



University of HUDDERSFIELD

University of Huddersfield Repository

Johnson, L., Blyth, Eric and Hammarberg, K.

Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India

Original Citation

Johnson, L., Blyth, Eric and Hammarberg, K. (2014) Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India. *Journal of Law and Medicine*, 22. pp. 136-154. ISSN 1320-159X

This version is available at <http://eprints.hud.ac.uk/id/eprint/21665/>

The University Repository is a digital collection of the research output of the University, available on Open Access. Copyright and Moral Rights for the items on this site are retained by the individual author and/or other copyright owners. Users may access full items free of charge; copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational or not-for-profit purposes without prior permission or charge, provided:

- The authors, title and full bibliographic details is credited in any copy;
- A hyperlink and/or URL is included for the original metadata page; and
- The content is not changed in any way.

For more information, including our policy and submission procedure, please contact the Repository Team at: E.mailbox@hud.ac.uk.

<http://eprints.hud.ac.uk/>

Barriers for domestic surrogacy and challenges of transnational surrogacy in the context of Australians undertaking surrogacy in India

Louise Johnson, Eric Blyth and Karin Hammarberg*

The ethical, social, psychological, legal and financial complexities associated with cross-border travel for reproductive services are gaining attention internationally. Travel abroad for surrogacy, and the transfer of gametes or embryos between countries for use in a surrogacy arrangement, can create conflict in relation to the rights of the parties involved: commissioning parents, surrogates and their families, gamete and embryo donors, and children born as a result of the arrangement. Australian surrogacy laws are restrictive and limit access to domestic surrogacy. Despite the introduction of laws in some Australian jurisdictions that penalise residents entering into international commercial surrogacy arrangements, hundreds of Australians resort to surrogacy arrangements in India and other countries each year. This article discusses legislation, policy and practice as they relate to Australians' use of surrogacy in India. It reviews current surrogacy-related legislation and regulation in Australia and India and existing evidence about the challenges posed by transnational surrogacy, and considers how restrictive Australian legislation may contribute to the number of Australians undertaking surrogacy in India.

INTRODUCTION

Infertility has been identified as a public health issue by the World Health Organization.¹ While parenthood is almost universally desired, it is estimated that, worldwide, more than 70 million people of childbearing age are infertile, and that around 40.5 million (56%) of these seek infertility treatment.² The use of assisted reproductive technology (ART) for family-building is increasing in high-income countries, in part as a result of the increase in age-related infertility due to the trend to delay childbearing.³ Also, changing laws in some countries allow groups previously denied access to ART, such as single women and men and gay couples, the same right to access ART as heterosexual

* Louise Johnson, BSc (Hons), Grad Dip Ed, Grad Dip Man, M Reg Studies, Chief Executive Officer, Victorian Assisted Reproductive Treatment Authority, Victoria; Eric Blyth, BA, MA, PhD, Professor of Social Work, University of Huddersfield, England; Karin Hammarberg, RN, BSc, PhD, Senior Research Officer, Victorian Assisted Reproductive Treatment Authority, Victoria, and Senior Research Fellow, Jean Hailes Research Unit, School of Public Health and Preventive Medicine, Monash University, Melbourne, Victoria. The views expressed are those of the authors and not those of the Victorian Assisted Reproductive Treatment Authority. The authors acknowledge the thoughtful comments on the manuscript provided by Professor Jenni Millbank and the administrative support provided by Ms Caroline Comoy. The authors have no conflicts of interest to declare.

Correspondence to: Louise Johnson, Victorian Assisted Reproductive Treatment Authority, PO Box 16123, Collins Street West, Melbourne, Vic 8007, Australia.

¹ Vayena E, Rowe P and Griffin P (eds), Current Practices and Controversies in Assisted Reproduction – Report of a WHO Meeting on “Medical, Ethical and Social Aspects of Assisted Reproduction” (World Health Organization, Geneva, 2002) p 383; McDonald Evens E, “A Global Perspective on Infertility: An Under Recognized Public Health Issue”, *Carolina Papers in International Health*, No 18 (University Center for International Studies, University of North Carolina at Chapel Hill, 2004), http://cgi.unc.edu/uploads/media_items/a-global-perspective-on-infertility-an-under-recognized-public-health-issue.original.pdf.

² Boivin J, Bunting L, Collins JA and Nygren KG, “International Estimates of Infertility Prevalence and Treatment-seeking: Potential Need and Demand for Infertility Medical Care” (2007) 22 Hum Reprod 1506.

³ Schmidt L, Sobotka T, Bentzen J and Nyboe Andersen A, “Demographic and Medical Consequences of the Postponement of Parenthood” (2012) 18 Hum Reprod Update 29.



couples. It is estimated that more than five million children worldwide have been born as a result of ART.⁴ In Australia in 2011, 4.1% of all women who gave birth had received some form of ART treatment.⁵

Many jurisdictions have introduced legislation or regulation to ensure minimum standards in ART practice to protect the interests of those who participate in or are born as a result of ART.⁶ Legal restrictions or limited availability of specific treatments or of donor gametes (oocytes or sperm) or embryos in the home country, economic reasons, a search for better quality services, a desire for privacy or for cultural comfort in a destination country can motivate people to travel internationally to access ART services.⁷

While the merits of transnational travel to access ART in promoting individual autonomy have been advocated by some,⁸ others have expressed concerns about some aspects of this practice.⁹ Concerns related specifically to surrogacy include the exploitation of socioeconomically disadvantaged women in developing countries acting as surrogates;¹⁰ the inability of commissioning parents to secure legal parentage of or citizenship for their child(ren) or even to return to their home country with their child(ren); and the welfare of children born as a result of surrogacy arrangements.¹¹

While not enshrined in law in most jurisdictions around the world, doctors and other professionals providing surrogacy services have an ethical obligation to carefully consider and protect the rights and physical and psychological wellbeing of all parties potentially involved in a surrogacy arrangement: the surrogate and her family, the commissioning parents, those donating gametes or embryos, and the children born as a result of surrogacy and their siblings.

This article discusses the legal, ethical, policy and practice complexities inherent in transnational surrogacy as they apply to Australians undertaking surrogacy in India. It also explores possible barriers for domestic surrogacy and reasons why Australian State and Territory laws banning commercial surrogacy, even when it takes place elsewhere, do not appear to stem Australians' use of transnational commercial surrogacy. The article concludes with some thoughts about how the health and wellbeing of those involved in surrogacy can be better safeguarded.

DEFINING SURROGACY

A surrogacy agreement is where a woman agrees to bear a child for another person or couple, the commissioning or intended parent(s), who will undertake the future care of the child. There are two

⁴European Society of Human Reproduction and Embryology, "World's Total Number of ART Babies Reaches 5 Million", *Focus on Reproduction* (ESHRE, Grimbergen, Belgium, September 2012) p 8, http://www.eshre.eu/binarydata.aspx?type=doc&sessionId=uhwexnzve1t5hztiiiflv25/SEPTEMBER_ISSUE.pdf.

⁵Macaldowie A, Wang Y, Chambers G and Sullivan E, *Assisted Reproductive Technology in Australia and New Zealand 2011* (National Perinatal Epidemiology and Statistics Unit, The University of New South Wales, Sydney, 2013).

⁶Ory SJ, Devroey P, Banker M, Brinsden P, Buster J, Fiadjoe M, Horton M, Nygren K, Pai H, Le Roux P and Sullivan E, *International Federation of Fertility Societies Surveillance 2013* (2013), http://c.ymcdn.com/sites/www.iffs-reproduction.org/resource/resmgr/iffs_surveillance_09-19-13.pdf.

⁷Romera N, Llacer J, Aula M, Canevelli S et al, "Session 51: Cross Border Reproductive Care" (2010) 25 Hum Reprod i77; Ethics Committee of the American Society for Reproductive Medicine (ASRM), "Cross-border Reproductive Care: A Committee Opinion" (2013) 100 Fertil Steril 645; Gürtin ZB and Inhorn MC, "Introduction: Travelling for Conception and the Global Assisted Reproduction Market" (2011) 23 Reprod Biomed Online 535.

⁸Pennings G, "Legal Harmonization and Reproductive Tourism in Europe" (2004) 19 Hum Reprod 2689.

⁹Shenfield F, "We Need a Code of Practice for Cross-border Reproductive Care", *BioNews* (18 October 2010); Ory et al, n 6, pp 110-113.

¹⁰Ory et al, n 6, p 113; International Federation of Social Workers, *Cross Border Reproductive Services 2012*, <http://ifsw.org/policies/cross-border-reproductive-services>; Ehrlich RS, "Taiwan Company Accused of Trafficking Vietnamese Women to Breed", *Washington Times* (6 March 2011); Palattiyil G, Blyth E, Sidhva D and Balakrishnan G, "Globalization and Cross-border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work" (2010) 53 Int Soc Work 686.

