

Review of Surrogacy Laws

Questions in the Issues Paper

Insights from people with personal experience of surrogacy

Question 1 If you or someone close to you has had personal experience of surrogacy, please describe:

Response:

I am a potential intended parent. I am a single man who was engaged until recently, and had plans with my fiancé to have a child. I have wanted children for some time. Unexpectedly, my then fiancé changed her mind about having children. The relationship ended as a result.

I have had a healthy and successful career, and I have the support of a lot of strong women around me, including friends, previous ex-partners and sisters. I have wanted a child for a long time and can provide a safer and healthier environment than many parents I know, but am concerned at 46 that I will be too old to re-partner and so I have decided to consider surrogacy options.

So far the experience seems to contain three elements:

1. On the inside, there are very good people who want to help people who want families, and who understand that in the current world, really emotionally healthy people who would make very good parents have not been able to create life through other means – these people, who are directly connected to the system, all seem positive and lovely;
2. People in my age bracket or friends and support more generally, who are all very positive (noting the challenges of going alone is more common for women – and often via insemination not surrogacy – than single men).
3. On the outside, there seems to be some structures predicated on ill-informed or overly simplistic moralism. These views, do not appear that common in the people I have discussed it with, but seem rather to be baked into the legal restrictions. Examples of these viewpoints are very discouraging, and underpin a considerable burden where they inform policy. These include views such as:
 - a. “you are a guy, you shouldn’t want kids” (the “**men shouldn’t want kids view**”);
 - b. “If it hasn’t happened, then it isn’t meant to happen” (the “**it surrogacy isn’t natural**” view);
 - c. “you are just buying a kid because your life as failed/God didn’t want you to have one/you’re lazy/immoral etc” (the “**surrogacy is transactional**” view)
 - d. The women would not want to be a surrogate; it is exploitative to them (the “**surrogacy is exploitative**” view)

