prescribed International Surrogacy Arrangements (s 10F)

8.2.2 The 2015 changes set out a process for international surrogacy arrangements – such as those involving South Australian intending parents and an overseas surrogate – to be recognised as lawful under South Australian law. Under these changes, the Attorney-General has the power to recognise an international surrogacy arrangement if certain conditions are met. Once recognised under this process, international surrogacy arrangements can then provide a legal avenue for parenting orders to be made under s 10HB. This change has not been put into effect and raises major issues.[271]

The Surrogate Register (s 10FB)

8.2.3 The 2015 Act requires the State Attorney-General to establish a Register of South Australian women over the age of 18 years who are willing to act as a surrogate in a lawful surrogacy agreement. The Register would not be available to the public, but could be accessed by approved groups of people, such as medical service providers. It was intended that the Framework would make

[267] Mr Page in consultation noted this is unhelpful: see below [25.2.5].

[268] *Family Relationships Act 1975* (SA) s 10FA(3).

[269] South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597–1598 (John Dawkins).

[270] Ibid 1598.

[271] See below Part 26.

it easier for prospective intending parents to access surrogacy in South Australia so they are not 'forced' to engage in arrangements overseas.[272]

8.2.4 The 2015 Act was intended to ensure the welfare of any child born as a result of surrogacy remains secure, to broaden the accessibility of surrogacy in South Australia, to limit the use of overseas commercial surrogacy and to retain the prohibition of commercial surrogacy.[273] The 2015 powers provided to the Attorney-General have not been used to date and no Framework or Register has been established at this stage. Various practical, operational and ethical implications in this context have been expressed to SALRI in its consultation.[274]

8.2.5 The former Attorney-General identified to SALRI that the then Government had 'significant and ongoing concerns about the impact of the changes made by the 2015 Amendment Act, particularly in relation to the establishment of the Register and the Framework, which would also require the Minister responsible to consider approvals for international surrogacy agreements.'

8.3 The 2017 Bill: Family Relationships (Surrogacy) Amendment Bill 2017 (SA)

8.3.1 In late 2017, changes were proposed to the surrogacy laws in South Australia that, if passed, would provide an alternative approach to the changes introduced in 2015.[275] The proposed 2017 changes were said to be broadly based on the New South Wales model.[276]

8.3.2 The proposed 2017 changes – which have not yet become law – would remove the State Framework for Altruistic Surrogacy, the Surrogate Register and the process for prescribing international surrogacy agreements introduced in 2015.[277] The proposed changes would also introduce a new process for the Youth Court to issue orders with respect to the parentage of children born as a result of surrogacy arrangements made by South Australian parents in other jurisdictions in Australia or overseas, provided such arrangements were not commercial surrogacy arrangements and other conditions were met.[278]

8.3.3 The 2017 Bill also proposed a new way for dealing with the expenses or costs that can be recovered by a surrogate mother under a lawful surrogacy agreement.[279]

8.3.4 The former Attorney-General set out to SALRI in his letter of 26 December 2017 the former Government's view that, whilst the approach taken in the 2017 Bill is preferable to the changes

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[272] Ibid 1597–1598.

[273] Ibid.

[274] See further below Part 10. See also Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[275] South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 7962–7964 (John Dawkins). On 18 October 2017, the Family Relationships (Surrogacy) Amendment Bill (SA) 2017 was introduced into the Legislative Council. The Bill ultimately failed to pass both Houses of Parliament before Parliament was prorogued in December 2017 before the 2018 election.

[276] South Australia, *Parliamentary Debates,* Legislative Council, 18 October 2017, 7962–7964 (John Dawkins).

[277] The 2017 Bill also proposed changes to the criminal offences into the Act, including the offence of 'entering, or offering to enter, a commercial surrogacy arrangement' and the offence of 'entering, or offering to enter, a surrogacy arrangement Family Relationships (Surrogacy) Amendment Bill (SA) (2017) s 10T(1).

[278] South Australia, *Parliamentary Debates,* Legislative Council, 18 October 2017, 7962 (John Dawkins).

[279] See further below Part 23.

to surrogacy brought about as a result of the 2015 Act, the Government remained concerned at some aspects of the Bill.

Part 9 - Specific Law Reform Issues

9.1 A National Approach to Surrogacy

9.1.1 Over the last decade, the many Australian[280] law reform bodies to have considered the issue of surrogacy have sought to articulate common principles to guide policy and law making in this complex area.

9.1.2 At the heart of these principles, is the need to protect the rights and welfare of any child born as a result of a surrogacy arrangement as well as protecting the rights, wellbeing and physical autonomy of surrogate mothers and the rights and interests of intending parents.

9.1.3 The central premise of the present law in Australia is that, whilst lawful surrogacy in Australia should be allowed and facilitated, commercial surrogacy should be discouraged or deterred, on the basis that 'commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones'.[281]

9.1.4 The complexities regarding surrogacy in Australia are compounded by the fact that regulatory roles and powers are shared between the States and the Commonwealth and the relevant laws differ from State to State. There is no one single uniform, or even consistent, surrogacy law or even common guiding principles. The implications of this are significant.[282]

9.1.5 There have been efforts at, if not a uniform scheme, at least consistent general principles. For example, in January 2009, the Council of Australian Governments (COAG) released a Discussion Paper proposing a potential model to harmonise surrogacy laws across all Australian jurisdictions.[283] The COAG model was based upon the *Assisted Reproductive Treatment Act 2008* (Vic), the *Surrogacy Act 2008* (WA) and the *Parentage Act 2004* (ACT). The model was designed to allow prospective intending parents to be recognised as the legal parents of a child in the place of the birth parents throughout Australia, subject to prescribed preconditions being satisfied.[284] The COAG model was based around the following key principles:

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[280] See, for example, Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018); 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* (April 2016); Family Law Council, *Report on Parentage and the Family Law Act* (December 2013); Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008); Legislative Council Select Committee, Parliament of Tasmania, *Report on Surrogacy* (2008); Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009); Social Development Committee, Parliament Of South Australia, *Inquiry Into Gestational Surrogacy* (2007); Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Position Paper Three - Surrogacy* (2005). There are also current reviews in Victoria and Western Australia as well as England.

[281] This principle was agreed to by the 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' (January 2009), <www.sclj.gov.au/sclj/standing_council_consultations/standing_council_pastconsultations.html>.

[282] 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* (April 2016) 6 [1.20].

[283] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy' (January 2009).

[284] Ibid 2.

- Parentage orders are to be made in the best interests of the child
- Intervention of the law in people's private lives should be kept to a minimum; and
- The model should seek to avoid legal dispute between the birth parent(s) and the intended parents.[285]

9.1.6 In addition, it was intended that under the new model the surrogate mothers could be compensated for reasonable expenses[286] and parentage orders would be made in relevant State courts provided it was fundamentally in the best interests of the child.[287]

9.1.7 This model was also considered by the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs in its 2016 inquiry into domestic and international surrogacy. The Commonwealth Committee suggested that the Commonwealth, in conjunction with the Council of Australian Governments, consider the development of a model national law that facilitates non-commercial surrogacy in Australia.

9.1.8 The Committee recommended that any regulatory framework in respect of surrogacy should have regard to the following four guiding principles:

1. That the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins),
2. That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate,
3. That sufficient regulatory protections are in place to protect the surrogate mother from exploitation, and
4. That there is legal clarity about the parent-child relationships that result from the arrangement.[288]

9.1.9 The Committee recommended that the Australian Law Reform Commission would be an appropriate body to examine and formulate a model national law to effectively regulate surrogacy in Australia.[289] SALRI notes that the terms of reference of the ALRC's current review of the family law system includes reference to published reports relevant to surrogacy[290] (though its Issues Paper makes

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[285] Ibid 2.

[286] Ibid 5.

[287] Ibid 8. The full set of the COAG Guidelines are set out at Appendix D.

[288] 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* (April 2016) 7 Rec 2.

See also Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>, 7 [43]; 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, Rec 1.

[289] 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* (April 2016) 8.

[290] Australian Law Reform Commission, *Terms of Reference: Review of the Family Law System* (27 September 2017) <https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>.

only passing reference to surrogacy).[291] The ALRC will report upon the review 31 March 2019.[292] Other jurisdictions, including Victoria[293] and Western Australia,[294] are also currently reviewing their laws relating to surrogacy and assisted reproductive technology.

9.1.10 These developments, coupled with SALRI's own terms of reference, demand that careful consideration must be given to how any potential legislative reforms in South Australia will interact with developments around Australia. SALRI considers that, whilst national uniform or consistent, laws relating to surrogacy are a commendable option,[295] this will prove a complex and time-consuming project. In the interim, it is desirable that South Australia's laws relating to surrogacy (including any general principles) should be both as effective as possible and, as far as appropriate, move towards national consistency.[296] Any guiding principles should draw on existing models.

9.1.11 A common feature of South Australian legislation is a statement of general principles or objectives to assist or guide parties in the administration and operation of the relevant Act.[297] Surrogacy is no exception and wide support was expressed in consultation, including at the Expert Forum, for a statutory statement of general principles or objectives to apply to any new *Surrogacy Act*. There is no such statement in relation to the present South Australian law regarding surrogacy.[298] Such a statement of general principles of objectives was perceived to assist parties and courts in the understanding and application of a new *Surrogacy Act*. It was emphasised that such principles (especially the best interests of the child)[299] should apply throughout a surrogacy process.

9.2 General Guiding Principles

9.2.1 A common theme of law reform efforts has been to identify general principles (or objectives) that should apply in any surrogacy process and ideally should be incorporated in any Act for the courts and parties to have regard to.[300]

9.2.2 There are said to be three broad policy objectives of the *Surrogacy Act 2010* (NSW), namely protecting the best interests of children born of surrogacy arrangements, providing legal certainty and preventing commercial surrogacy arrangements.[301]

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[291] Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (March 2018).

[292] Ibid.

[293] Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018).

[294] See further Department of Health, Government of Western Australia, *Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* <https://ww2.health.wa.gov.au/Articles/S_T/Submissions-for-HRT-review>.

[295] See above Recs 2, 3 and 4. See also above Part 4. See further Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 68 [4.96]; 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* (April 2016) 7 Rec 2.

[296] See Rec 2 above. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 68 [4.97]–[4.99].

[297] See, for example, *Adoption Act 1988* (SA) s 3; *Family and Community Services Act 1972* (SA) s 10; *Sentencing Act 2017* (SA) s 4; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8.

[298] The only specific present reference is that 'the welfare of the child must be regarded as the paramount consideration' for the Youth Court in deciding an application under s 10HB(6) of the *Family Relationships Act 1975*.

[299] See above Rec 8. See also above [7.2.1]–[7.2.11].

[300] See, for example, Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 25–30.

[301] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 5 [2.2].

9.2.3 In 2008, the Queensland Parliament commenced an inquiry into the decriminalisation of non-commercial surrogacy,[302] which ultimately led to the passage of the *Surrogacy Act 2010* (Qld). The Explanatory Notes set out the guiding principles that:

- The wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life are paramount;
- Each child born as a result of a surrogacy arrangement enjoys the same status, protection and support irrespective of the circumstances of the child's birth or the status of the persons who become the child's parents as a result of a transfer of parentage; [and]
- A child should be cared for in a way that promotes openness and honesty about the child's birth parentage;
- The autonomy of consenting adults in their private lives should be respected and that the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted.[303]

9.2.4 Other jurisdictions such as Tasmania[304] have similar statements (though others such as Western Australia are confined to confirming that the best interests of the child are paramount).

9.2.5 The Law Society of South Australia in its 2017 submission submitted that the guiding principles that should apply in the regulation of surrogacy are:

1. The best interests of the child.
2. The non-exploitation of women with particular regard to vulnerable women.
3. The rights of women to autonomy over their bodies and their medical treatment.
4. Prevention of human trafficking including the trafficking of vulnerable potential surrogate mothers and of children.

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[302] Legislative Assembly Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008).

[303] Explanatory Notes, Surrogacy Bill 2009 (Qld) 5.

[304] Section 2 of the *Surrogacy Act 2012* (Tas) provides:

'Interpretative Provisions Guiding principles

(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

(2) Subject to subsection (1), this Act is to be administered according to the following principles:

(a) a child born as a result of a surrogacy arrangement should be cared for in a way that –

(i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;

(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of –

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the intended parents of the child;

(c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;

(d) the autonomy of consenting adults in their private lives should be respected.'

5. The prevention of commodification of women's bodies and the desirability of laws that do not discriminate on the basis of sex, gender, sexual orientation or relationship status.[305]

9.2.6 Participants agreed at SALRI's Expert Forum that it would be beneficial for any legislative changes to the current regulatory framework for surrogacy in South Australia to be accompanied by a set of statutory guiding principles. They agreed that these principles should be broadly based on those identified by the Commonwealth Committee in its 2016 inquiry into surrogacy in Australia.[306] These guiding principles also received broad support in consultation.

9.2.7 The guiding principles identified by SALRI were:

- That the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins).
- That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate.
- That sufficient regulatory protections are in place to protect the surrogate mother and the intending parents from exploitation.
- That there is legal clarity about the parent-child relationships that result from the arrangement.
- The intervention of the law and the State in this area in people's private lives should be kept to a minimum.
- Any model should seek to avoid and resolve legal dispute between the birth parent(s) and the intending parents prior to the transfer of legal parentage.
- That the surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.[307]

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[305] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 7 [43], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[306] 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* (April 2016) 7 Rec 2.

[307] Principles 1–4 were outlined by the Commonwealth Committee while principles 5–7 emerged in SALRI's initial research and consultation. The National Health and Medical Research Council (NHMRC) in consultation also highlighted to SALRI the importance of the NHMRC Guidelines on the use of ART (the *NHMRC ART Guidelines*) in relation to surrogacy. The *NHMRC ART Guidelines* provide an overarching framework for the conduct of ART in both clinical practice and research, via guiding principles and practical guidelines that should be followed unless there is an effective alternative option that is consistent with the relevant principle, or unless otherwise specified by law. The guiding principles are in line with community expectations that ART activities will be conducted in a manner that shows respect, minimises potential harms and supports the ongoing wellbeing of all parties, including persons born as a result of ART. The *NHMRC ART Guidelines* recognize that there is legislation governing surrogacy in all Australian states and in the Australian Capital Territory and provide that all persons involved in surrogacy must ensure that they are familiar with the relevant legislation and operate within the law. It was noted [8.8]–[8.12] of the *ART Guidelines* provide guidance to support the implementation of an ethically acceptable surrogacy arrangement. This includes guidelines for the required counselling and consent processes for commissioning parents and potential surrogates, and the reimbursement of reasonable, verifiable out-of-pocket expenses to the surrogate. The *ART Guidelines* support the voluntary exchange of information between the person born, the surrogate and the commissioning parent(s), with the valid consent of all parties, and provide the minimum level of information that should be accessible to all relevant parties. This includes that they stipulate that persons born via a surrogacy arrangement are entitled to know the details of their birth and to have the opportunity

9.3 Best Interests of the Child

9.3.1 The universal theme SALRI heard from all parties at the Expert Forum and in its broader consultation (including the YourSAy contributors) was that the best interests of the child are paramount and that any framework needs to look at those interests from the start at the pre-conception stage, that is, from the very beginning of the process of forming a lawful surrogacy agreement.[308]

9.3.2 It is clear that any regulatory framework for surrogacy must include, as the statutory primary or paramount consideration, the protection of the 'best interests of the child'[309] throughout the process. As the recent NSW Review concluded: 'Protecting the interests of children born through surrogacy arrangements remains a central and critical policy objective.'[310] SALRI agrees with this view.

9.3.3 Any order to transfer the legal parentage of a child born as a result of surrogacy, should also be based on the best interests of the child.

9.3.4 It was overwhelmingly emphasised to SALRI that an integral part of the best interests of the child is the child's right to know their genetic and birth history. SALRI heard this from both parties that agreed with surrogacy in principle and those that opposed surrogacy in all forms. Monica, for example, a prospective surrogate mother, noted that 'every child has a right to know their emotional, biological and social story'. She also said that every child 'needs to know the team that came together to create a baby'. This should arise even if there is no biological link between the child and the surrogate mother. Mrs F expressed a similar theme. Dr Allan and Mr Adams also made this point, drawing on the not dissimilar contexts of donor conception and ART.[311] Chief Justice Pascoe also emphasised this point, noting that the child's right to know is a right under international human rights law.

9.3.5 SALRI reiterates[312] that it is vital that the primary or paramount statutory consideration or principle for any surrogacy framework is the child's best interests, including the child's right to know his or her birth and genetic history.

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to determine the significance of their gestational connection with the surrogate. SALRI concurs with the role and importance of the *NHMRC ART Guidelines*, in that they complement and support any legislative or regulatory framework notably as to the fact that surrogacy should be conducted according to sound public health principles; (see below Part 19) but, they do not require legislative force as part of any general statutory guiding principles – noting that registered ART providers are required to adhere to the *NHMRC ART Guidelines* as a condition of registration in this State.

[308] See above [7.2.10]–[7.2.11]. See also Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 1 [4], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[309] The term 'best interests of the child' is to be preferred in a surrogacy context to the term 'welfare of the child' that still appears in s 10HB(6) of the *Family Relationships Act 1975* (SA) . The term 'best interests of the child' accords with state and national law and practice and international law. Article 3 of the UN *Convention on the Rights of the Child* provides that in all actions concerning children, 'the best interests of the child shall be a primary consideration'.

[310] See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 5 [2.8]. See also at 5 [2.5]–[2.7].

[311] See also Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017). It is significant that children in South Australia (and Victoria, New South Wales and Western Australia) born of donated genetic material are entitled at 18 to access their full birth history. See 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, 23–24.

[312] See above Rec 2. See also above [7.2.1]–[7.2.11].

9.4 Surrogate's free and informed decision to act as a surrogate

9.4.1 All parties that SALRI spoke to emphasised that a surrogate mother needs to be able to make a free and informed decision to consent to act in a surrogacy arrangement. 'Surrogate mothers who are not properly informed or who are unable to give informed consent are at much higher risk of being exploited.'[313] This is an obvious and important principle. Any agreement from the surrogate mother to take part in the demands of a surrogacy arrangement must be free and informed.

9.4.2 Several parties, such as Mr Page and Angela, however, raised concerns about the extent of a surrogate mother's ability to withhold consent, for any reason, to the parentage order. Mr Page pointed to the problematic 2017 Queensland case of *Lamb v Shaw*[314] as an instance where the surrogate mother withheld consent 'capriciously.' Mr Page suggested to SALRI that, 'there ought to be the ability, as one sometimes sees in adoption legislation, to transfer parentage even without the consent of the surrogate and her partner when special circumstances demand it.'

9.4.3 This issue is considered further[315] but SALRI's view is that it is inappropriate to make any change to the present position that legal parentage remains with the surrogate mother unless, and until, a court orders parentage transferred to the intending parents.[316]

9.5 Regulatory protections to protect the surrogate and intending parents from exploitation

9.5.1 The potential for exploitation of the parties in the surrogacy context is real, even in a non-commercial system as in Australia. The urge and desperation of childless couples and individuals to become parents, especially after prolonged, costly, painful and unsuccessful fertility treatment is profound, as is their willingness to pay large amounts of money (even in a non-commercial system) in order to become a parent.[317] It was pointed out, by a number of individuals, that adoption is not a realistic alternative for many childless parties to surrogacy.[318]

9.5.2 SALRI heard many positive accounts of surrogacy in its consultation but it also heard from a number of parties (both surrogate mothers and/or intending parents) of questionable practices (albeit largely in an interstate context) and what was perceived as an overly commercial focus of certain professional parties in the provision of surrogacy related services. One intending parent queried whether Australian fertility providers had an undue commercial agenda. Their frank conclusion: 'It is a business.' A surrogate mother questioned whether fertility clinics have a financial interest in allowing

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[313] 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, 16.

[314] *Lamb v Shaw* [2017] FamCA 769 (21 September 2017).

[315] See below [25.4.1]–[25.4.13], [25.5.1].

[316] See below Rec 61.

[317] Mr Page noted to SALRI that the typical cost of surrogacy in Queensland, New South Wales, Victoria and South Australia is $30,000 to $70,000. The cost of surrogacy for Australians going to the United States is between $145,000 to $300,000 and in Canada is between $80,000 to $120,000 although Mr Page would suggest $120,000 as 'a ball park figure'. SALRI heard the cost of surrogacy arrangements in the Ukraine are typically far less.

[318] 'The marked and continual decline in availability of young children for both domestic and international adoption': Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135. See also 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,* February 2016, 2–3; [16.4.15] below.

as many women as possible to act as surrogates regardless of their suitability. Monica, an intending surrogate mother, emphasised that under the present system 'everybody else is making money out of surrogacy apart from the surrogates … People are there to make money.'

9.5.3 Another surrogate mother, Eliza Cole, spoke of the long-term impact being a surrogate mother had on her own health and the wellbeing of her family and other children, and the barriers she faced when seeking to access appropriate and timely treatment and support, particularly post birth. Ms Cole also drew attention to the need for fertility service providers, hospital staff and other health care professionals to focus on providing quality care to surrogate mothers, and warned of the dangers of compromising the independence of that care in surrogacy arrangements.

9.5.4 Other parties commented (again largely in an interstate context) of unease over perceived excessive fees from lawyers and counsellors.

9.5.5 Such issues have been expressed elsewhere. Chief Justice Pascoe, for example, in his submission to the Commonwealth Committee referred to the 'unfair contract position' of clinics and the risk of 'unethical practices' and 'inflated claims'. 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'.[319] Chief Justice Pascoe elaborated on these concerns in his written submission to SALRI:

> 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.

9.5.6 There are often concerns of the exploitation of the surrogate mother (especially in a commercial surrogacy context) by the intending parents. This is an important consideration. Eliza Cole, for example, raised the substantial list of seemingly small expenses associated with being a surrogate mother that mount up over time and can give rise to significant stress and emotional hardship for surrogate mothers and their families, if not adequately anticipated by the parties or if payment by intending parents is contested or delayed. This view was shared by another surrogate mother who told SALRI that in her experience, 'the women I speak to are often out of pocket and rarely break-even in their surrogacy journeys'.[320]

9.5.7 This theme emerges elsewhere. Surrogate mothers, according to Monica and others, are often very reluctant to incur costs to the intending parents and often end up out of pocket as a result. On the other hand, the intending parents may be reluctant, even unwilling, to reimburse legitimate, seemingly modest, expenses. In 2014, one domestic surrogate mother, 'Dianne', reported her frustration at her treatment by the intending parents (formerly close friends but 'I didn't even get a thank you') and their begrudging attitude to reimbursement of her modest expenses. Dianne believed the system of Australian 'altruistic' surrogacy offers little protection for the surrogate. She commented: 'That's why people are going abroad … I carried the baby, I birthed it and I handed her over. I did

[319] 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.

[320] Comment from an anonymous surrogate mother in YourSAy survey.

three rounds of IVF. I always believed that Australian surrogates shouldn't be paid. Now I think it needs to be done like a business transaction. You pay the surrogate so there's no backlash afterwards.'[321]

9.5.8 However, SALRI was often told in consultation that the position of the intending parents should not be overlooked and that exploitation can work both ways. A consistent theme of the experience of surrogacy in Australia that SALRI heard from both intending parents and surrogate mothers questions, in an Australian context, the stereotype of surrogacy in say India or Thailand of the typical acute imbalance between the positions of the wealthy intending parents and the surrogate mother.[322] The situation in Australia is different. Mrs F, Angela, Alice and others explained to SALRI that they are not the wealthy intending families of popular perception but rather 'normal' middle class families who underwent huge financial sacrifices to become parents.[323] Mrs F explained to SALRI that a number of years after the birth of her child born as a result of surrogacy, her family is still in debt. The surrogate mothers that SALRI spoke to were not financially motivated but rather driven by a profound desire to help childless couples[324] and were articulate and educated women in employment. Ms Cureton, a surrogate mother, for example, is a family lawyer.

9.5.9 One anonymous intending parent stated to SALRI that that their experience of surrogacy within Australia had proved frustrating, expensive and traumatic, highlighting a significant power imbalance between the surrogate mother and the intending parents, where the surrogate mother holds significant legal and emotional power over the intending parent. This intending parent told SALRI that the law should recognise the particularly vulnerable position that intending parents can find themselves and recognises that many intending parents are seeking access to surrogacy as a 'last resort' in response to a medical problem that cannot be remedies by any means. This party argued that there is a need to consider surrogacy through the approach of other forms of medical assistance such as organ donation for those needing a transplant. This intending parent reiterated surrogacy is not a matter of 'choice' but a medical need.

9.5.10 This theme was expressed elsewhere. Angela, an intending parent, for example, highlighted that any surrogacy framework should realise and make allowance for the fact that not only can a surrogate mother be exploited but the intending parents can be as well. There is scope for 'some level of blackmail' and 'they can hold your baby to ransom' and threaten to not give up the child.[325] Alice, an intending parent, supported the possibility of potential exploitation of intending parents as well as the surrogate to be recognised within the statutory statement of general principles, noting that exploitation can work both ways and 'when someone is carrying your baby, you will do anything for them'. There is 'so much potential for parents and surrogates to be taken advantage of' she continued. Alice explained that, as an intending parent, 'you would do anything for' the surrogate carrying your

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[321] Tim Barlass, 'When altruistic surrogacy goes wrong', *Sydney Morning Herald* (online), 10 August 2014, <https://www.smh.com.au/national/when-altruistic-surrogacy-goes-wrong-20140807-101bo5.html>.

[322] Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 51–52. See also 41–51.

[323] Various parties such as Mr Page also made this point to SALRI in consultation. 'Most Australian intended parents — whether undertaking surrogacy domestically or internationally — are middle class. They save up or draw down their mortgage, borrow money from the bank, family or friends or access superannuation to undertake surrogacy. Richer Australian intended parents undertake surrogacy through more expensive surrogacy agencies. Those with not so deep pockets so not, and either go to cheaper US surrogacy agencies, to Canada, or to other cheaper destinations, such as the Ukraine.'

[324] See also above n 99.

[325] This fear does not seem borne out in practice. SALRI heard from several parties that examples of the surrogate mother refusing to relinquish the child to the intending parents was very rare. Chief Justice Pascoe advised SALRI that the US experience is of the intending parents changing their mind, more than the surrogate mother. See also above n 232.

child. She said an intending parent can 'feel guilty' about what the surrogate is experiencing during the pregnancy and the typical response is 'to give them anything', even if it is not pregnancy related. Alice noted that as the surrogate is giving 'the greatest gift in the world' she 'would do anything for them.'

9.5.11 SALRI agrees that, whilst obviously the surrogate mother must be protected from exploitation, so too should the intending parents. There are well-founded fears of exploitation of the intending parents. The statutory statement of general principles or objectives should include the need to protect both the surrogate mother and the intending parents from exploitation. It would be a significant and unwelcome omission to not recognise the situation of the intending parents in this Report.

9.5.12 Acknowledging the multiple relationships, SALRI has included in its recommended draft principle, both the surrogate mother and the intending parents.

9.6 Legal clarity about the parent-child relationships arising from the surrogacy arrangement

9.6.1 This principle is self-evident. There should be clarity and certainty about something as important as the parent-child relationships arising from a surrogacy arrangement. Indeed, SALRI's reasoning and recommendations as to the need for proper and detailed legal[326] and counselling input[327] at the outset of the process to the surrogate mother (and her partner) and the intending parents are designed to provide greater clarity and certainty to the parent-child relationship (amongst other items).[328] The recent NSW Review highlighted the importance of legal clarity or certainty to the parties to surrogacy agreement, describing it as 'a valid and important policy objective'.[329]

9.7 Intervention of the law and the State

9.7.1 A strong (though not universal) theme expressed to SALRI, notably by both surrogate mothers and intending parents, is that the State should not be overly involved in this sensitive area and the parties should be free, within the broad legislative framework and general principles, to enter into such arrangements.[330] Such arrangements were seen by various parties such as J, Monica, Ms Cureton, Mrs F and Alice as private affairs and there was strong opposition to an intrusive or prescriptive state (or indeed other) surrogacy model.[331] As Professor Millbank said to a previous Review: 'The decision to undertake surrogacy is one that concerns the participants most acutely, and governments are ill-placed to make decisions about who will make appropriate parents or what family forms should take.'[332]

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[326] See below Part 21.

[327] See below Part 20.

[328] SALRI has heard concerning accounts (though in an interstate context) of surrogacy arrangements literally drafted on the back of an envelope.

[329] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 6 [2.9]–[2.11].

[330] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 52 [4.5]–[4.9], 52 [4.12], 67 [4.92].

[331] See also below [10.1.7]–[10.1.35].

[332] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 52 [4.6].

9.7.2 This theme also emerged in the YourSAy contributions. One party said: 'The State should not be meddling too much in these areas.' An anonymous intending parent similarly argued:

> It is my view that the State should not intervene in private mutually beneficial arrangements unless there is a strong reason to do so … The State's role should be to celebrate and encourage the practice [of surrogacy] which leads to so much joy for all involved. Legislation should be designed to protect all involved from various risks, but should not "throw the baby out with the bath water" and make the practice itself more onerous than it needs to be.

9.7.3 SALRI agrees with this view. This does not mean that the State abdicates its legitimate regulatory role and responsibility. Rather, the autonomy of consenting adults in their private lives should be respected (as appears in the Tasmanian and Queensland models). SALRI considers that, consistent with its terms of reference, any regulatory framework should be guided by the principle that, as far as practicable, surrogacy agreements 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 surrogacy arrangements.[333]

9.8 Avoid and resolve legal dispute

9.8.1 Many parties such as Chief Justice Pascoe, Ms Redman, the Law Society of South Australia and Dr Oxlad emphasised to SALRI the importance of detailed advice and an agreement between the parties at the outset of the process (and before any fertility treatment) to consider and discuss the rights and responsibilities of the parties and potential medical, legal, costs and other issues that may arise in the course of a surrogate arrangement. Such pre-conception counselling and legal advice is integral to the process as parties can be made aware of, and turn their minds to, potential complications and challenges that may arise in a pregnancy, birth and during the child's life as a result of the proposed surrogacy arrangement. Pre-conception legal advice is integral to ensure the consent given by all parties is fully informed consent, equipped with appropriate knowledge of potential risks and responsibilities, for example a child born with a serious ongoing medical condition or intellectual disability or if the mother suffers long term health complications.

9.8.2 The value of this early focus and regulation is obvious. As Mrs F and others explained, it clearly sets out the expectations and responsibilities and positions of the parties and reduces the scope for stress and uncertainty and subsequent disagreements and for things to later go wrong. As was noted in consultation, it is effectively shutting the stable door after the horse has bolted to try and secure the best interests of the child and to set out the positions of the parties after the child is born, and certainly when a case is before court.

9.8.3 Professor Keyes, for example, outlined:

> The dominant concerns should be the best interests of the child, and the health and well-being of the birth mother, and the law should be designed to prioritise those concerns. This requires pre-conception regulation. Experience in Australia and in other countries, including the United Kingdom, is that post-conception regulation alone, as is done in most Australian jurisdictions including South Australia, can be problematic because of the well-documented issue that once the

[333] In this context, SALRI agrees with the view of Professor Gleeson to the New South Wales Standing Committee that 'guidelines can be a better way of dealing with a lot of these things, rather than legislation' and that whilst the present system was not fool-proof, 'it seems to me that it is a more realistic and more appropriate way of trying to govern many of these issues, rather than bringing in the heavy hand of the law and the police': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 64 [4.75].

child is in the care of the commissioning parents, it is difficult to do anything other than approve the child being left in the care of the commissioning parents, even where mandatory requirements of the surrogacy legislation have not been observed. The ability to consider and protect the best interests of the child and parents at that stage may be compromised. Accordingly, pre-conception regulation is desirable, combined with a post-birth application for parentage orders.

9.8.4 The importance of mediation in this context was also often highlighted to SALRI.[334]

9.8.5 A consistent theme that SALRI heard in consultation is the likelihood of friction and tension between the surrogate mother and the intending parents and disputes (especially over costs).[335] Given the emotionally charged and sensitive nature of a surrogacy arrangement, this is only to be expected. A concern that was identified to SALRI by one party was an interstate example of a lawyer taking a combative approach and encouraging the parties to a surrogacy arrangement to bring legal proceedings in respect of relatively modest amounts of costs in dispute.

9.8.6 Both surrogate mothers and intending parents saw mediation as very helpful. Eliza Cole described the breakdown of the original constructive relationship between her and the intending parents over the issue of costs and access to post-birth counselling. Eliza Cole described issues with counsellors who conduct mediation via email and skype and strongly believes all forms of mediation should be completed face to face with qualified professionals. One intending parent described to SALRI their experience of surrogacy in Australia as frustrating, expensive and traumatic and noted disagreements with the surrogate mother over costs such as private insurance and various post-birth claims such as pet care, extensive travel and accommodation. J stated that during the prolonged surrogacy process (it will typically last well over year) emotions can run high and 'a can of worms'; might well arise, even between family members or close friends. Alice stated that, even with close family members or friends, it 'shows how things can go wrong' and it is likely to be a difficult process and 'a rabbit warren of things you don't expect will come up.' Alice noted 'nobody can really plan for' all the contingencies that may arise. Mrs F noted the importance of maintaining a constructive and positive relationship between the intending parents and the surrogate mother but pointed out that the process can prove demanding and dynamic and tensions can arise.

9.8.7 Monica emphasised that it is inevitable that things will go wrong during surrogacy agreements, but the need is to manage expectations and reduce any disagreements.

9.8.8 The advantages are clear of an early focus to clearly set out the expectations, responsibilities and positions of the parties to a surrogacy arrangement and reduce the scope for disputes arising and of mediation to try and resolve any disputes that may arise (or from escalating). Any surrogacy framework should seek to avoid and resolve any legal dispute between the surrogate mother and the intending parents prior to the transfer of legal parentage.

9.8.9 SALRI agrees with Professor Keyes and considers that its original draft statutory principle to avoid and resolve legal disputes is incomplete. Any model should ensure that, at the outset, all parties to lawful surrogacy agreement are fully aware of their rights and responsibilities (particularly in relation to the child) and such a model should seek to avoid and, if arising, resolve any legal dispute between the parties.

[334] See also below Part 22.

[335] See also below [23.1.7]–[23.1.8].

9.9 Surrogate's right to manage her pregnancy and birth

9.9.1 Many parties that SALRI spoke to, including Simone Cureton, Mrs F, Eliza Cole, Mr Page and Dr Allan emphasised the importance of the surrogate's bodily autonomy and having the same rights to manage her pregnancy and birth as any other woman.

9.9.2 Mrs F said it should never be overlooked that 'it is the surrogate's body'. Simone Cureton, a surrogate mother, recalled to SALRI two instances where she felt her autonomy had not been respected. Early in the pregnancy, her fertility provider called the intending parents directly to give her test results. Ms Cureton commented: 'How dare they!' During an obstetrician appointment, the doctor asked if she would like to have a scan and the intending father answered. She noted that both occasions were unwitting and not malicious at all but it still bothered her a lot. Feeling a sense of a loss of autonomy is not something that Ms Cureton thought would be an issue before her pregnancy.

9.9.3 Ms Cureton referred to the need to respect the surrogate mother's medical autonomy and this should be in the statutory guiding principles. She said: 'Bodily autonomy is the most important issue for me'. She summarised her thoughts: 'I don't want your baby, but I make the decisions concerning my body and, as a consequence of it being my body, the pregnancy being entirely mine.'

9.9.4 SALRI agrees this is a powerful consideration as identified by the Law Society of South Australia, Mrs F and Ms Cureton and should explicitly feature in any surrogacy framework.[336]

[336] It appeared in the 2017 Bill. See Family Relationships (Surrogacy) Amendment Bill 2017 s 10H.

9.9.5 Recommendation[337]

Recommendation 11

SALRI recommends that any new *Surrogacy Act* should contain the following statutory guiding principles to apply in any decision in relation to surrogacy, at both a pre-birth and post-birth stage:

1. That the best interests of the child are paramount and should be protected (including the child's safety and well-being and the child's right to know about their family and origins).

2. That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate.

3. That sufficient regulatory protections are in place to protect the surrogate mother and the intending parents from exploitation.

4. That there is legal clarity about the parent-child relationships that result from the arrangement.

5. The intervention of the law and the State in people's private lives, with regards to surrogacy, should be kept to a minimum.

6. Any model should ensure that, at the outset, all parties are fully aware of their rights and responsibilities (particularly in relation to the child) and such a model should seek to avoid and resolve any legal dispute (if arising) between the parties.

7. That the surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.

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[337] An alternative formulation of Rec 11 could be:

SALRI recommends that any new *Surrogacy Act* should–

- ensure that, at the outset, all parties are fully aware of their rights and responsibilities (particularly in relation to the child) and such a model should seek to avoid and resolve any legal dispute (if arising) between the parties;
- ensure that sufficient regulatory protections are in place to protect the surrogate mother and the intending parents from exploitation;
- provide legal clarity about the parent-child relationships that result from the arrangement
- contain the following statutory guiding principles to apply in any decision in relation to surrogacy, at both a pre-birth and post-birth stage:

    1. That the best interests of the child are paramount and should be protected (including the child's safety and well-being and the child's right to know about their family and origins).
    2. That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate.
    3. The intervention of the law and the State in people's private lives, with regards to surrogacy, should be kept to a minimum.
    4. That the surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.
    5. The need to protect both the surrogate mother and the intending parents from exploitation

Part 10 - How active should the State be in surrogacy arrangements?: The 2015 changes

10.1 Underlying premise

10.1.1 Since 2009, South Australia has set the parameters of what constitutes a recognised surrogacy agreement in this State by prescribing the conditions under which intending parents who live in South Australia can make an agreement with a surrogate mother. These conditions are set out in s 10HA of the *Family Relationships Act 1975*[338] and include the conditions that no valuable consideration be exchanged, the intending parents face infertility or other difficulties having children and counselling must be obtained by the surrogate mother. These, and other prescribed conditions, must be satisfied in order for the agreement to be lawful and for the intending parents to obtain a parenting order with respect to the child of the surrogacy agreement.

10.1.2 In 2015, changes were made to the law in relation to surrogacy in South Australia through the *Family Relationships (Surrogacy) Amendment Act 2015* moved by the Hon John Dawkins MLC. These changes sought to amend 'the current law in South Australia 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.'[339]

10.1.3 The intending parents that SALRI spoke to all agreed with the sentiment of the 2015 Act. SALRI often heard that overseas commercial surrogacy is a 'last resort' for intending parents. J, for example, noted his wish 'totally' to pursue the domestic lawful surrogacy route in preference to overseas arrangements and said that if an effective and viable lawful non-commercial surrogacy avenue was in place in Australia, this would reduce any temptation for intending parents to travel overseas. J noted the more complex and inaccessible any surrogacy scheme is in Australia, the more likely it is that parties will look beyond Australia and travel overseas.

10.1.4 Mr Everingham similarly commented:

> Engaging in overseas surrogacy exposes Australians to practices and procedures which are not in alignment with Australian best practice, including use of anonymous donors, multiple embryo transfer, high twin rates, complications related to premature delivery and often a lack of any meaningful relationship between surrogate and intended parent.

10.1.5 The 2015 Act introduced three new avenues designed to improve access to domestic and non-commercial surrogacy and to allow the relevant Minister, namely the State Attorney-General, to recognise international surrogacy agreements if certain conditions were met.[340] These changes, whilst well-intentioned, raise various legal, practical and ethical implications.

10.1.6 SALRI notes that some parties it spoke to argued that there should be an 'intermediary' to arrange, oversee or regulate surrogacy arrangements in South Australia. SALRI heard a range of views about what the role of such an intermediary could be in the South Australian context. The main views are discussed below.

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[338] See above Part 8.

[339] South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597-1598 (Hon John Dawkins).

[340] *Family Relationships (Surrogacy) Amendment Act 2015* (SA). See above Part 8.

Approval of Surrogacy Arrangement by a Statutory Authority or Body

10.1.7 Some parties described a potential intermediary as having a 'gatekeeping' role to approve a surrogacy arrangement and the suitability of the parties to take part in a surrogacy arrangement, crucially at the outset of the process and before any surrogacy related fertility procedure takes place. Some parties, including Professor Keyes and J, pointed to the Victorian Patient Review Panel and the Western Australian Reproductive Technology Council as potential models and supported the idea of a more elaborate State role in the regulation of surrogacy arrangements.[341]

10.1.8 Professor Keyes, for example, stated:

> It would be preferable for an agency with relevant experience and expertise, such as the Western Australian Reproductive Technology Council and the Victorian Patient Review Panel, to be involved in the regulation of surrogacy agreements prior to conception, to ensure that the arrangement complies with statutory requirements. Although surrogacy arrangements are in many senses private, they also involve wider social concerns, particularly the interests of children, which warrant regulation.

10.1.9 Professor Keyes said such a model would support the best interests of the child as well as the health and well-being of the surrogate mother.

Victorian Patient Review Panel

10.1.10 All parties to a surrogacy arrangement in Victoria are required under the *Assisted Reproductive Treatment Act 2008* (Vic) to apply to the Patient Review Panel. This includes the surrogate mother, the surrogate's partner (if any), the intending parents and any known donor of reproductive material. The application is lodged with a number of accompanying documents, including:

- A report from a counsellor who provided counselling to the parties in accordance with s 43 of the Victorian Act;
- A report from an independent psychologist who has assessed the parties;
- Certified copies of criminal records checks for the intending parent(s);
- Certified copies of criminal records checks for the surrogate mother and her partner;
- Certified copies of the child protection order checks for the intending parent(s);
- Certified copies of the child protection order checks for the surrogate mother and her partner;
- Proof of the surrogate mother's age (such as drivers' license, passport or birth certificate);
- Proof of the surrogate mother having given birth to a live child (such as any birth certificate(s));
- Evidence that the intending parent(s) and surrogate mother and partner have received independent legal advice (such as a copy of the legal advice received);

[341] See also 'That the NSW Government should consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) Rec 5, 101.

- Evidence or doctor's assessment about intending parent's ability to become pregnant, carry a pregnancy or give birth (if applicable).

10.1.11 The Victorian Patient Review Panel may only approve a surrogacy arrangement if it is satisfied of all these matters as set out in s 40 of the Victorian Act, or if it is satisfied that there are 'exceptional circumstances' such that it is still reasonable to approve of the arrangement. Such matters include:

- That a medical practitioner has formed an opinion that, in the circumstances, the intending parent is unlikely to become pregnant, be able to carry a pregnancy, or give birth; or if the intending parent is a woman, the woman is likely to place her life or health, or that of the baby, at risk if she becomes pregnant, carries a pregnancy or gives birth;
- That the surrogate mother's oocyte will not be used in the conception of the child;[342]
- That the surrogate mother has previously carried a pregnancy and given birth to a live child;
- That the surrogate mother is as least 25 years of age;
- That the intending parent(s), the surrogate mother and the surrogate mother's partner, if any, have received counselling and legal advice;
- That the parties to the surrogacy arrangement are aware of and understand the personal and legal consequences of the arrangement;
- That the parties to the arrangement are prepared for the consequences if the arrangement does not proceed in accordance with the parties' intentions, including-
    - The consequences if the intending parent(s) decides not to accept the child once born; and
    - The consequences if the surrogate mother refuses to relinquish the child to the intending parent(s);
    - That the parties to the surrogacy arrangement are able to make informed decisions about proceeding with the arrangement.

10.1.12 The Panel is guided by the guiding principles in s 5 of the *Assisted Reproductive Treatment Act 2008* (Vic).

10.1.13 The Western Australian model similarly requires parties to a prospective surrogacy arrangement to apply to the Western Australian Reproductive Technology Council for approval.[343]

10.1.14 A number of parties in consultation were not attracted to what was seen as the undue bureaucracy of the regulatory models of Victoria and Western Australia. Dr Oxlad saw the Victorian model as merely adding an 'unnecessary layer of bureaucracy'. Several parties such as Mr Page queried whether there was 'anything particularly magical about there being a regulator'. Mr Page noted to SALRI that there is significant overlap with this regulatory role and the Ethics Committee and approval of individual IVF clinics. Mr Page said: 'It adds another step which really does not reduce risk to any

[342] See also below [16.5.6]–[16.5.10].

[343] Dr Sonia Allan is currently conducting an independent review of the operation of the ART and surrogacy laws in Western Australia.

great degree, but adds delay and a cost burden to the taxpayers which does not exist for taxpayers in other States.' Mr Page has previously noted that the 'consistent view' expressed to him by clients and clinics is that the Victorian/Western Australian model 'is cumbersome, costly and slow'.[344]

10.1.15 Mr Page added that too much of an emphasis upon pre-conception approval can give rise to a misleading assumption that the arrangement is without risk. He explained:

> It presumes that all will be hunky dory post birth because the regulator got it right. In one case in which I was asked to save a failed surrogacy arrangement, the surrogacy had been approved by the Patient Review Panel in Victoria. Quite clearly, inadequate screening had occurred despite their being a regulator.

10.1.16 A range of views were expressed in the YourSAy responses and in consultation about the appropriateness and efficiency of a regulatory model that relies upon a statutory authority or agency to consider and provide pre-approval of surrogacy arrangements. However, any recommendation to establish a statutory authority like the Patient Review Panel in Victoria or the Human Reproductive Technology in Western Australia is squarely outside of SALRI's terms of reference which emphasised that surrogacy arrangements, as far as practicable, 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.[345]

10.1.17 SALRI notes the concerns raised by those parties as justifying a more elaborate state-based model of pre-approval. These concerns are intended to be largely addressed by SALRI's recommended processes for the enhanced role and content of both counselling[346] and legal[347] input and certificates.

A Non-Profit Intermediary

10.1.18 Parties including Mr Everingham and Monica told SALRI of their preference for a non-profit organisation (NGO) acting as an intermediary between surrogate mothers and intending parents to provide support throughout the course of the arrangement. It was suggested that such NGOs could receive some government funding to undertake this role.

10.1.19 Mr Everingham pointed in his submission to SALRI to the UK model of an NGO such as Surrogacy UK as a potential model to be considered in South Australia. He said:

> In England, there is a well-established practice of non-profit community organisations acting as intermediaries between surrogates and intended parents.[348] Groups such as Surrogacy UK charge intended parents around £850 as a join fee to assist in organisation administration and support costs, though provide no guarantee of intended parents matching with a surrogate.

10.1.20 Mr Everingham also suggested to SALRI that South Australia should introduce legislation to allow for advertising for surrogates by a non-profit organisation and 'to allow for a non-profit surrogate and intending parent screening, matching and support service to better support Australian arrangements'.

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[344] Stephen Page, 'An Overview of Surrogacy Legal Dramas', Surrogacy Australia National Conference, 27 May 2012.

[345] See also above [9.7.1]–[9.7.3].

[346] See below Part 20.

[347] See below Part 21.

[348] See also Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: the Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67, 74-75.

10.1.21 Several parties such as Dr Oxlad and Mrs F raised potential concerns about an NGO taking on such an intermediary role. British developments in the surrogacy context were noted. In 2012, Horsey and Sheldon referred to the role of British NGOs in relation to surrogacy and acknowledged 'a large number of these surrogacy arrangements appear to pass without dispute. However, analysis of those cases which do arrive in the courts suggests significant and ongoing problems, some of which might clearly have been avoided through better regulatory oversight.'[349]

10.1.22 A British Report[350] recommended government regulation of surrogacy intermediaries as early as 1998:

> … we believe that regulation of agencies involved in surrogacy is required. Regulation should seek both to monitor and control the activities of such organisations and, as far as possible, offer guidance on surrogacy arrangements generally. The central purpose of such regulation should be to attempt to ensure that adults do not embark on surrogacy without adequate information and advice, and that the highest priority is given to the welfare of the child to be born.[351]

10.1.23 Non-profit bodies in the UK are exempt from some of the criminal prohibitions in the *Human Fertilisation Embryology Act 2008* (UK). The recommendations of the *Brazier Review,* however, have not been implemented.[352]

10.1.24 The British experiences, particularly in cases such as *Re G and J v G,* highlight some of the potential issues that may arise with limited oversight of the role and activities of NGOs.

10.1.25 In *Re G (Surrogacy: Foreign Domicile)*,[353] an English surrogacy NGO called Childless Overcome Through Surrogacy (COTS) facilitated a UK surrogacy arrangement for Turkish intending parents, a Mr and Mrs G, to a surrogate mother resident in the UK. However, COTS was unaware of the vital fact that one or both of the intending couple had be domiciled in a part of the UK for the parents to be eligible for a UK parentage order in respect of a surrogate child. It became apparent in the proceedings that Mr and Mrs G's arrangement was not an isolated mishap in COTS' dealings and they had facilitated foreign intending parents in 20 other cases returning to their home country with the child.[354] McFarlane J 'readily accept[ed] that COTS is a well-intentioned voluntary organisation whose aim is to assist couples through surrogacy.'[355] However, His Lordship emphasised the 'very unsatisfactory nature' of the situation.[356] He expanded:

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[349] Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: the Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67, 74. The authors also note the complexity of surrogacy, family and immigration law and that "'well meaning amateurs" who run not-for-profit agencies may be poorly equipped to provide this advice': at 84.

[350] Margaret Brazier, Alastair Campbell and Susan Golombok *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation - Report of the Review Team,* Department of Health and Social Care (October 1998).

[351] Ibid 32.

[352] See Kirsty Horsey and Sally Sheldon, 'Still Hazy After All These Years: the Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67-89.

[353] [2007] EWHC 2814 (Fam).

[354] Ibid [19]

[355] Ibid [23].

[356] Ibid [23]. Mc Farlane J described the case as 'a cautionary tale which highlights the legal, emotional, and not least the financial consequences of surrogacy arrangements which are undertaken in this jurisdiction involving commissioning parents who are not domiciled in the UK. The law relating to the removal of children from the UK for adoption overseas is both complex and strict. This case has therefore involved some seven court hearings in the High Court in order to pick a way through the legal maze to achieve the most effective legal arrangement under which the commissioning parents can remove M to their home in Turkey in the hope of adopting her under Turkish law'… I am advised that the total cost of the social work and legal input in unravelling the consequences

> The traffic in young babies for adoption between one country and another is rightly now the subject of very strict control and is only authorised after proper and detailed scrutiny by the social services and other authorities. It is therefore a matter of significant concern that COTS has, albeit naively, been involved in the activities that I have described which are, and have long been, outside the law.
>
> For an agency working in the surrogacy field not to be aware of one of the basic requirements needed to obtain a parental order is a matter of some real concern. For the agency to be unaware until 2006 that it was unlawful for a British child to be taken abroad to be adopted (unless the UK court had so authorised) is a matter of very grave concern indeed.
>
> The court's understanding is that surrogacy agencies such as COTS are not covered by any statutory or regulatory umbrella and are therefore not required to perform to any recognised standard of competence. I am sufficiently concerned by the information uncovered in these two cases to question whether some form of inspection or authorisation should be required in order to improve the quality of advice that is given to individuals who seek to achieve the birth of a child through surrogacy. Given the importance of the issues involved when the life of a child is created in this manner, it questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs. To this end, a copy of this judgment is being sent to the Minister of State for Children, Young People and Families for her consideration.[357]

10.1.26 The activities of the British Surrogacy Centre of California, another NGO, were referred by Theis J to the British Department of Health in *J v G.*[358]

10.1.27 Professor Millbank has also explained the disadvantages of a model that relies primarily upon non-profit organisations noting the experiences in the United Kingdom. She said:

> Non-profit community surrogacy organisations have operated for a long period in the United Kingdom. While these groups also have the benefit of centralised experience, I suggest that their lack of professionalisation is a disadvantage. Such groups are often established by people who have experience as intended parents or surrogates, with a deep commitment to the issues but without the funds or remit to provide screening, matching, or comprehensive support services. There are currently a range of Internet forums and support groups in Australia (and outside of it) in which prospective parents, surrogates, and egg donors meet, with even less peer support, management, or oversight than their U.K. equivalents. There is, as yet, no viable model of a non-profit organisation to undertake these services on a professional basis.[359]

10.1.28 In 2014, the International Forum on Intercountry Adoption and Global Surrogacy accepted there could be a valid role for NGOs in the surrogacy sector, however, they cautioned that to reach any conclusion further research is required:

> Many Forum participants felt that there should be no role for private, for profit intermediaries in surrogacy arrangements, since they appear to be a driving force behind unacceptable practices. Alternatives might include appointing state agencies or licensing non-profit agencies to carry out the functions currently served by for-profit intermediaries. Others recognised that non-profit organisations would, however, also need significant oversight, as they may not in themselves solve

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of the arrangement that led to M's birth is just short of £35,000.00. That sum falls to be paid entirely by the British tax payer': at [4].

[357] Ibid [27]-[29].

[358] [2013] EWHC 1432 (Fam) [6]. See also Jenni Millbank, 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477, 480 n 2.

[359] Jenni Millbank, 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477, 487.

> many of the dilemmas raised by surrogacy, particularly if they were set up to "facilitate" such agreements without protections for women or children. Some Forum participants suggested that some non-profit or state run adoption agencies could serve as a model, and this possibility was recognised as an area in which further research and deliberation is needed.[360]

10.1.29 It is clear from SALRI's research and consultation that NGO's play an important role in the surrogacy context in Australia. The notion of a suitable 'intermediary' to assist the parties, especially the surrogate mother, is not without merit. 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. This can only be considered and progressed effectively at a national level as part of any move to a uniform national scheme for surrogacy. Such a preferred NGO or intermediary model also runs contrary to SALRI's view (and terms of reference) that the state should not have prescriptive involvement in this area. SALRI notes the importance for the parties to a lawful surrogacy agreement, as Mrs F and others emphasised to SALRI, to have the latitude to follow the avenue that most suits them and their circumstances.[361] What might suit one surrogacy arrangement where the parties are close relatives may not suit another where the surrogate mother and intending parents are comparative strangers.

A 'Professional' Intermediary

10.1.30 Professors Karpin, Millbank and Stuhmcke alternatively suggested to SALRI that specialised 'professional' intermediaries should be able to broker or arrange surrogacy arrangements and provide ongoing information and support to the parties throughout the course of a surrogacy arrangement.[362] Professors Karpin, Millbank and Stuhmcke noted that surrogate mothers need casework and support outside of the intending parents.

10.1.31 They suggested the professional intermediary could provide a case worker and a peer support group particularly for the surrogate mother. Professors Millbank and Stuhmcke noted to SALRI that surrogacy is an extremely emotionally demanding task and 'a long journey' for surrogate mothers and they are not properly supported. They told SALRI that 'pregnancy is most important part and there is no support' and questioned the present focus on getting pregnant and the 'end result'. They emphasised that there are 'completely different questions' raised with their research, being 'how can women doing this be best supported?' and 'what can we put in place for an absence of exploitation'.

10.1.32 Eliza Cole, drawing on her own experiences as a surrogate, suggested some form of professional specialised agency to provide support throughout a surrogacy arrangement. She said the agency could organise and facilitate counselling and handle expenses and accounts between the intending parents and the surrogate mother. Ms Cole said such a model may help the parties to focus on their 'special nurturing relationship' and the pregnancy rather than on issues such as costs which often cause disagreements.

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[360] Marcy Darnovsky and Diane Beeson, 'Global Surrogacy Practices' (Working Paper No 601, International Forum on Intercountry Adoption and Global Surrogacy, December 2014) 24.

[361] See also above [9.7.1]–[9.7.3].

[362] See also Jenni Millbank, Anita Stuhmcke and Isabel Karpin, Submission No 7 to the Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements,* 2016, 2.

10.1.33 Professors Millbank and Stuhmcke also identified to SALRI a real concern from their recent research of surrogate mothers who were physically or psychologically unsuitable to act as surrogate and noted a number of examples in their study where arguably unsuitable arrangements as the surrogate mother had particular vulnerabilities or health conditions.[363] They noted if a more professional or robust regime had been in place they believe that these unsuitable surrogates could have been screened out.[364]

10.1.34 Professors Karpin, Millbank and Stuhmcke have suggested that this 'professional' intermediary could be a for-profit broker or agency. In 2015, Professor Millbank highlighted the 'risk that profit motivations could overpower…professional standards of conduct.'[365] Professor Millbank has thus emphasised that if any steps were made liberalise legislative frameworks to allow for profit agencies to operate, it would require a level of appropriate regulation and oversight.[366] She noted that:

> Amounts and modes of payment to surrogates and charges to intended parents would have to be the subject of oversight. For example, the amount that intermediaries charge could be set by regulators (as a flat rate or as a percentage of the overall cost). The use of independent trust accounting to manage funds would increase transparency and accountability. In order to reduce the risk of poor quality or unethical service provision, standards would need to be set for both quality and independence of professionals, with monitoring and non-compliance sanctions that had some force. Privatised surrogacy brokers rather than a government agency would entail a high degree of licensing, oversight, and monitoring to ensure ethical practice.[367]

10.1.35 SALRI notes the concerns raised by parties suggesting a professional intermediary model for surrogacy in South Australia. Any recommendation to this effect, however, would be contrary to SALRI's view and terms of reference that the State should not have a prescriptive involvement in this area. SALRI notes that a professional intermediary model could potentially be considered by a future national legislative scheme in relation to surrogacy in South Australia.

10.2 The Attorney-General's Powers

Current Law

10.2.1 The 2015 Act set out a process for international surrogacy arrangement – such as those involving South Australian intending parents and an overseas surrogate mother – to be potentially recognised as lawful in South Australia. Under these changes, the State Attorney-General has the power to recognise an international surrogacy arrangement if certain conditions are satisfied. Once recognised under this process, international surrogacy arrangements can then provide a legal avenue for parenting orders to be made in South Australia under s 10HB of the 1975 Act. The 2015 Act was prompted by the extensive media coverage and public concern in response to the controversial 'Baby Gammy' saga.[368] It was intended that prescribing international surrogacy arrangements would prevent South

[363] See also above [9.5.1]–[9.5.2].

[364] See below Part 20 for further discussion of the procedures for the assessment and approval of surrogate mothers.

[365] Jenni Millbank, 'Rethinking "Commercial" Surrogacy' (2015) 12 *Journal of Bioethical Inquiry* 477, 487.

[366] Ibid.

[367] Ibid.

[368] South Australia, *Parliamentary Debates,* House of Assembly, 12 November 2014, 1597–1598 (John Dawkins). See, for example, of the media coverage, Judith Ireland, 'Tony Abbot says the case of baby Gammy is a "tragic' situation", *The Sydney Morning Herald* (online), 5 August 2014, <http://www.smh.com.au/federal-politics/political-news/tony-abbott-says-the-case-of-baby-gammy-is-a-tragic-situation-20140805-3d6fb.html>; Australian Broadcasting Corporation, 'Baby Gammy's biological father revealed as convicted paedophile, raises surrogacy law questions', *The 7.30 Report,* 5 August 2014 (Leigh Sales)

Australians deemed unsuitable, particularly those with a history of child sexual abuse offences such as David Farnell, from accessing surrogacy arrangements.[369]

10.2.2 The 2015 changes have never been implemented. The former Attorney-General, the Hon John Rau has explained:

> Basically, it [the 2015 Act] passed through on the voices, and it certainly was not looked at in any great detail here. As it turns out, that Bill was extremely difficult, if not impossible, to give practical effect to … The only thing I would say for my own part is *that the present Act is completely unworkable* … Absent this [2017] amendment being passed by the Parliament, *we are going to be left with the ruinous shambles that we presently have*, rather than something that is potentially a bit orderly.[370]

Consultation Overview

10.2.3 The strong theme that SALRI received in consultation was that the 2015 changes were a laudable and well-intentioned effort to clarify and improve the law in relation to surrogacy, but some aspects of these changes are problematic. One notable such aspect is the Attorney-General's role with respect to surrogacy. It was widely noted to SALRI in consultation that a State Attorney-General lacks the role, capacity or expertise in this specialised context.[371] It was especially noted in relation to recognising or dealing with international commercial surrogacy, that a State Attorney-General lacks the role, capacity or expertise for such a sensitive and specialised role. Most parties were unsupportive of the State Attorney-General being empowered to recognise overseas surrogacy arrangements involving South Australian residents.

10.2.4 Participants at SALRI's Expert Forum agreed that it was inappropriate for the Attorney-General (and/or State officials) to have extensive powers to intervene in private lawful surrogacy

<http://www.abc.net.au/7.30/content/2014/s4062904.htm>. For a discussion of Farnell's historic child sexual offences see *Farnell and Chanbua* (2016) 56 Fam LR 84; Leanne Nicholson and Ateisha Orr, 'Gammy father David Farnell "robbed" two girls of their childhood, judge says', *The Sydney Morning Herald* (online), 7 August 2014 <http://www.smh.com.au/national/gammy-father-david-farnell-robbed-two-girls-of-their-childhood-judge-says-20140806-1018os.html>.

[369] South Australia, *Parliamentary Debates,* House of Assembly, 12 November 2014, 1598 (John Dawkins). See also Chief Judge Pasco Federal Circuit Court of Australia, 'Parenting and Children's Issues: International Commercial Surrogacy and the Risk of Abuse' (Paper presented at the 3rd Annual Legalwise International Family Law Conference, Shanghai China, 17–20 September 2014). *Farnell* isn't alone in raising these concerns. One recent disturbing Victorian case revealed a man who had sexually abused two infant surrogate twins. The offender and his wife paid $44,000 for a Thai surrogate to give birth to the children. The offender admitted his intention was to bring the girls to Australia for purposes of sexual abuse. The abuse started from when the newborns were only 27 days old, continuing for eight months. The offender received 22 years in prison for his crimes relating to the twins and two nieces after pleading pleaded guilty to 38 charges, including two of trafficking children, 20 of incest, 11 of producing, accessing, or transmitting child abuse material, and an upskirting charge relating to photos he took of women's underwear while riding trains. See Nino Bucci, '22 Years in Jail for Man Who Abused His Surrogate Baby Twins', *The Age*, (online), 19 May 2016, <http://www.theage.com.au/victoria/22-years-injail-for-man-who-abused-his-surrogate-baby-twins-20160519-goyn2h.html>.

[370] This view was challenged in Parliament. 'Mr Dawkins took that Bill through the Legislative Council, where it was fully debated. It was considered by Caucus, and it was considered by the Liberal Party's party room. The Attorney-General had the opportunity in Caucus, or indeed in the Parliament, to give weight to his considerations. He thinks it is unworkable legislation, yet his party was happy enough to support it, and it was allowed through the parliament. I do not know if the Attorney-General is aware, but in this chamber the government has the numbers and he is the Attorney-General. If the Attorney-General is so certain that the current act of Parliament that passed through this Parliament was so inferior that it was not deserving of support, then perhaps he could have used his weight as the Deputy Premier to convince his party colleagues and caucus not to support it. He did not and the Bill went through the Parliament. At the time, he had the opportunity to put all these things on the record. He is the Attorney-General, he has lots of staff giving advice on these things, and he did not': South Australia, *Parliamentary Debates*, House of Assembly, 14 November 2017, 12038–12039 (John Gardner).

[371] There is no indication that either the former and current Attorney-General welcome this role.

arrangements. This was seen as a sensitive and specialist role ill-suited for the Attorney-General. This view was widely repeated in both the YourSAy contributions and in consultation. Monica, an intending surrogate and active member of the Australian surrogacy community, for example, said:

> I don't believe the Attorney-General should be the person who "plays God" on surrogacy agreements. The subtleties of surrogacy are many and complex. They are often very emotional as intended parents have often been through years of hardship medically, emotionally, psychologically in their journey to parenthood. Provided the "teams" (the surrogate and the intended parents) are meeting the requirements of drawing up independent legal agreements and completing counselling, there does not need to be a third party who gives the tick of approval.

10.2.5 Among those who did not support the Attorney-General's powers, one view was that the recognition of overseas commercial surrogacy arrangements (given the concerns of exploitation and commodification)[372] is fundamentally at odds with the underlying policy objectives of the South Australian scheme. Dr Allan, for example, told SALRI that the 2015 changes are inconsistent with the settled policy position on the issue of surrogacy, being that surrogacy, especially commercial surrogacy, is illegal in South Australia, with the limited exception of domestic non-commercial surrogacy. Dr Allan also noted that the 2015 changes appear unworkable from a practical perspective and open to the risk of creating a situation where South Australia is seen as a 'hot spot' for those looking to exploit international and domestic surrogacy regimes ('forum shopping').[373]

10.2.6 Other participants asserted that it is inappropriate, if not wrong, to give implied State approval to offshore commercial surrogacy and raised concerns that the recognition of international commercial surrogacy could encourage harmful arrangements and practices overseas. One YourSAy participant, for example, stated.

> The recognition of overseas surrogacy arrangements opens the door for commercial surrogacy and will encourage the abuse and human trafficking of women in impoverished Asian countries. There should be no recognition of overseas surrogacy arrangements as it is impossible to ensure there has been no illegal activity involved.[374]

10.2.7 Another party that participated in the YourSAy shared the view that any form of recognition of overseas commercial surrogacy arrangements in South Australia could encourage the exploitation of parties overseas. They argued:

> I am very concerned that this would simply reinforce all of the negative factors that exist in commercial surrogacy agreements overseas. Issues of class differences for example, and using overseas women to bear children for people in Australia is really quite terrible. Also, more importantly, this is not good for children. The distance between them and surrogate mother and donors is not conducive to their best interests. Being born as a result of an industry is so sad. The big money in international surrogacy for agents and lawyers, it just seems the industry is so open to all sorts of exploitation, including of intending parents. I do not agree that we should set up any kind of system that supports that. How on earth would one check what really happened overseas? A state has no control over that. Why would it become a rubber stamp.

10.2.8 Many participants, including Professor Keyes, Mr Page, Dr Allan and Chief Justice Pascoe also raised concerns about how a State Attorney-General could effectively and practically recognise international commercial surrogacy arrangements. It was noted that it would be very difficult, if not effectively impossible, for a State Attorney-General to really know if an international surrogacy

[372] See below [26.1.1]–[26.1.11].

[373] See further below Part 17.

[374] See further below Part 26.

arrangement was fair and equitable or exploitative. Mr Page stated it was preferable for a court to be given this role and described the Attorney General's powers as 'impractical'. Mr Page noted:

> There would be an ever-mounting pile of information requested as to each surrogacy journey. The Minister, with respect, I presume is not an expert on overseas jurisdictions, surrogacy agencies or IVF clinics. To properly discharge his or her role under the legislation, the Minister would require a burdensome amount of information-and even then may not be satisfied as to whether it is an appropriate jurisdiction, surrogacy agency or IVF clinic.

10.2.9 In the absence of Regulations and the *State Framework for Altruistic Surrogacy*, the Expert Forum and more than one party such as Mr Page and Dr Allan queried upon what basis the Attorney-General could recognise an international arrangement.

10.2.10 There was limited support for retention of the Attorney-General's role. One participant in the YourSAy process supported the Attorney General's powers, noting:

> [the] Attorney General is good. If control were given to the court system there would be a gradual loosening of requirements based on individual circumstances, which then sets a precedent for others, until the point is reached where the courts say it's become purely an administrative matter as they aren't saying no to anyone anymore.

10.2.11 Damian Adams also supported the retention and additionally the expansion of the Attorney-General's powers. He argued:

> The Attorney-General (AG) should maintain these powers and be the one to intervene. The AG should have mandated powers to introduce sanctions and to charge people for illegal activities in this area.

10.2.12 These views, however, are not representative of SALRI's broad consultation. SALRI heard from many parties who opposed the Attorney General's powers to prescribe international surrogacy arrangements and to 'recognise' surrogacy arrangements that did not otherwise meet the legislative requirements for lawful surrogacy arrangements in South Australia.

10.2.13 SALRI agrees with these views. It is no criticism of the expertise of the Attorney-General or their advisers but a State Attorney-General lacks the role, capacity or expertise for such a sensitive and specialised role as recognising international commercial surrogacy agreements.

10.3 The State Framework for Altruistic Surrogacy

Consultation Overview

10.3.1 Participants at SALRI's Expert Forum noted the sound policy objectives behind the 2015 amendments to the regulatory framework, especially the introduction of the State Framework. The benefit of clarity was noted, especially the need to ensure that domestic, lawful and non-commercial surrogacy is accessible to South Australian families and to provide practical guidance for parties on matters such as advertising surrogacy services, cost recovery and counselling. However, these changes are yet to be implemented and are unlikely to be implemented. The former Attorney-General explained to SALRI in his letter of 26 December 2017 that 'the development of the Framework is a significant undertaking, requiring specific expertise in medical legal ethics including aligning with existing medical standards, ethics, and policies that exist for the related areas of assisted reproductive treatment and adoptions.'

10.3.2 Participants at SALRI's Expert Forum agreed that legislative reform in this area was preferable to replace the Framework with an alternative regulatory approach that continues to give

effect to the sound policy objectives behind the 2015 Act. Participants agreed that this alternative regulatory approach should not include the Attorney-General. This theme was repeated in consultation. The State Attorney-General (with no disrespect to that role) is perceived as ill-equipped in light of the nature and complexity of the issues to formulate a surrogacy framework. SALRI agrees with this view.

10.3.3 It was further discussed in consultation that legislative reform at the State level was still necessary, as uniform national laws (although highly desirable) did not appear to be forthcoming in the near future.[375]

10.4 The Surrogate Register

Current Law

10.4.1 The Commonwealth Committee noted that one barrier identified in its consultation (including by the Law Council) is the difficulty in either finding a surrogate or in offering to be a surrogate.[376] The Hon John Dawkins told SALRI that this was a main concern of his and one he had been anxious to address. The purpose of the Register was explained in Parliament as follows:

> Often it is the ability to find a willing surrogate that presents the biggest hurdle for couples seeking to have a child through this method. However, by establishing a "surrogacy register", these reforms will improve access to potential surrogates across South Australia, hopefully diminishing this barrier and increasing the viability of surrogacy as an option for those who cannot conceive naturally.[377]

10.4.2 Most States and Territories, including (at least impliedly) South Australia, currently prohibit advertising[378] (in various forms) in relation to surrogacy and penalties may apply for such conduct. A number of contributors to the Commonwealth Committee called for the development of mechanisms that would enable either intended parents or those seeking to be surrogates to be placed in contact and noted that the lack of professional screening and matching services for surrogacy may place vulnerable women at risk.[379]

10.4.3 The Surrogate Register was intended to address this problem. The changes made to Part 2B by the 2015 Act require the Attorney-General to establish a Surrogate Register that lists the adult South Australian women who are willing to act as a surrogate mother under the *Family Relationships Act 1975* (SA). The list of potential surrogate mothers would not to be publicly available but could be provided to approved categories of people.

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[375] See above Recs 2, 3 and 4. See further above Part 4.

[376] 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* (April 2016) 15 [1.54].

[377] South Australia, *Parliamentary Debates*, House of Assembly, 4 June 2015, 1523 (John Gardner).

[378] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 3–5 [20]–[28], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[379] 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* (April 2016) 15 [1.55].

10.4.4 To date, the Attorney-General has not exercised these powers. Such a Register gives rise to various implications of both policy and practice.[380]

10.4.5 The previous Attorney-General in his letter to SALRI of 26 December 2017 explained: 'The Government has significant and ongoing concerns about the impact of the changes made by the 2015 Amendment Act, particularly in relation to the establishment of the Register and the Framework.'

Consultation Overview

10.4.1 The concept of the Surrogate Resister was widely seen in consultation as well intentioned and addressing the very real problem of how potential surrogate mothers and intending parents get in touch. J, an intending parent SALRI spoke to, liked the idea of being able to use a Surrogate Register to find a surrogate, particularly in a time sensitive situation where it may be difficult to find a surrogate within networks of family and friends. J, however, did not believe that the register needed necessarily to be a state register. Damian Adams also supported the idea of a Surrogate Register, provided that all surrogates registered had already undertaken independent counselling.

10.4.2 However, though the concept was seen as laudable and well-intentioned, there was only limited support from participants in both the YourSAy contribution and consultation for the Surrogate Register. A similar view was expressed at the Expert Forum. The view that strongly emerged in consultation was that a Surrogate Register raises privacy, policy and practical concerns and is inappropriate. Monica queried: 'Who is going to keep track of the Register, who is going to run it?' It was felt that the State should not play an elaborate role in this context. It was also noted that a Register is impractical and does not accord with the need for 'trust' and the nature of relationship building between surrogates and intending parents.

10.4.3 One intending parent who wished to remain anonymous observed:

> While I support the intent behind the Surrogate Register to make it easier to make connections between surrogates and intended parents, I do not necessarily think that this format would be the best approach. I am always amazed at the wonderful women who end up becoming surrogates for people who were strangers to them a relatively short amount of time earlier, but these deep and personal relationships that are formed are not likely to be the result of a formal register in most cases.

10.4.4 Mr Page, drawing on his wide experience in surrogacy law, noted that there is a need for surrogates and intending parents to be able to get in touch but no surrogate mother would ever join a State Register. Mr Everingham accepted the underlying rationale but noted the model of a State Register was impracticable and emphasised that much more is needed than an 'address book' of potential surrogates. Alice saw the Register as well intentioned but as 'unworkable' in practice.

10.4.5 Both surrogate mothers and intending parents highlighted to SALRI that it is crucial that they are able to get in touch and 'find each other' but they were unconvinced that a Surrogate Register was the preferable means to do this. Both surrogate mothers and intending parents emphasised that the trust necessary for a surrogacy agreement is premised upon relationship building between parties. Participants queried whether this critical relationship could be forged if surrogates and intending parents were matched by a State Register. Monica, an intending surrogate and active member of online surrogacy networks said:

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[380] See, for example, Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 4 [25], 5–6 [29]–[35], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

> Surrogacy is complex and altruistic surrogacy is all about relationships. Although a register would attempt to facilitate easier matches with Intended Parents and surrogates, it needs to not detract from the relationship that needs to be built up between both parties. This relationship is ultimately in the best interests of the future child. We need to maintain a relationship model, not a transaction model … A surrogate offering to carrying for a person/couple is a gift, it cannot be asked for. To ensure that the surrogate is the one to offer this gift, the surrogate needs to choose which IPs she wants to carry for. Not the other way around that the IPs choose a surrogate from a register.

10.4.6 Monica told SALRI that she thought the idea of a State Register of surrogates was a 'joke'. It was 'well-intentioned but doomed to fail'. Monica said it had things the 'wrong way around' as it created a 'transactional' rather than a 'relationship' based surrogacy model. She commented that it is a 'surrogate shop because it is not focusing on the relationship' and 'well-intentioned but doomed to fail' as it was impractical. Monica saw it as a 'surrogate shop where you can choose surrogates from' when the applicable 'currency should be time and love'.

