Surrogacy Issues is Volume 391 in the ‘Issues in Society’ series of educational resource books. The aim of this series is to offer current, diverse information about important issues in our world, from an Australian perspective.

KEY ISSUES IN THIS TOPIC
Surrogacy arrangements are complex and can involve a range of social, emotional, medical, financial and legal issues. Within Australia, only altruistic surrogacy is allowed, however Australians are increasingly accessing compensated surrogacy arrangements overseas in places such as Thailand, India and the US. State-based laws in Australia prohibiting commercial surrogacy do not appear to deter most people from the considerable expense and risk incurred in accessing it internationally.

This book explains altruistic surrogacy and the law in Australia, and explores a range of concerns raised in response to the growing international commercial surrogacy industry. Should commercial surrogacy be legalised, and in the process better regulated? What are the rights of the surrogate mother and the child?

SOURCES OF INFORMATION
Titles in the ‘Issues in Society’ series are individual resource books which provide an overview on a specific subject comprised of facts and opinions.

The information in this resource book is not from any single author, publication or organisation. The unique value of the ‘Issues in Society’ series lies in its diversity of content and perspectives.

The content comes from a wide variety of sources and includes:
- Newspaper reports and opinion pieces
- Website fact sheets
- Magazine and journal articles
- Statistics and surveys
- Government reports
- Literature from special interest groups

CRITICAL EVALUATION
As the information reproduced in this book is from a number of different sources, readers should always be aware of the origin of the text and whether or not the source is likely to be expressing a particular bias or agenda.

It is hoped that, as you read about the many aspects of the issues explored in this book, you will critically evaluate the information presented. In some cases, it is important that you decide whether you are being presented with facts or opinions. Does the writer give a biased or an unbiased report? If an opinion is being expressed, do you agree with the writer?

EXPLORING ISSUES
The ‘Exploring issues’ section at the back of this book features a range of ready-to-use worksheets relating to the articles and issues raised in this book. The activities and exercises in these worksheets are suitable for use by students at middle secondary school level and beyond.

FURTHER RESEARCH
This title offers a useful starting point for those who need convenient access to information about the issues involved. However, it is only a starting point. The ‘Web links’ section at the back of this book contains a list of useful websites which you can access for more reading on the topic.
Surrogacy arrangements are complex and involve medical, emotional, financial and legal issues. More Australians are considering surrogacy as a means to having a child because there is a decline in the number of children available for adoption, whereas they can access assisted reproductive treatment (ART).

**Surrogacy**

A surrogate mother is someone who conceives, carries and gives birth to a child for another person or couple (intended parents or commissioning parents). The surrogate mother agrees to give the child to that person or couple after the birth.

In most parts of Australia including Victoria, a surrogate mother must not have a genetic link to the child she carries for the other parent or parents. This means her egg may not be used in the surrogacy arrangement. The child’s genetic mother and genetic father (the mother and father for whom the surrogate is becoming pregnant) or a donor provides the egg and sperm used to form the embryo. This embryo is then transferred to the womb of the surrogate mother.

In some cases, a donor egg may be used with the genetic father’s sperm to form the embryo that is transferred to the surrogate mother. Donor sperm may also be used with the genetic mother’s egg to form an embryo for transfer to the surrogate mother. A donor egg and donor sperm or a donated embryo can also be used.

Within Australia, only altruistic surrogacy is allowed. It is illegal to pay a surrogate, beyond medical costs and other out-of-pocket expenses.

**Choosing surrogacy**

A surrogacy arrangement could be considered if:

- A woman is unable to become pregnant as she may have had a hysterectomy or is missing part of her uterus, uterine lining, ovaries or other parts of the genital tract
- A woman may have a health condition that makes pregnancy dangerous or she may not be able to carry a baby to term
- A couple in a male same-sex relationship may wish to have a child using their sperm
- A man may wish to have a child, but he does not have a partner
- A woman who has embryos in storage with her male partner dies and he wishes to use the embryos to have a child.

**Issues when considering surrogacy**

There are a number of medical, emotional, financial and legal issues that need to be considered when making a surrogacy arrangement. There are also issues involved once the surrogate mother gives birth and gives the child to the intended parents. Visit the Victorian Assisted Reproductive Treatment Authority (VARTA) website for information about these issues, [www.varta.org.au](http://www.varta.org.au)

**Achieving a positive surrogacy arrangement**

Factors that can contribute to a positive outcome from a surrogacy arrangement include:

- Minimising risk factors – such as having stable mental and physical health, a positive life situation and a supportive partner
- Clear and open communication between all parties
- Clear boundaries and realistic expectations between all parties
- Knowledge of the medical process (for all involved parties), including being realistic about the timeline (it could be up to a year before embryo transfer occurs)
- Realistic expectations about the emotional responses and reactions that may occur during the process. Emotions should be managed with care and sensitivity (anxiety, grief, guilt and...
disappointment are all common feelings)

- Discussions between all parties regarding the fair and reasonable payment of the expenses of the surrogate (including what expenses will be covered)
- Genetic (or commissioning) parent(s) should budget for medical, counselling and legal costs
- Agreement on a pregnancy and birth plan – all parties should be comfortable with the plan, but the birth mother has the right to manage her own pregnancy.

**Surrogacy legislation**

All surrogacy arrangements in Australia must be altruistic, which means that the surrogate does not receive financial compensation beyond the reimbursement of medical and other reasonable expenses.

Most Australian states have specific legislation that outlines the requirements for surrogacy. In the absence of legislation, states and territories are required to abide by national ethical guidelines issued by the National Health and Medical Research Council (NHMRC).

Check with your local in vitro fertilisation (IVF) clinic or legal advisor for the current surrogacy legislation in your state or territory. There is also information available on each state’s legal position on altruistic surrogacy.

**The medical risks of surrogacy**

There are certain medical risks involved with surrogacy. These risks are similar to those that may be experienced with all other methods of assisted reproductive treatment.

These may include:

- Effects on the child born as a result of the treatment – IVF treatment has a greater chance of producing multiple births, which increases the chance of a premature birth and a baby that is below the normal birth weight.
- Effects on the egg provider – there can be reactions to fertility drugs, including hot flushes, feelings of depression or irritation, headaches and restlessness. There is also a small risk of ovarian hyper-stimulation syndrome (OHSS) occurring, which can cause stomach pains, nausea, vomiting, shortness of breath and faintness. This condition is extremely rare.
- Effects on the surrogate – there are the usual risks associated with any pregnancy and birth. These risks are increased with the age of the surrogate.

**Surrogacy laws in Australia**

The laws surrounding surrogacy in Australia are complicated and differ between states and territories.

- Commercial surrogacy is when a woman is paid to become pregnant with and carry the embryo of another couple until birth.
- Commercial surrogacy is illegal in Australia, however altruistic surrogacy is permitted.
- Australian couples are encouraged to choose close relatives or friends with similar values when using altruistic surrogacy.
- Gay couples and single people are not permitted to enter into surrogacy arrangements in Western Australia or South Australia.
- It is illegal for people living in Queensland, NSW and the ACT to go overseas for commercial surrogacy.
- It is not illegal for residents of Victoria, Tasmania, SA, WA or the Northern Territory to go overseas for commercial surrogacy.
- The Northern Territory has no laws or regulations surrounding surrogacy.
- In Australia, the surrogate mother is presumed by law to be the parent of a child born in a commercial surrogacy arrangement. If she has a husband or partner who consented to the procedure, they are considered the other parent. But if she was single, the sperm donor may seek a declaration of parentage.
- Expectant biological parents can apply to the Family Court for a parenting order that would confer parental responsibility from the surrogate to them.
- Couples seeking a surrogacy arrangement are advised to seek legal advice before entering into an arrangement.

Sourced from *Australian Women’s Weekly*, ‘Surrogacy in Australia: What you need to know’ (7 August 2014) on 11 November 2014.
The transfer of human immunodeficiency virus (HIV) or hepatitis is also a risk, but this is usually quite rare. To eliminate this risk, mandatory screening of everyone involved in surrogacy is required.

To minimise the chances of the transfer of disease and to increase safety, embryos are quarantined for six months (although this time period may vary from clinic to clinic). At the end of this period and before proceeding with the embryo transfer, the screening for infections or diseases is repeated. For more detail about the risks involved in surrogacy, consult your fertility specialist.

Where to get help
- Your doctor
- An IVF clinic in your state or territory
- Victorian Assisted Reproductive Treatment Authority (VARTA), Tel (03) 8601 5250
- Surrogacy Australia, www.surrogacyaustralia.org

Things to remember
- Surrogacy is not a simple alternative to having a child.
- The process of surrogacy and surrounding issues are complex.
- Surrogacy legislation in Australia may vary from state to state.

Information produced in consultation with and approved by, Victorian Assisted Reproductive Treatment Authority.

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SURROGACY ISSUES

Wikipedia outlines the key legal, ethical and religious issues involving surrogacy, and explores some of the psychological concerns

A surrogacy arrangement or surrogacy agreement is the carrying of a pregnancy for intended parents. There are two main types of surrogacy, gestational surrogacy and traditional surrogacy. In gestational surrogacy, the pregnancy results from the transfer of an embryo created by in vitro fertilisation (IVF), in a manner so the resulting child is genetically unrelated to the surrogate. Gestational surrogates are also referred to as gestational carriers. In traditional surrogacy, the surrogate is impregnated naturally or artificially, but the resulting child is genetically related to the surrogate. In the United States, gestational surrogacy is more common than traditional surrogacy and is considered less legally complex.1

Intended parents may seek a surrogacy arrangement when medical issues make pregnancy either impossible or it is considered far too risky for the mother’s health. Monetary compensation may or may not be involved in these arrangements. If the surrogate receives compensation beyond reimbursement of medical and other reasonable expenses, the arrangement is considered commercial surrogacy; otherwise, it is referred to as altruistic. The legality and costs of surrogacy vary widely between jurisdictions, sometimes resulting in interstate or international surrogacy arrangements.

LEGAL ISSUES

As of 2013, locations where a woman could legally be paid to carry another’s child through IVF and embryo transfer included India, Georgia, Russia, Thailand, Ukraine and a few US states.3

The legal aspects of surrogacy in any particular jurisdiction tend to hinge on a few central questions:

- Are surrogacy agreements enforceable, void or prohibited? Does it make a difference whether the surrogate mother is paid (commercial) or simply reimbursed for expenses (altruistic)?
- What, if any, difference does it make whether the surrogacy is traditional or gestational?
- Is there an alternative to post-birth adoption for the recognition of the intended parents as the legal parents, either before or after the birth?

Although laws differ widely from one jurisdiction to another, some generalisations are possible:

The historical legal assumption has been that the woman giving birth to a child is that child’s legal mother, and the only way for another woman to be recognised as the mother is through adoption (usually requiring the birth mother’s formal abandonment of parental rights).

Even in jurisdictions that do not recognise surrogacy arrangements, if the genetic parents and the birth mother proceed without any intervention from the government and have no changes of heart along the way, they will likely be able to achieve the effects of surrogacy by having the surrogate mother give birth and then give the child up for private adoption to the intended parents.

If the jurisdiction specifically prohibits surrogacy, however, and finds out about the arrangement, there may be financial and legal consequences for the parties involved. One jurisdiction (Quebec) prevented the...
genetic mother’s adoption of the child even though that left the child with no legal mother.⁴

Some jurisdictions specifically prohibit only commercial and not altruistic surrogacy. Even jurisdictions that do not prohibit surrogacy may rule that surrogacy contracts (commercial, altruistic, or both) are void. If the contract is either prohibited or void, then there is no recourse if party to the agreement has a change of heart: If a surrogate changes her mind and decides to keep the child, the intended mother has no claim to the child even if it is her genetic offspring, and the couple cannot get back any money they may have paid or reimbursed to the surrogate; If the intended parents change their mind and do not want the child after all, the surrogate cannot get any reimbursement for expenses, or any promised payment, and she will be left with legal custody of the child.

Jurisdictions that permit surrogacy sometimes offer a way for the intended mother, especially if she is also the genetic mother, to be recognised as the legal mother without going through the process of abandonment and adoption.

Often this is via a birth order⁵ in which a court rules on the legal parentage of a child. These orders usually require the consent of all parties involved, sometimes including even the husband of a married gestational surrogate. Most jurisdictions provide for only a post-birth order, often out of an unwillingness to force the surrogate mother to give up parental rights if she changes her mind after the birth.

A few jurisdictions do provide for pre-birth orders, generally in only those cases when the surrogate mother is not genetically related to the expected child. Some jurisdictions impose other requirements in order to issue birth orders, for example, that the intended parents be heterosexual and married to one another. Jurisdictions that provide for pre-birth orders are also more likely to provide for some kind of enforcement of surrogacy contracts.

**ETHICAL ISSUES**

Ethical issues that have been raised with regards to surrogacy include:⁶

- To what extent should society be concerned about exploitation, commodification, and/or coercion when women are paid to be pregnant and deliver babies, especially in cases where there are large wealth and power differentials between intended parents and surrogates?
  - To what extent is it right for society to permit women to make contracts about the use of their bodies?
  - To what extent is it a woman's human right to make contracts regarding the use of her body?
- Is contracting for surrogacy more like contracting for employment/labour, or more like contracting for prostitution, or more like contracting for slavery?
- Which, if any, of these kinds of contracts should be enforceable?
- Should the state be able to force a woman to carry out “specific performance” of her contract if that requires her to give birth to an embryo she would like to abort, or to abort an embryo she would like to carry to term?

- What does motherhood mean?
  - What is the relationship between genetic motherhood, gestational motherhood, and social motherhood?
  - Is it possible to socially or legally conceive of multiple modes of motherhood and/or the recognition of multiple mothers?
- Should a child born via surrogacy have the right to know the identity of any/all of the people involved in that child’s conception and delivery?

**RELIGIOUS ISSUES**

Different religions take different approaches to surrogacy, often related to their stances on assisted reproductive technology in general.

**Catholicism**

Paragraph 2376 of the Catechism of the Catholic Church states that: “Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral.”

**Judaism**

Jewish law states that the parents of the child are the man who gives sperm and the woman who gives the egg cell. More recently, Jewish religious establishments have accepted surrogacy only if it is full gestational surrogacy with both intended parents’ gametes included and fertilisation done via IVF.

**PSYCHOLOGICAL CONCERNS**

**Surrogate**

A study by the Family and Child Psychology Research Centre at City University London in 2002 concluded that surrogate mothers rarely had difficulty relinquishing rights to a surrogate child and that the intended mothers showed greater warmth to the child than mothers conceiving naturally.

Anthropological studies of surrogates have shown that surrogates engage in various distancing techniques throughout the surrogate pregnancy so as to ensure that they do not become emotionally attached to the baby. Many surrogates intentionally try to foster the development of emotional attachment between the intended mother and the surrogate child.

Surrogates are generally encouraged by the agency they go through to become emotionally detached from the foetus prior to giving birth.

Instead of the popular expectation that surrogates feel traumatised after relinquishment, an overwhelming majority describe feeling empowered by their surrogacy experience.

Although surrogate mothers generally report being satisfied with their experience as surrogates there are cases in which they are not. Unmet expectations are
associated with dissatisfaction. Some women did not feel a certain level of closeness with the couple and others did not feel respected by the couple.\(^\text{15}\)

Some women experience emotional distress when participating as a surrogate mother. This could be due to a lack of therapy and emotional support through the surrogate process.\(^\text{16}\)

Some women have psychological reactions when being surrogate mothers. These include depression when surrendering the child, grief, and even refusal to release the child.\(^\text{17}\)

A 2011 study from the Centre for Family Research at the University of Cambridge found that surrogacy does not have a negative impact on the surrogate’s own children.\(^\text{18}\)

### Child

A recent study (involving 32 surrogacy, 32 egg donation, and 54 natural conception families) examined the impact of surrogacy on mother-child relationships and children’s psychological adjustment at age seven. Researchers found no differences in negativity, maternal positivity, or child adjustment.\(^\text{19}\)

### REFERENCES

15. Akker, Olga BA van den. ‘Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby.’ Oxford Journals 22, no. 8 (2007): 2287-2295.2

In November this year, Rebecca will give birth to a baby who – at just a few days old – will belong to another couple.

Rebecca, a former South East resident, has made the choice to become a surrogate mother. It’s a decision she said came easily after a family member underwent a serious operation.

“I was thirteen and my sister had to have one of her ovaries removed. She had a cyst and since then, she was told she may have trouble getting pregnant herself ... I knew at the time that if she couldn’t ... I would step up and act as a surrogate for her.

“It’s always been something in the back of my mind ... one day that I would do for somebody.”

A mother of two already, Rebecca said her own pregnancies were uncomplicated and she felt she could help another couple unable to conceive naturally.

At first she didn’t tell her husband but after her second child Taylor was born, she started to explore the possibility of becoming a surrogate further.

“Seeing my two kids and feeling as much love for them as I do, I couldn’t imagine someone not being able to have that for themselves,” she said.

Finding and establishing a relationship with intended parents

A social media site run by organisation Surrogacy Australia was where Rebecca met Mary* (not her real name), a woman who had struggled for eight years to become pregnant, undergoing countless IVF cycles in the process.

Initially more social to begin with, after months of communicating the talk turned more serious, with Rebecca offering to be a surrogate for Mary and her husband.

“It took a long time for us to make the decision that we were going to do it together. You need to really know the people you’re doing it for and create a good relationship.

“We met them in the middle, we went to Melbourne, four of us – my family and her and her husband ... we spent some time. Her and I spoke on the phone, three or four times a week for probably 12 months before we jumped into it.

“There’s so many potential things that could come up and go wrong so you almost need to be able to preemptively know what their decision would be. You need to understand each other really well,” Rebecca said.

Becoming pregnant for the intended parents

After a flight to Sydney and fifteen minutes in a doctor’s office, Rebecca was implanted with an embryo from the couple, falling pregnant on the first attempt.

Rebecca shrugs off suggestions she is a ‘natural mother’ but said she had never had any difficulty falling pregnant.

“I think they were happy when they heard it didn’t take us long, with my own two, to get pregnant. Everything was discussed, including what would happen if something went wrong with the baby, or if the pregnancy threatened Rebecca’s life.

“We were happy with the way they handled topics like this, they always said they would not be able to live with themselves if something happened to me trying to do this for them ... they would not recommend proceeding if it was looking to affect my health at all.

“Because I’m the one that’s pregnant in the legal agreements, basically it’s my body and I have the right to choose, along the whole pregnancy all the decisions that we make.”

“That’s how it works in surrogacy agreements, the intended parents can’t tell the expectant mother how to manage that pregnancy – it’s up to her to manage how she sees fit.”

The legal aspects of surrogacy

Rebecca said although commercial surrogacy was illegal in Australia, the intended parents would pay for her medical and legal costs, including small things such as travel to doctor’s appointments and anti-nausea medication.

She said the most difficult part, once undergoing rigorous counselling was the legal minefield. Even things such as who would hold the baby first in the delivery room were all written in a legal document and signed by both parents.

“We know when that baby is born, she will hold the baby first.

“That’s what keeps you going through all the hours of counselling and paperwork ... we’re both looking very much forward to that moment now.”

After the birth and into the future

Mary* and her husband will travel to Rebecca in country Victoria, to be there at the birth of their child and stay with them for several days afterwards. Rebecca said she may breastfeed the child for a day or two, to provide the nutrient-rich colostrum that newborns need from their mothers.

Rebecca said that after giving birth, Mary* and her husband would go to the Supreme Court to get a parentage order to officially change her name on the birth certificate, in effect, to become the legal guardians of the baby. She plans on an enduring, open relationship with the new parents after they return home.

“We plan on having a relationship with them later on, so my children to know their child ...”

“We will take photos along the way to explain to our children about the baby.”

“I foresee it now that it would be a similar relationship that I would have with my nieces or nephews, that you do feel something just that...
little bit extra but I don’t see it being much more than that.

“I would be happy to see that child being healthy and happy.”

