[8]

Use of surrogacy by Australians
Implications for policy and law reform

Sam Everingham

THIS CHAPTER USES THE results of an anonymous online survey of 217 intended or current Australian parents through surrogacy, conducted in 2012, to illustrate how surrogacy is practised by Australians. It concludes with a discussion of current challenges with regard to Australian law and policy in this area.

Surrogacy as a means of family formation is defined as a woman carrying a pregnancy for a third party, with the express intention of giving up all parental and custody rights to the resulting child(ren). Surrogacy can be traditional, where the surrogate carries a child using her own eggs (fertilised with sperm from either the intended father or a third-party donor), or (more commonly) gestational, where the surrogate is implanted with an embryo developed from the eggs and sperm from any combination of the intended mother and father and/or from third-party donors.

Reasons for the growth in surrogacy as a means of family formation

International research has shown that the desire for children among the involuntarily infertile remains very strong, even after years of unsuccessful attempts to become pregnant (Blyth, 1995; Edelmann, 2004; Langdridge, Connolly, & Sheeran, 2000; van Balen & Trimbos-Kemper, 1995). Langdridge et al. also noted the desire of infertile couples to have a biological connection between the child and at least one of the prospective parents rather than to adopt an unrelated child.

Surrogacy as a means of family formation among Australians who cannot otherwise have a first or subsequent child, has been driven or enabled by a number of factors. These include:

- child protection policy changes in recent decades, which have led to drastic falls in the availability of children via adoption. During 2011–12, Australian authorities noted the lowest number of adoptions ever achieved ($n = 333$). Of these, just

54 were of infants aged one year or less (Australian Institute of Health and Welfare [AIHW], 2012);
- source country adoption programs, which have strict criteria as to the age and family types who can adopt; for example, none of Australia's current intercountry adoption agreements allow same-sex couples (AIHW 2012);
- increasing numbers of Australian women putting off childbearing until they are older, leading to higher rates of age-based infertility (Luk, Greenfield, & Seli, 2010);
- improved assisted reproductive techniques, which allow greater use of gestational surrogacy, where the surrogate has no genetic relationship to the child(ren) she carries;
- increasing community awareness of surrogacy as a family formation option; and
- growth in the number of single and partnered gay males desiring to raise a family.

Surrogacy regulation and practice in Australia

In recent years, Australia has introduced regulatory systems guiding the practice of surrogacy that define who can and cannot act as a surrogate, who is eligible to be an intended parent through surrogacy, what financial compensation may be paid to a surrogate, how the law will deal with parental rights, and what, if any, counselling is required prior to entering an arrangement.

While there is now a process in Australia to transfer legal parentage to intended parents where uncompensated surrogacy has been used, advertising for a surrogate or by a potential surrogate is forbidden. Surrogacy arrangements that pay the surrogate any monies beyond medical and other out-of-pocket costs is illegal in any Australian state or territory (except the Northern Territory). Queensland, New South Wales and the ACT have criminal laws in place to discourage residents from engaging in surrogacy in countries where compensating a surrogate for more than medical and out-of-pocket expenses is legal (Page, 2011).

Study aims and methods

Research was commissioned by Surrogacy Australia[1] to better understand how Australians are accessing surrogacy arrangements. The objectives were to establish:
- the socio-demographic characteristics of Australians using and intending to use surrogacy;
- what other options were considered and why these were ruled out;
- how and when uncompensated and compensated surrogacy arrangements are accessed;
- parental attitudes to disclosure and donor identification
- what costs were incurred;
- how this was funded; and
- what users' and intending users' attitudes were to laws criminalising surrogacy in some Australian jurisdictions.

The research collected cross-sectional quantitative data via a 90-item survey comprising mostly fixed-choice questions. The study was fielded between 25 January and 17 February 2012.

1 A national not-for-profit consumer organisation that promotes advocacy, education and best practice in relation to surrogacy arrangements.

Emailed invitations with a link to a 20-minute survey were sent directly to Surrogacy Australia's email database of members and other families who were considering using, were in the process of using, or had used surrogacy arrangements. The research was endorsed and promoted by the moderator of the online Yahoo!7 chat forums run by GayDadsAustralia. Additionally, the study was promoted on the SurroAustralia Yahoo!7 chat forum for heterosexual families, and via postings and a web link on Surrogacy Australia's closed Facebook group.

