



FACT SHEET
Proposed changes to the
Assisted Human Reproduction Act
May 29, 2018

The law: In 2004, the *Assisted Human Reproduction Act* (AHR Act) came into force. The Act permits surrogacy, egg and sperm donation, within an altruistic framework. It prohibits payments for reproductive services and materials, but permits reimbursements for receipted expenditures, in accordance with the regulations.

The problems: No regulations governing reimbursement yet exist. The absence of such regulations has been deeply frustrating and stressful for those who use assisted reproductive technologies in Canada to create families, for women acting as surrogates and for gamete providers. In the absence of regulations, a grey market has developed.

The solution: In October 2016, then-Minister of Health Jane Philpott announced the Federal Government’s intention to strengthen the AHR Act. This goal includes developing the regulations for reimbursements for surrogacy, eggs and sperm. It is expected that the regulations will be in place in 2019. These regulations will provide Canadians with a clear legal path to follow in building their families without fear of criminal sanction.

The challenge: In March 2018, a Liberal Member of Parliament, Mr. Anthony Housefather, announced that he would introduce a private members’ bill to remove the criminal prohibition on payment for surrogacy, eggs, and sperm, and thereby curtail federal oversight.



Surrogacy and gamete donation within an altruistic framework, can be an important tool for creating families for some adults including members of the LGBTQ community, infertile couples, infertile women, and single men. We should avoid, however, treating women acting as surrogates as ‘service providers’, and gamete donors like ‘suppliers’. Instead, the Federal Government should encourage legal and medical frameworks, as supported in the AHR Act, that foster more altruistic relationships among women acting as surrogates, egg and sperm providers, and intended parents while advancing the health and well-being of children born through reproductive technologies.

1. Should the Government of Canada use the criminal law to govern assisted human reproduction?

Like many areas of shared jurisdiction, such as environmental law and inter-provincial transportation, the criminal prohibitions in the AHR Act are part of a complex regulatory regime that is intended to provide detailed guidance to Canadians on conduct and compliance. This regulatory regime serves several purposes: to deter certain activities, but also to lay out for Canadians a clear set of rules in relation to complex issues from human cloning to surrogacy arrangements. The criminal law provisions of the AHR Act aim, among other things, at:

- a prohibition on trade in the human body;
- the protection of human dignity (particularly the dignity of women and children);
- the protection of the health and well-being of women and children;
- the protection of women and children from exploitation; and
- ensuring that in Canada, women and children are not treated as commodities.

If the federal government elects to discontinue using its legitimate criminal law powers to govern this area, then oversight falls to the provinces and territories. In that event, significant disparities between the provinces and territories would likely arise, and with it, inter-provincial/territorial reproductive tourism.

2. Don't prohibitions on payment work to "criminalize women's bodies"?

The AHR Act is a pro-choice piece of legislation and there was all-party agreement to the ban on payment for surrogacy, eggs and sperm. Under the legislation, there is no 'criminalization of pregnancy'; what is criminalized is the sale of surrogacy and gametes. The legislation does not restrict participation in altruistic surrogacy or egg donation. The commitment in the law is to non-commercialization of the human body.

What the law criminalizes is payment. For example, selling eggs is not illegal but buying eggs is. All parties in Parliament sought this distinction to ensure that women's bodies would *not* be criminalized, and that there would be some mechanism for the federal government to intervene in cases where overt buying of human reproductive materials was occurring.

3. Why shouldn't surrogates be paid for their time and effort?

Selling children is illegal. For this reason, it is suggested that payment for surrogacy is not payment for a child, but payment for labour. This suggestion can only be true, however, if paid surrogates can both accept payment for their labour and keep the child if they so choose. If the terms of the agreement require her to relinquish the child once born, then it is not clear that the payment is only for labour. Surrogates and gamete donors are often happy to

participate altruistically so long as their expenses are covered; such reimbursement is permitted in the existing legislation and will be made more specific by the regulations being developed by Health Canada.

From another perspective, what do the proponents of payment believe is a fair wage for the so-called “job” of surrogacy? Pregnancy is a 24 hour a day commitment, 7 days a week, for 40 weeks. At a minimum wage of \$15/hour, and accounting for 1,600 hours of work (40 weeks of pregnancy), the cost of the labour alone would be \$100,800 (without addressing higher wages for overtime, breaks, benefits, vacation time and the reimbursement of expenses, workers compensation and so on). Others might argue that payment should only be based on 8 hours a day in which case the cost of labour would be \$24,000. Still others might argue that surrogacy is not a minimum wage job and the hourly wage should be \$30/hour (or more). Others might argue that the surrogate can work at another job while pregnant and so she should only receive a stipend of \$9,000 (a \$1,000/month). Which of these “wages” are fair and which are exploitative, and how will this be regulated?

4. What about the shortage of egg and sperm donors, and surrogates?

Some people suggest there is a shortage of surrogates, egg and sperm donors. However, empirical data to support this claim is lacking. In any case, even if there were a shortage, it doesn't follow that the shortage should be addressed by introducing a commercial system. In the case of blood and solid organs, when shortages have occurred, governments have responded with creative educational campaigns, public appeals, and facilitating altruistic donation.

5. Isn't it hypocritical to import sperm and eggs from jurisdictions that allow payment while prohibiting payment in Canada?

This is an important inconsistency. One way to resolve this inconsistency is to permit only the importation of eggs and sperm from countries that use an altruistic system and that disclose the identity of the gamete providers. A second option is to prohibit the importation of eggs and sperm altogether and to promote national self-sufficiency. A third option is to allow the status quo, similar to what we do for blood where it is known that Canadian Blood Services purchases blood from jurisdictions that pay their “donors” while continuing to strive for national self-sufficiency in blood donation.

6. The legislation came into force in 2004 before surrogacy and gamete donation were “mainstream”. Isn't it time to modernize the AHR Act?

Canadian legislation on assisted reproduction is aligned with legislation in the United Kingdom, Denmark, New Zealand, and most of Australia. These countries have laws banning

commercial surrogacy and egg donation that are very similar to ours. Other countries that have similar legislative approaches and values to Canada (including most Western European countries) are more restrictive and ban surrogacy entirely.

Relatively few jurisdictions explicitly permit commercial surrogacy. These include some American states, Russia, Georgia, Ukraine and Iran. Countries that previously welcomed Westerners seeking to pay for surrogacy—including Nepal, Thailand, India, and Mexico—are now increasing regulations to control (and in some cases to eliminate) their commercial markets often because of concerns about exploitation and human trafficking.

7. What should the Government of Canada do?

The Government of Canada should continue to “protect and promote the health, safety, dignity and rights of individuals who use or are born of assisted human reproductive technologies in Canada.” It should publicly reiterate its commitment to the principle of non-commercialization as already stated in the AHR Act. It should provide a robust legal framework to facilitate an altruistic framework for creating families using assisted reproduction. This means that the prohibitions on payment should be maintained, and the regulations on safety (section 10) and reimbursements (section 12) should be brought into force as planned by Health Canada. All of this to say that the Government of Canada should stay the course and give the AHR Act a chance to work as it was intended.

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