¹¹Roy SD, "Norwegian Stuck in Limbo with Twins Not Genetically Her Own", *Times of India* (21 July 2010); "Surrogate Children have No Right to German Passport, Court Rules", *The Local (Germany's News in English)* (28 April 2011); Millbank J, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?" (2011) 35 MULR 165; Ethics Committee of the ASRM, n 7.



forms of surrogacy. In “traditional” or “genetic” surrogacy the surrogate is inseminated with sperm from a donor or the commissioning father usually through artificial insemination, although conception following sexual intercourse has also been reported.¹² In this situation, the surrogate is the child’s genetic mother and there are accounts of this kind of surrogacy in the Bible (Genesis 16:1-4). Traditional surrogacy requires no medical intervention and is usually arranged informally between the parties concerned.¹³ There is well-documented evidence of other family and community-based responses to a couple’s inability to conceive a child, including the “gifting” of a child from within the extended family;¹⁴ arranging for a male member of the family or the community to have sexual intercourse with the female partner of a man believed to be infertile;¹⁵ and providing a new sexual partner for a man whose female partner has been unable to conceive, such as the sister of the woman, or allowing the man to have more than one wife.¹⁶ Any resulting child would be regarded as the child of the commissioning parents and raised by them.¹⁷

In gestational surrogacy, in vitro fertilisation (IVF) is used to create an embryo that is implanted into the uterus of the surrogate. The oocytes and/or sperm used to create the embryo(s) can be either from the commissioning parents or from a donor(s) and there is no genetic relationship between the surrogate and the child. Thus, several adults may be involved in the creation of a child through gestational surrogacy, including one or two commissioning parents, one or two donors, and the surrogate mother.

Traditional surrogacy has mostly remained within the ambit of “self-help” endeavours. However, despite initial ambivalence¹⁸ and regulatory restrictions,¹⁹ ART providers in a number of countries now facilitate gestational surrogacy, and some professional bodies have identified situations where this form of surrogacy may be indicated. The International Federation of Fertility Societies cites the following as indications for surrogacy:

- (1) Patients without a uterus, but with one or both ovaries functioning;
 - (a) Women with congenital absence of the uterus;
 - (b) Women who have had a hysterectomy for carcinoma or other reasons;
- (2) Women who suffer repeated miscarriage and for whom the prospect of carrying a baby to term is very remote. In this group, women who have repeatedly failed to achieve a pregnancy following IVF treatment may also be considered;
- (3) Women with certain medical conditions which may make pregnancy life-threatening, but for whom the long-term prospects for health are good.²⁰

Professional opinion regarding the use of surrogacy for social or non-clinical reasons appears mixed. While IFFS has stated that “requests [for gestational surrogacy] for career or social reasons are

¹² Blyth E, “I Wanted to be Interesting. I Wanted to be Able to Say ‘I’ve Done Something Interesting with My Life’: Interviews with Surrogate Mothers in Britain” (1994) 12 J Reprod Infant Psychol 189.

¹³ Blyth E, “Section 30 – The Acceptable Face of Surrogacy?” (1993) 15 J Soc Welfare & Fam L 248; Blyth, n 12; Blyth E, “‘Not a Primrose Path’: Commissioning Parents’ Experiences of Surrogacy Arrangements in Britain” (1995) 13 J Reprod Infant Psychol 185.

¹⁴ Douthett M and Bennett S, “A Pacific Perspective on Assisted Reproductive Technologies” in Coney S and Else A (eds), *Protecting Our Future: The Case for Greater Regulation of Assisted Reproductive Technology: A Discussion Document* (Women’s Health Action Trust, 1999) pp 38-39.

¹⁵ Tabong PT-N and Adongo PB, “Infertility and Childlessness: A Qualitative Study of the Experiences of Infertile Couples in Northern Ghana” (2013) 13 *BMC Pregnancy Childbirth* 72.

¹⁶ Tabong and Adongo, n 15 at 72.

¹⁷ Tabong and Adongo, n 15 at 72.

¹⁸ Blyth (1993), n 13; Blyth E, “Surrogacy Arrangements in Britain: Policy and Practice Issues for Professionals” (1998) 1 *Hum Fertil* 3. In the United Kingdom, the Human Fertilisation and Embryology Authority advised clinics that surrogacy should be considered only when it was physically impossible or highly undesirable for medical reasons for the commissioning mother to carry a pregnancy, but lifted these restrictions in its revised Code of Practice published in 2009 at <http://www.hfea.gov.uk/code.html>.

¹⁹ Millbank, n 11 at 165-207.

²⁰ Ory et al, n 6 at 110.



not considered to be reasonable indications”,²¹ the American Society for Reproductive Medicine Ethics Committee has argued against restricting access by single persons and same-sex couples to ART (including surrogacy) by advising that “programs should treat all requests for assisted reproduction equally without regard to marital status or sexual orientation”, since there is no “persuasive evidence that children are harmed or disadvantaged solely by being raised by single parents, unmarried parents, or gay or lesbian parents”.²² The Ethics Committee has further articulated criteria by which gestational surrogacy arrangements may be considered “ethically justifiable”:²³

- The surrogate is fully informed of the risks of the surrogacy process and of pregnancy;
- The surrogate has access to psychological evaluation and counselling and independent legal counsel;
- The surrogate receives “reasonable economic compensation” that takes account of “9 months of possible illness, risks to employment, burdens on other family members, and the like, but should not, however, create undue inducement or risks of exploitation or incentivize gestational carriers to lie about their own health conditions or family history”;²⁴
- The child’s legal parentage is determined on the basis of the “intentions of all the parties”.²⁵

Australia and India epitomise two contrasting approaches to surrogacy. They are discussed in this article to argue that surrogacy-related Australian State and Territory laws, at least in part, may be responsible for Australians’ use of surrogacy in India where a laissez-faire, not to say, facilitative approach to surrogacy is evident.

SURROGACY IN AUSTRALIA

Australian States and Territories were among the first in the world to introduce legislation to regulate the practice of ART, beginning in the late 1980s.²⁶ Australia’s first surrogacy birth occurred in Victoria in 1988.²⁷ At that time, surrogacy was generally considered an outlier to mainstream ART practice that divided opinions.²⁸

In Australia, the responsibility for regulating surrogacy is vested in the States and Territories. Although State and Territory governments agreed to harmonise surrogacy legislation throughout Australia, there is currently variation between the legislation of each jurisdiction.²⁹ In addition to adhering to State and Territory legislation, fertility clinics are obliged to abide by country-wide ethical guidelines and a professional accreditation scheme.³⁰ Guidelines from the National Health and

²¹ Ory et al, n 6 at 110.

²² Brzyski R, Braverman A, Stein A, Steinbock B, Wilder B, Adamson GD, Robertson J et al (Ethics Committee of ASRM), “Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons” (2009) 92 Fertil Steril 1190.

²³ Amato P, Brzyski R, Braverman A, Stein A, Steinbock B, Wilder B, Lamb D et al (Ethics Committee of ASRM), “Consideration of the Gestational Carrier: A Committee Opinion” (2013) 99 Fertil Steril 1838.

²⁴ Ethics Committee of ASRM, n 23 at 1839.

²⁵ Ethics Committee of ASRM, n 23 at 1840.

²⁶ Hammarberg K, Johnson L and Petrillo T, “Gamete and Embryo Donation and Surrogacy in Australia: The Social Context and Regulatory Framework” (2011) 4 Int J Fertil Steril 178.

²⁷ Leeton J, King C and Harman J, “Sister-Sister In Vitro Fertilization Surrogate Pregnancy with Donor Sperm: The Case for Surrogate Gestational Pregnancy” (1988) 5 J Assist Reprod Genetics 245.

²⁸ Leeton J, *Test Tube Revolution: The Early History of IVF* (Monash University Publishing, Clayton, 2013) p 77.

²⁹ Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) p 14, http://www.nt.gov.au/justice/policycoord/documents/polcoord_surrogacy_consultationpaper.pdf.pdf; Standing Council on Law and Justice, *Principals to Form the Basis of Surrogacy Laws in Australia* (2009), http://www.lccsc.gov.au/scij/archive/former_scij/projects/family_welfare/surrogacy.html?s=1001; *Surrogacy Act 2008* (WA); *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2010* (NSW); *Statutes (Surrogacy) Amendment Act 2009* (SA), amending the *Family Relationships Act 1975* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic), Pt 4.

³⁰ Reproductive Technology Accreditation Committee, *Certification Scheme* (Fertility Society of Australia, 2010); National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007), <http://www.nhmrc.gov.au/files/nhmrc/publications/attachments/e78.pdf>.



Medical Research Council state that “clinics must not undertake or facilitate commercial surrogacy” and instruct them not to facilitate non-commercial surrogacy arrangements unless every effort has been made to ensure that participants:

- have a clear understanding of the ethical, social and legal implications of the arrangement; and
- have undertaken counselling to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.³¹

Initial endeavours to regulate surrogacy in Australia led to widespread disparities between jurisdictions. However, in the last two decades, with the introduction of new or revised legislation, State and Territory surrogacy-related legislation and regulation now share three main characteristics:

- the criminalisation of commercial surrogacy;³²
- confirmation of the unenforceability of surrogacy contracts;³³
- prohibitions on advertising, providing advice or acting as an intermediary, for surrogacy.³⁴

The legal and regulatory restrictions applied to surrogacy in Australia mean that it is not accessible to some individuals or couples for whom it might otherwise be a viable family-building option. The greatest hurdle for undertaking surrogacy in Australia is finding a woman who is willing and able to be a surrogate without being financially compensated.³⁵ Furthermore, in South Australia and Western Australia gay men are explicitly excluded from access to surrogacy.³⁶ For those who are unable to find a surrogate, overseas commercial surrogacy provides a potential opportunity to have a child.

