The surrogacy trap: why our laws need new life By ABC's [Barbara Miller](http://www.abc.net.au/news/thedrum/barbara-miller/167170)

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[**PHOTO:** Each year, hundreds of Australians continue to flout, duck and bend the laws. (Jeremy Brown: www.sxc.hu)](http://www.abc.net.au/news/2012-12-24/a-baby-holds-a-finger-of-an-adult/4439952)

***Should Australia's surrogacy law allow women to be paid for helping infertile couples? Barbara Miller says while payment raises ethical dilemmas, there's no doubt current law needs to be changed.***

When Nicole Kidman and her husband Keith Urban thanked their "gestational carrier" for the birth of their daughter in 2010, they copped a lot of flak.

The use of such a clinical term, some commentators argued, dehumanised the woman who had acted as a surrogate for them, enduring a pregnancy just so the celebrity couple could be parents again.

There's no doubting that the term hardly brings on the warm fuzzies, but some surrogates choose to use it.

Take Kelly Rummelhart, an upbeat Californian mother of three children of her own, who has acted as a surrogate, using donor eggs, three times. Kelly visited Sydney earlier this year, partly to try to convince members of the New South Wales Parliament that they were wrong to introduce in 2011 a ban on the use of overseas commercial surrogates.

When I spoke to her then, she told me she was "more comfortable" with the term gestational carrier: "Because that's what I am".

*I'm carrying someone else's basically precious cargo and giving it back to them when that baby is born.*

Kelly says she became a surrogate to "help other people be parents". "I figured," she says, "I might as well be."

*You know, I've got this uterus that's giving out these beautiful babies and nice and healthy and great pregnancies, and so why should I not be able to share that?*

Kelly was paid for her troubles though, and Australia as a society is not comfortable with that concept. Using commercial surrogates within Australia is illegal everywhere except in the Northern Territory, which has no legislation on surrogacy.

Paying a woman overseas to bear a child for you is a crime for residents of New South Wales, Queensland and the ACT. The NSW Attorney-General Greg Smith says the practice is "unethical" and "not in the best interests of the mother or the child".

Kim Bergman, a psychologist from a prominent US surrogacy clinic, says surrogates there are motivated by what she calls "a healthy mix of altruism and narcissism".

"They know they can give this," she says. "They are honoured to help and they treasure the experience of seeing people become new parents."

In countries like India, where the payment in relative terms is much greater, that's arguably not the case. For Jenni Millbank, that's a problem. The family law expert from the University of Technology Sydney opposes a situation where "it's so much money that you do something you actually don't want to do and regret doing".

Does she think that's the case in India? "I think it's certainly more of a concern," she says.

Jenni thinks there has to be some kind of middle ground between pure commercial surrogacy and altruistic surrogacy, which is generally allowed in Australia. She says Australian women prepared to carry a child for someone else should be compensated in some form. That, Jenni argues, would reduce Australians' reliance on overseas clinics, and stop surrogacy being "exported".

The Chief Federal Court Magistrate John Pascoe is reportedly so concerned about the exploitation of overseas surrogates that he's proposing some form of commercial surrogacy be legalised here.

Jenni Millbank also thinks legal change is necessary:

*I'm always reluctant to say that the answer to a legal problem is more law. But in this case, I think we've made a hash of it, I do. I think it's a mess.*

That's a position supported by Sam Everingham, the president of the lobby group Surrogacy Australia. Everingham takes issue with the fact that lawyers and IVF specialists can make money through surrogacy in Australia, when "it's the surrogate themselves who's doing most of the work here and they need to be recognised for that".

"I think as a society we need to get a bit more comfortable with women's ability and right to decide how she uses her reproductive capacities."

Surrogacy arrangements, paid or not, can go spectacularly wrong, as happened in the baby Evelyn case in the late 1990s, which ended up in the Australian courts. The intending parents were eventually ordered to hand back the baby to the surrogate, a former friend, who was also the genetic mother of the child, a situation referred to as traditional surrogacy.

Some people desperate to have a child of their own pack up their lives and move to a state where it's not a crime to pay a woman overseas to act as a surrogate. Many stay put and flout the laws, and that's surprisingly easily done.

When a child is born through surrogacy overseas, it's the federal authorities that the new parents go through to get passports and citizenship for their children. The federal authorities make no distinction when processing those applications between citizens of different states and territories. That can leave Australian courts tasked with determining the parentage of the child in a difficult situation.

Federal Attorney-General Nicola Roxon has commissioned a review of the Family Law Act which will consider whether changes need to be made to assist with the determination of who should be considered the legal parent of a child born through surrogacy. However any resulting changes there won't impact on any state laws banning commercial surrogacy.

The New South Wales Surrogacy Act will also be reviewed in 2014, but the state's Attorney-General Greg Smith has signalled he doesn't expect any major changes under his watch.

Each year, hundreds of Australians will continue to flout, duck and bend the laws in what for some is a desperate desire to have children. As long as federal and state authorities look the other way, that situation is unlikely to change.

In whose best interests is that?

*Barbara Miller is a reporter with Radio Current Affairs. Her documentary*[*Surrogacy Secrets*](http://www.abc.net.au/radionational/programs/currentaffairsspecials/surrogacy-secrets/4431846)*airs on Radio National on December 27 at 5:10pm. View her full profile*[*here*](http://www.abc.net.au/news/thedrum/barbara-miller/167170)*.*