



**FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**Friday 19 September 2012**

**Chief Federal Magistrate Pascoe AO CVO**

**LegalWise 2<sup>nd</sup> Annual International Family Law Conference Cambodia:  
Intercountry Surrogacy – A new form of trafficking?**

**I. Introduction<sup>1</sup>**

The aching desire for a child felt by those unable to conceive by normal means, poverty and the profit motive can be a terrible combination resulting in exploitation (especially of the poor), abuse of human rights and the commodification of children. It is a lethal combination all the more shocking because those involved are often in positions of trust.

In about 2006 on a visit to a remote Wat in Payao I first became aware of what might be called “baby trafficking” – more specifically the movement of pregnant women across national boundaries in order to sell the newly born child – perhaps not technically trafficking at all because the women may be moving willingly and without coercion (although this may not always be the case) and giving up their babies to the traffickers for small sums of money and/or because they believe the children will have a chance for a better life. I decided to investigate this more fully, especially as even at a United Nations (UN) level so little was known. I was horrified at what I then found. In the time since the problem has only grown.

The sale of babies in various forms is a huge and highly profitable enterprise. The UN estimates this form of trafficking alone may be worth some \$10 billion.<sup>2</sup>

Let me start with an example of “baby trafficking” in its crudest form.

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<sup>1</sup> I wish to acknowledge the contribution of my Legal Associate Mr Tristan Baker in preparing this paper.

<sup>2</sup> Chief Federal Magistrate, John Pascoe, “Trafficking in Unborn Children” (Speech delivered at the LAWASIA Children and the Law Conference, Singapore, 23 May 2009).



In 2005 the UN Special Rapporteur on the Sale of Children related the following:

*In September 2003 a fishing boat from the Indonesian island of Tanjung Balai Karimun was allegedly intercepted heading towards Malaysia. According to information received, eight babies were found on this boat, packed in Styrofoam in fish boxes punctured in order to allow the babies to breath.<sup>3</sup>*

There have also been reports of babies being packed into vegetable crates and transported from Vietnam across China in carry bags for eventual sale.<sup>4</sup> Not surprisingly there was a lot of “spoilage” as some babies died in the process. Additional problems also arose if the babies were later found to be suffering from a serious illness. For example, a ring that was broken up in Singapore were found to have been abandoning 18 month old babies, that they had originally intended to sell, once they discovered the babies were suffering from HIV.<sup>5</sup>

Given the inherent difficulty in moving children, many traffickers have discovered that it is easier to move the mother with the baby “in utero”. The mother can then give birth in a safe place from which the baby can be sold and moved.

There is no time in this paper to deal in detail with all the documented evidence concerning these offences. Suffice it to say that major and highly profitable networks have also been broken up by police in Europe where women were moved from Eastern Europe to give birth in Greece and the babies sold primarily to couples from Italy and France looking to adopt illegally.<sup>6</sup> I also do not deal in this paper with the legal problems which arise when couples seek to adopt outside of the established legal framework except to note that this usually leaves the child in a position where he or she may never be able to discover their parentage.

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<sup>3</sup> UNCHR, “Report of the Special Rapporteur on the Sale of Children, child prostitution and child pornography, Juan Miguel Petit, Addendum, Communications sent to Governments and replies received”, 8 March 2005, UN Doc E/CN.4/2005/78/Add.3, at para 120; and UNCHR, “Report of the Special Rapporteur on Violence against women its causes and consequences, Yakin Erturk, Addendum, Communications to and from Governments”, 18 March 2005, UN Doc E/CN.4/2005/72/Add.1, [195].

<sup>4</sup> Vietnam gang “Smuggle 30 Babies” (9 April 2008) BBC News <<http://news.bbc.co.uk/2/hi/asia-pacific/7827800.stm>> last accessed 18 September 2012.

<sup>5</sup> S Powell, “HIV alert exposes baby trafficking” *The Australian* (Sydney) 15 June 2004.

<sup>6</sup> Rebecca Surtes, *Other Forms of Trafficking in Minors: Articulating Victim Profiles and Conceptualizing Intervention*, NEXUS Institute to Combat Human Trafficking, International Organization for Migration, 2005.



Now the traffickers have discovered another, perhaps even less readily detectable and less regulated<sup>7</sup> opportunity to make a profit – and unfortunately it is not just international criminals or corrupt officials who have seen the opportunity for profit. Many outwardly respectable people and organisations have seen the growth of international surrogacy as an opportunity to make money.<sup>8</sup> Surrogacy arrangements also have the additional inducement that they can get over some of the problems with illegal adoption. This is because there is in most instances a genetic relationship between the child and at least one of the intending parents.

