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The Program Manager
Reproductive Technology Unit
Patient Safety & Clinical Quality
Department of Health
Perth
Western Australia

By email – HRTSR@health.wa.gov.au

Dear Madam

REVIEW OF THE *HUMAN REPRODUCTIVE TECHNOLOGY ACT 1991* AND *SURROGACY ACT 2008*

I set out below my submission as to the review. I am happy to assist in any way if called upon for the purposes of the review. I will be seeking to meet with Associate Professor Allan via Skype and will have my secretary organise that.

1. Who am I?

I am a family and fertility lawyer based in Brisbane. I have acted for intended parents, surrogates, donors and donor recipients from all over Australia. I am the only lawyer in Australia who has appeared in Court in four jurisdictions to obtain parentage orders:

- Queensland;
- New South Wales;
- Victoria;
- South Australia.

I have acted for many intended parents from Western Australia, some of whom contemplated overseas surrogacy and some domestic surrogacy.

I have advised clients from overseas about surrogacy law and practice. Typically these or one of the parties is an Australian citizen. At last count there were clients from 28 countries overseas being:

Australia	
1	Australian Capital Territory
2	New South Wales
3	Northern Territory

4	Queensland
5	South Australia
6	Tasmania
7	Victoria
8	Western Australia
Overseas	
America	
1	Brazil
2	Canada
3	USA
Europe	
4	Belgium
5	Denmark
6	France
7	Germany
8	Ireland
9	Netherlands
10	Russia
11	Switzerland
12	UK
Middle East	
13	Iran
14	Israel
15	UAE
Asia	
16	China
17	Hong Kong
18	India
19	Indonesia
20	Japan
21	Malaysia
22	Philippines
23	Singapore
24	Thailand
Oceania	
25	New Caledonia
26	New Zealand
27	Papua New Guinea
28	Solomon Islands

I have written and presented widely about surrogacy law including for:

- Family Law Section, Law Council Australia;
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists;
- American Society of Reproductive Medicine;
- Fertility Society of Australia;
- Family Law Practitioners Association of Western Australia;

- Queensland Law Society;
- Law Society of South Australia;
- International Academy of Family Laws Surrogacy Symposium;
- American Academy of Adoption and Assisted Reproduction Attorneys;
- American Bar Association.

I was the co-author of and principal advocate of Policy 116b of the American Bar Association passed in February 2016 as to the proposed nature or the possible Hague Convention on private international law concerning children including international surrogacy arrangements. The Association has 400,000 members throughout the world.

I have presented about surrogacy in the UK, US, South Africa, Hong Kong and Australia.

I was admitted in 1987 as a solicitor to the Supreme Court of Queensland. I have been an Accredited Family Law Specialist since 1996. My first surrogacy case was in 1988. In 2017 my firm under my direction represented 116 singles or couples in relation to surrogacy and a further 5 couples or singles in relation to donor issues. I have also advised several IVF clinics in several States about regulatory issues. I have acted in cases involving posthumous use of sperm, including two cases from Western Australia. No doubt Associate Professor Allan will have access to more up-to-date figures than I do, but as best I can calculate, the number of Australians undertaking surrogacy currently represents:

- 40 surrogacy journeys a year in Australia; and
- 250 overseas surrogacy journeys undertaken by Australians each year.

I have acted in ground breaking cases, for example:

- *LWV v. LMH* (2012), which was a worldwide precent as to what constitutes conception.

- *P + P* (2012) – which established who was a couple and counselling requirements.

- *Re Grosvenor* (2017) and *Sigley and Sigley* (2018) – in which US surrogacy orders were registered in Australia, and with *Re Halvard* (2016) set the benchmarking as to what is commercial surrogacy;

- The first interstate surrogacy cases in each of Queensland and New South Wales (2012).

I am currently a member of the following amongst others:

- ANZPATH;

- Fellow of the International Academy of Family Lawyers including a member of its Surrogacy/Parentage Committee and of its LGBT Committee;

- Founder and director of the LGBT Family Law Institute Australia;

- Fellow of the American Academy of Adoption and Assisted Reproduction Attorneys;

- International representative on the ART Committee of the American Bar Association;

- Member of the Fertility Society of Australia;

- Member of the National Surrogacy and Donor Committee of City Fertility Clinic.

The views expressed in this submission are mine and do not necessarily represent the views of the various associations of which I am a member.

2. Human Rights Framework

It is essential that there is appropriate regulation of ART in Western Australia including that of surrogacy. In my view this can be achieved by:

- legislation regulating gamete and embryo donation;
- legislation as to parentage presumptions;
- legislation regulating surrogacy;
- reliance on the National Health & Medical Research Council's Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research (2017), related Commonwealth legislation and the scheme of RTAC regulation devised between the Fertility Society of Australia and the NHMRC;
- legislation setting up a central register.

Both ART and surrogacy generally have a myriad of complex moral and ethical issues and it is essential in my view that there is appropriate regulation. 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.

As part of that regulation, regulation ought to ensure that the human rights of all involved are protected, the most relevant being:

- The donor and donor's partner;
- Any donor conceived individuals (whether as children or adults);
- Surrogate and her partner;
- The intended parents;
- Any child conceived from a surrogacy arrangement.

A number of strengths, in my view of how we regulate surrogacy in Australia in all its different varieties are that:

1. There is a requirement for independent legal advice before the parties enter into the surrogacy arrangement.

2. There is a requirement for the parties to have independent counselling and screening with a report from that counselling prior to entering into the surrogacy arrangement.

