

COMMERCIAL SURROGACY – SOME TROUBLING FAMILY LAW ISSUES INTRODUCTION

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ABSTRACT: *Commercial surrogacy has flourished in recent times, apparently increasing by 1000% internationally between 2008 and 2010.¹ Countries have responded to the problem in different ways.² In Australia, surrogacy has recently been made the subject of specific legislation in all states and territories apart from the Northern Territory.³ The legislation draws a fundamental distinction between altruistic surrogacy and commercial surrogacy (the subject of this article). Surrogacy is commercial if the commissioning parents⁴ have agreed to pay the birth mother⁵ more than reimbursement of her expenses incurred in the pregnancy and birth. Under the surrogacy legislation, it is usually a crime to enter into a commercial surrogacy agreement, advertise for surrogacy arrangements, and procure surrogacy arrangements.⁶ In three jurisdictions, the offences are expressly stated to apply with extraterritorial effect,⁷ in order, it has been said, to prevent evasion of the legislation and exploitation of women in developing countries.⁸ By contrast, unpaid ('altruistic') surrogacy is permitted, subject to extensive and diverse regulations which are designed to protect the parties to surrogacy arrangements and the children born from them.*

KEYWORDS: Commercial Surrogacy, Troubling Family, Law Issues

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- ¹ Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel. Doc. No 10, March 2012 (referred to as Hague Conference, *Preliminary Report*), p 8.
- ² For a detailed review, see *ibid*.
- ³ The history of these reforms is described in detail in Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?', (2011) 35 (1) *Melbourne University Law Review*, 165, 177-186 (since that article was published, the Tasmanian Surrogacy Act 2012 was enacted and has come into effect). The surrogacy legislation which is current as at June 2013 is Parentage Act 2004 (ACT); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Family Relationships Act 1975 (SA); Surrogacy Act 2012 (Tas); Assisted Reproductive Treatment Act 2008 (Vic), Status of Children Act 1974 (Vic); Surrogacy Act 2008 (WA).
- ⁴ The state and territory surrogacy legislation differs on many points, including the use of terminology. The relevant term in New South Wales, Queensland and Tasmania is 'intended parents'; in South Australia and Victoria the term is 'commissioning parents'; in Western Australia it is 'arranged parents' and in the ACT it is 'substitute parents'. In most Australian jurisdictions, single people can be commissioning parents in altruistic surrogacy arrangements.
- ⁵ The surrogacy legislation in most Australian jurisdictions uses the term 'birth mother'. In the Victorian legislation, she is referred to as the surrogate mother.
- ⁶ See Mary Keyes, 'Cross-border surrogacy agreements' (2012) 26(1) *Australian Journal of Family Law*, 28, pp 40-41. The relevant offences and related penalties are described in n 9 below. There is no legislation relating to surrogacy specifically in the Northern Territory, and the South Australian legislation does not criminalize the commissioning parents' or birth mothers' actions in entering into the surrogacy agreement. In Victoria, the relevant offence is the receipt by the birth mother of payment in excess of reimbursement of her expenses: Assisted Reproductive Treatment Act 2008 (Vic), s 44(1).
- ⁷ Parentage Act 2004 (ACT), s 45(1) (applying to ordinary residents of the ACT); Surrogacy Act 2010 (NSW), s 11(2) (applying to those ordinarily resident or domiciled in the state); Surrogacy Act 2010 (Qld), s 54(b) (applying to Queensland ordinary residents). In addition, the ACT and NSW legislation specifically incorporate the general nexus provisions of the criminal law: Parentage Act 2004 (ACT), s 45(2) (referring to the Criminal Code 2002 (ACT), s 64(2)) Surrogacy Act 2010 (NSW), s 11(1) (referring to the Crimes Act 1900 (NSW), s 10C). This has the effect of extending the application of the surrogacy offences to activities done outside of the territory which have effects within the territory. The surrogacy legislation in the other jurisdictions does not contain any reference to nexus provisions, and would apply subject to the generally applicable rules about extraterritoriality of offences under Australian legislation. Generally, this means that if an act which is done outside the jurisdiction has an effect within the territory, the criminal law of the territory will apply: e.g. Criminal Law Consolidation Act 1935 (SA) s 5G(2)(c). As to whether entry into a surrogacy arrangement outside the jurisdiction can be said to have effects within the jurisdiction, see *Hubert & Juntasa* [2011] FamCA 504, [13] and *Johnson & Chompunut* [2011] FamCA 505, [12].
- ⁸ See NSW Legislative Assembly, *Hansard*, 10 November 2010, p 27,583 (Ms Burney).

INTRODUCTION

Commercial surrogacy arrangements involves serious criminal offences under the laws of most Australian jurisdictions.⁹ Yet the Family Court has seen an increase in applications for parenting and other orders under the Family Law Act 1975 arising from commercial surrogacy arrangements, mainly involving children from Thailand and India,¹⁰ where such arrangements are (as yet) permitted by law¹¹ and where poor women¹² can be found who, for a payment, will donate eggs, carry and give birth to a child, and then relinquish the child forever to the Australian commissioning couple, who return to Australia with the children. In most of the cases, one of the male commissioning parents is the genetic father of the child. In the published cases, the applicant commissioning parents then come to the Australian family courts seeking orders that they have parental responsibility, and, less commonly, that the applicant who has donated the sperm from which the child was born should be found or declared to be the child's father. At the time of writing there were sixteen reported cases in which the commissioning parents applied to the Family Court for parenting orders.¹³

⁹ The penalties differ between the jurisdictions in which entry into a commercial surrogacy agreement is criminalized. In every jurisdiction except Tasmania, this offence may be penalized with imprisonment. In NSW, the maximum penalty for entering into, or offering to enter into, a commercial surrogacy arrangement is 1,000 penalty units or imprisonment for 2 years (or 2,500 penalty units for a corporation): Surrogacy Act 2010 (NSW), s 8. In Queensland, the maximum penalty for the same offence is 100 penalty units or 3 years imprisonment: Surrogacy Act 2010 (Qld), s 56. In Western Australia, the maximum penalty for entering into a commercial surrogacy arrangement is \$24,000 or 2 years imprisonment: Surrogacy Act 2008 (WA). In the ACT, the maximum penalty for intentionally entering into a commercial surrogacy agreement is 100 penalty units, 1 year imprisonment or both: Parentage Act 2004 (ACT), s 41. In Victoria, the receipt by the birth mother of 'any material benefit or advantage' is the relevant crime, and the maximum penalty is 240 penalty units or 2 years imprisonment or both: Assisted Reproductive Treatment Act 2008 (Vic), s 44(1). In Tasmania, the maximum penalty for entering into or offering to enter into a commercial surrogacy agreement is a fine not exceeding 100 penalty units: Surrogacy Act 2012 (Tas), s 40.

