

SURROGACY IN AUSTRALIA: A JOURNEY OF LOVE, LAW AND REFORM

With Australia's outdated surrogacy laws, most intended parents head overseas to realise their dreams of growing their family. However, with the surrogacy industry largely unregulated across the world, this comes with risks for the intended parents, the surrogate and the child.

BY SARAH JEFFORD

IN 2018, I DELIVERED A BABY AS a surrogate for two dads I met on social media. I had already been through infertility treatment to conceive my first child. After completing our family, I donated my eggs to a couple who were experiencing infertility. Surrogacy presented an opportunity to experience the magic and challenge of another pregnancy without the responsibility of parenting another child. I was excited help grow another family.

Much like my other two pregnancies, my surrogacy pregnancy was smooth and relatively easy. I could no longer tolerate coffee, experienced terrible back pain in my first trimester, had moments of hormonal crying and was frustrated that the baby refused to move into head-down position.

I credit the experience of being a surrogate as a highlight of my life. It was complex, joyous, challenging and empowering. The reward and fulfilment I felt for delivering the baby continues to this day and we enjoy a close and loving relationship between our two families. I am Aunty Sarah and the relationship between my children and her is much like cousins.

I started my legal career in family law and since 2016 have practised in surrogacy and donor conception across Australia. I advise intended parents and surrogates entering domestic surrogacy arrangements, and many intended parents travelling overseas for surrogacy.

Surrogacy is uncommon in Australia

There are less than 150 surrogacy births in Australia each year. 80 per cent of domestic surrogacy arrangements occur between friends and family, while the remaining 20 per cent are found online, often through dedicated surrogacy Facebook groups.

Surrogacy is regulated at the state level, with inconsistent patchwork laws leading to legal and medical tourism within our own country. With advances in fertility treatments, donor conception and marriage equality, our surrogacy laws are largely mired in the past and have not kept up with the increasing demand.

Surrogacy challenges our ideas of family creation, and of womanhood and motherhood. We often think of surrogacy as a means to an end for intended parents but, at its core, ethical surrogacy is a story of love and a shared goal of growing a family. Professionals—clinicians, lawyers, counsellors, judicial officers—should view surrogacy from a place of optimism and not from a place of fear.

The risks are overseas

75 per cent of Australian children born via surrogacy are born overseas—over 350 a year. For many intended parents, it is often considered easier to travel overseas for surrogacy than to find a surrogate at home.

I have advised hundreds of intended parents engaging in international surrogacy in jurisdictions that are poorly regulated. There are risks for intended parents, the surrogate and the child. The surrogacy industry is largely unregulated across the world and agencies, clinics and intermediaries exploit the desperation and vulnerability of intended parents by offering 'guaranteed baby' packages, with limited recourse when things go wrong.

International surrogacy is an ever-changing whack-a-mole landscape: each scandal or disaster is followed by another one. It is not a matter of if, but when there will be another scandal. Over the years, intended parents have pursued surrogacy in



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India, Thailand, Nepal, Ukraine, Greece, Cyprus, Colombia, Mexico, Argentina, Georgia, Uganda, the USA and Canada. Some jurisdictions are safer than others, with better frameworks and safeguards.

We know from studies conducted by Dr Ezra Kneebone and others that 92 per cent of Australian intended parents would choose to engage in surrogacy at home if it were an option available to them. Our patchwork laws, prohibitions on advertising and restrictions on payments to surrogates, lead intended parents to head overseas.

The Churchill Fellowship

In 2024, I was awarded a Churchill Fellowship to research best practice surrogacy to inform law reform in Australia. I was frustrated with seeing Australian intended parents taking risks overseas and interested in how we could make surrogacy more accessible and safer at home. The safest place for surrogacy is in Australia, where we have universal access to high-quality healthcare, and can promote and protect the rights of women who are surrogates and children born via surrogacy.

