
The Parliament of the Commonwealth of Australia

Surrogacy Matters

Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements

House of Representatives
Standing Committee on Social Policy and Legal Affairs

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Foreword

For many Australians, having children and founding a family is an important and natural part of their lives. However, for some this dream does not come easily and when other avenues have been exhausted, options for surrogacy are considered.

The concept of surrogacy raises challenging and complex ethical and legal issues. A number of high profile offshore surrogacy cases involving Australians have highlighted these ethical issues, the possibilities for exploitation, and the importance of ensuring that at all times it is the best interests of the child that is paramount in any regulatory response to surrogacy.

In Australia, surrogacy is currently regulated through State and Territory legislation. While engaging in commercial surrogacy remains illegal in all Australian jurisdictions, many permit altruistic surrogacy arrangements although regulatory requirements vary across state borders. For intending families, this may frustrate their efforts to find a suitable surrogate, and results in inconsistent approaches that at times lack the full suite of protections and checks for all parties.

The inquiry has revealed that many Australians are pursuing offshore commercial surrogacy arrangements because of the difficulties of negotiating altruistic surrogacy arrangements in Australia. In making recommendations, the Committee considered carefully the differing perspectives presented by a range of government organisations, senior judicial officers, academics, industry, interest and religious groups. First and foremost, the Committee recommends that the practice of commercial surrogacy remain illegal in Australia. This recommendation was informed by the view that, even with the best of regulatory intentions, there is still significant potential for the exploitation of surrogates and children to occur.

The Committee supports options for altruistic surrogacy in Australia and recommends the development of a nationally consistent legal framework in Australia. It will take time to develop a model law and to engage States and Territories in an agreed approach that ensures that the best interest of the child are paramount. The Committee recommends that the Australian Government task the Australian Law Reform Commission with developing a model national law to

regulate altruistic surrogacy, with particular consideration of four key principles - the best interests of the child, the surrogate's ability to make free and informed decisions, ensuring the surrogate is protected from exploitation, and legal clarity about the resulting parent-child relationships.

The Committee has also identified a number of key issues for the ALRC to consider such as counselling, background checks, and independent legal advice for all parties, the transfer of parental responsibility, reimbursement for the surrogate and the need for a closed register of surrogates and intended parents.

Following the work of the ALRC, the Australian Government can then seek agreement from all States and Territories to adopt a nationally consistent approach to the regulation of altruistic surrogacy in Australia.

In regards to Australians who may seek to engage in offshore surrogacy arrangements, the Committee recommends that these arrangements are subject to detailed scrutiny. In many countries there is little regulatory oversight or protections for a surrogate and arrangements may be brokered through clinics or lawyers who do not have high regard for the best interests of the child or the welfare of the surrogate. The Committee considers there should be an audit of surrogacy destination countries to establish whether practices in those countries are consistent with proposed aspects of the national model law. In addition, the Committee has recommended that Australians seeking a passport for a young child to return to Australia are screened to ensure that no Australian or international surrogacy laws have been breached while outside Australia, and where breaches have occurred, that the Minister for Immigration be given the authority to make determinations relating to both the best interests and custody of the child.

In concluding, I would like to thank all of the individuals and organisations that provided submissions and appeared before the Committee. In particular, my appreciation goes to the many families who provided the most intimate of stories, outlining their many experiences with all aspects of surrogacy. These accounts formed the core of the Committee's deliberations, providing an insight that could not otherwise have been gained.

George Christensen MP
Chair



Membership of the Committee

Chair Mr George Christensen MP

Deputy Chair Ms Sharon Claydon MP

Members Ms Terri Butler MP

Hon Mr Mark Dreyfus QC MP

Mrs Louise Markus MP

Mr Tony Pasin MP

Ms Melissa Price MP (until 22 Feb 2016)

Mr Graham Perrett MP

Mr Michael Sukkar MP

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Terms of reference

The House of Representatives Standing Committee on Social Policy and Legal Affairs will inquire and report into the regulatory and legislative aspects of international and domestic surrogacy arrangements, with a focus on:

- the role and responsibility of states and territories to regulate surrogacy, both international and domestic, and differences in existing legislative arrangements
- medical and welfare aspects for all parties involved, including regulatory requirements for intending parents and the role of health care providers, welfare services and other service providers
- issues arising regarding informed consent, exploitation, compensatory payments, rights and protections for all parties involved, including children
- relevant Commonwealth laws, policies and practices (including family law, immigration, citizenship, passports, child support and privacy) and improvements that could be made to enable the Commonwealth to respond appropriately to this issue (including consistency between laws where appropriate and desirable) to better protect children and others affected by such arrangements
- Australia's international obligations
- the adequacy of the information currently available to interested parties to surrogacy arrangements (including the child) on risks, rights and protections
- information sharing between the Commonwealth and states and territories, and
- the laws, policies and practices of other countries that impact upon international surrogacy, particularly those relating to immigration and citizenship.



List of recommendations

Inquiry into surrogacy

Recommendation 1

The Committee recommends that the practice of commercial surrogacy remain illegal in Australia.

Recommendation 2

The Committee recommends that the Australian Government, in conjunction with the Council of Australian Governments, consider the development of a model national law that facilitates altruistic surrogacy in Australia. The model law should have regard to the following four guiding principles:

- that the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins),
- that the surrogate mother is able to make a free and informed decision about whether to act as a surrogate,
- that sufficient regulatory protections are in place to protect the surrogate mother from exploitation, and
- that there is legal clarity about the parent-child relationships that result from the arrangement.