Rebecca has now reached the second trimester of the pregnancy, with scans every few weeks and the baby belly beginning to show. Although she has dealt with a few negative responses, Rebecca said the delight she feels about the end result keeps her positive.

“We’ve had three scans so far ... the third one they came down and got to see their baby a few weeks ago.

“There was tears all round in the ultrasound room.”

Rebecca said she’s comfortable with her choice and said she knows that when the time comes, she will be able to hand over the newborn she has carried for 40 weeks within her.

“I can completely understand how some people would struggle with that ...”

“To me ... I have my two beautiful girls and to see the look on their face when that baby is born and it is genetically their baby.

“To see their baby for the first time after eight years of trying, I can’t imagine a feeling of wanting to keep that baby from them.”

THE LEGAL SIDE

A

Victorian family lawyer says the process of surrogacy is extremely complicated and needs a national approach. Currently, commercial surrogacy is illegal in Australia but parents can find a surrogate mother through online forums or avenues, paying for legal and medical costs. Complicating the process even more, each state in Australia has differing laws on surrogacy.

In part-one of Their Baby: Story of a Surrogate, we introduced surrogate mother Rebecca, who will give birth in November to a baby for another couple. Rebecca is a former South Australian who now lives in country Victoria. Although she became pregnant in NSW, where the intended parents live, she will have the baby in Victoria.

After making the decision to become pregnant with their child, it was time for the lawyers to step in. Every decision or possible outcome that affects Rebecca, the unborn child or the parents had to be discussed with independent lawyers.

Different laws for different states

Anna Parker, the Chair of the Children and Youth Issues Committee, Law Institute of Victoria, said the laws governing surrogacy come into effect not where the baby is born but where the process of fertilisation took place.

“In Rebecca’s situation if the commissioning or intended parents live in NSW and the procedure took place there, the parents will have to apply to the Supreme Court in that state,” Ms Parker said.

Ms Parker said surrogacy contracts can be different in every case, depending on where the surrogate and intended parents live.

“It’s very important to be aware of the specific law in the specific state where the procedure is taking place. Some states don’t require a written contract at all.”

When to seek legal advice on surrogacy

But at what stage should those considering finding a surrogate mother seek legal advice?

“As early as possible,” Ms Parker said.

“Certainly before the procedure takes place.”

“A lawyer can help advise on what goes into an agreement and can also help draw up the agreement.

“They can make sure everything takes place in a way that is legal and that will not interfere with a parentage order eventually taking place.”

The parentage order is sought by the intended parents after the birth of the child, by the parents attending the Supreme Court in their state, to become the legal guardians of the child.

Should Rebecca change her mind while pregnant, or after giving birth, Ms Parker said the contract becomes null and void, with no legal action able to be taken against the surrogate.

“The contract is not enforceable against the surrogate mother and she is legally able to change her mind.”

“In that case, the child’s parents could apply to the Family Court for an order for the child to live with them, but they wouldn’t be able to enforce the surrogacy contract to actually become the child’s parents.”

Ms Parker said that surrogacy arrangements were generally successful but there have been cases where the surrogate mother had kept the child.

“Sometimes the surrogate does have trouble relinquishing the child and unfortunately there’s no way to protect against that.”

Ms Parker said she was aware of cases where surrogates had handed over the child on the day of their birth, or days following, but the parents still had to apply to the Court to become the child’s guardians.

“Quite often, the initial bonding of the child is with the intended parents rather than with the surrogate mother,” she said.

The rights of the child

Ms Parker said in most states, surrogacy laws were designed to protect the rights of the child.

“The child is first and foremost. A parentage order will only be made if it is in the best interests of the child.”

Mrs Parker said there was nothing legally stopping the child from returning to their birth mother at any age after they were born.

“If for whatever reason the child wished to live with the surrogate mother, there wouldn’t be a legal prohibition on that matter.”

There is also no legal barrier to the child finding out about their true origins. Ms Parker said surrogacy was a ‘developing’ area of the law.

“My firm does a fair bit of surrogacy work, but it’s still rare ... an obscure part of family law. It’s only been in recent times that legislation has been enacted in terms of surrogacy so it’s becoming increasingly common. The states have moved to bring their legislation closer to each other in recent years. There is a move to nationalise laws regarding surrogacy however so far there’s no national consistency but there is a plan underway.”
THE INTENDED MOTHER
After battling fertility problems for eight years, she was concerned she would never be able to conceive. This November, she’ll hold her own baby in her arms. The intended mother shares her story and discusses her desire for a family.

Although not all women will have children, for many it’s a basic progression of a loving relationship, a right of womanhood to be able to procreate. But, due to many and varying factors, some couples struggle to conceive on their own, left on the sidelines to watch others who find it easy to build a family.

Mary® (not her real name) was concerned she would never be able to conceive, after several operations to her cervix.

“They did tell me, ‘it won’t affect your fertility’.

“I did wonder about it, even before my husband and I were together.

“We were together for about a year and trying naturally and that didn’t work. So we went to see a fertility specialist.

The couple tried IUI first, a procedure which involves tracking the woman’s cycles to see when she was ovulating. After several attempts, the couple then turned to IVF.

“We did that for 5 or 6 years. It was pretty draining – each time you go through an IVF cycle you get hopeful maybe it will work and scared that it won’t.

Mary described the ups and downs of the process as a ‘roller-coaster of emotions’.

“It puts your life in a holding pattern.”

The couple talked about giving up their battle, to live a life without children.

“I was probably the main instigator of us to keep it going.”

The couple also looked into adoption and egg donation before exploring surrogacy.

Finding a surrogate mother
Mary® said she was unsure to begin with, not knowing a whole lot about the process and her husband was equally dubious.

“He initially said, that’s pretty ‘full-on’, to get someone else to carry your baby, but he was open to thinking about it.”

“He met Bec and she was really great and I guess that alleviated a lot of his concerns about it.”

The couple met Rebecca online, through a social media page run by Surrogacy Australia. After talking online initially and then on the phone a few times a week – while Mary was undergoing egg donation procedures – the two women became close. After twelve months, Rebecca made an offer to become a surrogate for the couple.

“We felt very privileged to have that offer.

“It’s a massive deal for someone, for a friend to do that for you.

“I think one of the most important parts of it is being comfortable with your surrogate and their family and feeling that you can trust them.

Experiencing the pregnancy as an intended parent
After ten minutes in a doctor’s office in Sydney, Rebecca was implanted with the couple’s embryo, falling pregnant on the first attempt. Now well into her second trimester, Mary said although she is not carrying the child, she still feels a level of ownership.

“It has mine and my husband’s genetic material. I think you go into surrogacy, knowing that is your baby and Bec treats it like that.”

Mary said although she misses out on the pregnancy experience, including small things like when the baby kicks, she keeps in constant contact with Rebecca to hear about the daily trials of pregnancy.

“We’re there for the big milestones. I haven’t felt the baby kick yet, we were there for 12 weeks and it hadn’t started yet so I’m really looking forward to feeling that.”

The birth mother has to leave the hospital beforehand to allow permission for the couple to be allowed into the delivery room, but ultimately Rebecca will be the one leaving the hospital carrying the baby.

“The birth mother has to leave the hospital with the baby, if Bec has to stay in, the baby can’t be discharged into our care.”

The couple plan to stay with Rebecca for up to a week afterwards, while the new parents adjust to life with a new baby and make sure Rebecca is dealing with the process.

“It’s a big transition for Bec. Obviously I won’t be able to breastfeed so hopefully Bec will able to express. Mostly just to make sure she’s going OK after, emotionally.”

Then back to where we live and I will be off on maternity leave. Like everyone else.”

The couple are anxiously awaiting the 20-week scan, when they will carrying the baby is the only one who doesn’t.”

“It’s a bit cost-prohibitive for a lot of people.”

Mary said she and her husband had told their respective families and had introduced her own parents to Rebecca, but would wait before telling extended family, friends and work colleagues, preparing themselves for possible awkward conversations.

“Our family is really supportive, they just want us to have a child.”

“I guess you tell people when you feel it’s appropriate for that particular friendship.

“I certainly do advocate that openness and honesty in relationships. But then I guess if I had a sense that someone might feel uncomfortable with it or give me a hard time, I probably wouldn’t disclose it to them.”

Preparing for the birth
Three weeks before the baby is due, the couple will travel to Rebecca in country Victoria, to wait for the arrival of their child, a factor important for both parties.

“I know it’s really important for Bec that we’re there for the birth as well, so we’ll be waiting.”

Rebecca has to notify the hospital beforehand to allow permission for the couple to be allowed into the delivery room, but ultimately Rebecca will be the one leaving the hospital carrying the baby.

“The birth mother has to leave the hospital with the baby, if Bec has to stay in, the baby can’t be discharged into our care.”

The couple plan to stay with Rebecca for up to a week afterwards, while the new parents adjust to life with a new baby and make sure Rebecca is dealing with the process.

“It’s a big transition for Bec. Obviously I won’t be able to breastfeed so hopefully Bec will able to express. Mostly just to make sure she’s going OK after, emotionally.”

Then back to where we live and I will be off on maternity leave. Like everyone else.”

The couple are anxiously awaiting the 20-week scan, when they will
find out the gender of their baby, but said they will be waiting until later in the pregnancy before buying baby clothes.

Mary said that when it came to time to leave the hospital she trusted Rebecca to be able to give the child to them, to become the parents.

“There’s a lot of trust involved. You have to feel confident.

“We wouldn’t have selected someone who we had doubts about, in that sense, who wouldn’t be able to relinquish the child.”

Mary said both she and Rebecca had been assessed by psychologists prior to the procedure and had examined the ‘what-ifs’ of the process.

“We have to always talk to Bec about stuff and hopefully feel OK that Bec will be able to talk to us when things come up.

“There’s a lot more at stake so you have to have that honesty.”

What they will tell their child

When it comes to telling their child about its real mother, Mary said there was no option for them but honesty.

“We’ll be open about that from day dot.”

“Having openness in that process is really important for the child to help with forming their identity.

“We wouldn’t want to make that a secret, as something that might be shameful, it’s something to be celebrated.”

The couple plan on a continuing relationship with Rebecca and her family in coming years.

“What we would like is for the baby to know that before, to have always known and keep it part of their story.”

Although commercial surrogacy is illegal in Australia, prospective parents have found their mothers-to-be online and via friends and family. Others also seek help through the form of agencies such as Surrogacy Australia, which says it helps to support those planning on undertaking the process, sometimes finding prospective surrogate mothers abroad, in countries such as India and Thailand.

Sam Everingham is the founder of Surrogacy Australia. With his partner, the couple became parents to two baby girls via surrogacy. Their story has not been a straightforward matter and has involved many emotional moments and personal tragedy in their journey to parenthood.

Establishing the surrogacy agency

“My partner and I had been on the journey of trying to have a family for a few years and we got to the point where we were sort of forced to go overseas to create a family,” Mr Everingham explained.

“The fact that we weren’t able to find a surrogate to carry for us in Australia and we weren’t eligible for adoption under Australian law, those sorts of issues made it quite tough for us.

“We did a fostering course some years ago and then decided against that after finishing that course, it wasn’t the right journey for us.”

Mr Everingham said there were also issues with creating a family overseas and many hard parts of the process that got them thinking about establishing ‘a better way’.

“There wasn’t any support at the time for families who were going through this kind of turmoil of not being able to have kids of their own.”

“What started as an at-home not-for-profit grew very quickly into a large national organisation, with hundreds and hundreds of families ... it was certainly something that seemed to be needed.”

Finding a surrogate mother abroad

Mr Everingham and his partner sourced their surrogate mother from India, through a surrogacy agency.

“The clinics themselves will source a surrogate mum for you and you go from there but it’s a very hard for someone like us in a country as far away as Australia to put their trust in a clinic on the other side of the world and in a surrogate mum we haven’t met before.”

Mr Everingham said in India, intended parents met surrogate mothers at the start and end of the process but that the level of contact was very limited.

“It’s different if you’re using surrogacy in the United States, it’s much more a shared experience there because the cultural gaps aren’t so large ... or in Australia, where you can be very engaged with the surrogate mum.”

“If you’re using an overseas surrogate, the ideal is to use a surrogate who has already finished having her own family.

“The clinic is then engaged to screen the surrogate psychologically to make sure she is prepared to carry a child for someone else and she’s doing it for the appropriate reasons.”

The struggle of geographic distances

Mr Everingham said a lot of intended parents missed out on being present for the birth of their child because of unexpected arrivals and added distances and travelling time required with overseas surrogacy.

“A lot of parents I’ve dealt with over the years have had a call from a hospital overseas saying ‘you’re baby’s about to be born, hop on a
plane right now.’

‘That’s a very stressful thing for many parents, to suddenly have to get up and rush over and often not meet their child until a few days after the birth.’

In the case of Mr Everingham and his partner, they were able to meet their children for the first time about an hour after the birth took place.

Due to privacy reasons in India, intended parents wait in the room next door to the birthing suite. After two days, intended parents are able to take their child home with them.

When it comes to breastfeeding, Mr Everingham said some intended parents ask surrogate mothers to express milk. He and his partner sourced breast milk for their children closer to home, from Melbourne mothers who could provide extra.

“I used to drive around Melbourne with an esky and pick up breast milk from a number of different mums, willing to donate their extra breast milk to our kids because I thought it was quite an important thing for them. Most parents will just feed their kids formula.”

Communicating with surrogate mothers

Before leaving for home with the newborn, Mr Everingham said the general practice was to meet the surrogate mother after she’s recovered from the birth, with the potential to follow up and continue communicating in the future.

Depending on the situation, Mr Everingham said ongoing contact with surrogate mothers either happened or didn’t, as both parties returned to their families and lives.

“We found that a bit hard because we were hoping to have a bit more ongoing contact than our mums wanted.”

Telling their children about the process

For Mr Everingham’s kids, who are two ‘and a bit’ years old, he said it was important they knew about the surrogacy process and their beginnings.

“All parents going through surrogacy need to be really upfront and honest about where their kids came from. We keep a story book for our kids with pictures and names of their surrogate mum and their egg donor mum, their birth and the journey they had to come to that point.”

Mr Everingham said it was also important for the kids to be able to seek out and re-connect with surrogate mothers.

“For that reason, we try to keep up contact with the birth mums.

“Unfortunately in India, when you’re using egg donors they do so anonymously so it’s very hard for Australians to keep up contact with the donors but the surrogates, it’s more possible.”

Citizenship and legal aspects of overseas surrogacy

“There is now a standard process whereby Australia will award citizenship by descent for babies born overseas via surrogacy – that’s based on a DNA test, proving paternity.”

However, Mr Everingham said that current laws regard the surrogate mother as the legal mother when the child comes to Australia.

“The surrogate mum has to sign their passport applications, for example.”

Having the surrogate mothers name on the birth certificate of the child also varies between countries.

“In India for example, for the mother it just says surrogate on the birth certificate … in other countries, if you’re doing it in USA, often it’s the intended parents, the Australian parents that would go on the birth certificate instead.”

Loss, complications and the fight to create a family

In trying for children via surrogacy, Mr Everingham and his partner faced the painful ordeal of losing two children, twin boys.

“Those boys were born at twenty-six weeks. One was stillborn, with the other going into intensive care.

“He was there for seven weeks or so in intensive care, that was a tough road for us because he didn’t pull through.”

Mr Everingham said the loss of the twins made the couple very aware of the dangers of twin pregnancies, particularly when overseas clinics transferred ‘two, three or four embryos at a time’.

“In many surrogates, that will lead to multiple pregnancies and we see, quite commonly still these days, parents from Australia who are faced with the same situation we were, with a very pre-term birth and losing a child or having children in intensive care for many weeks or months.”

Would he do it again?

“I don’t know that I’d do it again overseas, it was a lot of hard work, a lot of stress but it was certainly worthwhile.

“We wanted a child badly and we, like many hundreds of families who go overseas every year, were prepared to take the good with the bad in order to create a family.”

FUTURE OUTCOMES

The definition of surrogacy is one that takes the place of another, a substitute.

This week [23-26 July 2013] on Mornings, we examined the topic of surrogacy – the process of finding a woman to carry a baby for somebody else. Earlier in the week, we heard from a mother of two, who is currently pregnant as a surrogate for another couple, and one of the intended parents, who will become a mother for the first time in November when the child is born.

We’ve also examined the legal side of surrogacy, discussing the ins and outs with a family lawyer, as well as speaking with the founder of Surrogacy Australia, a man who – with his own partner – experienced an emotional journey with surrogacy on the path to parenthood and establishing a family.

For those who assess the information available and decide on becoming a surrogate for another couple, what happens in five or ten years down the road? Do they still feel the same or differently about their experience?

Senior Researcher with Cambridge University, Dr Vasanti Jadva, has conducted a number of studies on the effects of the process on the surrogate mother and children born.
to surrogate mothers.

In the final part of the surrogacy series, Dr Jadva joined Mornings to discuss the findings and share the experiences of research participants.

“The first study we did was back in 2003 and at that time we were interested in the experiences of surrogates immediately after, a year after, they’d helped an intended parent have a child through surrogacy.

“That was looking at their experiences during the pregnancy and a year following.

When the child was aged one, participants recalled their feelings to the researchers about how they felt at the time of being pregnant, halfway into the process and when they relinquished the baby.

“It was about how they felt about it, their relationship with the intended parent, their own family relationships, so it was quite a detailed, in depth study.”

As Dr Jadva explained, commercial surrogacy is not legal in the UK (is also illegal in Australia) and can only be carried out ‘altruistically’. Dr Jadva also said there were no accurate figures on the prevalence of surrogacy in the UK.

Though, a recent study into parental order applications that were granted estimated around one hundred and fifty surrogacy’s per year. But Dr Jadva said not everybody applies for the parental order.

“It’s likely that that’s an underestimate of what’s actually happening.”

In the first study in 2003, thirty-four surrogate mothers were interviewed for the research.

Questioning spanned their motivations for being surrogates, how they heard about it, their relationship with the intended parent, their own family experiences of pregnancy, psychological health, feelings towards the handover, what the child should be told and ongoing communication with intended parents.

Recently, researchers went back to revisit the same group of women from the original study.

“Twenty of those original women took part and we also included additional women who had had a child around about the same time.

“The average age of the child was about nine to ten years. What we found was that some surrogates were actually doing subsequent surrogacies too. Some of them would have done them more recently and for others, that original surrogacy was the only surrogacy that they had done.”

Researchers found that in no instance did the group of surrogate mothers have any doubt about handing over the child to the intended parents.

They also found that high numbers of surrogate mothers, around 70 per cent of cases, were in touch with intended parents and the surrogate child, in varying degrees. Majority of contact maintained between intending mothers and surrogates.

How the children view the surrogacy

Researchers checked in with the children at one, two, three, seven and ten years of age. Asked how they felt about being born via surrogacy, Dr Jadva said the children responded positively.

“They were able to explain it in basic terms to us ... they were really aware of who their surrogate was in some cases, in others they hadn’t met the surrogate, and generally felt very positive about their birth.”

The after birth experience for surrogates

Dr Jadva said the original study found that the first few weeks following the birth were difficult for surrogates, who reported feeling ‘particularly down’.

“Sometimes they would explain this through their hormones, for feeling down, other times it would be explained in terms of ... they’ve been so involved in the lives of the intended parents for so long, a journey they’re going through together, once the baby’s born they know that journey has ended.

“It was that that was leading to them feeling down, rather than having handed the baby over to the intended parents.”

The effects of surrogate studies

“I can only speak for the UK context because that’s where the studies have taken place. We’re very fortunate in that we do have some laws governing surrogacy here. I think what it shows is that when surrogacy does takes place here, it can lead to very positive experiences.

“That doesn’t mean it always goes right and there are media reports about surrogacy arrangements where things don’t go right. But on the whole, we’re certainly finding that the experiences are positive.

“The only time that surrogates perhaps feel a bit down is if they had intended to maintain contact with the intended parents ... but then contact had stopped following the birth, they did report feeling quite upset about that and not having contact with the child, given it was something they’d planned to do.”

