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**Parenting and Children's Issues:
International Commercial Surrogacy and the risk of abuse**

INTRODUCTION¹

The trafficking of new-borns has evolved in sophistication with the ease of travel and medical advances in technology. The Peter Truong case graphically illustrates the terrible consequences for new-born babies of an unregulated market where new-borns are no more than tradeable commodities. In that case, a new-born boy was trafficked into the custody of two men, Peter Truong and Mark Newton, who smuggled him into America and legally adopted him. From the age of 21-months to 6 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 to meet around the world.

Further, the dire situation of Baby Gammy highlights the plight of surrogate mothers and unwanted commissioned children. This scandal is accentuated by the commissioning parent being a convicted paedophile, which potentially exposes the child to danger. The most basic of background checks on the father is glaringly absent.

¹ I wish to acknowledge the contribution of my Legal Associate, Mr Benedict Porter, in preparing this paper.

Both cases reveal that the international commercial surrogacy (“**ICS**”) market can, and is, being used by people ill-suited to be parents, driven by cash with no oversight by any regulating body, and likely to expose vulnerable women and children to terrible abuse.

Surrogacy is the new ‘front line’ in the trafficking and commodification of women and new born children.

In strict terms, surrogacy technology is a blessing. Recent scientific and technological advancements have played the proverbial stork and delivered babies to the arms of otherwise childless parents.² However, the blessing is arrived at via the participation of more than the traditional two parties. And often with large quantities of cash. It is here that the door for exploitation and abuse is opened. Laws are needed to protect the weak and vulnerable in an increasingly popular market, largely ignored by legislators, apart from grand gestures of criminalisation that are then ignored by citizens and prosecutors alike.

This paper will discuss the medical and legal vulnerability of the surrogate mother and the new born child, the predators and traders who exploit the gaping loopholes in the law, the role of the commissioning parents, and the commodification of mostly poor women and new-borns.

WHAT IS SURROGACY?

Justice Benjamin of the Family Court of Australia helpfully provides a useful legal definition of the practice:

“[A]n arrangement whereby a woman (‘the surrogate mother’) agrees to conceive and bear a child, which she intends to transfer to another or

² It is noted that the intended parent may be a sole mother or sole father or a couple, same-sex or otherwise. For the purposes of this paper, the plural ‘parents’ will be used, for convenience only.

*others (the ‘commissioning couple’ or ‘commissioning husband’ and ‘commissioning wife’) upon the child’s birth.”*³

Justice Benjamin tactfully omitted the words “genetically related” and could have omitted the word “conceive” as, oddly enough, neither are strictly necessary for a baby to be born via surrogacy means. A surrogacy arrangement can either be made on a commercial basis; that is, an arrangement where the surrogate mother is paid a fee, above and beyond reimbursement for her pregnancy-related expenses, to carry and birth the child; or altruistic surrogacy; that is, an arrangement where the surrogate mother is reimbursed for her pregnancy-related expenses only. The latter of these two arrangements is legal in Australia, and indeed, most other international jurisdictions, with a few notable exceptions such as China and Germany. The former is illegal in most jurisdictions, with a few notable exceptions such as India and Ukraine

There are several different types of surrogacy;

- Gestational (or Total) surrogacy: A surrogate mother is inseminated with an embryo created by in vitro fertilisation (“**IVF**”), using the egg and sperm of the intended parents. The resulting child is genetically related to both the intended parents, and genetically unrelated to the surrogate mother.
- Gestational surrogacy and egg/sperm donation: A surrogate mother is inseminated with an embryo created by IVF, using the intended father's sperm and a donor egg or the intended mother's egg and donor sperm. The resulting child is genetically related to either the intended father or mother and genetically unrelated to the surrogate mother.
- Gestational surrogacy and donor embryo: A surrogate mother is inseminated with a donor embryo created by IVF; such embryos may be

³ *Lowe & Barry and Anor* [2011] FamCA 625, at [5].

available when other people, undergoing IVF treatment, have embryos left over, which they opt to donate or sell to others. The resulting child is genetically unrelated to the intended parents and genetically unrelated to the surrogate mother.

- Traditional surrogacy: A surrogate mother is naturally or artificially inseminating with intended father's sperm via inter-uterine insemination (“**IUI**”), IVF, or home insemination. The resulting child is genetically related to intended father and genetically related to the surrogate mother.
- Traditional surrogacy and donor sperm: A surrogate mother is artificially inseminated with donor sperm via IUI, IVF, or home insemination. The resulting child is genetically unrelated to the intended parent(s) and genetically related to the surrogate mother.

Having listed the options available to hopeful-parents, it is easy to see how difficult it is to comprehensively and consistently legislate. Moreover, legal definitions of “parent” differ greatly between jurisdictions. I should also point out that surrogacy does not only cater to those who are infertile, or homosexual men. ‘Political surrogacy’, especially in China, is seen as a viable way to circumvent draconian government family planning policies; and ‘social surrogacy’ serves the fashion conscious and lazy who want a child but not the ‘inconvenience’ of child birth.