10.4.7 Simone Cureton also did not support a Surrogate Register and told SALRI that non-commercial arrangements rely upon the relationship between the surrogate and intending parents. Ms Cureton emphasised that these relationships take work and if intending parents had access to a Register there could be the temptation to just see the surrogate as the 'vessel carrying the baby'. She commented that it should not be a case of intending parents simply being handed the next name on the list'.

10.4.8 The intending parents that SALRI heard from broadly shared this view. One anonymous intending parent, for example, stated:

> While I support the intent behind the Surrogate Register to make it easier to make connections between surrogates and intended parents, I do not think that this is necessarily think that this format would be the best approach. I am always amazed at the wonderful women who end up becoming surrogates for people who were strangers to them a relatively short amount of time earlier, but these deep and personal relationships that are formed are not likely to be the result of a formal register in most cases.

10.4.9 Other parties expressed wider policy objections to the existence of State Register. For example, the Australian Christian Lobby said: 'The very existence of a State Register of possible surrogates is problematic. It places the state in a position of providing women for reproductive services.' The Association of Relinquishing Mothers (Victoria) stated:

> It is important that a Surrogacy Register is not created. A register of this kind is, in itself, advertising and brings the weight of the State to condone an action that is already known to have real deleterious effects on both children and parents.

10.4.10 Many parties reiterated a strong theme from SALRI's consultation that it is inappropriate for the state to have an extensive role to arrange and intervene in private lawful surrogacy arrangements. It was felt this was a private affair to be resolved between the relevant parties. One YourSAy participant, for example, said:

> The State should not be meddling too much in these areas. There should be a means for intending parents and would be surrogates to get in touch. But the state should set up the best lawful and ethical framework and then within those rules the parties should work things out.

10.4.11 There were also concerns raised by participants in the YourSAy responses. It was noted that a State Surrogate Register undermined important considerations of privacy.

10.4.12 The Australian Christian Lobby noted that if the State were to discharge this role, it could be exposed to liability if issues were to arise in the surrogacy arrangement.

10.4.13 The Social Issues Committee of the Anglican Church Diocese of Sydney did not support a Surrogate Register potentially being available to 'specified persons', or 'persons of a specified class', particularly medical professionals.[381] The Committee noted that the *National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* provide that clinics are not responsible for obtaining consent to a surrogacy arrangement itself and the clinics must not facilitate assisted reproductive treatment where there are concerns about whether an agreement is ethical or legal and that thus:

> This implies that a separate legal agreement must be in place before medical service providers engage with prospective surrogate parents, and it is inappropriate for them to be involved in the procurement of surrogate mothers.

10.4.14 SALRI intends no criticism of the role and expertise of a State Attorney-General and his or her advisers, but SALRI agrees that the role of the Attorney-General is ill suited to such a complex and sensitive area as surrogacy in either formulating a Framework for Domestic Surrogacy or approving international surrogacy agreements. SALRI suggests that this role should be removed. SALRI also considers that, although well intentioned, the Framework and Surrogate Register introduced by the 2015 Act are inappropriate and should be removed.

10.4.15 Recommendations

Recommendation 12

SALRI recommends that the current role of the State Attorney-General introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) with respect to surrogacy (including both the Framework and to approve individual surrogacy agreements (including international surrogacy agreements)) is inappropriate and should be removed.

Recommendation 13

SALRI recommends that the Framework introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) with respect to surrogacy be removed.

Recommendation 14

SALRI recommends that the State Register of potential surrogate mothers introduced by the *Family Relationships (Surrogacy) Amendment Act 2015* (SA) be removed.

[381] *Family Relationships Act 1975* (SA) s 10FB(5).

Part 11 - Connecting Surrogates and Intending Parents

11.1 Offences in relation to surrogacy

11.1.1 The Hon John Dawkins noted to SALRI in consultation that one of his main concerns, behind both the 2015 Act and the 2017 Bill, was how do intending parents and a potential surrogate mother get in touch without breaking the current law or opening the door to commercial advertising or commercial brokerage. It is in this context that the offences relating to commercial surrogacy need to be seen.

11.1.2 There are no specific prohibitions upon advertising a willingness to enter into a surrogacy arrangement in Part 2B of the *Family Relationships Act 1975* (SA).[382] It is an offence, however, except as authorised by or under the 1975 Act or the State Framework for Altruistic Surrogacy, for a person who, for valuable consideration, negotiates, arranges or obtains the benefit of a surrogacy contract on behalf of another. It is also an offence in South Australia for valuable consideration to induce another to enter into a surrogacy contract. A 'surrogacy contract', is defined in s 10F to not include 'a contract that forms part of, or relates to, a recognised surrogacy agreement or proposed recognised surrogacy agreement'. It is not an offence to induce a potential surrogate mother to enter a recognised surrogacy arrangement under s 10HA, an agreement entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory or a prescribed international surrogacy arrangement. Broadly similar offences exist in other Australian jurisdictions.[383]

11.1.3 The State Framework for Altruistic Surrogacy is required to contain information about the circumstances in which a person can advertise for the services of a surrogate mother.[384] A recognised surrogacy arrangement must comply with any other requirement prescribed by the Regulations.[385] It is not explicit in the present South Australian Act that when entering a recognised surrogacy arrangement, parties must comply with the requirements of the State Framework of Altruistic Surrogacy. To limit the circumstances in which a person can advertise for the services of a surrogate mother in respect of a *proposed* recognised surrogacy arrangement, additional regulations would need to require compliance with the State Framework of Altruistic Surrogacy.

11.1.4 The Law Society of South Australia in their 2017 submission therefore noted:

> In this context it seems that the Framework is intended to deal with the circumstances in which advertising may be engaged in by parties intending to enter into either a "recognised surrogacy agreement" under s 10HA, an agreement under a prescribed corresponding law of the Commonwealth or another State or Territory, or a prescribed international surrogacy agreement. It is not intended to regulate (and would not be effective to regulate) any other form of surrogacy agreement.[386]

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[382] It was an offence to advertise willingness to enter a surrogacy arrangement prior to the 2015 changes. See *Family Relationships Act 1975* (SA) s 10H(c) as repealed by *Family Relationships Act (Surrogacy) Amendment Bill 2015* (SA) s 6.

[383] See below Appendix B.

[384] *Family Relationships Act 1975* (SA) s 10FA(3)(d).

[385] Ibid s 10HA(7).

[386] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 4 [24], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

11.1.5 The Family Relationships (Surrogacy) Amendment Bill 2017 (SA) proposed to introduce new surrogacy related offences. The new s 10U(1) provided:

> A person who, for payment or other consideration, negotiates, arranges or obtains the benefit of a surrogacy arrangement on behalf of another is guilty of an offence.
>
> Maximum penalty: Imprisonment for 12 months'

11.1.6 The proposed new s 10U(2) retained the offence of inducing another, however, it made it an offence, for payment or other consideration, to induce another to enter into a *surrogacy arrangement* as opposed to a *surrogacy contract.*

11.1.7 In contrast to the current law, it was clarified in the 2017 Bill that the offences in s 10U(1) and (2) apply to a surrogacy arrangement 'whether it is a recognised surrogacy arrangement or otherwise.' Moreover, for the purposes of either offence it need not be proved a surrogacy arrangement was entered into or a woman became pregnant or gave birth to a child pursuant to a surrogacy arrangement.

11.1.8 Mr Page, Ms Redman, Dr Oxlad and others raised concerns in consultation that the proposed extension of s 10H(1) by s 10U(1) of the 2017 Bill arguably extends the scope of the offences too far and could potentially impede the otherwise lawful work of professionals, including legal practitioners and counsellors, necessary to achieve the broad purposes of the regulatory scheme. Mr Page said:

> Whilst on its face, clause 10U(I) appears to be substantially the same, why it is a considerable widening is that section 10H(I) refers to surrogacy contract whereas clause 10U(I) refers to surrogacy arrangement. The difference is substantial. If a solicitor in South Australia negotiates a surrogacy contract currently, then the solicitor commits an offence. Surrogacy arrangements under the Act are not binding. They are not contracts. If clause 10U(I) is enacted, then a solicitor cannot take part in negotiating a surrogacy arrangement for a client.

11.1.9 Mr Page noted that a similar offence exists in the United Kingdom and he has heard anecdotally that it has resulted in parties going to their solicitors with draft terms and agreements they have found online.

11.1.10 SALRI agrees with the concern about the scope of the proposed revised offence in the 2017 Bill. The term 'for payment or other consideration, negotiates, arranges or obtains the benefit of a surrogacy arrangement on behalf of another is guilty of an offence' covers a wide range of roles and transactions and could even cover roles and transactions such as detailed and informed legal advice[387] and effective counselling (including to ensure only suitable parties take part in surrogacy)[388] that are integral both to the operation of the current law and especially that recommended by SALRI. As raised by the Hon John Dawkins to SALRI, it is necessary that the law allows intending parents and potential surrogates to get in touch (and the provision of necessary services such as informed legal advice and effective counselling) without opening the door to commercial advertising or commercial brokerage or other inappropriate practices.

[387] See below Part 21.

[388] See below Part 20.

11.2 Consultation Overview

11.2.1 Some of the intending parents and surrogates that SALRI spoke to were involved in surrogacy arrangements with close family members. However, there was a cohort of surrogates that SALRI heard from in consultation that engaged in arrangements with individuals previously unknown to them.[389] These parties had established contact with intending parents online. SALRI heard in consultation from Surrogacy Australia that approximately 51 percent of surrogacy arrangements in Australia involve surrogates and intending parents that were previously unknown to each other and 49 percent of parties in Australia involve parties that had an existing relationship.

11.2.2 The Law Society of South Australia, Mrs F and others such as Monica, a surrogate mother, noted the importance of online means for the parties in a domestic surrogacy context to get in touch. Indeed, the strong theme to emerge in SALRI's consultation is that the law should not interfere with the ability of parties to get in touch, crucially by online means. One intending parent noted to SALRI that unless an intending parent has a relative or close friend willing to act as a surrogate mother, it is 'virtually impossible' to get in touch without recourse to online means, especially online groups.

11.2.3 Angela, an intending parent, noted there was nobody within her immediate circle of family and friends who could act as a surrogate. As Angela and her partner were unable to advertise to find a surrogate mother locally, her only real option was to travel overseas. Angela highlighted the problems in finding a surrogate and for potential surrogates and intending parents to get in touch. 'The hard issue is getting in touch.' She noted the need for at least some form of advertising or means for the parties to get in touch (though she noted in Australia there are far more intending parents than potential surrogates).

11.2.4 SALRI was told anecdotally by Mr Everingham, the founder of *Surrogacy Australia,* that 'hundreds of intended parents and surrogates annually routinely resort to DIY social media forums to locate and engage with each other.' He also told SALRI that 'close to half of altruistic surrogacy cases in Australia now occur between parties who had not earlier known each other.'

11.2.5 SALRI spoke to Monica, a prospective surrogate mother, who is also one of six administrators for the Facebook group page, *Australian Surrogacy Community*. She is also the main administrator of the *Fertility Connections* online forum. *Fertility Connections* is operated by volunteers and is a free service provided for prospective intending parents and surrogates. Monica was able to helpfully provide SALRI with a detailed understanding of how the online surrogacy networks operate. Monica told SALRI that the *Fertility Connections* forum operates in the same way as *Egg Donations Australia* whereby intending parents place an 'Introduction' on the forum that can be viewed by other intending parents and, importantly, potential surrogates. There is an anticipation that intending parents will be active on the forum, beyond their own personal goals to have a child. Monica commented that 'it takes a village to raise a child and it takes a village to make a child'. She commented that surrogates will want to act for people that they like, who are generally intending parents that are active and positive participants in the community. If intending parents are not active after two weeks, then their story gets shifted to the 'My Story' section of the website. She said this is better than Facebook where your post will get lost in the newsfeed after a couple of days. The My Story section ensures that all intending parents can still be viewed.

11.2.6 The etiquette of the Facebook group and *Fertility Connections* is that the intending parents do not initiate contact with surrogate mothers. Owing to the scarcity of surrogate mothers, it can be

[389] Monica noted of the cohort of surrogacy arrangements within her online networks, about half involved strangers and half involved relations or close friends.

like 'fresh meat'. If intending parents do initiate contact, they are removed from the online group. The relationship model is designed so the surrogate mother will strike up a general conversation with the intending parents and then they may suggest they talk about surrogacy. Outside of the online world, Monica said that surrogates and intending parents find each other through known networks of family and friends. Monica said that half of the surrogates in the Facebook group are 'known surrogates' who access the community as a resource for information and supporters.

11.2.7 Monica explained that, whilst she does not like explicit commercial advertising ('dollars for babies'), it is crucial that the law should not prevent or undermine the beneficial work hers and other online groups perform, especially for potential surrogate mothers and intending parents to meet and get in touch and 'match'. Other parties such as Mrs F reiterated this theme to SALRI.

11.2.8 SALRI received mixed reviews from participants of social media and online forums as a means for surrogates and intending parents to get into contact. It was often likened to online dating sites. It comes down to personal preference. Simone Cureton, for example, said the Facebook or online means of meeting suits some people in a surrogacy context but it is not for everyone. It will depend on the person. Ms Cureton found it 'overwhelming' at times. Some parties felt comfortable with such an online means. Others felt uncomfortable and were cautious of the dangers of potential surrogates and intending parents 'matching' online.

11.2.9 One intending parent, J, likened the current situation for intending parents in South Australia on social media and internet forums to be 'like waiting for a drug dealer at a dark street corner.' J highlighted the issue of accessing or finding a suitable surrogate. 'So many landmines in finding a surrogate.' It is the 'hardest bit'. J and his partner had no options available to them to find a surrogate outside of their circle of family and friends.[390] J said the notion to him of making contact via a Facebook-type site or network was 'ridiculous'. J supported some form of regulated advertising. He posed the question how else could an intending parent and potential surrogate mother get in touch and to help avoid the wrong people offering to act as surrogates. J noted his dislike of commercial surrogacy advertising of something like 'Dollars for Babies'.

11.2.10 The Law Society of South Australia, however, noted that a Surrogate Register, or other state-based mechanism is unlikely to prevent the internet being used by intending parents and surrogates to get in touch.

11.2.11 Participants at SALRI's Expert Forum supported practical, respectful methods of connecting potential surrogates with potential intending parents that include appropriate safeguards. Some Expert Forum participants raised concerns over the current 'Facebook' approach of matching surrogates with intending parents. Others supported some form of regulated advertising with safeguards included. There was some support at the Expert Forum for a modified approach to advertising to allow potential surrogates to contact potential intending parents though avoiding 'brokerage' or 'commercial' advertising.

11.2.12 Most parties that SALRI spoke to, including the Law Society of South Australia, Simone Cureton (a surrogate mother and lawyer), J and Monica said that properly regulated advertising in relation to surrogacy should not be specifically prohibited. The Law Society noted many surrogates are meeting intending parents and vice versa, through online surrogacy networks which have allowed many couples to find a prospective surrogate when they cannot find anyone in their immediate social circles.

[390] See also below [14.3.12], [15.2.3].

The Law Society 'noted that advertising for a surrogate, although not specifically prohibited in our State legislation, should not be unnecessarily restricted.'[391]

11.2.13 Moreover, it was pointed out to SALRI that intending parents and surrogate mothers should not be unnecessarily restricted or impeded from advertising a willingness to enter a lawful surrogacy arrangement. Ms Cureton, for example, does not support commercial brokerage or commercial advertising but supported a limited model of advertising 'with no commercial aspect' that allows social websites to operate and for parties to get in touch. She said that too strict an approach is 'crazy' and discourages transparency and parties are 'too scared to tell their story'.

11.2.14 This view was not universal. Some parties that SALRI spoke to or made submissions, including the Association of Relinquishing Mothers (Victoria) and the Australian Christian Lobby, did not support any form of surrogacy related advertising on policy grounds. The Association of Relinquishing Mothers (Victoria), for example, maintained: 'No human being should be advertised for sale.' These views, however, were not representative of SALRI's overall consultation. Mr Page, for example, said: 'The utility of the [advertising] offence has been outlived by reality.'

11.2.15 The Victorian Review also drew SALRI's attention to the problems of the present law making it an offence to advertise in relation to surrogacy. The Review observed:

> Anecdotally, it has been suggested that these restrictions, designed to protect people from exploitation, may have the effect of leading people to make arrangements outside the regulatory framework and therefore without support. It is understood that unmoderated online forums and discussion groups connecting potential donors and surrogates with intended parents have become common over recent years. There is significant but undocumented use of these forums that may bypass the legislated restrictions on advertising.[392]

11.2.16 Various suggestions were made to SALRI about how surrogacy related advertising could be effectively regulated to prevent the commercial brokerage and advertising of arrangements.

11.2.17 Kristopher Wilson of Flinders University stated an overly prescriptive approach was unhelpful and suggested the following formulation:

> any offence covers the act of commercial surrogacy itself and *to take steps to* offer, encourage, induce, assist, *or enable the delivery or procurement of commercial surrogacy services*. Such an offence ought capture commercial brokerage and commercial advertising, but not frustrate contact and negotiation between the parties in a non-commercial aspect which is essential, *or in the provision of commercial advice and support in relation to a non-commercial surrogacy agreement/arrangement.*

11.2.18 The Law Society of South Australia proposed that the relevant law could, for example:

> require that it include a standard form of words about the effect of the law in South Australia, and the address of a government website which provides information to the public about what is permitted in South Australia.[393]

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[391] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 4 [18], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>. See also Law Society of South Australia, , Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 4–5 [20]–[28], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[392] Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 22.

[393] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 5 [28],

11.2.19 It is important that any offence in this area does not undermine the valuable work of online social networks (as described by Monica and others) or impede parties getting in touch.

11.2.20 SALRI notes with interest the recent Review of the New South Wales Department of Health[394] in relation to the rationale and scope of any modern advertising offence.

11.2.21 The Review noted s 10 of the *Surrogacy Act 2010* (NSW) prohibits publishing any advertisement, statement, notice or other material representing that a person is seeking or willing to enter a surrogacy arrangement. Section 10(2) of the *Surrogacy Act* (NSW) ensures the prohibition does not apply if: the surrogacy arrangement is not a commercial surrogacy arrangement, and no fee has been paid for the advertisement, statement, notice or material.[395] The Review noted that the legislative rationale of 'the ban is that advertising may increase the risk of commercial surrogacy arrangements … [and] the ban reflects a preference for arrangements between families and close friends where there is an opportunity for ongoing contact between the child and the birth mother.'[396]

11.2.22 The NSW Review noted that the NSW ban is consistent with all Australian jurisdictions except Western Australia and South Australia. Western Australia allows the advertising of non-commercial surrogacy arrangements but prohibits any fee for brokering such arrangements.[397] South Australia has repealed its previous offences relating to advertising and replaced them with the present offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration.

11.2.23 The NSW Law Society suggested to the Review that NSW Health maintain a non-exclusive online advertising platform for altruistic surrogacy arrangements (with accompanying access to public education) but the Review did not adopt this recommendation given that NSW Health has a limited role in administering the relevant Act.[398]

11.2.24 The NSW Review observed that the advertising offence needs updating to allow appropriate non-commercial advertising but to preclude or discourage commercial advertising or brokering or 'introductions' (which the Review likens to brokering). The Review explained:

> There are grounds for relaxing the current restrictions on paid advertising for altruistic surrogacy arrangements. Altruistic surrogacy arrangements are legal, as is unpaid advertising by persons willing to act as or seeking an altruistic surrogate. If no rewards or other inducements are sought or offered and any advertisement makes clear that the arrangement would be a non-commercial one, we do not consider that the advertisement itself must be unpaid. This reform may make altruistic surrogacy more accessible in New South Wales. We also consider that any "brokerage" or introductory service between intended parents and surrogates should not involve payment of a reward. 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.[399]

<https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>. See below Part 13 for discussion of the benefit of a government website to provide reliable information about the law in relation to surrogacy in South Australia.

[394] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018).

[395] *Surrogacy Act 2010* (NSW) s 10(2)(a)–(b).

[396] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 18 [3.62].

[397] *Surrogacy Act 2008* (WA) div 2.

[398] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 18 [3.65]. See also below Part 13.

[399] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 19 [3.66]–[3.67]. See also 'The Committee recommends that the Queensland Government prohibits advertising and

11.2.25 SALRI notes that similar concerns have been raised in the 'altruistic' jurisdiction of Canada in relation to third parties profiting from the brokerage of otherwise altruistic arrangements. Professor Decka explains the 'inconsistency' in the legislative approach allowing the 'commercial brokerage' of altruistic arrangements in Canada:

> Although the AHRA prevents third parties from accepting, and commissioning parents (or anyone else) from offering, consideration for "arranging" surrogacy, it does not prevent third parties from brokering—on a for-profit basis—altruistic surrogacy connections as long as this facilitation does not qualify as "arranging".[400]

11.2.26 Canadian Surrogacy Options, for example, charges $7,500, not specifically to 'arrange' a surrogacy agreement, but for a range of services 'to help assist [their clients' dreams] of having a child' including organising and arranging medical and legal appointments but only *after* the parties have already been matched by the agency.[401] Canadian Fertility Consulting charges similar fees for its analogous 'support' model.[402] The Canadian framework has thus been described by Professor Millbank as a 'quasi-commercial market, as brokers and clinics are allowed to advertise and to profit from the arrangement - it is only the surrogate who may not."[403]

11.2.27 SALRI agrees with the approach taken in the NSW Review. It accords with the need, as identified to SALRI by Mr Page, Dr Richards and others, for any offence to focus upon commercial advertising and commercial brokerage as opposed to unwittingly undermining the valuable work of online surrogacy related social networks (as described by Monica and others) or impede parties from getting in touch (however they may choose). SALRI is aware of the challenge in drafting a suitable offence that prohibits commercial advertising or introduction or brokerage but is not so wide as to either unwittingly apply to parties acting in good faith such as lawyers or counsellors (as potentially under the 2017 Bill) or undermines or impedes parties getting in touch (however they may choose to get in touch). Following the approach in the recent NSW Review is also an opportunity to move towards a more nationally consistent legislative framework in relation to surrogacy.

11.2.28 Recommendations

Recommendation 15

SALRI recommends that the present law should be clarified to provide that any offence covering the act of commercial surrogacy itself should include offering, encouraging, inducing or assisting such an act. This would capture commercial introduction and brokerage and commercial advertising, but not frustrate communication and negotiation between the parties in a non-commercial aspect, which is essential.

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brokerage for altruistic surrogacy': Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 38 Rec 8.

[400] Maneesha Deckha, 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding' (2015) 61 *McGill Law Journal* 32, 69.

[401] See Canadian Surrogacy Options, *Fees* (2018) <https://www.canadiansurrogacyoptions.com/services/fees/>.

[402] See Alison Motluk, 'After pleading guilty for paying surrogates, business is booming for this fertility matchmaker', *The Globe and Mail* (online), 28 February 2018, <https://www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/>. Leia Picard (Swanberg) of Canadian Fertility Options was recently convicted of buying or offering to buy sperm or eggs and the services of a surrogate mother while taking money to arrange those services. It has been raised that, as Ms Swanberg was not charged with arranging surrogacy services, her current practices are within the relevant law. Ms Swanberg said: 'I went from being the dirty little secret who had the surrogates and donors to someone they're willing to have in their clinics to train in best practice.'

[403] Jenni Millbank, 'Rethinking 'Commercial Surrogacy in Australia' (2015) 12 *Bioethical Inquiry* 477, 480.

Recommendation 16

SALRI recommends that the *Surrogacy Act* (or relevant Act) should include an offence that 'a person must not publish any advertisement, statement, notice or other material that seeks to introduce people for a reward or other inducement with the intention that those people might enter into a surrogacy arrangement (whether non-commercial or commercial)'.

Part 12 - Extraterritorial Offence

12.1 The current position in Australia

12.1.1 One issue that arose in SALRI's research and consultation was whether the present State offences in relation to commercial surrogacy[404] should extend beyond South Australia's borders to have specific extraterritorial effect. Such specific extraterritorial application of surrogacy offences exist in New South Wales,[405] the Australian Capital Territory[406] and Queensland.[407] The NSW provision, for example, provides that 'the necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in the State.'[408] There is no such specific extraterritorial application in relation to South Australia's surrogacy offences.[409] The question is, should there be?

12.1.2 One argument is that the concerns surrounding international commercial surrogacy are such that specific extra territorial offences (and meaningful enforcement) are necessary to reflect and give effect to the policy against such arrangements and to deter and discourage such conduct.

12.1.3 The extension of the 2010 prohibition on commercial arrangements to overseas arrangements was introduced in New South Wales by the Minister for Community Service who provided the following explanation:

> My amendment will … give effect to the policy position agreed to by all States and Territories in Australia that commercial surrogacy is not supported in this country. We all know that the desire to be a parent is very powerful. That instinct is an important part of humanity's survival. However, in this brave new world we must protect everybody involved, including the surrogate mother. … I acknowledge the sadness of people who cannot realise that dream. However, gaining access to children by circumventing local laws and travelling overseas to engage the services of private clinics and then bring the children back to Australia is not a practice that we as the lawmakers of this State should encourage … It is crucial to the long-term psychological wellbeing of children to know who they are and where they come from. As Minister for Community Services I see evidence of this time and again. My amendment relates also to the issues of women's rights and to the potential for exploiting women in a vulnerable position, especially women in poor or developing countries. By making commercial surrogacy an extraterritorial offence we will help to prevent *exporting this exploitation of women overseas. We do not support it here so why should we support it overseas*.[410]

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[404] *Family Relationships Act 1975* (SA) s 10H. See also above Part 11.

[405] *Surrogacy Act 2000* (NSW) s 11.

[406] *Parentage Act 2004* (ACT) s 45.

[407] *Surrogacy Act 2010* (Qld) s 54.

[408] *Surrogacy Act 2000* (NSW) s 11(2). Section 10C of the *Crimes Act 1900* (NSW) also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State.

[409] Though there is an argument that, as Mr Page highlighted in consultation, the general State criminal laws which apply if there is 'sufficient territorial nexus' under s 5G of the *Criminal Law Consolidation Act 1935* (SA) might apply to commercial international surrogacy undertaken by a party ordinarily resident in South Australia. See generally *R v Winfield and Lipohar* (1997) 70 SASR 300; *Thai v DPP (No 2)* (2009) 196 A Crim R (Gray J). However, any such effect in relation to the commercial surrogacy offences is at odds with the parliamentary intention. See South Australia, *Parliamentary Debates*, Legislative Council, 25 February 2015, 210–211 (John Dawkins).

[410] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 2010, 27120 (Linda Burney).

12.1.4 The criminal focus of this law and its rationale was also expressed by Pru Goward, a member of the NSW Parliament, who supported extraterritorial surrogacy offences in the following strong terms:

> Women are not cows; they are not animals and their job is not to bear children for money because other people want children. If it is good enough to ensure that Australian women cannot be exploited commercially for this purpose, out of respect for women around the world – particularly the vulnerable women of Asia and other countries where commercial surrogacy flourishes - we should be particularly mindful that if we do not support this amendment, effectively we are saying that there is one rule for our women and another rule for women in poor countries. That is not good enough. Whilst this Parliament does not have a leading role in international relations and affairs, it should, as much as is able, uphold Australian values, which must mean respect for all and the right of all to live lives free of exploitation. Voting the right way will reflect our commitment to women in those poor countries and reinforce their rights as human beings.[411]

12.2 Consultation Overview

12.2.1 There was a difference in views expressed to SALRI in consultation regarding the role and benefit of such specific extraterritorial commercial surrogacy offences in South Australia.

12.2.2 At the Roundtable Expert Forum, participants expressed various views on whether extra-territorial offences should apply to those seeking to engage in, or negotiate, commercial surrogacy contracts. Some participants supported such offences, citing the need to reflect the policy objective that commercial surrogacy is unlawful and prohibited in South Australia. Such offences were said to reflect and give effect to the policy that overseas commercial surrogacy is undesirable and should be discouraged, especially in unregulated 'Wild West' jurisdictions. Others noted that such extra-territorial offences are ineffectual and unhelpful. It was noted that in the States where such offences exist (New South Wales, the Australian Capital Territory and Queensland), no one has ever been prosecuted. It was also said that criminalising this conduct could keep surrogate families and arrangements secretive and underground.

12.2.3 A similar diversity of views and reasoning emerged in SALRI's wider consultation.

12.2.4 Several parties in the YourSAy feedback and in consultation such as Mr Adams, the Association of Relinquishing Mothers (Victoria), Dr Renate Klein, the Australian Christian Lobby and the Social Issues Committee of the Anglican Church in Sydney supported specific extra-territorial offences to address commercial surrogacy.

12.2.5 It is significant that both the Family Court[412] and many commentators and researchers[413] have expressed concerns about the 'well-documented' abusive and exploitative practices all too often

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[411] New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, quoted in *Bernieresv Dhopal* [2015] FamCA 736 (9 September 2015) [26] (Berman J).

[412] See, for example, *Masters v Harris* [2017] FamCA 450 (28 June 2017) [56] (Johns J): '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 *Oakley v Kittur* [2014] FamCA 123 (4 February 2014) [5]–[10], [21], [27]; *Ellison v Karnchanit* [2012] FamCA 602 (1 August 2012) [5]; *Bernieres v Dhopal* [2015] FamCA 736 (9 September 2015) [25]–[26]; *Pappas v Ugapathai* [2017] FamCA 1090 (21 December 2017), [33].

[413] The concerns of Chief Justice Pascoe and others are significant. See further below [26.1.1]–[26.1.11].

associated with international commercial surrogacy. Chief Justice Pascoe noted to the Commonwealth Committee:

> a consistent approach across all States and Territories regarding Australia's position on altruistic and commercial surrogacy and overseas surrogacy arrangements is desperately needed. Any legislation or amendments should focus on preserving human dignity and human rights of all parties involved. It is submitted that until a common position on surrogacy is achieved that all commercial surrogacy is banned with extra-territorial application.[414]

12.2.6 However, it was also noted to SALRI that such extraterritorial laws are of little utility unless they are actively enforced and the need to also enforce such laws was also noted. Mr Adams, for example, argued that the authorities:

> must make steps to prosecute all parties involved in the exploitation of women and the sale of children, which is what occurs under international commercial surrogacy agreements. Previously in other Australian States, parties that have undertaken such agreements have not been prosecuted. Those States have in effect therefore given a green light to and endorsed exploitation and the sale of children. The only way to prevent such ethically and morally wrong practices is to actually prosecute those doing so as a preventative measure. Currently, it is well known within the "Surrogacy Community" that those undertaking commercial agreements overseas will not be prosecuted by those jurisdictions and therefore they feel free to flout and openly mock the law.

12.2.7 However, a strong contrary view was also expressed to SALRI that saw no need for such an extraterritorial offence in South Australia. Indeed, it was widely noted that such offshore surrogacy offences are ineffectual, if not positively unhelpful. This view was expressed by parties including Simone Cureton, Dr Ronli Sifris at Monash University, Mr Everingham of Surrogacy Australia, Professors Stuhmcke and Millbank and several intending parents.

12.2.8 Mr Page explained that 'history demonstrates that trying to stop (by criminal sanction) people going overseas for surrogacy does not work'. Mr Page noted that the Australian Capital Territory, New South Wales and Queensland extraterritorial offences had never led to any prosecutions, even when apparent clear cases had been referred to the DPP for consideration for prosecution by the Family Court.[415] He said the DPP is likely to have more pressing things to focus on. Mr Page noted these offences should either be enforced or repealed and 'don't have a mockery of the law'. Mr Page raised what real sanction would ever be imposed for a parent charged with breaching the extraterritorial offence as it could leave the child born as a result of surrogacy without a parent.[416] Mr Page also noted these offences can be readily evaded by the intending parents moving (or appearing to move as more than one party noted to SALRI) interstate where such specific laws do not exist. Mr Page said that such offences are unhelpful in leading to secrecy and discouraging transparency and any such parents from coming forward.

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[414] 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, 23.

[415] See also *Wickham v Baker* [2015] FamCA 1077 (3 December 2015) where the Family Court considered a certificate so that a party from the ACT involved in a commercial overseas surrogacy arrangement could give evidence without fear of self-incrimination. See also *Ellison v Karnchanit* [2012] FamCA 602, [3] (1 August 2012).

[416] See *Ellison v Karnchanit* [2012] FamCA 602, [3] (1 August 2012): 'While such an arrangement is not illegal in Thailand, the *Surrogate Parenthood Act 1988* (Qld) in which State the applicants and children live, asserts extraterritorial effect and renders the applicants liable to prosecution and potentially imprisonment for up to three years. Of course, imprisonment of the applicants would see two much loved children (from the children's perspectives) inexplicably separated from the only people they have known as parents. The potential for long term psychological and emotional harm to the children were such an event to come to pass is obvious.'

12.2.9 One anonymous intending parent (drawing on his and his partner's experience of international surrogacy) said:

> we certainly should not consider anything like the interstate bans on overseas surrogacy which are difficult to enforce and have not been applied. These rules do not stop the overseas surrogacy, but they do create a lot of fear and stress for the families involved, and may cause them to avoid government and legal services out of fear. This is certainly not in the best interest of the children.

12.2.10 Such views were repeated to SALRI elsewhere. Professors Karpin, Millbank and Stuhmcke, drawing on their recent research, described such offences as leading to 'evasion, fear and secrecy'. One parent, Alice, described such laws as 'ludicrous' and impossible to enforce and easy to evade and unhelpful in their effect as discouraging candour and transparency and driving such arrangements and practices 'underground'. Monica remarked to SALRI that punitive offences have the unhelpful effect of keeping things secret and 'under the table' and hidden from view and it is preferable things are 'transparent' and parties 'are free to tell and share their stories'. Mr Evans, a South Australian lawyer told SALRI that 'The criminal law, as far as possible, should not be involved in this delicate area.'

12.2.11 The lack of effectiveness of such laws has been described elsewhere.[417] Chief Justice Pascoe has noted that 'it is plain … that the current State and Territory laws do not deter people from engaging in commercial surrogacy in order to become parents' and international commercial surrogacy is becoming increasingly common'.[418] A recent ABC report had the following comment of the extraterritorial offences: 'Why introduce such a law and not enforce it.'[419] The practical effectiveness of the extraterritorial criminal laws to deter overseas surrogacy has been doubted.[420]

12.2.12 Academic commentators are also sceptical of the rationale of such extraterritorial offences. Petersen points out, the 'thriving industry of cross border surrogacy and the increase in the number of parental applications demonstrates that laws banning commercial surrogacy are virtually unenforceable in the global context of the 21st century.'[421]

12.2.13 Professor Anita Stuhmcke notes that three of the four jurisdictions worldwide that currently impose extraterritorial prohibitions on commercial surrogacy are Australian states and that

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[417] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 16 [3.52]–[3.53], 17 [3.58]. Indeed, even the domestic surrogacy laws are rarely prosecuted: 16 [3.53]. Mr Page noted to SALRI that from 1988 to 2008 under the Queensland laws (which at the time prohibited all forms of surrogacy) there were at most about half a dozen prosecutions. The most that anyone received was a $200 fine. Most of the culprits received bonds. It was put to Mr Page by a colleague who represented a couple that the courts took pity on those who were unable to have children. See also Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 9.

[418] 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, 5–6. See also Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 28, 42, 44–45.

[419] ABC Radio National, 'The People vs Surrogacy', *The People vs,* 12 August 2018 (Josh Szeps), <http://www.abc.net.au/radionational/programs/the-people-vs/the-people-vs-surrogacy/10043286>.

[420] See Australian Human Rights Commission, Submission No 67 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements,* 17 February 2016, 24 [117]; 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* (April 2016) 23 [1.71], 31 [1.113]; Family Law Council *Report on Parentage and the Family Law Act* (December 2013) 99–100.

[421] Kerry Petersen, 'Cross Border Commercial Surrogacy: A Global Patchwork of Inconsistency and Confusion' in Michael Freeman et al (eds), *Law and Global Health* (Oxford University Press, 2014) 209, 211.

the only other private life offences to attract a similar level of international liability are female genital mutilation and child sex.[422] She concludes that, with the exception of a couple of NSW Family Court cases in which the judge recommended that prosecution be considered, these laws 'are an exercise in pure symbolism'.[423] Professor Stuhmcke argues that the introduction of these laws followed little debate and failed to be informed by those actually engaging in cross-border reproduction. She also questions whether this infringes on a right to seek medical treatment wherever people choose.

12.2.14 One view is that such criminal laws should not be necessarily judged on their effectiveness and enforcement as the criminal law has an important symbolic role to declare society's values and expectations. SALRI has previously considered this question in relation to the operation of the much criticised 'gay panic' aspect of the vexed partial defence of provocation to murder. SALRI considered whether this law should be amended, as in Queensland, to provide that a non-violent sexual advance is incapable of amounting to provocation.[424] SALRI ultimately recommended that any legislative amendment to provide that a non-violent sexual advance (not confined to a gay sexual advance) is not capable of amounting to provocation, should not be adopted in South Australia as the practical value of such a provision, although serving as an important legislative statement of non-discriminatory intention, will be strictly limited, if not illusory.[425] SALRI noted the view in this context of the South Australian Parliament's Legislative Review Committee: 'It is the view of the Committee that it is not the role of Parliament to enact laws of no meaningful effect, aimed solely at conveying a message to the community. There are other mechanisms at the disposal of Parliament to achieve that end.'[426]

12.3 SALRI's Observations and Conclusions

12.3.1 SALRI accepts the strong concerns that have been expressed about international commercial surrogacy,[427] but it considers that any specific extraterritorial surrogacy offence is inappropriate and ineffectual. Such laws have not discouraged Australians from using commercial surrogacy overseas.[428] It is notable that no person has ever been prosecuted in Australia for international commercial surrogacy,[429] not even cases referred to the DPP by the Family Court for consideration of whether a prosecution should be instituted against the parents who had contravened the extraterritorial offences.[430] The State authorities, including SAPOL, are likely to lack the role, resources, specialised expertise and, one suspects, inclination (given their many other demands) to

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[422] Anita Stuhmcke, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in Paula Gerber and Katie O'Byrne (eds) *Surrogacy, Law and Human Rights* (Routledge, 2015) Ch 5.

[423] Ibid 71.

[424] South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (April 2017) x, 40–43 [5.6.1]–[5.6.10].

[425] South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (April 2018) Rec 1 47.

[426] Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (December 2014) 40. See also Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (31 October 2017) 16, 21, 30.

[427] See below [26.1.1]–[26.1.11].

[428] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 99–100.

[429] 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, 24 [117].

[430] *Findlay v Punyawong* (2011) 46 FamLR 302, 308 [32] (Watts J); *Dudley v Chedi* [2011] FamCA 502 (30 June 2011) [44] (Watts J).

effectively deal with international commercial surrogacy.[431] The notion of SAPOL officers travelling to Kiev or India or Cambodia to gather evidence or seeking or obtaining effective co-operation from overseas authorities is highly unlikely.

12.3.2 The parliamentary context is also significant. The Hon Jon Dawkins explained in relation to the 2015 Act that it was not his intention to introduce extraterritorial application of the commercial surrogacy offences and he had been careful to avoid doing so.[432]

12.3.3 SALRI also notes the view in consultation that such extraterritorial offences are readily evaded by parties moving address or appearing to move address. Finally, SALRI notes the powerful view in consultation that such extraterritorial offences are unhelpful in leading to secrecy and discouraging frankness and parties coming forward.

12.3.4 In any event, SALRI considers that any such offshore commercial surrogacy offence is better dealt with at a national level. It is open to the Commonwealth, given the wide scope of its external affairs constitutional power[433] and the wide range of existing offshore Commonwealth offences,[434] to outlaw recourse by Australians to commercial surrogacy overseas if it so chooses. The national authorities, especially the Australian Federal Police, have the role and specialised expertise to more effectively deal with and enforce such an offshore offence than the State authorities.

12.3.5 Recommendation

Recommendation 17

SALRI recommends that, in light of their ineffectual nature, the extraterritorial offences relating to commercial surrogacy as exist in the Australian Capital Territory, New South Wales and Queensland should not be introduced in South Australia.

[431] See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 17 [3.58].

[432] 'I would like to put on the record that it is not my intention to create an offence for individuals who engage in overseas surrogacy; therefore, whether someone has committed an offence or not when procuring a commercial surrogacy agreement overseas depends on whether an individual's action has, by law, created a territorial nexus and, therefore, enables their actions to come under South Australian law. Like all laws in South Australia if a territorial nexus … exists then when you breach a law of the state in another jurisdiction you can, depending on the facts of the case which have to satisfy very specific criteria, be prosecuted for that offence in South Australia. However, in the case of overseas surrogacy I am advised that this is very unlikely as the individual facts of the case and the location of the offence itself have to satisfy the aforementioned specific criteria which is laid out in the legislation. Therefore, unless a case occurred in which someone procuring a commercial surrogacy agreement overseas somehow satisfied the requirements of the necessary territorial nexus … they could not be prosecuted for an offence under this bill. Therefore, for someone to be prosecuted for an offence under … the Bill, their actions would first have to satisfy s 5G of the *Criminal Law Consolidation Act 1935* (SA), specifically that there was a necessary territorial nexus … in most cases it would be most unlikely as it would be incredibly hard to prove': South Australia, *Parliamentary Debates*, Legislative Council, 25 February 2015, 210–211.

[433] *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

[434] See, for example, Division 272 of the *Criminal Code* (Cth) entitled 'Child Sex Offences outside Australia' which contains various offences by Australian nationals relating to sexual intercourse or sexual activity, even where that activity takes place overseas. See further Danielle Ireland-Piper, 'Extraterritoriality and the Sexual Conduct of Australians Overseas' (2010) 22 *Bond Law Review* 16.

Part 13 - Availability of Surrogacy-Related Information and Resources

13.1 The problem with current practices

13.1.1 SALRI has heard that many members of the community find the current law and practice relating to surrogacy to be complex and inaccessible. The current law and the overlapping interstate and national implications were described by Dr Oxlad as an 'absolute nightmare'. Many of the parties that SALRI spoke to were understandably confused about the nature and the application of Part 2B of the *Family Relationships Act 1975* (SA) and also its interaction with interstate and national laws.

13.1.2 SALRI notes with concern that, during its consultation, it heard of instances of fertility providers not being aware of the requirements for a recognised surrogacy arrangement in s 10HA of the *Family Relationships Act 1975* (SA). For example, Hailey, an intending single parent, told SALRI that she received treatment in preparation for a surrogacy arrangement from a fertility provider in South Australia. The fertility provider did not know that single intending parents cannot be a party to a recognised surrogacy arrangement in South Australia. Hailey's treatment only ceased after she received legal advice.

13.1.3 SALRI also notes that there was widespread confusion in consultation amongst intending parents and surrogates as to what expenses fit within the statutory definition of 'reasonable costs'. SALRI heard, for example, of intending parents not compensating a surrogate mother for hospital car parking as they were unclear whether it was a 'reasonable cost'. Intending parents and surrogate mothers told SALRI that they often rely upon the online surrogacy community in these instances to seek advice about whether a particular expense should be reimbursed.

13.1.4 Surrogacy gives rise to complex and sensitive legal, medical and health issues. Many parties in consultation pointed to the relative lack of impartial and accurate Government information available regarding surrogacy in South Australia. The Victorian ART and Surrogacy website was noted.[435] It was highlighted to SALRI that there is only currently limited information available on the SA Health and Legal Services Commission sites. Simone Cureton, for example, liked the idea of a government website with comprehensive information about surrogacy. She said that because it is government, people will 'trust it a bit more', as it is more independent.

13.1.5 Alice similarly thought that some sort of Government online portal containing detailed information for surrogate mothers and intending parents would assist. Alice highlighted access to reliable information is an issue. She noted that her Australian fertility provider charged her $500 to enter the 'Surrogacy Program'. All she received for entering the 'program' was a guide book of largely web links and contact details that was not overly useful. Angela, another intending parent, also saw utility in one comprehensive surrogacy website with the necessary information and relevant links.

13.1.6 J noted to SALRI his particular concern that the women who may offer to act as a surrogate may well not know what the process is and implications actually involved. J noted the absence of a website or resources available for potential women who offer to be a surrogate to let them know what an arrangement is like. J was concerned that the women who do offer to be a surrogate may not

[435] See the site maintained by the Victorian Assisted Reproductive Authority: Victorian Assisted Reproductive Authority, *The Legal Side of Surrogacy* <https://www.varta.org.au/information-support/surrogacy/commissioning-parents/surrogacy-australia/legal-side-surrogacy>.

understand all the implications and the time involved and how they can be reimbursed for their reasonable costs.

13.1.7 Monica, a prospective surrogate mother, saw the benefit of a comprehensive Government website to provide surrogacy information, though she noted her online groups and linked websites provide much of this information already.

13.1.8 A similar theme was expressed to the Commonwealth Committee. As Chief Justice Pascoe observed: 'Comprehensive education of the public is needed regarding all aspects of surrogacy and should be made readily available by a neutral party such as a government department.'[436] The Committee noted the complexity and inconsistency of surrogacy law and practice across Australia[437] and that to access lawful surrogacy in Australia, 'intended parents and surrogates are not only required to navigate complex State and Territory legislation, but they are also faced with limited and inconsistent information on which to base their decisions'.[438] The Committee noted often, those seeking commercial surrogacy arrangements 'are left with inaccurate information or information aligned to commercial interests'.[439] A number of contributors to the Commonwealth Committee commended the legislative regime in Victoria which also 'provides a strong information framework for those seeking altruistic surrogacy arrangements'.[440]

13.1.9 The Committee concluded:

> To ensure that information is available to those seeking to make altruistic surrogacy arrangements, the Committee believes that the Australian Government should develop a website to consolidate relevant information. In developing a website, the Australian Government should ensure that it contains continually updated information on Commonwealth support and service provision including that provided through Medicare and the social security, welfare and child support mechanisms of the Commonwealth. It should also provide updated advice on the surrogacy framework, legislation and support services in each State and Territory.[441]

13.2 SALRI's Reasoning and Conclusions

13.2.1 SALRI sees the real benefit, as raised in consultation, of a national website or portal to provide reliable and impartial material on the various legal, ethical and medical issues and implications to all parties either contemplating or taking part in surrogacy.[442] In this context, SALRI notes Recommendation 6 of 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*

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[436] 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, 13.

[437] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) 26 [1.66]. See also Part 17.

[438] Ibid 21 [1.65]. Chief Justice Pascoe made this point to the Committee.

[439] Ibid 21 [1.65]. Professor Mary Keyes made this point to the Committee.

[440] Ibid 21 [1.66]. Chief Justice Pascoe made this point to the Committee.

[441] Ibid 21 [1.67].

[442] Some helpful information is provided at Department of Home Affairs, Australian Government, *Fact Sheet – International Surrogacy Agreements*, <https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/36a-surrogacy>; Department of Foreign affairs and Trade, *International Surrogacy* (24 August 2018) <https://smartraveller.gov.au/bulletins/Pages/surrogacy.aspx>.

Surrogacy Arrangements (2016) for the Commonwealth Government to develop a website that provides advice and information for Australians considering domestic altruistic surrogacy.

13.2.2 SALRI notes the need for interested parties, whether surrogate mothers or intending parents, to have access to impartial and accurate information regarding surrogacy and the benefit of such a website to provide advice and information for Australians considering domestic non-commercial surrogacy. Consequently, SALRI encourages the Commonwealth to implement Recommendation 6 of the Commonwealth Committee noted above.

13.2.3 In the event that the Commonwealth does not set up such a website, in the alternative or in addition, SALRI considers there would be real benefit for an appropriate agency or agencies at a State level such as the State Department of Health or the Legal Services Commission or the Law Society of South Australia to prepare a portal or page on their own website to provide reliable and impartial information about surrogacy.[443] It would be a question for the relevant interested parties or affected agencies to resolve operationally as to who would be the most appropriate party or agency to set up or be responsible for any such website.

13.2.4 Recommendations

Recommendation 18

SALRI recommends that a website should be developed which provides advice and information for Australians considering domestic surrogacy and should include:

1. Clear advice on the role of Commonwealth Government support and service provision for intending parents, surrogates and children including Medicare, social security and welfare payments, child support and paid parental leave;

2. Clear advice on the surrogacy legislation in each Australian State and Territory;

3. Clear advice on the support and services funded and provided for by each Australian State and Territory including relevant health, counselling and legal services available; and

4. Best practice guidelines and other information for health care providers including hospitals, obstetricians, paediatric care, employers and others dealing with surrogates.

In this context, SALRI encourages the Commonwealth to implement Recommendation 6 of 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* (2016) for the Commonwealth Government to develop such a website.

Recommendation 19

In the event that the Commonwealth does not set up such a website, in the alternative, or in addition to Recommendation 18 above, SALRI recommends that an appropriate agency or

[443] The State Department of Health would appear to be a suitable State agency to set up and maintain such a website though SALRI has been informed in consultation that the Department of Health is reluctant to undertake such a role.

agencies in South Australia such as SA Health or the Legal Services Commission prepares a suitable page on their own site to provide reliable and impartial information.

Part 14 - Threshold Issues

14.1 Current position

14.1.1 The current law in South Australia and elsewhere in Australia imposes various criteria for parties to undertake surrogacy and to constitute a lawful surrogacy agreement.

14.1.2 Section 10HA(2a) of the *Family Relationships Act 1975* (SA) outlines the conditions for a recognised or lawful surrogacy arrangement to comply with South Australian law. These current conditions may restrict some South Australians from being a party to a lawful surrogacy arrangement. There are also restrictions in relation to residency and the location of the fertility treatment for it to fall within the 1975 Act.[444]

14.1.3 In approaching these often sensitive issues, SALRI has sought to recognise the general principle that surrogacy agreements should be a private affair between mature and consenting adults[445] with the need to recognise and protect the interests of all parties, especially the best interests of a child born as a result of surrogacy.

14.2 Pre-conception agreement

Current practice

14.2.1 While existing practice in South Australia requires a proper pre-conception agreement between the parties as the pre-condition to any lawful arrangement, there is presently no explicit requirement in Part 2B of the *Family Relationships Act 1975* (SA) that a lawful surrogacy agreement must be entered into, or completed, before a surrogacy related fertilisation procedure takes place. This is a perhaps surprising omission that should be remedied.

[444] SALRI also notes that the present law requires the intending parents to be 'domiciled' in South Australia. In light of the fears of 'forum shopping' that have been expressed, it is appropriate to retain some form of residency requirement to undertake a lawful surrogacy arrangement. However, the requirement for the fertility treatment to take place within South Australia is problematic. SALRI also has considered the issue of the Australian citizenship or permanent residency of the parties to a lawful surrogacy agreement. See further below Part 17 for discussion of these and other jurisdictional issues.

[445] See also above [9.7.1]–[9.7.3].

14.2.2 The relevant laws in Tasmania,[446] Queensland[447] and New South Wales[448] all have specific legislative provisions to require that a lawful surrogacy agreement must be in place before any fertility treatment or 'conception' for a parentage order to be subsequently made by a court in respect of the agreement.

14.2.3 In Victoria and Western Australia, the surrogacy agreement must be approved by the relevant statutory regulatory body before any fertilisation procedure can take place.[449]

14.2.4 SALRI notes that Guideline 8.10.4 of the *National Health and Medical Research Council Ethical Guidelines for Assisted Reproductive Technology* also provides that 'clinics must not proceed with ART treatment to facilitate an altruistic surrogacy arrangement without first being satisfied that a legal arrangement is in place.'[450]

Consultation Overview

14.2.5 A strong theme of SALRI's consultation from parties such as Professor Keyes, Dr Oxlad, Monica, Mr Everingham and Mr Page was that a proper pre-conception agreement between the parties (following informed legal and counselling input) be a pre-requisite to any lawful surrogacy arrangement.

14.2.6 All the intending parents and surrogate mothers that SALRI spoke to said they had entered a written agreement before any fertility procedure took place.

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[446] The *Surrogacy Act 2012* (Tas) s 5(5) provides:

'(5) To remove any doubt, it is declared that a [lawful] surrogacy arrangement –

(a) does not include an arrangement made after the birth mother becomes pregnant; but

(b) may include a variation, made after the birth mother becomes pregnant, of an obligation under the arrangement to pay or reimburse the birth mother's surrogacy costs.'

[447] The *Surrogacy Act 2010* (Qld) s 22(2)(e) provides:

'(2) The court may make the parentage order only if it is satisfied of all of the following matters—

(e) the surrogacy arrangement—

(i) was made after—

(A) the birth mother and the birth mother's spouse (if any), jointly or separately; and

(B) the applicant, or joint applicants (jointly or separately);

obtained independent legal advice about the surrogacy arrangement and its implications; and

(ii) was made after each of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants, obtained counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications; and

(iii) was made with the consent of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants; and

(iv) was made before the child was conceived; and

(v) is in writing and signed by the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants; and

(vi) is not a commercial surrogacy arrangement;'

[448] The *Surrogacy Act 2010* (NSW) s 24 provides:

'24 Surrogacy arrangement must be a pre-conception surrogacy arrangement

(1) The surrogacy arrangement must be a pre-conception surrogacy arrangement.

(2) This precondition is a mandatory precondition to the making of a parentage order.

[449] SALRI, reflecting its terms of reference, does not support such a regulatory model. It may be in the future that under a national uniform model, the Family Court can carry out such a role.

[450] See also below Part 21.

SALRI's Reasoning and Conclusions

14.2.1 SALRI has highlighted the benefit of an early focus at the outset of the process to clearly discuss and agree and set out the responsibilities, expectations and positions of the parties before any fertility treatment takes place in a surrogacy context.[451]

14.2.2 SALRI reiterates its view that,[452] especially noting the view of Professor Keyes and others in consultation,[453] it is effectively shutting the stable door after the horse has bolted to seek to define the responsibilities and positions of the parties after fertility treatment has commenced and especially after any child is born and a case is before a court.

14.2.3 SALRI considers that a legislative requirement to confirm that all surrogacy arrangements are completed at the pre-conception stage is appropriate and would merely formalise the best practice manner in which arrangements are already generally handled in South Australia.

14.2.4 Recommendation

Recommendation 20

SALRI recommends that any *Surrogacy Act* should confirm that a surrogacy arrangement should not proceed or be undertaken in South Australia unless, and until, the parties have in place a legal agreement that satisfies the relevant legislative requirements such as legal and counselling advice.

14.3 Social or Medical Need to Access Surrogacy

14.3.1 In South Australia, an intending parent cannot simply access surrogacy. There is a need for some form of infertility.

14.3.2 Section s 10HA(2a) of the 1975 Act provides that, for a surrogacy arrangement to be recognised or lawful, there must be a social or medical need to access surrogacy. These needs are narrowly defined as follows:

> (i) it appears to be unlikely in the circumstances that a commissioning parent would become pregnant, or be able to carry a pregnancy or give birth (whether because of infertility, other medical reasons, risk to an unborn child or for some other reason); or
>
> (ii) there appears to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to a commissioning parent; or

[451] See above [9.8.1]–[9.8.9].

[452] Ibid.

[453] Professor Keyes told SALRI: 'The dominant concerns should be the best interests of the child, and the health and well-being of the birth mother, and the law should be designed to prioritise those concerns. This requires pre-conception regulation. Experience in Australia and in other countries, including the United Kingdom, is that post-conception regulation alone, as is done in most Australian jurisdictions including South Australia, can be problematic because of the well-documented issue that once the child is in the care of the commissioning parents, it is difficult to do anything other than approve the child being left in the care of the commissioning parents, even where mandatory requirements of the surrogacy legislation have not been observed. The ability to consider and protect the best interests of the child and parents at that stage may be compromised. Accordingly, pre-conception regulation is desirable, combined with a post-birth application for parentage orders.' See also above [9.8.1]–[9.8.9].

(iii) there appears to be a risk that becoming pregnant or giving birth to a child would result in physical harm to a female commissioning parent (being harm of a kind, or of a severity, unlikely to be suffered by females becoming pregnant or giving birth generally);

14.3.3 The above definition does not explicitly cover same-sex couples. Other Australian jurisdictions have different definitions of 'infertility' which more explicitly include LGBTIQ people who have a social need for surrogacy.

14.3.4 Section 30 of the *Surrogacy Act 2010* (NSW), for example, provides:

30 Medical or social need for surrogacy arrangement must be demonstrated

(1) The Court must be satisfied that there is a medical or social need for the surrogacy arrangement.

(2) There is a medical or social need for a surrogacy arrangement if:

(a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or

(b) there are 2 intended parents under the surrogacy arrangement and the intended parents are:

(i) a man and an eligible woman, or

(ii) 2 men, or

(iii) 2 eligible women.

(3) An eligible woman is a woman who:

(a) is unable to conceive a child on medical grounds, or

(b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or

(c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or

(d) if she were to conceive a child:

(i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or

(ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.

(4) This precondition does not apply to a pre-commencement surrogacy arrangement

Consultation Overview

14.3.5 There is sometimes a misconception (including in SALRI's consultation) that intending parents may choose to utilise surrogacy as an 'easy way out' to prevent career disruptions or to 'preserve their figure'.[454] This is not permissible under Part 2B of the *Family Relationships Act 1975* (SA) and also

[454] The media portrayal of 'celebrity' surrogacy arrangements supports this idea. See, for example, Amy Corderoy, Glenda Kwek and Andrew Hornery, 'The Real Celebrities are the Altruistic Surrogates', *Sydney Morning Herald* (online), 19 November 2011, <https://www.smh.com.au/lifestyle/the-real-celebrities-are-the-altruistic-surrogates-20110118-19vcu.html>; Catherine Bennett, 'It's Dehumanising to be "an Oven" for Someone Else's Baby', *The Guardian* (online), 10 May 2015, <https://www.theguardian.com/commentisfree/2015/may/10/surrogate-mothers-rich-westerners-poverty-dehumanising>; Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 20.

does not reflect the experiences of any of the parties that SALRI spoke to who had actually utilised surrogacy.

14.3.6 Most of the intending parents that SALRI heard from in consultation had medical conditions (such as cancer and Mayer-Rokitansky-Küster-Hauser Syndrome) which had led to prolonged and often traumatic struggles with infertility that ultimately prevented them from being able to have their own child.

14.3.7 SALRI heard from one party who had been diagnosed with unexplained infertility.

14.3.8 Mrs F, Angela, Alice and others described their prolonged efforts to have a child before turning to surrogacy as a 'last resort'. Mrs F explained that it is 'a very stressful process, very emotional process. Why would you ever do it unless you had to?' This theme also emerges from the recent research of Professors Karpin, Millbank and Stuhmcke.

14.3.9 The powerful accounts of some of the parties that SALRI spoke to are outlined below.

14.3.10 **Case Study: Angela's Story**

> At 16 years old, Angela was diagnosed with cancer. As part of her treatment, she underwent chemotherapy. When Angela later went to form a family with her husband she knew that because of her chemotherapy treatments IVF would be 'on the cards'. Angela underwent ten cycles of IVF. In each cycle, two embryos were implanted, the embryos, however, were not attaching. After her tenth cycle of IVF, Angela and her husband were told that they would not be able to conceive with Angela as a gestational mother. Angela noted the 'huge' physical, emotional and financial toll of all this IVF. At this stage Angela and her husband had two embryos left. They began to explore the option of surrogacy.

14.3.11 **Case Study: Hailey's Story**

> At the age of 21, Hailey was diagnosed with Mayer-Rokitansky-Küster-Hause Syndrome (MRKH). Due to Hailey's medical condition, she was born without a uterus. Hailey received this diagnosis after going through five different specialists and six years of investigations. At one point, a medical practitioner misinterpreted a scan and told her she had an inverted uterus. Hailey was finally diagnosed with an MRI scan.
>
> Following her diagnosis, Hailey always knew that adoption or surrogacy would be her only options to start her own family. Hailey, however, had always 'just thought you get married and then have kids'. After her 30th birthday, Hailey decided to have an Anti-Mullerian Hormone (AMH) test to check her egg levels. The test revealed that Hailey's ovarian reserve was 'quite low' for her age. At the recommendation of the specialists at the fertility clinic, Hailey immediately began the demanding process of daily hormone injections and egg retrieval. On her first round, they were able to retrieve eight eggs. A minimum of 10–20 eggs are considered a 'good number' for freezing, so she underwent another round of egg retrieval. Hailey was told by two fertility specialists that creating embryos in the future with frozen eggs is less successful than with fresh embryos, 'which puts a short time frame on creating embryos'. Hailey began the process of creating embryos using donor sperm through the fertility clinic.
>
> She called a lawyer for advice about the surrogacy process. She was told it was not lawful in South Australia to engage in a surrogacy arrangement as a single intending parent. Hailey commented that if she had not received this advice, the clinic would have gone ahead with the procedure.
>
> Hailey was advised that she would need to 'figure out elsewhere the surrogacy side of things'.

14.3.12 **Case Study: J's Story**

> J is a 36 year old man. He now tragically finds himself single and therefore in the 'ridiculous' situation of being unable in South Australia to lawfully access surrogacy.
>
> In February 2017, his long term partner (A) was diagnosed with breast cancer. After A's initial diagnosis and before she began the process of chemotherapy treatment, they collected their reproductive material and froze embryos. At this stage of the process they did not think surrogacy was going to be a step they would need to take, but they had always discussed and wanted a family together. They put all the precautions in place that they could to ensure they could have a family and thought they would have the opportunity to have children after they had gotten through her treatment.
>
> Unfortunately, A was given a terminal diagnosis. At around this time J and A got married. J and A decided to go down the path of surrogacy as their final option to create a family together. J saw a lawyer with A to seek advice about entering a surrogacy arrangement. J and A had a lot of difficulty finding a surrogate, in what was a very time sensitive situation.
>
> A's cousin, S, who was also a 'great friend', ultimately offered to be a surrogate. S is married and has a child of her own. 'That [surrogacy] is her gift.' The cousin's partner was also very supportive. A and J were both happy with this choice and she felt like a great fit for them. J's wife sadly died a few days after her cousin offered to be a surrogate mother. After A sadly died, surrogacy was no longer an option for J to form a family as surrogacy is not available for singles in South Australia. J pointed out the double standards and hypocrisy that if he had passed away and not his wife, she would have been able to access his genetic material and go ahead and form their family but he cannot.[455] At 36, he said there was a good chance this could be his last opportunity to have a child. J has sought advice from a lawyer here in South Australia that he should investigate an arrangement in Victoria or New South Wales.

14.3.13 J and Hailey's accounts are also discussed further in this Report in the context of jurisdiction[456] and in the context of singles access to surrogacy.[457]

14.3.14 Some parties, including Dr Renate Klein, were of the view that intending parents are wealthy individuals, typically gay men, and surrogates are generally of a lower socio-economic status. Dr Klein said: 'wealthy individuals believe they have the *right* to expect poorer people - and exclusively females - to grow and deliver them babies, whether for love or money.'[458]

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[455] In *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 (21 April 2010), the court ruled that sperm taken from a consenting man and stored by a fertility clinic for future use was the personal property of the man and on his death it formed part of his estate. See also *Re H, AE* (2012) 113 SASR 560, where the Supreme Court of South Australia gave permission for a woman to have the sperm of her recently deceased husband removed and stored. Nineteen months later the court gave the woman permission to use the sperm for the purpose of attempting to become pregnant through an *in vitro* fertilisation procedure. See, *Re H, AE (No 2)* [2012] SASC 177 (12 October 2012); *Re H, AE (No 3)* (2013) 118 SASR 259. The widow became pregnant with the deceased husband's sperm and a child was born nearly two years after the husband's death. See also, *In the Estate of the Late K* (1996) 5 Tas R 365.

[456] See below Part 17.

[457] See below Part 15.

[458] The media depiction of international commercial surrogacy and particularly celebrity intending parents often supports this view. See above n 454.

14.3.15 Many parties, however, including Angela, Alice and Professors Karpin, Millbank and Stuhmcke did not share this view.[459] Angela emphasised that the public's image of intending parents as wealthy people who 'take advantage' of surrogate mothers is simplistic, if not wrong. She reiterated that 'all the women that do it have medical issues, it is not a choice'.

14.3.16 During consultation, SALRI was often told that undertaking surrogacy was a 'last resort' on the part of the intending parents.

14.3.17 SALRI also notes that all of the surrogate mothers it spoke to were compassionate, caring and articulate individuals. SALRI has heard in its consultation of women acting as surrogates who were lawyers, teachers, public servants and psychologists.

14.3.18 In short, there was broad support in consultation that the present concept of infertility in order to access lawful surrogacy remains appropriate.

14.3.19 Dr Oxlad also identified a concern around the existing scope of infertility contemplated in the 1975 Act. She said it needs updating and refinement. Dr Oxlad commented that the current definition has an inherent focus upon 'medical' fertility and is not inclusive of LGBTIQ South Australians. Dr Oxlad preferred the use of the term 'medical or social need' as in the NSW Act. Another view was this term is unhelpful and 'lawful need' to access surrogacy is preferable.

14.3.20 Mr Page also noted that aspects of the terminology in the present law in relation to infertility are outdated and should be updated to accord with recent Acts to promote gender or LGBTIQ equality.[460]

SALRI's Reasoning and Conclusions

14.3.21 SALRI considers that the current broad concept of 'infertility' to access a lawful surrogacy arrangement in South Australia is sound and should be retained. However, some aspects of the present law are in need of clarification and refinement.

14.3.22 SALRI considers that some aspects of the terminology in the present law are outdated and should be updated. SALRI considers that the use 'medical or social need' as opposed to 'infertility' clarifies to the community that surrogacy is not a 'want' or 'choice' for intending parents and can and should only be accessed by parties who genuinely require it. It should be made clear in any new *Surrogacy Act* that 'a single[461] male or a male couple will automatically meet the requirement of "medical or social need", on the basis that men in such situations cannot conceive a child without the assistance of another party'.[462] Similar reasoning applies to a single woman. SALRI suggests that all references to 'husband' and their correlative definitions in Part 2B of the 1975 Act should be removed and replaced with 'spouse' to be more inclusive of surrogate mothers and especially intending parents in same-sex

[459] See also Karen Busby and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13, 42–52. See also above [9.5.8].

[460] See *Statutes Amendment (Surrogacy Eligibility) Act 2017* (SA); South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016).

[461] See below Part 15.

[462] New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26546 (John Hatzistergos, Attorney General).

relationships.[463] This appears a logical part of the recent measures in South Australia to update the law and remove outdated or discriminatory concepts in this area.[464]

14.3.23 Recommendations

Recommendation 21

SALRI recommends that the current concept of infertility to access lawful surrogacy in South Australia should be retained but that, to clarify and update the relevant terminology, the present definition of infertility in s 10HA(2a)(e) of the *Family Relationships Act 1975* (SA) should be removed and replaced in the new *Surrogacy Act* or other relevant Act with the following definition of medical or social need to access lawful surrogacy based on s 30(2) the *Surrogacy Act 2010* (NSW):

'(2) There is a medical or social need for a surrogacy arrangement if:

(a) there is only one intended parent under the surrogacy arrangement and the intended parent is a man or an eligible woman, or

(b) there are 2 intended parents under the surrogacy arrangement and the intended parents are:

(i) a man and an eligible woman, or

(ii) 2 men, or

(iii) 2 eligible women.

(3) An eligible woman is a woman who:

(a) is unable to conceive a child on medical grounds, or

(b) is likely to be unable, on medical grounds, to carry a pregnancy or to give birth, or

(c) is unlikely to survive a pregnancy or birth, or is likely to have her health significantly affected by a pregnancy or birth, or

(d) if she were to conceive a child:

(i) is likely to conceive a child affected by a genetic condition or disorder, the cause of which is attributable to the woman, or

(ii) is likely to conceive a child who is unlikely to survive the pregnancy or birth, or whose health would be significantly affected by the pregnancy or birth.'

[463] See *Family Relationships Act 1975* (SA) ss 10HA(1), (2a)(g), (2a)(k), (6).

[464] See *Statutes Amendment (Surrogacy Eligibility) Act 2017* (SA); South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016).

Recommendation 22

SALRI recommends that all references to 'husband' and their accompanying definitions in Part 2B of the *Family Relationships Act 1975* (SA) should be removed and replaced in any new *Surrogacy Act* with 'spouse' to be more inclusive of surrogate mothers and intending parents in same-sex relationships.

14.4 Age of surrogate mother

Current Law

14.4.1 It is important that the parties to a surrogacy arrangement possess the maturity to undertake such a demanding process.

14.4.2 Historically, it has been required that all parties to an agreement must be at least 18 years old since the first surrogacy legislation was introduced in South Australia in 2009.[465] There has been no apparent substantial parliamentary discussion or consideration of the appropriate age for surrogate mothers in South Australia since that time.

14.4.3 Under s 10HA(2a)(b) of the *Family Relationships Act 1975* (SA) all parties to a surrogacy arrangement, including the surrogate mother, must be over the age of 18.[466]

14.4.4 In every other Australian jurisdiction, except the Australian Capital Territory, a surrogate mother must usually be aged at least 25 at the time when the surrogacy arrangement is made. In New South Wales, Tasmania, Queensland and Victoria (but not Western Australia), this requirement can be dispensed of in 'exceptional circumstances'. These requirements were introduced, in New South Wales to ensure that a surrogate mother 'has sufficient maturity to grasp [the surrogacy arrangement's] implications'.[467]

14.4.5 This theme was repeated elsewhere. In the parliamentary debates on the Western Australian *Surrogacy Bill 2008,* Mr Whitely, for example, noted:

> All of this is gut feel, but I am talking about the best interests of the child, including the rationale for the surrogate mother to be over 25 years of age and to have had a previous child, which it is believed instinctively will make the situation work better.[468]

14.4.6 Individual fertility providers are likely to also have their own requirements for the age of a surrogate mother (generally a minimum age but possibly also a maximum age).

14.4.7 There are no legislative age restrictions on who can act as a surrogate mother in New Zealand, the United Kingdom or California.[469] In Canada, it is an offence to counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that the female person is under 21

[465] See *Statutes Amendment (Surrogacy) Act 2009* (SA) s 10HA(2)(b)(ii)

[466] A woman was also to be unable to register on the 'Surrogate Register' if she was under the age of 18. See *Family Relationships Act 1975* (SA) s 10FB(3)(a).

[467] New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26546 (John Hatzistergos, Attorney General).

[468] Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, 907.

[469] See Appendix C.

years of age.[470] In the Republic of Ireland, it has been proposed that women will only be able to act as a surrogate mother if between the ages of 25 and 47.[471]

14.4.8 There are no legislative provisions in any Australian jurisdiction which prescribe a maximum age for a surrogate mother.[472]

14.4.9 Table A below summarises the legislative requirements for the minimum age of a surrogate mother in Australia.

Table A – Australian legislative requirements for minimum age of surrogate mother

Legislation	Section	Requirement	Mandatory condition?
QLD *Surrogacy Act 2010* (Qld)	s 22(2)(f)	The birth mother and the birth mother's spouse must be at least **25** when the surrogacy arrangement was made.	No, the court may dispense of the requirement if the court is satisfied there are exceptional circumstances for giving the dispensation; and the dispensation will be for the wellbeing, and in the best interests of the child. See s 23(2).
NSW *Surrogacy Act 2010* (NSW)	s 27(1)	The birth mother must have been at least **25** years old when she entered into the surrogacy arrangement.	No, it is a mandatory precondition to the making of a parentage order, however, the birth mother must be at least 18 years old when she entered into the surrogacy arrangement.
WA *Surrogacy Act 2008* (WA)	s 17(a)(i)	The birth mother must have reached the age of **25** years to be granted a parentage order.	Yes, it is a mandatory precondition to the granting of a parentage order.
Tas. *Surrogacy Act 2012* (Tas)	s 16(2)(c)	The birth mother was **25** years of age when the surrogacy arrangement was made.	No, the court may dispense of the requirement if the court considers that the making of the parentage order is in the best interests of the child. Court may consider any other matter it

[470] *Assisted Human Reproduction Act,* SC 2004 c 2, s 6(4).

[471] See Appendix C.

[472] SALRI considers that this is an issue for the counselling (and screening) process. SALRI agrees with the recent New South Wales Review. 'We do not recommend an upper limit on the age of birth mothers. Many women choose to start their family later in life and have healthy pregnancies. Having an upper age limit would also limit further the already small pool of potential altruistic surrogate mothers': Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 22 [3.81].

			considers relevant. See s 16(3).
ACT *Parentage Act 2004* (ACT)	N/A	N/A	N/A
Vic. *Assisted Reproductive Treatment Act 2008* (Vic)	s 40(1)(b)	The surrogate mother must be at least **25** years to be approved by the Patient Review Panel.	No, the Patient Review Panel may approve of a non-complying surrogacy arrangement if the Panel believes the circumstances of the proposed surrogacy arrangement are exceptional and it is reasonable to approve the arrangement in the circumstances see s 41.

Consultation Overview

14.4.1 No examples of surrogate mothers in South Australia who had entered a surrogacy arrangement under the age of 25 were identified in SALRI's consultation and research. However, various parties, including Professor Keyes, Dr Oxlad and the Association of Relinquishing Mothers (Victoria) maintained that the current requirements for the minimum age for a surrogate mother should be 'reconsidered'.

14.4.2 The parties in consultation that opposed any form of surrogacy also did not see that there was any distinction between the quality of a surrogate mother's consent based upon her age.

Reform Options

14.4.3 The following two options were considered by SALRI. The views expressed by parties in consultation with regard to each specific option are noted as follows:

Option 1: Retain the current statutory age of 18

14.4.4 Ms Webster, a clinical psychologist with experience and a special interest in supporting parties through surrogacy told SALRI that a surrogate mother under the age of 25 who had not had her own child would raise 'red flags' as part of the screening role of the Accredited Independent Counsellor. Ms Webster maintained, however, that these concerns are more appropriately dealt with within the counselling (and screening) role of an Accredited Independent Counsellor to approve a surrogacy arrangement, rather than as a blanket legal rule. Ms Webster was concerned that raising the legislative requirement for the age of surrogate mothers could prove overly rigid and prescriptive.

14.4.5 Professors Millbank and Stuhmcke, submitted that any restriction upon an adult's choice to be a surrogate based upon her age is arbitrary and was an ineffective gatekeeping measure. They did not support a legislative provision to raise the present age requirement of 18.

Option 2: Raise the statutory age to 25

(a) As a mandatory condition

(b) With an opportunity for this requirement to be dispensed with in exceptional circumstances

14.4.6 This option accords with other Australian jurisdictions that have laws in relation to the minimum age of a surrogate mother, apart from the Australian Capital Territory, which has no legislative requirement in this regard.

