



National Office  
4 Champion Street  
Deakin ACT 2600

T 02 6175 0200  
F 02 6259 0462

E [natoffice@acl.org.au](mailto:natoffice@acl.org.au)  
W [acl.org.au](http://acl.org.au)

ABN 40 075 120 517

16 March 2018

The Program Manager  
Reproductive Technology Unit  
Patient Safety & Clinical Quality Clinical Excellence Division  
Department of Health  
189 Royal Street  
Perth, WA 6004

**Re: Review of the Human Reproductive Technology Act 1991 (HRT Act)**

The Australian Christian Lobby (ACL) is grateful for the opportunity to comment on the current review of laws relating to the Review of the Human Reproductive Technology Act 1991 (HRT Act).

ACL's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 100,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

Please feel free to contact me if I can be of further assistance in the consideration of this matter. I would be pleased to meet to discuss my submission or any other aspect in respect to this review.

Regards,

**Rev. Peter Abetz**  
Director for Western Australia  
Australian Christian Lobby

## Introduction

One of the stated objectives of the *Review of the Human Reproductive Technology Act 1991 (HRT Act)* is to bring the legislation in Western Australian into conformity with legislation in other states and the Commonwealth. Human reproductive technology (HRT) is legislated by each state and territory (with the exception of the Northern Territory, which does not have legislation in this area).

The National Health and Medical Research Council, as an agent of the Commonwealth has particular interest in assisted reproductive technologies (ART) and in 2017 published its *Ethical guidelines on the use of assisted reproductive technologies in clinical practice and research, 2017*.<sup>1</sup> The introduction to those guidelines highlights that:

*“the guiding principles in this document are in line with community expectations that ART activities will be conducted in a manner that shows respect, minimises potential harms and supports the ongoing wellbeing of all parties, including persons born as a result of ART.”*<sup>2</sup>

It would appear prudent for this *Review of the Human Reproductive Technology Act 1991 (HRT Act)* to operate within the NHMRC guidelines. The ACL does not endorse all aspects of the ART guidelines enumerated by the NHMRC but these nevertheless provide a common reference point, demarcating ethical boundaries that certainly ought not to be exceeded. Some specific points of difference between the recommendations of the NHMRC and the ACL’s preferred position will be made evident in the submission below.

This submission will address only those points of the *Review* in which the ACL has competency to comment. These relate particularly to the dangers of commodification of both women and children in various ART procedures. There is no right to a child. It is disingenuous for any ART legislation to claim to be operating in the best interests of a child when the child can only come into existence through the deliberate decision to fulfil the desire of a couple or an individual.

Surrogacy gives rise to a range of ethical concerns as well as problematic policy issues, such as the fair and ethical regulation of transnational commercial surrogacy

*1. Research and experimentation on gametes, eggs in the process of fertilisation and embryos. In particular consider the current disparity between the HRT Act and relevant Commonwealth legislation and need to adopt nationally consistent legislation regarding excess assisted reproductive technology (ART) embryo research and prohibited practices.*

As stated above, the NHMRC guidelines to ART, 2017<sup>3</sup> ought to provide the parameters for any recommendations arising from this Review.

---

<sup>1</sup>[https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/guidelines/ethics/16506\\_nhmrc\\_-\\_ethical\\_guidelines\\_on\\_the\\_use\\_of\\_assisted\\_reproductive\\_technology-web.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc_-_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf) Retrieved 2 March 2018.

<sup>2</sup> *ibid* p13.

<sup>3</sup>[https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/guidelines/ethics/16506\\_nhmrc\\_-\\_ethical\\_guidelines\\_on\\_the\\_use\\_of\\_assisted\\_reproductive\\_technology-web.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc_-_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf) Retrieved 2 March 2018.

There are a range of inconsistencies in Australia's state and territory legislation including:

- the profile, marital status and sexual orientation of couples/individuals who may be eligible for ART;
- legal requirements for eligibility for surrogacy arrangements and;
- requirements for criminal checks on participants.<sup>4</sup>

Similarly, penalties for engaging in transnational surrogacy arrangements vary between legislatures. Notwithstanding the penalties in various state jurisdictions, the Department of Foreign Affairs and Trade allows Australian Citizenship for children commissioned through international surrogacy agreements<sup>5</sup>, thereby undermines any disincentive for couples or individuals to engage in such practices.

