SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION
REVIEW OF SURROGACY LAWS

by

Margaret A. Somerville

Margaret A. Somerville AM, DSG, FRSC, FRSN,
A.u.A (pharm.), LL.B. (hons 1), D.C.L.,
LL.D. (hons. caus.)(x6), D.Sc.(hons. caus.), D.Hum.Let.(hons. caus.).

Samuel Gale Professor of Law Emeritus; Professor Emeritus, Faculty of Medicine.
Founding Director Emeritus, Centre for Medicine, Ethics and Law,
McGill University, Montreal
Professor of Bioethics, National School of Medicines,
Affiliate of the Institute for Ethics and Society,
The University of Notre Dame Australia,

Redfern, New South Wales
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SHOULD WE ALLOW 'COMMERCIAL SURROGACY' IN AUSTRALIA?

The title above sums up the question that I propose is one of the most important you will address in your Inquiry and I address in this submission: Should we allow 'commercial surrogacy' in Australia? Should payment of surrogate mothers, 'commercial surrogacy', continue to be prohibited? This prohibition means that no "fee, reward or other material benefit or advantage" is made to any person, including the surrogate mother, beyond reimbursing her reasonable costs."

Surrogate motherhood is an essential component of a much larger entity, the global, multibillion-dollar Fertility Industry. The role of surrogacy in this industry can be visualised in a New Yorker-style cartoon.

A nurse, with her back to the viewer, stands holding the hand of a small boy. Both face a row of stylised adults, each holding a glass of champagne.

Pointing at each adult in turn, she says to the boy: "That is your biological father (the sperm donor), your biological mother (the ovum donor), your gestational mother (the surrogate mother), your commissioning father, your commissioning mother (the intended parents), the IVF doctor who 'created' you, the lawyer who arranged the multi-party contracts, and the psychiatrist to sort you out."

Reproductive technology has allowed the Fertility Industry to deconstruct the previously inseparable elements of parenthood. Gestational motherhood is one of these elements. Previously, the unchallengeable law was that the woman who gave birth to a baby was the child's mother. Surrogate motherhood has changed that.

Currently, in many countries, abuses involving surrogate motherhood have precipitated legislation to limit or ban it. Your Terms of Reference ask you to conduct "a review of Australian surrogacy laws, policies and practices to identify legal and policy reforms …that …protect and promote the **human rights** of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount." This last statement is, in my view, the most important in the document, especially because that prioritisation is far from the current reality in the use of reproductive technologies.

Breach of children's rights…

Increasingly, as other countries realise the serious harms surrogacy inflicts on women and children and the abuses of their human rights it entails, its use in any form is being severely restricted or prohibited entirely. The ***World Youth Alliance*** (WYA) has recently made an excellent submission to the *UN Special Rapporteur on Violence Against Women and Girls*, which describes some of these developments. I strongly recommend reading this clear and concise document.[i] As the email to supporters of WYA with a copy of its submission attached says: "This is an important step forward in changing the international conversation around surrogacy from merely being one choice among many to an exploitative practice that treats women and children as objects to be bought and sold." (Email dated June 7, 2025)

The first and most fundamental question is whether surrogate motherhood, in general, is ethically acceptable. WYA argues it is not and I agree for a wide variety of reasons I identify later in this submission.

Surrogate motherhood is unethical because it breaches children's human rights regarding their coming-into-being and the family structure to which they have a right. It exploits vulnerable, socioeconomically deprived women. Its international commercialisation has opened up dehumanising scenarios, such as FedEx-ing frozen embryos to "warehouses" of surrogates in developing countries. And it seriously harms foundational societal values governing parent-child bonding, in particular that we have unconditional love for our children just because they are our children.

That said, as is so often true in trying to decide on the ethics that should govern human reproduction, especially regarding the use of reproductive technologies, there is no consensus.

And I know from personal experience how difficult it is to be faced with a sobbing, distraught woman unable to carry her and her husband's child and tell her that I believe that payment of surrogate mothers should be prohibited Her response – "I can't believe you would be so cruel as to disagree with our doing anything we can to have our own child" – this is the strongest argument for allowing surrogacy and possibly payment.

