

Submission to the House Standing Committee on Social  
Policy and Legal Affairs

# Inquiry into Surrogacy

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## Executive Summary

As defined in the Oxford dictionary, surrogacy is “the practice of giving birth to a baby for another woman who is unable to have babies herself”.

Unfortunately this simple definition belies the complex and muddled legislative framework that is currently in operation across Australia.

This mismatch of law combined with the ambiguity in the way it’s applied (especially in regards to overseas surrogacy), has resulted in thousands of Australian couples, through no fault of their own, not being able to realise their dream of starting a family.

And while there are many legal matters to address, from a surrogate and intending parents point of view, we would suggest that there are two high level changes that need to happen:

1. allow surrogates to be compensated for carrying a baby; and
2. create a regulated framework that enables intending parents and surrogates to be matched.

These two changes on their own would bring untold joy and hope to couples across Australia.

## About Surrogacy Australia

Surrogacy Australia was founded in 2010.

We have 5 people on our committee, all are non-paid volunteers, with each committee member having being personally involved in surrogacy either as an intending parent (IP), current parent or surrogate.

We have over 2,000 people on our mailing list, and have a paying membership of about 400.

We have a growing profile in the media, and have been part of many state and federal committees and inquiries into surrogacy.

In partnership with Families Thru Surrogacy, we run an annual conference which is aimed at helping consumers make an informed decision about surrogacy.

Surrogacy Australia was originally focused around supporting Australians going overseas. However, after the baby Gammy story in 2014 and the subsequent crackdown on surrogacy in overseas countries such as Thailand and India, it has become increasingly difficult for a 100% volunteer organisation such as ours, to keep up with all the changes in overseas laws.

This was compounded by the fact that more countries have started to offer surrogacy services to fill the gap. These countries are often 'Developing' nations, and do not offer a well regulated framework for surrogacy.

With this trend increasing, we are concerned about the welfare of surrogates, intending parents and most importantly any babies born in substandard medical conditions.

While we still support Australians going overseas with information and help, we see our primary role now as one to help bring a better surrogacy framework to Australia.

# What and why

## What is surrogacy?

While most people have heard of the term surrogacy, there is some confusion to what it exactly means.

In Australia, the most common type of surrogate is a 'gestational surrogate'. A gestational surrogate is a woman who carries another couples biological child. The fact that the surrogate is not biologically related, is a critical piece of information in the surrogacy debate.

It is critical because some opponents of surrogacy argue that the process of 'giving up' the baby after birth to the biological parents is too much of a burden on the surrogate. While support to both the surrogate and intended parents is important, this concern is simply not borne out (pun intended) in practice. This touches on having proper screening processes for surrogates, which we will discuss later in the submission.

## Why the need?

In most cases, the need to use a surrogate is not one of choice. While it's true that the average age of first time mothers is increasing, it is often factors outside the couple's control that requires them to use a surrogate.

Here are three real life examples from our members explaining why they need to use a surrogate:

1. a woman who had cancer and required her uterus to be removed;
2. a 28 year women who had such severe endometriosis she had to have a hysterectomy; and
3. a woman who was born with MRKH syndrome (Mayer Rokitansky Küster Hauser - which is the absence of uterus and/or vagina and/or cervix) meaning she could never carry a baby.

In most cases, women can still can go through IVF treatment (as long as they ovaries) so any embryos created are biologically related.

## The Status Quo

Trying to start a family can be a private matter at the best of times, so when a couple need to look into surrogacy, it often means stepping outside their comfort zone.

This is especially hard to do, if like in many cases, they have already spent years of failed IVF cycles and all the emotional and financial turmoil that goes with it.

