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Title: Untangling the Threads: Stakeholder Perspectives of the Legal and Ethical Issues Involved in Preparing Australian Consumers for Commercial Surrogacy Overseas

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Introduction:

This article focuses on the complexities of regulating Australian's access to commercial surrogacy overseas. Altruistic surrogacy is allowed in Australia but access to women willing to act as surrogates is limited and many Australians now seek surrogacy arrangements via commercial agencies overseas. This qualitative study interviewed key stakeholders in Australia, including clinicians providing reproductive medicine, lawyers providing legal services, consumer advocates, counsellors and health policy regulators. The aim of the study was to explore perceptions of various experts concerning commercial surrogacy overseas so as to identify issues for the establishment of ethical guidelines and surrogacy policies in Australia. A number of issues relevant to Australians seeking commercial surrogacy overseas were identified and in particular, relating to the level of informed decision-making required by intending parents as well as concerns for the welfare of children born. Amendments to current ethical guidelines and protections for children born and entering Australia are recommended.

Commercial surrogacy overseas commissioned by Australians has raised unique issues in Australia that we never saw coming. "Horror stories" of child statelessness,[1] child trafficking[23] and abandonment[4] have hit the media and invoked public debate. Less clear, but equally problematic, are issues relating to intending parents such as not having access to their genetic children. People seeking surrogacy overseas are entering into unchartered territory: a context in which there is little available information regarding

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[1] A Barker, "Desperate Australian Couples Unable to Leave Cambodia with Surrogate Babies", *ABC News*, 23 February 2017 <http://www.abc.net.au/news/2017-02-23/australian-couples-with-surrogate-babies-stuck-in-cambodia/8294810>.

[2] Barker, n 1.

[3] L Murdoch, "Phillippine Police Arrest Surrogate Mothers-to-be in Human Trafficking Crackdown", *The Sydney Morning Herald*, 4 January 2017 <https://www.smh.com.au/world/philippine-police-arrest-surrogate-motherstobe-in-human-trafficking-crackdown-20170104-gtli45.html>.

[4] "Abandoning Baby Gammy in Thailand Is a Disgustingly Selfish Act by Australian Parents", *Herald Sun*, 1 August 2014.

legal, ethical, social and health and welfare parameters. Health professional practice in Australia has been informed by national ethical guidelines that prohibited any facilitation of commercial surrogacy. What is being communicated to intended parents by health, welfare and legal professionals is unknown. Further, risks exist from engagement with unregulated health care practices in some countries. This article reports on a study that aimed to untangle and examine the perceptions of various experts and providers of information and support for people contemplating commercial surrogacy overseas, with the objective of laying groundwork for the establishment of best practice and informing the review of ethical guidelines in this area.

Background

Altruistic or uncompensated surrogacy occurs when an intending parent seeks the support of a woman who is willing to gestate and give birth to an infant with the expectation that he/she will be relinquished to the intending parents.[5] Despite being allowed in Australia, a recent survey of people who were considering surrogacy or were already engaged in an arrangement showed that 8% of respondents had commenced with a surrogate in Australia.[6] Commercial surrogacy overseas was considered significantly more often than altruistic surrogacy.[7] While it is not possible to determine how many Australians have a child through commercial surrogacy overseas, the Department of Immigration and Border Protection estimated that it deals with a steady flow of about 250 surrogacy cases annually.[8]

Commercial surrogacy overseas specifically relates to the purchase of the services of a surrogate mother and access to donated gametes such as eggs and sperm usually through a clinic offering assisted reproduction in an overseas country.[9] Altruistic surrogacy in Australia is allowed so long as it involves no reimbursement to the surrogate mother other than ordinary expenses.[10] Ordinary everyday expenses include those required to support the surrogate woman in travel, medical costs and so forth. People seeking surrogacy overseas generally do so for medical infertility and social reasons such as repeated

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[5] Commonwealth of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements (2016) https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into_surrogacy/Report*.

[6] S Everingham, M Stafford-Bell and K Hammarberg, "'Australians' Use of Surrogacy" (2014) 201(5) *Medical Journal of Australia* 1.

[7] Everingham, Stafford-Bell and Hammarberg, n 6, 1–4.

[8] Surrogacy Matters, n 5.

[9] M Crawshaw, E Blyth and O van den Akker, "The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice" (2012) 34(3) *Journal of Social Welfare and Family Law* 265.

[10] Surrogacy Matters, n 5.

failure of infertility treatments, repeated miscarriage, an absent uterus or a medical condition that makes pregnancy hazardous, sexual orientation or lifestyle.[11]

Social solutions, such as the adoption of an infant or child domestically or internationally, are also not readily available with a marked and continual decline in the relinquishment of young children by their birth mothers.[12] Furthermore, people typically prefer to have children that are genetically related to them.[13] Commercial surrogacy overseas offers the opportunity for people to use their own gametes in the creation of an embryo that is transferred to a woman (the surrogate mother) for gestation. It also offers the option of using or purchasing donated oocytes and/or sperm. This makes it available to people who have the economic and personal means to acquire it.