14.4.7 New South Wales, Queensland and Tasmania do not have a pre-approval statutory authority and all consider dispensing with the required age of 25 at the court order stage. This is problematic as it is unlikely that it would ever be in the best interests of the child to not dispense of such a requirement at the parentage order stage. The 'exceptional circumstances' of a surrogate mother under the age of 25 should preferably be considered at the pre-conception stage.

14.4.8 There was wide disquiet in SALRI's consultation about allowing women under the age of 25 to act as a surrogate mother. Dr Patricia Fronek, from her background as a social worker with a research interest in surrogacy, argued that enabling women who are 18 to be a surrogate mother is 'crazy'. Chief Justice Pascoe agreed that South Australia should move in line with the other Australian jurisdictions to require intending parents and surrogate mothers be at least 25 years old. The Chief Justice expressed his concern for exploitation and coercion in relation to potential surrogate mothers under the age of 25.

14.4.9 Mrs F and Dr Melissa Oxlad supported increasing the age of a surrogate mother to 25. Dr Oxlad noted that, drawing from her clinical experience in counselling parties in relation to creating a family through surrogacy, there is merit to restricting the age that a woman can act as a surrogate to 25. She agreed that there is merit to restricting the age that a woman can act as a surrogate to 25 years. She noted that there may be situations where a mother has had children at a young age and then later in life finds a younger partner who she would like to have children with requiring the assistance of her young adult daughter as an egg donor or surrogate. Similar situations can arise with regards to intending parents requesting assistance from young siblings and/or nieces. She described these as 'incredibly difficult situations' to place young women in. She said it is difficult for a young woman in such a situation to properly consent as they do not feel like they are able to say no.

14.4.10 The Australian Christian Lobby, in their submission to the 2014 Western Australian Review of the *Surrogacy Act 2008* (WA) noted that:

> The [WA] Act rightly places age restrictions on surrogate mothers. The age of 25 is appropriate because a surrogate mother will be at an optimal age for healthy pregnancy while having reached a level of maturity that is necessary to undertake a surrogacy arrangement.[473]

14.4.11 Professors Millbank and Stuhmcke emphasised to SALRI that if age limits are set out in the relevant legislation it must also include discretion to dispense of these requirements in 'exceptional circumstances' as a rigid approach is unhelpful. SALRI notes that this would be consistent with the laws in all jurisdictions that have a requirement for 25 to be the minimum age, apart from Western Australia where it is mandatory.[474]

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[473] Department of Health, Government of Western Australia, *Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014) 9.

[474] The *Surrogacy Act 2008* (SA) is currently being independently reviewed by Dr Sonia Allan.

14.4.12 The recent NSW Review also supported a general minimum age of 25 for surrogate mothers:

> The age of 25 brings sufficient maturity to understand the nature and implications of the surrogacy agreement (though counselling and legal advice remain critical to the process of giving informed consent). However, given that 18 is the age of legal adulthood, in exceptional circumstances women between the ages of 18 and 24 should be able to act as surrogates.[475]

SALRI's Reasoning and Conclusions

14.4.13 SALRI supports a general legislative age limit of 25 for a surrogate mother to be able to take part in a lawful surrogacy agreement. It is significant that this approach was supported in consultation and has been adopted interstate. SALRI shares the concern that an individual at the age of 18 may lack the maturity to enter something as profound and life altering as a lawful surrogacy arrangement and to act as a surrogate mother. SALRI also shares the concern of the Chief Justice and others for exploitation and coercion in relation to potential surrogate mothers under the age of 25. To ensure that the surrogate mother is over the age of 25, she could be required to provide proof of identity documents to the lawyer at the lawyer's certificate stage.

14.4.14 However, the age limit of 25 years should not be an absolute rule for a surrogate mother. Because it is not possible to predict all possible circumstances, and there may be cases where it is appropriate for a surrogacy arrangement to proceed where the proposed surrogate mother is under the age of 25 years,[476] SALRI considers that any *Surrogacy Act* should allow this to occur in 'exceptional circumstances'.[477] This approach also accords with interstate models. SALRI considers that the preferable way to provide for this would be to allow a woman under 25 years of age to act as a surrogate mother where the Accredited Independent Counsellor certifies as part of the vital counselling (and screening) process that, in his or her opinion, there are exceptional circumstances.[478] The Accredited Independent Counsellor is well placed and equipped as part of the counselling (and screening) process to determine if there are 'exceptional circumstances' and a potential surrogate mother under the age of 25 years is in fact suitable to take part in a surrogacy arrangement.

14.4.15 SALRI suggests that any *Surrogacy Act* should provide that a surrogate mother must be at least 25 years of age in order to be a party to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a woman under the age of 25 years acting as a surrogate mother.

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[475] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 22 [3.80].

[476] The example was raised in consultation of a sister or close relative to the intending parents who is 23 years of age and has the necessary sufficient maturity and life experiences to enter such an arrangement.

[477] This reflects wider principles of administrative law. See *British Oxygen Ltd v Board of Trade* [1971] AC 610. However, unlike normal administrative law practices and processes, there is no formal right of appeal or review of an adverse decision of an Accredited Independent Counsellor as part of the counselling (and screening) process. See further below [20.4.14].

[478] See also Rec 40 below. Another alternative, which would have greater public resource implications but which might provide a greater degree of reassurance, would be for any *Surrogacy Act* to provide that an application may be made to a court for an order permitting a woman under the age of 25 years to act as a surrogate mother if the court considers that there are 'exceptional circumstances'. This option has some merit but is at odds with the concerns of the Youth Court and Chief Magistrate (see above Part 4), SALRI's terms of references and the fact that, as far as practicable, surrogacy arrangements should be private affairs between the individuals concerned. Furthermore, this aspect is better covered as part of the counselling (and screening) process by the Accredited Independent Counsellor to certify that there are 'exceptional circumstances' to allow a surrogate mother under 25 to take part in a surrogacy arrangement.

14.4.16 Recommendation

Recommendation 23

SALRI recommends that any *Surrogacy Act* should provide that a surrogate mother must be at least 25 years of age in order to be a party to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a woman under the age of 25 years acting as a surrogate mother.

14.5 Age of intending parents

Current Law

14.5.1 There are different requirements in each Australian jurisdiction in relation to the age of the intending parent(s), with the exception of Victoria which has no legislative requirements.

14.5.2 Currently, intending parents must be 18 to enter a lawful surrogacy arrangement in South Australia. It has been required that all parties to an agreement be at least 18 years old since the first legislative arrangements in relation to surrogacy were introduced in 2009.[479] There has been no apparent substantial parliamentary discussion or consideration of the appropriate age for intending parents in South Australia since then.

14.5.3 In other jurisdictions, limitations on who can access surrogacy based upon age have been justified on the basis that intending parents are required to have a degree of maturity to understand and manage the serious implications of a surrogacy arrangement.

14.5.4 Table B below shows a summary of the legislative requirements in Australia for the minimum age of intending parents.

Table B – Australian Legislative requirements for minimum age of intending parents

Legislation	Section	Requirement	Mandatory condition?
QLD *Surrogacy Act 2010* (Qld)	s 22(2)(g)	Each intended parent must be at least **25** when the arrangement was made.	No, the court may dispense of the requirement if the court is satisfied there are exceptional circumstances for giving the dispensation; and the dispensation will be for the wellbeing, and in the best interests of the child. See s 23(2).
NSW *Surrogacy Act 2010* (NSW)	s 28(1)	Each intended parent must have been at least **18** years old when they entered into the arrangement	Yes, precondition to the making of a parentage order. See s 28(2).

[479] See *Statutes Amendment (Surrogacy) Act 2009* (SA) s 10HA(2)(b)(ii).

	s 29	If an intended parent was **under the age of 25** when the surrogacy arrangement was entered into the court must be satisfied that the intended parent is of sufficient maturity to understand the social and psychological implications of the making of a parentage order. Must provide evidence to the court that they received counselling from a qualified counsellor before entering into a surrogacy arrangement, and that the counsellor was satisfied that they were of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.	Section 29 requirements for counselling are a pre-condition to the granting of a parentage order under s 29(3).
WA *Surrogacy Act 2008* (WA)	s 19(1)	At least one intended parent must have reached **25** years of age to be granted a parentage order.	Yes, precondition to the making of a parentage order s 21(2)(a).
Tas. *Surrogacy Act 2012* (Tas)	s 16(2)(b)	The intended parent (or both intending parents if there are two) must be **21** years of age or more when the surrogacy arrangement was made.	Yes, the court is unable to dispense of the condition.
ACT *Parentage Act 2004* (ACT)	s 26(3)(b)	Both intended parents are at least **18** years old.	No, not mandatory. Must be taken into account by the court when granting a parentage order.
Vic. *Assisted Reproductive Treatment Act 2008* (Vic)	N/A	No legislative requirement. Individual clinics have their own guidelines. Monash IVF requires intended parents must be 25–53 years old.	N/A.

Consultation overview

14.5.5 SALRI notes that all the intending parents that it heard from in consultation were over the age of 25.

14.5.6 Some parties raised concern that potential intending parents could, at the age of 18, lack the maturity to enter something as profound and life altering as a lawful surrogacy arrangement.

14.5.7 The following options were thus considered by SALRI in this context.

Reform options

Option 1: Retain the statutory age of 18 for parties applying for a parentage order

14.5.8 This model relies upon each intending parent's maturity, understanding and ability to manage the implications of a surrogacy arrangement being appropriately assessed at the counselling (and screening) stage. SALRI notes that the Standing Committee of Attorneys General identified that:

> While the issues of the age of the surrogate mother and whether the surrogate already has children may be relevant factors, an alternative to creating further pre-requisites would be to deal with these issues in counselling.[480]

14.5.9 Dr Oxlad said that it is inappropriate to restrict intending parents' access to surrogacy on the basis of their age. She provided the example of where one or more members of a young long-term couple may have had cancer, and one or more of the couple may have undertaken fertility preservation to freeze sperm or eggs. Such a couple may be in a committed long-term relationship and have always known they wanted to have a child at a young age. If the age of intending parents was raised beyond the current requirements it may prevent such a couple from accessing surrogacy. This could be viewed as discrimination as any other young couple who had not experienced cancer, and could conceive naturally, would be able to make their own decision to become parents at a young age without restriction from the State. Dr Oxlad stated that the suitability of intending parents to enter into a surrogacy agreement should be determined by the Accredited Independent Counsellor via assessment and screening counselling, not based on age alone.

14.5.10 Jessica Webster, a clinical psychologist who provides assessment and implications counselling to parties looking to form a family through surrogacy also described to SALRI that the assessment of the maturity of intending parents is within her counselling (and screening) role.

Option 2: Raise the statutory age of one or both intending parents to 25

14.5.11 Dr Patricia Fronek told SALRI that intending parents should be over 25 and there should also be an upper age limit to ensure they are young enough to see their child grow up.[481]

14.5.12 SALRI notes that some consultees in the 2014 Review of the Western Australian *Surrogacy Act 2008* raised concerns that the requirement that at least one intending parent be at least 25 is arbitrary and discriminatory to those who otherwise meet the requirements to enter a lawful surrogacy arrangement.[482]

Option 3: Require that if an intending parent is under the age of 25 they provide evidence of their sufficient maturity to enter a surrogacy arrangement

14.5.13 A model based upon the New South Wales provisions could allow the regime to retain the flexibility to allow parties under 25 to access surrogacy where they have sufficient maturity but at the same time it recognises the concerns of participants that told SALRI that the required age for intending parents should be 25. The requirement that parties provide evidence of their maturity to enter a surrogacy arrangement would flag to Accredited Independent Counsellors the extra care that should be taken when assessing the suitability of intending parents to enter a surrogacy arrangement.

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[480] Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy' (January 2009) 15–16.

[481] SALRI notes that there are currently no jurisdictions that impose upper age limits on access to surrogacy in Australia, although they may exist at individual fertility clinics.

[482] Department of Health, Government of Western Australia, *Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014) 8.

SALRI's Reasoning and Conclusions

14.5.14 It has been suggested that age is an imperfect measure of maturity and that the parties' ability to understand and manage the implications of a surrogacy arrangement are more appropriately assessed within counselling, as required or at least contemplated by the present South Australian Act. In the parliamentary debates in Queensland, Western Australia and Tasmania, some MPs queried the 'rational basis' for imposing a restriction on access to lawful surrogacy based upon the age of intending parents. The Hon Giz Watson, for example, said during the debate on the Surrogacy Bill 2008 (WA):

> Somebody can be very mature at 21, and somebody else can be very immature and unprepared at 30. I opposed setting an arbitrary figure and considered that setting a minimum age of 18 was reasonable, because there are considerable assessments, preparations and checks and balances that any person seeking to participate in these arrangements has to go through, and that is one of the issues that came up in the discussion when the standing committee looked at this matter. Members should be aware of the measures that are already in place, including the requirement for a psychological assessment. It is difficult for us to predetermine whether somebody is mature enough at a certain age. It is a personal thing and sufficient checks and balances are in place. It is not appropriate for us to say the arranging parent or parents should be 21 or 25. It is quite arbitrary. I do not support setting the bar of age higher in the Act.[483]

14.5.15 During the debate on the Western Australian Bill, it was suggested that the age of 25 for an intending parent in Western Australia was intended to align with the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') definition of youth which extends to individuals under the age of 25.[484] SALRI notes that the age of 25 is largely used by UNESCO for statistical consistency and that it emphasises that 'youth is a more fluid category than a fixed age-group'.[485]

14.5.16 Mr Kim Booth in the parliamentary debate on the Surrogacy Bill 2011 (Tas) noted his own concerns with fixed age as a legislative concept of maturity in the surrogacy context:

> there are these different times that the community agrees, or Parliament has determined, as set times a person's life where you then become *ipso facto* able to vote or able to drink or whatever. But to restrict this ability to enter into a surrogacy arrangement by inserting '25 years of age' does not seem to have any rational basis to it. How could you possibly arbitrarily decide that you will not be capable of making this decision until you are 25, notwithstanding the fact that you have already been considered capable of voting, drinking and in fact having a family? In fact, as the Attorney said, the age of consent is 17, then obviously post 17 it is perfectly lawful for any other ordinary person in the community who is capable of conceiving naturally to have children. That person can start a family and can enter into lifelong partnership arrangements. Some of those intending parents with a desire to have children may discover for some reason they cannot and they want to make another arrangement, whether it be by adoption, by surrogacy arrangement, or by some sort of other assistance, IVF or whatever … I just think that it is discriminatory. I think if you were in a situation where you were an 18-, 20- or 22-year-old couple who had been intended parents, who had the full intention through that union of having children and wanted to start a family, I think it is potentially a very cruel thing, given that there will be so few people who go through these fairly difficult steps to become involved in this surrogacy. It is not like going down the street to get a milkshake and deciding to engage in surrogacy at the same time. I think this provision, by inserting '25 years of age', would be hurtful and discriminatory to a class of people, a group of people, who might have every single reason why they need or want to be involved in surrogacy,

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[483] Western Australia, *Parliamentary Debates,* Legislative Council, 19 June 2008, 4175 (Giz Watson).

[484] Western Australia, *Parliamentary Debates,* Legislative Council, 19 June 2008, 4175 (Ken Batson).

[485] United Nations Educational, Scientific and Cultural Organization, *What do you mean by 'youth'?* (2017) <http://www.unesco.org/new/en/social-and-human-sciences/themes/youth/youth-definition/>.

> who might be a perfect family in which to raise a child that will provide for future generations. To simply arbitrarily and capriciously insert a '25-year' definition as to when you suddenly achieve the capacity to enter into this agreement is unreasonable, it is discriminatory, and there is in fact no basis to it.[486]

14.5.17 The potential discriminatory features of a law that restricts access to surrogacy on the basis of the intending parents' age, particularly within the context of singles access to surrogacy, was also queried by Mr Robert Messenger in parliamentary debate on the Surrogacy Bill 2010 (Qld):

> There seems to be a dangerous inconsistency in applying the 25-year age limit. I can give an example. If a 27-year-old male was married to a 23-year-old female or they were in a de facto relationship and both of them applied to be the intended parents under this surrogacy legislation, they as a couple would not be eligible under this legislation. As it quite clearly states under (g), the applicant or each of the joint applicants must be at least 25 years old. In that case, the joint applicants would not qualify under this clause. However, if the 27-year-old applied singularly to qualify as an intended surrogate, that person would be eligible under this legislation.[487]

14.5.18 The NSW legislative approach to the age of the intending parents differs. Under the *Surrogacy Act 2010* (NSW), if an intended parent is under the age of 25 years, the Supreme Court must be satisfied that they have sufficient maturity to enter into such an arrangement. The NSW Attorney-General stated that this was an 'added safeguard … which will strengthen the legislative scheme requiring all people, especially young people, to think very carefully in light of professional advice about whether surrogacy is the best option for them.'[488]

14.5.19 SALRI notes that, additionally, fertility providers may impose their own lower and upper limits on the age of intending parents.

14.5.20 SALRI acknowledges the differing views expressed in both consultation and interstate about whether an age limit is appropriate for intending parents to be able to enter a lawful surrogacy agreement, or if this is an issue better left to the Accredited Independent Counsellor as part of the counselling (and screening) process (noting the view of Dr Oxlad). SALRI notes the concern expressed in consultation that potential intending parents at the age of 18 may lack the maturity to enter something as profound and life altering as a lawful surrogacy arrangement. It also seems inconsistent to impose one age limit for a surrogate mother and another for an intending parent. SALRI considers that the Queensland approach is appropriate and both intending parents must be at least 25 years when the surrogacy agreement is entered into. However, as with the situation of a surrogate mother, this should not be an absolute rule. There will be deserving situations where rigid adherence to an age limit of 25 for an intending parent (as with a surrogate mother) would be inappropriate.[489]

14.5.21 The Accredited Independent Counsellor is well placed and equipped as part of the counselling (and screening) process to determine if there are 'exceptional circumstances' and a potential intending parent under the age of 25 years is in fact suitable to take part in a surrogacy arrangement. SALRI suggests that the legislative age limit of 18 is increased to 25 for intending parents to be a party

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[486] Tasmania, *Parliamentary Debates,* House of Assembly, 14 April 2011, 43 (Kim Booth).

[487] Queensland, *Parliamentary Debates,* House of Assembly, 11 February 2010, 296 (Robert Messenger).

[488] New South Wales, *Parliamentary Debates,* Legislative Council, 11 November 2010, 27672 (John Hatzistergos).

[489] The real life example raised in consultation was a survivor of adolescent cancer who had their gametes frozen at the age of 13. By the time they reached the age of 23 and want to start their own family their gametes could already be 10 years old, reducing their likelihood of successful implantation. Consultees emphasised to SALRI that such parties could have the sufficient maturity to enter a surrogacy arrangement and may well have chosen to start their family at a younger age but for their medical circumstances.

to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a person under the age of 25 years acting as an intending parent.

14.5.22 Recommendation

Recommendation 24

SALRI recommends that any *Surrogacy Act* should provide that the intending parents must be at least 25 years of age in order to be a party to a lawful surrogacy agreement in South Australia, unless the Accredited Independent Counsellor, as part of the counselling (and screening) process, is satisfied that there are exceptional circumstances to support a person under the age of 25 years acting as an intending parent.

14.6 Surrogate mother has previously given birth to a live child

Current Law

14.6.1 There is currently no legislative requirement in South Australia for a surrogate mother to have previously given birth to a live child, although provisions are present in Western Australia, Tasmania and Victoria as outlined in Table C below.

Table C – Australian Legislative requirements for a surrogate mother to have previously given birth to a live child

Legislation	Section	Requirement	Mandatory condition?
QLD *Surrogacy Act 2010* (Qld)			
NSW *Surrogacy Act 2010* (NSW)			
WA *Surrogacy Act 2008* (WA)	s 17(a)(ii)	That the surrogate mother has given birth to a live child.	No, not mandatory where the Council is satisfied that there are exceptional circumstances because of which it should dispense with this requirement.
Tas. *Surrogacy Act 2012* (Tas)	s 16(2)(d)	That the surrogate mother has previously given birth to a live child.	No, the court may dispense of the requirement if the court considers that the making of the parentage order is in the best interests of the child. Court may consider any

			other matter it considers relevant see s 16(3).
ACT *Parentage Act 2004* (ACT)			
Vic. *Assisted Reproductive Treatment Act 2008* (Vic)	s 40(1)(b)	That the surrogate mother has previously carried a pregnancy and given birth to a live child.	No, the Patient Review Panel may approve of a noncomplying surrogacy arrangement if the Panel believes the circumstances of the proposed surrogacy arrangement are exceptional and it is reasonable to approve the arrangement in the circumstances. See s 41.

Consultation Overview

14.6.2 All the surrogate mothers that SALRI spoke to had previously carried a pregnancy and given birth to a child of their own.

14.6.3 None of the intending parents that SALRI consulted had a surrogate that had not previously had a child of her own.

14.6.4 The recent NSW Review did not support any legislative requirement that a surrogate mother should have previously given birth. The Review concluded:

> The Review does not recommend prescribing such a requirement in legislation. Presurrogacy counselling addresses the birth mother's individual circumstances, including whether she has given birth or not. Professional counsellors are best placed to consider emotional and physical risks that arise for each woman.[490]

14.6.5 Ms Webster and Dr Oxlad supported this approach in consultation with SALRI and cautioned against legislative prescription in this area.

14.6.6 Some parties disagreed and emphasised that surrogate mothers should be required to previously have had successful pregnancies and births as it ensures a surrogate can provide informed consent. Chief Justice Pascoe, for example, emphasised that if a surrogate mother has had a previous pregnancy, 'you know what pregnancy is like and you have some idea of how you would feel giving the child up'. The Association of Relinquishing Mothers (Vic) also said that it is important for a surrogate mother to have had the experience of giving birth to a child, rearing or having reared her own child, having gained some maturity and knowing some of the implications of giving a child she has nurtured through a pregnancy to others.

[490] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 23 [3.85].

14.6.7 It was also argued that surrogate mothers should have previously given birth, and ideally finished their own families as complications in a surrogate pregnancy may adversely impact the ability of surrogates to have children in the future. Dr Fronek, for example, noted that most other jurisdictions insist the surrogate mother has successfully completed at least one pregnancy. She believes that surrogate mothers should have to be over the age of 25 and have completed their own family as a surrogate pregnancy could have implications for future pregnancies (such as caesareans).

14.6.8 An alternative view was that, although it may be desirable for a surrogate mother to have had a previous child, it would be prescriptive and unhelpful to elevate this to a legislative or absolute requirement. The example of a sister or close friend without children who freely offers or agrees to act as the surrogate for an intending parent who is medically or physically unable to have children was cited to SALRI. The experiences of Eliza Cole also highlight that previously straightforward pregnancies are not necessarily indicative that a surrogacy arrangement will be without complications. Mr Page also noted he has acted in situations in Queensland and New South Wales where the surrogate has not had children before.

SALRI's Reasoning and Conclusions

14.6.9 Mr Hulls, emphasised that s 40(1)(b) was intended to enhance the consent given by the surrogate mother to the arrangement. Mr Hulls said:

> I believe if a surrogate mother has previously had a child, previously been through the birth experience, borne the child, gestated the child, she will be much better equipped to understand the implications of relinquishing a child. Having had her own child will help inform her in her decision to consent to hand over that child to a commissioning couple. There are lots of parallels for this. If you look at the French law in relation to medically assisted procreation, for example, it requires that a sperm donor must have already been a father before he can donate, and there are good reasons for that. It is important that people entering into these arrangements understand what it means to be a father or what it means to be a mother. If, as in this instance, they are going to be a surrogate mother, it is important that they understand what it is like to form emotional bonds and attachments to a child, to give birth to a child and to rear a child, so they can understand the enormity of the consequences of what they are going to do in entering into an agreement to relinquish that child.[491]

14.6.10 In Dr Hames' second reading of the Surrogacy Bill 2008 (WA) he highlighted that the requirement that a surrogate mother has previously given birth to a child when taken in combination with other provisions in the Act, is intended to ensure that the surrogate has 'carefully considered all the implications of a surrogacy arrangement and are suitable to take part in the arrangement.'[492]

14.6.11 Section 16(2)(d) was included in the *Surrogacy Act 2012* (Tas) on the basis of a recommendation made in the *Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011*.[493] It was considered that that it would allow a surrogate mother to provide fully informed consent as 'you do not know what it means to carry a child in term until you have gone through it.'[494] It was also noted that it could minimise negative health outcomes for the surrogate, Mr Hall stated:

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[491] Victoria, *Parliamentary Debates,* Legislative Assembly, 8 October 2008, 3938 (Robert Hudson).

[492] Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 December 2008, 737 (Kim Desmond Hames).

[493] Legislative Council Government Administration Committee, Parliament of Tasmania, *Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011* (2011) 68–69.

[494] Tasmania, *Parliamentary Debates,* Legislative Council, 27 March 2012, 66 (Greg Hall).

> Also it is not unusual that first pregnancies result in miscarriage or identify potential problems in carrying a foetus to full term. By ensuring the prospective surrogate has carried at least one previous child to term, this recommendation will overcome the possible heartache and disappointment suffered by both parties of potential difficulties with a first pregnancy.[495]

14.6.12 SALRI notes that in her submission to the 2011 Tasmanian Inquiry, Professor Millbank agreed that there was merit to a surrogate mother having previously experienced pregnancy and birth. However, she raised concerns that the inclusion of any such legislative requirement could prove overly rigid:

> We have had one disputed surrogacy arrangement in Australia and that involved a birth mother who had had three kids already. The surrogacy arrangement was her idea and she repeatedly raised it with the intended parents over a three-year period, yet when she had the child she was painfully depressed, could not bear the relinquishment, missed the child, thought she had made a terrible mistake and litigated for two years to get the child returned to her. This was a case in the 1990s case *Re Evelyn*. You can hope that if someone has had children before then they know what they are doing, but maybe they won't. Equally, there might be someone who has never had children who does understand themself sufficiently to know this is something that they can do and can do well. As it happens a lot of the clinics do require or prefer that a woman already has her own children, has completed her own family, for reasons that include not just psychological readiness but also, as you said, the possibility that pregnancy can go wrong and can impair your future fertility, for example. I can see that it is a desirable element but I would encourage you not to mandate it on the basis that you just lose that ability to make a case-by-case assessment.[496]

14.6.13 There is no nationally consistent approach to legislative requirements within Australia that the surrogate needs to have previously carried a pregnancy and given birth to a live child, so it is impossible to reach any conclusion for reform on this basis.

14.6.14 SALRI's view is that, although it may have some merit, a legislative requirement that a surrogate mother should have completed her own family is inappropriate and impracticable. Such a requirement in practice (although having some merit) would be very difficult to administer and it may intrude on legitimate situations. SALRI agrees with the approach of the recent NSW Review[497] and considers this issue is better addressed as part of the counselling (and screening) process.

14.6.15 Although the experience of pregnancy and birth may have important implications for a surrogate's ability to fully understand the implications of an agreement, it is an imperfect measure. Equally, although experiences in a woman's first pregnancy could alert professionals to potential risks that may arise during a surrogate pregnancy and birth, it is not a reliable indication of how a potential surrogate will experience future pregnancies.

14.6.16 It is preferable that an Accredited Independent Counsellor as part of the counselling (and screening) role discusses a prospective surrogate's previous birth and pregnancy experiences and if she has not previously been pregnant, her expectations of pregnancy and birth, and the possibility that acting as a surrogate could potentially adversely impact on her ability to have her own children in the future. SALRI considers that this is preferable to any legislative requirement.

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[495] Ibid.

[496] Legislative Council Government Administration Committee, Parliament of Tasmania, *Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011* (2011) 69.

[497] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 23 [3.82]–[3.85].

14.6.17 Recommendation

Recommendation 25

SALRI recommends that there should be no legislative requirement for a surrogate mother to have previously carried a pregnancy and given birth to a live child in order to access a lawful surrogacy agreement in South Australia, on the basis that this consideration should be addressed as part of the counselling (and screening) process.

Part 15 - Singles Access to Surrogacy

15.1 The current position

15.1.1 In its 2016 Report, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy*,[498] SALRI noted that 'an important issue' which had been raised in its consultation was the present law that precluded single people from accessing lawful surrogacy.[499] SALRI was unable to identify any cogent reason for this prohibition and observed that this restriction appeared discriminatory and at odds with the approach of other Australian jurisdictions.[500] SALRI concluded: 'If single people are seeking to make surrogacy arrangements, it is far preferable that they be permitted access to the lawful [South Australian] surrogacy provisions … that include a range of important legal protections for the rights of the child and the surrogate, rather than making unlawful or lawfully precarious arrangements with surrogates in Australia or overseas.'[501] SALRI recommended that Part 2B of the *Family Relationships Act 1975* (SA) should be amended to provide single people (as well as people from the LGBTIQ community) access to surrogacy in South Australia.[502]

15.1.2 In November 2016, in response to the SALRI Report, the original version of the Statutes Amendment (Surrogacy Eligibility) Bill 2017 (SA) included a provision to remove the restriction on single persons accessing surrogacy. However, at the Committee Stage in the House of Assembly, the Bill was amended to remove any reference to single people. Upon moving this amendment, Mr Lee Odenwalder MP explained that singles were removed from the Bill to ensure that it was able to achieve its 'primary aims', namely access to surrogacy for members of the South Australian LGBTIQ community:

> Essentially, this amendment is an attempt to alter the Bill so that it achieves what I think are its primary aims. I will not go on about it, but essentially it removes references to single people of any gender or persuasion being able to access surrogacy. This is in no way a reflection on single parents, of course; I have been a single parent myself, but generally I do not think it is people's first choice as to their family arrangements. Be that as it may, I want to be clear that I see this Bill as trying to achieve some loosely related things. To my mind at least, I see that there is a hierarchy of things this Bill is trying to achieve, and my fear is that in our attempt to push through a Bill which, as some people have pointed out, puts together some things which at first sight do not quite sit together, we will lose some important reforms aimed at addressing some unnecessary discrimination. This amendment and the consequential amendments take out references to single people accessing surrogacy. To my mind, at the top of the hierarchy I am talking about those couples, of any gender or sexual orientation, who want to start a family but who, for whatever reason, cannot. In the first instance, I am specifically thinking of a lesbian couple accessing IVF. We all know of the ridiculous lengths they have to go to now, the cost involved in travelling to, generally, Victoria or New South Wales to access these things. For me, that is the main or primary

[498] South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016).

[499] Ibid 65–66 [2.5.44].

[500] See *Surrogacy Act 2010* (NSW) s 25; *Assisted Reproductive Treatment Act 2008* (Vic) ss 3, 40; *Surrogacy Act 2010* (Qld) s 9; *Surrogacy Act 2008* (WA) s 3; *Surrogacy Act 2012* (Tas) s 5(1)(b). The Australian Capital Territory requires two 'substitute parents' to grant a substitute parentage order see *Parentage Act 2004* (ACT) s 24(c). The Northern Territory has no legislation in relation to surrogacy.

[501] South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016) 66 [2.5.47].

[502] Ibid 66 Rec 17.

> aim of this Bill, not discounting the important reforms below that in the hierarchy. These amendments are an attempt to see that we do not lose some good reforms in pursuit of other reforms for which there may be less demand. My sincerest intention with these amendments is to see this Bill pass, that is my sincere intention, and so approach this issue in a more incremental fashion. There may be Bills later, and I may vote for them, but I want to approach it in a more incremental, rather than have an all or nothing approach that could leave us with nothing.[503]

15.1.3 In the debate, the Hon Vickie Chapman MP highlighted that there are many 'reasonable' circumstances where a single person may need to enter a surrogacy arrangement to form their family:

> A commissioning parent who was single at the time of entering into a contract for surrogacy could be in a circumstance where they had lost their partner through death, they had another child, or they had lost the fertilised eggs that were sitting in the Flinders Medical Centre and died when we had a blackout recently. Now we are hearing that some of those parents are of course concerned because they are now of an age when they are unlikely to be able to have a healthy fertilised egg again. There are those sorts of circumstances.[504]

15.1.4 The apparent illogicality of the amendment to restrict singles' access to surrogacy within the context of the broader legislative reforms into remedy against discrimination did not go unnoticed. The Hon Tony Piccolo commented: 'I think that, as a matter of principle, if you are trying to deal with discrimination and you are going to use discrimination as part of the answer, that is untenable.'[505] The Hon Steph Key MP also remarked:

> I know a number of single people who would be offended by the fact that they have been taken out of what I consider to be a series of equal opportunity pieces of legislation that we have been dealing with. All of a sudden, we are now going to cut them out of it because they are single. I just think this does not make sense of the legislation that we are trying to put through.[506]

15.1.5 SALRI notes from this debate that the present law that precludes single access to surrogacy appears to be the result of a political compromise to extend eligibility for surrogacy to the LGBTIQ community as opposed to any firm expression of Parliamentary intent.

15.2 Consultation Overview

15.2.1 Virtually universal support was expressed to SALRI in its consultation to discard the current restriction on single people accessing lawful surrogacy. A YourSAy participant stated:

> Just because someone is single should not preclude them from becoming a parent and if for whichever medical reason they are unable to carry a pregnancy themselves (female) or a male that has made the decision they wish to be a parent responsibly so as to not put a child through potentially harmful custody disputes should not be discriminated on the basis they are not in a longer term relationship or marriage. Just because people are married or have been together in a marriage like relationship for the required time does not ensure that they will be better parents, or that within a short time won't separate so a child could still end up living with just one parent. Just as ART/IVF was once not available/accessible by single women but is now so should surrogacy be made available to all.

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[503] South Australia, *Parliamentary Debates,* House of Assembly, 16 November 2016, 7918 (Lee Odenwalder).

[504] South Australia, *Parliamentary Debates*, House of Assembly, 16 November 2016, 7918 (Vickie Chapman).

[505] South Australia, *Parliamentary Debates,* House of Assembly, 17 November 2016, 8074 (Tony Piccolo).

[506] South Australia, *Parliamentary Debates,* House of Assembly, 16 November 2016, 7919 (Steph Key).

15.2.2 SALRI has heard powerful stories in consultation from single people about their difficult journeys which have led them to surrogacy. These stories powerfully demonstrate the problems of the present law.

15.2.3 **Case Study: J's Story (continued)**[507]

> J is a 36-year-old man. He now tragically finds himself single and therefore in the 'ridiculous' situation of being unable in South Australia to lawfully access surrogacy.
>
> In February 2017, his long-term partner (A) was diagnosed with breast cancer. After A's initial diagnosis and before she began the process of chemotherapy treatment, they collected their reproductive material and froze embryos. At this stage of the process they did not think surrogacy was going to be a step they would need to take, but they had always discussed and wanted a family together. They put all the precautions in place that they could to ensure they could have a family and thought they would have the opportunity to have children after they had gotten through her treatment.
>
> Unfortunately, A was given a terminal diagnosis. At around this time J and A got married. J and A decided to go down the path of surrogacy as their final option to create a family together. J saw a lawyer with A to seek advice about entering a surrogacy arrangement. J and A had a lot of difficulty finding a surrogate, in what was a very time sensitive situation.
>
> A's cousin, S, who was also a 'great friend', ultimately offered to be a surrogate. S is married and has a child of her own. 'That [surrogacy] is her gift'. The cousin's partner was also very supportive. A and J were both happy with this choice and she felt like a great fit for them. J's wife passed away a few days after her cousin offered to be a surrogate. After A passed away, surrogacy was no longer an option for J to form a family as surrogacy is not available for singles in South Australia. J pointed out the double standards and hypocrisy that if he had passed away and not his wife, she would have been able to access his genetic material and go ahead and form their family, but he cannot. At 36 he said there was a good chance this could be his last opportunity to have a child. J has sought advice from a lawyer here in South Australia that he should investigate an arrangement in Victoria or New South Wales.

15.2.4 **Case Study: Hailey's Story (continued)**[508]

> Hailey was diagnosed with Mayer-Rokitansky-Küster-Hause Syndrome (MRKH) at age 21. Due to Hailey's condition, she was born without a uterus. After seeing five different specialists and six years of investigations, Hailey was finally diagnosed with an MRI.
>
> Following her diagnosis, Hailey always knew that adoption or surrogacy would be her only options to start her own family. Hailey, however, had always 'just thought you get married and then have kids'. After her 30th birthday, Hailey decided to have an Anti-Mullerian Hormone (AMH) test to check her egg levels. The test revealed that Hailey's ovarian reserve was 'quite low' for her age. At the recommendation of the specialists at the fertility clinic, Hailey immediately began the grueling process of daily hormone injections and egg retrieval. On her first round, they were able to retrieve eight eggs. A minimum of 10–20 eggs are considered a 'good number' for freezing, so she underwent another round of egg retrieval. Hailey was told by two fertility specialists that creating embryos in the future with frozen eggs is less successful than with fresh embryos, 'which puts a short time frame on creating embryos'. Hailey began the process of creating embryos using donor sperm through the fertility clinic.

[507] See above [14.3.12].

[508] See above [14.3.11].

She called a solicitor for advice about the surrogacy process. She was told it was not lawful in South Australia to engage in a surrogacy arrangement as a single intending parent. Hailey commented that if she had not received this advice, the clinic would have gone ahead with the procedure.

Hailey was advised that she would need to 'figure out elsewhere the surrogacy side of things'. Hailey decided to go ahead with an arrangement in New South Wales where singles can access surrogacy. The fertility clinic where Hailey initially went for her egg retrieval uses sperm donors from the United States. In New South Wales, however, embryos may only be created using Australian donor sperm that is not likely to result in offspring being born to more than five women, any current or former spouse of the donor (*Assisted Reproduction Act* (NSW) s 27(1)). This is known colloquially as the 'five family limit'. If Hailey had not been made aware of these legislative requirements before she had created embryos, she would have been left with embryos she could not use.

To meet the New South Wales requirements, Hailey was required to change fertility clinics. At her new fertility clinic, Hailey had two local donors to choose from that were also within the 'five family limit'. In two cycles, Hailey was able to create seven embryos for transfer in New South Wales. Hailey is currently 'living in New South Wales' using her cousin's address to meet the residency requirements under the New South Wales legislation. Hailey was recommended to use a New South Wales address by a member of the online surrogacy networks.

Hailey's cousin offered eight years ago when she was diagnosed with MRKH to be her surrogate. She made the offer on the condition that she did not want to be a surrogate over the age of forty. She is now nearly forty years old.

Hailey and her surrogate have undergone counselling at the fertility clinic and independent counselling. Hailey's surrogate was also required to undergo a psychological review. Ethics approval is a requirement in New South Wales. Hailey commented 'it's been a lot to go through, but it might be my only chance to have a baby.'

15.2.5 Many parties in consultation emphasised their objection to the present law denying singles access to surrogacy in South Australia. Alice, an intending parent, for example, noted her full support for single South Australians having access to surrogacy and IVF in South Australia and described the current law as 'bizarre'. The South Australian Equal Opportunity Commission highlighted the unfairness and illogicality of the present law and the overwhelming case for its amendment to allow singles as well as couples to access surrogacy. The Equal Opportunity Commission, Mr Page, Mr Everingham and others in consultation and the YourSAy contributions described this law as discriminatory.

15.3 SALRI's Reasoning and Conclusions

15.3.1 SALRI agrees with this view and reaffirms the position it expressed in 2016.[509] There is no sound basis for the present law.[510] It is significant that almost all other Australian jurisdictions allow singles access to surrogacy.[511] The recent English experience is also significant.[512]

15.3.2 SALRI concludes that the present South Australian law that denies single people the ability to access surrogacy is unsatisfactory and discriminatory and should be repealed.

15.3.3 Recommendation

Recommendation 26

SALRI recommends that the current prohibition in South Australia on single people accessing surrogacy is discriminatory and inappropriate and should be repealed.

[509] South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016) 66 Rec 17.

[510] See also Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 10 [3.15].

[511] See above n 500.

[512] The English decision in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam) criticised the discriminatory features of the English legislative regime that also precludes single people from accessing surrogacy arrangements. The High Court made a declaration that the lack of power to make a parentage order for a single intending parent under s 54(2) of the *Human Fertility and Embryology Act 2008* is incompatible with Article 14 (right to prohibition from discrimination) in conjunction with Article 8 (right to respect for private and family life) of the *European Convention on Human Rights*. A draft remedial order has been issued to remedy the discrimination and is expected to soon come into effect.

Part 16 - 'Team Baby' and the genetic relationship between the intending parents and the child

16.1 Context

16.1.1 Intending parents in order to access lawful surrogacy in South Australia must be unable to carry a child because they have a medical or social need for surrogacy.[513] In some situations, however, one or both intending parent may also not be able to provide human reproductive material (sperm or ovum) for the conception of the child.

16.1.2 One of the most sensitive issues that arose in SALRI's research and consultation was the situation of 'team baby', this is where both donor ovum and sperm are used in a surrogacy arrangement and there is no genetic link between the intending parents and the child born as a result of surrogacy.[514] Given advances in medical technology and the high rate of infertility, this is a real issue. Different views were expressed to SALRI about the team baby question and whether an intending parent should have to provide human reproductive material for the purposes of accessing a lawful surrogacy arrangement. Different views have been expressed and positions taken elsewhere in Australia to this difficult question.

16.2 Current Law

16.2.1 The present law (which is not entirely clear) provides that, to amount to a recognised South Australian surrogacy arrangement, the agreement must state that the parties intend that human reproductive material with respect to creating an embryo for the purposes of the pregnancy will be provided by at least one of the intending parents. However, this is not an absolute rule and is subject to the issue of a certificate under s 10HA(5).[515] A certificate issued under s 10HA(5) must be issued by a medical practitioner and must state, in the opinion of the medical practitioner, that both prospective intending parents appear to be infertile or there is a medical reason why it would be preferable not to use human reproductive material provided by the prospective intending parents to create an embryo for the purposes of achieving a pregnancy. In this situation, parties can access lawful surrogacy even if there is no genetic link between the intending parents and the child born as a result of surrogacy.

16.2.2 The Family Relationships (Surrogacy) Amendment Bill 2017 also provided that a pregnancy, the subject of a lawful surrogacy agreement, may be achieved without the use of human reproductive material from either of the intending parents but only if a medical practitioner is satisfied that both of the intending parents appear to be infertile or there is medical reason why it would be preferable not to use such human reproductive material to achieve the pregnancy.

16.2.3 There are different requirements in relation to the genetic relationship between intending parents and the child and the surrogate mother and the child in each Australian jurisdiction:

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[513] See above [14.3.1]–[14.3.23].

[514] The term 'Frankenstein's baby' was also raised in this context in consultation. SALRI accepts the view of Dr Oxlad that the term 'Frankenstein's baby' is inappropriate. Dr Oxlad noted her concern about how the use of such terminology could impact children born as a result of donor conception and/or surrogacy.

[515] *Family Relationships Act 1975* (SA) s 10HA(2a)(h)(ii).

- In Victoria, the Patient Review Panel may approve a surrogacy arrangement if the Panel is satisfied that the surrogate mother's oocyte will not be used in the conception of the child;[516]
- In the Australian Capital Territory, the surrogate mother may not be the child's genetic parent and at least one intending parent must be genetically related to the child;[517]
- In Western Australia, certain requirements may be dispensed with at the parentage order stage if one of the intending parents is the child's genetic parent;[518]
- In Queensland and Tasmania, an expansive view is adopted. It is a guiding statutory principle that the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of whether there is any genetic relationship between the child and any of the parties to the arrangement;[519] and
- The New South Wales Act is silent on the issue.

16.2.4 Table D below summarises the legislative provisions in relation to the human reproductive material provided in respect of lawful surrogacy agreements in Australian jurisdictions.

Table D: Legislative provisions in relation to the human reproductive material provided in respect of surrogacy arrangements in Australian jurisdictions

Legislation	Section	Requirement	Mandatory condition?
QLD *Surrogacy Act 2010* (Qld)	s 6(2)(b)(ii)	The same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of whether there is a genetic relationship between the child and any of the parties to the arrangement.	Section 6(2)(b)(ii) is a guiding principle of the Act.
NSW *Surrogacy Act 2010* (NSW)	N/A.	N/A.	N/A.
WA *Surrogacy Act 2008* (WA)	s 21(3)–(4)	No but certain requirements may be dispensed with if the surrogate mother is genetically related to the child and at least one of the intending parents is the child's genetic parent.	No.

[516] *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a).

[517] *Parentage Act 2004* (ACT) s 24.

[518] *Surrogacy Act 2008* (WA) s 21(3)–(4).

[519] *Surrogacy Act 2010* (Qld) s 6(2)(b)(ii); *Surrogacy Act 2012* (Tas) s 3(2)(b)(ii).

Tas. *Surrogacy Act 2012* (Tas)	s 3(2)(b)(ii)	The same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of whether there is a genetic relationship between the child and any of the parties to the arrangement.	Section 3(2)(b)(ii) is a guiding principle of the Act.
ACT *Parentage Act 2004* (ACT)	s 24	Neither birth parent of the child may be the genetic parent of the child and at least one of the intending parents must be a genetic parent of the child.	Yes.
Vic. *Assisted Reproductive Treatment Act 2008* (Vic)	s 40(1)(a)	The Patient Review Panel may approve a surrogacy arrangement if the Panel is satisfied that the surrogate mother's oocyte will not be used in the conception of the child.	No. See s 41 The Patient Review Panel may approve a surrogacy arrangement, despite failing to be satisfied of the matters referred to in section 40(1) in relation to the arrangement, if the Panel believes— (a) the circumstances of the proposed surrogacy arrangement are exceptional; and (b) it is reasonable to approve the arrangement in the circumstances.

16.3 Background to the current law

South Australia

16.3.1 On 21 June 2006, the Hon John Dawkins MLC introduced the first South Australian Bill, the Statutes Amendment (Surrogacy) Bill 2006, to regulate surrogacy in South Australia. Mr Dawkins emphasised that the law was intended to regulate arrangements involving heterosexual married intending parents that were able to provide their own reproductive material for the conception of a genetically related child through a close family member acting a surrogate. He explained:

> The Bill I introduce today is to amend the *Reproductive Technology (Clinical Practices) Act* and the *Family Relationships Act* in relation to what is known as altruistic gestational surrogacy. For many months I have been working with two female constituents who are unable to carry children, although they are capable of falling pregnant. One now has a son, due to the willingness of her cousin to be a surrogate mother for a child which has the genetics of both the constituent and her husband. This

> surrogacy was carried out interstate, as such practices are illegal in South Australia. In the other lady's case her mother was willing to carry a child that would become her grandchild, but subsequently the woman's aunt is carrying the child. These people are seeking the legalisation in South Australia of what is known as altruistic gestational surrogacy, as well as the recognition on birth certificates of the genetic parents of children born via this process.[520]

16.3.2 However, the 2006 Bill[521] proposed that at least one of the intending parents would provide human reproductive material with respect to creating an embryo for the purposes of the pregnancy, unless the parenting parents had a certificate issued under what is now s 10HA(5) of the 1975 Act. Such a certificate was to be issued by a medical practitioner and state that, in their opinion, both prospective intending parents appear to be infertile; or there is a medical reason why it would be preferable not to use human reproductive material provided by the prospective commissioning parents to create an embryo for the purposes of achieving a pregnancy.[522] The 2006 Bill was silent in respect to 'traditional' surrogacy arrangements.[523]

16.3.3 The 2006 Bill was ultimately withdrawn[524] but the provisions in respect to the genetic relationship between the intending parents and the child remained unchanged when the *Statutes Amendment (Surrogacy) Act 2009* (SA) eventually came into effect. These requirements have remained unchanged and currently can be found in ss 10HA(2a)(h)(ii) and 10HA(5) of the 1975 Act. There are no requirements, unlike Victoria and Tasmanian, in Part 2B of the 1975 Act that prohibit 'traditional surrogacy' in South Australia where the surrogate mother provides her own oocyte for the pregnancy.

16.3.4 The Family Relationships (Surrogacy) Amendment Bill 2017 (SA) also provided that a pregnancy the subject of a lawful surrogacy agreement could be achieved without the use of human reproductive material from either of the intending parents if a medical practitioner is satisfied that both of the intending parents appear to be infertile or there is medical reason why it would be preferable not to use such human reproductive material to achieve the pregnancy.

16.3.5 There has been no apparent significant South Australian parliamentary debate on the sensitive issue of a genetic link between the intending parents and the child or the surrogate mother and the child.

16.3.6 The Social Development Committee, as part of its 2006 South Australian Inquiry, considered the necessity of a genetic link to the intending parents in a surrogacy arrangement. The Committee acknowledged that there were six potential 'permutations' of a surrogacy arrangement involving intending parents that were a heterosexual couple, where:

- The intending father and intending mother, both provide human reproductive material;
- The intending mother provides her ovum and donated sperm is used;
- The intending father provides his sperm and a donated ovum is used;
- The intending father provides sperm and the surrogate's ovum is used;

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[520] South Australia, *Parliamentary Debates,* Legislative Council, 21 June 2006, 437–438 (John Dawkins).

[521] Statutes Amendment (Surrogacy) Bill 2006 s 10HA(2)(viii)(B).

[522] Ibid s 10HA(5).

[523] This is the situation where there is a direct genetic link between the surrogate mother and the child born as a result of surrogacy. See above Glossary.

[524] The 2006 Bill introduced by the Hon John Dawkins MLC was withdrawn and referred to the Social Development Committee: Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (2007).

- The surrogate's ovum and donated sperm is used; and
- Donated sperm and egg are used.[525]

16.3.7 There was some hesitation from participants to the 2006 Inquiry such as Professor Rob Norman who noted that the introduction of donated human reproductive material could render such arrangements 'very murky'.[526] Professor Norman commented that as a starting point it was important to 'get the basics sorted out where you have clearly defined genetic parents and a woman who agrees to carry those embryos, but to have other parties involved through donor gametes would be unwise'[527]

16.3.8 Dr Christine Kirby, however, told the 2006 Committee that the prohibition of the use of donor reproductive material would be discriminatory and that the use of donated material was already accepted in all other assisted reproductive treatment contexts[528] (a theme which Dr Richards has also raised in consultation to SALRI).

16.3.9 The Committee acknowledged that the donation of human reproductive material could add a layer of complexity to surrogacy arrangements but accepted that there were situations where neither intending parent could provide human reproductive material in respect of the arrangement:

> The issue of whether donor reproductive material should be used in gestational surrogacy is complex. Using the reproductive material of the commissioning parents in gestational surrogacy procedures establishes a biological link between them and their child. The Inquiry heard that a genetic link between the commissioning parents and child may minimise the risk of any legal complications. The Inquiry also heard that imposing a requirement for at least one commissioning parent to provide reproductive material will still provide for a genetic link but will allow greater flexibility in the types of gestational arrangements that could be considered. Should it not be medically possible for either the commissioning mother or father to provide reproductive material for a surrogacy procedure, the South Australian Council on Reproductive Technology suggests that in such situations it "may be more appropriate for the commissioning couple to adopt a child". Nevertheless, the Council argues that because unused embryos created through IVF procedures can be donated; there is no reason why they should not be used in gestational surrogacy arrangements.[529]

16.3.10 SALRI notes that there have been significant legal, social and medical developments since 2006 that have arguably shifted attitudes further towards the increased use of donated reproductive material in the surrogacy context such as developments with respect to ART and donor conception and particularly now that surrogacy is available to South Australians in same-sex relationships.[530]

Other Australian Jurisdictions

16.3.11 The 2016 Commonwealth Standing Committee Inquiry did not offer any detailed comment as to how the law should regulate the genetic relationship between the child and the parties to a surrogacy arrangement. The Commonwealth Committee commented:

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[525] Ibid 59.

[526] Ibid 60.

[527] Ibid.

[528] Ibid.

[529] Ibid 61.

[530] See *Statutes Amendment (Surrogacy Eligibility) Act 2017* (SA); South Australian Law Reform Institute, *Rainbow Families: Equal Recognition of Relationships and Access to Existing Laws Relating to Parentage, Assisted Reproductive Treatment and Surrogacy* (May 2016).

> The varied permutations of the source of genetic material that contribute to the biological makeup of a child sits alongside regulatory and legislative responses that make surrogacy a complex field of examination.[531]

16.3.12 There have been a range of views and rationales expressed in State and Territory Parliaments, legislative inquiries and law reform reports as to the purposes of restricting access to domestic surrogacy based upon an intending parent's ability to provide genetic material in respect of an arrangement.

Western Australia

16.3.13 In 2008, Western Australia was the second Australian jurisdiction to allow surrogacy. The West Australian Parliament took a relatively cautious approach. The genetic relationship between the child and the intending parents, was considered one of the 'serious encumbrances and complexities' that generated significant debate on the Surrogacy Bill 2007 (WA).[532] Dr Jacobs, for example, stated:

> If this Surrogacy Bill had been fashioned without those encumbrances, it would have delivered, for those very deserving couples who cannot have children, the opportunity to have children. This Bill provides the potential for that to happen, but because of all the encumbrances, we are having this debate. There is nothing wrong with a debate, but members from both sides of the House have outlined their misgivings about all the combinations and permutations, and all the complexities and perhaps complications. The Member for South Perth spoke about genetic bewilderment. There may be children who say, "Who am I?" Because of this Bill, a situation can arise whereby neither of the adoptive parents will have contributed any genetic material to the child. There are three areas of missed opportunity, and if they had been addressed, I think the Surrogacy Bill would have received the wholehearted support of this place, would have passed through Parliament and would have been fulfilling the need of those people that I believe it is designed for. In short, to make this Bill unencumbered and able to do what it should do for those deserving couples in Western Australia, it must ensure that only married or de facto couples of opposite sexes can produce a child through surrogacy; that the birth mother is not the child's genetic parent; and that at least one of the commissioning parents is the child's genetic parent. Speakers have suggested that the genetic material should be from the commissioning father and the mother. I would suggest that the genetic material should be from at least one of the couple.[533]

16.3.14 Dr Kim Hames MLA emphasised that, despite fears from other Members of 'social engineering', imposing any requirements in respect to the genetic relationship between the intending parents and child would be arbitrary. He outlined:

> These parents are in these circumstances because they have no other choice; they have nowhere else to go. Quite obviously, if those people were able to contribute their genetic material to that mix, by the male contributing his sperm or the female contributing her egg, they would. Why would they not want to do that of their own volition and choice? Why would they not want to have their own genetic material as part of the child to be born and to come into their care? The only time they would not do that would be when they were unable to do so. If they were unable to do so, why would the Member for Armadale put these poor people through all these hoops and bars and make them qualify only under exceptional circumstances? Is it because the Member for

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[531] 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* (April 2016) 1.

[532] Western Australia, *Parliamentary Debates,* Legislative Assembly, 2 December 2008, 759 (Graham Jacobs).

[533] Ibid.

> Armadale believes it is better for one to be a genetic parent? I would bet that those parents believe that too and that it is what they want.[534]

16.3.15 The *Surrogacy Act 2008* (WA) ultimately did not include any requirements in relation to the genetic relationship between the child and the parties. The Western Australian Act enables a court to dispense of the requirement that the surrogate has received counselling, the surrogate has received independent legal advice, the surrogate's consent and for the surrogate to have agreed to an approved plan for the child's long-term welfare.[535] Although there are no explicit requirements in respect to the genetic relationship between intending parents and the child, the Western Australian Act contemplates, or seems to favour, intending parents who are able to provide human reproductive material.

Victoria

16.3.16 Some participants in a 2007 review by the Victorian Law Reform Commission (VLRC)[536] argued that at least one intending parent should be genetically related to the child noting that 'if neither of the commissioning parents is able to contribute their gametes, then surrogacy might not be an appropriate method for having a child, and that perhaps parties should instead consider adoption.'[537] Other submissions to the VLRC argued that any such requirement could be discriminatory, that there is a large number of donated embryos available and that donated embryos are used in other ART contexts.[538] The VLRC ultimately recommended that no restriction be imposed on the basis of the intending parents' ability to provide human reproductive material. It explained:

> Having considered these arguments in depth, we have concluded that it is difficult to generalise about the value of genetic connections in family relationships … individuals place different weight on genetic connection to their parents and children. Outcomes for children are not necessarily dependent on whether they are genetically related to the people who parent them.[539]

16.3.17 It is significant that the Victorian model still takes a cautious approach in this area.

Queensland

16.3.18 A range of views were expressed to the Queensland Parliament's 2008 Inquiry about the importance of a genetic relationship with the intending parents.[540]

16.3.19 One woman who had previously acted as a surrogate mother likened surrogacy in the absence of a genetic link to a private adoption.[541] The Australian and New Zealand Infertility Counsellors Association similarly told the Queensland Committee:

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[534] Western Australia, *Parliamentary Debates,* Assembly, 3 December 2008, 906 (Kim Hames).

[535] *Surrogacy Act 2008* (WA) s 21(3)–(4).

[536] Victorian Law Reform Commission, *Assisted Reproductive Technology,* Report (2007).

[537] Ibid 177.

[538] Ibid.

[539] Ibid.

[540] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 48–52.

[541] Ibid 48. For an academic comparison of embryo donation and adoption see Fiona MacCallum and Heather Widdows, 'Ethical Issues in Embryo Donation' in Martin Richards, Guido Pennings and John Appleby (eds), *Reproductive Donation: Practice, Policy and Bioethics* (Cambridge University Press, 2012) 270–288.

> At least one intending parent should have a biological relationship to the child. The complexity of the familial arrangements should be minimised while attempting to ensure a link between the child and the family in which they are raised.[542]

16.3.20 Other parties, including the Australian Association of Social Workers (Queensland) and Queensland Fertility Group argued that a genetic relationship between the intending parents and the child born as a result of surrogacy should not be a legislative requirement for surrogacy as it could discriminate against people on the basis of their particular infertility.[543] The Queensland Fertility Group argued:

> It is not necessary for one of the [intending] parents to have a genetic relationship with the child. Genetic conditions or loss of fertility due to oocyte [egg] or sperm difficulties are treated by the use of donated gametes or embryos. The NHMRC ethical guidelines on the use of ART in clinical practice endorsed embryo donation as an ethical option in the treatment of infertility. In this instance neither the birth mother nor the social father of the person born is the genetic parent.[544]

16.3.21 The Queensland Committee considered that the preferred approach was to not include any specific requirements in the law in relation to a genetic connection with the surrogate mother or the intending parents.[545] It concluded:

> The paramount concern for children's best interests leads the Committee to require intending parents to contribute their gametes unless this is impossible or not medically recommended. It is recognised that an altruistic surrogacy arrangement with full genetic connection to the intending parents has the least potential risk for children, the birth mother and intending parents. However, the Committee believes that it is inequitable to limit surrogacy to individuals who have the capacity to provide their own genetic material, given:
>
> • Donor conception, including embryo donation, is already occurring;
>
> • Evidence from studies into donor conception shows that a genetic connection is not a strong determinant of the capacity to be a good parent;
>
> • The outcomes for children born from donor insemination and their families have been shown to be largely positive; and
>
> • Many different types of families, with and without genetic connections, already exist in the community.
>
> It is the Committee's view that identified need for surrogacy rather than genetic connection should shape requirements for access to ART and transfer of legal parentage in altruistic surrogacy.[546]

16.3.22 The Committee's preferred approach was ultimately adopted by the Queensland Parliament.[547] Some MPs during the parliamentary debate emphasised the importance of a genetic connection between the child and the intending parent. Mr Springborg, for example, said:

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[542] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 49.

[543] Ibid.

[544] Ibid. See also National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (20 April 2017), guideline 6 (for the use of donated embryos).

[545] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report* (2008) 54.

[546] Ibid.

[547] *Surrogacy Act 2010* (Qld) s 6(2)(b)(ii).

> I also have serious concerns about what is proposed in this legislation in that there does not have to be a clear genetic relationship between those people who are desiring to be parents under this arrangement and the surrogate mother. There are volumes of research around the place that indicate absolutely and clearly that, for the identity of that child and the stability of that child further down the track, wherever possible there should be a clear genetic relationship with that child. That comes back to the DNA that has been provided by those people who are going to be that child's parents. Clearly, there is a reason for that. As I said, it helps that person not only to discover but also to understand their identity and to ensure that surrogacy is a limited option—which it should be—for medical reasons, not for the social desires and mores and perceived rights of people who really would not be able to expect to have a child in a normal environment.[548]

Tasmania

16.3.23 The *Surrogacy Act 2012* (Tas) takes a similar approach as Queensland. As Mr Rockcliff explained in the parliamentary debate:

> Any methods of conception would be recognised, there would be no restrictions on the use of genetic material used in the conception of a child … Therefore the legislation before us today goes well beyond that of most other States and Territories.[549]

16.4 Consultation Overview

16.4.1 SALRI has heard in consultation that intending parents who use embryo donation have already experienced a prolonged and often traumatic journey of infertility.

16.4.2 There was no consensus in SALRI's consultation about the team baby question and whether an intending parent should have to provide human reproductive material for the purposes of a lawful surrogacy arrangement.

16.4.3 Dr Patricia Fronek, a social worker with a research interest in this area, does not support allowing children to be conceived through a surrogacy arrangement where there is no genetic relationship with either intending parent. She commented that she thought it was 'dangerous and could constitute the sale of children under international law'. She said it was like 'adoption by default', effectively creating a child for adoption which goes against all principles of international adoption.

16.4.4 Chief Justice Pascoe also expressed concerns to SALRI about surrogacy arrangements where neither intending parent donates reproductive material to create the embryo for the purpose of achieving a pregnancy. The Chief Justice noted this is a sensitive issue as both parents may be medically unable to have a child. However, the Chief Justice believes that there has to be a genetic link between at least one of the intending parents and the child born as a result of surrogacy. He emphasised the importance of DNA in the context of family law generally and its application to the orders the court makes. Chief Justice Pascoe is concerned that if there is no genetic relationship between the child and either intending parent, then the Family Court would only be able to grant parenting orders on the basis that it is in the best interests of the child, which is generally the Family Court's 'last line of defence' and parenting orders are not designed for such situations but rather for cases that involved, for example grandparents. Ultimately, the Chief Justice is concerned that if intending parents do not have a genetic relationship to the child it may be easier for them to 'back out'.

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[548] Queensland, *Parliamentary Debates,* Legislative Assembly, 10 February 2010, 140 (Lawrence Springborg).

[549] Tasmania, *Parliamentary Debates,* Legislative Council, 5 April 2011, 61 (Jeremy Rockliff).

16.4.5 Chief Justice Pascoe's submission to the 2016 Commonwealth Committee also noted that intending Australian parents who are unable to provide genetic material in respect of a surrogacy arrangement are not able to access surrogacy arrangements overseas as other intending parents:

> In order for a surrogate child to be bestowed with Australian citizenship, the child must have parentage orders issues by a State or Territory. Australian courts rarely grant parentage orders in cross-border cases. Subsequently, surrogate children born overseas without a direct DNA link to an Australian parent may not be able to obtain Australian citizenship. There may also be difficulty in obtaining passports and travel documents for the child because the names on the child's birth certificate may be that of the surrogate mother and an 'unknown' father, as issued by the surrogate mother's country.[550]

16.4.6 Chief Justice Pascoe had concerns about social engineering and that it could be 'moving well down the line of commodification' if intending parents are able to select an embryo with 'desirable characteristics.'

16.4.7 Kristopher Wilson, an academic with research interest in the legal impact of technology at Flinders University and an Oxford PhD candidate, in his submission, cautioned against comparisons to the donation of embryos for a surrogacy arrangement and the manipulation of the DNA of embryos to produce desirable characteristics. Mr Wilson said that 'the whole designer baby issue needs to be put to one side', when discussing surrogacy arrangements where there is no genetic link to either intending parent, as they are 'two completely different technology.' He emphasised that it was like 'comparing apples with oranges' and the two issues were 'connected but completely different issues.'

16.4.8 Mrs F supported the concept of 'team baby' and said that where both of the intending parents (or a single intending parent) are effectively unable to have a child, there is no logical reason to deny them access to surrogacy. Dr Richards expressed a similar view.

16.4.9 Professors Millbank and Stuhmcke questioned the necessity of a genetic link between the intending parents and the surrogate child and believes it is an attempt to 'somehow normalise [surrogacy] to some degree', but noted, 'how does it make it any more normal or usual?' They noted that it was never a first option for intending parents to have no genetic relationship to their child and it may result through a 'pattern of resignation and adjustment to failure and revelation of infertility over a long period of time.' They said: 'No one wakes and says let's have a completely unrelated child' and it only happens when intending parents have 'been through every other possibility' and it is a 'last resort.' They emphasised that there will be perfectly deserving situations where parties should be able to access lawful surrogacy regardless of any genetic link with the child.[551]

16.4.10 From the experiences of the participants in their recent study, Professors Millbank and Stuhmcke told SALRI that there is a shortage of egg donors in Australia, but there are more donor embryos available because of IVF. Chief Justice Pascoe said that he had concerns in this context about siblings potentially not having any relationship with each other.

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[550] 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, 10–11.

[551] Professors Millbank and Stuhmcke had spoken to one heterosexual couple in their recent study that had not donated any reproductive material. The intending mother was born without a uterus or ovaries, her sister was prepared to be an egg donor and they had also found a woman to act as their surrogate mother. The surrogate mother completed multiple cycles of IVF, they then found that the intending father was also infertile. The intending father's brother donated sperm, so the child would still be closely related to both intending parents. Professors Millbank and Stuhmcke strongly believed that it would be 'a very cruel thing to deny these people'.

16.4.11 Dr Klein and some responses in the YourSAy survey told SALRI that intending parents who engage in surrogacy arrangements, particularly where there is no biological link between the intending parents and the child, should look to other methods to form their families such as adoption and long-term foster care and adoption. One YourSAy participant, for example, said:

> Although it is a deep sadness when a couple can't have children naturally (I faced this possibility myself in my life) no one has a right to have a child. Adoption provides an excellent means by which such couples can have a child, although not their biological child. Other arrangements such as IVF and surrogacy attack the rights of the child which has the right to know and be brought up by their biological parents.

16.4.12 Another YourSAy participant commented:

> It also seems to be based on demand for children rather than thinking about what the bigger picture looks like. I think only a few years ago we said sorry to women and adoptees from the 60s 70s and 80s ... This just seems like the next wave of methods to meet the continuing demand for children. Meanwhile we have foster children in huge crisis. I know it's not quite the same, but … I can't help but think of all those kids already out there that need love and are waiting with their names on lists.

16.4.13 Dr Renate Klein told SALRI:

> Many gay men and many heterosexuals with fertility problems can, and do, make great parents, be it in foster care or permanent care arrangements (which is better for the child than adoption, see Mackieson, 2015). Or, quite simply in making a commitment to regularly spending time with the children of friends or siblings, and supporting them through the "fun" as well as the hard times. And there are many jobs that require dedicated child-centred professionals. Ask yourself if your desire for children is about the *joy* of spending time with children, or if it is about possession: wanting to *own* a child that you have bought (or at least solicited).

16.4.14 Professors Millbank and Stuhmcke emphasised to SALRI that many of the intending parents they have spoken to have tried unsuccessfully to adopt. Professor Millbank said they are 'trying everything to have a child, not a genetically related child'.

16.4.15 Adoption is not a realistic alternative to many families to surrogacy.[552] A South Australian Government website notes:

> Since 2006, there have been 1-2 children under the age of 12 months placed for adoption each year in South Australia. No older children have been placed in recent years.
>
> The South Australian pattern is similar to all other States in Australia, with the number of children placed for adoption becoming less, for a variety of reasons a such as:
>
> - Parents have more alternatives to adoption when they are making decisions about the future of their child.
> - There is greater income support for single parents and more resources in the community to help families (single and two parent) stay together.
> - There is greater community acceptance of different kinds of families, including sole parent families.
> - Worldwide research and experience has shown that it is often in a child's best interests to keep children within their own family or in extended families wherever possible.

[552] See above n 59, n 318.

- More easily accessible forms of contraception are available and abortion is a choice for some people, leading to low numbers of unplanned pregnancies.

> The number of people who wish to be considered as prospective adoptive parents outweighs the number of children who require adoption as a way of permanently and legally joining a family. There may continue to be a small number of infants whose parents choose adoption for them.[553]

16.4.16 Professors Millbank and Stuhmcke considered that, at the least, any framework should allow for parents to not donate reproductive material 'in exceptional circumstances'. They noted that any legislative regime in this area should be flexible and able to respond to advances; the law has 'never built in enough discretions - it is always a case by case basis.'

16.4.17 Mr Everingham, noted that from his experience, as founder of *Surrogacy Australia,* around five percent of intending parents are in a situation where there is no genetic link between them and their child. He submitted that these relationships should be recognised under the 1975 Act.

16.4.18 Dr Oxlad stated that gestational surrogacy (that is where one or both intending parents provides human reproductive material) are more common in South Australia. Dr Oxlad said that if a donated embryo (that is, where neither intending parent is providing genetic material) is used in a surrogacy arrangement, you are just adding a different person carrying the embryo and that this procedure does not fundamentally differ from a surrogate carrying an embryo created using genetic material provided by both intending parents. She also said this also does not significantly differ to donated embryos being used in other ART contexts such as a woman or couple with fertility difficulties carrying an embryo donated from others. Dr Oxlad acknowledged it could be 'slightly more complex' where a surrogate's egg is used, and where the surrogate mother has a genetic connection to the child. She did not have undue concern about traditional surrogacy, but only if this issue is carefully taken into account and thoroughly examined as part of the counselling (and screening) process. Mrs F expressed a similar view in consultation, though noted that problems in relinquishing the child are more likely to arise where there is a direct genetic link between the surrogate mother and the child.[554]

16.4.19 SALRI notes that the research as to the psychosocial development of children conceived through embryo donation, particularly in the context of surrogacy, is incomplete.[555] There is a body of research that suggests a genetic connection between intending parents and the child is not required for children born through surrogacy arrangements to have positive developmental outcomes.

16.4.20 MacCullum, Golombok and Brinsden, from their longitudinal empirical study of 21 British families with a child conceived through embryo donation concluded:

> Embryo donation families did not demonstrate less positive parenting than IVF families, suggesting that a genetic bond is not essential for good parent– child relationships. In fact, contrary to the proposition suggested by evolutionary psychology theory (Bjorklund et al., 2002), neither the embryo donation families nor the adoptive families showed evidence of reduced investment in their nongenetic child. This replicates findings from previous research on gamete donation families, in which no evidence has been found for poorer quality parenting from a nongenetic parent (Brewaeys, 2001; Golombok, Lycett, et al., 2004). Because maternal warmth and sensitivity in the embryo donation families is high, it is unlikely that there will be negative consequences for attachment relationships (Ainsworth et al., 1978). The desire of embryo donation parents to

[553] Government of South Australia Department of Child Protection, *Australian Born Children Local Adoption* (27 October 2016) <https://www.childprotection.sa.gov.au/adoption/adopting-local-child>.

[554] See also Pip Trowse, 'Surrogacy: Is it Harder to Relinquish Genes?' (2011) 18 *Journal of Law and Medicine* 614.

[555] See also above [7.5.23]–[7.5.25].

become parents and the efforts they have made to achieve this seem to result in a strong commitment to parenthood that can outweigh the potential drawbacks of genetic unrelatedness.[556]

16.5 SALRI's Reasoning and Conclusions

Team Baby

16.5.1 SALRI considered the range of views and legislative approaches taken in other Australian jurisdictions in respect to the genetic relationship between intending parents and the child as potential law reform options.

16.5.2 SALRI acknowledges the sensitivities and concerns in this area. It also notes the concerns from some participants in consultation of intending parents who may have gametes that could otherwise be used to conceive a child, but who choose embryo donation, as there is still some uncertainty surrounding the long-term outcomes of children who are embryo donor conceived. SALRI notes the early empirical research suggesting that children conceived through donor conception have similar psychosocial outcomes to their peers conceived through gamete donation, other assisted reproductive technology procedures and naturally.[557]

16.5.3 There appears to be no cogent reason to SALRI to restrict access to embryo donation for intending parents in lawful surrogacy arrangements due to the nature of their infertility. In other words, the concept of 'team baby', that is where there is no direct genetic link between the intending parents and the child born as a result of surrogacy, is appropriate (crucially providing the parties are effectively unable to have a child). SALRI concurs with the cogent reasoning and conclusion of the Queensland Committee.[558] It is significant that, in other ART contexts, there is no restriction on the basis of a lack of genetic link between the parents and the child. It would also be counter-productive to allow single persons access (as should be the case in SALRI's view),[559] but to then deny them access to lawful surrogacy if there is no genetic link between the single intending parent and the child.

16.5.4 SALRI's view is that embryo donation in a lawful surrogacy agreement, as in other contexts, should be used where all other assisted reproductive options have been exhausted. It is unlikely that any such legislative requirement would discriminate against those who would otherwise access donated embryos in the surrogacy context.

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[556] Fiona MacCallum, Susan Golombok and Peter Brinsden, 'Parenting and Child Development in Families with a Child Through Embryo Donation' (2007) 21 *Journal of Family Psychology* 278, 284. See also Fiona MacCallum and Sarah Keeley, 'Embryo Donation Families: A Follow-Up in Middle Childhood' (2008) 22 *Journal of Family Psychology* 22, 799; Fiona MacCallum and Sarah Keeley, 'Disclosure patterns of embryo donation mothers compared with adoption and IVF' (2012) 24 *Reproductive Biomedicine* 745; Susan Golombok, 'Families Created by Reproductive Donation' (2013) 7 *Child Development Perspectives* 61–65. There are some possible limitations to this study. See Tabitha Freeman, 'Gamete donation, information sharing and the best interests of the child: an overview of the psychosocial evidence' (2015) 33 *Monash Bioethics Review* 45, 48–50. MacCallum and Keeley emphasise that further research is necessary about when embryo donated children enter adolescence.

[557] See, for example, Fiona MacCallum, Susan Golombok and Peter Brinsden, 'Parenting and Child Development in Families With a Child Through Embryo Donation' (2007) 21 *Journal of Family Psychology* 278; Susan Golombok et al, 'Children born through Reproductive Donation: a Longitudinal Study of Child Adjustment' (2013) 54 *Journal of Child Psychology and Psychiatry* 653; Susan Golombok, 'Families Created by Reproductive Donation (2013) 7 *Child Development Perspectives* 61–65.

[558] See above [16.3.21].

[559] See above Part 15.

16.5.5 SALRI accepts that sensitivities arise in this area and suggests that its preferred position should be reviewed as part of any future wider review[560] in light of further research and other updates about the situation of embryo donor conceived people in adolescence and adulthood.