¹⁰ Of the sixteen cases which have been published as at June 2013 (listed below at n 13), the children were born in Thailand in eight cases and in India in another five cases. In two cases (the two oldest cases), the children were born in the US, and in one case, the child was born in South Africa.

¹¹ The Indian Ministry of Home Affairs issued guidelines on July 9, 2012, which state that foreign commissioning parents can only enter India on a medical visa and that such a visa will only be granted to heterosexual couples who have been married for at least two years. Other criteria include requirements that the commissioning parents' home country must have certified that the home country recognizes surrogacy, and must give an assurance that the child would be entitled to enter the home country as the biological child of the commissioning parents: Government of India, Ministry of Home Affairs, *Lok Sabha, Unstarred Question No 3491*, to be answered on the 19th March, 2013, <http://mha.nic.in/par2013/par2013-pdfs/lis-190313/3491.pdf> accessed 8 July 2013.

¹² The Australian cases typically include very little information about the birth mother or the egg donor. Studies of surrogacy in India show that most birth mothers are very poor, particularly in comparison to the commissioning parents, and are often uneducated and illiterate. In *Mason & Mason*, Ryan J noted that the birth mother's consent to the surrogacy agreement and to the parenting orders was recorded by thumb print: [2013] FamCA 424, [4], [5]. In Pande's study, 80.9% of the surrogate mothers 'reported family income below or around' the official poverty line in India: 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35 *Signs: Journal of Women in Culture and Society* 969, 974. Donchin notes that women in transitional economies 'who provide reproductive assistance to those from abroad typically have very limited earning power, have little formal education, and have to provide for their own children': 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24 *Bioethics* 323, 326. Bailey notes that justifying surrogacy arrangements by reference to the surrogate's choice 'obscures the injustice behind these choices: the reality that, for many women, contract pregnancy is one of the few routes to attaining basic social goods such as housing, food, clean water, education and medical care': 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' (2011) 26 *Hypatia* 715, 722.

¹³ *Re Mark* [2003] FamCA 822; (2004) 31 Fam LR 162 (28 August 2003) (Brown J); *Cadet & Scribe* [2007] FamCA 1498 (5 November 2007) (Brown J); *Wilkie & Mirkja* [2010] FamCA 667 (9 July 2010) (Cronin J); *Collins & Tangtoi* [2010] FamCA 878 (9 August 2010) (Loughnan J); *O'Connor & Kasemsarn* [2010] FamCA 987 (29 October 2010) (Ainslie-Wallace J); *McGee & Duchampes* [2010] FamCA 1230; *Dennis & Pradchaphet* [2011] FamCA 123 (22

Not surprisingly, this controversial topic has been the topic of a number of recent publications in Australia as well as elsewhere.¹⁴ In this article we hope to contribute to the rapidly-evolving discussion about how Australia might achieve a coherent position on commercial surrogacy that reflects informed and deliberate decisions about some difficult policy issues.

The present discussion is limited to family law, and especially the issues that have surfaced in the reported cases. First, it addresses the apparently simple question: Who are the parents of surrogacy children? We review the legislation and case law and try to identify what points are clear and what issues still need to be resolved.

Second, we review discretionary decisions, such as making parenting orders and declarations of parentage. Should the court be making such orders if doing so gives effect to criminal arrangements? And when it appears that the commissioning parents or others have acted criminally in participating in the surrogacy agreement, should the court refer the papers to the appropriate authority to consider prosecution? We review the answers that first instance judges have given to these questions, and suggest that a satisfactory outcome will require the Full Court to address certain fundamental questions of principle. We conclude that achieving a principled and consistent Australian approach to commercial surrogacy will require a cooperative effort between the Commonwealth and the states and territories.

WHO ARE THE PARENTS OF SURROGACY CHILDREN?

It is surprisingly difficult to identify the legal ‘parents’ of children born as a result of international surrogacy arrangements. This section examines the rather technical law involved. It deals especially with the Act’s presumptions of parentage, sections 60H and 60HB, and the admissibility of DNA evidence based on samples illegally taken from children. It also raises a question yet to be the subject of judicial decision, namely whether parentage is to be determined by Australian law, or the law of the country in which the child was born. We consider later whether the court should grant declarations of parenthood in surrogacy situations: that question involves policy issues to be reviewed in Part 2.

The international surrogacy arrangements that have appeared in the Australian case law generally follow a pattern. The commissioning couple make an arrangement whereby a

February 2011) (Stevenson J); *Ronalds & Victor* [2011] FamCA 389 (13 May 2011) (Dessau J); *Dudley & Chedi* [2011] FamCA 502 (30 June 2011) (Watts J); *Findlay & Punyawong* [2011] FamCA 503 (30 June 2011) (Watts J); *Hubert & Juntas* [2011] FamCA 504 (30 June 2011) (Watts J); *Johnson & Chompunut* [2011] FamCA 505 (30 June 2011) (Watts J); *Edmore & Bala* [2011] FamCA 731 (5 September 2011) (Cronin J); *Gough & Kaur* [2012] FamCA 79 (1 March 2012) (McMillan J); *Ellison and Anor & Karnchanit* [2012] FamCA 602 (1 August 2012) (Ryan J) (‘*Ellison*’ hereafter); *Mason & Mason* [2013] FamCA 424. See also *Schone & Schone* [2012] FMCAfam 1126. In *Rusken & Jenner* [2009] FamCA 282 (Bell J) the child was born to the parties in South Africa. In a commercial arrangement, a surrogate mother gave birth to the child, using donated sperm (and eggs of the intended mother had been inserted in the surrogate mother). The commissioning couple came to Australia and sought parenting orders. The surrogate mother intervened, seeking to have the child returned to her in South Africa. The case was determined according to factual matters relating to the child’s best interests, with minimal reference to the law. The child was ordered to live with the male applicant; the female applicant was to have contact; the surrogate mother (the intervener) was to have telephone contact only.

¹⁴ Keyes, above n 6; Millbank, above n 3; Olivia Rundle, ‘Transnational Surrogacy: Mapping the Issues’ *Handbook of the 15th National Family Law Conference* (2012) 59-81; Alexandra Harland, ‘International Surrogacy, Parentage Provisions and the Need for Australian Law Reform’ in the same volume, at 83-100.

woman, who is not related to the commissioning couple and is unknown to them before the arrangement, becomes pregnant with an embryo created from the sperm of one of the commissioning couple and an egg obtained from another woman who is also unrelated to and unknown to the commissioning couple.¹⁵ The intention is that the child will be handed to the commissioning couple at birth and brought up by them as their child, and in all the cases this is what has happened. By the time the case comes to court, the child has been in the care of the commissioning parents for some months, and has had no contact with the birth mother or egg donor.