What the surrogates told others

Dr Jadva said participants had told others what they were doing, with some reporting negative reports from other people. Some intended families also indicated the same thing.

“Sometimes, it was people from outside who didn’t really understand or had particular views about it but I think with the popularity of surrogacy growing, it’s becoming something that’s a lot more familiar.”

The future of surrogacy

“I think things are changing in surrogacy. A lot of people are travelling abroad for surrogacy and we don’t really know about the experiences there. There is still a lot of unknowns in the area of surrogacy so I definitely think more research and more exploring of the unknown is necessary.”

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The study, published online today in the Medical Journal of Australia, surveyed people considering or already engaged in surrogacy. The Jean Hailes Research Unit at Monash University and Surrogacy Australia found that only 8 per cent of the 259 surveyed used surrogacy in Australia. India and the US were the most common destinations for those who travelled overseas to access surrogacy.

Study co-author Dr Karin Hammarberg of the Jean Hailes Research Unit says there were multiple reasons Australians were going overseas for surrogacy.

“These reasons included not being able to find a surrogate in Australia, concerns that asking a surrogate to carry a child for no reward is unfair, and concern that the surrogate might keep the child,” said Dr Hammarberg.

Australian laws ban advertising for a surrogate and providing compensation to the surrogate, which contributes to people seeking surrogacy overseas.

“It was interesting to see that the study showed that state-based legislation criminalising overseas compensated surrogacy does not deter people from travelling overseas to access surrogacy,” she said.

According to Dr Hammarberg there is a need to review surrogacy-related laws and regulations in order to allow more equitable access to surrogacy arrangements within Australia and to ensure that children born as a result of surrogacy have the same right as other Australian children to know their origin.

“Allowing surrogates to receive some compensation might make it easier to recruit surrogates in Australia and avoid the need for people to undertake unregulated surrogacy overseas,” she said.


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**Australians’ use of surrogacy**

**Results**

- Of 1,135 potential participants, 312 (27%) commenced the survey. Of these, 24 did not fulfil inclusion criteria and 29 did not complete the survey.
- Eighty-nine respondents were considering surrogacy and 170 had commenced or completed surrogacy.
- Many respondents (53%) considered both overseas and domestic surrogacy. Among those who only considered one option, overseas surrogacy was considered significantly more often than domestic surrogacy (92% v 8%; \( P < 0.05 \)). Only 22 respondents (8%) commenced with a surrogate in Australia.
- The most common countries used for compensated surrogacy were India and the United States, and average total estimated costs were $69,212 for India and $172,347 for the US.
- Barriers discouraging domestic surrogacy included concern that the surrogate might keep the child (75%), belief that it was too long and complicated a process (68%) and having no one of the right age or life stage to ask (61%). Few intended parents (9%) were deterred by state laws criminalising compensated surrogacy.

**Conclusions**

- Most Australian intended parents via surrogacy consider or use overseas compensated arrangements. Laws banning compensated surrogacy do not appear to deter those seeking surrogacy arrangements.

International surrogacy arrangements

This fact sheet outlines some of the key issues for Australians considering entering into a surrogacy arrangement with someone outside Australia. From the Department of Immigration and Border Protection

If you are considering international surrogacy you should seek independent legal advice before beginning the process. You should also contact the Australian immigration office responsible for the country in which you plan to enter into a surrogacy agreement to determine if there are any Australian citizenship or visa processing requirements specific to that country.

Contact information for immigration offices outside Australia is available on the department’s website, www.immi.gov.au

What is international surrogacy?

International surrogacy is a surrogacy arrangement involving a surrogate mother who lives in an overseas country. This includes surrogacy involving either an altruistic or commercial arrangement.

Altruistic surrogacy is where the surrogate mother does not make a profit. She might, however, be reimbursed by the commissioning parents for the cost of reasonable medical and legal expenses. Altruistic surrogacy is legal in most Australian states and territories.

Commercial surrogacy is where payment is made to the surrogate mother that is beyond the recovery of medical costs – where the surrogate mother makes a profit from the arrangement. Commercial surrogacy arrangements are illegal within most Australian states and territories.

Children born through surrogacy arrangements in Australia

The legal transfer of parentage following surrogacy arrangements is the responsibility of state and territory governments. Most states and territories in Australia have legislated to regulate surrogacy arrangements in Australia and have provided for transfer of the legal parentage of children where the surrogacy arrangement meets the requirements set out in legislation.

Caution: This fact sheet reflects Australian law, as at the date of publication, which may impact upon Australian citizens or residents who are considering entering into an international surrogacy arrangement.

Surrogacy is poorly regulated in many countries, which gives rise to a range of concerns for the welfare of the parties involved. Concerns include both the potential exploitation of women and differing approaches among countries to the legal rights of children who are born as a result.

Both Australian and other countries’ laws concerning overseas surrogacy may change, and people should check the current legal position before undertaking an international surrogacy arrangement.

Section 60HB of the Family Law Act 1975 recognises orders of state and territory courts that transfer the legal parentage of children who are born as a result of surrogacy arrangements for the purposes of legal proceedings under the Family Law Act.

Children born through surrogacy arrangements outside Australia

As a party to the United Nations Convention on the Rights of the Child, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, and certain other treaties, Australia is committed to protecting the fundamental rights of children. These conventions include obligations to prevent the abduction, sale or trafficking of children.

Extreme caution is exercised by us in cases involving surrogacy arrangements that are entered into overseas, so as to ensure that Australia’s citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.

Legal issues affecting Australians undertaking surrogacy arrangements overseas

Surrogacy arrangements that are undertaken outside Australia may not fulfil the variety of requirements for a transfer of legal parentage under state and territory law. This may be because the arrangement entered into is commercial in nature and/or the parties may not have received counselling or independent legal advice. As a result, the transfer of legal parentage to the intended parents may not be available under Australian law. This result can have a range of effects for children born through an international surrogacy arrangement.

You should seek independent legal advice about the possible consequences of not being recognised as a legal parent of a child who is born through an international surrogacy arrangement.

The following Australian states and territories (see table on page 16) have legislation making it an offence for their residents to enter into overseas commercial surrogacy arrangements.

Bringing the child to Australia

To bring a child to Australia to live, the intended parents of the child will need to apply for either Australian citizenship by descent or a permanent visa for the child. Where a child becomes an Australian citizen by descent, the intended parents will also need to apply for an Australian passport for the child.

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Issues in Society | Volume 391
Australian citizenship by descent

A person born overseas to an Australian citizen does not obtain Australian citizenship by automatic operation of law. However, the person may apply for Australian citizenship by descent. Applications for Australian citizenship by descent are assessed according to requirements set out in the Australian Citizenship Act 2007 and the policy guidelines set out in the Australian Citizenship Instructions.

Eligibility requirements for Australian citizenship by descent

A child born outside Australia as a result of a surrogacy arrangement is eligible for Australian citizenship by descent if, at the time of their birth, they had a parent who was an Australian citizen.

If the child’s Australian citizen parent became an Australian citizen either by descent or because they were adopted outside Australia in accordance with the Hague Convention on Intercountry Adoption, then that parent must have been present in Australia (except as an unlawful non-citizen) for a total period of at least two years before they submitted the application. There is an exception for people who are not a national or citizen of any country at the time of their application and they have never been such a national or citizen.

Under the department’s citizenship policy, an application for citizenship by descent by a person under the age of 16 must be signed by a responsible parent.

Bars on approval for citizenship by descent

Citizenship by descent cannot be approved by the department if:

• The decision-maker is not satisfied of the identity of the person
• The applicant is aged 18 years or older and the decision-maker is not satisfied that the person is of good character
• The person does not meet national security requirements.

Determining parent-child relationships

A parent-child relationship is a question of fact to be determined by the department with regard to all the relevant circumstances.

In the majority of surrogacy arrangements, at least one of the intended parents is also a biological parent of the child. Normally, the biological parentage can be readily determined through medical records and/or DNA testing. Provided that DNA testing is carried out to approved standards the result of DNA testing is given substantial weight when determining if a person is a parent of another person.

Where there is no biological connection between an Australian citizen who is the intended parent and the child born through an international surrogacy arrangement, or where such a biological connection has not been satisfactorily established, it is necessary for an Australian citizen to provide other evidence to demonstrate that the Australian citizen was in fact the parent of the child at the time of the child’s birth. The type of evidence that would support such a claim is likely to require greater scrutiny and verification than DNA evidence. Consequently, an application based on such evidence may take significantly longer to decide.

Evidence that the parent-child relationship existed at the time of the child’s birth may include, but is not limited to:

• A formal surrogacy agreement entered into before the child was conceived
• Lawful transfer of parental rights in the country in which the surrogacy was carried out to the Australian citizen before or at time of the child’s birth
• Evidence that the Australian citizen’s inclusion as a parent on the birth certificate was done with that parent’s prior consent
• Evidence that the Australian citizen was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care
• Evidence that the child was acknowledged socially from or before birth as the Australian citizen’s child, for example, where the child was presented within the Australian citizen’s family and social groups as being the Australian citizen’s child.

Evidence that the Australian citizen treated the child as his or her own from some point in time after birth would not by itself be evidence that the Australian citizen was the child’s parent at time of birth, but it would lend weight to evidence of the types previously listed.

Responsible parents

If an applicant for Australian citizenship by descent is under 16 years old, their application must be signed by a responsible parent.

A person is a responsible parent if they meet one of the following requirements:

• The person is a parent of the child except where,
because of orders made under the *Family Law Act 1975*, the person no longer has any responsibility for the child

- Under a parenting order, the child is to live with the person
- Under a parenting order, the person has responsibility for the child’s long-term or day-to-day care, welfare and development
- The person has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.

While only one responsible parent is required to consent to and sign the application, the department encourages all responsible parents to reach an agreement as to whether or not to lodge an Australian citizenship application on behalf of the child.

**Requirements for a visa to Australia**

If the child is not eligible for Australian citizenship by descent, or the parent chooses not to apply on the child’s behalf for Australian citizenship, the parent will need to apply for a visa for the child to enable the child to enter and remain permanently in Australia.

In international surrogacy cases where the intended parent is a biological parent, and is also an Australian citizen, permanent resident or eligible New Zealand citizen, a Child (subclass 101) visa is the relevant visa for the child. Eligibility requirements for this visa are available on the department’s website. In most cases a DNA test will be requested as evidence of a biological link between the child and the sponsoring parent.

In international surrogacy cases where the intended parent is not a biological parent, an Adoption (subclass 102) visa is the relevant visa for the child. The intended parent would need to formally adopt the child in accordance with the law of the child’s country of usual residence and must meet additional residency requirements outside Australia before applying for the visa. It is rare for a child born of an international surrogacy arrangement to be able to meet the immigration requirements for an expatriate adoption and the subsequent grant of an Adoption visa. Detailed information on adopting a child outside Australia and obtaining a permanent visa for that child is available on the department’s website.

There are no other permanent visa options on grounds of a parent-child relationship available to a child born of a surrogacy arrangement if the child is not able to meet the legal requirements for the grant of either a Child or an Adoption visa.

**Sponsorship limitation and best interests of the child**

The sponsorship of a child who is younger than 18 years of age cannot be approved where the sponsor or the sponsor’s spouse or de facto partner has a conviction or an outstanding charge for an offence against a child, except in very limited circumstances. There must also be no compelling reason to believe that the grant of the visa would not be in the best interests of the child.

**Country-specific information**

For further information on surrogacy arrangements for specific countries, see:

- Australian High Commission India
  www.india.embassy.gov.au
- Australian Embassy, Thailand
  www.thailand.embassy.gov.au
- Embassy of Australia, United States of America
  www.usa.embassy.gov.au

**Applying for a passport**

For more information on how to apply for an Australian passport for a child, visit the Australian Passport Office website (www.passports.gov.au) or contact your nearest Australian Embassy, High Commission or Consulate.

Further information is available on the department’s website (www.immi.gov.au).

The department also operates a national general enquiries line.

Telephone: 131 881

Hours of operation: Monday to Friday from 8.30 am to 4.30 pm. Recorded information is available outside these hours.

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How easy is it to bring overseas-born surrogate babies back to Australia and what are their parents’ rights?

The recent baby Gammy case has exposed the pitfalls of the international commercial surrogacy trade. This fact file is courtesy of ABC News

Gammy, a baby with Down syndrome, was left with his Thai surrogate mother while his healthy twin sister returned to Western Australia to live with her biological father and his wife.

Since then, two Australian couples have been temporarily stopped from leaving Thailand with their surrogate children. Thai authorities are considering draft legislation that may shut down the commercial surrogacy trade.

A Family Law Council report, recently released by Attorney-General George Brandis, says “a significant and apparently growing number of children are being born as a result of commercial surrogacy arrangements outside Australia (more than several hundred each year)”.

The spate of cases raises questions about the legal rights a child born to an overseas surrogate has in Australia, and what rights Australians who engage in surrogacy agreements have in Thailand and other countries.

THAI SURROGATE MUMS ‘NOT COMPELLED TO GIVE UP THE CHILD’

Thai parentage law does not mention surrogacy. In Thailand, a birth mother is considered the legal mother of the child. If a Thai surrogate mother is married, her husband becomes the legal father.

The Australian embassy in Bangkok says Thailand currently has no laws or published court decisions directly relating to the practice of surrogacy.

Dr Sonia Allan from Macquarie University says the surrogate mother “is not compelled to give up the child to the commissioning or biological parents”.

“Arguably, a child born in Thailand acquires Thai citizenship, due to the legal status of the mother,” she says. Gammy’s Thai birth mother has not given up her parental rights, and Professor Allan says citizenship is determined by the legal parents, not by the biological parents.

Putting a commissioning, and often biological, father’s name on the Thai birth certificate does not give rise to legal paternity, and does not give him an automatic right to custody, she says.

In the case of baby Gammy, Professor Jenni Millbank from the University of Technology, Sydney told ABC News: “There is no legislation in either country to compel her to relinquish – she is a legal parent in both jurisdictions.”

The Australian Department of Foreign Affairs and Trade says: “Current advice is that Thai authorities are enforcing documentation requirements upon exit of the country when they suspect a child has been born by surrogacy in Thailand.”

It says required documents may include:

- Child’s birth certificate
- Copy of birth mother’s ID card
- Copy of intended parents’ passport(s)
- Surrogacy contract, and/or
- A court order issued by the Thai Family Juvenile Court to confirm that the birth mother has given up her rights to custody of the child.

INCONSISTENCY ACROSS JURISDICTIONS

The Thai law that confers parental rights on the surrogate is not mirrored in India, where the surrogate mother is not viewed as the legal parent.

The inconsistency in the laws raises the vexed issue of who is ultimately legally responsible for a baby born to a surrogate across international jurisdictions.

Professor Millbank says: “In the absence of Australian parentage the child would, in some circumstances (such as birth in India), be both stateless and parentless; in others the child would have the citizenship of the birth country (United States, Thailand) but no parents (California, British Columbia); or only a mother there (Thailand).”

Dr Allan told ABC News: “There is good reason to see the birth mother as the legal mother in the first instance”, arguing it is “a way of protecting the woman carrying the child if she does not want to relinquish it.”
When a baby is born to a surrogate mother in Thailand or India, euphoria may be quickly overcome by the legal minefield that must be navigated to get the baby Australian citizenship, a passport, and eventually to achieve the legal status having an Australian parent.

In order to obtain Australian citizenship for a child born to a surrogate overseas, the Australian parents need to lodge an application for Australian citizenship by descent.

If at least one person who was your parent at the time of your birth was also an Australian citizen at the time of your birth, you are eligible.

It is the same process any Australian parent needs to undertake when a child is born overseas.

In addition to the general documents required for Australian citizenship, the Australian embassy in Thailand says when a child is born as a result of a surrogacy arrangement there needs to be a certified copy of the agreement and evidence that the child is the biological child of the ‘commissioning’ parent. The embassy says the commissioning parent and child need to undergo DNA testing.

The application is determined in accordance with the Australian Citizenship Act 2007 and citizenship is ultimately conferred by the Department of Immigration and Citizenship.

Professor Millbank says parents commonly misunderstand that the granting of citizenship – which applies only for that sole legislative purpose – is a grant of parental status under Australian state and federal law.

Would baby Gammy be eligible for Australian citizenship? “Technically it appears the answer would be no – citizenship by descent is determined by the citizenship of the legal parents (and not necessarily genetics),” Dr Allan says.

“I think that granting baby Gammy Australian citizenship would require making a special exception in this case.”

The Minister for Immigration has the ultimate power to confer citizenship.

A spokesperson for Immigration Minister Scott Morrison says: “The child may be eligible for Australian citizenship. The Australian Citizenship Act 2007 does not differentiate how a child came to be born. Any application for Australian citizenship by descent is predicated on the link between parent and child.”

APPLYING FOR AN AUSTRALIAN PASSPORT

When a child born of a surrogate mother in Thailand applies for an Australian passport, the Department of Foreign Affairs and Trade recognises the legal rights of the Thai surrogate mother. She must consent in writing to the issue of an Australian passport to the child and explicitly consent to removal of the child from the country of birth.

“The written consent of all persons with parental responsibility for a child’s passport must be obtained for each new passport application until the child turns 18 years old,” the department says.

Earlier this year, there were reports that Israel refused to issue passports to children born to Thai surrogate mothers because it was concerned about Thai domestic law that stipulates that children born to surrogate mothers are Thai citizens and their mothers have full custody rights.

There was commentary suggesting the Israeli government was concerned about potential child trafficking or kidnapping.

OVERSEAS COMMERCIAL SURROGACY ON THE RISE DESPITE STATE BANS

While all states ban commercial surrogacy in Australia, NSW, QLD and the ACT also ban overseas commercial surrogacy, and people who engage in it can be subject to fines and prosecution.

According to a 2011 Family Court judgement, state laws “have aimed to protect women and children from what the legislature has seen as abusive practices which potentially surround the commercialisation of surrogacy”.

Although some states have banned overseas surrogacy agreements, the Family Law Council report notes “the number of children conceived as a result of overseas commercial surrogacy arrangements has increased dramatically in the past several years, despite the existence of laws prohibiting such arrangements, and that, to its knowledge, none of the intended parents in these cases has been prosecuted”.

Nonetheless, the bans on overseas surrogacy agreements in some states raise a number of questions for a couple returning with a surrogate child from...
While the federal Immigration Department may grant the child citizenship, the department warns commissioning parents that overseas surrogacy arrangements may not fulfil the requirements for a transfer of legal parentage under state law.

The department says this “may be because the arrangement entered into is commercial in nature and/or the parties may not have received counselling or independent legal advice”.

The Department of Foreign Affairs says “under Australian law, the surrogate mother may have parental responsibility for the child she gave birth to regardless of whether she has a biological connection, is listed on the child’s birth certificate or is considered to have parental responsibility under local law”.

The Family Law Council report says “a birth certificate that is issued in an international jurisdiction, or a parentage declaration made by a foreign court, is not binding on an Australian court”.

It warns that adoption of the children born from overseas surrogacy arrangements can also be difficult, and adoption – which is also governed by state law – is highly regulated.

It says “it would seem that a large number of young children are growing up in Australia without any secure legal relationship to the parents who are raising them”.

“Council notes the importance of protecting the child’s right to know of their birth parentage, the concerns expressed about the potential for exploitation of surrogates, and the need to ensure that children enjoy ‘the same status, protection and support irrespective of the circumstances of the child’s birth’,” it says.

The report recommends the introduction of a federal Status of Children Act, which would make orders about the status of children and legal parentage.

Dr Allan says: “The Australian approach to legal parentage is particularly complex in the context of transnational surrogacy arrangements. Australian law does not recognise parental status granted in other jurisdictions unless specifically prescribed under legislation for particular purposes.”

**RECENT CASES: OBTAINING ‘PARENTAGE’ RIGHTS**

There have been a number of cases in the federal Family Court in recent years which have involved surrogacy arrangements where applications for ‘parentage’ have failed to meet the requirements of state or territory law.

