

# Surrogates', intended parents', and professionals' perspectives on ways to improve access to surrogacy in Australia

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## ABSTRACT

While altruistic surrogacy arrangements are permitted in Australia, commercial ones are not. Regardless of this, most intended parents undertake commercial arrangements by bypassing domestic laws and engaging with foreign surrogates. Considering the welfare risks and ethical concerns associated with international surrogacy, developing a more accessible model of surrogacy in Australia has been proposed as a harm minimization approach. This study aims to describe how Australians who have navigated or facilitated surrogacy believe access to arrangements could be improved. Australian surrogates, intended parents, parents through surrogacy, and surrogacy professionals were interviewed, and interview transcripts were analysed thematically. The themes identified were 'improve public awareness', 'develop policies to guide healthcare practitioners', 'establish agencies', and 'reform the law'. 'Reform the law' had four sub-themes: 'harmonise laws across the states and territories'; 'grant intended parents legal parenthood at birth'; 'legalise commercial surrogacy and gamete donation'; and 'fair surrogate compensation'. Findings indicate that improving access to surrogacy in Australia will require an overhaul of the legislative environment relating to surrogacy and gamete donation, policies to guide healthcare practitioners, and public awareness campaigns.

**KEYWORDS:** Surrogacy, Law reform, Legal parentage

## I. BACKGROUND

Surrogacy arrangements involve a surrogate conceiving, carrying a pregnancy and giving birth under the premise of relinquishing the child to the intended parents at or soon after birth. While this process provides the opportunity of parenthood to those for whom pregnancy poses a health risk and those who are unable to carry a child, it is not a universally accepted means of reproduction. Surrogacy is criminalized in some parts of the world,

including in Italy where the head of the Catholic Church recently called for a worldwide ban on the 'deplorable' practice.<sup>1</sup> In other countries, surrogacy is legally permitted; however, regulatory frameworks for surrogacy practices vary between countries.

It is convention to label surrogacy arrangements altruistic or commercial to distinguish between arrangements where the surrogate is only reimbursed for expenses and those where they are paid an additional fee. These terms are contested by scholars.<sup>2</sup> The distinction falsely implies payment beyond reimbursement cannot coexist with altruism. What counts as a permitted reimbursable expense within one altruistic setting might be considered a commercial payment in another. Moreover, the distinction centres surrogate payment as the defining feature of a commercial arrangement, and not the other commercial entities which may be involved, including fertility clinics and lawyers. Nevertheless, this distinction has shaped legal responses to surrogacy in many parts of the world.

Commercial and altruistic surrogacy arrangements are legal in some jurisdictions, for example, in California, Georgia, and Mexico. In these jurisdictions, third-party agencies match intended parents to a surrogate, coordinate the legal and medical processes on their behalf, and mediate contact between surrogates and intended parents. Also in these jurisdictions, intended parents are typically granted legal parenthood at birth and the surrogate has no parental rights.

Other countries, such as Australia, New Zealand, and the UK, prohibit commercial surrogacy and permit only altruistic arrangements. In these countries, there are typically restrictions on how third parties can operate. For example, third parties in the UK can only operate as not-for-profit organizations. In some Australian jurisdictions, third parties cannot advertise or charge fees for matching a surrogate to intended parents. In these jurisdictions, legal parenthood is typically assigned to the surrogate at birth and is then transferred to the intended parents through a court application.

Surrogacy arrangements often involve donated gametes, particularly donated eggs. Jurisdictions differ in their regulatory approaches to gamete donation. Similar to surrogacy, some only allow altruistic donations, while others permit donor payment beyond the reimbursement of expenses. Also, in some jurisdictions, such as South Africa and Spain, gamete donors are required to be anonymous, whereas in others, such as New Zealand, the UK, and Australia, donor anonymity is banned and donor-conceived individuals have the right to know the identity of their donor at the age of majority.

There are significant barriers for intended parents to access altruistic surrogacy and donor gametes. Australian<sup>3</sup> and British<sup>4</sup> intended parents report difficulties in finding a surrogate and worry about the surrogate not relinquishing the child. There is also a shortage of egg and sperm donors in Australia and the UK. Consequently, many seek commercial surrogacy arrangements overseas ('international' surrogacy).

International surrogacy can be perceived by intended parents as more legally secure and straightforward than an arrangement in the home country. For some intended parents, a legal framework which grants legal parentage at birth provides a sense of legal certainty, not

<sup>1</sup> J. Horowitz, 'Francis Urges Ban on Surrogacy, Calling It "Despicable"' (8 January 2024). *The New York Times*. <<https://www.nytimes.com/2024/01/08/world/europe/pope-francis-surrogacy-ban.html>> accessed 1 March 2024.

<sup>2</sup> K. Horsey, 'The Future of Surrogacy: A Review of Current Global Trends and National Landscapes' (2023) 48 (5) *Reproductive BioMedicine Online* 1–16.

<sup>3</sup> S.G. Everingham, M.A. Stafford-Bell and K. Hammarberg, 'Australians' Use of Surrogacy' (2014) 201 (5) *Medical Journal of Australia* 270–273; E. Kneebone and others, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and overseas' (2023) 26 (6) *Human Fertility* 1448–1458.

<sup>4</sup> V. Jadva, H. Prosser and N. Gamble, 'Cross-Border and Domestic Surrogacy in the UK Context: An Exploration of Practical and Legal Decision-Making' (2021) 24 (2) *Human Fertility* 93–104; K. Horsey and others, 'Surrogacy in the UK: Myth Busting and Reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform' (Report, Surrogacy UK, November 2015).

only for themselves but also for their surrogate.<sup>5</sup> Being able to pay a surrogate beyond expenses can also be viewed as a more just and fair approach than having someone carry a baby for no financial reward.<sup>6</sup> Furthermore, international surrogacy may be someone's only option if surrogacy is prohibited in their home country or if eligibility criteria restrict access to married heterosexual couples.

