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The House of Representatives  
Standing Committee on Social Policy and Legal Affairs

### **Written Submission to Surrogacy Enquiry**

Dear Committee

This is a personal submission, based on working intimately within the Australian surrogacy sector for the past five years. In that time I have met with upwards of 500 families pursuing surrogacy and provided personalised advice to some 110 singles and couples planning surrogacy in efforts to educate and empower them in regard to risk mitigation, best practice and the interests of their unborn children. I have conducted a number of ethics-approved studies with both intended parents and the wider community on issues surrounding surrogacy.

My work is grounded in the disciplines of research and public health. The committee is invited to read my published research on the topic (See references). I would also highly recommend Jenni Millbank's paper *Millbank J. Rethinking "Commercial" Surrogacy in Australia. Bioethical Enquiry July 2014.*

Surrogacy is a complex yet very rewarding means to parenthood if carried out responsibly. Many commentators are eager to provide opinions on how it should be improved or limited in the absence of any direct experience of the processes, the pitfalls and the psychology of those involved.

#### **KEY POINTS**

The key points of my submission are:

##### **DOMESTICALLY**

- (1) A lack of appropriate psychological screening of Australian surrogates is leading to surrogates being approved without the necessary social supports and/or psychological make up. This in turn is leading to enormous problems for some surrogates during and following pregnancies. This seems partly due to a lack of willingness by the Australian & New Zealand Infertility Counsellors Association (ANZICA) to embrace the experience and tools used in markets with long experience of surrogate screening, where surrogates have been professionally screened for decades
- (2) A lack of appropriate psychological support for surrogate-commissioning parent relationships during pregnancy and pregnancy attempts is putting immense pressure on these relationships. The Australian health sector has invested no funds into such support
- (3) The lack of professional screening and matching services for surrogates in Australia is putting vulnerable women at risk. Approving a 'willing' surrogate because the commissioning parents



'had no one else who offered' is at best, bad practice, and at worst risks major psychological harm to surrogates

- (4) The absence of a Medicare rebate for surrogacy-related IVF procedures pushes the costs of such IVF to very high levels. For many, this acts as a disincentive to engaging in surrogacy in Australia and an incentive to engaging in third-world markets.
- (5) state laws currently prevent parents through overseas surrogacy being recognised as parents, a situation which is highly undesirable and not in children's best interests; This should be addressed by changing Commonwealth law and by ensuring that there are appropriate safeguards to protect children's best interests.

## **INTERNATIONALLY**

I have dealt with upwards of 120 Australian cases of surrogacy arrangements in overseas jurisdictions. My key concerns about some of these overseas arrangements are

- a) The high rates of multiple embryo transfer in many third-world surrogacy markets, often without consultation with the commissioning parents. Such practices in turn lead to high rates of twin pregnancies and high rates of pre-term delivery with its associated complications.
- b) Unacceptable levels of embryo mix-ups in storing and transfer processes
- c) Commissioning parents investing large sums of monies with unregulated, un-licensed surrogacy brokers. In such cases, commissioning parents have little recourse to refunds in cases where services are not provided or a market or agency closes
- d) A lack of understanding amongst commissioning parents of the importance of engaging with known donors for the sake of their unborn children
- e) A lack of provision for Australian children born via overseas surrogacy to be recognised as the legal children of commissioning parents under Family Law provisions.

## **RELEVANT CONTEXTUAL ISSUES**

The use of surrogacy as a means of family formation has increased significantly in Australia in recent years. Currently over 90% of Australians seeking surrogacy travel overseas to do so. Australian Government data shows that over 300 such newborns enter Australia each year.<sup>1</sup>

A range of factors mean the use of overseas surrogacy arrangements for Australians is very likely not only to continue but to increase in prevalence. Some of these factors (summarised below) result from inappropriate and discriminatory government policies and legislation.