Here are some of the challenges people currently face:

- intending parents can not advertise the fact they require a surrogate;
  - this means that someone they know must first know they are trying to have a baby, then guess that they need a surrogate.
- potential surrogates are unable to advertise to be a surrogate;
  - this means there are no structured avenues for surrogates to follow to get more information.
- if intending parents do require a surrogate, their immediate friends and family are often in the middle of creating their own families, thus limiting their options;
- surrogates can not be compensated;
  - the lived experience is that surrogates are not primarily incentivised by the compensation, something which can be managed within the framework criteria. Compensation or not, it is an amazingly altruistic offer;
- doctors are reluctant to discuss surrogacy options as it could be seen as facilitating a surrogacy arrangement;
- Medicare will not fund your IVF treatment if you use a surrogate
  - the Medicare rules state that they will **not** help fund any IVF treatment, if the embryos are to be transferred into a woman other than the commissioning mother.
- when a baby is born, the birth mother (even though in most cases they are not biologically related) is deemed the legal mother.

These are just a few of the reasons that has made Australian couples look to overseas to fulfill their dream of starting a family.

## Proposed Changes

While we appreciate that further investigation needs to occur in regards to how the legal technicalities are approached (is it a process of State harmonisation of laws, or would the States cede power to the federal government etc) there are effectively three core components that need legislative change. They are:

1. Create a surrogacy framework that:
  - a. allows accredited service providers to match IP's and surrogates;
  - b. allows surrogates to be compensated; and
  - c. enforces legally recognition of intended parents.
2. Make changes to Medicare so that all couples who can not carry a baby have access to Medicare funding for IVF treatment;
3. Decriminalise people going overseas to engage in compensated surrogacy
  - this is currently illegal in NSW, QLD and the ACT. It is not enforced, and is not in the best interests of the child if it were.

While the concerns and well being of the surrogate and intended parents are paramount, it is arguable that the needs of the child should reign supreme, when all decisions relating to surrogacy are made.

Surrogacy Australia are open to any measure that makes sense and is reasonable. From police checks, to counselling, from surrogate screening through to psychological tests, we think a well regulated framework is not only best for all parties, but would make the most sense to the Australian public.

## Conclusion

It is our strong contention that a compensated and well regulated surrogacy framework in Australia is the safest and best option for surrogates, intending parents and of course any children.

While there are already existing protections in place for children born through surrogacy, we believe a compensated framework will strengthen these existing protections, and allow more Australian couples to achieve their dream of starting a family here in Australia, rather than risking huge cost and medical complications overseas.

Our knowledge of how the surrogacy process works here in Australia, as well as overseas in compensated markets such as the US, clearly suggests that when done well, surrogacy is a truly beautiful process that we should be proud of.

# Personal Stories

## Submission 1

20 years ago due to “gross medical negligence” by a specialist I was given the mind numbing incredulous news that I would never be able to carry a baby.

The specialist had failed to follow correct recall and treatment procedures whilst I was under his care leading to a diagnosis of cervical cancer

My fiancée and I were completely unprepared for this devastating news.

After radical invasive surgery I was advised the only way we could have our own genetic child would be via a surrogacy arrangement.

I had never heard of the term ‘Surrogacy’ however over the next 6 years I was going to find out a lot about this word and concept and what it involved.

After many months of intensive counseling and medical preparation we attempted FIVE Non commercial surrogacy (altruistic) using my girlfriend's womb. None of these attempts resulted in a pregnancy.

It takes a certain type of person to become a surrogate and thus it was not as simple as going out and asking another friend to try for us (out of the goodness of their heart).

Our last resort was to investigate Commercial surrogacy. The two countries that could help us were the UK and the USA. After months of research and realizing that the USA had been making couples dreams of forming a family for over 30 years come true, we commenced an arrangement with the Centre For Surrogate Parenting in the USA (CSP).

From day one of making contact with the US based agency we felt supremely confident that CSP had the surrogacy process well researched and planned.

This arrangement was:

1. very expensive (due to the dollar rate and unplanned medical complications with myself)
2. difficult at times due to the geographic distance;
3. tedious with many counseling and legal sessions (in hindsight these sessions were vital and gave us all peace of mind)



Despite the above we never felt like giving up and we never felt that CSP would give up on us.

We felt 100% confident that the Agency and its medical partner companies were constantly concerned with:

1. our surrogates well being;
2. our emotional stability and ongoing commitment to the program;
3. legal on and ongoing protection of the unborn child

The surrogate chose us, we did not choose or select our surrogate. She read our story and made her mind up if she wanted to help us. We then met her and once we were all counseled and prepared the arrangement commenced.