International surrogacy is associated with significant ethical concerns and risks to the welfare of surrogates and children. Concerns pertaining to surrogates arise mostly from jurisdictions in which surrogacy clinics and agencies rely on financially disadvantaged women to act as surrogates. In these destinations, practices infringing on surrogates' bodily autonomy and ability to provide free and informed consent have been reported, including forced late-term abortions, forced caesarean sections, and oppressive living environments.<sup>7</sup>

Individuals born through international surrogacy will likely face difficulties should they wish to find information regarding, or contact, their genetic or gestational mother. This is because anonymous gamete donation is common,<sup>8</sup> and some intended parents do not have contact with their foreign surrogate.<sup>9</sup> While there is a growing trend of prohibiting anonymous gamete donation in recognition of the child's right to know information about their genetic origins,<sup>10</sup> the practice is still common in international surrogacy destinations.<sup>11</sup> There is also an increased risk of multiple births and its associated adverse pregnancy outcomes such as preterm birth due to the unregulated nature of fertility clinics in many of these destinations.<sup>12</sup>

Australia is one of the largest 'exporters' of intended parents in the world.<sup>13</sup> In the 2021–2022 financial year, 213 Australian babies were born through international surrogacy, primarily in the USA.<sup>14</sup> In contrast, just 100 domestic surrogacy births were reported by Australian and New Zealand fertility clinics in 2021.<sup>15</sup> The well-being of Australian children born through international surrogacy has been identified as a major concern for key stakeholders in Australia, such as reproductive specialists, lawyers, and health policy regulators.<sup>16</sup> Evidence suggests that most Australian intended parents would prefer to complete surrogacy in Australia if it were possible.<sup>17</sup> As such, the harms associated with international surrogacy could be reduced if domestic arrangements were more accessible.<sup>18</sup>

<sup>5</sup> C. Fenton-Glynn, 'International Surrogacy Arrangements: A Survey' (3 June 2024). *Cambridge Family Law*. <<https://www.family.law.cam.ac.uk/survey-international-surrogacy-arrangements>> accessed 5 June 2024.

<sup>6</sup> E. Jackson and others, 'Learning from Cross-Border Reproduction' (2017) 25 (1) *Medical Law Review* 23–46.

<sup>7</sup> N. Lepapa, 'Hard Labour: The Surrogacy Industry in Kenya—Part I' (28 May 2021). *The Elephant*. <<https://www.theelephant.info/investigations/2021/05/28/hard-labour-the-surrogacy-industry-in-kenya-part-i/>> accessed 1 March 2024; M. Roache, 'Ukraine's "Baby Factories": The Human Cost of Surrogacy' (13 September 2018). *Aljazeera*. <<https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy>> accessed 1 March 2024; S. Saravanan, 'An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India' (2013) 8 (10) *Philosophy, Ethics, and Humanities in Medicine* 1–12.

<sup>8</sup> Kneebone and others (n 3).

<sup>9</sup> M. Smietana, S. Rudrappa and C. Weis, 'Moral Frameworks of Commercial Surrogacy within the US, India and Russia' (2021) 29 (1) *Sexual and Reproductive Health Matters* 377–393.

<sup>10</sup> V. Ravitsky, 'Knowing Where You Come From': The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness' (2010) 11 (2) *Minnesota Journal of Law, Science & Technology* 655–684.

<sup>11</sup> Kneebone and others (n 3).

<sup>12</sup> *Ibid.*

<sup>13</sup> S. Everingham and A. Whittaker, 'Trends in Engagement in Surrogacy by Nationality 2018–2020: A Survey of Surrogacy Agencies' (2023) 8 (1) *Global Reproductive Health* 1–12.

<sup>14</sup> Australian Department of Home Affairs, *Freedom of Information Request FA 22/08/00210* (Freedom of Information Request, 2022).

<sup>15</sup> J. E. Newman, R. C. Paul and G. M. Chambers, 'Assisted Reproductive Technology in Australia and New Zealand 2021' (Report, Sydney: National Perinatal Epidemiology and Statistics Unit, the University of New South Wales, Sydney, 2023).

<sup>16</sup> L. Zannettino and others, 'Untangling the Threads: Stakeholder Perspectives of the Legal and Ethical Issues Involved in Preparing Australian Consumers for Commercial Surrogacy Overseas' (2019) 27 (1) *Journal of Law and Medicine* 94–107.

<sup>17</sup> Kneebone and others (n 3).

<sup>18</sup> J. Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 (3) *Journal of Bioethical Inquiry* 477–490

Legal scholars have long advocated for legalizing commercial surrogacy in Australia to achieve this.<sup>19</sup> Some Australian intended parents pursuing international arrangements believe it is unfair for women to act as surrogates without payment,<sup>20</sup> and would prefer commercial surrogacy to become legalized in Australia<sup>21</sup>. However, commercial surrogacy is a contentious topic which for some members of the Australian public raises concerns about the commodification of reproduction and the potential exploitation of surrogates.<sup>22</sup> Little is known about the broader surrogacy community's attitudes towards the idea.

This study aims to address this gap by exploring the views of Australians who have navigated or facilitated surrogacy on how access to domestic arrangements could be improved.

## II. METHODS

### I. Context

Australia is a federation of six states—New South Wales (NSW), Queensland (QLD), South Australia (SA), Tasmania (TAS), Victoria (VIC), Western Australia (WA)—and two territories—the Australian Capital Territory (ACT) and the Northern Territory (NT). Each jurisdiction is responsible for regulating surrogacy arrangements within their own borders. This is because the states and territories are responsible for the provision of health services to their residents.

Surrogate and intended parent eligibility requirements differ across Australia's states and territories (Table 1).<sup>23,24</sup> The minimum age of surrogates and intended parents varies, as does the presence of a requirement for both parties to be Australian citizens or permanent residents, and to undergo criminal record screening. Heterosexual couples with a medical indication for surrogacy are eligible in all jurisdictions, but same-sex couples and single individuals are only eligible in certain jurisdictions. In some jurisdictions, the surrogate must have previously given birth or reside in the same state or territory as the intended parents.

