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Director, Civil Justice, Vulnerable Communities and Inclusion
NSW Department of Communities and Justice
By email to policy@dcj.nsw.gov.au

Dear Director,

Review of the *Surrogacy Act* and the *Status of Children Act*

My name is Sarah Jefford and I offer this submission in response to the Discussion Paper reviewing the NSW *Surrogacy Act* and the *Status of Children Act*.

I have included an Index of proposed reforms at the end of this submission.

About Sarah Jefford

I am a surrogacy lawyer, practising in surrogacy and donor conception law across Australia. I was an IVF parent, and later became an egg donor and a surrogate, delivering a baby for two dads in 2018. I am the only lawyer practising exclusively in surrogacy and donor conception in Australia.

I have published a book, *More Than Just a Baby*, a guide to surrogacy for intended parents and surrogates,¹ and I produced the *Australian Surrogacy Podcast*, sharing stories from intended parents and surrogates around Australia. I am a founder of the *Surrogacy Sisterhood Retreats* and care packages for Australian surrogates.²

I provide advice to intended parents and surrogates pursuing surrogacy within Australia, and to intended parents considering options for international surrogacy arrangements. I provide advice to over 400 clients each year, across all states and territories, including over 140 domestic surrogacy arrangements per year of which about 40 are for NSW residents. 36% of my clients are residents of New South Wales and ACT.

In 2023 I was awarded the medal of the Order of Australia for services to the law, and for my work with the surrogacy and donor conception communities.

Surrogacy in Australia

There are estimated to be 120 surrogacy births in Australia each year.³ In 2023, 76 children born via surrogacy in Australia involved my clients.⁴

¹ Jefford, S, *More Than Just a Baby: a guide to surrogacy for intended parents and surrogates* (2020) Indie Experts.

² Jefford, S, *The Surrogacy Sisterhood* sarahjefford.com/surrogacy-sisterhood/ 2018, accessed 15 July 2024.

³ Australian and New Zealand Assisted Reproduction Database (ANZARD) 2021 Report at p45; author's own records as published here: sarahjefford.com/how-many-surrogacy-births-are-there-in-australia

⁴ Author's own records and as published here: sarahjefford.com/australian-surrogacy-statistics

The majority (about 78%) of arrangements involve existing relationships (sisters, extended family and friends) and the remaining 22% involve 'new' relationships, being friendships formed after meeting in designated surrogacy social media forums such as Facebook.⁵

A note from the writer

I was informed of the Review by a colleague and note that information was published on the Department of Communities and Justice *Have Your Say* website seeking submissions. As one of a few surrogacy lawyers in Australia, it is concerning that I was not advised of the Review directly. An online search for the Review yielded no results.

I do not believe the Review was widely publicised. Many in the surrogacy community would be unaware of the Review and the opportunity to make a submission. I encourage the project team to consider how information could be more widely disseminated to relevant stakeholders, professionals and community to ensure a breadth of responses. I encouraged my colleagues, clients and social media followers to make a submission, but question whether the Review can be truly inclusive if the community is unaware of it.

The ACT recently reviewed and reformed the *Parentage Act*.⁶ Despite a consultation process, and submissions made by various stakeholders including the Australian and New Zealand Fertility Counsellors Association (ANZICA), changes were made to the Act that were contrary to expert advice.⁷ I encourage the project team to give appropriate weight to submissions from experts who have experience with surrogacy counselling and legal practice, and to consider conflicts of interest from stakeholders who profit from the industry.

If necessary, the project team should seek further submissions and clarification from experts before making any recommendations and consider whether submissions represent the broad views of the community of people impacted by surrogacy, including surrogates, parents and persons born.

Responses to the Discussion Paper

1. What do you think of the guiding principle and policy objectives of the Surrogacy Act? Do you think they are still valid?

I agree with the guiding principles and particularly that the objective of the Act should be to protect the interests of children born via surrogacy. I believe this objective should be extended to children born via surrogacy in other jurisdictions to Australian intended parents, including those born internationally.

2. Does the Surrogacy Act ensure that the best interests of the child are paramount in every case?

I do not believe the Act ensures that the best interests of the child are paramount in all cases.

Surrogacy arrangements are not enforceable

Section 6 of the Act provides that surrogacy arrangements are not enforceable. In this respect, the Act does serve to ensure the best interests of the child are paramount, as the arrangement cannot be used to objectify the child born or demand the relinquishment of the child contrary to their interests.

⁵ Ibid.

⁶ *Parentage Act 2004* (ACT) reformed June 2024.

⁷ Section 28A of the *Parentage Act 2004* (ACT) provides for two pre-surrogacy counsellors, contrary to the ANZICA submission and advice.

Geographical nexus clause for offences

Section 11 of the Act criminalises parents who engage in international commercial surrogacy. Criminalising parents of children born via surrogacy for the act of engaging in surrogacy does not promote the best interests of the children, it only serves to increase the stigma surrounding surrogacy. All children should be treated equally under the law.

Affected parties must consent to order

Section 31 of the Act requires the birth parents to consent to the making of a parentage order.⁸ Other proceedings involving children, such as those under the *Family Law Act*, do not require the consent of parties to make orders about children. If an order is in the child's best interests, it should not rely on the consent of the birth parents.