Data were analysed by Q Professional using descriptive statistics. Univariate comparisons were made using *t*-test and chi-square statistics. A 95% confidence interval was used to define statistical significance where differences were detected. Some respondents did not answer all questions, and where the number of available responses was lower than the number of participants, this is indicated.

Results

Sample characteristics

A total of 217 respondents commenced the survey and 180 completed every relevant question. Table 1 illustrates the key sample characteristics.

Table 1: Respondent characteristics

Characteristic	%	Characteristic	%
Jurisdiction (*n* = 180)		Relationship status (*n* = 180)	
NSW	33	Single	8
VIC	34	Partnered	92
QLD	12	Household income (*n* = 180)	
WA	10	< $78,000	8
SA	2	$78,000–103,999	16
ACT	2	$104,000–129,999	15
TAS	2	$130,000–155,999	9
NT	1	$156,000–181,999	11
Outside Australia	4	$182,000–207,999	13
Gender (*n* = 182)		> $208,000	28
Male	63	Sexuality (*n* = 217)	
Female	37	Heterosexual men and women	45
Stage (*n* = 217)		Gay men	55
Considering surrogacy	29		
In a surrogacy arrangement	29		
Past user of surrogacy	42		

The mean age of respondents was 40 years (range: 24–57 years). Table 1 shows that there were significant numbers of respondents from a state/territory with extraterritorial criminalisation laws in place against compensated surrogacy (NSW, Queensland and the ACT).

Household incomes were, on the whole, very high compared to other double-income Australian households.

In addition, prior to considering surrogacy, 19% of the heterosexual respondents had been carers for another child (in 75% of cases their own biological child).

Options considered for creating a family

Adoption was the commonest alternative to surrogacy considered, particularly for heterosexuals, followed by long-term foster care (see Figure 1).

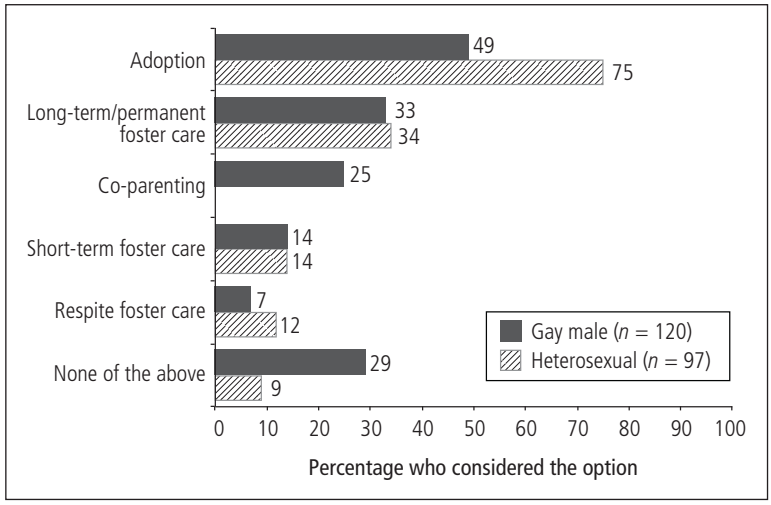

Figure 1: Alternative options considered for creating a family, by sexuality

Among the 34% who did not consider long-term foster care, concern regarding the lack of permanency and a preference for a biological connection were the key barriers (see Figure 2).

