

JOINT SUBMISSION FROM FAITH LEADERS TO  
THE NSW DEPARTMENT OF COMMUNITIES AND JUSTICE

REVIEW OF THE SURROGACY ACT 2010  
AND THE STATUS OF CHILDREN ACT 1996

2 AUGUST 2024

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## Introduction

As representatives of faith communities comprising close to half the population of NSW and 80% of religious believers in this state, we are pleased to provide this submission to the NSW Department of Communities and Justice review of the *Surrogacy Act 2010 (Act)* and the *Status of Children Act 1996*.

While the view of surrogacy within our faith communities differs, we are united in our rejection of any liberalisation of surrogacy laws within the state. In particular, we oppose any proposals to permit commercial surrogacy arrangements, either domestic or international.

The risk of exploitation and abuse of women and children due to commercial surrogacy is well known. While we strongly agree with the principle that, in any decision-making relating to children, the best interests of the child must be paramount, we are also united in our shared concern for women who may be made vulnerable and mistreated through the practice of surrogacy. The welfare of both parties therefore requires that commercial surrogacy continue to be illegal in NSW and that any proposals to amend the Act do not expand the availability of surrogacy in this state.

We look forward to working with the Department of Communities and Justice and all Members of Parliament to ensure that vulnerable women and children are protected in this state.

## Concerns relating to all forms of surrogacy

Noting that the Act permits altruistic surrogacy arrangements, in this submission we address our concerns with the existing regime and make recommendations for reform that seek to address those concerns. We also focus on proposals put in of the Discussion Paper for potential amendment to the Act to allow commercial surrogacy arrangements.

It is first necessary to briefly highlight concerns that are common to all forms of surrogacy, commercial or altruistic, so that this submission is not viewed as a blanket endorsement for the laws already in place and problems already present with the Act are recorded. Notwithstanding the fact that surrogacy is legal within New South Wales, the gravity of the implications of the practice for those involved and the paucity of data on its effects mean that great caution should be exercised. In light of those concerns below we make recommendations for reform of the current law and to enable the collection of data.

Children are entitled to be born into the care and affection of both a mother and a father. Each of a father and a mother plays a unique role in a child's life and a child has the right to be raised by them, wherever possible. Importantly, the rights belong to the child, rather than the 'right' of a parent to have a child.

It is not the role of Government to make any means available to individuals suffering from infertility to obtain a child. There are already many children in our society in need of nurture and parental care which can be given through means, such as through adoption or fostering, that are ethically non-contentious. Marriage (lifelong commitment between a man and woman) is the ideal foundation for a family, whereby through the act of sexual intercourse, the child is conceived, creating continuity between biological and social roles. While the vicissitudes of life can prevent this ideal from being realised, we nonetheless believe this should be the aim in the creation of new families.

Furthermore, while research regarding the long-term effects of surrogacy is scanty, there is evidence that potential dangers exist. What research has been done is difficult to generalise due to methodological problems such as non-representative sampling. A review of the psychosocial research into surrogate mothers, commissioning mothers and offspring has shown that there are multiple issues of concern, including in respect of the welfare of the child, the welfare of the surrogate and the welfare of siblings of the child.<sup>1</sup> The long-term effects of the psychological impact of relinquishing a child have not been well examined, but there is some evidence that surrogates are often deeply upset by the process, suffering separation anxiety and depression when they have to hand over the baby, and that even when happy to relinquish the child at birth, the surrogate's beliefs and preferences may not be stable over time.<sup>2</sup> Reports exist of the surrogate's own children fearing that they may be relinquished.<sup>3</sup>

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<sup>1</sup> Van den Akker OBA. Psychosocial aspects of surrogate motherhood. *Human Reproduction Update*. 2007;13(1):53-62.

<sup>2</sup> Van den Akker OB. A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy. *Journal of Psychosomatic Obstetrics & Gynecology*. 2005;26(4):277-84.

<sup>3</sup> Holder AR. Surrogate motherhood and the best interests of children. *The Journal of Law, Medicine & Ethics*. 1988;16(1-2):51-6.

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## Assisted reproductive technologies

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All forms of surrogacy arrangements involve assisted reproductive technologies that bear their own ethical considerations.

For example, the most recent data on assisted reproductive technology cycles in Australia and New Zealand recorded 111,253 *in vitro* fertilisation cycles occurring in 2021, resulting in 67,894 embryo transfers and 20,690 live births<sup>4</sup>. The number of embryos created and discarded, donated or frozen in these cycles is not recorded but there are clearly many more embryos created than will ever be transferred into their mother's womb.

Given that surrogacy uses *in vitro* fertilisation techniques, one ethical problem common to all forms of surrogacy is the creation of human embryos that will never be given the chance at life.