Traditional Surrogacy

16.5.6 SALRI acknowledges that particular sensitivities and complexities also arise in the situation of where there is no genetic link between the intending parents and the surrogate child, but the surrogate mother is proposing to contribute her own ovum to the arrangement (what is often called 'traditional surrogacy').[561] The South Australian Parliament has previously not sought to distinguish or regulate 'traditional' surrogacy in other contexts[562] and the present law draws no distinction between traditional and gestational surrogacy.[563]

16.5.7 The issue of traditional surrogacy, especially in the team baby context, was noted in consultation to SALRI by various parties, including Dr Oxlad and Mrs F, as giving rise to particular sensitivity, but no consensus emerged. More than one party opposed traditional surrogacy (including in a team baby context) as especially problematic but others such as Dr Oxlad and Mr Page noted to SALRI that this aspect is best left to be considered and resolved as part of the counselling (and screening) role.

16.5.8 This issue has unsurprisingly troubled other similar reviews as both the Queensland[564] and NSW[565] Parliamentary Committees. The NSW Committee received differing views about whether traditional surrogacy should be permitted.[566] The NSW Committee ultimately advised against a prescriptive approach, noting that this aspect was best left to the counselling (and screening) process to consider and resolve.[567] The Queensland Committee outlined the concerns it received about the situation of a surrogate mother providing her own ovum to a surrogacy arrangement, especially what was seen as the increased risks of the surrogate mother not relinquishing the child.[568] The Queensland Committee acknowledged these concerns but also ultimately advised against a prescriptive approach, concluding that this issue was best left to the counselling (and screening) process to consider and resolve.[569] The Committee explained:

> The Committee is extremely mindful of the literature on gestational versus traditional surrogacy and would prefer to avoid traditional surrogacy wherever possible. However, it does not wish to

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[560] See above Rec 9, [7.5.46].

[561] See above Glossary.

[562] For a discussion of the implications of traditional surrogacy generally see Pip Trowse, 'Surrogacy: Is it Harder to Relinquish Genes?' (2011) 18 *Journal of Law and Medicine* 614.

[563] For example, the relevant Act might authorise the making of Regulations which might provide for additional requirements applicable to particular classes of persons or cases, which might include cases where there is no genetic link between the intending parents and the surrogate child, but the surrogate mother is proposing to contribute her own ovum to the arrangement.

[564] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009).

[565] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008).

[566] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 91-92 [5.144]-[5.150].

[567] Ibid 92-93 [5.155].

[568] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008) 46-48.

[569] Ibid 54-55.

> prohibit traditional surrogacy. The Committee believes prohibition would drive traditional surrogacy underground, which could have detrimental effects on the parties involved.[570]

16.5.9 SALRI acknowledges that traditional surrogacy, especially in the team baby context where the intending parents do not provide any genetic material, raises particular sensitivities and complications.[571] SALRI concurs with the conclusion of both the NSW and Queensland Committees that a prescriptive approach in this area is inappropriate. There may be 'rare' situations where the intending parents do not provide any genetic material in which traditional surrogacy is appropriate.[572] As one party told the Queensland Committee: 'I don't think it [a requirement for gestational surrogacy] should be written into the law because it can't possibly cover all situations.'[573] SALRI agrees with the NSW and Queensland Committees that the question of a surrogate mother providing her own ovum to the proposed arrangement is best left to be considered and resolved as part of the counselling (and screening) process prior to any surrogacy agreement by the Accredited Independent Counsellor.[574] Indeed, this question (if it arises) should be one of the explicit statutory considerations to be covered by the Accredited Independent Counsellor and should be confirmed in the Counselling Certificate to be provided to the parties.[575]

16.5.10 The genetic parentage upon the child and the dynamics between all parties and the future disclosure of the child's genetic history should be considered in detail as part of any preconception surrogacy counselling (and screening) process.

16.5.11 Recommendation

Recommendation 27

SALRI recommends that any *Surrogacy Act* should clarify the present law regarding surrogacy arrangements involving a child with no genetic link to either of the intending parents, namely that the intending parents can enter into a lawful surrogacy agreement in South Australia but only if a medical practitioner is satisfied that both of the intending parents appear to be infertile or there is medical reason why it would be preferable not to use such human reproductive material to achieve the pregnancy. However, this aspect of the law should be reviewed in five years (or five years after commencement for any new *Surrogacy Act*) as further

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[570] Ibid 54.

[571] Both research and practice suggest that surrogate mothers are usually content to relinquish the child. See above n 232. Associate Professor Cook at Swinburne University of Technology, stated to the NSW Committee that the evidence did not support concerns about the birth mother failing to relinquish and that it was wrong to assume that surrogate mothers build strong attachments to the child they are carrying…'it needs to be kept in mind that surrogate women know clearly that they are not carrying their own child': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 46 [3.132]. See also at 45-46 [3.129]-[3.133], 47 [3.137]-[3.139]. However, different considerations may apply to the traditional surrogacy situation. See, for example, Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008) 46-47; Pip Trowse, 'Surrogacy: Is it Harder to Relinquish Genes?' (2011) 18 *Journal of Law and Medicine* 614. Three of the four examples in Australia of a surrogate mother refusing to hand over the child drawn to SALRI's attention were in the context of traditional surrogacy. See also above n 232.

[572] Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008) 48.

[573] Associate Professor Roger Cook, Swinburne University of Technology quoted by Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy Committee Report,* (2008) 48.

[574] See below Part 20.

[575] See further below [20.3.6], Rec 40.

research is available about the development and implications of donor-conceived individuals in adolescence and adulthood.

Part 17 - Jurisdiction

17.1 Current Law

17.1.1 A significant issue that arose in consultation concerns jurisdiction, that is which or whose laws should apply in a surrogacy situation where more than one Australian jurisdiction is involved.

17.1.2 To be a recognised surrogacy arrangement under s 10HA(2a)(c) of the 1975 Act, both of the intending parents must be 'domiciled' in South Australia. Moreover, to be recognised under the South Australian regime, the surrogacy arrangement must state that the parties intend that the pregnancy be achieved by a fertilisation procedure carried out in South Australia.[576] There is no requirement that the surrogate mother must reside in South Australia.

17.1.3 The Family Relationships (Surrogacy) Amendment Bill 2017*,* however, provided that to be a recognised surrogacy arrangement both of the intending parents had to be domiciled in South Australia on the day the agreement was entered into[577] (this appears too broad and may invite 'forum shopping').[578] The 2017 Bill did not seek to alter the requirement that the pregnancy is to be achieved by a fertilisation procedure carried out in South Australia.[579]

17.1.4 There is no one single uniform, or even consistent, surrogacy law in Australia. The different approaches taken by the various States and Territories have resulted in a degree of what has become known as 'medicine by postcode'[580] or forum shopping. The implications of this are significant and need to be addressed. In the view of the Commonwealth Committee:

> the disparate nature of surrogacy legislation in Australian States and Territories does little to assist the many Australians who aspire to be parents. It simply adds to the confusion, lessens the protections available to all parties and creates a culture of "jurisdiction shopping" to find the most suitable arrangements.[581]

17.1.5 A concern that was often expressed to SALRI is that, in the absence of any uniform national scheme, there needs to be at least broad consistency between the laws for surrogacy across Australia to promote understanding and adherence to the law as well as address the risk of forum shopping and parties utilising the laws of the jurisdiction most favourable.[582]

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[576] *Family Relationships Act 1975* (SA) s 10HA(2a)(h)(i).

[577] Family Relationships (Surrogacy) Amendment Bill 2017 (SA) s 10I(2)(c).

[578] SALRI prefers a requirement the intending parents are ordinarily resident in South Australia when any surrogacy agreement is signed. See also below Rec 29.

[579] Family Relationships (Surrogacy) Amendment Bill 2017 (SA) s 10I(2)(i). The present law does not confine the availability of a fertilisation procedure in South Australia to South Australian residents. It confines the availability of a parenting order to South Australian residents. SALRI proposes no changes in this regard. Any such limitation would be at odds with the modern interstate implications of domestic surrogacy and would also raise constitutional implications (see *Street v Queensland Bar Association* (1989) 168 CLR 461).

[580] Anita Stuhmcke, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18 *Journal of Law and Medicine* 601, 607.

[581] 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* (April 2016) 6 [1.20].

[582] Such a fear is far from fanciful as the situation of international surrogacy demonstrates. See above n 64.

17.2 Consultation Overview

17.2.1 SALRI spoke to some participants where the surrogacy arrangement had been entirely based in South Australia. In other words, the intending parents and surrogate mother resided in South Australia and the fertility treatment took place in South Australia and the child was born in the State. For these participants it was clear that it was Part 2B of the *Family Relationships Act 1975* (SA) which applied to their arrangement. However, SALRI has widely heard from the Law Society of South Australia, Mr Page, Dr Oxlad and others that it is now commonplace for a surrogacy arrangement to cross State borders and the jurisdictional implications of such arrangements are complex.[583] The confusion and complexity of the present overlapping laws in relation to surrogacy often emerged in SALRI's consultation.

17.2.2 SALRI spoke to Professor Jenni Millbank and Professor Anita Stuhmcke. They are currently undergoing a four-year Australian Research Council Project *Regulating Relations* with their colleague at the University of Technology Sydney, Professor Isabel Karpin. The project is examining the pathways of Australian patients into and out of Assisted Reproductive Technology both domestically and overseas and will conclude in December 2018. The project has collected information from 93 interviews of 27 professionals and 66 patients. Among the patients there were 37 intended parents in surrogacy arrangements, 10 surrogate mothers, and 16 recipients of donor eggs and/or embryos. Twenty-six patients had only undertaken treatment within Australia.

17.2.3 Professors Millbank and Stuhmcke said that the current law is based on an unevidenced assumption that all the parties would have lived in the same State because they had a pre-existing relationship, and that the fertility provider would be located in that State too. This is at odds with modern society and the findings of their research where travel across state borders 'is the norm and not the exception'. Professor Stuhmcke noted that the current law is based on the 'unfounded assumption [that] forum shopping is wrong'. She said: 'Why is it terrible, why don't we all go to the jurisdiction where the court process is the cheapest?' They noted that most intending parents and surrogate mothers find each other online and that the current regulatory schemes are based upon outdated 20th century assumptions. Professor Millbank and Stuhmcke commented: 'Nobody foresaw most arrangements would involve multi jurisdiction arrangements.'

17.2.4 It is routine for parties resident in South Australia to travel interstate (especially to New South Wales) to utilise the services of a specialised fertility provider. Professors Karpin, Millbank and Stuhmcke pointed out that there may be up to four jurisdictions involved in a lawful domestic surrogacy arrangement as the intending parents, the surrogate mother, the fertility provider and the egg donor may all be located in different jurisdictions.

17.2.5 Dr Oxlad often also encounters arrangements with parties across States. The law is premised on the basis that everything happens in one State. 'It's often not how it works'. In one surrogacy agreement with which she was involved as a counsellor, for example, the intending parents were from New South Wales, the surrogate mother was from South Australia and the baby was to be born in Victoria. All counselling was done in South Australia, the fertility treatment was completed in New South Wales to comply with the NSW legislation and the baby was born in Victoria. Dr Oxlad described the complications of the present system as 'an absolute nightmare' and supports a 'common sense' approach to jurisdiction processes that reflects modern interstate mobility and practice. Mrs F expressed a similar view. She described the complexity and 'more time, more money and more stress'

[583] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 4 [18]–[20], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

in navigating interstate law and practice as she and the surrogate mother (both resident in South Australia) had utilised an interstate fertility provider.

17.2.6 SALRI heard from some parties that are currently navigating the complexities of multi jurisdiction surrogacy arrangements in Australia. Hailey and J, for example, are both in the process of undertaking interstate surrogacy arrangements as they are unable to access surrogacy in South Australia because they are single.

17.2.7 Hailey's experiences particularly highlight the convoluted processes of multi-jurisdictional surrogacy arrangements in the Australian context in the absence of a nationally consistent regulatory framework.

17.2.8 **Case Study: Hailey's story**[584]

> At the age of 21, Hailey was diagnosed with Mayer-Rokitansky-Küster-Hause Syndrome (MRKH). Due to Hailey's condition, she was born without a uterus. She has a family member who is willing to act as her surrogate. Hailey, however, is single, so she is unable to enter a lawful surrogacy arrangement in South Australia.
>
> Hailey decided to go ahead with an arrangement in New South Wales where singles can access surrogacy. The fertility clinic where Hailey initially went for her egg retrieval uses sperm donors from the United States. In New South Wales, however, embryos may only be created using Australian donor sperm that is not likely to result in offspring being born to more than five women, including the donor and any current or former spouse of the donor (*Assisted Reproduction Act* s 27(1) (NSW)). This is known colloquially as the 'five family limit'. If Hailey had not been made aware of these legislative requirements before she had created embryos, she would have been left with embryos she could not use.
>
> To meet the New South Wales requirements, Hailey was required to change fertility clinics. At her new fertility clinic, Hailey had two local donors to choose from that were also within the 'five family limit'. In two cycles, Hailey was able to create seven embryos for transfer in New South Wales. Hailey is currently 'living in New South Wales' using her cousin's address to meet the residency requirements under the New South Wales legislation. Hailey was recommended to use a New South Wales address by a member of the online surrogacy community.
>
> Hailey's surrogate's lawyer was able to be based in South Australia. However, as Hailey is purporting to reside in New South Wales, her lawyer is based in Queensland. She has received advice from her lawyer entirely through phone consultations and emails.

17.2.9 Hailey's experience is outlined in more detail in the context of singles access to surrogacy.[585] Hailey's surrogate's fertility procedure will be required to occur in New South Wales.

17.2.10 J, an intending parent resident in South Australia with the surrogate resident in Victoria, highlighted that he had found it a complex process and difficult to understand the interaction between the laws of Victoria, South Australia and the Commonwealth in his surrogacy situation. He said it was very unclear which law would apply in his situation.

17.2.11 SALRI also spoke to Monica, a prospective surrogate mother, who is currently 'surrogacy dating' a South Australian couple. Previously, she was 'surrogacy dating' with two men in Melbourne. The arrangement did not work out due to the complexity of interstate jurisdictional issues. Monica stated that she would 'love' to see uniformity in surrogacy laws across all Australian jurisdictions.

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[584] See above [14.3.11] and [15.2.4].

[585] See above [15.2.4].

17.2.12 SALRI notes that many parties, including Mr Everingham and Professors Millbank and Stuhmcke, raised concerns for surrogate mothers having to travel interstate for surrogacy related fertility procedures in order to comply with the law where it may not be in their best interests.

17.2.13 Mr Page noted the 'difficulties' with interstate arrangements and the need for 'national non-discriminatory laws as to surrogacy', using a hypothetical example of 'Frida and Benny' to illustrate some of the complexities of circumnavigating surrogacy across Australian jurisdictions:

17.2.14 **Case Study: Frida and Benny's Story**

> Frida and Benny are a couple living in Adelaide. Frida's sister, Agnetha, who lives in Gawler, offers to be their surrogate. She is prepared to be a traditional surrogate.
>
> It is legal for traditional surrogacy to be undertaken under the *Family Relationships Act* (SA). However, the Ethics Committee of XYZ IVF Clinic in Adelaide has decided not to facilitate traditional surrogacy because of perceived risks with traditional surrogacy.
>
> Frida and Benny then search for an egg donor but are unable to find one in South Australia. Instead they find Marie, who is a prospective egg donor living in Sydney.
>
> Marie wants to undertake IVF in Sydney, just down the road from where she lives.
>
> Frida and Benny therefore have these choices:
>
> 1. If they under-take IVF in New South Wales, as they desire and in accordance with Marie's wishes, they will be unable to proceed with a surrogacy arrangement in South Australia. Therefore, they have to persuade Marie to come to Adelaide for treatment, or find another egg donor, or enter into a New South Wales (or Queensland) surrogacy arrangement on the basis that at the time of the birth and then proposed order concerning the child they are living in New South Wales (or Queensland).
>
> The *Family Relationships Act* (SA) simply does not have the flexibility that the *Surrogacy Acts* of Queensland, New South Wales or Tasmania have about where IVF may occur.
>
> It may seem at first blush that allowing IVF to occur anywhere allows a free-for-all as to where parties may undertake IVF. In reality, because there is judicial oversight, care still needs to be taken as to which IVF clinic is chosen (if it is overseas) because in Queensland, New South Wales and Tasmania evidence from the doctor ought to be put before the court and therefore accepted as an expert witness and the report accepted. Failure to accept that expertise or the report will likely mean that a parentage order may not be made.
>
> In contrast, if Marie lived in Melbourne, because of similar requirements of the *Assisted Reproductive Treatment Act 2008* (Vic) and the *Status of Children Act 1974* (Vic), doctors there would not provide treatment. Frida and Benny would be obliged to either fly Marie to South Australia or search for another donor, including overseas.

17.2.15 A number of parties such as Mr Page, Ms Cole, J, Hailey, Dr Oxlad and Mr Everingham raised the advantages of a sensible and simplified approach to jurisdiction (in the absence of any national uniform regulatory framework) that recognises the reality that many domestic surrogacy arrangements cross state borders.[586]

17.2.16 Disquiet was expressed by several parties such as Dr Oxlad and Mrs F at the prospect of Australian citizens recruiting relatives from overseas to act as surrogate mothers in Australia. The risk of exploitation and abuse was raised. The risk of any child born of such a surrogacy arrangement being

[586] See also above Part 4.

left stateless was also noted. It was suggested to SALRI that the law should provide that the surrogate mother and (for consistency) an intending parent/s must be either an Australian citizen or an Australian permanent resident to be eligible to access a lawful surrogacy agreement in South Australia.

17.2.17 Another issue that was raised by many participants within the context of greater mobility in surrogacy arrangements across Australian jurisdictions was the recognition of interstate parentage orders. Many parties emphasised to SALRI that the recognition of parentage orders from other Australian jurisdictions would be an important step towards a nationally consistent law. It was also noted that, nonetheless, in many respects, the regulatory schemes around surrogacy in each State and Territory should be comparable as they are governed by the *NHMRC Guidelines*.

17.2.18 Some parties, including Professor Keyes, cautioned against recognising arrangements in other Australian jurisdictions beyond the current law. Professor Keyes observed:

> South Australian law already recognises the effect of interstate surrogacy arrangements if a court in another Australian State or the Australian Capital Territory has granted a parentage order and the birth registration of the child has been amended accordingly.
>
> **S**outh Australian law should not otherwise enable the recognition of foreign or interstate surrogacy arrangements. Where the child is born and in the care of the commissioning parents, it is impossible to ensure that the requirements under South Australian law have been met. Recognising foreign or interstate arrangements may therefore have the indirect and unintended effect of enabling the circumvention of the South Australian requirements. Moreover, it would not be appropriate to recognise an arrangement that does not conform to the regulation of surrogacy in the place or places where the conception, pregnancy and birth occur, which may be different to the South Australian law.'

17.2.19 Other parties, however, told SALRI that there are still significant gaps in South Australia's recognition of arrangements from other Australian jurisdictions. Mr Page noted that s 22A of the *Births, Deaths and Marriages Act 1996* (SA) does not allow for the recognition of an interstate parentage order where a birth occurs in South Australia. Mr Page told SALRI that, from experiences in Victoria, the reciprocal administrative arrangements provision in s 11 of the *Births, Deaths and Marriages Act 1996* (SA) also does not cover this situation. Mr Page said:

> Prior to the 2015 amendments, this issue arose for clients of a Victorian colleague where the intended parents obtained a substitute parentage order in Victoria, but the child was born in South Australia. It took four months to resolve the impasse and meant that the intended parents had to deal with both the Registrars' of Births, Deaths and Marriages in South Australia and Victoria. My colleague described the process as a "nightmare".

17.3 SALRI's Reasoning and Conclusions

17.3.1 Surrogacy arrangements commonly cross state borders and the jurisdictional implications are complex, if not incoherent, with all seven States and Territories having their own laws and practices regarding surrogacy.

17.3.2 Some parties that SALRI spoke to, particularly single people, engaged in surrogacy in other Australian jurisdictions because they were unable to meet the eligibility requirements for a parentage order in South Australia.

17.3.3 SALRI also heard that within the modern context of surrogacy, surrogates and intending parents commonly get in contact online and many of the relationships are formed cross state and territory borders. Many parties told SALRI that when a surrogate mother resides outside of South

Australia, it may be in her best interests to receive her medical treatment and to participate in pre-conception surrogacy related processes as required under the Act in her home State.

17.3.4 SALRI notes that, although there is no explicit requirement under the 1975 Act that surrogacy related processes such as counselling occur in South Australia, complications can arise when parties engage in these processes in other Australian jurisdictions, due to the different legislative requirements in each jurisdiction and specific requirements imposed by individual fertility providers.

17.3.5 SALRI is mindful that, although there are differences in the approaches to processes such as counselling (and screening) in each jurisdiction, all health care professionals providing these services should be working under the *National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* and the *Australian New Zealand Infertility Counsellors Association Guidelines* relevant to surrogacy and, as such, the services provided should be substantially the same.

17.3.6 Intending parents who are residents of South Australia are only able to apply for a parentage order in the Youth Court of South Australia. South Australian intending parents or their surrogates who are provided with counselling and legal advice in other Australian jurisdictions that are comparable and analogous to the requirements for a counselling certificate and legal certificate under Part 2B of the *Family Relationships Act 1975* (SA) should not be prevented from applying for a parentage order in the Youth Court of South Australia.

17.3.7 SALRI suggests that the issue of jurisdiction and the recognition of surrogacy 'processes' should be approached in a flexible and common-sense manner (reflecting the desirability for national consistency and the realities of modern interstate domestic surrogacy) but without allowing or encouraging parties to 'forum shop' in South Australia. SALRI notes the support in consultation for such an approach, including from Chief Justice Pascoe and Mrs F. With a view to national consistency, SALRI suggests that South Australian law should recognise surrogacy related processes which occur in analogous and comparable Australian jurisdictions that contain the key features and safeguards of the South Australian legislative regime.

17.3.8 In order to be recognised, the interstate system would need to be closely similar, but not necessarily identical, to South Australia. This would mean that, for a surrogacy arrangement to be legally recognised in South Australia, the intending parent(s) must ordinarily reside in South Australia[587] prior to the agreement being entered into but where the surrogate mother resides and/or where the fertility treatment occurs should be irrelevant to the agreement and the relevant law.

17.3.9 SALRI considers the minimum features for an analogous regime (this is apart from any threshold criteria such as age or the need in South Australia to have a Working with Children Check or a national criminal history check) to be:

- a regulatory framework for compliance with the *National Health and Medical Research Council Guidelines for the Ethical Guidelines for Assisted Reproductive Technology (ART)*;
- a requirement that the initial counselling (screening) and legal advice of all parties in relation to the surrogacy arrangement occurs before any fertilisation procedure takes place;
- a requirement that the initial counselling (screening) of all parties be provided by a full member or person eligible for full membership with the Australian and New Zealand Infertility Counsellors Association; and

[587] This provides the constitutional nexus.

- a requirement that the initial counselling (and screening) of all parties be provided by an Accredited Independent Counsellor who is not employed or a contractor of a registered fertility provider; and

- the legal advice and the relevant certificate cover the important relevant issues consistent with SALRI's Recommendations 47 and 48.

17.3.10 SALRI agrees that any *Surrogacy Act* should provide that the surrogate mother and (for consistency) and an intending parent/s must be either an Australian citizen or an Australian permanent resident to be eligible to access a lawful surrogacy agreement in South Australia. SALRI in the interests of national consistency and effectiveness suggests that any *Surrogacy Act* should allow the mutual recognition of interstate surrogacy orders.

17.3.11 Recommendations

Recommendation 28

SALRI recommends that South Australian law should recognise surrogacy related processes that occur in analogous and comparable Australian jurisdictions which contain key features and safeguards of the South Australian legislative regime.

Recommendation 29

SALRI recommends that any *Surrogacy Act* should provide that, for a lawful surrogacy arrangement in South Australia to be legally recognised, the intending parent(s) must ordinarily reside in South Australia prior to the agreement being entered into. SALRI recommends that where the surrogate mother resides and where the fertility treatment occurs should be irrelevant to any such agreement.

Recommendation 30

SALRI recommends that any *Surrogacy Act* should provide that the surrogate mother and an intending parent/s must be either an Australian citizen or an Australian permanent resident to be eligible to access a lawful surrogacy agreement in South Australia.

Recommendation 31

SALRI recommends that any *Surrogacy Act* (or other relevant Act) should allow the mutual recognition of interstate surrogacy orders.

Part 18 – Risk Assessment

18.1 Current Law

18.1.1 Section 10HA of the *Family Relationships Act 1975* (SA) set out certain requirements for a lawful surrogacy agreement, which should occur prior to a pregnancy.[588] A lawful surrogacy agreement requires the surrogate mother and her husband or partner (if any) and the intending parents to be issued with a certificate by a counselling service,[589] which states that in the opinion of the Accredited Independent Counsellor: 'The proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.'[590]

18.1.2 There is no current requirement in South Australia that intending parents or surrogate mothers undergo any form of criminal history, police or background check at any stage of the surrogacy agreement process. This is dissimilar with adoption.[591] An Accredited Independent Counsellor has no means to secure or obtain a criminal history, police or background check to carry out their counselling (and screening) role to assess the suitability of the parties to a lawful surrogacy agreement.

18.1.3 The controversial case of *Baby Gammy*[592] demonstrates the potential for an intending parent with a worrying criminal history of child sexual abuse to access overseas commercial surrogacy in the absence of appropriate screening measures for Australian participants.[593] In introducing the Family Relationships (Surrogacy) Amendment Bill (2014) (SA), the Hon John Dawkins emphasised the concerns following the *Baby Gammy* case that intending parents with relevant criminal histories, particularly of child sexual offences, may access overseas commercial surrogacy:

> Recently, there has been significant media attention and community disquiet regarding the actions of some Australians pursuing the use of commercial surrogacy in international jurisdictions. … There have also been concerns raised about the suspicious background of some prospective parents, and certainly this was brought to public attention through the recent "Baby Gammy" stories that members would be familiar with.[594]

18.1.4 Unfortunately, the concerns and risks raised in the *Baby Gammy* case are not isolated. There have been several instances of intending parents accessing surrogacy to abuse children.[595]

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[588] *Family Relationships Act 1975* (SA) s 10HA(2)(a).

[589] Ibid see s 10HA(2)(g).

[590] Ibid s 10HA(3)(b)(ii).

[591] Adoption is subject to strict checks and requirements.

[592] *Farnell v Chanbua* (2016) 56 Fam LR 84.

[593] For a discussion of Farnell's historic child sexual offences see *Farnell v Chanbua* (2016) 56 Fam LR 84; Leanne Nicholson and Ateisha Orr, 'Gammy Father David Farnell 'Robbed' Two Girls of their Childhood, Judge says', *Sydney Morning Herald* (online), 7 August 2014, <http://www.smh.com.au/national/gammy-father-david-farnell-robbed-two-girls-of-their-childhood-judge-says-20140806-1018os.html>. See also Judith Ireland, 'Tony Abbott says the Case of Baby Gammy is a "tragic" Situation', *Sydney Morning Herald* (online), 5 August 2014, <http://www.smh.com.au/federal-politics/political-news/tony-abbott-says-the-case-of-baby-gammy-is-a-tragic-situation-20140805-3d6fb.html>; Julie Redman, 'If Baby Gammy Came To Live In Adelaide – Legal and Ethical Discussion on the Current State of Recognition of Children Born From Overseas Commercial Surrogacy' (Speech delivered at Law Society of South Australia, 18 May 2016).

[594] South Australia, *Parliamentary Debates,* House of Assembly, 12 November 2014, 1598 (John Dawkins).

[595] In 2013, Peter Truong an Australian citizen and his partner, Mark Newton, a citizen were sentenced in the United States to 30 years and 40 years imprisonment respectively for grave sexual offences involving the trafficking of their young son to an international child abuse network. Newton and Truong had purported to engage in a surrogacy arrangement when they paid a Russian woman $8000 woman for a child they brought back to

18.1.5 Following the *Baby Gammy* case, media commentators and child protection advocates suggested that additional criminal history screening measures should be included within the Australian domestic regulatory surrogacy framework.[596] Megan Mitchell, the Australian Human Rights Commission Children's Commissioner, for example, commented:

> The current practise of surrogacy does not adequately consider the risks to the child, nor to surrogate mother or the intended parents. We apply tests when people are working with children, or when they foster or adopt, so why don't we consider this for children born into surrogate families as well?[597]

18.1.6 It is significant that, to become a foster parent in South Australia, all adults in the household must have a child related employment screening clearance through the Department for Communities and Social Inclusion and child protection checks with the Department for Child Protection.[598] A person similarly cannot be registered as a prospective adoptive parent if:

a. They have as an adult been convicted of an offence involving violence towards a child, abuse of a child or abduction of a child.

b. If a child has, at any time, been removed from the care or custody of the person and become the subject of a care and protection order made under the *Children's Protection Act 1993* (SA), or

c. any other similar order made in this State or another State or a Territory of the Commonwealth (except with the approval of the Chief Executive).[599]

18.1.7 Given the strict requirements in relation to foster or adoptive parenting, the present lack of any requirement in South Australia that intending parents or surrogates undergo any form of

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Queensland. See Nick Ralston, 'Named: the Australian Paedophile jailed for 40 years', *Sydney Morning Herald* (online), 30 June 2013, <https://www.smh.com.au/national/named-the-australian-paedophile-jailed-for-40-years-20130630-2p5da.html>; Nick Ralston, 'Couple Offered Son to Paedophiles', *Sydney Morning Herald* (online), 1 July 2013, <https://www.smh.com.au/national/couple-offered-son-to-paedophiles-20130630-2p5eg.html>. There have been other disturbing cases. See, for example, Mary-Louise Vince, 'Man Sexually Abused Two Children born via Thai Surrogate, NSW Court Hears', *ABC News* (online), 9 December 2014, <http://www.abc.net.au/news/2014-12-09/man-appears-in-court-thai-surrogacy-child-sex-abuse-charge/5954954>; Editorial, 'Father Trafficked and Sexually Abused Surrogate Twin Baby Daughters', *ABC News* (online), 19 May 2016 <https://www.abc.net.au/news/2016-05-19/victorian-man-jailed-for-sexually-abusing-surrogate-twins/7428720>. See further 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, 9–10.

[596] See, for example, Editorial, 'Gammy Case Demands Surrogacy Background Checks', *Sydney Morning Herald* (online), 7 August 2014, <https://www.smh.com.au/national/nsw/gammy-case-demands-surrogacy-background-checks-20140807-101c2v.html>; NewsCorp Australia, 'Children's Commissioner wants Background Checks on Parents Using Surrogates', *Guardian Mail* (online), 12 August 2014, <https://www.couriermail.com.au/news/childrens-commissioner-wants-background-checks-on-parents-using-surrogates/news-story/d6e6218a894878831830a14deb41a337>; Richard Ackland, 'Surrogacy is still available to Paedophiles. This must change – but how?', *The Guardian* (online), 15 August 2014, <https://www.theguardian.com/commentisfree/2014/aug/15/surrogacy-is-still-available-to-paedophiles-this-must-change-but-how>.

[597] Megan Mitchell, 'Time to strengthen our Lax Surrogacy Laws', *The Herald* (online), 29 September 2014, <https://www.theherald.com.au/story/2591574/opinion-time-to-strengthen-our-lax-surrogacy-laws/>.

[598] See Department of Child Protection, Government of South Australia, *Steps to become a foster carer*, <https://www.childprotection.sa.gov.au/children-care/foster-care/steps-become-foster-carer>.

[599] *Adoption Regulations 2004* (SA) regs 8(2)–(3).

criminal history or background check at any stage of the surrogacy process is perhaps surprising. However, South Australia's approach is not unusual in Australia in relation to surrogacy.[600]

18.1.8 Victoria is the only Australian jurisdiction that requires all parties to a surrogacy arrangement to undergo a criminal history check *and* a child protection order check before they can access lawful surrogacy and be treated by a fertility clinic.[601] The criminal history check for each party to the surrogacy arrangement must be seen by the parties' counsellor before any treatment procedure carried out under a surrogacy arrangement can take place.[602] The counsellor must provide a statement to the Patient Review Panel that they have seen the criminal history checks.[603] All the parties are required to provide consent to the assisted reproductive treatment provider to conduct a child protection order check statement that includes details of whether a child protection order has been made removing a child from the person's custody or guardianship and if a child protection order has been made removing a child from the person's custody or guardianship, details of that order, including when and the period for which the order was made.[604]

18.1.9 A presumption against treatment applies if **a** relevant sexual offence has been established against a party to the surrogacy agreement[605] or a party has been convicted of a relevant violent offence[606] or a child protection order check reveals that a child protection order has been made removing a child from the custody or guardianship of a party.[607] An application may still be made to the Patient Review Panel if a presumption against providing treatment applies.[608]

18.1.10 SALRI notes that the Victorian scheme for surrogacy involves an elaborate State regulatory framework that is at odds with both SALRI's terms of reference and the strong (though not universal) theme in consultation that, as far as practicable, surrogacy agreements are private arrangements between the individuals concerned and the State (or indeed any other party) should not take a direct and ongoing role in the establishment and maintenance of individual arrangements.[609]

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[600] There is no requirement for working with children or equivalent checks to be undertaken by each party to a surrogacy arrangement in the Australian Capital Territory, Tasmania, New South Wales, Queensland and Western Australia. See 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, 20 [96].

[601] The Victorian requirements apply to anyone seeking artificial insemination treatment other than self-insemination or assisted reproductive treatment.

[602] *Assisted Reproductive Treatment Act 2008* (Vic) s 42(a).

[603] Ibid s 11(1)(c).

[604] Ibid s 12(2).

[605] Ibid s 14(1)(a)(i).

[606] Ibid s 14(1)(a)(ii).

[607] Ibid s 14(1)(b).

[608] There are exhaustive rights of appeal. The Patient Review Panel's decision may be reviewed by the Victorian Civil and Administrative Tribunal and ultimately by the Supreme Court of Victoria. See *Assisted Reproductive Treatment Act 2008* (Vic) s 15(1)(a). See also *ABY v Patient Review Panel (Health & Privacy)* [2011] VCAT 1382 (29 July 2011); *Patient Review Panel v ABY* [2012] VSCA 264 (26 October 2012). In *ABY v Patient Review Panel (Health & Privacy)*, the applicants argued that the presumption against treatment contained in s 14 of the *Assisted Reproductive Treatment Act 2008* (Vic) was invalid as it was inconsistent with the *Sex Discrimination Act 1984* (Cth) and therefore inoperative by virtue of the effect of s 109 of the *Constitution* and it was also invalid as it infringed s 117 of the *Constitution* because it discriminated against them as they were able to access IVF treatment in all other States and Territories apart from Victoria. These arguments were not considered as they were outside of the Tribunal's jurisdiction: at [18]–[31].

[609] See above [9.7.1]–[9.7.3], [10.1.1]–[10.1.35].

18.1.11 In 2014, the Hague Conference on Private International Law recommended, as a part of its Parentage and Surrogacy Project, a minimum substantive standard for international cooperation in relation to the welfare of any child born to an international surrogacy arrangement. It was suggested that this 'may include some basic checks in relation to the intending parents, including child abuse and criminal background checks'.[610]

18.2 Consultation Overview

18.2.1 The absence of any criminal history and/or Working with Children Checks to access a lawful surrogacy agreement in South Australia attracted wide concern in consultation.

18.2.2 More than one party highlighted the anomaly that suitable police or background checks apply in adoption but not in surrogacy. The Association of Relinquishing Mothers emphasised that the same screening standards should apply for surrogacy as are applied in the adoption context:

> all prospective parents should agree to mandatory checks on health, any domestic violence and relevant child protection history and that there should be consideration made of all the areas that apply to prospective adoptive parents to determine whether the commissioning couple would be appropriate to parent a child … rather than rubber stamping apparent suitability.

18.2.3 This theme has been expressed elsewhere.[611] The Australian Human Rights Commission in its 2016 submission to the Commonwealth Committee, supported the introduction of criminal history checks and working with children's checks for surrogacy in all Australian jurisdictions to align with the procedures already in place for foster care arrangements and adoption. The Australian Human Rights Commission observed:

> There are differences between adoption and surrogacy arrangements and the Commission does not suggest that the regulation of both be identical. However, there are also significant similarities. In the case of each of surrogacy, adoption and foster care arrangements, there is a regulatory regime administered by the State which provides for the transfer of parental responsibility for children. By contrast, in the case of children who are conceived naturally, or intended parents who use assisted reproductive treatment, there is no transfer of parental responsibility. The involvement of the State in this process of regulating the transfer of parental responsibility brings with it the obligation to ensure that the best interests of the child are a primary consideration … Assessment of the child's best interests must also include consideration of the child's safety. This includes the right of the child to protection against injury or abuse while in the care of parents or legal guardians. The *CROC* provides that these obligations extend to the taking of preventative measures … The Commission considers that there are additional preventative measures that could be taken in Australia to lessen the risk that children born as a result of surrogacy arrangements are placed with parents who may pose a risk to their safety … Such [legislative] criteria should include, as a minimum, criminal record checks and working with children checks.[612]

18.2.4 A number of parties, including Dr Allan, Dr Patricia Fronek, the Association of Relinquishing Mothers (Vic) and the Australian Christian Lobby, told SALRI that it is in the best

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[610] Hague Conference on Private International Law, 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (Preliminary Document No 3 B, Hague Conference on Private International Law, 2014) 26.

[611] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 80-81 [5.70]–[5.72].

[612] 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) 20–21 [98]–[102].

interests of the child for at least the intending parents to be appropriately screened with criminal history checks at a pre-conception stage.

18.2.5 The Australian Christian Lobby, for example, argued:

> Criminal checks should be part of the standard procedures to screen those commissioning surrogate children. Clearly, however, even these will be insufficient to entirely eliminate the risk of exploitation to the children produced through these arrangements. The now infamous case of Peter Truong and Mark Newton illustrates the potential consequences of this risk. Peter Truong and Mark Newton purchased their son as a new born, ostensibly in response to their heart-felt wish to found a family. From the age of 21-months to six years, the boy was sexually abused and groomed to perform sexual acts, not only on his two parents, but also on scores of men they organised for him to meet around the world. Truong and Newton are currently serving lengthy sentences in a US prison. Though the child was purchased after his birth, this case serves to highlight the dangers inherent wherever children become tradeable commodities. Since neither Truong nor Newton had previous criminal convictions, their true intentions in purchasing a child would not have been detected, even were screening to form part of Australia's procedures.[613]

18.2.6 Chief Justice Pascoe has noted that 'worst case scenarios' such as *Baby Gammy*[614] and the Truong/Newton case highlight that the present lack of background checks for at least the intending parents needs to be 'immediately remedied'.[615] The Chief Justice explained:

> The lack of checks exposes the child to unacceptable risks of discrimination, violence, abandonment, abuse and exploitation. Checks of the surrogate mother may also be needed. Home checks or assessment of the family may be needed. It is necessary to protect the future best interests of the child at the time when surrogacy arrangements are made, not after the child is born when it is too late. Clinics and agencies currently have no obligation to check commissioning parents.[616]

18.2.7 The need for some form of police or background check on the parties in a surrogacy context was highlighted to SALRI by parties such as Dr Melissa Oxlad as part of the full and frank exchange of information that should be required between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and with the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. It will also assist the Youth Court. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. It was widely suggested to SALRI that, as part of this process, each party should (if possible) obtain and provide to the other parties and the Accredited Independent Counsellor(s) either a Working with Children Check[617] and/or a national criminal history check.

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[613] Whilst Truong and Newton may not have been detected by police checks, the more extensive Working with Children Check may have exposed their obvious unsuitability to be parents. See below [18.3.10]–[18.3.18].

[614] *Farnell v Chanbua* (2016) 56 Fam LR 84.

[615] 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) 29.

[616] Ibid 29.

[617] SALRI acknowledges the difficulties at this stage with potentially requiring this item as part of any surrogacy process. See below [18.3.15]–[18.3.16].

18.2.8 Several parties supported a national criminal history check as appropriate in a surrogacy context.

18.2.9 Dr Oxlad in consultation supported Working with Children Checks in relation to the surrogate mother, partner and the intending parents. She views such checks as integral to both protecting the best interests of any child and as part of the counselling (and screening) process to assess and determine the suitability of the parties to take part in a lawful surrogacy agreement. Dr Oxlad drew attention to the more stringent and targeted nature of a Working with Children Check and argues this is preferable in a surrogacy context as opposed to a national criminal history or other police check.

18.2.10 Dr Oxlad considered that the checks should include both the surrogate mother and her partner. She raised the cogent situation of where a partner or husband has a worrying violent history or background which may put the surrogate mother and/or the child at risk.

18.2.11 A number of other parties also supported the need for both the intending parents and the surrogate mother to obtain suitable checks, ideally at an early stage of the process.

18.2.12 Julie Redman told SALRI that, although it is not a present legislative requirement, former Youth Court Judge McEwen would routinely require a Working with Children Check be undertaken before granting a parentage order. Ms Redman said that a Working with Children Check should be required to be undertaken by all parties before any surrogacy related fertility treatment as part of the lawyer's certificate process. The Law Society of South Australia, Dr Fronek and Professor Keyes also supported stricter checks on all parties in a surrogacy context.

18.2.13 Some intending parents raised to SALRI that it is unfair and discriminatory to place an additional requirement upon them to have a child through a surrogacy arrangement (especially where there is a genetic link between them and the child).[618] J pointed to the fact that there are many children born into undesirable situations with parents who have had no checks of their criminal histories. Other parties said that even the most irresponsible person or unsuitable parent is not required to seek police checks or official approval to have children by 'normal' means.

18.2.14 Similar concerns about the requirements for police or other checks have been expressed in a Victorian context since their introduction. Dr Ryan Tonkens, for example, has argued:

> The Victorian law isn't discriminatory against bad parents, or convicted criminals, it's discriminatory against infertile people. There's nothing about being infertile by itself that says anything about whether someone is likely to be a bad parent to their future child. And since fertility isn't linked to one's calibre as a parent, the State can only be justified in placing conditions on *all* prospective parents, regardless of fertility status.[619]

18.2.15 Associate Professor Mark Bowman, the Medical Director of Genea, in his submission to the 2009 NSW Standing Committee noted that he supported an identification of the suitability of intending parents in the 'broadest sense' but questioned 'why infertile couples should be selected for criminal checks while we do not take some sort of eugenic totalitarian approach to the whole of people trying to reproduce.'[620] Christopher Scanlon, an individual who accessed assisted reproductive

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[618] See also Sheryl DeLacy, Karen Petersen and John McMillan, 'Child Interests in Assisted Reproductive Technology: How is the Welfare Principle applied in Practice' (2015) 30 *Human Reproduction* 612.

[619] Ryan Tonkens, **'**States have no right to stop anyone wanting to access IVF', *The Conversation* (online), 26 October 2015, **<**https://theconversation.com/states-have-no-right-to-stop-anyone-wanting-to-access-ivf-46982>.

[620] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 81 [5.73]. See also at 81 [5.75].

treatment in Victoria, criticised the 'absurd and illogical discrimination of couples who access IVF' and queried whether the additional requirements placed upon access to IVF and surrogacy are discriminatory as it is seemingly directed at the LGBTIQ community.[621] He queried whether a 'possible reason for government suspicion of the infertile may be that the Victorian government is homophobic.'[622]

18.2.16 The recent NSW Review did not support police checks on the parties to a surrogacy arrangement. It said such checks would not prevent an offshore *Baby Gammy* type case and 'the requirement may merely cause unwarranted inconvenience, expense and distress for those seeking to use altruistic surrogacy for genuine purposes'.[623]

18.2.17 Law and practice in this area are complex and presently are in a state of flux[624] but SALRI adopts, for a surrogacy context, the rationale of the relevant law in relation to suitable background checks (whatever form they may take) set out in the preamble to the *Child Safety (Prohibited Persons) Act 2016* (SA):

> An Act to minimise the risk to children posed by persons who work or volunteer with them; to provide for the screening of persons who want to work or volunteer with children; *to provide for a system of accountability for persons working or volunteering with children; to prohibit those who pose an unacceptable risk to children from working or volunteering with children*; to provide for a central assessment unit to undertake screening of persons who want to work or volunteer with children; and for other purposes.

18.2.18 SALRI accepts that the vast majority of families who access surrogacy do so for legitimate reasons and cases of concern like *Baby Gammy* are likely to be few and far between. However, in any framework where the best interests of the child are paramount, the risk cannot be discounted.

18.2.19 SALRI acknowledges the view that it is unfair to require intending parents to undergo national criminal history or Working with Children Checks when even the most irresponsible person or unsuitable parent is not required to seek police checks or official approval to have children by 'normal' means. However, surrogacy is not the same as having children by 'normal' means. As Dr Fronek and Professor Cuthbert have noted: 'Surrogacy is an alternative pathway to parenthood … Multiple people are involved in this process – surrogate and donors, along with commissioning parents … These differences between surrogacy and normative family formation must be recognised.'[625]

18.2.20 SALRI suggests that surrogacy is arguably more akin to adoption. SALRI agrees in this context with the Australian Human Rights Commission and the justification for suitable checks.[626]

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[621] Christopher Scanlon, 'Police checks on IVF patients add to the pain', *Sydney Morning Herald* (online), 27 October 2013, https://www.smh.com.au/opinion/police-checks-on-ivf-patients-add-to-the-pain-20130926-2ugs6.html.

[622] Ibid.

[623] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 14 [3.38].

[624] See below [18.3.14]–[18.3.16]. See also South Australia, *Parliamentary Debates*, House of Assembly, 24 October 2018, 3097–3101.

[625] 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* (February 2016) 6.

[626] 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) 20 [98]. This point was also made by the Hague Conference on Private International Law in considering whether international surrogacy could be dealt with under the *Hague Convention on Intercountry Adoption*. See Katarina Trimmings and Paul Beaumont 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 *Journal of Private International Law* 627, 633 and 636-638.

18.2.21 Mrs F accepted criminal history or Working with Children Checks may be perceived by the parties as an unfair intrusion but supported such checks as necessary in a surrogacy context for all parties: 'All of this is in the best interests of the child and that is what we have to come back to it is not about us it is about the child.' The Australian Human Rights Commission accepted concerns that criminal history checks for intending parents could be viewed as an arbitrary interference with their right to privacy. The AHRC, however, submitted that any rights to privacy of intending parents were not arbitrarily interfered with by the introduction of criminal history and child protection checks. The AHRC commented:

> a requirement for a criminal record check and a working with children check would have some consequences for the privacy of intended parents. However, the burden of obtaining these checks in order to obtain approval as a prospective intended parent is not onerous. A requirement to conduct such checks in all cases is likely to be of significant benefit if it is effective in some cases in identifying people who should not be granted approval (or if such people are discouraged from making an application to be approved as an intended parent) that this additional burden can be justified as reasonable and proportionate to the aim of mitigating the potential risk of harm to children to be transferred into the care of the prospective intended parents.[627]

18.2.22 SALRI agrees with the broad views of Mrs F and the Australian Human Rights Commission that to require the parties as a pre-requisite to a lawful surrogacy agreement to undergo suitable background checks is a reasonable and proportionate measure to protect the best interests of the child.[628] It is appropriate, in light of both SALRI's research and consultation, to provide for a system of accountability for persons seeking to access lawful surrogacy to prohibit those who pose an unacceptable risk to children from taking part in such an arrangement.[629] SALRI also considers that, for consistency and the best interests of the child, both the surrogate mother and her husband or partner and the intending parents should undergo suitable background checks prior to entering any lawful surrogacy agreement.

18.3 Reform Options

18.3.1 There are several potential reform options to provide for suitable background checks of prospective intending parents and surrogate mothers. In considering the most appropriate approach, SALRI has balanced the best interests of the child, limiting the intervention of the State and operational implications.

Option 1: Counselling for all parties to the arrangement

18.3.2 This option has the least intervention and would maintain the effective status quo of assessing potential risk to the child during the counselling (and screening) process. This model was supported by COAG.[630] COAG did not recommend screening for intended parents. Rather, COAG

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[627] 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) 21–22 [104].

[628] The Australian Human Rights Commission only supported checks on the intending parents. See ibid: Rec 5, 22.

[629] The argument this will still allow individuals such as the father in the *Baby Gammy* case to utilise overseas commercial surrogacy arrangements. This may be so but is not a valid reason against introducing any form of background checks in relation to domestic surrogacy. The complex problem of international surrogacy and precluding unsuitable parties can only be dealt with at a national and international level.

[630] Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Service Ministers' Conference, Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) 18–19.

preferred what it described as a 'least interventionist' approach which relied on compulsory counselling (as required in each jurisdiction) to identify any possible safety issues for children, which could then be raised with a clinic's Ethics Committee before any surrogacy procedure was approved.[631]

18.3.3 There are limitations to the effectiveness of this approach as it relies upon all parties to the surrogacy arrangement being totally candid with all information relevant to the potential risks to the child. It is unlikely that the very small number of individuals who seek to access surrogacy for nefarious purposes that are at odds with the best interests of the child would disclose all relevant information to counsellors. An individual with a history of sexual or violent offences may also be reluctant to freely divulge their past offending. Furthermore, if such an individual did reveal adverse information to a counsellor that raised concerns about their suitability to take part in a lawful surrogacy arrangement and the counsellor did not issue a counselling certificate, the party could seek a counselling certificate from another counsellor, this time omitting to disclose the adverse information.

18.3.4 The counselling and screening process is crucial in a surrogacy context[632] and part of this process is the full and frank exchange of information between the parties to a surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and with the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. However, something more than counselling (and screening) is required to protect the parties, especially the best interests of the child. Some form of background check is also required.

Option 2: All parties to the arrangement provide a statutory declaration

18.3.5 The option of requiring the parties to a lawful surrogacy agreement to complete a statutory declaration was considered by the Standing Council of Attorneys-General as a potential 'intermediate measure'. All parties could be required to provide a statutory declaration as part of the lawyer's advice and certificate process[633] and declare any relevant criminal or child protection history.

18.3.6 Similar issues could also arise with this option as it relies upon the 'honesty' of all parties.[634] A statutory declaration has been described as 'not the best evidence'.[635] SALRI concurs with this view. If the primary consideration of any regulatory surrogacy framework is the best interests of the child, to rely on the frankness of an individual with a history of child sexual abuse to voluntarily declare such previous convictions appears an exercise in wishful thinking rather than considered child safety. SALRI

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631 Ibid. 'The COAG approach seems to have treated surrogacy arrangements as more similar to assisted reproductive treatment or natural conception on the one hand, than to adoption or foster care on the other hand': 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) 20 [97].

632 See below Part 20.

633 See below Part 21.

634 Christopher Scanlon, 'Police checks on IVF patients add to the pain', *Sydney Morning Herald* (online), 27 October 2013, <https://www.smh.com.au/opinion/police-checks-on-ivf-patients-add-to-the-pain-20130926-2ugs6.html>.

635 Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy', January 2009, 19.

can understand the frustration of law-abiding parents,[636] but something more reliable than a statutory declaration in itself is necessary under any surrogacy framework to support and strengthen the counselling and (screening) process and protect the best interests of the child. A statutory declaration may be useful but some form of background check is also necessary.

Option 3: All parties to the arrangement undergo suitable criminal history checks

18.3.7 Requiring the parties to a lawful surrogacy arrangement to submit to appropriate criminal history and/or background checks may be viewed as the most interventionist option in this area. However, this approach received the most support in SALRI's consultation and appears preferable to SALRI as it is calculated to promote child safety and protect the best interests of the child.[637]

18.3.8 The approach taken to criminal history screening in Victoria was considered by SALRI. In the absence of a statutory agency such as the Victorian Patient Review Panel, South Australia would need to take a different approach to criminal history and/or background screening.

18.3.9 Some of the factors that would need to be considered under any background checks are outlined below.

The type of screening check[638]

18.3.10 There are different types of criminal history or background screening checks to identify relevant additional information that cannot be detected on a standard South Australian Police Clearance Certificate. Child-related employment screenings are presently the standard screening measure used in South Australia to assess whether an individual could potentially pose a risk to the safety of children. The information that is assessed in a child-related employment screening includes:

- a national criminal history check;
- information from South Australian government databases, such as SA child protection records from Families SA (Department of Education and Child Development) and Care Concern investigations (by DHS or DECD) into the welfare of children in foster or state care;
- publicly available information from professional registration bodies relating to persons disciplined or precluded from working with children or vulnerable people;
- information from South Australian police, courts, and prosecuting authorities including information about charges for offences alleged to have been committed (regardless of the outcome of those charges);
- expanded criminal history information from other Australian police jurisdictions;
- any declarations made by the applicant in response to questions in the 'declaration' section of their screening application form; and

[636] See also Christopher Scanlon, 'Police checks on IVF patients add to the pain', *Sydney Morning Herald* (online), 27 October 2013, <https://www.smh.com.au/opinion/police-checks-on-ivf-patients-add-to-the-pain-20130926-2ugs6.html>.

[637] See also 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) Rec 5, 20–21 [96]–[103].

[638] This is complicated as the *Child Safety (Prohibited Persons) Act 2016* (SA) is due to commence operation in the near future.

- in some cases, information from professional accreditation bodies regarding people disciplined and/or precluded from working with children or vulnerable adults will be taken into account.

18.3.11 The general rule is that evidence of a conviction for offences such as of murder, sexual assault, violence in relation to a child, child pornography, child prostitution and child neglect precludes an individual from being considered suitable for child-related employment.

18.3.12 Several factors are considered during the assessment of a child-related employment screening including:

- the nature of and circumstances surrounding the offence
- the presence of a pattern of offending (if any)
- time elapsed since the offence was committed
- severity of a court-imposed penalty
- the age and vulnerability of the victim
- the relationship to the victim and age difference
- applicant's own age at the time of the offence
- whether a child played a part in committing the offence (either directly or indirectly)
- relevance of the offence to the role of the applicant
- the applicant's conduct since the time of the offence.

18.3.13 Five Australian jurisdictions, New South Wales, the Northern Territory, Queensland, Victoria and Western Australia carry out Working with Children Checks. Working with Vulnerable People Checks are carried out in the Australian Capital Territory and Tasmania. The information considered by Working with Children Checks varies across jurisdictions, but generally such checks consider:

- convictions – whether or not they are considered spent or were committed by a juvenile
- apprehended violence orders and other orders, prohibitions or reporting obligations
- charges (i.e. where a conviction has not been recorded because, for example, a proceeding has not been heard or finalised by a court, or where charges have been dismissed or withdrawn)
- relevant allegations or police investigations involving the individual
- relevant employment proceedings and disciplinary information from professional organisations (for example, organisations associated with teachers, child care service providers, foster carers and health practitioners).

18.3.14 SALRI notes that the new Regulations to accompany the forthcoming *Child Safety (Prohibited Persons) Act 2016* (SA) for Working with Children Checks are currently being drafted by the Attorney General's Department following a period of public consultation. Child-related Employment Screenings remain the relevant screening procedure until the *Child Safety (Prohibited Persons) Act 2016* (SA) commences operation and the new system applies.

18.3.15 A further complicating factor that emerged in SALRI's follow up consultation is the regime for the exchange of information relating to Working with Children Checks.

18.3.16 Working with Children Checks are conducted in accordance with an intergovernmental agreement that governs the exchange of information between the Australian jurisdictions and the use that jurisdictions may make of the information so exchanged. Any changes to the use of the information would therefore need to be agreed as part of the intergovernmental arrangement. The Working with Children Checks exist (as the name implies) for the purpose of employment vetting and the information is exchanged by the jurisdictions for this purpose. Whether, in the light of these interjurisdictional arrangements, it would be possible to get such a check done in circumstances where it is to be solely used for the purpose of assessing a person's suitability to enter into a surrogacy agreement (where there is no employment vetting purpose) is unclear and is a matter that would need to be considered.

18.3.17 SALRI sees merit in the view of Dr Oxlad. Given the targeted and additional information that can be identified through a Child-Related Employment Screening or Working with Children Check, SALRI considers this is *potentially* and *ideally* the most accurate and appropriate screening measure in the surrogacy context to identify potential risks to the child and help protect the best interests of the child. However, it must be noted that a Child-Related Employment Screening or Working with Children Check is not an assessment of the party's capacity or suitability to be a parent. There are also legal and operational implications as to whether a Working with Children Check is presently available in a surrogacy context.

18.3.18 It therefore may well not be possible to utilise a Working with Children Check at this stage in a surrogacy context. SALRI suggests that, in the alternative, a national criminal history check (though not as detailed in nature as a Working with Children Check) is still of value and should be utilised in a surrogacy context.

The timing of the screening check

18.3.19 Although it is not a present requirement under the 1975 Act, SALRI has heard that parties to a lawful surrogacy agreement currently undergo routine child-related employment screenings at the parentage order stage at the Youth Court. Without dismissing the value of such a check, the utility of such checks is diminished when they are only sought at the post-birth stage. Completing a Working with Children Check (or a national criminal history check) post-birth is not an effective measure to minimise the potential risk to the child. The *Baby Gammy* case highlights the problems that arise when a court is presented with revelations of potential risk to the child at the post-birth stage, notably that it is effectively too late to do anything as the child is with the intending parents. It is preferable that such checks be obtained and considered at an early stage.

18.3.20 Dr Oxlad emphasised in consultation that Working with Children Checks (or a national criminal history check) should be applied for before the counselling (and screening) stage so that they can be taken into account as part of this process and if anything comes up on the check it can be discussed individually and together by all the parties. The circumstances of any offence could then be discussed in any counselling report and would provide further information to the Youth Court at the parentage order stage.

18.3.21 SALRI sees the benefit of a Working with Children Check for all parties to be able to take part in a lawful surrogacy agreement. SALRI raises that the relevant law[639] could be amended to require a Working with Children Check in a surrogacy context. However, SALRI does not wish to be prescriptive and notes that legal and/or operational implications may well preclude the use of a Working with Children Check in a surrogacy context at this stage.[640] In the alternative, SALRI suggests that the parties to a surrogacy agreement should obtain (if possible) a national criminal history check prior to taking part in such an arrangement.

18.3.22 Such background checks are not a measure of the capacity or suitability of an individual to act as a parent but, reflecting wider developments to promote child safety,[641] such checks still play a valuable role to provide for a system of accountability for the parties taking part in a lawful surrogacy agreement and to help prohibit those who pose an unacceptable risk to children from taking part in such an arrangement. As the Australian Human Rights Commission notes: 'Assessment of the child's best interests must also include consideration of the child's safety.'[642]

18.3.23 A statutory declaration may be useful but, in itself, is inadequate. Some form of background check on the parties in a surrogacy context should be seen as a necessary part of the full and frank exchange of information that is required between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and with the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. A background check will help the Accredited Independent Counsellor assess or screen the suitability of the parties to take part in a lawful surrogacy arrangement and crucially to protect the best interests of any child.[643] The relevant check should be applied for by all parties before the counselling (and screening) stage so that they can be properly taken into account as part of this process. They can also be taken into account by the Youth Court in deciding upon the transfer of legal parentage. SALRI if of the view that background checks (whether a Working with Children check or a national criminal history check) should extend to the partner, if any, of the surrogate mother.

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[639] This cannot seemingly be done operationally. The forthcoming *Child Safety (Prohibited Persons) Act 2016* (SA) does not currently require a Working with Children Check to be used for lawful surrogacy arrangements. The *Child Safety (Prohibited Persons) Regulations 2018* (SA) could potentially be amended to include lawful surrogacy to be within the definition of 'work with children' under s 6(3) of the Act (see s 6(3)(c)). This would extend the prohibition under s 16(1), which states that 'a person must not work with children unless a Working with Children Check has been conducted in relation to the person within the preceding five years', to parties to a lawful surrogacy arrangement. However, there are complications: see above [18.3.14]–[18.3.16].

[640] The inclusion of Working with Children Checks as a prerequisite to taking part in lawful surrogacy agreement raises national issues and implications and it may be that this issue is better dealt with as part of any future move towards a national uniform surrogacy scheme. See also above Part 4.

[641] See *Child Safety (Prohibited Persons) Act 2016* (SA).

[642] 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) 21 [101].

[643] See also 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, 20-21 [96]–[103].

18.3.24 Recommendation

Recommendation 32

SALRI recommends that any *Surrogacy Act* should require the full and frank exchange of information between the parties to a lawful surrogacy agreement (that is the surrogate mother, her partner (if any) and the intending parents) and the Accredited Independent Counsellor(s), prior to a surrogacy agreement being entered into, so that all parties can properly assess whether or not to enter such an agreement and/or the agreement is appropriate and will be in the best interests of the child. Included in the information exchanged should be any information that will enable the other parties to the lawful surrogacy agreement, and the Accredited Independent Counsellor(s), to consider whether or not a party might pose a risk to the child or another party. As part of this process, each party should (if possible) obtain and provide to the other parties and the Accredited Independent Counsellor(s) either a Working with Children Check (though SALRI notes there may well be difficulties at this stage with such a requirement) or a National Criminal History Check. Any check must be obtained prior to accessing any surrogacy related fertility procedure AND prior to entering into a surrogacy agreement. The parties should be advised of this requirement as part of their independent legal advice obtained in the process of receiving their lawyer's certificate.

Part 19 – Health Best Practice for Surrogacy

19.1 Current Regulatory Framework for Provision of Fertility Services in South Australia

19.1.1 Strong support was expressed to SALRI by all parties about the importance under any regulatory scheme of protecting the physical and mental welfare of all parties to a surrogacy arrangement, notably to protect the best interests of the child. This includes the provision of high quality medical and counselling services to the parties, especially the surrogate mother and the child.

19.1.2 This Part examines the interaction between an appropriate regulatory framework for non-commercial surrogacy in South Australia and assisted reproductive treatment (ART) in a wider health context. SALRI's focus is on an effective and appropriate regulatory framework for non-commercial surrogacy in South Australia that recognises and protects the interests of all parties, notably the best interests of the child born as a result of surrogacy.[644] Though the ART and wider health context and background are a necessary backdrop for the operation of any surrogacy framework, SALRI's focus is not on these areas except to the extent that is necessary for this reference and, in so far as the interaction between surrogacy and best practice in an ART and wider health context supports and complements an appropriate regulatory framework for non-commercial surrogacy in South Australia. It is also necessary to set out something about the role and provision of ART in South Australia[645] (and elsewhere in Australia) and the operation and interaction of both the law and professional guidelines and public health principles. It is only with an understanding of this context, that one can properly understand the pivotal role and content of counselling within any domestic surrogacy framework.[646]

19.1.3 The professional and high quality of surrogacy related counselling was noted by various parties to SALRI. It is significant that, although the importance of timely and appropriate and independent counselling (including screening) to all parties to a lawful surrogacy agreement strongly emerged in both SALRI's consultation and research, much unease (largely in an interstate context) was expressed in consultation about the role, content and effectiveness of the current counselling process (including in screening or assessing the suitability of the parties to take part in a surrogacy agreement) and various suggestions were made to clarify and improve the present procedure.[647]

19.1.4 Fertility clinics providing ART such as IVF play a central role in facilitating surrogacy in South Australia. This includes:

- facilitating access to counselling services to parties to surrogacy agreements;
- providing fertility treatment and advice to both intending parents and surrogate mothers;

[644] See also Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) Rec 5.

[645] SALRI has been careful to not intrude into the role and operation of ART law and practice (though ART and surrogacy are closely linked) as this is a distinct area and has recently been the subject of a major review in South Australia. See Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017).

[646] See below Part 20.

[647] Ibid.

- fertilising and storing embryos from the intending parent(s), sometimes with the use of human reproductive material from donor(s);
- making determinations as to the intending parent's infertility; and
- providing fertility treatment to the surrogate mother (often involving the implantation of a fertilised embryo, known as 'gestational'[648] surrogacy).

19.1.5 Since 2010, fertility service providers in South Australia have been subject to a 'co-regulatory' system that includes a legislative framework which stipulates registration conditions for ART providers and professional self-regulation through the Reproductive Technology Accreditation Committee (RTAC) accreditation process.[649]

19.1.6 The legislative framework consists of the *Assisted Reproductive Treatment Act 1988* (SA) (the '*ART Act*') and the *Assisted Reproductive Regulations 2010* (SA) (the '*ART Regs'). These laws set out certain requirements for registration, mandatory conditions for registered ART providers, the powers of the Minister for Health to suspend or cancel registration and/or to remove a person from the Register, reinstatement provisions and an appeals process to enable review of any decision relating to the above.[650] If a clinic fails to adhere to these requirements, they are liable for fines of up to $120,000.

19.1.7 Of particular relevance, in the context of surrogacy, is the requirement for ART providers to obtain a licence from the RTAC.[651] In order to obtain a licence from the RTAC, fertility clinics must:

- ensure gametes, embryos and tissues are safe for donation and use in surrogacy arrangements and that appropriate counselling has been provided; and
- provide evidence of compliance with the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (the *NHRMC ART Guidelines*)[652] and any applicable State or Territory laws, which includes a mandatory requirement that counselling by a suitably qualified counsellor with training and experience in assisted reproductive technology must be provided to all donors, recipients and surrogates.

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[648] See above Glossary, [1.3.4].

[649] See Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) for further discussion of this co-regulatory approach.

[650] *Assisted Reproductive Treatment Act 1988* (SA), Part 2, in particular ss 9–10; *Assisted Reproductive Regulations 2010* (SA) regs 6–8. See also Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017).

[651] For further information see Fertility Society of Australia, *Reproductive Technology Accreditation Committee (RTAC)* (2018) <https://www.fertilitysociety.com.au/rtac/>.

[652] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) <https://www.nhmrc.gov.au/guidelines-publications/e79>. The NHMRC is an independent statutory agency established under the *National Health and Medical Research Council Act 1992* (Cth). The *NHMRC ART Guidelines* are divided into three parts: Part A provides background and introductory material; Part B provides ethical guidelines for the clinical practice of ART and Part C relates to ethical guidelines for research, including ethical principles for research, research involving gametes, and research involving embryos. Areas currently addressed by Part B which relate to clinical practice relevant to ART include ethical principles for clinical practice of ART; the use of gametes in reproductive treatment programs; use of donated embryos; storage of gametes and embryos; information giving, counselling and consent; record keeping and data reporting; sex selection; pre-implantation genetic diagnosis; surrogacy; training and quality assurance.

19.2 The NHMRC Guidelines

19.2.1 The National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (the *NHRMC ART Guidelines*) are issued by the NHRMC which is an expert body with the specific role of providing expert and informed advice to health professionals and Governments on ethical behaviour in health care and the conduct of health and medical research.[653] The Guidelines are developed by the Australian Health Ethics Committee and provide an overarching framework for the conduct of ART in both clinical practice and research. The Guidelines are reviewed by the Council and its Committees every five to ten years and provide a set of mandatory rules, principles or recommendations for ART related procedures.

19.2.2 The role and importance of these Guidelines were explained to SALRI by the NHRMC in its submission of 18 June 2018 as follows:

> The guiding principles are in line with community expectations that ART activities will be conducted in a manner that shows respect, minimises potential harms and supports the ongoing wellbeing of all parties, including persons born as a result of ART. The guiding principles are supported by practical guidelines that should be that should be followed unless there is an effective alternatively option that is consistent with the relevant principle, or unless otherwise specified by law.

19.2.3 The *NHRMC ART Guidelines* are especially important in the provision of fertility services and counselling with respect to surrogacy arrangements in South Australia. The *NHRMC ART Guidelines* include specific principles and guidance to service providers, with which compliance is a prerequisite for accreditation with the RTAC. The *NHRMC ART Guidelines* have been highlighted to SALRI by numerous interested parties such as the Australian Christian Lobby, Dr Allan, Dr Oxlad, Jessica Webster and Professor Keyes as representing best practice in terms of the provision of fertility services and counselling in the surrogacy context. SALRI agrees that, reflecting its earlier view, a prescriptive legislative framework is unhelpful and should be avoided as the operational details of any surrogacy framework are better left to such guidelines or other protocols.[654] However, as noted below, SALRI supports measures to promote, monitor and, where appropriate, enforce compliance with these guidelines and protocols as relevant in the surrogacy context.

19.2.4 Chapter 8 of the *NHRMC ART Guidelines* is of particular relevance to surrogacy arrangements and provides that clinics providing fertility services in respect of a surrogacy arrangement must:

- not proceed with ART treatment to facilitate a surrogacy arrangement without first being satisfied that a lawful arrangement is in place.

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[653] The members of the NHMRC are appointed under the *National Health and Medical Research Council Act 1992* (Cth) s 41(1). The Council undertakes its work through a network of Principal Committees, working committees and expert panels, whose members are part-time and give much of their time and expertise. The Council includes the chief medical officer for each State and Territory; and people with expertise in a range of related areas including: professional medical standards; public health research and medical research issues; public health; and ethics relating to research involving humans.

[654] See above [9.7.1]–[9.7.3]. Associate Professor Gleeson stated to the NSW Standing Committee that 'guidelines can be a better way of dealing with a lot of these things, rather than legislation' and that whilst the present system was not fool-proof, 'it seems to me that it is a more realistic and more appropriate way of trying to govern many of these issues, rather than bringing in the heavy hand of the law and the police': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 64 [4.75].

- not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers.
- not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangements are ethical and/or legal. This includes the arrangement for the reimbursement of verifiable out-of-pocket expenses.
- encourage each party to a surrogacy agreement to seek legal advice before reimbursements are given or received to ensure compliance with relevant State or Territory laws.
- ensure that the potential surrogate is medically and psychologically suitable[655] to undertake the requested ART activity and perform only a single embryo transfer.
- ensure that sufficient information about the ART treatment is provided to meet the requirements.
- must obtain valid consent from the relevant party or parties for each specific treatment or procedure required.[656]
- must respect the autonomy of surrogates to make informed decisions about their own medical care and treatment.[657]
- ensure that all relevant parties have adequate time for consideration of information and the complex issues involved before consent is provided.
- encourage a voluntary exchange of information between persons born via a surrogate, the surrogate and the intending parent(s), with the valid consent of all parties.

19.2.5 The *NHRMC ART Guidelines* further provide that all individuals and couples involved in a lawful surrogacy arrangement must undergo counselling before, during and after ART treatment and that this counselling must include a detailed discussion of the following:

- the potential long-term psychosocial implications for each individual and each family involved, including the person who may be born and any other child within the family unit(s) who may be affected by that birth.
- the reason(s) why the potential surrogate mother wants to become involved in a surrogacy program.
- the surrogate mother's right to make informed decisions about their own medical care, including before and during the pregnancy and birth.
- the possibility that the surrogate mother may need medical and/or psychological assistance following the birth and that the pregnancy may affect the surrogate mother's own health.

[655] See further below Part 20.

[656] The Guidelines also note that 'clinics are not responsible for obtaining consent for the surrogacy arrangement itself as this is a legal arrangement between the commissioning parent(s) and the intended surrogate': at 68 [8.11.1].

[657] See also above [9.9.1]–[9.9.4].

- the potential significance of the gestational connection and the right of a child born as a result of surrogacy to know the details of their birth,[658] and the benefits of early disclosure.

- the possibility that a child born as a result of surrogacy may learn about the circumstances of their birth from other sources (for example from other family members) and may independently access information about their birth.

- the possibility that a child born as a result of surrogacy may attempt to make contact with the surrogate mother in the future.

19.2.6 The *Guidelines* also instruct fertility clinics to:

- encourage the potential surrogate to include their spouse or partner (if they have one) in the discussions about the potential surrogacy arrangement, acknowledging the benefits of open disclosure and the potential impact of the decision on the spouse or partner, the couple's relationship and/or the family unit;[659] and

- ensure that the parties to the surrogacy arrangement acknowledge that persons born via a surrogacy arrangement are entitled to know the details of their birth and to have the opportunity to determine the significance of their gestational connection with the surrogate, in accordance with the principles outlined in the *Guidelines*.

19.3 Oversight of Compliance with the *NHMRC Guidelines*

19.3.1 The *Assisted Reproductive Regulations 2010* (SA) require, as a condition of accreditation with the RTAC, that fertility service providers adhere to the *NHMRC ART Guidelines*.[660] However, the RTAC accreditation scheme is a self-regulatory auditing process that relies on the adoption of quality management systems within the service provider's organisation. The co-regulatory regime applying to ART providers in South Australia was recently reviewed on behalf of the State Government by Dr Sonia Allan of Deakin University.[661] Dr Allan found that, while the RTAC accreditation scheme was a valuable approach to self-regulating service delivery, the monitoring of compliance with the requirements of the scheme, including compliance with the *NHMRC ART Guidelines* was 'not being adequately operationalised by the Minister'.[662] Dr Allan further found that:

> Lack of reporting to, and auditing by the Minister regarding the self-regulatory aspects of the regime also compromises the accountability and openness required for an effective co-regulatory regime. It is important to ensure that the [*Assisted Reproductive Treatment Act 1988* (SA)] is effectively operationalised while not creating unnecessary regulatory burden or functions. To give effect to a co-regulatory system too much top down governance should be avoided. On the other hand, it is

[658] This reflects the right under the *Convention on the Rights of the Child* for a child born as a result of surrogacy to be able to know his or her parents and family history. The importance of this theme was often expressed in consultation to SALRI. See above [7.2.1]–[7.2.11], [9.3.4]–[9.3.5], [24.3.1]–[24.3.3].

[659] This theme also emerged in SALRI's consultation. Surrogate or intending surrogate mothers explained that they were careful to obtain the full support of their partners before taking part in a surrogacy arrangement.

[660] *Assisted Reproductive Treatment Regulations 2010* (SA) Reg 8(2)(a).

[661] Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017).

[662] Ibid xix [8] and [9].

not acceptable to do nothing, as a co-regulatory system requires active participation in the regulatory system by both government and clinics.[663]

19.3.2 It is in this context that Dr Allan made various recommendations for the improvement of the co-regulatory regime, including that:

> the Minister seek relevant expert advice and evidence on a periodic basis to ensure that conditions of registration remain current and effective.
>
> Clinics be required to provide the Minister with evidence, for example through an audit report, that they have complied with the accreditation requirements of the RTAC and have addressed how any non-conformance has been remedied.[664]

19.3.3 Dr Allan also recommended that the Minister establish an ART Advisory Council whose role would include monitoring compliance with the *Assisted Reproductive Treatment Act 1988* (SA) and the *NHRMC ART Guidelines*, for example by reviewing annual reports from clinics.[665] This was supported by a further recommendation that Regulation 8(2)(b) should be amended to make it a condition of registration that ART providers provide an annual report to such an ART Advisory Council that includes details of the RTAC audit and any recommendations for improvement, as well as any further reports necessary to inform the Council of the action that has been taken in response.[666] SALRI notes that a similar oversight model currently operates in Victoria.[667]

19.4 Guidance for Hospital and Maternal Health Service Providers

19.4.1 SALRI also heard in consultation from surrogate mothers and intending parents about the need for South Australian hospitals, maternal health service providers and obstetricians to have access to practical information and guidance on how to provide appropriate and sensitive care to surrogate mothers and intending parents in the context of a lawful surrogacy agreement.