- tight policy restrictions (e.g. red tape, cost, selection criteria) and long wait times restricting the availability of national and international adoptions;
- the tendency of most intended parents not to choose permanent foster care arrangements as a path to parenthood;
- the strong desire to parent amongst many who cannot carry a child themselves;

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<sup>1</sup> Australian Government Department of Immigration & Citizenship. FOI request FA 12/03/00935 Citizenship by Descent applications granted to infants by India and USA posts 2008 – 2011, 2012.



- increasing age of women before attempting pregnancy leading to higher rates of age-based infertility;
- growth in single men and male same-sex couples desiring to raise a family;
- increase in the availability of assisted reproductive technology; and
- increasing awareness and knowledge about access to surrogacy arrangements.

In past inquiries conducted into surrogacy in Australia, there has been a failure to actively seek the views of three key groups

- a) Australian surrogates
- b) Older children born via surrogacy (aged 16 years and above)
- c) Australian intended parents and parents through surrogacy

The committee is strongly urged to actively seek meetings with each of these groups as a part of its inquiries. I can provide contact details for numerous individuals in each group above to the committee.

## **PROBLEMS WITH CURRENT AUSTRALIAN POLICIES**

### **Lack of Surrogate Compensation**

Many Australian surrogates who have carried altruistically feel that the constant anxiety over what they can and cannot claim as an expense from intended parents, while juggling their own family needs, spoilt or unnecessarily marred what was supposed to be a joyous process. Many agreed that the journey (often including several miscarriages prior to a successful birth) would have been far easier to bear if they had been compensated for the risk and potential unexpected burden.

In jurisdictions such as the UK, which also offer altruistic surrogacy, surrogate compensation of £10,000 - £15,000 is standard. Australian social policy and law needs to consult with international non-profit groups such as COTS and Surrogacy UK, to better understand the benefits and impacts of surrogate compensation.

### **Failure of State-based Criminalisation Provisions to Change Behaviour**

Research by Surrogacy Australia in January 2012 with parents or intended parents through surrogacy showed that half of those in states with criminalisation laws would enter an overseas contract regardless of these laws. Another 30% would move interstate in order to access overseas surrogacy<sup>2</sup>.

Surrogacy Australia's data collected from international agencies shows there has been only a slight downturn in the number of surrogacy arrangements entered into overseas each month since NSW criminalisation laws commenced in March 2011.

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<sup>2</sup> Everingham S. The Growth in Australians Use of Commercial Surrogacy as a Means of Family Formation, Fertility Society of Australia 2012 Conference, Oct 29-30 Auckland, New Zealand.



Such evidence makes it clear that state-based laws criminalising those entering overseas arrangements are failing to have significant effect in deterring intended parents. In addition, criminal legislation risks the following adverse effects:

- Making it more likely families who can do so will conceal the nature of their child's origins to others and potentially to the child themselves.
- Creating potential self-esteem issues for children growing up under legislation which discriminates against them on the basis of decisions made by their parents.
- Motivating families to engage with overseas clinics which do not have regulated processes and documentation in place, in order to reduce the likelihood of prosecution.

None of the above consequences of the legislation are in the best interests of children born through surrogacy arrangements, despite the intention of this legislation to place the best interests of the child as paramount.

It is a modern-day reality that children are increasingly being born through surrogacy arrangements. Australia is obliged, under the UN *Convention on the Rights of the Child* (Article 21) to ensure that the interests of children are paramount.

A well ordered legal system that appropriately recognised parents would aid in ameliorating these undesirable effects. For the reasons above, legislation governing how Australians can access surrogacy requires urgent review.

### **Cross-Border Determination of Parentage Issues**

A modern definition of legal parenthood needs to recognise that many Australian families are nowadays formed outside the once traditional boundaries of two heterosexual parents.

There is currently no provision in state or territory law that would allow the recognition of any relationship between infants born overseas via surrogacy and the intended parent, regardless of whether a biological link is established.

