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The Commissioner
Australian Law Reform Commission
PO Box 209
Flinders Lane
Victoria 8009
Email: surrogacy@alrc.gov.au

Dear Commissioner,

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION – REVIEW OF AUSTRALIA'S SURROGACY LAWS

I am making this submission to contribute to the Australian Law Reform Commission's review of Australia's surrogacy laws. I am a community member and work as a reproductive bioethicist and public health researcher.

I have read the Issues Paper and have responded to several of the questions posed in the paper below.

I consent to my submission being published, whether identified or de-identified, as appropriate.

Responses to questions:

1. If you or someone close to you has had personal experience of surrogacy, please describe:
    - What parts of your experience were positive?
    - What parts of your experience were negative?
    - What could be improved and how?

    N/A

2. What reform principles should guide this Inquiry?

Human rights: While it is true that the rights and welfare of the children born of surrogacy should have ethical primacy, it is essential to clearly articulate that this privileging of interests does not extend to embryos or fetuses, who do not possess full human rights. In the case of a conflict between the health, safety and wellbeing of the fetus and that of the pregnant person, the latter must prevail, with no differentiation on the grounds of whether it is a pregnancy involving a surrogate or not. The wording of any changes to regulation must take care to avoid any misinterpretation that would diminish women's reproductive rights, including access to safe and timely termination of pregnancy. Inconsistencies in abortion law between Australian States will also need to be considered here. If a fetal abnormality is discovered during a pregnancy involving a surrogate it is similarly essential that the decision whether or not to terminate the pregnancy belong solely to the pregnant person, as with any other reason they may seek to end the pregnancy (including change of circumstances, physical or mental illness, etc.). To avoid ambiguity, "centering the best interests of the child as the most important consideration," could perhaps be phrased "centering the best interests of the child born through surrogacy as the most important consideration." This avoids the "non-identity problem" where it could be argued centering the child's interests includes the interests of a particular future child to be brought into existence in the first place. Such a definition would necessarily infringe on the human rights of the surrogate, including their bodily autonomy and right to be free from slavery and forced labour.

Harm minimisation: This principle is best served by regulating domestic surrogacy consistently and fairly, making it so Australian intended parents do not have to resort to overseas arrangements or unscrupulous "brokers." Having clear guidelines regarding parental rights and responsibilities, including where surrogacy arrangements or relationships have broken down over the course of the pregnancy, minimise disruptions to the children born of surrogacy (e.g., if intending parents refuse to accept caring responsibilities for a child born with a disability, it should already be clear how this child will be taken care of otherwise, including at the State level, where needed). Minimising the potential for financial harm (for all parties involved) also requires that any compensated surrogacy model be regulated by a government or independent body, and not any for-profit business.

Harmonisation: Consistency across States in Australia will simplify the process and avoid unnecessary legal disputes. It might also increase the pool of available surrogates if able to access interstate candidates without having to factor in a whole different set of laws and restrictions.

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

The prohibition on the sale of children: This principle is best served by ensuring that any compensated model for surrogacy focuses on the time and effort involved in gestation, and not the handing over of a child at the end of the process. Avoiding any lump sum payments helps make it clear to the public that it is the surrogate's time that is being compensated. Even if a spontaneous abortion (miscarriage) occurs, the surrogate should still be compensated for any time already committed to the project and any recovery time required. It should also be made clear to intended parents that contracting a surrogate in no way guarantees they will become parents, and that what they are paying for is the *chance* for parenthood and the effort of another person to provide that, whether or not it is ultimately successful.

The right to bodily integrity: It is essential that intended parents are made aware that surrogacy arrangements, whether compensated or altruistic, do not override the surrogate's right to make decisions about their own body, including their diet, exercise habits, medical treatment, use of medications, sexual behaviours, etc. This remains the case even where behaviours may be harmful to the fetus, as in the case of drug use, alcohol consumption and smoking. In the rare cases where a surrogate's behaviour makes fetal harm likely, the same educational approaches should be used as are employed in standard maternal care. No penalties, whether social, legal or financial, should be imposed on the surrogate for contributing to fetal harm if these same penalties would not apply if it was a non-surrogacy pregnancy.