We will need to consider certain provisions of the Family Law Act 1975 dealing with parentage in particular situations. But it is useful to put them in context by first considering what would *otherwise* be the position under the Family Law Act.¹⁶

There is no relevant generally applicable definition of ‘parent’ in the Act.¹⁷ It has been held that the word ‘parent’ when used in the Act means ‘a person who has begotten or borne a child’ – a biological mother or father of the child, as distinct from a person who is merely caring for a child as a parent would do.¹⁸ It follows that for the purpose of the Family Law Act the identity of a child’s father, mother or parent is probably determined by reference to facts existing at the time of the birth. The subsequent care of the child would not seem relevant to determining who is the (biological) ‘father’, ‘mother’ or ‘parent’ (of course the court may make orders placing the child in the care of a non-parent if it considers that doing so will be in the child’s best interests).

If it were not for the specific provisions of the Act that will be examined below, identifying the child’s *father* in the typical commercial surrogacy situation would seem straightforward. If the sperm is that of the male commissioning parent (or one of them in the case of a same-sex male couple), in circumstances where everyone envisages that he will act as the father¹⁹, he would naturally be seen as the biological father. If the sperm had come from some other man, the commissioning parent would not be the father.

Identifying the *mother* in gestational surrogacy situations,²⁰ however, would not be quite so simple. Given the authorities to the effect that the Act refers to biological parents, it seems

¹⁵ The cases usually speak of the eggs being donated, but there is typically little or no evidence from which the courts could determine that the woman whose eggs were used had given free and informed consent. Indeed, there is generally little reference to the egg ‘donor’, although occasionally the courts note that she is unknown or that children will not have access to information about their genetic inheritance: e.g. *Mason & Mason* [2013] FamCA 424, [49].

¹⁶ The definition of ‘parent’ is not necessarily the same in different areas of law: *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393; *Mason & Mason* [2013] FamCA 424, [12].

¹⁷ The term ‘parent’ includes an *adoptive parent* (s 4) but that is not relevant to identifying the parents in a surrogacy situation.

¹⁸ See *Tobin v Tobin* (1999) FLC 92-848 (FC) at [42] (quoted in *Ellison* at [75]) (‘... in respect of the Family Law Act, in our view, the natural meaning of the word ‘parent’ is the first definition given in both the Oxford and Macquarie dictionaries, and the definition ‘a person who has begotten or borne a child’, from the Oxford English Dictionary (2nd ed. vol. 9), which was accepted by Gummow J (in a different context) in *Hunt and the Minister for Immigration and Ethnic Affairs* (1993) 41 FCR 380, at 386’) and [45] (‘Whilst the term may be capable of being used in different contexts to include broader categories than those of ‘father’ or ‘mother’, in our view, the natural meaning of the word in the context in Part VII, Division 7 of a child is the biological mother or father of the child and not a person who stands *in locus parentis*.’)

¹⁹ On this aspect, see in particular the illuminating discussion in *Baker & Landon* [2010] FMCAfam 280 (Reithmuller FM).

²⁰ Gestational surrogacy refers to an arrangement where the egg is not that of the birth mother. In most of the published Australian cases, the egg comes from a third woman, not the commissioning parents. In some of the altruistic cases, the

clear that a commissioning woman who seeks to mother the child, but has no biological connection with the child, would not be seen as the child's mother under the Family Law Act. Is the 'mother', then, the woman who gives birth to the child? When a child is born to a woman from her own egg, she is obviously the biological mother. But in 'gestational' surrogacy situations such as those in the international cases, we might hesitate to say whether the 'mother' is the egg donor or the woman who gave birth to the child. Neither conforms entirely to the conventional meaning of mother – the egg donor provided half the child's genetic inheritance, but was not pregnant with the child; and the birth mother, who was, lacks a genetic link with the child. Under the surrogacy arrangement, neither woman is intended to have a role in the child's life, but if words like 'parent' in the Act refer to biological parents, this may not necessarily preclude either the birth mother or egg donor from the status of a parent. One might contemplate the possibility of some kind of recognition of both women,²¹ but it has been pointed out that many provisions assume that a child will have one father and one mother,²² so this does not seem an option under the Family Law Act as presently drafted. As we will see, there are now specific legislative provisions about parentage, but as far as we are aware there is no Australian court decision on whether aside from such specific legislation the 'mother' of a child born following egg donation would be seen as the birth mother or the egg donor, or whether the answer might turn on particular circumstances.

In short, in the absence of any legislation specifically dealing with the question, in a gestational surrogacy situation the male commissioning parent who supplied the sperm would probably be the legal father under the Family Law Act, but it would be uncertain whether the 'mother' would be the birth mother or the egg donor.

We now consider the impact of the specific provisions of the Act relating to parentage, starting with those that contain presumptions of parentage.

Presumptions of parentage under the Act

The Family Law Act 1975 contains a number of presumptions of parentage (we deal below with section 60HB and 60H, which do not create presumptions but are relevant to determining parentage in some situations). In brief, the presumptions are as follows. A child born to a married woman during the marriage is presumed to be the child of the woman and her husband.²³ A child born to a woman in a de facto relationship (over a certain period) is presumed to be the child of the woman and her partner.²⁴ A child is presumed to be the child of a person named as a parent on the child's birth certificate.²⁵ There is also a presumption arising from a person's registered acknowledgment of parentage.²⁶ All these are rebuttable, and if they conflict, the one most likely to be correct prevails.²⁷ A different kind of presumption is the irrebuttable presumption that arises from a finding of parentage by a court

egg comes from the birth mother (this is referred to as genetic surrogacy). Where the egg comes from the birth mother, there is of course no difficulty.

²¹ The need to keep an open mind on such matters is underlined by the recent decision of the NSW Court of Appeal that there are circumstances in which it is not necessary to identify on the birth certificate whether a person is male or female: *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145.

²² *Groth v Banks* [2013] Fam CA 430 (Cronin J).

²³ Family Law Act, s 69P.

²⁴ Family Law Act, s 69Q.

²⁵ Family Law Act, s 69R.

²⁶ Family Law Act, s 69T.

²⁷ Family Law Act, s 69U.

