Many would-be parents, who can offer a child a good life but cannot themselves conceive, experience an aching desire for a child to nurture and care for. Assisted reproductive technology (“ART”) has enabled those with reproductive difficulties, or who are unable to have a child naturally, to have a family. ART is the proverbial stork that has delivered babies to the arms of many other-wise childless parents. In many and most situations this is a happy occasion.

However, one of the greatest challenges for any society is when technology provides a means to advance quickly past the status quo. It can bring rapid change before we have been able to properly consider what the implications of these new possibilities are, outpacing the capacity of the law to respond. Surrogacy (a form of ART) has done exactly this and has carried us forward into a new frontier, creating a ‘baby-making wild west’, which the law has yet to adequately tame.

Surrogacy is a controversial topic that is dynamic and complex. The issue affects human rights, children’s rights, and women’s rights, as well as challenging age-old notions of family, parenthood, and the sanctity of life itself. Yet it is not simply an academic argument that spins and pivots on new hypotheticals and imagined legislation. Nor is it a looming issue that we will face some time in the future, to which legislators can turn a blind eye and hope that a later government will deal with

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I wish to acknowledge the contribution of my Legal Associate, Lisa Churcher, in preparing this paper.
it; it is here and now and it is affecting many people’s lives. The choices we make today will continue to affect people and society in the future. Surrogacy is an ethical minefield, and we have been sleepwalking through this minefield for too long.

**What is surrogacy?**

Surrogacy has been defined in Australian family law as:

“[A]n arrangement whereby a woman (‘the surrogate mother’) agrees to conceive and bear a child, which she intends to transfer to another or others (the ‘commissioning couple’ or ‘commissioning husband’ and ‘commissioning wife’) upon the child’s birth”.²

Note that Justice Benjamin did not say ‘genetically related’, and he could have left out the word ‘conceive’ as well, as neither are actually required for a baby to be born through surrogacy. Such a baby may be created using the commissioning parents’ genetic material, or with the use of a donor gamete or donor foetus. There may be no genetic link to the commissioning parents.

A surrogacy arrangement may be either commercial or altruistic. In commercial arrangements, the surrogate mother is paid a fee above and beyond reimbursement for her pregnancy-related expenses, whereas in altruistic arrangements the surrogate mother is reimbursed for her pregnancy-related expenses only. Altruistic surrogacy is rare and predominantly between sisters or close friends. The majority of surrogacy arrangements are commercial but this is prohibited in many countries.³

**The business of international commercial surrogacy**

Domestic prohibitions have led many commissioning parents to look abroad for commercial surrogacy services and over the last few decades international commercial surrogacy has exploded in popularity.⁴ A commercial surrogacy industry has emerged, encompassing for-profit intermediaries such as agents, clinics and lawyers⁵. These intermediaries advertise to potential parents, marketing commercial

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² Lowe and Barry and Anor [2011] FamCA 625 at [5].
surrogacy as a reproductive solution for wealth couples, as well as recruiting local women to be surrogates. These women are usually poor, indebted and from lower social classes, and become surrogates for financial reasons. Obviously a commercial enterprise, the surrogacy industry bears all the usual hallmarks, including financial lures, cost cutting, competitive pricing, and techniques—which may be morally reprehensible but—which guarantee results. The industry is now a billion dollar ‘booming global business’.

The industry is largely unregulated, as it simply moves from country to country as one tightens its regulations. The same clinics have moved from India to Thailand to Cambodia and now to Laos.

Without regulation, it is the market that governs the surrogacy industry. South East Asian countries offer much cheaper prices—for the both the arrangement itself and the associated costs, such as airfares and accommodation. This has made it a more popular surrogacy destination with Australians than the US, despite the better protections available to women in the US. Thus, commissioning parents may engage in “rampant forum shopping...seeking the best surrogacy prices and conditions”. The process was described by one parent as “like going to the supermarket to pick up your baby.” This has led to serious threats to the human rights of those involved, particularly the surrogate mother and the child.