3. With the exception of Victoria and the Australian Capital Territory, there is a requirement for there to be a written surrogacy arrangement. The inquiry undertaken by the Tasmanian Parliament in 2011 rejected the format of the Bill on that point initially when it proposed that a surrogacy arrangement could be oral. Having advised clients about domestic surrogacy arrangements in all eight States and Territories, I would strongly endorse the need for the surrogacy arrangement to be written.

4. In addition to any regulatory requirements, the common practice of IVF clinics is to have a separate ethics committee to consider whether treatment should be given in any proposed surrogacy journey. Risks are carefully assessed, such as:

- whether surrogacy is necessary;
- psychosocial issues;
- medical issues;
- legal and regulatory issues.

5. That ultimately there is judicial oversight. I cannot state how important it is to have this step. From a procedural point of view it is necessary for the recognition of the parent/child relationship by virtue of the provisions of the *Surrogacy Act*, the *Family Law Regulations*, section 60HB of the *Family Law Act* and section 8 of the *Australian Citizenship Act*. From a substantive point of view, in my view it is absolutely essential because in the rare event that something goes wrong, my experience 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.

3. Non-discrimination

Since 1 August 2017 both Acts have fallen foul of section 22 of the *Sex Discrimination Act 1994* (Cth). This followed international criticism at the United Nations Human Rights Committee in Geneva about Australia's discrimination against LGBTI people.

In May 2017 I wrote to the Minister for Health, alerting him to this issue and asking what would be done to remedy this. I am delighted that this review is being undertaken.

4. Current discrimination

As was recognised in the regulations to the *Sex Discrimination Act 1994* (Cth), these two Acts discriminate against LGBTI people, particularly against gay couples. The effect of section 19 of the *Surrogacy Act* is that:

- Heterosexual couples can undertake surrogacy;
- Single women can undertake surrogacy;
- Lesbian couples can undertake surrogacy;
- Single men cannot undertake surrogacy;
- Gay couples cannot undertake surrogacy.

It is unclear if a couple in which one of the parties is intersex or transgender can undertake surrogacy in Western Australia currently.

These provisions are simply offensive and discriminatory in accordance with principles of international norms, more to the point in breach of section 22 of the *Sex Discrimination Act 1984* (Cth). There is a need, irrespective of any other change to the legislation, to ensure that the law in Western Australia does not discriminate against LGBTI people.

5. Yogyakarta Principles

In 2006 a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline the set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States should comply.

Principle 1 provides relevantly – the right to the universal enjoyment of human rights:

"All human being are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall: ...

(b) amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights."

Principle 2 – the rights to equality and non-discrimination – provide relevantly:

"Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall: ...

(c) adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

(e) in all their responses to discrimination on the basis of sexual orientation on gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination."

Principle 24 – the right to found a family provides, relevantly:

"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of a sexual orientation or gender identity of any of its members.

States shall:

(a) take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;

(b) ensure that laws and policies recognise the diversity of family forms...

(f) take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners."

6. Who wants to be a surrogate?

The typical surrogate is a woman who:

- is over 25;
- has had all of her own children;
- likes being pregnant;
- had problem free pregnancies and quick, problem free childbirths;
- above all, sees it as her mission in life, and for some, a mission from God, to give the gift of life to others.

This is the case for surrogates I have acted for or dealt with from Australia, New Zealand, Canada and the US.

I have acted in cases in Queensland and New South Wales where:

- the surrogate has not had children before;
- the surrogacy journey is traditional, not gestational.

With careful screening, these surrogacy journeys can work very well although our instincts with either is that they will be problematic.

I insist in all my surrogacy arrangements that the obligations of each party are clearly set out. Surrogate clients feel empowered that a clause is in the surrogacy arrangement akin to s.16 of the *Surrogacy Act 2010* (Qld) – that the surrogate has the same rights to manage her pregnancy and childbirth as any other woman.

In my view it is vital that this clear statement (and the clearly enunciated guiding principles and objects of the Queensland Act, including as to openness and honesty) becomes part of the statute law of Western Australia.

The view that surrogates are oppressed is not consistent with what I have observed in Australia, Canada, New Zealand or the US. Surrogates in these countries at least appear to be modern assertive women.

7. Digital disruption

Whether we like it or not, we are in the midst of the digital revolution. Digital disruption is not isolated to cab licences and Uber. Intended parents as a matter of course go online, often from their mobile phone, to find out how they can be parents through surrogacy. Sometimes the information that they obtain is accurate and at other times the information is wildly inaccurate or misleading. I applaud the continuing efforts of VARTA to provide information to members of the community. If the Reproductive Technology Council is to remain after this review, it ought to do likewise. I have simply lost count of the number of Western Australian clients who have a paucity of information about their options of family formation. One might have thought it was the remit of the statutory authority, the RTC, to provide that information; but to date it has not done so to any meaningful extent, at least on the feedback given to me by my Western Australia clients.

The numbers, as I indicated above (and no doubt Associate Professor Allan may well have more up-to-date numbers), are approximately 40 children a year born through surrogacy in Australia and 250 born overseas. These numbers demonstrate what I see in everyday practice – a continued

frustration by intended parents about there not being available egg donors or surrogates. According to recent news reports, which are consistent with what I have seen in practice, is that the number of surrogacy arrangements approved each year by the Reproductive Technology Council in Western Australia is approximately one.

The number of approved surrogacy arrangements is similar to that of South Australia, a State with a population of 1.7 million, AWOTE in Western Australia as of November 2017 is approximately $91,000 a year, according to the Tasmanian Treasury. By comparison, according to the same source, the amount in South Australia is $75,000. One would expect a higher number of approved surrogacies in Western Australia, given the higher population and higher income.

