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AUSTRALIAN ALTRUISTIC SURROGACY: STILL A WAY TO GO

RACHEL KUNDE*

This article is a first-person narrative of the author's lived experience as an altruistic surrogate in Australia. The author highlights the complex and emotional difficulties faced by all parties in surrogacy arrangements to advocate for various legislative reforms. Touching on the phenomenon of international commercial surrogacy and the relevance of ensuring personal autonomy for surrogate mothers, the author ultimately paints a picture of an Australia that can approach surrogacy ethically: respecting the rights of children and the dignity of each individual.

* Rachel Kunde is a wife and mother of three children who has been involved with the infertility community since 2006 when she became an administrator of an online egg donor support group. When surrogacy laws in Queensland came under review in 2009, Rachel entered a submission to the parliamentary investigation committee and spoke at the committee hearing in favour of surrogacy. Since then, she has been an advocate for all forms of surrogacy within Australia and has now been a traditional surrogate twice. Rachel has been volunteering her time to the not-for-profit surrogacy organisation Surrogacy Australia since 2011 and is also a full-time midwife. Rachel would like to thank Molly Jackson for her invaluable guidance and helpful support throughout the writing process.

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I INTRODUCTION

Surrogacy has been a phenomenon in Australia since the birth of Alice Kirkman in 1988. As a legal concept, however, surrogacy is still relatively new. Most Australian states have only introduced legislation regulating altruistic surrogacy arrangements in the last 10 years.¹ Even more recently, the 2014 media controversy about baby Gammy has now projected surrogacy and its ethical issues into Australian homes almost *ad nauseam*.²

My personal journey into surrogacy started when I decided to donate my eggs and ended when I gave birth to twins for a same sex couple in 2011. In this essay, I explore my journey and use my experience to discuss current issues surrounding surrogacy in Australia, and how I believe surrogacy can move forward ethically from the baby Gammy incident.

¹ Legislation that has been passed to legalise altruistic surrogacy arrangements within Australia include the *Surrogacy Act 2010* (Qld), *Surrogacy Act 2010* (NSW), *Assisted Reproductive Technology Act 2008* (Vic), *Parentage Act 2004* (ACT), *Statutes Amendment (Surrogacy) Act 2009* (SA), *Surrogacy Act 2008* (WA), and *Surrogacy Act 2012* (Tas). Before these, only the Australian Capital Territory's *Substitute Parentage Act 1994* (ACT) provided some regulation on surrogacy arrangements.

² See, eg, Australian Broadcasting Corporation, 'Fears of Surrogacy Ban after Australian Couple Deserts Thai Surrogate Mother of Baby with Down Syndrome', *ABC News* (online), 3 August 2014 <<http://www.abc.net.au/news/2014-08-02/outrage-as-australian-parents-desert-surrogate-mother/5643074>>.

II EGG DONATION AND THE BEGINNING OF A LIFE'S PURSUIT

In 2003 I was pregnant with my second daughter Ciara when I read an article in a Brisbane newspaper about a woman who had donated her eggs to an infertile couple. I rubbed my pregnant belly and wondered how anyone could give away a child. Even so, in my mind a seed was sown that would flourish into what I feel is one of my life's great achievements. After Ciara was born, I often thought about the article I had read and decided to explore this topic on the Internet. During my research I found an online support forum called *Aussie Egg Donors*. After gaining an understanding of the hardships people in this community had gone through to start a family, I felt comfortable with the concept of egg donation. I also found the first couple I was to donate my eggs to.