In the Australian context the woman who gives birth to a child is the legal mother. In situations of surrogacy where the child is not genetically related to the mother, Australian has amended its legislation to allow the application by intending parents for a parenting order following a surrogacy arrangement. A parenting order is a set of orders made by a court about the parenting arrangements of a child that are a binding record of legal parenthood. Permanent custody can then be achieved by the intending and genetic parents where a surrogate is considered to be the mother by law.[14] Primarily used for altruistic surrogacy, parenting orders may also be sought following commercial surrogacy overseas.

Legal parentage and the welfare of children born from surrogacy overseas are pressing issues. Several researchers have expressed concerns about how people are prepared for surrogacy overseas. For example, a study of "Parental Order Reporters" involved in surrogacy in the United Kingdom[15] reported emerging concerns about the inadequacy of preparation of participants in overseas surrogacy. This is primarily due to differences in laws between countries determining the status of parents and children. Different legislation in different countries conflicts, leaving a child's legal status vulnerable to these differences if not actively managed by intended parents. When returning to Australia following the birth of a child overseas, parentage and therefore the child's citizenship is determined by genetics. Citizenship

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[11] S Everingham, "Use of Surrogacy by Australians: Implications for Policy and Law Reform") <https://aifs.gov.au/publications/families-policy-and-law/8-use-surrogacy-australians-implications-policy-and-law-reform>.

[12] Australian Institute of Health and Welfare, *Adoptions Australia 2016–17* (Child Welfare Series no 67).

[13] Everingham, n 11.

[14] Family Court of Australia, *How Do I Apply for Parenting Orders?* <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/how-do-i/apps-orders/parenting-orders/fcoa-apply-parenting-orders>.

[15] Crawshaw, Blyth and van den Akker, n 9, 265–275.

laws in Australia require DNA testing to prove the relationship with at least one parent. These are social and legal situations that most Australians are unaware of and have never before navigated. Moreover, legal and ethical bodies are struggling to keep up with how to deal with these newly emerging and often complex issues.

Australians seeking surrogacy overseas can employ legal assistance; however, it is currently difficult to ensure accuracy of information related to the health implications of engaging in commercial surrogacy overseas. Outcomes such as ovarian hyper-stimulation syndrome, risks associated with the use of poorly screened gamete donors, multiple births, and errors in embryo care and transfer may not have been fully considered.

Couples who engage in treatment and surrogacy overseas may be poorly informed about international practices and the culture and laws of countries where they seek treatment. For instance some fertility clinics in Thailand employ egg donor recruitment agencies which advertise for donors on the internet and whose egg donors do not reside in the country in which surrogacy is taking place.[16] A further problem is a lack of transparency where website advertising may fail to include vital information such as where oocyte donors are recruited and their origins.[17] This creates a complex biological background for children regarding their genetic and gestational history. This situation is further compounded in several Eastern European countries, as well as Spain and Russia, where there is legislation that denies offspring the possibility of obtaining information about their biological origins.[18] One Australian woman, for example, described her deep regret that by choosing egg donation in Spain her daughter could not access any information about her biological background.[19] Medical, legal and cultural information would have benefited these persons.

Many people travelling for surrogacy and other fertility treatments do not disclose their plans or discuss them with others because they fear that others may react in a dismissive, negative or unhelpful way.[20] This raises a question of where intending parents can access reliable and supportive information to aid

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[16] *Pushing Boundaries: Reproductive Care across Borders* (Merck-Serono symposium, Brisbane, 3 April 2014).

[17] P Thorn and S Dill, "The Role of Patients' Organizations in Cross-border Reproductive Care" (2010) 94(1) *Fertility & Sterility* e24.

[18] Thorn and Dill, n 17.

[19] Pushing Boundaries, n 16.

[20] Thorn and Dill, n 17.

their decision-making and reproductive process, other than clinic websites that are largely concerned with advertising services rather than information provision.

In Australia a logical course of action, especially for couples experiencing failed infertility treatment, would be to seek information and advice from their Assistive Reproductive Technology (ART) physician, counsellor or fertility nurse. However, ethical guidelines that regulate assisted reproductive technology in Australia discourage ART clinicians from engaging in counselling about commercial surrogacy in the following way:

> It is ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes. Clinics must not undertake or facilitate commercial surrogacy arrangements.[21]

Some clinicians interpreted "facilitation" as prohibiting any conversation concerning surrogacy overseas with their patients[22] leaving patients to obtain information from unknown sources or to proceed uninformed.

Those seeking commercial surrogacy overseas are vulnerable and the safety of Australians and of the infants who are born as a result of these arrangements is paramount. Psychological and social preparation and support is a vital component of engaging in and parenting after surrogacy overseas.[23] There is little available research about what information is required or received by Australian couples, how it is delivered and by whom, how it can be accessed, what pathways and resources couples use in their quest for surrogacy and what barriers are experienced in assisting them.

Study Design

This qualitative descriptive study was approved by a University Social and Behavioural Research Ethics Committee (project number 7208). All participants were provided with written and verbal information about the study and signed a consent form prior to the interview.

Participants

Participants were recruited from key Australian organisations that were known to be involved in providing services to individuals who may be considering commercial surrogacy overseas. The participants were identified because of their knowledge and experience of the use of commercial

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[21] National Health and Medical Research Council 2017, Ethical guidelines on the use of assisted reproductive technology in clinical practice and research p. 65, https://www.nhmrc.gov.au/about-us/publications/ethical-guidelines-use-assisted-reproductive-technology

[22] deLacey personal conversations with physicians during Pushing Boundaries, n 16.