19.4.2 SALRI heard from a number of parties in its consultation about concerns of how health providers and hospitals respond to a surrogacy situation. There was reference to apparent uncertainty and a lack of clarity in this context and a perception that hospitals were unprepared in how to appropriately respond to surrogacy situations and recognise the roles of the various parties. There was also reference to clumsy and insensitive treatment of parties at hospitals. One intending couple even told of being asked to leave a hospital 24 hours after the birth of their child (and before the child was released) owing to the hospital's fear of legal liability in a surrogacy context.

19.4.3 SALRI notes that under s 10HAB(1) of the 1975 Act, the medical treatment provided to a surrogate mother or an unborn child to which a recognised surrogacy agreement relates is to be determined as if the recognised surrogacy agreement did not exist.[668] This reflects the basic proposition under Australian (and international) law that parentage (and the power to make decisions about a child's medical treatment) resides with the natural mother until such time as legal

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[663] Ibid.

[664] Ibid Recs 1, 3.

[665] Ibid Rec 5.

[666] Ibid Rec 5

[667] This is called the Victorian Assisted Reproductive Treatment Authority which was established in 2010 by the *Assisted Reproductive Treatment Act 2008* (Vic).

[668] See also proposed s 10G of the 2017 Bill.

parentage is formally transferred.[669] However, outside of this general principle there is little practical guidance for South Australian hospitals, maternal health service providers and obstetricians seeking to provide high quality and sensitive care for surrogate mothers, intending parents and their families.

19.4.4 One surrogate mother, Eliza Cole, has drafted a set of Hospital Guidelines that seek to outline some of the key practical considerations that medical care providers may wish to consider when providing care in the surrogacy context. These considerations include:

1. An inclusive approach to parenting classes, where the surrogate mother and intending parents (along with any relevant support people) are able to participate without discrimination.
2. Support for all parties to contribute to a birth plan, with the surrogate mother provided with the opportunity make the final decision about her care at the time of birth. This birth plan could include information about support people, approach to caesarean section, presence and role of intending parent(s) at various stages of the birth and labour.
3. Training and support for hospital and other staff likely to be providing care in a surrogacy context.
4. The use of separate obstetric and pre-natal appointments for the surrogate mother and the intending parent(s) so that the surrogate mother can have her health care needs addressed in a private environment.
5. Access to education and information about pregnancy, including pregnancy complications and neonatal care for intending parent(s).
6. Access to trained support staff for the intending parent(s) at the time of birth.
7. A sensitive approach to post-natal care for the surrogate mother and child born as a result of the surrogacy arrangement. This could include access to a private room if available, access to the surrogate mother's family and partner, access to nursery care for the baby, breastfeeding support for surrogate mother and intending parent(s), and access to specialist counselling and postnatal depression support and care.
8. A clear approach to discharge of surrogate mother and child from hospital, including the circumstances in which the child can be discharged into the care of the intending parent(s).

19.5 Consultation Overview

19.5.1 SALRI, as part of its wide consultation, heard from with those with direct experience with surrogacy arrangements in South Australia (from both intending parents and surrogate mothers), as well as with fertility counsellors, health consumer bodies, surrogacy advocates, lawyers, academics and Government policy officers. The strong and consistent view expressed by all parties was that all parties to a surrogacy arrangement should have access to high quality, specialist and independent fertility and counselling services prior to, and during, any lawful surrogacy arrangement and following the birth of any child from such an arrangement. The importance of sound underlying public health principles was also identified.

[669] See below Part 27. SALRI proposes, as part of a brief follow up Report into consequential surrogacy issues (see below Rec 68), to consider if the present law in South Australia in this respect needs any clarification.

19.5.2 Several parties such as Mr Adams, Dr Allan and Dr Oxlad also pointed to the need for fertility and counselling services to fully comply with the relevant principles and guidance set out in Chapter 8 of the *NHMRC ART Guidelines*,[670] and that information about these *Guidelines* be available to all parties prior to the negotiation of a lawful surrogacy agreement.

19.5.3 The role and the effectiveness of the current oversight and regulation of fertility providers and if stricter laws were necessary were also raised by several parties to SALRI. Differing views were expressed and no clear consensus emerged (though the importance of adherence to public health principles and the *NHMRC ART Guidelines* were highlighted).

19.5.4 The role and the effectiveness of the oversight and regulation of fertility providers was also raised to the NSW Standing Committee. The Committee described that some participants argued for greater legislative oversight[671] and questioned the appropriateness of self-regulation by fertility clinics in relation to surrogacy arrangements due to a possible conflict of interest, and in recognition of the fact there is often considerable pressure applied to approve surrogacy arrangements, while other inquiry participants argued that the existing guidelines were adequate.[672]

19.5.5 The Plunkett Centre for Ethics suggested to the NSW Standing Committee that there is a possible conflict of interest for a fertility provider who is an 'interested party' and 'stands to gain more as [surrogacy] laws become more permissive'.[673] The Centre explained:

> This is not to impugn the motives of all who work in the fertility industry: it is just to remind the Committee of its social responsibility to take proper account of the possibility of conflict of interest in arguments advanced by anyone who stands to benefit, financially or "professionally", from facilitating surrogacy arrangements.[674]

19.5.6 Other inquiry participants, however, argued to the NSW Standing Committee that the existing professional guidelines were sufficient, and that further legislation relating to ART and surrogacy arrangements was unnecessary.[675] Sydney IVF, for example, described the clinical guidelines they operated under as 'robust and adequate'.[676]

19.5.7 Many parties supported the current provisions of both the *Family Relationships Act 1975* (SA) and the *ART Act* (SA) and noted the effective and professional fertility and counselling services available in South Australia. However, some concerns were expressed to SALRI about the role, content and effectiveness of the present surrogacy framework (including the present counselling (and screening) process) and various suggestions were made for ways to improve the current surrogacy framework to provide enhanced protection to the rights and interests of the surrogate mother (and her partner and/or other children), the intending parents and the child born as a result of the surrogacy arrangement.[677] These suggestions build upon the recommendations made by Dr

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[670] National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) <https://www.nhmrc.gov.au/guidelines-publications/e79>.

[671] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 62–63 [4.63]–[4.67]

[672] Ibid 62 [4.62].

[673] Ibid 62 [4.63].

[674] Ibid 63 [4.63].

[675] Ibid 63 [4.68]. See also: 63–64 [4.69]–[4.75].

[676] Ibid 63 [4.69].

[677] See further below Part 20.

Allan in her 2017 review of the *ART Act* and had a focus on ensuring access to *independent* fertility services and counselling full compliance by service providers with the *NHMRC's ART Guidelines*.

19.5.8 Specific suggestions for reform in an ART or health context raised to SALRI included:

a. The need to adopt a public health approach to the regulation of non-commercial surrogacy. Such an approach would be based on public health principles including human rights principles, and the principle of do no harm, and would complement the focus on the need for appropriate and high-quality counselling for all parties, and specialist, high quality fertility and other health services. Participants at the Expert Forum noted that applying a public health framework to non-commercial surrogacy may also assist in identifying areas where further guidance is need for service providers, and further support is needed for all parties involved in surrogacy agreements.[678]

b. Ensuring information about the Chapter 8 of *NHRMC ART Guidelines* is accessible to all potential parties to surrogacy agreements and is provided as a matter of course to all clients of registered fertility clinics considering surrogacy as an option.

c. That the parties, particularly the surrogate, are provided some sort of support during the pregnancy from a professional intermediary or 'concierge' service.[679]

d. Implementing the recommendations made by Dr Allan following her review of the ART Act designed to ensure that fertility service providers comply with the co-regulatory regime set out in the *Assisted Reproductive Treatment Act 1988* (SA) and *Assisted Reproductive Treatment Regulations 2010* (SA) and provided for in the RTAC accreditation process.

e. Ensuring that the parties to a lawful surrogacy arrangement have access to accurate information about the nature of the fertility treatment provided to each relevant party, including the extent to which the intending parent/s intend to continue to receive fertility treatment once a viable pregnancy has been achieved by surrogate mother.

19.6 SALRI's Reasoning and Conclusions

19.6.1 The following key principles were supported as a sound basis by both the participants at SALRI's Roundtable Expert Forum and others in consultation such as the NHRMC, Dr Bernadette Richards, Dr Fronek, Dr Oxlad, Jessica Webster and the Anglican Church Diocese of Sydney:

- All parties to surrogacy arrangements should have access to high quality, specialist and independent fertility and counselling services prior to and during any lawful surrogacy arrangement and following the birth of any child from a lawful surrogacy arrangement.[680]

[678] SALRI Expert Forum Report.

[679] See also above Part 10.

[680] The issue of whether such counselling should be mandated is discussed below at [20.3.31]–[20.3.36], [20.4.12]–[20.4.13].

- The regulatory framework governing surrogacy arrangements in South Australia should be consistent with a public health approach[681] and with the public health principles set out in the *Public Health Act 2011* (SA).[682]

- Guidance should be provided to service providers and service recipients to ensure appropriate access to high quality medical, fertility and counselling services that are effectively targeted to the surrogacy context.

19.6.2 SALRI agrees with these principles. It is clear from SALRI's consultation and research that an appropriate and effective scheme for domestic surrogacy that protects the interest of all parties, especially the best interests of the child, must operate within a sound and accountable wider ART and general health framework.

19.6.3 SALRI concurs with the suggestions of Dr Allan and Dr Oxlad as to the need for fertility and counselling services to fully comply with the relevant principles and guidance set out in Chapter 8 of the *NHMRC ART Guidelines*,[683] and that information about these *Guidelines* be available to all parties prior to the negotiation of lawful surrogacy agreement. The *NHMRC ART Guidelines* play a valuable part in underpinning and supporting any domestic surrogacy framework and also should form at least the broad basis of the vital counselling (and screening) role to be undertaken with respect to the parties to a lawful surrogacy agreement.[684]

19.6.4 The regulatory framework governing surrogacy arrangements in South Australia should be consistent with a public health approach and with the public health principles set out in sections 5 to 16 of the *Public Health Act 2011* (SA). It is appropriate that information about Chapter 8 of *NHRMC ART Guidelines* should be accessible to all potential parties to domestic surrogacy agreements and be provided as a matter of course to all clients of registered fertility clinics considering surrogacy as an option. The relevant Chapters of the *NHRMC ART Guidelines* should be subject to public consultation and review on a regular basis, in addition to the existing processes for expert review by the NHMRC and its relevant committees.

19.6.5 SALRI notes that fertility clinics should provide potential parties to a lawful surrogacy arrangement with information about the circumstances in which fertility treatment will be provided to either the surrogate mother or the intending parent(s) prior to and during the surrogacy arrangement. This would allow parties to a lawful surrogacy arrangement to consider including, in the surrogacy arrangement, an undertaking by the intending parent(s) not to continue to receive fertility treatment once a viable pregnancy has been achieved by the surrogate mother in accordance with the surrogacy arrangement.

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[681] As the Australian Institute for Family Studies explains, the public health model is 'an epidemiological model that attempts to prevent or reduce a particular illness or social problem in a population by identifying risk indicators': Australian Institute for Family Studies , *Defining the Public Health Model for the Child Welfare Services Context* (2014) <https://aifs.gov.au/cfca/publications/defining-public-health-model-child-welfare-services-context>. Public health models aim to prevent problems occurring in the first place by targeting policies and interventions at the known risk indicators for the problem, swiftly identifying and responding to problems if they do occur and minimising the long-term effects of the problems. See further World Health Organisation, *The Public Health Approach* (2018) <http://www.who.int/violenceprevention/approach/public_health/en/>.

[682] These principles are set out in the *Public Health Act 2011* (SA) ss 5–16.

[683] National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) <https://www.nhmrc.gov.au/guidelines-publications/e79>.

[684] See further below Part 20. SALRI recommends that several aspects are added to the *NHMRC ART Guidelines* to be covered by the Accredited Independent Counsellor as part of the pivotal counselling (and screening) role.

19.6.6 In this context, SALRI notes the benefit of the recommendations made by Dr Allan designed to ensure that fertility service providers comply with the co-regulatory regime set out in the *Assisted Reproductive Treatment Act 1988* (SA) and *Assisted Reproductive Treatment Regulations 2010* (SA).[685] These recommendations would support and complement SALRI's recommendations in this Report directed at providing an effective and appropriate surrogacy framework for South Australia that recognises and protects the interests of all parties, notably the best interests of the child born as a result of surrogacy.[686]

19.6.7 SALRI also suggests that, as raised by Ms Cole, it would be beneficial for the provision of high quality and sensitive care to surrogate mothers and intending parents in a lawful surrogacy agreement to develop practical information and guidance (for example in the form of a Fact Sheets or Guidelines) on these and other related maternal health matters in consultation with surrogate mothers, intending parents, relevant South Australian hospitals, maternal health service providers and obstetricians. SALRI notes that in 2016 SA Health prepared a *Surrogacy in South Australian Public health Services Clinical Directive*.[687] This directive is to be reviewed in August 2019.[688]

19.6.8 Recommendations

Recommendation 33

The regulatory framework governing surrogacy arrangements in South Australia should be consistent with a public health approach and with the public health principles set out in sections 5 to 16 of the *Public Health Act 2011* (SA).

Recommendation 34

SALRI recommends that information about Chapter 8 of the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* should be accessible to all potential parties to surrogacy agreements and be provided as a matter of course to all clients of registered fertility clinics considering surrogacy as an option.

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[685] The Minister should seek relevant expert advice and evidence on a periodic basis to ensure that conditions of registration remain current and effective.

Clinics should, in addition to current requirements under the *Assisted Reproductive Treatment Act 1988* (SA), be required to provide to the Minister the Certification Body's audit report and recommendation to RTAC for the granting of a licence, including any outline of non-conformance and corrective actions required. Auditing of clinics concerning how any non-conformance has been remedied should be conducted by the Minister.

The Minister should establish an ART Advisory Council whose role would include monitoring compliance with the *Assisted Reproductive Treatment Act 1988* (SA), via receiving annual reports from clinics that include details of the RTAC audit and any recommendations for improvement, and any further reports necessary to inform the Council of action that has been taken in response.

[686] Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) Rec 5.

[687] SA Maternal and Neonatal Community of Practice, *Clinical Directive: Compliance is Mandatory- Surrogacy in South Australian Public Health Services Clinical Directive* (18 August 2016) SA Health <https://www.sahealth.sa.gov.au/wps/wcm/connect/a1bfd500416ad4408dc68df59af9b399/Surrogacy+in+South+Australian+Public+Health+Services_v1.0.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-a1bfd500416ad4408dc68df59af9b399-lOzKzMs>.

[688] Ibid.

Recommendation 35

SALRI recommends that the relevant Chapters of the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* should be subject to public consultation and review on a regular basis, in addition to the existing processes for expert review by the NHMRC and its relevant committees.

Recommendation 36

SALRI recommends that practical information and guidance (for example in the form of Fact Sheets or Guidelines) should be developed by SA Health in consultation with surrogate mothers, intending parents, relevant South Australian hospitals, maternal health service providers, fertility providers, counsellors and obstetricians on how to provide high quality and sensitive care to surrogate mothers and intending parents in the context of a lawful surrogacy agreement.

Recommendation 37

SALRI recommends that fertility clinics should provide potential parties to a lawful surrogacy arrangement with information about the circumstances in which fertility treatment will be provided to either the surrogate mother or the intending parent/s prior to and during the surrogacy arrangement. This would allow parties to a lawful surrogacy arrangement to consider including, in the surrogacy arrangement, an undertaking by the intending parent/s not to continue to receive fertility treatment once a viable pregnancy has been achieved by a surrogate mother in accordance with the surrogacy arrangement.

Part 20 - Counselling

20.1 The role of counselling

20.1.1 Section 10HA of the *Family Relationships Act 1975* (SA) prescribes certain requirements for a lawful surrogacy agreement, which should occur prior to any pregnancy.[689] A surrogacy agreement requires the surrogate mother and her husband or partner (if any) and the intending parents to be issued with a certificate by a counselling service,[690] which states that in the counsellor's opinion: 'The proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.'[691] The fertility provider (or its Ethics Committee) may then on the basis of this (and any other item) decide on the suitability of the parties and if it will allow them to proceed with a surrogacy arrangement.[692]

20.1.2 The role, content and effectiveness of counselling was widely identified in SALRI's research and consultation (including at the Expert Forum and in the YourSAy contribution) as a vital issue for any surrogacy framework. Indeed, to some parties it was the vital issue. SALRI concurs with this view. The counselling (and screening) role and the effective discharge of this role are fundamental to any surrogacy framework and to protecting the best interests of the child.

20.1.3 The importance of counselling has been expressed elsewhere in relation to surrogacy. The Commonwealth Committee, for example, observed:

> Counselling allows participants to explore ethical issues that may arise during the process including "…informed consent, psychological impacts, any issues arising from the birth of a child with disability, and how the child should be informed of the circumstances of their conception and birth".[693]

20.1.4 The NSW Standing Committee expressed a similar view:

> The Committee notes the importance of pre-treatment counselling in ensuring that parties to surrogacy arrangements make fully-informed decisions and have considered the wide-ranging implications of the surrogacy arrangement for themselves and for the child to born through the arrangement. The Committee also notes that pre-treatment counselling provides parties to surrogacy arrangements with the time to change their minds before they commit to the arrangement.[694]

20.1.5 Universal support was expressed to SALRI about the importance of specialist, independent counselling for all parties, including both the surrogate mother and her partner and the intending parent(s). This enables the parties to be fully informed of the various ethical, legal, medical and emotional issues, risks and implications associated with surrogacy and to reach an informed decision (assisted by legal advice) about taking part in a lawful surrogacy agreement.

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[689] *Family Relationships Act 1975* (SA) s 10HA(2)(a).

[690] See ibid s 10HA(2)(g).

[691] Ibid s 10HA(3)(b)(ii).

[692] It should be noted that different fertility providers have different practices and in other cases the counsellor's report effectively decides who can access lawful surrogacy treatment.

[693] 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* (April 2016) 10 [32].

[694] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 74 [5.32].

20.1.6 However, counselling also has an important wider 'screening' role to play in a domestic surrogacy context. It is vital that, as far as practicable, only suitable parties enter into a lawful surrogacy arrangement to ensure that the best interests of the child are protected. There have been concerns about individuals with prior offending (especially child sexual abuse)[695] or who are physically or psychologically unsuitable.[696] In the absence of any regulatory body such as in Victoria or Western Australia to approve the parties to a surrogacy arrangement, it crucially falls to the counselling (and screening) process to ensure that, as far as practicable, the parties are suitable to take part in a lawful surrogacy arrangement. This theme strongly emerged in consultation. Dr Oxlad and Mrs F, for example, highlighted the need to ensure that all parties are suitable to take part in an arrangement and to protect the best interests of the child.[697] The Law Society of South Australia commented that the counselling certificate process under s 10HA 'is useful in identifying any issues with respect to the best interests of the child prior to any agreements being entered into.' Leaving it to a court to resolve at the stage of transferring the child's parentage, is far too late.[698]

20.1.7 There was also strong support in SALRI's consultation for this wider 'screening' role of the counselling process. Chief Justice Pascoe emphasised to SALRI the importance of pre-conception counselling and screening for all parties to a surrogacy arrangement. He commented:

> in some jurisdictions currently, the main point of review to see whether the surrogacy arrangement and respective parties meet the criteria is when the commissioning parents are applying for transfer of parentage after the birth of the child. There are cases where the courts have noted that counselling was not provided prior to the pregnancy or some other such criteria was not met) but by this point the child has been born and there is very little that can be done. To avoid this, oversight and approval should be required before any ART process can take place.

20.1.8 The Commonwealth Committee heard many parties 'suggesting that there is a need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment.'[699] The Commonwealth Committee noted that there had been 'strong support' for background checks, medical and psychological screening for all parties prior to entering into a surrogacy agreement.[700] The Committee considered that all surrogacy agreements should include as a prerequisite; background, medical and psychological assessments for all parties.[701]

20.1.9 SALRI adopts the rationale of the counselling and (screening) process provided by the Australian and New Zealand Infertility Counsellors Association Guidelines:

> The pre-surrogacy counselling process must give time, space and intensity for a thorough consideration of the implications of the proposed treatment and the opportunity for a change of mind, minimising possible rupture of relationships which may be longstanding. Comprehensive pre-surrogacy counselling is an integral part of ensuring full informed consent as well as assessing [screening] surrogacy suitability.

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[695] 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* (April 2016) 10.

[696] See further below [20.3.1]–[20.3.49].

[697] Dr Oxlad told SALRI she has rejected unsuitable parties, both surrogate mothers and intending parents.

[698] See above [9.8.1]–[9.8.9], [14.2.2].

[699] 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* (April 2016) 10 [1.32].

[700] Ibid 11 [1.38].

[701] Ibid 11 [1.38]–[1.39].

20.1.10 A number of parties in SALRI's consultation pointed out the effective counselling services available in relation to domestic surrogacy. Indeed, the high quality and professional standard of counselling (as with legal advice) in South Australia in a surrogacy context was noted. However, there was also concern in SALRI's consultation about the role, content and effectiveness of the current counselling process[702] (though largely in an interstate capacity). It was noted that there is often confusion between the 'counselling' and 'screening' aspects of the current role and that the law should be clearer to include the 'screening' aspect of the process. The Law Society and others noted that the current counselling (and screening) process may be a tick box exercise. Several parties described to SALRI that the current process may prove ineffective and that unsuitable parties, especially surrogate mothers who are physically and/or psychologically unsuitable for the particular demands of surrogacy, may be allowed to take part in a domestic surrogacy arrangement. Various suggestions were made for ways to clarify and improve the current counselling (and screening) process in South Australia to provide enhanced protection for the rights and interests of the surrogate mother (and her partner and/or other children), the intending parents and the best interests of any child born as a result of the surrogacy arrangement.[703] These suggestions include recognition of appropriate interstate surrogacy processes.[704]

20.2 Provision of Counselling Services in Surrogacy Arrangements

Current Regulatory Framework in South Australia

20.2.1 All parties to a recognised or lawful surrogacy agreement, as well as the surrogate mother's partner (if she has one) under s10HA of the *Family Relationships Act 1975* (SA) must receive counselling from an accredited counselling service. There is no present express legislative requirement for 'independence' in relation to the counselling (screening) role.

20.2.2 The present provisions provide:

> *S10HA(2a) (f) the surrogate mother must have been assessed by and approved as a surrogate by a counselling service—*
>
> *(i) that is accredited for the purposes of this paragraph in accordance with the Regulations; and*
>
> *(ii) in accordance with any relevant guidelines published by the National Health and Medical Research Council; and*
>
> *(iii) in accordance with any other requirement that may be prescribed by the Regulations for the purposes of this paragraph;*
>
> *(g) each of the following persons must be issued with a certificate by a counselling service that complies with the requirements of subsection (3):*
>
> *(i) the surrogate mother and her husband or partner (if any);*
>
> *(ii) the commissioning parents;*

[702] See further below [20.3.1]–[20.3.49].

[703] See below Part 21.

[704] See above Part 17.

S10HA(3) For the purposes of paragraph (g) of subsection (2a), a certificate complies with the requirements of this subsection if—

(a) the certificate is issued by a counselling service that is accredited for the purposes of this subsection in accordance with the Regulations; and

(ab) the counselling provided to each person referred to in that paragraph must, unless it is not reasonably practicable to do so, be provided by the same counsellor; and

Note— Examples where it might not be reasonably practicable to do so would include where the counsellor has a conflict of interest with one of the parties, or is unavailable due to illness.

(ac) except as contemplated by paragraph (ab), the counselling must be consistent with—

(i) any guidelines related to such counselling published by the Australian and New Zealand Infertility Counsellors Association; and

(ii) any relevant guidelines published by the National Health and Medical Research Council; and

(b) the certificate states—

(i) that the person to whom it relates has received counselling about personal and psychological issues that may arise in connection with a surrogacy arrangement; and

(ii) that, in the opinion of the counsellor who undertook the counselling, the proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.

20.2.3 Regulation 4 of the *Family Relationships Regulations 2010* (SA) provides that a counselling service is an 'accredited counselling service' for the purposes of s 10HA if its employees meet the eligibility criteria for full membership of the Australian and New Zealand Infertility Counsellors Association,[705] or the service is accredited in writing by the Minister.

20.2.4 The purpose of these provisions is to ensure the provision of high quality, specialist counselling (and screening) for all parties to a lawful surrogacy agreement by requiring compliance with the eligibility criteria set out by the Australian and New Zealand Infertility Counsellors Association, any guidelines published by the Australian and New Zealand Infertility Counsellors Association[706] and the *NHRMC ART Guidelines*.

20.2.5 There are no specific requirements under the current regulatory framework for any counselling for the surrogate mother or intending parents after the counselling certificate has been issued. However, under s 10HA(2a)(k) of the 1975 Act, a recognised surrogacy arrangement must state that the intending parents, in accordance with any requirements in the *State Framework for Altruistic Surrogacy,* will take reasonable steps to ensure that the surrogate mother and her spouse or partner are offered counselling (at no cost to the surrogate mother or her spouse or partner) after the birth of the child, including a still-birth. The *State Framework for Altruistic Surrogacy* has not been prepared and is unlikely to be progressed.[707]

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[705] The criteria includes tertiary qualifications and experience in the area of fertility counselling and psychology. See Australia and New Zealand Infertility Counsellors' Association, *Admission of Members* (30 May 2012) Fertility Society of Australia <https://www.fertilitysociety.com.au/wp-content/uploads/ANZICA-MEMBERSHIP-CRITERIA.pdf>.

[706] Members of the Australian and New Zealand Infertility Counsellors Association are required to demonstrate compliance with the ethical guidelines set by RTAC and other external governing bodies, which include compliance with the NHRMC Guidelines relating to surrogacy.

[707] See above [10.3.1]–[10.3.3].

20.2.6 The Family Relationships (Surrogacy) Amendment Bill 2017 (SA) proposed to amend these provisions. For a surrogacy arrangement to be considered lawful it was to be required that:

s 10I(2)

…

(g) the surrogate mother has been assessed and approved under section 10J(1)(a);

(h) the surrogate mother and her partner (if any) have received counselling in accordance with section 10J(1)(b) or 10J(2) (as the case requires);

(i) the commissioning parents have each-

(i) been assessed and approved under section 10J(3)(a); and

(ii) received counselling in accordance with section 10J(3)(b).

s 10J

(1) For the purposes of section 10I(2)(h), the surrogate mother—

(a) must be assessed and approved as a surrogate by an accredited counselling service in accordance with any requirements set out in the Regulations; and

(b) must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the Regulations.

(2) For the purposes of section 10I(2)(h) , the partner of the surrogate mother must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the Regulations.

(3) For the purposes of section 10I(2)(i), each of the commissioning parents—

(a) must be assessed by and approved as a commissioning parent by an accredited counselling service in accordance with any requirements set out in the Regulations; and

(b) must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the Regulations.

(4) On a person receiving counselling under this section, the accredited counselling service must issue to the person a certificate that complies with the requirements set out in the Regulations.

(5) Except where it is not reasonably practicable to do so, counselling required under this section should be provided to each party to a lawful surrogacy agreement by the same counsellor.

(6) In this section—

accredited counselling service means a person or body accredited for the purposes of this section in accordance with the Regulations.

20.2.7 These amendments would have enabled the Regulations to clearly set out the distinct requirements of the counselling for the surrogate mother, the surrogate mother's partner and the intending parents and the assessment and approval of the surrogate mother and the intending parents. The current regulatory regime does not differentiate between the requirements of counselling for all the parties.

20.2.8 The 2017 Bill also contemplated a process for the assessment and approval of intending parents which is not present in the current law.

Regulatory Frameworks in Other Australian Jurisdictions

20.2.9 There are different requirements in each Australian jurisdiction for counselling (and screening) in relation to surrogacy. These requirements are both legislative and professional and, in some cases, established by fertility clinics themselves. The requirements in relation to surrogacy for each Australian jurisdiction are outlined below in Table E.

Table E: Regulatory Frameworks for Provision of Counselling Services in Surrogacy Arrangements in Other Australian Jurisdictions

	Counselling requirements				
Jurisdiction	Pre-agreement	During pregnancy	Post birth	Accreditation of counsellors	Independence of counsellors
Australian Capital Territory *Parentage Act 2004* (ACT)	No legislative requirement. s 26(3)(e) the court considers whether the birth parents and both substitute (intending) parents have received appropriate counselling and assessment from an independent counselling service.	No legislative requirements	No legislative requirements	No legislative requirements	s 26(5) counselling service is not independent if connected with (a) the doctor who carried out the procedure that resulted in the birth of the relevant child; or (b) the institution where the procedure was carried out; or (c) another entity involved in the carrying out the procedure.
New South Wales *Surrogacy Act 2010* (NSW) *Surrogacy Regulations 2016* (NSW) *Assisted Reproductive Technology Act 2007* (NSW)	*Surrogacy Act 2010* (NSW) s 35(1) each of the affected parties must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications *Assisted Reproductive Technology Act 2007* (NSW) s15A An ART provider must not provide treatment to a woman that is intended to	No legislative requirements	*Surrogacy Act 2010* (NSW) s 35(2) The birth mother and birth mother's partner (if any) must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications after the birth of the child and before consenting to the parentage order. *Surrogacy Act 2010* (NSW) s 17	*Surrogacy Act 2010* (NSW) s 4 Qualified counsellor means a person who has the experience or qualifications (or both) of a kind required by the regulations to exercise the functions of a counsellor under this Act. Qualified counsellor For counsellor pre arrangement and for the assessment report under s 15A	Independent counsellor for the purposes of s 15A Means a qualified counsellor within the meaning of the *Surrogacy Act 2010* (NSW) who is not employed or engaged by the ART provider. Independent counsellor for the purposes of s 17 Means a qualified counsellor who is not the counsellor who counselled the birth mother, the birth mother's partner if any or an intended parent about the making of a

	assist the woman to achieve pregnancy and which is sought in connection with a surrogacy arrangement unless the ART provider has been provided with an assessment report by an independent counsellor about the surrogacy arrangement that is based on interviews with the parties to the surrogacy arrangement. An assessment report must include the independent counsellor's opinion as to whether the parties to the arrangement understand the surrogacy arrangement including the possible outcomes of the surrogacy arrangement and are suitable persons to enter into or continue to enter the surrogacy arrangement.		An application for a parentage order must be supported by a report that was prepared by an independent counsellor that contains the independent counsellor's opinion as to whether the parentage order is in the best interests of the child and the reasons for that opinion. The report must include the counsellor's assessment of each affected party's understanding of the social and psychological implications of the making of a parentage order (both in relation to the child and the affected parties), each affected party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child, the care arrangements proposed in relation to the child, any contact arrangements proposed, the parenting capacity of the applicants. Whether any consent given by the birth parents to the parentage order is informed consent, freely and voluntarily given and the wishes of the child if	*Surrogacy Regulation 2016* (NSW) Reg 6 must be a member of or eligible for membership of the Australian New Zealand Infertility Counsellors Association and be familiar with the ANZICA and NHMRC Guidelines For s 17 independent counsellor's report *Surrogacy Regulations 2016* (NSW) Reg 7(1) Hold a qualification after at least 3 years full time study (or equivalent part time study), be a qualified psychologist, qualified psychiatrist or qualified social worker and have specialised knowledge based on the person's training, study or experience, that enables the person to give opinion evidence as to the matters in s 17. For s 35(2) after birth counselling *Surrogacy Regulations 2016* (NSW) Reg 7(2) Hold a qualification after at least 3 years full time study (or equivalent part time	surrogacy arrangement, to meet a precondition to the making of a parentage order and is not connected with a medical practitioner who carried out the procedure that resulted in the conception or birth of the child.

			the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes. The report must indicate the persons who were interviewed and the dates the interviews were conducted and set out the basis on which the person making the report claims to be an independent counsellor.	study), be a qualified psychologist, qualified psychiatrist or qualified social worker and have specialised knowledge based on the person's training study or experience of the social and psychological implications of relinquishing a child.	
Tasmania *Surrogacy Act 2012* (Tas)	s 16(2)(f)(i) each person who at the time the surrogacy arrangement is made must receive counselling from an accredited counsellor before the arrangement was entered into about the arrangement and its social and psychological implications. Requirement for the granting of a parentage order.	No legislative requirements	s 16(2)(f)(ii) each person who at the time the surrogacy arrangement was made was a relevant party must receive counselling from an accredited counsellor after the birth of the child and before the application for a parentage order is made about the arrangement and its social and psychological implications.	s 47 a person who has a tertiary qualification or its equivalent in social work, psychology, counselling or another relevant field and has, in the opinion of the Secretary of the Department, appropriate experience may be accredited by the Secretary by a notice in writing. s 18 the court may make an order requesting a report from an independent counsellor. May specify matters such as but not limited to: the understanding of the social and psychological	For the purposes of a s 18(4) independent counsellor report an accredited counsellor is independent if it is not the counsellor who counselled any relevant party in relation to s 16(2)(f); or is not, and is not associated with a medical practitioner who carried out the procedure that resulted in the conception or birth of the child to which the arrangement relates; or is not, and is not associated with a medical practitioner or other person who has been providing health care, or other care, to the person to whom the counselling is provided.

				implications of the making of a parentage order of each relevant party to the surrogacy arrangement, each relevant party's understanding of the principle that openness and honesty about a child's birth parentage is in the best of the child, the care arrangements proposed in relation to the child, any contact arrangements proposed, the parenting capacity of the intending parent or parents, whether any consent given by the birth parents to the parentage order is informed consent, freely and voluntarily given and the wishes of the child if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes and any other matters the counsellor thinks fit.	
Victoria *Assisted Reproductive Treatment Act 2008* (Vic)	s 40(1)(c) The Patient Review Panel may approve a surrogacy arrangement if the Panel is satisfied that the commissioning parent, the surrogate mother and the surrogate mother's	No legal requirements.	No legal requirements.		s 43(a) Counsellor providing services on behalf of the ART provider. The Patient Review Panel requires surrogate mother undergo an independent

	partner, if any, have received counselling and legal advice as required under section 43. s 43 Before a counselling agreement is entered into the commissioning parent, the surrogate mother and the surrogate mother's partner, if any, must- (a) undergo counselling, by a counsellor providing services on behalf of a registered ART provider, about the social implications of entering into the arrangement, including counselling about the prescribed matters; and (b) undergo counselling about the implications of the relinquishment of the child and the relationship between the surrogate				psychological assessment but there is no legislative requirement.

	mother and the child once it is born; and (c) obtain information about the legal consequences.				
Western Australia *Surrogacy Act 2008* (WA) *Surrogacy Regulations 2008* (WA) *Surrogacy Directions 2009* (WA)	s 17(c)(i) To be approved by the Council. It must be satisfied that 3 months before the approval is given each of the arranged parents, the birth mother and her partner and any other person who has donated reproductive material or who is the partner of a donor have undertaken counselling about the implications of the surrogacy arrangement. The counselling must be provided by an approved counsellor and cover the issues outlined in Reg 4, being: the likely effect of the surrogacy arrangement on the birth mother and on her relationship with the arranged parents; ➢ whether, and to what extent, the birth mother should allow the arranged parents or a donor to express	*Surrogacy Directions 2009* (WA) Direction 12 Fertility providers are to ensure that each party to a surrogacy arrangement is to have access to counselling and support services in connection with the arrangement following a decision by the Council in relation to an application for the approval of a surrogacy arrangement, during treatment in connection with a surrogacy arrangement, following a decision to discontinue treatment in connection with a surrogacy arrangement, during any pregnancy that results from treatment and following the miscarriage or birth of any child born in connection with a surrogacy arrangement. Direction 13 The fertility provider is to make all reasonable efforts to facilitate joint counselling for the surrogate mother and intending parents at 20 weeks after the beginning of a pregnancy, after the beginning of a pregnancy and within 14 days after a miscarriage or birth of the child.	*Surrogacy Act 2008* (WA) s 21(2)(b) the surrogate mother, her partner and the intended parents are required to have received about the effect of the proposed parentage order. *Surrogacy Regulations 2008* (WA) Reg 6 provide this counselling is by an approved counsellor after the birth of the child.	*Surrogacy Regulations* 2008 (WA) Reg 3 approved counsellor (for the purposes of s 17(c)(i) and s 21(2)(b)) means a counsellor approved by the Western Australian Reproductive Technology Council to provide counselling services under the *Human Reproductive Technology Act 1991* (WA) s 17(c)(ii) assessment must be conducted by a clinical psychologist.	No independence requirements.

	their views about aspects of the birth mother's lifestyle and ➢ behaviour during a pregnancy in connection with the ➢ surrogacy arrangement; ➢ whether prenatal testing will be considered and how the birth mother, the arranged parents and any donor will address a situation where a serious defect of a fetus is found; ➢ identification of expenses associated with the pregnancy and the birth that may be paid on behalf of, or reimbursed to, the birth parents and the circumstances in which those expenses may be paid or reimbursed; ➢ identification of expenses associated with a donation of eggs or sperm intended to be used for the conception of a child that may be paid on behalf of, or reimbursed to, a				

	donor and the circumstances in which those expenses may be paid or reimbursed; ➢ who is to be present at a child's birth; ➢ arrangements for the arranged parents to take care of a child following birth, including the process of separation of birth parents from the child; ➢ how the birth of a child born with a disability would be ➢ dealt with under the surrogacy arrangement; ➢ how the separation of the arranged parents, or the death ➢ of either or both of them, before a child's birth would be dealt with under the surrogacy arrangement; ➢ what information would be given to the child about the ➢ circumstances of the child's birth and when and by whom it would be given; what communication it is proposed that a child				

	would have with the birth parents and the family of the birth parents during childhood and how any proposed contact is to be managed; ➢ what communication it is proposed that a child would have with a donor and the family of a donor during childhood and how any proposed contact is to be managed; ➢ the likely effects of the surrogacy arrangement on other ➢ children of the birth parents or the arranged parents and the involvement of those children in the process in ways appropriate to their age and maturity; ➢ the likely effects of the surrogacy arrangement on the birth mother's husband or de facto partner (if any), including consideration of how the surrogacy arrangement may impact on that relationship;				

	➢ the likely effects of the surrogacy arrangement on a ➢ donor or the family of a donor; ➢ how the situation of birth parents changing their minds about transferring the care of a child to the arranged parents would be dealt with; ➢ the attitude towards, and impact of, the surrogacy arrangement on the extended families of the birth parents, the arranged parents and any donor; ➢ the level of support networks for the parties during the surrogacy arrangement; methods of conflict resolution. s 17(c)(ii) To be approved by the Council it must be satisfied that at least 3 months before the approval is given the intending parents, the surrogate mother and her partner (if any) and any other person who is to donate reproductive				

	material for the conception of the child and their partner if any must have been assessed by a clinical psychologist and confirmed to be in a written report to be psychologically suitable to be involved in the agreement.				

20.3 Consultation Overview

20.3.1 As part of its extensive consultation, SALRI heard from those with direct experience with surrogacy arrangements in South Australia (both intending parents and surrogate mothers), as well as from surrogacy advocates, lawyers, counsellors, health consumer bodies, academics and policy officers from SA Health. The strong and consistent view expressed by these parties (including at the Expert Forum) was that all parties to surrogacy arrangements (including the partner of the surrogate mother) should have access to high quality, specialist and independent counselling services prior to, and during, any lawful surrogacy arrangement and following the birth of any child from a lawful surrogacy arrangement.[708] It was also agreed that the initial counselling process should include effective screening of the suitability of the parties to take part in a lawful surrogacy agreement.

20.3.2 A number of parties noted the professional counselling (and screening) services available in South Australia and elsewhere in relation to domestic surrogacy. The professional and high quality of counselling (as with legal advice) in a South Australian surrogacy context was highlighted to SALRI.

20.3.3 However, different views were expressed to SALRI about the effectiveness of present counselling in Australia and there was significant concern in SALRI's consultation about the role, content and effectiveness of the current counselling (and screening) process (albeit largely in an interstate context). Concerns included that the current counselling (and screening) process may be a tick box exercise and that unsuitable parties, especially surrogate mothers who may be physically and/or psychologically unsuitable for the demands of surrogacy, may be allowed to take part in a domestic surrogacy arrangement.

20.3.4 Various suggestions were made for ways to clarify and improve the current counselling (and screening) process in South Australia to provide enhanced protection for the rights and interests of the surrogate mother (and her partner and/or other children), the intending parents and crucially the child born as a result of the surrogacy arrangement. These suggestions include recognition of appropriate interstate surrogacy processes.[709]

20.3.5 The key principles for the vital counselling role(s) in a domestic surrogacy context were discussed in SALRI's consultation by the participants at the Roundtable Expert Forum and others such as the NHRMC, Dr Richards, Dr Fronek, Dr Oxlad, Jessica Webster and the Anglican Church Diocese of Sydney. These following key principles emerged:

- All parties to surrogacy arrangements should have access to high quality, specialist and independent fertility and counselling services prior to and during any lawful surrogacy arrangement and following the birth of any child from a lawful surrogacy arrangement.[710]
- Guidance should be provided to service providers and service recipients to ensure appropriate access to high quality medical, fertility and counselling services that are effectively targeted to the surrogacy context.
- The surrogacy framework needs to include suitable means to assess the suitability of the parties to a lawful surrogacy agreement and prior to any such agreement.

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[708] These participants also pointed to the need for counselling services to fully comply with the relevant principles and guidance set out in Chapter 8 of the NHMRC ART Guidelines, and that information about these Guidelines be available to all parties prior to the negotiation of a lawful surrogacy agreement. See above Part 19.

[709] See above Part 17.

[710] See further below [20.3.31]–[20.3.36], [20.4.12]–[20.4.13].

20.3.6 Specific suggestions for reform which were raised to SALRI in relation to counselling (and screening) in a surrogacy context included:

a. The need for there to be 'independence' in the vital counselling (and screening) role.

b. Ensuring information about the Chapter 8 of *NHRMC ART Guidelines* is accessible to all potential parties to surrogacy agreements and is provided as a matter of course to all clients of registered fertility clinics considering surrogacy as an option.

c. Ensuring that the surrogate mother and her partner receive independent, specialist counselling before and after the surrogacy agreement and are given the opportunity to receive such counselling during the arrangement that adheres to the full range of matters set out in Chapter 8 of the *NHRMC's ART Guidelines*.

d. Ensuring that such counselling extends to the surrogate mother, her partner (if any) and the intending parents.

e. The need to carefully distinguish between the counselling and screening aspects of the present role.[711]

f. The issues to be covered in the counselling (and screening process) should include:

    (i) The potential long-term psychosocial implications for each individual and each family involved, including the surrogate child and any other child/ren within the family unit(s) who may be affected by that birth.

    (ii) The reason(s) why the potential surrogate mother wants to become involved in a surrogacy agreement.

    (iii) The need for the surrogate mother's free, voluntary and informed agreement to enter into a lawful surrogacy agreement.

    (iv) The surrogate mother's right to make informed decisions about their own medical care, including before and during the pregnancy and birth.

    (v) The possibility that the surrogate mother may need medical and/or psychological assistance during any attempts to become pregnant, during the pregnancy and following the birth and that the pregnancy may affect the surrogate mother's own health.

    (vi) The potential significance of the gestational connection and the right of a child born as a result of surrogacy to know the details of their birth and background, and the benefits of early disclosure.

    (vii) The possibility that a child born as a result of surrogacy may learn about the circumstances of their birth from sources other than the intending parents (for example from other family members) and may independently access information about their birth.

[711] 'There were two distinct types of counselling related to fertility treatment: on the one hand there is counselling aimed at providing information, discussing the implications of treatment, assisting in decision making and providing support, and on the other hand there is counselling aimed at assessing [screening] suitability': Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 71–72 [5.21].

(viii) The possibility that a child born as a result of surrogacy may attempt to make contact with the surrogate mother in the future.

(ix) The impact of the potential surrogacy arrangement on the surrogate mother's partner and other children, and on the couple's relationship and/or the family unit.

(x) The impact of the potential surrogacy arrangement on the intending parents' other children, and on the couple's relationship and/or the family unit.

(xi) The implications for all parties, if it is proposed that the surrogate mother will provide her own ovum for use within a surrogacy arrangement.

(xii) The exceptional circumstances present, which would deem it allowable for any party (the surrogate mother and/or intending parents) to participate in a surrogacy arrangement under the age of 25 years.

(xiii) The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the surrogate mother, her partner (if any) and/or the intending parents are suitable to take part in a lawful surrogacy agreement.

(xiv) The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the proposed surrogacy agreement will be in the best interests of any child already existing and any child born as a result of the surrogacy agreement.

g. Ensuring that fertility clinics have internal processes to ensure that appropriate counsellors are available to provide independent counselling to each party to the surrogacy arrangement. SALRI notes that this will require amending s10HA(3)(ab) to allow for each person referred to in s 10HA(2a)(g) to receive counselling from a different counsellor and/or to provide that the counselling provided to each person be provided on an independent basis regardless of whether it is provided by the same counsellor or not.[712]

h. Making it clear that the role of the Accredited Independent Counsellor cannot be performed by an employee or a contractor (someone who receives a commission, bonus or other form

[712] This issue came up in SALRI's consultation. One view is that best practice requires the intending parents and surrogate mother to see different Accredited Independent Counsellors as part of the counselling (and screening) process. Another view is that best practice requires the intending parents and surrogate mother to see the same Accredited Independent Counsellors as part of the counselling (and screening) process. Dr Oxlad favours this approach as she maintains it is not possible to make an assessment about suitability for a surrogacy arrangement and to determine whether such an agreement is in the best interests of any child born as a result of the agreement if the counsellor is only presented with half the information. She said that where the parties reside in different States, there should still be one counsellor who provides counselling (and screening) to all the parties to ensure a comprehensive assessment that considers all perspectives can be undertaken. She said that in present circumstances, such as people being interstate, with modern technology there appears to be no detrimental effect on the counselling process to have some parties seen face-to-face, and others seen over Skype. SALRI understands that currently all parties see the same counsellor as part of the counselling certificate process in South Australia. SALRI can see the advantages of the present approach in South Australia, namely one Accredited Independent Counsellor sees all parties as part of the counselling (and screening) process, but expresses no conclusion on the issue of whether the intending parents and surrogate mother should see different Accredited Independent Counsellors as part of the counselling (and screening) process. Different States take different approaches to this issue and it is ill-suited for legislative prescription. SALRI considers that it is preferable for this question to be determined by the parties and/or any professional or operational guidelines. It is also significant that there are only two or three individuals who presently perform this specialised role in South Australia and SALRI is keen to ensure that any recommendation is practical and is not operationally impracticable.

of valuable consideration in relation to a particular surrogacy arrangement) of the fertility provider providing the treatment.

i. Amending s 10HA (3)(b)(i) to require a counselling certificate to state that each party to the surrogacy arrangement has received counselling about the full range of relevant matters set out in Chapter 8 of the *NHRMC's ART Guidelines*.[713]

j. That the Accredited Independent Counsellor providing a counselling certificate as presently required by s 10HA(3)(b)(i) has the option to prepare an accompanying report that can be used as evidence by a court if required.[714]

k. That surrogate mothers be required to participate in one session of mandatory post birth counselling with the costs to be met by the intending parents.

20.3.7 Many parties described the professional and specialist counselling currently available in South Australia and elsewhere. However, other parties noted to SALRI that the counselling (and screening) provided to parties both prior to, and during, the negotiation of a lawful surrogacy arrangement may not always meet the full range of principles and standards set out in the *NHRMC ART Guidelines* and was not always provided on an independent basis to all of the relevant parties.

20.3.8 For example, SALRI heard that in some instances:

- Pre-surrogacy counselling was provided via Skype and in a group setting, without independent counselling provided to the surrogate mother and/or her family;[715]
- Pre-surrogacy counselling was provided without reference to the full range of matters listed in Chapter 8 of the *NHRMC ART Guidelines*;
- Access to post-birth counselling by surrogate mothers was difficult and not adequately addressed in the surrogacy agreement; and
- Fertility services were continued to be provided to the intending mother, despite the fertility clinic providing fertility services to the surrogate mother that resulted in a viable pregnancy.

20.3.9 There was concern in SALRI's consultation about the role and effectiveness of the current counselling process (especially in its 'screening' aspect).[716]

20.3.10 Dr Fronek noted her disquiet to SALRI that counselling is not necessarily focused on securing the best interests of the child.[717] Some parties, including Mr Page, Hailey and Professors

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[713] See also Rec 40 below. SALRI's recommendation draws on the items identified in Chapter 8 of the NHRMC's ART Guidelines but goes further.

[714] Dr Oxlad outlined to SALRI that it is her standard practice to prepare a detailed Report as part of the initial counselling (and screening) role and SALRI can see the value of such a Report. However, this is an issue for operational practice and policy rather than legislative prescription.

[715] Dr Oxlad, for example, described to SALRI that, as a matter of practice, she prefers not to see all the parties on one day except in 'exceptional circumstances', for example, where some or all of the parties have had to travel considerable distances such as from rural or remote areas or from interstate.

[716] See also: 'A particular concern that was relayed to the Committee suggested that a number of women who have acted as surrogate mothers have suffered post-traumatic stress disorder following relinquishment of the child': 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* (April 2016) 10 [1.34].

[717] See also 'Many professionals in surrogacy counselling roles see their interventions as primarily directed to support (that is focused on the commissioning parents) rather than assessment-oriented (that is focused on the protection of children)': Patricia Fronek and Denise Cuthbert, Submission No 63 to the House of Representatives Standing

Millbank and Stuhmcke raised concerns that counselling under the present law 'is merely to certify the suitability of the agreement' or a 'tick the box exercise'. Participants in the recent study conducted by Professors Karpin, Millbank and Stuhmcke described counselling as 'intrusive and patronising' and a 'hurdle to get around'. Hailey, an intending parent, told SALRI that she did not find counselling very useful. She commented: 'I wouldn't have had to have done if it was just me, it felt like just another box to tick."[718]

20.3.11 Alice commented to SALRI that she did not find the personality testing used in her Australian counselling process to be overly useful or relevant as a tool to screen surrogate mothers and intending parents. In hindsight, Alice believes that the relative who offered and acted as her surrogate mother should not have been approved to act as a surrogate in her domestic surrogacy arrangement because she had emotional and mental health issues associated with her previous pregnancies. The surrogacy arrangement ultimately proved detrimental to the surrogate mother's emotional state. Alice said: 'We should have had an inkling, but we went ahead.' Alice liked the idea of some sort of objective third party to screen surrogate mothers for their psychological suitability at the pre-conception stage. Alice found the counselling process to be very focused upon the surrogate mother and the needs of the intending parents were not addressed. Alice highlighted the benefit of robust counselling at the start to filter out or screen potential surrogates who are physically or psychologically unsuitable to act as a surrogate mother.

20.3.12 Mr Page raised particular concerns to SALRI about the role and rigour of counselling in the South Australian context:

> A criticism that I have of the current Act and of the [2017] Bill is that the pre-signing counsellor is merely to certify the suitability of the surrogacy arrangement. There is no provision about what is to happen with the report or that there is even a report. So as to ensure that there is transparency, there should be a mandated requirement in legislation that there is an affidavit from that counsellor for the court. The judicial officer will then be fully informed about what the issues were. That step (of requiring an affidavit) will mean that each of the lawyers will need to have a copy of that report (without the legislation needing to say so) as will the IVF clinic. Each significant player in the case, namely the lawyers and the IVF Ethics Committee will be wanting to minimise risk and reading that report. My practice is that my clients do not sign the surrogacy arrangement until the report is provided, and any risk issues in the report have first been addressed.

20.3.13 It was also suggested to SALRI that the present scheme fails to adequately distinguish between the 'counselling' and 'screening' aspects of the current role.[719] The importance of counselling is not only to provide support and information to the parties in a surrogacy arrangement but crucially to also assess or screen the suitability of all parties, the intending parents, the surrogate mother and her partner, to take part in a surrogacy arrangement.

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, 5. See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 77 [5.18].

[718] Hailey accepted that counselling brought up 'a few of the hard questions' she had not previously considered such as what would happen to the child if Hailey died during the pregnancy.

[719] See also 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*, February 2016, 5; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 77 [5.18].

20.3.14 Various parties told SALRI that appropriate psychosocial assessment as a 'screening measure' of the suitability of the parties should extend to both 'sides' of a surrogacy agreement. Dr Oxlad, for example, told SALRI that all parties to a surrogacy arrangement, including the intending parents and the surrogate's partner if any, should be 'screened' and that a counsellor can only make an accurate assessment of suitability if provided with complete information obtained by screening all parties.[720] Dr Oxlad and others noted that it was important not to omit the surrogate mother's partner.

20.3.15 Dr Fronek described how screening should extend to the intending parents:

> the IPs should be assessed for suitability to parent (especially as one has no relationship whatsoever) and manage the challenges of a surrogacy. Singles especially as they will need additional social support. There is so many domains that should be assessed for all IPs when the interests of the child is at the forefront of any legislation - from motivation, to strength of relationships, to parenting capacity and styles, providing a home for the child, managing unforeseen illness and disability etc and of course they should not be mentally ill.

20.3.16 Many parties (including Monica, a prospective surrogate, Alice, an intending parent, Dr Oxlad, Ms Webster, Mr Everingham, Professors Millbank and Stuhmcke), emphasised the particular importance of high-quality counselling and appropriate screening to filter out persons either physically or psychologically unable to act as surrogate mothers.

20.3.17 Monica pointed out the 'main motivation' for surrogate mothers is to help infertile couples as they 'are caring people' but 'there are train wrecks out there'. Monica told SALRI that surrogates rely upon the online community as an informal way to ask any of their 'counselling' queries about their suitability as a surrogate. Monica commented that they have the helpful resource of two GPs within the Facebook group.

20.3.18 Professors Millbank and Stuhmcke identified a very real concern from their research of surrogate mothers who were physically or psychologically unsuitable to act as surrogates and noted a number of arrangements in their study were arguably unsuitable arrangements as the surrogate mother had particular vulnerabilities or health conditions. They noted that if a more professional or robust regime had been in place they believe that these surrogates could have been screened out. They consider the roles of counsellors and fertility providers are both ill-suited to act as 'gatekeepers'. Under a voluntary regime, intending parents have the attitude that 'beggars can't be choosers' and they actively ignore these 'red flags' about the suitability of a surrogate. Professors Millbank and Stuhmcke are concerned as counsellors 'don't see themselves as gatekeepers' and parties often do not tell them the truth to avoid potential clinics'. They consider that 'fertility clinics are not equipped' to provide appropriate screening and counselling. They also identified that counsellors are not equipped to effectively carry out a screening role. Participants in their study described counselling as 'intrusive and patronising' and a 'hurdle to get around'. It is a 'tick box' exercise. Professors Millbank and Stuhmcke do not believe counselling is an effective screening tool and believe that surrogates need casework and support outside of the intending parents from some sort of professional intermediary. Such an intermediary could provide a case worker and a peer support group, particularly for the surrogate. They noted that surrogacy is an emotionally demanding task and 'a long journey' for surrogates and they are not properly supported.[721]

20.3.19 SALRI spoke at some length to Dr Oxlad and Jessica Webster, two clinical psychologists about how they approach surrogacy (and screening) related counselling in South Australia. Dr Oxlad

[720] See further above Part 16.

[721] See above Part 10.

told SALRI that she is only aware of two or three professionals who provide these services in South Australia.[722] They told SALRI that, unlike the position interstate, counsellors in South Australia employed by a fertility clinic confine their role to counselling (an Accredited Counsellor) as opposed to the screening aspect (an Accredited Independent Counsellor). They explained this is a practice as opposed to a South Australian legislative requirement.[723]

20.3.20 Ms Webster told SALRI that the onus is on counsellors to choose an effective method to assess prospective surrogates under the current regulatory framework. As part of the assessment process, Ms Webster conducts psychometric testing using the 'Personality Assessment Inventory.' She noted that the Personality Assessment Inventory is the recommended test, but some counsellors may not necessarily use it as it is costly.

20.3.21 Dr Oxlad noted that if a surrogate mother or intending parent has a history of mental health issues that should not automatically preclude them from involvement in a surrogacy arrangement. It is important for the Accredited Independent Counsellor to interview that person, and to obtain detailed information about the nature of the mental health issues including what precipitated the issues, whether the issues are ongoing and details about any treatment received. If issues are ongoing or involved post-natal depression it would also be prudent to seek consent to speak with any mental health professionals involved in the person's care to seek their professional opinion about the person's involvement in a surrogacy arrangement. Dr Oxlad described that it is also important to establish what professional supports will be in place for the person during any attempts to conceive, during pregnancy and post-birth.

20.3.22 Both Dr Oxlad and Ms Webster told SALRI that they prefer the present legislative framework following the 2015 changes. Dr Oxlad noted that the pre-2015 provisions[724] in relation to

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[722] The fact that there are presently only two or three Accredited Independent Counsellors in South Australia needs to be included within any surrogacy framework to ensure any system is practicable.

[723] SALRI notes that the present law is not clear and greater clarity is required in this aspect.

[724] **10HA—Recognised surrogacy agreements**

(2) A recognised surrogacy agreement is an agreement—

(vi) the surrogate mother has been assessed by and approved as a surrogate by a counselling service—

(A) that is accredited for the purposes of this subparagraph in accordance with the regulations; and

(B) in accordance with any relevant guidelines published by the National Health and Medical Research Council; and

(C) in accordance with any other requirement that may be prescribed by the regulations for the purposes of this subparagraph;

(vii) the surrogate mother and both commissioning parents each have a certificate issued by a counselling service that complies with the requirements of subsection (3) (being, as between the surrogate mother on the one hand and the commissioning parents on the other hand, different counselling services);

(3) For the purposes of subsection (2)(b)(vii), a certificate complies with the requirements of this subsection if—

(a) the certificate is issued by a counselling service that is accredited for the purposes of this subsection in accordance with the regulations; and

(b) the certificate states—

(i) that the person to whom it relates has received counselling—

(A) individually; and

(B) if the person is married, or is 1 of the commissioning parents—as a couple, about personal and psychological issues that may arise in connection with a surrogacy arrangement; and

(ii) that, in the opinion of the counsellor who undertook the counselling, the proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.

counselling were 'unworkable and impossible' as they required at least three separate counsellors; one for assessment (or screening) counselling of all parties, one for implications counselling for the intending parents and another for implications counselling for the surrogate.[725] Dr Oxlad said the 2015 changes resulted in an improved process and that the legislative addition that post-birth counselling be offered to the surrogate mother not at her expense has also proved beneficial.[726]

20.3.23 Both Dr Oxlad and Ms Webster told SALRI that their present practice is that they meet with all the parties to the arrangement, individually, as couples and as a group. Dr Oxlad's current practice under the present scheme following the 2015 changes is to tell all the parties upfront that they will require a minimum of six-seven sessions of counselling comprising of:

- Each of the intending parents separately (two sessions, one each)
- The intending parents together (one session)
- The surrogate mother and partner, if applicable, separately (one or two sessions depending on whether a partner exists)
- The surrogate mother and partner, if applicable, together (one session if a partner exists)
- A joint session with all the parties together (one session)

20.3.24 Dr Oxlad cogently described to SALRI that she views her duty as part of the counselling and (screening) process to be to the best interests of any child to be born as a result of surrogacy, rather than to any adult client, whether the surrogate mother, her partner and/or the intending parents.

20.3.25 Dr Oxlad also noted that depending on the ages of any existing children, she may also have a session with any children of the parties (intending parents or surrogate mother) to discuss the issues in an age appropriate manner. This is to ensure that the surrogacy agreement is also in the best interest of existing children. Ms Webster told SALRI that she has met with the children of a surrogate mother as part of the counselling (and screening) process. Ms Webster noted that parties often do not want to discuss a prospective surrogacy arrangement with their existing children 'unless it is happening'. Ms Webster explained that counselling sessions with the parties' existing children should be discussed in counselling but should not be a legislative requirement.

20.3.26 Dr Oxlad emphasised that in a surrogacy context it is important for the Accredited Independent Counsellor to properly see all the parties to a potential arrangement otherwise the counsellor does not have a complete picture from which to make an informed assessment about whether the surrogacy arrangement will be in the best interests of all concerned (especially any children, those already existing and those to be born as a result of the arrangement). This is important as people may omit or downplay information, or even lie to the Accredited Independent Counsellor in hope of being approved. She said that, without seeing all of the parties, it is extremely difficult for the Accredited Independent Counsellor to make a proper and accurate assessment of the arrangement as

(4) Without limiting any other kind of counselling that a person may seek, the counselling contemplated by subsections (2)(b)(vii) and (3)(b) must be consistent with—

(a) any guidelines related to such counselling published by the Australian and New Zealand Infertility Counsellors Association; and

(b) any relevant guidelines published by the National Health and Medical Research Council.

[725] This refers under the previous law to 'as a couple, about personal and psychological issues that may arise in connection with a surrogacy arrangement': ibid s 10HA(3)(b)(i)(B).

[726] See also below Part 23. This aspect also needs to be included within any costs system.

a whole. Dr Oxlad said she has rejected as unsuitable both prospective intending parents and potential surrogate mothers.[727]

20.3.27 As a matter of standard practice, Dr Oxlad prepares a report as part of the counselling (and screening) role. To provide a detailed assessment, the report is about 20 pages in length. She prepares multiple copies of the report and the counselling certificate so that all the parties have the same information and documentation. The parties are then able to provide the report and certificate to the clinic, the lawyer(s) and the court as required.[728]

20.3.28 Other parties (including Monica Professor Millbank and Professor Stuhmcke) noted to SALRI their view that there is inadequate emphasis upon counselling during any pregnancy. Monica considers best practice is to agree to ongoing trimesterly counselling as a 'team'. She said that, even if the counselling 'is not needed' at the particular time, it can prevent issues from manifesting further down the track. The surrogate mother should also have access to monthly counselling if she wants. Monica emphasised that things change, and things go wrong in a surrogacy context between the surrogate mother and the intending parents, and ongoing counselling is an important component of the 'relationships model' of surrogacy as it acknowledges that all relationships, despite the initial goodwill, will have their challenges. Counselling by an Accredited Counsellor during a pregnancy is important to manage the likely stresses and tensions.[729]

20.3.29 Dr Oxlad told SALRI that she always recommends to all parties that they undertake counselling at least once or twice during any pregnancy. Ms Webster also recommends that all parties seek counselling if required during the pregnancy. Dr Oxlad has had interstate clients who have continued counselling sessions during the pregnancy and they have reported the value of these sessions. Dr Oxlad said she highly recommends counselling during pregnancy as good practice as there may be a breakdown in communication between parties, differences of opinions about pregnancy management or birth plans, or complications may arise during pregnancy. However, she did not support mandated counselling (even for the surrogate mother) during pregnancy. It will depend on each situation and counselling for its own sake is unnecessary, even unhelpful.

20.3.30 Both Ms Webster and Dr Oxlad suggested that counselling should be made explicitly available, though not mandated (as with counselling to a surrogate mother during any pregnancy is under the present law)[730] to a surrogate mother in the not uncommon situation where all attempts to conceive have proved unsuccessful. Dr Oxlad said in such circumstances a surrogate mother may feel guilty. A typical reaction may be: 'I was their last hope and I didn't succeed.'

20.3.31 Many parties also stressed to SALRI the importance of counselling after the birth of the child or tragically following a still-birth. Both Dr Oxlad and Ms Webster told SALRI that they encourage all parties, particularly surrogate mothers to seek counselling post birth.

20.3.32 Dr Oxlad, from her clinical experience, emphasised the benefit for the surrogate mother to have post-birth counselling. She described one client who was struggling with possible post-natal depression and other physical health issues post-birth. The client did not seek counselling until a long-

[727] Dr Oxlad also described that the counselling and screening process should include the surrogate's partner given their significant (if often overlooked) involvement in a surrogacy arrangement and she stated to SALRI she would reject a surrogate's partner as unsuitable if, for example, there was a worrying history of family violence and proceeding with the arrangement would threaten the surrogate or any child.

[728] See also below Rec 49.

[729] See also above [9.8.1]–[9.8.9].

[730] *Family Relationships Act 1975* (SA) s 10HA(2a)(k).

time post-birth as she was mindful of all the costs incurred during the surrogacy arrangement and she felt 'bad' asking the intending parents for something else that would cost money.[731] She said this is an attitude shared by many surrogate mothers who could benefit from post-birth counselling. Dr Oxlad told SALRI that it is advantageous that all parties know from the beginning of the surrogacy process that one session of post-birth counselling is mandatory so that they all 'know upfront it is part of the deal' and can factor this into costings. Dr Oxlad noted that post-birth counselling could flag post-natal depression or any trauma symptomatology that may have resulted from the birth which could be important within the context of ongoing long-term costs.

20.3.33 Dr Oxlad said that from this post-birth counselling she would prepare a brief report that could be reviewed by the court when making any decisions about transferring the legal parentage of the child. She suggested that, rather than making 'parentage order'[732] counselling mandatory (as suggested by the Law Society and others), the court could review the pre-surrogacy counselling certificate and any accompanying report along with the post-birth counselling report and consider whether the court requires a more detailed report to assist the court in determining if any order is in the best interests of the child.[733] Dr Oxlad said the court could then choose whether such a report should be prepared by the Accredited Independent Counsellor who conducted the initial counselling and screening or the post-birth counselling or by another Accredited Counsellor.

20.3.34 Chief Justice Pascoe also noted in consultation that it should be optional (and not mandatory) for the court to order or obtain any report at the court order stage. It will depend if such a report will really assist the court to determine if any order is in the best interests of the child.

20.3.35 Dr Oxlad explained to SALRI her view that post-birth counselling should be mandatory rather than mandating counselling during the pregnancy. She emphasised that post-birth counselling is important for any duty of care to a surrogate mother. She also noted to SALRI (as also highlighted by Dr Allan and the Commonwealth Committee)[734] that women can be very traumatised by the birth experience itself and may develop PTSD. Dr Oxlad identified two benefits of a mandatory post-birth counselling session for the surrogate mother. It helps identify any issues such as reluctance to relinquish the child that may be material for a court and also helps identify potential long-term issues with cost implications such as PTSD or post-natal depression.[735] Dr Oxlad, reflecting a theme raised by Professor Millbank,[736] pointed out that counselling to be paid by the intending parents should be available post-birth whether there is a live birth or a still-born child. Dr Oxlad said that a surrogate mother who experiences a miscarriage or stillbirth may also experience significant mental health consequences including a level of self-blame.

20.3.36 Alice and Mrs F also suggested to SALRI a requirement for counselling after birth within the window before a parentage order is granted. Alice believes that this could be beneficial to raise any potential issues before the parties go to the Youth Court for the final order.

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[731] See also above [9.5.7].

[732] In counselling for Parentage Order reports, the focus of the counselling should be on the best interests of the child/ren born as a result of the surrogacy arrangement according to the Australian and New Zealand Infertility Counsellors Association.

[733] See also below [27.4.2] where SALRI raises the benefit of a power for a court to request a report from an independent counsellor and such cost to be ordinarily met by the intending parents (such as s 18 of the *Surrogacy Act 2012* (Tas) or s 17 of the *Surrogacy Act 2010* (NSW)).

[734] 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* (April 2016) 10 [1.34].

[735] See also below [23.2.17], [23.4.7].

[736] See below [23.2.16].

20.3.37 The need for there to be clear 'independence' in the counselling (and screening) role was emphasised by many parties to SALRI such as Dr Richards and Ms Cureton.

20.3.38 The perceived tension between the roles of fertility providers and counselling and screening was also raised in consultation to SALRI. Monica stated that counsellors at interstate fertility clinics may 'play God' and sign off on who can act as a surrogate. She said that very rarely will a counsellor say a surrogate is unsuitable, but they 'may red flag potential issues'. Monica commented that fertility clinics may have a financial interest in allowing as many women as possible to act as surrogates. Mrs F suggested to SALRI that some fertility providers may have a commercial interest or agenda that may conflict with the best interests of the child.

20.3.39 Linked concerns were also expressed to SALRI about the perceived conflict of interest or lack of independence in relation to counselling and screening performed by an employee or 'contractor'[737] of a fertility provider and the need to separate and distinguish the counselling and screening roles.

20.3.40 Several parties (including Dr Peters, Ms Cureton and Monica) said counsellors employed by a fertility provider should not be involved in the assessment or screening of the parties in a surrogacy arrangement in light of the perceived conflict of interest and lack of independence. Chief Justice Pascoe expressed a similar position. Dr Oxlad agreed that counsellors 'directly employed' by a fertility provider as an in-house counsellor should not advise on the suitability of any party to take part in a surrogacy arrangement but if such a restriction extended to anyone 'linked' or 'affiliated' to a fertility provider as a consultant there would be nobody in South Australia left to perform the vital counselling (and screening) role. SALRI notes that, although some parties have told SALRI it would be preferable to have separate counsellors undertaking the counselling (and screening) roles for the surrogate mother and the intending parents, there are only two to three individuals who presently provide these services in South Australia. Any regulatory framework needs to recognise this fact.[738]

20.3.41 The NSW Standing Committee also heard from a number of inquiry participants that counselling aimed at assessment or screening should be provided independently of ART clinics.[739] Ms Montrone stated to the Committee that 'an independent psychological assessment is an essential part of the informed consent process in altruistic surrogacy.'[740] The Australian and New Zealand Infertility Counsellors' Association also highlighted to the Committee the need for independent assessment suggesting that 'all parties (including partners) receive proper and independent biosocial and psychological assessment and counselling prior to commencement of the surrogacy arrangement.'[741] Associate Professor Cook similarly recommended that all parties are 'assessed by an independent psychologist'.[742] Professor Millbank insightfully commented: 'It is very difficult for counsellors if their wages are being paid by a clinic to say, "Actually we are not really sure that this particular practice is that great for people".'[743]

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[737] See above Glossary.

[738] See also above n 711.

[739] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 73 [5.24].

[740] Ibid 73 [5.25].

[741] Ibid 73 [5.26].

[742] Ibid 73 [5.27].

[743] Ibid 73 [5.28].

20.3.42 The NSW Standing Committee concluded:

> However, the Committee agrees with inquiry participants who argued strongly that assessment should be conducted by a counsellor operating independently of the ART clinic providing the services to facilitate a particular surrogacy arrangement. This assessment should then be taken into account by the clinic when determining whether or not to provide treatment to facilitate the surrogacy. The requirement for independent assessment would address any perceived or actual conflict of interest for clinics conducting assessments for treatment they would then provide.[744]

20.3.43 One issue that came up is whether any skills criteria should be prescribed for an Accredited Independent Counsellor. Dr Oxlad and others expressed concern to SALRI at the diversity in the skills and background of some counsellors who perform a counselling (and screening) role in Australia.

20.3.44 Dr Oxlad noted that, within the context of a deregulated health sector, there is diversity in the backgrounds of counsellors who provide surrogacy-related services in Australia. She said that at a minimum, counsellors should be required to be ANZICA members to reduce the likelihood of people taking on such an important and sensitive role without the necessary knowledge and experience and without fully appreciating its serious implications. Dr Oxlad suggested that it would be beneficial if counsellors were registered under the Australian Health Practitioner Regulation Agency given the possible risks to the parties involved.[745]

20.3.45 Mr Page in his submission told SALRI that any process of counsellor accreditation by the Minister in writing was inappropriate and a 'burden on the Minister (and taxpayer) which is not imposed on Ministers (and taxpayers) interstate'. Mr Page pointed to the definition in s 19 of the *Surrogacy Act 2010* (Qld) and said that the emphasis should be placed on 'objective criteria' in the legislation. Mr Page told the 2018 NSW Review that a broader definition of qualified counsellor should be adopted that relies on objective criteria and not membership of the Australian and New Zealand Infertility Counsellors Association.[746]

20.3.46 Two counsellors told the 2018 NSW Review that surrogacy counselling is a specialised field, for which generalist counsellors, or inexperienced counsellors, are not equipped.[747] These counsellors submitted that full membership of ANZICA is an appropriate requirement for counsellors who provide pre-surrogacy arrangement and relinquishment counselling under the NSW Act.[748]

20.3.47 The 2018 NSW Review did not support this recommendation because it 'would be overly prescriptive and may indicate a preference for professional associations.'[749] The Review concluded that the requisite qualifications and experience is covered in the NSW legislative requirements that a person:

- hold a qualification conferred by a university (whether within or outside New South Wales) after at least four years full time study or an equivalent amount of part time study; and
- be a qualified psychologist, qualified psychiatrist or qualified social worker; and

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[744] Ibid 74 [5.35]. See also iv.

[745] The value of professional accountability and sanctions for professional incompetence as with lawyers in relation to their role in providing surrogacy related legal advice (see below Part 21) is relevant.

[746] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 21 [3.71].

[747] Ibid 21 [3.73].

[748] Ibid 21 [3.73].

[749] Ibid 21 [3.73].

- have specialised knowledge of infertility (including surrogacy), based on the person's professional experience counselling clients on these issues.[750]

20.3.48 SALRI notes that Ms Webster and Dr Oxlad who provide surrogacy related services in South Australia are both clinical psychologists and full members of ANZICA. The Executive Committee of ANZICA may only admit a person to full membership of the Association who:

- Has at least a four-year tertiary academic qualification from a recognised institution and are:
    - registered to practise as a psychologist in Australia or New Zealand OR
    - a member of, or is eligible for, membership of the Australian Association of Social Workers or the New Zealand Association of Social Workers
    - registered to practise as a psychiatrist in a State of Australia or New Zealand OR
    - Has other equivalent professional and academic qualifications from Australia, New Zealand or from other countries AND
- is counselling clients who are concerned about issues related to infertility AND
- has at least two years full time or equivalent supervised postgraduate counselling experience. AND
- has demonstrated current knowledge of infertility and infertility treatments.[751]

20.3.49 SALRI notes that ANZICA is the peak body for infertility counsellors in Australia. Although, it may be considered by some parties undesirable to rely upon the accreditation of a particular professional association, within SALRI's recommended framework (and terms of reference) that seeks to minimise the State's involvement in private surrogacy arrangements,[752] it is difficult to conceive of an appropriate Government body to evaluate and monitor the demonstrated infertility knowledge of counsellors.