(unless that finding is set aside).²⁸ The presumptions in the Act do not indicate their scope of application in international cases, although most of them are clearly expected to have some application in cases where the child is born outside Australia.²⁹ The reported cases suggest that the presumptions are not often applicable in commercial surrogacy situations.³⁰

Section 60H

The determination of parentage in surrogacy situations is governed by specific provisions, notably sections 60H and 60HB, but interpreting them is complex, for a number of reasons. First, the older provisions in the Family Law Act about parentage read a little awkwardly with the newer sections dealing with artificial conception and surrogacy – for example the newer provisions speak of a child being or not being ‘the child of’ a person, but do not explicitly say who is a parent of the child. Second, there is an interplay between the Family Law Act’s provisions and certain state and territory laws dealing with parentage. Third, the provisions need to be applied in a wide range of factual situations, and it is not always clear whether the literal effect of the words reflects what the legislature might have intended. Fourth, different judicial views have been expressed about aspects of the provisions, notably whether some provisions implicitly exclude genetic donors from parental status, and to what extent the federal laws should be interpreted in a way that conforms with state laws.

Section 60H deals with the status of children born as a result of fertility procedures. It was not designed for surrogacy situations, but it can affect them, because fertility procedures are often used in commercial surrogacy. Most of the subsections of s 60H incorporate reference to the state and territory legislation relevant to determining parental status. Together, these provisions form a national scheme (although there are some inconsistencies between the federal and state and territory provisions), the effect of which is to recognise the birth mother and her consenting spouse or partner as the parents of a child born as a result of a fertility procedure irrespective of their biological connection to the child. The scheme also denies parental status to gamete donors in such cases, although as we will see there are different views about whether it does so in all situations.

In all states and territories, these provisions have an extraterritorial effect,³¹ which is significant because in international surrogacy cases the fertility procedures occur outside Australia. In some jurisdictions, the provisions apply irrespective of where the child was born,³² and in some jurisdictions the legislation specifically states that the provisions apply to

²⁸ Family Law Act, s 69S.

²⁹ Sections 69R, 69S, 69T are all stated to apply to prescribed overseas jurisdictions. As at June 2013, no overseas jurisdiction had been prescribed.

³⁰ See also the ‘provisional’ analysis in *Mason & Mason* [2013] FamCA 424, especially at [15], [33].

³¹ In all jurisdictions except NSW, these provisions which give the legislation an extraterritorial effect apply expressly to the situation of children born after fertility procedures, involving donated gametes: Parentage Act 2004 (ACT), s 11(7); Status of Children Act 1978 (NT), s 5B(1)(a); Status of Children Act 1978 (Qld), s 14(1)(a), 14(3)(a); Family Relationships Act 1975 (SA), s 10B(1); Status of Children Act 1974 (Tas), s 10A(1)(a); Status of Children Act 1974 (Vic), s 10B(1)(a) (this only applies to Part II – which relates to cases in which the birth mother has a male partner. Although the Victorian Act makes provision for parental status of children born to single women and to women in same sex relationships, the legislation does not expressly state the extraterritorial scope of those provisions); Artificial Conception Act 1985 (WA), s 4(1)(a). In NSW, there are no express provisions relevant only to the provisions relevant to the parental status of children born in from fertility procedures; but general provisions in the legislation state that the Act applies whether or not the child was born in the state and whether or not their parents have ever been domiciled in the state: Status of Children Act 1996 (NSW), s 4(1)(a), (d).

³² Status of Children Act 1978 (NT), s 5B(1)(b); Status of Children Act 1974 (Tas), s 10A(1)(b); Artificial Conception Act 1985 (WA), s 4(1)(b).

determine parental status ‘for the purposes of the law of the State’,³³ which might be taken to be an unilateral choice of law provision that is only intended to be applicable in litigation within that State. The Family Law Act does not explicitly stipulate the intended scope of application of the provisions relevant to determining parental status in the context of children conceived in fertility procedures, but Ryan J has expressed the view that sections 60H and 60HB have extra-territorial effect.³⁴

Section 60H(1) applies where a woman who gives birth to a child conceived artificially is married or in a de facto relationship at the time of the procedure. When it applies, section 60H(1) does two things. It provides that ‘the child is the child of the woman and of the other intended parent’, and, secondly, it *excludes* any other donors of genetic material: the child ‘is not the child of that person’. It applies if there is consent to the procedure by everyone involved – the woman and partner, and any provider of genetic material. It also applies where certain state and territory laws provide that the child is the child of the woman and the other intended parent, and thus it gives federal effect to such provisions.

Section 60H(2) and (3) apply where a woman gives birth to a child conceived artificially, whether the woman is partnered or single. Thus they apply to all artificially conceived children (whereas s60H(1) only applies to some). They give federal effect to certain state or territory laws which provide that the child ‘is the child of’ the woman (subsection (2)) and/or a man (subsection (3)).

Unlike s 60H(1), subsections 60H(2) and (3) do not expressly exclude any donor of genetic material from recognition as a parent. Judicial opinion has divided on whether they do so implicitly. On the ‘restrictive’ approach, these sections exclude any other donor of genetic material from parental status.³⁵ On this approach, where an unpartnered woman has a child by artificial conception, the sperm donor is not to be regarded as the child’s father. And where the woman gives birth using a donor egg – the case of gestational surrogacy – the egg donor is not to be regarded as a mother. Those favouring the restrictive approach may argue that it brings federal law into line with the effect of state laws.³⁶ On the competing view, sometimes called the ‘enlarging approach’,³⁷ the legislation does not exclude an argument that the sperm donor might be the father.³⁸

Section 60H(1) in surrogacy situations

Surrogacy is very different from the situation s 60H(1) was intended to cover. In surrogacy situations, the birth mother is not one of the intended parents. The intended parents are the commissioning couple. In most of the published commercial surrogacy cases, one of the commissioning parents has provided the sperm. So the child is intended to end up in the care

³³ Family Relationships Act 1975 (SA), s 10C(1), (2); Status of Children Act 1974 (Tas), ss10C(1), (1A), (2), (3), (4); Artificial Conception Act 1985 (WA), ss 6(1), 6A(1), 7(1), 7(2).

³⁴ *Ellison*, at [49].

³⁵ See especially *Patrick: An application concerning contact* (2002) FLC 93-096; *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694.

³⁶ See for example *Patrick: An application concerning contact* (2002) FLC 93-096; and the discussion in *Mason & Mason* [2013] FamCA 424 at [19] – [34].

³⁷ See eg *B v J* (1996) FLC 92-716; *Re Mark: An application relating to parental responsibilities* (2004) 31 Fam LR 162 (Brown J); *Ellison* at [18] – [25]; *Groth v Banks* (2013) Fam CA 430 (Cronin J).