This decision, of course, was not instantaneous. Firstly, I consulted with my husband Simon. Some donors looked for couples who were under a certain age, or who were childless. Some donors had a list of requirements that they would like from intended parents. For me, it was more about the connection I felt with the couple. In donating my eggs, I wanted to find people who shared the same ideals that Simon and I had — a couple who were easy-going and didn't take life too seriously. Most importantly, I wanted to know that they would always put their children's needs first when it came to disclosing the nature of their conception. For me, that meant a couple that would involve us in their family in some small way throughout the years; a simple photo here and there, and the knowledge that we were always available if the child (that would grow up into an adult) ever had questions for us. Mark and Samantha were a couple from a Queensland country town three hours away from where we lived. They had one child already and had tragically lost their second child to an extremely rare medical condition when he was one month old. Samantha was also at an age where her eggs were simply not viable any more. We quickly became friends, and, after extensive counselling and legal advice, I chose to donate my eggs to them.

This was not a simple process. Egg donation is an altruistic act — an egg donor cannot charge fees for their donation, but the recipient does need to cover any medical expenses of the IVF process. The egg donation occurs in generally the same way as an IVF cycle. It also involved me injecting synthetic hormones daily and undergoing surgery to retrieve the eggs I had produced. After the eggs had been fertilised in the clinic laboratory, in accordance with

clinical guidelines, I was no longer in control of my genetic material. My eggs were in the possession of the IVF clinic and Mark and Samantha had the right to use them. The donation and IVF process were extremely successful and one of the embryos created was transferred to Samantha, and led to the birth of their third child — a beautiful daughter whom by all accounts was perfect, slept like an angel, and had my eyes. Unfortunately Samantha developed a heart condition while pregnant and was strongly advised against pursuing another pregnancy. This prevented Samantha and Mark using the other embryos created during IVF.

III CONSIDERING ALTRUISTIC SURROGACY

After Samantha gave birth, I became a more active member of the infertility support community and decided to donate my eggs to another couple that I had met through the *Aussie Egg Donors* forum. I became a strong advocate for egg donation and although the concept of surrogacy was often discussed on our forum, surrogacy in Queensland was illegal at the time.³ Following the success of my second and then third egg donation, Simon and I completed our family with our third daughter, Addison. My attention was now drawn to surrogacy. During this time I had met women and their families who had been altruistic surrogates in New Zealand and had examined the legal issues of surrogacy in Australia while providing general advice to people who were suffering from infertility.

In 2008, the Bligh Government announced a review of the *Surrogate Parenthood Act 1988* (Qld) and I felt the need to advocate for overturning the previous laws introduced by the Bjelke-Petersen Government. These laws prohibited anyone in Queensland from becoming a surrogate or engaging a surrogate, both internationally and locally. At this time there were very few (or no) support or advocacy groups for surrogates in Queensland. On behalf of the people I knew who had a need for altruistic surrogates in Queensland, I entered a submission to the parliamentary review,⁴ and was honoured when I was asked to speak at the parliamentary committee hearing. Whilst my first venture into public speaking was shameful, there was overwhelming support for altruistic surrogacy legislation. The updated

³ *Surrogate Parenthood Act 1988* (Qld) s 3. It was an offence for a Queensland resident to enter into a surrogacy contract in Queensland or elsewhere. The maximum penalty was 3 years imprisonment.

⁴ Rachel Kunde, Submission to Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, 12 June 2008.

legislation was to be made two years retrospective meaning that anyone who became parents through a surrogacy arrangement in Queensland, or who acted as a surrogate prior to the commencement of the Act, could apply for transfer of parentage without prosecution.⁵

The knowledge that the law would be retrospective spurred me to actively consider becoming an altruistic surrogate. Having helped three couples through egg donation and seeing the joy that their daughters brought to their lives, I was keen to help another family as an altruistic surrogate. I was open to becoming a traditional surrogate; where an embryo is created using my own egg and the intended parent's ('IP's') sperm. This is opposed to a gestational surrogate, who becomes pregnant with an embryo created by the intended mother or otherwise donated gametes, and has no genetic tie to the child. Having donated my eggs already and remaining in touch with the families I had helped, I felt emotionally prepared to disconnect myself from the baby I would carry. I had created such a strong friendship with Samantha and Mark and, knowing they dearly wanted another child, it seemed natural to offer to carry their baby for them.

