

**Review of the Western Australian
Human Reproductive Technology Act 1991
and the *Surrogacy Act 2008***

Submission by:

GayDads WA

Assisted by:

David Monaghan (Barrister)

Marty Kavanagh (Lawyer)

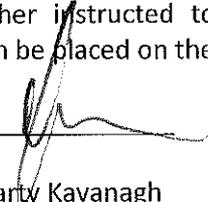
Rachel Oakley (Barrister)

Michael Nicholls QC

Debbie Taylor (Barrister)

I have been authorised by GayDads WA to sign and file this submission on behalf of GayDads WA.

I am further instructed to respectfully request that this submission be placed on the public record.

Signed: 

Name: Marty Kavanagh

Dated: 16 March 2018

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

Article 3, United Nations Convention on the Rights of a Child.

"On behalf of the Government of Western Australia, I am sorry for the hurt, for the prejudice, for the active discrimination that ruined lives

...for decades in Western Australia, unjust laws against homosexual acts were used to shame homosexual men, to deny their human rights, and to deny their humanity.

These laws were State-sanctioned discrimination."

Premier Mark McGowan on behalf of the government of WA apologising to WA Gay Men convicted of "homosexual acts", 31 October 2017. ¹

The State does not generally control people's reproductive activities, restricting itself to providing either care or, at the last extremity, alternative parents, for children whose parents cannot parent them adequately. Few States require a citizen to acquire a licence to reproduce. But few States have been able to resist the call for surrogacy to be either regulated or banned altogether.

Debbie Taylor, Barrister, Western Australia²

As it is the law rather than genetics which imposes the obligations and responsibilities attached to parenthood, it is the law that must determine which individuals are to be regarded as the "parents" of a child.

Thackray CJ in *Farnell*³ (the "Baby Gammy" case)

The Law needs to be changed to remove discrimination and allow gay men access to surrogacy in WA. This caused much grief for my husband and I, who have been together for almost 11 years.

A Western Australian Gay Man in his response to the GayDads WA Survey, February 2018.

¹ ABC news online, Western Australia 31 October 2017.

² Taylor, D 'A report identifying problems in the Australian approach to both domestic and International Surrogacy Arrangements' LLM studies.

³Thackray CJ in *Farnell & Anor and Chanbua* [2016] FCWA 17 (the *Baby Gammy* case)

TABLE OF CONTENTS

	Page No.
1. INDEX	4
2. GLOSSARY	6
3. GAYDADS WA	7
4. SURROGACY – PERSONAL STORIES	8
5. EXECUTIVE SUMMARY	16
6. RECOMMENDATIONS	19
• Access to Surrogacy	
• The Surrogacy Process in WA	
• Legal Recognition of the Children of Gay Men	
• Future Directions	
7. GAYDADS WA QUESTIONNAIRE RESULTS SUMMARY	22
8. COMMENTARY ON SURVEY RESULTS	26
• Demographics	
• The Surrogacy Process	
• Legal and Counselling Issues	
• The Surrogate	
• Altruistic Surrogacy	
• General Comments	
9. SURROGACY AND DOMESTIC LAW	29
• Children raised by Gay Parents do as well as Children raised by Heterosexual Parents	
• Historic Concerns about Surrogacy	
• Problems with Australian Legislation	
• Surrogacy and Criminality	
• Australia-wide comparison	
• Gender and marital status- potential invalidity	
• International law on Surrogacy	
• The Parentage Problem	
• The Recognition Problem	
• The Parentage Problem and its Consequences	
• Parentage and Parental Responsibility	

- The International Recognition Problem

10. ALTRUISTIC SURROGACY 39

- Altruistic Surrogacy and Low Birth Rates
- Lack of Reliable Information and Guidance
- The WA Surrogacy Process
- Initial Contact with Clinic
- Investigations and Counselling
- Implications Counselling
- Clinical Psychologists
- Legal Advice
- Cooling off period

11. THE SURROGATE – COSTS AND COMPENSATION 47

12. CHILDREN OF GAY PARENTS: FATHERS, PARENTS, PARENTAGE, PARENTAL RESPONSIBILITY AND BIRTH CERTIFICATES 48

- Gay Families in Western Australia
- Why are gay dads not Fathers or Parents of their Children?
- Adair & Anor and Bachchan
- Possible Solutions
 - Recognising valid overseas surrogacy agreements in WA Law
 - Declarations of Parentage
 - Pre-Birth Orders

13. ANNEXURE 1: REFERENCES 58

2. GLOSSARY

'artificial conception procedure' – IVF or AID

'artificial insemination procedure' - a procedure where human sperm are introduced, by a non-coital method, into the reproductive system of a woman but which is not, and is not an integral part of, an in vitro fertilization procedure (also AID - *artificial insemination by donor and AIH - artificial insemination by husband*)

'gestational surrogacy arrangement' - a surrogacy arrangement in which the surrogate uses a donor (ova) and either sperm from the intended father or donor sperm. The surrogate thus has no genetic connection with the resulting child.

'intended parents' - people who commission a surrogacy arrangement with the intention of becoming the child's parents

'intended mother' – a woman who commissions a surrogacy arrangement with the intention of becoming the child's mother

'international surrogacy arrangement' (an "ISA") is a surrogacy arrangement entered into in a State other than that in which it is intended to bring up the child.

'In vitro fertilization' or IVF' - the creation of an embryo outside the human body by the fertilization of an egg (ova) with sperm. The embryo is then implanted into a woman who carries it.

'parentage order' an order made by a court transferring legal parentage of

'Pre-birth order' a court order providing for assignment of parentage prior to birth.

'traditional surrogacy arrangement' – a surrogacy arrangement in which the surrogate uses her own egg (ova) and either sperm from the intended father or donor sperm. The surrogate has a genetic connection to the child.

3. GAYDADS WA

GayDads Western Australia was founded in 2008 and was strongly influenced by Gay Dads Australia, a blog by Rodney Cruise-Chiang, in Melbourne, Victoria. Rodney knew of other Perth gay males interested or already in the process of becoming parents and connected many intending parents. Soon afterwards GayDads WA was founded. GayDads WA facilitates sharing the information and experiences in the journey to parenthood- mainly via commercial surrogacy. More importantly GayDads WA encourages everyone to support each other during this complex and arduous journey.

In the formative years, the group grew quickly to 20 members. Ten years on, the group now has 96 members. We continue to form relationships to share the information we have, with other dads or gay guys interested in becoming dads. There are regular events that we hold to check- in with other gay men on their journey to become dads, answer their questions and as importantly, for our children to see and understand that our family structure is not unique.

The group is more inclusive with our definition of gay dads to include all dads that happen to be gay. For example, these would be from previous marriages, co-parenting and fostering. Support within the community is important and this group also provides a great way for all our children to interact.

4. SURROGACY – PERSONAL STORIES

What follows are the stories of three Western Australian gay couples and their journey towards parenthood. Names have been anonymised. The stories have not been edited.

John and Aidan

We begin writing this story as we sit on a plane on our way to Connecticut in the US for the birth of our first baby boy. It's Valentine's Day and I can't think of our better way to celebrate our love—we will soon be fathers together, and we are filled with nervous excitement!

Our official journey into surrogacy began three years ago. By "official" journey we mean when we first engaged with agencies and medical clinics, and words like gestational carriers, donors, cycles, blastocysts and birth orders became part of our common vocabulary. "Unofficially", the journey began many years earlier. We had both dreamed of being fathers for most of our adult lives. We had discussed, explored, wondered about how it might happen when we first got to know each other as a couple. But even before that, as single men, and in other long-term relationships we had each been involved in, parenthood was there as a part of life we each yearned for. We are both educators and have worked with kids most of our lives—"nurturing" in some sense feels intrinsic to who we are, but we didn't know if parenthood would ever be a reality.

Beyond just the "dreaming" of being parents, when we first started to talk seriously about how it might happen, we explored various avenues—adoption, fostering, surrogacy in Australia and overseas. With the very few adoptions that occur in Australia every year, that was not a pathway we explored for long. Fostering was and is something that we have given serious thought to and while we decided not to start our journey into parenthood this way, it is something we will still consider in the future. For us, being parents is not just about the desire to have our own child, but to provide a safe and loving home to a child—and we appreciate that there are already many children who are in need of just that. And so we began to delve deeper into the complicated world of surrogacy.

Exploring blogs, searching websites, talking to friends who had travelled the path previously, gave us a broadening understanding of the diverse options within surrogacy. Joining the "WA

GayDads” group opened us up to not just more knowledge but also an enormous support network of those who understood what we were doing. That has proven invaluable over the past few years and is just as important right now as we prepare for the birth of our son and turn our focus to new realities—feeding and sleeping routines, as well as navigating the legalities of birth certificates, citizenship and parentage orders.

We spent some time exploring the opportunities for altruistic surrogacy in Australia, but as a gay, male couple we quickly learned that there weren’t any in Western Australia. We contemplated whether we could try in another state where there were legal options, but restrictions around residency brought dead-ends. We knew a number of people who had looked internationally to commercial surrogacy, and we began to realise that this too seemed like our best, and perhaps only option to be parents. At the time there was quite a lot of media attention on surrogacy in India and Thailand. While this meant some restrictions to accessing surrogacy in these countries, it also solidified in us the importance of ensuring that whatever pathway we continued on, it must be done with three fundamental considerations—what was in the best interests of a child, ensuring the rights of women involved both as egg donors and gestational carriers, and protecting our legal rights as intending parents. These principles have guided all of our decisions along the way.

Through the network of GayDads WA we became aware of surrogacy in Mexico, and particularly in the state of Tabasco. We talked with a couple who had just become parents to twins there, and what attracted us was the fact that in Tabasco, commercial surrogacy was legal with laws protecting both the gestational carrier and the intending parents’ rights. The only other place where we had such assurances were in the US, which seemed prohibitively expensive.

Through some research we connected with two clinics that we felt comfortable with, which then opened us up to several agencies that supported the legal and relational processes. Numerous skype calls and emails later we decided to work with one of the clinics in Mexico and an agent based in the US. Things finally started to seem real as we drew up contracts with all the parties involved and made plans to visit the clinic in Mexico in January of 2016.

Like in any story of this kind, the journey is fraught with emotion, and it's true to say that the months following this exciting moment brought both joy and heartache. In broad terms, after visiting the clinic to begin the IVF process, over a period of 6 months we had three unsuccessful cycles of embryo transfers. While we had a confirmed pregnancy on two of these occasions, we lost both babies at a later stage. During this time, the laws in Tabasco changed to prohibit foreigners from engaging in surrogacy. So at that point, we had no more embryos, little confidence in the clinic's processes and no legal avenue in Mexico left. We decided that was enough and ended our contract with the clinic and agency.