³⁸ Even on the enlarging approach, however, a *mere* sperm donor, one who never intended to be a father, may not be recognised as such: see the analysis in *Baker & Landon* [2010] FMCAfam 280 (Reithmuller FM).

of the man who provided the sperm, and the man's partner (whether male or female), if he has one.³⁹ Section 60H(1) says that if the birth mother has a spouse or partner, that person will be the father of the child rather than the sperm donor. That outcome is not intended by anybody, and does not appear to benefit the child or anyone else.⁴⁰ It is apparent that the section was not drafted with the surrogacy situation in mind because the section refers to the birth mother's partner as the 'other intended parent', whereas in surrogacy nobody intends that person to act as the child's parent. There is a need to amend the section, although what form such an amendment would take will depend on the resolution of wider policy issues. It is arguable that there needs to be attention to a number of provisions to create clarity about the meaning of 'parent' and the relationship between the federal and state and territory provisions.⁴¹

Section 60HB

Section 60HB relates to parentage in some surrogacy situations. It applies when a state or territory court has made an order under its state or territory surrogacy legislation⁴² transferring parentage to the commissioning parents, whereupon the child 'becomes the child of' the commissioning parents. The effect of s 60HB is that such orders are also effective for the purpose of the Family Law Act.⁴³ The section is not currently relevant to commercial surrogacy cases because the state and territory laws allow such orders to be made only in *altruistic* surrogacy situations.

Evidence of parentage

The parentage of a child can be established by evidence in the ordinary way. Because establishing parenthood is often of great importance to determining what is best for a child, section 69V provides that if parentage of a child is a question in issue in proceedings under the Act, the court may 'make an order requiring any person to give such evidence as is material to the question'. But the best evidence is usually the results of properly conducted DNA tests of the relevant adults and children; and an unwilling person could prevent this by refusing to be tested, or refusing to consent to a child being tested. This problem is the subject of detailed provisions in the Act and the Regulations. By s 69W, the court can make a parentage testing order, requiring a 'parentage testing procedure' to be carried out on a child or other person.⁴⁴ If a person refuses to comply with such an order (or refuses to consent to a child having the test),⁴⁵ there is no penalty, but the court may draw such

³⁹ In *O'Connor & Kasemsarn* [2010] FamCA 987, the commissioning father was a single parent.

⁴⁰ For a striking example of the consequences of s 60H in an unusual circumstances involving an altruistic surrogacy where the commissioning parents were also the genetic parents, see *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694.

⁴¹ An issue discussed most recently in *Mason & Mason* [2013] FamCA 424 and *Groth v Banks* [2013] Fam CA 430.

⁴² The 'prescribed laws' to which s 60HB applies are Status of Children Act 1974 (Vic), section 22; Surrogacy Act 2010 (Qld), section 22; Surrogacy Act 2008 (WA), section 21; Parentage Act 2004 (ACT), section 26; Family Relationships Act 1975 (SA), section 10HB; Surrogacy Act 2010 (NSW), section 12: see Family Law Regulations 1984.

⁴³ The section concludes: 'then, for the purposes of this Act, the child is the child of each of those persons'.

⁴⁴ Family Law Act s 69W. It may be made on conditions, and the court can make associated orders, to enable it to be carried out and to make it more effective or reliable: s 69X.

⁴⁵ Family Law Act s 69Z.

inferences as appear just.⁴⁶ The carrying out of such tests, and reports of the results, are governed by detailed regulations.⁴⁷

The application of these provisions to commercial surrogacy situations, however, can pose a problem, particularly in relation to children born outside Australia. Who can authorize the taking of a sample from the child? Can the DNA evidence be admitted if tests are carried out on samples taken from a child without the necessary authorization?

*Ellison*⁴⁸ appears to be the only decision to consider such problems in detail, and it requires careful examination. Mr E, the male applicant, filed an affidavit that annexed photocopies of DNA reports undertaken by a body identified as ‘the S Institute’. Those reports identified Mr E as the biological father of the twin children involved in that case. The DNA samples were taken from the children on the basis of Mr E’s consent. However as the court pointed out, at the time ‘the birth mother was the only person who had authority to consent to a DNA sample being taken from the children’.⁴⁹

Initially, the court ruled that the DNA evidence was inadmissible. One reason was the ‘manner in which it was presented’ - presumably as annexures to Mr E’s affidavit rather than as original evidence from the pathologist.⁵⁰ The court also said the reports were inadmissible ‘as a consequence of’ a note by the pathologist which stated that ‘this testing report does not meet the requirements of the Family Law Act Regulations’.⁵¹ Of course the note itself would not affect the admissibility of the reports, and the context indicates that the court was referring to the taking of the samples from the children without parental authorization – which would indeed have been a reason that the report did not meet the requirements of the regulations. The judgment explained that under the Regulations, before a bodily sample is taken from a child, consent is required from ‘a person who is responsible for the long term care, welfare and development of the child’.⁵² The court found that Mr Ellison was not such a person under either Thai or Australian law (and did not find it necessary to consider which law was applicable).⁵³

It seems clear that the applicants and the pathologist treated the regulations as applicable. The applicants had claimed that the DNA evidence they relied on ‘complied with the Act and Regulations’,⁵⁴ and in a number of passages the Court appeared to apply the Regulations in considering the admissibility of the DNA evidence.⁵⁵ However the Regulations did not apply. They apply only after a parentage testing order under s 69W has been made, as the court itself noted,⁵⁶ and in *Ellison* no s 69W order had been made before the DNA samples were taken.⁵⁷

⁴⁶ Family Law Act s 69Y.

⁴⁷ Made under s 69ZC.

⁴⁸ *Ellison and Anor & Karnchanit* [2012] FamCA 602 (1 August 2012) (Ryan J). In a number of other cases the court has accepted DNA evidence without comment. If there were no parentage testing order and the birth mother consented to the samples being taken from the child and herself, there would seem to be no problem in admitting the evidence.

⁴⁹ *Ellison*, paragraph [20].

⁵⁰ *Ellison*, paragraph [19].

⁵¹ *Ellison*, paragraph [19].

⁵² *Ellison*, paragraph [22], citing Reg 21F(3)(a).

⁵³ *Ellison*, paragraph [27].

⁵⁴ *Ellison*, paragraph [19].

⁵⁵ For example, in paragraphs [22], [29].

⁵⁶ Paragraph [22], second last sentence.

Nevertheless, the court's ruling on the admissibility of the DNA evidence appears to have been based in part on the Regulations.