Western Australia has a population of just under 2.5 million people. The Australian population is approximately 24 million. In other words, approximately one in every 10 Australians reside in Western Australia. One might expect, based on the national numbers that if surrogacy is being entered into at the same rate in Western Australia as it is in the rest of the country, then:

- there should be 4, not 1 surrogacy journeys a year domestically;
- there should be 25 international surrogacy journeys a year.

It is alarming to think that for every child born through the domestic regime of surrogacy in Western Australia, 24 or 25 children might be born overseas. Even if it is say, 20 to 1 that says that there is something drastically wrong with the regulation of ART and IVF in Western Australia.

Western Australian intended parents are voting with their feet – and going elsewhere.

The cost of surrogacy varies dramatically, and one might think, encourage intended parents to stay at home and not go abroad. The figures I estimate from asking my clients:

- Cost of surrogacy – east coast Australia – $30,000 to $70,000;

- Cost of surrogacy – USA – $145,000 to $300,000 (although an agency has a VIP program where the cost is about $400,000);

- Cost of surrogacy – Canada – $120,000 as a ballpark figure.

The temptation is to produce a perfect form of stringent regulation, the aim of which is that no-one is exploited, human rights are protected and that appropriate safeguards are in place. A model of stringent (as opposed to adequate) regulation will inevitably fail, because it does not take into account human behaviour and the digital world in which we live.

The challenges are:

- Consumers who want to be parents will increasingly adopt solutions *for them*, not solutions imposed by regulators. The rise of Uber and the demise of taxi licensing is a clear parallel of consumerism at play.

- Consumers will increasingly adopt digital "solutions" and seek information from the web information available to them in seconds.

- If consumers perceive that regulations are too stringent, and don't strike the right balance – they will go elsewhere. This has already been demonstrated to have occurred in Western Australia with surrogacy regulation.

- The risk in their doing so is that some go to jurisdictions where there is no or minimal human rights framework. The challenge is to ensure that the balance of regulation is such that, with adequate safeguards, that intended parents are encouraged to be parents at home, not abroad.

- The current settings mean that intended parents who go to well-regulated jurisdictions with strong human rights based approaches, such as the US or Canada are treated the same as those who go to developing countries which often lack any protections or regulation.

- Those who had given up the idea of ever becoming parents, are increasingly aware that they now can become parents – and demanding solutions. If those solutions are not available at home, they will go abroad.

To say that there is currently successful regulation of surrogacy in Western Australia is akin to Yes Minister's Sir Humphrey Appleby boasting of the success of a hospital as having the best statistics in the country – a hospital that had no patients.

8. General commentary on the profile of those undertaking surrogacy

I do not keep specific figures about the sexuality of my clients. Because of biology, it is not surprising that a large number of those who intend to become parents through surrogacy are gay couples. From my experience it is not a majority. From my experience with Western Australian clients, about 50% are heterosexual couples, just under 50% gay couples and then others are singles.

This matches what I have seen nationally which is that there are a small number of single intended parents (primarily men) seeking to be parents through surrogacy, a small number of lesbian couples seeking to access surrogacy and the occasional transgender intended parent.

One may think that lesbian couples will never access surrogacy because if one woman could not get pregnant then the other can. Although not common, nature is not always so kind. On occasion lesbian couples need to access surrogacy.

Similarly, one might expect with a gay couple that if the sperm of one does not work, then they can become parents using the sperm of the other. On uncommon occasions, I have had gay couples who have needed to undertake sperm donation in order to become parents through surrogacy.

The desire to become parents is just as strong with clients who are:

- heterosexual couples;
- gay couples;
- lesbian couples;
- single; and
- other.

Similarly the desire to conceive and love a child seems to make little difference as to whether there is a genetic connection between the intended parents and the child.

Example of Judy:

Judy lives in New South Wales. She is a single woman. Judy sought to have a local surrogate, somewhere in Australia. Despite her best efforts, she was not able to locate anyone. This is not

uncommon – and is reflected in the number of births of children born overseas as opposed to those born domestically. Being a single woman, Judy also needed a sperm donor.

Judy was also unable to reproduce and needed an egg donor. Judy was also unable to source a local egg donor, i.e. someone in Australia. Accordingly, Judy felt that she had no option but to undertake surrogacy overseas or never become a parent, a concept that was completely alien to her.

Judy underwent surrogacy in Canada. ART was undertaken in the United States, utilising both a US sperm donor and a US egg donor. Twins were conceived and born. A Canadian court ordered the transfer of parentage to Judy.

Judy travelled home to Australia with her twins, who obtained Australian citizenship.

It is unclear if the children have a legal parent relationship with Judy under the *Family Law Act 1975* and *Status of Children Act 1996* (NSW). The children are much adored by their mother, Judy, her parents and members of extended family and friends.

Example of Don:

Don and his wife underwent surrogacy in Western Australia. They had great difficulty in finding a surrogate, until a friend offered to do so. Don and his wife found the statutory regime under the *Surrogacy Act* extremely onerous. Whereas the Act has a 3 month cooling off period before RTC approval, in reality it was 6 months. This meant that the process from the beginning until RTC approval was obtained was almost 2 years.

Their friend did not get pregnant.

Instead, frustrated with the process and not prepared to spend another 2 or 3 years in Western Australia locating a surrogate and then seeking approval, Don and his wife went to California. They found the approach in California by all concerned (lawyers, doctors, counsellors etc.) extremely professional, respectful of the surrogate and her human rights and transparent. A child was conceived and born. An order was made transferring parentage to Don and his wife. They travelled home to Perth and obtained Australian citizenship. Don's message was never to go through surrogacy in Western Australia and encouraging everyone to undertake surrogacy in California or the United States.