THE ISSUES

Desperate desire to have a child

Many would-be parents, who can offer a child a good life but cannot themselves conceive, experience an aching desire for a child to nurture and care for. The outright prohibition on commercial surrogacy in Australia has led large numbers of Australians to enter into surrogacy contracts abroad. Jurisdictions, such as India, Ukraine, and the US states of Florida and California, actively

permit commercial surrogacy, leaving such arrangements to be determined by the market. The market determines the terms of the contact,⁴ from the fee for the surrogate mother to the behaviours that she is to favour or avoid for the duration of her pregnancy,⁵ As Justice Ryan recently commented in the case of *Mason & Mason*⁶ (“**Mason**”), this unregulated market creates a ‘troubling’ environment for vulnerable women who have little bargaining power.

The unregulated market creates an unwholesome race to the bottom; commissioning parents may engage in “*rampant forum shopping...seeking the best surrogacy prices and conditions.*”⁷ In 2012 in India, the reproductive tourism industry was worth an estimated US\$500 million,⁸ with over 600 surrogacy treatment clinics assisting 60,000 commissioning parents a year.⁹ One participant of this unbridled trade in procreation described the process as “*like going to the supermarket to pick up your baby.*”¹⁰ Effectively, and at best, the cost involved in ICS – the expense of paying the fees to the agency, which includes the fee to the surrogate mother, and the airfares – is the only factor directly regulating the ICS market.

Good parents?

A looming issue in the debate surrounding surrogacy is that, in an unregulated market, there are no checks on the commissioning parents. The Peter Truong case shows that background checks will not always be successful, as Truong and Newton appeared to be honest parents.

⁴ Margret Ryznar, ‘International Commercial Surrogacy and Its Parties’ (2010) 43 *John Marshall Law Review* 1009, 1016.

⁵ Frank Langfitt, “Made in the USA: Childless Chinese Turn to American Surrogates.” NPR News Agency. 21 April 2014

⁶ [2013] FamCA 424.

⁷ Margaret Ryznar, Op Cit. 1011.

⁸ Anil Malhotra and Ranjit Malhotra, “All Aboard for the Fertility Express” (2012) 38 *Commonwealth Law Bulletin* 31, at 31

⁹ Neeta Lal, *Risks flagged in India’s fertility tourism* (1 August 2012) Asia Times Online www.atimes.com/atimes/South_Asia/NH01Df01

¹⁰ Heath Aston, ‘It was like going to a supermarket to pick up your baby’, *Sydney Morning Herald*, 2 September 2012, 16.

However, a simple background check on the father involved in the recent Baby Gammy incident would have shown his criminal convictions for child sexual abuse.

The Child Exchange Network in the US clearly illustrates exactly how easy and how toxic conditions can be for children who are treated as commodities. The best interests of the child demand that being desperate or affluent is not seen as equating with being a good parent.

Need to protect the human rights of the surrogate mother, the surrogate child, and the commissioning parents

The difficulty in discussing the issue of surrogacy is reconciling each of the parties' roles in the arrangement. Each is critical and should be equal, however this is not the reality. As such, there is a real risk that human rights may be ignored for the sake of completion of the contract.

The surrogate mother must endure the physical trauma of pregnancy and birth, and it is she who must endure the psychological pain of surrendering the child after its delivery. Moreover, in terms of many surrogacy contracts, the surrogate mother is effectively renting out her womb, and by doing so, relinquishing her rights to autonomy over her body; on one view, this is a type of uterine indentured slavery. The issue of consent is important as proper informed consent differ across jurisdictions and financial hardship may compel a surrogate mother to 'consent' under duress.

The child's rights are severely compromised in an ICS environment as the new-born has no way of being able to defend itself. Moreover, the presence of a contract and payment for services rendered, reduces a new born child to the status of tradable merchandise. The varying definitions of 'parent' across jurisdictions, the ambiguity of genetic heritage, and very real possibility of trafficking all expose the new-born child to serious human rights violations,

even in circumstances where all parties have good intent and are in agreement. The rights of the child are most commonly protected by its parents, however in cases where parentage is ambiguous or disputed, the child is exposed to being stateless or at least genetically bewildered.

Finally, 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.*”¹¹ This is, of course, not to be read as encouraging an infertile individual or couple to have a child in circumstances that ignore or violate the rights of another. One must question and scrutinise the intentions and parenting abilities of those who commission a child especially when they do so in circumstances of which they know are illegal or exploitative, and violate the rights of others

Australian lawyers who facilitate such dealings are particularly reprehensible. They expose their clients to damaging consequences, including the prospect of prosecution, not being able to take custody of the child, and being left in legal ‘limbo’. It is difficult to see how this is consistent with the lawyer’s role as an Officer of the Court, and seems to be driven purely by a desire to make money. An impression reinforced by the cases seen in the Courts to date.

THE LEGAL POSITION IN AUSTRALIA

One would think that strict laws controlling visa entry into any country, boosted by laws in relation to citizenship, and the ensuing difficulty of getting a child without papers into the commissioning parents’ home country would be disincentive enough to prevent the ICS trade from flourishing. This, however, is

¹¹ Declaration on Social Progress and Development, United Nations General Assembly resolution 2542 (XXIV), art.4

to underestimate both the desperation of the commissioning parents and the legal disconnect in Australia. Once a child is in Australia, the Courts are presented with a legal and ethical conundrum.