[23] Crawshaw, Blyth and van den Akker, n 9, 265–275.

surrogacy overseas by Australians and were considered to be key experts. Of the nine expert participants interviewed two held roles in organisations regulating health policy; three were consumer advocates; two were lawyers in practices specifically experienced in surrogacy; one was an ART clinician; and one a surrogacy counsellor.

Interviews

Data were collected through semi-structured interviews using an interview guide (Figure I). Participants were interviewed by three members of the research team (LZ, SdL and JG) and the interviews lasted between 22 and 86 minutes. The interviews were conducted over the phone for participants' convenience and were audio-recorded. A professional transcription company was engaged to transcribe the audio recordings.

Data Collection

A descriptive qualitative design enabled reporting of a descriptive account that remains close to the actual data.[24] Data were organised using qualitative software (NVivo, version 11). Data were analysed using Thematic Analysis,[25] an analytic method rather than a methodology; it is a method for identifying and analysing patterns in qualitative data and is suited to a wide range of research interests and theoretical perspectives – such as constructionist, feminist, participatory research. The method involves six phases including: getting familiar with the data, coding, searching for themes, reviewing themes, defining and naming themes, and weaving together the analytic narrative.[26] This is an inductive approach that enables themes to be identified from the data rather than beginning with an existing hypothesis. This method fits with the exploratory nature of this study and the fact that little is known about the topic.

Following transcription, the authors each read and re-read the transcripts to familiarise themselves with the overall content. Inductive coding was conducted by LL in NVivo with a specific focus on the question "what are the problems, barriers, enablers and/or gaps for Australian intending parents (IPs) pursuing commercial surrogacy overseas surrogacy?" Once LL had completed the initial coding, the codes were reviewed and discussed by all authors to gain consensus and identify the key issues for each group of stakeholders. The key issues for stakeholders identified by the participants formed the key

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[24] MA Neergard et al, "Qualitative Description – The Poor Cousin of Health Research?" (2009) 9(52) *BMC Medical Research Methodology*.

[25] V Braun and V Clarke, "Thematic Analysis" in H Cooper (ed), *The APA Handbook of Research Methods in Psychology* (APA, 2012) vol 2.

[26] Braun and Clarke, n 25.

themes reported in our findings. Stakeholders were defined as "individuals who are directly affected by commercial surrogacy overseas" and included intending parents, professionals working with the intending parents, children born through surrogacy and the surrogate mother and her own family.

Results

This section presents the themes from the analysis which outline the complexities and tensions that arise from engaging in commercial surrogacy overseas. This includes the challenges that intending parents themselves face, in addition to other stakeholders including professionals, children born through surrogacy and the surrogate mother and her family.

Urgency, Desperation and "Roadkill"

Participants typically saw intending parents as a vulnerable group who have had traumatic unsuccessful attempts to have children (P1 health policy, P4 consumer advocate, P6 ART clinician) or are experiencing grief and loss due to illness that prevents the possibility of pregnancy (P4 consumer advocate). Intending parents have often experienced a long journey to parenthood and are now "desperate to have a baby" (P1, health policy) and want a quick and guaranteed route to parenthood (P2 health policy, P3 and 4 consumer advocates). For many couples, they have tried many other options as outlined by Participant 6 (lawyer): "they've tried sex, then they've tried IVF, then they've tried egg donation, then they get to surrogacy. So, it's option number four by which stage they're roadkill". This history of failed attempts contributes to a sense of urgency that leaves intending parents open to exploitation from unscrupulous or poorly regulated overseas (OS) clinics (P9, counsellor), many of which offer a "one-stop-shop" (P1, health policy) for egg/sperm donation, sourcing a surrogate and provision of documents to support parentage (P1 health policy, P7 consumer advocate, P8 ART clinician, P9 counsellor). In this process, intending parents may not consider all the potential issues (P1 and 2 health policy, P6 lawyer, P9 counsellor) and/or may not receive support while overseas (P3, consumer advocate).

Issues for Intending Parents: Complex Decision Making with Absent or Questionable Resources

Participants reported awareness of many legal, ethical and financial issues for intending parents that led them to explore commercial surrogacy overseas. Altruistic surrogacy is legal in Australia but there are many legal and logistical barriers for intending parents. The first participant (P1) (working in health policy) pointed out that "while there was an intention to harmonise surrogacy legislation across Australia, the reality is that there are quite wide variations from one state to another", suggesting they can be difficult for intending parents to understand without legal advice. It is currently illegal to advertise for an altruistic surrogate and so intending parents must rely on their social and online networks to

attempt to locate a local woman willing to become a surrogate (P3 and 7 consumer advocates, P8 ART clinician): “They can put it in Facebook, they can ask their family and friends but they can’t advertise” (P8, ART clinician). However, the process of self-sourcing egg/sperm donation and/or a surrogate was reported to be a time-consuming and potentially fruitless process (P2 health policy, P6 lawyer, P7 consumer advocate, P8 ART clinician, P9 counsellor).