Families Through Surrogacy agrees with Judge Cronin in reference to the Family Law Act, when he points out that this Act:

*talks about a parent as a mother and a father, [however] it is more important to look at the benefits that children receive from the parenting responsibilities that the people who care for them undertake*

Australian laws currently create a discrepancy between the parents of children in different jurisdictions, which is highly undesirable, as children are dealt with as if they have different parents in different countries.

For example:

- The parenthood of children born through overseas surrogacy arrangements is recognised at a Commonwealth level by DIAC, which processes applications for Australian citizenship by descent, regardless of which Australian state or territory the intended parent resides and the laws of those states.



- Should the genetic parent of a child through surrogacy die intestate the co-parent of the child could lose custody of the child and the child will not automatically receive an inheritance from their genetic parents (unless a parentage order has been granted).

### **Inconsistencies in Australian Legal Determination of Parentage**

Despite being named on an overseas birth certificate as the father or mother, and being recognised under the *Australian Citizenship Act 2007* (Cth) as a parent, under Australian law, the biological intended parent(s) are recognised simply as a gamete provider, 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.

Recognising parents through surrogacy as parents at law is in the best interests of children, because it facilitates transparency and avoids motivations of parents to disguise surrogacy, which is damaging to children.

Undesirable consequences of lack of legal parental status include

- potential barriers to making decisions in the public healthcare and school systems
- the possibility of orders being made about parentage in Australia (eg through divorce proceedings) that are contradictory to the law in other countries

In the latter case, the current absence of legal parenthood in Australia might mean a child could be taken back to the country in which the intended parent is legally recognised in order to circumvent Australian law.

## **INTERNATIONAL ISSUES**

### **Costly & time-consuming Parenting Orders rarely used**

Parents utilising surrogacy arrangements in the US can list both their names on the birth certificate. This has also been the case for heterosexual couples using India. Such a practice, as well as the granting of an Australian passport under Citizenship By Descent processes, gives the vast majority of parents sufficient security not to bother applying for parenting orders.

Even in cases where one intended parent is not named on the foreign birth certificate, parenting orders are rarely applied for given the need to do this through the court system and the large amount of time, cost and often stress associated with such a process, not to mention the fear of being referred to the DPP for prosecution for those resident in NSW, QLD or the ACT who went through surrogacy arrangements after those laws came into effect.

The few families who do seek parental orders must do so via the Commonwealth Family law system, unless they are WA residents.

In the UK, there has been a noticeable increase in parental order applications being made (and granted) in the High Court to parents engaging in overseas surrogacy<sup>3</sup>. However as with Australia,

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<sup>3</sup> In the UK such applications must be made within six months of the child's birth



this is a legal process which incurs considerable time and cost to intended parents<sup>4</sup>. (A typical case will take six months before it is heard by a UK court).

The problems above have already left in excess of 1500 Australian children with their social parents not recognised as their legal parents in Australia. This is despite one or more of their social parents being a biological parent. This is not in the best interests of children, or families. It is important that the more than 1500 Australian children born via overseas surrogacy each year do not suffer from stigma or some sense of not being a legal part of the family that worked so hard to create them.

Currently the only avenue for non-biological parents through surrogacy to be recognised as a legal parent is through step-parent adoption – a process incurring unnecessary cost, uncertainty and time for a party who has parented the child concerned since birth.

### **Lack of Education**

There has for at least five years, been steady growth in the use of donors and surrogates (including Australians) who travel internationally to provide their services. There have been numerous cases where egg donors have travelled from one overseas country to another, inadequately prepared medically for the egg donation process.

While such practices are impossible to effectively curtail, there has been no education provided to commissioning Australian parents on the potential harms of such practices, where inadequately supervised.

### **POTENTIAL SOLUTIONS**

The Commonwealth should

#### **1. Standardise the definition of parenthood between all Commonwealth legislation**

If a child is granted citizenship by descent, then the tests under the Family Law Act should apply, defining who is a parent for all purposes for Australian law, including in relation to the tests used under the *Australian Citizenship Act*.

This would mean all children in Australia born through surrogacy arrangements are treated consistently and fairly and have the same rights as other children to (a) legally recognised parent/s who are their primary carers.