20.4 SALRI's Reasoning and Conclusions

20.4.1 The counselling (and screening) role and the professional and effective discharge of that role by an Accredited Independent Counsellor is fundamental to any surrogacy framework and to protecting the interests of all parties, notably the best interests of the child (which is obviously the paramount consideration). It is arguably, especially in the absence of any Victorian or Western Australian style regulatory body, the most important practical aspect of any surrogacy framework. SALRI agrees with the suggestions that have been identified by Mr Page, Dr Oxlad and others to clarify and improve the role, content and effectiveness of the present counselling (and screening) process. This not a criticism of the valuable work of the present practitioners in South Australia in this field. Indeed, to the contrary. It is to elevate their approach in practice to represent legislative best practice to support any framework.

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[750] Ibid 21 [3.73].

[751] Australian and New Zealand Infertility Counsellors Association, *Policy and Procedure Manual* (2008) <https://www.fertilitysociety.com.au/wp-content/uploads/ANZICA-Policy-and-Procedure-Manual-2008-Final.pdf>.

[752] See also above [9.7.1]–[9.7.3].

20.4.2 SALRI strongly supports that all parties to a lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) should have access to appropriate, high quality and specialist and counselling services prior to, during and following a lawful surrogacy arrangement.

20.4.3 SALRI considers that the parties to a lawful surrogacy arrangement, namely the intending parents, the surrogate mother, her partner (if any) and the intending parents, should undergo mandatory counselling (and screening) by an Accredited Independent Counsellor prior to any lawful surrogacy agreement and any fertility treatment relating to that agreement. This role includes the screening of the parties to determine their suitability to take part in a lawful surrogacy arrangement and that such an arrangement will be in the best interests of any child.

20.4.4 SALRI considers that, drawing on Chapter 8 of *NHRMC ART Guidelines* and the Australian and New Zealand Infertility Counsellors Association Surrogacy Guidelines, it will be advantageous for any *Surrogacy Act* to contain legislative best practice requirements as to the vital items to be covered by an Accredited Independent Counsellor as part of the counselling (and screening) process. Any *Surrogacy Act* should provide that the Accredited Independent Counsellor covers these vital issues and confirms this in the counselling certificate to be provided to the relevant party.

20.4.5 SALRI notes the sensitive nature of counselling in a surrogacy context, especially the vital counselling (and screening) role. It is a concern if individuals lacking the necessary expertise would undertake this role (though there is no such indication in South Australia). SALRI, consistent with present law and practice, suggests that full membership of, or eligible for full membership of, the Australian and New Zealand Independent Counsellors Association is a necessary prerequisite to act as an Accredited Independent Counsellor and carry out the counselling (and screening) role.[753]

20.4.6 SALRI notes that the present South Australian law does not confirm the need for independence in this vital counselling (and screening role). SALRI notes that the Australian and New Zealand Infertility Counsellors Association Surrogacy Guidelines recognise that there is a requirement in a number of jurisdictions for there to be assessment and counselling conducted by a counsellor who is independent of the treating fertility clinic. This is consistent with Recommendation 3 from the 2016 Commonwealth Committee which stated: 'The need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment.'[754]

20.4.7 SALRI suggests that any *Surrogacy Act* should confirm the need for independence in the vital role of the Accredited Independent Counsellor.

20.4.8 SALRI considers that a counsellor employed by a fertility clinic or a 'contractor' (in the sense of receiving a commission, bonus or any form of valuable consideration from the clinic as a result of the surrogacy arrangement in question)[755] should not act as an Accredited Independent Counsellor. There is an actual or perceived conflict of interest or lack of independence in any such situation. SALRI agrees with the NSW Standing Committee and considers that this prohibition should

[753] SALRI notes that there appears to be no direct ability on the part of the Australian and New Zealand Independent Counsellors Association to enforce and impose sanctions for professional incompetence (unlike with lawyers in relation to their role in providing surrogacy related legal advice (see below Part 21)).

[754] 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* (April 2016) 18 Rec 3.

[755] See above Glossary.

be made clear in any new *Surrogacy Act* and should not just be left to internal policy or protocol or professional guidelines.[756]

20.4.9 SALRI accepts that too expansive a prohibition could have the undesirable effect of disqualifying the two or three individuals who presently carry out the crucial counselling (and screening) role in South Australia from acting as Accredited Independent Counsellors. This is why SALRI does not favour any legislative prohibition extending to persons 'linked' or 'affiliated' to a fertility provider or clinic. This would prove too wide in practice. The prohibition on acting as an Accredited Independent Counsellor should apply to persons employed by a fertility clinic or a 'contractor' (in the sense of receiving a commission, bonus or any form of valuable consideration from the clinic or provider as a result of the surrogacy arrangement in question).

20.4.10 In this context, any *Surrogacy Act* should clearly preclude counsellors employed by a fertility provider from carrying out the screening role of an Accredited Independent Counsellor. The role of a counsellor employed by a fertility clinic should be confined to purely counselling (an Accredited Counsellor). SALRI notes the local practice (unlike interstate) is that counsellors employed by a clinic do not carry out a screening role in relation to surrogacy.

20.4.11 SALRI acknowledges, as did the NSW Standing Committee, that the term 'independent,' in relation to a counsellor being independent of any ART clinic, will need to be carefully defined.[757]

20.4.12 SALRI agrees with Dr Oxlad and Ms Webster that mandated counselling (even for the surrogate mother) during any pregnancy is inappropriate. It will depend on each situation and counselling for its own sake is unnecessary, even unhelpful. However, such counselling during pregnancy may be highly beneficial. SALRI notes that some surrogate mothers may be reluctant to incur additional expenses in relation to counselling during and after the pregnancy. SALRI agrees that the legislative provision confirming that the surrogate mother is entitled to utilise appropriate counselling during a surrogacy related pregnancy and any attempts to become pregnant is worthwhile. SALRI suggests that any *Surrogacy Act* should contain this provision. All parties to a surrogacy arrangement will be clearly aware of this entitlement from the outset and can factor such costs into a lawful surrogacy agreement.

20.4.13 SALRI agrees with Dr Oxlad that it should be mandatory for a surrogate mother to undergo one mandated session of counselling after the birth of a child with the costs to be met by the intending parents. The Accredited Counsellor as part of this session should be required to prepare a short post birth report to guide the court whether a more detailed counselling or other report is needed to assist the court in determining if any order is in the best interests of the child. The *Surrogacy Act* (or the relevant Act) should include a power for the court to order a fresh report from a qualified counsellor if the court considers it appropriate and/or in the best interests of the child.

20.4.14 The role of the Accredited Independent Counsellor as part of the counselling (and screening) process can have significant consequences, notably in determining who is able or unable to take part in a lawful surrogacy arrangement. SALRI accepts that normal administrative law practices and processes would include some formal right or means of appeal or review of an adverse decision of an Accredited Independent Counsellor as part of the counselling (and screening) process (as is included in the Victorian regulatory model). However, any right or means of formal appeal or review

[756] Though SALRI encourages and recommends that registered fertility clinics should adopt internal processes to ensure that any counsellor providing the crucial counselling and screening role to a party in a surrogacy context is in a position to provide independent counselling.

[757] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 75 [5.39].

is at odds with SALRI's terms of reference and the strong (though not universal) theme in consultation to avoid an elaborate State regulatory body or system to oversee surrogacy as exists in Victoria and Western Australia. It is impracticable to include such a right or means of formal appeal or review within SALRI's recommended framework (though an unsuccessful party could try another Accredited Independent Counsellor). SALRI accepts this situation is less than ideal and suggests this aspect is carefully considered as both part of any move towards a national uniform surrogacy model and as part of SALRI's recommended future statutory review of the operation of any *Surrogacy Act*.[758]

20.4.15 Recommendations

Recommendation 38

SALRI recommends that all parties to a lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) should have access to appropriate, high quality and specialist counselling services by an Accredited Counsellor as required prior to, during and following a lawful surrogacy arrangement.

Recommendation 39

SALRI recommends that any *Surrogacy Act* should provide that all parties to a South Australian lawful surrogacy arrangement (as well as the partner of the surrogate mother, if any) must obtain a counselling certificate (which includes screening as to the suitability of the parties to enter into the surrogacy agreement) by an Accredited Independent Counsellor prior to any lawful surrogacy arrangement or related fertility treatment.

Recommendation 40

SALRI recommends that, to give effect to Recommendation 39, the *Surrogacy Act* (or elsewhere) should include the following legislative changes to improve the present counselling (and screening) process:

1. Retaining the current requirements in s 10HA of the *Family Relationships Act 1975* (SA) for all parties to the surrogate agreement, and the surrogate mother's partner, to obtain counselling prior to the lawful surrogacy agreement by an Accredited Independent Counsellor.

2. Amending s 10HA(3)(ab) to require each person referred to in s10HA(2a)(g) to receive *independent* counselling, whether provided by the same counsellor or not.

3. Amending s 10HA(3)(b)(i) to require a counselling certificate to be issued by an Accredited Independent Counsellor which states that the person to whom it relates has received counselling about the full range of relevant matters which includes:

(i) The potential long-term psychosocial implications for each individual and each family involved, including the surrogate child and any other child/ren within the family unit(s) who may be affected by that birth.

(ii) The reason(s) why the potential surrogate mother wants to become involved in a surrogacy agreement.

[758] See above Rec 9, [7.5.46].

(iii) The need for the surrogate mother's free, voluntary and informed agreement to enter into a lawful surrogacy agreement.

(iv) The surrogate mother's right to make informed decisions about their own medical care, including before and during the pregnancy and birth.

(v) The possibility that the surrogate mother may need medical and/or psychological assistance during any attempts to become pregnant, during the pregnancy and following the birth and that the pregnancy may affect the surrogate mother's own health.

(vi) The potential significance of the gestational connection and the right of a child born as a result of surrogacy to know the details of their birth and background, and the benefits of early disclosure.

(vii) The possibility that a child born as a result of surrogacy may learn about the circumstances of their birth from sources other than the intending parents (for example from other family members) and may independently access information about their birth.

(viii) The possibility that a child born as a result of surrogacy may attempt to make contact with the surrogate mother in the future.

(ix) The impact of the potential surrogacy agreement on the surrogate mother's partner and other children, and on the couple's relationship and/or the family unit.

(x) The impact of the potential surrogacy agreement on the intending parents' other children, and on the couple's relationship and/or the family unit.

(xi) The implications for all parties, if it is proposed that the surrogate mother will provide her own ovum for use within a surrogacy arrangement.

(xii) The exceptional circumstances present, which would deem it allowable for any party (the surrogate mother and/or intending parents) to participate in a surrogacy arrangement under the age of 25 years.

(xiii) The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the surrogate mother, her partner (if any) and/or the intending parents are suitable to take part in a lawful surrogacy agreement.

(xiv) The need for the Accredited Independent Counsellor conducting the counselling and screening to confirm that the proposed surrogacy agreement will be in the best interests of any child already existing and any child born as a result of the surrogacy agreement.

Recommendation 41

SALRI recommends that any *Surrogacy Act* (or accompanying Regulations) provide that full membership of, or eligibility for full membership of, the Australian and New Zealand Independent Counsellors Association, is a necessary prerequisite to act in South Australia as an Accredited Independent Counsellor and carry out the counselling (and screening) role in relation to a lawful surrogacy agreement.

Recommendation 42

SALRI recommends that registered fertility clinics should adopt internal processes to ensure that an individual providing the counselling (and screening) to each person referred to in Recommendations 39 and 40 (see also s 10HA(2a)(g) of the *Family Relationships Act 1975* (SA)) is in a position to provide independent counselling (and screening) to each client (though also note Recommendation 43 below).

Recommendation 43

SALRI recommends that any *Surrogacy Act* should make it clear that an Accredited Independent Counsellor responsible for the issue of a counselling certificate (including determining the suitability of a party or parties to enter into a lawful surrogacy agreement) cannot be employed by a fertility clinic or be a 'contractor' (in the sense of receiving a commission, bonus or any form of valuable consideration from the clinic as a result of the surrogacy arrangement).

Recommendation 44

SALRI recommends that it should not be mandatory for the parties to undergo counselling during the surrogate mother's pregnancy. Rather, SALRI recommends that any *Surrogacy Act* should require that a lawful surrogacy agreement states that the intending parents will take reasonable steps to ensure that the surrogate mother and her partner (if any) are offered counselling (at no cost to the surrogate mother or her partner) during any attempts to become pregnant (even if a pregnancy is not achieved) and during any pregnancy to which the agreement relates.

Recommendation 45

SALRI recommends that any *Surrogacy Act* should provide that it is mandatory for the surrogate mother to undergo one session of counselling with an Accredited Counsellor of the surrogate mother's choice after the birth of a child (with any cost to be met by the intending parents). The counsellor (who need not be an Accredited Independent Counsellor) as part of this session should prepare a short post birth report to guide the court as to whether a more detailed report may be necessary to assist the court in determining if any order is in the best interests of the child. Any *Surrogacy Act* should include an express power for the court to order a more detailed report from an Accredited Counsellor or suitable other expert of the court's choice if the court considers it appropriate and/or in the best interests of the child.

Part 21 - Lawyer's Advice and Certificate

21.1 Current Law

21.1.1 Section 10HA(6) of the *Family Relationships Act 1975* (SA) provides that, as a condition precedent, for an agreement to be taken to be a recognised surrogacy agreement, the relevant terms of the agreement must be set out in a written agreement that is signed by each party. The signatures of each party must be attested by a lawyer's certificate and the certificate, with respect to the surrogate (and if relevant, her partner), must be given by a lawyer who is independent of the lawyer who gives a certificate with respect to either or both of the intending parents. A 'lawyer's certificate' for the purposes of the 1975 Act means a certificate signed by a lawyer and endorsed on an agreement certifying that the lawyer explained the legal implications of the agreement to a party to the agreement named in the certificate and the party signed the agreement in the lawyer's presence.

21.1.2 The 2017 Bill proposed to additionally require that the party appeared to understand the advice given about the legal implications of the lawful surrogacy agreement.[759]

21.1.3 A lawyer's certificate may only be endorsed by a person who is a legal practitioner of the Supreme Court of South Australia and holds a current practicing certificate. Thus, a legal practitioner admitted in another Australian jurisdiction is seemingly unable (as a Victorian based lawyer noted in consultation) to endorse a lawyer's certificate for the purposes of the South Australian regime. Such a situation appears anomalous on various grounds.

21.2 Consultation Overview

21.2.1 Almost all parties that SALRI spoke to in consultation emphasised the importance of informed, high quality, independent pre-conception legal advice. Ms Jefford, a Victorian surrogacy lawyer, noted: 'Surrogacy lawyers are few and far between, and often family lawyers cross over into surrogacy law without any appreciation of the law or the context of the arrangements.' It was noted that such legal advice should not be a mechanical or perfunctory tick box exercise but rather should be careful and considered and explain to the parties the legal responsibilities, risks and the various legal implications of the surrogacy arrangement. The legal advice serves a vital role in properly informing all parties of their legal rights and responsibilities, both toward each other and to any child born as a result of surrogacy, as well as the legal implications and risks of entering into a surrogacy arrangement. The legal advice sets out the understanding of costs within the non-commercial framework. Ms Brunacci also emphasised, drawing on her own background in family law and surrogacy practice, that such detailed and accurate advice (not a tick box effort) is essential to support the necessary focus prior to any fertility treatment so that the parties enter the agreement 'with their eyes wide open'. It is a case of effectively shutting the stable door after the horse has bolted, as Chief Justice Pascoe and others have raised in consultation, to seek legal advice or assistance after the fertility treatment has been successful or even as late as the court stage. Chief Justice Pascoe and the Law Society of South Australia viewed informed and detailed legal advice to the parties at the outset as essential.

21.2.2 Mr Page also noted that the requirement for independent legal advice for all parties was a 'strength' of the current regulatory regime in relation to surrogacy.[760] It was noted that parties suffer if they do not have access to such informed and proper advice. Alice, for example, commented to SALRI

[759] Family Relationships (Surrogacy) Amendment Bill 2017 (SA) s 10I(6)(b).

[760] Mr Page helpfully provided SALRI with a surrogacy contract that illustrates the detail and scope of his advice and the need for proper and informed legal advice of the various issues and implications.

that she had not found the lawyer she had seen before pursuing surrogacy particularly helpful or knowledgeable.

21.2.3 Julie Redman, an experienced South Australian lawyer, who regularly practices in surrogacy told SALRI that the current provisions relating to the obtaining of a legal certificate from a lawyer could be strengthened and expanded to require the lawyer to certify that they have provided written legal advice addressing a range of important matters listed in the Regulations or the Act. She said it should include the requirement to provide advice about the full range of legal advantages and risks to the parties in becoming party to a surrogacy arrangement. She commented it could also be used to ensure legal advice is provided on matters such as succession.[761] Ms Redman noted that this type of approach is required of lawyers providing advice on child support agreements under the *Child Support (Assessment) Act 1989* (Cth) and financial agreements under the *Family Law Act 1975* (Cth).

21.2.4 Sarah Jefford, drawing upon her experience as a surrogate herself and as a family and surrogacy lawyer based in Victoria, did not support the requirement that the lawyer advising the parties in South Australia must have a practising certificate in South Australia and that surrogacy arrangements must be in writing. Ms Jefford commented that:

> This is unique to the SA legislation – other surrogacy legislation has no such requirement. Most of my practice is conducted over Skype, and if my clients need to sign an Agreement then they make arrangements to do that with a Justice of the Peace or other witnesses. The Agreements are not binding, so there doesn't seem to be any particular reason why a lawyer should be present during the signing. I am able to practice surrogacy law across all States in Australia, except South Australia. This is because I cannot get a Practising Certificate for SA, whilst I hold one for Victoria. I can advise any person in any other State, but I cannot advise a Melbourne-based surrogate who is entering a surrogacy arrangement with South Australian intended parents …
>
> When a client is dissatisfied with their surrogacy lawyer in South Australia, they have very limited options to find someone else. And they cannot find a surrogacy lawyer interstate because of the requirements of the SA law.

21.2.5 There is further value in informed legal advice and a proper agreement. Such advice and an agreement promotes equality and parity between the parties and reduces the scope for exploitation or coercion which are often seen in offshore surrogacy arrangements. Such an agreement can, and should, also set out the various expenses and costs and this should reduce the scope for friction and disputes later down the track.

21.2.6 Monica, for example, saw the advantages of a detailed agreement after legal advice between the parties at the outset of the process that clearly sets out the agreed expenses and contingencies. J similarly noted the need for everything to be up front and set out and agreed at the start. All parties should 'know what they are entering into' and any agreement must be fully informed and based on both sides seeing their own lawyer and counsellor.

21.2.7 Mr Everingham also identified the need for proper legal advice and detailed agreements:

> Mandatory written surrogacy agreements are critical elements of successful gestational and traditional surrogacy arrangements as they ensure all parties have documented how they would intend for the surrogacy arrangement to progress. Such processes are invaluable in setting expectations, addressing fears and reaching a mutual understanding of the parameters of the

[761] The civil law implications of surrogacy in the South Australian context will be discussed in SALRI's forthcoming spin off report. See below Rec 68.

arrangement. They cover how issues such as expenses, communication, psychological and practical support will be addressed during pregnancy attempts, pregnancy itself and post-birth.

21.2.8 Many parties emphasised to SALRI the importance of pre-conception agreements in this context to allow consideration and discussion of potential issues that may arise in the course of an arrangement before the parties undergo surrogacy related fertility procedures. Pre-conception counselling and legal advice is integral to the parties so the parties can be made aware of potential complications and challenges that may arise in a pregnancy, birth and during the child's life as a result of the proposed surrogacy arrangement. Further, pre-conception legal advice is essential to ensure the consent given by all parties is fully informed consent, equipped with appropriate knowledge of potential risks and responsibilities, for example a child born with a serious ongoing medical condition or intellectual disability, or if the birth mother suffers long term health complications.

21.3 SALRI's Reasoning and Conclusions

21.3.1 SALRI accepts the strong benefit of providing informed legal advice to each party by an independent Australian (not necessarily a South Australian) lawyer prior to the parties entering into a surrogacy process, especially prior to undertaking any surrogacy related fertility treatment. This legal advice must be careful and considered and not just a tick box exercise. The legal advice should be confirmed in the form of a signed certificate by the lawyer certifying that the lawyer has covered certain essential aspects with their client. This certificate is helpful to ensure that the lawyer has properly carried out this vital role and, as Chief Justice Pascoe said in consultation, provides for accountability for the lawyer in the content and consequences of their advice. The legal advice is an integral aspect of the early focus that SALRI has recommended.[762]

21.3.2 The mandatory aspects to be covered in the advice (and confirmed by the certificate) are not only those directly relating to the terms of the agreement but also the consequential effects on the ongoing legal rights and responsibilities of the parties and the legal entitlements of the child.

21.3.3 The legal advice would supplement and support the counselling advice and certificate required from an Accredited Independent Counsellor by the parties. This certificate would be supplied to the lawyer prior to finalisation of the surrogacy agreement and must set out the proposed required items for the counsellor to cover with the parties.[763]

21.3.4 Any report prepared by an Accredited Independent Counsellor to accompany the necessary certificate as part of the counselling (and screening) process may or may not be provided to the lawyer at the discretion of the parties.

21.3.5 SALRI also considers that surrogacy agreements to be recognised by any *Surrogacy Act* should be contracts the proper law of which is the law of South Australia. This requirement avoids the need for a contract formally to specify expressly that the contract is governed by South Australian law, and thus ensures that a contract which lacks a formal express term to that effect is not, *ipso facto*, prevented from being recognised. At the same time, it allows the contracting parties, by including an express term to the effect that the agreement is to be governed by South Australian law, to ensure that an agreement meets this requirement. The requirement that a surrogacy agreement be one to which

[762] See above [9.8.1]–[9.8.9].

[763] See also above Recs 38–45, Part 20.

the law of South Australia applies reduces the potential for choice of law issues to complicate question of which State's legislation applies to the surrogacy arrangement.

21.3.6 SALRI notes the advantages of the model used in the *Family Law Act 1975* (Cth) for the statutory requirements for a financial agreement (including the form and content of the necessary legal advice).[764] SALRI suggests that, drawing on the financial agreement model, any lawful surrogacy agreement should be required to meet certain legal requirements in this regard to be valid. This would include the following:

(a) the agreement is signed by all parties; and

(b) before signing the agreement, each party is to be provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

(c) either before or after signing the agreement, each party is to be provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

(d) a copy of the statement referred to in paragraph (c) that was provided to the other party or to a legal practitioner for the other party; and

(e) the agreement is a contract of which the proper law of the contract is South Australian law; and

(f) the agreement has not been terminated and has not been set aside by a court.

21.3.7 For the purposes of the advice under point (b) above, the advice is to include information as to the rights and responsibilities for the child, particularly as to the authority to make decisions as to health care pre and post birth, and upon the making of an order as to parentage by a court of competent jurisdiction, the effects of the agreement on matters of succession and estate planning and the categories of costs recoverable (see below recommendations 51-54).

21.3.8 SALRI can see the advantage to the Youth Court being provided with the certificate(s) of an Accredited Independent Counsellor and any initial counselling reports in respect of the parties (as Mr Page suggested in consultation), the Working with Children Checks (or the national criminal history checks)[765] and the lawyers' certificates in respect of their advice. This material should be lodged with the Youth Court or any other relevant court prior to any order being made transferring legal parentage of the child. This will assist the court in reaching an informed decision as to whether transferring the legal parentage of the child is in the best interests of the child and if any further report may be needed.

21.3.9 Recommendations

Recommendation 46

SALRI recommends that any *Surrogacy Act* provide that both the surrogate mother and the intending parent(s) must have a certificate from an Australian lawyer certifying that they have

[764] *Family Law Act 1975* (Cth) s 90G.

[765] This also accords with the existing practice of the Youth Court. See also Part 18 above.

received appropriate independent legal advice on the surrogacy agreement and its various implications.

Recommendation 47

SALRI recommends that more detail and clarity should be added by any *Surrogacy Act* to the type of the legal advice that has to be provided to the parties.

In this regard, SALRI recommends that the form of a surrogacy agreement should meet certain legal requirements in order to be valid, and should include (at a minimum) the following criteria:

(a) the agreement is signed by all parties; and

(b) before signing the agreement, each party is to be provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and

(c) either before or after signing the agreement, each party is to be provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and

(d) a copy of the statement referred to in paragraph (c) was provided to the other party or to a legal practitioner for the other party; and

(e) the agreement is a contract of which the proper law of the contract is South Australian law; and

(f) the agreement has not been terminated and has not been set aside by a court.

Recommendation 48

For the purposes of Recommendation 47 above, SALRI recommends that the present law be extended in any *Surrogacy Act* to provide that the content of the legal advice provided to the parties should include information dealing with the rights and responsibilities for the child, particularly regarding the authority to make decisions relating to health care (both pre and post birth), and upon the making of an order as to parentage by a court of competent jurisdiction, the effects of the agreement on matters of succession and estate planning and the categories of costs recoverable (see Recommendations 51–54 below).

Recommendation 49

SALRI recommends that the Youth Court (or any other relevant court) should be provided with the counsellor's certificates, any initial counselling reports in respect of the parties, the Working with Children Checks (or the national criminal history checks) and the lawyers' certificates in respect of their advice to the parties. This material should be lodged with the Youth Court or any other relevant court prior to any order being made transferring the legal parentage of the child.

Part 22 - Mediation

22.1 Is there a need?

22.1.1 Pregnancy is already a demanding process at the best of times, but these demands and pressures are compounded in the surrogacy context. It was widely noted to SALRI that surrogacy arrangements even (or especially) between relatives and close friends will often prove stressful and friction, disagreement and disputes (especially over costs)[766] are commonplace. Most of the time (as with Alice), these disagreements are resolved, but sometimes not.

22.1.2 The role and benefits of mediation (and alternative dispute resolution) in the area of surrogacy (as with other areas of family law) are obvious.[767] Mediation plays a pivotal role in family law. An underlying premise of any regulated surrogacy framework should be to entrench the role and benefit of mediation to try to prevent disputes arising between the parties, and if such disputes arise (especially about costs), to promote their swift resolution and avoid lasting ill will and/or escalation to costly legal proceedings.

22.1.3 Most parties accepted that mediation in some form should be available to parties to help them work through any disagreements either during the surrogacy and/or after the birth.

22.1.4 There was a divergence of views among those consulted as to when or how often mediation should occur.

22.2 Consultation overview

22.2.1 Some participants at SALRI's Expert Forum saw value in providing access to both legal advice and accredited mediation services prior to and during the process of making a lawful surrogacy agreement, for example to help equalise the power dynamic that may exist between parties and to avoid costly disagreements down the track.

22.2.2 However, other participants considered the enforced use of mediators to be unnecessary and complicating and supported an approach that allows parties to work through a best practice template agreement with a focus on informed legal advice at the start and end of the agreement. This was considered to be a cheaper, streamlined and more effective option.

22.2.3 Julie Redman supported this view. She told SALRI that she encourages parties to mediate, but she does not include mandatory mediation. Ms Redman includes a clause in regards to non-

[766] Professors Karpin, Millbank and Stuhmcke found tensions are common between surrogates and intending parents and 'it's always about money and it's never about money'. They said that tensions related to cost are usually a result of some sort of other broken expectation.

[767] The particular advantages of mediation in a family law context are long established. 'Mediation, where a neutral third person assists the parties arrive at their own solution to their dispute, is regarded as being particularly suitable for parties who need to maintain some kind of relationship, as many parties to family law proceedings do. Mediation, as a dispute resolution process in family law, can provide greater flexibility in the outcomes, as parties are not necessarily constrained by legal remedies. Given the wide variety of individual circumstances in family law disputes, such flexibility is desirable': Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975, Parliament of Australia, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992) 314. 'Mediation usually works more quickly than either litigation or face-to-face negotiation. The overwhelming majority of matters will eventually settle but the speed element of mediation means a minimisation of costs ... a better result for the parties and less strain for the participants': P Biber 'Towards a Working Knowledge of Mediation' (1994) 32 *Law Society Journal* 32.

compulsory avenues of mediation in surrogacy arrangements that she prepares. SALRI sees the benefit of such an approach.

22.2.4 The Law Society of South Australia agreed with the approach that alternative dispute resolution processes should be made available to parties, however not as a mandatory process. Mediation will not always be necessary, given the nature of altruistic surrogacy is that the parties agree to all terms of their agreement, and both obtain independent legal advice once an agreement is drafted. The Law Society suggested that mediation services offered through the Youth Court, privately funded specialists, or family dispute resolution services such as Relationships Australia, could be utilised to assist parties in resolving disputes if and when they arise and that the mediation and outcomes reached during the mediation should remain confidential.[768]

22.2.5 Judge Eldridge of the Youth Court agreed with the suggestion that, in the event of a dispute in relation to a surrogacy agreement, the parties should have the right to access mediation services through an accredited family law mediator.

22.2.6 One surrogate mother, Simone Cureton, supported 'the idea of parties having access to an independent mediator' and the suggestion for optional mediation if a dispute arises.

22.2.7 Chief Justice Pascoe, in his written submission to SALRI, noted:

> It is not uncommon for the parenting arrangements and the nature of the surrogate mother's ongoing relationship with the child as contemplated prior to the pregnancy to change significantly after the birth. Mediation and dispute resolution services that serve families in crisis in the federal family law system would be best positioned to do this. However, funding and coordination of this would need to be agreed with the federal government.

22.2.8 Mr Everingham and some surrogates that SALRI spoke to, however, preferred ongoing counselling to formal mediation as it conforms more readily to the 'relationship model' of surrogacy. Monica, for example, told SALRI she encourages mediation to resolve any issues that arise throughout the surrogacy process outside of court. Monica believes that best practice is to agree to ongoing trimesterly counselling as a team. She said that even if the counselling 'is not needed' at the particular time, it can prevent issues from manifesting further down the track. Monica told SALRI that the surrogate mother should also have access to monthly counselling if she wants it. Monica emphasised that things change, and things go wrong, and ongoing counselling is an important aspect of the relationships model of surrogacy as it acknowledges that all relationships despite the goodwill will still have their complications and challenges but there is a need to manage expectations and reduce any rows.

22.2.9 J also supported this view, pointing out that from the negotiation to birth, surrogacy arrangements can be over a year in the making. Over such a long period of time, with emotions running high, he recognised that there is clear potential for disagreements to arise between intending parents and the surrogate mother. He accepted a 'can of worms' might arise, even between family members or close friends. J thought that it could be a sound idea to have a schedule of meetings with some sort of mediator every couple of months to raise concerns before they become big issues. The idea is to 'get it before it turns defensive'. He noted the aim should be 'to take the emotion out of it'. J supported access to mediation to try and avoid any problems escalating or disputes ending up in court.

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[768] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 2 [8]–[9], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

22.2.10 An alternative view (ARMS Vic.) which supported the establishment of an 'Approved Body'[769] said that there should be no disputes in relation to items or costs as costs would be identified in the Regulations and the Approved Body would apply the law uniformly. The submission acknowledged that there needs to be some consideration for 'unexpected costs' incurred by the mother, but such costs should be assessed by the Approved Body, concluding that the decision-making role of the Approved Body should negate the need for mediated or arbitrated outcomes in relation to costs.

22.3 SALRI's Reasoning and Conclusions

22.3.1 The benefits of mediation (and alternative dispute resolution) in the area of surrogacy (as with other areas of family law) are clear. An underlying premise of any regulated surrogacy framework should be to entrench the role and benefit of mediation to try to prevent disputes arising between the parties, and if such disputes arise, to promote swift resolution and avoid any escalation leading to lasting ill will between the parties and/or recourse to costly legal proceedings.

22.3.2 The advantages of mediation are particularly self-evident in the context of any surrogacy related dispute (especially as to costs) as SALRI has been consistently told in consultation.

22.3.3 The advantages of mediation are enhanced when considering the current lengthy backlog of claims in the Small Claims Court (that is disputes under $12,000). The Chief Magistrate noted any disputes about costs between the parties are unlikely to be swiftly resolved and the child is likely to have been born before the dispute is resolved. The Chief Magistrate noted that the average length of time for defended claims from lodgement to finalisation in the last year is 37 weeks for minor civil claims and 65 weeks for general civil claims.[770] The Chief Magistrate is not resourced to provide additional mediation services.

22.3.4 A consistent theme in SALRI's consultation, including from lawyers who practise in surrogacy, is the undesirability of having lawyers and the courts involved in such a sensitive area as the enforcement and disputes arising from a surrogacy agreement, particularly about costs. Recourse to lawyers and the already overworked court system in relation to disputes about costs or other issues is likely to have the unfortunate and undesirable effect of exacerbating tension between the parties and the likelihood of further disproportionate costs being expended to resolve the original dispute.

22.3.5 SALRI considers that the parties to a lawful surrogacy agreement should have the option of accessing mediation with a qualified mediator with specialist experience in family law disputes. These mediators would be able to assist the parties in resolving the dispute with the aim of maintaining the relationship between them.

22.3.6 Mediation should also be available to the parties prior to the dispute arising, should they wish to do so, for the purpose of having an independent person facilitate discussions between them directly and raise issues of concern in a non-conflictual manner. This independent facilitation (distinct from the role of an Accredited Counsellor) could also be used by the parties prior to entering into the agreement so as to discuss directly elements to be incorporated in to the agreement in a less adversarial

[769] The 'Approved Body' should be established through legislation to manage, oversee and facilitate the costs of any surrogacy arrangement. It should be independent of all parties, specifically the assisted reproduction providers and be bound by ethical standards that should be developed through consultation with the community. The setup and running costs of the Approved Body should be carried by the government to ensure true and total independence. It should have the capacity to refer infringements of the surrogacy law to the courts. Any such body is at odds with SALRI's terms of references and is not supported. See also above [10.1.15]–[10.1.35].

[770] The Chief Magistrate suggested that the Family Court is the preferable court to deal with any such disputes. See above Part 4.

and facilitated way (one of the issues raised in consultation is the possibility of utilising existing resources in regard to family law mediation, family law reports and the federal court resources as necessary, to benefit the parties to a surrogacy agreement and to ensure the court has properly satisfied its obligations to the best interest of the child prior to making any orders). SALRI sees the benefit of utilising the existing role and expertise of experienced mediators within the family law system but accepts that this raises practical, operational and resourcing issues beyond the remit of this Report.

22.3.7 In the event that the parties elect to mediate and cannot reach an agreement on an area of dispute they should be encouraged to appoint the mediator to act as arbitrator to resolve the dispute without additional delay and cost.

22.3.8 As with all Alternative Dispute Resolution methods this would be entirely optional unless ordered by the court when the matter appeared before it for final determination.[771]

22.3.9 The aim of mediation should be to try to prevent any disputes arising. The use of mediation and/or arbitration is strictly voluntary, and the parties should retain the right, in the alternative, to make an application to a court of competent jurisdiction, however, the aim should still be to keep the costs of litigation as low as possible.

22.3.10 Recommendation

Recommendation 50

SALRI, noting the value of mediation in a surrogacy context, recommends that:

(i) the parties have the right, although not compulsory, to access mediation services through an experienced family law mediator to assist in negotiating the surrogacy agreement between them and this should not constitute an offence by the mediator or facilitating service under the relevant provision (see Recommendations 15 and 16 above);

(ii) in the event of a dispute about the terms of the surrogacy agreement during the life of the agreement, the parties can attend mediation to attempt to resolve the dispute and, if this fails, either party can request the mediator to act as arbitrator in order to resolve the dispute, following which, any decision of an arbitrator is binding on the parties.

Note: The aim of mediation should be to try to prevent any disputes arising. The use of mediation and/or arbitration is strictly voluntary, and the parties retain the right, in the alternative, to make an application to a court of competent jurisdiction, however, the aim should be to keep the costs of litigation as low as possible.

[771] See below Part 25 for discussion of Family and Youth Court process.

Part 23 - Recoverable Costs

23.1 Current approach to recoverable costs

23.1.1 Section 10G of the 1975 Act prohibits and invalidates 'surrogacy contracts'. 'A surrogacy contract is illegal and void' which is defined in s 10F as those involving valuable consideration. Even a lawful surrogacy agreement is generally unenforceable for public policy reasons in relation to the child. As Chief Justice Bryant has noted: 'Surrogacy agreements are generally not enforceable — for example, for public policy reasons — except to the extent that they provide for the payment of the surrogate's pregnancy-related expenses. This means that a surrogate who refuses to give the baby to the intended parent(s) cannot be forced to under the agreement.'[772] It is unclear whether a recognised surrogacy agreement is presently enforceable in relation to costs.

23.1.2 The present non-commercial system of surrogacy throughout Australia precludes a surrogate mother being 'paid', 'rewarded' or receiving any form of 'valuable consideration' for her contribution but allows her medical and certain other expenses associated with acting as a surrogate to be reimbursed by the intending parents. Each State or Territory (excluding the Northern Territory) has different rules as to the precise costs that can be covered within a lawful surrogacy agreement.

23.1.3 A surrogacy arrangement is only lawful in South Australia if it satisfies the conditions of a 'recognised surrogacy agreement'. To be recognised as lawful, a surrogacy agreement must be one where the surrogate mother receives no payment, reward or other material benefit, other than for specific expenses set out in s 10HA (2a)(i) of the *Family Relationships Act 1975* (SA). These expenses are those connected with, or consisting of:

1. A pregnancy (including any attempt to become pregnant) that is the subject of the agreement.
2. The birth or care of a child born as a result of that pregnancy.
3. Counselling or medical services provided in connection with the agreement (including after the birth of a child).
4. Legal services provided in connection with the agreement (including after the birth of a child).
5. Reasonable out of pocket expenses incurred by the surrogate mother in respect of the agreement.
6. Any other matter prescribed by the Regulations for the purposes of this provision.[773]

23.1.4 This provision is an attempt to reach a practical balance between the broad legal policy position that only non-commercial surrogacy agreements are lawful in Australia, and the need to ensure that surrogate mothers are not left out of pocket or deterred from seeking appropriate medical, counselling or legal services.

23.1.5 However, the present law in South Australia is problematic in various respects regarding costs and the reimbursement of expenses to the surrogate mother.

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[772] Hon Diana Bryant, Submission No 42 to the House of Representatives Standing Committee on Social Policy and Legal Affairs *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements,* 11 February 2016, 3. This also means that the intending parents cannot be compelled to take the child if they should change their mind. See also below n 903.

[773] To date, no other matter has been prescribed for the purpose of this section.

23.1.6 The costs associated with having a child through a surrogacy arrangement can be extensive, even where the surrogate mother does not recover any valuable consideration for the act of becoming pregnant, the nine months of pregnancy or giving birth to the child. These costs include medical costs associated with attempting or establishing the pregnancy, ongoing obstetric care, legal costs associated with preparing the surrogacy agreement, counselling costs for all parties and their families, travel to and from medical appointments, child care costs and a wide range of other incidental costs directly associated with the surrogacy agreement. As Eliza Cole, told SALRI of her experience as a surrogate mother:

> I drove myself five hours each way (ten hours round trip) every month for the majority of the pregnancy - pre-pregnancy and post natal appointments… My husband and I had to fly up for counselling. IPs covered the flights, but after dropping our kids to childcare, and then getting to airport by 7am and then counselling and back to the airport by 3pm to get home for school it meant only eating in the airport and you know how much airport food costs. … Similarly, each time I went to the hospital the parking was $10 or more. … Don't even get me started on the cost of hospital food and TV for the duration of the hospital stays! These little costs - $10 here or there - are the ones that add up to a big amount for a family with one income.

23.1.7 A strong theme in SALRI's consultation was that even under the most amicable surrogacy arrangement, a surrogate mother, under the present non-commercial framework, is likely to end up out of pocket as a result of acting as a surrogate. There is a strong perception that everyone other than the surrogate mother makes a profit and the surrogate is the one who does not make a profit and even loses out financially.[774] Monica, for example, said that under the current legal framework in Australia it is 'very rare' to find surrogate mothers who are not out of pocket at the end in some way. Monica emphasised that under the present system: 'Everybody else is making money out of surrogacy apart from the surrogates ... People are there to make money.' It was stated to SALRI that the surrogate mother is still likely to be left out of pocket, no matter how liberal the intending parents are.

23.1.8 Friction and disagreements between the intending parents and the surrogate mother about costs are a regular feature of the present system, even for comparatively modest amounts (as Ms Cole and others pointed out). Professors Karpin, Millbank and Stuhmcke found tensions are common between surrogate mothers and intending parents and 'it's always about money and it's never about money'. They said that tensions related to cost are usually a result of some sort of other broken expectation. Mr Everingham noted that costs disputes of some kind arise at some stage in about half of all surrogacy arrangements (though most are ultimately resolved and don't escalate).

23.1.9 There was a strong view in consultation (including at the Expert Forum) that the notion of 'reasonable costs' is vague and imprecise and greater statutory clarity and content is needed as to the costs that can be covered in a lawful surrogacy agreement.[775] Professors Karpin, Millbank and Stuhmcke, drawing on their recent research, also noted that there is a lack of clarity as to the kinds and amounts of lawful costs allowed under the present law and that, in the Australian context, the 'fees are primarily not to the surrogate' and that 'all the women we have spoken to have ended up out of pocket'. They found a 'huge' amount of 'unpaid labour' in domestic surrogacy, for example, the husband driving the surrogate to her appointments and the caregiving for the family when the surrogate is unable.

23.1.10 The *State Framework for Altruistic Surrogacy* – introduced by the 2015 Act – was an attempt to address some of these concerns and provide further clarity and detail about the costs that could be

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[774] One surrogate mother, for example, noted her view to SALRI they had been financially exploited by both the intending parents and the fertility provider. See also above [9.5.1]–[9.5.12].

[775] See also Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 103–106 [6.45]–[6.63], 107 Rec 7.

recovered under a lawful surrogacy arrangement in South Australia. For example, the Framework potentially allows the Minister to specify the types of costs that can be recoverable under a lawful surrogacy agreement, and/or to recognise as lawful a surrogacy agreement that includes costs that otherwise fall outside of the items listed in s 10HA. As previously discussed,[776] the Framework is perceived as well-intended but is problematic and has not been implemented.

23.1.11 The current approach to costs recoverable under a lawful surrogacy agreement in South Australia attracted considerable feedback in SALRI's consultation and many parties advocated for an alternative approach to dealing with this issue.

23.1.12 As a preliminary issue, there was also unease with s 10G of the 1975 Act which prohibits and invalidates 'surrogacy contracts' ('a surrogacy contract is illegal and void') which are defined in s 10F as those involving valuable consideration. Such contracts are presently legally unenforceable, even potentially in relation to the agreed costs between the parties. This was widely seen in consultation as unhelpful and to undermine the role and importance of informed legal advice and a considered agreement between the parties. Alice's lawyer told her such a 'contract' in South Australia was 'not worth the paper it was written on' as it was not a binding contract. Dr Oxlad and others similarly noted to SALRI that the response of many parties in their experience to a surrogacy arrangement doubts the utility of such an unenforceable agreement (and incurring the costs to obtain one).[777]

23.1.13 SALRI notes that this position is unclear under the present law and there is benefit in bringing greater clarity and certainty and for any *Surrogacy Act* to provide (as was contemplated under the 2017 Bill) that a lawful surrogacy agreement is legally enforceable in relation to costs.

23.2 Issues relating to costs recoverable by a surrogate mother

23.2.1 As part of its consultation, SALRI asked the community and parties with direct experience with surrogacy arrangements to share their views on the following issues relating to recoverable costs:

- What do you consider are the appropriate medical or other expenses or costs associated with acting as surrogate mother that a surrogate mother should be lawfully entitled to or lawfully able to claim?
- Should there be a cap on any such costs or expenses?
- Should any cap be global or to individual items?
- What means should be used to provide for such costs to be effectively agreed between the parties?
- How should any dispute between the parties be most effectively resolved?
- Is there a role for mediation or arbitration?
- What of unexpected costs on the surrogate mother that may arise?

23.2.2 SALRI sought submissions on these issues through its YourSAy online survey as well as during its Expert Forum and with face to face meetings.

[776] See also above [10.3.1]–[10.3.3].

[777] See also above n 264.

23.2.3 Two key principles emerged from SALRI's consultation and research as integral to the issue of costs recovery in a lawful surrogacy agreement. These are:

- No valuable consideration should be provided for the act of becoming pregnant and carrying a child for another person.
- A surrogate mother should not be financially disadvantaged as a result of taking part in a surrogacy arrangement and should be able to recover any costs actually incurred as a direct result of the pregnancy and birth.[778]

23.2.4 There was wide support for these principles at the Expert Forum and in consultation, including from Ms Redman, Mr Page, Chief Justice Pascoe, Dr Oxlad and both surrogate mothers and intending parents. Monica's approach, for example, is that ideally, a surrogate 'should never be out of pocket for a minute'. Even those parties usually opposed to surrogacy agreed with these two key principles, albeit with caution in case such costs serve as a 'Trojan horse' to introduce a system of commercial surrogacy. As Dorothy Kowalski elaborated: 'I am wholeheartedly against any form of commercial surrogacy and trust that altruistic surrogacy laws will evolve to include disincentives to "payments of reasonable expenses" becoming a back door way to turn apparently altruistic surrogacy into de facto commercial surrogacy.' One YourSAy contributor noted: 'The devil will be in the detail.'

23.2.5 It was also accepted in SALRI's consultation that all parties to a surrogacy agreement must obtain high quality independent legal advice[779] and counselling (including screening)[780] before any surrogacy process takes place. It was noted by parties such as Ms Redman and Alice that this legal advice should cover a range of civil law issues and obligations arising from a surrogacy agreement, including medical treatment questions relating to the child and the probate and succession implications for the parties, especially the surrogate mother and her existing children.[781]

23.2.6 It was widely accepted in consultation that the Attorney-General should not play an active role in prescribing in detail the types of costs recoverable in individual agreements, or in adjudicating or resolving disputes about costs issues in surrogacy agreements. It was felt that the Attorney-General lacks the expertise and role for this function.[782]

23.2.7 SALRI's consultation also raised the question of the need to design a system of costs recovery that is clear and consistent, fairly applied and accessible to all parties of surrogacy agreements without the need to obtain expensive legal advice or resort to legal proceedings (except as a last resort).

23.2.8 The Expert Forum and most parties in the YourSAy contribution and consultation agreed that the current South Australian approach to costs is problematic and greater clarity is necessary.[783] Some parties, such as Mr Page, pointed to models in New South Wales and Queensland (though not Victoria) as being preferable. It was generally agreed that at a minimum, the South Australian law should be expanded to allow a limited category of the following costs to be recovered: medical insurance, life insurance, and loss of earnings (limited by time period); travel and accommodation

[778] J expressed the two common themes in this concise manner and SALRI has adopted his formulation.

[779] See above Part 21.

[780] See above Part 20.

[781] SALRI intends to conduct a short spin off Report into the consequential civil and other legal issues raised by surrogacy. See below Rec 68.

[782] See above Part 10. See also above Rec 12.

[783] See also Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 23.

expenses associated with medical care or counselling, and/or child care costs. It was also generally agreed that there should be no overall cap on costs, but rather that these be limited to what is necessary and appropriate on a case by case basis.

23.2.9 Although agreement was reached in SALRI's consultation on these general principles, views differed as to the most appropriate model to deal with recoverable costs. For example, some Expert Forum participants and other parties viewed the premise under the present law of 'reasonable costs' as uncertain and vague[784] and suggested that there is a need to move away from the idea of 'reasonable costs' and towards the idea of adequate compensation. This would provide an important policy incentive for people considering engaging in international surrogacy to instead pursue lawful surrogacy arrangements in South Australia. It could also avoid the scenario raised in consultation by Ms Cole and others where everyone around the surrogate mother is getting paid (that is the lawyer, counsellor, fertility clinic) but the surrogate has to 'fight' to recover relatively modest expenses such as car parking or child care. For one participant, this approach would also be a more appropriate acknowledgement of the reproductive labour involved.

23.2.10 Other Expert Forum participants and parties in consultation were wary of opening up the regulatory regime to include compensation or even a more expansive list of reasonable costs. For these participants, it was preferable to look to regimes such as organ donor regimes, where only medical costs were covered and matters such as loss of wages were not.

23.2.11 Other parties saw merit in adopting a prescriptive, but slightly more expansive, approach to recoverable costs, that would offer clarity and detail to parties at the beginning of an agreement but that would also be clearly limited (for example, income limited to a certain number of weeks).

23.2.12 A few parties questioned the need to enable any costs to be recoverable by the surrogate in an altruistic arrangement. For example, one respondent to the YourSAy survey declared:

> A quick google search shows altruism to mean "unselfish, selfless, self-sacrificing, self-denying; considerate, compassionate, kind, decent, noble, public-spirited; generous, magnanimous, ungrudging, unstinting, charitable, benevolent, beneficent, liberal, open-handed, free-handed, philanthropic, humanitarian". I don't see anywhere in the definition a clause that says "gets paid loss of income" or "can claim childcare and travel for family".[785]

23.2.13 However, this approach received little support. Most parties in consultation (even those opposed to any form of surrogacy) and Expert Forum participants agreed that a surrogate mother should be able to recover the costs associated with a lawful surrogacy agreement and that the list of recoverable costs in the South Australian law requires reform to provide greater clarity and content. It was agreed that, at a minimum, the current statutory list of categories of lawful costs should remain but be supplemented by further detail and broadened in scope.

23.2.14 One response to SALRI's online survey said: 'I believe that surrogate mothers should have access to a broader range of "reasonable costs" in order to allow the surrogate mother (and in some cases, family) not suffer due to the surrogacy itself.' Another response similarly commented: 'Yes definitely she should be compensated for loss of income and also for the work of pregnancy and childbirth given she is undergoing this process to assist another couple.' Another response said:

> The surrogate should most definitely be reimbursed for all surrogacy related expenses. These should include all loss of wages extending the all appointments related to surrogacy. Maternity

[784] See also ibid; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Legislation on Altruistic Surrogacy in NSW* (2009) 103–106 [6.45]–[6.63] Rec 7, 107.

[785] See also above [3.2.1]–[3.2.12].

> clothes, vitamins, pregnancy related massages, paying for a cleaner, helping her family with meals, covering childcare expenses if her children need to attend paid care so she can attend surrogacy appointments. Regarding a body to resolve disputes or questions - if we set up a matching service in Australia, one of the options might be to help to manage the finances of some surrogacy teams.

23.2.15 SALRI also received strong feedback from surrogate mothers keen to stress that there is no evidence of surrogate mothers in South Australia being motivated by 'greed'[786] or seeking to exploit the current non-commercial legal framework for commercial gain. For example, one surrogate mother who wished to remain anonymous stated:

> I am concerned with comments by professionals working in this area that "surrogates are receiving payments under the table". I am a surrogate, and have spent time with over 100 surrogates in recent years. What evidence do people have that payments are being made "under the table"? The women I speak to are often out-of-pocket and rarely break-even in their surrogacy journeys. In lieu of actual evidence that surrogates are receiving payments, perhaps people making these comments should consider whether such a viewpoint is in fact a reflection of their own experience of the world, rather than of those women who are acting altruistically for the benefit of others. That people cannot trust that a woman could do something without receiving payment as enticement, leaves me disappointed and saddened. I am concerned that those views are damaging, presumptuous and offensive and do nothing for the cause of altruistic surrogacy.

23.2.16 It was also pointed out to SALRI that it is important that the lawful costs of the surrogate mother extend to where a surrogate mother does not become pregnant or a child is not carried to full term.[787] This was noted to SALRI as an aspect of costs that is sometimes overlooked. It is crucial, Professors Millbank and Stuhmcke noted, that both attempts to become pregnant and/or where a pregnancy is ultimately not successful are within any lawful surrogacy framework. They noted current laws focus on entry into the arrangement and relinquishment of the baby at the end of the arrangement, not on how best to support the surrogate mother throughout the arrangement and also absent is the possibility of longer-term health needs for the surrogate following the birth.

23.2.17 It was also pointed out to SALRI that any surrogacy framework and a lawful agreement should be capable of covering the long-term costs of the surrogate mother if she should suffer physical and/or especially psychological complications as a direct result of the surrogacy arrangement. For example, long-term stress on a surrogate mother as a result of the process is not unknown.[788]

23.2.18 Those with direct experience with surrogacy arrangements in South Australia told SALRI that the law should be more responsive to the surrogate mother's direct and indirect costs. For example, Ms Cole, drawing on her experience as a surrogate mother, explained that direct costs include

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[786] See also above n 99.

[787] Professors Millbank and Stuhmcke noted to SALRI that one third of heterosexual intending parents require an egg donor. This generally only emerges after a long process of five to ten years of fertility treatment in Australia. Egg donors, in Australia, are generally significantly older than they ideally should be for a good success rate. With older donated eggs each expensive cycle of IVF may have only a ten to fifteen percent chance of success. In the United States, they noted that the average age of egg donors is twenty-five. From their qualitative research they have found that most women who volunteer as egg donors in Australia are over the age of 35. Professors Millbank and Stuhmcke noted that in these scenarios there is much higher degree of difficulty with parties generally spread over different jurisdictions with a much lower chance of success. They have heard in their research from parties using two or three different egg donors. They noted that potentially three quarters of pregnancy attempts in surrogacy are unsuccessful. Medical complications and miscarriages are not uncommon. The surrogate may have had no problems with previous pregnancies and they have a 'horrible' surrogacy pregnancy. Many surrogacy arrangements are not ultimately successful.

[788] See also 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* (April 2016) 10 [1.34].

legal fees (which go beyond the agreement and can include advice about parenting orders and estate planning), medical and related costs (such as remedial massage, diet requirements, dental costs arising from deterioration of teeth during pregnancy). Indirect costs include lots of small expenses such as hospital car parking, hospital food, accommodation for family, travel costs for family, loss of home duties, child care costs and relocation costs. For Ms Cole, it was important that both direct and indirect costs should be recoverable under a lawful surrogacy agreement, and that such costs be required to be paid by intending parents once incurred by the surrogate mother. Ms Cole also suggested that consideration be given to changing the current law to allow a lump sum to be negotiated at the start of the agreement for costs likely to be incurred by the surrogate.[789] Ms Cole explained that this would be particularly beneficial to cover issues such as loss of home duties, loss of income and post-birth counselling and medical costs. It would also allow parties to discuss these issues at a time where the relationship is at its best, rather than when relations could be strained by unexpected difficulties in pregnancy and birth.

23.2.19 An alternative option supported by Ms Cole would be to establish a specific body to deal with costs issues that may arise from time to time between parties.[790] This was also supported by an intending parent who spoke with SALRI on an anonymous basis. The intending parent said that the current law should be reformed to:

> take the form of a more detailed, prescriptive list of the types of costs that can be recovered under a legal agreement, for example a detailed schedule of costs that should include: medical costs related to birth, counselling costs at time of agreement, private health insurance, income insurance, life insurance, specific incidentals such as child care costs related to hospital care, loss of income but limited to eight weeks. Each of these costs should be limited by time for recovery and capped. For example, medical expenses incurred only up until six months after birth and limits on post-birth counselling. This is necessary to avoid claims for expensive dental care or other medical or counselling treatment many years later. Under such a model, the intending parents and the surrogate could agree on what costs are included in their agreement at the outset, and the intending parents can transfer funds to the surrogate to cover these costs. This would enable the surrogate to clearly articulate the costs they expect to incur and to receive adequate compensation for costs incurred as a direct result of the pregnancy. However, it would also ensure that the surrogate accepts some responsibility for the risks associated with the pregnancy and any ongoing or emerging issues in the post birth phase. This approach may need the support of an agency or body to help articulate the costs schedule or to determine the appropriate costs caps and provide advice to surrogates and intending parents at the time of making the agreement. Alternatively, this detailed costs schedule and caps could be set out in the legislation or Regulations.

23.2.20 These reform options, along with alternative options, are set out further below.

23.2.21 Finally, SALRI consulted with legal practitioners with wide experience in advising parties about lawful surrogacy agreements in South Australia and interstate, who include a 'best practice' approach to the issue of recoverable costs. Julie Redman, a leading Adelaide lawyer in this area, explained her standard practice is to invite potential parties to a surrogacy agreement to address a range of detailed questions about the types of costs that may arise under the surrogacy agreement, prior to negotiating an agreement. Ms Redman also provides parties with written legal advice about the law and detailed provisions about what can and cannot form part of an agreement and the general risks associated with surrogacy agreements, prior to providing specific advice about the particular agreement the parties may wish to make. Finally, Ms Redman routinely attaches an addendum to the surrogacy

[789] Other parties such as Professors Millbank and Stuhmcke also raised this suggestion to SALRI.

[790] See also above [10.1.5]–[10.1.35].

arrangement which lists in detail the types of costs recoverable by the surrogate mother, once this has been negotiated and agreed upon by the parties. SALRI also spoke to Mr Page (based in Queensland but active across Australia) who adopts a similar considered and comprehensive approach to costs.[791]

23.2.22 SALRI suggests that any reforms should build upon this approach and seek to equip all parties to a surrogacy arrangement with relevant, accurate legal information and advice, especially as to the costs responsibilities and implications, prior to finalising any surrogacy agreement.

23.3 Reform Options

23.3.1 The following reform options were considered in detail by SALRI as part of this Reference.

Option 1 'Reasonable Costs' and the Family Relationships (Surrogacy) Amendment Bill 2017

23.3.2 The Family Relationships (Surrogacy) Amendment Bill 2017 proposed changes to widen the scope of expenses that can be recovered by a surrogate mother under a lawful surrogacy agreement. In particular, the Bill seeks to introduce a new s 10L into the *Family Relationships Act 1975* (SA) that would make it clear that it is lawful to reimburse a surrogate mother for 'reasonable surrogacy costs' which are defined in the Bill as the reasonable costs associated with:

- pregnancy (including any attempt to become pregnant);
- birth or care of a child born as a result of the pregnancy;
- the value of the surrogate mother's actual lost earnings because of leave taken for up to two months before the birth, or for any other period during the pregnancy when the surrogate mother was unable to work on medical grounds;
- counselling or medical services[792] (including after the birth of a child);
- legal services (including after the birth of a child);
- reasonable out of pocket expenses incurred by the surrogate mother; and
- any other matter prescribed by the Regulations.

23.3.3 The 2017 Bill also set out a process for enforcing in court the obligation to pay 'reasonable surrogacy costs' under a lawful surrogacy agreement.[793] Unlike the current law, the 2017 Bill would allow for the surrogate mother to recover lost income associated with her surrogacy role.

23.3.4 These aspects of the 2017 Bill were said to be modelled on the *Surrogacy Act 2010* (NSW) which also permits a surrogate mother's 'reasonable costs'[794] to be recovered under lawful surrogacy agreements and defines 'reasonable costs' as those associated with becoming or trying to become

[791] Mr Page helpfully provided a deidentified detailed surrogacy contract he had drafted to SALRI as an example.

[792] For the purposes of this section, a reference to costs for medical services does not include such costs to the extent that they are recoverable under Medicare or any health insurance or other scheme.

[793] See proposed s 10N(2) which provides that: 'An obligation under a recognised surrogacy arrangement to pay or reimburse the reasonable surrogacy costs (within the meaning of section 10L(2)) of the surrogate mother is enforceable in a court of competent jurisdiction unless a child is born as a result of the surrogacy arrangement and the surrogate mother— (a) refuses or fails to relinquish the custody and guardianship of the child to the commissioning parents; or (b) does not consent to the making of a parentage order.'

[794] Defined in s 7 of the *Surrogacy Act 2010* (NSW).

pregnant, a pregnancy or a birth, entering into and giving effect to a surrogacy arrangement. Under the NSW law, 'reasonable costs' also include:

- any reasonable medical, travel or accommodation *costs* associated with becoming or trying to become pregnant;
- any reasonable travel or accommodation *costs* associated with the pregnancy or birth;
- any premium paid for health, disability or life insurance that would not have been obtained by the birth mother, had the surrogacy arrangement not been entered into;
- a loss of earnings as a result of leave taken for up to two months before the birth, or for any other period during the pregnancy when the surrogate mother was unable to work on medical grounds.

23.3.5 However, unlike the 2017 Bill, the NSW Act provided that the costs will only be 'reasonable' if it is *actually incurred* and can be verified by receipts or other documentation. The 2017 Bill in relation to 'reasonable costs' is seemingly wider in scope than under the NSW model.

23.3.6 This first approach received some support among those consulted by SALRI. However, some parties raised concerns about its lack of detail and raised questions about how 'reasonableness' would be determined in practice. Such a model was perceived as uncertain.

23.3.7 The Association of Relinquishing Mothers (Victoria) also 'note[d] with alarm' the effect of the proposed new s 10N(2) of the Family Relationships (Surrogacy) Amendment Bill 2017 (SA) which allowed an obligation to pay or reimburse surrogacy costs to be enforceable except where a surrogate mother refuses or fails to relinquish the custody and guardianship of the child; or does not consent to the making of a parentage order. They said:

> This is entirely unfair and unreasonable for two reasons. Firstly, it assumes that the mother and her existing family can afford to bear the costs of the pregnancy and birth until such time as the child is handed to the commissioning couples. That could amount to a form of bribery where the mother and her family are not in a position to support the cost of the pregnancy and birth. A consent made in these circumstances has the potential to be given under duress where the mother knows that her family cannot afford the medical and legal costs that have accrued to that point. Secondly, one rightly assumes that the mother engaged with integrity in the agreement to be a surrogate. She could not have anticipated that she would be unable to hand over the child. She and her family should not be punished for such a change… Where the mother chooses to keep the child she has borne, and should the commissioning couple mount a court challenge, they should be required to pay the mother's legal costs, as well as their own. There should be no circumstances where the mother is required to pay the costs of legally defending her decision to keep the child.

23.3.8 SALRI also notes its concern, as identified by the Association of Relinquishing Mothers (Victoria), that the model in the 2017 Bill is at apparent odds with established practice and can be perceived as diluting the premise that the surrogate mother remains the legal parent of the child unless, and until, the court transfers parentage.[795]

[795] See below [25.4.1]–[25.4.13], [25.5.1].

Option 2 Recovery of a more detailed list of costs 'necessarily incurred' or 'directly related' to the surrogacy arrangement

23.3.9 Under this reform option, s 10HA(2a) of the *Family Relationships Act 1975* (SA) would be amended to provide that a lawful surrogacy agreement can include recovery for all costs '*necessarily incurred*'[796] or '*directly related*' to the lawful surrogacy agreement (including the process of getting pregnant, the pregnancy and birth of the child). The scope of these costs should not be capped but be set out in the parties' individual surrogacy agreements. Recoverable costs should include:

- Medical costs related to a pregnancy (including any attempt to become pregnant) that is the subject of the agreement.
- The birth or care of a child born as a result of that pregnancy.
- Counselling provided in connection with the agreement (including after the birth of a child).
- Medical services provided in connection with the agreement (including after the birth of a child).
- Legal services provided in connection with the agreement (including after the birth of a child).
- Any premium paid for health, disability or life insurance which would not have otherwise been taken out if not for the agreement.
- Loss of income of the surrogate mother as a result of leave during the pregnancy or immediately after the pregnancy when the surrogate mother was unable to work on medical grounds, limited to a period of two months (according with the approach in Tasmania and New South Wales).
- Travel and accommodation costs of the surrogate mother (and her family) related to the pregnancy (including any attempt to become pregnant);
- Reasonable out of pocket expenses (concluding child care related expenses and loss of domestic services expenses) incurred by the surrogate mother in respect of the agreement.

23.3.10 Under this option, the provision would also contain a regulation-making power to prescribe additional costs 'necessarily incurred' as a result of the surrogacy agreement; and be supported by the development of a non-legally binding 'Schedule' or 'Table' of costs that provides examples to potential parties to surrogacy agreements of the types of costs, and monetary amounts, typically incurred during a surrogacy agreement. For example, such a Table could list standard medical insurance costs for a pregnancy, an indication of the type of legal costs associated with drafting a surrogacy agreement and examples of the type of pregnancy care costs regularly encountered such as appointments with a physiotherapist.

23.3.11 The relevant provision could be further amended to clarify that:

- The scope of recoverable costs should be set out in the parties' individual surrogacy agreement, but *must include* all relevant medical costs and the provision of independent

[796] The use of the term 'necessarily incurred' aligns with the language contained in the COAG Discussion Paper and supports moves towards a nationally consistent approach. See above Parts 4 and 9.

legal advice and counselling to the surrogate mother and her partner prior to, during and after the term of the surrogacy agreement;

- Costs recoverable are those that have been *actually incurred*; and
- The provisions in the lawful surrogacy agreement relating to costs are legally enforceable between the parties (though legal proceedings should be a last resort).[797]

23.3.12 This more detailed, potentially more flexible, approach was supported by a number of surrogate mothers and intending parents who are looking for increased guidance and resources to enable them to negotiate surrogacy agreements from a well-informed standpoint. This approach also received the support of the majority of the members of the Expert Forum on the basis that it would appear to provide greater clarity and certainty and 'strike a balance' between ensuring surrogates are not left out of pocket or financially disadvantaged, but also providing some clear limits on the types of costs that can be lawfully recovered. Some surrogate mothers consulted would like this to be supported by a statutory provision to the effect that all outstanding recoverable costs in the agreement must be paid prior to a transfer of legal parentage order being made.

Option 3 Establish a separate body to provide advice on recoverable costs, administer cost recovery and resolve costs related disputes.

23.3.13 Some parties in consultation supported the establishment of a specialist, independent body to:

- Provide information and support for parties to surrogacy agreement in a 'health care' environment, where parties are given independent advice and support;
- Practically administer the payment of the surrogate mother's costs (for example, a surrogate mother would take her car parking ticket to this body who would assess whether the cost incurred was covered in the agreement and then provide the payment directly to the surrogate and invoice the intending parents); and
- Resolve any disputes between the parties as to costs.

23.3.14 This option was strongly supported by some surrogate mothers, who cited the need to focus on the relationship between the parties and avoid any direct discussion of payment of costs. It was also supported by some intending parents, who preferred to focus on building and sustaining a positive personal relationship with the surrogate mother and avoiding a legal dispute of costs at the time of applying for a parentage order. Ms Cureton, for example, stated:

> All out of pocket expenses associated with the pregnancy should be covered with the inclusion of the surrogate mother's income. But for the pregnancy the cost would not have been incurred - then it should be reimbursed/recoverable. It should be left to the surrogate and commissioning parents to negotiate the reimbursement of the costs. However, if negotiations break down then I think an independent body should be available for advice on the reasonableness of seeking reimbursement and may include a mediation service - Possibly an Ombudsman Service.

23.3.15 However, other parties questioned the need for, and utility of, this approach, pointing to the need to ensure that parties are free to develop relationships of trust between themselves and negotiate lawful surrogacy agreements without external interference. This option was also opposed on the ground that a well drafted and detailed surrogacy arrangement should anticipate and address the full range of issues relating to recoverable costs, avoiding the need for a specialist dispute resolution

[797] See also above Part 21.

body on costs issues. It was noted that the current Small Claims civil process (whereby parties are required to undertake mediation prior to proceeding to court) is adequate to resolve any unanticipated costs issues arising from a well-prepared surrogacy agreement.[798]

23.3.16 This option is also at odds with other key principles identified by SALRI in its consultation, such as the strong theme to remove, or least limit, the role of the State in private surrogacy agreements and that surrogacy arrangements are private matters between the parties. It is also at odds with SALRI's term of reference that SALRI should be guided, as far as possible, by the general 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. For these reasons, this option was not considered preferable by SALRI.

23.4 SALRI's Reasoning and Conclusions

23.4.1 SALRI notes that the enforceability of costs is unclear under the present law and considers that there is benefit to bringing greater clarity and certainty and therefore any new *Surrogacy Act* should provide (as was contemplated under the 2017 Bill) that a lawful surrogacy agreement is legally enforceable in relation to costs. This should not be connected or dependent upon the relinquishment of the child.

23.4.2 In relation to the preferable costs model for any surrogacy framework, SALRI on the basis of its extensive research and consultation supports an approach based on Option 2 above in relation to the issue of what costs should be the subject of a lawful surrogacy agreement and recoverable by surrogate mothers.

23.4.3 Under this approach, a more detailed list of recoverable costs would be set out in the relevant Act and supported and supplemented by a Regulations making power. Any new provision would also be ideally accompanied by non-legally binding information on the typical costs recoverable in a lawful surrogacy agreement to help alert potential parties to lawful surrogacy agreements about the types of issues they should consider in their negotiation process. This could take the form of a Table or Schedule of Costs that is made available to the public through a government website,[799] or through a questionnaire or 'frequently asked questions' document that could be made available through a suitable agency that currently disseminates general legal information about family law issues.[800] SALRI understands that lawyers in this field who adopt a best practice approach in providing legal advice to parties to surrogacy arrangements already also provide advice and information about the full range of costs that may arise in a surrogacy arrangement. SALRI commends such an approach and notes that it has benefit in this context.[801]

23.4.4 This forms part of the 'holistic' approach recommended by SALRI which is focused on preventing disputes through a strong focus at the outset of the process by providing access to high

[798] The present delays in the Small Claims Court impede such an approach. See above [22.2.23], below n 802.

[799] See above Part 13.

[800] The Legal Services Commission, Relationships Australia or other similar body.

[801] This approach would also be ideally supported so that the costs provisions in a lawful surrogacy agreement are enforceable as a last resort through the existing small claims court process that is mediation based. However, the current backlog in the courts are problematic. See below n 802.

quality, independent legal advice and counselling to all parties, and encouraging mediation and ensuring that, if disputes arise, they are swiftly resolved prior to the transfer of legal parentage.[802]

23.4.5 SALRI accepts that, as raised by the Chief Magistrate, there is a compelling case that any disputes about costs in a surrogacy context (along with surrogacy in general) should be dealt with by the federal courts given their national role and specialised expertise and processes and it is inappropriate to fragment the surrogacy jurisdiction between State and Commonwealth courts.[803]

23.4.6 However, this is likely to only occur as part of a future national uniform scheme and until this eventuates (which is likely to prove a prolonged process), the State courts will have to retain their jurisdiction for surrogacy (including the resolution of any disputes about costs). The present delays in the Small Claims Court (where the average present length of time for defended claims from lodgement to finalisation in the last year is 37 weeks for minor civil claims and 65 weeks for general civil claims) are such that a child is likely to have been born before a costs dispute is ever heard in the Small Claims Court. The likelihood, then, is that any dispute about costs will be outstanding when the Youth Court considers the transfer of legal parentage and it makes sense to therefore provide the Youth Court with an express incidental power to determine any outstanding issue such as an unresolved dispute about costs when it considers transferring the legal parentage to the intending parents. Section 24 of the *Surrogacy Act 2012* (Tas), for example, is a worthwhile provision in this context.[804]

23.4.7 There is a need to avoid imposing an indefinite and unreasonable burden on the intending parents. However, SALRI agrees that any surrogacy framework and a lawful agreement should be capable of covering the proper and long-term costs of a surrogate mother if she should suffer physical and/or psychological complications as a direct result of the surrogacy arrangement. SALRI concurs with the view of Chief Justice Pascoe that it is inappropriate to make specific provision for long-term costs but this should be left to the legal agreement between the parties and the usual law to resolve.

23.4.8 Any legislative reforms with respect to costs should be further supported by linked changes to s 10HA of the 1975 Act relating to the need for parties to a lawful surrogacy agreement to produce a lawyers' certificate indicating that they have received appropriate legal advice.[805]

23.4.9 SALRI has recommended expanding the present law to require the lawyer to certify that they have provided written legal advice addressing a range of vital items listed in the Regulations or the Act. These should also include the issue of permissible costs and costs recovery and should also be

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[802] This approach would be ideally supported by the surrogacy regulatory framework ensuring that the costs provisions in a lawful surrogacy agreement are enforceable through the existing small claims process that is mediation based. However, the present delays in the Small Claims Court, impede such an approach. The Chief Magistrate noted any disputes about costs between the parties are unlikely to be swiftly resolved and the child is likely to have been born before the dispute is resolved. The Chief Magistrate noted that the average present length for time for defended claims from lodgement to finalisation in the last year is 37 weeks for minor civil claims and 65 weeks for general civil claims. See also above [22.2.3].

[803] See above Part 4. The Chief Magistrate told SALRI her clear preference is that surrogacy is better left to the Family Court to resolve (including disputes between the parties as to costs under a lawful surrogacy arrangement). The Chief Magistrate noted: The jurisdiction for disputes should not be divided depending on whether the child is born or not. Disputes [both] prior and after the child's birth should be dealt with by the Family Court.' The Chief Magistrate was clear that the Magistrates Court 'does not have the resources or expertise of the Family Court to deal with disputes arising from a surrogacy agreement, whether these occur before or after the child is born'.

[804] 'If the court makes a parentage order … it may make any other order (including any orders as to the disposition of property) that it considers is required in order to deal with matters relating to, or arising from, the order or the surrogacy arrangement to which the order relates': *Surrogacy Act 2012* (Tas) s 24. See also *Surrogacy Act 2010* (NSW) s 19.

[805] See also above Part 4.

expanded to cover additional issues such as succession and other civil law matters, as Ms Redman has raised.[806] This approach of lawyers certifying not only that legal advice was sought, but that the advice covered a range of specific matters, is currently employed in other family law contexts such as child support agreements and binding financial agreements in the Family Court. In the surrogacy context, it should include the requirement to provide advice about the full range of legal advantages and risks to the parties in becoming party to a surrogacy arrangement.

23.4.10 SALRI considers that, if its suggested approach is implemented, most issues raised in consultation would be addressed. This approach would also have the advantage of being consistent with the principles outlined by national bodies engaged in standard-setting in the surrogacy context.

23.4.11 Recommendations

Recommendation 51

SALRI recommends that any *Surrogacy Act* should provide that the part of the surrogacy agreement relating to costs and expenses should be legally enforceable.

Recommendation 52

SALRI recommends that, in relation to costs, the guiding principles should be set out in any new *Surrogacy Act* and should be that:

(i) No valuable consideration should be provided for the act of becoming pregnant and carrying a child for another person; and

(ii) A surrogate mother should not be financially disadvantaged as a result of taking part in a surrogacy arrangement and should be able to recover any costs actually incurred as a direct result of the pregnancy and birth.