The NMHRC guidelines advise against commercial surrogacy and overseas surrogacy arrangements and it is illegal in all jurisdictions. .6 John Pascoe, Chief Justice of the Family Court, has warned strongly against any form of commercial surrogacy as “the new ‘front line’ in the trafficking and commodification of women and new born children.”<sup>7</sup> This issue will be discussed further when considering commercial surrogacy.

#### **Recommendation:**

Adoption of nationally consistent legislation regarding excess assisted reproductive technology (ART) embryo research and prohibited practices. These to align within the parameters of the NHMRC guidelines.

## *2. Genetic testing of embryos, saviour siblings, mitochondrial donation and gene editing technology.*

### *2.1 Genetic testing of embryos*

While it is understandable that parents and doctors wish to avoid the possibility of transmitting genetic illnesses to future generations, the tendency towards selection of healthy embryos for implantation is indistinguishable from eugenics. We may begin with wishing to avoid certain serious conditions but to what length are we prepared to go, as a society, to ensure perfect children? Already some societies, such as Iceland, are heralding the eradication of Downs syndrome – largely through abortion.<sup>8</sup> Practices such as genetic testing of embryos simply pre-empts a later abortion, but the same end is achieved: the eradication of persons with certain congenital conditions from the human race.

<sup>4</sup><http://www.essentialbaby.com.au/conception/surrogacy/a-guide-to-australias-surrogacy-laws-20160224-gn2u0p> (retrieved 6 March 2018)

<sup>5</sup><http://smartraveller.gov.au/guide/all-travellers/birth-death-marriage/pages/birth-adoption-and-surrogacy.aspx> (retrieved 6 March 2018)

<sup>6</sup>Nikola Berkovik, “Surrogacy, a new form of trafficking, Family Court Chief”, *The Australian*, 8 March 2018. (Available from: <http://www.abc.net.au/news/2014-10-09/surrogacy-claims-strengthen-calls-for-inquiry/5800258>)

<sup>7</sup>Berkovik, op. cit.; see also Pascoe, op. cit.

<sup>8</sup><https://www.sbs.com.au/topics/life/health/article/2017/08/16/why-are-so-few-babies-down-syndrome-born-iceland> (retrieved 12 March 2018)

## 2.1 Saviour siblings

The government can obviously have no influence on the situation in which a couple conceives a child naturally with the hope that it will be a match for a sibling who requires a bone marrow transplant. Even this natural process is ethically problematic as it may lead to a commodification of the child who is conceived as a means to an end.

The possibility of such a couple creating surplus embryos with a view to screening and discarding those embryos which do not meet the required genetic profile is obviously much more problematic in ethical terms. The creation of multiple embryos in the knowledge that some or all may be discarded fails to take account of the essential humanity of all embryos.<sup>9</sup>

## 2.3 Mitochondrial donation.

Mitochondrial donation may reduce the wastage of extra embryos but it creates another set of difficulties by creating a child with three genetic parents. Françoise Baylis identifies some of these issues.<sup>10</sup> She raises the harm to the egg-donor in the process of hyper-stimulation of ovaries; harm to future generations – citing other scholars who warn that the consequences of mixing mtDNA from different sources is still experimental and might not be safe in the longer term.<sup>11</sup> Baylis outlines the advantages for couples where there is a disability carried in the matrilineal line, however, she also warns of the possible use of the technology for non-medical reasons such as the desire of a lesbian couple to carry a child that is genetically linked to both partners, and designer babies.

Genetic parenthood in mitochondrial transfer is questioned by bioethicist Monika Piotrowska.<sup>12</sup> Such practices make it difficult to determine genetic parenthood. The existence of three genetic contributors is not by definition 'reproduction' as we currently understand it.

### **Recommendations:**

- 1) Children and embryos are not a commodity and it is not acceptable to genetically engineer 'undesirable' traits from future children.
- 2) Mitochondrial donation tampers with genetic lineage and there is little conclusive scientific knowledge about long term consequences.
- 3) Genetic testing of embryos, mitochondrial donation and the creation of saviour siblings should not be permitted as they are eugenic practices that contribute to the commodification of children.