In this way, other Commonwealth legislation is also covered, such as the Status of Children Act, and Australian Passports Act. Such a definition should have retrospective operation.

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<sup>4</sup> See for example [2013] EWHC1432 Justice Theis



## **2. Provide education to Commissioning Parents**

The Commonwealth government and its associated departments have engaged enormous resources in recent years, particular through Australians foreign missions, in assisting to sort out the problems of Australians engaging in international surrogacy

It would be prudent to invest funds into a targeted education campaign with commissioning parents, beyond that currently available via the Department of Immigration & Broder Protection.

## **3. Better enable access to surrogacy in Australia**

If Australian policy makers are serious about minimising potential harm to surrogates, intended parents and children born through surrogacy overseas, Australia needs to improve access to surrogacy domestically.

### ***a) Commonwealth legislation should reduce cost as a disincentive to altruistic surrogacy***

A Medicare rebate should be available to all IVF used for surrogacy, surrogate preparation and embryo transfer. In this way surrogacy is not limited to intended parents of a higher socio-economic strata.

### ***b) Standardize state-based eligibility requirements for altruistic surrogacy***

Restrictions in some states prevent single and same-sex couples accessing surrogacy. The rationale for such discriminatory policies is unclear. These should be reviewed and standardised.

### ***c) Surrogate-intended parent matching services to be lawful***

Better access to surrogacy within Australia would require far greater access to Australian surrogates.

A key change required is the establishment of a not-for-profit agency to act as a centralized database for potential surrogates and intended parents to register. This model might allow registered Australian ART providers to access the database and facilitate meetings between potential surrogates and intended parents.

### ***d) Allowing financial compensation of Australian surrogates to a capped value***

Research by Surrogacy Australia and academic researchers has shown evidence that intended parents are often uncomfortable accepting the 'gift' of surrogacy in the absence of any financial compensation beyond expenses. Research with surrogate mothers shows that most in countries offering paid arrangements are motivated by a mix of altruism and financial betterment.

Appropriate capped compensation could include a significant gift (such as a family holiday) for the surrogate mother which recognises her labour, physical discomfort and restrictions, managed by a third party.



In Canada for example, costs are allowed for ‘time and effort’, which takes into account not only medical, ART, legal and counseling costs, but an additional amount for the effort required to undertake surrogacy.

#### **e) A funded Surrogate Support Network**

Medical practitioners, church leaders and social workers understand their work as vocational. In these professions, as with surrogacy, the job requires individuals to give time and emotional energy that goes beyond their job requirements. To choose surrogacy work should be understood as a vocational choice with a huge emotional, physical and time commitment.

Women who make this choice should be supported, as one Australian surrogate explains:

*“we surrogates are a breed unto our own ... so having someone to talk them through it and to simply tell them that what they are experiencing is normal and that they are actually sane is what I would call essential. Not simply during and after the pregnancy but through the whole process and for months or even years after. .... most of the people who had negative experiences simply didn’t have the support network they needed. It’s just too hard to express everything you are going through with your recipient”*

If legislators are keen to protect the best interests of Australian surrogates it would make sense to have such a network funded as are other community funded groups, given its potential to build capacity for best-practice surrogacy arrangements within Australia.

Such an organisation would provide specific knowledge, experience and access to individuals and communities engaging in surrogacy arrangements. Its roles could include workforce advancement through specialised education, policy development and intersectoral networking.

#### **PARENTS OWN STORIES**

I conclude this submission by providing an account from an Australian parent as to their own surrogacy experience, their relationship with their surrogate and their reflections on outcomes for their own families.