My introduction to reproductive trafficking

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11 Heath Aston, “It was like going to a supermarket to pick up your baby”, Sydney Morning Herald (2 September 2012) 16.
When I first encountered “baby trafficking”, newly-borns were being packed into plastic shopping bags or boxes – no bigger than a document-archive box – and transported across national borders in order to be sold at market. One such example was the discovery of babies, packed in vegetable crates, for the purpose of trafficking from Vietnam to families in China. In these horrendous conditions, it is hardly surprising that some babies perished on the journey, euphemistically referred to in the trade as “spoilage.”

Given the inherent difficulty in moving children, traffickers discovered that it is easier to move the mother with the baby “in utero”. The women gave birth to their respective children in local hospitals, and with the collusion of local medical staff and doctors, the new-borns were registered to the purchasers with the birth-mother sent to local bus station.

Often, the surrogacy business is not at all dissimilar to what I discovered over a decade ago: pregnant women—this time carrying someone else’s genetic child—are moved across borders by surrogacy brokers as the regulatory framework changes. In one critic’s view, this should be labelled ‘reproductive trafficking’ because “it creates a national and international traffic in women in which women become moveable property, objects of reproductive exchange, and brokered by go-betweens mainly serving the buyer.”

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There are many such instances: Indian women moved to Nepal,\textsuperscript{16} Kenyan women flown to India for IVF and then returned to Nairobi to give birth, \textsuperscript{17} Cambodian and Laotian women moved to Thailand for more complex surrogacy-related births; \textsuperscript{18} all in return for money and all vulnerable to the surrogacy brokers who control the visas, finances and entire arrangement.

In a particularly awful example, a surrogacy clinic in Thailand trafficked at least 13 Vietnamese women to Thailand. Once in Thailand, these women were imprisoned, and impregnated with the genetic material of would-be parents. In some cases, the method of impregnation was rape by the commissioning father.\textsuperscript{19}

\textbf{Exploitation of the Surrogate Mother}

Even where women are not actually trafficked, the marginalised nature of most surrogate mothers raises concerns about the quality of their consent, as socio-economic or familial pressures are a significant factor in the decision to undertake surrogacy.\textsuperscript{20} The surrogate mother is effectively renting out her womb and is forced to relinquish control of her body through contractual terms that stipulate how she may behave and what she may or may not do during the pregnancy.\textsuperscript{21} A lack of knowledge about the enforceability of the contract and the fear that she will not be

paid if she does not comply, may compel her to agree to the suppression of her autonomy.

A common term in many Indian surrogacy contracts was that where the surrogate mother is diagnosed with a life-threatening illness during the pregnancy, she is to be “sustained with life support equipment to protect the foetus viability and ensure a healthy birth on the genetic parents’ behalf”.22

Often, surrogate mothers have been forced to have caesareans with little or no information as to the risk that such an operation posed to them. 23  Caesareans are performed to accommodate that desires of the commissioning parents and often prioritise the health of the foetus above the health and wellbeing of the surrogate mother. 24  In one awful case, a young surrogate collapsed and went into convulsions at her 8-month check-up.  The clinic performed an emergency caesarean, delivering a healthy boy, before sending the mother to another hospital where she died.25  Another suffered post-birth complications and was told to find a public hospital, as the delivery of the baby had ended any contractual obligations the clinic had towards her.  The young woman died before her husband was able to get her in to a hospital.26

**Surrogacy and baby trafficking**
The interplay between trafficking, exploitation and surrogacy not only affects the surrogate mothers, but also the children born through these arrangements.

In 2016, an Australian woman—Tammy Davis-Charles, a surrogacy broker—was arrested on trafficking charges in Cambodia. She was convicted of falsifying documents in order to obtain passports for Australian children born to Cambodian surrogate mothers. The birth certificates listed the husband as Australian and the

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wife as Cambodian, but the women were already married to Cambodian men. Ms Davis-Charles was sentenced last year to 18 months jail.