Because the test results were inadmissible, in November 2011 the court adjourned the hearing, and 'ordered that Mr E and the children undergo a parentage test procedure conducted in accordance with the regulations'.⁵⁸ But this did not happen. The pathologist, Dr B, was wrongly advised that it would be enough to prepare a new report using the previously collected sample, and so, instead of having fresh tests in accordance with the order, the applicants led further evidence relating to the *original* tests. Dr B gave oral evidence, which apparently resolved other difficulties,⁵⁹ but could not have cured the problem that Mr Ellison lacked capacity to authorize the taking of samples.

We can now turn to the law, and the Court's ruling. Section 69ZC says that 'a report made in accordance with regulations covered by paragraph 69ZB(b)' may be received in evidence. But what is the status of a report made after a parentage testing order that does *not* comply with the regulations? In *Re C (No 1)* (1991),⁶⁰ Fogarty J had held that such noncompliant reports were inadmissible, since 'neither the Act nor the regulations seem to provide any discretion or capacity to admit the report notwithstanding non-compliance'. It was a report 'made in accordance with the regulations' that the court may receive into evidence under the section.⁶¹ The current Regulations confirm this. Reg 21M (5) provides that 'A report completed otherwise than in accordance with this regulation is taken to be of no effect.' As Ryan J pointed out in *Ellison*, 'strict compliance' is required.⁶² Accordingly, Ryan J, accepting the correctness of *Re C*, said that the initial reports were non-compliant with the regulations,⁶³ and thus inadmissible.⁶⁴ The later reports would also be non-compliant, and therefore equally inadmissible as the first report.⁶⁵

Nevertheless, Ryan J ultimately did admit the first reports into evidence. The reasoning is contained in the following paragraphs of the judgment:

30. Thus it is necessary to determine whether the first DNA reports might nonetheless be admissible under the Act and Evidence Act. In this regard it was fortunate for the applicants that these proceedings were conducted in accordance with Division 12A of the Act and that evidentiary rules, which would have made admission of aspects of the evidence on this topic problematic, did not apply (s 69ZT of the Act). In *Re C (No 1)* (1991) 15 Fam LR 350, Fogarty J said that compliance with the Regulations is mandatory and there is no capacity to admit a non compliant report into evidence. Mullane J

⁵⁷ Advice received from the applicants' solicitors. Indeed, no s 69W order could have been made: the section requires that a child's parentage arises in proceedings under the Act, and on the facts the tests predated the commencement of the proceedings.

⁵⁸ *Ellison*, paragraph [19]

⁵⁹ See paragraph [31] of the judgment, quoted below.

⁶⁰ *Re C (No 1)* (1991) 15 Fam LR 350.

⁶¹ Then s 66W(10), identical in relevant ways to the present legislation.

⁶² Paragraph [29].

⁶³ The first report had actually included a note to the effect that it was non-compliant because Mr Ellison did not have the legal capacity to authorize the taking of samples.

⁶⁴ Paragraph [29].

⁶⁵ Paragraph [29]: 'The applicants' decision to simply have the first samples and data reviewed and a second report issue does not result in a report which complies with the Regulations.'

in *McK v O* (2001) FLC 93 ruled inadmissible a DNA certificate where a parentage testing order was not made.

31. Sections 69W and 69ZB do no more than provide a mechanism which, following the making of a DNA parentage testing order, renders admissible a compliant DNA certificate which would otherwise be inadmissible. The sections are permissive and do not exclude the admission of other non-ordered forms of DNA evidence provided that material complies with the evidentiary requirements for admission. Clearly, when a parentage testing order has not been made more than mere production of the DNA certificate will be required so as to admit this DNA evidence.
32. As was mentioned earlier, subject to an issue about capacity to consent to the procedure, Dr B's oral evidence and documents produced under subpoena from the testing laboratory resolved other matters which would have rendered those first reports inadmissible. Importantly, the chain of custody was sufficiently reliable to establish that the samples tested were taken from Mr Ellison and the children. The effect of this was that the first DNA reports were admitted and the totality of the admitted evidence on this point established to a degree of medical certainty that Mr Ellison is the children's biological father.

With respect, this reasoning is problematical. It is true, as pointed out in paragraph 31, that the requirements relating to reports following a parentage order do not apply to *other* evidence that might be tendered. That other evidence will be admitted if it passes the ordinary tests of evidence law; and because of s 69ZT those tests are in some ways more relaxed in children's cases than they used to be.⁶⁶ This principle seems to have been the reason that other parentage evidence was admitted.⁶⁷ But it does not justify admitting the first reports. On the assumption that the Regulations were relevant, for the reasons given above doing so was inconsistent with *Re C* and her Honour's own analysis. If a court-ordered parentage report does not comply with the Regulations, it cannot be admitted under s 69ZC, and, on the authority of *Re C*, it cannot be admitted at all. Nothing in the pathologist's oral evidence removed the reason it was noncompliant, namely the lack of authority to take the samples from the children.

As noted earlier, this reasoning seems to treat the Regulations as applicable. But we submit that where no s 69W order has been made, section 69ZC and the Regulations would simply not apply⁶⁸ and the admissibility of the DNA evidence is governed by the general law of evidence.

The problem was that under Thai and Australian law only the birth mother had parental responsibility, and she had not consented to the samples being taken. The samples were therefore obtained improperly. Admitting any evidence based on these samples would require consideration of s 138 of the Evidence Act 1995 (Cth), which makes material that has

⁶⁶ Compare *McK v O* (2001) FLC 93, also mentioned in paragraph 29.

⁶⁷ Her Honour treated the oral evidence of the pathologist, and the second report, as 'non-ordered forms of DNA evidence': paragraph [30].

⁶⁸ Section 69ZB provides that regulations can be made relating to 'the carrying out of parentage testing procedures under parentage testing orders...'

been obtained ‘improperly or in contravention of an Australian law’ inadmissible unless certain things are established (see below). It does not appear that the Court was referred to this section, which is in Part 3.11 of the Evidence Act and is therefore not excluded by s 69ZT. In order to admit evidence so obtained, the Court would have had to find that ‘the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained’.⁶⁹

Section 138 required the Court to consider the following matters:⁷⁰

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
 - (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
 - (d) the gravity of the impropriety or contravention; and
 - (e) whether the impropriety or contravention was deliberate or reckless; and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Because the Court’s attention was not drawn to section 138, we have no judicial guidance about how it should be applied in situations like *Ellison*. Its application would depend on the facts of each case, and on the judge’s evaluation of the various matters. There may of course be factors supporting the admission of the evidence. But the reference to the International Covenant on Civil and Political Rights is interesting, and shows how the application of human rights might be more complex and nuanced than indicated in the submissions made in *Ellison*. Arguably, taking DNA samples from a child without authority violates Article 9.1 (‘Everyone has the right to ... security of person’). More specifically, Article 24 provides that

Every child shall have, without any discrimination [...], the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The protection of children against assaults and interference such as the unauthorized taking of DNA samples is surely a measure of protection required by the child’s status as a minor, and

⁶⁹ Evidence Act 1995 (Cth), s 138(1).

