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Surrogacy in Australia // Leihmutterschaft in Australien

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Surrogacy in Australia

M. Montrone¹, P. Thorn²

Kurzfassung: Leihmutterschaft in Australien. In Australien wird die Leihmutterschaft seit den 1990er-Jahren durchgeführt, wobei die altruistische Leihmutterschaft erlaubt und die kommerzielle Leihmutterschaft verboten ist. Australien ist eine Föderation von Bundesstaaten und Territorien, in denen die Leihmutterschaft nicht auf Bundesebene, sondern in diesen Gerichtsbarkeiten gesetzlich geregelt ist. In den meisten Gerichtsbarkeiten verbietet die Gesetzgebung, eine internationale kommerzielle Leihmutterschaft durchzuführen, obwohl bislang keine Strafen verhängt wurden und die so gezeugten Kinder die australische Staatsbürgerschaft erhalten können. Die Zahl inländischer Leihmutterschaften reicht von weniger als 10 Geburten im Jahr 2005 bis etwa 80 im Jahr 2018, die Zahl der Leihmutterschaften außerhalb Australiens war 2018 fast dreimal so hoch (232). Innerhalb Australiens ist für alle Beteiligten eine psychosoziale Beratung erforderlich, und obwohl diese Beratung auch bei einer Leihmutterschaft im Ausland empfohlen wird, ist sie gesetzlich nicht vorgeschrieben und wird nur selten durchgeführt.

Es wird als wichtig erachtet, dass Kinder, die im Rahmen einer Leihmutterschaft geboren werden, Zugang zu Informationen zur Identifizierung ihrer Leihmutter (und gegebenenfalls des Sponsors bzw. der Spenderin) haben, bei einer inländischer Leihmutterschaft werden diese Informationen von den zuständigen Behörden aufbewahrt. Im Ausland geborene Kinder haben möglicherweise keinen Zugang zu dieser Information.

Schlüsselwörter: Leihmutterschaft, Australien, psychosoziale Beratung, Gesetzgebung

Abstract: In Australia, surrogacy has been practiced since the 1990s, with altruistic surrogacy permitted and commercial surrogacy prohibited. Australia is a federation of states and territories with surrogacy covered by legislation in these jurisdictions rather than federally. In most jurisdictions, legislation also prohibits citizens undertaking international commercial surrogacy, though no penalties have been enforced, and the offspring are able to obtain Australian citizenship. Numbers of local births through domestic surrogacy range from less than 10 in 2005 to approximately 80 in 2018, with surrogacy births to Australian intended parents through overseas surrogacy being nearly three times as great (232) in 2018. Counselling is required for all parties to surrogacy arrangements in Australia, and though recommended for parties to overseas surrogacy, it is not required by legislation, and is rarely undertaken.

It is considered important for children born through surrogacy to have access to identifying information on their surrogate (and donor/s if relevant) and in domestic surrogacy this is retained by government authorities, though children born overseas may not have access to this information. **J Reproduktionsmed Endokrinol 2020; 17 (5): 240–5.**

Key words: surrogacy, Australia, counselling, legislation

Background and Legislation

“Family formation through surrogacy is both a complex psychological and social process. A surrogacy arrangement is one in which *before the child is conceived*, the intended parent/s and the surrogate mother (and her partner if she has one) agree that the surrogate will become pregnant *with the intention* that the child/ren will, at birth, be given into the care of the intended parents as their own. The most common reasons for surrogacy are absence of uterus (such as after surgery for women), congenital malformation of the uterus, a medical condition that compromises pregnancy making it unsafe for the woman or her prospective baby, or for men who may be in a same sex relationship (or may be single)” [1].

Attitudes to surrogacy changed significantly in Australia over the 20-year period from 1998 to 2008, with the introduction of legislation where there had been previously prohibition and sometimes criminal penalties. The births

of three children through surrogacy in Australia punctuate these changes and have been explored particularly well in an article by Professor Jenni Millbank of the University of Technology, Sydney: “*From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of ‘New’ Surrogacy in Australia.*” [2]. From this can be seen how differing surrogacy situations, and related political and community views, impacted surrogacy legislation in Australia over the period.

The overarching guiding principles of surrogacy and other third-party reproduction programmes in Australia are characterised by: fundamental concepts pertaining to altruism; rights for individuals born of surrogacy and donor gamete arrangements to be informed of the circumstances of their conception, including biological heritage; and assurances of participant informed consent [3]. This form of third party assisted reproduction has been practiced in some jurisdictions in Australia since the late 1990s, with the first legislation to recognise parentage through surrogacy being the Austral-

ian Capital Territory in 2004 [4]. And though non-commercial surrogacy was practised in New South Wales, there was no process of parentage recognition until legislation was introduced in 2010 [5].

