Submission to the West Australian Review of the Human Reproductive Technology Act 1991 (HRT Act) and the Surrogacy Act 2008

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ARMS (Vic) is a not for profit organisation which was formed in 1982 by a group of women who had lost their children to adoption and who realised they (and many other women) had all had similar experiences of being denied the right to mother the children to whom they had given birth.

ARMS has supported mothers ever since, holding support group meetings each month in Melbourne for the past thirty-five years, and more recently in Victorian regional areas as well. We well know the experience of grief and trauma that follows the taking or 'giving' of a child, and as an organisation, are extremely concerned with the parallels between adoption and surrogacy. Both are made to appear "normal" and acceptable within a society where one part of the community covets that which another part of the community has, in this instance, a child.

At the centre of every surrogacy is a relinquishment and as a society, through the adoption experience, we have close to 100 years' knowledge and experience of the psychological and emotional damage of relinquishment and the secrecy that has been attendant upon it. Surrogacy will create the new generation of grieving women and generations of offspring who are disenfranchised from their origins.

What is clear from adoptions and the subsequent donor conception experience is that it is not a woman's role to produce a baby for someone else, just because they want one. Those who advocate for surrogacy fail to accept as relevant, the trauma of separation of mother and child. Society, through the apology for past wrongs by Australia's Federal and State Governments, have acknowledged the damage of social policy that separates a mother and child to meet the desire for a child by a couple unable to produce their own. There is no excuse for us as a community, if we fail to learn from the past and repeat that damage because we refuse to accept the parallels.

We wish to convey in the strongest possible terms our opposition to any form of commercial surrogacy and believe that 'altruistic' surrogacy is a dangerous notion that should not be supported by the State.

Following is our submission to the West Australian Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008.

Marie Meggitt
on behalf of ARMS(Vic)

PREAMBLE

It has been more than 25 years since ARMS first called the community to recognise that surrogacy would produce the new generation of grieving women. Since then we have seen an explosion of prospective commissioning couples desperate to secure a child, especially as the pool of babies available to be adopted has dramatically reduced. Surrogacy is even more attractive than adoption because it offers the possibility of either one or both of the commissioning couple to be genetically connected to the child. It also enables the commissioning couple to negate any meaningful role that the carrying mother plays by dismissing it as the incubation of "their" child. While traditional surrogacy is not a recent phenomenon, fertility clinic assisted surrogacy is, and this brings serious policy ramifications.

A Public Policy Framework

Altruistic surrogacy has occurred in society for centuries without a public policy framework around it. The desire for such a framework flows from the ambition of commissioning couples, IVF clinics and surrogacy businesses. Clinics would like the opportunity to expand their client base, particularly into a population of fertile women, which would improve their statistical 'success' rate. Commissioning couples want to be sure that at the end of the pregnancy and having spent quite a lot of money, they will in fact be given the child they have bought. Now with the dramatic growth of surrogacy businesses in America and the push for an Australian market, there is almost unendurable pressure on governments to provide legislative security, and therefore opportunities for this business growth.

Early Experiences of Surrogacy

ARMS women in the late 1980s had the privilege of meeting several of the first women to undertake to carry a child on behalf of a commissioning couple, without payment. Elizabeth Kane became the pin up woman of the pro-surrogacy movement for several years, until she started living the consequences of her act of altruism – deep depression, her previous children suffering profound emotional disturbances and her marriage on the brink of disintegration. Elizabeth, Mary-Beth Whitehead and Lori-Jean are women we met who told of their experiences of being a so-called 'surrogate'. In truth, they were mothers – but language is used to diminish status when society is doing something unconscionable.

All three women spoke eloquently of the impact on their families of their decision to relinquish the child they carried to the commissioning couple. It had far reaching and ongoing negative consequences for their children and their marriages. Women who become birth mothers for a commissioning couple are in a nightmare predicament because of the contradictory views of society. Just as it has been for the mother who has relinquished in adoption, on one hand the woman is applauded for giving her child to a 'deserving' couple, who can provide a two parent environment for the child, but on the other she is treated with suspicion because she has 'given away' her child. This irony and nightmare for women is best exemplified

by a court case in the late 1980s where a woman who was carrying a child in a surrogacy arrangement, lost custody of her previous three children in a divorce proceedings because the Judge deemed that she was an unfit mother because she was prepared to give away the unborn child. He was convinced by her husband that she was, as a consequence of the surrogacy, an unfit mother.