There are a number of other incidents that highlight the opaque connections between surrogacy and child trafficking. The Australian Immigration Department issued a warning that surrogacy may be used as a smokescreen for trafficking in 2014, after a DNA test revealed that an Australian man, who had apparently commissioned twins using donor eggs in India, actually had no biological links to the children. Authorities were unable to determine whether it was an error by the clinic, donor sperm was knowingly used or the children were trafficked. Australian consular officials have reported cases where the parents claim the mother gave birth to the child, but it is strongly suspected that the birth was actually the result of a surrogacy arrangement. When surrogacy is not declared, children may be taken out of the country without the knowledge or permission of the surrogate mother.

**Commodification and the Sale of Children**

As mentioned, baby-selling is not a new thing. The Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography prohibits the sale of children, defining it as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. According to the recent report of the Special Rapporteur on the sale and sexual exploitation of children,

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30 Department of Foreign Affairs and Trade, above n 12; Department of Immigration and Boarder Protection Submission No 45 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Inquiry into Regulatory and Legislative Aspects of Surrogacy Arrangements, 2016.

commercial surrogacy as currently practised meets this definition. Some argue that surrogacy is the sale of a service rather than a product, but in most cases the transfer of the child is an essential part of the agreement and so this differentiation is not a sound one. The buying and selling of a human being reduces the inherent personhood of a human to a market commodity. While many will treasure their child acquired through commercial surrogacy, this commodification may alter how we understand the worth of those bought and allow us to behave towards a child as if it were a good that can be purchased, returned or upgraded.

Unfortunately, this is not just a hypothetical risk. In 2014, a wealthy Japanese businessman—Mitsutoki Shigeta—was alleged to have fathered around 15 children through eleven surrogate mothers in Thailand. Mr Shigeta had told one of the clinics he used that he wanted 10 to 15 babies a year, and that he wanted to continue the baby-making process until he’s dead. He wanted to win elections and planned to use his big family for voting. Mr Shigeta pursued custody of the children through the Thai courts and was granted sole parental custody on 20 February 2018. A New York clinic tells of a prospective client who requested six embryos be implanted of which he proposed to pick the ‘best’ two and give the rest up for adoption: treating children like excess product to give away.

Commodification also affects the child’s sense of worth. While views and experiences vary, a now-adult surrogate child highlighted the pain of commodification thus:

“I don’t care why my parents or my mother did this. It looks to me like I was bought and sold…. When you exchange something for [m]oney it is called a commodity. Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? . . .Because somewhere between [the] narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else’s needs and wants are put before the kids’ needs. We, the children of surrogacy, become lost.” 39

**Commodification, abandonment and abuse**

As international commercial surrogacy predominantly occurs in places with little to no regulation, parents have a crude “returns policy” and can back-out option if they change their mind, abandoning the unwanted child when the commissioning parents return to their home country. The ‘Baby Gammy’ scandal was such a scenario: the Western Australian couple commissioned a child through surrogacy in Thailand but, when the surrogate mother developed twins, one of whom had Downs Syndrome, the couple abandoned the child with Downs Syndrome and returned to Australia with his sister only. 40

In another case, an Australian couple entered into a surrogacy arrangement in India which also bore twins, a boy and a girl. The couple only wanted the girl, as they apparently already had a son and could not afford another. The couple applied at the Australian High Commission for papers for only the girl. The commissioning parents and the girl returned to Australia. But what of the boy? No one has been able to locate him and there were rumours of paid adoption and trafficking. 41 If the wife had conceived and carried the twins for nine months, I wonder whether the parents would have been so ready to leave one behind.

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40 Widely reported in Fairfax and other Australian media outlets, commencing 1 August 2014. Lindsay Murdoch, “Australian couple leaves Down’s Syndrome Baby with Thai Surrogate” *Sydney Morning Herald* (1 August 2014).
The sale of children through surrogacy has led to horrific instances of abuse. A particularly awful instance is that of Peter Truong and Mark Newton. This American/Australian couple had several failed attempts at international commercial surrogacy before buying a new-born child from Russia for US$8,000. The child was groomed and sexually abused from the age of 21 months to 6 years old. Often the abuse was recorded and shared. The boy himself was shared with paedophiles around the world through online forums and the abuse only stopped with the arrest of the boy’s “fathers”.