Altruistic surrogacy, where a woman agrees to carry a baby with the intention to relinquish the child to intended parent/s for no compensation is the only form of surrogacy that is legal and commercial or compensated surrogacy is prohibited. Surrogacy is now legal in seven out of eight Australian jurisdictions, but there are subtle legislative [6] and counselling differences [7] between the states and territories. Thus, for example, treatment for same sex male couples and/or single intended parents, is currently permissible in most jurisdictions but not all (eg Western Australia).

In 1997, prior to surrogacy legislation in Australia, there was an unofficial geneticⁱ

ⁱ The surrogacy conception did not involve an IVF clinic. It would have been a home insemination using the semen of the intended father and the oocyte of the surrogate.

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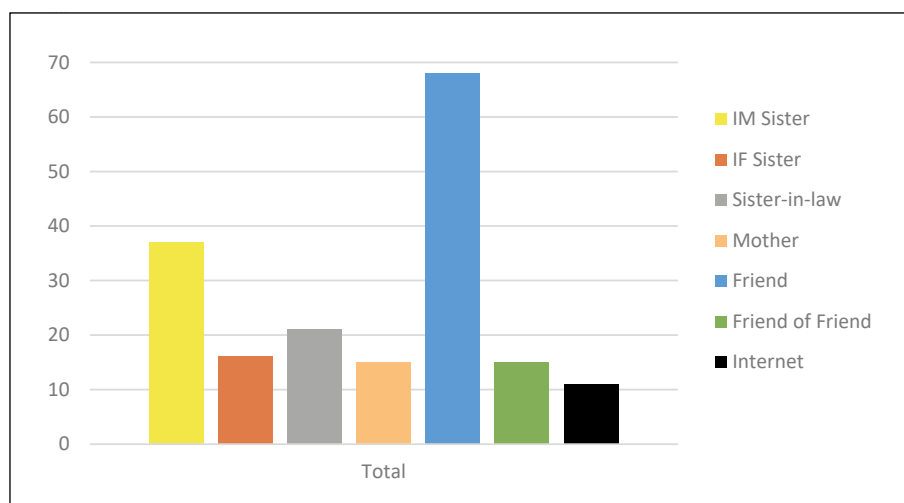


Figure 1. Number of Surrogates by Relationship to Intended Parents (4/2002–6/2020)

surrogacy arrangement between friends which resulted in the birth of “*Baby Evelyn*”. Relationships between the intended parents and the surrogate and her partner broke down, and in 1998 following a decision of the High Court of Australia the child was returned to live with the surrogate mother [8]. Since then there have been no documented cases where relinquishment has not occurred, though there have been some reported post-delivery relationship and legal differences. A 2016 systematic review [9] of research into surrogacy outcomes conducted by Söderström-Anttila and colleagues found “*most surrogacy arrangements are successfully implemented.*”

There have at times been moves to harmonise legislation Australia wide, with the most recent Australian Government “*Inquiry into Surrogacy*” resulting in a report in May 2016 [10] with recommendations related to domestic altruistic surrogacy arrangements as well as to procedures related to international commercial surrogacy arrangements involving Australian intended parents. As at September 2020 there has been no related legislative change.

■ Altruistic Surrogacy in Australia

When intended parents need to find a surrogate in Australia, they most often do this through informal family and friendship networks. In a recent study, of the sociodemographic and psychological characteristics of a large sample of 160 surrogacy arrangements over a 15-year period to 2018 [11] the connection between the surrogate mother and intended

parents was primarily close family (sisters or sisters-in-law or mothers) (48.6%) or other extended family or friends (46.3%), with the remaining small percentage meeting through online surrogacy forums (5.1%). Whilst the sample for this study was from one independent psychological practice in Sydney, New South Wales, it is a large sample over a number of years, and there is no evidence to indicate that it should not be seen as representative of the broader Australian surrogacy situation. The graph above shows relationship data from a longer period of 18 years up to June 2020.

Most intended parents were in heterosexual couple relationships, though, following legislation in the state of New South Wales [5] which permitted their treatment, 22% of the sample of intended parents were same sex male couples [11] (Fig. 1).

