



COMMENTARY

Surrogates' and intended parents' experiences of surrogacy arrangements: a systematic review

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ABSTRACT

This commentary situates the recently published systematic review of empirical studies of surrogates' and intended parents' experiences of surrogacy by Kneebone, Beilby and Hammarberg within the context of increased international interest in legislative and regulatory reforms to surrogacy. The commentary evaluates the strengths of this systematic review, before turning to a discussion of how jurisdictions could introduce reforms aiming to facilitate domestic surrogacy arrangements, focusing on the UK and the Law Commission's recent proposals.

INTRODUCTION

The recent systematic review of empirical studies of surrogates' and intended parents' experiences of surrogacy by Kneebone, Beilby and Hammarberg, published in this journal (*Kneebone et al., 2022*), provides an excellent starting point for those exploring surrogacy – particularly cross-border arrangements. The authors presented an overview of studies conducted in 12 different jurisdictions, allowing this review to be a good way to contextualize current and future debates on surrogacy regulation. As noted by the authors, it is important that policy makers are informed by the lived experiences of those involved in surrogacy. Many Minority World states, including New Zealand, the Republic of Ireland and the UK, are likely to reform their surrogacy legislation in the relatively near future. It is in this context that this commentary is offered.

Many of the studies reviewed detailed commercial gestational surrogacy

experiences, often cross-border. Although many of these jurisdictions, for example India, generated much academic interest at the time, they have since prohibited cross-border surrogacy arrangements. With 13 out of the 47 studies discussing India, the emphasis of the findings is somewhat skewed as a result.

The strength of the review lies in the finding that both 'sides' of surrogacy arrangements – surrogates and intended parents – were generally satisfied with their experiences, hoping to maintain relationships after birth. Expectedly, this was more challenging in cross-border arrangements, sometimes due to language or communication difficulties. The geographical distance involved often led to feelings of disengagement and lack of control or connection, particularly compared with 'domestic' arrangements. At other times, this was directly a product of the same rules that led intended parents to seek cross-border surrogacy, for example problems

accessing 'domestic' surrogacy due to restrictions on eligibility.

Surrogates based in India and Ukraine were more likely to leave their families for some of the surrogacy; in these locations, surrogates were actively discouraged from building any kind of relationship with the intended parents. The disparity in agency between surrogates and all other stakeholders was clear in India, with surrogates reporting feeling a loss of autonomy, being 'subjected to medical procedures which they had no say over such as fetal reduction and caesarean sections'. Exploitative practices were allowed by those managing the arrangements (and sometimes asked for by intended parents), as seen, for example, in surrogates caring for babies after birth, or in terms of breastfeeding expectations. Other infringements on autonomy were described 'in settings where profit-driven clinics operate with no regulatory oversight' and 'oppressive living environments, poor surrogate health care and forced late-

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term abortions', mostly in unregulated surrogacy operations in Ukraine and Kenya. There were also lower levels of continued contact between surrogates and the families they helped to create, and more legal challenges.

The authors define their dichotomy between 'commercial' and 'altruistic' settings. However, the terms are contested and overlap. That surrogates in both these settings show no real indication of money being their driving motivation, but rather a desire to help others have families, is supported in the current authors' own work. Similarly, evidence of these pervasive surrogacy myths, mostly connected to stigma (e.g. Russian surrogates) or social acceptability (e.g. surrogates keeping their decisions a secret) and misconceptions about surrogacy were prevalent across jurisdictions, more so than expected. However, this could be related to the study's time frame and skewing towards studies of commercial/gestational surrogacy in India in particular.

The study must be contextualized in terms of much of the literature not falling within its methodology, including non-peer reviewed pieces, blogs, expert reports, etc., and peer-reviewed papers pre-dating the study time frame, as the included publications spanned just over 10 years, from January 2010 to June 2021. Of particular interest are the themes and subthemes identified by the researchers: most of their findings resonate with those of other studies, anecdotal stories in the 'surrogacy community' and our own research. Kneebone, Beilby and Hammarberg's conclusion that there should be 'collaboration between fertility organisations to develop best practice guidelines' to 'support clinics in providing international surrogacy services that minimise the risk of harm to those accessing care' is also of particular note.

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The likelihood of an international framework for surrogacy any time soon is exceptionally remote. Regardless, removing barriers to domestic surrogacy and/or the 'push factors' prompting intended parents turn to engage in cross-border surrogacy is especially welcome. In fact, this is a focus of the Law Commission of England and Wales and Scottish Law Commission's joint review

of surrogacy laws, with their final report and draft bill expected in spring 2023. It is anticipated these will include attempts to bolster domestic surrogacy in the UK and provide a secondary route for the recognition of cross-border surrogacy arrangements.

New Zealand's recent Law Commission review is similar: facilitating domestic ('altruistic') surrogacy, aiming to reduce the number of New Zealanders opting for cross-border care, while recognizing the need for those who do go overseas to have their familial relationships recognized upon their return (*Te Aka Matua o te Ture | New Zealand Law Commission 2022*). In Ireland, the Oireachtas' Joint Committee on International Surrogacy has also taken evidence on how the Republic should deal with international surrogacy, in the light of a domestic Bill that proposed to do nothing about it; recommendations include the establishment of a pathway for the legal parenthood of children born from international surrogacy arrangements, similar to the *Law Commissions' 2019* draft proposals, discussed later.