At present, as we can see in the NSW *Surrogacy Act 2010*, for example, 'commercial surrogacy' is prohibited, but what is called "altruistic surrogacy" is

not. You are asked to consider "how to reduce barriers to domestic altruistic surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy".

My concern is that bringing up the question of "reimbursement" in a light supposedly sympathetic to the birth mother, might, over time, cause public opinion to be more favourable to relaxing the prohibition on "commercial surrogacy". Indeed, the media coverage of the Inquiry has overtly exploited it as an opportunity to advocate for the repeal of the prohibition on payment. Even the *Law Society of NSW Journal Online* has engaged in such advocacy.

In the remainder of this Submission, I set out some of the arguments against allowing 'commercial surrogacy' from the perspectives of the harm to children it generates; the harm to surrogate mothers it inflicts; and the harms to individual societies it engenders and the global reality it creates.

ARGUMENTS AGAINST 'COMMERCIAL SURROGACY' FROM THE PERSPECTIVE OF THE CHILD

What are our obligations as a society regarding the creation of children through surrogate motherhood? These obligations will depend, in part, on the impact of surrogacy on a child gestated by a surrogate mother.

Ethically, we must *place the future child at the centre of the decision-making* about the use of reproductive technologies and surrogacy, not the prospective parents, scientists or entrepreneurs, who want to research and develop, use or sell reproductive technologies or services.

Who is currently at the centre?

Kathleen Sloan and Jennifer Lahl[ii] point out that "In the media, the *longing of childless people* to have children always takes center stage" and that the risks and harms to surrogate mothers are ignored or suppressed with praise for the surrogate's generosity and "altruism". The same peripheral status is true for the resulting children. Ethics, however, requires that the child and their 'best interests', as the most vulnerable person, and as your reference requires, be placed at the centre.

What are children's rights regarding their coming-into-being and family structure?

Consequently, we must act primarily based on what respect for children's coming-into-being and for their future well-being and human rights *require that we* ***not do***.

If we believe that everyone has a need and a right to know who the people are through whom life travelled to them, we will not agree with the actions of an Australian gay couple. They wanted to ensure, as far as possible, that the child they "commissioned" could not trace their biological origins and find a mother. They chose to have the fertilization procedure in America, not Australia, and to have two women who were to remain strangers to each other and lived far apart, one as the ovum donor and the other as the surrogate mother.

A further issue this case raises is whether children born through reproductive technology should have a right both to know who their biological and gestational progenitors are and to contact them. Ontario law governing birth certificates is interesting in this respect. It now allows up to four people to be named as either parents, mothers or fathers. The registrants may choose their designation among these three - seemingly with no conditions to fulfil – and with a court order five or more people can register.

What do we know already about children born from donated gametes*?*

Many say they feel deracinated, cut off from their biological families and their genetic origins – they call themselves "genetic orphans". They describe feeling that "half of them is missing", that "there is a black hole beneath them of which they can never reach the bottom". They say they can't understand "how society could have done this to them" by failing to regulate or possibly prohibit the way they came into being, let alone society being complicit in the wrongdoing by funding it.

Does a child have a right to a certain kind of family?

Controversially, I believe that all children have a *right to both a mother and a father* and, if possible and not contrary to the 'best interests' of the child, to be reared within their own biological families. This view is rejected on the

grounds that adults have a right to have a child. I believe this is an error. Rather, children have a right to have parents.

I also propose that we must *balance rights to individual autonomy with what is required to protect others and the 'common good'.* This means, to state yet again, that we need to place the child at the centre of all decision-making about surrogacy and all uses of reproductive technologies.

So what are the problems with 'commercial surrogacy' from the perspective of the child?

It constitutes reification and commodification of a child: Treating a child as merchandize, a "thing" a "product" that can be bought and sold is dehumanizing. As the Napoleonic codes articulate, some entities must be "hors de commerce" – remain outside of commercial activity - to respect them. American political philosopher Michael Sandel, in his book" *What Money Can't Buy*", explains that commodifying some human interactions, such as parents' relationships with their children, is unethical. It lays waste to and destroys the intrinsic nature and essence of the relationship and *corrupts the values* that relationship represents, namely, that parents' love for their child is unconditional, priceless and beyond commerce.