Transfer of parentage following surrogacy

Until November 2000 no Australian State or Territory provided for the transfer of parentage from the surrogate to the commissioning parents when a child was born as the result of surrogacy.³⁷ Since State and Territory laws vest parentage of a child in the birth mother (in common with many other jurisdictions), the surrogate is regarded as the legal mother regardless of her genetic relationship to the child.³⁸ Commissioning parents who wished to formalise their parental relationship with a child born following surrogacy were compelled to do so by applying for a residence or parental responsibility order under the *Family Law Act 1975* (Cth).³⁹ In Victoria⁴⁰ and New South Wales,⁴¹ commissioning parents could also apply to adopt the child in very restricted circumstances where the surrogate and commissioning parents were members of the same family.

The momentum for State and Territory law to provide specifically for the transfer of parentage following a surrogacy arrangement built as a result of: media interest in, and the apparent increasing

³¹ National Health and Medical Research Council, n 30 at [13.2].

³² *Parentage Act 2004* (ACT), s 41; *Surrogacy Act 2010* (NSW), s 8; *Surrogacy Act 2010* (Qld), s 56; *Surrogacy Act 2008* (WA), s 8; *Assisted Reproductive Treatment Act 2008* (Vic), s 44; *Surrogacy Act 2012* (Tas), s 40; *Family Relationships Act 1975* (SA), s 10H; Stuhmcke A, “The Criminal Act of Commercial Surrogacy in Australia: A Call for Review” (2011) 18 JLM 601.

³³ *Assisted Reproductive Treatment Act 2008* (Vic), s 44(3); *Surrogacy Act 2010* (Qld), s 15; *Surrogacy Act 2010* (NSW), s 6; *Surrogacy Act 2008* (WA), ss 7, 21(2)(d), (3)(c); *Surrogacy Act 2012* (Tas), s 10; *Family Relationships Act* (SA), ss 10G, 10HB(7).

³⁴ *Assisted Reproductive Treatment Act 2008* (Vic), s 45; *Surrogacy Act 2010* (NSW), s 10; *Surrogacy Act 2010* (Qld), ss 55-58; *Surrogacy Act 2008* (WA), ss 9-11; *Parentage Act 2004* (ACT), s 43; *Family Relationships Act 1975* (SA), s 10H; *Surrogacy Act 2012* (Tas), s 41; see Table 1.

³⁵ Everingham S, Stafford-Bell M and Hammarberg K, “Australians’ Use of Surrogacy” (2014) 201 MJA 270.

³⁶ *Surrogacy Act 2008* (WA), s 19; *Family Relationships Act 1975* (SA), s 10HA(2)(b)(iii).

³⁷ See the *Artificial Conception (Amendment) Act 2000* (ACT).

³⁸ *Family Law Act 1975* (Cth), s 60HB.

³⁹ Such orders may be granted in favour of “any other person concerned with the care, welfare or development of the child” (*Family Law Act 1975* (Cth), s 65C(c)). Possession of an order enables commissioning parents to make educational and medical decisions for the child and allows for the issue of a passport, but does not grant parental status and expires once the child reaches 18 years of age.

⁴⁰ *Adoption Act 1984* (Vic), s 122(2).

⁴¹ *Adoption Act 2000* (NSW), s 87(2)(a).



public acceptance of surrogacy;⁴² judgments in several parental order applications to the Family Court of Australia that advocated legislative reform;⁴³ applications by commissioning parents to adopt the child;⁴⁴ and several unsuccessful applications by commissioning parents to State and Territory courts for declarations of legal parentage.⁴⁵

In 2000, the Australian Capital Territory became the first Australian jurisdiction to address the legal status of the child born following surrogacy.⁴⁶ The *Artificial Conception (Amendment) Act 2000* (ACT) enabled the Australian Capital Territory Supreme Court to grant a Parentage Order in favour of commissioning parents if six conditions were met:

- (1) at least six weeks and no more than six months must have elapsed since the birth of the child;
- (2) at least one of the commissioning parents is the genetic parent of the child;
- (3) the child's home must be with the commissioning parents;
- (4) the legal parents of the child, with full understanding, must agree freely with the arrangement;
- (5) the commissioning parents must be domiciled in the Australian Capital Territory when the application and order are made; and
- (6) the commissioning and the legal parents must have been assessed by and received counselling from a service other than that which is carrying out the IVF procedure.

Provisions contained in this and two other Acts (the *Birth (Equality of Status) Act 1988* (ACT) and the *Substitute Parent Agreements Act 1994* (ACT)) were consolidated into a single Act (the *Parentage Act 2004* (ACT)) to provide legal recognition of parentage and family relationships. The 2004 Act removed discrimination related to parentage with the recognition of same-sex partners and introduced a new requirement that neither the surrogate (birth mother) nor her partner may be the genetic parent of the child.

Other Australian jurisdictions followed the Australian Capital Territory's lead to provide for the legal transfer of parentage following a surrogacy arrangement.⁴⁷ These provisions share some broad characteristics, requiring the surrogacy agreement to be:

- entered into prior to the establishment of the pregnancy;⁴⁸
- the subject of certified independent legal advice (in most jurisdictions);⁴⁹ and
- the subject of independent and/or certified counselling for all parties (in most jurisdictions).⁵⁰

Problems and barriers resulting from differences between Australian jurisdictions regarding eligibility and other criteria for the transfer of parentage following a surrogacy arrangement, especially

⁴² Millbank, n 11 at 176; Millbank J, "From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of 'New' Surrogacy in Australia" (2012) 21 *Griffith Law Review* 108.

⁴³ See, for example, *Re Mark* (2003) 31 Fam LR 162.

⁴⁴ See, for example, *W: Re Adoption* (1998) 23 Fam LR 538; *Re A and B* (2000) 26 Fam LR 317; *Re D and E* (2000) 26 Fam LR 310.

⁴⁵ See, for example, *PJ v DOCS* [1999] NSWSC 340; *Re Application pursuant to the Births Deaths and Marriages Registration Act 1997* [2000] ACTSC 39. The latter case led to the *Artificial Conception Amendment Act 2000* (ACT) and is highlighted as the genesis of the 2003 ACT inquiry: Australian Capital Territory Law Reform Commission, *Substitute Parentage Agreements*, Report No 20 (2003) pp 2-4. See also *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694.

⁴⁶ *Artificial Conception (Amendment) Act 2000* (ACT).

⁴⁷ See Table 1 for surrogacy legislation throughout Australia.

⁴⁸ *Parentage Act 2004* (ACT), s 23; *Surrogacy Act 2010* (NSW), s 24; *Surrogacy Act 2010* (Qld), ss 7(1), 22(2)(e)(iv); *Family Relationships Act 1975* (SA), s 10HA(2)(a)(i); *Surrogacy Act 2011* (Tas), ss 4-5; *Assisted Reproductive Treatment Act 2008* (Vic), s 3; *Surrogacy Act 2008* (WA), ss 3, 17(e).

⁴⁹ *Surrogacy Act 2010* (NSW), s 36; *Surrogacy Act 2010* (Qld), ss 22(2)(e)(ii), 32; *Family Relationships Act 1975* (SA), s 10HA(6)(c); *Surrogacy Act 2011* (Tas), s 16(2)(a)(i); *Assisted Reproductive Treatment Act 2008* (Vic), ss 40(1)(c), 43(c); *Status of Children Act 1974* (Vic), s 23(2)(b)(iii); *Surrogacy Act 2008* (WA), s 17(c)(i), (ii); *Surrogacy Regulations 2009* (WA), reg 5(2)(f).

⁵⁰ *Surrogacy Act 2010* (NSW), s 17(1)-(2); *Surrogacy Act 2010* (Qld), ss 22(2)(e)(ii), 32; *Family Relationships Act 1975* (SA), s 10HA(2)(vii), (3)(b)(i)-(ii); *Assisted Reproductive Treatment Act 2008* (Vic), ss 40(2)(a), 43(a)-(b); *Surrogacy Act 2008* (WA), s 17(c)(i), (ii); *Surrogacy Act 2011* (Tas), s 16(2)(f).



when the commissioning parents and surrogate reside in different jurisdictions have been acknowledged by the federal government.⁵¹ This creates added difficulties for commissioning parents and their children.⁵²

Children born overseas to a non-Australian surrogate are not regarded as the legal children of the Australian commissioning parents under State or Territory law, or generally under federal law, regardless of genetic links to one or both, or the recognition of them as the parents in a foreign birth certificate or court order.⁵³ An application for parental responsibility can be made if the commissioning parents are Australian. However, practically, the commissioning parents need to bring the child into Australia prior to consideration of an application in the Family Court of Australia. To address this dilemma, the Department of Immigration and Citizenship issued instructions in 2009, updated in 2013,⁵⁴ entitling a child born overseas following a surrogacy arrangement to Australian citizenship-by-descent if at least one of the commissioning parents:

- is an Australian citizen;
- has parental responsibility for the child; and
- is the child's genetic parent (as demonstrated by DNA testing, records from the clinic providing ART services, or relevant documentation from a court of law).