Recommendation 53

SALRI recommends that any *Surrogacy Act* should provide that all costs '*directly related*' to the lawful surrogacy agreement (including the process of getting pregnant, the pregnancy and birth of the child) should be recoverable by the surrogate mother under a lawful surrogacy agreement. The scope of these costs should be set out in the parties' individual surrogacy agreements. However, such costs should be permitted to include:

a. Medical costs related to a pregnancy (including any attempt to become pregnant) that is the subject of the agreement.

b. The birth or care of a child born as a result of that pregnancy.

c. Counselling provided in connection with the agreement (including after the birth of a child).

d. Medical services provided in connection with the agreement (ie: medical services provided prior to achieving a pregnancy, and medical care provided during the pregnancy and after the birth of a child).

[806] See above Part 21. SALRI proposes, as part of a spin-off report, to examine the succession and other civil law implications of surrogacy. This aspect need not delay any *Surrogacy Act*. See below Rec 68.

e. Legal services provided in connection with the agreement (including after the birth of a child).

f. Any premium paid for health, disability or life insurance which would otherwise not have been taken out, but for the agreement.

g. Loss of income of the surrogate mother as a result of leave during the pregnancy or immediately after the pregnancy when the surrogate mother was unable to work on medical grounds. Recoverable loss of income should be limited to a period of two months. Loss of income should be recoverable regardless of the surrogate mother's access to alternative sources of paid leave during the same period (such as paid parental leave), provided the leave was required on medical grounds.

h. Travel and accommodation costs of the surrogate mother (and her dependents) related to the pregnancy (including any attempt to become pregnant);

i. Reasonable out of pocket expenses (including childcare related expenses and loss of domestic services expenses) incurred by the surrogate mother in respect of the agreement.

j. Any other costs directly related to the surrogacy agreement as prescribed by the Regulations.

Recommendation 54

SALRI recommends that the present law relating to recoverable costs should be amended in any *Surrogacy Act* to provide that:

a. The scope of recoverable costs should be set out in the parties' individual surrogacy agreement, but must include all relevant medical costs and the provision of independent legal advice and counselling to the surrogate mother and her partner prior to, during and after the term of the surrogacy agreement;

b. Costs recoverable are those that have been actually incurred by the surrogate mother; and

c. The provisions in the lawful surrogacy agreement relating to costs are legally enforceable between the parties (for example through the small claims process).

Recommendation 55

SALRI recommends that information setting out the typical range of costs recoverable under a lawful surrogacy agreement be made publicly available, for example in the form of a Table or Schedule of Surrogacy Costs, or as a questionnaire, to prompt potential parties to surrogacy agreements to turn their mind to the full range of potential costs recoverable under a lawful surrogacy agreement pursuant to Recommendations 52–54 above. Such information could be prepared with the assistance of legal experts and published by a relevant Government department or other body that currently disseminates general legal information on family law matters such as the Legal Services Commission or Relationships Australia.

Recommendation 56

SALRI recommends that any *Surrogacy Act* should include an express incidental power to enable the relevant court to determine any outstanding issue such as an unresolved dispute about

costs under a surrogacy agreement when it considers transferring the legal parentage to the intending parents.

Section 24 of the *Surrogacy Act 2012* (Tas) is an example of such a provision in this context.

Part 24 - Birth Certificates for Children Born as a Result of Surrogacy Arrangements

24.1 Fundamental right to know parents

24.1.1 A consistent theme that emerged in SALRI's consultation was the fundamental importance accorded to a child born to a surrogacy arrangement to know (or at least be able to access) their full birth history and family background.[807] As Chief Justice Pascoe emphasises:

> Thus every child has the right to information about their genetic heritage,[808] the circumstances surrounding their birth and the identity of the "parents" involved in their conception (this may include biologically related and non-biologically related parents). This also means that a child has a right not to be deceived about their real origins … These rights cannot be removed or diminished, despite what commissioning/intending parents may believe is in the best interest of the child.[809]

24.1.2 The role and importance of a birth certificate in this context with respect to a child born as a result of a surrogacy arrangement was repeatedly raised to SALRI in consultation.[810] Suggestions were made for ways to improve the current process and to protect the rights and interests of the child (notably their right to know their family and history) and to ensure that all parties to the surrogacy arrangement are appropriately acknowledged. SALRI also consulted with the Births, Deaths and Marriages Registry and received useful practical insights into both the current process for obtaining a birth certificate and feedback on proposed reform options. The Births, Deaths and Marriages Registry explained that their role is purely a factual record keeping repository.

24.1.3 International human rights law protects the right of a child to be registered immediately after birth and, crucially, the right to know his or her parents.[811] As Chief Justice Pascoe noted to SALRI in consultation, a 'fundamental part of the child's right to know their parents and their origins is having good records'. For these reasons, it is helpful to set out the current process for obtaining a birth certificate for a child born as a result of a lawful surrogacy arrangement in South Australia and then to examine if any changes to current law and practice are appropriate.

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[807] See also above [7.2.1]–[7.2.11], [9.3.4]–[9.3.5].

[808] This is an important consideration. A child, for example, may wish to know of any likely hereditary condition that could impact on having children.

[809] 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, 20.

[810] See, for example, 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, 25–29. The role and operation of either a State or national ART or Donor Registry (which would include the details of the parties in a surrogacy arrangement including the surrogate mother, the intending parents and any donors of genetic material) have also been identified by Dr Allan, Mr Adams, the Australian Christian Lobby and others to SALRI as significant in this context. Though any such Registry is beyond SALRI's terms of reference, such a Registry is valuable to provide for the child's entitlement to know, or at least access, their birth and family history and accords with recent developments in South Australia and elsewhere. See further Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) Chs 4–5.

[811] CROC art 7. See also above [7.2.1]–[7.2.11].

24.2 Current Process

Registration of birth and issue of Birth Certificate

24.2.1 When a child is born in South Australia as a result of a lawful surrogacy arrangement, the following steps under the *Births, Deaths and Marriages Registration Act 1996* (SA) ('*BDM Act*') occur to register the birth of that child and to issue the child with a birth certificate.

(i) Notification of birth

This is undertaken by the hospital (or other relevant authority)[812] and must include information about whether the child was born alive, the date and place of birth, the child's sex if determined, the name and address of the child's birth mother, and details of the doctor or midwife responsible for the mother at the birth.[813] This notification of birth does not include any information about the intending parents or the child's biological parents (unless they also include the birth mother).

(ii) Lodgement of Birth Registration Statement

Following notification of birth, a Birth Registration Statement ('BRS') must be lodged by a parent or guardian of the child[814] within 60 days of the birth.[815] The information that must be included in a BRS includes: if the child was conceived as a result of a fertilisation procedure, the name (if known) of the biological parent who donated the semen or ovum resulting in the child's birth, as well as the name of the birth mother and the name of the child's father (determined under the *Family Relationships Act 1975* (SA)).[816]

Although the BRS must include the particulars of the biological parents of the child,[817] the fact that a person is described as a biological parent of a child in a BRS or in an entry about the birth in the Register does not constitute an acknowledgement of parentage for the purposes of the *Family Relationships Act 1975* (SA) or any other law.[818] The BRS does not include any information about the intending parents (unless they are also the biological parents).

(iii) Registration of Birth by BDM Registrar

Following receipt of the BRS, the child's birth is registered by the BDM Registrar.[819] The information to be included in the Register is set out in Reg 6 of the *BDM Regs* and includes, if the child was conceived as a result of a fertilisation procedure, the name (if known) of the biological parents and the name of the child's birth mother and father (as determined by the *Family Relationships Act 1975* (SA)). At this stage, the information in the Register does not include any information about the intending parents (unless they are also the biological parents).

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[812] *Births, Deaths and Marriages Registration Act 1996* (SA) ('*BDM Act*') s 12.

[813] *Births, Deaths and Marriages Registration Regulations 2011* (SA) ('BDM Regs') Reg 4.

[814] *BDM Act* s 13.

[815] Ibid s 16.

[816] *BDM Regs* Reg 5.

[817] As defined in *BDM Act* s 14(2).

[818] *BDM Act* s 14(3).

[819] *BDM Act* s 17.

(iv) Alteration of details of parentage after registration of birth

The Registrar may include registrable information about a child's parents in the Register after registration of the child's birth if the father and mother of the child make a joint application (in writing accompanied by a statutory declaration) for the addition of the information (or by application of one parent in certain circumstances).[820] The Registrar must also include or correct registrable information about a child's parents in the Register after registration of the child's birth if a court directs the inclusion or correction of the information in the Register, or the Registrar is advised of a finding by a court that a particular person is a parent of the child. A court can make an order for the registration of a birth or for the inclusion or correction of registrable information about a birth or a child's parents.[821]

Transfer of Parentage and Surrogacy Orders

24.2.2 Where the Youth Court makes an order under s 10HD of the 1975 Act transferring the parentage of a child from birth mother to intending parents, the particulars of the order made by the Youth Court must be registered by the Registrar of Births, Deaths and Marriages in relation to the registration of the child's birth and the child's name.[822] For example, the Registrar must make changes to the child's birth certificate to replace the child's birth mother and her partner/spouse with the names of the intending parents, and change the child's surname to reflect that of the intending parents.

24.2.3 Where the Youth Court makes an order under s 10HD of the *Family Relationships Act 1975* (SA), the Office of Births, Deaths and Marriages registers the particulars of the order by making a new entry in the Birth Register. The new birth certificate must only disclose and certify up-to-date particulars contained in an entry (eg only disclose the intending parents and not the birth mother); and must not provide any information disclosing a change in a parent or parents of the relevant child, or a change in the name of the child (including by disclosing the name of, or information about, any birth parent who is no longer considered as a parent of the child).[823]

24.2.4 The original entry is then 'locked down', with the details of the entry remaining as per the original registration by the birth parent(s). Access to a certificate certifying all relevant entries in the Register is available to the relevant child once they attain the age of 18 years or to a parent who is a party to the surrogacy agreement. The parents may apply at any time.[824]

Access to the Register

24.2.5 In general terms, the Registrar decides who can access information on the Register, based on the following criteria: the nature of the applicant's interest, the sensitivity of the information, the use to be made of the information and any other relevant factors.[825] The privacy of the persons to whom the entries in the Register relate is also a key consideration.[826] The Births, Deaths and Marriages Registry is also required to have an access policy that can be made available to interested parties.[827]

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[820] Ibid s 18

[821] Ibid s 19.

[822] Ibid s 22A.

[823] Ibid s 22A(3).

[824] Ibid s 22A(4).

[825] Ibid s 43.

[826] Ibid s 45.

[827] Ibid s 47.

24.2.6 When it comes to accessing information about surrogacy arrangements, the Registrar must restrict access to the Register to maintain the confidentiality of any information that would disclose the making, or discharge, of a surrogacy order.[828] However, relevant information will be made available to a party to the surrogacy arrangement, and to the child born as a result of a surrogacy arrangement once they attain 18 years.

Biological Parent Information on Birth Certificate

24.2.7 Where a child is conceived using sperm or ovum donated by the intending parent(s), this information will be held in the Birth Register provided the donor consents by signing the Birth Registration Statement.[829] There is therefore a potential situation that birth certificate(s) will need to state: the child's birth parent, intending parent(s) and donor(s).

24.3 Common Concerns raised in Consultation

24.3.1 The strong theme that emerged in SALRI's consultation was the importance of children born as a result of surrogacy to know and/or to be able to access their genetic and birth histories.[830] It is also a strong theme under international human rights law.[831] During the course of its consultation, SALRI received submissions and comments on the process in relation to a birth certificate that emphasised the importance of three factors when considering the legal process for obtaining a birth certificate for a child born as a result of a lawful surrogacy agreement. These were the right of the child to know his or her 'full' or 'true' birth story, including the details of the surrogate mother, any genetic donor(s) and the intending parents.

24.3.2 Monica, for example, said that the intending parents should appear on the child's birth certificate but there should also be some sort of notation on the birth certificate to indicate that the child was born through a surrogacy arrangement and/or any egg or sperm donation. She said that there should be a means for any child born as a result of surrogacy to find out the role that the surrogate mother played in their birth, even if there is no biological link with the surrogate mother. Monica commented that 'every child has a right to know their emotional, biological and social story'. She also commented that every child 'needs to know the team that came together to create a baby'. She stated that if things should breakdown between the intending parents and the surrogate they should still have the same entitlement to know their story. Monica suggested drawing on what happens with ART.[832]

24.3.3 Mrs F expressed a similar theme and strongly supported the right of a child born as a result of surrogacy to know or access their full family and birth history (regardless of whether there is

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[828] Ibid s 49A.

[829] Ibid s 46.

[830] See above [7.2.1]–[7.2.11], [9.3.4]–[9.3.5]. SALRI notes that it heard from some parties in consultation including Dr Lynch, Mr Adams and the Association of Relinquishing Mothers Victoria (reflecting wider research and academic commentary) that children born as a result of a surrogate pregnancy should also be entitled to an ongoing meaningful relationship with their surrogate mother and their gamete donors. This may be highly desirable (indeed, both surrogate mothers and intending parents that SALRI has spoken to have indicated this is also their strong wish) but this ultimately cannot be legislated and comes down to the preferences of the parties. SALRI has been told by counsellors with specialised expertise in this area, including Ms Webster and Dr Oxlad, that nature of the ongoing relationship between the intending parents, the child and the surrogate mother should be discussed in pre-conception counselling.

[831] 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, 19–20.

[832] See also Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) Chs 4–5.

any genetic link between the child and the surrogate mother). Mrs F described her dealings to be recognised as her child's legal parent with the Office of Births, Deaths and Marriages as 'pedantic'. She emphasised the importance of there being a suitable prompt or acknowledgment without undermining the privacy of the child to be able to access their full birth history at a suitable time.

24.3.4 While there was strong agreement of the need to give effect to the child's right to know their full history and to include the three themes noted above, there was disagreement as to the precise means to achieve this and the role and information to be available on a birth certificate.

24.3.5 One view advanced by Dorothy Kowalski was:

> A child's genetic history should be recorded on a *truthful and comprehensive* birth certificate that is available in the same way and with the same freedom as the birth certificates of children born without surrogacy. Documentation of genetic records of all parties should be mandatory prior to the commencement of any surrogacy arrangement.

24.3.6 A YourSAy respondent similarly stated:

> The best interests of the child should be the primary concern - the rights of the child to understand their story of conception and biological makeup together with their birth story are in the best interests of the child. I believe the Birth Certificate should reflect those details (including the names of an egg/sperm donor if differing from the 'mother' and/or 'father', the name of the surrogate mother).

24.3.7 Another YourSAy respondent commented:

> All parties' rights should be considered, the child being first and foremost. We need to ensure surrogates best interests are considered, but as part of the child coming foremost - their genetic mother should be on the birth certificate. It should be an open arrangement so that the child will know both the surrogate and genetic mother.

24.3.8 The right of the surrogate mother to be formally acknowledged for her role in the child's birth was highlighted by some in consultation. The importance of ensuring that the child born as a result of the surrogacy arrangement has information about any siblings was also noted.

24.3.9 Eliza Cole, drawing on her experience as a surrogate mother, submitted to SALRI that the current process does not adequately acknowledge the major role played by the surrogate mother and the impact and implications for the surrogate mother's other children. Ms Cole commented:

> All research indicates that children born through surrogacy should know their birth parents, and if it is hidden from them it has a detrimental effect. Currently when the parentage order is granted the birth mother is removed and the Intended mother is listed as a birth mother. With all due respect she is not the birth mother. It is disrespectful and offensive to remove the birth mother and claim someone else gave up a year of their time to prepare for pregnancy, and carry a pregnancy to term then birth this child. Birth certificates when altered for parentage orders should still list birth mother and also biological/intending mother. This way the child will always know they were born through surrogacy and a parent cannot hide it from them (which does happen, and has proven to be detrimental to the child). Obviously, there should be no discrimination based on race or gender etc also. The state needs to also recognise the surrogate's children. To be a surrogate you must have had your own children - so it stands to reason that these children are also affected by their mother getting pregnant, birthing a baby, and giving it away. The needs of these children should also be respected - however currently we only ever hear about the best interest of the baby born through surrogacy. The surrogate's children are equally as important as the surrogate baby.

24.3.10 Other parties agreed that, although children born as a result of surrogacy have the right to know their genetic and birth histories, this should not extend to the 'public' birth certificate showing

all the details. Dr Allan expressed this view and noted the privacy and discriminatory implications of a 'public' birth certificate showing all the details and parties involved in an ART and/or surrogacy context. Monica similarly agreed that it would be fine to have some sort of notation on the birth certificate to indicate someone was a child of a surrogacy arrangement. However, she said in the interests of privacy, as birth certificates are used for a number of identification purposes, people may not necessarily want this information to be immediately apparent to all people who view their birth certificate. At the same time, she believed that all children born as a result of surrogacy should know their birth histories, even if the surrogate mother has no direct biological link to the child. She pointed to the notations on the birth certificates of adoptees. Alice expressed a similar view.

24.3.11 A complicating factor is the understandable desire on the part of the intending parents to acknowledge or progress, as early as possible, their intention to become the child's legal parent. SALRI heard from some parties in consultation about the anguish and uncertainty faced by intending parents during the period between the registration of the child's birth by the hospital, the issue of the initial birth certificate and the proceedings in the Youth Court relating to parentage.

24.3.12 These considerations give rise to the reform options discussed below.

24.4 Possible Reform Options

24.4.1 The following options have been identified as reform options by individuals and organisations consulted as part of this Reference. SALRI also sought feedback from the Births, Deaths and Marriages Registry as to the merits, practicalities and other implications of pursuing these options.

Option 1: Include Reference to Intending Parents on Notification of Birth

24.4.2 Some parties suggested that the intending parents be noted in some way on the notification of a child's birth, or on the Birth Registration Statement, when the child is born under a surrogacy arrangement. It is argued that such a change would help ease the anxiety sometimes felt by the intending parents at the time of birth and during the 'waiting period' between birth and the application of transfer of parentage orders, which can be between four weeks and six months.[833] For example, the relevant Regulation[834] could be amended to list the intending parents on the Birth Registration Statement, along with a statement to clarify 'the fact that a person is described as an intending parent of a child in a birth notification does not constitute an acknowledgement of parentage for the purposes of the *Family Relationships Act 1975* (SA) or any other law.'[835]

24.4.3 This option raises practical concerns, as noted by the Births, Deaths and Marriages Registry, which explained that at the time of registering the child's birth, the Registry is not aware that the child's birth is subject to a recognised surrogacy agreement. Under s 10HB of the 1975 Act, an application to the Youth Court may only be made when the child is between the ages of four weeks and six months.[836] At this point the court considers whether to make an order, based on factors such as the best interests and welfare of the child, whether the surrogate mother fully understands what is involved, whether the intending parents are fit and proper persons and other prescribed matters. This option may have the effect of usurping, or at least undermining, this legal process.

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[833] *Family Relationships Act 1975* (SA) s10HB(2).

[834] *BDM Regs* Reg 5.

[835] A similar statement could be included that currently applies to biological parents: see *BDM Act* s 14(3).

[836] See also below [25.2.2]–[25.2.5], [25.5.2].

Option 2: Transfer of parentage and new Birth Certificates for Children born as a result of Surrogacy

24.4.4 Some individuals suggested to SALRI that once the Youth Court makes an order under s 10HD of the Family *Relationships Act 1975* (SA) and a new birth certificate is issued with respect to the child, that the new birth certificate contain some reference to the child's birth mother (not as a legal parent of the child, but as a person associated with the child's birth).

24.4.5 Some parties suggested that the name of the birth mother should be included in the new birth certificate as a matter of course, and available to all people able to access the Register.

24.4.6 Others suggested that this information should only be included with the written consent of all parties to the surrogacy agreement and/or as part of the order made by the Youth Court.

24.4.7 Others suggested that a separate, non-legally binding certificate or statement of birth be provided to all parties of the surrogacy agreement, and the child subject to the arrangement, that details the child's biological parents, birth mother and intending parents. This statement would exist alongside, but have no legal effect on, the child's birth certificate that would be made in accordance with the current law.

24.4.8 It was argued by more than one party in consultation that the child, and all parties to the surrogacy arrangement, should be provided with a 'truthful statement about the child's birth'. Some surrogate mothers feel particularly strongly about the need to be recorded in some formal way in a statement about the child's birth. They argue that the biological parents of the child receive this formal recognition, but this is not currently provided to birth mothers.

24.4.9 SALRI notes that other parties in consultation support the current procedure with respect to the issue of new birth certificates following the Youth Court's order transferring legal parentage.

24.4.10 The Births, Deaths and Marriages Registry explained that it may be difficult to manage the expectations of all parties (birth and intending parents) for referencing the child's birth mother on the new birth certificate. The Registry explained that a birth certificate is a document of identity required for such purposes as employment, opening bank accounts, getting a driver's licence, applying for a passport and other related matters. The Registry warned that if the birth mother's name is included in the birth certificate as a matter of course, consideration needs to be given to the confusion and embarrassment that may be caused to all parties.

24.4.11 This concern was raised by others in consultation. Even parties such as Monica, Mrs F, Dr Oxlad, and Dr Allan (who strongly supported the child's right to know his or her full history) recognised the understandable need to protect their privacy.

24.4.12 The Births, Deaths and Marriages Registry further noted that under the current provisions, a person who is a party to the surrogacy agreement that gave rise to a surrogacy order is entitled to a certificate certifying all relevant entries in the Register.[837] This includes details of the child's post surrogacy birth registration, plus details of birth parent(s), but is not intended to be relied upon for identity purposes.

Option 3: Surrogate Child Access to the register

24.4.13 Some parties suggested to SALRI that, if neither of the above reform options are pursued, changes should be made to the *BDM Act* to allow the child born of a surrogacy arrangement to have

[837] *BDM Act* s 22A(4).

some discrete indication on his or her birth certificate as to the fact that there may be further particulars about his or her birth that are included on the Register, including that he or she was born as a result of a surrogacy agreement. It was further suggested that children born as a result of a surrogacy agreement be able to access further information about their birth, including the name of their birth mother prior to turning 18, such as at the age of ten or 12. It was argued that children born as a result of a surrogacy agreement should be able to independently enquire into their birth story prior to attaining 18 years, and that there should be some independent prompt for the child to do so, in the event that the child's legal parents have not disclosed the surrogacy arrangement to the child.

24.4.14 Under the present law, once a child born of a surrogacy arrangement reaches the age of 18 years, they are entitled to obtain a certificate certifying all relevant entries in the Register. The Births, Deaths and Marriages Registry explained to SALRI that, in its experience, applications tend to be made by the child's parent(s) up until the child is around 16 years of age.

24.4.15 The Registry expressed concerns about the impact on the welfare of children if this option was implemented. It noted, for example, that if children under 18 years were to receive an independent prompt that there is additional information in the Register about their birth which they can then access, and the parents have not disclosed the surrogacy arrangement to the child, it could potentially be distressing for the child to learn their birth story from the Registry, particularly if the child is only ten or twelve years of age.

24.5 SALRI's Reasoning and Conclusions

24.5.1 SALRI notes the experience and practical perspectives offered by the Births, Deaths and Marriages Registry. However, SALRI also agrees with the consistent view advanced in consultation by Chief Justice Pascoe and many others and fully concurs with the importance of a child's right to know their 'full' birth, genetic and family history. This question is not unique to children born of a surrogacy arrangement. It accords with the important and increasingly recognised right for children, in the not dissimilar context of donor conception and ART, to also know their history and family.[838] There are sound reasons of policy (reinforced by international human rights) why a child should be entitled to know (or at least access) their full birth history.[839] Great significance is attached to a birth certificate in this context.[840]

24.5.2 SALRI, having regard to its research and consultation, supports a form of Option 3 above.

24.5.3 However, SALRI considers that the birth certificate of a child born to a lawful surrogacy arrangement upon a court order transferring legal parentage to the intending parents should not simply result in a new birth certificate showing the intending parents.

24.5.4 Rather, a birth certificate for a child born as a result of a surrogacy arrangement should include a brief neutral notation such as an asterix (one suggestion in consultation), or a term such as

[838] See Sonia Allan, *Report on the Review of the Assisted Reproductive Treatment Act 1988* (SA) (Department of Health, South Australia, 2017) Chs 4–5; 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, 23–25.

[839] See also above [7.2.1]–[7.2.11], [9.3.4]–[9.3.5], [24.3.1]–[24.3.3].

[840] 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, 25–29.

'Re-issue' (as raised by Chief Justice Pascoe[841] and others), to indicate that there are relevant historical records which can be sought. The note of the existence of the historical record should appear on the face of the birth certificate but should not provide specific detail of the type of record held. An asterix or mark of 'Re-issue' would be sufficient.[842]

24.5.5 Any details about the surrogate and/or any donors of genetic material should not appear on the face of the birth certificate given the sensitivity and privacy of such material. A birth certificate is required for various 'public' purposes such as employment or as proof of age and private material such as the fact and details of a surrogate mother and/or any donor should not appear on it. SALRI also notes the legitimate concerns that have been raised to SALRI of the potential for a child to be discriminated against upon production of their birth certificate for identity purposes (such as school enrolment).

24.5.6 The problem is that a birth certificate, without some brief endorsement to suggest there is additional material to which the child is entitled beyond the public form, may prove inadequate in a surrogacy context. It may be that, despite the advantages of openness and transparency as both surrogate mothers and intending parents have told SALRI,[843] the intending parents never inform the child about the circumstances of his or her birth. Unless there is some 'independent prompt' on the birth certificate, the child may never have any inkling of the material behind the public form to which they are entitled.

24.5.7 SALRI supports the view that a child born as a result of a surrogacy arrangement should be entitled to obtain a certificate certifying all relevant entries in the Register, including details of the surrogate mother and/or any donors, once the child obtains the age of 16 years (which appears a sensible age).[844]

24.5.8 Provision should also be made in the Registrar's Access Policy to allow the Registrar to exercise his or her discretion to grant a child born as a result of a surrogacy arrangement access to a certificate certifying all relevant entries in the Register regardless of age, provided the Registrar is satisfied that such access would not be harmful to the welfare of the child. Noting the potential practical issues raised by the Registry with respect to this option, SALRI supports the suggestion that the Registrar should have the ability to request that a counselling certificate or similar documentation be provided in support of the child's application, thereby allowing the Registrar to make an informed decision. [845]

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[841] Ibid 29.

[842] The BDM Registrar considers this type of notification could be confusing to other agencies and authorities dealing with birth certificates as they will not know what it means and it may prompt unnecessary questions. The Registrar also expressed concern that it may not prove helpful for the child, as the child may not know what it means either.

[843] Dr Oxlad, Dr Allan, Dr Fronek and others also stressed this theme in consultation, drawing on findings from adoption.

[844] The Registrar told SALRI that she does not necessarily have a problem with the age of 16, but notes that under the current law, the intending parents can apply to access information about the surrogate and any donors of human reproductive material on behalf of the child. In any event, under the current law, once the child turns 18 they can apply for a new birth certificate and the Registrar will provide them with a letter containing information about previous birth certificates and other birth information such as the name of surrogate and any other donors.

[845] The Registrar expressed unease regarding the idea of investing the Registrar with the discretion to provide access to a child under 16 as it is not within the powers or skills of BDM to conduct this type of inquiry. The Registrar suggested that some type of documentary evidence be provided to support the child's application and allow the Registrar to make an informed decision, for example, a certificate from a counsellor or doctor.

24.5.9 It is significant that SALRI's proposals in relation to the role and operation of birth certificates in a surrogacy context received wide support in consultation including from Chief Justice Pascoe,[846] Dr Allan, Dr Oxlad and both surrogate mothers such as Ms Cureton and Monica and intending parents such as J. SALRI considers that there are strong reasons of policy (also reflecting international human rights law and linked developments with respect to ART and donor conception) for changes to present law and practice in South Australia

24.5.10 SALRI notes the view of the Births, Deaths and Marriages Registry that their role is as a purely factual record keeping repository and is aware of possible operational considerations, but SALRI is of the view that it should be eminently practicable to establish a system as recommended.

24.5.11 Recommendations

Recommendation 57

SALRI recommends that the process in South Australia for obtaining a birth certificate with respect to a child born as a result of a lawful surrogacy agreement includes mandatory requirements at the stage of notification of birth, registration of birth and issue of birth certificate for the collection of information about the child's intending parents and any donors of human reproductive material. The collection of such information should not affect the legal parentage of the child, which should remain with the surrogate mother (and her partner/spouse as is the current position under the *Family Relationships Act 1975* (SA)), unless, and until, an order for transfer of legal parentage is made by the Youth Court.

Recommendation 58

SALRI recommends that the current process for re-issuing a birth certificate upon a declaration of legal parentage by the Youth Court remain and that the Register of Births retains the name of the surrogate mother in its historical records.

Recommendation 59

SALRI recommends that a birth certificate for a child born as a result of a surrogacy arrangement should, upon any transfer of legal parentage, include a brief notation such as an asterix or the term 'reissue' to indicate that there are relevant historical records which can be sought. The note of the existence of the historical record should appear on the face of the birth certificate but it should not provide specific detail of the type of record held. The details as to the surrogate mother and/or any donors of genetic material should not appear on the face of the birth certificate given the privacy of such material and other legitimate concerns.

Recommendation 60

SALRI recommends that a child born as a result of a surrogacy arrangement should be formally entitled, under the relevant Act, to obtain a certificate (or similar documentary record) certifying all relevant entries in the Register of Births, including details of the surrogate mother and/or any donors of genetic material, once the child attains the age of 16 years.

[846] See also 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, 25–29.

In addition, provision should be made in the Registrar's Access Policy to allow the Registrar to exercise his or her discretion to grant a child born as a result of a surrogacy arrangement access to a certificate certifying all relevant entries in the Register of Births regardless of the child's age, provided that the Registrar is satisfied that such access would not be harmful to the welfare of the child. The Registrar may request that a counselling certificate or similar documentation be provided to assist in their assessment.

Part 25 - Surrogacy, Parentage Orders and the Family Court

25.1 The Current position in South Australia

25.1.1 The law in South Australia (and throughout Australia) as to the parentage of a child born under a surrogacy arrangement is not simple.[847] It raises various legal, jurisdictional and constitutional implications.[848] In all Australian jurisdictions, the woman who gives birth to a surrogate child is presumed to be the child's *legal* mother. This means that the surrogate mother is the legal parent of a child born of a surrogacy arrangement at birth.[849] One of the primary purposes for parties to enter into a lawful surrogacy agreement in South Australia is so that the intending parents can be recognised as the legal parents of the child. They do this by obtaining an order from the Youth Court of South Australia which transfers the legal parentage from the surrogate mother to the intending parents.

25.1.2 Under the current South Australian law, the process for obtaining such orders is set out in s 10HB of the *Family Relationships Act 1975* (SA). This is not a simple or straightforward provision. Ms Brunacci described it as an 'imprecise and singularly unenlightening provision'. The application may only be made under s 10HB when the child is between the ages of four weeks and six months.[850] The welfare of the child born as a result of surrogacy is the paramount consideration for the Youth Court to grant an order recognising the intending parents as the child's legal parents.[851] The court must also be satisfied that the child's surrogate mother freely and fully understands the effect of making the order,[852] the intending parents are regarded as 'fit and proper persons' to be parents and any other consideration the court deems relevant.[853] The effect of an order under s 10HB is that the intending parents are treated as the parents and the birth parent is no longer a legal parent.[854] The Youth Court will also notify the Birth, Deaths and Marriages Registrar of the order.[855]

25.1.3 The effect of the present law is that, where the parties have engaged in a surrogacy agreement that is legally recognised in South Australia,[856] they have the opportunity to seek an order

[847] See, for example, Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135; Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A Child-Centred Approach' (2015) 23 *Journal of Law and Medicine* 396. Indeed, the interaction between the various State, Territory and Commonwealth laws as to parentage in general is convoluted. See Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 56–57, 58–59.

[848] See generally Family Law Council, *Report on Parentage and the Family Law Act* (December 2013).

[849] Mr Everingham of Surrogacy Australia suggested that this position should be changed. He argued that the 'process could be streamlined by changing State legislation to automatically recognise the Intended Parents as the legal parents at birth, unless vetoed by the surrogate, allowing the intended parents to be named on the birth certificate, the child's Medicare card and making redundant a lengthy transfer of parentage via court processes.' SALRI notes this view but is unconvinced that any change to the present law in this context is appropriate as any such change amounts to a major departure from established practice across Australia and the requirements of the *CROC*. See also below [25.4.1]–[25.4.13], [25.5.1].

[850] *Family Relationships Act 1975* (SA) s10HB (5).

[851] Ibid s 10HB(6).

[852] Ibid s 10HB(7).

[853] Ibid s 10HB(10)–(11).

[854] Ibid s 10HB(13).

[855] Ibid s 10HD.

[856] That is, meets the criteria set out in *Family Relationships Act 1975* (SA) s10HA.

from the Youth Court with respect to the parentage of the child born as a result of surrogacy, provided they also satisfy the criteria set out in s 10HB.

25.1.4 The importance of judicial oversight of the transfer of parentage from the surrogate mother to the intending parents is crucial: a theme highlighted by Chief Justice Pascoe in consultation. Mr Page similarly noted that 'from a substantive point of view, in my view it is absolutely essential to have judicial oversight' and that 'in the rare event that something goes wrong, my experience of courts in Queensland, Victoria and South Australia is that judges are particularly sensitive to ensure that in the volatile circumstances that all parties are treated as sensitively as possible and, as one would expect, the best interests of the child are the paramount concern.' SALRI supports this reasoning and the importance of judicial oversight of any transfer of parentage, although it notes that ideally this role is better suited for the Family Court given its role and specialised expertise and processes.[857]

25.1.5 However, an order in South Australia to transfer the legal parentage from the surrogate mother to the intending parents is unavailable from the Youth Court where the parties have relied upon a surrogacy agreement that does not meet the requirements of s 10HA, or where the circumstances set out in s 10HB are not satisfied. For example, if the parties to the surrogacy agreement exchanged valuable consideration, or if the intending parents engaged an international surrogate mother, the intending parents cannot utilise the Youth Court and may only look to the Family Court to provide a practical outcome to the question of 'who is the legal parent' of the child born. In such circumstances, the legal parentage of the child born to the surrogate mother will not be transferred to the intending parents under South Australian law. The birth mother will be presumed to be the legal mother of the child. The Family Court will be confined to issuing a 'lesser' parental responsibility order[858] (though still based on the best interests of the child). The Family Court has determined that it is unable to make a declaration of parentage in these circumstances.[859]

25.2 Concerns raised in Consultation

25.2.1 SALRI received comments in consultation from several parties about issues that arise in relation to the processes and means for the Youth Court to determine and transfer parentage to the intending parents.

Limitation Period

25.2.2 An application may only be made in South Australia to transfer the legal parentage when a surrogate child is between the ages of four weeks and six months. There is no apparent flexibility.

25.2.3 The rationale of the minimum period in which to seek a transfer of parentage was explained by Baker J in a 2012 English decision[860] as follows:

> A surrogate mother is not merely a cipher. She plays the most important role in bringing the child into the world. She is a "natural parent" of the child... The act of carrying and giving birth to a baby establishes a relationship with the child which is one of the most important relationships in

[857] See above Recs 2, 3 and 4. See also above Part 4.

[858] As the Law Society in its submission to SALRI noted: 'as a result of *Bernieres*, it is clear that the Federal Court system will not determine parentage but rather the lesser status of parentage: parental responsibility': Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 3 [13], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[859] *Bernieres v Dhopal* (2017) 324 FLR 21. See also below Part 26.

[860] *D, L (Minors) (Surrogacy) and in the Matter of Human Fertilisation and Embryology Act 2008* [2013] 2 FLR 275.

> life. It is, therefore, not surprising that some surrogate mothers find it impossible to part with their babies and give consent to the parental order. That is why the law requires that a period of six weeks must elapse before a valid consent to a parental order can be given.[861]

25.2.4 SALRI agrees with the reasoning of Baker J and supports the retention in South Australia of the minimum period of four weeks (not six weeks as in England) in which to make an application to transfer parentage.

25.2.5 Mr Page noted that the maximum six month limitation period to seek a transfer of legal parentage is common across Australia. It was initially legislated in the *Parentage Act 2004* (ACT) and was apparently copied from British legislation. Mr Page noted 'its source was completely arbitrary: the needs of a constituent of a member of the House of Commons'. Mr Page proposed that while intended parents should pursue an application as quickly as possible to transfer parentage, greater flexibility should be allowed than currently exists if the intended parents fall outside the six month period.' Mr Page suggested that a court should be able, in 'exceptional' or 'special' circumstances, to extend the period to make an application to transfer legal parentage. The recent NSW Review also outlined the benefit of such a provision.[862]

Part VII of the *Family Law Act 1975* (Cth) and Surrogacy Arrangements

25.2.6 Part VII of the *Family Law Act 1975* (Cth) contains several provisions that can be used to recognise the parentage and grant parental responsibility orders for a child of a surrogacy arrangement (or in other circumstances such as ART).[863] A parental responsibility order provides children born as a result of surrogacy with such protections as Medicare, medical treatment and family inheritance. Parental responsibility orders can provide intending parents with all of the day to day duties, powers, responsibilities and authority which by law parents have in relation to children. However, in some circumstances, particularly in the context of international surrogacy arrangements, intending parents may well be unable to obtain a declaration of parentage from the Family Court.[864]

25.2.7 Section 69VA of the *Family Law Act 1975* (Cth) is of particular significance.[865] It provides:

> As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

25.2.8 The main use of this provision involves applications for support under a child support assessment application (such as where a man denies paternity).[866] A declaration of parentage has also been sought by the intended parents in various surrogacy cases, notably *Bernieres*. Several issues and problems are raised regarding the operation and effect of this section, especially in the context of surrogacy.[867]

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[861] Ibid 285 [24]–[25].

[862] Department of Justice, Government of New South Wales, *Statutory Review: Surrogacy Act 2010* (July 2018) 11–12 [3.16]–[3.25].

[863] This is a technical and complex area. See generally Family Law Council, *Report on Parentage and the Family Law Act* (December 2013).

[864] *Bernieres v Dhopal* (2017) 324 FLR 21. See further below Part 26.

[865] See also *Family Law Act 1975* (Cth) s 60HB.

[866] See for example, *Jamison v Hanley* [2012] FMCAFam 218; *Lovegood v Creevey* [2010] FMCAFam 113.

[867] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 49 [2.7.1].

25.2.9 The use of the power under s 69VA by the Family Court is confined to situations where the question of parentage is a primary issue of dispute incidental to the determination of another matter within the Commonwealth's constitutional power.[868] It is not a stand-alone power to make a declaration of parentage.[869] In recognition of these problems, New South Wales, Queensland, Tasmania and Victoria made referrals of their power to the Commonwealth between 1987 and 1997 to enable the Family Court to make a determination of parentage 'whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth.'[870] However, the Family Law Council notes 'that no other referrals appear to have been made [and] it seems clear that the Commonwealth has not acted on the existing referrals.'[871] The Family Law Council urged the Commonwealth to seek a referral from South Australia 'to enable the family courts to make stand-alone declarations of parentage for the purposes of all Commonwealth laws' and that following such a referral the Commonwealth should amend s 69VA of the *Family Law Act 1975* (Cth) to reflect these referrals.[872]

25.2.10 A further problem of s 69VA, as the Family Law Council explains, is that a declaration of parentage under s 69VA of the *Family Law Act 1975* (Cth) is only 'conclusive evidence of parentage for the purposes of all laws of the Commonwealth', and as such is not binding for State and Territory issues such as birth registration, inheritance, and enrolling children in school, where the relevant State and Territory law does not expressly provide for recognition of Family Court parentage orders.[873] As Millbank explains, 'a declaration of parentage under s 69VA is conclusive in all Commonwealth law, but a declaration, finding or order of parentage from the Family Court does not necessarily carry through to State law and it is the states which register births and control birth records'.[874]

25.2.11 Only the Australian Capital Territory, New South Wales and Queensland at present have a conclusive presumption of parentage on the basis of a finding of parentage made by another State or Commonwealth court. South Australian legislation[875] only refers to findings of 'paternity' in relation to children born outside of marriage.[876]

25.2.12 A summary of the relevant provisions of the Commonwealth Act are outlined below.

Section	Operation	Obstacles applying to international and/or commercial surrogacy arrangements
s 60HB	If a court has made an order under a prescribed law of a State or Territory that a person is the parent of a child born under a surrogacy arrangement, they are also parents for the purposes of the *Family Law Act 1975* (Cth).	State and Territory jurisdictions do not allow for orders of parentage for children of commercial surrogacy arrangements. State and Territory jurisdictions require evidence of the consent of the surrogate mother. Difficult to establish in the overseas context.

[868] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 48 [2.7].

[869] Ibid 49 [2.7]. See also *Whitley v Ingham* [2013] FCCA 869 (22 July 2013) [14]..

[870] *Commonwealth Powers (Family Law—Children) (Amendment) Act 1997* (Vic), s 4; *Commonwealth Powers (Family Law—Children) (Amendment) Act 1996* (NSW); *Commonwealth Powers (Family Law—Children) Act 1990* (QLD) s 3; *Commonwealth Powers (Family Law) Act 1987* (Tas) s 3.

[871] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 49 [2.7.1].

[872] Ibid 60. See also: 61 Rec 10.

[873] Ibid 49 [2.7.1].

[874] Jenni Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23 *Australian Journal of Family Law* 1, 157

[875] *Family Relationships Act 1975* (SA) s 7.

[876] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 49–50 [2.7.1].

		In South Australia the fertilization procedure resulting in the surrogate child must be carried out in South Australia.
s 69R	Creates a presumption of parentage where a person has been entered as a child's parent on the register of births or other parentage information kept in the Commonwealth, an Australian State or Territory or a prescribed overseas jurisdiction.	Since 2015, South Australian law has a mechanism to recognise international surrogacy agreements that meet certain conditions or are prescribed by regulation, however, no overseas jurisdiction has been prescribed for the purposes of s 69R.
s 69S	Creates a presumption of parentage where another court has made a finding expressly that a person is a parent of a particular child.	Excludes courts from certain prescribed overseas jurisdictions.
s 69VA	Gives the Family Court a general discretion to grant declarations of parentage.	Can no longer be used following the Full Court decision in *Bernieres v Dhopal* (see below).
s 70G	Allows for the registration of overseas parenting orders.	Does not amount to a transfer of parentage from surrogate mother to the commissioning parents.[877]
ss 64B 65C 65D	Parental responsibility orders.	Does not amount to a transfer of parentage from surrogate mother to the commissioning parents.

25.3 Recent Case Law

25.3.1 The legal position under the *Family Law Act 1975* (Cth) with respect to the parentage of children born to international surrogacy arrangements is not straightforward.[878]

25.3.2 The practice of international commercial surrogacy, as the Law Society of South Australia and others have noted to SALRI, especially in developing countries, has attracted extensive concern with respect to the rigour of the process of approval of many international surrogacy agreements.[879] The Family Court has acknowledged these concerns and has recognised the potential for international surrogacy arrangements to be used as a vehicle for the trafficking and abuse of children[880] and the

[877] See *Sigley v Sigley* [2018] FamCA 3 (10 January 2018).

[878] See Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 68–85, 98–104.

[879] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 2–3 [12], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[880] *Cowley v Yuvaves* [2015] FamCA 111 [24] (2 March 2015).

exploitation of vulnerable women in developing countries.[881] Chief Justice Pascoe has also made his concerns clear, both to SALRI and elsewhere.

25.3.3 However, prior to 2017, the best interests of the child have outweighed these concerns and the court generally granted declarations of parentage to intending parents[882] (though differing views have been expressed).[883] Such orders have even been made where the consent of the surrogate mother is called into question,[884] or where an intending parent has a history of child sexual offences[885] or where it is an offence for the residents of that State to enter into an international commercial surrogacy agreement.[886] This is not to be critical of the Family Court. As Chief Justice Pascoe explains, once a child born as a result of surrogacy is in Australia and if, or when, the intending parents seek orders from the Family Court to care for the child, at this point, a court is 'faced with a *fait accompli* in balancing the conflicting policy goals of prohibited international commercial surrogacy agreements that have already been executed, and the best interests of the child'.[887] The Chief Justice notes that as the child is already born and in Australia with the intending parents, 'it is almost impossible for the courts to determine that it is not in that child's best interests to remain with the commissioning parents even if they have broken the law'.[888]

25.3.4 In 2017, this approach was thrown into doubt. The Full Court of the Family Court in its 2017 decision of *Bernieres v Dhopal* 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).[889] The result of this decision is that the legal parentage of many children of surrogacy arrangements which do not comply with the strict requirements of State laws remain in doubt.[890] The apparent 'gap' was concisely outlined by Berman J at first instance as:

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[881] *Mason v Mason* [2013] FamCA (7 June 2013) 424 [4] (Ryan J); *Fisher-Oakley v Kittir* [2014] FamCA (4 February 2014) 123 [7] (Cronin J).

[882] See, for example, *Ronalds v Victor* [2011] FamCA 389 (13 May 2011) [8]–[11]; *Ellisonv Karnchanit* [2012] FamCA 602 (1 August 2012); *Farnell and Chanbua* (2016) 56 Fam LR 84; *Abney v Pramof* [2016] FamCA 1059 (9 December 2016); *Re: Grosvenor* [2017] FamCA 366 (26 May 2017); *Re Halvard* [2016] FamCA 1051 (5 December 2016); *Saliba v Romyen* [2015] FamCA 927 (22 October 2015). See also Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 68–74 [3.4].

[883] *Dudley v Chedi* [2011] FamCA 502 (30 June 2011); *Mason v Mason* [2013] FamCA 424 (7 June 2013). See also Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 68–74 [3.4].

[884] See, for example, *Mason v Mason* [2013] FamCA 424 [4] (7 June 2013).

[885] *Farnell and Chanbua* (2016) 56 Fam LR 84, 235–237 [771]–[780]..

[886] *Dudley v Chedi* [2011] FamCA 502 (30 June 2011) [37] (Watts J). Professors Keyes and Chisholm explain that the application of the paramountcy principle does not preclude the court having regard to relevant policy matters, including evidence that the orders sought 'will give effect to a criminal transaction': Mary Keyes and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Matters' (2013) 27 *Australian Journal of Family Law* 105, 131–132.

[887] 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, 6. See also *Ellison v Karnchanit* [2012] FamCA 602, [87] (1 August 2012); Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 28, 48.

[888] 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, 6. See also Mary Keyes, 'Cross-border Surrogacy Agreements' (2012) *Australian Journal of Family Law* 28, 37, 43, 46.

[889] The court also held that, as a matter of statutory construction the more specific s 60HB, which refers explicitly to State parentage orders for children born under surrogacy arrangements, prevails over the court's more general discretion in s 69VA. See *Bernieres v Dhopal* (2017) 324 FLR 21.

[890] *Bernieres v Dhopal* (2017) 324 FLR 21. See also *Bernieres v Dhopal* [2015] FamCA 736 (7 September 2015).

> Clearly the circumstances surrounding the birth of Q are not dealt with directly either by the relevant State legislation or by reference to s 60HB of the Act. It may well be an unsatisfactory position that children who are born pursuant to a commercial gestational overseas surrogacy arrangement are not acknowledged by either State or Commonwealth legislation.[891]

25.3.5 In its more recent decision in *Shaw v Lamb,*[892] the Full Court re-emphasised that the Family Court is unable to recognise the parentage of surrogate children based upon State or Territory laws unless all of the requirements of any such laws are strictly satisfied. The Family Court does not, by virtue of it being a Superior Court of Record, have any inherent power to grant the declaration as sought. The Family Court highlighted that it is the responsibility of the states and territories to regulate the parentage status of children born under domestic and international surrogacy arrangements.

25.3.6 The effect of *Bernieres* is that, whilst the Family Court can make a parental responsibility order in relation to a child born of an overseas commercial surrogacy in favour of the intending parents, the Family Court cannot make a declaration of parentage as this is presently within the role and jurisdiction of the States. This is the 'gap' or 'lacuna' identified in the law.[893]

25.3.7 There have been various calls (including in SALRI's consultation by Ms Redman, the Chief Magistrate and the Law Society of South Australia) for the Commonwealth courts such as the Federal Circuit Court and/or the Family Court to be responsible for any orders concerning surrogacy, whether domestic or international.[894] This suggestion is given weight by the 'gap' identified in *Bernieres*. It is considered that the State courts lack the role and specialised expertise to effectively deal with surrogacy. However, as Mr Page noted in consultation, until the Commonwealth reaches an agreement with the States and Territories about legislating for surrogacy and provides the resources for that to occur, it will remain the obligation of state courts, such as the Youth Court, to deal with surrogacy.[895]

25.3.8 For an overview of the relevant case law in this area see the table of cases set out at Appendix E.

25.4 Consultation Overview

Parentage Orders

25.4.1 There were a range of views expressed to SALRI about the most appropriate mechanism to transfer legal parentage from surrogate to intending parent and when this should occur.

25.4.2 Some parties queried the legal presumption in Australia that the surrogate mother and her partner are the legal parents of the child at birth. Dr Ronli Sifris, for example, supported the adoption of a Californian intent-based approach to legal parentage in South Australia. Under this model, surrogacy arrangements create a legally binding contract between the intending parents and surrogate.

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[891] *Bernieres v Dhopal* [2015] FamCA 736, [120] (7 September 2015).

[892] [2018] FamCAFC 42 (13 March 2018).

[893] See also Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A Child-Centred Approach' (2015) 23 *Journal of Law and Medicine* 396. SALRI accepts that Brenieres is not an absolute proposition. Mr Page in consultation identified five potential means by which the Family Court could still make a declaration of parentage in relation to a child born of an overseas commercial surrogacy in favour of the intending parents. This is a very technical area with constitutional and international law implications. The avenues are of only very limited utility. As Mr Page notes, they 'are technical, at times costly, difficult and do not apply across the board for the benefit of children'.

[894] See above Part 4.

[895] See also above Rec 2.

A 'pre-birth parentage order' can also be granted to enable the intended parents to be recognised as the legal parents of the child from birth. Dr Ronli Sifris, said:

> embracing a model of parenthood by intent would, axiomatically, give effect to the intention of all parties in cases of donor conception, surrogacy and adoption thereby remedying the current state of disarray and incoherence in the law. Importantly, in the context of surrogacy such an approach would also serve the best interests of the child as in most cases it may be presumed that it is in the child's best interests to have their functional parents, those who intended to (and in fact are) raising that child, recognised as their legal parents.

25.4.3 Other parties, including Mr Everingham, Monica and Angela argued that legal parentage should be transferred from the surrogate mother to the intending parents at birth. Angela, as an intending parent, engaged in a commercial surrogacy arrangement in the Ukraine where she and her partner became the legal parents at the time the surrogacy arrangement was signed and were named as the child's legal parents on the original birth certificate. Angela told SALRI she would not enter an arrangement in South Australia unless it was legally enforceable in respect to the transfer of parentage and there was a means to require a surrogate to relinquish the child at birth. She noted that if a surrogate mother was hesitant to sign away her rights to the child, this would send 'red flags' straight away. Angela told SALRI that she finds the South Australian parentage order disrespectful. She emphasised: 'Adopting my own child offends me'.

25.4.4 Mr Everingham of Surrogacy Australia in consultation suggested that this position should be changed. He argued:

> Domestic surrogacy arrangements require many months of preparation, legal advice and counselling to ensure informed consent. Failing to respect that groundwork by insisting that the surrogate is the legal parent post birth is not in the best interests of the child. Currently it is the Australian surrogate and her partner (if she has one) who are listed as parents on the birth certificate or are recognised as the legal parents until a court process can transfer parentage. Amending this requires significant work, requiring an expensive and time-consuming process. This inconveniences all parties and leaves the child in a situation where there is no legal parent residing with them in the six to twelve months required for the transfer of parentage. Australian surrogates repeatedly report not wanting to be named on the birth certificate or as legal parent,[896] given the administrative complications this entails. This reality also discourages intended parents and surrogates from engaging domestically... This process could be streamlined by changing State legislations to automatically recognise the Intended Parents as the legal parents at birth, unless vetoed by the Surrogate, allowing the intended parents to be named on the birth certificate, the child's Medicare card and making redundant a lengthy transfer of parentage via court processes.

25.4.5 Several parties such as Mr Page, Alice and Angela raised concerns at the ability of a surrogate mother to withhold consent for any reason to the transfer of legal parentage. Mr Page pointed to the problematic 2017 Queensland case of *Lamb v Shaw*[897] as an instance where the surrogate mother withheld consent 'capriciously'. Mr Page suggested to SALRI that, 'there ought to be the ability, as one sometimes sees in adoption legislation, to transfer parentage even without the consent of the surrogate and her partner when special circumstances demand it.'[898]

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[896] This is at odds with some of the views SALRI received in consultation. SALRI notes that the rights of the surrogate child extend to knowing (at least been able to access) their birth history and details of the surrogate mother.

[897] *Lamb v Shaw* [2017] FamCA 769 (21 September 2017). See also *Shaw v Lamb* (2018) FLC 93–826; *Lamb v Shaw* [2018] FamCA 629 (21 August 2018).

[898] See further below [25.4.12]–[25.4.13], [25.5.1].

25.4.6 Other parties, including Chief Justice Pascoe, Dr Allan, Dr Lynch, Dr Fronek and the Association of Relinquishing Mothers (Victoria), however, strongly cautioned against any proposals to transfer legal parentage at birth. These parties emphasised the need for a formal transfer of parentage to the intending parents by a court to ensure appropriate judicial oversight, and the importance of the relationship between the birth or surrogate mother and the child (at least until this time). The Association of Relinquishing Mothers (Victoria) submitted:

> The mother is the legal parent of the child to whom she has given birth. That legal status is of critical importance and the legislation must stipulate protections for the mother and the child during the period prior to consent and during the revocation period. Good practice in adoption suggests that consent should not be taken until six weeks after the birth and the revocation period should be at least 30 days. There should be no possibility to waive these time periods. The mother should be entitled to have the care of the child during these periods. Most importantly, should the mother be unable to have the child in her care, the child should not be placed in the care of the commissioning couple, as this presents an almost insurmountable barrier to an unpressured consent.

25.4.7 This view was not shared by other parties that SALRI spoke to in consultation, including surrogate mothers. Simone Cureton, a surrogate, for example commented, 'the day I walk out of that hospital the baby is no longer my responsibility.' Most parties agreed that after a parentage order is granted the surrogate mother and her partner should no longer have a legally recognised relationship with the child. The Association of Relinquishing Mothers (Victoria), however, submitted that 'although not the legal parents, the birth parents should continue to be treated as parents under the Act, once a parenting arrangement is created.' It also submitted that the surrogate mother and her partner should be entitled to discharge a parentage order, with financial assistance under the Act.

25.4.8 Several parties that SALRI spoke to such as Ms Redman and Dr Oxlad agreed that South Australia should take a prudent middle ground to the transfer of legal parentage, in line with the approach taken in other Australian jurisdictions.

25.4.9 Alice, an intending parent that SALRI spoke to, could not see why she was required to wait six months for the court process of the legal transfer of the child's parentage in South Australia. She found ultimately that the Youth Court procedure was only ten minutes and so straightforward she could have represented herself. The surrogate mother was very content to relinquish the child.

25.4.10 Alice emphasised that there were potential issues that still could arise during the period before the transfer of parentage at the Youth Court. Alice raised the concern of what happens when the relationship deteriorates throughout the pregnancy and the surrogate mother refuses to consent to the signing of the parentage order. Alice believes that if the surrogate mother does not consent to the transfer of parentage there should be some sort of alternative power for a court to still recognise the parentage of the intending parents where it is in the best interests of the child.

25.4.11 SALRI notes that there have been only a very small number of parentage orders granted by the South Australian Youth Court in respect of surrogacy arrangements.[899] Professors Millbank and Stuhmcke noted the State Courts only see a small proportion of the surrogacy cases within Australia. Many families 'will not seek to formalise their legal arrangements.'

25.4.12 SALRI notes the suggestion of Mr Everingham to provide a mechanism (with suitable safeguards) to transfer or presume a transfer of parentage at birth. However, SALRI is not convinced that any such change to the present law in this context is justified. First, such a change amounts to a

[899] See above Part 4.

dramatic departure from established practice across Australia. Secondly, it is a departure from the requirements of international human rights law, notably the *CROC,* that a child know its birth parents. Finally, SALRI shares the cogent view expressed to it by Chief Justice Pascoe in consultation:

> Parentage should go automatically to the surrogate mother and only be transferred to the commissioning parents by court order based on the best interests of the child. No pre-birth criteria should determine parentage and a transfer of parentage should not happen any earlier than six weeks after the birth. This gives the surrogate mother time after the birth to change her mind, ensuring her consent to any transfer is genuine, and protects the child from being parentless in the case of unforeseen complications.

25.4.13 SALRI also notes the insightful view of Professor Millbank that it is widely acknowledged that surrogacy is 'unique' because the involvement of the surrogate mother 'is far more intense and enduring than the involvement of a known sperm (or egg) donor in other forms of ART families.'[900] This supports the current legal position that the surrogate mother is accorded legal parentage in the absence of any transfer process by a court (even if she is not a genetic parent of the child). This ensures that the surrogate mother's needs and interests are centred and that she is empowered to change her mind at any point in the process up until, and after, birth. There is a broad consensus that any parentage transfer process must be based on the informed consent of the parties in the period following, rather than preceding, or at birth.[901] Any suggestion of allowing a court to insist on 'specific performance' of a surrogacy arrangement and require a surrogate mother who has changed her mind to hand over the child to the intending parents is at odds with policy and both national and international practice and human rights.[902]

25.5 SALRI's Reasoning and Conclusions

25.5.1 SALRI agrees that, consistent with existing practice, legal parentage should remain with the surrogate mother unless and until a court of appropriate jurisdiction makes a parentage order to the contrary.[903] It would be a drastic departure from the status quo for South Australia to do otherwise.

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[900] Jenni Millbank, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23 *Australian Journal of Family Law* 1, 157.

[901] Ibid.

[902] It is also significant that, as noted by Chief Justice Pascoe in consultation, it is, in fact, very rare for a surrogate mother to change her mind and wish to retain the child. See above n 232.

[903] One question raised in consultation was what may happen in the unlikely event (see above n 232) that a surrogate mother refuses to relinquish the child and/or consent to the transfer of legal parentage to the intending parents (noting the exceptions already proposed whereby consent cannot be obtained but the order is still made). The intending parents (providing at least one has a genetic connection to the child) can seek orders for parental responsibility (as well as live with and spend time with orders) under the *Family Law Act 1975* from the Family Court in relation to the child. The Supreme Court also possesses an inherent wardship or *parens patriae* jurisdiction which can be utilised in a surrogacy context where there is a gap in the law (see, for example in England, *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam); *JP v LP and Others* [2015] 1 FCR 445; *M v F & SM (Human Fertilisation and Embryology Act 2008)* [2017] EWHC 2176 (Fam)). In an extreme situation where the child's safety is at risk, Child Protection remedies could be utilised. In the alternative, where the surrogate mother wishes to transfer parentage, but the intending parents are no longer willing to take on parentage responsibility, the surrogate mother has limited options. She is entitled to recovery of any direct costs she has incurred within the lawful surrogacy agreement (see above Part 23). If the surrogate mother retains the child and the intending parents have a genetic link, the surrogate mother may be eligible to seek ongoing child support payments to support the child. The surrogate mother can also choose to surrender the child or put the child up for adoption in the same way as a biological parent. A court would be unlikely to transfer parentage to intending parents upon application by the surrogate mother where the intending parents do not consent as this could possibly place the child at risk. The

25.5.2 SALRI agrees that a blanket restriction of six months is not necessarily in the best interests of the child. However, neither is ongoing uncertainty about the potential for an application conducive to the best interests of the child (or the other parties). While intended parents should pursue an application to transfer parentage as swiftly as possible, greater flexibility should be allowed than currently exists if there is some good reason for the intending parents falling outside six months in making an application. SALRI sees the benefit of the relevant court having the discretion to extend time where it is in the best interests of the child to do so and the reason for non-compliance with the time limit is explainable and justified. SALRI notes the cogent views in this regard of Sir James Mumby, President of the Family Division of the English High Court.[904] An example may be that the child, at birth, is suffering from severe ill health and as such the focus of the parties is on the care of the child as opposed to the application. Another example may be where the surrogate mother has experienced severe physical or psychological complications as a result of the child's birth and is not in a position to provide meaningful consent to the transfer of the child's legal parentage and/or the intending parents do not wish to add to the stress of her and her family.[905]

25.5.3 The effects and implications of any non-compliance with the statutory criteria of any surrogacy agreement also need to be taken into account. SALRI emphasises that there is strong benefit for recognising and protecting the interests of all parties — notably the best interests of a child born to surrogacy — to insist on strict adherence to the requirements of any *Statutory Act*. SALRI is aware that any discretion conferred on a court to overlook non-compliance should be sparingly exercised and with caution; otherwise the surrogacy framework could be largely ignored and the various safeguards (especially as recommended by SALRI in this Report) could be rendered ineffective. However, SALRI accepts that too prescriptive an approach is inappropriate and could even prejudice the best interests of a child born to surrogacy (such as where there is a technical and inadvertent breach of the statutory criteria by the intending parents and it would be counter-productive and contrary to the best interests of the child born to surrogacy to deny transfer of legal parentage). SALRI suggests that any *Surrogacy Act* provide that a court should have a discretionary power to make a parentage order notwithstanding that one or more of the conditions otherwise applicable for the making of such an order is not satisfied. When exercising this discretion, the court should consider all relevant circumstances, including the nature and extent of the non-compliance with such conditions, the circumstances of non-compliance including whether the non-compliance was deliberate or inadvertent, and the best interests of the child. SALRI is confident that any such power would be exercised by a court with caution and with the best interests of the child as the primary consideration.

25.5.4 SALRI supports the Family Law Council's recommendation[906] for South Australia (as has New South Wales, Queensland, Tasmania and Victoria) to make the necessary referral to the

court's incidental powers upon application to make any order in the best interest of the child could also extend to include orders for maintenance where child support may not be otherwise payable.

[904] *Re X (a child) (Surrogacy: Time Limit)* [2014] EWCH (Fam) 3135. Mumby P noted that such orders or declarations went to the most fundamental aspects of status and to the very identity of a child born as a result of surrogacy and have a transformative effect on the child's legal relationships with the surrogate and intending parents and the practical and psychological realities of the child's identity, thus having an effect extending far beyond the merely legal, which is, for all practical purposes, irreversible. The President could not think that the British Parliament had intended that the gate to the making of an order should be barred even if the application was one day late. Such a result would be 'almost nonsensical' given the myriad potentially innocent reasons there might be for non-compliance with the time limit': at [55].

[905] See, for example, *Re X (a child) (Surrogacy: Time Limit* [2014] EWCH (Fam) 3135.

[906] 'Recommendation 10: The Australian Government should seek a referral of power from South Australia consistent with the referrals from New South Wales, Queensland, Tasmania and Victoria which provide that the family courts may make a determination of parentage whether or not the determination of the child's parentage is incidental to

Commonwealth to enable the Family Court to make stand-alone declarations of parentage for the purposes of all Commonwealth laws. This is a sensible arrangement. It will provide particular assistance in a surrogacy context to a federal court by permitting a declaration of parentage in favour of a biological parent of a child born as a result of surrogacy. As the biological parentage is not generally in dispute in a surrogacy situation, the court currently cannot make the declaration and parentage presumptions instead apply such as to the surrogate mother and her partner (if any). In the circumstances of *Bernieres*, for example, a referral of power would have led at least to a parentage declaration being made in favour of the intending father (who was also the biological father) though the intending mother would still only be eligible for a parental responsibility order (such as was made in the decision).

25.5.5 SALRI notes that a declaration of parentage under s 69VA of the *Family Law Act 1975* (Cth) is only 'conclusive evidence of parentage for the purposes of all laws of the Commonwealth', and as such is not binding for State and Territory issues such as birth registration, inheritance and enrolling children in school, where the relevant State and Territory law does not expressly provide for recognition of Family Court parentage orders (South Australian legislation only refers to findings of 'paternity' in relation to children born outside of marriage).

25.5.6 SALRI sees the benefit of the approach in the Australian Capital Territory, New South Wales and Queensland to have a conclusive statutory presumption of parentage on the basis of a finding of parentage made by another State or Commonwealth court. This will ensure that a child who has received a declaration of parentage from a federal court also receives the benefits at a State level of the entitlements of a child, particularly as it relates to rights and laws of succession. SALRI considers that there is benefit for South Australia to adopt the approach of Australian Capital Territory, New South Wales and Queensland in this regard. SALRI suggests that an interstate order relating to the parentage of a child of a surrogacy arrangement be able to be given effect as if it was made in South Australia, in addition to recognising Commonwealth orders as to parentage.

25.5.7 Recommendations

Recommendation 61

SALRI recommends that, consistent with existing law and practice, legal parentage should remain with the surrogate mother until a court of appropriate jurisdiction makes a parentage order to the contrary.

Recommendation 62

SALRI recommends that any *Surrogacy Act* provide that a court should have the discretion to be able to extend the period in which an application to transfer legal parentage can be made. When exercising a discretion to extend, the court should consider all relevant circumstances as to the reason for the delay in making the application and determine whether an extension of time is in the best interests of the child.

the determination of any other matter within the legislative powers of the Commonwealth. Upon receiving the referral of power from South Australia, the Australian Government should amend s 69VA of the Family Law Act to reflect those referrals': Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 61.

Recommendation 63

SALRI recommends that any *Surrogacy Act* provide that a court should have a discretionary power to make a parentage order notwithstanding that one or more of the conditions otherwise applicable for the making of such an order is not satisfied. When exercising this discretion, the court should consider all relevant circumstances, including the nature and extent of the non-compliance with such conditions, the circumstances of non-compliance including whether the non-compliance was deliberate or inadvertent, and the best interests of the child.

Recommendation 64

SALRI recommends that South Australia should refer a power (consistent with the referrals from New South Wales, Queensland, Tasmania and Victoria) which provides that the Family Court may make a determination of parentage 'whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth' and upon receiving the referral of power from South Australia, the Commonwealth Government should amend s 69VA of the *Family Law Act 1975* (Cth) to reflect these referrals.

Recommendation 65

SALRI recommends that South Australia introduce a conclusive statutory presumption of parentage on the basis of a finding of parentage made by another State, Territory or Commonwealth court, as is the situation in the Australian Capital Territory, New South Wales and Queensland.

Recommendation 66

SALRI recommends that an interstate order relating to parentage of a child of a surrogacy arrangement be able to be given effect as if it was made in South Australia, in addition to recognising Commonwealth orders as to parentage.

Part 26 – Responding to International Commercial Surrogacy: the *Bernieres* 'gap'

26.1 The Policy Context to *Bernieres*

26.1.1 A number of submissions to SALRI powerfully highlighted the concerns surrounding international commercial surrogacy, notably as to the exploitative and coercive practices that often arise and the disregard for the best interests of the child and the welfare of the surrogate mother.

26.1.2 The concerns around international commercial surrogacy are 'well-documented'. The practice of international commercial surrogacy, especially in developing countries, has attracted extensive concern.[907] As Chief Justice Pascoe outlined to the Commonwealth Committee: 'International surrogacy has exposed children to unacceptable risks of discrimination, violence, abandonment, sexual and physical abuse, exploitation and trafficking.'[908] The Chief Justice repeated these concerns in consultation to SALRI.

26.1.3 The Law Society of South Australia noted that it 'is informed by legal practitioners who work in this area that serious concerns exist with respect to the rigour of the process of approval of many international surrogacy agreements.'[909] There are regular reports of exploitation.[910] A common theme is that surrogate mothers are in an inherently weaker bargaining position with deficiencies vis-à-vis intending parents with whom they contract.[911] This, it is argued, perpetuates their vulnerability.[912] These complications limit the capacity for the consent of such surrogates to the agreements into which

[907] See, for example, Susan Crockin, 'Growing Families in a Shrinking World: Legal and Ethical Challenges in Cross-Border Surrogacy' (2013) 27 *Reproductive BioMedicine Online* 733, 741; Annie Donchin, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24 *Bioethics* 323; Nishtha Lamba et al, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33 *Human Reproduction* 646–653; Kristine Schanbacher, 'India's Gestational Surrogacy Market: an Exploitation of Poor, Uneducated Women' (2014) 25 *Hastings Women's Law Journal* 201; Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365; United Nations 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* (15 January 2018).

[908] 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, 9. The Chief Justice noted the similarity between child trafficking and commercial surrogacy agreements is 'disturbing' and commercial surrogacy contracts closely resemble contracts for the purchase of a child (which is child trafficking). 'The only difference between surrogacy arrangements and child trafficking arrangements is that the former occurs prior to birth, and the latter occurs after birth. In surrogacy arrangements, the emphasis is supposedly on the services that the surrogate mother is providing, and giving her adequate compensation or payment, rather than the purchase of the end product (which is a child)': at 9.

[909] Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, te25 May 2017, 2-3 [12], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>.

[910] See, for example, Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365, 367

[911] See, for example, Margaret Ryznar, 'International Commercial Surrogacy and its Parties' (2009) 43 *John Marshall Law Review* 1009, 1028–1029; Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) 30 *University of Pennsylvania Journal of International Law* 1429, 1446; Sheela Saravanan, 'Global Justice, Capabilities Approach and Commercial Surrogacy in India' (2015) 18 *Medicine, Health Care and Philosophy* 295, 303.

[912] See Penne Watson Janu, 'The Case for Discouragement of Surrogacy Arrangements' (1996) 4 *Journal of Law and Medicine* 72, 75.

they enter to be 'free'.[913] Such issues are exacerbated by the less than ideal conditions in which surrogates may be required to live by surrogacy clinics.[914]

26.1.4 A number of submissions to the Family Law Council also raised particular concerns about the potential for exploitation of women and children in the context of the largely unregulated commercial surrogacy markets such as in India and Thailand.[915] The former Department of Immigration and Citizenship noted its particular concerns about:

> [t]he growing number of cases presenting from countries where there is no or limited legal framework surrounding surrogacy, such as India, Thailand and Malaysia. The lack of a legal framework in these countries, coupled with the poverty of many of the population, increases the potential for exploitation of the surrogate mother as well as the risks of child trafficking.[916]

26.1.5 The Family Court has, on more than one occasion, expressed its concern about unsatisfactory practices in connection with international commercial arrangements.[917] Chief Justice Pascoe highlighted these concerns of exploitation to SALRI in discussion. His Honour, then Chief Judge of the Federal Circuit Court, told the Commonwealth Committee on Surrogacy that vulnerable birth mothers are too often presented in ways: 'that I think puts them at less than the value of cows being impregnated for the purposes of calving.'[918]

26.1.6 Judge Pascoe went on to highlight the strong concerns:

> We see cases of women being implanted with multiple embryos; we see forced abortions; we see women being forced to have caesarean after caesarean so that the child is born at a time that suits

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[913] Ronli Sifris, 'Commercial Surrogacy and the Human Right to Autonomy' (2015) 23 *Journal of Law and Medicine* 365, 376; 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, 76. There is a contrary argument. 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': Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 91. 'The amount of money given to a surrogate mother in India may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment). These are basic needs and may seem trivial from a notably rich westerner's perspective, but they become mega needs in a country like India, which lack social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society': Centre for Social Research, *Surrogate Motherhood - Ethical or Commercial* (2013), <www.csrindia.org/>, 4.

[914] See, for example, Diksha Munjal-Shankar, 'Autonomy, Choices and Consent in Commercial Surrogacy: Viewing through the Indian Lens' (2015) 7 *Asian Bioethics Review* 380, 388.

[915] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 82. Professor Keyes, Professor Chisholm and Chief Judge Pascoe raised this concern.

[916] Ibid 83. Dr Sonia Allan raised similar concerns.

[917] See, for example, *Masters v Harris* [2017] FamCA 450 (28 June 2017) [56] (Johns J): '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) (7 June 2013); *Oakley v Kittur* [2014] FamCA 123 (4 February 2014) [5]–[10], [21], [27]; *Ellison v Karnchanit* [2012] FamCA 602 (1 August 2012) [5]; *Bernieresv Dhopal* [2015] FamCA 736 (9 September 2015), [25]–[26]; *Pappasv Ugapathai* [2017] FamCA 1090 (21 December 2017) [33].

[918] Judge John Pascoe (private capacity), Roundtable Discussion on Surrogacy, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, 5 March 2015, 7.

> a couple flying in from overseas, and literally being thrown on the street when it is not possible to have any more abortions.[919]

26.1.7 Judge Pascoe likened international commercial surrogacy as:

> going into the Wild West, where there is no regulation at all and where, effectively, what we have is a baby production industry, where babies are treated as a commodity and there are no protections at all. I think it should be deeply disturbing that Australians are so heavily involved in what amounts to the production and sale of newly-born children.[920]

26.1.8 Concerns of exploitation and commodification in relation to commercial surrogacy are not necessarily confined to Third World countries. Such concerns have also been expressed in relation to the United States,[921] even California, despite its impressive health care system and lower incidences of exploitation.[922]

26.1.9 SALRI acknowledges that a contrary view also emerged in both research and consultation that challenges the notion that offshore commercial surrogacy is inevitably exploitative and inappropriate. Intending parents such as Alice and Monica told SALRI that it is misplaced to think of the exploitation and abuses seen in an offshore commercial enterprise as in India or Thailand as applying in a safe and regulated system such as California or the Ukraine. Indeed, more than one intending parent who had utilised commercial surrogacy in the Ukraine commented in very favourable terms on the Ukraine system.

26.1.10 Some commentators view commercial surrogacy, whether domestically or offshore, as an unobjectionable opportunity for women to freely exercise bodily and economic autonomy.[923] 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.'[924] The Family Law Council cited one Indian study: 'Eurocentric portrayals of and speculations about surrogacy

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[919] Ibid 8.

[920] Ibid 7.

[921] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into the Regulatory Aspects of International and Domestic Surrogacy Arrangements* (April 2016) 25 [1.85].

[922] Ibid 24 [1.82]. See also 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, 46–47.

[923] See, for example, Yasmine Ergas, 'Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy' (2013) 27 *Emory International Law Review* 117, 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 *Journal of Law and Medicine* 280, 292; Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) 30 *University of Pennsylvania Journal of International Law* 1429, 1459; Diksha Munjal-Shankar, 'Identifying the "Real Mother" in Commercial Surrogacy in India' (2014) 18 *Gender, Technology and Development* 387, 392.