We have always maintained that while having a child is so important to us, our own relationship as a married couple must be primary, without which we would not be the parents we hope to be. Feeling very disappointed and somewhat disillusioned we took a break from the process for a few months.

Towards the end of 2016 we attended a conference hosted by Families Through Surrogacy which featured presentations from clinics, agencies and families who had successfully navigated surrogacy, both domestically and internationally. We listened with interest about the options for gay male couples in Canada and the US—feeling that these were our only available avenues. While we learnt of a number of families who successfully had children in Canada through altruistic arrangements, we were not fully confident in the legal processes that protected intending parents there. So after some time, we decided to actively explore commercial surrogacy in the United States. While this since seemed prohibitively expensive, we realised that such a commitment was our best chance to become fathers.

With our experience in Mexico behind us, we moved quite quickly through the vetting process of finding a medical clinic and agency. Feeling more confident about what questions to ask and what was of importance we settled on a clinic and agency in Connecticut that we felt comfortable working with. We made plans to visit there in January 2017 to repeat the process we'd begun twelve months earlier. One of our concerns about the clinic we worked with in Mexico was the lack of transparency, and particularly the little information and contact we had with the gestational carrier, both before and during the pregnancy. We wanted this to be different this time—not only for our own reassurance, but to also for the woman carrying our

child. After visiting both the clinic and agency in Connecticut we left with a feeling of hope and trust.

Our first decision with the clinic involved choosing an egg donor. The profiles we looked through were so thorough in detail that they appeared a combination of a CV, genealogy and dating profile. Such details are obviously significant when considering the potential genetic make-up of your child, so we took our time and had particular traits in mind. Beyond the biological points, one determinant that was important in our decision was whether the donor was open to a relationship with a potential child in the future. We will do all we can to create a full, loving family for our son, but we also want him to have the right to know his biological mother in the future too.

While we worked with our clinic on choosing an egg donor, we worked with the agency on pairing us with a gestational carrier. Knowing that a right “match” can take months, we were thrilled to be introduced to Tracy several weeks after our visit to the clinic. We were excited just reading about her on paper, but even more thrilled after we skyped with her and her husband. While this was Tracy’s first time as a gestational carrier, having had four of her own children she was very calm and natural about what we were undertaking together. She and her husband work as a nurse and doctor, and while our arrangement would be commercial, it was clear their motivations were not financial but to help a family realise their dream of having a child.

We already had embryos created and frozen from our visit to the clinic. After a few months of us getting to know Tracy more and finalising details of our gestational contract, in June 2017 we had two embryos transferred. Hours, days, weeks went past, and we finally received the call that the five-week test confirmed we were pregnant with a single baby. The elation of the news was dizzying, but we had been here before, so we steadied ourselves until we were further along the journey. We were fortunate to chat with Tracy daily to not just hear how she was feeling but to further our relationship with her and her family, who we remain in contact with. Twelve-weeks, sixteen-weeks, twenty-weeks...while we continued to hold our breath with each scan, we began to exhale with a widening smile and more ease.

Our baby boy grew bigger and stronger on one side the world, while we started to prepare our home for him back in Australia. Our own excitement seemed matched by the anticipation of family and friends, and what seemed like a dream for so long began to be more real. By the time we were in the third trimester we were breathing easier and the weeks seemed to disappear, leading us to where we are now.

It has been a journey getting to this point, and like most journeys a retrospective view brings great clarity to each step. It now seems clear that engaging in surrogacy in the US, and particularly in Connecticut was a choice we should have started with. The quality of medical service and legal protection for both the gestational carrier and us as intended parents has come at a financial cost, but been greatly reassuring. When we arrive in Connecticut we will meet Tracy and her husband at a courthouse to obtain a pre-birth order from a judge acknowledging us as our baby's parents from the moment of birth. When we apply for his birth certificate, it will be both our names listed as his parents. This is wonderful, but sadly something we could never achieve in Australia right now. In fact, we are concerned that when we return to Australia with our son, our parentage would not even be recognised under current family law in WA.

After our appointment with the judge, we will be visiting the hospital where our son will be born to meet the labour and birth team with Tracy and talk through our birthing plan. To be so jointly responsible and included in this process with Tracy is a gift. Again, we hope for such inclusion and assurance as we access the Australian medical and schooling system in the future—not for our sake, but for our son's.

We appreciate that people do not enter surrogacy lightly, particularly gay men who can feel the scrutiny and judgement of others in the community. Our primary concern is our future child, and this has been the basis of all our decisions to this point, as well as parenting choices in the future. We are not naïve to his need for female figures in his life, and look forward to his aunts playing an important nurturing role in his upbringing. We also want him to know his cultural history as a baby born in America with connections to his gestational family and biological mother. We will do all we can to keep these alive.

It's thrilling to think our son can arrive any day now, and while it may seem as though our journey to parenthood is nearly complete, we appreciate that it is ongoing and ever-evolving. We can't wait to meet him, get to know him and bring him home to his family in Australia. We would love for him to have a little brother or sister one day, but we are in no rush to start this process again. Our hope would be that we could take the next stage of our journey closer to home in Western Australia. But in the meantime, we will get ready for that call from Tracy to say it's time to meet her at the hospital, so we can meet our son...we can't wait!

14th February 2018

Nathan and Chris

We have been together since 2013 and were recently married in January of this year. Marriage and the desire to have our own children have very much been central to our relationship.

The past two years have been spent working through the best option for us to begin our family. The surrogacy laws in Australia and especially Western Australia have made this process both tedious and emotionally exhausting. We have gone through all the options now as to how we can finally commence this journey. We have spoken to family members to be a possible surrogate and this is no longer a viable option. We have spoken to friends for egg donation and this too has become both tedious and complicated. We have spoken to many people regarding the surrogacy options in Australia, even to the point where we were considering a move over east to a state where the laws are more favourable for same sex relationships. This option is also not really viable, nor a pragmatic option for us. So, we are really only left with the option to locate an egg donor and surrogate overseas.

The options overseas are more favourable for our situation and at this point in time it seems that Canada is the best option for our current situation. We have considered surrogacy in Asia and the USA as well as Mexico. However, the legal transparency and financial stress associated with these countries is of high concern for both us and our families here in Perth.

The financial aspect of following our journey overseas for both an egg donor and surrogate is exorbitant to be blunt – we are budgeting for the process to cost around one hundred

thousand dollars. When people ask the amount that we are going to pay for our child they are often shocked – some friends are even distressed. Our only reply is “what is our option?” Even for us this amount used to create terrible emotional stress, especially when we work so hard to pay our mortgage and daily living expenses in Perth. Now, however, we are resolved that this is going to have to be the price for our family and are prepared to remortgage our property to continue our journey for our own family. It is horrible to give a financial price for our child, but this is the only way for us now.

Australia does not make this an easy process at all for same sex male couples. We are duly supporting this submission for changes to occur within the Australian legal system to acknowledge and assist with the many people in our current situation.

Jack and Peter

Ever since I held my one-month-old twin nephews, when I was 19 years old, I instinctively knew I wanted to be a parent. Being a gay man, I knew it was going to be tough. I never met any gay man that was interested in becoming a parent, perhaps I was not in the right crowd or dating the right person.

Many years later, it was getting apparent to me that my biological clock was ticking and potentially running out. I gave myself a deadline of 40 years old for my parenthood to occur. It was an arbitrary age, but something that made more sense to me as I did not want to be a dad to teenagers when I was in my late 50's or 60's. It was becoming progressively harder with each date I went on. Fortunately, at 35, I met my partner, where this topic was discussed on our first date. After many discussions, it was decided that we would embark on our parenting journey.

In 2010, we reviewed what was available to us to fulfill our dream to become parents. We looked at adoption, fostering, finding a female friend to help us on this journey. Many of these options were difficult to achieve as we are gay males. We searched through the several options in depth... Babies that were available for adoption were really low: < 100 for opposite-sexed couples; let alone to gay males. The only couple that we knew of, we heard on the news. And, that was because the gay male couple knew the birth mother. Fostering was something that whilst we would have entertained the idea, the very thought that the

child/ren could return to their legal guardian, was just too much to bear. Finding a female friend or acquaintance to help us in our quest proved challenging. Our circle of female friends were already embarking on their personal journey to become parents. It was through this searching that it consolidated for us that we would want our own biological children and, that we would be the primary parents.

After many countless hours spent researching we found that overseas commercial surrogacy was the only way forward for us.

Surrogacy in WA at that time was new. It only allowed opposite-sexed couples to access altruistic surrogacy locally. Because of this, we looked to overseas commercial surrogacy. Our research brought us to several countries including India, Thailand, Canada, and USA. In the USA, commercial surrogacy has been available for more than 10yrs (at the time of our research), well regulated and, the legal rights of all parties, protected. This option was at a much greater cost: financially, emotionally and geographically. We had to put a savings plan together. We sold our inner-city home and moved into the outer suburbs; planned our work schedules and finances to allow for one of us to be at home with our child/ren; enlisting the help of extended family. The emotional toll was difficult as our baby and surrogate were in the USA whilst we are in Perth. Those early stages were difficult to comprehend. Our baby/ies were growing and it was a surreal experience with regular updates on SKYPE, Facebook chats, the scans, the inability to feel the baby's movement inside our surrogate's womb. However, we were fortunate to be present at the births of all of our 4 beautiful daughters. They are now aged 7, 4½ and 7month old twins. There were a few hiccups along the way which meant additional costs and time delays. However, we are forever in debt to our egg donor and her family, and the other parts of the journey: the fertility clinic, the agency, the lawyers to help us realise our dream to be parents.

I believe the time is now to review the surrogacy process in WA so that gay males that want to be parents, can do so locally instead of going overseas.