Recommendation 3

The Committee recommends that the Attorney-General request the Australian Law Reform Commission (ALRC) to conduct a 12-month inquiry into the surrogacy laws of Australian States and Territories, with a view to developing a model national law on altruistic surrogacy. The Attorney-General should request that the ALRC consider:

- first and foremost, the best interests of the child,

- previous reviews of Australian surrogacy laws, including the 2009 report of the Standing Committee on Attorneys-General and the 2013 Family Law Council report on Parentage and the Family Law Act 1975,
- the need for State and Territory laws to be non-discriminatory,
- the need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment,
- the need for background checks, medical and psychological screening, and independent legal advice for all parties entering into a surrogacy arrangement,
- the need for parties to enter into a non-binding surrogacy agreement which sets out shared expectations of all parties, including dispute resolution processes, and which ensures that parties respect the birth mother's right to make decisions about her own health and that of the child,
- the processes by which parental responsibility is transferred from the birth mother to intended parents, and when this transfer should take place,
- the need for adequate reimbursement for the birth mother for legal, medical and other expenses incurred as a consequence of the surrogacy,
- the need for a closed register of surrogates and intended parents, to be administered by a Government body, access to which may be granted following background checks, and medical and psychological screening, and
- whether States and Territories should keep standardised statistical information on families formed through surrogacy to enable long-term studies of surrogacy's effect on families.

Recommendation 4

The Committee recommends that the Attorney-General request that the Australian Law Reform Commission consider the issue of birth certificates as part of its inquiry as set out in Recommendation 3. In particular, the ALRC should consider whether a child's birth certificate should contain information on all gestational, genetic and intended parents, including a record that the child was born as a result of a surrogacy arrangement

Recommendation 5

The Committee recommends that, within six months of the proposed report of the Australian Law Reform Commission being presented to the Attorney-General, the Attorney-General should request that the Council of Australian Governments (COAG) commit to the following actions:

- consultation with all Australian States and Territories in relation to the proposed model, and
- the development of national uniform legislation on altruistic surrogacy to be implemented in all Australian States and Territories.

The Committee considers that the deliberations by COAG should not exceed 12 months.

Recommendation 6

The Committee recommends that the Australian Government develop a website that provides advice and information for Australians considering domestic altruistic surrogacy. The website should include:

- clear advice on the role of Australian Government support and service provision for intended parents, surrogates and children including Medicare, social security & welfare payments, child support, paid parental leave,
- clear advice on surrogacy legislation in each Australian State and... Territory, and
- clear advice on the support and services funded and provided for by each Australian State and Territory including relevant health, counselling and legal services available.

Recommendation 7

The Committee recommends that the Australian Government establish an interdepartmental taskforce (which should include eminent jurists with relevant expertise) to report in 12 months on ways to address the situation of Australians who choose enter into offshore surrogacy arrangements, with respect to:

- protecting the rights of the child, particularly their rights to be free from exploitation, to know their genetic heritage, to know the circumstances of their birth, and to have an ongoing relationship with their birth mother and any siblings or genetic donor/s,
- ensuring birth mothers give their free and informed consent and reducing the likelihood that they face exploitation,

- ensuring that Australians who enter into offshore surrogacy arrangements meet their responsibility to act in the best interest of all of their children, and
- considering whether it should be unlawful to engage in offshore surrogacy in any overseas jurisdiction where commercial surrogacy is prohibited.

While not condoning Australians' use of offshore surrogacy, the aim of the taskforce should be to ensure that where the regulatory, economic or social conditions in a particular jurisdiction give rise to an increased risk of exploitation or rights violations, Australians entering into or facilitating surrogacy arrangements in that jurisdiction are made aware of those risks, and are subject to a more stringent investigative process to ensure that the rights of the birth mother and the child have not been infringed.

Recommendation 8

The Committee recommends that the interdepartmental taskforce should undertake a systematic audit of surrogacy destination countries to assess the extent to which surrogacy practices in these countries meet the requirements laid out in recommendation 3. The Committee considers that this audit will assist in informing the Australian Government's response to the Australians who choose to enter into offshore surrogacy arrangements.

Recommendation 9

The Committee recommends that the Australian Government introduce legislation to amend the *Migration Act 1958* such that Australian residents seeking a passport for a young child to return to Australia are subject to screening by Department of Immigration and Border Protection officials to determine whether they have breached Australian or international surrogacy laws while outside Australia, and that, where the Department is satisfied that breaches have occurred, the Minister for Immigration is given the authority to make determinations in the best interests of the child, including in relation to the custody of the child.

Recommendation 10

The Committee recommends that the Australian Government, in its representations to the Experts' Group on Parentage/Surrogacy at the Permanent Bureau of the Hague Conference on Private International Law should prioritise:

- the rights of the child, particularly their right to know their genetic heritage, to know the circumstances of their birth, and to have

ongoing relationships with their birth mother and any siblings or genetic donor/s,

- the rights of surrogate mothers to be free from exploitation, and to only engage in surrogacy arrangements to which they give their free and free informed consent, and
- the development of an international convention dealing with the regulation of parentage and surrogacy.