The *Family Law Act 1975* (Cth) interacts with State and Territory surrogacy legislation in relation to parentage. In 2012, the Commonwealth Attorney-General issued the Family Law Council with terms of reference to review aspects of the Act in relation to parentage, including whether any amendments should be made to:

- make the Act more consistent with State and Territory legislation that provides for the legal parentage of children born as a result of surrogacy;
- assist the family court to determine the parentage of children born as a result of ART, including surrogacy, where State and Territory laws do not apply; and
- assist other Commonwealth agencies, such as those responsible for immigration, citizenship, and passports, to identify who the parents of a child are for the purposes of Commonwealth laws.

A report of the review was released to the general public in August 2014.⁵⁵

In 2009, the Standing Committee of Attorneys-General began discussions to establish a “national model to harmonise regulation of surrogacy” to address the differences in surrogacy legislation in Australia. In the resulting 2009 proposals,⁵⁶ the Committee stated:

[t]he proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia. It is judged that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones.⁵⁷

The guiding principles for surrogacy proposed by the Committee are that:

- parentage orders should be made in the best interests of the child;
- intervention of the law in people's private lives should be kept to a minimum; and

⁵¹ Family Law Council, *Report on Parentage and the Family Law Act* (December 2013), <http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf>; *Surrogacy Act 2008* (WA); *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2010* (NSW); *Statutes (Surrogacy) Amendment Act 2009* (SA).

⁵² Millbank, n 11 at 180-185.

⁵³ Millbank, n 11 at 200-206.

⁵⁴ Department of Immigration and Citizenship, *Australian Citizenship Instructions* (1 July 2009), http://www.citizenship.gov.au/_data/assets/pdf_file/0017/213560/aci-jul-2009.pdf; Department of Immigration and Citizenship, *Australian Citizenship Instructions* (1 January 2013), http://www.citizenship.gov.au/_pdf/aci-jan-2013.pdf.

⁵⁵ Family Law Council, n 51.

⁵⁶ Standing Committee of Attorneys-General Joint Working Group, n 29.

⁵⁷ Standing Committee of Attorneys-General Joint Working Group, n 29, pp 4-5.



- the model should seek to avoid legal dispute between the legal parent(s) and the commissioning parents.⁵⁸

In practice, State and Territory laws and regulations relating to surrogacy are still not harmonised and significant differences between them remain (Table 1). Most notable is the criminalisation of extraterritorial commercial surrogacy in some jurisdictions.

TABLE 1 Australian surrogacy-related legislation and regulations

Australia	No Commonwealth legislation; however, sections of the following Acts impact on surrogacy: <i>Family Law Act 1975</i> (Cth), s 60HB; <i>Prohibition of Human Cloning for Reproduction Act 2002</i> (Cth), s 21
Australian Capital Territory	<i>Parentage Act 2004</i> (ACT)
New South Wales	<i>Surrogacy Act 2010</i> (NSW)
Northern Territory	Abides by South Australian regulation
Queensland	<i>Surrogacy Act 2010</i> (Qld)
South Australia	<i>Family Law Act 1975</i> (SA)
Tasmania	<i>Surrogacy Act 2012</i> (Tas)
Victoria	<i>Assisted Reproductive Treatment Act 2008</i> (Vic) (Pt 4, Surrogacy); <i>Assisted Reproductive Treatment Regulations 2009</i> (Vic)
Western Australia	<i>Surrogacy Act 2008</i> (WA); <i>Family Court (Surrogacy) Rules 2009</i> (WA); <i>Surrogacy Regulations 2009</i> (WA)

Criminalisation of extraterritorial commercial surrogacy

The Australian Capital Territory,⁵⁹ New South Wales⁶⁰ and Queensland⁶¹ have taken steps to discourage residents from participating in extraterritorial surrogacy arrangements that do not conform to domestic legislation by requiring an individual or couple who have engaged in commercial surrogacy to declare this when seeking a parentage order or when applying for adoption. Such admission could result in a financial penalty or imprisonment. Turkey is the only other jurisdiction in the world where undertaking extraterritorial surrogacy is a criminal act.⁶²

The motivation behind this measure was to avoid the commodification of children and surrogates and economic exploitation of vulnerable women, particularly in developing countries where surrogacy is a proliferating business and protective regulation is absent. The Hon Linda Burney, who was responsible for introducing the measure in New South Wales, argued in parliamentary debate that:

[b]y making commercial surrogacy an extraterritorial offence we will help to prevent exporting this exploitation of women overseas. We do not support it here so why should we support it overseas?

In some countries where commercial surrogacy is allowed, such as the United States, some regulation is in place to protect the wellbeing of surrogate mothers. In other countries regulation is mostly absent. In my mind it would be irresponsible and indeed immoral to legislate in New South Wales but to be silent on the potential exploitation by our own citizens of vulnerable women overseas.⁶³

⁵⁸ Standing Committee of Attorneys-General Joint Working Group, n 29, pp 2.

⁵⁹ *Parentage Act 2004* (ACT), ss 24(c), 26(3)(d).

⁶⁰ *Surrogacy Act 2010* (NSW), ss 8, 23.

⁶¹ *Surrogacy Act 2010* (Qld), s 54.

⁶² Grtin ZB, "Banning Reproductive Travel: Turkey's ART Legislation and Third-party Assisted Reproduction" (2011) 23 *Reprod Biomed Online* 555.

⁶³ New South Wales, Legislative Assembly, *Parliamentary Debates* (28 October 2010) p 27120 (Linda Burney).



In a similar vein, the Hon Greg Donnelly quoted from media sources:

Outsourcing surrogacy to countries like India or Ukraine opens the women there to exploitation of the kind our MPs are keen to avoid here.

In laissez-faire fertility markets overseas, poor women have no protection ... they give up the right to be able to change their mind after birth.

Even in parts of the US, surrogate mothers lack basic protections.⁶⁴

By contrast, some lawmakers voiced concerns that such legislation might be ineffective and counterproductive. For example, the Hon David Shoebridge argued:

The urge to have a family is overwhelming for many people. IVF procedures are not successful for many couples and it can be difficult to find a person prepared to carry a child under an altruistic surrogacy arrangement. That is the biological and factual reality. Many people driven by an overwhelming urge to have a child will travel to jurisdictions in which commercial surrogacy is not illegal ... States in America have sophisticated laws that deal with commercial surrogacy arrangements. Making entering into those arrangements unlawful in New South Wales will not stop couples from heading off to those jurisdictions. In fact, it will only make criminals of those people for entering into an arrangement that they will enter into in any event. It will not stop the practice.⁶⁵

While it is somewhat early to judge the impact of allowing domestic surrogacy and criminalising extraterritorial commercial surrogacy in Queensland, New South Wales and the Australian Capital Territory, evidence of its ineffectiveness in preventing the practice is emerging. First, early judgments have cast doubt on the willingness of either the judiciary or law enforcement agencies to take exemplary action against Australians who disregard the ban on undertaking commercial surrogacy overseas. In two recent cases involving applications for parental responsibility following declared commercial surrogacy, the Family Court judge referred his judgments to the Office of the Director of Public Prosecutions to consider whether the commissioning parents should be prosecuted.⁶⁶ The applicants in one of these cases had entered into surrogacy arrangements with two surrogates. While their first application for parental responsibility was referred to the Office of the Director of Public Prosecutions, their second application was heard by a judge who awarded them parental responsibility without any such referral. In subsequent cases, the Family Court judge afforded greater weight to the children's best interests than to public policy considerations and issued certificates under the *Evidence Act 1995* (Cth) to exclude the possibility of self-incrimination for intended parents.⁶⁷ To date, no prosecutions for breach of the extraterritorial surrogacy laws had been instituted by government law agencies. Secondly, some Australian couples who have contravened extraterritorial surrogacy legislation are taking evasive action to avoid drawing attention to themselves. A survey conducted by Surrogacy Australia and recent media reports have revealed that some commissioning parents are eschewing parentage order applications or relocating to jurisdictions where extraterritorial commercial surrogacy is not explicitly banned.⁶⁸ This early evidence suggests that, to some extent at least, critics' fears that criminalisation of extraterritorial commercial surrogacy would not stop the practice have been realised.

SURROGACY IN INDIA

In India, which has explicitly – and successfully – carved a niche for itself as a centre for “medical tourism”, commercial surrogacy is a flourishing business. The Indian government's Ministry of

⁶⁴ New South Wales, Legislative Council, *Parliamentary Debates* (11 November 2010) p 27684 (Greg Donnelly).