One case raised in the Family Law Council report involved a Queensland couple, Mr and Ms Dudley, and a Thai surrogate mother, Ms Chedi. In 2011, the Family Court heard an application by the intending father, who was the biological parent of twin children born to Ms Chedi. “The parents were not able to obtain a transfer of parentage order from the relevant state court as the commercial surrogacy arrangement used by the parties was not permitted by Queensland law,” the report says.

However, given the children’s need for a legal relationship of some kind with the intended parents, Justice Garry Watts made parenting orders giving the applicants parental responsibility for the children during their minority.

It should be noted that Justice Watts declined to make a finding that Mr Dudley in that case was a parent.

Dr Allan says: “When people have broken state laws, the Family Court may still have had to determine legal parentage of children born as a result. This may arguably be seen as a ‘conflict’ as it places the Family Court judges in a difficult position.”

The judgement noted that not having full parenting rights may have an impact in areas such as:

- Medical treatment for the child
- Registering with Medicare and health funds
- Applications for passports or schools that require a birth certificate specifying the child’s parents
- Rights for a child arising upon the death of a parent, including rights to an intestacy and superannuation
- The ability of a child to be referred to as ‘a child’ in a will, and
- Complications in relation to recognition as to entitlements and liabilities under the child support regime and recognition of a child’s rights to entitlements on injury or death of a parent in schemes of workers’ compensation.

While it is not illegal for people from Western Australia to engage in commercial surrogacy overseas,
baby Gammy’s parents, David and Wendy Farnell, said in an interview with 60 Minutes on August 8 that they are still not recognised as the parents of baby Gammy’s twin sister, Pipah, who is living with them in Bunbury, WA.

Mr Farnell told the program: “Everybody is saying we don’t recognise her, because she is not born in Australia, and she is not under our name. So we are desperately trying to get her our name and be recognised as the parents.”

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**RECENT AUSTRALIAN SURROGACY ISSUES ABROAD**

**INDIA**

- **October 2014**: Childless Australian couples looking for surrogate mothers in India are being denied visas to enter the country, advocates say.
- Surrogacy advocates claim India had frozen out Australians from the surrogacy industry following recent revelations a child was abandoned in India by an Australian couple.
- In 2012 an Indian surrogate gave birth to twins for an Australian couple who left one baby behind, saying they could only afford to take one child.
- Indian authorities said they have asked Australia for clearer guarantees that children born under surrogacy arrangements will be granted Australian nationality. The consulate said it will issue visas if those guidelines are met.


**THAILAND**

- **February 2015**: Thailand’s parliament passed legislation banning commercial surrogacy, putting a halt on foreign couples seeking to have children through Thai surrogate mothers.
- The issue of surrogacy was spotlighted in August 2014 after a West Australian couple were accused of leaving a twin boy, known as Baby Gammy, with his surrogate mother after they discovered he had Down syndrome and was critically unwell. David and Wendy Farnell took Gammy’s healthy sister Pipah to their home in Bunbury.
- The revelation that Gammy was abandoned by his Australian parents prompted raids that targeted dozens of fertility clinics across Bangkok. Mr Farnell, a convicted child sex offender, retained custody of Pipah late last year after an investigation by the WA Department for Child Protection.
- The new law bans all foreign and same-sex couples from seeking surrogacy services in the country.
- Only married heterosexuals with at least one Thai partner are allowed to use surrogates. There are no fees allowed for the service and the surrogate mothers must be Thai and over 25 years old. The surrogate mothers are also required to be relatives of either the husband or wife. The legislation also includes a ban on advertising and promotions, and shuts down surrogate agents and unregistered clinics.
- Through the support of charities and the public, Gammy and his surrogate mother Pattaramon Chanbua and her family have a new home in Thailand and he is receiving the medical treatment he needs. Pattaramon also applied for Australian citizenship for Gammy which was granted in January 2015.
- In 2014 up to 150 Thai surrogate mothers carrying babies for Australian couples were expected to give birth by the end of 2015. DFAT officials negotiated with Thailand for a transition period to enable the children and their Australian parents to depart Thailand.
- A 24 year-old Japanese businessman fathered at least 15 babies through surrogate Thai mothers, telling police he wanted to have more than 20 babies to take care of his many businesses.

Diana Bryant called for a national inquiry into surrogacy, and described the current lack of legislation as “reckless”.

Chief Justice Bryant aired her frustration after seeing many cases before her court where commissioning parents – Australians who had gone overseas to secure a child via international surrogacy – could not prove who the mother was.

Evidence on genetic heritage is scant, and the Family Court is left with a situation where Australian laws are being breached, but the children have already been granted visas to be in Australia.

“I do think there ought to be a government inquiry into surrogacy,” she said.

“We have laws in some of the states and territories which make it illegal to enter into commercial surrogacy overseas, and yet parents do that knowing it is in breach of the law.

“They come back to Australia ... the Australian Government gives them visas and they seek visas and seek orders from the Family Court, all knowing they breached the law.

“At the moment those laws are not being enforced. I think that is a very bad message. It puts the courts in a difficult position. It is a bad message to give to society. If we have laws they should be enforcing them. If we don’t have laws, let them be repealed.”

‘Eggs come from anonymous sources in Ukraine’

Chief Justice Bryant also said the current arrangements in Australia were in breach of the Convention on the Rights of the Child – of which Australia is a signatory.

She said in some cases out of Thailand, the eggs from women had come from anonymous sources in Ukraine.

She warned that children in 20 years time would want to know who their biological mothers were.

“One of my greatest concerns about surrogacy is the breach of the conventions of the rights of the child ... they do not know one half of their genetic material. They do not know where their mother comes from.

“In Thailand eggs are acquired from the Ukraine. There is no chance those children will know who their biological parents are. I think as Australians we are being quite reckless ... we are creating a number of children in 20 years time, who will want to know their birth mothers and there is no chance they will know anything about them.”

The call for a national inquiry was backed by another senior judge – Chief Justice of the Federal Circuit Court, John Pascoe – who said an inquiry needed to investigate how to protect the human rights of all the parties involved, including the commissioning parents back in Australia.

“I think we need an inquiry for a whole range of reasons. Firstly, I don’t think we can outlaw conduct in Australia but then say it’s fine as long as it doesn’t take place here,” he said.

“Particularly when we know it’s taking place in countries where it exposes women and children to potential serious human rights abuses.

“Secondly there’s the issue of the legitimate couples who just want the joy of raising a child. For many of those people, they’ve been down...”
a very long road often littered with tragedy and disappointment.

“They may have endured years of IVF treatment with consequent physical and emotional effects. Those people deserve compassion. We can’t ignore the fact that the technology is there, they need to be able to access it and they need to access it in ways that protect their rights and in ways that protect the right of the child that they get through these arrangements.”

Both judges want the inquiry to look into whether Australia needs to legalise commercial surrogacy to avoid human rights abuses to women and children overseas.

“I think the difficulty for judges is that it’s almost impossible to establish the genetic background of the child,” Chief Justice Pascoe said.

“It is almost impossible to establish whether the surrogate mother actually consented to relinquish the child, and of course the family courts can only make orders in relation to the parenting of the child.

“They can’t make orders in relation to parentage which would, for example, entitle the child to a birth certificate. So children really can be left in limbo.”

Surrogacy Australia represents people looking to become, or who already are, parents through surrogacy.

President Sam Everingham said authorities almost never enforced bans on international surrogacy.

He said it was time for all states to change the rules, as many of his organisation’s members were breaking the law.

“Many of them are. And it’s no way for young children to grow up, into a society where their parents have broken a law in order to create that family,” he said.

“It’s not fair on the kids, it’s not fair on the families that they’ve been forced into that situation by a system in Australia that’s failed them.

“Luckily the state governments have the good sense not to enforce this law. We’ve had a few cases where there have been referrals to the Department of Public Prosecutions, but those cases have been thrown out.”

A Department of Foreign Affairs and Trade statement said the Federal Government did not regulate overseas surrogacy arrangements.

“This is a matter for the countries in which these arrangements are made. Within Australia, the regulation of surrogacy is a matter for states and territories,” the statement said.

“All jurisdictions which have legislated on surrogacy have criminalised commercial surrogacy.

“Three jurisdictions have also legislated to make it illegal for residents of those jurisdictions to enter into commercial surrogacy arrangements in foreign jurisdictions.”

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WHAT CHANCE FOR INTERNATIONAL SURROGACY LAWS?

After the Baby Gammy controversy many have called for international surrogacy laws. But is this possible when countries have such vastly different notions of what constitutes a child and a parent? Sonja van Wichelen writes in The Drum

Growing concerns about global surrogacy arrangements have sparked calls from researchers and lawyers at the Forum for International Adoption and Global Surrogacy for a new international convention to regulate the practice.

Any new legal framework would need to cover up to five parents: the birth mother, the genetic mother, the genetic father, the intended mother and intended father. But national laws differ in how they define such parentage in legal terms, and much of that is related to cultural understandings of kinship.

The Australian public has had a crash course in the complex moral and legal issues involved in global surrogacy through the Baby Gammy controversy. But is it actually possible to have an international agreement when there are such vastly different notions of what constitutes a child, a parent and family life in different countries?

Academics and lawyers advocating a new international legal system covering global surrogacy are calling for a Hague Convention similar to the Convention on Intercountry Adoption, which Australia ratified in 1998. Yet making such a legal instrument in the realm of private international law is a very tricky matter, and international surrogacy raises some very unique questions not encountered in adoption.

In contrast to international adoption – where states could agree that it was essentially a good thing – surrogacy is a much more contentious practice, with most countries prohibiting commercial surrogacy.

The implementation of an international regulation already implies an institutionalisation of a transnational practice, yet the practice is still morally disputed in countries such as France, Germany, and Australia.

Many policymakers from across the world are calling for more research into how international surrogacy arrangements can create identity issues of the child. Adult adoptees have long pleaded for “legal openness”, and have worked for the right to access their birth and adoption documents.

If global surrogacy were to be sensitive to these issues, anonymity would need to be avoided, and genetic, social and other identifying information would need to be registered and documented for possible later use of the resulting child/adult.

To create a convention for global surrogacy, minimum agreements between states are needed on the issue of legal parentage, otherwise some children may end up with an unclear status in relation to their nationality or citizenship and become stateless subjects.

Any new legal framework would need to cover up to five parents: the birth mother, the genetic mother, the genetic father, the intended mother and intended father. But national laws differ in how they define such parentage.
in legal terms, and much of that is related to cultural understandings of kinship.

In the meantime, more research is needed to study the effects of surrogacy arrangements on women and children. And it could prove useful to compare the practice with other forms of international family-making practices such as adoption.

For example, the current laws in India allow for commercial gestational surrogacy arrangements where the child is legally assigned to one or both of his or her genetic parents. Although in Australia this child would be granted citizenship by descent, this does not necessarily mean that the intending parents are considered legal parents in Australian law.

To create a convention for global surrogacy, minimum agreements between states are needed on the issue of legal parentage, otherwise some children may end up with an unclear status in relation to their nationality or citizenship and become stateless subjects.

The forum also discussed the possible exploitation of women from developing countries such as Thailand and India. Anthropological research in India informed us that women opting for surrogate arrangements often come from the lower middle class and that their choices are informed by their dire economic situations.

Once contracted, these women are often subjected to invasive medical procedures such as hormonal treatments (to boost fertility or to block breastfeeding) and compulsory caesarean sections. They are also expected to follow a strict living and diet regime during the nine months of pregnancy in the confinement of a clinic far away from their own village, family, and children.

Many pregnancies result in miscarriage or forced abortions, with

the financial agreements terminated once the pregnancy does not result in a live birth.

In instances such as these, labour laws are needed to help these women by giving them rights as they negotiate the terms of their contracts. Yet this approach beds down the commodification of babies as it defines them as the end product of a contractual agreement.

In sum, while many Australians are now clambering for international regulation following the Gammy case, the Forum for International Adoption and Global Surrogacy discussions implied a degree of caution. One opinion is that the regulation of global surrogacy does not require a convention within international private law, rather it could be part of national labour laws in conjunction with public international laws such as the CEDAW, which protects women’s rights, and the UNCRC, protecting children’s rights.

In the meantime, more research is needed to study the effects of surrogacy arrangements on women and children. And it could prove useful to compare the practice with other forms of international family-making practices such as adoption.

If we are to truly make a global effort to better regulate international surrogacy arrangements, we need to fully understand how they will impact on everyone involved, particularly the children themselves.

Dr Sonja van Wichelen is a senior research fellow at the Institute for Culture and Society at the University of Western Sydney.

Thriving overseas surrogacy market fuelled by messy Australian laws, parents say

Parents who have had children through surrogates in Australia say the thriving overseas surrogacy market is being fuelled by messy Australian laws, reports Adam Harvey for ABC News

Their comments come in the wake of the baby Gammy scandal, where an Australian couple abandoned their disabled surrogate child in Bangkok.

Australian laws vary wildly, with some states banning gay couples and single women from having a surrogate child, while others criminalise anyone who pays an overseas surrogate.

One couple, Adrian and Kylie Raftery, have moved from Sydney’s Blue Mountains to Melbourne because they are worried about possible prosecution if they have an overseas surrogacy.

“It’s a huge move from New South Wales to Victoria,” Mr Raftery told 7.30.

“Just the simple thing of the family network, you can’t rely on mum and dad to babysit just so you can go out on a Saturday night on a date night.”

Ms Raftery nearly died during the premature birth of their first child, Sophie, who was stillborn and doctors told her she would not survive another birth.

Four years later they had another child, Hamish, through a domestic surrogacy. Now they want to have another baby.

“We’ve elected to move to Victoria to give ourselves the option in the future,” Mr Raftery said.

Australian laws vary wildly, with some states banning gay couples and single women from having a surrogate child, while others criminalise anyone who pays an overseas surrogate.

CLAIMS COMMERCIAL SURROGACY BANS INEFFECTIVE

According to surrogacy law expert Professor Jenni Millbank, the Raftery family have been caught by 2010 NSW legislation.

“So that means NSW couples travelling anywhere else in the world for commercial surrogacy are committing a criminal offence, as they are in Queensland and the ACT.”

But Professor Millbank says that ban on commercial surrogacy has had little effect on the practice.

“There are many people doing it,” she said.

“Lots of parents I’ve spoken to have moved. Not because they’re afraid of going to jail – I would be surprised if anyone went to jail because of that – but because they work in professions where they can’t afford a criminal charge.

“I’ve seen doctors, accountants and teachers moving to Victoria and South Australia so they can continue in their quest to have a child.”

ALTRUISTIC SURROGATES IN SHORT SUPPLY

There are no restrictions on same-sex couples in Queensland, where Jarred Merrell and Michael Knowles are raising a pair of two year olds.

“I would never change a thing. We’re so blessed,” Mr Merrell said.

“For Michael and I, as same-sex parents, we grew up assuming [we would] never have a family. To be able to make this happen means so much.”

They wanted to have a child through a regulated system, so began searching in America.

“That didn’t end up working out, so we went through a fair bit of money there,” Mr Merrell said.

Then they found Rachel Kunde through an online infertility forum.

“It’s been such an empowering experience,” Ms Kunde said.
“Not just for them as parents but for me, because I come away with a sense of doing something good for someone else altruistically.”

Ms Kunde’s gesture is all-too-rare. She says more women would become surrogates if they were paid more than a token fee.

“There are not many women [who] are willing to carry a baby altruistically, so we do need to see some sort of incentives for surrogate mothers,” she said.

“In the same regard we don’t want to motivate people for the wrong reasons.”

Ms Kunde says the baby Gammy case is not a reflection on most surrogacy arrangements.

“We’ve seen, through Michael and Jared, how amazing surrogacy can be,” she said.

“We want that option to remain open to anyone in Australia. This is only one case amongst hundreds of positive stories.

For many of us, it just sticks in our throat that a poor woman, whether that’s a poor Thai woman or a poor Australian woman, is being paid money by a richer person to take risks with their own health.”

Dr Peter Illingworth

CALLS FOR CHANGES TO LEGISLATION

The medical director of IVF Australia, Dr Peter Illingworth, has great reservations about commercial surrogacy.

“Clearly it’s important that couples who are striving to have a family should have as many options available to them as possible,” he said.

“But for many of us, it just sticks in our throat that a poor woman, whether that’s a poor Thai woman or a poor Australian woman, is being paid money by a richer person to take risks with their own health.”

Calling for legislation change, Dr Illingworth says that legally, the baby is considered the child of the surrogate, and a judge must determine parentage after the baby is born.

That means that surrogates can walk away from an arrangement after the child is born.

“It would be much simpler and would give a lot more certainty for all of the participants involved, not least the child, that this could all be sorted even before the surrogacy arrangement started,” he said.

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CHAPTER 2
International and commercial surrogacy

General information on overseas surrogacy

SURROGACY AUSTRALIA explains with this fact sheet overview

The word ‘surrogate’ just means appointed to act in the place of. Surrogacy refers to an arrangement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child for a couple or single person with the intention of giving that child to that person/people once the child is born (also called surrogate pregnancy).

**Types of surrogacy**

**Complete/gestational/ gestational contracted surrogacy**

The surrogate mother is implanted with an already fertilised embryo which may be produced using in vitro fertilisation (IVF), via the intended parent’s egg and sperm or using a donated or purchased egg (in the case of gay males) or sperm.

In this case the pregnant woman makes no genetic contribution to the child. This type of surrogacy is far more common amongst Australians, and is viewed as providing a greater distance between the surrogate mother and the child.

**Traditional/partial/genetic contracted surrogacy**

The gestational surrogate provides the egg for the child and is impregnated with the sperm of the commissioning father (usually through artificial insemination). In these cases, the gestational surrogate is genetically linked to the child but she relinquishes any legal rights of parentage over the child to the commissioning parents.

**Types of surrogacy agreements**

**Altruistic**

Altruistic contracted surrogacy arrangements are those where the surrogate agrees to receive no payment or reward, although it is rare that a total non-commercial agreement is ever made as it is expected that the commissioning party will pay the pregnant woman’s medical bills. It is important to note that you are not ‘buying’ a baby. The payments made to the surrogate are by way of compensation.

Altruistic surrogacy is legal, albeit tightly regulated in some Australian states. Legally, it needs to be carried out under the auspices of an accredited Australian IVF clinic. Intending parents are not permitted to advertise for a surrogate and most commonly utilise a family member or close friend. In all cases, gestational surrogacy arrangements are implemented.

Contrary to popular belief, surrogates are not all poor women being exploited for their fertility. Many are middle-class women who want to help make families. They come from all walks of life. Some are done having children of their own, while some want more children in the future.
Commercial contracted surrogacy arrangements are those in which the party seeking a child agree to pay a fee to the surrogate beyond the cost of her medical needs.

**WHO ACTS AS A SURROGATE?**

Contrary to popular belief, surrogates are not all poor women being exploited for their fertility. Many are middle-class women who want to help make families. They come from all walks of life. Some are done having children of their own, while some want more children in the future.

The emotions involved in surrogacy are very strong on both sides. Surrogates need to make sure they have appropriate support before choosing surrogacy. Support organisations exist for those choosing this option.

**HOW DO SURROGATES FEEL ABOUT RELINQUISHING A CHILD?**

Research carried out by the Family and Child Psychology Research Centre at City University, London, UK in 2002 and 2006 showed surrogates rarely have difficulty relinquishing rights to a surrogate child.

Most stories (especially movie dramas) about the subject focus on the problems of the practice, and on the conflicts that may arise from it, but this is rare in reality. Most surrogate arrangements end without problems, with both the intending parents and the surrogate coming away satisfied.

**WHAT SORT OF AUSTRALIANS USE SURROGACY?**

In some cases it is the only available option for a couple who wish to have a child that is genetically related to at least one of them.

People who choose surrogacy may be:

- Heterosexual women who are unable to carry a child due to a range of factors (e.g. infertility, hysterectomy, absent or poorly functioning ovaries, an absent or malformed uterus, a maternal disease which precludes pregnancy, recurrent pregnancy loss, or repeated IVF implantation failures)
- Single women or lesbian couples who can’t or don’t want to go through pregnancy or artificial insemination
- Single or same-sex partnered men.