Additionally, it has been noted that there are health risks associated with a child born via surrogacy that are even greater than those for children born of *in vitro* fertilisation. These include “an increased likelihood of multiple pregnancies, increased mortality rate, low birth weight, early delivery and risks of genetic damage.”<sup>5</sup>

Proposals that would expand access to surrogacy in New South Wales would thereby expand the number of embryos created who will ever be given a viable chance at healthy life and so should be rejected on this basis.

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## Impact on children

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Section 3 of the Act names the guiding principle of its administration as “the best interests of the child of the surrogacy arrangement are paramount” and question 2 in the Discussion Paper asks if the Act ensures this is the case.

It is not possible to assess the impact until now of surrogacy legislation on the best interests of the child, because – as the Victorian Law Reform Commission (**VLRC**) noted – “there is limited empirical research available on outcomes of surrogacy arrangements, particularly in relation to outcomes for children.”<sup>6</sup> In the time since the VLRC report, literature reviews of studies that show no harm to children born of surrogacy arrangements have warned that these studies must be viewed with caution<sup>7</sup> due to their limitations. For example, the most frequently cited longitudinal study on children born of surrogacy had only 28 participants for the entirety of the study, with measurements of the psychological wellbeing of the children being provided by the commissioning mothers and not the children themselves<sup>8</sup>.

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<sup>4</sup> Newman JE, Paul RC, Chambers GM 2023. Assisted reproductive technology in Australia and New Zealand 2021. Sydney: National Perinatal Epidemiology and Statistics Unit, the University of New South Wales, Sydney.

<sup>5</sup> Pascoe J. Submission No. 35 to House of Representatives Standing Committee on Social Policy and Legal Affairs. *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements*. (February 2016).

<sup>6</sup> Victorian Law Reform Commission, author. (2007). *Assisted Reproductive Technology and Adoption Final Report 12* Retrieved July 29, 2024, from <http://nla.gov.au/nla.obj-2592087404>

<sup>7</sup> Söderström-Anttila, Viveca et al. “Surrogacy: outcomes for surrogate mothers, children and the resulting families-a systematic review.” *Human reproduction update* vol. 22,2 (2016): 260-76. doi:10.1093/humupd/dmv046

<sup>8</sup> Waters, E. 27 Mar 2024. Inconclusive: The Research on Surrogacy's Impact on Children, The Heritage Foundation. Available at: <https://www.heritage.org/marriage-and-family/commentary/inconclusive-the-research-surrogacys-impact-children> (Accessed: 29 July 2024).

What is known, however, are the increased risk of preterm birth, low birth weight and birth defects to a child born of assisted reproductive technologies<sup>9</sup> and that the environment that contributes most to the flourishing of children is being raised by their married, biological parents<sup>10</sup>.

In all its forms, surrogacy undermines the rights of children under international human rights instruments.

Article 7.1 of the Convention on the Rights of the Child (**CRC**) states:

*“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”*

Article 9.1 of the CRC provides:

*“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.”*

Article 9.3 provides:

*“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”*

The only way in which surrogacy arrangements can be seen as not departing from Australia's international human rights obligations is if the surrogate mother is not characterised as a parent of the child and the term 'parent' is instead used to define any person who raises a child, even if there is no genetic or gestational relationship. Such an interpretation, however, would render meaningless the obligations in the CRC. Additionally, the attachment between mother and child begins to occur *in utero*<sup>11</sup> and the separation of a child from its birth mother is known to cause emotional trauma.<sup>12</sup> For this reason, negating the role of the birth mother altogether when considering the human rights and best interests of the child seems injudicious.

Indeed, the attachment between mother and child is recognised and respected even when it comes to domestic animals, with the NSW Government Department of Primary Industries *Animal Welfare Code of Practice* for the breeding of dogs and cats stating that kittens and puppies must not be separated from

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<sup>9</sup> Pinborg, A., Wennerholm, U., Bergh, C. Long-term outcomes for children conceived by assisted reproductive technology, *Fertility and Sterility*, Volume 120, Issue 3, Part 1, 2023, pp. 449-456.

<sup>10</sup> Amato, Paul R. “The impact of family formation change on the cognitive, social, and emotional well-being of the next generation.” *The Future of children* vol. 15,2 (2005): 75-96. doi:10.1353/foc.2005.0012

<sup>11</sup> How mother-child separation causes neurobiological vulnerability into adulthood (2018) Association for Psychological Science - APS. Available at: <https://www.psychologicalscience.org/publications/observer/obsonline/how-mother-child-separation-causes-neurobiological-vulnerability-into-adulthood.html> (Accessed: 29 July 2024).

<sup>12</sup> *Ibid.*

their mother until they are more than seven weeks of age, and must not be re-homed before they are eight weeks of age<sup>13</sup>.

Others have interpreted the CRC as requiring at least one of the commissioning parents to be genetically related to the child born of surrogacy, but there is no such requirement presently in the Act<sup>14</sup>.