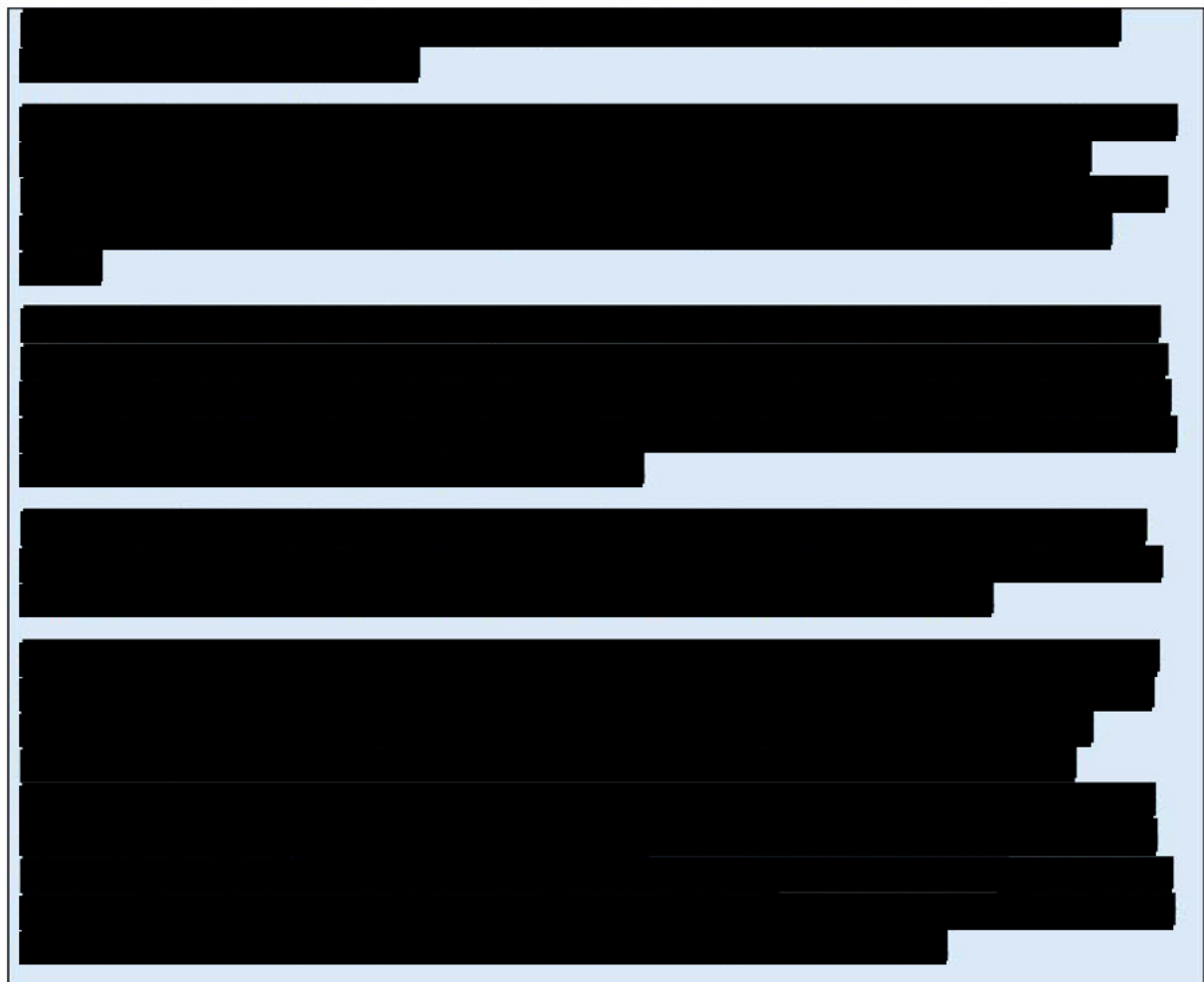
- e. Women are only breeders, and so deciding to be a surrogate is a “yes or no” decision, and does not require the potential surrogate to weigh other factors such as their work or career.
4. The problems with these views is that they distract attention away from very important issues, such as:
- a. The rights of children should be paramount, but children are let down society wide in so many circumstances, and it is actually more unlikely they would be let down by a parent who has gone to such an effort to have a child. If nothing else, data driven analysis should dictate this consideration, not bias or prejudice against the fertility challenged.
 - b. Surrogates are women who are both (a) willing to be surrogates, and (b) are also economic actors who have lives, careers, and other important things they are doing – they need to be treated as such;
 - c. Fertility-impairment is a real issue, people who are in this situation are very vulnerable and are at risk of all sorts of exploitation themselves.
 - d. Surrogacy is arising from a growth in technology coupled with the broader breakdown of patriarchal power structures in the 1960s and 1970s. In simple terms, people have many more types of relationships with each other than they did 50 years ago. Surrogacy, if regulated well, doesn't represent a failing of society but in fact represents an apex moment in our ability to understand the complexity and diversity of current human relationships.
 - e. Prohibition never works. Regulation always protects the vulnerable better than prohibition. This is particularly relevant here as every person has a risk of vulnerability in any form of parenthood (whether through surrogacy or not). Relevant here, children, intended parents and surrogates all have vulnerabilities, and so regulation provides the only sensible means to ensure safety to each party individually and all parties collectively.

So my experience is a really lovely core of people who really want to be great parents who are fertility-impaired and looking desperately at options to make that happen, surrounded by very loving support but at the risk of being preyed upon. Then adjacent to that are my immediate friends, work colleagues and family who are supportive. Outside of that core group of people engaged in surrogacy and immediate supports exists a different system. That external system which – although balancing some difficult issues – more often than not confuses the means by which people become parents with how they will be as parents, and seems to be based faulty assumptions and a society who wants to restrict people who would often actually be the best parents, only because they have to rely on new technology, while providing no meaningful support to children born conventionally to unfit parents.

I will give you an example of this experience as follows:

[REDACTED]

[REDACTED]



Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

There is no immediate conflict of rights, in that it is a false conflict put forward to suggest that somehow someone in an ethical commercial surrogacy system would be disadvantaged.