Intending parents who seek surrogacy in Australia need to screen potential surrogates without any guidance because at present “most of the matching done is done via online groups, so there’s no professional screening in place” (P3, consumer advocate). Given the mismatch between supply and demand for surrogates, there is the potential for surrogates to be overwhelmed with responses from intending parents who are desperate to find a surrogate to carry their future child (P3, consumer advocate).

Altruistic surrogacy also carries potentially high reimbursement and medical costs. There are different views about what constitutes legal reimbursement for the surrogate’s expenses under altruistic surrogacy and what might be interpreted as an illegal payment erring towards a commercial surrogacy arrangement (P3 consumer advocate, P5 lawyer). Intending parents may also have to pay unexpected out-of-pocket expenses for medical costs as there is no Medicare rebate for in vitro fertilisation (IVF) for surrogacy if the intending mother is physically unable to gestate (P8, ART clinician). Even though many intending parents would have preferred to achieve parenthood through surrogacy in Australia (P1 and 2 health policy), this combination of barriers means that intending parents may seek commercial surrogacy overseas.

Commercial surrogacy overseas is a very expensive process. According to P5 (lawyer), P7 (consumer advocate) and P8 (ART clinician) it costs around A$150,000 to A$200,000. In addition, these transactions are not necessarily covered by Australian consumer law, which means that intending parents can lose their money should arrangements fall through (P3, consumer advocate). In addition, the fact that intending parents can be expected to pay for unanticipated medical costs for complications; P8 (ART clinician) highlights some of these concerns by asking “what are the costs involved in keeping that child alive over there? Can the parents meet that? … Then how do they get the sick child back?” There are also reports of questionable practices by some commercial clinics such as transfer of multiple embryos (P2 health policy, P3 consumer advocate, P8 ART clinician, P9 counsellor), failure to refund money (P3, consumer advocate) and/or poor quality of care (P8, ART clinician). For example, P6 (lawyer) pointed out that clinics may be deceptive with regard to the identity of donors: “Now they [intending

parents] look at a book and say 'yes, we picked her, she can be the donor' and they're told it's her but in fact it's someone else." … we're not allowed to advise you.

These risks faced by intending parents may be exacerbated by the restrictions that prevent health professionals from advising about surrogacy (P1 health policy, P3 consumer advocate) and the social stigma surrounding surrogacy (P2 heath policy).

Health professionals recognised that it could be legally risky to provide information about surrogacy (P1, health policy). Some took a "neutral" approach and discussed surrogacy overseas and the potential issues that could arise while leaving the intending parents to make the decision ultimately either way (P1 and 2 health policy). However, Participant 6 (lawyer) pointed out that depending on State legislation, it is illegal for health professionals to aid clients to break the law as "you may in fact be committing that offence as a principal offender". It was recognised by many participants that the required level of knowledge in a field as complex and constantly changing such as surrogacy (P3 consumer advocate, P7 ART clinician) is beyond the capacity of the non-specialist health professional such as general practitioners (P3, consumer advocate).

Those who opted for a "neutral" approach encouraged intending parents to consider all the potential issues rather than promoting surrogacy (P1 and 2 health policy): "a counsellor should always be neutral, but it is important for a counsellor to look at the evidence and look at the issues and raise them with the client" (P2 health policy). Conversely, Participant 4 (consumer advocate) found that health professionals were too worried about breaking the law to give information about surrogacy: "They [nurses] were saying, look, we're not allowed to advise you, but there are groups on Facebook and … you just need to Google these words". For P7 (consumer advocate), this meant that "we stopped counting after about 20 attempts [at IVF]" as IVF doctors did not want to suggest surrogacy "because there is this perception of 'it's a minefield'". As a result, couples may be going through multiple rounds of potentially unsuccessful IVF without realising that there is another option.

Similarly, intending parents often avoided discussing their arrangements with professionals or friends/family (P3, consumer advocate), but instead may be "doing this research completely on the Internet" (P2, health policy). Online sources included forums and Facebook groups comprised primarily of intending parents and surrogate mothers who were at various stages in their surrogacy journey (P3 and 4 consumer advocates, P7 ART clinician). However, accessing information from online sources can

give rise to concerns about the credibility and reliability of information "much of the stuff they read online is, perhaps, not as trustworthy as they'd like" (P3, consumer advocate). There was the perception among professionals that intending parents are often poorly informed and have not considered all the potential issues (P1 and 2 health policy, P3 consumer advocate, P9 counsellor) and that there is a need for independent advice (P8 ART clinician, P9 counsellor). This is especially important in commercial surrogacy where "all the agency's interested in is getting their money" (P9, counsellor) and the child and intending parents' best interests are not necessarily considered.

Legal Parentage and Childhood Identity

Once intending parents have achieved parenthood through surrogacy overseas, they face legal barriers that prevent them from attaining legal parental status in Australia. In everyday life, this does not typically affect the child's ability to access education or health care. However, it becomes more difficult when the family wish to apply for the child's passport, or in the event that the intending parents' relationship breaks down. There is the common perception that having the intending parents' names on the birth certificate is enough to ensure legal parentage, but "the birth certificate is only evidence of parentage, not proof" (P6, lawyer). The ensuing legal processes for achieving a legal parentage order can be complex and very expensive, around $20,000 (P6 lawyer).