⁶⁵ New South Wales, Legislative Council, *Parliamentary Debates* (11 November 2010) pp 27675-27676 (David Shoebridge).

⁶⁶ *Findlay and Punyawong* [2011] FamCA 503; *Dudley and Chedi* [2011] FamCA 502.

⁶⁷ *Ellison and Karnchanit* [2012] FamCA 602; *Mason and Mason* [2013] FamCA 424.

⁶⁸ Everingham S, “Surrogacy Australia 2012 Survey Results of Online Survey of Australian Parents and Intending Parents” (Paper provided to Louise Johnson by Sam Everingham) (Everingham (2012a)); Everingham S, “The Growth in Australians' Use of Commercial Surrogacy as a Means of Family Formation” (Paper presented at Fertility Society of Australia Conference, Auckland, New Zealand, 28-31 October 2012) (Everingham (2012b)); data provided to Louise Johnson by Sam Everingham. See also “Aussie Surrogacy Stories: We Broke the Law ... and Spent \$100,000!”, *Woman's Day* (7 October 2013), <http://womansday.ninemsn.com.au/lifestyle/truelifestories/8733888/aussie-surrogacy-stories-we-broke-the-lawand-spent-100000>.



Tourism actively promotes travel to India as a destination for medical treatment, utilising publicity material, international road shows, and financial incentives to attract foreign patients to use Indian medical service providers. Viewed from this perspective, travel to India for the purposes of surrogacy could be regarded as an unremarkable extension of its menu of health care services designed to attract foreign customers and revenue. Alternatively, international surrogacy as a form of outsourcing reproduction could be seen as an adjunct to yet another of India's noted achievements in the globalised economy. Regardless, the effect has been to bestow on India the title of the "surrogacy capital" of the world. Commercial surrogacy in India dates back to 2002 and today the industry is estimated to turn over more than US\$400 million per year.⁶⁹

In response to extensive international criticism, efforts have been made to establish a regulatory framework for surrogacy in India. For example, the Indian Centre for Medical Research has drawn up surrogacy-related guidelines. However, these have no statutory basis and are unenforceable,⁷⁰ and there is ample evidence of non-compliance with these guidelines. For example, the guidelines state that:

No more than three oocytes or embryos may be placed in a woman in any one cycle, regardless of the procedure/s used, excepting under exceptional circumstances (such as elderly women, poor implantation, adenomyosis, or poor embryo quality) which should be recorded. No woman should be treated with gametes or with embryos derived from the gametes of more than one man or woman during any one-treatment cycle.⁷¹

While some Indian surrogacy clinics respect the wishes of surrogates and commissioning parents who want only one embryo transferred, in other clinics surrogates may not be offered this choice or be aware that they have a choice, and multiple embryos may be transferred. Then, if more than one or two embryos implant, the surrogate is expected to undergo selective fetal reduction where one or more fetuses are terminated.⁷²

In spite of longstanding attempts to institute a regulatory framework for surrogacy with statutory power in India these have yet to be realised. The *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind) and *Assisted Reproductive Technologies (Regulation) Rules 2010* (Ind) provide for legally enforceable contracts to be agreed between the commissioning parent(s) and the surrogate.⁷³ While there is provision in the Bill for counselling for commissioning parents, there is no requirement for counselling for surrogates.⁷⁴ However, it requires the surrogate to undergo screening for infectious diseases, refrain from engaging in any act that could harm the fetus or the child after birth, agree to relinquish all parental rights, agree to undergo fetal reduction if she is carrying multiple fetuses and, if she is married, obtain her husband's consent to undergo the medical procedures associated with surrogacy. The Bill allows the surrogate to receive monetary compensation.⁷⁵ It stipulates that surrogates and donors are to be recruited by an "ART bank" which is independent of the clinic where the procedures take place.⁷⁶ Furthermore, surrogate and donor identities cannot be revealed by the "ART bank" either to the treating clinic or to persons receiving treatment.⁷⁷

⁶⁹ Bhalla N and Thapliyal M, "India Seeks to Regulate Its Booming 'Rent-a-Womb' Industry", *Reuters.co.uk* (30 September 2013), <http://news.yahoo.com/india-seeks-regulate-booming-rent-womb-industry-082742912.html>.

⁷⁰ Indian Council of Medical Research, "Code of Practice, Ethical Considerations and Legal Issues" in Sharma RS et al (eds), *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India* (Ministry of Health and Family Welfare, Government of India, 2005) at [3.2.7], http://icmr.nic.in/art/Chapter_3.pdf.

⁷¹ Indian Council of Medical Research, n 70 at [3.2.7]

⁷² Sachdev-Gour S, Khanna M, Banerjee K and Kadam K, "Indian Panel Q&A" (Paper presented at Surrogacy Australia Conference, Melbourne, Australia, 6-7 April 2013).

⁷³ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 34(1).

⁷⁴ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 20(6).

⁷⁵ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 34.

⁷⁶ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 20.

⁷⁷ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 26(13).

There are concerns that the Bill continues to commodify women's reproductive capacity as it enables commercial arrangements.⁷⁸ The International Federation of Social Workers argues that surrogates need to be educated about their rights and empowered to assert their wishes and that "all humans need protection from all forms of discrimination and exploitation, including circumstances where this affects their reproductive capacities".⁷⁹

Some elements of the Indian media have also questioned the ethics of India's current regulatory guidelines and proposed Bill:

Before the law is put on the anvil, it needs serious debate. Can the rights of women and children be bartered? ... Is the new law a compromising with reality in legitimising existing surrogacy rackets? Is India promoting reproductive tourism?⁸⁰

While specific provisions in the Bill require commissioning parents to demonstrate their ability to take the child to their home country, they are also obliged to appoint a local guardian who is legally responsible for taking care of the surrogate until the child is born and delivered to the commissioning parents. The guardian is also legally responsible for the child until she or he is delivered to the commissioning parents. If they fail to take delivery of the child, the guardian is free to hand the child over to an adoption agency within one month of the child's birth.⁸¹

Under this Bill, parents and children only have the right to obtain non-identifying information about the surrogate and/or any donor used in the arrangement.⁸² The birth certificate of a child born through the use of a surrogacy arrangement will identify the commissioning parent(s) as the child's parent(s).⁸³

To date, this Bill had not been enacted. However, it has been reported that the Indian Planning Commission is reworking the proposed legislation to take into account concerns about the lack of protection for the surrogate and the health and rights of children born through surrogacy.⁸⁴ How this will influence future surrogacy legislation is yet to be seen.

In 2013, the Indian Ministry of Home Affairs restricted the issue of a medical visa to enter India for the purpose of engaging in a surrogacy arrangement to heterosexual couples who have been married to each other for at least two years and in whose home country surrogacy is legal.⁸⁵ The precipitous restriction of India's previous inclusive regime that enabled unmarried or gay individuals or couples to enter into a surrogacy arrangement left many expectant parents awaiting the birth of their babies in breach of the new regulations. While one Indian surrogacy clinic reported that Australian couples in this situation had been advised that they would be able to return home with their babies,⁸⁶ it was also reported that some Australian couples who were no longer able to enter surrogacy arrangements in India were experiencing difficulties in getting permission to return embryos stored in India to Australia.⁸⁷

⁷⁸ Gupta JA and Richters A, "Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self-determination" (2008) 5 J Bioethical Inq 239.

⁷⁹ International Federation of Social Workers, n 10.

⁸⁰ Malhotra A, "More Questions Than Answers Over Rent-a-Womb Market", *The Hindu* (24 July 2010).

⁸¹ Palattiyil et al, n 10 at 686-700.

⁸² *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), ss 32, 36.

⁸³ *Assisted Reproductive Technologies (Regulation) Bill 2010* (Ind), s 34(10).

⁸⁴ Singh M, "Plan Panel Wants to Make Surrogacy Law More Women-centric", *Times of India* (1 August 2013), http://articles.timesofindia.indiatimes.com/2013-08-01/india/40960523_1_surrogacy-icmr-plan-panel.

⁸⁵ Haxton N, "India Cuts Off Commercial Surrogacy to Many Australians", *AM with Tony Eastley* (15 January 2013); Rajadhyaksha M, "No Surrogacy Visa for Gay Foreigners", *Times of India* (18 January 2013).

⁸⁶ Sachdev-Gour S, "Best Practice in Surrogate Preparation" (Paper presented at Surrogacy Australia Conference, Melbourne, Australia, 6-7 April 2013).

⁸⁷ Correspondence with Nicholas Walker, Kellehers Australia, Barristers & Solicitors.