Best Interests of the Child

For all Australian States and the Australian Capital Territory, commercial surrogacy arrangements are illegal.¹² However, the Family Law Courts are governed by the *Family Law Act 1975* (Cth) which has the overriding purpose of acting in the “best interests of the child.”¹³ This leaves the Courts in a difficult situation where the birth mother is said to have relinquished her rights and responsibilities as the parent of the child, the commissioning parents may have broken the law by entering into an ICS agreement, and have brought the child back to Australia where the child’s status is uncertain. In such circumstances, it is almost impossible¹⁴ 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.¹⁵ As Justice Ryan commented in *Ellison & Karnchanit*,

*“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.”*¹⁶

¹² Queensland, New South Wales, and the Australian Capital Territory regard the illegality as criminal and apply the law to its’ inhabitants extraterritorially. See: *Surrogacy Act 2010* (Qld), s 56; *Surrogacy Act 2010* (NSW), s 8; *Parentage Act 2004* (ACT), s 41; *Assisted Reproductive Treatment Act 2008* (Vic), s 44; *Surrogacy Act 2012* (Tas), s 38; *Family Relationships Act 1975* (SA), s 10H; *Surrogacy Act 2008* (WA), s 8. The Northern Territory has no legislation relating to surrogacy although the ‘National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (2007)’ provide that it is ethically unacceptable to undertake or facilitate pregnancy for commercial purposes (at [13.1]).

¹³ *Family Law Act 1975* (Cth) s.60CA

¹⁴ Two matters have been referred to the Queensland Director of Public Prosecution for consideration of criminal prosecution: *Dudley v Chedi* [2011] FamCA 502 and *Findlay v Punyawong* (2011) 266 FLR 236; [2011] FamCA 503. Neither matter was pursued by the DPP.

¹⁵ Philippa Trowse, “Surrogacy – competing interests or a tangled web?” (2013) 22 Qld Lawyer 199, at 199

¹⁶ [2012] FamCA 602 at [87]

Justice Ryan continued, quoting Justice Hedley of the High Court of England and Wales in the matter of *X and Y (Foreign Surrogacy)*;

“The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order...If public policy is truly to be upheld, it would need to be enforced at a much earlier stage than the final hearing...The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.”¹⁷

ICS arrangements raise many concerns about the rights and interests of the children involved. From the beginning, the child’s future is often uncertain. Prior to birth, the child’s status remains the subject of legal debate, and vulnerable to usurpation of others.¹⁸ Post-birth, questions surrounding the child’s parentage and nationality remain.

Parentage vs Parenting Orders

In Australia, there are no laws that recognise parentage under ICS arrangements. Therefore commissioning parents are left to seek parenting orders. It is important to distinguish ‘parentage’ from ‘parenting’ orders. Parentage orders are orders of the Court that declare who are the legal parents of the child, often resulting in the issuance or reissuance of an amended birth

¹⁷ *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 at [24]; [2009] 1 F.L.R. 743

¹⁸ For the discussion of when does a child’s legal personality begin, see Claire Achmad, ‘Contextualising a 21st century challenge: Part One Understanding international commercial surrogacy and the parties whose rights and interests are at stake in the public international law context’ (2012) *New Zealand Family Law Journal* 190, 195.

certificate.¹⁹ The Australian government will only bestow citizenship on a surrogate child if that child has parentage orders issued by a State or Territory²⁰.

Parenting orders are orders of the Family Court or the Federal Circuit Court of Australia that determine who cares for the child. Apart from the conflicting policy goals, on which I will elaborate, parenting orders fall well short of a commissioning parent's ultimate goal to become parents. The orders merely designate parental responsibility.

This area is fraught with conflict and tension between two significant policy goals. On the one hand there is the Federal policy goal of protecting the best interests of the child. However, on the other hand, there is the State and Territory policy goal of protecting women and children from 'commodification' and exploitation. From the desperate parents' point of view, as Justice Hedley clearly identifies above, their final hurdle is entry into their home country. Once the entry visa is secure, then at least parenting orders are almost a *fait accompli*.

The acquisition of the entry visa can often be done via fraudulent means, as seen in the Peter Truong case below. Legal identity based on fraud, however temporary, again exposes the child to danger and pushes ICS further into unregulated and unknown territory.

It is worrying that some intended parents, desperate for a child to the point of willingness to break the law, may seek to hide the child so as to avoid potential prosecution.²¹ This conundrum is best illustrated by the number of confirmed commercial surrogacy births commissioned by Australians, estimated

¹⁹ See, *Parentage Act 2004* (ACT), s 24(c); *Surrogacy Act 2010* (NSW), s 31(1); *Surrogacy Act 2010* (Qld), s 20; *Family Relationships Act 1975* (SA), s 10HB(2)(a); *Status of Children Act 1974* (Vic), s 20(1)(a); *Surrogacy Act 2008* (WA), s 12; and *Surrogacy Act 2012* (Tas), ss.14 and 15.

²⁰ *Australian Citizenship Act (2009)* (Cth), s.8.

²¹ Jenni Millbank, Submission to 'Family Law Council: Report on Parentage and the Family Law Act' December 2013, at 5; Surrogacy Australia, Submission to 'Family Law Council: Report on Parentage and the Family Law Act' December 2013, at 3; Et al.

at several hundred per year,²² set against the few Parentage Order applications filed in the Courts.²³ Questions and uncertainties abound: What is the status of these children? Are they with appropriate adults? What is the legal relationship between the child and those who are raising him or her?

