

Submission to The Standing Committee on Social Policy and Legal Affairs' Inquiry into surrogacy

As an academic economist, I have in recent years been conducting research regarding surrogacy and in particular transnational commercial surrogacy. In this submission I will respond to several of the themes of the terms of reference based on the areas of my scholarly expertise as an economist, and with reference to related academic literature.

As complex and emotive an issue as surrogacy is, it is important to think rationally about the welfare of all those involved directly in surrogacy. The main participants are the intended parents, the gestational surrogate, donors of any gametes, and the children conceived and born through such an arrangement. Any regulation of surrogacy arrangements ought to be determined primarily by the interests of those parties. In the below discussion I will focus primarily on the contracting parties with respect to surrogacy, that is the intended parents and the surrogate. Of course the wellbeing of children born through these arrangements is of paramount importance, but since this is less controversial, I will provide brief commentary on that at the end.

Since the advent of modern forms of surrogacy through assisted reproductive technology, there has been much discussion of whether it should be prohibited, how it should be regulated, and whether contracts should be enforced. Posner (1989) provides a cogent argument for the enforceability of surrogacy contracts based on law and economics (albeit with reference to traditional surrogacy rather than gestational surrogacy). The eminent judge in summary finds *'no persuasive evidence that contracts of surrogate motherhood are less likely to maximize value than the classes of contracts that the law routinely enforces'* (Posner 1989, Page 26). Similar arguments are put forward by others regarding the enforceability of gestational surrogacy contracts (Hatzis 2003).

One big controversy regarding surrogacy is where or not it is appropriate to allow surrogates to be compensated financially for their surrogacy pregnancies. This argument is sometimes framed as altruistic surrogacy versus commercial surrogacy, which can be misleading. The introduction of compensation is not likely to remove all altruistic motivations, and indeed there is evidence that even in contexts such as transnational commercial surrogacy in Thailand that many of the commercial surrogates were motivated to a substantial degree by altruistic intentions (Hibino and Shimazono 2013).

There has been debate within economics about the impact of money on the supply of blood and organ donation going back to Titmuss (1970). The argument is on one hand is that paying compensation to donors will increase the supply of willing volunteers who take the incentive of money into their decision, but on the other hand it may be that being paid may somehow dampen the natural altruistic motivations of some individuals. More recently some of these issues around the supply of blood have been summarised by Slonim, Wang et al. (2014), and many of these can apply also to surrogacy.

Several theoretical economic models have been proposed which incorporate altruism and compensation as possible incentives for surrogates (Hewitson 1997, Kossoudji 2005, Banerjee 2013). These theoretical models add to our understanding of the possible impact of compensation on the supply of surrogates, but there is certainly need to investigate further the experiences and views of surrogates about this issue.

Discussions of transnational surrogacy are often tied into the issues around compensation, since many (but not all) overseas surrogacy arrangements entered into by Australians are compensated surrogacy arrangements. Of course a reasonable proportion of overseas surrogacy arrangements entered into by Australians take place in the well-regulated United States or Canada (Everingham, Stafford-Bell et al. 2014), which may be quite different contexts to developing countries such as India, Thailand and Nepal (all now no longer destination countries for Australians seeking surrogacy). According to survey data, the United States was the most popular destination country for international surrogacy for Australians prior to 2009 (Everingham, Stafford-Bell et al. 2014), and is likely to grow in importance once again as other alternatives have disappeared. For that reason, when considering regulation of overseas surrogacy, it is important to think about the context of Australians engaging with the well-regulated US surrogacy market. Even the UK, which is more open to domestic surrogacy than Australia in many ways, still has many intended parents going to the US to enter a surrogacy arrangements for many reasons (Gamble 2012). To get a ballpark estimate of the amount of surrogacy arrangements occur in the United States we can look at the following data. The Centers for Disease Control and Prevention (2014) reports that gestational surrogates were used in 901 ART cycles, or around 1% of ART cycles in 2012, which would include both domestic and international intended parents, and would not capture all surrogacy arrangements.

When it comes to developing countries, these discussions are often similar to other contexts of outsourcing to lower-income countries, and similar solutions to perceived problems are proposed such as 'fair trade' principles (Humbyrd 2009). Available evidence for the case of Thailand does suggest however that in the Thai surrogates were well-compensated and in most cases happy with their decision. Surrogacy packages in Thailand were advertised at around 30,000USD, of which the surrogate would reportedly receive around 10,000USD (Whittaker 2014). This is quite a substantial sum compared to the minimum wage of 300 baht, around 10USD per day (Ra 2014). A survey of Thai surrogates found that they had annual income equivalent to a range of 3500 to 11000USD per year, and varied education levels from only elementary school through to college graduates (Hibino and Shimazono 2013). In addition to monetary motivations, the importance of altruistic motivations for Thai surrogates through Buddhist concepts of merit-making has been often expressed by surrogates and researchers (Hibino and Shimazono 2013, Kodama 2013, Whittaker 2014). And while in the case of surrogacy in India there are certainly have been concerns raised about potential exploitation (Panitch 2013), there are also accounts emphasising the agency of the surrogates (Deomampo 2013), and the potential for large returns for the surrogates (Vora 2013). There are certainly risks involved with the surrogacy industry in developing countries, but these should not necessarily be addressed by prohibition. Evidence shows that there are many cases where such transnational commercial surrogacy arrangements have been beneficial to all parties involved, who maintain healthy relationships to this day.

While the focus of discussions so far has been on the contracting parties, the surrogate and the intended parents, it is important to consider separately the impacts of a surrogacy arrangement on the children born through such a means. Were surrogacy not permitted, a child born through surrogacy would not exist. Posner (1989) exhorts us not to neglect this fact in the consideration of surrogacy contracts, and further suggests that *enforceability* of surrogacy contracts is important in ensuring that children come into the world in a stable environment. It is of course also relevant to consider how the psychological and emotional wellbeing of children born through surrogacy may be affected by the fact that they were born in this way. As the children from the earlier cases of surrogacy back to the 1980s reach adulthood, there is further evidence becoming available on their wellbeing. A series of papers from the UK consider the wellbeing of the children, their families, the surrogates and their families (Golombok, Readings et al. 2011, Jadva, Blake et al. 2012, Golombok, Blake et al. 2013, Jadva and Imrie 2013). From these studies

there is little evidence of any persistent negative effects on the emotional wellbeing of the children involved.

In summary, while there are many complex issues around how surrogacy arrangements should be organised and regulated, there are also many successes. Surrogacy arrangements that have occurred within Australia often have been successful, and this experience could be built about by harmonising state laws, and by considering the possibility of moving to a well-regulated compensated system similar to the United States. Australians will continue to seek to engage in surrogacy arrangements overseas in various countries, and from Australia's perspective one of the most important roles is to make sure that these arrangements are legal under both countries laws and international law, and that the issues around things like citizenship and legal parentage are organised in a way that will be most beneficial to the children.

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