FactCheck: is Australia legally obliged to look after children abandoned after commercial surrogacy?

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“I would imagine there’d be a number of reasons why the police should be involved and obviously the welfare authorities as well... I would have thought also that Australia has some obligation to track down and look after the welfare of the child that has been left behind.” – Chief Justice of the Federal Circuit Court, John Pascoe, Foreign Correspondent, June 23, 2015.

Details of a 2012 case of an Australian couple who were delivered a set of twins, a boy and girl, via a commercial surrogacy arrangement in New Delhi, continue to be revealed, most recently by this week’s episode of Foreign Correspondent.

Shortly after the birth the couple told Australian High Commission staff in New Delhi they would be adopting out the boy, and returning to Australia with the girl. Citizenship and a passport were
subsequently granted for the girl. However, controversy remains regarding who adopted the boy, and whether money changed hands.

Should the police be involved and does Australia have obligations to track down the boy and ensure his welfare?

**Acting contrary to the law of NSW**

Commercial surrogacy is prohibited by law in all states of Australia and the ACT. In NSW, where the couple reside, the prohibitions apply extra-territorially. This means that people from NSW who travel elsewhere to engage in commercial surrogacy, including the couple in question, are breaking the law. (Extra-territorial prohibitions also apply in Queensland and the ACT).

The extra-territorial laws, which passed via a “free vote” in the NSW parliament, were based upon the view that commercial surrogacy places the needs of intending parents above the needs of the child, and that gaining access to children by circumventing local laws and travelling overseas “was not a practice that …lawmakers …should encourage”.

The NSW couple could therefore be prosecuted in Australia for entering into the arrangement. If found guilty of breaking the law they face fines of up to A$110,000 and/or imprisonment for two years.

**What other sanctions might apply?**

In the abovementioned Foreign Correspondent report, Shakhar Naphade, Senior Counsel to the Indian Supreme Court suggested the couple may have engaged in child abandonment under Indian law. Section 317 of the Indian Penal Code provides for the offence, which carries a penalty of up to seven years imprisonment (and/or fines). Treaty obligations between Australia and India would enable extradition of the couple to India for prosecution. Naphade further suggested that if the child had been abandoned, the Australian government may have aided and abetted such abandonment.

However, whether the law of abandonment applies in circumstances in which a child is relinquished by its birth mother and father for adoption needs to be determined. Pursuant to the Hindu Adoptions and Maintenance Act, 1956 it is legal for a birth mother and father to consent to the adoption of a child, provided certain criteria is met.

**Is the boy an Australian citizen?**

The legal status of the boy is important in determining who has obligations to ensure his welfare and safety.

A child born outside Australia as a result of a surrogacy arrangement is eligible for Australian
citizenship by descent if, at the time of birth, they had a parent who was an Australian citizen (including where the commissioning person(s) have contributed sperm, egg or embryo provided a biological connection is established using medical records and/or DNA testing).

However, Australian citizenship by descent does not occur automatically. An application must be made pursuant to the Australian Citizenship Act 2007 and the policy guidelines set out in the Australian Citizenship Instructions.

As there was no application by the commissioning couple for Australian citizenship for the boy, he is not an Australian citizen.

What if he was legally adopted?

Under Hindu adoption laws, from the date of adoption an adopted child is deemed to be the child of his or her adoptive father or mother for all purposes. The boy would continue to be an Indian citizen, and is not stateless. All the ties of the child with the family of his birth are deemed to be severed and replaced by those created by the adoption in the adoptive family.

Does Australia have a legal obligation to track down the boy and look after his welfare?

Australia is a party to the United Nations Convention on the Rights of the Child, its optional protocols, and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. All oblige Australia to protect the fundamental rights of children and prevent their abduction, sale, or trafficking. Australia has cited NSW prohibitions on commercial surrogacy as one way it meets such obligations.

However, Australia does not have legal obligations toward specific children who are not within its jurisdiction. The Department of Foreign Affairs said concerning the particular case:

“As no application for Australian citizenship or passport was made for the male child at the time, India became responsible for his welfare and adoption arrangements became a matter for its legal system. Australian officials at the High Commission have no concerns regarding the legality of the adoption in India...”

Nevertheless, despite no apparent legal obligation to act, Australian authorities may have a moral obligation to ensure the boy is safe and well. Arguably that moral obligation would extend to providing the boy information about his biological heritage and siblings.

Would allowing commercial surrogacy in Australia prevent such
occurrences?

There is no evidence that permitting commercial surrogacy in Australia would prevent such occurrences.

It is possible that some people would still travel for reasons including, but not limited to, lower costs, sex-selection, a preference for not having contact with the surrogate mother or sperm/egg/embryo donor(s) after birth, and/or to avoid meeting other legal criteria.

It is also legal to relinquish children for adoption in Australia, and the couple would not have been obliged to care for a son they did not want here either.

Verdict

The couple may face legal prosecution under both Australian and Indian law, if the authorities decide to pursue them.

Australia has an obligation to enforce the laws it claims exist to protect children from exploitation, commodification, sale or trafficking. Doing so may deter some other people from engaging in commercial surrogacy arrangements.

Australia may not have a legal obligation to find the boy, however it may have a moral obligation to check on his safety and well-being.

Review

This analysis of Australia’s legal and moral obligations toward a boy born to Australian commissioning parents in India is both sound and considered.

It points to the limits of current legal frameworks to protect children born of these arrangements and their skewed approach to prioritising the interests of commissioning parents over the rights of those children.

This article further highlights the need for international engagement on the issue of commercial surrogacy to protect the rights and interests of children.

Finally, the article addresses the overly simplistic argument that permitting commercial surrogacy in Australia would provide an acceptable alternative by outlining those reasons why many commissioning parents will still seek an overseas solution. – Liz Bishop
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