

Annexure 2 to LIV Comments regarding Surrogacy Inquiry

Surrogacy Law around the world– Comparative Tableⁱ

	All surrogacy banned	Commercial surrogacy banned	Altruistic surrogacy allowed (traditional and/or gestational)	No regulation	Policy re expenses (for altruistic surrogacy)	Comments
France	Yes	Yes				
Italy	Yes	Yes				
Germany	Yes	Yes				
China (Hong Kong SAR)	Yes	Yes	Yes with restrictions (genetic link required)			Only the gametes of a married couple can be used implying both intended parents must be genetically related to the child ⁱⁱ .
Japan	Yes	Yes				
UK	No	Yes	Yes with restrictions	No	Permitted to pay “reasonable” expenses to the surrogate, term left undefined	At least one of the intended parents needs to be genetically related to the child.
Australia	No	Yes	Yes (gestational) with restrictions	No	Generally permitted to pay “reasonable” expenses to the surrogate, expressed to include medial counselling	Generally criminal code provisions target parties as well intermediaries Traditional surrogacy arrangements (where

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			(traditional surrogacy not permitted)		and legal expenses. See Annexure 1 for different approaches adopted across states	surrogate using her own egg) are not permitted under the legislation ⁱⁱⁱ .
New Zealand	No	Yes	Yes with restrictions	No	Generally permitted to pay “reasonable” expenses to the surrogate, expressed to include medial counselling and legal expenses.	New Zealand has legislation concerning ART which specifically regulates certain aspects of surrogacy arrangements and includes an ethics approval process for surrogacy arrangements involving IVF. However, there is no legislation regulating the legal parentage of children born as a result.
Israel	No	Yes	Yes with restrictions	No		entering into any arrangement which is not compliant with the legislation will amount to a criminal offence. Surrogate has to be unwed, but this can be waived by committee if no other solution can be found
The Netherlands	No	Yes	Yes with restrictions	No		Criminal code provisions targets intermediaries not the parties
India	No	Yes (since 2015)	Yes with restrictions	No		See Note 1
Thailand	No	Yes (since 2015)	Yes with restrictions	No		See Note 1

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Nepal	No	Yes (since 2015)	Yes with restrictions	No		See Note 1
Austria	No	No	Prohibition against egg donation prohibits altruistic arrangements other than traditional surrogacy (in which surrogate uses her own egg)	No		
Norway	Yes	Yes	No	No		Prohibition against egg donation and surrogacy
Ukraine	No	No	Yes with restrictions.	No		The legislation is sparse and silent on central matters such as the payments which may be made to the surrogate. Only heterosexual spouses may enter into a surrogacy arrangement, there must be a medical need for surrogacy and the child must be genetically related to one of the spouses

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Greece	No	No	Yes	No	Surrogate may claim for loss of income (even where surrogate was not employed).	entering into any arrangement which is not compliant with the legislation will amount to a criminal offence
Russia	No	No	Yes	No		The legislation is sparse and silent on central matters such as the payments which may be made to the surrogate.
Panama	No	No	Yes	No		
Belgium	No	Yes				
South Africa	No	Yes	Yes with restrictions (genetic link required)	No	<p>Generally permitted to pay “reasonable” expenses to the surrogate, expressed to include medial counselling and legal expenses.</p> <p>Surrogate may claim for any expenses that are directly related to the surrogacy/pregnancy and you may claim for loss of income (even where surrogate was not employed). The North Gauteng High Court in South Africa) has expressed concern about</p>	<p>Laws changed in 2010 to limit surrogacy to altruistic surrogacy only. The Children’s Act provides for the intended parent’s names to be entered directly onto the birth certificate after the birth eliminating the need to apply for adoption.</p> <p>Gametes of both intending parents should be used unless this is impossible as a result of medical or other valid reasons, in which case at least one of the intending parents should be genetically related to the child</p>

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					<p>possible abuse of these provisions because of deep socioeconomic disparities in the country: Ex parte matter between WH, UVS, LG and BJS (case No 29936/11, October 2011, not yet reported), at para. 64 and M. Slabbert, “National Report on Surrogacy: South Africa^{iv}”.</p> <p>The commissioning parents will cover the cost of a medical aid for the duration of your pregnancy/birth, including a few months post-partum.</p> <p>A life insurance policy will also be provided by the commissioning couple for the duration of the surrogacy^v.</p>	
Iceland			Proposal to allow altruistic surrogacy but only for	Yes		On 13 October 2015, government announced a proposal to legalise surrogacy. The legislation would continue the current ban on anonymous donations of reproductive cells, thus requiring that the intended parent and child know the identity of