There may also be insecurity about legal parentage. Intending parents may not apply for or be awarded parental responsibility. This means children may not be able to apply for a passport, and it is unclear what the absence of legal parentage could mean for custody arrangements should the intending parents' relationship break down (P3 and 4 consumer advocates). When intending parents do not have legal parentage, it adds complexity to family court processes; as outlined by P5 (lawyer) regarding the divorce of a couple who had accessed surrogacy in India: "all documents sent over to India, have them translated into Hindi, have the English and Hindi version of all court documents, and they're quite voluminous, served upon them, and get the agents to arrange for an affidavit of service and an affidavit of translation." Similarly, the lack of transfer of legal parentage meant that the surrogate mother and her husband were legally required to pay child support rather than the IPs (P5, lawyer), which in practice would be unlikely to occur.

As intending parents are focused on achieving parenthood, they do not always consider the child's right and need to know about their social and genetic origins (P1 and 2 health policy, P6 lawyer, P9 counsellor). Children have a natural desire to know about their origins and they have a right to an identity and to know their social and genetic information (P2 health policy, P6 lawyer, P9 counsellor). As

highlighted by P2 (health policy): “often the parents’ point of view is that love is enough, that we’re going to love this baby … but it doesn’t stop a person’s interest in knowing where they came from”. Not with standing some countries legal determinations, it is typically the intending parents who make decisions about opportunities for on-going relationships with the surrogate mother, which may not be consistent with what children will want and need as developing adults (P4 consumer advocate, P6 lawyer, P9 counsellor). Intending parents may access anonymous donors, not realising the significance of children being able to know or trace their genetic origins (P1 and 2 health policy, P6 lawyer, P9 counsellor).

Another difficulty with surrogacy overseas is that in non-English speaking and poorer countries, it may be difficult or impossible for the child to trace their surrogate mother or donor later should this be desired (P6 lawyer). In addition, it is unclear to what extent children might be able to connect socially and emotionally with their surrogate mother, as “the surrogate may not speak their language, they might be of a very different socioeconomic background” (P2, health policy). This also raises questions about children’s potential responses to their origins, such as viewing themselves as originating from a situation of exploitation, as one counsellor reported an intending parent saying: “how is our child going to feel that we paid some poor Cambodian woman” (P9, counsellor).

Poor quality practices in some clinics overseas meant that there have been instances of embryo laboratory errors so that when DNA testing occurred the child was found to be not genetically related to either of their intending parents (P2 health policy, P3 consumer advocate). Consequently, those children’s genetic origin would remain unknown and intending parents then faced questions around whether they still wanted to take the child home (P3, consumer advocate). Intending parents were also left wondering what might be happening to their actual genetic children (P9, counsellor). However, the main concern for the child is what might happen to them and who their family might be if the intending parents do not want to take home a genetically unrelated child. This possibility was highlighted by P3 (consumer advocate) who reported: “There’s one or two cases I remember where the parent didn’t want to take the child”. Similarly, some countries have closed down their surrogacy industry after media publicity over surrogacy horror stories, leaving the arrangements for other unborn children in limbo as to what will happen to them after birth. The stigma surrounding child DNA that does not match the intending parents can mean that intending parents keep this knowledge concealed from their family and friends; again, raising questions about how and whether children will be informed about their genetic and social origins (P3, consumer advocate).

It is also unclear how children might feel about their origins, particularly in relation to the surrogate's motives given that the surrogate received financial payment to gestate them. On the other hand, children of surrogacy may also consider it to be exploitative if their surrogate mother was not paid (P7 consumer advocate, P8 ART clinician, P9 counsellor). Participant 8 (ART clinician) also made the point that the surrogate mother is the only one *not* being paid in surrogacy arrangements in Australia: "I think it's ironic that in surrogacy the lawyers … [and] the doctors make money out of it but the poor surrogate … doesn't make anything." Conversely, some participants felt that it could be unpleasant or traumatic for children to find that their surrogate was paid to carry them rather than coming from an emotional connection between people (P9 counsellor), especially if the surrogate was very poor and vulnerable to exploitation (P2 health policy, P9 counsellor).

Considering Risk

There are no background screenings required for intending parents so there is the risk that some may seek to have children through surrogacy arrangements for child exploitation or may otherwise be unsuitable parents (P3 consumer advocate, P7 ART professional). This risk, however, also applies to people who become parents naturally as there are no screenings required for individuals to conceive a child and become parents.

In general, Australian laws make commercial surrogacy overseas difficult or illegal in certain States. This does not seem to prevent it as intending parents find ways to circumvent the laws or have not been prosecuted despite them. However, enforcement of these laws is difficult because if intending parents are punished for this crime it will inevitably affect their new-born child/ren and courts have tended to administer the minimum penalty (P5 lawyer, P6 lawyer).

Another concern included that there may be poorer health outcomes for children born through surrogacy arrangements due to the practice of returning multiple embryos: "They [clinics overseas] often put two-three embryos back putting that child at risk of premature complications" (P8 ART clinician).