Notably, Western Australia's *Surrogacy Act*⁹ does not require the consent of the birth parents in the making of a parentage order, for a gestational surrogacy arrangement.

The consent of the birth parents can be used as a barrier to obtain a parentage order. This is not in the child's best interests.

3. Does the Surrogacy Act provide sufficient protections for birth mothers?

A surrogacy arrangement is not enforceable

Section 6 of the Act provides that a surrogacy arrangement is not enforceable, other than the payment of the surrogate's costs. While lay persons may consider this is to the detriment of the intended parents, it serves to protect the surrogate from being coerced or pressured into continuing the surrogacy arrangement, and/or relinquishing the child to the intended parents.

Other legislation explicitly ensures the surrogate's autonomy. See, for example, Queensland legislation,¹⁰ or Northern Territory legislation, which states that '*a surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.*'¹¹ Replicating this clause in the NSW legislation may serve to clarify the paramountcy of the surrogate's autonomy and protection of her rights.

Requirements for pre-surrogacy counselling and independent legal advice should remain, to ensure protections of the welfare, autonomy and rights of surrogates.

Surrogate's surrogacy costs – legal advice

Under **Section 7** of the *Surrogacy Act*, the intended parents must cover the surrogate's *reasonable costs associated with the surrogate and their partner receiving legal advice in relation to the surrogacy arrangement or a parentage order relating to the surrogacy arrangement.*¹²

While this clause protects the surrogate's right to legal advice, in practice it is difficult to ensure the surrogate's legal fees are covered by the intended parents and gives rise to a potential conflict of interest. The lawyer providing advice to the surrogate must be independent, but the intended parents are liable for the payment of the surrogate's legal costs. In times of dispute, the intended parents may refuse to cover the cost of the surrogate's legal advice, putting the surrogate at disadvantage should she need to enforce a claim – including for the cost of legal advice. This may leave a surrogate vulnerable and without legal counsel or relying on pro bono legal advice.

⁸ *Surrogacy Act 2010* (NSW) s31(2).

⁹ *Surrogacy Act 2008* (WA) ss21(2)(d), 21(3) and (4).

¹⁰ *Surrogacy Act 2010* (QLD) s16.

¹¹ *Surrogacy Act 2022* (NT) s10.

¹² *Surrogacy Act 2010* (NSW) s7(4)(b).

In contrast, the fact of being liable for the surrogate's legal fees is often sufficient for the intended parents to agree to a surrogate's demands, even if they are unreasonable. The surrogate can demand payments, for legal fees and other expenses, and withhold consent to the parentage order until the intended parents have made payments.

The comments above likewise apply to the intended parents' liability for the reasonable costs of the surrogate and their partner accessing counselling pursuant to Section 7(4)(a) of the Act.

The Reviewers should consider alternative mechanisms to ensure the surrogate's expenses are covered by the intended parents. A government-regulated escrow system may be beneficial to manage the intended parents' funds and the distribution to the surrogate for her expenses. Such a system provides certainty for all parties that the funds are appropriately and independently managed in accordance with the legislation.

4. Does the legislation adequately meet the needs of various family structures, including LGBTIQ+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements?

Definitions and language

The *Surrogacy Act*¹³ refers repeatedly to the 'birth mother' and to a 'woman' being a surrogate. To be inclusive of all gender identities and reflective of the language used in the surrogacy community, the words 'birth mother' should be replaced by 'birthing person' or 'surrogate' and the word 'woman' replaced with 'surrogate.'

This change to language does not exclude surrogates who identify as women but serves to include surrogates who identify as non-binary or otherwise.

References to *intended parents* in the Act does not use any gendered terms other than under **section 30**. In that respect, gendered terms should be replaced with 'medical or social need for surrogacy.'

The surrogacy community generally prefers the language of 'surrogate' to 'birth mother,' noting that *motherhood* is a loaded term and not essential to the act of being a surrogate. This language also differentiates surrogacy from adoption, where the reference to 'birth mother' may be more accepted.

5. Do you have any comments about the definition of surrogacy arrangements?

I have no comment about the definition of surrogacy arrangements, save for my comments above in relation to improvements for inclusive language and replacing 'woman' with 'person' or 'surrogate.'

6. Do you have any comments about the extent to which surrogacy arrangements can be enforced?

I support the current framework for ensuring that surrogacy arrangements are not enforceable, save for the reimbursement of the surrogate's expenses. I submit that these provisions should continue, to protect the autonomy of the surrogate and the rights of the child.

I believe an escrow system for managing the surrogate's payment of costs may assist in the enforcement of costs pursuant to **Section 7**. Such a system should be established by government rather than left to for-profit enterprise which is vulnerable to exploitation.

¹³ *Surrogacy Act 2010* (NSW) generally, including s4.

7. Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?

There is nuance to consider between what is ‘commercial’ surrogacy and what is ‘compensated’ surrogacy. Commercial surrogacy might be considered that which involves payment of a fee to a surrogate which is a transaction in exchange for being a surrogate or relinquishing the baby. By contrast, compensated surrogacy involves payments to the surrogate to compensate her for the time, effort, risk, emotional and physical labour of being a surrogate, pregnancy and birth.

Compensated surrogacy

I encourage the project team to consider the introduction of a model of compensated surrogacy in New South Wales.