The disharmony between State and Federal objectives does nothing to protect overseas surrogate mothers, or indeed the children to whom they give birth. Despite the disharmony and evident failure of prohibitive commercial surrogacy laws, there seems little legislative interest in remedying the situation. It is noted that to date only one MP has questioned whether it is in the best interests of the child to have their parents incarcerated as a result of the circumstances of their conception.²⁴

The recent publication of the Family Law Council's Report on Parentage and the Family Law Act, whilst in my view manifestly inadequate, is at least an indication that reform proposals are being considered.

It is surely appropriate to ask; why have criminal sanctions against a practice if the laws are not intended to be enforced? The Rule of Law is brought into disrepute. Federal Judges are left to make discretionary orders, in violation of State laws, so as to protect the best interests of a vulnerable child.

Nationality

Often, the commissioning parents' names may not be recorded on the child's birth certificate, rather listing the surrogate mother's name and the father as 'unknown'. This can create difficulties in obtaining passports and travel documents for the child. If parentage and nationality cannot be established there

²² Family Law Council, 'Report on Parentage and the Family Law Act' December 2013, at 99

²³ *ibid*

²⁴ Jenni Millbank, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21(1) Griffith Law Review 101, 126

is the potential that the child may be left “*marooned, stateless and parentless.*”²⁵ This is exactly the case for the twins ‘of’ Norwegian citizen, Ms Volden, who commissioned a child via a donor embryo gestational surrogacy arrangement. The Indian Government does not consider the Indian surrogate mother the parent of the twins, rather the commissioning parent Ms Volden, and so will not recognise the twins as Indian. However, Norway does not recognise Ms Volden as the mother of the twins, as they were born through an ICS arrangement and are not genetically related to her.²⁶ Such a situation is in direct conflict with the child’s right to acquire nationality from birth, guaranteed under Art.7(1) of the United Nations Convention on the Rights of the Child.²⁷ However neither country will issue citizenship.

International Law offers little protection to vulnerable surrogate mothers and their children. The Permanent Bureau to the Hague Conference on Private International Law has drawn attention to the inability of current anti-human trafficking conventions to deal with ICS.²⁸ ICS therefore remains in a situation similar to that of international adoption prior to the 1993 Hague Adoption Convention.²⁹

However, International Law is developing. In June this year, the European Court of Human Rights effectively overturned a ruling of the French Court of Cassation. The European Court declared that it was contrary to the child’s human right to Family Life for the French government, a party to the European Convention on Human Rights,³⁰ to deny a surrogate child French

²⁵ *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at [10]; [2009] 1 F.L.R. 738

²⁶ See generally: Sumitra Deb Roy, “Stateless twins live in limbo” *The Times of India*, 2 February 2011

²⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

²⁸ Hague Conference on Private International Law, ‘Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference’, p21-22.

²⁹ The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993)

³⁰ Convention for the Protection of Human Right and Fundamental Freedoms, Rome, 4 November 1950. See Article 8 - Right to Respect for Private and Family Life

citizenship if the surrogate child shared a genetic relationship with the biological parent-citizen, even though any form of surrogacy is illegal in France.³¹ The European Court concluded that such a denial of citizenship undermined the child's identity within French society and, despite the child's parent holding French citizenship, the child would face uncertainty of nationality, which would then have negative repercussions for the child's self-identity.

The recent publication of the Family Law Council's Report on Parentage and the Family Law Act recognises the legal problems encountered by a child born through ICS when brought back to Australia. The Council recommended a mechanism for Judges to follow so as to more easily transfer parentage. Whilst this recommendation may provide relief for children already in Australia with respect to their 'parent', the recommendation seems to tacitly encourage Australians to participate in ICS, which seems extraordinary and ignores major issues of human rights protection. It is hard to see the Family Law Council's recommendations as other than a disappointing avoidance of the real issues in ICS.

EXPLOITATION

In 2009, the Standing Council of Attorneys-General raised concerns about the practice of unregulated commercial surrogacy, noting it "*risks the exploitation of poor families for the benefit of rich ones.*"³² This risk becomes especially relevant where wealthier commissioning families rely on 'middlemen' to make the necessary arrangements. The language is, however, fraught with misnomers. The agency clinic is often not a middleman, but the contracting party. The commissioning parents contract with the agency to

³¹ *Mennesson v France; Labasse v France* ECHR 185 (2014). The decision may be appealed by 26 September 2014.

³² Standing Committee of Attorneys-General Joint Working Group, *A proposal for a National Model to Harmonise Regulation of Surrogacy* (2009), 4-5.

produce a baby via surrogacy. The commissioning parents supply the required genetic material to the agency, indeed the agency may source some or all of the genetic material for the procedure themselves. The clinic then implants the embryo into the surrogate mother, whom it has sourced, and with whom it has a service contract. As such, privacy of contract precludes any relationship between the commissioning parents and the surrogate mother. In fact, the terms ‘surrogacy agreement’ or ‘surrogacy contract’ are a misnomers; in very few jurisdictions are surrogacy contracts actually enforceable at law. The gaps are widened by different laws governing ICS in in different jurisdictions.