⁷⁰ Evidence Act 1995 (Cth) s 138(1).

is thus protected by Article 24. More generally, a court applying s 138 would need to consider not only the impact on the particular children before the Court, but the effect of the decision on the human rights of children in general, and their parents,⁷¹ and their rights would arguably be diminished by admitting into evidence DNA samples taken from children without the consent of a person having parental responsibility.

For these reasons, in our view the position relating to the admission of DNA evidence based on samples taken from children without proper authorization may be summarized as follows.

- If a parentage testing order has been made, the noncompliant DNA reports must be excluded because of the Regulations and *Re C*. If this is incorrect, the reports cannot be admitted unless s 138 of the Evidence Act is applied, because they were taken ‘in contravention of Australian law’: under the Regulations, a sampler ‘may not take’ a sample from a child unless consent has been given by ‘a person who is responsible for the long-term care, welfare and development of the child’.⁷²
- If no such parentage testing order had been made, the Regulations are irrelevant, and the admissibility of the report should be determined under ordinary principles. Those principles include s 138 of the Evidence Act 1995 (Cth). Samples taken from a child without parental authority are surely obtained ‘improperly’ and therefore the Court cannot admit the evidence unless it finds, having regard to the specified matters, that the desirability of admitting the evidence outweighs the undesirability of admitting it.⁷³

The applicable law in international family cases

For most issues in international family law, the applicable law is the law of the forum *per se*, without reference to choice of law questions. Historically, this could be explained on the basis that the courts only exercised jurisdiction when the parties were domiciled in the forum.⁷⁴ The application of forum law could then be justified on the basis that forum law was by virtue of the jurisdictional rules the law of the domicile.⁷⁵ Although the common law jurisdictional rules were expanded very substantially in the Family Law Act,⁷⁶ there has been no corresponding change to the choice of law rules.

Subsection 42(1) of the Family Law Act states that when the court exercises jurisdiction under the Act, it must apply the Act.⁷⁷ This provision is sometimes treated as a choice of law

⁷¹ And compare UNCROC, eg Art 3.2 (‘ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her ...’) and Art 5 (‘States Parties shall respect the responsibilities, rights and duties of parents ...’)

⁷² Family Law Regulations 1984, Reg 21F(1), (3)(a).

⁷³ Evidence Act 1995 (Cth) s 138(1).

⁷⁴ *Le Mesurier v Le Mesurier* [1895] AC 517, 540. At common law, married women lacked capacity to acquire a domicile independently of their husbands, and so there was only one forum in which proceedings could be brought.

⁷⁵ As it happens, the law of the domicile is the law most often applied when a choice of law analysis is used in family law. For example, the law of the matrimonial domicile is presumed to be the law that the parties intended to govern their entitlement to property: *Murakami v Wiryadi* (2010) 268 ALR 377, [98], [121], [126].

⁷⁶ In all applications other than applications for divorce orders, the mere presence of either party at the time that initiating process is filed is sufficient: Family Law Act 1975 (Cth), s 39(4) (matrimonial causes other than divorce orders), s 69E(1) (applications involving children). This is subject to the court’s discretion to decline to exercise jurisdiction on the basis that the court is a clearly inappropriate forum: *Henry v Henry* (1996) 185 CLR 571.

⁷⁷ This is subject to s 42(2), which requires the court to apply common law choice of law rules, subject to the Marriage Act 1961 (Cth). There are very few common law choice of law rules applicable in family litigation, as explained above.

rule, justifying the Australian courts' application of the Act in international cases. It has been interpreted to have that effect in a case about parental status.⁷⁸ No doubt, if an Australian court is asked to make a parenting order or a declaration of parentage, it would have to do so under the Family Law Act, even if there were an international element to the case.⁷⁹ It is much less clear that the law of the forum should be applied to determine other issues, such as who is a child's parent, when the child is born outside Australia and the birth and genetic mothers are not Australian.

In international surrogacy cases, including *Ellison*, the courts assume that Australian law is applicable to determining parental status without justifying that assumption.⁸⁰ In several cases, the courts have referred also to the law of the place where the child was born, also without any explanation.⁸¹ Determining the applicable law for identifying parental status is a novel issue in private international law.⁸² It should not simply be assumed that forum law is applicable to this question if the legislation is silent as to its intended scope of application. Further attention needs to be given to what law should be applied in international cases. It is not appropriate simply to dismiss the relevance of the law of the place where the fertility procedure occurred, where the child was born, and where the mother is domiciled and resident, without clear legislative instruction to do so.

Parentage in commercial surrogacy situations: summary

To conclude, in commercial surrogacy arrangements where the child is born through donated eggs and the sperm of one of the commissioning parents, the position relating to parentage under Family Law Act appears to be as follows:

- The child's legal mother will be the birth mother if the circumstances fall within s 60H(1)(where the birth mother is married or partnered)⁸³ or within s 60H(2)(if a state or territory law says the child is her child). If the birth mother is single and no such state or territory law applies, the position is uncertain.
- If a commissioning intended father provided the sperm, no provision of the Family Law Act explicitly prevents the court from finding him to be the father if at the time of the procedure the birth mother had no consenting husband or de facto partner. However under state and territory laws such sperm donors are irrebuttably presumed not to be the father,⁸⁴ and as noted elsewhere in this article, Ryan J has expressed a

⁷⁸ *Brianna v Brianna* (2010) 43 Fam LR 309, [65].

⁷⁹ *Re Mark: an application relating to parental responsibilities* [2003] FamCA 822, [94].

⁸⁰ *Re Mark: an application relating to parental responsibilities* [2003] FamCA 822.

⁸¹ *Dudley & Chedi* [2011] FamCA 502, [25]; *Dennis & Pradchaphet* [2011] FamCA 123, [20].

⁸² The leading treatise states that similar provisions in English legislation, dealing with parental status for children born after assisted reproduction, 'are rules of English domestic law and do not amount to general rules of the conflict of laws', but does not suggest when those rules ought to be applied: Lord Collins of Mapesbury (gen ed), *Dicey, Morris & Collins on the Conflict of Laws* (14th ed, 2012, Sweet and Maxwell), p 1216. The characterisation of the rules as domestic suggests that they should not be applied without a choice of law analysis.