Most Australian surrogacy arrangements occur between friends and family members.<sup>25</sup> For those unable to find a surrogate through existing networks, closed Facebook groups are used as a forum for prospective parents and potential surrogates to meet and source information.<sup>26</sup> There are no surrogacy agencies in Australia. However, the charity Surrogacy Australia offers a for-fee support service which includes introductions between potential surrogates and intended parents, although only two to three introductions occur on average per year.<sup>27</sup>

Under federal law, when a surrogate gives birth, she (and her de facto or married partner, if applicable) is considered the legal parent.<sup>28</sup> Intended parents are required to apply to the courts for a Parentage Order to transfer parentage from the surrogate (and her partner if

<sup>19</sup> L. Skene, 'Why Legalising Commercial Surrogacy is a Good Idea' (10 December 2012). *The Conversation*. <<https://theconversation.com/why-legalising-commercial-surrogacy-is-a-good-idea-11251>> accessed 1 March 2024; T. Johnson, *The Regulation of Commercial Surrogacy in Australia: A Harm Analysis*, PhD Thesis (Queensland University of Technology, 2020).

<sup>20</sup> Everingham and others (n 3); Jackson and others (n 6).  
<sup>21</sup> D.W. Riggs, "25 Degrees of Separation" Versus the "Ease of Doing It Closer to Home": Motivations to Offshore Surrogacy Arrangements Amongst Australian Citizens' (2015) 5 (1) *Somatechnics* 52–68.

<sup>22</sup> K. Tremellen and S. Everingham, 'For Love or Money? Australian Attitudes to Financially Compensated (Commercial) Surrogacy' (2016) 56 (6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 558–563.

<sup>23</sup> Comments made in relation to legislation are correct at the time of writing (February 2024).  
<sup>24</sup> Parentage Act 2004 (ACT); Surrogacy Act 2010 (NSW); Surrogacy Act 2010 (Qld); Surrogacy Act 2019 (SA); Surrogacy Act 2012 (TAS); Assisted Reproductive Treatment Act 2008 (VIC); Surrogacy Act 2008 (WA).

<sup>25</sup> M. Montrone and others, 'A Comparison of Sociodemographic and Psychological Characteristics among Intended Parents, Surrogates, and Partners Involved in Australian Altruistic Surrogacy Arrangements' (2020) 113 (3) *Fertility and Sterility* 642–652.

<sup>26</sup> Jackson and others (n 6).  
<sup>27</sup> A. McKie, 'Surrogacy Australia's Support Service (SASS) End of October 2023 - Monthly Report' (Report, Surrogacy Australia, 2023).

<sup>28</sup> Family Law Act 1975 (Cth).

**Table 1.** Surrogate and intended parent eligibility in each Australian state and territory

IPs' state/territory	Minimum age of surrogate	Surrogate prior live birth	Surrogate domiciled in state/territory	Australian citizen or permanent resident	Criminal record screening	Minimum age of IPs	Same-sex couples are eligible IPs	Single individuals are eligible IPs
ACT	81	✗	✗	✗	✗	18	✓	✗
NSW	25	✗	✗	✗	✗	25	✓	✓
NT	25	✗	✓	✓	✗	25	✓	✓
QLD	25	✗	✗	✗	✗	25	✓	✓
SA	25	✗	✗	✓	✓	25	✓	✓
TAS	25	✓	✓	✗	✗	21	✓	✓
VIC	25	✓	✗	✗	✗	18	✓	✓
WA	25	✓	✗	✗	✗	At least one IP must be ≥25 years	✗	Women only

Note: IP: intended parent.

applicable) to them. The post-birth transfer of parentage process takes, on average, between 2 and 6 months and can cost up to AUD 6,000.<sup>29</sup> If a Parentage Order is granted, the birth certificate of the child is re-issued to list the intended parents as the birth parents. The re-issued birth certificate does not state that the child was born through surrogacy, but, in some states/territories, if donor gametes were used, the birth certificate contains an addendum which states that there is additional information about their birth available.

## 2. Study design

This was a qualitative study using semi-structured interviews. Qualitative methods can be used to describe how a phenomenon is experienced or perceived by a person of interest.<sup>30</sup> The study was approved by the Monash University Human Research Ethics Committee (36145).

## 3. Inclusion criteria

Australian surrogates, intended parents, parents through surrogacy, and Australians working in a professional capacity facilitating people through surrogacy were eligible to participate in this study.

## 4. Recruitment

Professionals, intended parents, and parents through surrogacy were invited to participate via email. The contact details of the professionals were previously known to the researchers as personal contacts or obtained online through their professional web page. The contact details of the intended parents and parents through surrogacy were previously known to the researchers as they were provided by participants in a previous study who were willing to be interviewed for this study. In the previous study, participants were recruited through social media and the support and advocacy organizations, Surrogacy Australia and Growing Families.<sup>31</sup> The surrogates were recruited through snowball sampling—intended parents and parents through surrogacy were asked to share the recruitment email with surrogates.

Surrogates, intended parents, and parents through surrogacy who agreed to participate were asked to fill in a short form which gathered information regarding their state/territory of residence and characteristics relating to their surrogacy journey. We purposively sampled participants until there was an equal number of surrogates, parents through surrogacy, and surrogacy professionals, and all states and the ACT were represented. We did not expect to recruit participants who lived in the NT as surrogacy only became legal there at the time the interviews were conducted (December 2022). Surrogates and parents through surrogacy who had completed their surrogacy arrangement within the last 5 years were prioritized.

Written consent was obtained from participants prior to the interviews. Complimentary access to an infertility and assisted reproductive technology counsellor was offered to all participants; however, none took up this opportunity.

## 5. Data collection

Semi-structured interviews use researcher knowledge to identify the questions that should be asked to address the research question. The interview guide was informed by our

<sup>29</sup> T. Culhane-Smith, 'Australian Surrogacy Process Chart: A Complete Guide to Surrogacy' (December 2022). *Surrogacy Australia*. <<https://www.surrogacyaustralia.org/wp-content/uploads/2023/01/Australian-Surrogacy-Process-Chart-V3.8.pdf>> accessed 1 March 2024.