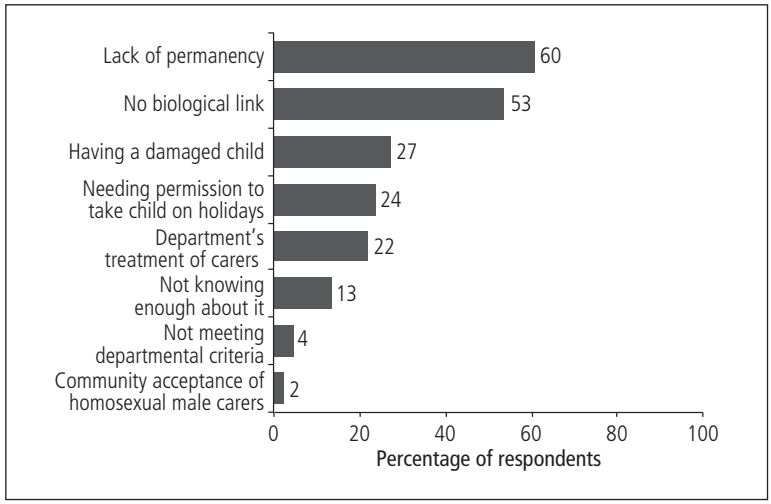

Figure 2: Reasons for not considering long-term foster care

Uncompensated surrogacy

Australian heterosexual intended parents were significantly more likely to have considered an uncompensated arrangement (74%) when compared with gay male intended parents (38%).

Of the 46% who did not consider uncompensated surrogacy, the main reasons they gave for this related to the unenforceable nature of altruistic contracts, leading to concern that their surrogate might decide to keep the child (see Figure 3). The view that asking someone to carry for love alone was an unfair exchange was also commonly expressed, particularly among heterosexual intended parents.

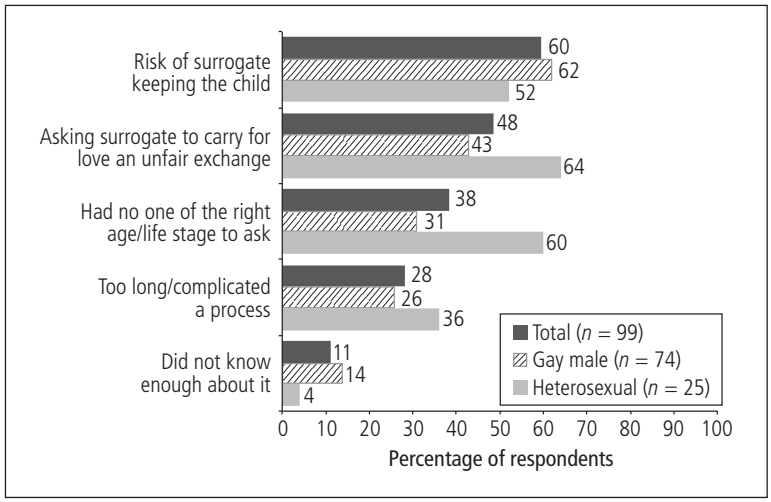

Figure 3: Reasons why uncompensated surrogacy was not considered, by sexuality

Of the 117 who considered altruistic surrogacy, over half (59%) did not ultimately attempt such an arrangement. This group were most likely to report being unable to find a surrogate who would commit to carry altruistically. However, as Table 2 (on page 72) shows, reported reasons were varied.

Intended parents engaging in uncompensated surrogacy often require an egg donor. Among heterosexual respondents who attempted uncompensated arrangements, 23% reported needing an egg donor from the start. An additional 31% required a donor after failing with their own eggs. However, locating a potential altruistic egg donor was not a barrier for most intended parents—76% located a possible donor.

Of those 117 intended parents who looked for an altruistic surrogate, 23 commenced altruistic attempts. Only half of these were commenced under regulated arrangements. Of those who commenced, seven were unsuccessful due to the surrogate not falling pregnant, or the commissioning parents or surrogate changing their mind about progressing.

Compensated surrogacy

Nearly all gay male intended parents (97%) and most heterosexual intended parents (88%) surveyed had considered compensated arrangements outside Australia. Before making such a decision, respondents reported consulting on average five different (mostly online) sources.

Table 2: Reasons for not going ahead with uncompensated surrogacy	
Reason given	**% (*n* = 57)**
Unable to find altruistic person (wanted payment)	51
Too long/complex a process	32
Risked damaging relationship	32
Not comfortable asking someone else to be surrogate	30
No one offered to be surrogate	30
Not legal at the time	21
Could not locate an egg donor	21
Did not know anyone who had done it	21
Risk of surrogate keeping the child	9
Possible health/legal complications	7
Intended parent fell outside clinical criteria for assisted reproductive technology (ART)	5
Surrogates who offered were not suitable (e.g., had no prior children)	5
Rights of each party were too vague	5
Surrogate changed mind	4
Felt judged and unsupported	4
High costs	4
Hard to find a clinic offering surrogacy	2

Countries used for compensated surrogacy

India was by far the commonest country used, with no significant differences found by client sexuality. However, there appear to have been marked changes in the countries used over recent years. Of parents using overseas arrangements, only 14% reported using a US agency in 2011–12, compared to 52% prior to 2009. In contrast, the proportion using India increased from 29% prior to 2009 to 80% in 2011–12 (see Figure 4).

