

Making commercial surrogacy illegal only makes aspiring parents go elsewhere

February 25 2016, by Paula Gerber, Monash University



The most important thing when considering surrogacy laws are the rights of the children. Credit: Bridget Coila/Flickr, CC BY-SA

When many people hear the word "surrogacy" their immediate reaction is to think of the plight of [Baby Gammy](#), abandoned in Thailand by his intended parents.

Yet stories like this do not reflect the experience of hundreds of Australians who travel overseas every year to start a family through

compensated [surrogacy](#). For the overwhelming majority of these [people](#), the experience is costly and stressful, but not exploitative or degrading.

People who require the services of a surrogate in order to have a child are going offshore because the only surrogacy permitted in Australia is altruistic surrogacy. Laws in all Australian states and territories, except the Northern Territory, prohibit the payment of any money to a surrogate, beyond reimbursement of reasonable medical expenses.

Because of this prohibition on compensated surrogacy within Australia, hundreds of couples go overseas every year to engage the services of a surrogate. This is true even in Queensland, New South Wales and the ACT, where it is a criminal offence to enter into a compensated surrogacy arrangement overseas.

These laws are clearly an abject failure. They are not deterring people from heading offshore to engage in surrogacy. There has not been a single prosecution, let alone a conviction, for pursuing extra-territorial surrogacy.

Against this backdrop, the federal parliament's Standing Committee on Social Policy and Legal Affairs is conducting an [inquiry](#) into the regulatory and legislative aspects of international and domestic surrogacy arrangements. It is expected to finalise its report in June 2016.

This is a welcome development. Although there is no consensus on how compensated surrogacy should be regulated, there is general agreement that the current system is not working.

One way of working through all the ethical, moral and legal questions associated with surrogacy is to use international human rights law as the lens through which to consider the issues. In the foreword to my recent [book on surrogacy](#), Gillian Triggs, president of the Australian Human

Rights Commission, observed that international [human rights](#) treaties:

... now provide a body of law that can inform our approaches to new ethical and legal challenges, including those stimulated by scientific advances.

The starting point in any consideration of regulating compensated surrogacy must be the best interests and rights of the child. The [Convention on the Rights of the Child](#), which binds Australia (and every other country in the world except the United States), does not explicitly mention surrogacy. However, several provisions can guide consideration of how to regulate surrogacy to protect the best interests of children born through this procedure.

Article 7 provides that children have a right to an identity and to know and be cared for by their parents. Children born through surrogacy may have up to five parent-like people: two intended parents, a sperm donor, an egg donor and the surrogate. In this context, Article 7 is best understood as meaning that children have a right to know their biological and gestational parents and to be cared for by their intended parents.

With many overseas surrogacies, the record-keeping is poor or non-existent, making it impossible for a child to find out their genetic origins. Australia has one of the best systems in the world for recording persons who donate eggs and sperm. This ensures that children born through surrogacy in Australia will be able to identify all the people associated with their creation.

Many people's reaction to surrogacy today is reminiscent of the reaction to IVF when the first "test-tube baby" was born in Australia in 1980. As Peter Illingworth, president of the Fertility Society of Australia, [noted](#):

At the time babies being born through this sort of technology was

considered revolutionary and really quite odd and unusual and quite bizarre [...] many people had fears that we were entering into a brave new world of designer babies and synthetic babies and there was a lot of concern and fear.

We need to acknowledge and address the legitimate fears that people have about surrogacy. But rather than trying to stop these [scientific advances](#), we should put in place safeguards to prevent exploitation of vulnerable women and protect the rights of children born through surrogacy.

It is time to allow compensated surrogacy to take place in Australia by creating a legal framework that avoids the laissez-faire approach seen in some parts of the US, and the harmful practices seen in many developing countries that lack the high-quality health care and legal systems that Australia has.

When moving forward, we would do well to keep in mind the words of Lebanese philosopher [Khalil Gibran](#):

Your children are not your children [...] they come through you but not from you, and though they are with you yet they belong not to you [...] you may give them your love but not your thoughts, for they have their own thoughts. You may house their bodies but not their souls.

This reminds us that how a child is conceived, and how a child is born, is largely irrelevant. What is important is that children are loved and their inherent dignity respected.

If we bear this in mind, we should be able to develop a regulatory system that allows compensated surrogacy to take place in Australia, rather than forcing people to pursue such arrangements offshore.

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