He said to me to the effect: *"Everyone else is getting paid: doctors, lawyers, counsellors and the judge. Yet the woman who bears the most risk, including the risk of death, namely that of the surrogate, is the only one not being paid. That doesn't make any sense."*

9. Is money the motivation?

The expenses paid for Australian surrogates varies from case to case, but from my experience has been between $8,000 and $30,000, often in the range of $11,000 to $15,000.

The one case in which my firm acted where the surrogate's expenses were $30,000 involved a surrogate who ceased work for medical reasons – and the intended parents had not obtained income protection insurance for her. If that insurance had been obtained, the cost would have been much lower. The Court in making the parentage order was aware of the amount.

Canada has an altruistic model of surrogacy. A typical Canadian surrogate will be reimbursed

expenses of up to a cap of C$20,000 to C$22,000.

The US is viewed typically as having a commercial model of surrogacy. However, it was made plain in *Re Halvard*, surrogacy in the US may be within Australian definitions of altruistic surrogacy.

Surrogacy regulation in the US varies from State to State and often is judge made law. My US colleagues have made plain to me that judges there expect certain norms to be met in the terms of the gestational carrier agreements – including caps on the amounts that surrogates receive by way of base compensation.

Base compensation varies considerably across the US from as low as US$20,000 in some places to typically US$37,000 to US$42,000 in California. With two highly regarded, long established surrogacy agencies the base compensation is as high as US$60,000.

While money is a clear motivation, the message I have received time and again from lawyers, surrogacy agencies and surrogates is that the prime motivator for surrogates is giving the gift of life, not that of money. There is some limited research to this effect also.

Surrogacy agencies in the US avoid would-be surrogates who are indigent or in receipt of social security, for obvious risk reasons:

- The would-be surrogate is acting out of financial desperation, the wrong motivation; and
- Therefore may be more inclined not to care for the unborn child properly through the pregnancy, or indeed call off the surrogacy.

Surrogates in the US and Canada from my experience are typically usually working or middle class women. All have typically finished high school. Most are married. Some cohabit with male partners. Some are single. A few are lesbian. Some have college degrees and a few have post graduate qualifications.

The profile of US and Canadian surrogates is little different in my experience to Australian surrogates: most of whom are working or middle class, most are married, some de facto, some single, a few lesbian. Typically Australian surrogates have finished high school. Some are professionals. One was a chief financial officer, and another a doctor.

10. The myth of rich intended parents

While surrogacy is not cheap, it is untrue to assert that the only people who undertake surrogacy are rich.

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 US surrogacy agencies. Those with not so deep pockets do not and either go to cheaper US surrogacy agencies, to Canada, or to other cheaper destinations, such as the Ukraine.

Due to their ethnicity, Australians may seek to undertake surrogacy in their country of origin. For example, Greek Australians may do so in Greece.

11. Comparison with interstate models

As Professor Allan is well aware, the House of Representatives' surrogacy inquiry in 2016 recommended that there be national non-discriminatory laws as to surrogacy. That report has not been acted upon in any way. Nevertheless, there are plain difficulties with the model of regulation of surrogacy in Western Australia and difficulties with interstate arrangements.

Example of George and Mildred:

George and Mildred lived in London, where George had a very successful career in the City. They are unable to conceive children except through surrogacy. George's sister-in-law, Elizabeth who lives in Brisbane with her husband Philip offers to be the surrogate. George and Mildred, Elizabeth and Philip enter into a Queensland surrogacy arrangement. They can do this even though George and Mildred do not live at the time of signing in Queensland. In accordance with the ANZICA counselling guidelines, counselling has to occur in person prior to entry into the surrogacy arrangement. That counselling occurred.

After the birth of the child, George and Mildred move to Queensland. As they are resident in Queensland at the time of the hearing of the application, they are able to obtain an order from the Childrens Court of Queensland transferring parentage to them.

The *Surrogacy Act 2008* (WA) does not have that flexibility and would have prevented a couple such as George and Mildred coming within the regulatory regime of the Act, including ultimately judicial oversight of the process. They would have been denied parents if the surrogate had been living in Western Australia – unless they had moved to Western Australia at the time of entry into the surrogacy arrangement. It is likely that if George and Mildred were unable to access a regulatory regime allowing family surrogacy, they would have undertaken surrogacy in the U.S.

Example of Bill and Ben:

Bill and Ben are farmers in Western Australia. They are a couple who want to have a child. They are denied access to the *Surrogacy Act* because they are a gay couple.

They undertake surrogacy in the United States – where they are recognised by a Court order as the parents. In doing so they realise that they may be committing a criminal offence in Western Australia. Nevertheless, they have obtained citizenship for their child who resides with them. It is doubtful, in light of the decision in *Bernieres and Dhopal* [2017] FamCAFC 180 that they have a legal parent/child relationship under the *Family Law Act* and therefore for inheritance purposes.

Example of Frida and Benny:

Freda and Benny are a couple living in northern New South Wales. Frida is genetically male but is transgender. Frida has had surgery and identifies as female. She and Benny wish to have a child. They approach a Queensland IVF clinic. They are able to proceed with surrogacy because:

(1) the *Surrogacy Act 2010* (NSW) does not discriminate;
(2) the *Surrogacy Act 2010* (Qld) does not discriminate;
(3) the *Surrogacy Act 2010* (NSW) allows IVF to occur anywhere;

(4) the *Surrogacy Act 2010* (Qld) does not prevent doctors in Queensland from providing treatment for patients outside Queensland for surrogacy if the surrogacy journey is an altruistic one.

If Freda and Benny had been living in Western Australia:

- It is uncertain as to whether they would be able to access the *Surrogacy Act*. Are they a heterosexual couple within the meaning of that Act?
- They are not able to access IVF clinics interstate. Intended parents do not have a choice. They are forced by the State regulation under the *HRT Act* and the *Surrogacy Act* to undertake their ART in Western Australia.