It has been suggested that one of the major motivations for turning to this method of reproduction is the difficulties associated with adoption in contemporary Australian society.

These include the fact that changes in social attitudes and legislation have led to fewer women placing their children up for adoption, and couples may wish to avoid being asked to adopt a child of a different race or having to go through the difficulties of international adoption.

Adoption in Australia, with the exceptions of certain states, is currently not an option available to gay male couples.

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SURROGACY AND WHY MANY PARENTS BREAK THE LAW

While overseas arrangements are no easy journey, such is the determination of intended parents, they will put up with the expense, worry and risk of legal and medical complications. By Sam Everingham

Zac is a NSW policeman. He and his wife, Louise, a 34-year-old lawyer are ready to break NSW law. I met them last week. Louise had suffered three miscarriages before turning to IVF. Since then her womb has been carefully prepared five more times. Only two of the nine embryos implanted turned into a pregnancy and both miscarried.

Her doctor finally made a diagnosis – she had ‘killer cells’ in her womb. Her physician is recommending surrogacy – another woman to carry her embryo, her child for her. It is a process which is becoming an increasingly common means of family formation for those who cannot carry a child themselves. This includes not only infertile couples, but singles and gay couples who yearn to be parents.

However couples like Louise and Zac are loathe to attempt to find an altruistic surrogate in Australia. While relatives have offered, that’s just too close to home for their comfort. A stranger? Again, Louise would feel uncomfortable about accepting such generosity and a baby, without being able to compensate her surrogate, even though the surrogate would have no genetic relationship to her child. For many couples like Louise and Zac, they either cannot locate a surrogate in Australia, are uncomfortable not being able to compensate her, or would rather distance their surro-gate from their own family.

Unfortunately this means the efforts Australian states have gone to in recent years to guide the practice of surrogacy at home is failing miserably.

Enter overseas surrogacy. The global economy and the preparedness of thousands of Australians like Zac and Louise to travel means that ‘cross-border’ surrogacy arrangements are increasingly common (for Australians this mostly means India, the US or Thailand). While Queensland, New South Wales and the ACT each have criminal laws in place outlawing overseas surrogacy, each of these governments knows it would be political suicide to charge, detain and worse, lock up a new parent. So their laws have never been policed. In fact a number of NSW parents through surrogacy have shown off their newborns in major newspaper stories – complete with photographs and names. No authorities have come knocking.

While overseas arrangements are no easy journey, such is the determination of intended parents, they will put up with the expense, worry and risk of legal and medical complications. And surrogacy journeys can have no shortage of these.

For example India – at present the main destination for hundreds of Australian families through surrogacy each year – has just announced that foreigners need to be married for a minimum of two years (and resident in an Australian state which allows overseas surrogacy) to apply for their new ‘surrogacy’ visas. This rules out 70 per cent of intended parents. It means scores of Australians who have babies on the way in India are biting their fingernails hoping for a ‘clean exit’. Scores more are shifting to agencies and clinics in Thailand – a more expensive option but not as costly as the US, where medical insurance, legal fees and high hospital costs can make surrogacy unattainable for all but wealthy Australians.

The problem is, the exodus of parents from India to Thailand is not just Australians, but Israelis, British, Americans, Dutch, Scandinavians, Brazilians together with many other nationalities. It has lead to Indian middle-men agents descending on Bangkok in an attempt to do deals with hospitals, IVF specialists and other surrogacy services. It is unlikely Bangkok’s IVF industry has the infrastructure in place to cope with the demand. Amongst greedy clinics trying to take shortcuts, there are bound to be problems – unethical agents, surrogates not properly screened and inadequate medical care.

Sam Everingham is president of Surrogacy Australia – a not-for-profit organisation set up to support Australians who are planning on becoming, or who are already, parents via surrogacy arrangements.

Surrogacy: whose reproductive liberty?

An explicit human rights-based approach can perhaps help remedy the shortcomings of liberty as the sole way to justify surrogacy, writes Kate Galloway

Changing notions of the understanding of ‘family’ in Western culture have resulted in part from the increasing availability of assisted reproductive technologies.

Alongside technological innovation such as IVF, surrogacy has been increasing in visibility. Most Australian jurisdictions permit only altruistic surrogacy – it is unlawful to pay women to carry a baby other than to reimburse them for reasonable expenses. Consequently, many intending parents are looking overseas to engage women to have their babies.

The topic of overseas surrogacy arrangements hit the headlines recently in the case of Baby Gammy. The child was one of twins born to a Thai mother for an Australian couple. Gammy was born with Down’s Syndrome and while his healthy sister was taken by the commissioning couple, Gammy was left in Thailand with his mother. The case raises ethical dilemmas on almost every front: that he suffers a disability; that he was rejected in favour of his healthy sister; and that his mother was asked to have a late term abortion. In particular media have focused on Baby Gammy’s medical condition and the criminal history of the biological father, raising critical issues of child protection.

While these are important, somewhat lost in much public debate is the nature of surrogacy as intrinsically a gender issue. As only women can carry and birth a child, surrogacy raises questions of the woman’s autonomy in choosing to be a birth mother especially where the woman is poor. In particular, surrogacy is a question of competing reproductive liberties as between the commissioning parents and for the birth mother.

Motherhood

One of the challenges in coming to grips with the ethics of surrogacy is that it separates dimensions of motherhood. ‘Mother’ simultaneously has a genetic, biological and social dimension. In a ‘traditional’ conception, gestation, birth and family structure, converge and we take the idea of ‘motherhood’ as a unitary concept.

Sheila Jeffries, Professor of Sexual Politics at University of Melbourne has pointed out that separating reproduction from motherhood poses a risk of aiding trafficking in children. Her point is well made. But it is also problematic because it suggests that women who reproduce necessarily must adopt the social role described as motherhood. There is no essential link between women’s reproduction with the social role of motherhood. It is well known, for example, that single fathers or same-sex relationships can offer stable and loving family environments for children.

Indeed, feminism has been instrumental in calling for such a separation to enable them to engage more fully in the so-called public sphere of work, freed of their construction as mothers. This is not to say that women have necessarily called for a separation from reproduction itself. But women in the West have nevertheless increasingly achieved reproductive freedom, taking control of their own fertility and choosing when and if they become mothers. This has also involved the continuing struggle to find material support for mothering and the constant caring implicit in the role, beyond the romantic construction of ‘motherhood’.

The social construction of ‘motherhood’ reflects the deeply held cultural expectations of woman as mother. Where society has internalised the elevated status of motherhood, women may believe that personal success, fulfilment and happiness will only happen through motherhood. This stereotype can result in discrimination against women who do not have children and reduces women who do to an essentialist role of child rearing.

If the cultural connotation of motherhood is part of women’s oppression, the question might be asked whether surrogacy can be justified – for intended mothers, genetic mothers or birth mothers. Janice Raymond, for example, suggests that allowing surrogacy at all simply upholds essentialist notions of what it is to be a woman and that even an altruistic surrogacy arrangement between family members plays on social expectations of sisterly love to give freely what might be considered “the greatest gift of all”. On this basis, she argues, it should be opposed.

It is therefore important for women to be able to separate reproduction from mothering and its gendered connotations. Freeing women from the implications of social constructions of motherhood – what society expects of women who reproduce – can allow them to fully express who they are, and to exercise their
One problem with a reproductive liberty approach to surrogacy is that the rights of the intending parents can outweigh the effects of the arrangements on gamete donors, birth mothers and children. 

autonomy and independent identity. Social attitudes about childless women – encapsulated in Senator Bill Heffernan’s notorious description of former Prime Minister Julia Gillard as “deliberately barren” – exemplify these expectations. In a double standard, pregnant women are systematically discriminated against in the workplace. When taken together these expectations indicate a strong social preference for women to procreate, but remain at home and out of the public sphere.

But it is likewise important to value the role of mothers. Part of this is recognition of the embodied experience of motherhood as integral to many women’s identity. Thus motherhood itself can be an expression of women’s independence and autonomy. This is particularly so in terms of women’s exercise of reproductive freedom. This idea is complicated, however, in the case of a surrogacy arrangement.

**Whose reproductive rights?**

Implicit in the media reporting around the Baby Gammy case is the assumption of reproductive liberty. Reproductive liberty is the exercise by women and men of autonomy and self-determination in begetting and rearing children. An individualist, rights-based approach to reproduction, reproductive liberty justifies surrogacy along with any other mode of reproduction. It is perhaps more prevalent in jurisdictions such as the US with a stronger rights-based system but can also be seen to some extent in Australia.

A recent review of surrogacy laws in Queensland for example, supported surrogacy in principle as part of the “liberty of consenting adults to conceive a child and to parent”. As this indicates, one problem with a reproductive liberty approach to surrogacy is that the rights of the intending parents can outweigh the effects of the arrangements on gamete donors, birth mothers and children. A framework of legal rights alone can fail to acknowledge the social and emotional context of reproduction, which challenge the idea of ‘informed consent’ to the arrangement.

For the birth mother, there is also a question of reproductive liberty. Is it not right that a woman can freely choose to have a baby? This is in one sense the ultimate expression of autonomy and control over one’s person. There are two possible barriers to a broad acceptance of a woman’s right to express her reproductive liberty through becoming a birth mother in a surrogacy arrangement. The first is the social construction of motherhood that impedes our understanding that a woman may choose to give up her baby. The second is whether this is an expression of a woman’s liberty or rather exploitation based on her vulnerability due either to her race, her class, her economic situation or a combination.

One way of considering the conflict between personal autonomy and possible exploitation is to differentiate between reproductive rights and reproductive justice. Sarah London for example, argues that reproductive rights of choice, privacy and autonomy, are necessary but not sufficient to achieve reproductive justice. A framework of reproductive justice considers the effect of power relations and differential resources of the parties to a surrogacy arrangement that opens potential for exploitation by powerful parties. It therefore opens the way to respect women’s social, mental, economic and political wellbeing associated with full self-determination in making reproductive choices.

In Australian jurisdictions the prohibition on commercial surrogacy is an attempt to prevent the exploitation of financially disadvantaged women – one measure perhaps of reproductive justice. In contrast, in the case of Baby Gammy, the fact of his mother’s poor financial status may imply that her ‘choice’ to enter into a surrogacy arrangement was not a free one. While she may not have been coerced, her relative financial disadvantage calls into question the justice of the arrangement.

In a world where women are free from cultural and social expectations of motherhood and where structural barriers causing women’s economic disadvantage are removed, would surrogacy still exist? There is still surely an argument that some people would seek to generate a family through surrogacy, and some women would willingly seek to have a child for another. In conditions of perfect equality, theoretically these arrangements could exist as genuine representations of reproductive liberty.

In the present world of inequality and exploitation, many argue that surrogacy should be regulated rather than shut down. Regulation is proposed in the interests of protecting the vulnerable from inevitable exploitation. In these circumstances an explicit human rights-based approach can perhaps help remedy the shortcomings of liberty as the sole way to justify surrogacy. It offers the chance to consider the reality and context of the lives of real women facing difficult choices.

Importantly also, it seeks to ensure that the birth mother expresses her self-determination through fully informed consent in any arrangement rather than as a victim or exploited ‘other’ serving the interests of those imposing their own reproductive liberties.

**Kate Galloway** is a legal academic at James Cook University in Cairns. Her areas of interest include feminist legal theory and justice.

The rights of children must come first in international surrogacy

Cross-border surrogacy debates and practices need to be re-orientated from the needs and wishes of adults to the preservation and protection of children’s rights and best interests, asserts Helen Freris

The recent case of Baby Gammy has drawn attention to the ethical pitfalls posed by international surrogacy. Significant among these is the need to refocus discussion of the issue towards the rights and best interests of children.

Few reliable statistics exist, but it is generally agreed that the number of children born through surrogacy is increasing, due to greater acceptance of assisted reproductive technology and a drop in the number of children available for adoption.

Unlike international adoption, which is highly regulated in Australia, and whose goal is to provide a family for children unable to be cared for in their own country, international surrogacy operates for the most part in a nebulous legal landscape. Offshore surrogacy agencies and fertility clinics have been established as profit-making ventures for the sole purpose of supplying children to involuntarily childless couples and individuals.

We need to focus squarely on the rights of children born through surrogacy arrangements, because they are not only longed for by their commissioning parents, but also individuals in their own right, members of our society with inherent rights set out in the UN Convention on the Rights of the Child (CRC).

Parenthood is not a right, but a responsibility of families and of society. The creation of a child through surrogacy is a decision made by adults, but with a direct bearing on children.

The CRC provides that, among other rights, children have the right to grow up in a family and to know and preserve their identity and their relationships with their family of origin. The CRC also upholds children’s entitlement to safety and security and to physical, emotional, psychological and spiritual wellbeing.

Although intentionally created to become part of the family of their commissioning parents, it is important not to view children born through surrogacy merely as the outcomes of contractual arrangements, created by technology and transnational labour in exchange for remuneration. They, like other children, are individuals, separate to their parents and with inherent rights of their own.

In the words of Kahlil Gibran:
Your children are not your children.
They are the sons and daughters of Life’s longing for itself.
They come through you but not from you.
And though they are with you yet they belong not to you.

These children – and their safety and wellbeing – are the responsibility not only of their commissioning parents, but of all those involved in their creation, and of the society into
which they are born.

One practical way to exercise this responsibility is to ensure surrogacy programs are operated so that children have access to accurate birth records and both non-identifying and identifying information regarding donors and surrogates, with appropriate counselling and support for all parties. Only with such arrangements can the burden of secrecy, brought about by the anonymity of donors and surrogates, be lifted from the lives of these children.

Australia’s recent experience of the impact of forced and closed adoption practices has much to teach us. Past practices, in which access to adoption records was denied and mothers were coerced into relinquishing their newborn children for adoption, have taken a heavy toll on the lives of many Australians, including those adopted internationally into this country.

My colleagues and I at ISS know the impact of this secrecy and the consequent search for identity, as we assist adoptees to trace their origins and reunify with original family members on a daily basis. Adoptees have often shared the importance of knowing about the circumstances of their birth, and the names and some of the history of their original family.

Even if an adoptee experienced a happy childhood in their adoptive family, and has no desire for contact with their original family, the sense of completeness in finally removing the veil from their origins can be profound. For surrogate-born and other donor-conceived adults, practical considerations such as having access to genetic or medical information on a donor or biological parent are critical. The use of anonymous donors or surrogates arguably continues the mistakes of past adoption practice, potentially leading to feelings of confusion, grief or disconnection by the donor-conceived or surrogate-born person.

So how can the rights of children born through surrogacy be upheld? I believe that Victorian practice provides a useful model. It incorporates requirements for extensive counselling and psychosocial assessment of both intending parents and surrogates, police and child protection background checks for all parties, and registration of information relating to donor-conception for later access by people seeking to learn about their origins.

In 2013, the International Social Service network produced a ‘Call to Action’ on the needs of children born through surrogacy and other forms of assisted reproductive technology.

This recommended that policymakers, legislators and other professionals focus on:

• The feasibility of international regulation of cross-border surrogacy through a Hague Convention or a Special Comment of the UN Committee on the Rights of the Child
• Investigation of the long-term impact on and psychological adjustment of children to separation from their surrogate mothers
• The development of policies and practices to ensure the wellbeing and protection of all children born through surrogacy, but especially those with specific needs due to disability or those deprived of parental care
• Arrangements to ensure citizenship of surrogate-born children to avoid statelessness
• Policies and practices to preserve the access of surrogate-born individuals to birth/donor records.

Parenthood is not a right, but a responsibility of families and of society. The creation of a child through surrogacy is a decision made by adults, but with a direct bearing on children. Cross-border surrogacy debates and practices need to be re-oriented from the needs and wishes of adults to the preservation and protection of children's rights and best interests.

Helen Freris is the National Services Manager of International Social Service Australia.

She is a qualified social worker and accredited Family Dispute Resolution Practitioner. She practises in the areas of cross-border family separation, international child welfare and post-adoption tracing and reunification.

Commercial surrogacy in Australia: rethinking notions of ‘natural’

Legislating for commercial surrogacy would enable Australia to overcome concerns about poorly regulated clinics overseas, argues Damien Riggs

Often emphasised in discussions about children’s best interests is the idea that certain ways of having and raising children are “natural”. For example, this word appears frequently in reference to how children are conceived (with heterosexual intercourse often referred to as “natural reproduction”). It also appears in reference to how children are raised (e.g. it is typically seen as “natural” for a child to have a mother and a father).

Views on what is “natural” have had a predictable airing in public debate over commercial surrogacy as a result of two recent cases of babies being abandoned by intended parents first in Thailand and now in India. Legislating for commercial surrogacy in Australia would help avoid this type of outcome. One barrier to the implementation of such legislation, however, is the view that commercial surrogacy is “unnatural”.

**NATURAL OR NATURALISED?**

To progress discussions about children’s best interests beyond claims about what is “natural”, it is useful to consider the word as a moral category. In other words, what is referred to as “natural” is determined by human beings, rather than simply reflecting the world around us. This approach can help us to see that often what is described as “natural” in regard to the conception, birth and raising of children is what in fact has been “naturalised”, rather than strictly what is “in nature”.

So, for example, heterosexual intercourse doesn’t occur absent of a whole range of factors that are not, technically speaking, “in nature”. This includes how we present ourselves to others (e.g. clothing, grooming, scents), how we meet people (such as on dating sites) and the contexts in which heterosexual intercourse may occur (in buildings, for example). None of these is natural in the true sense.

Similarly, births that result from heterosexual intercourse are not strictly speaking “natural”. They often take place in hospitals, with the assistance of highly qualified professionals, and for some people with the use of medication and/or surgery. Again, we would find none of this in nature.

Views on what is “natural” have had a predictable airing in public debate over commercial surrogacy as a result of two recent cases of babies being abandoned by intended parents first in Thailand and now in India. Legislating for commercial surrogacy in Australia would help avoid this type of outcome. One barrier to the implementation of such legislation, however, is the view that commercial surrogacy is “unnatural”.

Will you look at that!

God, that’s so last century!

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We can see, then, that what is treated as “natural” is actually “naturalised”; it is what has become part of our nature as people living in a country such as Australia.

These points about what is considered “natural” are important when we come to topics that are at times depicted as unnatural. For example, a public debate is under way in Australia about commercial surrogacy. As a mode of conceiving and birthing children, commercial surrogacy is often (though not always) depicted as unnatural and thus not in the best interests of children.

**BIRTH RATE AND AGEING AFFECT US ALL**

The problem we face in Australia, however, is a declining birth rate (below replacement rate) and an ageing population. Australian citizens are thus encouraged to reproduce in order to ensure the future wellbeing of the nation and its citizens. If such a pro-natalist approach is important, then we must acknowledge that fulfilling population targets requires a wide range of options in terms of the conception and birth of children.

Just as the significant institutional supports for the birth of children conceived via heterosexual intercourse have been naturalised (e.g. hospitals, paid parental leave and medical science), so too should commercial surrogacy be naturalised as yet another way of having children.

Over the past decade reproductive technologies have become available to a much wider range of people. This has required legislative change to allow access for groups of people who, in the past, would have been considered “unnatural”.

What is now required are legislative changes that again revisit how we determine the borders of what is considered “natural”, this time to acknowledge that the nation is best off regulating its citizens within its borders, rather than accepting a status quo that implicitly encourages people to travel abroad for access to reproductive technologies (such as commercial surrogacy). This would certainly be in the best interests of all parties, including women in countries outside of Australia who at present act as commercial surrogates for Australian citizens, a situation that is largely beyond the regulatory purview of Australia.

**LEGISLATION IS IN EVERYONE’S BEST INTERESTS**

Legislating for commercial surrogacy within Australia would allow for the tight regulation of surrogacy arrangements, which would include ensuring the safety of women who act as surrogates, and the keeping of records so that into the future children can find information about all involved in their conception and birth.

