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Special Rapporteur on Violence against Women and Girls
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Dear Ms Alsalem

Submission on Surrogacy and violence against women and girls

Feminist Legal Clinic Inc. is a community legal service based in Sydney that works to advance the human rights of women and girls. Our casework and advocacy are specifically focused on defending women from male violence and human rights abuses. We welcome the opportunity to make this submission. Our brief responses to your key questions follow:

1. What specific forms of violence are women and girls subjected to in the context of surrogacy?

1) **Surrogate mothers** are exposed to significant physical and psychological harm. The process of giving birth carries inevitable risks that are increased in the context of surrogacy.¹ Negotiated contractual rights should never be allowed to compromise or trump the basic human rights of women to physical autonomy.

2) **Women who are the “commissioning parent”** may be coerced by a male partner focused on siring genetic progeny, or by societal norms that prioritise the maintenance of a certain physical appearance, to agree to a surrogacy arrangement. This impacts not only on their personal self-esteem, but also devalues motherhood and women generally. It sends the message that women are to be valued for their reproductive potential or physical beauty in a manner similar to livestock.

¹ <https://www.acpjournals.org/doi/10.7326/M24-0417>

3) **Women and girls who provide egg cells** may suffer significant physical and psychological harm from this commodification of their reproductive capacities which is both dehumanising and exploitative.

4) **Surrogacy-born infants**, including girls, are subjected to forced and premediated separation from their mother which is cruel and inhumane and leaves them exposed to further abuse and exploitation.

2. How prevalent is the exploitation of women and girls in the practice of surrogacy?

Surrogacy is increasingly prevalent following advances in reproductive technologies. Australians are significant customers of this industry globally despite existing laws against commercial surrogacy, as they are not currently being enforced.

3. To what extent does surrogacy intersect with human trafficking, including for the purposes of exploitation, sale of children, or forced reproductive labour?

Like all human trafficking, surrogacy is promoted by those who are willing to exploit women and children to profit from the selfish demands and appetites of callous and depraved men.

4. What accountability mechanisms exist to provide redress and protection for women and children who are victims or at risk of violence, coercion, or abuse in the context of surrogacy?

Australia has laws against commercial surrogacy, but these are not enforced and adoptions arising from surrogacy arrangements entered into overseas seem to be rubber stamped by Australian courts. There is no accountability and cases like the Baby Gammy case demonstrate how our courts are in fact facilitating these unethical arrangements.²

5. What are the consequences of surrogacy for all parties involved? What are the gendered risks for surrogacy-born children particularly girls?

By its nature, surrogacy can have devastating health impacts on the women who are exploited as breeding vessels and egg donors. Further, the children of surrogacy are traumatised by the forced separation from their mother and are also at much heightened risk of sexual abuse, since they may well have been “purchased” by men for this explicit purpose. This has been demonstrated by the Truong and Newton case and other cases.³

² Farnell & Anor and Chanbua [2016] FCWA 17; 'Baby Gammy: Surrogacy row family cleared of abandoning child with Down syndrome in Thailand', *ABC News* (online), 14 April 2016, <<http://www.abc.net.au/news/2016-04-14/baby-gammy-twin-must-remain-with-family-wa-court-rules/7326196>> .

³ <https://www.abc.net.au/news/2014-03-10/boy-with-henna-tattoo-network-exposed/5310812>; <https://www.theguardian.com/commentisfree/2014/aug/15/surrogacy-is-still-available-to-paedophiles-this-must-change-but-how>; <https://www.theguardian.com/australia-news/2016/may/19/man-who-sexually-abused-surrogate-twin-baby-daughters-jailed-for-22-years> - for some reason the perpetrator's identity has been protected in this case.

6. What link exists between surrogacy and stereotypes against women? How can surrogacy influence the image of women in society?

Surrogacy arrangements devalue motherhood and women generally by conveying the impression that we are merely breeding vessels and that a dollar value can be placed on our reproductive role. It reduces women to livestock carrying progeny on behalf of those with greater financial resources and suggests that we should not expect to retain control or influence our own offspring if we do not have economic standing.