While neither the Act nor the Discussion Paper mentions any other children of the surrogate mother, it has been reported that they experience fear that they will also be relinquished<sup>15</sup>. As Chief Justice Thackray of the Family Court of Western Australia stated in a surrogacy matter before him:

*“It is noteworthy that no evidence was provided about the long-term impact on mothers of giving up children they carried, and there was no evidence of the impact on the children themselves. Nor was there any expert evidence of the impact on the other children of birth mothers who would have seen their mother pregnant, and perhaps felt the baby move in her belly, only to find that the baby never came home from hospital. Did those children wonder who would be the next to be given away? And what of their feelings of grief and loss if they were misled into believing the baby had died?”<sup>16</sup>*

In response to the question 4 in the Discussion Paper, the legislation does not adequately meet the needs of other children of the surrogate mother, and any review of the Act should include a requirement that the best interests of other children of surrogate mothers should also be a primary consideration.

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### *Impact on women*

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Surrogacy presents a dualistic view of womanhood, separating her physical reality from her emotional, psychological and spiritual experience. Surrogacy relies on the proposal that a woman can carry a baby in her womb for nine months with no significant or long-lasting emotional impact and that motherhood can be separated into as many as three different parts: genetic, gestational and intended.

Surrogate mothers are counselled to limit or sever any emotional connection with the child they are nurturing by, for example, not referring to themselves as mothers and speaking to the baby about his or her parents. However, this negates the impact of pregnancy on women. As Chief Justice Thackray noted:

*“[S]urrogate mothers are not baby-growing machines, or “gestational carriers”. They are flesh and blood women who can develop bonds with their unborn children.”<sup>17</sup>*

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<sup>13</sup> Department of Primary Industries. Animal Welfare Code of Practice Breeding Dogs and Cats under the *Prevention of Cruelty to Animals Regulation 2012*. August 2021. Available from: [https://www.dpi.nsw.gov.au/\\_data/assets/pdf\\_file/0013/1310431/INT21-114956-Breeding-Code-Document.pdf](https://www.dpi.nsw.gov.au/_data/assets/pdf_file/0013/1310431/INT21-114956-Breeding-Code-Document.pdf)

<sup>14</sup> International Social Service, Surrogacy (International Social Service 2021) Accessed <https://www.iss-ssi.org/index.php/en/what-we-do/en/surrogacy>; Winkler J. [Development of the maternal bond during pregnancy]. *Casopis lekaru ceskych*. 2000;139(1):5-8.

<sup>15</sup> Holder AR. Surrogate motherhood and the best interests of children. *The Journal of Law, Medicine & Ethics*. 1988;16(1-2):51-6.

<sup>16</sup> Farnell & Anor and Chanbua [2016] FCWA 17 at 757.

<sup>17</sup> Ibid.

In other circumstances, separation of mother and child is viewed as a tragedy and a mother is supported in her grief over that separation. However, surrogacy arrangements seek to reverse this, treating an inalienable right – a woman’s right to love and claim custody of the child she bears – as alienable<sup>18</sup>.

In motherhood, two natural and beautiful aspects of womanhood, the ability and desire to bear and raise children and the willingness to sacrifice self for the sake of others, are united. Surrogacy arrangements placed these in competition with each other, and a woman is encouraged to prioritise self-sacrifice over her ability and desire to nurture. This is especially the case when women are asked to act as surrogates for family members. As Professor Janice Raymond wrote:

*“[There] are unique affective “inducements” in familial contexts that do not exist elsewhere. Although there is no “coercion of contract” or “inducement” of money, there could be the coercion of family ties in which having a baby for a sister or another family member may be rationalized as the “greatest gift” one woman can give to another.”<sup>19</sup>*

In a similar vein, Kajsa Ekis Ekman wrote:

*“The only thing she gets is the halo of altruism, which is a very low price for the effort and can only be attractive in a society where women are valued for how much they sacrifice, not what they achieve.”<sup>20</sup>*

Alarming, the 2016 Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs report *Surrogacy Matters (Surrogacy Matters Report)* said that “a particular concern that was relayed to the Committee suggested that a number of women who have acted as surrogate mothers have suffered post-traumatic stress disorder following relinquishment of the child.”<sup>21</sup>

It is clear that surrogacy, even if altruistic, is inherently prejudicial to the welfare, mental and emotional health of birth mothers. The selfless act of motherhood, which begins by nurturing the baby in the womb is undermined and reduced to a mere ‘service’ or ‘process’ by surrogacy arrangements. Surrogate mothers who begin the journey of surrogacy cannot know how it will affect them and the industry is seemingly ill disposed to understanding how birth mothers fare, let alone committed to making their welfare a priority. It is clear that the surrogacy industry has a net negative effect on the wellbeing of women involved.

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### *Impact on parenthood*

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The desire to bear and raise children is a good and natural occurrence and the tragedy of infertility cannot be understated. Surrogacy is often proposed as a response to this very real human tragedy. However, this response is misguided because it gives credence to the erroneous idea that a couple, or individual, possesses the right to have a child.