As the facilitators connecting the childless parents with the often desperately poor surrogate mother, the agencies make a healthy profit from ICS. Agencies provide the fertilisation facility and procedure for the parties, supply food, accommodation, and nursing for the surrogate mother, handle the receipt and payments of monies, and diplomatic papers and ultimate delivery of the baby for the commissioning parents.

The unethical practices of many surrogate agents, including lawyers, driven by the desire for money, include a lack of informed consent, a distortion of the risks faced by the surrogate mother and baby, inflation of success rates, and the prescription of unnecessary treatments.³³ The control over the surrogacy mother’s body can have dire consequences for the birth mother, especially where surrogacy agencies insist on unnecessary caesarean births to comply with birthdate requests and return-travel itineraries.

The Plight of the Surrogate Mother

In surrogacy arrangements, the person most at risk is the surrogate mother. Pregnancy health concerns aside, her vulnerability and dependence on the other players in the arrangement, devalue her humanity as a “*object of*

³³ Ibid.

reproductive exchange.”³⁴ Flimsy contractual rights, lack of education and/or properly informed consent, and often dire poverty as the driving force behind participation in the arrangement means that she is most likely to be exploited in the business deal. Ultimately, she is in a position of others having power over her body.

It is not uncommon for commissioning parents never to meet the birth mother.³⁵ This additional degree of detachment removes another potential protection for the surrogate mother. The commissioning parents generally do not want to exploit the surrogate mother; they want a fair deal – money for labour. But, as they generally do not want the surrogate mother to be a part of their lives beyond the birthing-service, commissioning parents often remain at arm’s-length so as to avoid “*messy personal involvement*”.³⁶ This ‘messy personal involvement’ is what deters many European governments from condoning any form of surrogacy; “*it is wrongheaded to create children whose relationship with the woman who provided the egg or carried them will be severed.*”³⁷

Moreover, clinics often limit the surrogate mother’s contact with their own families during the course of the pregnancy. This isolates the surrogate mother, cutting her off from any emotional and family support, with the intention of increasing her docility and compliance.

A further consideration is that of the social stigmatisation that many surrogate mothers experience as reaction to their work, which is often classed as

³⁴ Mark Henaghan, “International Surrogacy Trends: How Family Law is Coping” (2013) *Australian Journal of Adoption*, Vol 7, No.3, at [5.0]

³⁵ Achmad, op cit, 193.

³⁶ Pamela Laufer-Ukeles, ‘Mothering for Money: Regulating Commercial Intimacy’ (2013) 88 *Indiana Law Journal* 1223, 1270.

³⁷ Tamar Lewin, *Coming to US for baby, and womb to carry it. Foreign couples heading to America for surrogate pregnancies.* New York Times. 5 July 2014. www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies

dirty or immoral. This is especially so in India.³⁸ There are also no guarantees that the surrogate mother will even be adequately paid. All too often, the money is kept by the agency, or by a husband or other family members.³⁹

Such detachment dehumanises the surrogate mother; she is a living incubator, imprisoned and controlled in an intentionally commercialised setting. This detachment from family, combined with the cultural and geographical distance of the commissioning parents, results in the isolated surrogate mother relying on, and thus vulnerable to, the unscrupulous and covert practices of some agencies and “*provides a ground ripe for unethical practices.*”⁴⁰

Caesarean births are promoted by agency clinics as they can control the birthing schedule and inflate prices for ‘guaranteed, on-time delivery!’ and not necessarily nor substantially passed on to the surrogate mother who undergoes the surgery. Indeed, little thought or information is given to the birth mother in some clinics about the potential consequences of such procedures.⁴¹ Nor is support always offered to the surrogate mother after the birth. In one tragic Indian case, reported in 2010, a surrogate mother was thrown out of a surrogacy clinic immediately after a successful caesarean birth. This mother was suffering from post-birth complications and, as the clinic had no further contractual obligations towards her, was instructed to find care at a public hospital. The surrogate mother died before her husband could transport her to the nearest public hospital.⁴²

³⁸ Claire Achmad, ‘Contextualising a 21st century challenge: Part Two Public 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, 212.

³⁹ Ibid.

⁴⁰ Usha Smerdon, ‘Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India’ (2008) 39 *Cumberland Law Review* 15, 29.

⁴¹ Smerdon, op cit, 29.

⁴² Scott Carney, *Inside India’s Rent-a-Womb Business* (10 March 2010) Mother Jones <<http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>>.

It is a common term in many surrogacy contracts entered into in India that where the surrogate is diagnosed with a life-threatening illness during pregnancy she is to be:

*“Sustained with life support equipment to protect the foetus viability and ensure a healthy birth on the genetic parents’ behalf.”*⁴³

This focus on protecting the foetus and not the mother reduces devalues her humanity; the subject of the contract (the baby) is to be protected so as to carry the contract through to completion, however adverse to the host (the surrogate mother).

Consent

The issue of consent is important, and indicates the surrogate mother’s voluntary willingness to participate in the arrangement, and critically not to be the legal parent of the child. However, there are many questions as to the freedom of the surrogate mother when she gives consent. Academics argue that consent cannot be freely given when made in circumstances of financial desperation.⁴⁴ Moreover, others argue that first-time mothers cannot give actual consent as they do not have a full understanding of what they are consenting to. Some jurisdictions that allow altruistic surrogacy limit surrogacy participation to only those who have previously carried and given birth.⁴⁵

In *Mason*, as mentioned above, an illiterate mother signed an agreement purporting to limit her ability to manage her health during the pregnancy and to make decisions about the delivery of the baby.⁴⁶ Effectively, her body was at the behest of the commissioning couple and enforced by the controlling agency.