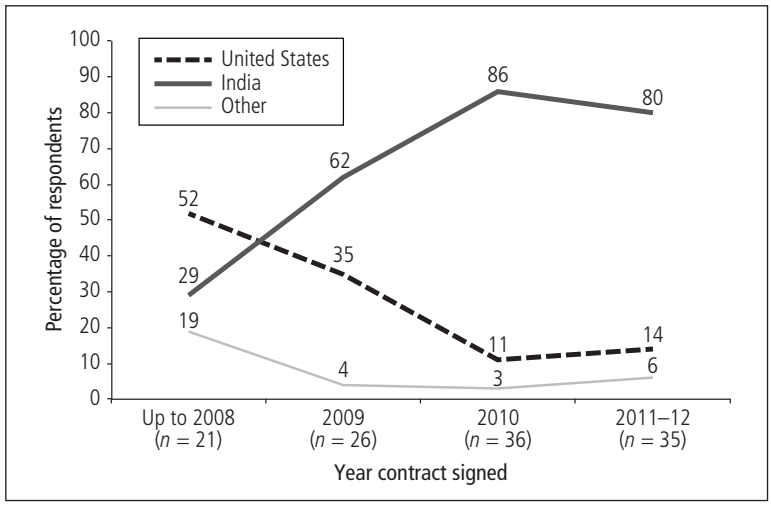

Figure 4: Country used for commercial surrogacy, by year contract was signed

While the number of respondents who had used US agencies ($n = 33$) was not large, significant proportions of Australians left themselves financially exposed to potentially large perinatal medical costs in case of pre-term delivery by not taking out post-birth medical insurance,[2] an item that is prohibitively expensive for many. While this was also true in respect to taking out surrogate health insurance, this might be explained by some US surrogates using pre-existing health insurance policies.

Compensated egg donor issues

Of those heterosexual couples using compensated surrogacy, 30% attempted to self-cycle (used their own eggs). Another 20% shipped frozen embryos overseas.

All gale male intended parents using compensated arrangements had engaged or planned to engage at least one egg donor, while 70% of heterosexual parents used or planned to use an egg donor for an overseas arrangement. While results suggest that the US was once the most common source of egg donors for Australians, in recent years India has become the most common (54% of all donors accessed), in line with its dominance as a centre for surrogacy arrangements. All donors in India, and most in the US, Thailand and South Africa, do so anonymously, in contrast to current Australian practice and guidelines.

Among intended parents in the surveyed sample who had successfully engaged in surrogacy, the proportion who had to use two or more egg donors (because of failure to produce viable embryos from earlier egg donations) was 34% for the US compared to 50% for India.

Number of surrogates engaged

Among those who had engaged successfully with an overseas surrogate to produce one or more children, a higher number of surrogates were engaged by those using India (74% engaged with two or more surrogates) compared to the US (only 19% engaged with two or more surrogates).

Eight per cent of those engaging in compensated surrogacy had a surrogate miscarry in the second or third trimester. For 21% of this group, miscarriages were experienced during two or three surrogate pregnancies after 12 weeks' gestation.

Multiple births

Multiple births are a very common outcome for Australians using compensated surrogacy. Forty per cent of respondents who had used India and 62% who had used the US reported twin births. In contrast, just 14% of regulated uncompensated surrogacy births in Australia in 2010 resulted in twins.

Compensated surrogacy costs

A significant downward trend in total spend has been evident over the last five years, largely due to the move from US- to Asia-based surrogacy arrangements. Among those who had achieved a successful pregnancy and birth in 2010 or 2011, average total estimated costs (including egg donor, surrogacy agency fees, hospital costs, post-birth

2 In the US, many Australians rely on their surrogates' insurance pre-birth, but post-birth, health insurance is advisable given there is no universal health coverage available. This involves the "pre-purchase" of medical services at a pre-negotiated price. Non-refundable premiums for singleton pregnancies start at $11,000.

medical costs, insurance, legal and government fees as well as travel and accommodation) were $165,000 for the US, compared to $70,000 for India.