IVF is now a preferred means for an infertile couple to attempt to procure a child as it is possible to create a child that is biologically related to both husband and wife. Alternatively, providing a donor egg creates a way in which the birth mother has her status reduced to that of incubator, as she has no genetic connection to the child she is carrying. However, as so many of the women who have walked this path have attested, the genetic connection is only one dimension of carrying a child. Science and women's experiences now tell us that the gestational period is of enormous significance to both the foetus and the mother, and this relationship needs to be acknowledged and valued. It is a fallacy to suggest that a woman is less connected to a child that is not her own progeny.

Altruism

'Altruistic surrogacy' provides just one further dimension of the exploitation of women. Women are socialised into caring and this sets them up for exploitation, especially where there is a power imbalance in the family. Lori Jean told of this strongly when she reflected that she had undertaken to carry a child for her sister because she thought and hoped that her sister would love her more. She gave birth to her sister's husband's child who was also her child and her family disowned her because she realised during the pregnancy that she felt deeply attached to the child. She did relinquish her child to her sister, and was immediately cut off by her sister, losing all of the relationships in her family of origin, and the one she was promised with her child. This is not an uncommon story and in many ways it makes sense.

The woman who cannot carry a child is still infertile, even if she has been given a child. It could be an ongoing source of pain to engage with the woman who carried your husband's child, who could do what you could not, and whose existence served to reinforce your own sense of inadequacy. Some fertile women feel both sorry for an infertile sister and responsible for her situation. It can be very difficult to answer the question 'why won't you do this for me', especially when it can be reduced to feeling like one sister won't give the other something the fertile one has. The sorry truth of most families is that there are power relations that exist and that can and do leave women disadvantaged. These unequal relationships are evident in all families, but they take on a special character when a child is at stake. The divorce courts are an easy example of the extent to which the power dynamics in families can be vicious and deeply unequal. When a child is the prize, power and money are played hard and the woman who is in it because of her emotional commitment, isn't even on the same playing field. This has been the lived experience of the women we have met or had contact with through sister organisations.

Third World Concerns

Compounding the commodification of babies via surrogacy is the use of girls and women in third world countries to provide these services: surely clear exploitation of the powerless by the powerful. If commercial surrogacy were to be legalised in Australia this exploitation would not be diminished. The amount of money paid to the birth mother would perhaps not be as life changing as it is to the birth mothers in poor third world countries, but it would still be money paid by someone who *has* more, to someone who *needs* more.

Policy initiatives must ensure that girls and women in third world countries are not used in this way; that commercial surrogacy is prohibited and that any contract cannot be held valid where it demands the transfer of the child from the birth mother, should that be against her wishes. The lesson from adoption is that a woman cannot truly grasp the lived truth of relinquishing a child until she has given birth to that child and has had time to recover from the birthing process.

Counselling

Counselling services in adoption were heavily skewed towards persuading the pregnant woman to give up her child, and promoting the interests of the prospective adoptive couple. When IVF began, again, counselling services were extremely poor, avoiding - as much as possible - addressing the implications of donated genetic material. We can't assume that the services offered in the surrogacy context are any better, and what we know to this point is that 'counselling' is often provided by those who have a vested interest in the outcome. At minimum, any woman who enters a surrogacy arrangement must be provided with appropriate adequate, relevant counselling for both herself and her family. Legal representation should be provided to her prior to an agreement being entered into and throughout the process of the pregnancy. It should be paid to an independent body that oversees the expenditure, and contributed to by obliged contributions from both commissioning couples and the medical clinics who provide services to them to ensure the independence of the counselling.

Marginalising the Birth Mother

The focus in surrogacy always appears to be on the commissioning parents - how much they want a family; how they can achieve their wish; how much it costs them financially and emotionally. Surrogacy intentionally violates the gestational link between the child and the birth mother. And what of the children who do not come up to the expectations of the commissioning parents? We have seen what happens when a baby is born with a disability, or there are more babies than the commissioning parents expected. Who can say that just because these babies are born in Australia of Australian surrogates that this will not happen?

It has been in the nature of adoption, and continues to be the case with surrogacy, that the power and influence has resided with the adopters or commissioning parents and the institutions that have facilitated this process. By their nature they

have money, influence, and status, control of the delivery of messages through media - and these days the addition of celebrity status in a society that celebrates fame and rewards it in many ways. Allowing altruistic surrogacy throughout Australia is the thin edge of the wedge. Those in Australia who currently gain financially from international commercial surrogacy are waiting in the wings to take it a step further: legal commercial surrogacy in all States and Territories of Australia. They are running a business and want to ignore the complexities of this social policy.

Pregnancy and Relinquishment

The focus needs to be switched to (1) the birth mother and her needs. She is the one carrying the baby for nine months; the one taking the risks by being plied with drugs and hormones; the one bonding with the baby for the nine months that it lives inside her womb; the one going through childbirth and taking all the attendant risks; and (2) the child who is to be born of surrogacy.