## II. Definitions

For those unfamiliar with the recent developments in the field of reproductive medicine it may be useful to give some provisional definitions.

Most states with laws relating to surrogacy arrangements distinguish between “altruistic surrogacy” and “commercial surrogacy”. In altruistic surrogacy arrangements, the surrogate mother receives no compensation for carrying and delivering the child. In commercial surrogacy the “free market” philosophy is applied, allowing surrogate mothers and/or the facilitating organisations to make a net gain.

It is also necessary to point out that there are different types of surrogacy: either “traditional” or “gestational”.

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<sup>7</sup> Cf: a non-exhaustive list of current treaties created to protect the rights and interests of children and their mothers in the area of international adoption include: Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, 1870 UNTS 167 (entered into force 1 May 1995) (“Hague Adoption Convention”). See also the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (“UNCRC”) and its *Optional Protocol on the sale of children, child prostitution and child pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002); the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) (“Palermo Protocol”); the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); and the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>8</sup> With reports that intercountry surrogacy brings US\$445 million per year into India alone it is not hard to see why traffickers are making the switch. See Karen Smith Rotabi and Nicole Footen Bromfield, “The Decline in Intercountry Adoption and New Practice of Global Surrogacy: Global Exploitation and Human Rights Concerns” (2012) 27 *Affilia* 129, 133.



- In **traditional surrogacy** (also known as “complete surrogacy”) the eggs of the surrogate mother are used in the conception of the child. The surrogate mother will carry the child for another couple or person, and then relinquish the baby once born. This form of surrogacy has been practiced around the world for thousands of years. In Australia, for example, the customary adoption practices of some communities in the Torres Strait have been described as similar to Western styled surrogacy.<sup>9</sup>
- **Gestational surrogacy** is a far more recent phenomenon which has been made possible by advances in *in vitro* fertilisation (IVF) technology. In this form of surrogacy an embryo is created *in vitro* and then transferred into the uterus of a woman who does not contribute the egg. The sperm of the intended father can be used in this process to create a genetic link with the child. Gestational surrogacy now accounts for 95 per cent of all surrogate pregnancies in the United States.<sup>10</sup>

The distinction between these two forms of surrogacy has important implications in the area of family law. In traditional surrogacy arrangements the surrogate mother is genetically related to the child. However, in gestational surrogacy the surrogate mother does not contribute an egg and merely plays the role of “carrier”. This can create uncertainty when attempting to determine the child’s parentage or nationality as I will elaborate on later.

### III. The Hague Adoption Convention and Surrogacy

A prohibitive legal approach to surrogacy in many states, such as Australia<sup>11</sup>, combined with the liberal approach of a minority of States has led many intending parents to use surrogate services abroad.<sup>12</sup> This has precipitated a rapid expansion in surrogacy treatment clinics in countries such as India where there are now an estimated 600 IVF clinics assisting 60,000

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<sup>9</sup> *Lowe & Barry and Anor* [2011] FamCA 625, 4.

<sup>10</sup> Usha Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India” (2008) 39 *Cumberland Law Review* 15, 17.

<sup>11</sup> See *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Statutes Amendment (Surrogacy) Act 2009* (SA); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Contracts Act 1993* (Tas); and *Surrogacy Act 2008* (WA).

<sup>12</sup> Hague Conference on Private International Law, “A Preliminary Report on the Issues Arising from International Surrogacy, Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation of Intercountry Adoption”, 7.



parents a year.<sup>13</sup> One Australian participant has disturbingly described this process of “procreative tourism”<sup>14</sup> as “like going to the supermarket to pick up your baby”.<sup>15</sup>

In 2011 the Permanent Bureau to the Hague Conference on Private International Law pointed out the inability of current anti-trafficking conventions to deal with intercountry surrogacy.<sup>16</sup> Many current treaties include broad mandates, such as Article 35 of the UNCRC which requires States to:

*[T]ake all appropriate national, bilateral and multilateral measures to prevent the abduction of, sale of or traffic in children for any purpose or in any form.*<sup>17</sup>

However, the current definition of child trafficking requires traffickers to have a purpose of exploiting the child (such as through forced prostitution or labour) before it will be considered criminal.<sup>18</sup> It is hard to establish this “exploitation” motive in the case of intercountry surrogacy where the child normally goes to a loving family.