Surrogate Mother Relationships, Compensations and Protections

When women agree to become a surrogate mother, it is the start of a very long commitment: "it's often an 18-month relationship because often the first few embryo transfers don't take, there are miscarriages …" (P3, consumer advocate). Surrogacy is also a process that has emotional and health consequences (P2 health policy, P6 lawyer). Payment or reimbursement for surrogates is an ethical concern because of the potential for exploitation (P2 health policy, P6 lawyer), children's perceptions of their surrogate's payment and whether the surrogate has to cover her own "out of pocket" expenses (P6, lawyer). Some participants referred to the concept of "emotional labour" (P9, counsellor) or that surrogates were happy to bring a child into the world as a gift and gain benefits from positive relationships with the intending

parents (P4 consumer advocate, P9 counsellor). However, in cases where the relationship with the intending parents is tenuous, unwanted or breaks down, the money is argued to be compensation so that the surrogate gets something tangible out of the process "[if] the surrogate doesn't get the warm and fuzzy compensations, the gratitude, appreciation, recognition … she still gets $50,000" (P9, counsellor).

In Australia there are laws governing the conditions under which a person can become an altruistic surrogate and these vary from State to State (P4 consumer advocate, P6 lawyer). For example, the potential surrogate's age and whether they have previously had children (P6, lawyer) can lead to assumptions being made about a young woman's capacity to understand and consent to gestational surrogacy. For example, Participant 6 (lawyer) believed that surrogates should be at least 25 years old and have had previous pregnancies so "they can truly give informed consent". Another key issue arises for surrogates who are carrying for unknown intending parents. This might occur when, for example, they meet on a forum or through surrogacy networks. In such situations it can be difficult for potential surrogates to identify suitable intending parents because surrogates tend to be unsupported in screening and selecting Ips (P3 consumer advocate).

Implications

The project reported in this article set out to examine the perceptions of various experts and providers of information and support for people contemplating commercial surrogacy overseas. Overwhelmingly, the views of participants in this study confirmed the already widely acknowledged ethico-legal complexity that surrounds the use of overseas commercial surrogacy.[27][28] The findings of this study suggest that leaving aside the question of whether commercial surrogacy is morally acceptable or not, an overarching problem is a lack of regulation and professional oversight and this in turn leads to various vulnerabilities and potential harms for all parties involved. Lack of regulation and clear guidance impacts on the practice of professionals who provide services to families who are considering commercial surrogacy, particularly in terms of if or how they should provide support. Despite the potential safeguard of professional oversight there has been little to no previous research in Australia or internationally that explores how professionals respond to clients who wish to pursue commercial surrogacy overseas.

What is clear from the statistics that are available is that while altruistic surrogacy is allowed in Australia, its occurrence is not as prevalent as the use of overseas commercial surrogacy and this is perceived by

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[27] American College of Obstetricians and Gynecologists, "Committee Opinion: Family Building through Gestational Surrogacy" (2016) 127(3) *Obstetrics and Gynecology* e97.

[28] KL Armour, "An Overview of Surrogacy around the World: Trends, Questions and Ethics" (2012) 16(3) *Nursing for Women's Health* 231.

participants as being due to certain regulatory constraints. For instance, intending parents are unable to advertise for a surrogate and are therefore solely reliant on someone offering to perform this role from within their circle of family and friends. In addition, despite the substantive physical, emotional and relational contribution made by a surrogate mother to the gestation of an infant, there are significant constraints to her receiving fair and adequate financial compensation. Further, although the primary aim of Australian legislation concerning surrogacy was to harmonise legislation, in reality the laws are fragmented and complex. This in turn leads to intending parents needing to seek legal advice so as to navigate the field of parental orders and legitimate parenthood successfully. The legal costs can potentially preclude some intending parents from being able to access surrogacy in Australia. While some steps are evidently being made through online forums to provide a meeting ground for would-be altruistic surrogates and intending parents seeking a surrogate, it is yet to be seen whether this improves the incidence of altruistic surrogacy and reduces the use of overseas commercial surrogacy in Australia.

Intending parents who have the capacity and means undoubtedly weigh the availability of an altruistic surrogate plus medical and legal costs of a domestic arrangement against the increasingly competitive financial costs of a commercial arrangement, especially where overseas clinics offer streamlined packages of egg or sperm donor, surrogate mother and IVF medical services that appear to be both convenient and cost-efficient. The stress of finding a suitable surrogate, of co-ordinating medical intervention, and of negotiating relational complexities is significantly reduced and if uninformed of the potential pitfalls, overseas commercial surrogacy may appear to be an easier pathway for intending parents than to pursue domestic altruistic surrogacy.

Also clear from the findings of this study is that experts consider intending parents who have a history of infertility and have engaged in unsuccessful infertility treatment to be especially vulnerable. Traumatised and "burned out" from years of fertility treatment, intending parents may opt for the quickest and seemingly easiest pathway to parenthood, and may succumb to beguiling and misleading advertising by overseas commercial surrogacy clinics. Participants in this study perceived a need for intending parent literacy concerning commercial surrogacy in general but also overseas medical care, foreign legal contexts, child rights and Australian citizenship laws in particular.

Because professional guidelines discourage promotion of commercial surrogacy, health care professionals are quite rightly wary of engaging with intending parent clients around the issue. At the same time, some participants were concerned that not doing so would not necessarily discourage some intending parents from pursuing this option and that they would be doing so without the required

information and preparation. Such a situation leaves intending parents who are considering overseas commercial surrogacy exposed, isolated and lacking in appropriate advice and counselling that might prevent harms or mitigate them.