The experience of women who have lost children to adoption has been that our feelings in relation to the child we carried were not as important as those of the couple who were to become the adoptive parents. Surrogacy is designed to meet the needs of the commissioning couple. The birth mother's emotional landscape will always take second place, if only because of the imbalance of power. In a surrogacy arrangement it is expected that there will be no emotional attachment, but the foetus that is growing is ultimately and irrevocably linked with her body. The birth mother will bond with the child in utero, regardless of whether or not she has contributed genetic material. In any pregnancy there is cell transfer. This cell memory remains for the mother and child over their lifetime. The relinquishing mother will grieve for the child. This reaction is normal and if separated permanently from the child, is likely to be lifelong, as we learned in adoption. No-one knows how they will cope with a situation until they've lived it. Early evidence shows that after the first warm glow of altruism wears off, women are missing their babies and do grieve. In surrogacy it is a hidden and socially unacceptable grief, because the birth mother 'chose' it.

The Interests of the Child

Surrogacy ignores the welfare of the child because it treats the child as a commodity to be ordered and exchanged as an article of transfer. The effects of surrogacy for the child are likely to be even more damaging than in adoption because of the planned nature of the decision to deliberately create a child to be relinquished.

Children born of surrogacy in the US in the '80s are beginning to speak out. "When the only reason you're in the world is because of a big fat pay cheque, it's degrading." "How would you feel about being born specifically to be given away?" We also know from surrogacy arrangements that have occurred to date that they can have a serious and deleterious impact on the existing and subsequent children of the birth mother who will need to help them understand why she would give away what they see as one of their siblings; and contend with a child's fear that they too

may be given away. What are we as a society saying to the other offspring the birth mother has about the concept of motherhood? What does the mother's action say of the bonds of motherhood on which her other children depend?

Public Policy

The creation of a child with the intention of forming another family has been a highly contested space for over 50 years. The Australian experience is particularly important because we have led the world in an advancement of understanding the impact of adoption and by creating legislation around inter-country adoption and surrogacy that in particular protects the interests of the child. That notion also – the best interests of the child – is itself a contested idea. The United Nations makes it very clear what serves the best interests of the child:

- The child shall have the right from birth to know and be cared for by his or her parents
- Parties undertake to respect the right of the child and to preserve his or her identity including family relations as recognised by law without unlawful interference.

The child is voiceless, powerless and in need of protection. Therefore it is imperative that we as adults ensure that any legislation we enact must protect and secure the needs of the child.

Australia is highly regarded, and rightly so, in its policy development and legislative application because it has found ways to reflect the UN conventions as well as meeting the interests and needs of infertile couples without contravening those important first principles. Some examples of this are:

- providing access to identifying information to adoptees and their natural parents;
- protecting the interests of children from third world countries by ensuring that adoptions are only organised on a government to government basis;
- recognising that traditional adoption is not in the interests of either the child or the original family by providing guardianship and custody as an alternative mechanism for the secure placement of a child in need of a family;
- by legislating for an open adoption model;
- by prohibiting commercial surrogacy;
- and by ensuring that any contract entered into would not be supported by courts in Australia, where it was believed pressure had been brought to bear on the carrying mother.

To leave the birth mother unprotected in surrogacy legislation is yet another example of an unwillingness to take the lessons of past policy and apply them rigorously to new technological practices. Clearly, some in the medical / legal profession recognise that doing so is not in the economic interest of their business

model, as it is predicated on ensuring the interests of the commissioning couple even if at the expense of the birth mother and the child.

In conclusion
The fact that we as a country are discussing this a mere three years after our Prime Minister apologised and promised *"to make sure these practices are never repeated. In facing future challenges, we will remember the lessons of family separation. Our focus will be on protecting the fundamental rights of children and on the importance of the child's rights to know and be cared for by his or her parents"* is extremely concerning and indicates that we have not learned from past mistakes.

In the creation of public policy it is imperative to illuminate the value judgements, political pressures and social consequences that are involved in any movement towards legislation. It cannot be assumed that science and the creation of families are value free processes. It is therefore essential that the values that underpin whatever progress we make in relation to these matters, properly reflect the values of an informed community and not those of a self-invested medical fraternity and an elite of white, middle class, well-off couples in search of the status of family.

SUBMISSION COMMENTS ON THE SURROGACY ACT

As an overall comment about the Surrogacy Act 2008 we believe that the Act does not acknowledge the central role of the birth mother by providing protections for her and her current children and nor does it identify the best interests of the child to be born. These are critical deficits in the present Act and by inference suggest that the interests of the commissioning couple are paramount. The Act reads as a protection device for commissioning couples and the clinics and agencies that support them.