⁴³ Pamela Laufer-Ukeles, ‘Mothering for Money: Regulating Commercial Intimacy’ (2013) 88 *Indiana Law Journal* 1223, 1268.

⁴⁴ Mark Henaghan, “International Surrogacy Trends: How Family Law is Coping” (2013) *Australian Journal of Adoption*, Vol 7, No.3, at [5.0]

⁴⁵ Merryn Ekberg, ‘Ethical legal and social issues to consider when designing a surrogacy law’ (2014) 21 *Journal of Medical and Law* 728, 731-2

⁴⁶ *Mason & Mason* [2013] *FamCA* 424, [4].

In such arrangements, the surrogate mother's body is effectively rented out, and the baby, when born, is a commodity. The notion of informed consent in such a case is laughable.

Lack of evidence of consent poses a problem for judges considering parentage orders where evidence of consent is not available, as discussed by Justice Baker of the High Court of England and Wales, in the matter of *D, L (Minors)*⁴⁷:

*“[24] 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... [25] 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 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.”*⁴⁸

Justice Baker eventually made parentage orders stating that the applicants had made serious and not *“half-hearted [n]or token attempts to find the surrogate [mother].”*⁴⁹ The Indian clinic refused to assist in locating her to the point of being hostile and the only point of contact listed for the surrogate mother was a false address.

Such obvious lack of care for the surrogate mother and her post-birth well-fare is truly alarming.

⁴⁷ *D, L (Minors) (Surrogacy) and in the Matter of Human Fertilisation and Embryology Act 2008* [2012] EWHC 2631 (Fam); [2013] 2 FLR 275

⁴⁸ *Ibid*, at [24]-[25]; [2013] 2 FLR 285

⁴⁹ *Ibid*, at [28]; [2013] 2 FLR 286

Reproductive Trafficking

Surrogacy agency practices can resemble those used by human or sex traffickers. Agents looking for potential surrogate mothers prey on unsophisticated and often illiterate rural women, who they then compel to move to major cities away from their family. One surrogate mother recalled her recruitment process in the following terms; “*Madam told me I should become a surrogate and if I do, all my worries will go away.*” This woman was also told to “*think of the pregnancy as ‘someone’s child comes to stay at your place for nine months.*”⁵⁰

In one critic’s view, this process should more accurately be labelled ‘reproductive trafficking’ because:

“*[I]t creates a national and international traffic in women in which women become moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer.*”⁵¹

The notorious ‘Baby 101’ case, where 13 Vietnamese women were trafficked to Thailand, imprisoned, and raped so as to be impregnated, the children being sold to mainly Taiwanese buyers, is a telling example of how such a view is by no means fanciful or exaggerated.⁵²

Where women are not physically trafficked, the marginalised nature of most surrogate mothers raises serious questions about whether socio-economic or familial coercion was a causative factor in the final decision to become a surrogate mother. Putting it bluntly:

⁵⁰ Sam Dolnick, *Pregnancy Becomes Latest Job Outsourced to India* (30 December 2007) USA Today <http://www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm>.

⁵¹ Janice G Raymond, *Reproduction, Population, Technology and Rights* (1998) ISIS International <http://www.isiswomen.org/index.php?option=com_content&view=article&id=534:reproduction-population-technology-and-rights&catid=134>.

⁵² See AFP, *Women freed from ‘inhuman’ baby ring* (25 February 2011); ABC News: <<http://www.abc.net.au/news/2011-02-25/women-freed-from-inhuman-baby-ring/1956588>>.

*“The choice between 9 months of being well-fed and medically monitored as a surrogate (even if behind lock and key) is far superior to being forced into prostitution internally or trafficked for sex in other nations...where women face brutal conditions of sex work/slavery.”*⁵³

Finally, there remains the question of what rights a surrogate mother has if she decides to keep the baby to whom she gave birth. It is unlikely that a surrogate mother would be able to retain the baby due to her unprotected rights and vulnerability to the agency. However it is not unheard of for the surrogate mother to abscond with a surrogate baby.⁵⁴ The illiterate and poor surrogate mothers used in ICS arrangements in developing countries are far removed from those in the US who are comparatively educated, have access to the law, and may not live in poverty; differences clearly shown in the famous *Baby M* case.⁵⁵ This vulnerability places the surrogate mother at considerable risk of psychological harm resulting from the loss of the baby,⁵⁶ especially in Traditional surrogacy, where the mother is genetically related and more likely to form a closer bond to the child.⁵⁷ In a chilling example of what is described as ‘counselling’ but can only be seen as brainwashing, one client liaison officer for a Chinese surrogacy clinic stated; “[We] tell them every day that the baby in their stomach isn’t your baby...It is emotional comfort...”⁵⁸

These are several examples from the plethora of reasons why commercial surrogacy is banned in Australia and many other jurisdictions. It is morally reprehensible for developed countries to be involved in exploiting the

⁵³ Karen Smith Rotabi and Nicole Footen Bromfield, “The Decline in Inter-country Adoption and New Practice of Global Surrogacy: Global Exploitation and Human Rights Concerns” (2012) 27 *Affilia* 129, 136.