⁸³ This is also the case in all state and territory jurisdictions, if the mother is married or in a heterosexual relationship. In most jurisdictions, this is also the case for single birth mothers and birth mothers in same sex relationships. In Tasmania, the legislation does not specifically state that single birth mothers will be legally recognized as the mother. In Victoria, the legislation relevant to single mothers and birth mothers in same sex relationships is in the only part of the legislation relevant to parental status that is not expressly given an extraterritorial application. See references above at n 7.

⁸⁴ The parental status presumptions of the ACT, NSW, South Australian and Victorian legislation all provide in such circumstances that the sperm donor is irrebuttably presumed not to be the father: Parentage Act 2004 (ACT), s 11(5),

provisional view to the effect that the Family Law Act in effect incorporates the parenthood provisions of state and territory law.⁸⁵ On that view, state and territory provisions might prevent the sperm-providing commissioning parent from being recognized as the father. However this would be a surprising outcome. Under section 60H(2) and (3), the provisions of state and territory legislation relating to parental status are picked up only to identify which persons *are* the parents of a child for the purposes of the Act. Section 60H(2) and (3) do not explicitly pick up any state or territory provisions stating who is *not* the father.

- If at the time of the procedure the birth mother did have a husband or de facto partner who consented to the procedure, unless contrary to existing authorities it is held not to apply to surrogacy situations, s 60H(1) might lead to the bizarre result that the legal father will be the *birth mother's husband or partner*, and not the biological father who seeks to act as such.
- Where a parentage testing order has been made, DNA evidence is inadmissible in family law proceedings if there has been noncompliance with the Regulations, for example if samples were taken from a child without proper authorization. And whether or not there has been a parentage testing order, such samples, and any other evidence improperly obtained, can be admitted only if the court applies s 138 of the Evidence Act 1995 and finds that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, having regard to the matters listed in that section.

In this area, therefore, several issues need attention. First, the Full Court could usefully clarify the law in some respects, including the question whether parentage is to be determined by Australian law or the law of the country in which the children are born. Second, there is a need for legislative reform. In our view s 60H needs to be amended because it has been interpreted in a way that can produce absurd results in some surrogacy situations. What that amendment should be, and whether the other parentage provisions of the Act are satisfactory, are questions of policy. No doubt their resolution will be aided by the report of the Family Law Council when it has finished its work on this topic.⁸⁶

CONCLUSION

As we have suggested in this article, the Australian law relevant to surrogacy is incoherent and ineffective. In the context of international commercial surrogacy, this is most evident in the lack of coordination between relevant federal legislation, especially the Family Law Act, and the state and territory surrogacy legislation. We have not referred in detail to the relevant law on immigration and citizenship, but these cases come before the Family Court only after

12; Status of Children Act 1996 (NSW), s 14(2), (4); Family Relationships Act 1975 (SA), s 10C(4); Status of Children Act 1974 (Vic), ss 13(1)(c), (2), 15(1)(b), (2). The ACT, NSW and South Australian provisions are stated to apply whether or not the fertility procedure occurred in the jurisdiction, and whether or not the child was born in the jurisdiction, but the relevant Victorian provisions are not.

⁸⁵ *Mason & Mason* [2013] FamCA 424.

⁸⁶ The terms of reference for the Council's parentage review were issued by the Attorney-General in June 2012 and updated in September 2012.

a determination has been made by immigration officials that the child is the child of an Australian for immigration purposes. Once that decision is taken and the child is in Australia and has been brought before the court, it seems inevitable that parenting orders will have to be made, as we have explained above. This shows that reform to other areas of law will continue to be futile without reform to immigration law and practice. The lack of effective or direct coordination between these various areas of law leads, intentionally or not, to the subversion of state and territory policies on surrogacy.

This lack of coordination is consistent with a more widespread ambivalence towards the enforcement of the surrogacy legislation. In applications for parenting orders and adoption involving surrogacy, there seems little willingness to identify or take into account criminal behaviour,⁸⁷ or to prosecute offenders.⁸⁸ In the case of altruistic surrogacy, the courts have already shown themselves likely to relax the legislative pre-requisites to granting a parentage order, in the state or territory jurisdictions in which this is permitted.⁸⁹ As we have already noted, once the child is in the care of the commissioning parents, and assuming that the birth mother has consented to relinquish the child, the strong view of the paramountcy principle appears to require this.

The legal response to surrogacy requires closer and more careful consideration. It is highly undesirable that the law is so complex and inconsistent; greater cooperation between the Commonwealth, the states and territories is necessary. There are good reasons for the control of commercial surrogacy, which become more important when the birth mother is from a developing country and likely to be highly vulnerable, where the egg donor is unknown, and when the children are likely to be unable to identify their genetic heritage or to identify or know their birth mothers.

⁸⁷ In most international commercial surrogacy cases in the Family Court, the court either does not comment on the possible criminality of the arrangements, or states that it is not relevant to their decision. See e.g. *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162, [94]. It is likewise in adoption cases: e.g. *Blake & Another* [2013] FCWA 1; *McQuinn & Shure* [2011] FamCA 139. *McQuinn* was an international altruistic case; but at the time the agreement was entered into, all forms of surrogacy were criminalized under Queensland legislation, and that offence applied to ordinary residents of Queensland acting outside Queensland: Surrogate Parenthood Act 1988 (Qld), ss 3, 2 (definition of ‘prescribed contract’).

⁸⁸ There are very few reported instances of prosecutions under the surrogacy legislation. The Investigation into Altruistic Surrogacy Committee of the Queensland Parliament identified only five prosecutions under the Surrogate Parenthood Act 1988 (Qld). The Committee noted that none of the individuals who had been charged under that legislation had received a severe penalty, and that ‘In most cases, the charges were dismissed and no conviction was recorded’: Queensland Parliament, Investigation into Altruistic Surrogacy Committee, *Report* (2008), p 9.

⁸⁹ In several of the very few published cases of applications for parentage orders in altruistic surrogacy cases, the courts have relaxed the requirements for granting a parentage order: e.g. *BLH v MW* [2010] QDC 439 and *C v B* [2013] NSWSC 254. This is permitted under the Queensland and NSW legislation that was in issue in these cases, as well as in the Tasmanian legislation. For the same reasons as we have identified above in part 2, it seems likely, if not inevitable, that the courts will exercise their discretion to make parentage orders even if the requirements of the legislation are not fulfilled, because to do otherwise would not be consistent with the child’s best interests.