The right to freedom from discrimination: For intended parents this right means not being forced to submit to invasive testing or scrutiny in order to start a family when people who are physically and socially fertile are not subjected to these tests. While the addition of third-party assistance (the surrogate, fertility specialists, etc.) may justify that a minimum standard for parental fitness be demonstrated by intended parents before access is granted, this should not be onerous or impose significant financial or emotional stress. The level of intentionality in parenting projects that require assisted reproductive services often mean more thought has been given to the welfare of future children than in other cases. However, even in rare cases where intended parents of surrogacy arrangements are determined to be unfit, standard child protection services should be mobilised to prevent harm, rather than imposing barriers to surrogacy on all intended parents. Requiring additional checks, like police checks, before

engaging in a surrogacy arrangement sends the message that intended parents are less trusted than other future parents, which is discriminatory and unfair.

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 / facilitated?

   It is recognised best practice in adoption and IVF cases that children be given accurate and age-appropriate information about their origins. The same principle should be applied to children born of surrogacy. Where a surrogate has used their own eggs (traditional surrogacy), there is important information regarding genetic inheritance, family medical history and resemblance that the child might benefit from. But even where there is no genetic link (gestational surrogacy), there may be social, physical or psychological factors of relevance to the child's wellbeing. For the same reasons we avoid closed adoptions, we should avoid concealment of surrogacy from the children born of these arrangements.

5. What do you think are the main barriers that prevent people from entering into surrogacy arrangements in Australia, and how could these be overcome?

   Perceptions that surrogacy is risky or that unenforceable contracts mean intended parents have no rights, present barriers to domestic surrogacy. But more than this, the restrictions on who can be a surrogate and the ban on advertising limit awareness and access. Overcoming this requires public engagement and education.

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

   As far as is safe, eligibility criteria should be as minimally restrictive as possible, noting that physiologically fertile opposite sex couples do not have to meet any criteria to become parents beyond an ability for unprotected sex.

7. Are there any current requirements which should be changed or removed?

Eligibility criteria that require that a cisgender woman to demonstrate she is medically unable to gestate a fetus to access surrogacy are necessarily discriminatory as no equivalent standard can be imposed on cisgender men (e.g., that they would have to attempt gestation first). It is entirely reasonable for a person of any gender to want to be a parent without wanting to be pregnant. Reasons for wishing to avoid pregnancy might be social, physical, psychological or financial.

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

A valid surrogacy agreement should specify what expenses are being reimbursed, whether any additional payments will be made and the structure and timing of these payments (assuming a regulated compensated system is legalised in future). It should also include the surrogate's ideal birthing plan and any preferences for the gestational period, alongside the intended parents' preferences. It should be noted such preferences are for communicative purposes only, and are not binding (e.g. the intended parents can express a desire for the surrogate to expose the developing fetus to music, but this does not obligate the surrogate to do so). The agreement should also include contingencies for if there is a fetal abnormality detected, if the intended parents suffer a relationship breakdown, if the surrogate becomes unwell, etc.

9. Should surrogacy agreements be enforceable?

The only part of a surrogacy arrangement that could be made enforceable without violating the rights of the individuals involved is the payment of the surrogate's expenses, as agreed upon. This should be enforced by the regulatory body overseeing surrogacy arrangements, with non-compliance handled in a similar way to unpaid child support.

10. What process requirements should be in place for surrogacy arrangements?

It is reasonable to expect all parties to a surrogacy arrangement to undergo counselling to ensure informed consent. Seeking independent legal advice would also be highly recommended.

11. What are the gaps in professional services for surrogacy in Australia?

    More counsellors and lawyers who specialise in fertility matters will be needed to meet the service needs of surrogates and intended parents if greater access to domestic surrogacy is to be achieved. If separate surrogacy services are proposed, these should be not-for-profit to avoid perverse financial incentives leading to exploitation.

12. What is the best way for professional services for surrogacy to operate?

    A not-for-profit independent or government regulatory body should oversee surrogacy arrangements and all associated services. Counsellors and lawyers advising parties to a surrogacy arrangement should not work for fertility services, especially if those services stand to profit (e.g., from providing IVF).