Future intentions

Seventy-nine per cent of those considering surrogacy for the first time were likely, very likely or definitely going to engage in compensated surrogacy (see Figure 5). In states/territories where compensated surrogacy overseas is criminalised, this high proportion was undiminished, with 71% likely, very likely or definitely going to engage.

Those who already had one or more children through surrogacy also had high levels of intention to have another child via surrogacy (40% likely, very likely or definitely). Even among those from an Australian state/territory with criminalisation laws, 46% were definitely, very likely or likely to have another child via compensated surrogacy.

All respondents were asked in which of seven countries they would consider entering into a surrogacy arrangement if they had a need. India received the highest levels of consideration (see Figure 6 on page 75). Only 45% would consider an arrangement in Australia and 42% in the US. Thailand received particularly low levels of consideration (12%), considering its proximity to Australia. This is possibly due to adverse publicity around differences in immigration procedures for infants born in Thailand at the time the survey was conducted. Consideration of surrogacy in Australia is disappointingly low.

Those who had used an agency in the US or India in the past were significantly more likely than the average to consider using that country again.

Response to criminalisation laws

Respondents were asked to imagine they were both considering a compensated arrangement and resident in a state or territory in which laws made engaging in overseas compensated surrogacy a criminal offence (whether or not they actually lived in such a jurisdiction). They were asked to nominate which one of five different decisions they would take (see Figure 7 on page 75).

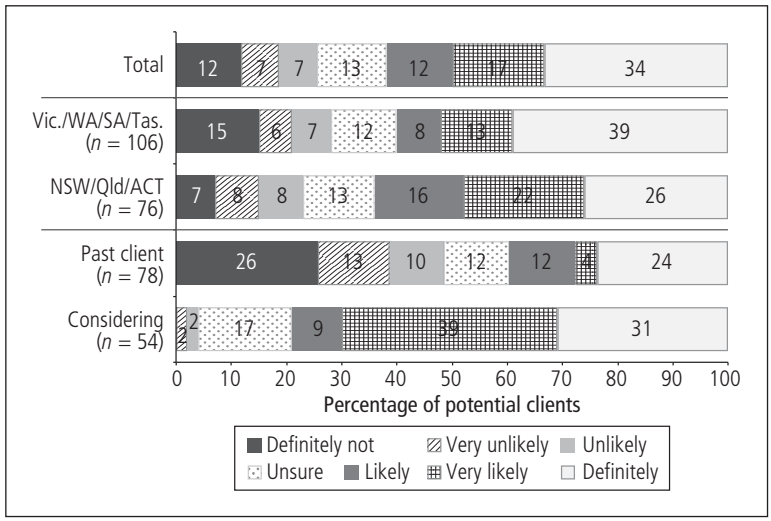

Figure 5: Likelihood of entering into a new compensated surrogacy contract, by state/territory of residence and whether new or past client