*Our twins were born via a gestational surrogate in California with the support of the Center for Surrogate Parenting (‘CSP’). CSP helped and supported us with every aspect of our surrogacy journey – from initially learning about what was involved, to finding our egg donor (a separate person to our surrogate), to being matched with our surrogate, all the way through to the arrival of our children, including all the emotional, legal and logistical aspects you experience all the way.*

*Our surrogate selected us from a number of profiles she was provided with by CSP. CSP (with the aid of a psychologist), then arranged our first meeting and all our subsequent meetings/contact until we mutually decided to work together to try to have our family.*

*Our surrogate was a married woman with two of her own children, educated and in a sound financial position. She wanted to be a surrogate as she her own pregnancies had gone very smoothly and she knew she had the physical and psychological capacity to help a couple like us. Our surrogate was*





*provided with constant support throughout the entire journey, meeting regularly with a psychologist as well as attending a monthly support group with other surrogates in her area (again arranged by CSP). As the parents-to-be, CSP offered us whatever help we asked for and needed. This ranged from big to small things – finding the best IVF Doctor, finding a suitable Attorney, steering us in the right direction for health insurance, recommending accommodation options in California (we arrived at 30 weeks to support our surrogate and attend all appointments in the lead up to the delivery of our twins at 37 weeks), through to the small things such as helping us with sending flowers to our surrogate, arranging for groceries to be delivered when she was in the final stage of the pregnancy, and advising us on appropriate gifts when we wanted to send her something on her birthday (such as a gift voucher for pregnancy massage – a small token but something that let her know we were thinking of her).*

*CSP helped match us with our surrogate (which was a long and thorough process), and helped us to establish our relationship with her, but the ongoing relationship and the close friendship that has existed now for over 10 years is something we all chose to maintain. We are close friends with not only our surrogate, her husband and children but also with her extended family – her parents, siblings and their children. Our surrogate and her husband have visited us on multiple occasions in Australia, and we have returned to California as a family on numerous occasions to spend time with them. We exchange emails, skype and phone calls regularly. We celebrate respective birthdays, Christmas and milestone events that occur between our families. Our children have known since the very beginning the story of how we came to be a family, the remarkable people who helped us along the way and how tremendously blessed we are. It is very much normal to our children, and something they (and we as their parents) are very honest about. Our children understand that families come about in many different ways, and each is as valid and special as the next one. Surrogacy doesn't define them as children, us as parents or as a family.*

*Our surrogate was paid by us for carrying our children. It was not the reason she wanted to be a surrogate, nor would it have made commercial sense to be doing it for the money. Our surrogate could have made more money being employed in an entry level job and not had to have gone through IVF, a twin pregnancy, significant morning sickness and a post pregnancy recovery period. We have had many conversations over the past decade about the misconception that surrogates are 'only in it for the money' and she has always said she has never met one single surrogate who felt that way. The amount paid is nominal in the scale of what is involved. It's a rare and unique woman who wants to be and can be a surrogate, and the financial support received is way down the bottom of the list of reasons they do it. At the same time, as the intended parents we felt it was important some money was paid to our surrogate and we felt totally comfortable with the arrangement. It was all above board, everyone was very clear on what was being paid, nobody was asking for financial side deals and we weren't doing things such as buying her a car or paying her children's school fees to get around the issue of not being allowed to pay her.*

*Our children are aware that we paid our surrogate to help us and they understand the reasons why. It never was, nor never has been a defining or really relevant aspect of the relationship we all have. We occasionally pay people to babysit our children now, and we paid our surrogate to babysit our children before they were born. Our surrogate termed herself 'their oven' and our children say 'we grew in our surrogates stomach as mum's was broken'. They don't see our surrogate as a*



*relative or a special aunty, they are very clear on who she is to them , and they value their relationship with her and her family as much as we do.*

*Over the past decade we have referred a number of people to CSP and continue to feel that the experience, insight and empathy they have for their surrogates and intended couples is outstanding. We have also known many people who have entered into surrogacy arrangements within Australia without the knowledge of doctors, hospitals or any authorities. The risks, complications and life long implications on these arrangements are truly frightening and a legal minefield for all involved. For us, commercial surrogacy was our only way of having children (we exhausted all other options) and it proved to be a positive, above board, ethical and rewarding experience.*

## References

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