Our surrogate had children of her own, is a gifted speech therapist for children at risk and to this day, 12 years later after the birth of our amazing identical twin boys she is still in weekly contact with us.

Our boys know and understand:

- why I couldn't carry them in my body;
- that both my husband and I are their genetic parents;
- all about the lady who nurtured them for 9 months of gestation

We all communicate via email and our surrogate's children look forward to seeing the photo updates of our family.

We are eternally grateful to our surrogate.

**SHE GAVE ME BACK WHAT WAS TAKEN AWAY FROM ME THROUGH NO FAULT OF MY OWN.**

We are so grateful to the US based agency for the care, skill and expertise they imparted to us. For them it was never about the money its all about the end result for both the surrogate and the intended parents. The agency was most concerned with the well being of the surrogate as a happy fulfilling experience for her is the best referral an organization like this can hope for.

We encourage childless couples to, via a reputable agency FULLY explore the surrogacy concept and commitment. Being a family and a parent is the most rewarding thing for my husband and I.

## Submission 2

Years trying to have a family?	7+ years to have another child
Money spent	Considerable amount of money on IVF and medical treatment in Australia (upwards of \$30,000) and greater than \$120,000 in the US.
Personal impact	Until our pregnancy with our child by surrogacy, the fertility journey was extremely difficult and stressful for myself, my husband and our family. Surrogacy has been a world of love and a healing balm.
Benefit of an improved framework	If the laws in Western Australia accurately reflected the facts of a surrogacy situation (it is not an adoption) and arrangements for surrogacy were faster and less prohibitive, we would not have gone overseas.

I was mistakenly diagnosed with adeno-carcinoma of the cervix after the birth of our second child and my cervix was removed. Due to complications from that unnecessary surgery, I developed secondary infertility and other medical issues which resulted in lot of medical management. After trying to fall pregnant naturally with our much wanted third child, we resorted to IVF. We tried numerous attempts at 'soft' and then full-scale IVF which was extremely expensive, invasive, time consuming and psychologically challenging for myself, my husband and our family. Finally, we very fortunately fell pregnant with our third child. Because I had my cervix removed, I unfortunately had to undergo a further operation and have a cervical suture put in to keep the pregnancy in place. In itself this procedure carried risk, was uncomfortable and emotionally challenging. Tragically, due to the cervical suture, I developed an undiagnosed infection at 26 weeks pregnancy. It was an extremely traumatic and life-threatening emergency situation for myself and my child. Our baby was born by emergency caesarean and died in my arms. I was extremely ill in intensive care. My husband thought he was going to lose both of us. The pain and grief of that loss and trauma is inexpressible.

Many doctors and nurses in hospital asked us if we would try again. Initially it seemed impossible to contemplate. Age was not on our side. We sought a lot of medical advice and decided that we would try one last round of IVF. It was extremely difficult to go through

that again. We produced one viable embryo. Ultimately we received conflicting medical advice that a further pregnancy would be too risky. We were told that we should consider disposing of our embryo.

Here was the dark room with no doors and no windows. We couldn't bear to dispose of our embryo. We felt surrogacy was our only option.

I have no sisters. I have no female cousins or relatives who have finished their families. I had two friends offer to carry the embryo. However the processes in Western Australia are unwieldy, relatively untested and uncertain. We did not have time on our hands. We had two other children who were meanwhile growing up. My husband and I felt very unsure about testing the boundaries of close friendship. Further, the law in Western Australia was such that we would have been required to adopt our biological child and the birth mother (with no biological connection) could change her mind about a misplaced (in my view) legal right to keep the child which she had not created but carried.

I am a lawyer and my husband and I both strongly felt that we wanted to consider a system with a strong legal framework protecting and supporting all participants and facilitating the process. We looked at cheap options overseas (India and the Ukraine) but only seriously considered the USA because of its long established frameworks and the experience of agencies involved. We chose to pursue surrogacy through an agency (rather than directly) for the same reasons – experience and established practices. We chose an agency with more than 30 years' experience.