In the absence of any international regulation, intercountry surrogacy remains in a situation similar to that of international adoption prior to the 1993 Hague Adoption Convention. This leaves the potential for great harm to be caused to children, vulnerable surrogate mothers and naïve commissioning parents involved in the process.<sup>19</sup>

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<sup>13</sup> Neeta Lal, *Risks flagged in India’s fertility tourism* (1 August 2012) Asia Times Online <[http://www.atimes.com/atimes/South\\_Asia/NH01Df01.html](http://www.atimes.com/atimes/South_Asia/NH01Df01.html)> last accessed 28 August 2012.

<sup>13</sup> This term was originally used in 1999. See R Deech, “Clones, Ethics and Infertility or Sex, Sheep and Statutes” (1998-99) 2 *Quinnipiac Health Law Journal* 133, 133.

<sup>14</sup> This term was originally used in 1999. See R Deech, “Clones, Ethics and Infertility or Sex, Sheep and Statutes” (1998-99) 2 *Quinnipiac Health Law Journal* 133, 133.

<sup>15</sup> Heath Aston, “It was like going to a supermarket to pick up your baby” (Sydney), 2 September 2012, 16.

<sup>16</sup> Hague Conference on Private International Law, “Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements, Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference”, 21-22.

<sup>17</sup> See above n 7.

<sup>18</sup> See Palermo Protocol, above n 7.

<sup>19</sup> Erica Davies, “The Rise of Gestational Surrogacy and the Pressing Need for International Regulation” (2012) 21 *Minnesota Journal of International Law* 120, 137-138.



#### **IV. Exploitation – but not as the Hague Adoption Convention knows it**

The potential for exploitation and abuse in the field of commercial surrogacy is well recognised. In 2009 the Australian Standing Council of the Attorneys-General noted that commercial surrogacy “commodifies the child” and “risks the exploitation of poor families for the benefit of rich ones”.<sup>20</sup> This potential for harm, according to SCAG, justified criminalising the practice of commercial surrogacy in Australia.

The most prevalent dangers created by intercountry surrogacy include the uncertain legal parentage and nationality of the children born; the diminution of the child’s rights; and the risk of vulnerable women being exploited. I will look briefly to each of these issues.

##### **(a) Uncertainty Surrounding the Child’s Parentage and Nationality**

Surrogacy arrangements normally come to the attention of receiving state authorities in one of two ways: either at overseas consular authorities when the intending parent(s) request a passport for the child in order to return home; or when intending parent(s) and the child are back in the receiving state and they wish to ensure that the child’s legal status is regularised there.<sup>21</sup>

Determining the parentage and nationality of intercountry surrogates can be a complicated and fraught task. Many States have differing rules on what evidence is required to prove identity and nationality. In Common Law countries the question of legal parentage is often viewed as a matter of fact, rather than a conclusion of law. Foreign birth certificates may, therefore, carry very little weight.<sup>22</sup>

Due to these difficulties, the procedures being used by intending parents are often cumbersome and lengthy which is obviously not in the best interests of the child.<sup>23</sup> Often parentage or nationality cannot be established and children may be left “marooned, stateless and parentless” as Justice Hedley pointed out in the English case of *Re X & Y*.<sup>24</sup>

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<sup>20</sup> Standing Committee of Attorneys-General Joint Working Group, *A proposal for a National Model to Harmonise Regulation of Surrogacy* (2009), 4-5.

<sup>21</sup> Hague Conference on Private International Law, above n 16, 19.

<sup>22</sup> *Ibid* 19-24.

<sup>23</sup> *Ibid*, 20.

<sup>24</sup> *Re X & Y (Foreign Surrogacy)* [2009] Fam 71, 76C.



### **(b) The Children Involved are Placed at Risk**

As there is little or no regulation in the States where surrogacy arrangements are being conducted creating a risk that children may be “commissioned” specifically for trafficking or abuse purposes.<sup>25</sup>

This is by no means a fanciful concern. It has been claimed that in Germany one quarter of all intercountry adoptions have a commercial or criminal background and alleged that adoption has even been used as a method for facilitating pedophilia.<sup>26</sup> In the Pennsylvania case of *Huddleston*<sup>27</sup> a twenty-six year old man entered into a surrogacy arrangement as a sole intending parent. The surrogate mother, who was a resident in Pennsylvania, was inseminated with the intending father’s sperm. The child was handed over to the father the day after birth and died approximately six weeks later as a result of sustained physical abuse.<sup>28</sup>