Just as the significant institutional supports for the birth of children conceived via heterosexual intercourse have been naturalised (e.g. hospitals, paid parental leave and medical science), so too, it is suggested here, should commercial surrogacy be naturalised as yet another way of having children.

Importantly, it is not argued that commercial surrogacy should become privileged as a way of having children.

Legislative change in the child protection sector is needed too, so that more children who cannot live with their birth parents can be raised by other people wishing to have children, under permanent arrangements. Like discussions about commercial surrogacy, discussions about changes to the child protection sector also require us to rethink what we consider “natural” in terms of having and raising children.

For some, raising “another person’s child” might seem unnatural. For others, it might seem unnatural to separate a child from their birth parents. And for yet others, it might seem unnatural to encourage relationships between the multiple parents involved in raising a child in the context of child protection.

As this piece has suggested, for us to truly progress conversations about children’s best interests in Australia, it is important that we widen our scope in terms of what we see as “natural”.

Damien Riggs is Associate Professor in Social and Policy Studies, and an Australian Research Council Future Fellow at Flinders University.
MAKING SURROGACY LEGAL WOULD VIOLATE CHILDREN’S RIGHTS

Of each of the parties involved in commercial surrogacy, the only party possessing unarguable and inalienable rights is the child born of commercial agreements, write Liz Bishop and Bebe Loff.

The current debate about commercial surrogacy has focused on the competing needs of couples or individuals desperate to have children, and the exploitation of vulnerable women in low-income countries. But no one seems to be talking about the rights of the child.

This is particularly odd because the debate, which is loosely constructed around the competing desire of people to be parents and of women not to be exploited, is couched largely in the language of rights. The proposed solution for settling these competing desires is legislation that supports commercial surrogacy.

Rights vs desires

Claims to rights do not, in and of themselves, create rights. International law recognises both the right to found a family (Article 16), and the right to benefit from scientific progress (Article 15). But neither of these rights, however cobbled together, can defensibly form a right to outsourcing the creation of child. Indeed, the creation of a child through commercial surrogacy could not have been contemplated in their origin.

Since the claim to create a child by means of a surrogate mother falls short of characterisation as a right, how is this claim to be understood? It is most readily recognised as a desire or interest.

The strongest argument for recognition of these desires or interests is that of same-sex couples. A same-sex couple will always be incapable of creating a child without the involvement of a third party.

But this lack of capacity doesn’t produce the right to a child, let alone the right to a child resulting from a contractual arrangement. Although the desire for a child may be great, desires are not rights.

What of the rights of the surrogate mother? We recognise the right to work, but that can be equally satisfied in ways other than commercial surrogacy.

Commercial surrogacy may seem to many women in low-income countries, and their families, as the best option for alleviating poverty. But that’s not a compelling argument for regulating commercial surrogacy.

Rather, it calls for addressing the poverty, limited opportunities and education of women, which together serve to create the environment rendering such arrangements an attractive option.

Analogies may be drawn with the arguments in support of the right of sex workers to perform sexual services for payment as an occupation. But in sex work, pregnancy is a hazard to be minimised. Children are not an intended outcome of that commercial act.

But surely we don’t need to create a scheme in which the immediate desires of adults are knowingly placed ahead of the rights of the child. It’s also hard to see how permitting commercial surrogacy in Australia will resolve the problem of the difficulties for all parties entailed in enforcing surrogacy contract.

Rights of the child

And where in the surrogacy debate do we recognise the rights of the child? Of each of the parties involved in commercial surrogacy, the only party possessing unarguable and inalienable rights is the child born of commercial agreements.

Enshrined in the Convention on the Rights of the Child, this guarantees the right to dignity, protection from sale or trafficking, registration of his or her birth and to know his or her parents.

In writings about adoption and IVF, there is a strong body of evidence demonstrating that children are profoundly interested in their parentage.

In surrogacy arrangements, whether commercial or not, if there’s a falling out between the gestational mother and the parents (who may or may not be genetically related to the child), the child may never know who gave birth to him or her. This risk is magnified in international surrogacy.

The experience of commercial surrogacy agreements in recent years has seen children languish stateless when...
their personal circumstances change and commissioning parents no longer want the child. And it’s not only because of disability that a child may not be claimed by his or her commissioning parents.

In the interim between commissioning the surrogate and the birth of the child, parents may separate or divorce, or one or both parents may be severely injured in an accident or a parent may die. Commissioning parents may change their minds.

What point would there be in enforcing contractual or personal arrangements under these circumstances? Is it really conceivable that society would (or, indeed, could) force parents to rear children once they’ve decided they would rather not?

These are not fanciful risks. Cases dealing with surrogacy contracts gone wrong have been determined by courts elsewhere, none happily.

**An inalienable responsibility**

Internationally recognised human rights often conflict. When they do, a balancing exercise is required to minimise the restrictiveness of the outcome. But in this circumstance, what we’re seeking to balance are strongly held desires against internationally and nationally recognised rights.

A child should neither be thought of as a vegetable nor a puppy able to be acquired as the result of a commercial transaction. This violation of the dignity of the child says something about those who are content to return to historic understandings of a child as the property of its parents or, more correctly, its father.

We can’t ensure that all children will be born to loving parents to whom they are genetically related. Parents may abuse and abandon their children and not all parents are genetically related to their children.

But surely we don’t need to create a scheme in which the immediate desires of adults are knowingly placed ahead of the rights of the child. It’s also hard to see how permitting commercial surrogacy in Australia will resolve the problem of the difficulties for all parties entailed in enforcing surrogacy contract.

The cacophony of voices in the surrogacy debate is silenced only with recognition that the individual without choices and with rights is the child.

We’re yet to realise the rights of baby Gammy. He has a sister, he has a commissioning mother, and he has a commissioning father, through whom he has siblings. He has a surrogate mother with whom he has a clear bond.

And, equally, he has inalienable rights. We bear an inalienable responsibility to protect and prioritise these rights.

**Liz Bishop** is a Lecturer in Public Health and Human Rights at Monash University.

**Bebe Loff** is Associate Professor and Director of the Michael Kirby Centre for Public Health and Human Rights at Monash University.

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Reject commercial surrogacy as another form of human trafficking

Any attempt to recreate in Australia the harms that the commercial surrogacy industry has created elsewhere should be resisted, asserts Sheila Jeffreys

The practice of reproductive surrogacy is in the news in Australia because of the story of a Thai child, Gammy, a twin who was apparently abandoned by the buyers because he was sick. They took his healthy sister. This story should not be seen as just an individual bad news story. It has much to tell us about the effects of commercial surrogacy. This industry is an offshoot of the very profitable reproductive technology industry, which created, through IVF, the possibility of persons buying children in the marketplace.

The surrogacy industry has created the trafficking in women for the use of their wombs. In extreme forms it includes the imprisonment of women in slave camps. It trafficks babies from one continent to another. The result is that children can be rejected, left over or abandoned like the sofa that buyers decided was in the end not the right colour. Children have become goods to be traded.

Discussion of surrogacy usually revolves around the rights of the buyers and how the industry can be better regulated. The debate should be about whether such a harmful industry should be permitted at all.

Transforming the place of motherhood

The surrogacy industry has transformed the understanding of motherhood. It creates two classes of mothers, birth mothers and commissioning mothers, who may or may not be related to the babies they pay for. An industry created for profit has already upturned generationalism, with grandmothers bearing children for their own daughters.

The women who give birth to the children are called surrogate mothers, in an attempt to distance them from the ‘real’ or commissioning mothers. Yet the surrogate mothers are the persons who have carried the infants in their wombs. They created them out of their flesh and blood for nine months.

They suffer not just the exploitation of having their bodies controlled by others – the buyers, agents and doctors – but then must suffer the psychological effects of having their babies removed. The pain of poor and often desperate women in other countries who are sometimes repeatedly pimped out to baby farms by male partners or families for profit is not considered relevant. They are expected to treat their bodies as factories and their babies as products that are unrelated to their humanness.

Trafficking is made easier because the surrogacy industry has separated childbirth from motherhood. Once the ability to give birth was a source of women’s strength, something women could do in a male-dominated society that men could not. It is now possible for men to acquire children without the bother of developing a relationship with a woman.

A Japanese businessman has reportedly managed to acquire 13 babies by surrogacy, nine of whom were kept in a nursery he sometimes visited. He intended to take them to Japan to run his business when they grow up. This story reveals the problems that can arise when single men or men in couples can buy children who will have no mother of any kind. These children may be acquired for the purposes of abuse, and there may be no woman with an interest in the child’s welfare around to protect that child.

The Australian buyer of the Thai child has a wife, but has been found to be a serious child sex offender, which raises questions about his intentions for the child. There are precedents of the creation of children for the specific purpose of sexual abuse. The father in the baby Gammy case has publicly denied this was his intention.

A Queensland male gay couple were imprisoned last year for, the police believe, creating a boy child by surrogacy specifically for abuse. The boy was acquired from a Russian surrogate mother and the abuse started shortly after birth. Sexual abuse of him was uploaded to a boy lovers’ site and he was taken around the world for abuse by other paedophiles.

Money for babies invites trafficking

The surrogacy industry not only rips apart the connection between motherhood and reproduction, but undermines the welfare of trafficked women and babies. It raises disturbing questions about what children are for, an end in themselves or to serve the purposes of their buyers.

Surrogacy industry entrepreneurs are campaigning to change the law in Australia, where only altruistic surrogacy is allowed. Their aim is to enable the commercial surrogacy industry to grow in this country. A supposedly well-regulated industry here, they say, is the answer to abuses overseas.

It is time to open a debate among feminists, ethicists and politicians about the implications of the commercial industry for the surrogates and for the children. While three Australian states now have laws to prevent the use of surrogates in other countries, these need to be adopted in all states. Any attempt to recreate in Australia the harms that the commercial surrogacy industry has created elsewhere should be resisted.

Sheila Jeffreys is a Professor of Sexual Politics at the University of Melbourne.

THE CONVERSATION

THE CONTRADICTIONS OF BABY GAMMY: DISABILITY, DISCRIMINATION AND THE TRUE COST OF SURROGACY

Bioethicist Nicholas Tonti-Filippini explores some of the complex ethical issues brought to light by the plight of baby Gammy.

There has been extensive recent discussion of the circumstances of baby Gammy, suffering from Down’s syndrome and heart problems, and apparently left behind with the birth mother in Thailand by the Australian commissioning couple, though they took his well sister home. Australians have responded generously with support for this photogenic little boy so that he can receive appropriate medical treatment.

The Thai government has responded by proposing restrictions on this form of trafficking in human persons and there has been much criticism of the commissioning couple, culminating in the discovery of an apparent history of child abuse by the commissioning male partner.

The public and media reaction to these circumstances has been interesting. The shared premise would seem to be a negative reaction to a couple abandoning their biological child because he has a disability. There is also the plight of the birth mother who has not apparently received what was due to her under the commercial arrangement. Disquiet has also been expressed about the fact that the arrangement was commercial and exploitative of the poverty of the Thai birth mother.

A matter that seems to be relatively hidden in this discussion is that it would have been normal Western medical practice (around 90% of cases) to have aborted Gammy when it was discovered that he had Down’s syndrome, but his birth mother reportedly refused on religious and conscientious grounds. The fact is that whatever a commissioning couple might want, a birth mother has the final say on such matters under the criminal law in most jurisdictions, though of course she may be placed under contractual and financial pressure to do as the agency or the commissioning couple want.

That decision about eugenic abortion generally favoured by the medical profession, and warranting expensive early detection by screening and invasive testing to detect abnormality, raises curious anomalies about attitudes to disability. Disability discovered before birth is seen differently from disability after birth.

Before birth, it is accepted practice to inject the heart of the unborn child with potassium chloride to cause death before inducing a stillbirth, or late term there may be a partial birth abortion in which during delivery an instrument is inserted into the child’s brain through the back of the neck so it also is born dead. After birth, even the birth of a baby of the same or even less maturity or gestational age, to end the life would be regarded as a criminal offence in most jurisdictions.

Anecdotally, mothers who opt not to have their child given the fatal injection before birth are placed under great pressure to use the technique to prevent the birth of a child with a disability. It is a cognitive dissonance that seems irresolvable that birth, not maturity or gestational age, to end the child’s life would be regarded as a criminal offence. Cultural attitudes to disability are obviously conflictual. Public
reaction appears to condemn the commissioning couple for reportedly deserting a child on the basis of disability and the inherently discriminatory attitude involved, but would presumably have accepted the killing of baby Gammy before birth at the request of the commissioning couple or the agency, if the birth mother had acquiesced.

**THE MORAL PROBLEMS OF SURROGACY**

There are many other conflicts underlying this case. In reality, surrogate motherhood represents a failure to meet the obligations of maternal love, marital fidelity and responsible motherhood. That is to say, carrying a pregnancy involves a unique relationship to the child in which the woman becomes the child’s mother. As the mother of the child, she has natural obligations to nurture the child. These obligations are felt by many mothers despite having decided on abortion. A woman who is about to abort will often express protective views, such as about not taking antibiotics that might harm the child, even though she has decided to abort.

Furthermore, if the woman is married she has entered into a convenantal agreement in which her capacity to become a mother is given exclusively to her husband as he gives himself exclusively to her including his capacity to be a father. That means an inherent conflict between her married status and her allowing her body to be used for commercial gain to become pregnant from outside her relationship to her husband and her family.

One wonders about the impact on Gammy’s two siblings in this case, as they see their mother give or in effect sell her birth child to others. What would it mean for Gammy’s birth siblings now if, having loved Gammy as a family addition, the commissioning couple were to move to take Gammy away with them? What effects would that have on the confidence they would have had in the bond they have with their mother, and their father, if there is a father in the picture?

**SURROGACY AND THE RIGHTS OF THE CHILD**

Commercial or even so-called ‘altruistic’ surrogacy contracts offend the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by their own parents.

This right is recognised by the United Nations in the Convention on the Rights of the Child, which upholds the child’s right:

- To preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference
- Not to be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child
- Not to be separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests
- To rely on the common responsibilities of both parents for the upbringing and development of the child, and their primary responsibility for the upbringing and development of the child on the basis of the best interests of the child, and
- That in adoption decisions, the authorities shall ensure that the best interests of the child shall be the paramount consideration.

Surrogacy sets up, to the detriment of families, a division between the physical, psychological, emotional and spiritual elements that constitute those families. The woman’s capacity to bear a child is implicitly separated from her role as mother to that child and any other children she may have. She must plan to deny any affection she has for the commissioned child she carries. As I have already mentioned, one wonders how her other children may regard the fact that she gives a child away and what that means for the security of their relationship to her.

In that respect, the treatment of the surrogate is problematic because it does not recognise the motherhood that exists in becoming pregnant and nurturing the child until birth. The surrogate is implicitly treated as an object, and her body is used as a mere incubator rather than as the child’s mother. As the child’s mother, she is linked to the child physically, emotionally, cognitively and spiritually, and that reality ought not to be denied.

To enter into a contract to the contrary by which her connectedness is to be rejected is essentially false. This is borne out by the number of occasions on which birth mothers opt not to give up the child for adoption by the commissioning couple, even when their own gametes are used and the birth mother is not genetically related.

**ALTRUISTIC SURROGACY**

So-called ‘altruistic’ surrogacy removes the commercial or trafficking element, but given that it normally happens between relatives, the project is more likely to be fraught with exploitative tension between the commissioning couple and the female relative and her family. I was consulted by a woman who felt pressured in this way by both her infertile sister and her own parents and other family members. They felt she had an obligation. She felt she had no choice. It was not really a matter of consent.

In fact, commercial surrogacy may be a cleaner break and less exploitative. The payment of a sum of money is usually far less complicated than the complex emotional relationships by which a sister may be induced under emotional pressure to perform this service so intimately involving her body, and not without effect on her family relationships, her health and the ongoing significance.
of actually being the child’s birth mother. She would endure all that pregnancy and childbirth involves, and then the suffering involved in relinquishing the bonds formed by carrying the child in her womb for nine months, and then the severance of the bonds formed – especially bonds formed through the hardship and self-investment in the sufferings of childbirth for the sake of the child.

Anyone attending or experiencing labour and birth, cannot help but see how the joy of having the baby in the mother’s arms normally seems to override the significance of her suffering, however extreme and prolonged. There is such an outpouring of love and delight in the achievement. But for the commissioned birth mother, that is all overshadowed by the removal of the baby, that enormous loss, and coping with the biological reality of no baby to assist her with the milk in her breasts and the many other changes to her body normally induced by the transition from pregnancy to suckling a new babe, aiding the healing of any damage and recovering her normal body.

Biologically and psychologically, the loss of a baby at or soon after birth is an enormous burden to bear – well attested by those who suffer a stillbirth. If the child remains within the extended family, then the conflicted nature of the situation will always be there, particularly if the commissioning couple make decisions with which the birth mother might not have agreed. Medical treatment decisions for the child, and even decisions about schooling have been shown to be a source of tension, because, in reality, pregnancy and childbirth forge a unique connection between the mother and the child she carried. She has invested hugely of herself in the child.

In one case with which I am familiar, the major divisive issue was that the commissioning sister sent the child to the school that the sisters had both attended, but which had been a miserable experience for the sister who gave birth to the child. She petitioned strongly for a different choice, and clearly saw herself as much more than just the little girl’s aunt.

On the periphery are the birth mother’s other children and her husband, if she has one. Most agencies will not accept a surrogate who has not completed her own family, because the complication of non-compliance with the agreed relinquishment is more likely to be a problem. What does it mean for a man who has entered into an exclusive relationship, implied by marriage in almost all cultures, to see his partner exploited in this way? Especially, as is usually the case, if they are driven to it by poverty and the financial advantage of her participation? Might he feel that he has failed her?

MEETING THE NEEDS OF POVERTY

I chaired an Australian government public enquiry into the selling of human organs and tissues and tissue products. There are several levels of problems that were explained in the submissions. A key concept for us was the extent to which the organ or tissue had been attenuated from the donor. Loss of genetic or other connectedness was significant in reducing the likelihood of difficulty. But in surrogacy, motherhood is so significant, even if there is no genetic connection to the child. So much is invested by the birth mother in pregnancy and birth. His mother will never forget Gammy, and his every milestone will affect her.

Other aspects involve commercial exploitation. The amount that is usually paid to the surrogate or to the organ donor is usually too little to make any long-term difference to her family’s underlying poverty. Studies by the Philippines government, by whom I was engaged as a consultant, showed no significant difference to poverty for living kidney donors who had received between $1,500 and $3,000 Australian dollars for their effort. They might have bought an old car or some other luxury, but soon after it had broken down and their means of livelihood remained the same.

Also, because they had been paid, they were not offered the medical care and support normally given to living donors, and were clearly worse off for their experience. Greater risks were taken with them, leaving them without the benefits of advanced Western medical care. In surrogacy arrangements, the Western care lavished on a relinquished child is likely to be very different from the care provided for the birth mother and the child’s siblings who remain with her, as is obvious for abandoned Gammy, who could not even be provided with an adequate milk supply when he needed it, nor the medical and surgical treatment needed.

PREIMPLANTATION AND REPRODUCTIVE DISCRIMINATION

One further complication that has been raised is commissioning couples wanting invasive tests done to determine the gender of the child, with the aim of not transferring a

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child of the ‘wrong sex’. This is often advocated for ‘family balancing’ reasons in the Australian context, but may also be discriminatory against girls in male-prefering societies often for economic reasons – such as the need to have a son to work the land or to avoid having to pay for an expensive dowry for a girl who later marries.

Obviously sex selection, and in fact invasive testing and selection in relation to avoiding the transfer of unwanted embryos, may be in the contract. However, it remains very expensive and has very poor success rates. The data in the latest report by the Victorian Assisted Reproductive Treatment Agency showed that there were only 17 births in the whole state following over 400 preimplantation genetic diagnosis (PGD) attempts. There are high rates of miscarriage and stillbirth after PGD has been done and much lower pregnancy rates using a reduced number of embryos, given the exclusion of those not wanted, even though they may have no abnormality or disease – just a non-preferred feature such as female gender. PGD also causes damage resulting in fewer embryos surviving to be transferred.