<sup>30</sup> K. Hammarberg, M. Kirkman and S. de Lacey, 'Qualitative Research Methods: When to Use Them and How to Judge Them' (2016) 31 (3) *Human Reproduction* 498–501.

<sup>31</sup> Kneebone and others (n 3).

previous systematic review on the experiences of surrogates and intended parents,<sup>32</sup> and a survey of Australian intended parents' decision making.<sup>33</sup> It included questions about participants' lived experience of surrogacy and of providing professional support to surrogacy participants and their attitudes towards Australia's regulation of surrogacy. Topics included: sources of information and support; experiences of undertaking the preconception legal requirements; experiences of surrogate reimbursement; experiences of the transfer of legal parentage; attitudes towards Australian surrogacy laws; and attitudes towards laws in other countries. The interview guide was reviewed by an experienced qualitative researcher not associated with the study and a parent through surrogacy. Amendments were made based on their feedback. A copy of the interview guide is included in the supplementary materials.

EK conducted the interviews via Zoom between December 2022 and April 2023. The interviews lasted between 46 and 97 minutes, with a mean duration of 63 minutes. The interviews were recorded using Zoom's cloud recording feature, which also generates an audio transcription. EK viewed recordings and edited transcripts to ensure the interviews were transcribed verbatim.

## 6. Data analysis

Reflexive thematic analysis was used to analyse the interview transcripts.<sup>34</sup> The output of this method is 'themes', patterns of shared meaning across the data set. Data analysis involved six steps: (i) familiarizing yourself with the data; (ii) generating codes; (iii) searching for themes; (iv) reviewing themes; (v) defining and naming themes; and (vi) producing the report.

EK familiarized herself with the data by watching the video recordings and reading the transcripts. Prior to coding, E.K. identified the sections of the transcripts which related to the accessibility of surrogacy. This was done because the interviews explored the participants' experiences of surrogacy more generally than relating to access alone. These sections were copied into Excel and inductively coded line-by-line. All authors (EK, KH, and KB) reviewed, defined, and agreed upon the final themes.

To identify the transcript sections relating to access, the content was mapped to Levesque and others' five dimensions of patient-centred access to healthcare<sup>35</sup>; approachability, acceptability, availability and accommodation, affordability, and appropriateness of the service. Table 2 provides a definition of these as they apply to surrogacy.

The Australian surrogacy community is small, and extra caution was taken to not report findings, which could reveal the participants' identity. Only a description of the participant's involvement with surrogacy (surrogate/parent through surrogacy/surrogacy professional/intended parent) is provided alongside the illustrative quotes in the results section.

## 7. Reflexivity

Like all research, this project is shaped, in part, by the authors' personal experiences and assumptions. The authors all identify as white women—two of the authors have experienced childbirth and mothering, one of whom did so through donor conception. This study is the final stage of a larger mixed-methods project in which the authors have investigated whether the surrogacy regulations in Australia meet the needs of surrogates, intended parents, and those born through surrogacy. Throughout this project, the authors have met with, collaborated with, and disseminated research findings to members of the surrogacy community.

<sup>32</sup> E. Kneebone, K. Beilby and K. Hammarberg, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: A Systematic Review' (2022) 45 (4) *Reproductive BioMedicine Online* 815–830.

<sup>33</sup> Kneebone and others (n 3).

<sup>34</sup> V. Braun and V. Clarke, 'Using Thematic Analysis in Psychology' (2008) 3 (2) *Qualitative Research in Psychology* 77–101; V. Braun and V. Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11 (4) *Qualitative Research in Sport, Exercise and Health* 589–597.

<sup>35</sup> J. Levesque, M. F. Harris and G. Russel, 'Patient-Centred Access to Health Care: Conceptualising Access at the Interface of Health Systems and Populations' (2013) 12 (18) *International Journal for Equity in Health* 1–9.



**Table 2.** Levesque and others' five dimensions of access as applied to surrogacy

Dimension	Definition as applied to surrogacy
Approachability	Surrogacy is perceived as a possible and legal route to parenthood.
Acceptability	Surrogacy is a culturally and socially accepted route to parenthood.
Availability and accommodation	The legal and medical requirements of a surrogacy arrangement can be met in a timely manner.
Affordability	Intended parents, surrogates, and their families have the economic capacity to spend the resources and time required to participate in a surrogacy arrangement.
Appropriateness	The fit between the surrogacy arrangement and the needs of intended parents, surrogates, and their families.

Because of this, the author who conducted the interviews (EK) had already established a rapport with some of the interview participants.

### III. RESULTS

#### 1. Participants

Fifteen individuals were interviewed (Table 3). All participants identified as white Australians and their ages ranged between 30 and 59 years, although one participant did not provide their age. Participants resided across all Australian states (Table 3), and most lived in capital cities ( $n = 13$ ).

The six professionals worked in legal ( $n = 2$ ), psychological ( $n = 2$ ), and support ( $n = 2$ ) roles. Most had a lived experience of surrogacy—two were parents through surrogacy, and two had acted as a surrogate.

Of the six women who had acted as a surrogate, five had carried for a same-sex male couple and one for a heterosexual couple (Table 4). Four surrogates met their intended parents through online internet forums or Facebook groups, while two carried for family members. Five women had given birth to one child through surrogacy, while one had given birth twice to two singletons to the same intended parents. At the time of the interview, the age of the children they birthed ranged between 2 months and 4 years.

Of the intended parent and parents through surrogacy, four were in same-sex male relationships and three were members of a heterosexual relationship (Table 5). Of the three heterosexual individuals, two were married to each other and were interviewed together at their request. Four parents through surrogacy had completed surrogacy overseas—in Ukraine, the USA, and India—and two had completed surrogacy in Australia. Two parents had two children through surrogacy and the others had one. At the time of the interview, the age of their children ranged between 2 months and 16 years.

#### 2. Themes

Four overarching strategies to improve access to surrogacy in Australia were identified: 'improve public awareness', 'develop policies to guide healthcare practitioners', 'establish agencies', and 'reform the law'. 'Reform the law' had four sub-themes: 'harmonise laws across the states/territories'; 'grant intended parents legal parenthood at birth'; 'legalise commercial surrogacy and gamete donation'; and 'fair surrogate compensation'.