Drivers of surrogacy

7. What are the main factors driving the demand for surrogacy?

Surrogacy, like the adoption industry, seems to be driven by profit as well as the demand by certain males for access to children as a commodity and in circumstances where they can dispense with the safeguarding role played by the natural mother.

8. What is the demographic and socioeconomic profile of women who become surrogate mothers in your country? Please provide disaggregated data where possible.

In general, women who agree to become surrogate mothers are experiencing economic hardship and agree to these arrangements under financial duress. In Australia, commercial surrogacy is technically unlawful, but even ostensibly altruistic arrangements are often exploitative in nature on closer examination. Genuinely altruistic arrangements should not need to be enforced by way of contractual obligation or force of law.

Legal frameworks, safeguards, and jurisprudence

9. What are the legal, policy or regulatory frameworks governing surrogacy in your country?

According to the Australian Government website⁴:

All Australian states and territories permit altruistic surrogacy where the surrogate has their expenses covered with no other payment provided or personal profit made.

Commercial surrogacy – where the surrogate receives more than their reasonable expenses – is illegal in Australia. It is also illegal for some Australians to engage in commercial surrogacy overseas. If Australians engage in commercial surrogacy, they are usually not recognised as legal parents in Australia and the surrogate remains the legal parent of the child.

However, as previously stated, we have yet to see any prosecutions taking place and there are concerted efforts currently to legalise commercial surrogacy in Australia.

⁴ <https://www.surrogacy.gov.au/>

9. How is the requirement to consider the child's best interests reflected and implemented in relevant laws, policies and regulations concerning surrogacy?

The 'best interests of the child' would appear to be determined by Australian courts according to the financial means of those seeking parenting orders. This is partially because those with more limited means (such as surrogate mothers in developing countries) are unlikely to be able to afford the necessary legal representation to challenge the forcible removal of a child and because there is an implicit assumption that material wealth will play a more important role in securing a child's well-being than the love and protection afforded by a relatively impoverished mother.

10. How is the child's right, wherever possible, to know and be cared for by his or her parents (Article 7.1 of the UN Convention on the Rights of the Child) taken into account in relevant laws, policies and regulations regarding surrogacy?

Recognition of parenthood through the legal fiction of adoption can be used to facilitate surrogacy arrangements and effectively deprives children of the human right to know and be cared for by their actual parents.⁵ In determining parenthood, male genetic material would appear to be the guiding consideration for our courts. The surrogate mother who is derisively referred to as the 'gestational carrier' may have been effectively constrained by contractual provisions, while the rights of egg donors don't seem to rate a mention in caselaw. In contrast, the High Court case of *Masson v Parsons* (2019) found that even a sperm donor could be legally recognized as a parent.⁶

11. In countries where surrogacy is permitted or otherwise tolerated, what safeguards exist to prevent violence against surrogate mothers and children born through surrogacy?

Although within Australia commercial surrogacy is currently still illegal, there are inadequate safeguards to protect overseas surrogate mothers and the children born through surrogacy from Australian 'customers.' I have also personally witnessed an ostensibly altruistic surrogacy arrangement being perfunctorily approved by a male family court judge in less than 15 minutes. This was despite the surrogate mother being legally unrepresented and having not yet experienced separation from the breastfeeding infant, and her brother and his male partner planning to leave the country shortly with the child.

12. How effective have legislative, policy and regulatory frameworks been in preventing and responding to violence against women and children in the context of surrogacy?

There does not appear to have been any earnest effort to protect women and children from the violence of surrogacy and indeed there is a concerted push currently to remove existing constraints.⁷ We would welcome your

⁵ <https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>

⁶ *Masson v Parsons* [2019] HCA 21; 266 CLR 554

⁷ <https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/>

intervention on this issue by way of submission to the Australian Law Reform Commission (ALRC) which is currently conducting a review of surrogacy laws.⁸ This review is led by ALRC President Justice Mordy Bromberg together with Professor Ronli Sifris who has made public her views in favour of Australia introducing legislation that regulates “compensated surrogacy”.⁹

13. What legal precedents, rulings, or judicial interpretations have influenced States’ approach to surrogacy and its impact on women’s and children’s rights?