OVERSEAS TRAVEL FOR SURROGACY BY AUSTRALIANS

Although the data cannot be independently verified, various sources indicate considerable overseas travel for surrogacy by Australians. Respondents to a survey conducted by the Australian consumer group, Surrogacy Australia, reported that of the 259 Australians surveyed, only 44 were currently considering or had commenced an altruistic surrogacy arrangement in Australia. The remainder had pursued or planned to pursue commercial surrogacy arrangements overseas.⁸⁸

A review of surrogacy arrangements reported in Australian media between January 2007 and December 2010 undertaken by Millbank revealed 69 existing, current and planned cases. Of these, 44 involved travel to access donor gametes unavailable in the home jurisdiction or to evade restrictive local surrogacy laws (nine interstate and 35 overseas). Thirty-two of the international arrangements involved payment to the surrogate. In nine arrangements where travel was not reported as part of the arrangement, the commissioning parents indicated that they would travel to evade local restrictions if necessary.⁸⁹ An especially concerning finding from Millbank's media survey was that multiple pregnancy and birth resulting from multiple embryo transfer had occurred in eight cases (seven sets of twins and one of triplets). Seven of these had resulted from overseas surrogacy arrangements: four in India and three in the United States. Millbank describes three additional overseas cases involving multiple embryo transfer, including plans in an Indian surrogacy arrangement to transfer as many as four embryos. High multiple pregnancy and premature birth rates were also reported in a survey of Australians who undertook surrogacy overseas.⁹⁰

According to one report, practical – if not legal – barriers facing the family-building aspirations of Australian gay couples and single men appear to have prompted increasing travel for surrogacy to both India and California.⁹¹ While only 23 babies were born following surrogacy in Australia in 2011,⁹² a survey undertaken by Surrogacy Australia of 14 overseas clinics and agencies known to engage in surrogacy arrangements revealed that at least 269 babies were born to Australian commissioning parents through international surrogacy arrangements in 2010-2011 and 257 in 2011-2012.⁹³ Surrogacy Australia also sourced data from the Australian Department of Immigration and Citizenship. Australian citizenship-by-descent applications to the Australian Department of Immigration and Citizenship from India more than doubled between 2008 and 2011, from 170 to 394 for infants born to Australian parents through commercial surrogacy.⁹⁴

Various media and industry sources indicate that of foreign individuals and couples undertaking surrogacy in India, Australians comprise a significant proportion.⁹⁵ One Indian doctor claimed that:

of 100 surrogates on my books, 55 are pregnant and more than 50 per cent of those children will be born Australian babies ... Most of the commissioning parents have done IVF in Australia and been advised by their specialists that surrogacy is their best option.⁹⁶

⁸⁸ Everingham et al, n 35.

⁸⁹ Millbank, n 11 at 165-207.

⁹⁰ Stafford-Bell M, Everingham S and Hammarberg K, "Outcomes of Surrogacy Undertaken by Australians Overseas" (2014) 201 MJA 1.

⁹¹ Heard H, "Life's Indian Givers", *Melbourne Leader* (1 October 2008); Everingham (2012b), n 68.

⁹² Macaldowie et al, n 5.

⁹³ Everingham (2012a), n 68.

⁹⁴ Everingham (2012a), n 68; Everingham (2012b), n 68.

⁹⁵ Pande A, "'At Least I Am Not Sleeping with Anyone': Resisting the Stigma of Commercial Surrogacy in India" (2010) 36 *Feminist Studies* 292; Hodge A, "Birth of a Booming Baby Industry", *The Australian* (26 June 2010), <http://gaydadsaustralia.wordpress.com/2010/06/26/the-australian-birth-of-a-booming-baby-industry-by-amanda-hodge>.

⁹⁶ Hodge, n 95.



CHALLENGES POSED BY TRANSNATIONAL SURROGACY

Advertisements by clinics and entrepreneurs offering surrogacy in India proliferate on the internet, although verification of available information is rarely possible in advance of engaging with service providers.⁹⁷ One website provides reassurance about the legal aspects of surrogacy arrangements in India, promoting a vision of a problem-free procedure:

the surrogate, has no genetic link to the baby she is carrying. This means that the child is the genetic property of the couples, and the surrogacy contract is legally recognized and enforceable. Unlike adoptions, there is no risk of the genetic mother changing her mind about giving the child for adoption.

In the past few years there have been many cases of the misuse of surrogacy. To prevent this, certain guidelines have been laid down. A contract is drafted specifying that the baby becomes the legitimate adopted child of the genetic couple. The genetic parents, the surrogate mother and her spouse will sign this document.⁹⁸

Shipping of embryos or sperm to India, which are then used to establish a pregnancy in a local surrogate, is advertised by some reproductive services agencies as a way of reducing the cost.⁹⁹

According to a recent survey of Australians who had undertaken transnational surrogacy, the average cost was approximately US\$70,000 in India compared to more than US\$170,000 in the United States.¹⁰⁰

Taken together, the affordability of surrogacy, the ready availability of surrogates, the lack of regulation, the widespread English language knowledge and good travel infrastructure, make surrogacy in India a potentially attractive proposition for childless foreigners. It is often portrayed as an opportunity for local socioeconomically disadvantaged women and their families to escape poverty.¹⁰¹ However, media reports have highlighted serious flaws in some Indian commercial surrogacy arrangements.¹⁰² These relate primarily to inadequate care provided to and/or exploitation of surrogates, including accounts of multiple pregnancies, selective fetal reduction, pregnancy termination and a mix-up that resulted in the surrogate keeping the child (who was not genetically related to the commissioning parents).¹⁰³ Other problems identified relate to the child's legal parentage or citizenship status which in many cases prevent or significantly delay the ability of the commissioning parent(s) to return to their home country with the child.¹⁰⁴

The surrogates' perspective

The experiences of Indian women who agree to be surrogates have been explored in surveys of surrogates in three cities in the province of Gujerat conducted by the Centre for Social Research.¹⁰⁵

⁹⁷ Blyth E, "Fertility Patients' Experiences of Cross-border Reproductive Care" (2010) 94 *Fertil Sterile* 11.

⁹⁸ Medical Tourism Corporation, "Surrogacy Clinic India" (as at 3 September 2014), <http://www.medicaltourismco.com/india-hospitals/rotunda-center-for-human-reproduction.php>. Interestingly, a surrogacy arrangement in which the Rotunda clinic figures prominently that is far from problem free for either the American commissioning parents or the Indian surrogate is the subject of the film *Made in India* by documentary filmmakers Rebecca Haimowitz and Vaishali Sinha, see <http://www.madeinindiamovie.com>.

⁹⁹ IVF Surrogacy Treatment India, "Shipping Embryos: Cryo-shipping of Embryos and Sperm to India for Surrogacy" (as at 3 September 2014), <http://www.ivftreatmentindia.wordpress.com/shipping-embryo>.

¹⁰⁰ Everingham et al, n 35.

¹⁰¹ Pande A, "Not an 'Angel', Not a 'Whore': Surrogates as 'Dirty' Workers in India" (2009) 16 *Indian Journal of Gender Studies* 141; "Indian Surrogacy Helps Lift Some Poor, but Raises Ethical Issues", *PBS Newshour* (5 August 2011), http://www.pbs.org/newshour/bb/globalhealth/july-dec11/surrogates_08-05.html.

¹⁰² Haimowitz and Sinha, n 98.

¹⁰³ "Surrogate Mother Dies of Complications", *Times of India* (17 May 2012); Medew J, "Surrogacy's Painful Journey", *The Age* (23 March 2013).

¹⁰⁴ "Apex Court Extends Manji's Custody with Grandmother", *The Hindu* (21 August 2008); Roy, n 11; Spiewak M, "Verbotene Kinder", *Zeit Online* (23 April 2010); "Japanese Baby Gets Birth Certificate", *The Hindu* (10 August 2008).

¹⁰⁵ Centre for Social Research, *Surrogate Motherhood – Ethical or Commercial* (2012), <http://womenleadership.in/images/pdf/SurrogacyReport.pdf>.



Interviews with women from one clinic in Anand,¹⁰⁶ three clinics in New Delhi,¹⁰⁷ and women previously employed in a garment factory in Bangalore¹⁰⁸ provide further insights into surrogacy in India from the surrogates' perspective.