In the Pennsylvanian case of Huddleston a young man commissioned a surrogate child as the sole parent. Six weeks after being delivered to the man, the child died due to of severe physical abuse. In 2016, an Australian man was sentenced to 22 year in prison for sexually assaulting his specifically-commissioned-for-abuse twin daughters when they were only 27 days old.

The Right of the Child to Know their Parents and Origins

One of the dangers of commercial surrogacy that is often ignored is its impact on the child’s right to know their parents.

The UN Convention on the Rights of the Child (“CRC”) was adopted in 1982 to specially acknowledge and protect the vulnerabilities of children. The CRC gives all children, no matter where they live, how they were conceived, or the nature of their family, the right to know their parents. This right includes the right to know one’s

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42 Department of Justice, United States Attorney Joseph H. Hogsett, Southern District of Indiana ‘Hogsett announces charges against four men in international child exploitation conspiracy’ (28 June 2013)
legal, social, genetic and birth parents. Further, governments are obliged to help preserve children’s identity, name, nationality, and family ties. The CRC was significant in its recognition of the importance for a child to know his or her origins; not just for medical and other practical reasons, but also for a sense of identity and belonging which that knowledge entails.

Numerous studies in relation to adopted children and those conceived by donor gametes have demonstrated how important it is for children to know their parents and their origins: it is fundamental to our sense of identity and self-worth. The term “genealogical bewilderment” was termed for the sense of distress and confusion that many feel because they do not know their origins. The lack of medical history poses real risks, not just to the children without access to it, but for generations to come.

The use of anonymous genetic material mean that many children born through international commercial surrogacy can never learn their genetic heritage. Many countries, including Australia, have now abolished anonymity for gamete donors in recognition of the importance for donor-conceived people to know their history and identity. However, there are still countries that allow anonymity and Denmark actively promotes its donor anonymity laws, having developed a thriving and profitable reproductive tourism industry based on allowing indefinite anonymity. Parents seek anonymous donors because they want their parental role undisputed. It is selfish and speaks to their own insecurity in their role as a parent. In doing so,

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these parents lay the foundations of pain, secrecy and confusion in the life of their child.

There are also very real difficulties in tracing surrogate mothers. In family law cases concerning parental rights following international surrogacy, it is common for Courts to allow substituted service or waive service on the surrogate mother because she cannot be located.54 Given that these cases normally occur a short time after the child has been born, it will be far more difficult for a child to try to locate their surrogate mother many years later.

**Regulatory Responses**

The threats to the rights of children and surrogate mothers posed by commercial surrogacy has led the majority of countries to prohibit it. 55 Very few countries now permit commercial surrogacy, including Armenia, Georgia, Israel,56 Kazakhstan, Liechtenstein, Russia, Uganda, Ukraine and some states in the USA.57 Even less allow commercial surrogacy services to be provided to foreigners.58 Some ban all forms of surrogacy on the basis that it is fundamentally reductive and exploitative of women.59 Australia prohibits commercial surrogacy while permitting and regulating altruistic surrogacy.

Regulation of altruistic surrogacy falls within two categories: a minority of states require pre-approval of the surrogacy agreement by a committee or court but in most

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56 Israel authorises monthly ‘compensation payments’ to the surrogate for pain and suffering, which are seen by many as placing it in the category of permissive states.

57 There is affirmative case law or legislation allowing commercial surrogacy in: California, Maryland, Massachusetts, Ohio, Pennsylvania, South Carolina (case law); and Alabama, Arkansas, Connecticut, Illinois, Iowa, Nevada, North Dakota, Oregon, Tennessee, Texas, Utah, West Virginia and Wisconsin(legislation): Petra De Sutter Report of the Rapporteur on Human Rights and Ethical Issues related to Surrogacy Council of Europe Parliamentary Assembly Doc. 14140 (23 September 2016), 5


states, including Australia, the surrogacy agreement is unenforceable and the focus is on the status of the parents and children after birth. While pre-approval isn’t required, certain conditions must be met that involve pre-conception matters.