5. EXECUTIVE SUMMARY

- 5.1 The Parliament of Western Australia in recent years has acted with admirable courage, humanity and decency to remove discrimination against the LGBTIQ community. The decriminalisation of homosexuality in 1989⁴, the recognition of same sex de facto relationships in 2002⁵, and the quashing of historic criminal convictions for “homosexual acts” in 2017 are history-making of legislation. Such legislation undoubtedly influenced the majority of Western Australians in their approval of marriage equality⁶ in 2018.
- 5.2 The 2018 review of the *Human Reproductive Technology Act 1991* and the *Surrogacy Act 2008* represents a unique opportunity for Parliament to continue its proud recent history of removing discrimination, and to show progressive leadership and to adopt world’s best practice in surrogacy law.
- 5.3 Context is important. At the time of its enactment surrogacy was described in parliament as: *‘not an issue that affects many couples’*⁷.
- 5.4 Whilst that may be true for heterosexual couples it affects **every** male same-sex couple in Western Australia. Indeed, there is no other class of community members that are as a whole more affected by eligibility, for and regulation of, surrogacy in Western Australia.
- 5.5 WA is the only Australian state that denies access to surrogacy to same sex couples.
- 5.6 Western Australian law discriminates against:
- (a) Gay men (denial of access to surrogacy); and
 - (b) The children of gay men because WA law does not recognise their parents. The children of heterosexuals or lesbians in WA do not suffer such discrimination.
- 5.7 The focus of this submission is to advocate for the removal of discrimination against gay men and their children.
- 5.8 For gay men key issues surrounding surrogacy in WA include:
- (a) legal access to surrogacy in their home state;

⁴ *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA)

⁵ *Acts Amendment (Gay and Lesbian Reform) Act 2002* (WA)

⁶ *Marriage Amendment (Definition and Religious Freedoms Act 2017* (Cth)

⁷ Hansard, 1 March 2005, p.194a.

- (b) a practical and streamlined model of surrogacy that will actually result in WA surrogacies so that as a consequence overseas commercial surrogacy will be eliminated;
- (c) facilitating surrogates to legally assist intending gay parents so that surrogates receive reasonable compensation which does not amount to financial inducement;
- (d) removing the economic discrimination against gay men who cannot afford average commercial surrogacy costs of \$50,000 to \$200,000 (see survey results below); and
- (e) ensuring that under WA law, gay parents are recognised as the parents of their children.

5.9 For the period 2010 to 2017 the WA Reproductive Technology Council approved a total of 28 surrogacy applications and recorded 10 births.⁸

5.10 Members of GayDads WA are the parents of 48 children- almost five times the total number of WA surrogacy births over the period 2010 to 2017. 97% of these children were born as a result of overseas commercial surrogacy (see survey results below).

5.11 The desire to be a parent and to love, care and provide for a child is an innate human attribute. In 2018, the reality is that:

- (a) Gay men in Western Australia are having children;
- (b) Gay men in Western Australia will continue to have children; and
- (c) Children will continue to grow and thrive in the love and care of gay men.

5.12 These children and their parents are Western Australians and deserve to be treated as equal before the law.

5.13 WA surrogacy legislation was essentially introduced to provide surrogacy options to infertile heterosexual couples. However, a consequence of such legislation (intended or unintended) is that a whole community in WA – gay men and their children, are excluded from surrogacy and legal recognition of parenthood.

5.14 GayDads WA share the concerns of many who wish to minimise the risk of exploitation of overseas surrogates, particularly those from economically disadvantaged countries. However, by failing to provide surrogacy access to gay men, Parliament leaves a void- a void that is inevitably filled by overseas commercial surrogacy – potentially aggravating the risk of exploitation of overseas surrogates.

⁸ WA RTC Annual Report 2016/2017.

- 5.15 In the best interests of children, surrogates and intending parents GayDads WA respectfully submit that a broader, more inclusive model of altruistic surrogacy - “non-commercial” surrogacy, is the most appropriate long-term solution.
- 5.16 By this submission gayDads WA invites Parliament to not only remove the discrimination against gay men but to give consideration to legislating worlds best practice surrogacy process that will remove any need for Western Australians to consider overseas commerical suggogacy.
- 5.17 GayDads WA is conscious of the many calls for harminisation of State and Territory laws on surrogacy. GayDads WA invites Parliament to take the lead, set new standards and show the way.

6. RECOMMENDATIONS

Access to Surrogacy

- 6.1 The *Surrogacy Act 2008* (WA) be amended to allow access for gay men (single or couples) to altruistic surrogacy in Western Australia.
- 6.2 Section 12 of the *Criminal Code 1913* (WA) (which criminalises parents who participate in overseas commercial surrogacy) be repealed.
- 6.3 Consideration be given to the validity of s19 of the *Surrogacy Act 2008* which defines an “eligible couple” for the purpose of transfer of parentage as:

*“2 people of opposite sexes who are married to, or in a de facto relationship”
with each other.*

The Surrogacy Process in WA

- 6.4 The existing surrogacy process (which was designed to facilitate surrogacy for infertile heterosexual couples) be modernised to so as to achieve a surrogacy process that:
 - (a) is as simple, streamlined and as efficient as possible;
 - (b) is altruistic, but which allows for reasonable compensation (to include such costs as medical expenses, psychological fees, travel, and actual loss of income) so that the surrogate is not out of pocket and is compensated but not to a level that creates a financial inducement;
 - (c) imposes necessary but not onerous obligations on intending parents;
 - (d) does not impose a cost and financial burden that discriminates against intended parents of limited financial means;
 - (e) has a “one-stop shop” that is co-ordinated and managed by a government or non-profit agency (e.g. Department of Health or Department of Communities) that co-ordinates:
 - service providers
 - information to potential surrogates and potential intending parents
 - a database/register of potential donors, surrogates and intending parents
 - background checking and compliance
 - medical and legal compliance

- better reporting of short and long-term outcomes for parties to surrogacy arrangements;
- (f) has a process that has clear and consistent documentary requirements;
- (g) establishes clear and concise medical, psychological and legal qualification criteria;
- (h) where assessments and decisions are subject to a review process through the State Administrative Tribunal; and
- (i) a process that is subject to a review three years after legislative changes are implemented.
- 6.5 The requirement for psychological testing and a report of psychological suitability be repealed. The clinical psychologist's report to council should be a certificate of psychological suitability, based on guidelines under the Act, Regulations and Guidelines, in the same way that implications counselling is dealt with.
- 6.6 If the legislation continues to require a detailed report from a Clinical Psychologist, it should be on the basis that it be made available to the Court for the purpose of the Court's determination about a pre-birth order which permits the registration of the intending parents on the child's birth certificate and which becomes a final order of transfer of parentage after the birth of the child.
- 6.7 The approval process be made more transparent and should focus much more on the provision of information rather than assessment.
- 6.8 The cooling off period is not necessary. The appropriate agency should be in a position to assess the cooling off period as having started from a particular date. This might be the date of completion of the first implications counselling session for the intending parents and their surrogate; or receipt of legal advice.

Legal Recognition of the Children of Gay Men

- 6.9 Gaydads WA respectfully recommend that Parliament legislate to effect the legal recognition of existing and future gay parents as fathers and parents in Western Australian Law. If minded to do so Parliament may wish to consider new or amending Legislation, Rules and Regulations as follows:
- (a) Amending ss 6 and 7(2) of the *Artificial Conception Act 1985 (WA)* to conclusively presume that where a gay dad provides his sperm for an artificial fertilisation

procedure under a surrogacy arrangement and where the gay dad wishes to rear that child, he and his de facto partner (or husband) are the fathers of the child that results from the pregnancy.

- (b) Enacting a provision in the *Family Court Act 1997* (WA) to apply a presumption of parentage where gay dads names appear as parents on overseas birth certificates.
- (c) Prescribing countries such as USA (and/or individual states), Canada, Mexico, India, Thailand and Nepal as “overseas jurisdictions” per s 190 of the *Family Court Act 1997* (WA). This would have the effect of recognising gay dads as parents.
- (d) Prescribing foreign instruments where a man executes an instrument acknowledging fatherhood per s 192 of the *Family Court Act 1997* (WA). This would have the effect of recognising gay dads as fathers.
- (e) Enacting a section similar to s 69VA⁹ of the *Family Law Act 1975* (Cth) where the Family Court of WA could make a declaration of parentage.
- (f) Legislating to give effect to Pre-Birth Parenting Orders.

6.10 The Artificial Conception Act 1984 (WA) be amended so that:

- (a) There exists a presumption of parentage in favour of the intended parents who are signatories to an approved arrangement.
- (b) The presumption above be sufficient for the intended parents to be registered on the birth certificate.
- (c) The presumption be rebuttable.
- (d) The presumption become a conclusive presumption upon a formal declaration of parentage by the state Family Court.

6.11 Legislating for pre-birth orders and recognise pre-existing pre-birth orders.

Future directions

6.12 The process be subject to a review three years after legislative changes are implemented.

6.13 Clear and concise and accessible data and records be kept to inform future reviews.

⁹ See *Bernieres & Anor & Dhopal & Anor* [2017] FamCAFC 180 for a discussion in the Full Court about the extent of the power to make a s69VA order.

7. GAYDADS WA QUESTIONNAIRE RESULTS SUMMARY

7.1 During February 2018 GayDads WA invited its members to complete a voluntary and confidential online questionnaire.

7.2 80 people responded comprising:

- 27 two dad families (66%)
- 12 intending two dad families (29%)
- 2 existing single dad families (5%)

7.3 Some questions were not relevant to all respondents, so it should be noted that the number of responses to individual questions may vary.

7.4 The results of the questionnaire offer a valuable insight into experiences of gay dads in WA. The results are summarised as follows:

Question	Existing Two Dad Family	Intending Two Dad Family	Existing Single Dad Family	
How would you best describe your current family situation?	66%	29%	5%	
	7+ Years	5-6 Years	3-4 Years	1-2 Years
How long were you in a relationship prior to beginning your surrogacy journey?	44%	32%	12%	12%
	Yes	No		
Did you explore surrogacy in WA?	66%	34%		
	1	2	3	4+
How many children have you had through surrogacy?	48%	42%	7%	3%
	1			
if you are currently pregnant, how many children are you expecting via surrogacy?	100%			
	Less than 1 year	1 - 2 years	2-3 years	3+ years

Question						
How long did the surrogacy process take from initial contact to returning home with your baby?	5%	48%	41%	6%		
	Yes	No				
Would you like to have more children in the future (through surrogacy, fostering or adoption?).	74%	26%				
	Yes	No				
Are you intending to engage in surrogacy in the future?	59%	41%				
	Yes	No				
Have you done domestic altruistic surrogacy?	3%	97%				
	Canada	India	Mexico	Thailand	USA	Other
In which country have you engaged (or do you intend to engage) in surrogacy?	6	10	4	6	12	6
	Less than \$50,000	AU50K - \$125K	AU125K – \$200K	More than \$200K		
What was the total cost of each surrogacy journey? (including fees to agency, clinic, surrogate etc.). if multiple journeys indicate average cost per pregnancy.	5%	54%	22%	19%		
	Yes	No				
Did you engage (or do you intend to engage) with a surrogacy agency to support your journey?	95%	5%				
	Yes	No				