The fertility industry generates multi-million dollar profits each year.¹⁴ Surrogacy involves fertility treatment, legal advice and counselling and a court process, as well as obstetric healthcare. Each professional involved in surrogacy is paid for their time and expertise. We do not ask them to provide their services without compensation – to do so would be insulting.

The surrogate undertakes most of the physical and emotional work and takes many risks in a surrogacy arrangement, and yet is unpaid. While existing provisions in the Act¹⁵ allow for a surrogate’s expenses to be covered, the reality is that the physical and emotional cost to a surrogate and their family cannot be compensated under the current system.

We know that there are only 120 surrogacy births in Australia each year, and over 200 surrogacy births overseas for Australian intended parents. Most intended parents feel compelled to go overseas for surrogacy because they cannot find a surrogate in Australia¹⁶ and 92% of intended parents would prefer to pursue surrogacy in Australia if they had the opportunity.¹⁷

Many intended parents engaging in international surrogacy are doing so in unregulated jurisdictions with many risks to the surrogate and the child. Multiple and regular surrogacy scandals have occurred over the past decade, involving Australian intended parents engaging in international surrogacy.¹⁸

If we are to encourage surrogacy in Australia, where surrogates and the children born have access to adequate healthcare, and their respective legal rights are protected, then we need to consider introducing regulated, compensated surrogacy in Australia. Refusing to recognise the work involved in conception, pregnancy and birth does nothing to encourage surrogacy in Australia. While the fertility industry booms, surrogates are lucky to break even during a surrogacy arrangement, and it is not uncommon for a surrogate to be out of pocket and left with ongoing physical and emotional consequences.

Amending Section 7 of the *Surrogacy Act* to include capped compensation as a separate figure as a new Section 7(f) as an example:

¹⁴ Gorton, M. 2019. *Helping Victorians create families with assisted reproductive treatment*. Victorian Government 12.

¹⁵ *Surrogacy Act 2010* (NSW) s7.

¹⁶ Kneebone, E et al. 2023. *Australian intended parents’ decision-making and characteristics and outcomes of surrogacy arrangements completed in Australia and overseas*.

¹⁷ Ibid.

¹⁸ Jefford, S. (2023) *Surrogacy and human trafficking: it happened here*. sarahjefford.com/surrogacy-and-human-trafficking-it-happened-here.

7(f) A payment of up to \$1,000 per calendar month for each month of pregnancy plus each month after pregnancy for a period of 3 months.

Such a nominal figure would, in this example, compensate surrogates for \$1,000 per month, which would result in a maximum payment of \$12,000 over 12 months for a full-term pregnancy and recovery period. The figure could be any regulated, capped figure chosen by the regulators, but for the sake of this example, \$1,000 per month amounts to only \$32 per day. This figure can hardly be argued to be an enticement to be a surrogate or to relinquish the child but might make surrogacy more viable in Australia.

Such payments should be additional to the payment of a surrogate's lost income. Payments should not be in exchange for the surrogate's compliance with a contract, or in exchange for the relinquishment of the child. Both the surrogate's bodily autonomy and the best interests of the child should be protected, and neither is compromised if the surrogate is compensated and appropriate safeguards in place.

Introducing regulated, capped compensated surrogacy may assist in promoting surrogacy in Australia and reduce the need for intended parents to travel overseas to unregulated jurisdictions. If we are truly concerned about the welfare of surrogates and children born via surrogacy, we should be working to make it viable within Australia. Compensated surrogacy is one way to do that.

8. Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?

Geographical nexus for offences and the best interests of the child

Most of the 200+ children born overseas each year for Australian intended parents are pursuant to commercial surrogacy arrangements. **Section 11** of the *Surrogacy Act* criminalises intended parents who are resident in New South Wales and have engaged in commercial surrogacy overseas. Most other jurisdictions do not include such a clause.

Section 11 of the Act should be repealed. There have been no prosecutions of parents who have engaged in commercial surrogacy outside NSW. If the children's best interests are paramount, it should not matter that they were born via commercial surrogacy.

Section 11 does not deter intended parents from pursuing commercial surrogacy overseas; it only serves to stigmatise the children born via surrogacy and supports a veil of secrecy and shame for their parents.

*Rendering commercial surrogacy illegal will not promote openness and transparency. If criminal law will not stop the practice the result is that it will be driven underground.*¹⁹

Notably, academics and judicial officers find the prohibition of commercial surrogacy problematic when considering the paramountcy of the best interests of the child:

*...the laws banning commercial surrogacy are ineffective...Because judges have to apply the principle that the best interests of the child is the paramount consideration, there do not appear to have been many cases...where a court has refused to make a parenting order...*²⁰

If we are focused on the best interests of the children born, then criminalising their parents for engaging in something that is legal in the country of destination does not serve that purpose.

¹⁹ Stuhmcke, A. "Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty." *Surrogacy, Law and Human Rights*, edited by Gerber P and O'Byrne K. Routledge, 2016, 77.

²⁰ Harland, A and Limon, C. "Recognition of Parentage in Surrogacy Arrangements in Australia." *Surrogacy, Law and Human Rights*, edited by Gerber P and O'Byrne K. Routledge, 2016, 165.

The writer is aware of Australian intended parents being advised to amend their commercial surrogacy contracts to make them 'look altruistic.' The practice, which involves amending an international surrogacy contract such that any fees payable to the surrogate are reframed as 'reasonable expenses' is problematic and unethical, and leaves intended parents vulnerable to scrutiny and allegations of fraud.