The question is how to make 'domestic' surrogacy more attractive. The authors of the review suggest that prohibitions on commercial surrogacy are the primary barrier to access, with 'expanding the financial compensation that altruistic surrogates receive' encouraging more surrogates. We do not agree that this is necessarily the solution. Instead, it is necessary to combat pervasive surrogacy 'myths', especially the perception of surrogacy as 'dangerous' or contested – or even illegal, as demonstrated by a recent Progress Educational Trust study into public opinions (*Progress Educational Trust, 2022*). The lack of certainty engendered by the legal framework prompts intended parents to worry about surrogates renegeing on agreements (and hence they do not get their longed-for child) and simultaneously renders surrogates concerned about being left with a baby they did not intend to have – despite all evidence pointing the other way, even in the UK's 'altruistic' context.

The next biggest perceived risk, in our view, stems from the opaqueness of the current UK legislation in relation to parental orders – the legal mechanism transferring parenthood after birth from

the surrogate (and their partner, as applicable) to the intended parents. In particular, the 'requirement' (although it is clearly not) that no money other than to cover the surrogate's 'reasonable expenses' should have passed between the parties results in a hyperawareness of all finances exchanged, with surrogates potentially being left out of pocket (*Mahmoud, 2022*) and intended parents fearing that they risk losing legal parenthood if they 'get it wrong' (*Horsey and Sheldon, 2012*). Unsurprisingly, some intended parents prefer to undertake their surrogacies within a commercial context, with the security of enforceable contracts, and the involvement of brokers and agencies, as well as legal parenthood at birth. However, in these circumstances, without legal advice counselling otherwise, intended parents may be unaware of the requirement of a parental order to establish legal parenthood in the UK, or the fact that legal parenthood is more than being named on the birth certificate. Domestic surrogacies, with certainty in parenthood and payments established prior to birth, are in everyone's best interests.

The *Law Commissions' 2019* draft proposals afford intended parents legal parenthood at birth, provided that their specified 'pathway' for surrogacy is followed. Against the backdrop of a more tightly regulated framework, this pathway includes recognized surrogacy organizations, and informed consent proffered by written agreements, legal advice and implications counselling. Although agreements on the whole would remain unenforceable, unlike New Zealand's proposals (NZLC, 2022, recommendation 8), financial arrangements may be afforded more security. No movement towards a commercial model is seen in the UK, New Zealand or Ireland, but reforms to rules surrounding advertising may occur, recognizing the difficulties in their enforcement in a digital age. A regulator for recognized surrogacy organizations and the creation of a surrogacy register further enhances the ever-growing legitimacy of surrogacy as a modern form of family building (*DHSC, 2018*). Overall, these reforms – should they materialize – will modernize the domestic practice of surrogacy, providing much-needed security and certainty. In this way, the legal, social and other support that surrogates and intended parents receive will be brought in line with the already well-regulated and

successful clinical procedures used by many of those involved in surrogacy (see, for example, *Horsey et al., 2022*).

Importantly, though, are these changes desired by the surrogacy community? We argue that the answer to that is overwhelmingly 'yes'. The authors of the review suggest that 'regulators and policy-makers can, and should, be informed by the lived experiences of those involved in surrogacy', and we are in complete agreement with this.

Kneebone, Beilby and Hammarberg point to 'limited research on the experiences of altruistic surrogates'. Although true to an extent, both of the current authors have conducted empirical research with altruistic surrogates in the UK context and have found that surrogates, and less unexpectedly intended parents, support a move towards intended parents' legal parenthood resting from birth, and resist commercialization (or even a move towards them receiving payments beyond expenses) (*Horsey 2015, 2018; Mahmoud, 2022*). Furthermore, high levels of ongoing relationships are reported between intended parents, their children and the surrogates (and often their families). Psychological studies reveal that surrogates who operated within the UK context were happy with their decisions and that there was no negative effect on their own family relationships (*Jadva et al., 2019*). From the other side, a longitudinal study from the Cambridge Centre for Family Research shows that families created by surrogacy fared no better or worse overall than families created by other forms of assisted conception; indeed, when the children were aged 14 years, the families created by surrogacy were doing better than others (*Golombok et al., 2017*).

Surrogacy is here to stay as a legitimate form of family building (*DHSC, 2018*) and should be supported and legitimized by government and healthcare providers alike. Doing so safeguards the health and well-being of those involved, while

protecting the rights and interests of the children born, including in relation to their lifelong identity. With any luck, fewer intended parents will feel the need to participate in cross-border commercial surrogacy, especially as the emerging destinations are increasingly manifesting wherever surrogacy is completely unregulated. Cross-border surrogacy remains a concern, given the issues with autonomy, stigma and healthcare summarized by Kneebone, Beilby and Hammarberg in their review. While some destinations are better than others in the sense of better regulation and more ethical practices, including some US states (*Jadva et al., 2019, 2021*), this comes at a high financial cost, potentially pushing some towards less ethical surrogacy arrangements. In the absence of international protocols, clear rules, supporting people to become families through surrogacy in a safe, ethical way in their home countries, are very welcome in the UK and beyond.

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