At its core, an ethical surrogacy system would open up parenting to loving parents who would do anything for their children, protect children, ensure women are not compelled but nonetheless appropriate adjustments are made for lost earnings and equivalent.

An ethical commercial surrogacy system would accommodate all rights, efforts to say otherwise represent a false dilemma designed to attack the system.

Human rights

Question 3 What do you think are the key human rights issues raised by domestic and/or international surrogacy arrangements? How should these be addressed?

Response:

The issue is screening and regulation to allow ethical commercial surrogacy whilst preventing exploitation.

- In respect of children, information for them when they grow up is a factor. Otherwise, we are still often talking about children who are the biological child (at least on one side) of the intended parent. The means of gestation is one factor in hundreds of factors representing the wellbeing of children. There is arguably considerable prejudice and bias on this one issue, as against other issues which affect the rights of all children (whether born through surrogacy or not).
- Consistent with the above and contrary to some assumptions, it is more probable that intended parents will be 'better' parents than parents who did not go through surrogacy, as the level of effort creates a self-selection effect that only persons who really want to be parents would undertake the effort.
- In respect of surrogates, you would need to make sure they are not being exploited by the agencies. Organisations like SEED provide a good basis for this screening and regulation.
- In respect of surrogates, women need to balance childbearing with other real life realities. Financial compensation, rather than being seen as a "payment" is more about an appropriate understanding of women as autonomous actors with competing obligations and priorities.

Question 4 What information about the circumstances of their birth do you think children born through surrogacy should have access to? How should this be provided or facilitated?

Response:

Surrogacy agencies, like hospitals or the like, should provide records when a child turns 18. If the surrogate or donor wants to be confidential, this is similar to a number of equivalent issues (including in natal medicine).

Insights about the key issues and potential reform options

Barriers to domestic surrogacy

Question 5 What do you think are the main barriers that prevent people from entering surrogacy arrangements in Australia? How could these be overcome?

You might want to consider the experiences of any groups who may face greater barriers to accessing domestic surrogacy than others, such as LGBTIQ+ people, people who are financially disadvantaged, or people from culturally and linguistically diverse backgrounds.

Response:

See my example in Q1. The barriers are both legal, and also arise from the example of [REDACTED] who is asked to make a very extreme choice, even if she wants to be a surrogate.

I will add, as a single male intended parent, there are other barriers which are highly unfair, based on gender bias.

Eligibility requirements for surrogacy

Question 6 Should there be eligibility requirements for surrogacy? If so, what should those requirements be?

Response:

Probably not on the basis that if anyone is going to go to the effort of surrogacy, they have probably **self-selected** themselves as loving parents. This cannot be said of parents who conceive children in housing trust or in a nightclub at 22 years old. Again, there is a real risk that the law is conflating the means of gestation through technology (which is fine if the surrogate is treated ethically and the child has good parent(s) at the end)– with the important ethical issues of what is correct for the child and society.

If there Any eligibility criteria should focus only on (a) can the person/couple have a child; and (b) will they be suitable parents. Other factors create real prejudice to people who would be incredible parents (such as single men, LGBTIQA+ etc).

For example, there is no barrier on any person having children in any other way. I was recently reviewing the family law Court list to see the level of stalking, harassment, and abuse in the divorce list. Placing myself in the shoes of the child, I would much prefer to be the child of a loving parent who spent years trying to have me, than be the child of most parents in the Family Court list.

Question 7 Are there any eligibility requirements which should be introduced, changed, or removed?

Response:

The State legal restrictions should be removed. South Australia currently has the best test.

Surrogacy agreements — validity and enforceability

Question 8 Are there any requirements for a valid surrogacy agreement you think should be introduced, removed, or changed?

Response:

Female bodily autonomy is paramount, so surrogacy agreements should really only relate to the status of parents after birth. Surrogates should retain bodily control whilst pregnant.

As indicated above, ethical economic surrogacy should be allowed. If there were concerns, safety process could be implemented, so that the surrogate must know the intended parent for 6 months or a year before agreeing the agreement, or some equivalent process.