Surrogacy in Australia is regulated by the States and Territories, leading to what has been described as a “a patchwork of regulatory stitching”60 In some States commercial surrogacy is criminal, in others its simply illegal, in some States there are laws with extraterritorial application, and in the Northern Territory the word ‘surrogacy’ is not mentioned at all.61

In all States and Territories, legal parentage goes to the birth mother automatically and her partner (if any). Transfer of legal parentage to the commissioning parents requires a court order. Specific criteria must be met for a court to make such an order. This criteria varies across jurisdiction but common criteria includes that the surrogate mother is over a particular age and has given birth to a live child previously, that all parties have undertaken counselling prior to entering into the arrangement (and frequently post-birth too), that all parties have obtained independent legal advice and that the surrogate mother has given consent. States often require the commissioning parents to be unable to conceive and bear a child naturally.62

Other countries have similar criteria. In some, such as the UK and Hong Kong, the commissioning parents must be a couple.63 It is also common to require a genetic link between the child and at least one of the commissioning parents.64 Some

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62 See Surrogacy Act 2010 (NSW) ss 18, 21-38; Assisted Reproductive Treatment Act 2008 (Vic) ss 10, 14, 40 and 42; Family Relationships Act 1975 (SA) ss 10HA and 10HB; Surrogacy Act 2008 (WA) ss 15, 22 and 22; Surrogacy Act 2010 (Qld) s 22; Parentage Act 2004 (ACT) s 26; and 62 Surrogacy Act 2012 (Tas) ss16 and 22.


64 Such as the UK, Canada, Israel, New Zealand (see Hague Conference on Private International Law, A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements, Preliminary Document No 3C of March 2014 for the attention of the Council of April 2014on General Affairs and Policy of the Conference (March 2014) 16-17) and South Africa (see AB and others v Minister of Social Development and others 2017 (3) SA 570 (CC)).
countries limit services to heterosexual couples with fertility problems, and to couples where at least one is a resident or citizen.\textsuperscript{65}

Yet, the commercial surrogacy industry and its advocates insist that commercial surrogacy be accepted worldwide as a market-based system designed to respond primarily to adult demands for children. For example, the American Bar Association (“the ABA”) advocates for commercial surrogacy and for the profit-driven intermediaries who practise globally.\textsuperscript{66}

The ABA notes that “it is undeniable that the commissioning of children through surrogacy — for money — represents a market” and praises this market for allowing international surrogacy to operate efficiently. Consequently it objects to any attempt to regulate the market, and in doing so rejects application of the best interests of the child standard to surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects licensing requirements for surrogacy agencies and rejects rights to birth records or origins information. In fact, it rejects “regulation of the surrogacy industry for the purpose of reducing human rights violations”.\textsuperscript{67}

It is clear that the industry will continue to thrive while a profit can be made and there are people willing to flout restrictions and ignore human rights abuses for the sake of achieving parenthood. Unless every country bans commercial surrogacy, the industry and would-be parents will continue to find a way through. This raises the difficult question for countries that do prohibit commercial surrogacy: what to do when commissioning parents return home with a child? What if the child is already here?

**Responding to the Fait Accompli**

Parents who have evaded domestic laws by engaging in commercial surrogacy abroad will often then seek to return home with the child and be recognised as the child’s

\textsuperscript{65} Such as and Hong Kong (see Code of Practice on Reproductive Technology and Embryo Research, Council on Human Reproductive Technology (January 2013) http://www.chrt.org.hk/english/publications/publications_code.html (accessed 4 October 2017)).

\textsuperscript{66} Ms. Maud de Boer-Buquicchio, Special Rapporteur, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material UN Doc A/HRC/37/60 (15 January 2018) 8.

\textsuperscript{67} Ms. Maud de Boer-Buquicchio, Special Rapporteur, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material UN Doc A/HRC/37/60 (15 January 2018) 8.
parents. However, they face a number of obstacles in doing so due to countries’ conflicting laws relating to nationality and parentage, which can leave a child potentially stateless and with ‘limping’ parentage.