Making this decision entailed an enormous amount of emotional, legal, and financial considerations. The process of becoming a surrogate is extremely complex — not simply a matter of determining how to get pregnant. There are also ongoing issues in regards to the sort of support that would be offered, what expenses were to be covered, and how much contact there would be during and after the pregnancy. I have always believed the principal issue to consider is the impact the surrogacy will have on those around us, especially the child that will result from the surrogacy. There were very limited resources available to us at the time and, as surrogacy was new in Queensland, there were no agencies or individuals that we could approach to help us with this process. This made the experience very isolating.

Most of my support came from Mark, Samantha, Simon, and the online communities I was engaged in. People were always happy to listen to me voice any concerns I had regarding the timing of my cycle or the impact surrogacy would have on those around us. Proceeding at the time we did, our surrogacy arrangement required little practical pre-planning: it was merely an issue of timing my cycle and conducting a home insemination. We underwent no

⁵ *Surrogacy Act 2010* (Qld) s 63.

counselling, had no legal advice, and had no written agreement other than the information we had covered in countless emails prior to the birth of the baby. As a result, our relationship required a level of trust that few people would be comfortable with. Mark and Samantha had to trust that I would do what was best for their baby while pregnant — and of course that we would willingly give them the child after birth. We had to trust that they would support us throughout the pregnancy and agree to raise the child with full disclosure about the nature of their birth. While some people would not be comfortable going ahead in a situation like this, it was one I had no concerns about due to the relationship that my family and I had with Samantha, Mark, and their family.

With surrogacy having been quite common in the United States for some time, there are extensive personal accounts available from children who had been born through surrogacy. One of the blogs I had read while considering the surrogacy was by a man in his early 20s who had been born through a traditional surrogate and had only in his teens been told the truth about his conception.⁶ He was clearly traumatised by the truth that had been denied him for his entire life. He questioned his whole personality: his parents' love, the price that was paid for his life, and everything about the world around him. He had tracked down his surrogate mother and clearly struggled to define their relationship. The latest blog I read before going ahead with the surrogacy was about his surrogate mother having another child of her own. He was in angst about why she chose to keep *that* baby but not him. The blog was distressing to me for so many reasons and my heart hurt for a young man who was clearly suffering because of other people's actions.

While I felt strongly for him and the clear struggle he was having with his human identity, I felt that becoming an altruistic surrogate and having the child grow up with complete disclosure could prevent this happening to any child I conceived through surrogacy. I also had the added advantage of having a close friend in New Zealand who had successfully been an altruistic surrogate to draw advice and support from. Through her I could see the vast ethical differences between altruistic and commercial surrogacy.⁷

⁶ Brian C, *The Son of a Surrogate* (9 August 2006) <<http://sonofasurrogate.tripod.com>>.

⁷ The American online surrogacy support group *Surrogate Mothers Online* has also helped me gain a more balanced view on commercial surrogacy in the United States; See Surrogate Mothers Online LLC, *Surrogate Mothers Online Q & A* <<http://www.surromomsonline.com/answers/index.htm>>.

IV MY EXPERIENCES AS AN ALTRUISTIC SURROGATE

Going into my first surrogacy, I had the strong sense that I would happily be able to give the baby to his rightful parents when he was born: for Simon and myself, our family was complete with our three daughters. But the bond between a woman and the baby she carries can be a remarkable thing and so I couldn't truly know how I would feel until it happened. Samantha and Mark were well aware of this and always assured me that if I could not give the baby to them they would never force me to. Regardless, the thought of keeping someone else's child didn't sit well with me despite the detriment it could have on my mental wellbeing. If a situation like this were to occur and both parties wanted to keep the child, the dispute would be heard through the family court and an inquiry into the best interests of the child would be undertaken.⁸ Luckily it didn't come to that and the day of Christopher's birth was something I will always remember and reflect on as a beautiful day. While there were moments after the birth where I struggled emotionally, as all women who recently give birth do, I never once thought that I had done the wrong thing in becoming a surrogate.