It needs to be held as the clear framework for these arrangements, that this is a contract entered into freely, knowingly, and with proper and secure supports in place for the contract to be met. If those safeguards fail, it is not the role of the Court to secure a child for a commissioning couple. It is the role of the Court to ensure the best interests of a child, which is outlined by the Hague Convention and starts with protecting the mother and child, regardless of the genetic contributions of donors. This should be the case if, as a society, we still uphold the view that children are not commodities and women are not, at their essence, incubators.

Further, the current Act is silent on the issue of international surrogacy arrangements. To avoid exploitation of women in other countries, and to ensure that commissioning couples do not act outside the law, all the rights and safeguards that apply in Australia should be applied to international surrogacy arrangements. Where these are avoided, or cannot be applied in another country, a child from a mother in another country should not be given a passport to enter Australia.

Finally, there is a significant oversight in the Act in that it does not make any requirement for establishing whether a commissioning couple is suitable to become parents. As the State has involved itself in providing a social policy framework for altruistic surrogacy, it has a responsibility to both the prospective child and the birth family to ensure that the commissioning couple is of sufficient capacity and appropriate intention to be approved to exercise the opportunity provided by the Act. This has been the case in Adoption legislation for the best part of 100 years and there seems even more reason to continue this expectation in this Act, given that we now have cases where couples solicit children for sale, sexual services and exploitation.

The following are comments and recommendations on the particularities of the current Surrogacy Act.

Division 1, Part 6 - Reasonable Consideration

If the intention of the Act is to ensure that commercial surrogacy is prohibited, then this section needs to be reconsidered.

- There is no mechanism in the Act for establishing the dollar figure of what is paid by the commissioning couple. There should be an oversight of these payments through an organisation that monitors the flow of money in every

instance of these arrangements. To achieve this there needs to be powers of investigation, power to obtain information and strong penalties available to the oversighting organisation.

- All expenses agreed to in the Contract and paid for by the commissioning couple should be paid to a third party, such as the Council, to ensure there are fewer opportunities to make illegal payments and to enable less opportunity for obligation to be created between the birth mother and the commissioning couple.
- Psychological counselling, paid for by the commissioning couple, compromises the birth mother and her family. For example, the commissioning couple can decide who provides the service, allowing that their choice would be a counsellor who supports their perspective, thus not having true independence. Where payments are able to be made directly to the birth mother, it provides an opportunity for the commissioning couple to use it as a device to inflate the expense to make a back-door payment.
- Life, disability and health insurance is another issue of concern. The health risks associated with both the pregnancy and the potential effects of the process of super-ovulation where these are used, may last well beyond the confinement. What safeguards exist for the birth mother to continue to have this insurance protection? Further, if ongoing payment of premiums is agreed to, what monitoring is done, and by whom?
- If any protections agreed to through a contract require the birth family to take court action to have them upheld, then it is unlikely to be a deterrent to the commissioning couple to break the agreement, given that such action would be prohibitively expensive, especially for a family that is also needing to manage a sick mother and the attendant medical costs. A fund should be established by the Council, contributed to by all commissioning couples and the Government, that provides financial resources to the birth family to take court action, where their rights have been contravened.

Division 2 - Offences

It is very clear that there is enormous money being poured into the area of surrogacy and HRT. The American market is expanding constantly because commercial surrogacy is allowed. There are significant and close connections between Australian HRT services and the American counterparts and the pro-surrogacy movement enjoys strong donor support. It is a multi-million dollar industry, both here and elsewhere. In light of that, the level of penalty for all of the offences nominated in the current Act is seriously inadequate. Further, there is no mechanism established, nor responsibility given to an organisation, to monitor any breaches, or to facilitate the bringing of charges.

Currently it is the case that the medical, legal and surrogacy businesses providing HRT services are lobbying strongly to use their facilities to enable surrogacies. We

know that couples have travelled overseas and procured the services of poor women in third world countries. Given that there are laws prohibiting this, it is again a question as to why no one has faced the Courts.

Part 3 Division 1, 13 - Child's Best Interests Paramount
It is of great concern that this section does not outline precisely what constitutes the best interests of a child in this circumstance. There is no shortage of clarity about this, in particular, the Hague Convention on the Rights of the Child, and closer to home the Victorian Law Reform Commission's Report into the Review of Adoption Act 2017.
In 13.2 the Act nominates an extremely narrow definition that is unsatisfactory in that it does not take into account the complex family relationship that has been created.

Division 2, Section 16 (1) – Parentage Order
The Act appears to be silent on the matter of children born of a birth mother in another country. This section should be written to include protections for any proposed other country surrogacy arrangement. Any protections offered to birth mothers in Australia should also be extended to women in other countries who are providing this service.