The writer is also aware of employers, particularly government, referencing the *Surrogacy Act* and Section 11 to deny access to paid parental leave to intended parents who have engaged in international surrogacy.²¹ The Department of Education in New South Wales only provides paid parental leave to employees who have engaged in altruistic surrogacy pursuant to the Act and on the provision of a parentage order.²²

Regulation of service providers

While residents of New South Wales may be criminalised for engaging in commercial surrogacy, for-profit service providers in New South Wales facilitate intended parents engaging in commercial surrogacy overseas and face no consequence. These organisations rely on gaps in legislation and frame themselves as 'educational,' bringing commercial surrogacy agencies and clinics to Australia to market themselves to intended parents, including New South Wales residents.

Service providers are not qualified to give legal advice to intended parents and take no responsibility for poor outcomes, risks or consequences. Australians have been encouraged to engage in surrogacy arrangements in countries where surrogacy has proven to be unregulated, unethical, exploitative and risky including in Thailand, India,²³ Ukraine²⁴ and Greece.²⁵

While Section 11 should be repealed, service providers should be tightly regulated.

9. Do the offences and penalties for commercial surrogacy in the Surrogacy Act meet the policy objectives?

Section 11 prohibits NSW residents from entering a commercial surrogacy arrangement in another jurisdiction. This section should be repealed. There have been no criminal prosecutions under this clause. The penalty for breaching Section 11 does not serve the best interests of the children born, noting that their parents may be criminalised and penalised for their child's existence.

10. What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?

Best interests of a child

²¹ Star Observer, *Gay Surrogate Dads Wage Legal Battle for Paid Parental Leave*, www.starobserver.com.au/news/gay-surrogate-dads-wage-legal-battle-for-paid-parental-leave/200978, 26 February 2021, accessed 15 July 2024.

²² NSW Department of Education *Teachers Handbook Chapter 4 Leave: Adoption, Maternity and Parental Leave*, 4.2.6 *Altruistic surrogacy leave*, as updated on 28 February 2024.

²³ ABC News *India to ban surrogacy services to foreigners through Supreme Court* 28 October 2015 <https://www.abc.net.au/news/2015-10-28/india-to-ban-booming-surrogacy-service-to-foreigners/6894104> accessed 23 July 2024.

²⁴ ABC 7:30 *Australian parents warn reality of Ukrainian surrogacy doesn't always match the dream*, 21 August 2019 <https://www.abc.net.au/news/2019-08-21/australian-parents-warn-about-ukraine-surrogacy-lotus/11426396> accessed 23 July 2024

²⁵ ABC News, *Australian parents left in limbo after surrogacy scandal in Greece*, 24 August 2023 <https://www.abc.net.au/news/2023-08-24/parents-left-in-limbo-after-raid-at-surrogacy-clinic/102773230> accessed 23 July 2024.

Article 2 of the United Nations *Convention on the Rights of the Child* provides that the rights of children must be ensured without discrimination.²⁶ Yet, under the *Family Law Act* and state surrogacy legislation, children born via international surrogacy are denied legal parentage.²⁷

*Denying a child legal parentage when there are no concerns about the care being provided by their parents cannot be justified when considered from a children's rights perspective.*²⁸

Presumptions of parentage

I note the *Equality Bill* introduced by Alex Greenwich MP proposes to allow parentage orders to be granted for children born overseas including via commercial surrogacy.

I do not believe parents should have to obtain a parentage order in Australia to be recognised as the parents of their child born overseas. Introducing a system that encourages or expects parents to engage in a court process in Australia, is to implement yet another costly process which only benefits the lawyers engaged to make such applications.

The *Status of Children Act* should be amended to provide a presumption of parentage for a child born overseas via surrogacy based on evidence, such as an international parental order and/or birth certificate. Such a presumption would make it easy to presume that intended parents are recognised as the parents of their child without costly court processes to prove what is already known. Alternatively, an administrative registration process could suffice.

There is stigma and shame associated with surrogacy and particularly for intended parents who engage in commercial surrogacy. Section 11 of the Act serves to frighten intended parents and drives the practice underground.²⁹ Many parents feel anxious that they may not be recognised as the parents of their child and since the case of *Bernieres and Anor v Dhopal and Anor*,³⁰ their anxieties may be well-founded. Some parents seek parenting orders for the shared parental responsibility of their children; this is insufficient to extinguish the presumption that the surrogate may still be considered the parent of the child.³¹

Lack of clarity around the parentage of children born overseas raises concerns for succession and estate planning for the parents and children and their future offspring.

Access to paid parental leave

As noted above in response to point 8, parents have been denied access to paid parental leave if they cannot produce evidence of a parentage order. It cannot be said that denying paid leave to a parent is in the child's best interests because their parents engaged in international or commercial surrogacy. Intended parents engaging in commercial surrogacy often choose not to apply for their workplace paid parental leave on the basis that they face shame and recriminations from their employer.

The writer has advised intended parents living in New South Wales who have chosen to relocate to Victoria, or used a Victorian address, when entering a commercial surrogacy arrangement. Intended parents who are public servants, police officers, medical practitioners, lawyers, members of parliament and their staff and those in high-profile

²⁶ United Nations, *Convention on the Rights of the Child* (20 November 1989) Article 2.