Question				
Did you seek legal advice prior to engaging in surrogacy	76%	24%		
	Altruistic	Commercial		
What was the nature of your relationship with the surrogate?	16%	84%		
	Yes	No		
Was your surrogate provided with access to legal advice prior to beginning a surrogacy arrangement?	97%	3%		
	Yes	No		
Did you and/or your surrogate engage in psychological support/counselling prior to engaging in surrogacy?	75%	25%		
	Yes	No		
As part of the surrogacy process, was your surrogate provided with ongoing counselling/support.	91%	9		
	Yes	No		
Have you or do you intend to have an ongoing relationship with your surrogate?	74%	26%		
	Yes	No		
Did you meet your surrogate prior to beginning surrogacy	81%	19%		
	Yes	No		
Did you have a pre-birth parentage order in the state of your child/ren's birth?	48%	52%		
	Altruistic	Commercial		
What was the nature of your relationship with the egg donor?	25%	75%		

Question				
	Family Member	Friend	Other	
If you have a personal relationship with your egg donor, what is the nature of that relationship?	40%	10%	50%	
	Yes	No		
Does your child have the option to know the identity of the egg donor?	66%	34%		
	Yes	No		
If you still have embryos remaining, can you access those embryos?	74%	26%		
	Yes	No		
If you had existing embryos overseas, would you want the opportunity to bring those embryos to Western Australia?	86%	14%		
	Yes	No		
Would you engage in altruistic surrogacy if it was available in Western Australia	92%	8%		
	Yes	No		
If you have had a child through surrogacy, have you sought a parentage order in the Family Court of Western Australia	24%	76%		

8. COMMENTARY ON SURVEY RESULTS

Demographics

8.1 The survey results show a population of gay dads:

- who are mainly two dad families (66%) or intending two dad families (29%) with existing single dad families being a minority of 5%;
- who as a group are fathers to 48 children (much more than the 10 or 15 births via surrogacy in WA since the Act was introduced in 2008);
- most of whom before commencing the surrogacy journey most gay dads were in relationships of 3 to 7+ years (88%);
- who in the main have 1 to 2 children families (90%); and
- whose children have been born via commercial surrogacy (97%).

The Surrogacy Process

8.2 Of note in terms of the surrogacy experience of the survey population is:

- most gay dads reported that the surrogacy process (from initial enquiry to returning to Australia with their child) took from 1-2 years (48%) or 2-3 years (41%);
- the countries where the surrogacy occurred reflects the changes in overseas jurisdictions, earlier surrogacies occurred in Thailand and India and more recent surrogacies occurred in the USA, Canada and Mexico;
- the cost of the surrogacy process ranged from \$50,000 to \$125,000 (54%), \$125,000 to \$200,000 (22%) and \$250,000+ (19%). Such costs raise issues of discrimination based on economic capacity; and
- most gay dads (94%) used a surrogacy agent.

Legal and Counselling Issues

8.3 The survey provides an interesting insight as to the legal and counselling context of the surrogacy:

- 76% of gay dads obtained overseas legal advice about the surrogacy. Many gay dads were unable to obtain legal advice in Western Australia as commercial surrogacy is illegal;

- 97% of surrogates were provided with access to legal advice prior to the surrogacy arrangement;
- 75% of surrogates and intending parents participated in psychological support/counselling prior to engaging in the surrogacy and 90% of surrogates were provided with ongoing counselling/support.

The Surrogate

- 8.4 81% of the survey participants met the surrogate in person, or by phone or video conference prior to beginning surrogacy; and
- 8.5 73% of participants intend to have an ongoing relationship with the surrogate.

Altruistic Surrogacy

- 8.6 91% of the survey respondents said they would participate in altruistic surrogacy in WA if the law so permitted.

General Comments

- 8.7 Survey participants were also invited to make general comments. Common themes were:
- Treating the children of gay parents the same as children of heterosexual or lesbian parents.
 - Treating the “biological” father and his partner equally under the law.
 - Allowing gay men in WA access to altruistic surrogacy.
 - A desire that both gay dads (biological or not) be recognised as fathers and parents of a child born via surrogacy without the need to apply to the Family Court of WA.
 - A desire for a simpler process of altruistic surrogacy .
 - Inability to obtain legal advice re surrogacy in WA- because lawyers are generally unwilling to advise on an illegal act.
 - Legislation to give effect to pre-birth parenting orders
 - Recognition in Western Australian law of overseas birth certificates naming gay dads as fathers and parents regardless of where or when the child was born

(prospective and retrospective recognition) or whether the surrogacy was altruistic or commercial.

- Lack of enforceability of surrogacy agreements
- Allowing gay men to move embryos to Western Australia.
- Use of the term “Intended Parents” instead of “Arranged Parents” in legislation.
- Improving the means by which potential surrogates and intended parents can be linked.

9. SURROGACY AND DOMESTIC LAW

Children raised by gay parents do as well as children raised by heterosexual parents.

9.1 The social research is quite clear- children raised by gay parents do as well as children raised by heterosexual parents. This was confirmed as recently as 23 October 2017 by a comprehensive research analysis published in the *Medical Journal of Australia* by Professor Frank Oberklaid and colleagues.¹⁰ Professor Oberklaid cited a 2017 review of 79 studies, a 2014 review of more than 40 studies, a 2013 review in Australia and concluded as follows:

The consensus of the peer-reviewed research is that children raised in same-sex parent families do as well emotionally, socially and educationally as children raised by heterosexual couple parents. These findings have been replicated across independent studies in Australia and internationally.

Historic Concerns about Surrogacy

9.2 Surrogacy has presented a problem for the State for a number of reasons. One is that not everyone approved of women having children with the intention that they should be brought up by someone else or that, if they do, they should be paid for doing so.

9.3 As with other aspects of personal life, like the availability of divorce or abortion, surrogacy has attracted a lot of criticism, not all of it necessarily well founded either ethically or logically.

9.4 What has become known as the 'Baby Gammy'¹¹ case is instructive in this regard. Among the many grave allegations made against the parents (the Farnells) was that they abandoned baby Gammy- a Down Syndrome twin born via commercial surrogacy in Thailand in 2013. The allegations were influential in significant changes to Thai surrogacy law. The matter was determined by Thackray CJ on 14 April 2016. The Family Court media statement addressed the allegations against the Farnells:

¹⁰ 'Same sex couples 'make good parents: researchers' *The Australian* 23 October 2017.

¹¹ *Farnell & Anor supra*

*The Court also found that the Farnells did not abandon Gammy in Thailand, did not seek to access Gammy's trust fund for Pipah's welfare needs or to meet their legal costs, and never applied to the Court for Gammy's trust fund for any purpose.*¹²

- 9.5 The State does not generally control people's reproductive activities, restricting itself to providing either care or, at the last extremity, alternative parents, for children whose parents cannot parent them adequately. Few States require a citizen to acquire a licence to reproduce. But few States have been able to resist the call for surrogacy to be either regulated or banned altogether.
- 9.6 States have also been faced with a problem about how they should treat the children born as a result of surrogacy arrangements. If they are to be treated as the children of the intended parents, how is that to be achieved? Until recently, legal systems have not thought it necessary to define a 'mother' or a 'father', but the development of artificial reproductive techniques has meant that they have had to do so. Unfortunately, the definitions have been based on the premise that the child born as a result of an artificial reproductive technique will be brought up by the woman who gives birth, and her partner if she has one.
- 9.7 Another problem for Australia is that matters relating to surrogacy fall within the powers of the States, not the Federal Parliament, which has meant that each State has developed a different legislative response, although all only permit arrangements in which the woman who carries the child receives no reward beyond reimbursement of her reasonable expenses.

Problems with Australian Legislation

- 9.8 As the House of Representatives Standing Committee on Social Policy and Legal Affairs in its report in 2016 'Surrogacy Matters' put it:

'To access altruistic surrogacy in Australia, intended parents and surrogates are not only required to navigate complex State and Territory legislation, but

¹² Family Court of WA, Media Statement 14 April 2016 www.familycourt.wa.gov.au

they are also faced with limited and inconsistent information on which to base their decision.’.

9.9 In summary, all of the States and Territories, except the Northern Territory, have passed legislation about surrogacy arrangements. All Australian legislation about surrogacy provides only for unenforceable altruistic arrangements in which payment to a surrogate is limited to reasonable expenses,¹³ and criminalises (with extraterritorial effect) commercial arrangements. None of the legislation makes any provision either for a parentage order to be made in respect of a surrogacy arrangement made other than under its own terms, or for the recognition of an order conferring parentage as a result of a surrogacy arrangement, whether made elsewhere in Australia or abroad.¹⁴

Surrogacy and Criminality

9.10 All States in Australia that have legislation about surrogacy prohibit making arrangements for reward and make doing so a criminal offence. In Western Australia there is an offence of “making surrogacy arrangement that is for reward”. Section 8 of the Surrogacy Act 2008 (WA) provides that:

“Making surrogacy arrangement that is for reward

A person who enters into a surrogacy arrangement that is for reward commits an offence.”

9.11 In addition, “commercial trading in human eggs, human sperm or human embryos” is also a criminal offence.¹⁵ It is also a criminal offence in Western Australia to “cause or

¹³Commercial surrogacy is illegal in every State of Australia – see *Farnell v Chanbua* [2016] FCWA 17 at [195]; ‘Surrogacy Matters’, Foreword, p v.

¹⁴In so far as Australia is concerned, parentage orders made as a result of surrogacy arrangements by the various States will be recognised throughout the Commonwealth of Australia by virtue of s 118 of the Constitution: “Full faith and credit shall be given, throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State.”). And if a person or persons are regarded as being the parents of a child born as a result of a surrogacy arrangement by an order made in a State or Territory, the child is regarded as being their child for the purposes of the Family Law Act 1975 (Cth) and its associated rules of court – see Family Law Act 1975 (Cth), s 60HB.

¹⁵ Human Reproductive Technology Act 1991 (WA), s 53Q. However, “valuable consideration” does not include “reasonable expenses” – see s 53Q(4), so provided only “reasonable expenses” are paid, no offence is committed.

permit” an artificial fertilization procedure except pursuant to a license or exemption by which it is authorised by the *Human Reproductive Technology Act 1991* (WA).

9.12 In some States, there are specific extraterritorial prohibitions on commercial surrogacy arrangements, but in Western Australia offences relating to surrogacy arrangements and reproductive technology have extra-territorial effect by virtue of s 12 of the criminal code of Western Australia.

