

Information for IAFL/LawAsia webinar commemorating Anne-Marie Hutchinson

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Australian surrogacy statistics

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In the webinar I asserted that:

- For every baby born through surrogacy in Australia approximately three are born overseas.
- More Australian children are born via surrogacy in the USA than in Australia.
- The top 5 countries that Australians go to are the US, Ukraine, Georgia, Canada and Thailand, with growth happening in China.

It is estimated that approximately 48% of the Australian population are either migrants or the children of migrants. There has been extraordinary diversity of where Australians undertake surrogacy overseas. Sometimes I have seen in my practice Australians who are either migrants or descendants of migrants who have either undertaken, or considered going, to the home country to undertake surrogacy - as they have family support there and are familiar with the systems there. These countries have included:

Table 1

Countries where my clients have migrated from and have then considered, attempted or completed surrogacy journeys

Bangladesh
Brazil
Canada
China, excluding Hong Kong, Macao, Taiwan
Colombia
Ghana
Greece
Hong Kong ¹
India
Iran
Kazakhstan ²
Malaysia
New Zealand ³
Nigeria
Russian Federation

¹ But as surrogacy is not available in Hong Kong, then have considered surrogacy elsewhere, such as the USA and Canada.

² On discovering it was not available, underwent surrogacy in the US instead.

³ Margaret Casey QC and I have advised as to several trans-Tasman surrogacy journeys.

Singapore
South Africa
Sri Lanka
Ukraine
United Kingdom
United States of America

Sometimes they did not proceed. For example, the couple who had migrated from South Africa did not proceed with their surrogacy journey back there, as South African law required them to be domiciled there. While they could have returned to South Africa, they chose not to. They proceeded in the US instead.

Sometimes they were unsuccessful. For example, the heterosexual Queensland couple who returned to Ghana to undertake side by side IVF with implantation of the intended mother, along with implantation of identical embryos into her sister, i.e., surrogacy. Neither pregnancy succeeded. The couple ultimately underwent surrogacy in Australia instead.

By contrast, an Australian heterosexual couple who were migrants from Nigeria successfully underwent surrogacy in Nigeria. Nigeria does not have specific laws about surrogacy. Instead the birth mother, the surrogate, is deemed to be the mother. Adoption laws apply. The Nigerian court required a specific report from an Australian psychologist that the intended parents had given informed consent before it was prepared to make an adoption order.

Most overseas surrogacy destinations are not LGBTIQ friendly or friendly for single intended parents, for example, both the Ukraine and the Republic of Georgia require that the intended parents be a heterosexual married couple. Both the US and Canada are LGBTIQ friendly.

In the period from 30 June 2020 to 31 January 2021, according to the Australian Department of Home Affairs, citizenship applications for children born overseas via surrogacy have been made for children born in these countries:

Table 2
Where children were born via surrogacy who applied for Australian citizenship by descent, 30 June 2020 to 31 January 2021

Belarus
Brazil
Canada
China, excluding Hong Kong, Macao, Taiwan
Colombia
Czech Republic
Georgia
Greece
Guatemala

India
Mexico
New Zealand
Russian Federation
Thailand
Ukraine
United Kingdom
United States of America

According to the Department of Home Affairs, the top 5 destinations for Australian children born via surrogacy are:

Table 3
Top 5 Australian surrogacy destinations 1 July 2018 to 31 January 2021

No.	Country	Year ending 30 June 2019	Year ending 30 June 2020	Period 1 June 2020 to 31 January 2021	Year ending 30 June 2021*
1.	USA	95	120	55	86
2.	Ukraine	61	50	27	42
3.	Georgia	16	20	27	39
4.	Canada	14	34	18	28
5.	Thailand	10	11	6	9

*I have calculated the annual figure for the year ended 30 June 2021, assuming that the number of applications was at the same rate from 1 February 2021 to 30 June 2021, as it was from 1 July 2020 to 31 January 2021.

The difference in the number of domestic surrogacy journeys and international surrogacy journeys makes for sobering reading. The international figures are compiled by the Department of Home Affairs. The domestic figures are from the Australian and New Zealand Assisted Reproduction Database (ANZARD) run by the University of New South Wales⁴, which have four limitations:

- The Department's figures are for the year ended 30 June. ANZARD's figures are per calendar year.
- ANZARD's figures have a lag time of about two years.
- ANZARD only counts gestational surrogacy through IVF clinics. Traditional surrogacy – where the surrogate is also the genetic mother, which occurs either through a clinic or at home - is excluded.
- ANZARD includes clinics in Australia and New Zealand. Regrettably I do not have statistics for surrogacy in New Zealand. Australia has a population of about 25

⁴ I lecture in the Law and Ethics in Reproductive Medicine at the University of New South Wales. I take no part in the collection of the data or the organisation of ANZARD.

million, and New Zealand about 5 million. I have not reduced the domestic figures proportionately in Table 4, but I have done so in Table 5.