Question 9 Should surrogacy agreements be enforceable? You might want to consider:

- a. if all parts of the agreement should be enforceable;
- b. who should be able to enforce the agreement; and
- c. how agreements could be enforced.

Response:

In respect of bodily autonomy of the surrogate whilst pregnant, no. In terms of the surrogate changing their mind, no – women should control their own bodies.

In respect of the intended parent becoming the parent at the end, yes – this should be enforceable. If economic surrogacy were introduced, then any compensatory benefit should also be enforceable by the surrogate. It would be better for these funds to be held in escrow or equivalent.

Process requirements for surrogacy

Question 10 What process requirements should be in place for surrogacy arrangements? You might want to consider:

- a. if counselling should also be available after the child's birth;
- b. what should happen if legal advice and counselling are not provided before entering a surrogacy agreement; and
- c. if parentage applications should require proof of legal advice and/or counselling.

Response:

Counselling is always a good idea. I would not invalidate agreements due to a lack of counselling but it is reasonable to make this a condition.

Professional services, including legal and counselling services

Question 11 What are the gaps in professional services for surrogacy in Australia? You might want to consider:

- a. if surrogacy agencies should operate in Australia; and
- b. the availability, accessibility, and subject matter to be covered in legal advice and counselling sessions.

Response:

My experiences is that the domestic services and international services are good, as long as you go to the correct place. Perhaps a registration system for reputable operators would assist. However, generally "inside the surrogacy services world" people seem lovely, well informed and provide quality services. The issue seems to exist outside the service providers at a broader policy level.

Question 12 How should professional services operate in Australia? You might want to consider:

- a. what their role should be;
- b. if they should be for-profit or not-for-profit, or how they should be funded;
- c. if different types of services should operate together or separately, for example, whether counselling services should be independent or integrated within agencies or fertility clinics; and

d. how they could best meet the diverse needs and experiences of people involved in a surrogacy arrangement.

Response:

See answer to Q11

Limits on advertising

Question 13 How should surrogacy advertising be regulated? You might want to consider:

- a. if advertising should be allowed;
- b. who should be allowed to advertise;
- c. what advertising content should be allowed; and
- d. where advertising should be allowed, for example via newspapers, social media, or by establishing a surrogacy register.

Response:

Advertising should be allowed, and systems like SEED should be implemented. See answer to Q 11.

Access to Medicare and parental leave

Question 14 What entitlements, if any, should be available to surrogates and intended parents? You might want to consider:

- a. Medicare rebates for fertility treatments;
- b. access by surrogates to paid or unpaid parental leave, including through enterprise agreement terms; and
- c. if it is desirable to make surrogacy arrangements generally more affordable, and how this could be achieved.

Response:

Surrogates and intended parents should both receive parental leave as per any parent, reflective of the period they need it. Again, there is a risk that the law is placing too great an emphasis on the process of gestation with the help of an additional person over the actual role of becoming a parent.

Reimbursing and compensating surrogates

Question 15 How could the process for reimbursing surrogates for reasonable expenses be improved? You might want to consider:

- a. what expenses should be reimbursable;
- b. how payment should be calculated;
- c. if there should be limits on any amounts;
- d. the process for reimbursement (for example, whether money should be kept in trust, whether there should be a requirement to produce receipts, etc); and
- e. any jurisdictions (either within Australia or overseas) that have processes for reimbursement worth learning from.

Response:

As indicated above in my example in Q1, Australia should have a form of ethical economic surrogacy.

Basically, to think through this – take my example. Imagine you have a friend who wants to be a surrogate but already has a life. Think about how much you would want to give them in the return of the gift they are giving you. Once you feel comfortable and you feel like you have properly protected them for their contribution, given who they are, then you have your answer.

Now, in respect of surrogates who do not know the intended parents or do not know them as well – take my example again, and imagine it were that relationship -then note that the gift that they are giving the intended parent is even greater because they are doing it for a stranger. Adjust the answer and apply that same test.