In Australia, nationality and citizenship are governed by federal law but legal parentage is governed by the States and Territories. If a child is born overseas, parents can apply to the embassy to recognise the child’s nationality and grant a passport to enable the child to travel to Australia. Australian citizenship by descent is a matter of fact, and a genetic link between the child and parents supports that fact. So where a child is born abroad through surrogacy using the gametes of at least one parent, the child can be recognised as Australian and travel ‘home’ with the commissioning parents. However, legal parentage is determined by State law and is slightly more complicated.

In all Australian States legal parentage goes automatically to the birth mother and any partner. Of course, in surrogacy cases, the birth mother may not be related to the child and may have no intention of acting as the child’s mother in any broader sense. Nonetheless, the birth mother remains the legal mother of the child until the child is recognised as the child of another by a court order. This protects the child from being parentless.

As no Australian state recognises commercial surrogacy, commissioning parents who have engaged in international commercial surrogacy cannot be recognised as legal parents by a state court. Some then apply to the federal family courts for parenting orders. These are quite different to orders determining legal parentage. Parenting orders determine who has parental responsibility for the child, including who can care for and make decisions concerning the child. Thus commissioning parents with parenting orders are effectively court-appointed carers and the child is left without the protection of a legal parent.

Many countries, but not all, take a similar approach, where the birth mother is the legal parent until a court order declares otherwise. However, in some—such as South
Africa, Russia, Ukraine, and various states in the USA and Canada—parentage is determined by the surrogacy contract and the commissioning parents are the legal parents from birth. This difference of approach can leave children as ‘piggy-in-the-middle’, as a 2015 case between the UK and US shows. In this case, a English man commissioned a child through surrogacy in Minnesota, where he received a birth certificate declaring him to be the father. However, when he returned to the UK, the English Court refused to make a declaration recognising him as the legal parent because it was not permitted under the relevant legislation. As the English Court set out:

“The surrogate mother, although she no longer has any legal rights in relation to [the child] under Minnesota law, is treated in this country as being his mother. Whatever his legal rights in Minnesota, the father does not have parental responsibility for [the child] in this country.”

While that child was left without a legal parent in the UK, the child was—at least—not left stateless as the US and Canada have a ius soli rule to nationality: if you were born in the country you are entitled to become a citizen. However, this is an uncommon rule and the diverse laws regarding acquisition of nationality across jurisdictions can leave the child “marooned, stateless and parentless”.

While nationality is a matter of fact that can be established by genetic link in Australia, in other jurisdiction it is determined by legal parentage. In many of the popular ‘birth’ countries, the commissioning parents are the legal parents from birth. This means that the child cannot acquire the nationality of the surrogate mother. Whether or not the child can acquire the nationality of the commissioning parents is dependent on whether the countries they come from recognise the parentage determination by the birth country. The child may be left stateless where the commissioning parents’ country does not recognise them as the legal parents because

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73 Re X & Y (Foreign Surrogacy) [2008] EWHC 3030 at [10].
either it applies its own law to the question of parentage or because public policy prohibits the recognition of parentage through surrogacy.74

This is what happened to twins commissioned using a donor embryo surrogacy agreement by Ms Volden, a Norwegian citizen. India, where the surrogacy took place, did not recognise the twins as Indian because it considered Ms Volden to be the legal parent. However, because the twins were not genetically related to her and were commissioned through commercial surrogacy, Norway did not recognise Ms Volden as their mother or the twins as Norwegian.75

Thus, some commissioning parents cannot regularise their legal status and it is believed that many parents never seek to do so. Nationality and legal parentage are the foundation of a range of rights for the child, and without them, the child’s positions is precarious.76 The lack of a legal parent-child relationship can cause difficulties if the parents separate or if there are medical or school issues and the child has no one with the legal status to intervene or act.

**The Best Interests Dilemma**

The CRC requires that the best interests of the child be the primary concern in all actions concerning children”.77 The dilemma is where the best interests of a child already born through surrogacy and with uncertain parentage clashes with prohibitive surrogacy policies made in the best interests of children generally.