Australia-wide comparison

9.13 The various State and Territory laws regarding surrogacy were summarised in the Department of Health’s Review of the *Surrogacy Act 2008* of November 2014. Appendix 5 of that review neatly summarises the laws in each respective State and Territory and compares each jurisdiction’s law with respect to “Eligibility requirements” and “Types of surrogacy”. For ease of reference that Appendix is duplicated below:

Appendix 5: Comparison of regulation across jurisdictions

	WA	VIC	NSW	SA*	TAS	QLD	ACT
Eligibility requirements							
Medical need	√	√	√	√	√	√	
Social need	X	√	√	X	√	√	
Heterosexual couple	√	√	√	√	√	√	√
Female same-sex couple	X	√ _a	√ _a	X	√ _a	√ _a	√
Male same-sex couple	X	√	√	X	√	√	√
Single female	√	√	√	X	√	√	X
Single male	X	√	√	X	√	√	X
Age of arranged parent(s) (years)	≥25 ^b	≥18	≥18	≥18	≥21	≥25	≥18
Age of birth mother (years)	≥25	≥25	≥25	≥18	≥25	≥25	*
Types of surrogacy							
Traditional	√	X	√	√ _c	√	√	X
Gestational	√	√	√	√	√	√	√
Genetic connection with intended parent(s)	X	X	X	√ _d	X	X	√
Criminal record screening	X	√	X	X	X	X	X
Child protection order check	X	√	X	X	X	X	X
Transfer of parentage: mandatory record keeping	√	√	√	√	√	√	√

Advertising for altruistic surrogacy by intended parents/surrogate	√	×	√	×	√	×	×
--	---	---	---	---	---	---	---

WA: Western Australia; VIC: Victoria; NSW: New South Wales; SA: South Australia; TAS: Tasmania; QLD: Queensland; ACT: Australian Capital Territory; * Northern Territory follows SA legislation; a If both women meet the medical eligibility requirements. b Applies to at least one arranged parent. c Use of artificial fertilisation procedure mandatory. d Unless medical certificate.

9.14 Since that 2014 review, South Australia has enacted the *Statutes Amendment (Surrogacy Eligibility) Act 2017*. It is now the case that Western Australia is the only jurisdiction in Australia (that legislates regarding surrogacy) where male same-sex couples cannot access surrogacy.

Gender and marital Status- potential invalidity

9.15 A matter that was not canvassed in the 2014 review, is the potential invalidity of the eligibility provisions of the *Surrogacy Act 2008* that exclude access to surrogacy on the basis of gender or marital status. In *McBain v. State of Victoria*¹⁶ a Victorian doctor sought declaratory relief in the Federal Court in circumstances where he assessed a single woman as appropriate for invitro fertilisation treatment when under s8 of the *Infertility Treatment Act 1995* (Vic):

“A woman who undergoes a treatment procedure must -

- (a) be married and living with her husband on a genuine domestic basis; or*
- (b) be living with a man in a de facto relationship.”*

9.16 Sundberg J considered s22 of the *Sex Discrimination Act 1984* (Cth) which provides:

“(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s sex, marital status, pregnancy or potential pregnancy:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;*
- (b) in the terms or conditions on which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person; or*
- (c) in the manner in which the firstmentioned person provides the other person with those goods or services or makes those facilities available to the other person.*

¹⁶ *McBain v State of Victoria* [2000] FCA 1009

(2) *This section binds the Crown in right of a State.*"

9.17 His Honour determined that the exclusion of access to invitro fertilisation treatment to a single woman by s8 of the *Infertility Treatment Act 1995 (Vic)* constituted discrimination under s22 of the *Sex Discrimination Act 1984 (Cth)* and pursuant to s109 of the *Constitution* was therefore invalid to the extent that it excluded access to single women. The doctor was therefore able to provide invitro fertilisation treatment to the single woman without fear of prosecution under the Victorian legislation.

9.18 It is submitted that consideration be given to the (in)validity of s19 of the *Surrogacy Act 2008* which defines an "eligible couple" for the purpose of transfer of parentage as:
"2 people of opposite sexes who are married to, or in a de facto relationship".

International Law on Surrogacy

9.19 International surrogacy arrangements present two problems; the first might be described as the 'parentage problem', the second the 'recognition problem'.

The Parentage Problem

9.20 The parentage problem is a problem in conflict of laws – that is to say, a misalignment between the applicable law relating to parentage in the country in which the child is conceived and (usually) born and the country to which the intended parents bring the child.

The Recognition Problem

9.21 The recognition problem relates to the fact that many countries do not recognise orders relating to parentage arising from surrogacy arrangements.

The Parentage Problem and its Consequences

9.22 Parentage problems arise because surrogacy arrangements nearly always involve some form of artificial fertilisation procedure, and the law relating to the relationships between the people involved in, and born as a result of, artificial fertilisation procedures has as its social objective the identification of the persons *receiving* the treatment as

being the legal parents of the resulting child. This can be readily understood when one considers the law about artificial insemination by donor, AID, the purpose of which was (and is) to allow couples in which the man was infertile to have a child as a result of the wife being impregnated with donor sperm. The intention was to make the mother's husband the father of the child and to avoid the donor of the sperm being identified as a parent – as would be the effect of the ordinary application of the common law rules relating to parentage.

- 9.23 As artificial reproductive techniques advanced, the same social objective was maintained in the legislation, so that a child born as a result of in vitro fertilization (IVF) was (and is) regarded as being the child of the woman who gave birth and her husband (or, later, as unmarried relationships came to be recognised in some jurisdictions, her male de facto partner).
- 9.24 The problem is that the law relating to the attribution of parentage is by no means uniform. Not only are there international variations, but countries that include discrete law areas (for example, Australia and the United States of America) may well have different rules in different parts of the country. In the case of Australia, that is because the construction of its Constitution means that it is a matter for the various States, and not the Commonwealth.
- 9.25 The result of the application of the disparate laws relating to parentage is that a child may have no mother, one mother or two mothers and no father, one father, two fathers (or any permutation of these), depending on the legal systems involved. Putting it simply, a child moving through three law areas may have different parents in each of them.
- 9.26 Inevitably, this leads to serious problems which, in the early stages of the aftermath of a surrogacy arrangement, relate principally to civil status, because it is quite possible that the result of a surrogacy arrangement might be a Stateless child who is a legal orphan, as happened to two children born in India as a result of a surrogacy arrangement commissioned by a Norwegian woman. The arrangement involved both donor eggs and donor sperm. India and Norway both refused to recognise the

children, who as a result were Stateless.¹⁷ The same problem faced a German couple, Mr & Mrs Balaz, who commissioned a surrogacy arrangement in India using Mr Balaz's sperm and a donated egg. When twins were born in 2008 the Indian birth certificates that were issued named Mr & Mrs Balaz as parents. However, the German authorities refused to recognise those certificates as establishing either parentage or nationality, because surrogacy was prohibited in Germany. Mr & Mrs Balaz then tried to get Indian passports for the children, but their application was refused because the children did not have an Indian parent. As a consequence, the children were Stateless. Although the Indian birth certificates were later recalled and Mrs Balaz was replaced with the Indian surrogate mother as the children's mother (Mr Balaz was still identified as the father) the Indian passport authority continued to refuse them Indian passports despite their having been born on Indian soil to an Indian mother (which meant, of course, that the surrogate was now recognized as the legal mother).¹⁸

Parentage and Parental Responsibility

9.27 States that permit surrogacy arrangements under a regulated scheme provide a mechanism for transferring parentage from the people who would otherwise be identified as the parents of the child to the commissioning (or 'intended' parents). These are usually referred to as 'parentage' orders.

The International Recognition Problem

9.28 However, there is no international agreement on the recognition of parentage orders. They are specifically excluded, for example, from the recognition rules in the 1996 Hague Convention on the Protection of Children.¹⁹ So a parentage order only has local effect.

¹⁷ See 'International Movement of Children: Law, Practice and Procedure', (2nd edn), Lowe and Nicholls, LexisNexis/Family Law, (2016), para 36.16, p 879, FN 30

¹⁸ Adoption was not an option (as was suggested by the Indian Supreme Court) because neither the requirements of Indian domestic law on adoption nor the requirements of the 1993 Hague Convention on International Adoptions could be met, the children having been neither orphaned or abandoned.

¹⁹ Long title: The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

- 9.29 That means that intended parents who bring a child to their country of origin will find that if they have a parentage order it MAY not be recognised, and they will be unable to obtain a parentage order in their country of origin because the arrangement will not have been conducted under the regulatory scheme in force there. However, please see 12.8 of this submission.
- 9.30 So they will usually apply for a ‘parenting order’; that is, an order that confers parental responsibility on them.
- 9.31 Almost everyone who enters into an international surrogacy arrangement fails to understand the difference between parentage and parental responsibility. Many States have mechanisms for conferring parental responsibility on people who have not acquired it by operation of law. So, for example, in England and Wales a father who is not named on the child’s birth certificate and has not been able to make a parental responsibility agreement with the mother may make an application for a parental responsibility order. Sometimes parental responsibility accompanies other orders – if the father in the previous example made a successful application for a residence order, that residence order would carry with it parental responsibility. In the same way, Australian legislation enables courts to confer parental responsibility on people, and in some circumstances it is conferred as a necessary adjunct to a parenting order.²⁰ However, parental responsibility simply means that the holder can exercise all the duties, powers, responsibilities and authority which by law parents have in relation to children.²¹ It does not make the holder a parent; in other words, if some legislative provision requires the status of parent that status cannot be fulfilled.
- 9.32 Parental responsibility ceases, of course, when the child becomes 18 years of age (in Australia) whereas parentage is something that subsists throughout the life of both parent and child and in some circumstances beyond.
- 9.33 To take an example, the *Guardianship and Administration Act 1990* (WA) makes provision in s 110ZD for circumstances in which people can make a treatment decision on behalf of a person who is unable to make a reasonable judgment in respect of medical treatment. There is a list of persons who, in order of priority, can make a

²⁰ Family Law Act 1975 s 61D(1).

²¹ Family Law Act 1975 s 61B.

treatment decision. Understandably, the first person in terms of priority is the patient's spouse or de facto partner, followed by their nearest relative, including a parent. However, people whose parental responsibility had expired would not be classified as a "parent".