This study has shown that a major issue for participants in overseas commercial surrogacy is the welfare and wellbeing of the child(ren). What it will mean to future generations of adults that they developed inside and were influenced epigenetically by another mother's body and lifestyle is yet to emerge and be determined. Furthermore, how these people will perceive their parents' actions of paying a stranger in another country for their gestation and birth is an unanswered question, particularly if this stranger is perceived as poor and vulnerable. Even more concerning for child welfare is that in some countries where egg donors are accessed, laws forbid any record keeping that might later enable a person to gain information about their origins. Intending parents using overseas commercial surrogacy may be supported by competent and specialised lawyers who advise and prepare the necessary documentation for a parental order. However, a troubling issue identified in this study is that once on home soil with their new infant, intending parents do not always follow through on the processes for legal parenthood. Other than accessing a Medicare card, the pathway to legal parenthood is expensive and cost-prohibitive. The legal status of parents is largely assumed and goes unquestioned in educational and health frameworks in Australia but may come under scrutiny in legal processes such as divorce and child custody disputes.

For health care professionals providing support and counselling to clients considering overseas commercial surrogacy means entering murky and problematic terrain. Professional codes require they act to protect their clients from harm yet ethical guidelines state that: "Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy provider". [29] As a result, professionals working in assisted reproductive technology are reluctant, or even refuse, to discuss overseas commercial surrogacy for fear of professional and/or legal repercussions – which are quite real. However, while the intent of the National Health and Medical Research Council guidelines is to prevent commodification and exploitation, it has unfortunately had the unintended effect of discouraging professionals from providing expert guidance concerning commercial surrogacy, even with individuals who are already committed to a course of action that could be unsafe and precarious and for which they are not well equipped.

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[29] National Health and Medical Research Council, n 21.

Commercial surrogacy is illegal in Australia and raises a raft of ethical issues relating to exploitation, meaning it is not appropriate for professionals to recommend commercial surrogacy as a reproductive option. However, there could be a place for professionals to provide impartial guidance to families who have questions about overseas commercial surrogacy. This could involve discussing the risks of commercial surrogacy, ethical dilemmas, and protection of the interests of surrogate mothers in decision-making and the potential impacts for children. In the absence of such professional guidelines, professionals may avoid talking about commercial surrogacy at all, and leave families and children without access to potentially helpful advice.[30] Alternatively, professionals who choose to discuss commercial surrogacy in the absence of guidance could be acting illegally or may make decisions based on individual or professional values. For example, some professionals may focus primarily on the intending parents' rights to autonomy or self-determination, while others may prioritise the rights and needs of any potential children being born from such an arrangement.

Consequently, there is a need for amendment to the guidelines so that professionals have a clearer understanding of their professional and ethical role, not in promoting commercial surrogacy but in advising and ensuring that all intending parents are well informed and empowered in their decision-making.

Health professional involvement is especially important to protect the best interests of the child who is the most vulnerable in commercial surrogacy overseas. Commercial surrogacy presents a number of human rights concerns for children in terms of the United Nations Convention on the Rights of the Child. For example, according to the Convention children have the right to "preserve his or her identity".[31] This is at risk in commercial overseas surrogacy because children do not have choices around whether they know about or meet their surrogate mother. In some cases, the [situationally lawful] practices of clinics or deliberately dishonest behaviour or inadvertent errors means that children's genetic origins are untraceable. Thus, overseas commercial surrogacy may fail to protect children's rights to their own identity. As commercial surrogacy is a relatively new phenomenon, there is no research that explores the informational needs and desires of individuals born through surrogacy. However, literature looking at the needs and desires of donor-conceived individuals suggests that many will want information about

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[30] Withheld for peer review process, personal conversations with physicians during Pushing Boundaries, n 16.

[31] Office of the United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

their genetic origins for a variety of reasons[32] and this information may not be available to all children born through surrogacy overseas since it is not protected in the way that it is in Australia. It is important that intending parents are made aware of how pursuing commercial surrogacy overseas can impact on the children born from such an arrangement both in the short- and long-term, particularly in terms of not being able to learn about their biological and social identities.

Figure 1: Interview schedule

1. ROLE IN WORKING IN THE AREA OF COMMERCIAL SURROGACY OVERSEAS
Prompts:
• What is your role/roles? Why? How?
• Main issues that come up – legal, ethical, emotional, social
• Examples
• How do you navigate these issues?
• What tools do you have at your disposal for navigating these issues?
• If not involved directly, explore rationale for why not (eg benefits of altruistic surrogacy)
2. PERSPECTIVES ABOUT COMMERCIAL SURROGACY OVERSEAS
Prompts:
• Experiences
• Examples of conversations
• Perspectives about what is happening now in Australia and/or overseas
• Harms/benefits
3. PERSPECTIVES ABOUT WHAT THE CLIENTS NEED
Prompts:
• What is required to keep all parties safe? (children, surrogates, and intending parents)
• In Australia and overseas
4. PERSPECTIVES ABOUT WHAT NEEDS TO CHANGE FOR THE FUTURE
Prompts:
• Health care systems
• Health care practice
• Laws
• Policies
• Community opinions/views

Figure 2: Summary table of codes identified in data analysis

Group/stakeholder	**Problem/risk/barrier/pitfall**

[32] A Ravelingien, V Provoost and G Pennings, "Open-identity Sperm Donation: How Does Offering Donor-identifiying Information Relate to Donor-conceived Offspring's Wishes and Needs?" (2015) 12 *Bioethical Enquiry* 503.

