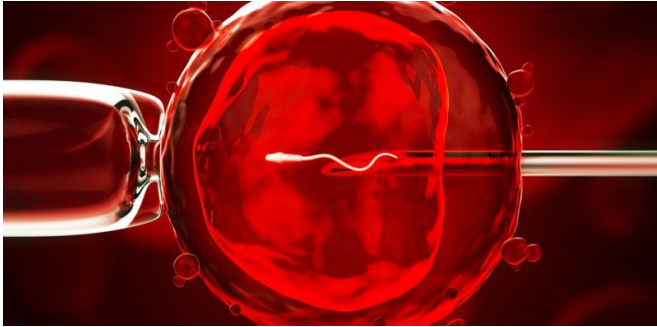


# A new way to regulate surrogacy to give more certainty to all involved

21 September 2017, by Ruth Walker And Liezl Van Zyl



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Starting a family through surrogacy is fraught with stresses and [uncertainties](#).

For heterosexual couples it is often the last resort after a history of disappointment and even tragedy. Gay couples remain subject to [discrimination and stigma](#) when it comes to planning a family.

Surrogates face the risk that the intended [parents](#) might opt out of the arrangement, leaving them the legal mother of a child they did not plan to raise. They are often not compensated for their service.

We think it is time for a [new way to regulate surrogacy](#) to provide certainty over legal parentage and protection of the surrogate's rights.

## Surrogacy now

In genetic surrogacy (also known as traditional or partial surrogacy), the surrogate uses her own egg and becomes pregnant through artificial insemination, usually using the intended father's sperm. In gestational surrogacy (also called host surrogacy), the surrogate carries a couple's embryo, or an embryo created using donor gametes, and becomes pregnant using in-vitro fertilisation techniques.

[Current legislation in many countries](#) creates unnecessary risks for all parties involved in a surrogacy arrangement. Many intended parents plunge into the even riskier world of [international surrogacy](#) where they encounter further obstacles to securing parental rights when they return with a baby.

In a number of jurisdictions, including New Zealand and [Australia](#), the only form of surrogacy that is permitted is [altruistic \(or unpaid\) surrogacy](#). Typically, intended parents are allowed to reimburse pregnancy-related expenses, but are not permitted to pay anything beyond that.

We think this is unfair. Surrogates deserve fair compensation and, indeed, most intended parents want to be able to compensate the surrogate for her work and the risks she undertakes.

Antiquated adoption laws, such as New Zealand's [Adoption Act 1955](#), require the intended parents to adopt the baby from the surrogate. This generates tensions throughout the relationship over whether the surrogate will relinquish the baby, the intended parents will adopt it, and the social workers and Family Court will give their approval. All parties are entitled to certainty over legal parentage.

## The professional model

[Commercial surrogacy](#) is an option in some jurisdictions. It relies on a contract to determine the obligations of both parties with no recourse other than the courts when something goes wrong. We think it is a mistake to regulate surrogacy according to the norms of business, which is based on the principle, "Let the buyer beware."

Instead, we propose a third alternative: the professional model. It is inspired by the way the caring professions are regulated. Its unique provisions would protect the rights of surrogates, put the interests of the intended baby at the heart of

the arrangement, and give intended parents certainty by recognising them as the legal parents of the baby from its birth.

At the centre of the model is a regulatory body similar to those of the nursing and medical professions. It would be responsible for licensing fertility clinics, maintaining a register of surrogates, determining a fair rate of compensation and ensuring compliance with a code of ethics. Registration would protect the surrogate's rights by setting a fee that cannot be negotiated down (or up) and cannot be made contingent on compliance with the intended parents' wishes or a successful outcome to the pregnancy.

The surrogate's rights to bodily integrity and medical confidentiality cannot be negotiated away. She has the right to refuse unreasonable demands and be protected from practices that compromise her safety. For example, the regrettably common practice of transferring two or more embryos when there is no clinical justification for doing so would not be permitted. Intended parents have to understand that the surrogate retains all her rights as a pregnant woman.

Registration of all surrogates would also protect women from coercion. In a confidential process used to ensure that a woman is medically and psychologically fit to undertake a surrogacy, and sensitive to the ethical responsibilities she would be taking on, she would be able to disclose feeling pressured or reluctant. All the intended parents would know was that the regulatory body declined to register her.

### **Intended parents and baby**

The professional model also aims to protect intended parents, who are vulnerable in a number of ways. Surrogacy is often the last remaining avenue for heterosexual couples. For gay couples, regulation could lessen discrimination when it comes to starting a family.

The intended parents need the compassion and understanding of their surrogate as they go through an inevitably stressful process. They have no control over the surrogate's behaviour during the

pregnancy, do not have a right to information and cannot make decisions about its course. The surrogate retains her right to bodily integrity and medical confidentiality both now and under our model.

They must therefore rely on the surrogate's generosity with both information and decision making. What this means is that the surrogate should have an appreciation and understanding of the ethical significance of her role. She must be trustworthy and able to put the interests of the intended parents and the baby ahead of her own in the way that professionals do.

The intended baby has independent interests, principally being born full-term and healthy. The surrogate's duties to the intended baby mean she should act in evidence-based ways under the supervision of professionals to increase the chances of that outcome. In a few tragic cases, it may not be in the intended baby's interests to be born and the surrogate must make her decision accordingly.

### **Professional support**

Under our proposed regulation of surrogacy, both parties would have access to professional support as needed, from the time that a surrogacy arrangement is contemplated until some time after the birth.

There will always be tensions and difficulties in a [surrogacy](#) arrangement. Most will end well, but lack of support is one reason why some end badly. The professional model greatly reduces risks through registration of surrogates, counselling before the pregnancy is established and, critically, by making help available as needed.

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