---

<sup>9</sup> For arguments concerning where we should establish the beginning of the human person in biological terms, please see Dr Megan Best, *Fearfully and Wonderfully Made: ethics and the beginning of human life*, Matthias Media, 2012. (ISBN: 978-1-921896-61-3)

<sup>10</sup> Baylis, Françoise. "The Ethics of creating children with three parents" *Reproductive BioMedicine Online*, vol. 26, 2013, pp. 531–534.

<sup>11</sup> Baylis, op.cit.

<sup>12</sup> Monika Piotrowska, "Is Assisted Reproduction, Reproduction?", *The Philosophical Quarterly*, vol. 68, Issue 270, Oxford University Press, 1 January 2018, pp. 138–157.

*3. Posthumous collection, storage and use of gametes and embryos, including the consent required, conditions for use, and any impact on other legislation such as the Human Tissue and Transplant Act 1982, Artificial Conception Act 1985, Births Deaths and Marriages Registration Act 1998, Administration Act 1903 and Family Provision Act 1972*

Consent of the deceased person in posthumous collection of gametes is necessary, but not in itself sufficient to outweigh the right of every child to have a relationship with both biological parents. The sole possible reason for engaging in such a practice would be the desire of a surviving partner to have the child of the deceased.

It is important to distinguish between 'collection', 'storage', and 'use'; as well as distinguishing between the moral status of 'gametes' and 'embryos'. In the case of posthumous collection, storage and use of gametes, it is difficult to perceive of a situation where this would be beneficial for the possible creation of a child in the future. In the case of existing embryos, however, it would be suitable for them to be implanted into the genetic mother of the embryos. In the case of the death of the genetic mother, there may be a case of implantation of the embryos, but this would be a delicate situation requiring prior consent of the mother.

**Recommendations:**

- Gametes should not be collected, stored or used posthumously.
- Stored embryos may be implanted into the mother even after death of the father, but such issues should have been part of pre-ART counselling.

3.1 Rights to storage of gametes and embryos including:

- rights upon separation or divorce, or the death or the physical or mental incapacity of an individual, or one or both members of a couple.

These are issues which may arise and ought to be included in the counselling of the original couple prior to undertaking any ART.

- rights of third parties such as subsequent spouses, and the rights of other relatives.

Since decision-making rights over another person's gametes are not recognised during the life of the biological parent, the posthumous recognition of these prerogatives seems anomalous. If one genetic parent survives, they may wish to implant stored embryos, but even this would be an extremely difficult situation requiring extensive and comprehensive counselling of the partner and subsequent spouse.

**Recommendations:**

- 1) The handling of embryos in storage should be the subject of counselling prior to couples engaging in ART. This should include any possible rights of subsequent spouses.
- 2) There role of other relatives in determining the storage or usage of stored gametes and embryos ought to be the subject of counselling prior to couples engaging in ART.
- 3) There should be no posthumous collection of gametes and no storage of gametes of a deceased person.

*4. The impact on the HRT Act of relevant Commonwealth and State legislation, and aspects of legislation of other jurisdictions which could be incorporated into the HRT Act.*

Any review conducted by the Western Australian Government on ART ought to operate within the NHMRC Guidelines on ART.

*5. Management of information / the Reproductive Technology Registers, including; Use and Collection of data:*

- *Confidentiality of information*
- *Use of data for research,*
- *Use of data for purposes of national data collection and;*
- *Access to information about donation, genetic parentage and donor conception,*
- *The Voluntary Register*

#### *5.1 Confidentiality of information*

It is ACL's view that information about genetic parentage and related information concerning medical implications of genetic profiling should be protect the privacy of parties concerned but available to any child conceived from donor material.

#### *5.2 Use of data for research*

Data may be collected and used for research provided that anonymity and confidentiality of all parties is protected, and permission is obtained from the donors, surrogate, social parents and any child born of through ART.

#### *5.3 Use of data for purposes of national data collection*

Collection of data as part of a national data bank of information relating to donors and surrogates would facilitate the identification of donors in a mobile population.