My fellowship took me to the International Surrogacy Forum in Cape Town, then on to Ireland, the UK, Canada and the USA. I was interested in ways we can affirm and promote best practice surrogacy and make surrogacy more accessible in Australia, to increase the number of domestic surrogacy arrangements and reduce the number of intended parents travelling overseas for surrogacy.

During my travels, I met with many lawyers, advocates, industry professionals and members of the surrogacy community. In Ireland and England, I heard about campaigns for law reform and how other countries are grappling with the growing number of children born overseas to their citizens. In Canada, I was curious to learn about the need for regulation in a growing free market, often touted as a good option for Australian intended parents.

The USA presents many opportunities for Australia to learn about surrogacy legal frameworks, with states ranging from strict regulation to almost none at all. In New York, I learned about how the Child-Parent Security Act provides a framework for regulating service providers. Surrogacy-matching services must be licensed, with strict standards for anyone wishing to offer a surrogacy service. New York has also codified a surrogate’s Bill of Rights, protecting the rights of women who choose to become surrogates.

Ethical standards

There is no single international instrument for what ethical standards should apply to surrogacy. We can look to some instruments, including the *Convention on the Rights of the Child*, the International Social Service’s Verona Principles for the protection of the rights of children born through surrogacy, and the National Health and Medical Research Council guidelines. We have minimal case law for surrogacy in Australia, but we can refer to international case law for guidance about what best-practice, ethical surrogacy involves.

Ethical standards for a surrogacy arrangement include:

- a clear legal framework that recognises a pre-conception surrogacy arrangement and provides a mechanism to transfer parentage from the birth parents to the intended parents;
- psychological assessments and counselling support for the parties;
- independent legal advice for each party;
- ensuring each party can provide informed consent;
- protection of the surrogate’s right to autonomy;
- payments to the surrogate that are for gestational services and expenses, and not in exchange for the relinquishment of the child; and
- protection of the rights and best interests of the child.



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Children born via surrogacy have rights to establish their identity, obtain citizenship and access information about their birth and genetic heritage. They should have access to high quality healthcare, prenatally and after birth. These children have a right to family, privacy and to be cared for by their parents, without discrimination.

Law reform must be implemented to protect and promote the principles of ethical surrogacy and the rights of women and children.

A vision for surrogacy in Australia

The Australian Law Reform Commission (ALRC) is reviewing Australia’s surrogacy laws, with the final report due to government at the end of July 2026. Community, professionals and industry have made submissions to the review, making sure the lived experiences of those in the surrogacy community are heard loud and clear.

My Churchill travels, and my experience as a surrogate and practising as a surrogacy lawyer, have informed my views for surrogacy law reform across Australia.

A national surrogacy framework

We need a national surrogacy legal framework. The states and territories should transfer their powers to the Commonwealth to implement one *Surrogacy Act* for the entire country. In lieu of that, the states and territories must develop uniform surrogacy laws to improve accessibility, remove discrimination, and reduce medical and legal tourism within our own country.

Surrogacy matters should be regulated within the Federal Circuit and Family Court of Australia. A specialist list should be created in the family court with judicial officers trained and experienced with surrogacy matters.

In the UK, international surrogacy matters are dealt with by the High Court Family Division. There is some consistency,

with experienced practitioners and judicial officers handling matters with expertise and understanding. Cases such as *Re Z (Foreign Surrogacy)* [2024] EWFC 304 have shaped practice in this area and informed the profession.

Assisted reproductive treatment and a Surrogacy Commission

Surrogacy is part of the broader world of third-party reproduction, family creation and fertility treatment. The last 12 months has put the fertility industry under the spotlight, with reports of embryo mix-ups and a lack of consistent regulation. The recent government rapid review calls for independent regulation of fertility services.

We need to go further and create a national regulatory commission for assisted reproductive treatment, donor conception and surrogacy. An independent authority would take decision-making away from the individual professionals and fertility clinics, and establish standards and licensing for service providers.