Specific details of Australian state and territory legislation can be found at this government [website: https://www.surrogacy.gov.au/surrogacy-in-australia](https://www.surrogacy.gov.au/surrogacy-in-australia). There is a discussion of some of the leading Australian cases on surrogacy at this website, <https://sarahjefford.com/surrogacy-case-updates/>, operated by a self-described ‘family creation lawyer’ who has also acted as an egg donor and surrogate mother.

Recommendations

15. What steps should States, regional bodies, and international institutions take to address violence and other human rights violations and abuses linked to surrogacy?

It is our position that all surrogacy should be banned both within Australia and globally as it necessarily involves a premeditated and forced separation of an infant from its mother (since no baby consents to this) which is an act of extreme cruelty that inflicts life-long suffering on both woman and child.

16. How can international cooperation be improved to prevent, investigate, and hold perpetrators to account for violence and other human rights violations and abuses in connection with surrogacy?

Those who pursue, organise and profit from these exploitative surrogacy arrangements should be prosecuted. International law enforcement authorities should co-operate to investigate surrogacy operations and bring those responsible to justice. Currently these businesses are flourishing in clear view of the authorities.¹⁰ The women who have been recruited as surrogate mothers should be regarded as victims of exploitation acting under financial duress and should be spared from any prosecution. Proceeds recovered from illegal

<https://lsj.com.au/articles/reforming-australias-surrogacy-landscape/>
<https://www.spectator.com.au/2024/02/the-shameful-trade-of-women-and-children-why-theres-no-place-for-alex-greenwichs-regressive-surrogacy-reforms-in-nsw/>

⁸ <https://ministers.ag.gov.au/media-centre/australian-law-reform-commission-review-australias-surrogacy-laws-06-12-2024>

⁹ https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2345748/Submission-001-Ronli-Sifris.pdf

¹⁰ <https://www.surrogacyaustralia.org/>
<https://www.ivf.com.au/treatments/donor-programme/surrogacy>
<https://sarahjefford.com/international-surrogacy-options/>

surrogacy businesses should be applied to support and compensate the women and children impacted.

17. How can existing international human rights instruments be leveraged to address the human rights concerns related to surrogacy?

There are some protections of maternity and prohibitions against the traffic in women within CEDAW, as well as the right to be cared for by one's parent in Article 7 of CRC as mentioned above. There are also general human rights provisions that could be leveraged including the right to liberty and security of the person, the prohibition on slavery and servitude and the prohibition against torture, cruel, inhuman or degrading treatment (Articles 3,4 and 5 UDHR). Article 25 of the UDHR also states: *Motherhood and childhood are entitled to special care and assistance*. However, none of these provisions are adequately explicit to ensure women and children are sufficiently protected against surrogacy.

18. Should the possibility of developing a dedicated international instrument governing surrogacy be explored, and if so, what form should it take?

A dedicated international instrument recognising the importance of the attachment between a mother and infant and unequivocally banning all forms of surrogacy is needed to provide the necessary clarification and protection to women and their children.

19. Should a specific international instrument focus on banning or regulating surrogacy?

Yes. Banning – not regulating.

I appreciate this submission lacks detail in many areas, but we are happy to expand if needed. Some further discussion of this topic can also be found in my earlier published article, ["Women's reproductive rights: Spoiled for choice?"](#).¹¹ In addition, we endorse the submissions of FINRRAGE, Women's Declaration International and Abolish Surrogacy Australia.

Thank you again for this opportunity and for all your work protecting women and girls from violence.



Anna Kerr
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Feminist Legal Clinic Inc.
Organization in Special Consultative Status with the Economic and Social Council (ECOSOC) since 2023.

¹¹ Women's reproductive rights: Spoiled for choice?". [2018] Precedent AULA 8; (2018) 144 Precedent 28