²⁷ *Family Law Act 1975* (Cth) ss 60H and 60HB.

²⁸ Harland, A. *Surrogacy, Identity, Parentage and Children's Rights – Through the Eyes of a Child*. *Family Court Review*, Vol 59 No. 1 January 2021 121-130 at 121.

²⁹ *Ibid* n15.

³⁰ (2017) FLC 93-793

³¹ *Family Law Act 1975* (Cth) ss 60H and 60HB.

occupations including media, fear repercussions from their employer, or prosecution, if they engage in commercial surrogacy.

The writer is aware of several government employees being denied paid parental leave until they had provided their employer with a copy of the parentage order. This is despite advice that to do so breaches **Section 52** of the *Surrogacy Act*, which prohibits the disclosure of information relating to surrogacy arrangements.

To rectify the situation, legislation should recognise the parentage of children born via international surrogacy and make it clear that this recognition is regardless of whether a parentage order has been granted, or the child was born via altruistic or commercial surrogacy. The children born deserve the same recognition regardless of their birth heritage or situation.

11. Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising related to altruistic surrogacy arrangements?

Paid advertising for a surrogate

Advertising for a surrogate, or a willingness to be a surrogate, is prohibited under **Section 10** of the Act, if a fee has been paid for the advertisement, statement, notice or other material.³² Section 10(2)(b) serves no purpose and should be repealed. People willing to engage in surrogacy should be allowed to advertise that intent, and pay for the cost of the advertisement, without criminal consequence. There is no discernible difference between an unpaid advertisement (for example, on social media) and a paid advertisement.

Surrogacy is uncommon in Australia, and it is more common for Australian intended parents to pursue surrogacy overseas. Prohibitions and limitations on advertising only serve to stigmatise surrogacy, which limits the options for surrogacy within Australia. Repealing **Section 10(2)(b)** would remove unnecessary limitations on advertising which may assist in promoting surrogacy within Australia, thus decreasing the need for intended parents to travel overseas for surrogacy.

12. Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?

There are no legitimate matching surrogacy services in Australia. Parties are left to navigate the requirements and processes of surrogacy themselves. This can lead to parties wishing to enter an arrangement, who are not emotionally equipped for surrogacy, including those with significant mental health history, untreated mental health conditions and lack of support networks. Parties can become invested in a surrogacy arrangement that is not in their best interests, or that of a child.³³

There is a lack of clarity within the Act as to whether any professionals hold the responsibility of ensuring a surrogacy arrangement meets the criteria and should proceed. In Victoria, the Patient Review Panel³⁴ holds power to approve or deny a gestational surrogacy arrangement, as does the Reproductive Technology Council for Western Australians.³⁵

³² *Surrogacy Act 2010* (NSW) s10(2)(b).

³³ See for example, *Lamb and Anor & Shaw* [2018] FamCA 629 and *Tickner & Rodda* [2021] FedCFamC1F 279.

³⁴ *Assisted Reproductive Treatment Act 2008* (Victoria) Part 9.

³⁵ *Surrogacy Act 2008* (WA) s18.

In New South Wales, the decision to proceed may be left with the fertility clinic³⁶ and clinics rely on a counsellor to advise against proceeding with the arrangement. The writer has observed that counsellors may be reluctant to ‘gate-keep.’ The legislation does not grant power to lawyers to approve or deny a surrogacy arrangement.³⁷ Parties can choose to engage with different professionals (‘practitioner-shopping’) and withhold or change information to obtain approval despite advice to the contrary.

Current matching practices

22% of surrogacy arrangements are established through social media,³⁸ including via the *Australian Surrogacy Community* on Facebook and various state-based Facebook groups. These well-intentioned volunteer-run groups are not subject to any regulation. With no other options to find a surrogate or intended parents, parties are left to navigate finding someone on social media, in the hope they may proceed with surrogacy together.

While many surrogacy relationships are positive and remain intact, it is despite the lack of regulation, not because of it.

Much work has been done to build the online surrogacy communities by individual surrogates (including the writer) and intended parents, to educate and advocate for positive, well-informed best practice surrogacy.³⁹ There are no government resources available to provide education or promote surrogacy in Australia. Surrogacy counsellors and lawyers support parties to navigate the process and the complex relationships of surrogacy.

The Surrogacy Sisterhood Retreats and care packages⁴⁰ were developed in response to surrogates seeking to be supported by their peers. No similar supports exist for intended parents. The Sisterhood is entirely volunteer run; costs covered either by the surrogates themselves, or by donations. There is no government funding for any support services for anyone involved in surrogacy in Australia.

Surrogacy Australia’s Support Service

The Surrogacy Australia Support Service (SASS) is a private business with charitable status. It is not endorsed by any government in Australia. SASS purports to facilitate introductions between surrogates and intended parents.⁴¹ Intended parents are encouraged to join the service at a cost of over \$1,300⁴² for the hope that they may be ‘matched’ with a surrogate; there is no guarantee of a match and no provision for a refund if unsuccessful. Surrogates are outnumbered by intended parents, and SASS only claims to have matched eight arrangements in over 5 years.⁴³ These matches account for less than one percent of all arrangements across Australia.⁴⁴

The facilitation of a surrogacy arrangement by a third-party, including introducing parties for the purpose of surrogacy, is restricted in other jurisdictions including South Australia,⁴⁵

³⁶ NHMRC, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2017) 8.9 at p66 “A clinic must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal.”