[924] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013). 'The amount of money given to a surrogate mother in India may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment). These are basic needs and may seem trivial from a notably rich westerner's perspective, but they become mega needs in a country like India, which lack social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society': Centre for Social Research, *Surrogate Motherhood - Ethical or Commercial* (2013) <www.csrindia.org/>, 4.

cannot incorporate the reality in India, where commercial surrogacy has become a survival strategy and a temporary occupation for some poor rural women.'[925]

26.1.11 Mr Page and Mr Everingham drew SALRI's attention to jurisdictions whose laws are said to adequately protect the interests of all parties in a surrogacy context and the best interests of the child and argued that such jurisdictions could be 'prescribed' for the purposes of Australian or South Australian law to allow or recognise parentage in favour of the intending parents.[926]

26.2 *Bernieres v Dhopal*: A legal gap?

Consultation Overview

26.2.1 Many parties that SALRI spoke to (especially intending parents)[927] confessed to finding the legal and other implications of *Bernieres* confusing. SALRI has received a wide range of views about the effect of *Bernieres* (does it really give rise to a 'gap' or 'lacuna' in the law) and if it does, should South Australia legislate to try and remedy the 'gap' and provide a means for the State to legally declare or recognise the parentage of children born of overseas commercial surrogacy arrangements.

26.2.2 No clear agreement was reached at the Expert Forum as to whether *Bernieres* represents a 'gap' in the South Australian law that requires a State legislative response. There was a difference of opinion at the Expert Forum as to whether South Australia should provide an avenue to recognise parentage in light of *Bernieres* for children born of offshore surrogacy arrangements, especially commercial surrogacy arrangements. There was a similar difference of opinion amongst YourSAy contributors and in consultation.

26.2.3 Some participants at the Expert Forum considered that, given the legal grey area was created, at least in part, by the passport and citizenship practice of the Commonwealth[928] and a series of pre-*Bernieres* Family Court decisions that had made legal declarations of parentage,[929] those families who are already in Australia with children born as a result of international surrogacy agreements should be given an 'amnesty' from the State regimes and be recognised as the legal parents of their children.[930]

26.2.4 This issue was also raised in consultation by the Social Issues Committee of the Anglican Church of Australia, Diocese of Sydney. Mr Everingham argued that there should be a 'retrospective amnesty' for intending parents who have already entered into overseas arrangements 'and South Australia should show leadership in this and going forward, specific overseas jurisdictions should be recognised. It is necessary for the States to take leadership to pressure the Commonwealth.'

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[925] Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 *Journal of Women in Culture and Society* 969, 971. 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': Sharmila Rudrappa, *India's Reproductive Assembly Line* (12 May 2012) <www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/>.

[926] Mr Everingham nominated certain United States jurisdictions, Canada, United Kingdom, New Zealand, Israel, South Africa, Greece, Ukraine, Georgia and Russia as such suitable jurisdictions.

[927] SALRI has made it clear throughout its consultation that it would not provide any legal advice or guidance and if any party in consultation had any doubt about their position, they should seek legal advice about their legal situation and any issues or implications.

[928] See below [27.3.1].

[929] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 68–74 [3.4].

[930] See also Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 78.

26.2.5 One alternative view is that there is in fact no 'gap'. Some participants at the Expert Forum asserted that no gap in fact arises from *Bernieres*, and that legal parentage with respect to international surrogacy agreements (especially if they may amount to commercial arrangements) should not be declared by State courts. This was seen as very important for some parties in consultation who held strong concerns about the conditions under which international surrogacy agreements may be reached, and the absence of consistent human rights protections in the countries where surrogacy may take place. Professor Keyes, for example, outlined:

> Enabling applications for parentage orders in cross-border cases is problematic. It is very difficult to ensure that the protections of the child and parents which are set out in the legislation are met in cross-border arrangements. This creates the prospect that the local requirements might be avoided deliberately or unwittingly; in either event, the protections that they establish might not be applied.

26.2.6 Dr Allan similarly maintained that if the underlying policy objective of the present law is that international commercial surrogacy is wrong (noting the 'well documented' concerns)[931] and should be discouraged, then there is no gap. The underlying policy premise is that only domestic non-commercial surrogacy is lawful, and it follows that all international surrogacy agreements are unlawful and therefore a declaration of parentage in favour of the intending parents should not be available in South Australia. Dr Allan and others stated that for South Australia to recognise international commercial surrogacy arrangements may be perceived as the State condoning or even encouraging exploitative and unlawful offshore practices. As a YourSAy correspondent similarly argued:

> SA should not recognise any international surrogacy arrangements as they open the door to human trafficking and abuse of women, especially women in poverty. Recognition of surrogacy arrangements from other Australian jurisdictions should only occur where those jurisdictions meet the same requirements as in SA, including the refusal to recognise international surrogacy arrangements.

26.2.7 The contrary view is that is there is such a 'gap' and that it is appropriate, even necessary, in light of *Bernieres* (and the perceived inaction of the Commonwealth), for South Australia to remedy this gap and provide a means to recognise the parentage of children born through international surrogacy.

26.2.8 Some participants at the Expert Forum and in consultation felt that the current approach 'punishes' families who have engaged in international surrogacy overseas by refusing to recognise legal parentage under Australian law. One intending parent who had a child with his partner in an overseas commercial arrangement told SALRI it is 'incredibly unfair' to deny both the surrogate child and the intending parents the ability to be formally recognised as the legal parents. This parent added: 'I would strongly recommend that the process to recognise the parentage of children born through surrogacy, including international surrogacy, be as simple and clear as possible.'

26.2.9 The Law Society noted that the recognition of international surrogacy in light of *Bernieres* requires 'further and careful consideration' and that 'international surrogacy involves a number of complex issues and may be better dealt with by the Federal/Family Court.'[932]

26.2.10 Others similarly agreed that *Bernieres* gives rise to a real gap in the law. Chief Justice Pascoe said there are two reasons why the lacuna in *Bernieres* is significant: it covers up or conceals a child's

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[931] See above [26.1.1]–[26.1.11].

[932] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 3 [10], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

right to know their family and background and also doesn't meet international best practice. The Chief Justice noted, though, that any solution to *Bernieres* must be resolved at a national level.

26.2.11 SALRI also heard from other parties such as Mr Page, that the effect of the decision in *Bernieres* presents an 'extremely worrying' gap in the law 'as there are hundreds, if not thousands, of children in Australia whose legal relationship with their parents is uncertain.' Mr Page outlined:

> In my view, South Australia should legislate to protect these children. South Australia should not wait until there is resolution at COAG … In the absence of action by the Federal Government, some action must be taken to protect the children of South Australian parents. There ought to be the ability, in a more flexible manner than that proposed under the [2017] Bill, for those in South Australia to have their parentage recognised. If it is possible for a United Kingdom court to make a parental order where there has been an overseas surrogacy arrangement as commonly happens (with the requirement of making full disclosure to the court about the overseas surrogacy contract that was entered into along with the payment that was made to the surrogate under that contract) then it is possible to do so, one would think, in South Australia. The court in *Bernieres v Dhopal* has thrown down the challenge to the States that it is the States' responsibility due to s 60HB of the *Family Law Act* to regulate surrogacy.

26.2.12 Some participants at SALRI's Expert Forum saw the decision in *Bernieres* as an opportunity to clarify the legal status of intending parents with respect to their children born as a result of international surrogacy agreements, for example by permitting State courts to recognise such agreements as lawful in their respective jurisdictions.

26.2.13 Mr Everingham drew attention to the major effects of *Bernieries* and supported State legislation to remedy the gap. Mr Everingham outlined:

> Despite being named on an overseas birth certificate as the father or mother, and being recognised under the *Australian Citizenship Act 2007*, the biological intended parent(s) are recognised simply as gamete providers/donors, and have no legal status as a parent under the *Status of Children Acts*. Where a third-party gamete was sourced, the non-biological parent also has no status as a parent at law. Without a parental order Intended Parents are not the child's legal parent under Australian law. This means that the Intended Parents may:
>
> • not have the authority to make decisions about their child's education and medical care;
>
> • not be able to travel abroad with the child;
>
> • face legal complications should they separate or divorce;
>
> • face difficulties with issues of inheritance and pensions; and
>
> • need to find and involve the surrogate in future decisions involving their child.

26.2.14 Dr Ronli Sifris also argued in consultation that *Bernieres* has left a gap in the law which should be resolved by a South Australian legislative response:

> From the perspective of South Australia's legal position, this decision is significant as it means that, if South Australian law does not provide an avenue for parents of children resulting from compensated surrogacy arrangements to become the *legal* parents of those children, then those children will have no avenue for enabling the recognition of their functional family as their legal family. In addition to the potential emotional impact of such discrimination, the lack of appropriate legal recognition of the family structure also has potential practical implications. Therefore, South Australia should amend its law to provide an avenue for legal parentage for intended parents entering compensated surrogacy arrangements.

26.2.15 In light of the concerns raised by international commercial surrogacy, several parties argued that South Australia should introduce extraterritorial offences to prohibit the practice.[933] The Social Issues Committee of the Anglican Church of Australia, Diocese of Sydney, for example, said:

> With regard to *Bernieres v Dhopal* (2017) 324 FLR 21, we believe the most appropriate response is to ban commercial surrogacy and international surrogacy, so that the parentage status of children born in international surrogacy arrangements does not need to be resolved by the South Australian Government. This avoids its being put in a position where it feels obligated to grant parentage to obviously unsuitable adults.

26.2.16 Many parties, including Ms Redman, Judge Eldridge, Judge Hribal (the Chief Magistrate), Dr Andrew Cannon (Acting Chief Magistrate) and Chief Justice Pascoe noted that, although a potential gap exists following the Full Court's decision in *Bernieres,* it is more appropriate to be dealt with by legislative reform at the national level. The capacity for a State to exercise any meaningful oversight or effective role in relation to an international surrogacy arrangement (especially if commercial) was widely doubted. It was politely noted by more than one party that the State lacks the role or capacity to become effectively involved in such a sensitive issue with international implications.

26.2.17 Many parties, notably Judge Eldridge and the Chief Magistrate also noted that the Family Court (notwithstanding its current review process)[934] is the preferable forum to deal with any cases involving international surrogacy due to its specialised role, expertise and resources.[935]

26.2.18 Professor Keyes observed that it is 'very difficult' for a State court to be satisfied of the absence of exploitative requirements and that the best interests and welfare of the mother and child had been protected. She explained:

> Documented problems with international surrogacy arrangements militate against allowing parentage orders to be made in international surrogacy cases; particularly, as already noted, once the child is in the care of the commissioning parents, it is impossible to address problems that have occurred in the arrangement, it is impossible to ensure the requirements of the State's own legislation have been addressed, and there is a risk of undermining the regulation of surrogacy in the place or places where the conception, pregnancy and birth occurred.

26.2.19 A YourSAy correspondent argued, on grounds of both policy and practice, against a State responding to *Bernieres* by allowing recognition of an overseas commercial surrogacy agreement:

> No. I am very concerned that this would simply reinforce all of the negative factors that exist in commercial surrogacy agreements overseas. Issues of class differences for example, and using overseas women to bear children for people in Australia is really quite terrible. Also, more importantly, this is not good for children … Being born as a result of an industry is so sad. The big money in international surrogacy for agents and lawyers, it just seems the industry is so open to all sorts of exploitation, including of intending parents. I do not agree that we should set up any

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[933] See above Part 12.

[934] Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (March 2018). See also Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth); Federal Circuit and Family Court of Australia Bill 2018 (Cth). On 23 August 2018, the Senate referred these Bills to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 15 April 2019. The Committee has resolved that it will table its report by 26 November 2018.

[935] Indeed, a strong view was that surrogacy in general is better handled at a national level by the Family Court. See, for example,, Law Society of South Australia, Submission to South Australian Attorney-General's Department, *State Framework for Altruistic Surrogacy*, 25 May 2017, 9–10, [57], <https://www.lawsocietysa.asn.au/pdf/submissions/L%20250517%20to%20AGD%20re%20State%20Framework%20for%20Altruistic%20Surrogacy%20(2)%20Final.pdf>. See above Recs 2, 3 and 4. See also above Part 4.

> kind of system that supports that. How on earth would one check what really happened overseas? A State has no control over that. Why would it become a rubber stamp.

26.2.20 Another view was that, although *Bernieres* gives rise to a gap in the law, it is not a 'die in the ditch' issue and it is issue of form rather than substance.

26.2.21 Participants at SALRI's Expert Forum and parties in consultation including the Law Society of South Australia, noted that even under *Bernieres*, it is possible for intending parents to obtain parental responsibility orders from the Family Court with respect to a child born as a result of international surrogacy arrangements. It was noted this is the effective equivalent to a legal parentage order insofar as it allows for the day to day care and control of the child and the making of all decisions which otherwise a parent would not have the power to make, such as health, education, religion and residence.

26.2.22 SALRI also heard from South Australian intending parents who have engaged in overseas commercial surrogacy arrangements. SALRI spoke to Alice and Angela who had both engaged in arrangements in the Ukraine where the intending parents are named on the child's original birth certificate. The children born as a result of surrogacy hold Australian passports. Alice and Angela have not gone to the Family Court to seek parental responsibility orders in respect of their children. They view such orders as unnecessary and they have not yet encountered any problems in the absence of a formal legal declaration of the parentage of their young children.

26.2.23 Alice agreed it is an issue that needs to be resolved at a national level and it cannot be sorted out at a State level owing to the complex national and international implications. Mrs F shared this view.

26.2.24 Monica, an active member of the online Australian surrogacy networks, told SALRI that it is widely known within the community that if you enter a surrogacy arrangement overseas you are not the legal parents of your child. Monica also commented that this does not have any adverse consequences at a practical level (given the issue of an overseas birth certificate and an Australian passport and citizenship) but, symbolically, it is still a 'bitter pill to swallow' for intending parents.

26.2.25 Professors Karpin, Millbank and Stuhmcke discussed with SALRI the concept of 'legal double think' where intending parents know they are not really the legal parents of their child but actively work to not know that and live their lives avoiding the issue. They (echoing the point of Chief Justice Pascoe) noted relatively few arrangements from overseas commercial surrogacy are also taken to the Family Court to recognise or ratify, as parties tend to 'fly under the radar' and parties go out of their way to avoid the Family Court.

26.2.26 Professors Karpin, Milbank and Stuhmcke suggested the burst of surrogacy parenting orders in the Family Court was the result of intending parents no longer being put on the birth certificate in Thailand. Their research shows parents perceive going to the Family Court as a waste of money or are worried about the extraterritorial offences. They prefer to rely on Australian passports and/or foreign birth certificates (where both intending parents are shown on the birth certificate regardless of any genetic link).

26.2.27 Several submissions were also made to the Family Law Council that an alternative way to fill 'the statutory gap' may be to recognise parentage as determined by another properly regulated jurisdiction. This could be achieved by prescribing overseas jurisdictions for the recognition of either

birth certificates or court orders in the *Family Law Act 1975* (SA).[936] Mr Everingham, on behalf of Surrogacy Australia, suggested to the Family Law Council: 'The Commonwealth should name prescribed overseas jurisdictions under s 69R of the *Family Law Act* so that overseas birth certificates are recognised; and so that s 70G provisions, registration of overseas orders, such as those made in the US, are able to be properly activated.'[937]

26.2.28 This suggestion was also raised in consultation to SALRI. Mr Page and Mr Everingham drew SALRI's attention to jurisdictions whose laws protect the position of all parties in a surrogacy context including the best interests of the child, and argued that such jurisdictions could be 'prescribed' for the purposes of Australian or South Australian law to allow or recognise parentage in favour of the intending parents.[938]

26.2.29 Chief Justice Pascoe brought to SALRI's attention the ongoing work at the Hague Conference on Private International Law with which he is involved about the possible future recognition in Australia of foreign judgments and jurisdictions with a suitably regulated system of surrogacy that properly protects the interests of all parties, especially the best interests of the child. The Chief Justice said it may be possible in the future to provide for the recognition in Australia of foreign judgments and overseas jurisdictions with a proper, safe and regulated system of surrogacy but this work is still underway in the Hague to determine the necessary criteria and jurisdictions. The Chief Justice noted any such recognition is preferably for the national level and not a State level given the context and issues involved.

26.3 SALRI's Reasoning and Conclusions

26.3.1 The question of whether *Bernieres* leaves a legislative gap that should be resolved is difficult. SALRI notes that the Family Law Council was also troubled by this 'difficult question that raises a number of competing considerations … [notably] the "potentially irreconcilably conflicting concepts" described in *Re X and Y (Foreign Surrogacy)*, namely the need to apply 'full rigor' to the prohibition against commercial surrogacy and the need to protect the welfare of the child created by such an arrangement.'[939] SALRI has also been troubled by this 'difficult question'.

26.3.2 SALRI is aware of the various points of divergence in consultation and research about whether South Australia should seek to overcome the *Bernieres* 'gap' and provide a means to recognise legal parentage arising from offshore (usually commercial) surrogacy. In such situations, SALRI should return to first principles and place the welfare or best interests of the child as the paramount consideration and, following, and not unrelated, is the welfare of the surrogate mother.

26.3.3 SALRI notes the argument presented by Dr Sonia Allan and others that providing a means to declare or recognise offshore surrogacy parentage can be perceived as implicitly endorsing or even condoning unlawful and exploitative offshore practices and infringements of human rights. The argument that it is inappropriate for South Australia to be viewed as implicitly condoning such offshore

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[936] The Family Law Council noted the submissions of Mr Page, Surrogacy Australia and the Law Institute of Victoria 'This approach has been taken by several jurisdictions, which recognise intending parents as legal parents from before birth (eg California)': Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 85, n 431.

[937] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 99.

[938] Mr Everingham nominated certain United States jurisdictions, Canada, the United Kingdom, New Zealand, Israel, South Africa, Greece, Ukraine, Georgia and Russia.

[939] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 99 [3.9] quoting *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) (Hedley J).

practices or arrangements is convincing. This is a strong consideration in light of the cogent concerns regarding commercial surrogacy in at least some overseas jurisdictions.[940] As Chief Justice Pascoe noted to SALRI in consultation: 'The human rights abuses surrounding international commercial surrogacy have been well documented and its cross-border nature raises further difficulties in the conflicting laws concerning nationality and legal parentage of children.'

26.3.4 SALRI also notes the conflicting views in research and consultation about the implications of *Bernieres* and whether the Family Court's inability (and crucially a state court under the present law) to make a declaration of parentage in respect of offshore surrogacy is a real or symbolic issue.

26.3.5 SALRI further notes that the issue of Australian citizenship, a passport and an overseas birth certificate showing the intending parents as the parents of the child (and the ability to obtain a parental responsibility order from the Family Court) may satisfy many intending parents who perceive a formal declaration of parentage as unnecessary. However, SALRI accepts, as noted by Chief Justice Pascoe and others, the effect of *Bernieres* is far from ideal and a declaration of legal parentage for a child born as a result of surrogacy has both symbolic and real effect. 'Parental responsibility orders [from the Family Court] do not provide the same protection and certainty as a finding of legal parentage.'[941] The Law Society of South Australia also noted in its submission to SALRI that 'as a result of *Bernieres*, it is clear that the Federal Court system will not determine parentage but rather the lesser status of parentage: parental responsibility.'[942]

26.3.6 However, the problem remains, consistent with SALRI's previous reasoning,[943] that a state lacks the international role and capacity and the specialised expertise to be able to effectively oversee the recognition of parentage from international surrogacy agreements. It would be effectively impossible for the state to be satisfied of the absence of coercion or exploitation and that the interests of the parties and the best interests of the child had been protected.

26.3.7 SALRI notes the unfortunate effect and implications of *Bernieres* but considers that, for reasons of both policy and practice, it is inappropriate for South Australia to 'go it alone' and to seek to provide an avenue for the state to recognise or give effect to parentage arising from unlawful surrogacy arrangements (especially international commercial surrogacy arrangements). The State courts lack the resources and specialist expertise and specialised processes to effectively perform such a difficult function. There is an obvious need for a national solution to this problem and the danger, if South Australia should 'go it alone', of allowing forum shopping.

26.3.8 SALRI agrees with the view of Chief Justice Pascoe and considers that any response to *Bernieres* is an issue for a national level (whether for the Commonwealth or the Commonwealth, States and Territories jointly). It is inappropriate for any State or Territory, in isolation, to try to seek to resolve the difficult effect and implications of *Bernieres* in relation to both international commercial and non-commercial surrogacy arrangements. As part of any such process, the question of a retrospective amnesty or a list of prescribed recognised jurisdictions with properly regulated surrogacy systems should be considered at a national level. The State again lacks the role or capacity to effectively determine such issues.

26.3.9 That said, there is a potential solution, however, to the *Bernieres* 'gap'.

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[940] See above [26.1.1]–[26.1.11].

[941] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013)

[942] Law Society of South Australia, Submission to the South Australian Law Reform Institute, *Surrogacy Reference*, 6 July 2018, 3 [13], <https://www.lawsocietysa.asn.au/pdf/Submissions/SALRI118.pdf>.

[943] See above Part 4.

26.3.10 In 2013, the Family Law Council foresaw a decision such as *Bernieres* and recognised the problems in using the present *Family Law Act 1975* (Cth) to make a declaration of parentage for children born of overseas surrogacy arrangements and felt this was a real concern. The Family Law Council stated:

> the effect of this position is that there is currently no capacity for the family courts to recognise or accord parental status to intended parents where children are born as a result of a commercial surrogacy arrangement. [The Family Law] Council is aware, however, that a significant and apparently growing number of children are being born as a result of commercial surrogacy arrangements outside Australia (more than several hundred each year), and that very few cases have come before the family courts seeking parentage orders. As a consequence, it would seem that a large number of young children are growing up in Australia without any secure legal relationship to the parents who are raising them. The question that arises is how to address this problem. Council notes at the outset that this is a difficult question that raises a number of competing considerations. However, Council agreed on the need for reform to address the lived reality for children born as a result of commercial surrogacy arrangements, and to ensure they are not disadvantaged by the way in which their family was formed or the status of the adults who are raising them. Council concluded that the paramount concern for the family courts must remain the best interests of the child, and that decisions regarding the prohibition or regulation of commercial surrogacy are a matter for government.[944]

26.3.11 The Family Law Council stated the most appropriate way to protect the interests of children born to Australians of overseas surrogacy arrangements (pending any international solution) was by a Commonwealth law to provide the Family Court with a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguards' or criteria have been satisfied. Professors Karpin, Millbank and Stuhmcke also suggested this remedy in consultation.

26.3.12 The Family Law Council was mindful of the fact that a transfer of legal parentage under a Commonwealth Act would only operate in relation to Commonwealth laws and would not lead to legal recognition of parenthood under State and Territory laws and it would not entitle intending parents to be registered or declared as the parents of the children under State or Territory law.[945]

SALRI notes that this is a sensible and effective solution to the *Berneries* 'gap' (if such a 'gap' is considered to require resolution) as it relates to parentage declarations from offshore surrogacy. This course of action supports and reinforces SALRI's recommendation for South Australia to make provision to give effect to Commonwealth declarations of parentage at the State level[946] (though this recommendation has independent value and should be undertaken regardless of whatever happens to the *Bernieres* gap). This is a practical means to address the issue of international commercial surrogacy and the issue of the appropriate safeguards (including recognising properly regulated international surrogacy jurisdictions) would be a matter of national policy and practice. This solution would also utilise the specialised role of the federal courts.

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[944] Family Law Council, *Report on Parentage and the Family Law Act* (December 2013) 99 [3.9].

[945] Ibid 100–101.

[946] Ibid Rec 10, 49–50 [2.7.1], 60 [2.11].

26.3.13 Recommendation

Recommendation 67

SALRI recommends that it is an issue at the national level (whether for the Commonwealth or the Commonwealth, States and Territories jointly) to resolve the effect and implications of *Bernieres* in relation to both international commercial and non-commercial surrogacy arrangements.

Part 27 - Incidental Issues

27.1 Consequential Issues

27.1.1 Domestic surrogacy and any lawful surrogacy agreement raise various civil law implications that are often overlooked.

27.1.2 Some parties in consultation such as Ms Cureton, Mrs F and Alice raised with SALRI the various civil law implications of surrogacy, especially of what happens if the intending parents or surrogate mother should die before the legal transfer of parentage, especially for succession law issues such as superannuation, intestacy or family provision. Another issue raised in consultation was the interaction of parental consent and medical treatment of any surrogate child, especially about valid consent if the child should have any medical issues in the six month period before the transfer of legal parentage from the surrogate mother to the intending parents.[947] Such issues should not be overlooked.

27.1.3 SALRI suggests that it undertake a short spin off Report into the various consequential civil law issues and implications raised in this Report in a domestic surrogacy context. Any such spin off Report need not delay any new *Surrogacy Act* as any recommendations will relate to other Acts.

27.1.4 Recommendation

Recommendation 68

SALRI recommends that it examine the various consequential civil law issues and implications such as succession law and medical care raised in a domestic surrogacy context as part of a short spin off Report.

27.2 Medicare and Commonwealth Issues

27.2.1 The issue of Medicare coverage for surrogate mothers was identified to the Commonwealth Committee.[948] There are no Medicare rebates available for the costs of assisted reproductive services related to surrogacy as it is not considered 'medically necessary' for the surrogate undergoing the treatment.[949] Medicare does not subsidise surrogacy in any way.[950] For intending mothers who can carry a child, however, costs associated with assisted reproductive services considered 'clinically relevant' can attract a Medicare rebate without any restrictions based upon age or the number of previous cycles.[951]

27.2.2 The unavailability of Medicare in a surrogacy context was criticised by several parties to SALRI. Hailey, an intending parent, questioned why surrogacy is not considered 'medically necessary'. She commented: 'You don't have to have a baby, but neither does anyone else having IVF.' SALRI

[947] See *Family Relationships Act 1975* (SA) s 10HAB.

[948] 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* (April 2016) 14 [1.51].

[949] *Health Insurance Act 1973* (Cth) s 19A, *Health Insurance (General Medical Services Table) Regulations 2012* (Cth) s 2.37. See Medicare Benefits Schedule Note TN 1.4.

[950] Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 12.

[951] Georgina Chambers, et al, 'Population Trends and Live Birth Rates Associated with Common ART Treatment Strategies' (2016) 13 *Human Reproduction* 2632, 2633.

notes that the treatment of surrogacy under the Medicare Benefits Schedule has also received significant media attention in recent years.[952]

27.2.3 Several parties that SALRI spoke to raised concerns about the cost of surrogacy related fertility treatment due to the lack of Medicare coverage for surrogates. Mr Everingham told SALRI that the 'bulk' of costs for intending parents associated with surrogacy arrangements in Australia are 'non-Medicare rebateable IVF.' He described:

> This is a major financial hurdle for intended parents and limits the ability of people to seek surrogacy arrangements. By the time Australians are considering surrogacy, many have spent large amounts of money on unsuccessful ART, so when they see surrogacy-related IVF available overseas for significantly less cost in far shorter timeframes, it is unsurprising over 85% engage in overseas surrogacy.

27.2.4 This view is consistent with what SALRI heard from intending parents and surrogates in consultation. Hailey, for example, told SALRI that each transfer will cost her approximately $5000 without Medicare rebates.[953] SALRI notes that the 2014 Western Australian *Review of the Surrogacy Act (2008),* highlighted the high medical costs associated with surrogacy in Australia could push intending parents to engage in offshore surrogacy arrangements:

> Medicare funding is a Commonwealth Government matter. Without Medicare funding surrogacy is very expensive, and the case can be made that easing the financial burden may help to increase access to altruistic surrogacy in Australia. This, in turn, may reduce the number of persons seeking international commercial surrogacy, often in an unregulated environment.[954]

27.2.5 Many intending parents and surrogate mothers, including Hailey, Alice, Angela and Monica, emphasised to SALRI that they found the lack of Medicare rebates for assisted reproductive treatment to be 'unfair and 'discriminatory'. Hailey, for example said: 'It all feels like discrimination I did not choose to be born this way.' Angela told SALRI she is 'infuriated' that her inability to carry a baby is not considered a disability for the purposes of Medicare. She said it was the discrimination more than the money which bothered her.

27.2.6 Mr Everingham also emphasised the discriminatory nature of the treatment of surrogacy under the Medicare Benefits Schedule:

> many of these intended parents require surrogacy due to a medical disability. Hence, the current Medicare regime for ART rebates is discriminatory given that the same rebates do not apply to

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[952] See, for example, Alice Workman and Gina Rushton, 'These Women Are Paying Tens Of Thousands Of Dollars To Have Children And Say It Should Be Refunded By Medicare', Buzzfeed News (online), 18 June 2018 <https://www.buzzfeed.com/aliceworkman/uterus-cancer-medicate-rebates-surrogacy-ivf?utm_term=.ra9dbGYjg#.hywpxNmq6**>;** Melissa Davey, 'We felt cursed': how altruistic surrogacy can give hope after years of heartbreak', The Guardian (online), 11 September 2016 <https://www.theguardian.com/australia-news/2016/sep/11/we-felt-cursed-how-altruistic-surrogacy-can-give-hope-after-years-of-heartbreak#img-1>; Jane Cafarella, 'Baby dilemma: couples are turning to their superannuation savings to fund surrogacy', The Sydney Morning Herald (online), 13 October 2016 <http://www.smh.com.au/comment/surrogacy-costs-creates-vulnerability-on-both-sides-20161010-grywv2.html>; Bronwyn Devine, 'Our surrogacy laws are not keeping up with the Kardashians', The Daily Telegraph (online), 10 August 2017 <https://www.dailytelegraph.com.au/rendezview/our-surrogacy-laws-are-not-keeping-up-with-the-kardashians/news-story/0607c3dc7bfadce33104ca6c4b38aff7>.

[953] Each cycle will also cost Hailey an additional $1000 as she is required to travel interstate as a single intending parent.

[954] Government of Western Australia, *Department of Health, Review of the Surrogacy Act 2008: Report to the Western Australian Parliament* (November 2014) 14.

surrogate mothers as those who are able to carry their own child via IVF. Other Commonwealth social services legislation does not discriminate against those requiring surrogacy.

27.2.7 SALRI notes that, in the absence of Medicare rebates, the medical related expenses for surrogacy in Australia may prove prohibitive. Moreover, SALRI agrees that distinguishing in the Medicare Benefits Schedule between those who cannot and those who can receive Medicare rebates for their ART based upon whether they can carry a child appears discriminatory. SALRI notes, however, that Medicare coverage for surrogate mothers is a Commonwealth issue and beyond SALRI's role in a South Australian law reform context.[955]

27.3 Passports

27.3.1 SALRI heard a range of views from parties in consultation about how the Commonwealth should approach the issue of Australian citizenship by descent and passports for Australians who engage in commercial surrogacy arrangements overseas.[956] SALRI notes that the involved processes surrounding citizenship and passports in the overseas commercial surrogacy context are a Commonwealth matter and beyond SALRI's reference in the South Australian law context.

27.4 Suggestions to include in a new *Surrogacy Act*

27.4.1 SALRI suggests that the opportunity of formulating a new *Surrogacy Act* should be utilised to include any worthwhile provisions (drawing on interstate models) lacking in the present law in South Australia (or not within the 2017 South Australian Bill).

27.4.2 It would be helpful for any *Surrogacy Act* to include the following express incidental items:

(a) To remove any doubt, to make it clear that a lawful surrogacy agreement does not include an arrangement after the surrogate mother becomes pregnant[957] but may include a variation made after the surrogate mother becomes pregnant of an obligation under the agreement to pay or reimburse the surrogate mother's proper costs (such as s 5(5) of the *Surrogacy Act 2012* (Tas)).

(b) The duty is retained of the parents of a child born as a result of surrogacy, before any order is made transferring the parentage of the child, to have the child's birth registered under the *BDM Act*[958] (such as s 31 of the *Surrogacy Act 2012* (Tas)).

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[955] This issue is perhaps best considered as part of any move towards a national uniform scheme. See also Part 4.

[956] Some parties such as the Association of Relinquishing Mothers (Vic) argued to SALRI that Australian citizenship by descent and/or passports should not be granted in cases of offshore commercial surrogacy under any circumstances. However, intending parents who had engaged in overseas arrangements highlighted to SALRI the bureaucratic process of obtaining citizenship by descent and Australian passports for their children to return home. Alice told SALRI that the relatively swift process to have legal parentage registered for her child in Ukraine was contrasted by the protracted and bureaucratic eleven-week process from the Australian authorities to obtain citizenship by descent and parentage and a passport for their new baby. Alice found the process distressing and the situation was only resolved three days shy of the expiration of their Ukrainian visas.

[957] See also above Rec 20.

[958] See above Part 24.

(c) The power for a court to request a report from an independent counsellor and such cost to be ordinarily met by the intending parents (such as s 18 of the *Surrogacy Act 2012* (Tas)).[959]

(d) A power to provide for separate legal representation of the child (such as s 45 of the *Surrogacy Act 2012* (Tas).

(e) The power, if a court makes a parentage order, for the court to make any other incidental order (including any order as to the disposition of property) 'that it considers is required in order to deal with matters relating to, or arising from, the order or the surrogacy arrangement to which the order relates'.[960]

(f) A power or procedure for an appeal to the Supreme Court in relation to a decision of the Youth Court granting or refusing an application for a parenting order (such as s 25 of the *Surrogacy Act 2012* (Tas)).[961]

(g) Clarification of the effect of a parentage order if the relationship between the parties is relevant for the criminal law (such as s 26(3) of the *Surrogacy Act* 2012 (Tas)).

(h) An application for the discharge of a parentage order may be made if the order was obtained by fraud or duress or any consent to the making of a parentage order was, in fact, not given or was given for valuable consideration or for any other exceptional reason that is in the *best interests of the child* (such as s 27 of the *Surrogacy Act 2012* (Tas).

(i) Provision for the discharge of a parentage order, including any incidental power (such as s 28 of the *Surrogacy Act 2012* (Tas)),[962] the effect of the discharge of such an order (such as s 29 of the *Surrogacy Act 2012* (Tas))[963] and provision for appeal to the Supreme Court against any decision granting or refusing discharge of a parentage order (such as s 30 of the *Surrogacy Act 2012* (Tas)).[964]

(j) Reporting of any application in relation to a surrogacy agreement should be prohibited (such as s 42 of the *Surrogacy Act 2012* (Tas)).[965]

(k) Conformation that any surrogacy related proceedings should be held in a closed court (such as s 47 of the *Surrogacy Act 2010* (NSW).

27.4.3 Recommendation

Recommendation 69

SALRI recommends that the opportunity of formulating a new *Surrogacy Act* should be utilised to include a number of worthwhile provisions (drawing on interstate models such as the *Surrogacy Act* 2010 (NSW) or the *Surrogacy Act 2012* (Tas)) lacking in the present law in South Australia (or not within the Family Relationships (Surrogacy) Amendment Bill 2017).

[959] See also *Surrogacy Act 2010* (NSW) s 17. See also above Part 21, Rec 45.

[960] *Surrogacy Act 2012* (Tas) s 24. See also *Surrogacy Act 2010* (NSW) s 19. See further above [23.4.6] (costs).

[961] See also *Surrogacy Act 2010* (NSW) s 48.

[962] See also ibid ss 44, 46.

[963] See also ibid s 45.

[964] See also ibid s 48.

[965] See also ibid s 52.

Appendix A - Submissions Received

Ms Penny Wright, State Guardian of Children and Young People

Ms Alana Lucas, National Health and Medical Research Council (NHMRC)

Mr Sam Packer, SA Health

Ms Lee Wightman, SA Health

Dr Ronli Sifris. Monash University

Professor Mary Keyes, Griffith University

Dr Catherine Lynch JD

Ms Helen Paues, Registrar, Registration Branch, Consumer and Business Services (Births Deaths and Marriages)

Mr Sam Everingham, Surrogacy Australia

Ms Sarah Brown

Anonymous – Surro1

Anonymous – Surro2 ('Monica')

Anonymous – IP1

Anonymous – IP2

Anonymous – IP3 ('J')

Anonymous – IP4 ('Angela')

Anonymous – IP5 ('Alice')

Anonymous – IP6 ('Hailey')

Dr Patricia Fronek, Griffith University

Dr Niki Vincent, Commissioner for Equal Opportunity, SA

Mr Tim Mellor, President, Law Society of South Australia

Dr Sonia Allan, Deakin University

Ms Eliza Cole, former surrogate mother

Mrs F (intending mother)

Mr Stephen Page, lawyer

Mr Damian Adams

Mr Daniel Glynn, Diocesan Secretary, Social Issues Committee of the Anglican Church of the Diocese of Sydney

Ms Clara Geoghegan, Australian Christian Lobby

Ms Jo Fraser, Association of Relinquishing Mothers (Victoria) (ARMS Vic)

Dr Olivia Rundle, University of Tasmania

The Honourable John H Pascoe , AC CVO, Chief Justice, Family Court of Australia[966]

Judge Penny Eldridge, Youth Court of South Australia

Dr Andrew Cannon, A/Chief Magistrate, Adelaide Magistrates Court

Judge Mary-Louise Hribal, Chief Magistrate, Adelaide Magistrates Court

Ms Simone Cureton, surrogate mother

Ms Julie Redman, lawyer

Dr Bernadette Richards, University of Adelaide

Ms Jessica Webster, Clinical Psychologist

[966] Any comment or submission from Chief Justice Pascoe to this Report are his own comments provided in a private capacity and do not represent the views or any position of the Family Court of Australia.

Professor Jenni Millbank, University Technology Sydney

Professor Anita Stuhmke, University Technology Sydney

The Hon John Dawkins MLC

Dr Melissa Oxlad, Clinical and Health Psychologist and Lecturer, University of Adelaide

Ms Anita Brunacci, lawyer

Ms Dorothy Kowalski

Dr Renate Klein

Mr Kristopher Wilson, Flinders University

Madison Forman, law student

Appendix B: Summary of Surrogacy Laws in Australia

Legislation	Altruistic surrogacy permitted	Altruistic surrogate compensated for reasonable costs *	Commercial surrogacy prohibited	Criminal offences in relation to commercial surrogacy	Criminal offences with extra territorial effect	Recognition of International Commercial Surrogacy Arrangements
Australia Capital Territory *Parentage Act 2004* (ACT)	Yes	Yes s 40 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child × The value of the surrogate mother's lost earnings × Insurance premiums ✓ Counselling or medical services × Reasonable costs of child born × Cost of being party to parentage order × Legal services/ advice × Travel or accommodation costs × Reasonable out of pocket expenses	Yes s 41	Yes • Entering into s 41 • Procuring s 42 • Advertising s 43 • Facilitating s 44	Yes s 45	No
New South Wales *Surrogacy Act 2010* (NSW)	Yes	Yes s 7 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs	Yes ss 8, 23	Yes • Entering into s 8 • Advertising s 10	Yes s 11(2)	No

		✓ Reasonable out of pocket expenses				
Queensland *Surrogacy Act 2010* (Qld)	Yes	Yes s 11 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes s 56	Yes • Advertising s 56 • Giving or receiving consideration s 57 • Providing technical, professional or medical services s 58	Yes s 54(b)	No
South Australia *Family Relationships Act 1975* (SA) (Post 2015 Amendments) **CURRENT LAW**	Yes	Yes s 10HA ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child × The value of the surrogate mother's lost earnings × Insurance premiums ✓ Counselling or medical services × Reasonable costs of child born × Cost of being party to parentage order ✓ Legal services/ advice × Travel or accommodation costs ✓ Reasonable out of pocket expenses (in respect of the agreement)	Yes • A surrogacy contract (apart from a recognised surrogacy arrangement) is illegal and void s 10G • Recognised surrogacy arrangements must be for no valuable consideration other than for reasonable expenses s 10HA(2a)(i)	Yes • Except as authorised by the Act or the *State Framework* negotiates, arranges or obtains the benefit of a surrogacy contract for valuable consideration s 10H(1) • For valuable consideration induces another to enter a surrogacy contract s 10H(2)	No	Yes s 10F • 'international surrogacy arrangements' can be prescribed for the purposes of the Act if approved by the Attorney-General or declared by the Regulations • Prescribed international surrogacy arrangements are 'recognised surrogacy arrangements' under the Act, allowing for parenting orders to be made under s 10HB

South Australia *Family Relationships Act 1975* (SA) (Proposed 2017 Amendments)	Yes	Yes s 10L ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings × Insurance premiums ✓ Counselling or medical services × Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs (likely covered by reasonable costs provision s 10L(1))(f) ✓ Reasonable out of pocket expenses (in respect of the agreement)	Yes s 10T	Yes • Entering or offering to enter a commercial surrogacy arrangement s 10T(1) (inserted 2017) • Entering or offering to enter a surrogacy arrangement s 10T(2) (inserted 2017) • Negotiating, arranging or obtaining the benefit s 10U(1) • Inducing another s 10U(2)	No	No
Tasmania *Surrogacy Act 2012* (Tas)	Yes	Yes s 9 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes s 40	Yes • Commercial brokerage or advertising s 41	No	No

Victoria ***Assisted Reproductive Treatment Act 2008*** **(Vic)**	Yes	Yes s 44(2) ✗ Pregnancy and any attempt to become pregnant (only prescribed costs) ✗ The birth and care of the child ✗ The value of the surrogate mother's lost earnings ✗ Insurance premiums ✓ Counselling or medical services (those not recoverable by Medicare) ✗ Reasonable costs of child born ✗ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✗ Reasonable out of pocket expenses	Yes s 44	Yes • Entering into s 44	No	No
Western Australia ***Surrogacy Act 2008*** **(WA)**	Yes	Yes s 6 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✗ Reasonable costs of child born (could be covered by s 6(1)(a) ✓ Cost of being party to parentage order ✓ Legal services/ advice ✗ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes	Yes • Entering into s 8 • Introducing parties s 9 • Publishing willingness s 10 • Facilitating s 11	No	No

* The Northern Territory legislation is silent on the issue of surrogacy

Appendix C – Table of Surrogacy Laws in the United States of America, Ireland, the United Kingdom and New Zealand

Jurisdiction	Altruistic Surrogacy permitted?	Reasonable costs for altruistic arrangement	Surrogacy arrangements enforceable?	Commercial Surrogacy Permitted?	Offences in relation to commercial surrogacy	Requirements for surrogate mother	Requirements for intending parents	Parentage of the surrogate child	Regulation of international surrogacy arrangements
 Codified state by state Some states no legislation	Yes, in states with relevant legislation	• Not defined in many states/not relevant in others • Michigan expenses incurred as a result of the pregnancy and actual medical expenses of the surrogate (*Michigan Compiled Law Service* § 722.853) • New York payments for reasonable and actual expenses incurred for legal, medical, nursing and hospital fees; reasonable and actually incurred expenses for housing, maternity clothing, clothing for the child, transportation for 60 days prior to the birth and 30 days (*Social Services Law* § 6-1-374(6); *Domestic Relations Law* § 8-123)	No in New York, Indiana and Michigan Yes in California, Connecticut, Denver,	Yes permitted in California	Michigan criminal offence (*Michigan Compiled Law Service* § 722.859) Civil penalties in New York (*Domestic Relations Law* § 8-123)	• In California no restriction on age or otherwise • Surrogacy treated as an 'intent based' commercial enterprise • If surrogate mother has change of heart original intent prevails • In Florida surrogate must be over 18 (Fla. Stat. § 742.15)	• California no restriction on who can be an intending parent • Other states which expressly allow surrogacy have strict requirements e.g. Florida • Florida the commissioning mother cannot gestate to term or it will cause risk to her physical health or the baby's AND the couple must be legally married (heterosexual or non-heterosexual) AND both over the age of 18 (Fla. Stat. § 742.15)	• In some states without any legislation- transfer of parentage only possible through post birth adoption • Can obtain pre-birth parentage orders in California (Cal Fam Code § 7692(f)(2), 7633); Connecticut (Conn.Gen.Stat. §7-48a); Delaware (Delaware Code § 8-611); New Hampshire (N.H.Rev.Stat. Ann.168-B-12); Nevada (Nev. Rev. Stat. NRS 126.500-126.810) • Orders enforceable at birth • Named on child's initial birth certificate • In other states there is a designated post birth process to transfer parentage	• No attempt to regulate international arrangements

Jurisdiction	Altruistic Surrogacy permitted?	Reasonable costs for altruistic arrangement	Surrogacy arrangements enforceable?	Commercial Surrogacy Permitted?	Offences in relation to commercial surrogacy	Requirements for surrogate mother	Requirements for intending parents	Parentage of the surrogate child	Regulation of international surrogacy arrangements
 Currently no legislation Dept of Health proposed a *Assisted Human Reproduction Bill* in 2017	Yes Head 36	• See Head 41(5) • Pre-natal and post-natal medical expenses • Travel or accommodation (associated with the pregnancy or birth or being a party to proceedings of making parentage order) • Lost earnings for a period of not more than two months during which the birth is anticipated or any other period the surrogate was unable to work on medical grounds • Counselling and independent legal advice in relation to the arrangement and the making of a parentage order • All costs must be actually incurred and capable of verification	No Head 41(1)	No Heads 36(1)(c), 40	An offence for a person to engage in an arrangement as a surrogate, intending parent or treatment provider that contravenes the requirements of a permitted surrogacy arrangement n Head 36(1) see Head 86(3) (including the arrangement is non-commercial)	• Resident of Ireland • Consent and independent legal advice required for the Regulatory Authority's approval • Must be over the age of 25 and under the age of 47 • Must previously have given birth to a child • Assessment and approval by medical practitioner and counsellor • It is an offence to not meet the requirement in Head 38 see Head 36(4) and 86(3)	• Prior to any assisted reproductive treatment must receive authorisation of the Regulatory Authority • Legislative requirements include consent and independent legal advice • Resident of Ireland • Couples that are married civil partners or cohabitants • Singles • One parent must be under 47 years of age • Embryo implanted must be created using the gamete of one parent • Must meet medical infertility requirements • It is an offence to not meet the requirement in Head 37 and 45 see Head 36(4) and 86(3)	• Surrogate mother legal mother of child at birth • Applications for parentage order only domestic altruistic arrangements • Child becomes legal child of intending parent or parents	• An international arrangement is not permitted under Head 36(1)(a) • Potentially n offence to engage in an international surrogacy arrangement as a surrogate, intending parent or treatment provider under Head 86(3) • Unclear whether it is intended to have extra territorial effect

Jurisdiction	Altruistic Surrogacy permitted?	Reasonable costs for altruistic arrangement	Surrogacy arrangements enforceable?	Commercial Surrogacy Permitted?	Offences in relation to commercial surrogacy	Requirements for surrogate mother	Requirements for intending parents	Parentage of the surrogate child	Regulation of international surrogacy arrangements
 *Surrogacy Arrangements Act 1985* (UK) *Human Fertilisation and Embryology At 2008* (UK)	Yes	• 'reasonable expenses' are not defined in the legislation • Determined on a case by case basis see X & Y [2008] EWHC 3030 (Fam) [22].	No s 1A	No	Offence for a person (other than an intending parent or surrogate mother) to initiate, compile information for, take part, offer or agree to negotiate in the making of surrogacy arrangement on a commercial basis	Consent s 54(6)	• Consent s 54(6) • Gametes of at least one intending parent used for the creation of the embryo s 54(1)(b) • Must be 18 years of age s 54(5)	• Surrogate mother the legal parent of the child at birth • Parental orders may be granted for overseas or domestic arrangements • Court has to take into factors in s 54 • Court must be satisfied that the nether party has received any benefit other than for expenses reasonably incurred • BUT the Court has the power to authorise payments that are not 'disproportionate to reasonable expenses', where the intending parents have acted in good faith and cooperated with the authorities • AND the 'paramount consideration' is the welfare of the child	• No attempt to regulate international arrangements • Broad discretion to 'authorise' payments- e.g. compensation of $42 993 not disproportionate to expenses of $9 5000 see AB and CD v GH [2016] EWFC 63 [11].

Jurisdiction	Altruistic Surrogacy permitted?	Reasonable costs for altruistic arrangement	Surrogacy arrangements enforceable?	Commercial Surrogacy Permitted?	Offences in relation to commercial surrogacy	Requirements for surrogate mother	Requirements for intending parents	Parentage of the surrogate child	Regulation of international surrogacy arrangements
 *Human Assisted Reproductive Technology Act 2004* (NZ) *Guidelines on Surrogacy involving Assisted Reproductive Procedures*	Yes s 14(1)	• See s 14(4) • collecting, storing, transporting or using a human embryo or gamete • counselling in relation to the arrangement • insemination or in vitro fertilisation • ovulation or pregnancy tests • legal adviser for independent legal advice	No s 14(1)	No	• Arrange a commercial surrogacy arrangement s 15 • To undergo a surrogacy arrangement without the prior approval of the Ethics Committee s 16	• Consent • Independent medical and legal advice	• Must apply for approval from the Ethics Committee • Guidelines on Surrogacy involving Assisted Reproductive Procedures outline considerations must be taken into account including: • that that one intending parent be genetically related to the child • there is an understanding of the day to day care and adoption of the child • independent medical and legal advice and counselling • parents are medically infertile and is not for 'personal or social convenience' • the risks for all parties and the child are justified	• Child had no legal relationship with intending parents at birth • Application for adoption through Family Court • Required to be assessed as suitable adoptive parents by social worker • Criminal history checks and referees • Must be in the best interests of the child	• Children entering New Zealand of international surrogacy arrangements only have temporary immigration status- not entitled to citizenship or passport • Ministerial guidelines granting visa or citizenship • Factors to be considered include the best interests of the child, whether the child is genetically related to the intending parents, whether the arrangement was commercial, evidence of informed consent,

									steps to preserve the child's genetic and birth histories etc • Can rely on foreign parental order if is deemed by the High Court to have the same effect as a NZ OR transfer parentage through domestic adoption- can be difficult to meet requirements of Adoption Act 1955 NZ) in international surrogacy arrangements

Appendix D – COAG draft principles on surrogacy

1. A court may grant a parentage order where the court is satisfied a surrogacy arrangement was entered into by the surrogate mother, her partner (if any) and the intended parents prior to conception.

2. A court may grant a parentage order where the court is satisfied all parties have undergone counselling with an accredited counsellor in relation to the surrogacy arrangement.

3. A court may grant a parentage order where the court is satisfied all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement.

4. A court may grant a parentage order where an application was made to the court at least 21 days, but not more than six months after the birth.

5. The intended parents must reside in the jurisdiction in which the application is made.

6. All parties to the surrogacy arrangement must give informed consent to the granting of a parentage order.

7. The child must be living with the intended parents at the time the application is heard.

8. A court may grant a parentage order where the court is satisfied granting the order is in the best interests of the child.

9. A court may grant a parentage order where certain requirements set out in the model provisions are not met if the court is, despite this, satisfied granting the order is in the best interests of the child. The ability of the court to waive requirements is subject to mandatory requirements set out in legislation.

10. A court may take into account any other matter it considers relevant when determining whether to grant a parentage order.

11. A court may grant a parentage order to parents who are now lawfully raising children under the age of 18 years conceived through surrogacy if:

(a) the court is satisfied that a surrogacy arrangement was entered into prior to conception;

(b) the court is satisfied the surrogacy arrangement was not a commercial arrangement;

(c) all parties consent to the granting of the order; and

(d) it is in the bests interests of the child. In determining such an application the court will be required to take into account the views of the child, where appropriate.

12. After a parentage order is granted a new birth certificate can be applied for and will resemble an ordinary birth certificate recording only the names of the legal parents.

13. The original birth record would still exist and the child would be able to obtain both records in defined circumstances.

14. The jurisdiction where the original birth certificate was issued will provide for the mutual recognition of a parentage order granted in another jurisdiction by provision of a new birth certificate. Alternately, the jurisdiction where the original birth certificate was issued should cancel the birth certificate and the jurisdiction where the parentage order was granted should issue a new birth certificate.

15. The surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.

Appendix E: Table of Relevant Family Law Cases

CASE NAME	CASE CITATION	PARENTAGE ORDER MADE?	PARENTAL RESPONSIBILITY ORDERS MADE?	SUMMARY
Shaw & Lamb and Another	[2018] FamCAFC 42 (13 March 2018)	✓	✗ (Orders set aside)	• Parentage orders of Tree J in *Lamb and Another & Shaw* set aside • Challenge on appeal is whether the male intending parent could be entered as a 'father' on the child's birth certificate as a parent of the child • Was necessary for the trail judge to make a finding as to the nature of the surrogate mother and her partner at the time of the fertilisation procedure to apply the provisions of the *Status of Children Act 1978* (Qld) [29]-[31] • [50] 'Further, the application of s 23 of the *Status Act*, which is the basis for his Honour's ultimate conclusion, requires satisfaction – in the absence of agreement – that there was no husband or de facto partner of the appellant to whom presumptions of parentage might apply in contradistinction to the application of s 23 of the *Status Act*. To the extent that the reasons do not deal with that issue, and the issue of the nature of the relationship as at the date of the fertilisation procedure between the appellant and the man who was her partner at the time of trial, we respectfully consider his Honour's reasons to be inadequate.'
Koutafides and Another & Sausurre	[2018] FamCA 90 (14 February 2018)	✗	✓	• Intending parents married couple seeking equal shared parental responsibility of the child of an international commercial surrogacy arrangement • The male intending parent was biologically related to the child and a donated ovum was used • Initially the intending parents were seeking to be declared parents of the child under s 69VA, however, following the Full Court's decision in *Bernieres* their application was withdrawn • Evidence the intending parents had a strong relationship with the child orders made for equal shared parental responsibility
Sigley & Sigley	[2018] FamCA 3 (10 January 2018)	✓* (overseas orders registered)	✓* (overseas orders registered)	• Intending parents married couple seeking the registration of a court orders made in a court in the United States in a prescribed jurisdiction • Was the intention of the intending parents to return to Australia before children had started school

				• The children attained Australian citizenship by descent • The parents were in the United States on temporary work visas • Factors relevant to the registration of an overseas commercial surrogacy order: [30] • 'the unique circumstances of this couple and their inability to biologically parent and carry their own baby; • the well-regulated nature of the surrogacy arrangements entered into between the applicants and the surrogate, notwithstanding its commerciality; • the judicial oversight to the arrangements given by the Court in the USA, including the procedural fairness offered thereby to the woman who carried the baby for the applicants; • the acceptance by the Australian Government of that US jurisdiction as a prescribed jurisdiction for the purposes of the registration of 'overseas child orders' made in Courts of that jurisdiction, thereby, I am satisfied, signifying the Australian Government's satisfaction with the standard of the judicial processes that would have occurred in the making of the order; and • the fact that the arrangements entered into, regardless of their nature, brought into the world a child who is the biological child of at least one of the applicants, the legal child of both of them, who is being loved and raised as their child, who as an Australian citizen, like her parents, will be coming back to live in Australia in the near future, and who has every right to expect that the legal nature of her relationship with both of her parents is appropriately recognised in this country of hers.' • Registration of orders granted
Pappas and Another & Ugapathai	[2017] FamCA 1090 (21 December 2017)	✗	✓	• Intending parents are a couple seeking equal shared parental responsibility of two year old child of commercial surrogacy arrangement • The child had lived with the intending parents since birth • Paramount consideration best interests of the child s 60CC • Orders granted as considered in the child's best interests as both parents had 'loved, cared for and supported' the child since birth [48] and there was no other potential carer seeking an order
Lamb and Another & Shaw	[2017] FamCA 769 (21 September 2017)	✓	✓	• The case involved an altruistic surrogacy arrangement gone very sour in Queensland • The intending parents struggled for many years with infertility and ultimately decided to proceed with IVF treatment

				• Before commencing IVF treatment, it was discovered that the intending mother had breast cancer • One embryo was successfully frozen, but following her treatment the mother was unable to carry a child • The mother's third cousin agreed to be a surrogate for the couple • All of the steps required under the *Surrogacy Act 2010* (Qld) were undertaken including counselling by all parties • Although things initially went off smoothly, with the frozen embryo successfully implanted with only a 25 percent chance of success, relations between the surrogate mother and intending parents soon broke down • The surrogate mother felt from the very early stages of the pregnancy she was not been given the attention she needed by the intending parents • The genetic mother by her own admission considered herself to be a 'control freak' and when confronted with such a situation she had no control over, she coped by withdrawing and retreating • Her disengagement was also critically related to her history with infertility and the very faint chances of success which were given to her by the doctors such that she 'dared not hope' for a successful outcome • The birth mother, however perceived this to be a signal of a lack of support and disinterest in the pregnancy • She also raised concerns as to the level of hormones she was being administered by the fertility clinic • In a session with her counsellor the birth mother expressed deep regret for going ahead with the pregnancy and indicated that she wished to undergo an abortion • The genetic parents became aware of these sentiments, and became increasingly concerned that she was 'holding their baby hostage' • A fortnight before the baby was due, the birth mother retained a new solicitor • A letter was sent to the genetic parents highlighting the need for them to make timely payments to the birth mother, implicitly threating that she would not hand over the child or consent to a parenting order until payment was made • The birth mother gave an interview to the 7.30 report the day before entering the hospital for her scheduled C section (see transcript *Australian Broadcasting Corporation,* 'Legal tug-of-war highlights flaws of current

				surrogacy system', 7.30 Report, 18 April 2016 (Madeleine Morris); see segment < http://www.abc.net.au/news/2016-04-18/legal-tug-of-war-highlights-flaws-of-current/7336368>) • In the interview the surrogate mother expressed that she intended to relinquish custody and hold them to ransom: o 'I'll [sic] gonna [sic] let her have him for a little bit, see what it's like… I'm gonna [sic] take him from her arms. And I'm gonna say, "You pay my money or you don't see your son ever again'" • The dispute between the genetic parents continued, with the birth mother continuing to assert explicitly that additional payments of $21 000 would be required to proceed to a parentage order • Street J in his decision ultimately concluded that it was in the best interests of the child to have no contact with the birth mother • His Honour expressed that he had some 'difficulty in sharing' the Full Court's construction of s 60HB in *Bernieres* • He was able to get around by the decision by finding that as the donor of sperm, the genetic father was stripped of any rights or liabilities but not fatherhood per se • It was thus considered that the father was a parent and could be so recognised under s 60HB of the *Family Law Act* • This decision appears wholly inconsistent with the Full Court in *Bernieres* as here too the intending father was genetically related to the child
Bernieres v Dhopal	(2017) 324 FLR 21	✗	✓	• First decision of the Full Court of the Family Court on parenting orders for a child of an overseas commercial surrogacy arrangement • Married heterosexual couple engaged in overseas commercial surrogacy arrangement • Sperm donated from the male intending parent used to create the embryo • Child attained citizenship by descent and issued an Australian passport • The Court found that as a matter of statutory construction sections 60H and 60HB prevailed over the more general provision of s 69VA • The parents were not recognised as the parents under the relevant Victorian legislation as the arrangement was commercial not altruistic and thus could not be granted parentage under s 60HB • The Court acknowledged that this left the child here, and potentially many other with their parentage seriously in doubt

Masters and Another & Harris	[2017] FamCA 450 (28 June 2017)	✗	✓	• Non-heterosexual couple seeking parental responsibility orders for twins of an international commercial surrogacy arrangement • Originally applied for a declaration of parentage- but this application was withdrawn at the final hearing • Children granted Australian citizenship by descent and issued Australian passports • In the children's best interests that the applicants share equal parental responsibility for the children
Re: Grosvenor	[2017] FamCA 366 (26 May 2017)	✓* (overseas orders registered)	✓* (overseas orders registered)	• Application made by married couple to register orders made in relation to a commercial surrogacy arrangement in North Carolina • Anonymous egg donor used the male intending parent was genetically related to the child • Order made before the child was born male intending parent the legal parent of child and for the female intending parent to be the child's legal parent from birth • ss 70G, 70H and 70H *Family Law Act 1975* (Cth) • The fact that the child was not yet born when the North Carolina order was made was not a bar to the registration of the order
Abney and Another & Pramod and Another	[2016] FamCA 1059 (9 December 2016)	✗	✓	• Intending parents a non-heterosexual couple • Equal shared parental responsibility orders for four children (two sets of twins) conceived in two separate Thai commercial surrogacy arrangements with two separate surrogate mothers • The four children were born within days of each other • All four children granted Australian citizenship of descent and returned to Australia • No order for declaration of parentage sought • Application for equal shared parental responsibility Part VII of the Act made • 'I note that the policy with respect to commercial surrogacy and the Act appears to be unclear in Victoria, and this may well be a matter of community controversy. Although the evidence in this matter indicates that the surrogacy arrangement between the applicants and each of the respondents was voluntary, this in itself is a question I do not need to decide in order to determine whether to grant the orders sought by the applicants. Despite any questions of policy surrounding commercial surrogacy

				arrangements, I am here tasked with determining only whether the orders sought by the applicants are in the best interests of the children.' [48]
Re: Halvard and Another	[2016] FamCA 2051 (5 December 2016)	✓* (overseas orders registered)	✓* (overseas orders registered)	• Heterosexual married couple, the male intending parent was Australian and the female intending parent was American • At the time resident in USA • Child born in Tennessee through gestational surrogacy arrangement (the child is genetically related to both intending parents • Payments were made to the surrogate mother for surrogacy related expenses • Court orders Tennessee that the intending parents were the legal parents of the child • As a result of being born in USA child a citizen and citizenship of descent Australia • Orders of Tennessee Court registered in Australia pursuant to ss 70G, 70H and 70J
Kirby and Another and Hewitt and Another	[2016] FamCA 948 (11 November 2016)	×	✓	• Mr and Mrs Kirby married couple unable to conceive a child • Mr and Mrs Hewitt already cared for 6 children (3 with high needs) • Mr Hewitt and Ms Kirby siblings • Mr and Mrs Hewitt became pregnant- as they knew Mr and Mrs Kirby had fertility issues asked if they could care for child • Child born and registered with name 'Kirby' and lived with Mr and Mrs Kirby since birth • In the best interests of the child for order of equal shared parental responsibility to be made to Mr and Mrs Kirby
Farnell v Chanbua **('Baby Gammy Case')**	(2016) 56 Fam LR 84	×	✓	• Twins (male and female) born in Thailand of a commercial surrogacy arrangement of married Australian heterosexual couple • The male twin with Down Syndrome remained in Thailand with the surrogate mother whist the female twin returned to Australia with the intending parents • Surrogate mother applied to have the female twin returned to her in Thailand • Parental responsibility orders granted for the intending parents considered in the best interests of the female twin despite the male intending parent having previous convictions for child sex offences

Wickham & Baker and Another	[2015] FamCA 1077 (3 December 2015)	N/A	N/A	• Preliminary hearing • ACT heterosexual couple entered a gestational surrogacy arrangement overseas • The child was born and genetically related to both intending parents • Child granted citizenship by descent and permitted to enter Australia • Offences under the *Parentage Act 2004 (ACT)* have extraterritorial effect • Seeking a certificate under s 128 of the *Evidence Act 1995* (Cth) in respect to evidence which might incriminate them
Crisp & Clarence	[2015] FamCA 964 (9 November 2015)	✗	✓	• Applicant (31 year old female) and respondent (44 year old female) were in a de facto relationship between 2004-2011 • Both parties agreed that their relationship was 'highly conflicted' [10] • 2007 IVF procedure collection of respondent's eggs • Couple engaged in counselling • 2010 respondent began to receive IVF transfers • 2010 applicant had egg harvested and fertilised same donor as respondent- embryo was not viable • Relationship ended 2011, maintained contact with each other but no longer lived together • April 2011 applicant suggested a transfer of her eggs to the respondent • Applicant alleges relationship resumed in July 2011 • Documents signed to consent to the IVF procedure in Queensland predicated upon the respondent and the applicant being in a relationship • August 2011 applicant considers the date of separation • September 2011 respondent pregnant with applicant's biological child • April 2012 child born in South Australia • Respondent opposed the recognition of the applicant as the parent of the child • Applicant was seeking equal shared parental responsibility, with the child to live primarily in Adelaide with the respondent but to spend increasing time with applicant in Adelaide and later in Brisbane or elsewhere • Respondent seeking sole parental responsibility for the child with facetime communication with the applicant on special occasions • Made a finding the applicant a parent but considered it inappropriate to make a declaration she was a parent • Orders made for equal shared parental responsibility of the child

Saliba and Another & Romyen	[2015] FamCA 927 (22 October 2015)	×	✓	• Married heterosexual couple Thailand commercial surrogacy arrangement • Twins conceived in gestational arrangement, male intending parent donated sperm and a donated ovum (identity unknown) • Application for citizenship by descent successful and children entered Australia • No application for parentage orders made were seeking parental responsibility orders granted
Bernieres v Dhopal	[2015] FamCa 736 (9 September 2015)	×	✓	• Victorian heterosexual married couple international gestational commercial surrogacy arrangement • Donor ovum, child genetically related to the male intending parent • Unable to apply s 60HB as the arrangement was commercial not altruistic and not commissioned in Victoria [72] • 'Section 69VA is not a stand-alone power but requires parentage of a child to be in issue in proceedings in respect to another matter.' [78] • No inherent power to make the order as the Family Court is a 'creature of statute' [86]-[90] • Agrees with the construction of Ryan J in *Mason & Mason* and considers s 69VA to offer no assistance as a source of power [96]-[98] • Orders for equal shared parental responsibility granted
Cowley and Another & Yuvaves	[2015] FamCA 111 (2 March 2015)	×	✓	• Surrogacy arrangement in Thailand (only direct payment to surrogate mother taxi fares and an iPad) • Heterosexual couple, both intending parents work and reside in South East Asia, one of the applicants was an Australian citizen • Sought orders for equal shared parental responsibility • No parentage declaration sought • Had another child previously through a surrogacy arrangement • Owned property in Victoria intended to return for children's schooling • Successfully applied for citizenship by descent • Agreed 'with the level of disquiet which has been expressed by the judges of this Court because of the prospects of the potential abuse of these types of proceedings for ulterior motives such as the international trafficking of children… concerns about organisations or agencies profiting from the

				poverty and other problems that women in developing countries such as Thailand might face.' [24] • Appropriate and in the best interests of the child parental responsibility order [29]
Green-Wilson & Bishop	[2014] FamCA 1031 (6 November 2014)	✓	✓	• Commercial surrogacy arrangement entered into in India by non-heterosexual couple from Victoria (relocated there after researching the legality of international commercial surrogacy arrangements in New South Wales) • Sought parentage order for the intending father biologically related to the child and equal shared parental responsibility orders for both parents • Notes 'concerning' features of the arrangement- limitations on surrogate mother making her own medical and welfare decisions, written in English [9] • Successful application citizenship by descent • s 20 *Status of Children Act 1974* (Vic) child must be conceived procedure carried out in Victoria s 60HB did not apply • Distinguishing *Mason and Mason*- New South Wales legislation 'covers the field' - offences commercial surrogacy and provisions altruistic surrogacy [40] • 'The landscape is markedly different in Victoria, as commercial surrogacy is not prohibited here. Therefore, there is a lacuna between State and Commonwealth laws in respect of children living in the State of Victoria born as a result of international commercial surrogacy procedures.' [41] • Appropriate to make orders where state legislation silent on commercial surrogacy procedures where not prohibited [44] • Best interests of child order s 69VA and equal shared parental responsibility orders
Fisher-Oakley & Kittur	[2014] FamCA 123 (4 February 2014)	✗	✓	• Intending parents entered commercial surrogacy arrangement in India • Sought orders equal shared parental responsibility • Judicial notice taken of the dangers of international child trafficking 'those sorts of criminal elements involve the trafficker declaring themselves as the biological parent of a child and having the birth mother refuting o rejecting any involvement in the child's life' [5] • Raised the potential financial circumstances of the surrogate mother [7]

				• 'the Court is raising these issues because it is concerned that it needs to be satisfied that this child is not caught in that web of horror and intrigue.' [7] • No declaration sough under s 69VA [20] • Recognised the Court had the power to make a parentage order under s 69VA 'The court has power to make such a declaration if it has some evidence that might assist in determining the parentage of the child.' [20] • Best interests of the child equal shared parenting order made
Mason & Mason and Another	[2013] FamCA 424 (7 June 2013)	✗	✓	• Non-heterosexual couple from New South Wales engaged in a gestational commercial surrogacy arrangement in India • Surrogate children (twins) conceived using donor egg and one of the intending father's sperm • Provisions in the agreement limited the surrogate mother's ability to make decisions about her own medical decisions during the pregnancy and birth [4] • Signed document in English (surrogate mother was illiterate in Hindi and English [4] • Twins entered Australia attained citizenship by descent- DNA test, biologically related to one of the intending fathers • [33] 'it is my preliminary view that for the purposes of the Act, the 2008 amendments evince an intention by Parliament that the parentage of children born as a result of artificial conception procedures or under surrogacy arrangements will be determined by reference to those provisions and not the general parentage provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parentage.' • Found that parentage order could not be made orders made • Orders for equal shared parental responsibility between the two intending parents for the twins made
Carlton & Bissett and Another	[2013] FamCA 143 (19 February 2013)	✓	✓	• Children were born out of an altruistic surrogacy arrangement commissioned by one male intending parent • His sperm was used to fertilise an egg from an unknown egg donor implanted into the surrogate mother • During the pregnancy the male intending parent met his now partner • Their relationship progressed throughout the pregnancy and it was agreed that he would take on a parental role

				• Argument based upon s 69S(1A)(a)(ii) because South Africa is not specified for the purposes of the Act • Declaration s 69VA based upon the best interests of the child • 'Here, the only factors relate to what is in the children's best interests; there being no issues of public policy which might intrude into those deliberations' [32] • 'It will be apparent that I have accepted that Mr Bissett is able to rely on the general presumptions of parentage notwithstanding the provisions of s 60H and s 60HB, both of which were inserted into the Act after the general presumptions. Those provisions are not directed to children born in another country to a person or people ordinarily resident in that country at the time of conception and birth.' [33] • Order of parentage for the intending parent biologically related to the child granted • Equal shared parental responsibility order granted
Ellison and Another & Karnchanit	[2012] FamCA 602 (1 August 2012)	✓	✓	• Intending parents were a heterosexual married couple from Queensland, seeking parentage orders and parental responsibility orders for two children of a commercial surrogacy arrangement in Thailand • The male intending parent was genetically related to the children and ova from an unknown donor was used • Children granted Australian citizenship by descent and passports • [68] 'In my view, absent words of exclusion, the wording of s 60HB is specific and only applies in situations where an order had been made under a prescribed law of a State or Territory. As there has been no order made under a prescribed law of a State or Territory s 60HB does not apply to the facts of this case.' • s 69R of no assistance as Thailand not prescribed [70] • s 69S of no assistance as Thailand not prescribed, no Australian findings in this case [71] • s 69T no relevant instrument executed, of no assistance [72] • [87] 'Without a doubt a matter such as this raises public policy issues, namely the potential for a declaration of parentage to potentially subvert (in part) at least the spirit of law in Queensland in relation to commercial surrogacy. However, the AHRC is demonstrably correct in its submission that "the court is faced with having children in front of it and needs to make orders

				that are in the best interests of those children, and at that stage **it's probably too late to ask whether – or to inquire into the legality of the arrangements that had been made. The court really needs to take children as it finds them"** (Transcript, 26/3/12, pp 25-26).' • [91] 'Although the children have been granted Australian citizenship, a declaration of parentage has a wider reach than parenting orders. Considered from the perspective of the children, it is difficult to discern **how it could be in their interests to permit public policy considerations to stand in the way of a declaration of parentage in relation to the person who is their biological father**.' • Order made pursuant to s 69VA the male intending parent is a parent of the children • Parental responsibility orders made in favour of both intending parents • Best practice principles as recommended by AHRC and the ICL outlined [134]-[139]

Appendix F – Bibliography

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Appendix G – Notes of SALRI meeting with Repromed representatives, 26 October 2018

The South Australian Law Reform Institute, in relation to its surrogacy reference, met representatives of Repromed, a leading South Australian fertility provider, on 26 October 2018.

Repromed emphasised to SALRI that the number of fertility patients who require surrogacy to achieve a pregnancy is very small and would make up less than 0.5% of its patients. As such, Repromed highlighted that there is no commercial incentive for agencies such as Repromed to reduce barriers for its patients to access surrogacy. SALRI was told by Repromed that the vast majority of patients who access surrogacy do so because they cannot achieve a healthy baby by carrying the pregnancy any other way. Repromed explained that they place significant emphasis upon its adherence to the fundamental principle of acting in the best interests of the unborn child when its medical professionals make decisions to treat patients for infertility, and when developing relevant policies on the issue. In this context, Repromed concurred that the NHMRC and ANZICA guidelines should underpin and support any domestic surrogacy framework.

Repromed outlined to SALRI a number of key issues that should be addressed in any proposed reform to the existing South Australian law and regulatory framework. These were:

1. Non – discrimination and the elimination of any possible discrimination based on gender, marital status (including singles) or sexuality to access fertility treatment using surrogacy. The principle of non-discrimination was also raised by Repromed in the context of the availability of Medicare rebates from the Commonwealth for the costs of assisted reproductive services related to surrogacy. Repromed highlighted that people should not be discriminated against based upon the particularities of their infertility and that for some parties, surrogacy is a 'medically necessary' process to achieve their family. Repromed highlighted that discriminatory features in the South Australian and Commonwealth legislative arrangements in relation to surrogacy push people to less regulated jurisdictions overseas that can present dangers for the surrogate, the intending parents and the unborn child.
2. Clarity in regard to the scope of reasonable expenses that can be exchanged in a lawful surrogacy arrangement. Repromed emphasised to SALRI that the current legislation is too vague in this regard. Repromed commented it would assist greatly if there was more specific guidance available to both intending parents and surrogate mothers on this issue. Repromed noted that sensible guidelines are required to allow appropriate compensation for those carrying a pregnancy to cover the loss of income related to appointments and sacrifice to their own family life as a direct result of altruistically carrying the pregnancy.
3. Flexibility in access to treatment. Repromed told SALRI it advocates for greater flexibility for those who access surrogacy treatment. It noted the restrictive nature of only allowing intending parents who have been domiciled in South Australia for a period of at least 2 years as unnecessary and unduly restrictive. Repromed did not support an extraterritorial offence in relation to offshore commercial surrogacy arrangements to make the conduct of intending parents who engage in such arrangements overseas to be illegal. It noted that such an approach was overly restrictive. Repromed emphasised to SALRI that parties should be made to adhere to regulatory requirements irrespective of the geographic location where they receive treatment, particularly in the context of domestic altruistic surrogacy arrangements that cross State and Territory boundaries.

Repromed stressed to SALRI that its role as a fertility provider is to allow people to achieve families in the safest way, with the best interests of the child always remaining central. Repromed noted that the best interests of the child should be the primary consideration throughout any surrogacy process.