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<sup>18</sup> Anderson, E. Is Women’s Labor a Commodity? *Philosophy & Public Affairs*, Vol. 19, no.1 (1990): 71-87.

<sup>19</sup> Raymond, J.G. Reproductive Gifts and Gift Giving: The Altruistic Woman. *The Hastings Center Report*. Vol 20, No. 6 (Nov-Dec 1990), pp 7-11.

<sup>20</sup> All surrogacy is exploitation – the world should follow Sweden’s ban | Kajsa Ekis Ekman (2016) *The Guardian*. Available at: <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban> (Accessed: 29 July 2024).

<sup>21</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (4 May 2016), [1.34].



A child is not a right, but a gift<sup>22</sup> and characterising the bearing of children as a human right risks prioritising the desires of parents – however good those desires are – over the rights and best interests of children. As the United Nations Human Rights Council wrote:

*“[It] is recognized that there is no “right to a child” under international law. A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing a “right to a child” would be a fundamental denial of the equal human rights of the child. The “right to a child” approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.”<sup>23</sup>*

As faith leaders we are deeply concerned that the NSW Government would seek to expand access to and normalise an industry that treats children as commodities rather than a gift to be cherished and protected by their parents and by society more broadly.

## Recommendations for Existing Regime

As articulated above, we have very real concerns about the wisdom of non-commercial surrogacy. As is noted in the Discussion Paper, due to these concerns some countries prohibit all forms of surrogacy, including France, Germany, Taiwan and Spain. The gravity of the above concerns mean that this option should not be discounted.

However, if altruistic surrogacy is to remain legal in NSW, then we propose several amendments to the existing regime.

The Act’s guiding principle (section 3) is based on the assumption that surrogacy can be in the best interests of the child. Section 3 provides:

This Act is to be administered by reference to the principle that, *in relation to any surrogacy arrangement*, the best interests of the child of the surrogacy arrangement are paramount. (emphasis added).

The best interests of the child should not be stated to be ‘in relation to any surrogacy arrangement,’ for, from the outset, this places the best interests of said child subservient and secondary to the interests of the adults seeking a surrogacy arrangement. The best interests should be considered without the presumption of a prior arrangement under the Act. Therefore, the substance of the following amendment should be effected to section 3:

*“Notwithstanding any provision of this Act to the contrary, this Act is to be administered according to the principle that the wellbeing and best interests of the child are paramount.”*

Additionally, non-commercial surrogacy should be subject to those arrangements and requirements that apply to adoption with regard to the suitability of the parents and ongoing relationship of the child to all parties involved. We would also recommend promoting an open relationship between all parties as occurs currently in open adoption.

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<sup>22</sup> Catholic Church. *Catechism of the Catholic Church: Revised in Accordance with the Official Latin Text Promulgated by Pope John Paul II*. United States Catholic Conference, 2000, n. 2378.

<sup>23</sup> United Nations Human Rights Council. Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material. (15 January 2018).

A Review Panel should be established for approval of surrogacy arrangements prior to conception (following the examples of Victoria<sup>24</sup> and Western Australia<sup>25</sup>) and for ensuring that the paramount consideration under the Act (as reformulated above) is observed.

Additionally, an ongoing and regular review by parliamentary committee should be built into the Act requiring the assessment of the operation of the legislation against the paramount consideration stated at section 3. Importantly, the Review should:

- (a) facilitate the giving of personal evidence by persons involved in the surrogacy process, including the experience of surrogate mothers, commissioning parents, and of children born of surrogacy arrangements (including impacts on the mental, psychological and emotional health of the foregoing);
- (b) have access to, and the ability to direct production of:
  - a. information on the number of surrogacy arrangements;
  - b. the number of embryos created and not used in the surrogacy process; the circumstances underpinning and the numbers of parentage orders applied for and issued and the reasons for refusal of those orders;
  - c. information on whether there are ongoing unethical or unscrupulous practices such as multiple embryo transfers to ensure a live birth with subsequent termination of pregnancy, or foetal reduction to the number of offspring desired by parents;<sup>26</sup>
  - d. information on whether applications for Australian citizenship by descent made for children born through international surrogacy were commercial surrogacy agreements or altruistic agreements in breach of the Act (a possibility contemplated in the Discussion Paper);<sup>27</sup>
  - e. breaches of the Act that have not been prosecuted and the factors underpinning such outcomes; and
  - f. applications made by children born of surrogacy arrangements and biological parents to access information on the Birth, Deaths and Marriages Register, and the outcome of those applications;
- (c) inquire into the efficacy of the Act's existing prohibitions and identify factors leading to breaches of the Act, including circumstances of coercion being applied to surrogates; and
- (d) be empowered to investigate into and make recommendations for reform to address any issues identified as a result of the above.

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<sup>24</sup> Patient Review Panel. Victorian Government. [www.vic.gov.au/patient-review-panel](http://www.vic.gov.au/patient-review-panel). Accessed 29 July 2024.