12. Changing nature of heterosexual couples seeking surrogacy

Ten years ago, those heterosexual couples seeking surrogacy typically had undergone endless rounds of IVF. IVF in Australia is funded in large part by a Medicare rebate if the doctor deems the patients to be medically infertile and the ART is not for the purposes of surrogacy. Eight to ten years ago heterosexual couples would often come in worn down by the rollercoaster ride of failed attempts at IVF involving elation, hope, anxiety and depression. Clients of mine have undertaken up to 32 rounds of IVF. All of this has been subsidised to some greater or lesser degree by the Australian taxpayer. Often this endless IVF would be undertaken because there was no alternative. Surrogacy was not readily available or talked about.

Times have changed. More commonly now heterosexual couples undertake 5 or less rounds of IVF before realising that they need to either obtain the assistance of an egg donor or a surrogate. The number of Australians who access egg donation overseas is staggering. In 2016 I visited a fertility clinic in South Africa. I was told by the director of that clinic that 3-5 Australian couples attend there *per business day* for the purposes of egg donation.

Australia in my view has rightly recognised that a child has a right to know their genetic origins. That is not the case in South Africa or most other places that have egg donation. Nevertheless, the regulatory challenge in Australia is to make egg donation easier so that intended parents don't pursue egg donation overseas. More importantly, for the benefit of the child who may be conceived from that egg donation that this occurs in Australia, not overseas.

The strong message that I receive from my clients – loud and clear – with the exception of Western Australia, is that my clients would rather undertake IVF and with everything associated with it at home and not overseas.

Why I say that there is an exception with Western Australia is that my clients in Western Australia generally would prefer to undertake ART in Western Australia. However, many of them are aware that the costs of IVF in Western Australia is the most expensive in the country, typically another $2,000 to $3,000 per IVF cycle compared to undertaking IVF in Brisbane, Sydney or Melbourne. One might wonder why that complained of cost is so much higher. I speculate two possible reasons:

1. The isolation of Perth and a comparative lack of competition in Perth as compared to fierce competition in the eastern capital cities;
2. The regulations set out in the directions of the Commissioner of Health.

The details of the Directions and their conflict within the *Ethical Guidelines* in placed would mean that Western Australia IVF clinics likely would spend more than interstate clinics on meeting the regulatory compliance burden. That cost burden, inevitably, is passed onto intended parents (before they contact me).

Why shouldn't someone living in Perth be able to easily access IVF services of a doctor of their choice somewhere else in Australia, when those doctors are subject to largely the same regulatory regime for medical practice with AHPRA, and (except when surrogacy is involved), the cost of ART is met by the Commonwealth taxpayer?

13. Compensation

In my view, surrogates ought to be properly compensated and should no longer be out of pocket. Surrogates have a real risk of death. They endure all kinds of expenses. The definition of *reasonable expenses* contained under section 6 of the Act is simply too narrow. It needs to be widened, along the lines of Queensland or New South Wales.

Example of Anne-Marie:

Anne-Marie was a surrogate in Brisbane. The intended parents lived in Sydney. During the course of her pregnancies, Anne-Marie would suffer backache. Anne-Marie sought that she have acupuncture and massages during the course of the pregnancy. Each of these was deemed to be a reasonable cost within the relevant sections of the *Surrogacy Act 2010* (NSW) and the *Surrogacy Act 2010* (Qld). Neither is a reasonable expense allowed under section 6(3) of the *Surrogacy Act 2008* (WA). If the parties had entered into this surrogacy arrangement in Western Australia, they would have been committing the offence of entering into a surrogacy arrangement that is for reward.

Quite simply, there are a myriad of different rules varying from State to State as to what is or is not commercial surrogacy. In my view, following decisions of the Family Court, there is much more of a blurred line as to what is commercial surrogacy in Australia (which I will detail below). In Victoria, for example, it is a criminal offence being commercial surrogacy to pay life insurance for the surrogate – even though by becoming pregnant and giving birth she has a risk of death. South Australia had similar rules but still South Australian legislation remains vague about what can be paid and what cannot be paid. Queensland and New South Wales have similar rules under their *Surrogacy Acts*, based on reasonable cost. In my view this is the most flexible approach and avoids arbitrary outcomes as to whether or not parties might be committing criminal offences by seeking to provide properly for their surrogate. The definitions under the Queensland and New South Wales Acts lead to a less likely outcome of the surrogate being out of pocket. If the aim is to ensure that the surrogate is adequately provided for, the definition of surrogacy arrangement that is for reward under section 6 of the *Surrogacy Act 2008* (WA) is woefully inadequate. Rather than protecting the surrogate, it leaves her financially exposed.

14. Recognition of interstate parentage orders

There is no specific recognition in the *Births, Deaths and Marriages Registration Act 1998* (WA) of interstate parentage orders. Such orders may arise with intended parents who live interstate but with a surrogate who lives in Western Australia. There ought to be such recognition similar to that contained under the New South Wales equivalent.

15. Publishing offence

It would appear that the utility of this offence has been outlived by reality. Every day anyone in Western Australia who wants to undertake surrogacy can open their mobile phone and within a few seconds see an advertisement to undertake surrogacy somewhere else – typically on a commercial basis. The law has little effect and one wonders about its utility.

16. Repeal of section 11 *Surrogacy Act*

Anyone who is contemplating undertaking commercial surrogacy ought to be able to obtain legal advice. The effect of section 11 is that anyone living in Western Australia cannot obtain legal advice from a lawyer in Western Australia if that person is contemplating undertaking surrogacy overseas – or indeed interstate.