⁵⁴ Ian Johnson and Cao Li, “China Experiences a Booming Underground Market in Child Surrogacy.” *New York Times*. 3 August 2014

⁵⁵ *In re Baby M*, 537 A 2d 1227 (NJ 1988).

⁵⁶ Mark Henaghan, “International Surrogacy Trends: How Family Law is Coping” (2013) *Australian Journal of Adoption*, Vol 7, No.3, at [5.0]

⁵⁷ Pip Trowse, ‘Surrogacy: Is it harder to relinquish genes?’ (2011) 18 *Journal of Law and Medicine* 614, 617-18.

⁵⁸ Ian Johnson and Cao Li, “China Experiences a Booming Underground Market in Child Surrogacy.” *New York Times*, 3 August 2014.

vulnerability of women in developing countries, whilst banning the practise at home. For reasons that will be discussed below, developed countries with an effective Rule of Law, should make ICS illegal but make domestic commercial surrogacy legal to allow proper regulation, supervision, and protection for all parties involved.

NASTY REALITIES

I wish to discuss a few actual cases to which I have previously alluded, to illustrate the vulnerability of the surrogate mother and child and how devastating failure to regulate ICS will be.

First, I refer to the insidious set of circumstances of the Peter Truong and Mark Newton case. These two, now incarcerated, ‘fathers’ purchased a new-born baby from a mother in Russia for US\$8,000, after several failed attempts at ICS arrangements. With falsified documents, the trio entered America and the fathers legally adopted the child. The child was then regularly sexually abused from the age of 21-months to 6 years old. As he grew, he was instructed and groomed and abused and video-taped for posterity, not only by his fathers, but by those to whom he was offered around the world organised via online child abuse forums. The abuse only stopped when police agencies, mostly by luck and coincidence, arrested the fathers.

The Pennsylvanian case of *Huddleston*⁵⁹ also highlights this risk. There, a young man commissioned a surrogate child as the sole intended parent. The surrogate infant died, six weeks after being delivered to the commissioning father, as a result of severe physical abuse.⁶⁰

⁵⁹ *Huddleston v Infertility Center of America, Inc.*, 700 A.2d 453 (Pa. Super. Ct. 1997).

⁶⁰ Hague Conference on Private International Law, op cit, at 19.

The very recent Baby Gammy situation⁶¹ offers another illustration of vulnerability and potential for abuse. This involved an Australian convicted paedophile abandoning the twin of a commissioned child in Thailand, born with Down's Syndrome, and retaining his healthy twin sister. The surrogate mother was forced to lie to the Australian Embassy that the birth was not the result of an ICS agreement,⁶² resulting in the issuing of a genuine (but based on inaccurate information) visa. Such circumstances sound alarm bells about the future safety of the baby daughter in the commissioning father's care and for the disabled baby son left in the poor surrogate mother's care. A complete lack of background checks on the commissioning father's criminal past allowed such arrangements to proceed unimpeded. Furthermore, the surrogate mother, who entered into the arrangement for financial reasons, is now left to care for the disabled child. There are no laws protecting her position, nor that of the child. Moreover, under Thai law, the birth mother is deemed the child's legal parent. In Ukraine, however, the genetic parents are deemed the child's legal parents, as discussed in *Re X & Y (Foreign Surrogacy)* above. If Baby Gammy's situation had arisen in Ukraine, then the baby would have no 'parent' in the country where he was located.

Finally, the US Child Exchange Network, uncovered by Reuters in 2013, offers another sinister situation ripe for abuse if applied to a commercial surrogacy situation. The Child Exchange Network involved online notice boards for parents who wanted to either 'off-load' a problem child or 'pick-up' a child for whom to care. The parties would typically meet at an arranged cafe or carpark, sign over power of attorney of the child to the stranger, hand over the child, and leave. Should the parents involved with Baby Gammy have returned

⁶¹ Widely reported in Fairfax and other Australian media outlets, commencing 1 August 2014. Lindsay Murdoch, "Australian couple leaves Down's Syndrome Baby with Thai Surrogate" Sydney Morning Herald, 1 August 2014.

⁶² According to Joan Smith, "The Truth Behind Thai Fertility Tourism" Bangkok Post, 5 August 2014, at 1

to Australia with both children, and wanted to ‘off-load’ the handicapped Gammy via a similar network, then who is to say what type of person will receive him. Indeed, Baby Gammy may be exposed to the same potential ‘off-load’ if his Thai surrogate mother were unable or unwilling to care for him.

A WAY FORWARD?

In the past six years there has been a 300 per cent rise in the number of Australians entering into ICS arrangements in India alone.⁶³ Obviously, Australians are not deterred from ICS despite the practice being illegal in Australia. With Australian domestic laws failing to deter desperate parents, and international laws unable to deal with the newly arisen practice, money is the only gatekeeper to ICS.

In the interests of protecting woman and children it is necessary to reconsider Australia’s present position on commercial surrogacy, not only for its own citizens but so as to contribute to the international community’s struggle with ICS and related child abuse and human trafficking.