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			traditional surrogacy (in which surrogate uses her own egg)			the potential egg or sperm donor. ^{vi}
Argentina	No		Yes			<p>An intending mother, whether genetically related to the child or not, will often have to adopt the child and this can be a lengthy procedure involving State authorities^{vii}.</p> <p>Note if a putative mother is also a genetic mother she may contest maternity since the genetic link must prevail (the surrogacy arrangement was not mentioned in the decision) – E. Lamm, “National Report on Surrogacy: Argentina”</p>
Ireland	No	Yes	Yes	No		No express provision but possible violation of trafficking or adoption laws: M. Harding, “National Report on Surrogacy: Ireland”
Brazil						Some court decisions have allowed intending parents to register as the legal parents of a child born following a surrogacy arrangement, by consent with the surrogate mother, despite the general rules on legal parentage ^{viii} .
Czech						If a surrogate mother takes payment for a

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Republic						surrogacy, she could be prosecuted for trafficking in children, s.168, the Criminal Code: M. Pauknerová, "National Report on Surrogacy: Czech Republic"
Venezuela						
Canada	No	Yes	Yes	No		Different arrangements exist between provinces.
USA	-----	-----	-----	-----		Different arrangements exist across states ^{ix} . Note In the United States of America, of the 18 states which allow commercial surrogacy, 12 have specific statutory regulation and six rely on judicial precedent ^x
California	No	No	Yes	No		<p>California permits and consistently enforces altruistic and commercial surrogacy arrangements, through the use of pre-birth orders and surrogacy contracts (in writing; prior to conception) which allow parentage to be transferred to the intended parents before birth. Californian law allows both genetic and non-genetic parents to receive a pre-birth parentage declaration so long as the pre-birth agreement is valid.</p> <p>This factor, alongside the fact that commercial arrangements are allowed, makes the United States and California in particular, one of the most popular destinations for Australians seeking</p>

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						international surrogacy arrangements. However, there is still difficulty for intended parents living outside the US. For a child born through surrogacy to be allowed to leave the US with legally recognised intended parents, the child must have a US passport, court approval, and a birth certificate listing the intended parents. Yet even these rules may be easier to follow than the difficult Australian surrogacy laws. ^{xi}
Florida	No	No	Yes	No		

Notes:-

1 - Following highly publicized cases of Baby Gammy in Thailand and the Japanese father who allegedly fathered 16 children through Thai surrogate mothers, Thailand, Nepal and India are the latest countries in Asia to restrict surrogacy to altruistic surrogacy. The countries which still allow commercial surrogacy and which are now being used by Australian parents to engage in overseas commercial surrogacy in light of the change of position in Thailand, Nepal and India, are Cambodia and Laos^{xii}.

2 – For those who States who regulate surrogacy, there appears to be two categories of regulations:

- (1) – the first group applies a process of “pre-approval” of surrogacy arrangements, whereby the prospective intending parents and the surrogate mother must present their arrangement to a body to be approved before the arrangement and any medical treatment may proceed. The bodies are required to verify that the conditions of the legislation have been met^{xiii}.
- (2) In the second group, regulation relates only to putting in place a set procedure for the intending parents to obtain legal parentage for a child born as a result of a surrogacy arrangement ex post facto. Here the focus is on the transfer of legal parentage post-birth, and the process usually includes a retrospective consideration of the arrangement to determine whether the conditions of the legislation have been met such that a “parental order” (transferring legal parentage) may be made^{xiv}.

ⁱ “Legal problems with international surrogacy arrangements”, Michael Nicholls QC, 20 October 2013.

ⁱⁱ <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

ⁱⁱⁱ <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

^{iv} <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

^v <http://www.surrogacy.co.za/faqs/>

^{vi} <http://www.loc.gov/law/foreign-news/article/iceland-legalization-of-surrogacy-proposed/>

^{vii} <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

^{viii} <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

^{ix} Like Australia, surrogacy in the United States is also regulated on a State-by-State basis; however the situation is more complicated. The laws range from non-existent in the majority of States, to permitting both altruistic and commercial surrogacy arrangements in other States, through to criminalising all forms of surrogacy in other States.

<http://hrlc.org.au/regulating-surrogacy-in-australia/>

^x <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>

^{xi} <http://hrlc.org.au/regulating-surrogacy-in-australia/>

^{xii} <http://www.theguardian.com/lifeandstyle/2014/aug/23/interpol-japanese-baby-factory-man-fathered-16-children>; <http://www.smh.com.au/world/bangkok-baby-factory-includes-twins-from-australian-womans-eggs-20140817-105146.html>

^{xiii} <http://www.smh.com.au/world/somebody-has-to-be-the-icebreaker-aussies-seeking-babies-turn-to-cambodia-20151027-gkijf5.html>

^{xiv} <https://assets.hcch.net/upload/wop/gap2012pd10en.pdf>