The *Queensland Surrogacy Act* was passed in Parliament a month before Christopher's birth. We were the first surrogacy case the hospital had ever had and the first birth that fell under the new legislation. The hospital accommodated most of our wishes and went out of their way to make things easier for me. I had no idea how I would feel post-birth so I simply took things as they came. Over the three days I was in hospital I could feel my emotions growing and I was eager to go home. I distinctly remember Simon picking me up to go home. We waved goodbye to Samantha, Mark, and their now completed family, and drove away from the hospital ourselves. As soon as our car drove out of the hospital car park and there was no one left but Simon and myself, my emotions burst from me. I sobbed and sobbed unable to articulate what I was feeling at that moment. I was not sad that my time with Christopher was over because I knew he and his family would always be a part of our lives. I was sad that our journey was over. I felt like I had hit a brick wall and I was battered and bruised because all of a sudden I no longer had to think about the surrogacy. I no longer had to wonder how it would all end. I no longer woke with Christopher kicking merrily against my bladder and

⁸ *Surrogacy Act 2010* (Qld) s 22.

texting Samantha about how cheeky he was going to be. It was over and I was emotionally and physically exhausted.

Over the next week I would often lay awake at night wondering if I had done the right thing. Thinking back to the blog written by the American man who struggled with the knowledge that he was born through surrogacy, I wondered if Christopher would grow up hating me for the choices I made on his behalf. Finally when the baby blues lifted and with much support from my friend in New Zealand, I knew I had made the right choice. I knew Christopher would grow up with us in his life and he would always know how we felt about him and the amazing role we played in his creation. It only took me three months after the birth of Christopher to know that I wanted to try again. Simon was not so keen but after much discussion I talked him into it. I won't pretend that he jumped on my bandwagon. Simon is simply the type of man that wants to please his wife and, knowing that it was something I felt I needed to do, he just didn't try to stop me.

I met Michael and Jared, a same sex couple who lived only a few suburbs away from us, through an online support group. They had been trying to have a family through surrogacy for quite some time when we connected. An unsuccessful attempt in America had exhausted their bank account and after trying for 18 months with an Australian surrogate, they all decided to call it a day and look into other possible options to create their family. We met a month later and it was only four months after entering into our agreement that we received a positive pregnancy test. Our experience with meeting Michael and Jared was somewhat different to the experiences of meeting potential intended parents in the past. Previously we took the time to form relationships with our intended parents through months of emailing which finally lead to face-to-face meetings. I only exchanged emails with Michael and Jared briefly before meeting and this was simply due to the fact that they lived so closely and I felt comfortable with them from the beginning. How quickly we seemed to jump into our surrogacy arrangement is not something that I recommend to any party I counsel who is looking to undergo surrogacy. When I reflect on the situation, I often realise how blindly we all trusted each other from the get-go. This was an extremely risky thing to do when, if successful, the lives of children would be involved.

In hindsight, I am grateful that we had two negative cycles prior to becoming pregnant in order for our relationship to be tested through hard times before arriving at the good times. Our experience did turn out to be a very positive one, but it could have easily gone the other way if we weren't the people we portrayed ourselves to be from our first communications. From the beginning, the pregnancy also felt very different to my previous pregnancies. I should have known that the excessive morning sickness I was experiencing was unusual. An ultrasound at 9 weeks explained why — two heartbeats were seen flickering on the screen. Michael and Jared were thrilled. Simon and I constantly joked that they had no idea what they were getting into. The pregnancy was extremely difficult and meant that I had to give up work at 18 weeks. I spent most of my days resting, as simply walking upstairs left me dizzy and unable to catch my breath.