10. ALTRUISTIC SURROGACY

Altruistic surrogacy and low birth rates

10.1 For the period 2010 to 2017 the WA Reproductive Technology Council (“RTC”) recorded that just 10 surrogacy babies have been born through domestic surrogacy arrangements, approved under the *Surrogacy Act 2008 (WA)*.²²

10.2 The Fertility Society of Australia provided useful statistics from 2015 in relation to Surrogacy Arrangement Cycles in Australia and New Zealand²³:

Table 1: Number of initiated ART treatment cycles by treatment type, Australia and New Zealand, 2015

	Number of initiated ART cycles	Percentage of treatment types	Number of clinical pregnancies	Number of live deliveries	Number of liveborn babies	Number of liveborn singletons at term with normal birthweight
Autologous	73,481	94.5	16,898	13,375	13,959	11,035
<i>Fresh</i>	45,995	59.2	8,175	6,408	6,691	5,192
<i>Thaw</i>	27,486	35.4	8,723	6,947	7,268	5,843
Oocyte recipient	2,386	3.1	661	536	560	408
Embryo recipient	442	0.6	100	77	81	54
Oocyte donation	1,158	1.5	0	0	0	0
GIFT ^(a)	4	0.0	0	0	0	0
Surrogacy arrangement cycles	250	0.3	67	52	55	44
<i>Commissioning cycles^(b)</i>	60	0.1	0	0	0	0
<i>Gestational carrier cycles^(c)</i>	190	0.2	67	52	55	44
Total	77,721	100.0	17,726	14,040	14,655	11,541

(a) GIFT cycles were classified separately from autologous cycles.

(b) A variety of cycle types undertaken as part of surrogacy arrangements, e.g. cycles undertaken by intended parents or women donating their oocytes or embryos for use by the gestational carrier.

(c) A cycle undertaken by a woman who carries, or intends to carry, a pregnancy on behalf of the intended parents with an agreement that the child will be raised by the intended parent(s).

10.3 When those statistics are compared to the available data from the Western Australian RTC, it would seem that surrogacy numbers are lower than might be expected. WA births are also low compared to those published by the Victorian Assisted Reproductive Technology Authority (VARTA)²⁴

²² RTC Annual report 2016/2017 supra

²³ Fitzgerald O, Harris K, Paul RC, Chambers GM 2017. Assisted reproductive technology in Australia and New Zealand 2015. Sydney: National Perinatal Epidemiology and Statistics Unit, the University of New South Wales Sydney

²⁴ Statistics from annual reports, accessed 10 March 2018.

Year/Applications	No of surrogate women	Number embryos transferred	of Pregnancies	Live births
2010-2011	9	16	8	1
2011-2012	31	67	12	10
2012-2013	32	74	32	8
2013-2014	32	53	8	7
2014-2015	30	44	6	6
2015-2016	22	33	13	11
2016-2017	27	48	13	9

10.4 Overall, the interstate data suggests that the existing surrogacy models across Australia are not resulting in high numbers of births for heterosexual or gay couples. Yet, the incidence of overseas commercial surrogacy increases. GayDads WA say that restrictive models of altruistic surrogacy are inhibiting potential surrogates.

Lack of Reliable Information and Guidance

10.5 At present, there is almost no reliable information available to intending parents in WA. Anecdotally it seems intending parents generally gather information as best they can and with little guidance, through word of mouth, closed Facebook groups and internet-based searching. Some gay dads have reached out for legal advice and been told that it is not available to them if they are already committed to an overseas arrangement²⁵. This leaves intending parents exposed to unscrupulous operators who frequently encourage them to head overseas and engage in unlawful surrogacy.

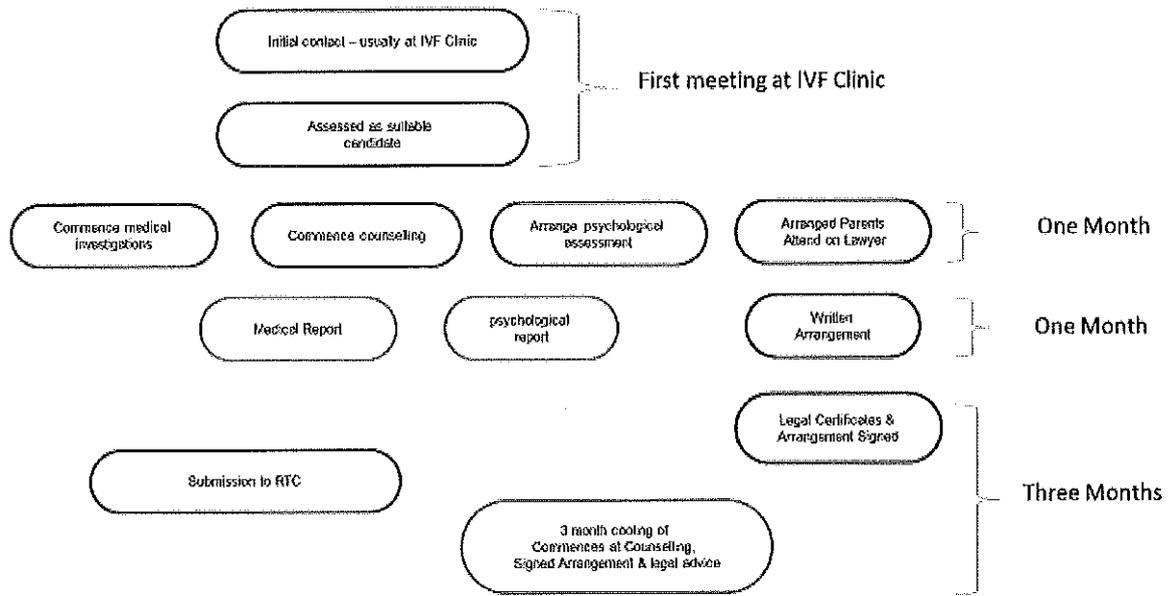
10.6 There is a wealth of information available on the VARTA website²⁶ which might easily be duplicated, with legislative references amended to reflect the position in WA. As an inter-state government agency, this ought to be achievable with relative ease.

²⁵ Presumably because of the interpretation of section 11 of the Surrogacy Act 2008.

²⁶ <https://www.varta.org.au/information-and-support/surrogacy> [accessed 10 March 2018]

The WA Surrogacy Process

10.7 For those who do manage to navigate their way to one of the three clinics offering surrogacy services in WA²⁷, the process will generally work as follows:



* Note: Timeframes in the diagram above are estimates of the minimum time the process will take.

Initial Contact with Clinic

10.8 Each of the clinics in WA provides some basic information via their websites²⁸. Generally, intending parents will be referred to a surrogacy co-ordinator who will assist with assessment as to eligibility. Surrogacy co-ordinators are required to provide information to 'be the primary contact point for persons who have enquiries about surrogacy arrangements'²⁹. That said, clinics have been wary about taking the co-ordination role too far, perhaps because of section 9 of the *Surrogacy Act 2008* (WA):

²⁷ Concept, PIVET and Hollywood Fertility

²⁸ [http://www.conceptfertility.com.au/files/5814/4461/7000/Surrogacy Information Sheet 12-3-15. UserTemp-6.pdf](http://www.conceptfertility.com.au/files/5814/4461/7000/Surrogacy%20Information%20Sheet%2012-3-15%20UserTemp-6.pdf); <https://www.pivet.com.au/products/surrogacy/surrogacy/>; <https://www.pivet.com.au/faq/>; <https://www.hollywoodivf.com/assisted-conception/surrogacy-information/> [all accessed on 28 February 2018]

²⁹ Surrogacy Directions 2009 (WA), direction 8

9. Reward for introducing parties for surrogacy arrangement

(1) A person who receives, or seeks to receive, valuable consideration for introducing or agreeing to introduce persons with the intention that they might enter into a surrogacy arrangement commits an offence.

Penalty: a fine of \$12 000 or imprisonment for one year.

(2) Subsection (1) applies whether or not it is intended that the surrogacy arrangement be one that is for reward.

10.9 Section 9 is presumably intended to prevent the operation of surrogacy agencies. However, what it has actually done is leave clinics wary about advertising any form of register for surrogates or intending parents to join with a view to being introduced in some way. Because the fertility clinics are ultimately providers of a service, which service is provided at a commercial level; one could interpret then as receiving 'valuable consideration' when profiting from the eventual custom of parties to a domestic surrogacy arrangement.

10.10 Section 10 of the *Surrogacy Act 2008* (WA) permits, by omission, advertising for an altruistic surrogate³⁰. Because of current eligibility criteria under the Act, it is necessary to obtain medical reports to confirm that intending parents meet the infertility medical criteria under the Act. By the time intending parents arrive at the decision to investigate surrogacy as an HRT option, they tend to have medical confirmation of infertility readily to hand. Scheduling implications counselling, psychological testing and solicitors' appointments tends to take time.

Investigations and Counselling

10.11 Although surrogacy co-ordinators have ready access to medical staff through their own clinics' affiliations, the co-ordinators are not in a position to co-ordinate other services and intended parents are often left to locate the other professionals themselves. This can lead to a disjoint in information sharing between the counsellors, psychologists, lawyers and medics who are assisting the parties to prepare an application.

³⁰ In contrast, other commonwealth jurisdictions prohibit advertising for altruistic arrangements

Implications Counselling

10.12 Implications counselling is well defined and well managed under the Act and regulations³¹. No report issues from the Implications counsellor. A certificate confirming that the counselling has been completed is given to the RTC with an application for a surrogacy arrangement to be approved. In practise, it seems, there is no exchange of information between the implications counsellor and the clinical psychologist who will produce a separate report. Perhaps this is because of professional obligations to maintain patient confidentiality of the counsellors and psychologists.

Clinical Psychologists

10.13 Approval of an altruistic surrogacy arrangement by the RTC may turn on a psychologist's report. NIL guidance is given to clinical psychologists in the Act, Regulations or Directions as to the conclusion the psychologist is to make regarding 'psychological suitability' or the process of assessment of the parties to the arrangement. Though section 17c(ii) of the Act requires that the arranged parents, the birth mother and her husband or defacto and any other person (as defined under s17 b(iii)) be examined by a clinical psychologist as to whether they are psychologically suitable to be involved in a surrogacy arrangement, there is no definition in the Act of what is 'psychologically suitable'.

10.14 Without a definition it is impossible for a clinical psychologist to assess the parties to a surrogacy arrangement as to suitability. For example, is 'psychologically suitable':

- (a) Limited to the psychological competence of the parties to understand the contractual arrangements they might enter into;
- (b) Does it extend to the parties' capacity and/or competence to care for a child born of a surrogacy arrangement;
- (c) Does it require that the clinical psychologist confirm that they understand all of the implications counselling they have undertaken and that any risks or potential

³¹ See esp. Regulation 4 Surrogacy Regulations 2009(WA) which contains 20 sub-regulations as to what should be covered in that counselling and Directions 12 and 13 of the Surrogacy Directions 2009 (WA) which details further requirements as to additional counselling after the arrangement is approved.

conflicts have been discussed and that the parties have planned appropriate strategies to mitigate those risks?