PGD presumes to measure the value of a human life only within the parameters of ‘normality’ and physical wellbeing. By treating the human embryo as mere ‘laboratory material’, the dignity of the developing child embryo is also subjected to discrimination by the practice. Dignity belongs equally to every single human being, irrespective of the parents’ desires, or the person’s social condition, educational formation or level of physical development.

If at other times in history, while the concept and requirements of human dignity were accepted in general, discrimination was practised on the basis of race, religion or social condition, today there is a no less serious and unjust form of discrimination which leads to the non-recognition of the ethical and legal status of human beings suffering from serious diseases or disabilities. Sick and disabled people are not some separate category of humanity; rather, sickness and disability are part of the human condition and affect most individuals at some stage.

Reproductive discrimination through PGD or prenatal diagnosis and abortion reflects a very sad attitude towards people with disabilities. What would it mean for a child with a disability, to see a sibling excluded by PGD and the unwillingness of the parents to allow a pregnancy of a child with a similar disability?

**A CHILD IS NOT A CURE FOR INFERTILITY**

One of the things to bear in mind in all this is that most couples (77%) who undergo an IVF procedure do not succeed in giving birth to a child from that procedure. The much higher rates of success quoted by the teams involve extrapolating what might happen if the woman were to have the procedures numerous times, despite the physical and medical hardship and the costs of earlier failures.

In fact, very few women would be prepared to have the multiple surgical procedures and general anaesthetics, even if they could afford the many thousands of dollars involved. For most, the procedure fails them. That is hugely complicated by a surrogacy arrangement and having to deal with for-profit foreign agencies and immigration laws.

In addition, the pain of infertility is not just a matter of being childless. Even if IVF or surrogacy manages to produce a child using someone else’s fertility, the couple still remains infertile and that pain will stay with them. Counselling is an important step to assist a couple to come to terms with the tragedy of infertility, whether or not they subsequently seek to have a child by means of the technology.

The evidence also suggests that if surrogacy or donor gametes are used, the child may become a symbol of that infertility, particularly if the relationship between the child and the commissioning man or woman is strained, as often happens when a child becomes a teenager. It is important not to infantilise children when discussing the consequences of obtaining a child through assisted reproduction. A baby or even a primary school age child may do just as well on average as other children.

The real issues raised by the manner of conception are much more likely to occur later, when the child better understands what happened, and in the case of a donor or donors, that there has been a fragmentation of parenthood and there are others who have a parenting relationship to the child. If the matter has been hidden that may cause resentment. If the young person has identity concerns they may be exacerbated and there may be a need to find the hidden donor and other family members.

Finally, one of the problems with surrogacy contracts is that they are in effect a decision to adopt a child, and adoption by the commissioning parents might not be in the best interests of the child because details of the arrangement may deny the child contact with the birth mother, and with the man who is the child’s gestational father through his relationship to her. Essentially surrogacy contracts may involve treating both the birth mother and the child as objects to be used for the benefit of the commissioning couple.

**Professor Nicholas Tonti-Filippini is Associate Dean and Head of Bioethics at the John Paul II Institute for Marriage and Family in Melbourne. His most recent book is About Bioethics – Volume IV: Motherhood, Embodied Love and Culture. He has been a member of the Australian Health Ethics Committee of the National Health and Medical Research Council and chair of the sub-committees on the Unresponsive State and Commercialisation of Human Tissue.**

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Gammy and surrogacy: an ethical dilemma

By now many of us have read about Gammy, the six-month-old baby with Down syndrome who was reportedly abandoned in Thailand by his biological parents.

Gammy and his twin sister were born to a surrogate mother, a young Thai woman who says she was compelled to offer her services to an agency so that she might pay off some of her family’s debt.

Gammy’s birth mother, Pattaramon Chanbua, lives about 90km south of Bangkok in the seaside town of Sri Racha, where she works as a food vendor. At 21, she is already the mother of two other children. She told the ABC that the money promised to her by the surrogacy agency would be put towards her family’s debt and her children’s education – a fee in total of about $16,000, and which she claims she never received in total.

At this stage, the story is murky and new facts and considerations seem to be emerging daily. Biological parents David and Wendy Farnell first claimed not to have knowledge of Gammy, then denied he was their son altogether, saying Chanbua isn’t the surrogate they dealt with.

At the time of writing this, the Farnells’ story had changed once again, this time claiming they’d been told Gammy would only survive for 24 hours.

Complicating the matter even further are revelations that David Farnell is a convicted child sex offender, serving two sentences in the late ’90s for the abuse of three girls under the age of 13. Chanbua is now reportedly concerned for the welfare of Gammy’s twin sister, saying, “I am very worried about my baby girl”. (In Thailand, birth mothers are considered the legal custodians of children regardless of whether they are biologically related.)

The situation itself is scant on answers, but the questions keep piling up. And chief among them is the one that asks, uncomfortably, whether or not there should be ethical and moral limits placed on couples trying to conceive – particularly when it comes to the colonisation and exploitation of impoverished women’s bodies.

Surrogacy laws in Australia are complicated and vary between the states, but ultimately only allows for the expensive and difficult-to-secure option of altruistic surrogacy – that is, surrogacy performed for no financial gain. And so comes the outsourcing, most typically through agencies in Thailand, India, the US and Canada.

In the year to June 2012, about 400 Australian children were born through surrogacy arrangements
in Thailand. In 2009, 47 Australian children were born to surrogate mothers in India; just two years later, that number had almost officially quadrupled to 179 amid concerns the true figures were somewhere near 400.

Commercial surrogacy is a multi-million-dollar business, with the majority of money spent going to agencies, lawyers and brokers – not the women actually carrying and birthing the children so desperately wanted. The average cost of a commercial surrogacy deal is somewhere between $50,000 and $150,000. The average.

The cost of surrogacy doesn’t come cheap. But as Gammy’s situation has highlighted, when there are people willing and (crucially) able to pay, there are necessary ethical questions that must be asked.

For example, is it morally defensible to support a system in which the reasonably wealthy can trade on the potential desperation of women in order to realise their dreams of having a family?

On the flipside, is the urge to ‘protect’ women from exploitation merely another way we deny women agency when it comes to the choices they make about their bodies – particularly when those choices involve using individual sexual or reproductive function for commercial gain?

These are questions that need to be considered when approaching the morally vexatious issue of outsourcing pregnancy and childbirth (noting that it is done by both women AND men for a multitude of reasons, and should never be lazily reduced to the sexist stereotype of the career woman who ‘squandered’ her childbearing years and is now crying foul about it).

Infertility and conception are emotive topics, and I truly sympathise with the people who have struggled with both. But we also need to be aware of the impulse to prioritise the needs of the individual (particularly the one with power and privilege) over what is too easily viewed as an homogenised mass ripe for plucking – in this case, the people of colour living in developing nations whose bodies are routinely co-opted (whether by individuals or corporations) for the purposes of cheap, mass production.

This is an issue that goes far beyond that of surrogacy, but its one to which the politics of international surrogacy are inextricably bound.

Throughout history, women have been exploited for and punished by their reproductive capabilities or lack thereof, and poor women have suffered the most. Consider the historic circumstances of wet-nurses or live-in nannies, practices almost invariably characterised by the power imbalance wrought by classism and racism.

In the case of Pattaramon Chanbua, women can now be employed to carry children for couples who are then at liberty to reject them if that child doesn’t meet their expectations, leaving them financially unsupported and literally left holding the baby.

In Laurie Penny’s new book, *Unspeakable Things*, she discusses the myth of the women who can “have it all”, pointing out that “it all” is supposed to be a child, a husband, a job in finance and a wardrobe full of beautiful shoes. But Penny also suggests that the neoliberal society’s aspirations for wealthy white women are only possible if they are supported by the labour of working class women (who have always borne the brunt of the world’s unpaid workload).

Who, she asks, is worrying about whether or not these women can “have it all”?

Clementine Ford is a freelance writer, broadcaster and public speaker based in Melbourne.

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BABY GAMMY CASE REVEALS MURKY SIDE OF COMMERCIAL SURROGACY

REFORMS AROUND SURROGACY SHOULD FOCUS ON PROTECTING WOMEN AND CHILDREN, NOT THE ‘MARKET’, OBSERVES SONIA ALLAN

However it played out, baby Gammy was left with Ms Chanbua, who loves and cares for him, but struggles to pay his medical expenses. The story has attracted international outrage, and a public campaign to raise money for baby Gammy’s care.

The story of baby Gammy and his “surrogate” mother has captured the world’s attention, highlighting just how complex and fraught commercial surrogacy arrangements can be. It also shows Australia is right to prohibit commercial surrogacy – and why other countries should do the same.

Gammy was born with Down syndrome and a congenital heart condition. He is a twin, conceived as a result of a commercial surrogacy arrangement between an unidentified Australian couple (the “genetic parents”) and Pattaramon Chanbua, a Thai national whose family was struggling to pay off debts. Ms Chanbua was paid 350,000 Baht (A$11,700) to carry and bear a child.

According to Ms Chanbua, when it was discovered she was carrying twins, she was offered an additional 70,000 Baht (A$2,000). But when doctors further discovered one of the babies had Down syndrome, she was told to abort the affected twin. She refused on religious grounds and, after the twins’ birth, the Australian couple left with only the healthy girl.

The Australian father has since claimed the couple did not know about the other child. But Ms Chanbua states the father came to the hospital to see the twins. It’s unclear what role the surrogacy agency played.

The legal situation

The majority of nations that regulate surrogacy worldwide, prohibit commercial surrogacy. Such prohibitions are largely based on views that commercial surrogacy commodifies women and children, and poses an unacceptable risk of exploitation and human trafficking.

All Australian states and the Australian Capital Territory prohibit such arrangements here. New South Wales, Queensland and the ACT further prohibit people from travelling to other countries to engage in such practices. The Australian government lists these prohibitions in its reports to the United Nations to show we meet our international obligations against the sale and trafficking of children.

However, a minority of nations have allowed (or continue to allow) commercial surrogacy to occur: Guatemala, Russia, the Ukraine, India and some US states. As a consequence, brokers, lawyers, and clinics have encouraged people wishing to have children to travel to such destinations to “realise their dreams” of having a family.

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At the time of the arrangement that resulted in Gammy’s birth, draft laws in Thailand had not yet been enacted, and the practice appears to have been unregulated. Thailand was seen as a particularly favourable destination as the cost was also low, compared to the United States, for example, where surrogacy can cost up to $100,000.

When things go wrong

Some people who engage in commercial surrogacy are already breaking the law in their own country. Others have found themselves in complex situations where the legal parentage and citizenship of the children is unclear.
In addition, people who remove children from Thailand without the approval of the Thai government would be subject to Thai anti-trafficking laws.

The baby Gammy story also highlights human rights issues in commercial surrogacy arrangements.

Note that the request for Ms Chanbua to have an abortion would have been illegal in Thailand, unless her health was at risk, or the pregnancy was a consequence of sexual assault. Neither appears to have been the case.

Ms Chanbua refused on religious grounds, and by choice carried the pregnancy to term. But other women may not be able to do the same. In India, some women are required to sign a contract agreeing that they will abort on demand.

**No room for commercial surrogacy**

Some surrogate advocates, lawyers and agencies argue that it would be better to permit commercial surrogacy in Australia, as if we could somehow prevent exploitation and commodification, as well as the social, cultural, economic and racial disparities.

Some point to the “happy stories” of surrogacy fulfilling the dreams of would-be parents of having a family. And no doubt, there are families who must be happy having had a child they can call their “own”.

But what we must not forget are the realities of this “business”. We so often do not hear about the number of abortions it took to get the final product right, or the miscarriages, the early births, the pregnancy complications, the babies left behind, or the reasons why the surrogate entered the arrangement for money in the first place. Whenever commercial surrogacy takes place, there are risks and power imbalances.

When the surrogacy “support services” refer to “the market” in which they operate, we, as a nation, should stop and think. We must not ignore the extent to which commercial surrogacy arrangements can exploit and commodify women and children. We might also think about how such a business preys on people’s desires to have children.

... However, a minority of nations have allowed (or continue to allow) commercial surrogacy to occur: Guatemala, Russia, the Ukraine, India and some US states. As a consequence, brokers, lawyers, and clinics have encouraged people wishing to have children to travel to such destinations to “realise their dreams” of having a family.

While baby Gammy’s story certainly calls for government support and action, the focus should not be on how to support the commercial surrogacy “market”, or to broaden the “market” to Australia.

Rather, we should focus on how to protect the rights and welfare of children and women in line with global human rights standards. This includes the continued prohibition of commercial surrogacy arrangements.

Sonia Allan is Senior Lecturer, Law at Macquarie University.

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WHY LEGALISING COMMERCIAL SURROGACY IS A GOOD IDEA

Many couples have a strong desire for a biologically-related child and will go to great lengths to have one. Loane Skene argues her case for legalised surrogacy in Australia.

Chief Federal Court Magistrate John Pascoe's call for amending Australian state legislation to allow commercial surrogacy, subject to statutory controls, has much to commend it. The aim of the legislation would be "to stop the exploitation of poor women and protect the legal status of children caught up in the booming overseas surrogacy trade" according to today's Fairfax papers.

Prohibition and protection

It's often said that the only way to protect 'vulnerable' people is by legally prohibiting conduct in which they may be exploited, with criminal penalties for those who engage in such activity. Historically, that has been the case in Victoria with many procedures related to assisted reproductive treatment (ART), such as commercial surrogacy, being criminal offences.

But experience has shown that strict prohibitions are often not effective in activities related to reproduction, especially when they can be lawfully undertaken in other countries. The desire to have a biologically-related child is so strong that infertile couples may ask an Australian woman to be a surrogate – if they can find one who will do this for free. Or they can travel to a country that doesn't ban surrogacy.

Such couples may have difficulty gaining access to ART facilities in Australian jurisdictions that ban payment for any activity related to surrogacy, but a child could be conceived without technological assistance by injecting the man's semen into the surrogate, or by sexual intercourse between them.

Things can go wrong wherever surrogacy occurs – the surrogate may be reluctant to hand over the child after the birth; or the commissioning couple may not accept the child.

The couple's relationship may have broken down. The child may have a disability or otherwise fall short of their expectations. They may refuse to pay the medical and other expenses of the surrogate mother, who may be unable to work for some time after the pregnancy, especially if she keeps the child herself.

Legalising commercial surrogacy with open, accessible information would give children born from surrogacy similar rights to know their parentage and identity; and to be protected by law.

Surrogate mothers have reportedly suffered dreadfully in other countries as they have their reproductive potential advertised abroad after being 'groomed' to be attractive to foreign couples. They bear a pregnancy and have to relinquish the child. The payments for these arrangements may be substantial but the surrogates receive little as greedy organisers and corrupt government officials take their share of the proceeds.

Legalising commercial surrogacy

There's nothing to suggest that Australian surrogates are suffering in the same way. Nonetheless, the best form of protection for them and any children to be born from surrogacy may be legislation that enables commercial surrogacy to be undertaken openly, by trained, registered health professionals, in licensed and monitored premises.

Such legislation would safeguard the health of both the surrogate woman and the child. It would assist in the resolution of disputes, for example, if the surrogate mother later wants to keep the child, or the commissioning parents refuse to pay the surrogate, or they don't accept the child.

It would ensure that proper records are kept, which will be important for the child's later welfare. Openness and transparency in respect to one's ancestry have been increasingly emphasised in Australia. And adopted children now have a right to know who their biological parents are.

The child would also be an Australian citizen and have parents with legal responsibilities to care for the child. This may not be the case if a child is born overseas in a surrogacy arrangement.

Publicity about Australian couples being stranded in other countries trying to get 'their child' back to Australia, and have it legally recognised as such in immigration papers, was no doubt a contributing factor in setting up the forthcoming review of Australian surrogacy law by the Family Law Council.

There's legislation in some states permitting altruistic surrogacy with provision for proper documentation and legal responsibilities. With ART, the state of Victoria has been a world leader in enabling most children born from donated gametes to find out the name of their father when they are 18.

Legalising commercial surrogacy with open, accessible information would give children born from surrogacy similar rights to know their parentage and identity; and to be protected by law.

Loane Skene is Professor of Law and Adjunct Professor, Faculty of Medicine, Dentistry and Health Sciences at the University of Melbourne.

The Conversation

Not for profit: the case against commercial surrogacy

Safeguards to protect women and children should not be eroded though commercial surrogacy arrangements, argues Sonia Allan

For singles and couples who can’t naturally conceive and carry a baby to term, surrogacy is sometimes considered an option to have a child. Current laws across Australia permit ‘altruistic’ surrogacy which prohibit the exchange of funds for surrogacy, beyond reasonable expenses, in order to protect the woman and child involved.

Some commentators argue these restrictions should be lifted to allow commercial surrogacy. This would involve a transaction between a commissioning person or couple and a woman, either directly or via a broker. So the woman carries and bears a child, and then permanently relinquishes it to the commissioning person or couple, in exchange for a fee.

But while advocates for commercial surrogacy in Australia present it as a workable solution to issues of global exploitation of women and children, if you look a little deeper it emerges as an ethically and legally fraught process. Australia should not join the ranks of Guatemala, India, Thailand, Russia, Georgia, the Ukraine and some US states which permit commercial surrogacy.

THE MARKET MENTALITY

Commercial surrogacy advocates focus on payment for the surrogate’s ‘services’, using strong market-based language. Such market mentality preys on people’s vulnerabilities, and detracts from the realities involved.

Commissioning couples are sold the idea that commercial surrogacy is simply a business transaction that can be performed with ease. They are told they will achieve emotional fulfilment and a family of their own using commercial surrogates who are really giving, altruistic women, who want to help (for a fee or compensation).

The reality of commercial surrogacy paints a different picture. Concerns for women and children are minimised or ignored by brokers, lawyers, and others who stand to profit.

Sociological studies of surrogates suggest that commercial surrogates are susceptible to financial inducement and are vulnerable to exploitation because of their financial status. As US legal researcher Katherine Drabiak points out:

“Rhetoric that portrays the surrogate as a reasonably well-educated, financially stable woman motivated by altruism stands in contrast to reality.”

This is so in both developing and developed countries. Some proponents of commercial surrogacy argue that in order to prevent exploitation, surrogates should be paid a minimum amount to compensate them for the risk and burden they take. Allegedly the minimum payment will serve to avoid ‘unfair inducements’.

Commissioning couples are sold the idea that commercial surrogacy is simply a business transaction that can be performed with ease.

But who would act as a surrogate in such circumstances? It’s most likely to be women who are vulnerable or financially needy: low-income single mothers, migrants, unemployed women, or mothers unable to work and care for her children at the same time – enticed (or induced) by the minimum payment.

Perhaps what will follow is that we will be asked to believe that accepting low payments for commercial surrogacy reflects that surrogates are not really doing it for the money after all. Of course, such rhetoric keeps the price of commercial surrogacy down.

Note, while advocates of commercial surrogacy equate carrying a child with labour (work), they do not suggest that anywhere near the minimum wage be paid (24 hours a day for nine months at A$16/per hour = approximately A$107,000).

Finally, we can’t forget that the ‘marketisation’ of birth involves a child. That child will perhaps one day be aware of the commercial transaction that surrounded his or her birth. The consequences of being handed over for ‘minimum’ compensation are unknown.

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GLOBAL COMMERCIAL SURROGACY

There is no doubt that in the global commercial surrogacy market, poor and vulnerable women have been trafficked for use as surrogates for the profit of agents or brokers.

Even in more ‘routine’ cases, in both the developing and developed world, there are concerns about the extent to which women engaged as surrogates are influenced by social, cultural, and economic inequities.

The law should not be changed because of people who have chosen to enter into, or facilitate, commercial surrogacy arrangements abroad – sometimes in contravention of Australian laws.

This is not reason to bring commercial surrogacy to Australia. In fact, it should be reason not to do so.