At 27 weeks and three days, after Simon had left for work, I began bleeding heavily with what ended up being a suspected placental abruption (where the placenta separates from the uterine wall). I phoned Simon, Michael, and Jared, who all rallied. Jared was home so he came straight over while I waited for the ambulance. Michael was already at work in the city and decided to go straight to the hospital and meet us there. Simon jumped on the first bus home. He arrived just as I was taken away by the ambulance. What occurred after my arrival in hospital is a blur. Identifying the source of the bleeding seemed almost impossible and there was talk of me staying in hospital for the rest of the pregnancy on bed rest. Simon was waiting for my mother to arrive to look after the children before coming into the hospital so unfortunately he had no idea what was happening. Theatre was on standby in case I had to be rushed in for an emergency caesarean. We spoke to countless doctors, midwives, paediatricians, and anaesthetists and a scan showed both babies were still alive and seemingly healthy. When it was clear the bleeding was not subsiding the decision was made to deliver the babies within three hours: their health was not at risk, but mine clearly was.

Not long after the decision was made, Simon finally arrived at hospital. When he walked into the room and saw me he started crying. The look on his face broke my heart. I wondered how I could do this to him — how could I do something that made such a strong man reduce to tears? Jared was present when Simon arrived and later confided to me that it was in that moment that he became aware of just how much the surrogacy impacted on my health and

my family. Simon also confided in me much later that he took a photo of me when he arrived because he thought it could be the last time he saw me alive. This situation is not something that I thought about when deciding to become a surrogate. Having had relatively healthy pregnancies in the past, the thought that my own life could be at risk as a result of carrying someone else's child was not something that ever entered my mind. This is now something I talk to potential surrogates about when they are considering walking the same path.

Despite the gravity of the situation, the twins were born healthy that afternoon — tiny — at just over one kilogram each. After ten weeks in hospital they were finally home to wreak havoc on their fathers' lives. Simon and I were right — Michael and Jared had no idea what they were getting into. We watched with smug satisfaction as they struggled with sleepless nights and unsettled babies, whilst also delighting in the fact that they took it all in their stride. Thinking back on my two surrogacies, I found my emotional recovery after the birth of Christopher prepared me for my second surrogacy journey. I rolled with my emotions instead of fighting against them as I did with Christopher and by the time the twins were born I had a vast support group to help me process my feelings.

Now, five years on from my first surrogacy experience, I can honestly say that I would not change a thing. My family has helped create other families that are unequivocally connected to our own. No amount of words can express how blessed I feel to have been able to experience the joy of a truly altruistic act despite the trials and tribulations we have been through.

V AUSTRALIAN SURROGACY & HUMAN DIGNITY: WHERE ARE WE NOW?

After the twins' birth I became actively involved in the not-for profit organisation *Surrogacy Australia*, eventually becoming Executive Officer in May 2014.⁹ I have been a point of support, advice, and education for individuals and other organisations that are interested in surrogacy. In August 2014, only three months into my executive officer role, the news of baby Gammy was picked up by the media. The surrogacy community was aware of the story months before it became international news and had privately been raising funds for the family in Thailand. Unfortunately when the story hit the media it turned the community on

⁹ Surrogacy Australia, *Surrogacy Australia: Home* <<http://www.surrogacyaustralia.org>>.

its head. All of a sudden people who were actively involved with surrogacy in Thailand were left in limbo. The ethical issues of both international and local surrogacy were thrust into the spotlight: peoples' personal struggles were being aired like dirty laundry.

Is surrogacy ethical? Is it another form of child trafficking? How can impoverished women truly be making an informed decision to become surrogates? Should we ban surrogacy completely? Is surrogacy a violation of the United Nations Convention on the Rights of the Child?

Questions such as these made international headlines and brought the issue of surrogacy into every home across Australia. Millions of people watched while the Farnell's tried to explain their reasoning behind leaving their son with a poor Thai woman. They emphatically stated that it would not have ended that way if surrogacy in Thailand was more controlled, if the baby had been terminated as requested (which didn't occur as the surrogate controlled the pregnancy and didn't consent to the procedure), and if they had been allowed more involvement.