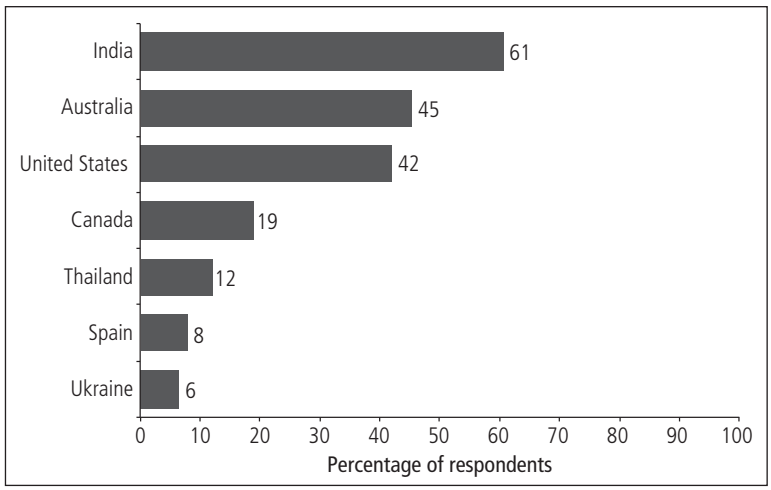

Figure 6: Countries that respondents would consider for future surrogacy

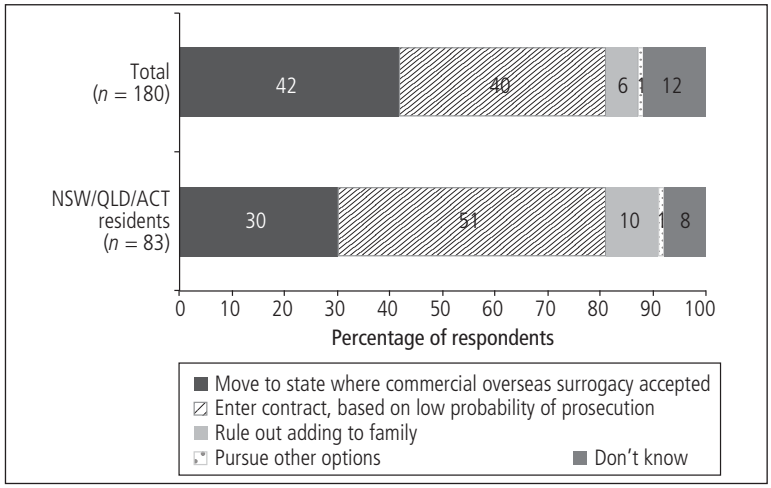

Figure 7: Responses to considering compensated surrogacy in scenario where participant is resident in state with criminalisation laws

Only 7% of respondents said that such laws would be a deterrent to compensated surrogacy. The most common option (for 51%) was to enter into an overseas surrogacy contract regardless, based on a low probability of prosecution. The second most common response entailed moving to an Australian state where overseas surrogacy is not criminalised.

Disclosure issues

Informing children of their origins

Parents and intending parents through surrogacy were asked at what stage, if any, they would tell their child that an egg donor had been used, if this was the case. Most (88%)

would tell the child when they were young, while 8% would tell the child when they were 16–18 years. Three per cent would only inform their child of their donor origins if there was a medical need. One per cent felt it best not to tell at all.

In regard to informing the child that a surrogate had carried them, 95% would tell the child when they were young and 5% when the child was 16–18 years. There were no differences in responses by sexuality of the parents.

Donor identification

Respondents were informed that in some countries, donors can donate either anonymously, with no opportunity for their offspring to make later contact, or via "identity release", where the child may access donor contact details when they reach adulthood.

Respondents were asked which type of donor they were most comfortable with and what type they felt best for the child. Only 64% were most comfortable with using an identity release donor. A far higher proportion (81%) believed that identity release donors would be of most benefit to their child.

Heterosexual respondents were more likely than gay male respondents to be most comfortable with an anonymous donor (41% vs 32%), though this difference was not statistically significant. Of ten factors considered in selecting a donor, donor willingness to be identified was ranked lowest in importance. Donor health and the donor's family health history were the principal issues of importance.

Discussion

Shifts in public policy away from adoption to alternative legal orders have clearly had a significant role in dissuading potential parents from permanent foster care, given the lesser certainty of permanency. For example, Victoria's Permanent Care orders, unlike adoption orders, do not change the legal status of the child and expire when the child turns 18 or marries. There is also provision for revoking or amending such orders.

Intended parents are steering clear of regulated surrogacy

The findings demonstrate that the drive to have a child with a biological link to one or both parents is greater than the barriers erected by Australian legislators trying to discourage use of unregulated and cross-border arrangements.

The number of Australian parents having children through regulated surrogacy arrangements annually remains very low ($n = 14$ in 2010) compared to well over 270 babies estimated to be have been born to Australians, according to a 2011 self-report survey of just 14 surrogacy agencies in India, the US and Thailand (Everingham, 2012; Macaldowie, Wang, Chambers, & Sullivan 2012).

In fact, even among those survey respondents currently engaged in an arrangement in Australia, a significant proportion chose to use a private arrangement rather than engage in the complexities of regulated surrogacy, thus forgoing benefits (such as the transfer of the intending parental name to the birth certificate) while avoiding what may have been perceived as barriers (lengthy delays due to screening requirements, and legal and psychological counselling).