Pre-birth transfer of parentage

Parties to a surrogacy arrangement must seek a parentage order to transfer parentage from the birth parents to the intended parents in the months after the birth. The current framework leaves the parties in a legal quagmire whereby the people who don’t want to parent the child remain the legal parents for months after the birth, while the people who are caring for the child are not recognised as the legal parents. This does not reflect the parties’ intentions and is not in the child’s best interests.

Parties often report problems dealing with hospitals and accessing services including Centrelink and Medicare while they await the parentage order. Only 10 per cent of hospitals in Australia have a surrogacy policy and many people report that the



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surrogate is pressured to care for the baby while the parents are excluded from the birthing suite. Hospitals and social services rely on the legal framework which presumes the birthing person is the legal parent without recognising the legitimacy of the surrogacy arrangement or the parties’ expectations and intentions.

In other jurisdictions, a transfer of parentage can occur pre-birth and without the need for post-birth court proceedings. The process of pre-birth orders allows the parents to take responsibility for their child from the moment of birth without compromising the surrogate’s autonomy during pregnancy. Pre-birth orders provide clarity for the parties, hospitals and other services, and ensures continuity of care and access to social services.

Australia should implement a mechanism that allows for the pre-birth transfer of parentage, such that a child’s birth certificate can be issued listing the intended parents as the legal parents. The parties’ intentions, and the best interests of children, can be supported through recognition of legal parentage from birth.

Dispense with the surrogate’s consent

Most state and territory legislation requires a surrogate’s consent to the transfer of parentage which can only be dispensed with in circumstances where they have died, cannot be located or are incapacitated.

Current laws do not allow for dispensing with consent where it has been unreasonably

withheld. In all other aspects of family law, parenting and parentage orders can be made with or without the parties’ consent.

A child’s best interests should never be compromised by the lack of consent from one party and a surrogate withholding consent should not compromise the making of a parentage order.

Compensated surrogacy

With 75 per cent of children born via surrogacy being born overseas, we need to consider ways to increase the accessibility of surrogacy in Australia. Small changes to our laws—allowing advertising for a surrogate and harmonising our state laws—may go some way to raise the profile and instances of domestic surrogacy.

Barriers to surrogacy in Australia include the lack of financial compensation for surrogates. The most effective way to improve accessibility for surrogacy in Australia is to compensate surrogates for the time, effort and risk of pregnancy and birth. The fertility industry is worth over \$800 million a year. Everyone is paid, including the lawyers, counsellors, fertility clinics and even birth photographers. That is, everyone except the one person who takes most of the risks and does most of the work.

Something that surprises many people is that surrogates are not motivated by money. This does not mean they should not be compensated when they carry a child for someone else. We know from studies of American surrogates that they too are motivated by empathy



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and altruism, and yet they are paid. I imagine many lawyers too enjoy their work and find it rewarding—but we would never suggest a lawyer work for free.

Paying surrogates is often equated with commodifying women and children, considered exploitative and akin to human trafficking. When we consider that the fertility industry profits and everyone is paid in surrogacy except the surrogate, it is clear that altruistic surrogacy exploits the unpaid labour of women.

I never wanted the young person to whom I gave birth to think she had been bought or sold. I also consider she should not be conditioned to believe women must work for free while others profit from her labour.

We can implement a framework that compensates a surrogate for *gestational services* that is not payment in exchange for the child. If we are concerned with addressing the number of Australians engaging in international surrogacy that involves human trafficking and exploitation, we should be finding ways to make surrogacy more accessible at home and paying surrogates is the most effective way to do that.

In this discussion, critics often raise the argument that there is no right or entitlement to a child, or to exploit the labour of women. This is true. However, women also have a right to decide what to do with their bodies and to exploit their reproductive labour as they wish, including carrying and birthing a child they do not wish to parent for the purpose of helping someone experience parenthood.

Accessible, equitable and fair surrogacy laws support the rights of women who wish to be surrogates, protect the rights of children and provide a safe framework for intended parents to grow their families. Accessible surrogacy in Australia safeguards against exploitation and the risks of international surrogacy.