There is no denying that surrogacy can go wrong, usually because of some human failing: failure to communicate, failure to consider the wishes of others, failure to consider the potential legal and parental issues, or failure to plan for any unwanted medical outcomes. However, I believe that the actions of one should not affect the intentions of many. In the odd instance when a surrogacy journey does end negatively, it will always be the child that suffers the direst consequences — they are denied knowledge behind the truth of their conception, they are left with citizenship in limbo, or worse, they are left with no one to claim them. Circumstances like this happen often in everyday life. It is unfortunate that when surrogacy is involved, a large amount of attention is brought to the possible pitfalls of surrogacy. Children are born to drug-addicted mothers every day, newborn babies are left abandoned to die in storm water drains, and children are neglected or abused by their parents. When this occurs, the nature of their conception is never called into question. I do not think, therefore, that we can paint all infertile couples with one brush.

Each Australian state that has surrogacy legislation has the same guiding principle — the rights of the child are to be protected at all times. When the rights of the child are protected, so too is the child's inherent human dignity. Despite this, many argue that surrogates are

being taken advantage of, children are being used as commodities, and so, their dignity is jeopardised. I feel that this argument is largely redundant, as it seems to see human dignity as one-dimensional. Dignity is of course an extremely multi-faceted concept, often largely determined by personal values and beliefs. Recognising the emotional complexity of surrogacy is surely the first step in determining its effect on human dignity.

Towards the end of last year I was involved with the SBS program *Insight*. Fellow guest Kajsa Ekis Ekman likened all forms of surrogacy to reproductive prostitution, commenting off camera that it is always women who sacrifice themselves and put their lives on the line when it comes to the needs of others. Eighteenth century philosopher Immanuel Kant's categorical imperative may support her argument¹⁰ if the surrogate was only being used as a means to an end — something that would violate her personal autonomy.¹¹ I cannot say this was the case for me. I have confidence in, and respect for, my personal autonomy. In other words, I believe my decision to become a surrogate was made completely free from coercion. I willingly entered into an arrangement that was not legally enforceable against me. I also had complete control over the pregnancy and the choices on how the pregnancy was managed. In fact, I believe my decision to become an altruistic surrogate mother was the epitome of true autonomy.

Australian legislation on surrogacy also distinguishes between commercial and altruistic surrogacy, the former of which is accused of coercing surrogate participation — financially incentivising women to sell their reproductive abilities.¹² Only altruistic surrogacy, where the surrogate gains no incentives of a financial value, is legal in Australia.¹³ The same legislation also makes it difficult to solicit or advertise as an altruistic surrogate,¹⁴ and criminalises the taking or providing of financial reward for acting in surrogacy

¹⁰ Mark Thomas Walker, *Kant, Schopenhauer and Morality: Recovering the Categorical Imperative* (Palgrave Macmillan, 2011).

¹¹ Lawrence O Gostin, *Surrogate Motherhood: Politics and Privacy* (Indiana University Press, 1990) 142.

¹² See, eg, Kajsa Ekis Ekman, *Being and being bought: prostitution, surrogacy and the split self* (Suzanne Martin Cheadle trans, Victoria Spinifex Press, 2013) ch4 [trans of: *Varat och varan: Prostitution, surrogatmödraskap och den delade människan* (first published 2010)].

¹³ See, eg, *Surrogacy Act 2010* (Qld) s 57; *Surrogacy Act 2010* (NSW) s 8. The only exception is the Northern Territory, which currently has no legislation on surrogacy. A commercial surrogacy arrangement could theoretically be legally undertaken here, however an appropriate transfer of parentage could not occur due to the lack of supportive legislation.

¹⁴ See, eg, *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2010* (NSW) s 10; *Assisted Reproductive Technology Act 2008* (Vic) s 45.

arrangements.¹⁵ Therefore, the surrogacy that can legally exist in Australia is the kind that requires a strong, altruistic act of personal autonomy on behalf of a surrogate mother. This legislation is clearly intended to provide protections for surrogate mothers and the children born from surrogacy arrangements. In my experience, aspects of the current legislation also make it very difficult for surrogacies to run smoothly and for people to discuss the complexities of pursuing surrogacy. Furthermore the legislation creates complications for surrogate mothers to be fairly compensated for the expenses they incur during the surrogacy arrangement.