<sup>25</sup> Reproductive Technology Council. West Australian Government. [www.rtc.org.au/](http://www.rtc.org.au/). Accessed 29 July 2024.

<sup>26</sup> Best M. *Fearfully and Wonderfully Made*: Matthias Media; 2014.

<sup>27</sup> Discussion Paper, 9.

## Concerns specific to commercial surrogacy

By highlighting proposed amendments to the Act that are outlined in the *Equality Legislation Amendment (LGBTIQA+) Bill 2023 (Equality Bill)*, the Discussion Paper raises the possibility of legalising international commercial surrogacy. For this reason, it is necessary to outline some concerns that are either unique to, or exacerbated by, including a commercial element to surrogacy arrangements. Given the grave problems with commercial surrogacy highlighted below, and in response to the Discussion Paper's consultation questions 1, 2, 3, 7, 8 and 9, we strongly oppose any moves to legalise commercial surrogacy.

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### *Introduction of a commercial principles into familial relationships*

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The legalisation of commercial surrogacy arrangements involves the introduction of commercial norms and market values into the realm of the parent-child relationship.

These arrangements are not only contrary to the rights of the surrogate mother but also to the best interests of the child, because they facilitate a perception of a child that is similar to a consumer good not only available for purchase but, more disturbingly, market valuation. For example, it is not unreasonable to imagine that some commissioning parents would seek to include terms that placed conditions upon a surrogate mother's dietary habits, physical activity, working hours and medical care, and be given remedies under contract law if any of these were breached.

Former Chief Justice of the Family Court, John Pascoe, noted that this could harm the personhood and identity of a child, making them feel objectified and lacking self-worth<sup>28</sup>. As to its effect on women, Chief Justice Pascoe wrote that:

*"the market-driven focus behind commercial surrogacy arrangements often prioritises the completion of contractual obligations over the rights and wellbeing of the surrogate mother... in a situation where women's bodies are able to be rented out for the purpose of making and procuring a child, the woman is objectified, devalued and dehumanised."*<sup>29</sup>

Commercial surrogacy can encourage a mentality that reduce the child to a product, the surrogate mother to someone merely providing a 'service' and the purchaser someone who is effectively buying another human being — that is, commercial surrogacy turns human beings into commodities. We strongly oppose the introduction of commercial surrogacy in any form whatsoever in NSW.

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<sup>28</sup> Pascoe J, above, no. 5.

<sup>29</sup> Ibid

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## *Risk of abuse and exploitation*

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The links between commercial surrogacy, particularly international commercial surrogacy, and the abuse of women and children are widely known and reported.

The United Nations' *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*<sup>30</sup> is worth citing at length:

*"Abusive practices in the context of surrogacy are well documented. Examples include convicted sex offenders from Australia and Israel employing surrogate mothers from India and Thailand, a wealthy Japanese man employing 11 surrogate mothers, leading to the births of 16 infants in Thailand and India, the abandonment of a surrogacy-born infant with disability in Thailand, and the abandonment or sale of "excess" surrogate-born infants in twin births in India. Commercial surrogacy networks transfer surrogate mothers, sometimes while pregnant, across national borders in order to evade domestic laws; in one case, Vietnamese women were found and freed by Thai authorities, leading to human trafficking charges in the context of a baby-farming scheme.*

*"Many of these abuses occur in unregulated contexts, often in cases involving intending parents from Western countries employing for-profit intermediaries to contract with vulnerable surrogate mothers in developing countries. However, abusive practices also occur in purportedly well-regulated commercial surrogacy jurisdictions. For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements. According to governmental authorities, a prominent surrogacy attorney admitted that "she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over \$100,000. The convicted attorney told the local media that, as to abusive practices, she was the "tip of the iceberg" of a "corrupt" "billion-dollar industry"."*

The Australian case noted in the above resulted in a court order where the commissioning sex offender father was not permitted to be alone with his daughter born by surrogacy<sup>31</sup>. In his judgment ordering the father not be allowed alone with his daughter, Chief Justice Thackray commented that the case:

*"serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities, with all the usual fallout when contracts go wrong. The facts also demonstrate the conflicts of interest that arise when middlemen rush to profit from the demand of a market in which the comparatively rich benefit from the preparedness of the poor to provide a service that the rich either cannot or will not perform."*

Former Chief Justice of the Family Court, John Pascoe, was similarly scathing of international commercial surrogacy, saying:

*"The international commercial surrogacy market can be, 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*

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<sup>30</sup> United Nations Human Rights Council. Above, no. 23.