Firstly, the need for a uniform approach from State and Federal governments is central for Australia to effectively move towards any proposed model of commercial surrogacy regulation. Academics have suggested that to avoid a black market trade in commercial surrogacy emerging further, Australia should consider legalising and regulating commercial surrogacy domestically.⁶⁴ This model would be open only to Australian citizens, to prevent ICS tourism, and so commissioning parents, agency clinics, surrogate mothers, and children can be adequately treated, observed, regulated, and prosecuted if necessary.

⁶³ Amy Corderoy, ‘More parents defy law with overseas surrogacy’ *The Sydney Morning Herald* (Sydney), 14 September 2013, at 3.

⁶⁴ Merryn Ekberg, ‘Ethical legal and social issues to consider when designing a surrogacy law’ (2014) 21 *Journal of Medical and Law* 728, at 729.

Such arrangements within Australia should ensure that surrogate mothers and the children receive adequate medical care and legal protection if either suffers any physical, emotional, legal, or financial harm. In addition, strict rules around record keeping and when a child is to be informed of his or her genetic origins could also be enacted to protect the rights of the child.⁶⁵

Regulation should also ensure that surrogate mothers are properly informed prior to entering the agreement and thus capable of giving fully informed consent. In addition to such a requirement, it may also be advisable for Australia to consider prescribing a compulsory education course for surrogate mothers. The exploitative elements that exist in the economics of commercial surrogacy, as suffered by the women who presently participate in commercial surrogacy arrangements in developing countries, will need to be closely monitored so as not to “*create a situation in which [the industry] coerce[s] people economically.*”⁶⁶

Any amendment to the *Family Law Act 1975* (Cth) to encompass surrogacy arrangements should include a provision dealing with the situation where a surrogate mother changes her mind, either to terminate the pregnancy or to not give up the child. It is recommended that such a provision provide that the commissioning parents not be able to sue the birth mother in the event she declines to relinquish the care of the child. In effect, this would mean that the contract between the birth mother and commissioning parents would not be enforceable.⁶⁷ This is an ethical question ultimately up to the legislature to decide.

⁶⁵ See e.g.: *Human Fertilisation and Embryology Act 1990* (UK) and *Human Fertilisation and Embryology Act (Disclosure of Donor Information) Regulations 2004* (UK).

⁶⁶ Leslie Cannold, as quoted in “Call to Reform Surrogacy Laws” by Esther Han, *Sydney Morning Herald*, 9 December 2012

⁶⁷ As is the case in New Zealand. The *Human Assisted Reproductive Technology Act (2004)* (NZ) allows altruistic surrogacy but not commercial surrogacy, however s.14 states that any surrogacy contract is unenforceable.

Provision should also be made to prevent the commissioning parents being able to compel the birth mother to terminate the pregnancy or to have a caesarean birth. Moreover, the surrogate mother should not be prevented from suing the commissioning parents in the event that they were to decline to take responsibility for the care of the commissioned child.

At the very least, legalisation of commercial surrogacy in Australia would recognise reality and protect all parties. It also acknowledges the apparent gap in our world view, namely that somehow women in developing countries can be dealt with differently to women in Australia; that somehow their basic human rights can be ignored.

Despite decriminalising the practice in Australia, ICS may still remain popular because of its competitive prices and a lack of options for those denied access to the surrogacy regime in Australia due to failed background checks. This may result in women and children in other countries remaining vulnerable. To combat this, Australia should enact a hard-line regime to deter ICS. Such a regime may allow a shortlist of countries to be approved for ICS. The shortlisted countries must meet a minimum standard of support and protection for the parties, share the details of black-listed applicants, and be signatory to relevant human rights conventions.

ICS engaged in countries not on the shortlist is to be considered unlawful and the Government held responsible for enforcing laws to prevent the child entering Australia. As Justice Hedley stated above; “*The point of admission to this country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement.*”⁶⁸

These recommendations are far from perfect, but such measures would operate to protect vulnerable surrogate mothers and children and reduce the

⁶⁸ *X and Y (Foreign Surrogacy)* [2008] EWHC 3030 at [24]; [2009] 1 F.L.R. 743

commercial focus that has emerged in surrogacy arrangements. The focus should return to protecting human dignity and the rights of all parties concerned.

CONCLUSION

Government at all levels must be seen as having a responsibility to protect the poor and vulnerable, especially women and children. Our moral and legal obligations should not stop at the Customs barrier. How can we justify not allowing commercial surrogacy in Australia but allow ‘open slather’ elsewhere, knowing that there is a serious risk to the human rights of very vulnerable women and children?

As we have recently seen in Thailand, there is also a risk to those Australians wanting to be parents for all the best reasons who can be left in a legal limbo with consequent distress and potential adverse legal, emotional, and financial consequences.

A properly regulated commercial surrogacy regime in Australia would avoid many of the major pitfalls which currently exist, and eliminate the opportunities for unscrupulous middlemen, including lawyers, to exploit the vulnerabilities of those desperate to be parents for legitimate reasons, surrogate mothers, and the newly born.

A proper inquiry that enables all interested parties to be heard is to be commended. This is not an area for half-hearted or incomplete responses – it needs to be carefully considered and all sectors of the community given the opportunity to participate. We may then be in a position to implement a properly regulated legal regime for commercial surrogacy with appropriate protection and a real recognition of the human rights of all involved.