VI POTENTIAL SOLUTIONS

In the last six years I have gained personal experience in being a surrogate while also being a keen observer of countless other local and international surrogacy arrangements through the support groups I have facilitated. As a result I feel I have pinpointed the ingredients necessary to make a surrogacy arrangement work as well as seeing where current legislation is failing people. The Gammy case highlighted the fact that there are clear problems with the current legislation in Australia. A 2014 study highlights that Australians are the highest per-capita users of overseas surrogacy of any country in the world.¹⁶ For many couples facing barriers to starting a family in Australia, such as inconsistent state legislation, lack of Australian women willing to be surrogates, and lack of legal protection for intending parents, going overseas appears to be the only solution. This clearly highlights that surrogacy in Australia still has a long way to go to ensure it is safely accessible to everyone.

There are shortcomings in the current framework in terms of few resources for people who are looking to become surrogates or are looking for a surrogate to create their family. Unless people are willing to do extensive research themselves, join a support forum and share their personal stories, or outlay considerable upfront legal costs, they can find the process too hard and confusing. This could be mitigated if the government looked at funding an independent not-for-profit body with the purpose of educating people about their rights and

¹⁵ See, eg, *Surrogacy Act 2010* (Qld) s 57; *Surrogacy Act 2010* (NSW) s 9(1); *Assisted Reproductive Technology Act 2008* (Vic) s 44(1).

¹⁶ Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australian's Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 270, 273.

responsibilities regarding surrogacy. The Victoria Assisted Reproduction Technology Authority ('VARTA') provides advice on surrogacy and egg donor matters in Victoria.¹⁷ Due to the differences in legislation on reproductive technology across the states and territories, VARTA cannot provide appropriate advice outside of Victoria. A national government body that is funded similarly to VARTA would be extremely beneficial to the fertility community within Australia and could help guide people along the surrogacy path, ensuring they are educated and making informed decisions when it comes to choosing which path to follow to create their family.

In each state it is a requirement that surrogates and IPs have counselling and legal advice prior to entering into an arrangement, however once the surrogate is pregnant, parties are left to their own devices. The onus is left on the surrogate and the IPs to make sure things run smoothly. Surrogacy is a highly emotive topic for those involved, requiring a lot of openness, honesty, and flexibility to allow for a smooth journey. This is something that each individual will handle in their own way and the current government failing lies in the lack of support for surrogates and intended parents during the pregnancy and after the birth. Surrogacy could be idealised as a beautiful event where parties see eye to eye on all matters and at the end of the day the surrogate proudly hands over the baby to the gushing intended parents and all is well.

The reality is extremely different and, like all relationships, communication is key. When communication fails, feelings are hurt, emotions run high, and relationships can go sour between IPs and surrogates. This could be addressed in the establishment of some form of government rebate for counselling, applicable to all relevant parties, at various stages of the pregnancy (not simply prior to entering into the agreement). Although this may incur additional time and costs for parties involved, it is hard to put a price on the emotional wellbeing of each individual. I have experienced first-hand the pain caused when communication and support systems break down: ultimately it is the resulting child that will suffer the consequences.

I also believe Australian states should be looking into compensated surrogacy through uniform national legislation. Compensated surrogacy is not to be confused with commercial

¹⁷ Victoria Assisted Reproductive Treatment Authority, VARTA <<https://www.varta.org.au>>.

surrogacy as undertaken in countries such as India, Thailand, and the United States, where a woman is paid in a commercial sense for a service at an agreed rate. Crucially, in commercial surrogacy arrangements, the IP's generally manage the pregnancy and thereby risk removing the surrogate's personal autonomy. A compensated surrogacy approach means that all the surrogate's relatable expenses can be covered without fear of prosecution. To some extent, Australian surrogacy legislation follows this practice although the limits of compensation are worryingly unclear. I also believe that the compensation scheme should be broadened so as to address the risk pregnancy places on the surrogate's health and to cover any unexpected burden the pregnancy may place on her or her family.