- (d) If the parties are all psychologically suitable but there are existing children who may be at psychological risk if the arrangement goes ahead, what difference might that make to the assessment of 'psychological suitability'?
- (e) Should the parties to an arrangement be required to complete psychological testing?

The above are important questions because reporting clinical psychologists pay passing attention to the questions, while others go into much more detail.

10.15 GayDads WA recommend that either:

- (a) The requirement for psychological testing and a report of psychological suitability be repealed; or
- (b) the clinical psychologist's report to council should be a certificate of psychological suitability, based on guidelines under the Act, Regulations and Guidelines, in the same way that implications counselling is dealt with. GayDads WA submit that the RTC should not have to read a report and interpret from it whether parties are psychologically suitable or not; OR
- (c) If the requirement for psychological suitability remains, it should be on the basis that it supports a pre-birth order.

Legal Advice

10.16A search of LinkedIn will take intending parents to a number of family lawyers who claim to have experience in surrogacy matters but, in reality, RTC statistics indicate how very few professionals have actual experience in managing a domestic surrogacy arrangement. Surrogacy co-ordinators tend to keep their own in-house list of lawyers who are willing to be briefed in relation to Surrogacy Arrangements. There is no centralised list of Surrogacy Lawyers.

10.17 The experience of many gay dads has been that they are unable to access legal advice in relation to international arrangements. This is because of the interpretation of section 11 of the *Surrogacy Act 2008* (WA):

11 (1) A person who provides a service knowing that the service is to facilitate a surrogacy arrangement that is for reward commits a crime except in the circumstances described in subsection (2).

(2) It is not an offence against subsection (1) if the service is a health service provided to the birth mother after she has become pregnant.

*Penalty: **imprisonment for 5 years.***

*Summary conviction penalty: a fine of **\$12 000 or imprisonment for one year.***

10.18 Arguably, a lawyer who is approached by intended parents who will be entering into cross-border arrangements 'for reward'³² might be deemed to provide a service in connection with that arrangement, even if their advice clearly states that the intending parents are likely to be committing a criminal act if they proceed with the arrangement.

10.19 Having sourced a lawyer, intending parents will generally instruct their lawyer to draft up the surrogacy arrangement, and to liaise with the lawyer appointed by the birth parent(s) to give advice. The speed in which lawyers can produce the arrangement and advice will depend on a number of factors such as: availability of lawyers and parties to meet; particular aspects of the arrangement which are unique to each family; geography etc. Some lawyers produce very detailed arrangements; others work from a 'boilerplate' template. The detail contained within a surrogacy arrangement is generally up to the parties. All that is really necessary is an arrangement which covers the aspects of Part 17 of the *Surrogacy Act 2008* (WA) and that it is accompanied by the

³² These need not necessarily be commercial in the 'for profit' sense. For example, an altruistic Canadian arrangement would have broader definitions of 'reasonable expenses' which would result in it being categorised under WA legislation as an arrangement 'for reward'.

information listed in regulation 5 of the Surrogacy Regulations 2009 (WA)³³, the arrangement itself may be relatively brief.

10.20 This creates something of a conflict for lawyers who are drafting arrangements and advice. On the one hand, some lawyers tend to prefer to give very detailed advice and to carefully draft arrangements which canvass matters which have been discussed in implications counselling and which carefully define 'reasonable expenses'. On the other hand, greater detail may lead to interpretation of agreements and statutes at the RTC decision stage when approving (or importantly not approving) an arrangement. Lawyers have to resolve a dilemma:

- Should they give scant information to the RTC so that fewer questions may be raised and approval is more likely? or
- Do they go into great detail so as to provide a thorough agreement and advice, knowing that this could create questions and potential rejection of the arrangement by the RTC; whose decision is final: there is no process of appeal.

10.21 GayDads WA submits that the RTC approval process should be made far more transparent and should focus much more on provision of information than assessment.

Cooling off period

10.22 By the time parties to a surrogacy arrangement have made a first approach to a clinic, surrogacy tends to be something that has been discussed and contemplated over many months if not years. By the time they have completed implications counselling, psychological assessment and received legal advice; the parties will have been engaging with those professionals for at least several months.

10.23 The cooling off period is not necessary. In the event the cooling off period continues to be a part of the surrogacy process GayDads WA submits that the RTC should be in a position to assess the cooling off period as having started from a particular date. This might be the date of completion of the first implications counselling session for the intending parents and their surrogate; or receipt of legal advice.

³³ Age of the parties, implications counselling certificate, legal certificates, psychological report, medical practitioners' reports

11. THE SURROGATE- COSTS AND COMPENSATION

11.1 GayDads WA are strongly of the view that a surrogate, or her family, should not be in any way out-of-pocket as a direct result of a surrogacy arrangement. Western Australian legislation has a narrow definition of reasonable expenses which has the effect that an 'altruistic' surrogate experiences economic loss. Rather than being called 'altruistic surrogacy' the current system could better be called 'philanthropic surrogacy'.

11.2 GayDads WA are also of the view that a surrogate ought to be able to be compensated (paid or given a gift) for her effort and contribution to the intended parent(s) family, provided that the compensation is not of such size that it is the primary motivator/inducement for a surrogate to enter into the arrangement. Problems with compensation/expenses with the current legislation include:

- (a) payments or consideration "other than for reasonable expenses associated with pregnancy or birth" is too narrow and does not cover expenses after birth such as expenses associated with post-natal depression or costs associated with complications arising from birth;
- (b) the definition of earnings foregone by the surrogate does not include time off work during the pregnancy for medical appointments.

12. CHILDREN OF GAY PARENTS: FATHERS, PARENTS, PARENTAGE, PARENTAL RESPONSIBILITY AND BIRTH CERTIFICATES

Gay Families in Western Australia

12.1 The lack of legal recognition of children and their gay dads under Western Australian law is a of very serious concern to GayDads WA.

12.2 The children of gay dads in Western Australia may assume that the men who are responsible for their day to day care, provide for their every need and who love them unconditionally are their fathers and parents. This assumption has no basis in law. Under Western Australian law children born to gay dads via overseas surrogacy have no “father” or “parent” in Western Australia.

12.3 A typical example of a gay family in WA is one where:

- both dads are in a defacto relationship;
- one dad has provided the sperm and the eggs are provided by an anonymous donor;
- the child is conceived by way of an invitro fertilisation procedure (“IVF”);
- the child is born to an overseas surrogate;
- the child acquires Australian citizenship by descent after DNA evidence confirms that one dad is the “biological” father;
- In many cases the overseas birth certificate will recognise one or both gay dads as the parents of the child; and
- The gay dads return to Western Australia with their child.

12.4 Under Western Australian Law the mother of the child born in these circumstances is the surrogate and the father of the child is her husband (if the surrogate is married). If the surrogate is not married, under Western Australian law the child has no legal father.

12.5 Under Western Australian Law:

- Neither the biological dad nor his partner are father/s of the child
- Gay dads are not parents of the child

In legal terms the gay dads are strangers to the child.

Why are gay dads not fathers or parents of their children?

12.6 The legal obstacles to gay dads being fathers or parents under Western Australian Law are summarised as follows:

Question	Answer	Why?
If the sperm of a gay man is used to conceive a child via an artificial fertilisation procedure, is the gay man the <u>father</u> of the child?	No	The effect of ss 6 and 7(2) of the <i>Artificial Conception Act</i> 1985 (WA) is that when a woman gives birth as a result of an artificial fertilisation procedure: <ul style="list-style-type: none"> (a) the woman’s husband is conclusively presumed to be the father of the child; and (b) any man not being the woman’s husband who donated the sperm is conclusively presumed <u>not</u> to be the father of the child.
If a lesbian woman gives birth to a child as a result of an artificial fertilisation procedure, is her de facto partner a <u>parent</u> of the child?	Yes	S 6A of the <i>Artificial Conception Act</i> 1985 (WA) provides that when a woman in a same sex de facto relationship gives birth as a result of an artificial fertilisation procedure her same sex de facto partner is conclusively presumed <u>to be</u> a parent of the child.
Could a gay dad and his de facto partner/husband be considered <u>parents</u> of the child	No	The only definition of “parent” in the <i>Family Court Act</i> 1997 (WA) relates to adoptive parents.
	No	The three definitions of ‘parent’ in the <i>Interpretation Act</i> 1984 (WA) do not apply to gay dads

Question	Answer	Why?
	No	Sections 188 to 193 of the <i>Family Court Act 1997</i> (WA) detail a range of rebuttable presumptions about parentage. However, as most of the sections refer to a 'child of a marriage' or are predicated on heterosexual relationships, the presumptions for the most part do not apply to gay dads.
	No	<p>ss 190 and 192 of the <i>Family Court Act 1997</i> (WA) open up the possibility that one or possibly both gay dads <u>could be</u> presumed to be parents if they are named as parents of the child in a "prescribed overseas jurisdiction" [s 190] OR</p> <p>If, in an overseas jurisdiction a man has executed an instrument acknowledging that he is the father of a specified child.</p> <p>However, the Family Court of Western Australia has not prescribed any overseas jurisdictions for the purposes of s 190 and s 192.</p>
	No	S 69VA of the <i>Family Law Act 1975</i> (Cth) gives the Family Court of Australia the power to determine the issue of parentage by declaration.

Question	Answer	Why?
		<p>However, no equivalent section applies in the <i>Family Court Act 1997</i> (WA).</p>
<p>Could a gay dad be a 'biological parent'.</p>	<p>Yes</p>	<p>The effect of the <i>Interpretation Act 1984</i> (WA) and s 3 of the <i>Human Reproductive Technology Act 1991</i> (WA) could be considered a 'biological parent'. However, such recognition is of little legal benefit to the gay dad in terms of being recognised as a father or parent under WA law.</p>
<p>In light of the recent introduction of marriage equality, could the child of married gay men be a "child of the marriage" under s 60F (1) of the <i>Family Law Act 1975</i> (Cth)?</p>	<p>No</p>	<p>S60F(1) applies to children of "a husband and wife".</p>
<p>Is it possible for one or both gay dads to apply to the Family Court for an order for "parental responsibility"?</p>	<p>Yes</p>	<p>The effect of sections 88(c), 84(2a) and 89(1) of the <i>Family Court Act 1997</i> (WA) is that any party "concerned with the care, welfare or development" of a child to apply for an order for parental responsibility and the Family Court may allocate such responsibility. Whilst self-representation is always available, the process can be lengthy, complex and expensive (\$10,000 to \$15,000).</p>

Question	Answer	Why?
		In any event “parental responsibility” ceases when the child reaches the age of 18. By contrast a person never ceases to be a “parent”.
Other than a formal adoption is it possible for gay dads to be registered as parents on their child’s birth certificate?	No	Even in circumstances where one or both gay dads are registered as parents on an overseas birth certificate gay dads cannot be registered as the parents of their children in WA.