Medical costs of surrogacy, including for obtaining embryos, are not covered by the Australian government health organisation, Medicare. All medical, legal and surrogacy related costs, are payable by intended parents, with some variations in state and territory jurisdictions. Thus, for example, in New South Wales, there is reimbursement of surrogacy related costs for the birth mother and her partner, including “*any reasonable medical, travel or accommodation costs associated with becoming or trying to become pregnant*” [5] as well as specified “*loss of earnings*” for the birth mother [5]. There is no set limit for reimbursement in any jurisdiction in Australia. Often intended parents have investigated obtaining embryos for use in gestational surrogacy even before

finding a surrogate. Or they may already have embryos in cryostorage at an IVF clinic, such as when an intended mother does an IVF stimulation cycle prior to undergoing cancer related treatment.

It can be daunting for intended parents to know where to look to find a surrogate, and as one intended father said about the difficulty in asking for this help, “*it’s not like you are asking for a cup of coffee.*” Commonly surrogates report that when they discuss their plans with other women the response they hear is “*That’s amazing, I couldn’t do it.*” There is a range of online information available to help intended parents in finding a surrogate [12–14] and the Victorian Assisted Reproductive Technology Authority has a particularly good comprehensive brochure [15] which can be used by intended parents to search for their surrogate, and to aid in discussions about what is involved in surrogacy.

Once the parties reach the stage of actively considering going through surrogacy, they would be referred for IVF clinic medical and supportive counselling appointments related to the surrogacy, followed by referral to independent counsellors for comprehensive implications and decision-making counselling, and/or psychosocial assessment counselling, depending on the jurisdiction [6, 7]. They would also be referred to legal practitioners and the proposed surrogate mother may be required to obtain independent obstetric advice. Before a surrogacy arrangement is approved to proceed, there is a thorough comprehensive informed consent process which involves all parties to a surrogacy arrangement: the intended parent/s, and the surrogate mother and her partner. When gestationalⁱⁱ surrogacy treatment occurs, it is routine best practice for there to be single embryo transfer to ensure best health outcomes for surrogate mother and baby. Geneticⁱⁱⁱ surrogacy whilst legal, usually takes place outside an IVF clinic as a home insemination. This type of surrogacy is uncommon in Australia (<1% in a recent study [11]) unlike the United

ⁱⁱ Gestational surrogacy is undertaken at an IVF clinic. The oocyte is that of the intended mother or a donor. It is not that of the surrogate.

ⁱⁱⁱ Genetic surrogacy (also known as insemination, partial or traditional surrogacy) involves the oocyte of the surrogate, and the sperm of an intended father. Also see footnote i

Kingdom where a 2005 study by van den Akker [16] found 36% of surrogates used insemination surrogacy.

Processes for approval of a surrogacy arrangement depend on the jurisdiction [7]. There may be a requirement for pre-surrogacy reports (medical, counselling, legal) to be sent to an independent authority, such as the Patient Review Panel in Victoria; or the Ethics Committee of the IVF clinic in New South Wales and a counselling report for a genetic surrogacy arrangement would usually be sent to the legal representative of the intended parents.

After the birth of child/ren through a surrogacy arrangement there are requirements for the submission of surrogacy related reports to be submitted to the appropriate court as determined by the jurisdiction. When all processes are complete, usually within a required six months period after the surrogacy birth, there is the issuance of a new birth certificate detailing the name/s of the intended parent/s as parents of child/ren born through the surrogacy arrangement. Identifying information of all parties to the surrogacy arrangement, including any gamete donor/s and the surrogate mother, are then retained on a separate permanent government record, available to surrogacy offspring at a designated time, usually at the offspring age of 16 or 18 years.

■ Counselling in Australian Domestic Surrogacy Arrangements

Counselling by qualified^{iv} infertility counsellors is an integral part of altruistic surrogacy treatment and is required in all jurisdictions [7]. The implications of participating in a surrogacy arrangement are thoroughly considered for all, including potential offspring of the surrogacy and existing children of the surrogate mother. Adult parties to the surrogacy (intended parent/s and the surrogate and her partner if she has one) are often required to also have independent counselling [7] not dissimilar to German guidelines for psychosocial counselling in cross border reproduction [17].

^{iv} Qualification requirements depend on the state or territory jurisdiction [7]. In some there is a requirement for approval by an authority, in others it is necessary to provide evidence of qualifications and experience when a surrogacy counselling report is submitted to the court.