*Buying and selling a child is also contrary to human dignity***.** Likewise, "manufacturing" children breaches human dignity. *Mass producing them* is an extreme example. A Chinese man commissioned eight simultaneous surrogate mother pregnancies – if one, why not eight? And if eight, why not one hundred? In 2014 the son of a Japanese billionaire had at least ten children by Thai surrogate mothers. He is reported as saying, "He wanted 10 to 15 babies a year, and that he wanted to continue the baby-making process until he's dead." '

Mass production' is also a problem with sperm donation. A donor conceived Queensland woman has just made the shocking discovery she has at least 77 half siblings. She is calling for the reform of the use of reproductive technology so "this can't happen again."

Is "social surrogacy" ethically acceptable?

Social surrogacy is when a woman can gestate her child but chooses instead to hire a surrogate mother.

What about using *artificial uteruses* when these are developed? Might it be more ethically acceptable than using surrogate mothers?

And what does the future hold?

What about a uterine transplant to allow a man to carry a child? This might be possible in 5 to 10 years. Or designing our children, for example, making a child with more than two genetic parents? What about creating artificial sperm or ova so a same-sex couple could have a genetically shared child? Chinese scientists just announced successfully creating mice, which grew to adulthood, with sperm from two male mice and no female involved.

Does a human being have a right not to be designed, not to be manufactured, not to be the object of commercial deals, to come into existence with their own unique, naturally created untampered with ticket in the great genetic lottery of the passing on of human life?

Does informed consent to surrogacy make it ethically acceptable?

*A common j*ustification of surrogacy is that all adults have consented to the arrangement, But the child, the most vulnerable person and the one most likely to be harmfully affected, has made no such choice and given no consent.

One response to this *absence of consent on the part of the child* argument is that the *child has no right to complain*, as he or she wouldn't exist except for the steps undertaken. Joanna Rose, an anonymous sperm donor-conceived adult who objects to such donor conception, responded, when faced with this argument by a member of a Parliamentary committee, "If I were the product of rape, I would be glad to be alive, but that doesn't mean that rape is ethically acceptable."

We can also consider the doctrine of "*anticipated consent*". This provides that when we must take a decision that will have major impact on someone unable to give consent to it, can we reasonably assume that if they were able, they would give consent.

The prioritization of the 'best interests' of children resulting from using reproductive technologies must govern the use of these technologies.

The bottom line, regarding surrogate motherhood and all uses of reproductive technologies, should be that when adults' claims to use these

technologies clash with the rights or 'best interests' of the resulting children, the latter must prevail. Often, however, this is not the case, including, for example, when the intervention confuses family relationships. In a Texas case, a grandmother acted as a surrogate for her daughter and son-in-law's child. I was consulted on the ethics of a daughter-in-law being impregnated with her father-in-law's or brother-in-law's sperm because her husband was sterile, and the family belonged to a culture in which family blood relationship was very important.

I submit that we must start from a basic presumption that the child's rights to be born into a natural family structure in which the family relationships have not been intentionally confused, must be given priority. If surrogacy, in general, or any instance of surrogacy is not in a child's 'best interests' in such regards, it is unethical. The same "child's 'best interests' principle" should apply to all uses of reproductive technologies.

ARGUMENTS AGAINST 'COMMERCIAL SURROGACY' FROM THE PERSPECTIVE OF SURROGATE MOTHERS

Surrogacy, especially "commercial surrogacy", involves the exploitation of impoverished and vulnerable women, and the creation of a market for children.

As explained in relation to our obligations to the child, ethics require us to make decisions based on a primary presumption in favour of the most vulnerable persons affected by the decision and not to exploit seriously disadvantaged people by taking advantage of their impoverished state. Much 'commercial surrogacy' offends these principles.

Respect for women's autonomy argument

It is argued that allowing "commercial surrogacy" implements respect for a woman's right to individual autonomy and self-determination: Her right to decide for herself what to do with her own body.

But this view presupposes that everyone is equal and in a position to "take it or leave it" with respect to deciding whether to be a surrogate, which is not true of many women who act as surrogates. We must ask: Are they really free to give informed consent? Are more privileged people taking advantage of

their vulnerable state? Are we fulfilling our societal level duties to protect vulnerable people?