Adair & Anor and Bachchan

12.7 The 2017 Family Court case of *Adair*³⁴ is an example of the problems gay dads have being recognised as parents. This case involved an application by a terminally ill gay man and his former partner who sought an order for equal shared parental responsibility for his twin children born via an overseas surrogacy arrangement. The First Applicant was very concerned that parental responsibility for his children after his death be awarded to his former partner. The First Applicant could not transfer parental responsibility for the children via his will for the simple reason that in law the Applicant had no parental responsibility to transfer. Ultimately the Family Court of WA made an order allocating parental responsibility to both applicants pursuant to section 84 (2a) of the *Family Court Act WA 1997*. Whilst the Court dealt with the matter with great sensitivity the reality was that a terminally ill man had to apply to a court to ensure the future care of his children. GayDads WA says it is unconscionable that gay men and their children are so discriminated against.

³⁴ *Adair & Anor and Bachchan [2017] FCWA 78*

POSSIBLE SOLUTIONS

Recognising valid overseas surrogacy agreements in WA law

12.8 A possible solution to the problem of recognising parents in circumstances of an overseas surrogacy (as cited by Mr Stephen Page) arises from *Carlton & Bissett*.³⁵ In this case a South African man underwent surrogacy in South Africa. Two weeks before his children were due to be born, a South African judge made an order upholding the South African surrogacy agreement, which meant that the man, who was also genetically the father, was the parent of the children for all purposes under South African law.

12.9 The case opens up the possibility that if a surrogacy arrangement is valid in the country where the surrogacy occurs, and the intending parents are recognised as a parent, then as a matter of comity they should be recognised as a parent under Australian Law.

Declarations of Parentage

12.10 The state of Western Australia has an opportunity under this review to enact legislation which will provide the Family Court of Western Australia with the ability to make orders which declare, establish or transfer parentage for parties to a surrogacy arrangement approved in this State.

12.11 At present, Family Court of Western Australia can make orders for a transfer of parentage under the *Surrogacy Act 2008* and it can make orders for the 'welfare of children' pursuant to section 162 of the *Family Court Act 1997* (WA). It cannot make orders which declare a person to be a parent³⁶.

12.12 There is provision in the Commonwealth legislation for intended parents to be recognised as parents if a court order is made under a State or Territory law to the effect that the child is the child of one or more persons³⁷. In the *Family Law Act 1975* (Cth), section 69S makes specific reference to presumptions of parentage arising from findings of courts.

³⁵ *Carlton & Bissett* [2013] FamCA 142

³⁶ See s67VA Family Law Act 1975 (cth)

³⁷ Section 60HB Family Law Act 1975 (cth)

Pre-Birth Orders

12.13 There is a real opportunity for WA to lead the way in Australia.

12.14 Post *Carlton & Bisset, Re Halvard & Re Grosvesnor*, Australian single judge courts have effectively endorsed pre-birth orders by registering overseas pre-birth orders. This is arguably because the Court has been able to have careful regard to a properly regulated surrogacy arrangement through which the birth parents and intended parents' consent to an order being made in the late stages of pregnancy which give the child of the arrangement a certain status at birth.

12.15 GayDads WA suggest that the requirement to register birth parents as legal parents; only to reverse that registration a matter of days later is a cumbersome process which is unnecessary.

12.16 Anecdotally, it is reported that the legal status of the birth mother and her de facto partner or spouse at birth, and the requirement to register the birth to reflect that, as one of the most confusing and confronting aspects of a surrogacy arrangement.

12.17 The Family Court is required to take into account the best interests of a child before making a transfer of parentage order.

12.18 If there is an opportunity for the Court to make that determination prior to birth, GayDads WA ask: how do those considerations change between, say, 34 weeks of pregnancy (mid-way through the third trimester) and 44 weeks after the start of the pregnancy (i.e. 28 days after birth, being the earliest a transfer of parentage order can currently be made).

12.19 WA has the most heavily regulated surrogacy in Australia. If that regulation is to remain in place, it should be possible to streamline the process of transfer of parentage.

12.20 GayDads WA submit that a Decree Nisi and Absolute for transfer of parentage would achieve that.

12.21 GayDads WA suggest these options:

- (a) Parties may apply for a pre-birth order, which order is made final (by administrative process) on a date to be set, or on presentation by the intending parents and surrogate of an application for consent orders³⁸.

³⁸ An amendment to the BDM legislation may be necessary so that registration of birth by the responsible person pursuant to the notifications requirements of section 12 of the BDM Act

- (b) In the alternative, parties may elect to register the birth in 'the usual way' and apply for a transfer of parentage.

12.22 The lack of recognition under WA law of the children of gay dads is a matter of major concern. The current law in Western Australia is summarised as follows:

- **Heterosexual men and women and de facto and married heterosexual couples** are recognised in Western Australian Law as the fathers, mothers and parents of their children conceived through artificial insemination procedures.
- **Lesbian women and lesbian de facto couples** are presumed to be parents of their children conceived through artificial insemination procedures.
- A **gay man** who donates his sperm with the express intention that he will care for and provide for a child conceived through an artificial insemination procedure is not recognised in Western Australian Law as the father or parent of that child.
- A **gay man and his de facto partner or husband** are not recognised as fathers or parents of children conceived through artificial insemination procedures and surrogacy.
- A **gay man recognised** as a father on an overseas birth certificate is not recognised as a father under WA law.
- **The children of gay dads** in WA are not legally recognised as the children of the men who care, provide and love them every day.
- The recent introduction of **Marriage Equality Legislation** (*Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth)) **does not** introduce the same presumptions of parental recognition that apply to the children of a "husband and wife."
- Thackray CJ summarised the legal position in relation to parenthood in *Farnell & Anor and Chanbua* [2016] FCWA 17 (the '*Baby Gammy*' case) at paragraph 362 as follows:

As it is the law rather than genetics which imposes the obligations and responsibilities attached to parenthood, it is the law that must determine which individuals are to be regarded as the "parents" of a child.
- The issue is not just one of heterosexual rights versus same-sex rights, but whether Parliament considers it appropriate that the children of gay dads who are born

through artificial insemination procedures and/or surrogacy are not afforded the same legal recognition in terms of fatherhood and parenthood as the children of heterosexual and lesbian citizens of Western Australia? In plain terms the issue is whether Parliament is willing to allow discrimination against the children of gay men and their fathers to continue in Western Australia.

- GayDads WA respectfully submits that the children of gay dads in WA should have the same legal recognition of their fathers and parents and that the existing discrimination is unconscionable.

12.23 GayDads WA respectfully recommend that Parliament legislate to effect the legal recognition of gay dads as fathers and parents with retrospective and prospective effect. If minded to effect such recognition Parliament may wish to consider new or amending Legislation, Rules and Regulations including the following:

- (a) Amending ss 6 and 7(2) of the *Artificial Conception Act 1985 (WA)* to conclusively presume that where a gay dad provides his sperm for an artificial fertilisation procedure under a surrogacy arrangement and where the gay dad wishes to rear that child, he and his de facto partner (or husband) are the fathers of the child that results from the pregnancy.
- (b) Enacting a provision in the *Family Court Act 1997 (WA)* to apply a presumption of parentage where gay dads names appear as parents on overseas birth certificates.
- (c) Prescribing countries such as USA (and/or individual states), Canada, Mexico, India, Thailand and Nepal as “overseas jurisdictions” per s 190 of the *Family Court Act 1997 (WA)*. This would have the effect of recognising gay dads as parents.
- (d) Prescribing foreign instruments where a man executes an instrument acknowledging fatherhood per s 192 of the *Family Court Act 1997 (WA)*. This would have the effect of recognising gay dads as fathers.
- (e) Enacting a section similar to s 69VA of the *Family Law Act 1975 (Cth)* where the Family Court of WA could make a declaration of parentage.
- (f) Legislating to give effect to pre-birth parenting orders.

12.24 GayDads WA suggest that the *Artificial Conception Act 1984 (WA)* be amended so that:

- (e) There exists a presumption of parentage in favour of the intended parents who are signatories to an approved arrangement.

- (f) The presumption above be sufficient for the intended parents to be registered on the birth certificate.
- (g) The presumption be rebuttable.
- (h) The presumption become a conclusive presumption upon a formal declaration of parentage by the state Family Court.

13. ANNEXURE 1 – REFERENCES

Legislation

Acts Amendment (Gay and Lesbian Reform) Act 2002 (WA)
Adoption Act 1994 (WA)
Artificial Conception Act 1985 (WA)
Criminal Code 1913 (WA)
Family Court Act 1997 (WA)
Family Law Act 1975 (Cth)
Human Reproductive Technology Act 1991 (WA)
Interpretation Act 1984 (WA)
Law Reform (Decriminalisation of Sodomy) Act 1989 (WA)
Marriage Amendment (Definition and Religious Freedoms Act 2017 (Cth)
Sex Discrimination Act 1984 (Cth)
Surrogacy Act 2008 (WA)
Surrogacy Regulations 2009 (WA)

Cases

Adair & Anor and Bachchan [2017] FCWA 78
Carlton & Bissett [2013] FamCA 142
Family Court of WA, Media Statement 14 April 2016 www.familycourt.wa.gov.au
Farnell & Anor and Chanbua [2016] FCWA 17
McBain v State of Victoria [2000] FCA 1009

Reports/Journals

ABC news online, Western Australia 31 October 2017.
Fitzgerald O, Harris K, Paul RC, Chambers GM 2017. Assisted reproductive technology in Australia and New Zealand 2015. Sydney: National Perinatal Epidemiology and Statistics Unit, the University of New South Wales Sydney
Hansard, 1 March 2005, p.194a
Same sex couples ‘make good parents: researchers’ The Australian 23 October 2017.
Statistics from annual reports, accessed 10 March 2018.
Surrogacy Directions 2009 (WA), direction 8

*Taylor, D 'A report identifying problems in the Australian approach to both domestic and International Surrogacy Arrangements' LLM studies
WA RTC Annual Report 2016/2017.*

Internet Sources

*<https://www.varta.org.au/information-and-support/surrogacy> [accessed 10 March 2018]
http://www.conceptfertility.com.au/files/5814/4461/7000/Surrogacy_Information_Sheet_12-3-15_UserTemp-6.pdf; <https://www.pivet.com.au/products/surrogacy/surrogacy/>,
<https://www.pivet.com.au/faq/>; <https://www.hollywoodivf.com/assisted-conception/surrogacy-information/> [all accessed on 28 February 2018]*