<sup>31</sup> Farnell & Anor and Chanbua [2016] FCWA 17

vulnerable women and children to terrible abuse. Surrogacy is the new frontline in the trafficking and commodification of women and newborn children.”<sup>32</sup>

Like the Special Rapporteur, Chief Justice Pascoe has also outlined examples of abuse and trafficking of children conceived by commercial surrogacy. He wrote:

*“International surrogacy has exposed children to unacceptable risks of discrimination, violence, abandonment, sexual and physical abuse, exploitation and trafficking. Listed below are only some of the horrifying examples of this:*

- *Baby Gammy, a twin child who was born with Downs’ Syndrome, was abandoned by the commissioning parent and left in Thailand with the impoverished and uneducated surrogate mother. One of the commissioning parents is an Australian man with a child sex offence conviction. Associated rights concerns are discrimination, sibling separation, and nationality.*
- *In the 1997 Pennsylvanian case of Huddleston, a surrogate child died within 6 weeks of being handed into the commissioning father’s care as a result of sustained physical abuse.*
- *In the Truong/Newton case, a new-born boy was trafficked into the custody of two men and legally adopted in America. 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, streaming the abuse online.*
- *In 2010 the surrogate twins of the Le Roches (French citizens) were not granted either French or Ukrainian (the nationality of the surrogate mother) citizenship or passports. In a desperate attempt to transfer the child to France, the intended parents hid the children under a mattress in their car and attempted to leave Ukraine. The Le Roches were charged under Ukrainian child trafficking laws but the children have since been returned to the Le Roches, who remain living in Ukraine while trying to remedy the twins’ stateless status.*
- *In the Baby 101 case, 13 Vietnamese women were trafficked to Thailand, imprisoned, inseminated or raped to be inseminated, and their children sold to buyers predominantly from Taiwan.”<sup>33</sup>*

Judge Pascoe’s link of international commercial surrogacy to trafficking was also noted in the Surrogacy Matters Report, which noted that “some overseas jurisdictions pose a more serious risk of exploitation and human rights violation than others when it comes to surrogacy arrangements... In extreme cases these arrangements can risk falling foul of the international prohibition on human trafficking.”<sup>34</sup>

The Special Rapporteur noted that some women are “particularly vulnerable to exploitation due to poverty, powerlessness, a lack of education, and multiple forms of discrimination.”<sup>35</sup>

Financially needy women in foreign jurisdictions may engage in commercial surrogacy for profit when they would not do so otherwise. Such activity is evident in developing countries involved in the

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<sup>32</sup> Berkoivic N. Surrogacy the new slavery, says top judge John Pascoe. The Australian. 19 September 2014.

<sup>33</sup> Pascoe J, above, no. 5.

<sup>34</sup> House of Representatives, *Surrogacy Matters*, above no. 21, [1.115]

<sup>35</sup> United Nations Human Rights Council, above, no. 23.

international surrogacy trade, “where the surrogate mother is more likely to be poor, illiterate and uninformed of her rights.”<sup>36</sup> This can lead to a situation where the socio-economic disparity between the surrogate mother and the international parents purchasing her womb and the child is so great that there is a severe power imbalance between the two groups, leading to a lack of negotiating power in terms of surrogacy contracts, exploitation and little control of the birth mother over the situation.

It has also been noted that surrogacy agencies prey on these types of women, who often lack informed consent because they are not aware of the contractual terms or the associated health risks, which are greater for those in developing countries and include “perforation of organs, increased risk of ectopic pregnancy, complications from multiple pregnancies, foetal reduction and caesarean sections.”<sup>37</sup>

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### *Breaching international prohibitions on slavery and the sale of children*

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Commercial surrogacy is banned for important ethical reasons, including that it amounts to the sale of a child. It is also banned for important human rights considerations. As the Australian Government clarifies:

Some commercial arrangements can be classed as the sale of children. This breaches the *Convention on the Rights of the Child* (United Nations). Some surrogate mothers provide their services under bonded labor arrangements. This is a form of slavery, and against the law. It breaches the *Abolition of Forced Labour Convention* (United Nations).<sup>38</sup>

Article 35 of the CRC requires State parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”<sup>39</sup>

The *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* confirms that “commercial surrogacy as currently practised usually constitutes the sale of children as defined under international human rights law.”<sup>40</sup> The report goes further to say that if the arguments in favour of commercial surrogacy are accepted, it could jeopardise the gains made in the context of adoption, which were previously based on commercial interests as well.

In light of the Act’s guiding principle that the best interests of the child must be paramount, proposals to legalise any arrangement that would be defined in international law as the sale of a child, or that contribute to the risk of trafficking or that legitimise commercial adoption must be forcefully rejected.

The uncertainty which exists in international commercial surrogacy, such as who is the ‘parent’ from whom the child should not be separated, and which nationality should the child be (particularly when the possibility of the child being stateless exists), means that Australia, having ratified these treaties, has the obligation to oppose this trade.

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<sup>36</sup> Pascoe J, above, no. 5.

<sup>37</sup> Ibid.