The Baby 101 scandal is another chilling example of how child traffickers are abusing current surrogacy arrangements. In early February 2011 Thai Police rescued thirteen Vietnamese women from an “illegal and inhuman” surrogate baby breeding ring. These women had been kept in two houses run by a trafficking syndicate with links to Taiwan, China and Burma. The Thai Minister of Public Health also noted “In some cases it looks like [the women] were raped” in an unsophisticated attempt to produce surrogate children.<sup>29</sup>

Press reports at the time indicate that the women involved had been inseminated by various means in Vietnam and moved to Bangkok. They were then locked up in “safe houses” for the period of gestation. The purchasers would arrive when the babies were born. The “father” was in fact genetically related to the child. It was claimed the Vietnamese women were

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<sup>25</sup> This concern was raised by the Permanent Bureau of the Hague Convention in 2011, see above n 16 18.

<sup>26</sup> Carlotta Alloero, UNICEF Innocenti Research Centre, “Inter-Country Adoption, Sale of Children & Child Trafficking: Misunderstanding and Evidence” (2009), 7 (on file with the author).

<sup>27</sup> *Huddleston v Infertility Center of America, Inc.*, 700 A.2d 453 (Pa. Super. Ct. 1997).

<sup>28</sup> Hague Conference on Private International Law, above n 16, 19.

<sup>29</sup> AFP, *Women freed from ‘inhuman’ baby ring* (25 February 2011) ABC News <<http://www.abc.net.au/news/2011-02-25/women-freed-from-inhuman-baby-ring/1956588>> last accessed 7 September 2012. States may be able to combat this extreme form of surrogate trafficking by implementing the terms of some international treaties already in existence. For example the “Model Law against Trafficking in Persons”, developed by the United Nations Office of Drugs and Crime to assist States with the implementation of the Palermo Protocol specifically mentions “forced pregnancy” and the “use of women as surrogate mothers” as potential examples of “exploitation” which could be included in domestic criminal laws against trafficking.



willing participants in the process and happy to part with the child at birth. The evidence, such as was made public, pointed in the contrary direction.

In light of these human rights violations and other cases involving commercial exploitation of poor Thai women the Thai Government has proposed a draft Surrogacy Act that would expressly outlaw commercial surrogacy with proposed sentences of up to 10 years for contravention.<sup>30</sup>

### **(c) Further Exploitation Risks for Other Actors Involved**

As the Baby 101 case demonstrates, intercountry surrogacy arrangements have the potential for harmful consequences not only for the children involved but also their birth mothers. This is particularly so if the birth mother is poor, illiterate and unaware of her rights. It maybe important to note at this stage that the phenomenon of surrogate child trafficking is not a unique problem to South East Asia, but exists all over the world. In Europe there have been reports that young Polish women were lured to the Netherlands, Belgium and Germany to act as surrogate mothers to childless couples.<sup>31</sup>

Apart from the trafficking element, vulnerable surrogate mothers are also placed at a high risk or harm by market based decisions in commercial surrogacy arrangements. In India it has been observed that Cesarean sections are routinely used in the case of surrogate pregnancies. Such operations are preferred over natural birth as it allows paying couples to choose the birth date of their child that best suits them.<sup>32</sup> It also benefits the clinics who can charge additional costs for the operation. Little thought is given to the birth mother whose risk of death during child birth is two-to-three times higher than what it would be in a natural birth.<sup>33</sup>

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<sup>30</sup> Corporate Counsellor, *Draft surrogacy act under consideration* (22 April 2011) Bangkok Post <<http://www.bangkokpost.com/business/economics/233141/draft-surrogacy-act-under-consideration>> last accessed 11 September 2012.

<sup>31</sup> Abi Daruvalla, *Poles hired as surrogate mums in illegal trade* (4 June 1995) The Independent <<http://www.independent.co.uk/news/world/soles-hired-as-surrogate-mums-in-illegal-trade-1584960.html#>> last accessed 7 September 2012.

<sup>32</sup> Rotabi and Bromfield, above n 8, 133.

<sup>33</sup> Scott Carney, *Inside India's Rent-a-Womb Business* (10 March 2010) Mother Jones <<http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>> last accessed 7 September 2012.