Section 17 – Requirements for Surrogacy Arrangements To Be Approved
The rules outlined under this section should equally apply to any overseas surrogacy arrangement.
Section 17 (a) (i) and (ii)
It appears that this is one of the few sections that offer protections to a prospective birth mother – that she be at least 25 years of age and that she has had the experience of giving birth to a child, with an implied presumption that she is also rearing that child. This section is very poorly worded and does not clearly indicate that the intention is that the woman has (a) gained some maturity, and that (b) she can know something of the implications of giving a child she has nurtured through a pregnancy to others, forever, and potentially without any further contact.
It is of grave concern that the Act provides that there can be exceptions to this very narrow protection; and that these 'exceptional circumstances' are not defined in any way.

- We believe that there should be no exceptions to this base line;
- that if this is to proceed, then exceptional circumstances should be defined clearly;
- and that this purpose (protection) should be clear.

There is no place in the Act where a woman with any kind of mental health issue or intellectual impairment is protected from offering to take this role, except that there is a presumption made by virtue of (c) (ii) that a psychologist would deem such a woman as unsuitable. However, that ought not be assumed.

Clarifying the purpose as outlined above in (a) and (b) is essential and this means specifically noting that this includes the woman:

- being at least 25 years of age
- having had the experience of giving birth to a child
- is rearing that child
- has gained some maturity
- can know something of the implications of giving a child she has nurtured through a pregnancy to others
- recognizes that this is a lifetime commitment
- may have no further contact with the child.

Section 17 (c) is of concern in that it is critically important to specify that this counselling

- should not be provided by the surrogacy agency,
- that the parties should not attend the same counsellor or psychologist;
- that the counselling should not be paid for by the commissioning couple;
- and that any prospective birth grandparents of a genetically related child be protected under this part of the Act.

Section 18 - Application of Human Reproductive Technology Act 1991
The Council's capacity to delegate its responsibilities to committees raises a number of concerns. What might be the makeup of the 'Committee'? Will its membership have a vested interest in a particular outcome? How does the Council ensure that both the spirit and the letter of the Act is reflected in any decisions made by the Committee. It is critically important that the makeup of the committee reflects a true balance of the competing interests in this Act and is not dominated by the medical, legal and the surrogacy industries.

Division 3, 19 (2) – Eligible Couple
We assume that this part of the Act will change to fall into line with the recent federal marriage equality legislation. While this is a legal necessity, there need to be protections in place that ensure the safety of a child born under this Act. There is considerable opportunity for the exploitation of children and stringent safeguards should be enacted to ensure that this Act does not provide a source of children for paedophiles. At minimum, single men should not have access to surrogacy arrangements.
Section 19 (2) 'eligible person means a woman who' (b)
There are now many genetic abnormalities or diseases that are managed by medical interventions at the embryonic stage. We believe that this sub-section should be clearer in identifying that it applies to only those women for whom there is not a medical resolution to their condition at the time of their application.
19 2 (c) It should be made clear that this should exclude women who could deliver a child through caesarean section.

Part 3 Division 3 Section 20 (2) – Applying For A Parentage Order

There are rights that a birth mother has that are inalienable. It is very concerning that there is no place in the Act where these rights are specified in a clear and unchallengeable way. The birth mother has the right to be provided with a situation where she gives consent without duress. This is particularly fraught in the situation of a surrogacy arrangement, because it is predicated on the understanding that the purpose of the pregnancy is to give the child to the commissioning couple. Where the birth mother finds that she no longer is certain that she can do that, or that she even wants to hand the child over, she is deeply enmeshed with the commissioning couple.

She is likely to be receiving financial compensation, even if only to the extent of the health care she is receiving. It is possible, under this current Act that any counselling she is having is also being paid for by the commissioning couple. (This demonstrates the importance of the counselling not being paid for by the commissioning couple.)

If the child is the biological child of the commissioning husband, there are significant issues to be considered for her in relation to her existing family and any ongoing contact that would be important for the child, with its natural father. Further, she will be working through the enormous burden of disappointing the commissioning couple, reneging on 'the deal' and needing to take into consideration her current husband's views and the needs of her existing family. This would be a very traumatic time for her.

In the current Act, it is not clear that she has the right to have her consent given without duress. At minimum this means that her consent should not be required until at least six weeks after the birth of the child. She should not be in hospital when the consent is provided. It should be clear in the Act that she can take the child home in the six week period. It needs to be stipulated that a revocation period is provided. Given the complexity of the matters to be considered, it is reasonable that this period would be of at least 30 days duration. Obviously it is in addition to the period provided before a consent is taken.