Comprehensive surrogacy counselling guidelines have been developed by the Australian and New Zealand Infertility Counsellors' Association (ANZICA) [1] which is a sub group of the Fertility Society of Australia. Surrogacy counselling ranges from psychoeducation and implications counselling by an IVF clinic counsellor; to counselling by an independent counsellor with comprehensive psychological assessment of the surrogacy; and post-birth counselling after the birth of child/ren through a surrogacy arrangement. Depending on the jurisdiction there may be legislated requirement for counselling [7] at one or all of the following stages of the surrogacy:

Pre-surrogacy counselling of all parties to a surrogacy arrangement

The following issues are considered during pre-surrogacy counselling with intended parent/s, surrogate and her partner, if she has one:

- *Psychological wellbeing of the surrogate*: her reproductive history, coping strategies, mental health history, current psychological state, stress factors;
- *Relationships*: relationships between the parties to the surrogacy arrangement, commitment to and motivation for the surrogacy, capacity to make independent decisions, implications for existing children and for children to be born of the surrogacy, planned future relationships (before, during and post pregnancy);
- *Gametes/embryos*: decision making around the choice of sperm in same sex male couple intended parents; availability of a permanent, accurate record of conception, gestation and birth of surrogacy offspring;
- *Surrogacy treatment*: the amount of perceived control by intended parents over the birth mother's behaviour during treatment, pregnancy risk factors, attitudes to pre-natal screening, pregnancy loss as well as termination of pregnancy if diagnosis of disability, sovereignty of the surrogate related to decisions over her body; and
- *Legal/process*: forensic history, awareness and acceptance of legal ramifications and informed consent issues, possibility of a breakdown in the surrogacy, and a dispute resolution plan.

During delivery/handover counselling

Though there is no formal requirement for involvement of a counsellor at a hospital during a surrogacy birth, there may be informal input from hospital social workers, and comprehensive nursing and medical support is reported. Further, issues related to the handover of a child born through a surrogacy arrangement are discussed as part of the routine pre-surrogacy counselling and there may have been a handover or relinquishment plan developed. Depending on the wishes of the surrogate, all parties to the surrogacy arrangement may be present during the obstetric delivery, though when there is additional medical intervention, such as a caesarean, only one support person may be permitted.

Post-birth counselling

There is mostly no formal requirement for post-birth supportive counselling. Whilst intended parent/s may seek supportive therapy to help with management of the baby, there is no evidence of increased problems with parenting in comparison to the general new parent population, nor of infant psychological attachment problems. Sometimes a surrogate may seek counselling to help with management of post-birth emotional issues. A breakdown in the relationship between surrogate and intended parent/s is rare, but if it occurs one or more parties may seek therapeutic support.

In the state of New South Wales [5], there is a legal requirement for post-birth relinquishment counselling of the surrogate mother, and her partner if she has one. Experience has shown this to be a valuable step on the surrogacy journey, acting as a debrief session for the surrogate about the surrogacy experience and related impact on her life and that of her family. Post-birth relationships with the intended parent/s and the baby she has relinquished are also explored. Most often the surrogacy is reported as being a very "*special*" experience, valued not only by intended parent/s but also by family and community. Issues considered in post-birth relinquishment counselling include: emotions and physical reactions of the surrogate mother before, during and after delivery of the baby; the pregnancy, delivery and handover of the baby - how it proceeded, who was present, and reac-

tions of all parties during delivery and afterwards; and post-birth contact of the surrogate mother with the baby and the intended parent/s.

Parentage order counselling of all parties to the surrogacy arrangement

In some jurisdictions [7] (New South Wales, Queensland, Tasmania, Western Australia) there is a formal requirement for parentage order counselling for all parties to the surrogacy arrangement: intended parent/s, surrogate, and her partner if she has one, and also the child/ren born from the surrogacy arrangement. A report on this counselling may be required before the court issues a new birth certificate in the name/s of the intended parents. Issues considered in parentage order counselling include: the understanding of all parties of the social and psychological implications of the making of a parentage order; each party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child/ren; whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given.

Counselling in surrogacy is thus comprehensive and will take time, with pre-surrogacy counselling occurring over 1 to 2 months before treatment. Sometimes parties decide not to proceed (5%) following consideration of issues raised during counselling with a small percentage (1.7%) assessed as unsuitable [11]. However, most cases proceed and the counselling ensures that they do so with a full awareness of all implications for themselves and all other parties.

■ Births in Australia through Surrogacy Arrangements

There is no official government record of information on surrogacy births in Australia prior to 2005, however there is anecdotal evidence of surrogacy treatment from the late 1990s in some states (Australian Capital Territory, New South Wales) resulting in a small number of babies born. Though there are state and territory legal processes for a change of birth certificate to show the names of intended parents rather than surrogate birth mother, Australia wide data is not available.