When India passed laws restricting access to surrogacy to Indian citizens, 'commercial surrogacy' increased in south-west Mexico, a region suffering from serious poverty. One surrogate mother there was asked why she chose to be a surrogate. She explained her husband had left her, she had three young children and no job training or skills, so her only two options were to be either a prostitute or a surrogate mother. She decided that the latter would be less harmful to her three children.

Other problems

These include *complications in the pregnancy* which result in situations where the commissioning parents want abortion or "selective reduction of a multiple pregnancy" (some, but not all, fetuses are killed but left in the uterus and delivered dead with the living fetuses at birth) and the surrogate refuses the intervention.

Such cases have included a surrogate being pregnant with triplets, identical twins and a singleton. The commissioning parents wanted "selective reduction" of the singleton, but one identical twin died. In another case, the surrogate was pregnant with twins, one with Down Syndrome. The commissioning mother wanted "selective reduction" of the Down syndrome twin and threatened to abort both twins unless the surrogate mother agreed. The selective reduction resulted in the "wrong" twin – the one without Down syndrome - being killed.

Commissioning parents have refused to accept and have abandoned children born with disabilities: or conditions such as Down syndrome. We also must consider harm to the surrogate's other children. One such child asked her mother who had acted as a surrogate, "Mummy are you going to give me away too?" And no pregnancy is without risk. Surrogates have died from pregnancy complications and others have lost the capacity subsequently to have their own children.

ARGUMENTS AGAINST 'COMMERCIAL SURROGACY' FROM A SOCIETAL and GLOBAL PERSPECTIVE

i.) *Societal issues and concerns*

Surrogacy challenges the concept and societal value of *unconditional parental love* for one's child, just because they are one's child. Women as mothers, far ere than men as fathers, represented this belief and established the societal value that a mother automatically bonds to a child to whom she gives birth –"her" child - and she has unconditional love for them just because they are her child. I submit that an important reason surrogate motherhood was condemned so vociferously when it emerged was that it threatened this value carrying role of women. The surrogate clearly did not unconditionally love her child and planned to give it away.

In the mid-1980's surrogacy became a prominent focus in the emerging debate on the values that should govern new reproductive technologies. The "Baby M" case in the United States often made daily headlines.

In this 1986 case, the surrogate, Mary Beth Whitehead, refused to relinquish her and William Stern's biological child to the intended parents, William and Elizabeth Stern. After lengthy court battles, the Sterns were awarded custody and Mary Beth visiting rights on the grounds that this arrangement was in the child's "best interests". This finding was challenged by some commentators on the grounds that it was largely based on a comparison of the Sterns' relative wealth in comparison with Mary Beth's, who, like almost all surrogate mothers, was poor.

How is surrogacy different from adoption?

In adoption, a child needs a family, and we are dealing with a situation that was not intentionally created. We usually see the birth mother, in agreeing to adoption, as making a major sacrifice in what she believes to be the 'best interests' of her child. Unlike with surrogacy, her action in giving up the child does not contradict her love for the child, but rather affirms it.

In surrogacy, we have adults wanting a child and having one created with the intention that the child will be given away by their gestational mother. In seeing this as ethical and legally facilitating it, surrogacy does damage, that adoption does not, to societal values that uphold the bonding of parents to their children and their unconditional love for them just because they are their children.

Surrogacy tourism

The most common example is “commissioning parents” seeking surrogates in developing countries who are less expensive or to avoid a prohibition on surrogacy in their own country. The prohibition might only be on ‘commercial surrogacy’ (payment of the people involved) or also on so-called ‘altruistic surrogacy’ and might or might not have extra-territorial application.

There can, however, be other reasons for seeking a foreign surrogate mother. A Chinese couple used an American surrogate mother so their child would be born in the United States and entitled to American citizenship. That would also open the possibility of their being able to immigrate to the United States under family reunification provisions.

We allow ‘altruistic surrogacy, so why not ‘commercial surrogacy? An ethically relevant difference between them relates to *injustice and unfairness* – only the wealthy can buy and the vast majority of those who sell need to do so because they are poor and have no other options to support themselves and often their families as well.