#### *5.4 Access to information about donation, genetic parentage and donor conception*

Children have a right to know their genetic parents and their host mother because all these persons have had a role in shaping their biological identity. Apart from confirming parentage, children conceived through ART may have many reasons for wishing to identify donors including (but not limited to) factors relevant to their identity, medical history as well as the risk and/or fear of forming consanguineous relationships.

The right of the donor to anonymity in the interests of leading a quiet family life cannot be protected at the expense of the superior right of the child to information relating to his or her genetic background. The protection of the interests of the child is guaranteed by both the United Nations

Convention on the Children Rights and the European Convention on Human Rights.<sup>13</sup> Article 8 of the UN Convention on the Rights of the Child states that a child has a right to an identity: official records of who they are and that a government should respect a child's right to a name, a nationality and family ties. Article 9 states that the child has a right to live with its parents, and if this is not possible the right to stay in contact with both its parents.<sup>14</sup> It is difficult to reconcile these rights with the variety of potential relationships which can ensue from artificial reproductive technologies.

### Narelle's Law

An example of legislation which might be adopted in relation to access to information about donors is the *Assisted Reproductive Treatment Amendment Act 2015*, discussed below and known as 'Narelle's Law'. The legislation is named for Narelle Grech who, from the age of 15, sought to find her donor known as T5. Narelle was battling with hereditary bowel cancer and was desperate to find her donor father and to learn something about her medical history.

### 5.5 The Voluntary Register

It is important for individuals conceived through ART to have access to information pertaining to their genetic origins. The NHMRC guidelines recommend a central register.

In Victoria, under 'Narelle's Law' requires that Central and Voluntary Registers are maintained but that their management would be transferred from the Registrar of Births, Deaths and Marriages to the Victorian Assisted Reproductive Treatment Authority (VARTA)—a government authority established under the ART Act 2008 (Vic.).<sup>15</sup> Sonia Allen, in her discussion of how the law will operate writes:

*"The Act specifies what information must be kept on the Central Register, including but not limited to identifying information about the donor of gametes, the number of births resulting from the use of donated gametes and other prescribed information. The Central Register will also hold results of any genetic testing undertaken to establish relatedness.*

*The Voluntary Register will continue to allow the following persons to place information on the voluntary register and express wishes for contact: persons born as a result of donor treatment procedures; the descendants of persons born as a result of donor treatment procedures; donors; women who have undergone donor treatment procedures and their partners, if any; and the relatives of all such persons. This may be particularly important when records have been destroyed. In addition, there is new provision for a person to enter any photograph, toy, jewellery or other item approved by VARTA onto the Voluntary Register. The law will continue*

---

<sup>13</sup> J. Zyberaj, and E. Ilkonmi, "The Complexity of Donor Assisted Reproduction Anonymity", *Academic Journal of Interdisciplinary Studies*, vol. 2(9), Rome, 2013. [nbed page numbers?]

<sup>14</sup> [https://www.unicef.org/crc/files/Rights\\_overview.pdf](https://www.unicef.org/crc/files/Rights_overview.pdf) (retrieved 14 March 2018)

<sup>15</sup> Sonia Allan, "Donor identification: Victorian legislation gives rights to all donor-conceived people", *Family Matters*, No. 98, November 2016. (Available at: <https://aifs.gov.au/publications/family-matters/issue-98/donor-identification>). Retrieved 14 March 2018.

*to provide for counselling before the disclosure of information in the Voluntary Register.”<sup>16</sup>*

Interestingly, the NHMRC guidelines on ART recommend that embryos held in storage prior to 2004 when donors still had the option of remaining anonymous, are not to be used for implantation, presumably because the current preference is that the right to access information of donors is now seen as being of a higher importance than anonymity.<sup>17</sup> This direction, however, leaves those embryos created by anonymous donors prior to 2004, in an ambivalent situation.

**Recommendations:**

1. That identity of surrogates be included in data collection and be available to the child carried by the surrogate, if the child requests that information.
2. That all data relating to donors, surrogates, and children born of ART be confidential and can only be used with permission of the relevant parties.
3. That a central register be established to complement the existence of any existing voluntary registers and that such a register be modelled on the Victorian model as decreed by the *Assisted Reproductive Treatment Amendment Act 2015* (Vic.)