In two recent cases,78 the European Court of Human Rights held that France’s refusal to recognise the genetic father of a child born via surrogacy as the legal parent was a violation of the child’s right to respect for private life.79 The Court held that the

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78 *Mennesson v France* (European Court of Human Rights, Fifth Section, Application No 61592/11, 26 June 2014) and *Labassee v France* (European Court of Human Rights, Fifth Section, Application No 65941/11, 26 June 2014).

right requires that everyone should be able to establish details of their identity including a legal parent-child relationship and that Member States must strike a fair balance between public policy and those directly affected. The best interests of the child must be prioritised.

These decisions require Member States to recognise a legal relationship between a child and their genetically-related commissioning father, even when the country has very little ability to control the circumstances leading to the child’s conception and birth. In doing so, it may encourage other would-be parents to also circumvent domestic laws to do the same. This will continue to foster an industry that tramples upon the human rights of children and impoverished women in order to make a profit, risking the rights of the child to know its parents and its origins, and exposing children to exploitation and commodification. This is not in the best interests of children. Yet it is not in the best interests of a child to be stateless and without legal parents, or to have the only parents it has known subjected to criminal sanctions in order to deter others.

In response to these dilemmas, there are a number of initiatives by the international community that I have had the honour to be involved with. In 2011, the Permanent Bureau to the Hague Conference on Private International Law (‘HCCH’) began examining the possibility of work in this area. A number of preliminary reports and studies have been undertaken and the expert group, which I am on, has met a number of times. This work is broadly focusing on the problems with the establishment and/or recognition of a child’s legal parentage and nationality. The HCCH believes an international framework that would build bridges between differing legal systems would assist States.

Another initiative, complementary to the work of HCCH, is the development of a set of guiding principles by the International Social Service. These principles address a variety of issues surrounding cross border surrogacy arrangements while maintaining a strong focus on the best interests of the child. The intention is to acknowledge the very good reasons for prohibiting surrogacy, provide a framework

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to guide states that do choose to permit it, while providing protections for children born as a result.

The current absence of an international framework and lack of guidance has led to judicial frustration in Australia, as courts have been left to struggle alone with the cases before them and the poor evidence available regarding the circumstances of the surrogacy. Justice Ryan has commented that:

“[The Australian Human Rights Commission] is demonstrably correct in its submission that ‘the court is faced with having children in front of it and needs to make orders that are in the best interests of those children, and at that stage it’s probably too late to ask whether – or to inquire into the legality of the arrangements that had been made. The court really needs to take the children as it finds them.’”

A useful framework was provided in the recent report by the Special Rapporteur on the sale and sexual exploitation of children. She notes that all States are obliged to prohibit the sale of children and posits that this is a ‘safe harbour’ amidst the controversy surrounding surrogacy. She argues that commercial surrogacy can be conducted without constituting the sale of children if the surrogate mother is paid for gestation services only and not for the transfer of the child. To ensure that this is not just a legal fiction, there must be no contractual or legal obligation on the surrogate mother to legally or physically transfer the child. The surrogate mother must be considered to have completed her obligations in carrying and birthing the child, even if she retains the child and maintains both legal parentage and parental responsibility. She further recommends that all payments must have been made to the surrogate mother prior to any transfer of the child and be non-reimbursable if she chooses to keep the child, and that transfer of legal parentage must be by a court or competent authority after the birth and with the best interests of the child a paramount consideration.

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82 Green-Wilson & Bishop [2014] FamCA 1031, 10 per Johns J
83 Mason v. Mason [2013] Fam CA 424, 4 per Ryan J.
84 Ellison and Anor & Karnchanit [2012] FamCA 602, [87].
These recommendations of the Special Rapporteur provide guidance and a minimum standard necessary to prevent the sale of children, whether or not countries permit, regulate or prohibit surrogacy.

**Conclusion**

Surrogacy is a difficult and complex topic, where the understandable and deep longing for a child collides with the rights of that child and the woman who carries it. The involvement of unregulated for-profit intermediaries and the cross-border nature of most arrangements adds layers to the complexity, and creates more openings for unethical practices and human rights abuses to occur. The issue is truly a minefield. Nonetheless, it is clear we must keep returning to the best interests of the child. It is the child who is the ultimate victim and the innocent victim. We need to be fully awake, alert to the dangers and let the best interests of the child guide us through the minefield.