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Criminalising international commercial surrogacy does not work

Recent discussions centre on commercial surrogacy and payments to surrogates. Critics call for the global ban of surrogacy and commercial surrogacy in particular. Australian states and territories prohibit commercial surrogacy and NSW, Queensland and the ACT go further and prohibit residents from engaging in international commercial surrogacy.

Intended parents have been referred to the police, including the recent Queensland case of *Lloyd & Compton* [2025] FedC-FamC1F 28, but no prosecutions have resulted.

Criminalising commercial surrogacy presumes all commercial surrogacy is exploitative, while altruistic surrogacy is inherently good. This binary view lacks understanding of the complexity of surrogacy. Commercial surrogacy is not inherently exploitative but poor regulation does risk the safety of women and children. We should be advocating for proper legal frameworks that meet ethical standards, not demonising parents who engage in international surrogacy.

There are further, deeper consequences of criminalising international commercial surrogacy. *Lloyd & Compton* highlighted that parents who seek remedies in the family law system may face criminal prosecution for having engaged in international surrogacy. The vast majority of intended parents are avoiding the family law courts, a framework that should apply equally to all children.

Criminalising international commercial surrogacy does not promote the rights of children

To be clear: there are two classes of children in Australia—those whose parents can avail themselves of remedies in the family law system, whose best interests are paramount, and those who were born via international commercial surrogacy, whose



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parents face criminal repercussions for their existence and are avoiding the family law system.

It cannot be said that criminalising international commercial surrogacy is in the child’s best interests.

The ALRC called for submissions to their review, and in particular from those with lived experience of surrogacy. But there was a caveat: submissions received from intended parents who had engaged in international commercial surrogacy might be referred to the authorities for breaking the law. Some intended parents chose not to make submissions, while others did so via a lawyer to protect their anonymity. The review is not inclusive if it is not safe for everyone to make submissions.

This is an indictment on our government and our legal systems.

Criminalising international commercial surrogacy is not the answer, nor does it work. The way to reduce the number of Australians engaging in international commercial surrogacy is to increase the accessibility of domestic surrogacy. This can be done through a national framework and uniform laws that provide legal clarity, regulating the industry and compensating surrogates. The antidote to exploitation is education.

Australians heading overseas should be armed with knowledge and unbiased information that allows them to make informed decisions that protect their rights, and the rights and welfare of surrogates and children.

Regulate the industry

Criminalising parents does not address the exploitative practices of the surrogacy industry. The laws prohibiting international commercial surrogacy are directed at parents, while the surrogacy industry operates, and profits, with impunity. While intended parents felt unsafe making a submission to the ALRC

review, industry representatives made submissions without fear.

The industry in Australia is almost entirely unregulated. Trade shows showcasing international surrogacy providers make significant profit at the expense of intended parents, who may not be able to differentiate between providers or identify risks. There is a lot of virtue signalling by members of the surrogacy industry who label themselves as ‘ethical’ without reference to any standards. Professionals, including fertility clinics and law firms, provide tacit endorsement by attending, speaking and sponsoring events that promote surrogacy in unregulated jurisdictions.

The surrogacy industry is fuelled by conflicts of interest, quid pro quos and sponsorship deals that undermine ethics and integrity.

A story of hope and optimism

Surrogacy is one of the most complex human experiences. When viewed through the lens of optimism, hope and love, surrogacy can provide parents with the opportunity to grow their family in a way that is ethical, and promotes and protects the rights of children and women.

Practitioners advising parties to a surrogacy arrangement should ensure they have adequate knowledge, not just of the relevant laws, but of the complex relationships and experiences of surrogates, intended parents and people born via surrogacy. Our practice must be informed by psychosocial expertise and the lived experiences of the people involved.

We have a responsibility to lead with humanity and ethics. This includes educating parties about ethical standards and the rights and interests of women and children. We must maintain the highest standards of ethics and integrity in our work and promote ethical, best-practice surrogacy. 📌