**Table 3.** Participant characteristics ( $n = 15$ )

<b>Participant characteristics</b>	<b>N</b>
Involvement with surrogacy <sup>a</sup>	
Professional	6
Intended parent	1
Parent through surrogacy	6
Surrogate	6
Location in Australia	
Queensland	3
New South Wales	4
South Australia	1
Tasmania	1
Victoria	2
Western Australia	4

<sup>a</sup> Number is greater than 15 because some professionals were also parents through surrogacy or had acted as surrogates.

**Table 4.** Characteristics of the surrogates ( $n = 6$ )

<b>Surrogate characteristics</b>	<b>N</b>
Sexual orientation of IPs	
Same-sex male couple	5
Heterosexual couple	1
Relationship to IPs	
Family member	2
New connection	4
Time since latest surrogacy birth	
0–6 months	1
1–2 years	3
3–4	2

**Table 5.** Characteristics of the parents through surrogacy ( $n = 6$ ) and intended parent ( $n = 1$ )

<b>Characteristics</b>	<b>N</b>
Relationship status	
Same-sex male couple	4
Heterosexual couple	3
International versus domestic	
International	4
Domestic	3
Number of children through surrogacy	
0	1
1	3
2	3
Age of youngest surrogacy child	
0–6 months	2
1–2 years	1
3–5	1
5–10	0
11–16	2
NA <sup>a</sup>	1

<sup>a</sup> Not applicable because one participant (the intended parent) did not have a child through surrogacy.

### *A. Improve public awareness*

Participants noted that members of the public were poorly informed about whether surrogacy was legal and whether surrogates were paid. Participants explained that this resulted in people asking the '*rudest, weirdest, strangest things*' (P7, parent through surrogacy), eg:

*It's amazing how many people ... that are straight up like 'is it your kid?'. (P8, parent through surrogacy)*

It was common for surrogates to be motivated by second-hand experiences of infertility, such as working within the fertility industry or having same-sex male friends. It was suggested that if surrogacy was normalized and better understood in the community, more women would come forward wanting to act as a surrogate:

*I don't know if I'd not worked in that [fertility] clinic if I ever would have been a surrogate, because it's such a far-fetched idea. (P12, surrogate)*

*If it was a more commonplace or less daunting prospect, then I think that Australia would have more surrogates come forward. (P12, surrogate)*

### *B. Develop policies to guide healthcare practitioners*

Participants recounted both positive and negative experiences with healthcare providers. Positive experiences were categorized by providers viewing surrogacy as a legitimate practice and respecting the parenting intentions of the surrogate and intended parents.

*[The hospital] gave the boys their own room. They treated me and both babies as separate patients. I didn't have to discharge at the same time as the babies did. They sent the home midwives to check on me and the babies separately. (P13, surrogate)*

Conversely, negative experiences involved healthcare providers not recognizing the legitimacy of surrogacy arrangement. One participant (a parent through surrogacy) recounts their hospital experience where their surrogate could not be discharged from the hospital without the baby:

*[My surrogate] and I got the message loud and clear that if she left, child safety would be notified ... I was immediately branded invisible. I wasn't a parent. (P10, professional, parent through surrogacy)*

In one instance, a public hospital refused service:

*I rang up [the public hospital] and said it was a surrogacy and I'm gonna have the intended mother there and then they said 'no, we don't really do surrogacy'. So we had to go through private. (P14, surrogate)*

A hospital policy relating to surrogacy arrangement was recommended to be developed at the state level:

*The way it is now, every single hospital has to reinvent the wheel to create a surrogacy policy for themselves ... they've got to work it out for themselves each time, with very limited information on how to do this. Let's just have a surrogacy policy at the state level. (P15, professional)*

### C. Establish agencies

Attitudes towards surrogacy agencies were mixed. Some participants advocated for them to be established in Australia because currently 'there's nowhere to go for help' (P7, parent through surrogacy) and they would make it easier for intended parents to find a suitable surrogate.

*There's a lack of any meaningful process of screening potential surrogates in the Australian context. So some [intended parents] may get a surrogate offer, and then she'll ghost them. She'll vanish after talking to them online for a few months because she's changed her mind or partner's talked it out of her ... So many many people I deal with have had that experience. (P1, professional, parent through surrogacy)*

It was also noted that:

*Having an agency in place moderates some of the behaviour, because [surrogates and intended parents] have to deal with the third party who can say 'No, don't do that. You shouldn't be doing that and this is why'. (P10, professional, parent through surrogacy)*

Some surrogates and professionals raised concerns about the commercial nature of agencies and advocated for non-profit organizations to take on the role of agencies. Concerns were raised about how for-profit models might increase the cost borne by intended parents and attract staff without a lived experience of surrogacy:

*The amount of fees that [intended parents] pay to this company will end up getting higher and higher and push it out of the way, so that more people can't afford it ... It's all people who are being paid to give advice. People who probably haven't even been surrogates or IPs themselves, so really don't know how it feels, giving advice because they've been paid to do so. (P13, surrogate)*

For some surrogates and professionals, however, concerns were raised about the potential for any paid service to take advantage of intended parents who are desperate to find a surrogate, regardless of whether the service provider operates as non-profit or not.

*I just think a paid service that's privately owned, or privately run ... there's all sorts of ethical and integrity issues with it that it just leaves intended parents kind of vulnerable. Like, 'do we join it or not? And if we do, do we actually get anything for it?'. (P9, professional, surrogate)*

### D. Reform the law

#### Harmonize laws across the states/territories

Participants expressed frustration at the differences in surrogacy laws across Australia's states and territories, particularly the laws stipulating surrogate and intended parent eligibility. The requirement for intended parents to be a heterosexual couple and for surrogates to have previously given birth was deemed discriminatory by participants.