We were lucky that we could afford the costs which were significant.

We went through an involved psychological screening and matching process. We had detailed contracts drawn up by lawyers (our gestational carrier had independent representation) addressing the entire process and various possibilities.

We were extremely pleased with the support provided by the agency to both ourselves and our gestational carrier with ongoing contact with a psychologist for all parties and group meetings for our gestational carrier. We had no issues.

We obtained a pre-birth order from a court based on affidavit evidence which accurately reflected the facts to date and named us as parents. On the basis of that document, we were also able to be named as parents on our child's birth certificate.

We were extremely blessed that our journey went without a hitch. Our gestational carrier fell pregnant and had an easy pregnancy with a natural delivery. We went to the US for the transfer of our one embryo (which was shipped by biological courier), our 20 week ultrasound and the birth of our child. We stayed in hospital and had our own room. Our gestational carrier came and went as she pleased. She expressed for us for several weeks



and then we returned to Australia.

Often there is a concern that the gestational carrier will somehow feel as if she is 'giving away' her baby. This was a question we asked our agency but it is not born out by research or experience. Surrogates have deeply considered why they wish to be surrogates and their connection with any child they carry. Our gestational carrier felt like she was giving us back our baby which she felt she had effectively been 'babysitting.' She said it was the biggest gift that she could ever imagine giving anyone and it was like 100 Christmases rolled into one. All that our surrogate wanted to do was bring a healthy baby into the world for us.

We have a happy, healthy child who brings untold joy to her siblings and immediate and extended family and all the people who accompanied us in our journey. We have a fantastic ongoing relationship with our gestational carrier, her husband and all of her children.

I believe that we can do beautiful life-giving things for each other if we can just take the blinkers away and it is entirely possible to create new life-enhancing types of relationships.

## Submission 3

Years trying to have a family?	10+ years to start family
Money spent	\$200,000+
Personal impact	Looking to sell house and go to the US. Disconnect between friends and family.

My wife and I have spent 10 years trying to start our family. We started trying to have a family when we were both in our mid 20's, and continued to do IVF cycle after IVF cycle, as each time we were given hope and encouraged to keep trying.

It is not lost on us that medical practitioners make large amounts of money from each IVF cycle, which makes their goal of making money disconnected with ours, which is to create a family in the least number of IVF attempts. I will be interested to see how many send this inquiry a submission. Hopefully I'm proved wrong!

We have endured ectopic pregnancies, miscarriages and countless amounts of money and time trying to start a family.

We will not give up, as it is something we want to do, no matter the cost.

We are now seriously considering moving to the US to start our family over there.

## **Submission 4**

My husband and I have been trying to have children for 10 years and we finally have a baby girl on the way via commercial surrogacy in America. We underwent 7 rounds of IVF in Australia with the clinics here repeatedly telling us it was numbers game and to keep trying. After 19 failed implantations we decided to try surrogacy. After researching various countries and clinics we decided on CSP in Los Angeles.

We were matched with the most incredible surrogate and the process has been seamless from beginning to now. One of our main concerns going into surrogacy was the treatment and psychological health of the surrogate. With CSP we have complete peace of mind that our surrogate is protected legally and supported emotionally and mentally. I feel very strongly about compensation for surrogate mothers as they are putting their families and themselves in what can turn out to be a very complex situation emotionally, mentally and medically. Without compensation and representation by agencies such as CSP it becomes a situation that could very easily turn out extremely complicated for all involved. Surrogates must be compensated for this amazing gift that they are providing people. There has to be something in it for the surrogate and their family. It's ridiculous to think that technology has provided us with these opportunity and what's holding it back is the narrow perspective of governments. Commercial surrogacy need to be introduced to Australia.

The United States have created a model that works.

The staff at CSP have been amazing and have made this process very easy for us. In situations like this it would be very difficult to feel comfortable without the support of the agency. We can relax and enjoy the last part of our journey without worrying about anything but the health of surrogate and baby. Without agencies such as CSP we would never have been able to fulfill our dream of having a family.