<sup>38</sup> Australian Department of Foreign Affairs and Trade, ‘Going overseas for international surrogacy’ <https://www.smartraveller.gov.au/before-you-go/activities/surrogacy#:~:text=Some%20commercial%20arrangements%20can%20be,slavery%2C%20and%20against%20the%20law.>

<sup>39</sup> United Nations. (1989). *Convention on the Rights of the Child*. Treaty Series, 1577, 3.

<sup>40</sup> United Nations Human Rights Council, above, no. 23.

## Parentage Orders

The Discussion Paper raises potential changes to the making of parentage orders in surrogacy arrangements highlighted in the Equality Bill and the *Parentage (Surrogacy) Amendment Bill 2023*. Each of these proposes that a court may make a parentage order for illegal surrogacy arrangements, including commercial surrogacy arrangements, if doing so would be in the best interests of the child. Consultation questions 13-16 inclusive also address questions of parentage orders.

Chief Judge John Pasco noted that allowing the courts to make a parentage order notwithstanding an illegal surrogacy arrangement presents the court with a *fait accompli*, because “as the child is already born and in Australia with the commissioning parents, it is almost impossible for courts to determine that it is not in the child’s best interests to remain with the commissioning parents even if they have broken the law.”<sup>41</sup> Such a proposal would not only reward breaches of the law, it would incentivise commissioning parents to deliberately target and exploit surrogate mothers in poorer jurisdictions and in more vulnerable positions, so as to present a significant difference between a child’s interests in returning to their birth mother or remaining in Australia.

This is particularly problematic given that there have been no prosecutions in NSW over breaching of existing bans on commercial surrogacy, despite the arrangements being the subject of media reporting, family court proceedings or even public fundraising campaigns<sup>42</sup>. There is also no recorded disciplinary action against NSW lawyers who facilitate these arrangements in breach of the law. The refusal to prosecute any of these cases suggests an unwillingness to treat flouting of the law with any seriousness and has resulted in the prohibition on commercial surrogacy not acting as a deterrent<sup>43</sup> and allowing courts to make parentage orders even when the law is breached would mean that the pre-conditions contained within the Act are nothing more than cosmetic. As noted previously, the statutory review mechanism recommended above should be empowered to investigate and report upon these issues.

Question 9 in the Discussion Paper asks whether the offences and penalties for commercial surrogacy in the Act meet the policy objectives. Offences and penalties can only respond to objectives if they are enforced. It is the unwillingness to prosecute that must be addressed if the offences and penalties are going to have anything except symbolic effect.

## Access to Information on Parentage

There is consistent research indicating that surrogate mothers believe that the surrogate arrangements should be disclosed to offspring, and that they benefit from ongoing relationships with children born.<sup>44</sup> As the Discussion Paper makes clear:

Following the registration of a parentage order, [Births Deaths and Marriages] can issue an amended birth certificate with the intended parents as the child’s legal parents. The amended certificate does not include any information that indicates that the child was born of a surrogacy

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<sup>41</sup> Pascoe J, above, no. 5.

<sup>42</sup> Ibid; NSW Government. Submission No. 66 to the House of Representatives Standing Committee on Social Policy and Legal Affairs. *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements*. (February 2016).

<sup>43</sup> House of Representatives, *Surrogacy Matters*, above no.18, [1.71]

<sup>44</sup> Van den Akker O. Genetic and gestational surrogate mothers' experience of surrogacy. *Journal of Reproductive and Infant Psychology*. 2003;21(2):145-61. Van den Akker OB. A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy. *Journal of Psychosomatic Obstetrics & Gynecology*. 2005;26(4):277-84.

arrangement. The Act allows a person aged over 18 who was the child of a surrogacy arrangement to receive his or her original birth certificate and full birth record.

We strongly oppose the practice where the birth certificate contains no reference to the surrogacy arrangements or the gestational mother, as it reduces the chances for offspring to discover this fact in the event that commissioning parents withhold the information from them.

In NSW a child who is not informed that they were born from a surrogacy arrangement may never know their parentage, as the only record available to them will be the amended birth certificate. Chief Judge John Pascoe of the Federal Circuit Court of Australia has highlighted some of the consequences of complete information not being provided on a birth certificate:

In some jurisdictions, this has resulted in the child becoming stateless. In some jurisdictions, commissioning parents' names are not recorded on child's birth certificate, leading to difficulties in establishing parentage, nationality, and acquiring travel documents such as passports. Conversely, in other jurisdictions, the birth mother's name is purposely omitted in favour of the commissioning parents, creating difficulties in later identifying the surrogate mother if required. The difference between biological parentage and legal parentage is profound and information regarding both are required to satisfy the right of the child to know his or her parents.

While certain of these comments relate to jurisdictions in which no record is maintained, the regime in NSW allows that a child may never know their parentage. In 2016 the *Surrogacy Matters* Report concluded:

The Committee considers that children have the right to know and understand the circumstances of their birth and of their genetic heritage. This applies equally to all children, not just those born of surrogacy arrangements.