The definition of *surrogacy arrangement that is for reward* is so narrow that:

- entry into an interstate surrogacy arrangement may constitute the committing of the offence;

- entry into a surrogacy arrangement in an altruistic jurisdiction, such as Washington State, Michigan, Virginia or Canada – may also constitute an offence in Western Australia.

As was made plain in the Baby Gammy case, *Farnell v. Chambua* [2016] FCWA 17, intended parents in Western Australia may inadvertently be committing the offence of entering into a surrogacy arrangement that is for reward by engaging in surrogacy overseas by virtue of section 12 of the *Criminal Code*.

Associate Professor Allan is well aware of my views that surrogates should be properly compensated, and this should be allowed under the Western Australian legislation. With appropriate checks and balances, the surrogate can be protected, such as:

- independent legal advice pre-signing;
- counselling pre-signing;
- written surrogacy arrangement;
- review by ethics committee of the relevant IVF clinic;
- post-birth assessment to recommend to the court as to the child's best interests;
- judicial oversight.

17. Language

The international term of those who wish to be parents through surrogacy is *intended parent*. This is commonly used in the courts in the United States and Canada and by colleagues in the United Kingdom. It is also the language of interstate legislation, such as Queensland and New South Wales. To be called *arranged parents* doesn't give credit to the role of those who wish to be parents. Similarly archaic language such as *substitute parents* seems as though their parenting is not real but fake. *Commissioning parents* sounds as though they have bought a baby in the same way that they might have commissioned a ship or the purchase of a car. 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.

18. Surrogacy arrangement not binding

Section 7 contains the common principle found throughout Australian surrogacy law. The principle contained within section 7 is a noble one. It is that a woman who has given birth should have the right to decide whether or not she should hand over the child. She should not be pressured or the subject of duress. Unfortunately, as seen in cases such as *Lamb and Shaw* [2017] FamCA 769, a surrogate has the ability to withhold the consent for any reason. There ought to be the ability nevertheless to transfer parentage even without her consent in circumstances other than those involving child protection issues.

The complaint that I have recently heard from UK colleagues is that because of the failure to ensure that the agreements are binding, the same problem exists in the UK where surrogates capriciously at times withhold consent causing untold grief to the intended parents and one must think failing the best interests of the child.

19. Eligibility

To ensure commonality across Australian States as to regulation, it is urged:

1. Adopt the model seen in New South Wales or Queensland. Almost 8 years of practice with the model demonstrate that in general it works very well, with flexibility and sufficient checks and balances to protect all concerned.

2. Consistent with that, change the definition of eligibility to that seen in New South Wales and Queensland – a model giving greater flexibility than under the *Surrogacy Act*.

20. Six month limitation

The 6 month limitation period is common across Australia. It was copied from UK legislation and was originally derived from an arbitrary source – the needs of a constituent of a Member of the House of Commons.

While intended parents should pursue an application as quickly as possible, greater flexibility should be allowed than currently exists if the intended parents fall outside the 6 month period, as seen in for example *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam).

21. The model for surrogacy regulation

Western Australia and Victoria are alone in requiring regulatory approval before the surrogacy arrangement can proceed. The model is that if regulatory approval has been obtained, then the process before the Court is straightforward. It is presumed that the regulator got it right.

Having advised many clients in Queensland, New South Wales, Victoria and South Australia about surrogacy, I don't see that there is anything particularly magical about there being a regulator. The taxpayer has to pay for the regulator. With the regulatory model the intended parents have to obtain the approval of the ethics committee of the IVF clinic and then obtain the approval of the regulator. Not having a regulator means that they still have to obtain the approval of the ethics committee of the IVF clinic. IVF clinics are very keen to ensure that they don't impose risk where it is unnecessary. They are very much risk averse. They do not wish to be viewed as risking their licences to operate or insurance.

As far as I am aware, the cooling off period in Western Australia is unique worldwide. I see no

great benefit from the cooling off period, but instead inbuilt delay.

There are many delays already inbuilt into the surrogacy journey, giving all concerned plenty of time to reflect and reconsider.

Surrogacy is not a journey for the faint hearted. It is the means of reproduction of last resort, and typically requires those involved to jump many hurdles.

Presumably the cooling off period was enacted because it was thought that intended parents undertake surrogacy on a whim. On the contrary, intended parents face a variety of hurdles in a long and costly journey. They don't ever undertake the journey on a whim.

The regulatory model in Western Australia and Victoria has in my belief two flaws:

1. It adds another step which really does not reduce risk to any great degree, but adds delay and a cost burden to taxpayers which does not exist for taxpayers in the other States.

2. It doesn't address what happens post birth. 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 arrangement had been approved by the Patient Review Panel in Victoria. Quite clearly, inadequate screening had occurred, despite there being a regulator. The parties fell out post birth. There was no mechanism for post birth assessment or counselling as there is in Queensland and New South Wales and as there is now to a limited degree (in part because of submissions that I made) in South Australia. If and when the parties fall out post birth, it is extremely helpful if there is some counselling or assessment process so that each of the parties know that they have been heard and they can move towards a workable solution with a minimum of acrimony. In my view, the post birth model as seen in Queensland or New South Wales works well. It is respectful towards the surrogate. In my view there doesn't need to be the relinquishment counselling as seen in New South Wales but if it is to occur, then it is best to occur from being given by the counsellor who provided the pre-signing counselling so that the surrogate and her partner only have to deal with two counsellors in the process, rather than three.