³⁷ *Surrogacy Act 2010* (NSW) s 36 requires the parties to have obtained legal advice; there is no requirement for a lawyer to ‘approve’ the arrangement.

³⁸ Author’s own records. Of 464 surrogacy arrangements between 2021 and 2024, 102 reported finding a surrogate via social media with the remainder reporting finding a surrogate through friends and family.

³⁹ The writer has a blog of over 100 articles about surrogacy and donor conception. Community-run events in each state aim to educate and promote surrogacy in Australia.

⁴⁰ *Ibid* n2.

⁴¹ Surrogacy Australia Support Service Register www.surrogacyaustralia.org/register

⁴² *Ibid*.

⁴³ Surrogacy Australia Support Service Monthly Report, www.surrogacyaustralia.org/sass-monthly-report/ accessed 14 July 2024.

⁴⁴ Author’s own records of 450 surrogacy arrangements 2021-2024, also published sarahjefford.com/australian-surrogacy-statistics/.

⁴⁵ *Surrogacy Act 2019* (SA) s24.

Northern Territory⁴⁶ and Western Australia.⁴⁷ SASS operates nationally but is registered in New South Wales.

It is the writer's view that SASS exploits the vulnerability and desperation of intended parents seeking a surrogate in Australia.

Surrogacy Australia operates in a vacuum without any regulation, minimum standards or qualifications. Surrogacy Australia is not subject to any professional code of conduct, unlike fertility counsellors,⁴⁸ lawyers⁴⁹ and clinicians.⁵⁰

There are no regulations that require SASS to guarantee a match. SASS is not bound to ensure that an arrangement or outcome is in the child's best interests or the interests of the parties; nor is SASS required to ensure the arrangement meets the necessary preconditions for a parentage order.

There is no regulation to ensure that SASS delivers the services it claims to provide. The writer has heard numerous accounts from intended parents that they were denied a refund and left disappointed with the SASS service; there is no regulatory body to complain to when services fall short of expectations.

Despite laws prohibiting the facilitation of introductions for the purpose of surrogacy, SASS continues to operate.

A regulated, government-run service to facilitate surrogacy arrangements.

Government must take responsibility for any register of people willing to be a surrogate or seeking a surrogate. Government regulation is necessary to ensure that parties are not exploited by privately-run organisations.

The introduction of a Register of people willing to be surrogates necessitates government regulation to ensure the safety of all who engage with it. Such a Register should include screening, facilitating relationships and ensuring criteria are met under the Act.

There must be screening and assessment provisions for people seeking to be surrogates and intended parents. A simple register of names is inappropriate and subject to exploitation. Other jurisdictions, including the United States of America, insist on medical screening, mental health assessments and background checks before someone is considered an appropriate candidate for surrogacy.

Government should regulate any surrogacy services to ensure parties are not exploited. Organisations must have minimum standards for the qualifications of staff and processes required to facilitate arrangements between parties.

A vacuum exists in surrogacy education and services in Australia which has resulted in untrained, unqualified and sometimes unethical practices from private individuals and organisations. There are no safeguards in the Act to protect the parties or persons born from third party organisations seeking to profit from surrogacy.

Government should fund community education to promote surrogacy within Australia and to support parties to understand their rights and obligations under a surrogacy arrangement.

13. Do you have any comments about the process for obtaining parentage orders in NSW?

⁴⁶ *Surrogacy Act 2022* (NT) s 49.

⁴⁷ *Surrogacy Act 2008* (WA) s9.

⁴⁸ Fertility Society of Australia's *Code of Conduct*.

⁴⁹ *Legal Profession Uniform Law 2014* (NSW)

⁵⁰ Reproductive Technology Accreditation Committee (RTAC) Code of Practice; NHMRC *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2017).

Upon the birth of a child via surrogacy, the intended parents must apply for a parentage order in their home state. The parties are often confused and frustrated with the parentage order process. The parties have already completed pre-surrogacy counselling and legal advice and met the necessary criteria to enter a surrogacy arrangement. The parentage order is considered *fait accompli* noting that even if the parties have not met all preconditions, the child's best interests are paramount, and a parentage order is most often considered to be in their best interests.

If the Review finds that the parentage order application process is to continue in its current form, then several amendments should be made:

Filing fees

The application for a parentage order in New South Wales incurs a fee of \$1,351 as of 1 July 2024. Other states impose fees between \$121.55 (Tasmania) and \$989.90 (QLD). However, four jurisdictions – Northern Territory, South Australia, Western Australia and ACT – do not charge a fee for a parentage order application. The disparity in fees is discriminatory and makes surrogacy less accessible for New South Wales residents compared to residents in other jurisdictions. There should be no fee levied for an application for parentage order.