Table 4 Comparison of domestic and international surrogacy in Australia 2004 to 31 January 2021

Year ended 31 December	Domestic gestational surrogacy births (Australia and New Zealand)	Year ended 30 June	International surrogacy births (Australia)
2005	6		
2006	17		
2007	7		
2008	8		
2009	19	2009	10
2010	16	2010	<10
2011	23	2011	30
2012	19	2012	266
2013	35	2013	244
2014	36	2014	263
2015	52	2015	242
2016	45	2016	214
2017	62	2017	139
2018	86	2018	175
2019	73	2019	232
		2020	275
		2021 to 31.1.21	165 (annualised to 259)

One can therefore see the following:

1. In the calendar year 2019 there were 73 births domestically, but 232 internationally. If Australians and New Zealanders have children domestically via surrogacy at the same rate (and we don't know this), then the number of domestic births in Australia via gestational surrogacy for the calendar year 2019 were number of births 73 divided by combined population of Australia and New Zealand (25 + 5) multiplied by the population of Australia equals: $73/(25+5) \times 25 = 60.83$, rounded to 61. Therefore the 2019 figure is closer to 4 international births to 1 domestic birth (232 international births compared to 61 domestic births). Given that the number bounces from year to year, I took the more cautious approach to say that for every Australian child born via surrogacy, three are born overseas.
2. I have highlighted the explosion in growth in 2011 to 2012 which I discuss below.
3. More Australian children are born via surrogacy in the US than in Australia:

Table 5: Comparison of Australian children born via gestational surrogacy in Australia and in the USA 2015 to 31 January 2021

Year ended 31 December	Domestic gestational surrogacy births (Australia and New Zealand)	Domestic gestational surrogacy births – estimated Australia ⁵	Year ended 30 June	Australian children born via surrogacy in the US
2015	52	43	2015	57
2016	45	38	2016	49
2017	62	52	2017	66
2018	86	72	2018	67
2019	73	61	2019	95
			2020	120
			2021 to 31.1.21 Annualised	55 86

Drivers of international surrogacy

I said in the webinar that, as the figures demonstrate, the demand for surrogacy exceeds the availability of supply in Australia. Australians therefore go overseas in order to become parents. Sometimes they do so because they or their parents were migrants. Sometimes the research that intended parents do is very basic- reach for their phone, google “surrogacy” and then click on the link of the overseas agency. Often they might talk to other intended parents who have undertaken the journey.

There is a shortage of surrogates in Australia primarily because Australian laws prohibit the payment of surrogates other than for their expenses. Put bluntly, only a few women would potentially put their lives at risk to have someone else’s child, unless that woman was a relative or friend of the intended parents, and therefore had a deep emotional connection to them⁶.

Australian discrimination

Discrimination in the law also plays a part. Surrogacy law is primarily State based. An overview of these discriminatory barriers is as follows:

**Table 6
Australian surrogacy discrimination**

State or Territory	Discrimination?
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⁵ Using formula in point 1 under table 4 above.

⁶ My husband and I are parents to our daughter through a domestic surrogacy journey.

Australian Capital Territory	The intended parents must be a couple. The surrogate must be in a couple relationship. No discrimination based on sexuality.
New South Wales	None.
Northern Territory	There are no laws concerning surrogacy. The only IVF clinic therefore will not undertake surrogacy. Until the pandemic it was easier for NT residents to undertake surrogacy overseas than to do so interstate (which required residence for jurisdictional purposes). NT law appears to allow the IVF clinic to discriminate in the provision of assisted reproductive treatment. The NT is likely to have surrogacy laws in place in mid 2022 ⁷ .
Queensland	None. Queensland law appears to allow discrimination in the provision of assisted reproductive treatment, but this is not seen in practice ⁸ .
South Australia	None.
Tasmania	The intended parent/s, surrogate and her partner (if any), must all reside in Tasmania when entering into the surrogacy arrangement. Tasmania has a population of about 500,000.
Victoria	None.
Western Australia	The law allows single women, female couples and heterosexual couples to access surrogacy. See comments below.

Aside from its limited allowance for those who can undertake surrogacy, Western Australia has rigorous regulation of surrogacy for those allowed to proceed. Western Australia has about 10% of the Australian population, but has consistently had *one* birth a year via surrogacy. *If* Western Australian residents are undertaking international surrogacy at the same rate as other Australians, *then* for every child born in Western Australia via domestic surrogacy, 27 (based on the 2020 figures) are born overseas. It would appear axiomatic that to make it easier for Western Australian residents to undertake surrogacy at home will mean that fewer international surrogacy journeys will be completed by them, including in some cases to jurisdictions where the quality of IVF and human rights protections for the surrogate and child are poor.