Pande explored the narratives of Indian surrogates and concluded that:

in the narratives of the Indian surrogate, God makes all the choices. Surrogacy becomes God's gift to needy mothers and an opportunity for them to fulfil their familial duties.¹⁰⁹

According to Pande, the narratives in this study reinforced inequalities between commissioning mothers and surrogates with commissioning mothers expressing a desire to contribute towards a worthy cause and save an Indian family from desperate poverty and some surrogates expressing a desire for the wealthier commissioning mother to rescue them from poverty.¹¹⁰

Stockey-Bridge's interviews with 12 lower and upper middle class Indian surrogates indicated that they were motivated to be surrogates because the payment would allow education for their children, a better home and a better future. The surrogates expressed hopes that the children born through surrogacy would be well cared for and that they would be interested in future contact.¹¹¹

The survey conducted by the Centre for Social Research also found that surrogates were motivated by the payment which would allow them to educate their children. Unemployment and wanting to help a childless couple also ranked highly. While surrogates reported that the decision to become a surrogate was taken jointly with their husband, there appeared to be underlying pressure to take on surrogacy to support the family to buy a house or provide funds for setting up a business.¹¹² Surrogates reported that their earnings from surrogacy were primarily used for the education of their children, followed by building a new house.¹¹³ This is consistent with the views of surrogates interviewed by Stockey-Bridge, none of whom experienced extreme poverty, who viewed surrogacy payments as a chance to get ahead and do something for their children and family, giving their children a good education or setting up a business.¹¹⁴

Women in Rudrappa's study described their experience as a surrogate in Bangalore's reproduction industry as more meaningful than garment production work which afforded few breaks, involved long hours, and exposed female workers to health problems and sexual harassment. They also felt that the work as a surrogate provided them with greater control over their emotional, financial and sexual lives.¹¹⁵

In the Centre for Social Research study of 100 surrogates from Anand, Surat and Jamnagar in the province of Gujarat, most came from lower middle class backgrounds, were married and had children. While half were educated to at least primary level, 51% of the surrogates from Anand were illiterate. Most were experiencing surrogacy for the first time and first met the commissioning parents at the time of signing the surrogacy contract. The experience of other surrogates, friends and family members, or an approach by a surrogacy agency had influenced the decision to be a surrogate. Women

¹⁰⁶ Pande A, "'It May Be Her Eggs But It's My Blood': Surrogates and Everyday Forms of Kinship in India" (2009) 32 *Qualitative Sociology* 3797; Pande, n 95; Pande A, "Transnational Commercial Surrogacy in India: Gifts for Global Sisters?" (2011) 23 *Reprod Biomed Online* 618.

¹⁰⁷ Stockey-Bridge M, "Motivations & Experiences of Indian Surrogates" (Paper presented at Surrogacy Australia Conference, Melbourne, Australia, 26-27 May 2012).

¹⁰⁸ Rudrappa S, "India's Reproductive Assembly Line" (2012) 11 *Contexts* 22; Surrogacy Services India, "Surrogacy Package" (as at 3 September 2014), <http://www.surrogacyservices.net/surrogacy-package.html>; Rudrappa, S, "Making India the 'Mother Destination': Outsourcing Labor to Indian Surrogates" (2010) 20 *Research in the Sociology of Work* 253.

¹⁰⁹ Pande (2011), n 106 at 624.

¹¹⁰ Pande (2011), n 106 at 624.

¹¹¹ Stockey-Bridge, n 107.

¹¹² Centre for Social Research, n 105, pp 37-40.

¹¹³ Centre for Social Research, n 105, pp 57-58.

¹¹⁴ Stockey-Bridge, n 107.

¹¹⁵ Rudrappa (2012), n 108.

were also persuaded to be surrogates by their husbands to improve the financial stability of the family unit. While most contracts were signed by all parties in a timely way, in as many as 40% of cases, surrogates did not sign contracts until the second trimester of pregnancy. As some surrogates were illiterate, they were verbally informed about the contract clauses by clinic or hospital staff members and had no means to check details. Furthermore, most surrogates had not received a written copy of the contract¹¹⁶ exposing them to risk of legal and financial exploitation.

In addition to the potential risk of exploitation, the risk of pregnancy-related complications, particularly those associated with multiple pregnancies, may jeopardise surrogates' health and wellbeing. When the birth is by caesarean section, this affects the surrogate's capacity to resume other work including care for their children after birth. Surgical delivery also poses potential risks associated with subsequent pregnancies if high-quality medical care is not provided.¹¹⁷

Commonly, contracts do not include the surrogate in pregnancy-related decisions. For example, most contracts state that decisions about inducing abortion in the case of fetal abnormalities and about the surrogate relinquishing the baby immediately after birth can be made by the commissioning couple and clinic without consulting the surrogate.¹¹⁸

The commissioning parents' perspective

Although less well documented, commissioning parents may also experience difficulties associated with commercial surrogacy in India. A survey of Australian commissioning parents conducted by Surrogacy Australia indicated that actual expenses often are significantly higher than the advertised costs when airfares, accommodation, unanticipated medical bills and other costs are taken into account.¹¹⁹ In a recent survey of more than 250 commissioning parents, Everingham et al found that barriers discouraging domestic surrogacy included being unable to find a surrogate, concern that a surrogate carrying a child for no reward was an unfair exchange, concern that the surrogate might keep the child, and a belief that the process was too long and complicated. Most participants in this study were engaged in or planned to undertake commercial surrogacy overseas and fewer than 10% were deterred by State and Territory laws criminalising compensated surrogacy.¹²⁰

Australian commissioning parents engaging in surrogacy in India interviewed by Stockey-Bridge disclosed concerns about:

- exploitation of surrogates;
- the use of anonymous egg or sperm donors and the impact on anonymity on their future children; not being able to meet the donor;
- the surrogate not being able to see the baby after the birth; and
- the wellbeing of the surrogate.¹²¹

The perspective of the child

Children born as a result of surrogacy in India do not have access to identifying information about the woman who gave birth to them or the donor/s in cases where donor gametes were used. Hence, Australian children born through transnational surrogacy arrangements do not enjoy the same social protection or rights to know their biologic origins, or have the same chance to make contact with genetic relatives, as those born through surrogacy arrangements in Australia. Nor do they enjoy the same rights as children conceived without the need for ART in the country of treatment.

¹¹⁶ Centre for Social Research, n 105.

¹¹⁷ Stephanie L, "Outsourcing a Life", *San Francisco Chronicle* (as at 3 September 2014), <http://www.sfchronicle.com/local/bayarea/item/India-surrogacy-23858.php>.

¹¹⁸ Centre for Social Research, n 105, pp 55, 60.

¹¹⁹ Everingham S, "Money, Time and Patience" (Paper presented at Surrogacy Australia Conference, Melbourne, Australia, 26-27 May 2012).

¹²⁰ Everingham et al, n 35.

¹²¹ Stockey-Bridge M, "Common & Uncommon Motivations & Experiences of Australian Intended Parents" (Paper presented at Surrogacy Australia Conference, Melbourne, Australia, 26-27 May 2012).



To date, no studies have investigated the outcomes for or experiences of children born as a result of international surrogacy arrangements, although there is emerging evidence about the health and wellbeing of children born as a result of surrogacy in the United Kingdom. In 2009, Shelton et al investigated psychological adjustment of children aged between five and nine years in families built using ART either with the parents' gametes; donor sperm; donor oocytes; or donor embryos. Their study included 21 children who were born following gestational surrogacy. No between-group differences in psychological adjustment were observed.¹²² In 2013, Golombok et al reported on children's adjustment at ages three, seven, and 10 years in 30 surrogacy families, 31 oocyte donation families, 35 donor insemination families and 53 spontaneous conception families. While children in surrogacy families were overall well-adjusted, at age seven, they showed higher levels of adjustment difficulties than donor-conceived children, but this was no longer apparent at the age of 10 years. The authors speculated that two factors may explain this finding: greater levels of ongoing contact with the surrogate that may undermine family relationships, especially where the surrogate is also the child's genetic mother, and lack of a gestational relationship between the child and the commissioning mother.¹²³ In 2000, Golombok et al initiated a longitudinal study of 37 families with a child born as the result of surrogacy. In 2006, they reported that most families had maintained contact with the surrogate and no negative impacts on either parenting or child development were noted.¹²⁴ In 2012, when the children were on average 10 years old, Jadva et al reported on the 33 families who remained in the study. Over time, contact with the surrogate had decreased, especially where the surrogate was previously unknown to the commissioning parents. Almost all children who had been informed of the nature of their conception had a good understanding of this. Most families reported positive relationships with their surrogate and almost all of the children who were in contact with their surrogate reported that they liked her.¹²⁵

The results of these studies suggest that, in the short-term at least, the psychosocial outcomes of surrogacy for the children appear benign. However, the generalisability of these findings is limited by the small number of participant families and the ages of the children and the fact that it concerns a domestic setting. It is not known whether commissioning parents who make overseas surrogacy arrangements will be as transparent about the arrangement and the child's origins as parents in these studies. Also, unlike in the existing studies, contact between the commissioning parents/child and the surrogate (and donor where applicable) may not be possible as a result of anonymity, and there may be cross-cultural barriers relating to language, culture, distance, norms and expectations.

Prospective longitudinal studies of the long-term social and psychological wellbeing of children who are born following surrogacy arrangements that do not allow them to access information about the surrogate and donor are urgently needed.

INTENDED VERSUS ACTUAL EFFECTS OF SURROGACY LAWS

The use of surrogacy as a means of family formation is a recent phenomenon and little is known about its short or long-term consequences for the parties involved. The debate about the potential risks and benefits of this practice is ongoing and policy and law-makers' approaches to managing surrogacy vary. Australian States and Territories only permit altruistic surrogacy and gamete donation on the basis that commercial surrogacy and gamete donation may be exploitative and may commodify women who act as surrogates or donors, and the children who are born as a result of surrogacy and/or gamete donation. This legal position is linked to the recognition of children's right to know their biological origins and the person who gave birth to them. In addition to criminalising commercial

¹²² Shelton KH et al, "Examining Differences in Psychological Adjustment Problems Among Children Conceived by Assisted Reproductive Technologies" (2009) 33 *Int J Behav Devel* 385.