6. *Surrogacy:*

- *The impact on the Surrogacy Act of relevant Commonwealth and State legislation and aspects of legislation of other jurisdictions, which could be incorporated into the Act, including consideration of harmonisation of domestic surrogacy legislation;*
- *The need for continued prohibition on commercial surrogacy;*
- *International commercial surrogacy arrangements.*

The three issues concerning commercial surrogacy above will be considered together. The NHMRC guidelines on ART are clear and precise:

*Do not practice, promote or recommend commercial surrogacy ... it is ethically unacceptable to provide, or offer to provide, direct or indirect inducements for surrogacy services.<sup>18</sup>*

The NHMRC guidelines are concerned with the commodification and exploitation of the surrogate, the commissioning parents and any person born as a result of the surrogacy arrangement.

<sup>16</sup> Ibid.

<sup>17</sup> “5.13.1: “Clinics should not use gametes collected before the introduction of the 2004 edition of these Ethical Guidelines without the consent of the gamete donor to the release of identifying information for any future treatments.” ([https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/guidelines/ethics/16506\\_nhmrc\\_-\\_ethical\\_guidelines\\_on\\_the\\_use\\_of\\_assisted\\_reproductive\\_technology-web.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc_-_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf) (retrieved 2 March 2018)

<sup>18</sup> [https://www.nhmrc.gov.au/\\_files\\_nhmrc/file/guidelines/ethics/16506\\_nhmrc\\_-\\_ethical\\_guidelines\\_on\\_the\\_use\\_of\\_assisted\\_reproductive\\_technology-web.pdf](https://www.nhmrc.gov.au/_files_nhmrc/file/guidelines/ethics/16506_nhmrc_-_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf) (retrieved 2 March 2018) p.65



Surrogacy may involve a range of parents both biological and social. The gametes may be from one or both of the commissioning parents. There may be an ovum donor and a sperm donor and the gestational carrier. All of these people will be in a social or biological relationship with the child.

Chief Justice of the Family Court, John Pascoe has recently made headlines in a recent speech to the United Nations by likening international surrogacy to human trafficking.<sup>19</sup>

### 6.1 Exploitation of the surrogate

Commercial surrogacy will always involve the production of a baby commissioned by affluent person or couple using a woman who is of lower economic standing.<sup>20</sup> She may also be coerced by her own family who view this as a way out of poverty.<sup>21</sup>

The surrogate mother is the one who must endure the physical burden of pregnancy and labour as well as the psychological pain of surrendering the child after delivery. Commercial surrogacy has been described as the rental of a womb, but this fails to take into consideration the wholistic extent to which the vulnerable women are exploited through this process. The extent of exploitation is much better captured by Justice Pascoe's discussion of 'uterine indentured slavery'.<sup>22</sup> According to Pascoe, 'informed consent' in any real sense is highly unlikely in the case of surrogate mothers in developing countries.

It is even less likely that any discussion will take place about the long-term physiological consequences for the surrogate mother regarding the intimate biological relationship that develops between the host mother and the developing child. Loike and Fischback warn that:

*It may come as a surprise when the surrogate realizes that she is not merely a host mother but that despite carrying a genetically unrelated fetus, her genetic fingerprint may eventually contribute to future medical risks or benefits of the child.*<sup>23</sup>

They recommend that this information should be part of the counselling process for prospective host mothers.

---

<sup>19</sup> Berkovik, op. cit.; Pascoe, op.cit.

<sup>20</sup> Renate Klein, 'Can Surrogacy be Ethical?' (Available at: <http://www.abc.net.au/religion/articles/2015/05/18/4237872.htm>). Retrieved 14 March 2018.

<sup>21</sup> Pascoe, op. cit., p.6

<sup>22</sup> ibid. p.6

<sup>23</sup> J.D. Loike, R.L. Fischbach, "New Ethical Horizons in Gestational Surrogacy", *J Fertil In Vitro IVF Worldw Reprod Med Genet Stem Cell Biol*, vol. 1:109, 2013. doi:10.4172/2375-4508.1000109 (Available at: <https://www.omicsonline.org/open-access/new-ethical-horizons-in-gestational-surrogacy-jfiv.1000109.php?aid=18500>). Retrieved 14 March 2018.