22. The challenge of children born overseas

There are likely now well over 100 children and maybe over 250 children born overseas to parents who reside in Western Australia. For many of those children, the parent/child relationship between them and their parents is doubtful, given the effect of the decision of the Full Court of the Family Court in *Bernieres and Dhopal* [2017] FamCAFC 180. Western Australia is blessed because unlike the other States, the Family Court of Western Australia is invested with both State and Federal jurisdiction. The WA Parliament can give the Court jurisdiction to make declarations that those who have undertaken surrogacy overseas are the parents of the children. Australia is a signatory to the *UN Convention on the Rights of the Child.* Article 8 in particular says that the child has a right to an identity. As recognised in the English case of, for example, *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) – the child's identity in reality is that with the intended parents.

We are right to be concerned about the impact of intended parents who have undertaken surrogacy in developing countries. Nevertheless, it is our obligation to protect the children. We are failing to do so by failing to recognise the parent/child relationship between them and their parents. These are not isolated numbers but likely vastly outnumber the number of children who have had orders made under the *Surrogacy Act.*

In the view of Justice Forrest, as set out in judgments below, it appears that the Commonwealth's view is that surrogacy is well regulated in the United States.

As the Australian Human Rights Commission made plain in its submissions in *Ellison and Karnchanit* [2012] FamCA 602, while one might not approve of the conduct of the parents, the children are innocent and need to be protected.

These children who have been born overseas ought to be protected as to their legal status. We ought not to have to wait for a *Hague Convention* to be in place covering the issue, a matter that may take another 5, 10 years or longer.

23. No need for the donor to sign

Western Australia is alone for requiring the donor to sign the surrogacy arrangement and thereby have legal advice and counselling. Nowhere else in the world to my knowledge is this a requirement. Donor recruited sperm, egg or embryos therefore cannot be used for surrogacy in Western Australia.

This step does not go to reducing risk (as opposed to surrogacy journeys occurring interstate) but does go to increasing cost and delay and lack of availability of surrogacy in Western Australia thereby increasing the chances of intended parents travelling overseas to access surrogacy. It ought to go.

24. Regulation of ART in Western Australia

One wonders at the utility of the Reproductive Technology Council. It has set out mandatory guidelines which are Directions in the Gazette of 30 November 2004.

Quite simply, the Directions ought to be in sync with the 2017 version of the National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research.*

They are not. The *Ethical Guidelines* are peer reviewed and involved a thorough consultation process over approximately 3 years. They are simply more flexible in many respects than the Directions under the Gazette, which no doubt reflected good practice on 30 November 2004 but are now inconsistent in some respects with the regime that otherwise applies across Australia.

I said above that I speculated that the cost of ART in Western Australia is higher than the eastern States in part because of the need to comply with regulatory requirements. WA doctors must not only comply with the *Ethical Guidelines* (as must doctors elsewhere) but also comply with the Act and directions and the latter two in preference to the *Ethical Guidelines.*

The *Ethical Guidelines* are comprehensive. Other than the desirability of a Central Register, one wonders at the utility of the regulation in Western Australia.

Example of Jack and Jill:

Jack and Jill want to be parents. Jack has terminal cancer. Many years ago he donated his sperm to be held in storage, in light of his diagnosis. Jack wishes Jill to become a mother using his sperm.

Jack and Jill marry two weeks before his predicted death. Jack lives on for another couple of

months and then dies.

Jack's sperm is stored in a laboratory in Perth. Jill still wants to become a mother. Because of the *Directions*, treatment cannot occur in Western Australia. In order to become a mother, the sperm is shipped to an IVF clinic in Brisbane. There is then compliance with the *Ethical Guidelines*. In addition to verifying consent, legal advice as to compliance, counselling for Jill (with a report) and an adequate period of mourning, Jill is then able to proceed to become a mother using Jack's sperm. At all times Jill resided in Perth.

25. The need for the continuation of functions conferred, on the Council and on the CEO respectively by the *HRT Act*

In my view, the Council adds a small cost to the Western Australian taxpayer. The risks that are evident with the ART journey and surrogacy in particular are no greater alleviated in Western Australia than anywhere else by its existence. One wonders its utility. It hasn't updated its Directions since 2004, 14 years ago. The legislative pathway to undertake surrogacy appears to be inordinately difficult in Western Australia compared to interstate. The Council if it has published material about how to become parents has been far less active than its Victorian equivalent.

26. International commercial surrogacy arrangements

As I mentioned above, people from Western Australia have gone to the United States and Canada for the purpose of surrogacy. The provisions of sections 6 and 8 of the *Surrogacy Act* and section 12 of the *Criminal Code* means that they may have in some cases committed an offence under Western Australian law. No-one has been prosecuted. In 2014 the then heads of Australian family law, Chief Justice Bryant of the Family Court of Australia and Chief Justice Pascoe of the Federal Circuit Court of Australia called for the repeal of laws criminalising Australians undertaking commercial surrogacy overseas. They said that the laws were ineffective but if they were there they ought to be enforced and if not enforced (as was the pattern across Australia) they ought to be repeated because to do otherwise was to make a mockery of the law. Nothing has changed since that statement was made in late 2014. No-one has been prosecuted for undertaking surrogacy overseas.

Intended parents from Western Australia have also undertaken surrogacy in the Ukraine and in the past, Thailand.

New Life Agency which seems to have a specialty of setting up in developing countries, has in the past offered surrogacy in India, Thailand, Cambodia and Mexico and now has set up surrogacy in Kenya. In my view, we can't control what happens in overseas countries such as Kenya. Several of our jurisdictions have had laws criminalising those undertaking commercial surrogacy overseas, in Queensland's case since 1988. Very few prosecutions occurred in Queensland for any type of surrogacy and indeed it seems that not one person has ever been prosecuted for undertaking commercial surrogacy overseas in any Australian jurisdiction. As was obvious in *Farnell v. Chambua*, Mr and Mrs Farnell clearly believed that they had not committed any offence in Western Australia, even though they may have done so in pursuing surrogacy in Thailand. They weren't prosecuted, despite the case receiving the most extraordinary publicity.