One tragic example of this commercially driven mindset was reported in 2010 when a surrogate mother died after giving birth. It was reported by her husband that as soon as the baby was delivered the mother was thrown out of the private surrogacy clinic and told by the managing physician to find care in a public hospital. She died before her husband could secure a place.<sup>34</sup>

The practice of commercial surrogacy also raises concerns about the level of self-determination and free will vulnerable surrogate mothers are able to exercise. Rotabi and Bromfield, in the context of South American surrogacy arrangements, have made a blunt observation in this regard:

*The choice between 9 months of being well-fed and medically monitored as a surrogate (even if behind lock and key) is far superior to being forced into prostitution internally or trafficked for sex in other nations like neighbouring Mexico or beyond, where women face brutal conditions of sex work/slavery.*<sup>35</sup>

As is the case with human trafficking for the sex industry, traffickers looking for potential surrogate mothers prey on rural women who they compel to move to major cities to be exploited. One surrogate mother in India has recounted the process that was used to recruit her. She recalled “Madam told me I should become a surrogate and if I do, all my worries will go away”. This woman was also told to “think of the pregnancy as ‘someone’s child comes to stay at your place for nine months.’”<sup>36</sup>

The unsophisticated nature of many of the women preyed upon to become surrogate bearers and the procedural similarities with other forms of human trafficking should be cause for concern.

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<sup>34</sup> Ibid.

<sup>35</sup> Rotabi and Bromfield, above n 8, 136.

<sup>36</sup> Sam Dolnick, *Pregnancy Becomes Latest Job Outsourced to India* (30 December 2007) USA Today <[http://www.usatoday.com/news/health/2007-12-30-surrogacy\\_N.htm](http://www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm)> last accessed 7 September 2012.



I have to ask also what does it say about the moral values of those rich nations, that they are prepared to use women from poorer countries as “battery hens” and see as acceptable the exploitation of these women in ways which would never be accepted at home.

## V. The Approach of the Australian Judiciary

Australia’s current approach to surrogacy arrangements has been succinctly put by Justice Benjamin in the Family Court of Australia. In a case concerning a domestic surrogacy arrangement His Honour noted “Modern science and medical skill surrounding the creation of life are now well ahead of legal, social and legislative policy”.<sup>37</sup>

The recent decision of *Ellison & Karnchanit*<sup>38</sup> is the latest case to grapple with the complicated issues posed by intercountry surrogacy and offers some assistance. Here Justice Ryan was petitioned to award parental responsibility over twins in favour of a couple who had contracted for a surrogate baby to be born in Thailand, using the father’s sperm.

The case is a good illustration of the complex issues surrounding the determination of parentage and nationality. One issue, for example, is the problem posed by section 60H of the *Family Law Act 1975* (Cth). Upon first reading this section suggests that if the surrogate mother was in a de facto relationship at the time of artificial conception then the child may belong to the birth mother and her de facto partner.<sup>39</sup> This is despite the fact that the applicant’s sperm was used in the conception procedures.<sup>40</sup>

In the end the decision was made easier by the fact that the birth mother desired no role in the children’s life. It was therefore in the children’s best interests that the commissioning couple shared parental responsibility of the children.<sup>41</sup>

In making this order Her Honour formulated some rules (Best Practice Principles) to be considered when hearing a case concerning intercountry surrogacy.<sup>42</sup> These rules include

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<sup>37</sup> *Lowe & Barry and Anor* [2011] FamCA 625, 2.

<sup>38</sup> *Ellison and Anor & Karnchanit* [2012] FamCA 602.

<sup>39</sup> *Ibid*, 16.

<sup>40</sup> For a similar approach see the English case of *Briody v St Helens and Knowsley Health Authority* [2002] QB 856. In that case it was decided that if an individual enters a non-commercial surrogacy arrangement, the surrogate mother is awarded legal parentage, even if the child is conceived using the egg of the intending mother and is genetically related to the contracting parties.

<sup>41</sup> *Ellison and Anor & Karnchanit* [2012] FamCA 602, 35.



requiring, *inter alia*, confirmation that the surrogacy arrangement was entered into before the child was conceived and that the birth mother had give *informed consent*.

*Ellison*, however, does not definitively resolve the problems created by intercountry surrogacy. Judicial decisions, by their nature, remain ad hoc, and judges are often restricted to unique factual matrices of the case before them. Applications to the court can also be a cumbersome and lengthy process which is not in the interests of the child who is left in limbo.