## 6.2 Exploitation of the ovum donor

The ovum donor may or may not be the surrogate mother. The harvesting of ova is not without physical and psychological consequence as detailed by Francoise Baylis in her discussion of mitochondrial transfer.<sup>24</sup> As she states:

*it is one thing to incur the physical and psychological risks of hormonal stimulation and egg retrieval in pursuit of a personal reproductive project; it is quite another to do so for someone else's reproductive project.*<sup>25</sup>

## 6.3 Exploitation of the child

The end product of surrogacy – the child – has no decision-making capability, yet his or her future is determined by the surrogacy process. Pascoe raises a plethora of such issues in which the child, intimately affected by the outcome, has no voice:

- the ambiguity of genetic parenting
- the definition of 'parent' across a number of jurisdictions
- the existence of a contract which brought it into being
- the very real possibility of trafficking.

All of these issues expose the child to human rights violations because, as Pascoe explains:

*the rights of the child are most commonly protected by its parents, however in cases where the parentage is ambiguous or disputed, the child is exposed to being stateless or at least genetically bewildered.*<sup>26</sup>

In cases of adoption, the state's responsibility to care for children under its protection involves the extensive screening of potential parents to ensure their suitability. No such safeguards protect the interests of children conceived through surrogacy. The case of Baby Gammy, a child commissioned through surrogacy who was then rejected by the commissioning couple on the basis of disability, created a media stir in 2015. Still more shocking however, was the subsequent revelation that the boy's father, David Farnell, was

---

<sup>24</sup> Baylis, op.cit: "Drug-induced egg production and retrieval involves considerable time and inconvenience. On average, 56 hours are required for interviews, counselling, screening, hormonal stimulation and egg retrieval (Ethics Committee ASRM, 2004). As well, there are physical and psychological risks associated with the requisite medical procedures (Maxwell et al., 2008). The daily hormone injections can be uncomfortable and painful. Moreover, they can result in cramping, abdominal pain, nausea, vomiting, bloating, mood changes and irritability. More serious potential physical harms include rapid weight gain and respiratory difficulty, damage to the other organs such as the bladder, bowel and uterus, decreased fertility, infertility and life-threatening haemorrhage, thromboembolism and ovarian, breast or colon cancer. Potential psychological harms include significant stress and sequelae."

<sup>25</sup> Baylis, op.cit.

<sup>26</sup> Pascoe, op.cit., p. 6–7.

subsequently awarded custody of Gammy's twin sister, despite a criminal record including 22 child sex convictions particularly relating to young girls.<sup>27</sup> Where Farnell would never have been considered an appropriate adoptive parent, there are no restrictions on his access to children born through surrogacy.

Arguably, even were criminal checks to form part of the standard procedures to screen those commissioning surrogate children, these would be insufficient to eliminate the inevitably increased risk of exploitation to the children produced through these arrangements. Peter Truong and Mark Newton, for example, purchased their son as a new born, ostensibly in response to their heart-felt wish to found a family. 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 for him to meet around the world. Truong and Newton are currently serving lengthy sentences in a U.S. prison. Though the child was purchased after his birth, this case serves to highlight the dangers inherent wherever children become tradeable commodities. Since neither Truong nor Newton had previous criminal convictions, their true intentions in purchasing a child would not have been detected, even were screening to form part of Australia's procedures.<sup>28</sup>

Children produced through surrogacy may also be harmed by separation from his or her host mother. The relationship between the gestational carrier and the child is both biological and intimate, even where the child has been produced with a donated ovum.<sup>29</sup> There is still much research to be done in this field, but it is known that the child in utero responds to sounds and smells and that post-natal exposure to these sounds and smells can be soothing for a new born. 'From the moment they enter the world, babies know the difference between their mothers and everybody else.' Removal of the child from the familiarity of its surrogate mother therefore causes distress for the newborn as it does for the mother. According to Erica Komisar:

*when mothers are missing or non-existent, children mourn that loss. If we are going to embrace a system where mothers are exchanged for other caregivers, then we need to address the loss these children feel; denying this causes additional pain.*<sup>30</sup>

#### 6.4 Policing international trade

The Federal Government has enforced strict border control measures for other types of immigration but neglected surrogacy, an area in which Australia's borders remain porous. Penalties for transacting international surrogacy vary between federal and state jurisdictions from fines only to three years imprisonment (Qld.). Nevertheless, commissioning parents can have is reasonable certainty that

---

<sup>27</sup> Samantha Hawley, "Baby Gammy, one-year-old at centre of Thai surrogacy scandal, granted Australian citizenship", *ABC News*, 20 January 2015. (Available at: <http://www.abc.net.au/news/2015-01-20/baby-gammy-granted-australian-citizenship/6026600>). Retrieved 16/03/18.

<sup>28</sup> Ibid p.6

<sup>29</sup> Loike and Fischbach, op. cit.

<sup>30</sup> Erica Komisar, *Being There: why prioritising motherhood in the first three years matters*, New York, 2017, p. 18.

children born overseas through surrogacy to an Australian parent will be granted Australian Citizenship.<sup>31</sup>

Given that commercial surrogacy is considered unethical in all Australian jurisdictions, there ought to be severe penalties for this practice, in the hope that these would serve as a strong disincentive. At the moment, commissioning parents who knowingly flout the law, do so without consequence. The only jail term ACL is aware of has been served by the intermediary nurse in the Baby Gammy case, and she served her sentence in a Cambodian jail.<sup>32</sup>

The UN Special Rapporteur on the sale and sexual exploitation of children, Maud de Boer-Buquicchio, said commercial surrogacy posed “unresolved dilemmas” and had “created urgent concerns both for states and for the international community”.

Speaking at a recent meeting in Geneva, she said: “Surrogacy, in particular commercial surrogacy, often involves abusive practices.” She called on countries to adopt clear laws to ban the sale of children, including in the context of surrogacy. She also urged the international community to ensure that any international laws recognising parentage had appropriate bars to recognition where the foreign legal system did not adequately protect the rights of the child or surrogate mother.<sup>33</sup>

**Recommendations:**

- 1) To prohibit offering or providing, direct or indirect inducements for surrogacy services. (As per NDMRC guidelines for ART.)
- 2) To require the relevant authorities to actively enforce the laws surrounding commercial surrogacy.
- 3) That Federal legislation regarding citizenship for commercially contracted surrogacy be reviewed and reflect the serious nature of this trade in persons and contracting of ‘uterine indentured slavery’. Such legislation should cross-reference to State penalties for obtaining international surrogacy services.

## 7. International trade in gametes and embryos

The NHMRC guidelines state:

*5.5.1 Treatment in Australia using gametes donated by persons living in another country must not take place unless it can be established that the gametes were obtained in a manner consistent with any Commonwealth legislation and any relevant state or territory legislation, accreditation body guidelines and these Ethical Guidelines.*<sup>34</sup>

---

<sup>31</sup> <http://smartraveller.gov.au/guide/all-travellers/birth-death-marriage/pages/birth-adoption-and-surrogacy.aspx> Retrieved 10 March 2018.

<sup>32</sup> ‘Australian nurse sentenced to 18 months’ jail in Cambodia on surrogacy charges’, *The Guardian*, 3 August 2017. (Available at: <https://www.theguardian.com/world/2017/aug/03/australian-nurse-sentenced-to-18-months-jail-in-cambodia-on-surrogacy-charges>). Retrieved 15 August 2018.

<sup>33</sup> Berkovik, op. cit.

<sup>34</sup> [https://www.nhmrc.gov.au/files/nhmrc/file/guidelines/ethics/16506\\_nhmrc\\_ethical\\_guidelines\\_on\\_the\\_use\\_of\\_assisted\\_reproductive\\_technology-web.pdf](https://www.nhmrc.gov.au/files/nhmrc/file/guidelines/ethics/16506_nhmrc_ethical_guidelines_on_the_use_of_assisted_reproductive_technology-web.pdf) (retrieved 2 March 2018)

**Recommendation:**

International trade in gametes and embryos should be prohibited.

---