Table 1. Births (liveborn) in Australia through Gestational Surrogacy. Mod. from [18].

Calendar Year	Single-tons	Twin Births	Total Births
2005	6		6
2006	17	6	23
2007	7		7
2008	8		8
2009	17	2	19
2010	12	4	16
2011	21	1	23
2012	19		19
2013	35		35
2014	36		36
2015	52		52
2016	45		45
2017	62		62
2018	85	1	87

Thus, summary statistical information on gestational surrogacy births in Australia (Tab. 1) was obtained from the Australia and New Zealand Assisted Reproduction Database (ANZARD) [18]. The information for the 2018 calendar year is the latest data and was published in 2020. Note that this includes a small number of surrogacy births in New Zealand, with there being for example 9 surrogacy related applications for adoption in 2017 [19]. Note also that there could be potentially a domestic New Zealand surrogacy birth for Australian intended parent/s and an Australian domestic surrogacy birth for New Zealand intended parent/s.

As genetic surrogacy arrangements usually take place outside an IVF clinic there would be no details in the table

Table 2. Citizenship Approvals for Births through International Surrogacy. Mod. from [22].

Year 1 July – 30 June	Total Births
2008/2009	10
2009/2010	< 10
2010/2011	30
2011/2012	266
2012/2013	244
2013/2014	263
2014/2015	246
2015/2016	207
2016/2017	164
2017/2018	170
2018/2019	232

of ANZARD [18] gestational surrogacy arrangements. The numbers, however, are very low as evidenced in the recent study [11] with only 2 out of the 160 cases being genetic surrogacy. Note also that there would be some donor oocyte gestational surrogacy arrangements included in Table 1 and for an estimate of numbers it is of interest that in this same study there were 20 arrangements using donor oocytes out of the 160 cases [11].

■ International Surrogacy (Cross Border Reproductive Services)

As can be seen from Table 2 below there was a marked increase in the number of citizenship approvals for offspring of international surrogacy treatment from 2009/2010, evidence of increased international surrogacy arrangements undertaken by Australians, most of which would have been commercial, even though prohibited in most home jurisdictions. This increase was most probably connected to the significant political and legislative focus and related media attention in Australia during the development of legislation in a number of states in the preceding few years. This would have alerted intended parents to the possibility of surrogacy for family formation but did not give them enough knowledge of the benefits of altruistic surrogacy locally for them to follow this path, and nor did they have enough knowledge of the disadvantages and prohibitions of international commercial surrogacy to decide against travelling overseas. As well, there is a consumer group, "Surrogacy Australia" [14] which has been active in the promotion of international surrogacy.

There have also been unfounded concerns that surrogates in Australia may refuse to relinquish the child and a belief that domestic surrogacy was too long and complicated a process [20]. And as there are few upfront requirements required for overseas surrogacy, it may appear to be quicker and easier. However, as evidenced by recent difficulties related to international surrogacy since the COVID-19 pandemic [21], problems with overseas surrogacy tend to occur at the end of the surrogacy process, rather than the beginning.

There is little evidence of counselling in most overseas surrogacy arrangements,

though some jurisdictions do require psychological assessment of surrogates. Following the Australian government “*Inquiry into Surrogacy*” in 2016, it was recommended in the report “*Surrogacy Matters*” [10] that it be a requirement of approval of overseas surrogacy that there be evidence of similar counselling requirements to those of surrogacy arrangements in Australia, such as pre and post surrogacy counselling for all parties to the arrangement [7]. Currently, the requirements for intended parents who are organising for Australian citizenship for children born through surrogacy arrangements are to provide evidence of a parental link^v; and the surrogate mother’s identifying information and proof of consent, before there is citizenship approval [22].

Citizenship for Children born through International Surrogacy

In most states and territories (eg. Australian Capital Territory, New South Wales, South Australia, Queensland) it is an offence for a resident to undertake a commercial surrogacy arrangement outside Australia. However, despite this prohibition, it is not uncommon for residents in such jurisdictions to undergo surrogacy arrangements overseas resulting in the birth of children, and to date, there have not been any penalties imposed related to current legislation [2]. These children would usually be granted Australian citizenship with numbers of citizenship approvals for the years 2008/2009 to 2018/2019 shown in Table 2. This information was obtained through applications to the Australian Department of Home Affairs under the Freedom of Information Act 1982 [23].