Intending parents	Financial risk, not covered by Australian consumer law; agencies keep money without delivering service (P3).
	Financial risk, unexpected overseas medical costs (ie premature birth) (P3). Many things can go wrong that may be unanticipated (P4).
	May be poorly informed, need independent advice (P1, P2, P3).
	Accessing information online, such as forums, Facebook so reliability issues (P1, P3).
	Desperate for a baby (P6), have already tried everything (P1), want to achieve parenthood quickly (P2). Looking for reliable way to parenthood (P3).
	Lack of protection for IP's interests in OS arrangements (P1).
	OS surrogacy providers a "one stop shop" provide all services that are needed in one location (P1, 7).
	Difficult to find their own surrogate, need to rely on own networks and online resources (P1, P3).
	Horror stories (P1), stigma so avoid telling friends/family (P3); support networks often other IPs (P3, P4).
	Emotional connection with surrogate may or may not be desired (P2).
	Exporting embryos might need approval, which is less likely to be granted in a commercial arrangement (P2).
	May not receive counselling from OS clinics (P2).
	Parents feel that love is enough; no need for children to trace their heritage (P2).
	No Medicare rebate for surrogacy like other forms of ART (P2).
	Grief and loss – miscarriages (P3).
	May have to lie about legal parentage to get education and health care for their child (P3).
	May not understand what is required for legal parentage ie birth certificate (P7).
	Not enough surrogates in AU to meet demand (P3).
	Surrogacy arrangements not enforced or enforceable (P4).
	Commercial surrogacy is faster than altruistic (P4).
	IPs a vulnerable population – experienced a lot of pain and open to exploitation (P4).
	Moving states to avoid state legislation around surrogacy (P5, P6).
	Legal and child support costs if parental order not sought in event of parental separation (P5).
	Lying to evade law (P6).
	Inequality; only rich can afford surrogacy (P8).

	Information changes quickly, soon out of date (P7); Very expensive.
Surrogate	A very long commitment, not just 9 months – 18+ months (P3).
	Balancing how much reimbursement/payment surrogates should receive (P2, P6).
	Potential for exploitation (P2, P6).
	Emotional and health consequences (P3).
	Need to screen IPs personally without support in AU (P3).
	Surrogacy arrangements not enforced or enforceable (P4).
	Paternalistic laws for screening surrogates in AU ie must have had own children, age limit.
	Money as compensation in case emotional side of relationship breaks down (P9) Emotional labour (P9).
Health care providers	Legally risky to provide information about surrogacy (P1).
	Need to sensitively point out potential issues of OS surrogacy, recognising that IPs ultimately make decision (P2).
	Required level of knowledge of surrogacy currently too complex for GPs (P3).
	IPs not legal parents when consenting to procedures (P5, 6).
	Should refer parents to seek independent legal advice (P6).
	May not be aware they are committing an offence by referring to other services ie referring to OS clinics (P6).
	Landscape of surrogacy constantly changing (P7).
Children born through surrogacy arrangements	Not able to trace their genetic parents (P1); not able to access information about their medical history (P1, P2).
	Parents make decisions about whether they want to there to be opportunities on-going relationship with surrogate (P2, P4, 6), what if this differs to what children want later on – can they track down the surrogate?
	Whether parents decide to disclose surrogacy/genetic origins (P2).
	May be difficult for children to connect with surrogate (ie language, socioeconomic backgrounds (P2).
	Managing concerns over whether surrogate or donor was/was not paid (P2).
	Poorer health outcomes for children born through surrogacy (P2).
	Mix-ups in the lab – child's DNA does not match (P2, P3).
	If DNA mix up, do parents want to take child home? (P3).

	How will children manage knowledge that surrogate was very poor; possibly exploited and motive was financial (P2).
	Stigma and concealed information around origins if DNA mix-up (P3).
	IPs focused on getting a child and do not necessarily prioritise child's rights/needs to know their origins (P9).
	Usually able to access school and health care as these institutions do not ask for proof but parents may have to lie (P3).
	No background screening of IPs (P3).
	Countries close mid operation (P3) – so what happens to children?
	Legal parentage status for children (P6).
	Same laws that prevent child trafficking regulate surrogacy (p6); policing surrogacy by punishing parents can also impact on the child.
Aust health system	Increased costs as children born through surrogacy have greater health needs (P2).
Lawyers	Inconsistent decisions from the courts (P5).
Legal issues	Legal parentage (P5, 6).
	Lack of trust in developing countries' legal systems (P6).
	Families lying to evade law (P6).

Figure 3: The changing social and cultural landscape of Australians travelling overseas for commercial surrogacy[33]

1: Previous destinations for Australians seeking commercial surrogacy

2: Current destinations for Australians seeking commercial surrogacy

[33] Neither of these charts report the percentage of Australians travelling to various destinations but rather report the scope of countries accessed.