Being clear that there is an option to leave hospital with the child is critical in terms of how the Court assesses the 'best interests' question. Taking a child who has resided with the commissioning couple and returning it to the birth parent is considered traumatic. It would be less of an issue if the child had not left the mother in the first place.

Section 21- Court May Make Parenting Order

This Section demonstrates most clearly our above mentioned concern that this Act does not treat the parties with equal concern and consideration and is heavily weighted towards protection of the commissioning couple and the capacity of surrogacy agencies to protect their economic interests by ensuring the child will be handed over to the commissioning couple. This section does not reflect that the contract is meant to have been entered into willingly and openly, with proper safeguards in place for all parties.

It is relevant to start with first principles which are identified in subsections 3 and 4.

Sub-section 21 (3) suggests that the birth mother might be incapacitated or that the commissioning couple may be unable to contact the birth parent. Being unable to contact seems highly implausible, given that the Act assumes that she will hand over the child, but is also uncontactable. In what circumstance would she have handed over the child, but have not signed consent? If this is the case, is it not an obligation of the Court to ensure that there has not been duress, rather than to move to dispense with her consent? If she is uncontactable, what exactly does that mean, and what efforts have been made and by whom, to contact her? Is it possible that she, her other children, her husband or de facto, her parents, the neighbours, all don't know where she is, have left their house, the state, and none can be contacted? This all seems so very unlikely.
The Act needs to specify what efforts are to be made to contact the birth mother and her family, and by whom this should be done, in what ways and over what time frame. There is precedent for this in the Victorian Adoption Act 1984. Given the potentially broad application of the notion of incapacity, it is very important that the Act clarify what that might constitute, specifying particular instances that the Act is intended to cover.

Much of this section seems to be influenced by the issue of whether the child is the biological child of the birth mother. This allows the Court, and in consequence surrogacy agencies, to take a very narrow view of surrogacy as a social policy instrument. There is a mountain of scientific evidence, academic research and personal experience that indicates that surrogacy is a highly complex and fraught emotional, psychological and social landscape which does not rest exclusively on whether the birth parent is also the genetic donor. She may be carrying a child from an egg donation that is not from the commissioning woman. In that instance, both women have equal standing at law in relation to any additional claim to the child.

Saying that is only to demonstrate that this is not a useful yardstick by which to measure where a contested child's future should lie. A birth mother does more than just give birth and the legislation needs to reflect that complexity. Where it doesn't it feeds directly into treating the child as the object of a contract, a consumable whose ownership is governed by the one dimension of genetic material. This is entirely reductionist and does not bring a 21st century understanding to the issues being legislated.
In summary, given that there is a clear understanding of the complexity of surrogacy:

- There should be **NO** circumstance where the Court would dispense with the requirement to undertake counselling by any party to the surrogacy.
- There should be **NO** circumstance where a party is not required to take independent legal advice.
- There should be **NO** circumstance in which the Court dispenses with the consent of the birth mother, unless she died in the delivery of the child, or through an accident, or is in a coma that she is not likely to emerge from in the foreseeable future.

- There should be **NO** circumstance in which the birth mother's agreement to the Plan should be dispensed with.

It needs to be held as the clear framework for these arrangements, that this is a contract entered into freely, knowingly, and with proper and secure supports in place for the contract to be met. If those safeguards fail, it is not the role of the Court to secure a child for a commissioning couple. It is the role of the Court to ensure the best interests of a child, which is outlined by the Hague Convention and starts with protecting the mother and child, regardless of the genetic contributions of donors. This should be the case if, as a society, we still uphold the view that children are not commodities and women are not, at their essence, incubators.

Section 22 (1) (a) – Contents of Approved Plan
The responsibility of the Court is to ensure that there is an 'adequate balance to the rights and responsibilities of the parties to the plan'. To be able to do this, the Act needs to clarify that the intention is to protect all the parties' rights. At the moment there is an emphasis on the rights of the commissioning couple, and it appears that the intention of the Act is to ensure that any child that is commissioned in this way will in fact be given to the couple.
22 (2)
A significant consideration in the current Act is the provision for agreements around ongoing contact between the birth mother, her existing family and the child and its family. This is a key consideration in allowing relationships to develop, honesty and transparency being built as a corner stone of the legislation, and a way of ensuring that this legislation does not repeat the errors of the past that we have witnessed in both adoption and IVF and the donor conceived children of that system. The best forum for this is the Family Court. The Act would be better if it gave leadership to the parties by both setting out a values statement that recognized the importance of these extended relationships, and where access agreements are made, enshrining the right in the legislation and providing redress where there is conflict. Our experience has been that couples agree to access arrangements to procure the child and then take actions such as moving interstate, to the country, or making the access so difficult and fraught that it becomes traumatic for the birth family to exercise their rights. Further, the costs of going back to court become prohibitive, and are borne by the birth family.