⁷ I was a member of the Northern Territory Government's joint surrogacy working group.

⁸ By way of example, my husband and I undertook IVF in Queensland, followed by surrogacy in Queensland, prior to a parentage order made by the Childrens Court of Queensland (by which we formally became our daughter's parents).

Extra-territorial surrogacy offences

Four jurisdictions in the world make it an offence of some kind to engage in commercial surrogacy overseas. They are: Australian Capital Territory, New South Wales, Queensland and Hong Kong. This can also be an offence, due to long arm laws, in South Australia and Western Australia. Not one person has ever been prosecuted in any of those jurisdictions, despite the large numbers of residents from those jurisdictions apparently engaging in commercial surrogacy (which is a term that is defined by statute differently in each place), and despite the laws in Queensland being in place, for example, since 1988.

In Hong Kong, for example, the police are involved in the process. The parents apply for a permit for the child to reside in Hong Kong. So that they do not commit an offence by misleading the government, they say that the child was born via surrogacy. Police then arrest the parents and take them to the station, or politely ask them to attend. Once there, police ask questions of the parents – who then decline to answer, based on the right to silence. The parents are not prosecuted.

I am only aware of two cases in Australia where there was police involvement as to possible international commercial surrogacy. In the first case, police determined that the surrogacy (in Canada) was altruistic, and took no further action. In the other, the couple came to the attention of Australia's anti-money laundering agency. Police were concerned that the couple may have engaged in child trafficking, and commercial surrogacy. The couple had not had a child and were able to convince the police that the surrogacy arrangement was not a commercial one. Police took no further action.

In 2014, the then heads of the Australian family law system then Chief Justice Diana Bryant and then Chief Judge John Pascoe called for the repeal of these laws, as they make a mockery of the rule of law. They have not been repealed.

Hong Kong also makes it an offence to engage in commercial egg donation overseas. No one has been prosecuted. Under long arm laws, many Australians engaging in commercial egg donation overseas are likely to have committed serious offences, punishable by up to 15 years imprisonment. No one has been prosecuted. My clients have travelled the world to undertake egg donation, sometimes as part of the surrogacy journey and sometimes for some single women or heterosexual partners, egg donation without surrogacy.

Table 7
Where my clients have undertaken egg donation

Jurisdiction
Argentina
Cambodia (prior to surrogacy changes in 2016)
China
Cyprus
Greece
India (until 2018)

Laos (with Thailand)
Malaysia ⁹
South Africa
Thailand
Russian Federation
Ukraine

As seen in Table 4, in 2011 to 2012 there was an explosion in growth in the number of children born overseas via surrogacy, growing from 30 to 266, where it has remained relatively stable since, when domestic surrogacy declined from 23 births to 19 births, gradually increasing since then.

The explanation for the increase is simple. Each of the States enacted surrogacy legislation over a period of four years, between 2008 and 2012. The explosion in numbers, however, is attributable to two factors:

- New South Wales carried out a consultation process to enact what became the *Surrogacy Act 2010* (NSW). At no time in the consultation process did the Government ever say it was going to ban NSW residents from engaging in commercial surrogacy overseas. A last minute amendment in Parliament achieved that change- the amendment not having been foreshadowed, and resulting in a firestorm of publicity of aggrieved intended parents.
- That in turn led to a huge amount of publicity about surrogacy and its availability overseas, in turn leading to the formation of Surrogacy Australia, which commenced running seminars in 2011 concerning surrogacy.

The amendment aimed to prevent NSW residents going overseas and exploiting surrogates in developing countries. Instead, the process brought overseas surrogacy to the attention of NSW residents in particular (and then to the country), resulting in them primarily going to India in particular. None of those NSW residents were prosecuted. The change to the legislation had the opposite effect to the policy aim- it increased NSW residents going to developing countries for surrogacy, rather than deterred them.

Some final words

Many intended parents who undertake international surrogacy and egg donation overseas are not aware of the law when they enter into their deals. Some of them are particularly well educated and include lawyers- who did not think to get legal advice first. Instead they might have relied upon what they found on the web or been told by an agency. They may have assumed that IVF standards are the same the world over (they're not). Few things are more confronting than having to tell a fellow lawyer that they have likely committed a serious criminal offence- even if the chances of prosecution are very low.

⁹ While there might be restrictions on the availability of surrogacy for

I would urge anyone contemplating international surrogacy and egg donation to get expert legal advice at the beginning. It might save them a lot of money and heartache.

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