Drivers of offshore surrogacy

Surrogacy Australia analysed the surrogacy industry internationally, Australian state and federal laws, how these laws are applied in practice, and social media discussion by

intended parents. This revealed a number of factors that have contributed to the high numbers of Australians engaging in overseas arrangements. These include:

- a fast maturing commercial surrogacy industry, marketing itself principally via online and word-of-mouth channels to intended Australian parents;
- the preparedness of Australia's then Department of Immigration and Citizenship to award citizenship by descent to any infant for which DNA testing proves a genetic match with an Australian citizen;
- the reluctance of state governments with criminalisation provisions with regard to compensated surrogacy to police such law;
- state-based surrogacy laws that discourage intended parents from publicly advertising for a surrogate or vice versa;
- the exclusion of certain applicants from accessing regulated surrogacy (e.g., single or partnered males in some states);
- the requirement for lengthy screening and ethics approval processes for all parties before embryo transfers may commence;
- a lack of well-screened Australian surrogates, leading to some surrogacy arrangements breaking down prior to or after birth;
- discomfort among many intended parents in using a close friend or family member as their surrogate; and
- a desire by many intended parents to "fast-track" what is perceived to be a slow process in Australia. Sourcing a surrogate and donor, obtaining a specialist appointment, undergoing screening and psychological evaluation, seeking approvals and starting treatment can delay embryo transfer by a year or more in Australia, while it can be considerably expedited overseas.

The rise (and fall) of Australians using surrogacy in India

Australian citizenship-by-descent applications for infants born to Australians in India (394 in 2011) have increased by 132% over 2008–11 (Department of Immigration and Citizenship, 2012). This rise may have been associated with greater awareness among Australians of India as a surrogacy destination, linked to increased media and online exposure.

The high numbers of Australians choosing India as a destination for surrogacy has been partly due to the availability of highly trained, English-speaking doctors, well-equipped hospitals and speedy access to treatment. Private medical services are comparable in quality with those provided in more economically developed countries, but at a substantially lower cost (Chinai & Goswami, 2007). Between 2004 and 2006, the number of Indian websites advertising surrogacy services more than quadrupled, with marketing heavily geared to foreigners (Smerdon, 2008).

However, since this survey was conducted, India has introduced restrictions on foreigners' access to surrogacy. Australians wanting to access surrogacy in India now require a medical (surrogacy) visa, the conditions of which stipulate that the applicant must have been married for at least two years and be resident in a country in which overseas surrogacy is not illegal. Hence, those excluded from access to this visa include single intended parents, de facto couples and gay men. Such intended parents will be more likely to engage in surrogacy in the US, Thailand or Australia.

Recognition as legal parents

Australian law currently fails to recognise parents using overseas arrangements as the legal parents of their child(ren) through surrogacy, regardless of a biological

connection. This situation, added to the criminal stigma pervasive in some states, may lead some children to view their social parents in a poorer light or, worse, have a tainted view of their own identity. Such outcomes would not be in the best interests of children, despite the intention of Australian legislation to place the best interests of the child as paramount.

Parental disclosure of surrogacy and egg donation

State-based legislation in some jurisdictions that criminalise families using overseas surrogacy makes it more likely that some (particularly heterosexual) families will conceal the nature of their child's origins to both the child and third parties. Such legislation also makes it likely that many children born through surrogacy will later discover that their manner of gestation was conducted outside the law.

It is clear that in many cases donor eggs are required by those using overseas surrogacy. These are mostly acquired from overseas donors who have not agreed to identity release and have often provided only limited medical history. Intended parents will often have only a first name, scant personal details and a picture of their donor to share with their child as they grow up. The vast majority surveyed intended to disclose early to their child that a donor was used.

However, research shows that for heterosexuals parents, intention does not always translate to practice. In a UK study by Jadva, Blake, Casey and Golombok (2012) of 42 heterosexual parents through uncompensated surrogacy followed up intermittently over a ten-year period post-birth, just under half of those using traditional surrogacy had not disclosed the use of the surrogate mother's egg, and thus the child was unaware that the surrogate mother was their genetic mother.

Findings from another study of infertile women planning on using surrogacy to start a family also showed that most women would disclose the use of surrogacy but not the use of gamete donation, suggesting that intended parents find it more difficult to disclose the use of third-party gametes than the use of third-party gestation (van den Akker, 2000).