Section 23
It is unclear what might constitute 'the interests of justice' and it would be helpful if the legislation gave some guidance on this. Our introductory comments indicate our views on this matter. Justice can conflict with the best interests of the child, especially if the principle client is viewed as being the commissioning couple.

Section 24 – Multiple Births:
There are many decisions that are made in relation to multiple births that shock the community. Baby Gammy is a case in point. As an in principle position, it is our view

the legislation should allow that the birth mother has the prevailing rights to make decisions about both the carrying and the keeping of any child beyond the one that was the subject of the original contract. Further, should the commissioning couple not want to take any siblings that occur as a result of a pregnancy, then the birth mother should be entitled to keep all the children of that pregnancy should she so wish, so that those siblings are not separated.

Section 25 – Name of Child

This is a very strange inclusion. Sub-sections 1 and 2 a) and b) suggest that the birth family can name the child; the Court must consider the principle that that name should not be changed. But then sub-section 3 says that the commissioning family can then use the opportunities under State or Commonwealth legislation to change the name. Surely this is duplicitous? It suggests that the State does not believe that surrogacy arrangements are truly entered into freely, honestly and respectfully. In fact it specifically enables dishonesty, promoting the interests of the commissioning couple above even the interests of the child as recognized in Section 25 (2) (a). If this is the case, why does the State legislate for surrogacy? By doing so, it is facilitating the interests of surrogacy agencies and the HRT medical profession and commissioning couples whose actions are creating a market for the commodity this child becomes. At minimum, 25 (3) should be reversed. It is dishonourable, dishonest, denies the paramount interest of the child, and allows the negotiations entered into by the parties to be undermined.

Section 26 – Effect of Parentage Order

It is alarming that in this most modern of times, the law is still willing to be an ass. In the Adoption legislation, it is said that the child becomes the child of the adoptive parents, as if born to them. Clearly, a lie. In this Act in Section 26 (1) (b) it says that the birth parents are to be treated as not being parents of the child. Whilst we understand the intention is to give legal standing to the commissioning couple, it is not in society's interests to do that by creating a lie. This is also problematic when it comes to allowing the parties to agree to contact after the birth of the child. What standing will the birth parents have in court, if by law they are treated as not being parents?

Section 27 – Discharge of Parentage Order

This section is deeply disturbing in that it appears not to allow for the birth family to make an application to discharge the parentage order. We suggest that it should do so, and that financial support should be available to the birth family to pursue the application.

27 (5) (b) In this instance, it is important for the legislation to outline either here or in regulation what constitutes 'reasonable efforts'. Further, it is in the interests of the child that, where necessary, financial assistance is made available to the birth family so that they can adequately engage as a party to any application.

Section 30 – Varying Approved Plan
Where a party to the Approved Plan wishes to vary it, financial consideration needs to be made to ensure that legal representation is possible for the birth mother.

Section 32 (2) – Court to Notify Certain Officers
We believe that it is important to also provide to Births Deaths and Marriages, the names, ages and gender of all the existing children of the birth mother who were alive at the time of the surrogacy arrangement, as these children are likely to be impacted by the arrangement, and are siblings of the child who is transferred by the Act.
32 (3)
It is concerning that there might not be an original birth certificate available from Births Deaths and Marriages in a State other than Western Australia, on being applied for. Where this is the case, it should be an obligation on BDM Western Australia to initiate one.

Section 36 (2)
We would like to see the legislation give more direction to the Court in relation to what might be considered 'serious risk'. To date, adoptive parents have argued that knowing the whereabouts of their child constitutes such a risk. There needs to be some kind of review process, the involvement of a court psychologist for example to ensure that 'risk' is not about attitude or anxiety on the part of the parents.

Section 44
Counselling is a tricky area to be regulating or legislate for, at least because the party needs to be a willing participant for it to be useful or successful. That said, it is important to consider in such a setting:

- Parenting a non-biological child
- The value of honesty in the creation of the family
- The need to provide the child with an opportunity for a relationship with the birth family

For the birth mother and her family

- The potential impact on her existing children
- The possibility that she may change her mind
- The importance of understanding her rights
- The role of contact in the lives of both the child of the arrangement and her existing children
- The long term impact of relinquishment
- The experience of other surrogate arrangements
- Preparation for the birth and how to manage the commissioning parents

This is not an exhaustive list, but does outline the breadth of matters that need discussion.

Perhaps the last word should be given to Judge Stephen Ernest Thackray 2014
This case "should also draw attention to the fact that surrogate mothers are not baby-growing machines, or 'gestational carriers'. They are flesh and blood women who can develop bonds with their unborn children. The appalling outcome of Gammy and Pipah being separated has brought commercial surrogacy into the spotlight. Quite apart from the separation of the twins, this 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."