In more detail:

- (a) All expenses should be reimbursable, including appropriate calculations to reflect lost earnings, physical imposition, time, care, generosity of spirit.
- (b) See my test wholistic test above – more generally it should be left to the intended parents and surrogates to resolve (in my image of ethical surrogacy there are safety nets to avoid exploitation of either the surrogate or the intended parents, which I think are preferable to a set calculation).
- (c) See answer to (b).
- (d) Yes, money would be preferably held in trust somewhere.
- (e) I imagine many experts will provide excellent information on this, I defer to them.

Question 16 Do you support a) *compensated* surrogacy and/or b) '*commercial*' surrogacy? You might want to consider whether you agree with how we have described compensated and '*commercial*' surrogacy.

Response:

I prefer the term ethical economic surrogacy, but yes I support it. It should be legal. See discussion in Q 1.

Question 17 If Australia was to allow for compensated or 'commercial' surrogacy, how could this be implemented? You might want to consider:

- a. how compensation should be calculated;
- b. if there should be a limit on the amount of compensation;
- c. who should set the amount of compensation;
- d. the process for compensation (for example, whether it should be paid in monthly instalments, whether the money should be kept in trust etc); and
- e. any jurisdictions (either within Australia or overseas) that have processes for compensation worth learning from.

Response:

This should definitely be implemented. See response to Q1 (in example) and detailed answer of wholistic payment calculation in Q15

In addition to this, for surrogates who do not know the intended parents, they should be compensated. There are methodology that other submissions will point to; I would largely say it should be left to each specific intended parent and surrogate to work through (again, I propose other safety nets to ensure the surrogacy is ethical).

Legal parentage of children born through surrogacy

Question 18 What are the main problems with the requirements and processes for obtaining legal parentage for a child born through domestic and/or international surrogacy?

Response:

Well, the first point is that in a number of States it is illegal. So, probably legalising it in NSW and QLD.

Question 19 How could the process for intended parents to become the legal parents of children born through surrogacy be improved? You might want to consider:

- a. timing (for example, if the process happens before or after the birth of the child);
- b. who makes the decision (for example, if it is an administrative or judicial decision);
- c. if recognition should be automatic;
- d. if the process should be different depending on the circumstances (for example, based on whether the surrogate has a genetic link to the child, the type of payment they received, and whether the surrogacy arrangement was in Australia or overseas);
- e. whether intended mothers are or should be treated differently to intended fathers in legal parentage determinations;
- f. whether the granting of legal parentage should depend on compliance with process requirements;
- g. the importance of prioritising the best interests of the child; and
- h. whether we can learn from the processes of any other countries.

Response:

The USA system is preferable, where the Intended Parent is recorded as the parent on the birth certificate initially.

Citizenship, passports and visas

Question 20 What, if any, are the main problems with obtaining the following documents for a child born through international surrogacy:

- a. Australian citizenship;
- b. an Australian passport; or
- c. an Australian visa.

Response:

I have not proceeded far enough on the journey to comment on this, but I understand it can be an issue – especially if the surrogacy happens in countries where English is not the primary language. This, again, would be solved by having ethical economic surrogacy in Australia.

Question 21 How could the process for obtaining these documents be improved?

Response:

See answer to Q19, in respect of US system. Australia could issue citizenship prior to returning to Australia.

Oversight and harmonisation – Inconsistent laws

Question 22 What is the best way to approach differences in surrogacy regulation between or within jurisdictions? You might want to consider:

- a. the ways in which surrogacy regulation is inconsistent between jurisdictions;
- b. if these inconsistencies are problematic;
- c. any impacts of the differences between federal legal regimes (for example, citizenship law and family law);
- d. if a judicial process for transferring legal parentage is retained, whether applications for parentage should be determined in state courts, the Federal Circuit Court and Family Court of Australia, or both;
- e. how important it is that the approaches are harmonised or made more consistent; and
- f. how any harmonisation could be achieved (for example, by regulating surrogacy at a federal level or through uniform or substantively consistent state legislation).

Response:

I am not sufficiently expert in this area of law to comment and will defer to others.