*I think one [state] doesn't even allow gay couples to go through the process. I just think like it's 2022, like that is so discriminatory! (P5, surrogate)*

*In some states you can't surrogate for people, even if you haven't had your own children, which you know, some people don't ever want to have their own kids, but would still like to help somebody else out. (P13, surrogate)*

Uniform laws across Australia were advocated for so 'there'd be less confusion' (P14, surrogate) and to prevent people from circumventing local laws by moving interstate:

*Uniform laws would be nice ... I've got clients that will leave one state and go to another state because the laws in their home state don't suit them. (P9, professional, surrogate)*

### **Grant intended parents legal parenthood at birth**

Participants, intended parents in particular, viewed the post-birth transfer of parentage as an unnecessary and expensive bureaucratic process and advocated for automatic recognition of the intended parents' parental status when the child was born.

*It's just an expensive bureaucratic process. It would just be so much easier and straightforward to have it all done at the beginning at the birth. (P11, intended parent)*

Surrogates and professionals had mixed views towards the post-birth transfer of parentage. While some advocated for automatic recognition of the intended parents' parental status, others were ambivalent or agreed with the status quo. For some, the surrogate's name on the birth certificate was symbolic of her importance in bringing the child to life. Here a professional recounts a time when they asked a surrogate what they thought about the matter:

*She said 'it's like I did nothing. If that happened, I did nothing'. She said 'I think it's important that it's documented legally that this is what happened'. (P3, professional)*

An alternative approach was proposed in which the intended parents are granted legal parenthood from birth, but the surrogate's role is also formally recognized on the birth certificate:

*Ideally there'd be some kind of thing where there's like a birth record, which still officially recognises her role, but also so we can be the legal parents from birth so we don't have to go through all that. (P4, parent through surrogacy)*

However, participants also explained that the current process means the intended parents cannot cut ties with the surrogate immediately following the birth and avoid the post-birth expenses.

*I don't actually mind the process as it currently is because I think there's a little bit more accountability for the IPs to maintain contact and do the things they're meant to, because until [transfer of parentage] legally goes through, you have to do the right thing. (P9, professional, surrogate)*

### Legalize commercial surrogacy and gamete donation

Participants had mixed views towards legalizing surrogate payment beyond reimbursement. Those in support noted that it would help to make surrogacy more accessible to intended parents by increasing the number of women willing to act as a surrogate and would recognize the labour performed by surrogates.

*[Commercial surrogacy] would benefit families who can't have a child, and it would also benefit Australian women. It would put money back into the economy. It wouldn't have to go under the table. They wouldn't have to be on these Facebook weird groups. It would be a win win for both parties I think if you could do a commercial model. (P7, parent through surrogacy)*

*The baby that I carried cost his dads \$60,000. Who earned the \$60,000? The IVF clinic, the lawyers, the doctors, the counsellors. I didn't earn a penny. Why shouldn't I earn some like everybody else? (P6, professional, surrogate)*

Parents through surrogacy and professionals noted the shortage of egg donors in Australia and argued that more donors will be required should access to surrogacy be increased. Participants advocated for permitting commercial donation in order to increase the number of people willing to donate.

*We have commonwealth and state laws that say "don't pay egg donors" and they have up to 15 years jail time and what's the impact? We have a critical shortage of egg donors. (P10, professional, parent through surrogacy)*

Various reasons were proposed for opposing commercial surrogacy. Some believed additional payment would negate the altruism that currently underpins surrogacy in Australia. Others were concerned that further payment could result in the exploitation of financially disadvantaged women and surrogates' autonomy being infringed upon.

*I've met such wonderful people over time. It's a very special thing they do, and they're doing it because it's a very special thing. (P3, professional)*

*I think [commercial surrogacy] would then encourage people to do it for the wrong reasons ... a lot of women who are perhaps facing a lot of financial hardship or lower [socioeconomic status] background in general ... I worry it would lead to the misuse and the abuse of females. (P5, surrogate)*

*You might also have really bad relationships where the [intended parents] expect the surrogate to do whatever they want, because they're paying them. That doesn't give autonomy to the surrogate. (P14, surrogate)*

### Fair surrogate compensation

According to participants, surrogates are frequently left out-of-pocket. In some instances, surrogates were left out-of-pocket because they did not ask for reimbursement of costs incurred (as a result of feeling awkward or not wanting the intended parents to bear the expense). In other instances, it was allegedly because the intended parents did not want to cover all the costs.

*There were times when I would use my sick days instead of asking them to cover my wages, because I'd be off when I was pregnant ... It wasn't because I couldn't ask them, because I could and they would have covered it. But I just kind of felt like it's already expensive enough.* (P13, surrogate)

*Sometimes, intended parents come in and they view surrogacy as something like a business project. This can result in them viewing their surrogate as a resource in that project. If they are working within a limited budget, this can lead them to putting pressure on their surrogate to minimise her pregnancy or birth related needs. It's like "we've only got \$40,000, do you really need that?"* (P15, professional)

To “make up for all the little bits that you can't ever chase up” (P12, surrogate), participants advocated for a new model of surrogacy—compensated surrogacy. This model involved the payment of a flat fee to cover all expenses incurred, as well as additional compensation for the time and effort involved with the arrangement. Participants made it clear, however, that the fee should not be so high as to become a financial incentive.

*It's pretty well understood that surrogates are pretty selfless and don't like asking for things. So rather than having to go cap-in-hand like, "Oh, my back's really killing me. May I please have a massage?", it'd be nice if there was some kind of stipend or something on top of expenses. So they can have a little bit more wriggle room and to try and make the process as stress free as possible.* (P4, parent through surrogacy)

*The way I describe commercial [surrogacy] is where you pay a woman to have a child, but there's no limit on the cost ... So it becomes a sort of a capitalistic endeavour. And then there's the compensated model ... it's still altruistic, but it's compensated altruistic, where there's a reasonable amount of expenses that you can expect that will cover a woman for 9 months.* (P2, parent through surrogacy)

#### IV. DISCUSSION

This study aimed to identify strategies which could improve access to surrogacy arrangements in Australia. The findings suggest that surrogacy is legally, socially, and financially challenging to navigate and that increasing access requires a multipronged approach which includes an overhaul of laws relating to surrogacy and gamete donation, policies to guide healthcare practitioners, and public awareness campaigns. In doing so, the number of Australian intended parents seeking international surrogacy and the associated risks of harm can be reduced.