From our position of strong opposition to commercial surrogacy we recommend the following.

RECOMMENDATIONS

1. A preamble stating the framework and value base for the Act should be created.
2. A complete prohibition on commercial surrogacy should be stated.
3. No payments should be made directly by the commissioning couple to the birth mother.
4. A fund should be set up, managed by the Council or some other independent body and all payments that are made to meet the 'reasonable expenses' should be paid into it and disbursed by the fund to the birth family.
5. Any penalties that are paid by Court Order from a contravention of the Act should be paid into a fund - managed by the Council - that provides financial support to birth families where they need to take legal action or get legal advice to protect their rights under the Act.
6. The dollar value of the penalties outlined in the Act should be increased to a minimum of $100,000
7. International commercial surrogacy arrangements should not be recognized by Australia and the child should not be provided with a visa or passport.
8. The penalties for going overseas to procure a child through surrogacy should be applied rigorously.
9. The best interests of the child should be defined and that definition should take into account all parties to the conception and birth.
10. Protections for the birth mother and her family should be specified and include the mother:
    - being at least 25 years of age
    - having had the experience of giving birth to a child
    - is rearing, or has reared her own child
    - has gained some maturity
    - can know something of the implications of giving a child she has nurtured through a pregnancy to others
    - recognizes that this is a lifetime commitment
    - understands she may have no further contact with the child.

11. The makeup of any 'committee' appointed by the Council should reflect a true balance of the competing interests in this Act and is not dominated by the medical, legal and surrogacy industries. It should not have any members of any organisation that is likely to benefit financially, either directly or indirectly from any decision that is made by the committee.
12. Single men should not have access to engaging in surrogacy arrangements.
13. For a woman to be eligible for a surrogacy service, there must be no medical resolution to the condition that justifies the use of the service.
14. Counselling
    - should not be provided by the surrogacy agency,
    - the parties should not attend the same counsellor or psychologist;
    - the counselling should not be paid for by the commissioning couple
    - any prospective birth grandparents of a genetically related child are to be protected under this part of the Act.
15. The circumstances of the pregnancy and birth must be arranged such that the birth mother is not under duress to consent to providing the child to the commissioning couple.
16. To this end,
17. her consent should not be taken before 6 weeks has elapsed
18. a revocation period in addition to that should be provided of 4 weeks
19. it should be made clear that she can take the baby home with her during that period
20. There should be **NO** circumstance where the Court would dispense with the requirement to undertake counselling by any party to the surrogacy.
21. There should be **NO** circumstance where a party is not required to take independent legal advice.
22. There should be **NO** circumstance in which the Court dispenses with the consent of the birth mother, unless she died in the delivery of the child, or through an accident, or is in a coma that she is not likely to emerge from in the foreseeable future.
23. There should be **NO** circumstance in which the birth mother's agreement to the Plan should be dispensed with.
24. The Act must specify what actions are to be taken, by whom, in what ways, and in what timeframe, to contact the birth mother or her family in the (highly unlikely) circumstance that she is 'uncontactable'.
25. The Act should identify that it is in the best interests of the child that contact is maintained with the birth family, especially where there are half or full siblings, and that openness and honesty about the conception and birth of the child are paramount.
26. The legislation should give guidance to what constitutes 'the interests of justice'.

27. Where multiple embryos are being carried, it is the birth mother who is entitled to choose whether to carry those foetuses to term. It should also be her decision, if the commissioning parents don't want the siblings, to decide whether she would like to raise the child or children.
28. The legislation should not allow the child's name to be changed subsequent to the making of the 'Plan'. It should be through the negotiations of the plan that the child's name is determined, taking into account the wishes of both parties.
29. The birth parents should continue to be treated as parents under the Act, once a parenting arrangement is created.
30. Birth parents should be entitled to make an application to discharge a parentage order, with financial support to do so, where needed.
31. What constitutes 'Reasonable efforts' to contact the birth family must be specified
    where a discharge of the parentage order is being considered.
32. The names, ages and gender of all the existing children of the birth mother should be registered with Births, Deaths and Marriages and be available to the child who is the subject of the surrogacy arrangement.
33. The legislation should give some guidance to what it considers constitutes 'serious risk' when considering an application to a person from having access to information.
34. The Court should provide guidance as to the breadth of issues it expects should be covered in any counselling that is provided to any party to the arrangement.
35. The Act is silent on the matter of the birth mother or family providing in her Will, for the child of the arrangement. A birth mother or family should be entitled to bequeath to any child she has given birth to, regardless of whether the child is her genetic offspring.