Oversight and harmonisation – Oversight

Question 23 Is it appropriate for surrogacy arrangements to be subject to oversight? If so, what is the best approach? You might want to consider:

- a. the need for a regulator or oversight body and what it could look like (for example, an administrative body or a tribunal);
- b. if oversight should be national or state and territory based; and
- c. which groups need oversight (for example, health professionals).

Response:

This is not required, beyond counselling or potential health (including mental health) vetting at first instance. Agencies could be regulated (see for example self regulation via SEED in USA). However, Intended Parents and Surrogates should not be subject to this. It is not applied to other parents and again, there is a risk that the law is conflating the means of pregnancy with the ultimate outcome.

The role of the criminal law

Question 24 Should the law have a role in discouraging or prohibiting certain forms of surrogacy? You may wish to consider:

- a. if engaging in or facilitating certain forms of surrogacy, whether in Australia or overseas, should be sanctioned or criminalised;
- b. the effect of using the criminal law to regulate certain forms of surrogacy; and
- c. whether there are regulatory approaches preferable to the criminal law.

Response:

Ethical economic surrogacy should be legal. To the extent that surrogacy is being conflated with criminal conduct, I consider this largely a distraction as against the need to set up an appropriate ethical system. Surrogacy, in itself, should not be criminal. If there is criminal conduct in the course of surrogacy, then this would remain illegal, as it would in any other pregnancy. The efforts to attach notions of criminality is largely to provoke cognitive bias (similar to an *ad-hominem* attack) rather than address the vision of an ethical economic surrogacy system.

Lack of awareness and education

Question 25 Do you think there is a need to improve awareness and understanding of surrogacy laws, policies, and practices? You might think about how people currently find out about surrogacy, or the particular groups or professions who could benefit from improved education and information.

Response:

Again, the people who work and give their lives to help *'fertility challenged'* parents are amazing and largely seem to do a great job.

The system will continue to normalise, the more it occurs. However, it would be nice (especially as a single male) if people were more familiar with it. I think most people in society are largely ok with surrogacy and the public policy is yet to catch up with public sentiment.

Issues we consider to be out of scope

Question 26 Do you have any views about the issues we consider to be in or out of scope?

Response:

I refer you again to my answer to Q1 and my example.

Other insights

Question 27 Are there any important issues with regulating surrogacy that we have not identified in the Issues Paper? Do you have any other ideas for reforming how surrogacy is regulated?

Response:

Thank you for your time. See again Q1 and example.

Australia historically has been the country of a “fair go” and largely a country of common sense, in particular when it comes to health. Notwithstanding this, we seem to be stuck in a cycle where we are really unsympathetic to persons who can’t have children without support. Traditional gender bias means we cannot seem to accept that women would want to be a surrogate, and we seem to somehow believe that children could suffer a detriment because of assistance in the pregnancy process through gestational surrogacy. When we sit back and think about it calmly, we should see the following self evident truths:

1. Intended Parents are likely to be incredibly loving and devoted, because they have had to work so hard for the chance to be a parent, unlike many other parents who “fall into it”;
2. The main rights of the child are protected by having the best parents who love and care for them. Given this, the rights of the child are actually likely to be prioritised in many cases with Intended Parents, as those parents are likely to be the most committed given how hard they worked to have the privilege of a child;
3. Ethical issues like access to information for children when they become adults is important, but hardly an unprecedented issue;
4. For surrogates, there should be an acceptance that (a) some women want to be surrogates (it is not some innately exploitative thing, but rather some women want to do it); and (b) women may want to do it, but women are not purely there to be pregnant, but are vibrant social and economic actors in their own right. They are entitled to balance their desire to be surrogates with compensation for the gift they are giving.
5. Finally, as said above – prohibition never works. If policy wants to ensure protections against exploitation, then a system of ethical economic surrogacy which is legal is the only policy mechanism which will ensure this. Efforts to prohibit will merely stigmatise something which is natural, damage the social and mental health of people who merely want to have kids or help people have kids and fails to provide proper structures to ensure healthy outcomes.

Outlawing surrogacy was wrong. We are really making a lot of policy confusion about something which is basically natural and normal, reflects our more evolved and complex society when it comes to gender equality, and should be allowed to happen.