Increasing access to surrogacy is likely to be opposed by those who view surrogacy as inherently unethical. There is a vocal group who advocate against surrogacy on the basis that it severs the natural bond between a mother and child. In 2023, an international convention (the ‘Casablanca Convention’) for the global abolition of surrogacy became public.<sup>36</sup> More recently, the group behind the convention held a 2-day international conference in Italy aiming to inform ‘public decision-makers about the harmful effects of surrogacy’.<sup>37</sup> Prohibiting

<sup>36</sup> Declaration of Casablanca, Casablanca 2023 (Web Page). <<https://declaration-surrogacy-casablanca.org/casablanca-2023/>> accessed 5 June 2024.

<sup>37</sup> Declaration of Casablanca, Rome 2024 (Web Page). <<https://declaration-surrogacy-casablanca.org/rome-2024/>> accessed 5 June 2024.

surrogacy, however, will not protect women and children. It will instead force more intended parents into accessing surrogacy through unregulated or black markets where the welfare risks will be higher. The most feasible way to minimize these risks is to provide intended parents with the opportunity to access safe and ethical surrogacy at home.<sup>38</sup>

Participants reported low community awareness about surrogacy and its regulation in Australia. Although empirical investigation into the Australian public's knowledge has not been conducted, there are anecdotal reports from members of the surrogacy community of the public holding misconceptions towards surrogacy such as 'that it's illegal, that it's impossible, and that there are restrictions that in fact do not exist'.<sup>39</sup> Confusion surrounding the legal status of surrogacy may in part be explained by the divergent regulatory responses to surrogacy seen across the world and even between Australia's states and territories. Improving the public's awareness of surrogacy as a legitimate means of reproduction may increase the number of women wanting to become surrogates. Research with Canadian surrogates revealed that visible representation of surrogacy on social media influenced their decision to pursue surrogacy.<sup>40</sup> Interviews with Australian egg donors have similarly identified the need for raising public awareness about egg donation.<sup>41</sup> Future research into the Australian public's knowledge of surrogacy and its regulation could inform campaigns aimed at raising awareness for the need for surrogacy.

Currently, there are no national or state/territory guidelines available in Australia for healthcare providers detailing the appropriate provision of care for surrogacy teams. This is a significant issue because as demonstrated in this study, some providers lack the expertise to appropriately care for surrogacy teams. The UK Government, in collaboration with surrogacy organizations and healthcare practitioners,<sup>42</sup> has issued guidance on this very matter. The guidance specifies that with the surrogate's consent, the intended parents should be treated as the parents and the baby and surrogate can be discharged separately.<sup>43</sup> This aligns with how the study participants conceptualized positive healthcare experiences. An independent inquiry into South Australian surrogacy laws recommended the development of guidance for healthcare practitioners.<sup>44</sup> While this has yet to be completed, this study provides further evidence for the need of such guidance.

Considering the contentious nature of surrogacy, it's not surprising that the participants had mixed views towards law reform, particularly regarding the topics of surrogate payment and the recognition of parentage. This finding aligns with the results of a recent survey study which aimed to ascertain the views of intended parents and surrogates in the UK towards

<sup>38</sup> N. Gamble and others, 'In Support of Surrogacy: a Response to the Pope's Call for a Universal Ban' (22 January 2024). *BioNews*. <<https://www.progress.org.uk/in-support-of-surrogacy-a-response-to-the-popes-call-for-a-universal-ban/>> accessed 5 June 2024.

<sup>39</sup> S. Jefford, *Surrogacy Information for Healthcare Providers (Web Page)*. <<https://sarahjefford.com/surrogacy-information-for-healthcare-providers/>> accessed 5 June 2024.

<sup>40</sup> S. Fantus and P. A. Newman, 'Motivations to Pursue Surrogacy for Gay Fathers in Canada: A Qualitative Investigation' (2019) 15 (4) *Journal of GLBT Family Studies* 342–356.

<sup>41</sup> R. G. Hogan and others, '“Battery Hens” or “Nuggets of Gold”: A Qualitative Study on the Barriers and Enablers for Altruistic Egg Donation' (2022) 25 (4) *Human Fertility* 688–696.

<sup>42</sup> Department of Health & Social Care, *The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales (Web Page)*. <<https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>> accessed 5 June 2024.

<sup>43</sup> Department of Health & Social Care, *Care in Surrogacy: Guidance for the Care of Surrogates and Intended Parents in Surrogate Births in England and Wales (Web Page)*. <<https://www.gov.uk/government/publications/having-a-child-through-surrogacy/care-in-surrogacy-guidance-for-the-care-of-surrogates-and-intended-parents-in-surrogate-births-in-england-and-wales#post-birth>> accessed 5 June 2024.

<sup>44</sup> D. Plater and others, 'Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA)' (Report, South Australian Law Reform Institute, 2018).



law reform suggestions.<sup>45</sup> Around half of the participants in that study agreed that the surrogate should be reimbursed for all expenses incurred *and* receive a modest payment on top and three-quarters agreed the surrogate should *not* be the legal parent at birth. The remaining disagreed or were unsure. However, a lack of consensus should not deter lawmakers from considering such reform proposals.

Because surrogacy challenges traditional norms some perceptions may be based more on ideologies rather than lived experience.<sup>46</sup> For example, interview participants who were opposed to commercial surrogacy conflated payment beyond the reimbursement of expenses and the absence of altruistic motivations. This was also reported in a survey study of the Australian public's attitudes towards surrogate payment.<sup>47</sup> While the dichotomous labelling of commercial and altruistic surrogacy does imply that commercial surrogates are not altruistically motivated, this is not necessarily true. Payment does not preclude altruistic motivations, and this has been demonstrated by multiple studies from the US in which commercial surrogates report a desire to help others.<sup>48</sup>

Some scholars use the term *compensated* surrogacy to more accurately describe surrogacy arrangements where surrogates receive payment beyond the reimbursement of expenses, but are still altruistically motivated.<sup>49</sup> Compensated surrogacy was argued for by participants in this study and in a previous interview study of Australians who had completed cross-border reproductive care.<sup>50</sup> Fairly compensating surrogates would prevent them from being left out-of-pocket and provide them with financial recognition for the labour undertaken and the risks involved with pregnancy and childbirth. Any attempt to determine the appropriate fee should be undertaken with consultation with the surrogacy community.