Back in Australia, those who commission surrogates in commercial arrangements abroad must apply for legal parentage of these children. This is not always guaranteed. In such instances, our concern should lie with the welfare and best interests of the child, but this does not mean that legal parentage should be assured. Courts must scrutinise each individual case.

PROTECTING WOMEN AND CHILDREN

Australian states and territories need to preserve their current laws that serve to protect women and children by prohibiting commercial surrogacy, while permitting ‘altruistic’ surrogacy in some circumstances. Everyone should be treated equally under such laws.

Australia also has an obligation to work to reduce the international commercial surrogacy trade. One option is to prohibit Australians from engaging in such arrangements abroad. But in doing so we must be careful to recognise the vulnerabilities of commissioning parents too. As such, we need also consider the actions of lawyers and other agencies who make a business (and handsome profit) out of giving ‘advice’ to people about commercial surrogacy abroad, and who are pushing for its inception here.

Most importantly, Australia needs also to facilitate and support different family formations via other means, such as co-parenting arrangements, or foster-care and adoption when there is a child in need. We must recognise the desire some people feel to have children but commercial surrogacy should not be sold to them as a way to achieve such desire.

Sonia Allan is Senior Lecturer, Health and Biotechnology Law at Deakin University.

THE CONVERSATION

WORKSHEETS AND ACTIVITIES

The Exploring Issues section comprises a range of ready-to-use worksheets featuring activities which relate to facts and views raised in this book.

The exercises presented in these worksheets are suitable for use by students at middle secondary school level and beyond. Some of the activities may be explored either individually or as a group.

As the information in this book is compiled from a number of different sources, readers are prompted to consider the origin of the text and to critically evaluate the questions presented.

Is the information cited from a primary or secondary source? Are you being presented with facts or opinions?

Is there any evidence of a particular bias or agenda? What are your own views after having explored the issues?

CONTENTS

BRAINSTORM 52
RESEARCH ACTIVITIES 53
DISCUSSION ACTIVITIES 54
MULTIPLE CHOICE 55-56
Brainstorm, individually or as a group, to find out what you know about surrogacy issues.

1. **What is surrogacy? Name at least three different types of gestational surrogacy.**

2. **What is meant by the term ‘altruistic surrogacy’? What is its current legal status in Australia?**

3. **What is meant by the term ‘commercial surrogacy’? What is its current legal status in Australia?**
Complete the following activities on a separate sheet of paper if more space is required.

Surrogacy arrangements are complex and involve medical, emotional, financial and legal issues. More Australians are considering surrogacy as a means to having a child because there is a decline in the number of children available for adoption.

Write a few paragraphs addressing the following ethical questions in relation to surrogacy arrangements. Research and include references to back up your answers.

1. **Is a commercial surrogacy arrangement more like contracting for employment/labour, more like contracting for prostitution, or more like contracting for slavery?**

2. **Should a child born via surrogacy have the right to know the identity of any/all of the people involved in that child’s conception and delivery?**

3. **To what extent is it a woman’s human right to make contracts regarding the use of her body for surrogacy?**
Complete the following activity on a separate sheet of paper if more space is required.

The majority of nations that regulate surrogacy worldwide, prohibit commercial surrogacy. Such prohibitions are largely based on views that commercial surrogacy commodifies women and children, and poses an unacceptable risk of exploitation and human trafficking.

Consider the statement above. Are you for or against the legalisation of commercial surrogacy in Australia? Form into two or more groups in your class and compile a list of points with which to discuss the pros and cons of introducing commercial surrogacy to Australia. Share your thoughts and ideas with the other groups, and take a final vote to reflect the overall views of the class.

PROS

CONS
Complete the following multiple choice questionnaire by circling or matching your preferred responses. The answers are at the end of the next page.

1. In what year did Australia ratify the *Convention on Intercountry Adoption*?
   a. 1901
   b. 1945
   c. 1978
   d. 1998
   e. 2011
   f. 2015

2. In what year did Thailand’s parliament pass legislation to ban commercial surrogacy?
   a. 1901
   b. 1945
   c. 1978
   d. 1998
   e. 2011
   f. 2015

3. It is illegal for people who live in which of the following Australian states or territories to go overseas for commercial surrogacy? (select all that apply)
   a. Australian Capital Territory
   b. New South Wales
   c. Queensland
   d. South Australia
   e. Tasmania
   f. Victoria
   g. Western Australia

4. Match the following terms to their correct definitions:
   1. **Gestational surrogacy and donor embryo**
      a. The surrogate is implanted with an embryo created by in vitro fertilisation (IVF), using the egg and sperm of the intended parents. The resulting child is genetically related to the intended parents, and genetically unrelated to the surrogate.
   2. **Traditional surrogacy**
   b. This involves naturally or artificially inseminating a surrogate with the intended father’s sperm via intrauterine insemination (IUI), IVF or home insemination. With this method, the resulting child is genetically related to the intended father and genetically related to the surrogate.
   3. **Gestational surrogacy and donor sperm**
      c. The surrogate is implanted with an embryo created by IVF, using the intended father’s sperm and a donor egg. The resulting child is genetically related to the intended father and genetically unrelated to the surrogate.
   4. **Traditional surrogacy and donor sperm**
      d. The surrogate is implanted with an embryo created by IVF, using the intended mother’s egg and donor sperm. The resulting child is genetically related to the intended mother and genetically unrelated to the surrogate.
   5. **Gestational surrogacy and egg donation**
      e. The surrogate is artificially inseminated with donor sperm via IUI, IVF or home insemination. The resulting child is genetically unrelated to the intended parent(s) and genetically related to the surrogate.
   6. **Gestational surrogacy**
      f. A donor embryo is implanted in a surrogate; such embryos may be available when others undergoing IVF have embryos left over, which they opt to donate to others. The resulting child is genetically unrelated to the intended parent(s) and genetically unrelated to the surrogate.
5. Respond to the following statements by circling either 'True' or 'False':

   a. Altruistic surrogacy is legal in Australia.  
      True / False

   b. The average cost of a commercial surrogacy deal is somewhere between $50,000 and $150,000.  
      True / False

   c. Surrogate mothers are always poor women in need of extra money.  
      True / False

   d. A child born outside Australia as a result of surrogacy is eligible for citizenship by descent.  
      True / False

   e. Commercial surrogacy is not allowed in any states of the USA.  
      True / False

   f. Australia is not a signatory to the Convention on the Rights of the Child.  
      True / False

   g. A single person living in South Australia is allowed to enter into a surrogacy arrangement.  
      True / False

   h. A gay couple who live in Western Australia are not permitted to enter into surrogacy arrangements.  
      True / False

MULTIPLE CHOICE ANSWERS

1 = a, b, c; 2 = f; 3 = a, b, c; 4 = e, 5 = c, 6 = a; 5 – a = T, b = T, c = F, d = T, e = F, f = F, g = F, h = T.
In most parts of Australia, a surrogate mother must not have a genetic link to the child she carries for the other parent or parents. This means her egg may not be used in the surrogacy arrangement (Better Health Channel, *Surrogacy*). (p.1)

All surrogacy arrangements in Australia must be altruistic, which means that the surrogate does not receive financial compensation beyond the reimbursement of medical and other reasonable expenses (*ibid*). (p.2)

Gay couples and single people are not permitted to enter into surrogacy arrangements in WA or SA (AWW, *Surrogacy in Australia: What you need to know*). (p.2)

It is illegal for people living in QLD, NSW and the ACT to go overseas for commercial surrogacy (*ibid*). (p.2)

As of 2013, locations where a woman could legally be paid to carry another’s child through IVF and embryo transfer included India, Georgia, Russia, Thailand, Ukraine and a few US states (Wikipedia, *Surrogacy*). (p.4)

Currently, commercial surrogacy is illegal in Australia (Hill, K and Wilson, G, *The Journey to Parenthood*). (p.9)

In 2012, 269 babies were born to surrogate parents in Australia. To July 2013, 254 babies were born through the process of surrogacy (*ibid*). (p.11)

According to survey results, most Australian intended parents via surrogacy consider or use overseas compensated arrangements. Laws banning compensated surrogacy do not appear to deter those seeking surrogacy arrangements (Everingham, SG, Stafford-Bell, MA, and Hammarberg K, *Australians’ use of surrogacy*). (p.14)

The legal transfer of parentage following surrogacy arrangements is the responsibility of state and territory governments (DIBP, *Fact Sheet 36a – International Surrogacy Arrangements*). (p.15)

A child born outside Australia as a result of a surrogacy arrangement is eligible for Australian citizenship by descent if, at the time of their birth, they had a parent who was an Australian citizen (*ibid*). (p.16)

A significant number of children are being born as a result of commercial surrogacy arrangements outside Australia (more than several hundred each year) (ABC, *Fact file: How easy is it to bring overseas-born surrogate babies back to Australia and what are their parents’ rights*?). (p.18)

In 2012, an Indian surrogate gave birth to twins for an Australian couple who left one baby behind, saying they could only afford to take one child (March, S, *Australian couples looking for surrogate mothers in India denied visas to enter the country*). (p.21)

In February 2015, Thailand’s parliament passed legislation banning commercial surrogacy, putting a halt on foreign couples seeking to have children through Thai surrogate mothers (Corben, R, *Thailand bans surrogacy over Baby Gammy*). (p.21)

The issue of surrogacy was spotlighted in August 2014 after a WA couple were accused of leaving a twin boy, known as Baby Gammy, with his surrogate mother after they discovered he had Down syndrome and was critically unwell. David and Wendy Farnell took Gammy’s healthy sister Pipah home to WA (*ibid*). (p.21)

In 2014, up to 150 Thai surrogate mothers carrying babies for Australian couples were expected to give birth by the end of 2015. DFAT officials negotiated with Thailand for a transition period to enable the children and their Australian parents to depart Thailand (*ibid*). (p.21)

In some cases out of Thailand, the eggs from women had come from anonymous sources in Ukraine (Smith, S and Hawley, S, *Australian surrogacy laws a ticking time bomb, children risk growing up in limbo, senior judges warn*). (p.23)

The current laws in India allow for commercial gestational surrogacy arrangements where the child is legally assigned to one or both of his or her genetic parents. Although in Australia this child would be granted citizenship by descent, this does not necessarily mean that the intending parents are considered legal parents in Australian law (van Wichelen, S, *What chance for international surrogacy laws*?). (p.25)

Surrogates are not all poor women being exploited for their fertility. Many are middle-class women who want to help make families. They come from all walks of life. Some are done having children of their own, while some want more children in the future (Surrogacy Australia, *General Info on Overseas Surrogacy*). (p.29)

India recently announced that foreigners need to be married for a minimum of 2 years (and resident in an Australian state which allows overseas surrogacy) to apply for their new ‘surrogacy’ visas (Everingham, S, *Surrogacy and why many parents break the law*). (p.30)

Most agencies will not accept a surrogate who has not completed her own family, because the complication of non-compliance with the agreed relinquishment is more likely to be a problem (Tonti-Filippini, N, *The Contradictions of Baby Gammy: Disability, Discrimination and the True Cost of Surrogacy*). (p.42)

In the year to June 2012, about 400 Australian children were born through surrogacy arrangements in Thailand. In 2009, 47 Australian children were born to surrogate mothers in India; just 2 years later, that number had almost officially quadrupled to 179 amid concerns the true figures were somewhere near 400 (Ford, C, *Gammy and surrogacy: an ethical dilemma*). (pp. 44-45)

Commercial surrogacy is a multi-million-dollar business, with the majority of money spent going to agencies, lawyers and brokers (*ibid*). (p.45)

The average cost of a commercial surrogacy deal is somewhere between $50,000 and $150,000 (*ibid*). (p.45)

The majority of nations that regulate surrogacy worldwide, prohibit commercial surrogacy (Allan, S, *Baby Gammy case reveals murky side of commercial surrogacy*). (p.46)
GLOSSARY

**Artificial insemination**
Placing sperm into the reproductive tract of a woman.

**Altruistic surrogacy**
A practice whereby a woman agrees, for no financial gain, to become pregnant and bear a child for another person or persons to whom she intends to transfer the child's care at, or shortly after, the child's birth. (Specific expenses incurred, associated with the pregnancy and birth, may be reimbursed.)

**Assisted Reproductive Technology**
ART is the application of laboratory or clinical technology to sperm, eggs and/or embryos (fertilised eggs) to assist the conception of a baby.

**Commercial surrogacy**
An arrangement in which a surrogate is paid for carrying the child. Commercial surrogacy is not permitted in Australia or New Zealand.

**Commissioning parent**
Person(s) who enter into the surrogacy arrangement for a woman to carry a child on behalf of the person(s).

**Conception**
When a sperm fertilises an egg to form an embryo.

**Embryo**
An egg that has been fertilised by a sperm and has started to divide.

**Embryo transfer**
Procedure by which the embryo (usually aged 1 to 2 days but may be developed to the blastocyst stage) is placed into the uterus or the fallopian tube after IVF.

**Fertilisation**
When a sperm enters the egg to form an embryo.

**Foetus**
An unborn individual in the later stages of development – in humans, from 7–8 weeks after fertilisation until birth.

**Gametes**
Eggs and sperm.

**Gamete intrafallopian tube transfer**
GIFT is a procedure where an egg (or more than one egg) retrieved from the body of a woman and sperm obtained from a male are both inserted back into the fallopian tube of a woman, with the aim to achieve fertilisation (and then pregnancy) within the body of the woman.

**Gestational surrogacy**
Where a woman agrees to carry a pregnancy for another person/couple and has no biological connection to the baby.

**Infertile**
The inability to conceive after a year of unprotected intercourse in women under 35 or after 6 months in women over 35, or the inability to carry a pregnancy to term.

**In vitro fertilisation**
IVF is an infertility treatment in which eggs and sperm are placed in vitro (meaning 'in glass') for fertilisation to occur outside the body.

**Miscarriage**
Spontaneous loss of an embryo or foetus from the uterus.

**Ovary**
One of two reproductive organs in a female that produces eggs and secretes estrogen and progesterone.

**Ovulation**
The process where the follicle opens to release the egg from the ovary. Occurs in response to luteinising hormone.

**Pre-implantation genetic diagnosis**
PGD is an embryo screening technique which can be used to identify embryos with chromosome abnormalities. A single cell is removed from an early-stage embryo and checked for genetic disorders using molecular techniques. Only the healthy embryos are transferred to the woman’s body.

**Sperm**
The male sex cells, produced in the testes.

**Sperm donor**
When a man donates sperm through a fertility/IVF clinic. He has no legal or financial obligation to donation.

**Surrogacy**
When a woman agrees to become pregnant for another woman and her partner. Once the baby is born she transfers the child's care at, or shortly after, birth to the commissioning parents.

**Surrogacy arrangement**
Arrangement, agreement or understanding whether formal or informal under which a woman agrees with another to try and become pregnant.

**Surrogate mother**
A surrogate mother is someone who conceives, carries and gives birth to a child for another person or couple (intended parents or commissioning parents). The surrogate mother agrees to give the child to that person or couple after the birth.

**Traditional surrogacy**
When a woman agrees to carry a pregnancy for another person/couple where her own eggs are used in the conception of the pregnancy.

**Uterus**
The uterus, or womb, is the place where the embryo attaches and grows during gestation. It comprises an outer muscular layer called the myometrium and an inner glandular lining called the endometrium. The endometrium is shed each month, resulting in a period.

**Zygote Intra-Fallopian Transfer**
ZIFT occurs when the egg is fertilised by the man’s sperm in a laboratory, resulting in a zygote (or fertilised egg) which is then placed into a woman’s fallopian tube.

**Zygote**
A fertilised egg up to the time it first divides.
Websites with further information on the topic

Access Australia – Australia’s National Infertility Network  www.access.org.au
Adelaide Centre for Bioethics and Culture  www.bioethics.org.au
Altruistic Surrogacy  www.fertilityconnectionsaustralia.com
Australian Family Association  www.family.org.au
Australian Institute of Health and Welfare  www.aihw.gov.au
Australian Surrogacy and Adoption Blog  http://surrogacyandadoption.blogspot.com.au
Bub Hub  www.bubhub.com.au
IVFAustralia  www.ivf.com.au
Melbourne IVF  www.mivf.com.au
Monash IVF  www.monashivf.edu.au
Surrogacy Australia  www.surrogacyaustralia.org
Surrogacy Center Australia  www.surrogacycentre.com.au
Surrogacy Conceptions  www.surrogacyconceptions.com.au
Surrogacy NSW  www.surrogacynsw.com.au

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THANK YOU
- Surrogacy Australia
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### INDEX

| A  | adoption 17, 24, 33, 50  
|    | assisted reproductive treatment (ART) 1  
|    | see also IVF  
|    | Australian states/territories 2, 3, 50  
|    | Australian Capital Territory (ACT) 2, 3, 16, 19, 26, 46  
|    | New South Wales 2, 3, 16, 19, 26, 46  
|    | Northern Territory 2, 3, 19  
|    | Queensland 2, 3, 16, 19, 26, 46  
|    | South Australia 2, 3  
|    | Tasmania 2, 3  
|    | Victoria 1, 2, 3, 26, 48  
|    | Western Australia 2, 3  
| C  | Catholicism 6  
|    | child  
|    | biological connection to 16  
|    | interests of the 17  
|    | psychological concerns 7  
|    | relinquishment of 18, 29  
|    | rights of 9, 15, 22-23, 33-34, 37-38, 41  
|    | sponsorship of 17  
|    | trafficking 15, 39, 46  
|    | Convention on the Rights of the Child 33  
| D  | disability 40-43  
|    | DNA testing 16, 17, 19  
| E  | embryo transfer 3  
|    | exploitation 39, 44, 45, 46, 47, 49  
| F  | Family Court 2, 22-23  
| G  | ‘Gammy’, baby 18, 21, 24, 25, 26, 27, 31, 32, 33, 38, 39, 40-43, 44-45, 46-47  
| H  | heterosexual  
|    | couples 3  
|    | women 29  
|    | human rights 22, 38  
|    | human trafficking 15, 39, 46  
| I  | India 12, 14, 17, 21, 25, 30, 44, 47  
|    | infertility 43  
|    | international surrogacy see also overseas surrogacy  
|    | arrangements 15-17  
|    | definition 15  
|    | laws, Australian 22-23  
|    | regulation 24-25, 33-34, 35-36  
|    | in vitro fertilisation (IVF) 1, 2, 4, 5, 6, 28, 29, 39, 43  
| J  | Judaism 6  
| K  | kinship, cultural understandings of 25  
| L  | laws see also Australian states/territories  
|    | Australian states 9, 26-27  
|    | international 24-25  
|    | jurisdictions  
|    | not recognising surrogacy 4-5  
|    | permitting surrogacy 5  
| M  | medical risks 2-3  
|    | mother see surrogate  
|    | motherhood 31-32, 39  
| O  | overseas surrogacy 11-12, 14, 15-17, 18-21, 22-23, 24-25, 28-29, 30, 31-32, 33-34, 44-45  
|    | see also commercial surrogacy and international surrogacy  
|    | bringing child to Australia 15  
|    | citizenship aspects of 12, 16, 19  
|    | jurisdictions, inconsistency across 18  
|    | legal issues affecting Australians 15  
|    | visa requirements, Australian 17  
| P  | parent-child relationships, determining 16  
|    | parentage  
|    | rights 5, 20-21  
|    | transfer of 15  
|    | parenting order 2, 9, 17  
|    | parents  
|    | commissioning 18-21, 31-32, 33-34, 38, 40, 49  
|    | intended 3, 5, 8, 10-11  
|    | responsible 16-17  
|    | passports, applying for 17, 19  
|    | preimplantation genetic diagnosis (PGD) 42-43  
| R  | reproduction, ‘natural’ 35-36  
|    | reproductive  
|    | discrimination 42-43  
|    | liberties 31-32  
|    | rights 31-32  
| S  | same-sex couples 2, 3, 26-27, 29  
|    | sexual abuse 39  
|    | singles  

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