There is also the additional problem that courts are faced with a *fait accompli* situation once the child has been brought back into Australia. Once the child is within Australia the courts must priorities the interests of that child.<sup>43</sup> This may place the courts at odds with public policy designed to discourage intercountry surrogacy arrangements.<sup>44</sup>

## **VI. The Need for Global Safeguards**

Due to the globalised nature of intercountry surrogacy arrangements, regulation on an international scale is necessary in order to adequately protect the rights of the parties involved. It has been suggested that the establishment of a Convention based on international co-operation, similar to the Hague Adoption Convention, would be the best solution.<sup>45</sup>

An international convention would help alleviate the main concerns identified above. Some salient requirements for such a convention were identified in a 2009 Memorandum on intercountry surrogacy commissioned by the Hague Adoption Convention. According to the Memorandum, to ensure adequate protection a surrogacy convention must:

- Include an adapted version of Article 23 of the Hague Adoption Convention requiring States to recognise certified adoptions made in accordance with the Convention;<sup>46</sup>

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<sup>42</sup> Ibid, see [132]-[140].

<sup>43</sup> See *Family Law Act 1975* (Cth), ss 60CA and 65AA; also Art 3 UNCRC.

<sup>44</sup> See *Re X & Y (Foreign Surrogacy)* [2009] Fam 71, [20].

<sup>45</sup> Katarina Trimmings and Paul Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level" (2011) 7(3) *Journal of Private International Law* 627, 633.

<sup>46</sup> "Memorandum: Is there a need to regulate intercountry surrogate-pregnancy agreements in private international law?", written under the instruction of Peretz Segal, Ministry of Justice Israel, by



- Incorporate a modified version of Article 26 of the Hague Adoption Convention specifying that recognition includes recognition of “the parent-child relationship between the child and his or her adoptive parents”;<sup>47</sup>
- Include a provision requiring the approval of intercountry surrogacy agreements prior to their inception allowing courts in member states to avoid a *fait accompli* situation;<sup>48</sup> and
- Create Centralised Authorities, similar to those created under Article 17 of the Hague Adoption Convention, charged with the Supervision of private surrogacy provider agencies operating within its jurisdiction.

Such a convention would have the advantage of directly regulating intercountry surrogacy arrangements. It would also help provide a useful framework for determining what represents a legitimate surrogacy arrangement and what constitutes human trafficking.

## VII. Conclusion

As the National Committee on Bioethics of Cyprus observed “[T]he use of a surrogate mother conflicts with the principle of human freedom. A new kind of slavery and commercialisation of human beings is created.”<sup>49</sup> In this commercialised arrangement women are often reduced to moveable property and objects of reproductive exchange in a transaction that may more aptly be termed “reproductive trafficking”.<sup>50</sup>

In a paper in 2009 I dealt in detail with the gaps in the UN framework and in national laws to protect the newly born child.<sup>51</sup> The need for regulation, to ensure the most vulnerable are protected, is now more urgent than ever.

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Jennifer Chernick, B.A. Stanford University, 2009 (on file with the Permanent Bureau), 10.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid, 20.

<sup>49</sup> “Memorandum: Is there a need to regulate intercountry surrogate-pregnancy agreements in private international law?”, written under the instruction of Peretz Segal, Ministry of Justice Israel, by Jennifer Chernick, B.A. Stanford University, 2009 (on file with the Permanent Bureau) citing Anna Hassapi, “Woman’s Surrogacy Ordeal Highlights Lack of Legal Protection” available at <<http://www.cyprus-mail.com/news/main.php?id+45879>>.

<sup>50</sup> Usha Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India” (2008) 39 *Cumberland Law Review* 15 citing Janice G Raymond, *Reproduction, Population, Technology and Rights* (4 May 2007) Isis International <[http://www.isiswomen.org/index.php?option=com\\_content&task=view&id=534&Itemid=200](http://www.isiswomen.org/index.php?option=com_content&task=view&id=534&Itemid=200)> last accessed 10 September 2012.

<sup>51</sup> Pascoe, above n 2.



I would like to conclude with the following comment given by a now grown up surrogate child. In a haunting way, it illustrates how the interests of the child can so often be left out of the equation and why regulation is necessary to ensure that the child's interests are paramount:

*Because somewhere between narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants are put before the kids['] needs. We, the children of surrogacy, become lost. That is the real tragedy.<sup>52</sup>*

How many children have been lost or condemned to a life of eternal turmoil and a desperate search for self-discovery, in favour of those wanting to make a quick buck from the desperation of poverty on the one hand and the desperate desire to be a parent on the other?

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<sup>52</sup> Smerdon, above n 10, 60.