¹²³ Golombok S et al, "Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment" (2013) 54 *J Child Psychol Psych* 653.

¹²⁴ Golombok S et al, "Non-genetic and Non-gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-being of Mothers, Fathers and Children at Age 3" (2006) 21 *Hum Reprod* 1918.

¹²⁵ Jadva V, Blake L, Casey P and Golombok S, "Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins" (2012) 27 *Hum Reprod* 3008.



surrogacy within Australia, some jurisdictions have also criminalised surrogacy arrangements undertaken overseas. Other rules applied to surrogacy in Australia include the ban on advertising for a surrogate and the unenforceability of contracts between surrogates and commissioning parents to allow the surrogate to keep the child if she changes her mind about giving the child to the commissioning parents after the birth.

India, however, has no surrogacy-related laws or enforceable regulation and the practice of surrogacy is part of a growing industry providing medical services to foreigners. Commercial surrogacy and gamete donation, where women acting as surrogates or who donate oocytes are paid for their services, are widely practised in India and attract individuals and couples seeking surrogacy from many countries, including from Australia. By contrast with Australia, clinics are not obliged to keep records that allow gamete donors and surrogates to be identified to commissioning parents or the children born as a result of surrogacy.

While the intent of the restrictive Australian State and Territory laws and regulations relating to surrogacy is to protect the parties involved in surrogacy, they also severely limit access to domestic surrogacy and may thereby inadvertently contribute to Australians travelling to India and other countries for surrogacy. A recent survey of Australians who consider or undertake surrogacy identified three main barriers for doing this in Australia:

- the inability to find a surrogate;
- a belief that it is unfair to ask a woman to carry a pregnancy for no reward; and
- the possibility that the surrogate may keep the child.¹²⁶

These barriers are directly linked to the legal restrictions that ban advertising for and compensating a surrogate and make surrogacy contracts unenforceable.

Australian ART-related legislation and regulation promote the interests and wellbeing of children born as a result of ART procedures and make provision for those born as a result of surrogacy and/or gamete donation to have access to information about their biologic origins. However, children born as a result of surrogacy and/or gamete donation in India are not afforded this right. Therefore, it could be argued that the limited access to surrogacy within Australia and the resulting travel to India for surrogacy undermine the intent of legislation to protect the rights of children born as a result of surrogacy and/or gamete donation.

One of the arguments for passing laws that criminalise overseas commercial surrogacy was that this would protect impoverished surrogates in developing countries from exploitation. However, based on survey findings of Australians considering or undertaking surrogacy, it appears that making commercial surrogacy overseas a criminal activity does not deter them from engaging in transnational surrogacy.¹²⁷

Taken together, while the intent of Australian surrogacy legislation and regulation is to protect the rights and interests of surrogates, commissioning parents and children born as a result of surrogacy, the actual effect is that many people for whom surrogacy is the only way they can have children are unable to access it within Australia and therefore travel to India and other countries. This, in turn, perpetuates the potential exploitation of women who act as surrogates or oocyte donors in countries where their rights are not protected; leaves children born as a result of surrogacy and/or gamete donation in places where anonymity is practised unable to trace their origins; makes children who are not genetically linked to either commissioning parent ineligible for Australian citizenship-by-descent; and makes commissioning parents who return to jurisdictions where transnational commercial surrogacy is banned vulnerable to prosecution.

¹²⁶ Everingham et al, n 35.

¹²⁷ Everingham et al, n 35.



CONCLUDING REMARKS

On the basis of evidence that restrictive surrogacy legislation does not stop commissioning parents from travelling to places where this is permitted,¹²⁸ pragmatic approaches to improve access to domestic surrogacy and minimise potential adverse effects of transnational surrogacy are needed. Millbank, for example, proposes that a “wage-based” compensation for surrogates involved in domestic surrogacy arrangements may increase the availability of domestic surrogates.¹²⁹ She also argues that Australian courts considering requests for transfer of parentage following a surrogacy arrangement should be required to prioritise the perceived best interests of the child when making judgments, as occurs in the United Kingdom. United Kingdom experience has shown that courts have been able to make child-welfare-oriented decisions in cases where local laws on payment of expenses have not been adhered to.¹³⁰

Van Hoof and Pennings advocate for “moderate, tolerant and nuanced” legislation relating to cross-border reproductive treatments, including surrogacy, as there is no “consensus on the harmfulness or wrongfulness of these treatments”.¹³¹ While acknowledging the challenges inherent in deciding where the responsibilities lie in regulating and monitoring reproductive travel and protect the parties involved, Whittaker argues that global level action is needed to avoid the negative consequences of reproductive travel due to restrictive legislation in the home country.¹³² A potential vehicle for global action is the International Federation of Fertility Societies – a global “umbrella” organisation, to which 54 national fertility societies are affiliated.¹³³ Two of the Federation’s objectives are to:

- stimulate basic and applied research and the dissemination of knowledge in all aspects of reproduction and fertility; and
- contribute to the standardisation of terminology and evaluation of diagnostic and therapeutic procedures in the field of reproduction.

A broad interpretation of these objectives could incorporate consideration of the ethical and psycho-social aspects of ART practices, including surrogacy.

Blyth et al point to the important role of counselling to enhance the psychological wellbeing of those involved in transnational surrogacy. They provide an ethical framework for clinical practice for counsellors who work with commissioning parents, donors, surrogates and children who are born as a result of surrogacy.¹³⁴

Internationally, a global solution to address the problems that can arise from surrogacy arrangements is currently being considered. In 2012, the Permanent Bureau of the Hague Conference on Private International Law issued a preliminary report on issues related to international surrogacy arrangements and in 2013, it circulated a questionnaire to gather more information on the nature and extent of international surrogacy and the issues arising for the status of children born as a result of

¹²⁸ Crockin SL, “Legal Perspectives on Cross-border Reproductive Care” (2011) 23 *Reprod Biomed Online* 811.

¹²⁹ Millbank, n 11 at 207.

¹³⁰ Horsey K and Sheldon S, “Still Hazy After All These Years: The Law Regulating Surrogacy” (2012) 20 *Med Law Rev* 67.

¹³¹ Van Hoof W and Pennings G, “Extraterritoriality for Cross-border Reproductive Care: Should States Act Against Citizens Travelling Abroad for Illegal Infertility Treatment?” (2011) 23 *Reprod Biomed Online* 546.

¹³² Whittaker A, “Challenges of Medical Travel to Global Regulation: A Case Study of Reproductive Travel in Asia” (2010) 10(3) *Global Social Policy* 396.

¹³³ International Federation of Fertility Societies, <http://www.iffs-reproduction.org/?page=AboutIFFS>.

¹³⁴ Blyth E, Thorn P and Wichman C, “CBRC and Psychosocial Counselling: Assessing Needs and Developing an Ethical Framework for Practice” (2011) 23 *Reprod Biomed Online* 642; Blyth E, “International Guidelines for Infertility Counselling – Is There an Emerging Trend?” (2012) 27 *Hum Reprod* 2046.



international surrogacy.¹³⁵ The Bureau's final report is expected to facilitate consideration of whether or not the development of a new international treaty on surrogacy is desirable and feasible.¹³⁶

Finally and very importantly, Inhorn and Gürtin emphasise the urgent need for multidisciplinary empirical research, conducted in diverse settings and using a variety of methods, into all aspects of the increasingly common practice of cross-border reproductive travel, including for surrogacy. An empirical evidence base is fundamental to inform the development of ethical guidelines, standards of care, and policy by professional and regulatory bodies. Evidence-informed guidelines and clinical practice can potentially improve the psychosocial outcomes for the many women and men who hope to become parents through surrogacy and their children, and the women and men who help them realise their hopes for parenthood.¹³⁷

¹³⁵ Permanent Bureau for the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, Prel Doc No 10 (Permanent Bureau, The Hague, 2012), <http://www.hcch.net/upload/wop/gap2012pd10en.pdf>; International Reference Centre for the Rights of Children Deprived of their Family (ISS), *Monthly Review*, No 174 (July-August 2013) pp 1-7, [http://assets.fiomedia.nl/files/2013_174_JulAug_review_ENG%20\(2\).pdf](http://assets.fiomedia.nl/files/2013_174_JulAug_review_ENG%20(2).pdf)

¹³⁶ The Hague Conference on International Private Law has decided to defer until 2015 a decision on whether and how to pursue this project. Permanent Bureau for the Hague Conference on Private International Law, *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project*, Prel Doc No 3B (Permanent Bureau, The Hague, 2014), http://www.hcch.net/upload/wop/gap2014pd03b_en.pdf; *Study of Legal Parentage and the issues arising from International Surrogacy Arrangements*, Prel Doc No 3C (Permanent Bureau, The Hague 2014), http://www.hcch.net/upload/wop/gap2014pd03c_en.pdf (provisional edition pending completion of the French version).

¹³⁷ Inhorn MC and Gürtin ZB, "Cross-border Reproductive Care: A Future Research Agenda" (2011) 23 *Reprod Biomed Online* 665.