Post-birth counselling

Under **Sections 35(2) and 17**, the parties must engage in two post-birth counselling processes. This is different from every other state and territory jurisdiction. In Victoria, ACT, Western Australia and South Australia, no post-birth counselling is required. In Queensland, Tasmania and Northern Territory, only counselling with one post-birth counsellor is required.⁵¹

The parties often report that the counselling feels like a 'tick-a-box' exercise for a parentage order, rather than benefiting the parties or the child born. While there are benefits to post-birth counselling, it should not be a pre-requisite for the parentage order being made. In South Australia, the intended parents must ensure the counselling is available to the surrogate during pregnancy and for 6 months after birth.⁵²

The reviewers could consider consolidating Sections 35(2) and 17 such that only one post-birth counselling is required. The reviewers should also consider repealing both Sections 35(2) and 17 and replacing with provision for counselling to be available, but not required, after the birth.

Affidavit of Australian legal practitioner

Part 56A of the *Uniform Civil Procedure Rules 2005* (NSW) outlines the requirements for a parentage order application. **Rule 56A.9**⁵³ requires that the applicants file an affidavit from each legal practitioner that gave advice to a party prior to them entering the surrogacy arrangement. The only other jurisdiction that requires affidavits from the legal practitioners is Queensland.⁵⁴

In practice, this is costly, frustrating and superfluous, noting that the legal practitioners can and generally do provide a certificate of legal advice prior to the parties entering the arrangement. The certificates of legal advice should be sufficient evidence to support the application for a parentage order, removing the need for lawyers to swear affidavits, sometimes years after providing legal advice.

For contingency reasons, rule 56A.9 is impractical. 56A.9 of the Uniform Civil Procedure Rules should be repealed.

⁵¹ See for example, *Surrogacy Act 2010* (QLD) s32.

⁵² *Surrogacy Act 2019* (SA) s 15.

⁵³ *Uniform Civil Procedure Rules 2005* (NSW) Rule 56A.9.

⁵⁴ *Surrogacy Act 2010* (QLD) s25(3).

Repeal Part 3 of the Surrogacy Act and allow for a post-birth registration process

The Review presents an opportunity for an alternative and more visionary process for recognising the parentage of the intended parents.

The current parentage order process is inefficient and costly. Current parentage order application filing fees at the NSW Supreme Court are \$1,351.⁵⁵ Legal fees are additional, often between \$4,000 and \$15,000. Counselling (as required under Sections 35(2) and 17) incurs additional fees.

While the process of applying for a parentage order is underway, the birth parents are the legal parents of the child.⁵⁶ A child's right to identity⁵⁷ and matters of succession, estate planning and legal parentage leave all parties and the child in a precarious position until the parentage order is made. This is not in the child's best interests and risks the estate of the birth parents.⁵⁸

Intended parents often cannot access Medicare and social security benefits, or apply for a passport for the child, until the parentage order is made, and this may be in breach of the United Nations *Convention on the Rights of the Child*.⁵⁹

A less intrusive, smoother administrative process could involve the registration of the child's birth, listing the *intended parents* as the child's parents. This could be done with the birth parents' consent within a set timeframe after the birth. The Registry of Births Deaths and Marriages could manage this simple, administrative process. Such a process would not require costly and cumbersome paperwork, noting that the parties had already met the pre-surrogacy requirements before conception.

The Act could provide for the court to manage those cases where preconditions were not met, or the birth parents refused to consent to the birth registration. Most parentage orders are made by consent with all preconditions met; referring these simple matters to the Registry of Births Deaths and Marriages would remove them from the court process and relieve pressure on the court.

Provision could be made, in the administrative process, for the parties to complete post-birth counselling and to safeguard outstanding expenses payable to the surrogate.

Making the post-birth parentage recognition process more accessible and less costly serves to promote the best interests of the child and protects the interests of the parties.

14. Do you have comments about the preconditions to obtaining parentage orders?

For the sake of clarity, the writer submits that save for comments above and below, the preconditions of a parentage order should remain, if Part 3 is not repealed entirely.

Section 31: Affected parties must consent to order

As noted above, the consent of the birth parents is not required in Western Australia, where the birth parent is not a genetic parent of the child.⁶⁰ The consent of any parent is not required for the making of a parenting order under the *Family Law Act 1975* (Cth).

There should be provision for the intended parents to proceed with a parentage order without the surrogate's consent, if the surrogate has been served with a copy of the

⁵⁵ Supreme Court of New South Wales Schedule of Fees supremecourt.nsw.gov.au/practice-procedure/filing-fees.html as of 1 July 2024.

⁵⁶ *Family Law Act 1975* (Cth) s60H.

⁵⁷ United Nations, *Convention on the Rights of the Child*. (20 November 1989) Articles 7 and 8.

⁵⁸ See for example, *Administration and Probate Act 1958* (Victoria) s 91.

⁵⁹ United Nations *Convention on the Rights of the Child* Article 16.

⁶⁰ *Surrogacy Act 2008* (WA) ss21(2)(d), 21(3) and (4).

application and given an opportunity to respond. Such reform allows the intended parents to proceed without the birth parents needing to engage with the process unless they wish.

In cases where the parties' relationship has broken down, it should not be the case that a parentage order cannot be made without the birth parents' consent. It is not in a child's best interests that their parentage is determined by the consent or otherwise of the birth parents. Current provision for dispensing with the consent of the birth parents is restrictive.⁶¹

There are occasions where the birth parents have separated, after entering the surrogacy arrangement and before the making of the parentage order. Despite the separation, the surrogate's partner is still required to consent to the making of the parentage order.⁶² Obtaining their consent can be frustrating and may raise safety concerns for the surrogate. Allowance for the intended parents to proceed without the surrogate's partner's consent would be in the child's best interests and may also serve to protect the parties.