Conclusions

It is clear that Australians who cannot carry a pregnancy themselves are overwhelmingly choosing to engage in overseas rather than domestic surrogacy arrangements, despite the recent efforts of Australian states to provide legal pathways to parenthood for uncompensated surrogacy arrangements.

Many in this group intend to continue to ignore state-based laws or move interstate in order to create a biological family of their own through surrogacy. These findings, together with the continuing low numbers of intended parents accessing uncompensated surrogacy or foster care arrangements, strongly suggest that Australian adoption, permanent care and legally accessible surrogacy processes are failing to meet the needs of the involuntarily infertile to create or add to their family.

In the interests of both harm minimisation and protecting the interests of children, there is an urgent need to address these issues through a review of relevant policy and legislation. Australia may need to improve access to surrogacy domestically to prevent intended parents being so discouraged by laws and regulations that they circumvent these by engaging with overseas jurisdictions.

Better access to surrogacy within Australia would require far greater availability of appropriately screened and motivated surrogates. For this to occur, the adoption of

models that work well in other jurisdictions would be necessary. Possible initiatives could include:

- a non-government, not-for-profit agency to act as a matching service between surrogates and intended parents;
- appropriate standardised financial compensation for the surrogate mother, managed by a third party, which recognises her time out of the workforce, her labour, physical discomfort and restrictions while pregnant; and
- community education to provide wider understanding of the characteristics needed to be a surrogate mother, to assist in increasing the pool of Australian surrogates.

All children born through surrogacy arrangements should be treated consistently, fairly and be guaranteed the same rights as other children to a prejudice-free life and the protections entailed by legal recognition of their biological parent(s).

References

Australian Institute of Health and Welfare. (2012). *Adoptions Australia 2011–12* (Child Welfare Series No. 54; Cat. No. CWS 42). Canberra: AIHW.

Blyth, E. (1995). Not a primrose path: Commissioning parents' experiences of surrogacy arrangements in Britain. *Journal of Reproductive and Infant Psychology*, *13*, 185–196.

Chinai, R., & Goswami, R. (2007). Medical visas mark growth of Indian medical tourism. *Bulletin of the World Health Organization*, *85*(3), 164–165.

Department of Immigration and Citizenship. (2012). *Citizenship by descent applications granted to infants by India and USA posts 2008–2011* [FOI request FA 12/03/00935]. Canberra: DIAC.

Edelmann, R. J. (2004). Surrogacy: The psychological issues. *Journal of Reproductive and Infant Psychology*, *22*(2), 123–136.

Everingham, S. (2012, May). *Money time & conviction: How Australians are accessing surrogacy*. Paper presented at the Surrogacy Australia National Conference, Melbourne.

Jadva, V., Blake, L., Casey, P., & Golombok, S. (2012). Surrogacy families 10 years on: Relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins. *Human Reproduction*, *27*(10), 3008–3014.

Langdridge, D., Connolly, K., & Sheeran, P. (2000). Reasons for wanting a child: A network analytic study. *Journal of Reproductive and Infant Psychology*, *18*(4), 321–338.

Luk, J., Greenfield, D. A., & Seli, E. (2010). Third party reproduction and the aging couple. *Maturitas*, *66*, 389–396.

Macaldowie, A., Wang, Y. A., Chambers, G. M., & Sullivan, E. A. (2012). *Assisted reproductive technology in Australia and New Zealand 2010* (Assisted Reproduction Technology Series No. 16; Cat. No. PER 55). Canberra: AIHW.

Page, S. (2011, May) *Rail gauges re-invented: The wonderful world of Australian surrogacy regulation*. Paper presented at the Fertility Nurses of Australia Conference, Gold Coast, Qld.

Smerdon, U. R. (2008). Crossing bodies, crossing borders: International surrogacy between the United States and India. *Cumberland Law Review*, *39*(1), 15–86.

van den Akker, O. (2000). The importance of a genetic link in mothers commissioning a surrogate baby in the UK. *Human Reproduction 15*, 1849–1855.

van Balen, F., & Trimbos-Kemper, T. C. M. (1995). Involuntarily childless couples: Their desire to have children and their motives. *Journal of Psychosomatic Obstetrics & Gynaecology*, *16*, 137–144.