In my view, the laws in Western Australia concerning overseas surrogacy should reflect the reality and that is that Western Australians are going in large numbers overseas for commercial surrogacy because it is not available back home. They shouldn't be criminalised in doing so.

Instead, there should be greater ability to undertake surrogacy at home so that the temptation to go

abroad is lessened and that there is better regulation (including better protection of human rights) at home than may occur abroad, at least in developing countries.

If those in Western Australia undertake surrogacy abroad, then there ought to be the ability (currently denied them) to seek a declaration from the Court that they are the parents of the child – and thereby have judicial scrutiny by Judges of the Family Court of Western Australia.

27. Recognition of overseas surrogacy

There are currently three ways that overseas surrogacy journeys are recognised in Australia:

1. The intended parents live overseas, complied with the laws overseas and were recognised as the parents overseas. Those intended parents are therefore recognised as the parents here, in accordance with the decision of the Family Court of Australia in *Carlton and Bissett* [2013] FamCA 143.

2. There has been an overseas adoption of some kind. This overseas adoption may fall outside the terms of the *1993 Hague Convention on Intercountry Adoption*, such as a second parent adoption for surrogacy. Because there has been an adoption, then by virtue of the definition of *child*, *parent*, *adopted* in section 4 of the *Family Law Act 1975* (Cth), then we have the bizarre outcome that parent 2, namely the second parent through a second parent adoption is a parent for the purposes of the *Family Law Act* and inheritance, but parent 1 may not be, in light of the decision in *Bernieres and Dhopal.*

3. The limited exception in which US surrogacy orders are able to be registered in Australia.

28. Registration of US surrogacy orders

On three separate occasions, Justice Forrest of the Family Court has registered US surrogacy orders in Australia:

- *Re Halvard* [2016] FamCA 1051;
- *Re Grosvenor* [2017] FamCA 366;
- *Sigley and Sigley* [2018] FamCA 3.

In all of these cases the Court had to consider, as a matter of discretion, with the tests set out in *Re Grosvenor*, whether it was appropriate to register the overseas order, in light of public policy considerations amongst other things. His Honour noted that the Commonwealth has accepted that judicial processes in US jurisdictions concerning surrogacy are appropriate. His Honour had the benefit of reading the gestational carrier agreement in each of the three cases.

In *Re Halvard* the solicitor submitted that it was a commercial arrangement under the *Surrogacy Acts* of New South Wales and Queensland, but his Honour disagreed, saying that it was reasonable but generous compensation to the surrogate and was not commercial surrogacy masked as altruistic. In *Re Grosvenor* and in *Sigley and Sigley*, his Honour was satisfied that each surrogacy arrangement was commercial but nevertheless thought it appropriate to register the overseas order.

I acted in both *Re Grosvenor and Sigley and Sigley*. The process, whilst cheaper and quicker than obtaining a declaration of parentage under the *Family Law Act,* is still nevertheless not a streamlined one. For example, in *Sigley and Sigley* from recollection the material was lodged with the Court in August but the judgment was not delivered until the following January. No doubt there are pressing demands on judicial resources.

29. International trade in gametes and embryos

There remains a worldwide shortage of sperm. From discussions I have had with representatives of sperm banks at previous Fertility Society of Australia conferences, there is a worldwide growth in demand per annum of about 5% - an extraordinary growth. US sperm banks, such as Seattle Sperm Bank, Xytex Sperm Bank and California Cryobank export to Australia.

The limit under 8.1 of the *Directions* of no more than five recipient families worldwide means that it is likely to be unviable for these sperm banks to provide sperm to clinics in Western Australia. This may well result in intended parents in Western Australia travelling somewhere else to access donor sperm, where the limits are not so tight. It would appear by comparison that the limit of five families in New South Wales appears to be five only in New South Wales and not a worldwide limit, for example. I note that the number set under the *Ethical Guidelines* is *reasonable.*

Having a cap is designed to ensure that inbreeding does not occur by accident but that there is available sperm. If there is not available sperm because sperm banks overseas won't deliver to WA clinics, one wonders the point of the cap.

I am aware that there is a small number of eggs imported into Australia from the United States, in compliance with NHMRC *Ethical Guidelines* requirements and for those that occur in Victoria the further requirements of VARTA and its legislation.

Even if the RTC were to be abolished and the *Directions* repealed, I would anticipate that the import of any eggs into Western Australia will be minimal given the strict requirements under the *Ethical Guidelines.*

I am not aware of any international trade in embryos whether in and out of Australia or elsewhere.

Intended parents ship their embryos from Australia to overseas clinics, for use in implantation in the intended mothers in these clinics or for use in their surrogacy journey.

Intended parents who do so on the gauntlet of regulation in both countries. In Australia, this means compliance with the *Ethical Guidelines* plus compliance with any State requirements.

Due to the stringent requirements of the *Ethical Guidelines* (let alone any State requirements), it is extremely difficult to import embryos into Australia.

In addition to any other regulations, Commonwealth regulations requiring the Minister for Agriculture's consent for the export of cattle embryos has meant that at times there have been delays at the border so that officials can be satisfied that the embryos being exported are human embryos, not cattle embryos.

Prior to 9/11, there were stories of intended parents carrying their embryos overseas. Following security upgrades post 9/11, my understanding is that this is not occurring, but that all exports of embryos are carried by specialist freight handlers instead.

There have been occasional reports of those who ship their embryos overseas having their embryos lost or destroyed in transit.

Yours faithfully

Stephen Page
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Accredited Specialist Family Law

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