Comparison of Domestic and Overseas Surrogacy

Concerns regarding the exploitation of women in many countries offering international commercial surrogacy have been raised for years, and are well documented [24, 25]. There is also often evidence of significant socioeconomic disparity of surrogates compared with intended parents. This is quite different from altruistic surrogacy in Australia, a country with a comparatively flat social structure, and no evidence of socioeco-

nomie disadvantage in surrogacy [11], or the power differentials inherent in marked social disparities and chronic economic deprivation. Further, in domestic Australian surrogacy there is most often a relationship between the intended parents and the surrogate and her family, with surrogates being connected through family or friendship networks (94.9%), thus the child/ren born of the surrogacy arrangement have opportunities for ongoing contact with their surrogate birth mother [11].

In third party reproduction (donor gametes, donor embryos and surrogacy) in Australia there is a recognised need for there to be government records of parties involved in the birth of children. Accordingly, there are state and territory records retained with identifying information of all parties connected to the birth of surrogacy offspring: intended parents, surrogate mothers, and gamete or embryo donors. In international surrogacy it is rare for there to be government retention of identifying information of surrogates or gamete donors, and thus there may be significant limitations to potential future contact by offspring with parties to their conception and/or birth.

■ Outlook

In the ANZICA Submission [26] to the Federal Government 2016 “*Inquiry into Surrogacy*” [10] there was consideration of the pros and cons of domestic and in-

ternational surrogacy. ANZICA accepted that there will continue to be Australians travelling overseas for international commercial surrogacy, despite local prohibitions. It was thus recommended that, before approval of Australian citizenship for offspring of international surrogacy, there should be required documentary evidence of best practice medical, psychosocial and legal treatment of all parties as is required in Australia, including evidence that there has been counselling of all parties to the surrogacy and that there is retention and long term access to identifying information on gamete donors and surrogates held by a government organisation in the country of birth.

As well as recommendations to harmonise surrogacy legislation in Australia in the recommendations of the “*Surrogacy Matters*” report [10] there were four guiding principles for domestic and overseas surrogacy arrangements:

- That the best interests of the child should be protected (including the child’s safety and well-being and the child’s right to know about their origins).
- That the surrogate mother is able to make a free and informed decision about whether to act as a surrogate.
- That sufficient regulatory protections are in place to protect the surrogate mother from exploitation.
- That there is legal clarity about the parent-child relationships that result from the arrangement.

■ Relevance for Practice

Altruistic surrogacy is practised in Australia, though commercial surrogacy is prohibited. Comprehensive medical, counselling and legal pre-treatment and post-birth requirements address the rights and best interests of all parties to the surrogacy arrangement, including offspring, and the evidence is they work well. Though international commercial surrogacy is against the law in most Australian jurisdictions, and has inherent logistical problems, it is practised, and offspring are able to obtain citizenship. In 2016, there were federal government recommendations to harmonise legislation in Australia, as well as domestic and intercountry surrogacy practice, but they are yet to be implemented.

The overall positive experience from 25 years of altruistic surrogacy in Australia is also important for Germany because of the current debate on the question whether surrogacy should stay forbidden in Germany or not [27]. Australian experience shows that domestic altruistic surrogacy can be managed well, with there being respect and consideration of all involved, and minimal disagreement even in such an intense and emotionally charged situation. There are benefits to all, including the surrogate mother and her family, as well as the intended parents and the children born of altruistic surrogacy arrangements, many of whom have long term family and friendship relationships with the women who gave birth to them.

^v Under s.16 of the Australian Citizenship Act 2007 a genetic link is not required. What is required is that the parent is someone considered in the wider view of Australian society as the parent.

As at September 2020 the Inquiry into Surrogacy [10] recommendations had not been implemented, however if there has been anything learnt from observation of surrogacy and legislation in Australia, it is that though it may sometimes take a while, legislation will eventually be enacted to ensure best practice. Given the significant impact of the COVID-19 pandemic on international surrogacy, there is increased interest in domestic surrogacy, from within the infertility professions as well as from consumers. There is also acknowledgement of the responsibilities of professionals working in domestic surrogacy to act to inform

the fertility and wider Australian community of the advantages of surrogacy in Australia where it is practiced ethically, responsibly and considers the short and long-term best interests of all involved: intended parents, surrogate mothers and their families, and offspring of surrogacy.

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Conflict of Interest

Miranda Montrone states that there is no conflict of interest.

Petra Thorn states that she is chair of the German Society of Fertility Counselling – BKiD.

Stephen Page states that there is no conflict of interest.

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