15. Do you think the process for obtaining parentage orders adequately protects birth mothers and other parties to a surrogacy arrangement?

The timeframe to apply for a parentage order is when the child is between one month and 6 months old. During this time, and while waiting for a parentage order to be granted, the birth parents remain the legal parents of the child. This has implications for succession and estate planning, and legal responsibility for the child. Surrogates have raised concerns with the writer about having legal responsibility for a child's welfare while they wait for the parentage order.

Noting the writer's comments above at point 13, the project team should also consider provisions that protect the surrogate and their partner from legal obligations while a parentage order or registration process is underway.

16. Do you think the parentage order process meets the policy objectives of the Act, including providing legal certainty and promoting the best interests of the child?

To promote the best interests of the children born, surrogacy and parentage order processes should provide clarity and certainty as to parentage, at the earliest opportunity.

17. Do you have any other comments about the provisions of the *Surrogacy Act*?

The government has an opportunity to rethink surrogacy in New South Wales and establish an ambitious new landscape for surrogacy in Australia. A well-regulated system of surrogacy which protects all parties from exploitation and the best interests of the children born could see an increase in surrogacy in Australia, and a decrease in intended parents engaging in surrogacy overseas. This serves to protect the interests of children born.

Compensated surrogacy which is capped, regulated and managed by government or independent authority protects the autonomy of surrogates and recognises the work of surrogacy, pregnancy and birth.

Government should develop information and education resources about surrogacy to raise the profile of surrogacy in New South Wales. In a vacuum of information and support, for-profit service providers flourish, often exploiting intended parents and encouraging international surrogacy, risking the welfare of overseas surrogates and the children born.

⁶¹ *Surrogacy Act 2010* (NSW) s 31(2) allows for dispensing with the birth parents' consent only if they have died or lost capacity or cannot be located.

⁶² *Surrogacy Act 2010* (NSW) s31.

Service providers should be regulated. Education should be provided to healthcare providers particularly working in family planning, reproductive and fertility health and obstetric care.

Thank you for the opportunity to make a submission. The writer is available for further submissions or to discuss further.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Jefford', with a large initial 'S' and a stylized flourish.

SARAH JEFFORD OAM

Index of proposed reforms

| Provision | Surrogacy Act - current | Proposed reform and comments |
|--------------------|--|--|
| Guiding Principles | The best interests of the child are paramount. | See response at point 1. No change proposed. |
| Sections 4 and 5 | Definitions including: <i>birth mother</i> and <i>birth mother's partner</i> Surrogacy arrangement meaning includes reference to <i>woman</i> . | See response at point 4. Replace <i>birth mother</i> with <i>surrogate</i> or <i>birthing person</i> or <i>birth parent</i> Replace <i>woman</i> with <i>surrogate</i> or <i>birthing person</i> |
| Section 6 | A surrogacy arrangement is not enforceable | See responses at points 2 and 3. Proposed change to explicitly protect the rights and autonomy of the surrogate to manage pregnancy and birth as any other pregnant person. |
| Section 7 | Birth mother's surrogacy costs - meaning | See responses at points 3, 6 and 7. Surrogate's costs should include provision for compensation beyond reasonable expenses. Surrogate's expenses should be managed by an independent, government-regulated escrow company. |
| Section 8 | Commercial surrogacy arrangements prohibited | See responses at points 7 – proposal to include regulated, capped compensation for surrogates. No change proposed to section 8. |
| Section 10 | Advertising of surrogacy arrangements prohibited except as provided in 10(2). | See response at point 11. Repeal Section 10(2)(b) to allow for paid advertising for a surrogacy arrangement. |

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| Section 11 | Geographical nexus for offences – prohibition of commercial surrogacy for residents of New South Wales. | See response at points 2, 8 and 9. Repeal Section 11 to decriminalise commercial surrogacy for New South Wales residents engaging in surrogacy overseas. |
| Section 31 | Affected parties must consent to order: The consent of a birth parent to the making of the parentage order is a mandatory precondition to the making of the parentage order. | See responses at points 1 and 14. The consent of a birth parent should not be a precondition to the making of a parentage order. Section 31(32) should be amended or repealed. |
| | Establishment of a Register of Surrogates | See response at point 12. Government should establish a regulated system for assessing and facilitating parties for a surrogacy arrangement. Government should establish educational resources and promote surrogacy in Australia. Government should regulate private service providers. |
| | Parentage Orders for children born overseas, including via commercial surrogacy | See responses at point 10. Parentage should be presumed without the necessity for a court order. |
| Part 3 | Parentage Order application process | See responses at points 13 and Repeal or amend Sections 35(2) and 17 for provisions for post-birth counselling. Repeal Part 3 and replace with an administrative process managed by the Registry of Births Deaths and Marriages. |
| R56A.9 | Rule 56A.9 of the Uniform Civil Procedure Rules 2005 (NSW) requires affidavits from both lawyers who provided legal advice to the parties. | See comments at Question 13. Repeal 56A.9 to remove the requirement for lawyer affidavits. |

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| Filing Fees | The current Supreme Court filing fee for an application for parentage order is \$1,351. | See comments at Question 13. Filing fees for surrogacy parentage order should be nil. |
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