The *Surrogacy Matters* Report emphasised the importance of making available information on their genetic parents to those surrogates:

The Committee recommends that the Australian Government, in its representations to the Experts' Group on Parentage/Surrogacy at the Permanent Bureau of the Hague Conference on Private International Law should prioritise: the rights of the child, particularly their right to know their genetic heritage, to know the circumstances of their birth, and to have xv ongoing relationships with their birth mother and any siblings or genetic donor/s<sup>45</sup>

It also recommended that 'the ALRC should consider whether a child's birth certificate should contain information on all gestational, genetic and intended parents, including a record that the child was born as a result of a surrogacy arrangement.'<sup>46</sup>

The Act allows that a child may never know their parentage. The Act should be reformed so to avoid this circumstance.

Furthermore, the rights of the child to access information on their genetic heritage should not be frustrated by Government discretion over the right to access that information. A person born of a surrogacy arrangement should have an automatic right to obtain information on their genetic heritage, regardless of the provision of the consent of the birth parents, rather than having their rights dependent

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<sup>45</sup> House of Representatives, *Surrogacy Matters*, above no. 21, xii.

<sup>46</sup> *Ibid* xiv-xv.



on the wishes of the adults who engage in a surrogacy arrangement. That right should extend to the right to a record of the Court proceedings for parentage orders. If it is known that this is the legislated protection to the child, only donors willing to establish a relationship (if such is sought by the child) will offer to enter a surrogacy arrangement. Likewise, it would mean that only intended parents who recognise the legislated protection of any child born via surrogacy—including their a priori right to obtain information on their genetic heritage and pursue a relationship with their surrogate mother should they wish to do so—would be able to legally enter into a surrogacy arrangement. Consideration should be given to the implementation of a mechanism to allow the birth / genetic parents to find their children, to which the children would consent.

## Other inquiries regarding surrogacy

It is worth noting that previous state and federal inquiries into surrogacy arrangements have rejected the legalisation of commercial surrogacy.

In NSW, there have been three inquiries that addressed the issue of commercial surrogacy.

The first review occurred prior to the introduction of the Act. In that report, the Legislative Council Standing Committee on Law and Justice recorded its opposition to commercial surrogacy<sup>47</sup>.

A 2018 statutory review of the Act conducted by the then Department of Justice similarly rejected the introduction of commercial surrogacy<sup>48</sup>.

Most recently, while the Legislative Assembly Committee on Community Service reported on the Equality Bill recommended the Bill be debated<sup>49</sup>, it is worth noting that an overwhelming 79.93% of respondents to the public survey rejected the proposed amendments to the Act.

At a federal level, the 2016 Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs report *Surrogacy Matters* has, as its first recommendation, that “the practice of commercial surrogacy remain illegal in Australia.”

Additionally, the *Surrogacy Matters* report made a number of recommendations that are not reflecting in the Act, nor in the proposals countenanced by the Discussion Paper. These include:

- that the best interests of the child, including **the child’s right to know about their origins**, be protected (emphasis added);
- the need for background checks, medical and psychological screening, and independent legal advice for all parties entering into a surrogacy arrangement;
- the right of the child to have ongoing relationships with their birth mother and any siblings or genetic donor/s; and
- the right of surrogate mothers to be free from exploitation.

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<sup>47</sup> NSW Legislative Council Standing Committee on Law and Justice. Legislation on altruistic surrogacy in NSW. May 2009. Available at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/1659/090525%20Final%20Report%20-%20Legislation%20on%20altruistic%20su.pdf>

<sup>48</sup> Department of Justice. Statutory Review: *Surrogacy Act 2010*. NSW Government. July 2018. Available at: <https://www.parliament.nsw.gov.au/tp/files/73919/Review%20of%20Surrogacy%20Act%202010.pdf>

<sup>49</sup> NSW Legislative Committee on Community Services. Report 1/58 - Equality Legislation Amendment (LGBTIQA+) Bill 2023. June 2024. Available at: [https://www.parliament.nsw.gov.au/ladocs/inquiries/3041/Report%20-%20Equality%20Legislation%20Amendment%20\(LGBTIQAplus\)%20Bill%202023.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/3041/Report%20-%20Equality%20Legislation%20Amendment%20(LGBTIQAplus)%20Bill%202023.pdf)

## Conclusion

We acknowledge and affirm the desire of many people to conceive and bear children and do not underestimate the significant struggle that infertility presents. However, the appropriate remedy for that struggle is not to transfer this struggle to vulnerable women and children, exposing them to the risk of exploitation and abuse of women in commercial surrogacy arrangements.

The Act's guiding principle that the best interests of the child must be paramount, alongside the need to protect women in Australia and overseas from exploitation demands that commercial surrogacy remain illegal in New South Wales, and that any proposals made by the Department to amend the Act do not expand the availability of either altruistic or commercial surrogacy in this state or overseas.

[Signatories overleaf]

## Signatories



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