Currently in Australia, only the *New South Wales Surrogacy Act* and *Queensland Surrogacy Act* outline examples of what pregnancy-related expenses are. Other legislation, such as the *Victorian Assisted Reproductive Treatment Act*, only determines that the surrogate mother is entitled to be recompensed the 'prescribed costs', without actually defining what those costs entail.¹⁸ This delineation is not definitive and leaves confusion over what could be a reasonable cost. Other state legislation is even more vague, leaving surrogates, IPs, and lawyers alike disputing what a pregnancy-related expense is and what it isn't. In fact, I have had one surrogate mention to me that her lawyer suggested that bio oil (used in pregnancy to prevent stretch marks) is not a relatable expense and, if she were to claim it, she could be seen to be breaking the law. Another was told that claiming the paid parental leave supplied by the government could also be seen as profit from the pregnancy, regardless of the fact that the Australian government allows the claim for surrogate mothers and intended parents.¹⁹ This issue of coverable expenses could be addressed in two ways: either each state outline clearly what is a relatable pregnancy expense, or the government considers compensated surrogacy with a cap on how much the surrogate can claim. This would ensure she does not end up out of pocket and can reduce undue stress on the IP-surrogate relationship.

Extending the Medicare rebate to IVF cycles would also provide relief to families trying to pursue surrogacy within Australia, potentially encouraging couples to undergo domestic

¹⁸ *Assisted Reproductive Technology Act 2008* (Vic) s 44(2).

¹⁹ See Australian Government, *Paid Parental Leave Guide: 1.1.S.100 Surrogacy* (21 February 2015) Guides to Social Policy Law <<http://guides.dss.gov.au/paid-parental-leave-guide/1/1/s/100>>.

surrogacy, and avoiding other ethical complications that arise with international surrogacy. Medicare does not currently provide support for couples wishing to access IVF in the context of a domestic surrogacy arrangement which can leave intended parents significantly out of pocket. Standard IVF procedures can start at \$1200 after Medicare rebates with subsequent cycles being offered for only \$600. This is in stark contrast to IVF procedures for surrogacy purposes, which set couples back in excess of \$16 000. The simple explanation for the discrepancy in expenses for the same procedure is due to the fact that the latter is not eligible for Medicare rebates.

At a federal level, creating a framework of harmonised legislation sanctioning compensated altruistic surrogacy arrangements with revisions to Medicare that gives surrogates access to IVF funding, and allows surrogates to be compensated \$10 000 to \$15 000, would significantly lower the costs of creating surrogacy arrangements — quite likely to below the level of international surrogacy arrangements. On top of IVF expenses, IPs are also paying for legal expenses which can cost in excess of \$10 000, covering both their own lawyer and their surrogate's legal expenses. The IPs are also responsible for counselling fees, which extend into the thousands of dollars, placing further financial burden on intended parents whose only option of creating a family is through a surrogacy arrangement. If costs could be kept to a minimum through offering Medicare rebates for IVF procedures, Australians may be incentivised to have children under a well-regulated, domestic framework instead of being lured into overseas arrangements which often offer "simpler" and more expeditious arrangements.

VII CONCLUSION

There is an old saying: 'you can choose your friends, but you can't choose your family'. I like to think that I have done what I can to prove this saying redundant. I look at each family that I have helped create as a form of my extended family. The people I helped were chosen on the basis of our relationship, not on our common goals. I chose to help these people with every intention that they would continue to play a role in our lives. I am proud to say that I selected my family and have an open and transparent relationship with all of them because of the nature of our experiences. I feel that if the Australian government consulted with the surrogacy community and adopted the suggestions outlined in this essay, then surrogacy

within Australia would be a smoother and more accessible experience for all involved. Furthermore, if advances in this area are successful, surrogacy in Australia could finally be approached ethically — respecting the rights of children and the dignity of each individual.

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