In short, paid surrogacy degrades and exploits women, especially under-privileged ones who become a “breeder class”. It commodifies children, denigrates human reproduction and, in doing so, causes serious harm to important, widely shared human values on which we base our societies and are established by our beliefs about the nature of parents’ relationship to their children.

In 2011 the European Parliament adopted a resolution condemning surrogacy as a *violation of women's human rights*. As Americans, Kathleen Sloan of the National Organization for Women and Jennifer Lahl, president of the Center for Bioethics & Culture write:

> “Human rights violations *against* women and children are being reframed as "human rights" *to* a child. … The women required to breed these children are non-entities, merely "incubators," "hosts," "ovens" or "gestational carriers;" it is very difficult to imagine anything more objectifying.”

Paid surrogacy, in effect, amounts to manufacturing babies for adults who want them, turning the babies into commercially viable products that are at the centre of a worldwide “Fertility Industry” that generates billions of dollars annually.

ii.) *Global issues and concerns*

At the international level, we can compare surrogacy with trafficking in organs and people for transplantation.

'*Commercial surrogacy'* and the *sale of organs* are *b*oth ethically wrong for the same reasons: they involve *using human beings simply as a means,* rather than as an *end, in themselves*; they treat human beings and human life as objects or things by commodifying them. That *offends the human dignity* of the surrogate and respect for human dignity, in general. It is to do wrong and, no matter how much good we might realize, good ends do not justify unethical means.

'Commercial surrogacy' is also wrong because it *breaches principles of equity and justice*. In practice, desperately poor, vulnerable women with no other options are exploited as surrogates for rich, privileged, commissioning parents. Some argue that such *abuses could be guarded against*. But, even if the surrogate were a rich, competent, free-living, consenting adult woman with a strong desire to sell her uterine services, doing so would still violate respect for human dignity.

However, '*commercial surrogacy'* raises even larger issues, namely the impact approval of it would have on some of our most important shared values and beliefs about what it means to be human.

CONCLUSION

Central to the essence of our humanness is that we are morality-seeking and meaning-seeking beings. 'Commercial surrogacy', by commodifying the human person and the human body, especially in the most intimate of all our relationships that of mother and child, constitutes a breach of this essence and the values that help us to find meaning.

In Australia, what would be the future impact of decriminalizing 'commercial surrogacy' on some of our society's most important values, especially respect for human life and its transmission? Shared beliefs that parents have unconditional love for their children, just because they are their children? Our belief that human life is priceless and must never be made a commodity? And what effect would that have on what we decide about the ethics that should govern radical new reproductive technologies, for example,

the use of artificial uteruses or uterus transplants to men, which I have mentioned in this Submission.

We should keep in mind that we use the criminal law to uphold our most important shared societal values, not just to punish criminals. Paying a surrogate mother for being a surrogate mother is presently a crime. I have argued that reality upholds certain values. We have a choice: Do we want to negate or to protect those values?

Through science, we now hold human life in the palm of our collective human hand with the power to manipulate it. We are the first humans with this power, which confronts us with momentous new possibilities to change human life and its transmission and the momentous ethical decisions those possibilities entail. The Fertility Industry markets this power, but the prohibition on 'commercial surrogacy' limits their business. They and people wanting to use surrogacy (their potential customers) want 'commercial surrogate motherhood' to be permitted. Opening the 'access to surrogacy door' further would have implications far beyond 'commercial surrogacy'.

We must search for the ethics we need to guide the decision making on whether to allow 'commercial surrogacy' or to keep it, as at present, prohibited.

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[i] https://wya.net/wp-content/uploads/Submission-to-the-UN-Special-Rapporteur-on-Violence-Against-Women-and-Girls.pdf?utm_source=brevo&utm_campaign=2025-05%20%20Global%20Follow-up%20Email%20May&utm_medium=email

[ii] Kathleen Sloan, a Connecticut-based feminist leader, is a board member of the National Organization for Women and the International Coalition for Reproductive Justice. Jennifer Lahl, from the San Francisco Bay area, is founder and president of the Center for Bioethics and Culture. Sloan, Lahl: Inconvenient truths about commercial surrogacy https://www.twincities.com/2014/03/31/sloan-lahl-inconvenient-truths-about-commercial-surrogacy/