The findings of this study have clear implications for Australia, but also for other countries which similarly permit only 'altruistic' surrogacy. In 2023, the Law Commission of England and Wales and Scottish Law Commission published surrogacy law reform recommendations following 4 years of inquiry.<sup>51</sup> The commission recommended a 'new pathway' for domestic surrogacy which would grant intended parents legal parentage from birth, like participants in this study, in particular intended parents, advocated for. As part of this pathway, surrogates have the ability to withdraw their consent to relinquishment until 6 weeks after the birth. The UK government has decided not to move forward with the commission's recommendations for the time being.<sup>52</sup> The findings from this study support the need for intended parents to be granted legal parentage from birth. However, the proposed new pathway received mixed responses because of the various conditions it imposed on surrogacy participants. For example, the surrogate must be

<sup>45</sup> K. Horsey and others, 'UK Surrogates' Characteristics, Experiences, and Views on Surrogacy Law Reform' (2022) 36 (1) *International Journal of Law, Policy and the Family* 1–16; K. Horsey and others, 'UK Intended Parents' Characteristics, Experiences, and Views on Surrogacy Law Reform' (2023) 37 (1) *International Journal of Law, Policy and the Family* 1–17.

<sup>46</sup> Horsey (n 2).  
<sup>47</sup> Tremellen and Everingham (n 22).

<sup>48</sup> M. Smietana, 'Affective De-Commodifying, Economic De-Kinning: Surrogates' and Gay Fathers' Narratives in U.S. Surrogacy' (2017) 22 (2) *Sociological Research Online* 163–175; Z. Berend, 'The Romance of Surrogacy' (2012) 27 (4) *Sociological Forum* 913–936.

<sup>49</sup> P. Gerber, 'Arrests and Uncertainty Overseas Show Why Australia Must Legalise Compensated Surrogacy' (24 November 2016). *The Conversation*. <https://theconversation.com/arrests-and-uncertainty-overseas-show-why-australia-must-legalise-compensated-surrogacy-69203>; R. Sifris and S. Page, 'Australian Surrogacy Law: Recommendations for Reform' in P. Gerber and M. Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Lawbook Co, 2nd ed, 2021).

<sup>50</sup> Jackson and others (n 6).

<sup>51</sup> Law Commission of England and Wales and Scottish Law Commission, 'Building Families Through Surrogacy: A New Law', Report Vol 2 (2023).

<sup>52</sup> A. Fox, 'Proposed Changes to Surrogacy Law "Will Not Be Taken Forward at the Moment"' (10 November 2023) *The Independent*.

domiciled in the UK which would exclude many British intended parents.<sup>53</sup> Further consideration may therefore be needed before law reform is achieved in the UK.

Within the Australian context, granting legal parentage to the intended parents at birth would avoid the overly bureaucratic and expensive court process currently required. The concerns also raised in this study relating to intended parents not abiding by their post-birth responsibilities to the surrogate might be mitigated if the intended parents perceive the surrogate as having the ability to withdraw her consent for a certain period of time post-birth. Crucially, by implementing such a change, the intentions of both parties—the surrogate and intended parents—are appropriately reflected at birth and immediately following.<sup>54</sup>

The primary strength of this study is that it has considered access not just from the perspective of the intended parents, but also from surrogates and those working in the field. In fact, this is the first study in Australia to investigate surrogacy from the perspective of the surrogate. The framework used to guide the analysis was particularly useful in this study because other definitions of access do not address a service's appropriateness and this is crucial for exploring surrogacy access because undesired surrogacy regulations, such as the prohibition of commercial surrogacy, can drive people overseas.<sup>55</sup>

The following limitations should also be considered when interpreting the findings. The participants were largely recruited through social media, particularly via closed Facebook groups, and people not involved with these online communities may have different views. The findings also do not include the views of all those who should be consulted when considering law reform in this area. For example, it will also be important to ascertain the views of those born through surrogacy and gamete donors involved in surrogacy arrangements. We also were not able to recruit participants from the NT or the ACT, which are the two smallest Australian jurisdictions by population.

Since the first laws on surrogacy were introduced in Australia in 1984,<sup>56</sup> over 30 inquiries have been conducted,<sup>57</sup> and yet the current regulatory environment still fails to adequately support people involved with surrogacy. It will become an increasingly common form of family formation and improving access to domestic arrangements—in Australia and elsewhere—protects women and children from the harms associated with the unregulated international market. The findings of this study suggest that while law reform is required to achieve this, policies to guide healthcare practitioners and public awareness campaigns should accompany legislative efforts to support people engaged in surrogacy.

## ETHICS APPROVAL

The study was approved by the Monash University Human Research Ethics Committee (36145).

<sup>53</sup> N. Gamble and H. Prosser, 'Law Commissions' Proposals Won't Achieve Surrogacy Modernisation' (17 April 2023). *BioNews*. <<https://www.progress.org.uk/law-commissions-proposals-wont-achieve-surrogacy-modernisation/>> accessed 5 June 2024.

<sup>54</sup> T. Johnston, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in P. Gerber and K. O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate Publishing Limited, 1st ed, 2015)

<sup>55</sup> Riggs (n 21).

<sup>56</sup> A. Stuhmcke, 'Surrogate Motherhood: The Legal Position in Australia' (1994) 2 (1) *Journal of Law and Medicine* 116–124.

<sup>57</sup> Plater and others (n 44); M. Thompson and D. Plater, 'An Issue that is not Going Away: Recent Developments in Surrogacy in South Australia' (2019) 16 (1) *Journal of Bioethical Inquiry* 477–481.

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