13. How should surrogacy advertising be regulated?

    Assisted reproduction straddles a grey area between a (potentially) commercial practice and a healthcare service. Bans on direct-to-consumer pharmaceutical advertising reduce a lot of exploitation and mis/overuse of medications in Australia. Surrogacy could be treated in a similar way, with limited advertising allowed and bans on "kickbacks" for medical professionals. This would not preclude the formation of a surrogacy register, managed by the central body overseeing arrangements.

14. What entitlements, if any, should be available to surrogates and intended parents?

    All benefits that would otherwise be available to a pregnant person should be available to a surrogate (e.g., Medicare rebates, access to public health services). Paid or unpaid parental leave should be awarded to whoever is the primary caregiver for the child born for the period in which they fill this role, which might include the surrogate. Surrogates should receive paid sick/personal leave for the time required to recover from birth and for any medical appointments associated with conception or pregnancy.

15. How could the process for reimbursing surrogates for reasonable expenses be improved?

Having a comprehensive list of approved items, created in consultation with surrogates with lived experience, will help clarify what can be covered. This should include incidentals after birth, such as maternity pads, vitamins, pelvic physiotherapy, etc. required for recovery. Lost income should also include any time spent before conception receiving relevant counselling and legal advice, any time taken off work for IVF rounds (whether successful or not) and any additional sick leave required. As it will be very difficult to distinguish illness directly related to pregnancy and illness exacerbated by pregnancy, all sick leave should be assumed eligible, unless it can clearly be proven unrelated.

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?

Compensated surrogacy is likely to have more social support than commercial, due to concerns about exploitation and commodification. Strict regulations and fixed caps are a good method of ensuring no "bidding" for services or financial coercion (e.g. if the payments are open for individual negotiation, some people will be paid substantially different fees for the same service). A common concern in surrogacy ethics literature focuses on the risk that financially disempowered people will be coerced into surrogacy due to a lack of options. Sometimes the suggested response is to exclude people of low socio-economic status from eligibility or restrict them to altruistic arrangements only to prevent exploitation. However, it is important to note that this effectively sends the message that you can only be paid for the service if you can prove you do not need money, whereas if you do need money, you will be expected to work for free. This compounds disadvantage and is discriminatory, as the more financially empowered are afforded more autonomy and the freedom to increase their economic advantage, while those with less receive nothing. It also intersects with the "dignity of risk" arguments for people with disabilities, which oppose overly paternalistic policies. It is entirely reasonable, for example, for a person experiencing unemployment to consider compensated surrogacy a viable choice, both as a way to receive some money and because they have more time available to commit to the arrangement. As such, a blanket ban on surrogates who are not otherwise employed outside the home would be overly restrictive.

17. If Australia was to allow for compensated or 'commercial' surrogacy, how could this be implemented?

    Ideally, a consistent, centrally regulated agency that is governmental or not-for-profit would implement any payment schemes to avoid potential misuse.

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?

    The main problem with legal parentage in surrogacy cases is the real risk that children will be left without legal parents and potentially stateless, a clear violation of their rights. While changes to Australia's laws cannot influence the legal situation overseas, it should at least be clear within domestic arrangements how and when parentage can be transferred to the intended parents. The surrogate must retain decision-making rights over the fetus while it is within her body, and up to a certain time after birth (which should ideally be decided by an independent committee of medical professionals and psychologists). As soon as practicable, after confirming the surrogate's continued desire to relinquish the child, the legal transfer of parentage should occur as rapidly as possible in line with whatever agreement was pre-determined. If the intended parents have suffered a relationship breakdown in the interim since the surrogacy arrangement, this should already have a contingency plan to follow. Financial obligations to the child might persist even if the intended parents are no longer together.

19. How could the process for intended parents to become the legal parents of children born through surrogacy be improved?

    Until parentage can be determined, the intended parents could be automatically legally recognised to have an interest in the child. This might carry certain rights to information or consultation regarding the child. In a surrogacy arrangement there is no compelling reason to treat intended mothers and fathers differently, especially if both are equal genetic contributors. If the surrogate is the genetic parent, this could be considered in cases of contested parentage, but for the most part gestational parenthood alone would be sufficient grounds to respect the rare cases where a surrogate might change their mind about relinquishing the child. Having entered a surrogacy arrangement should not count against a

surrogate in cases of contested parentage, but having committed to the process could be taken into account for the intended parents. In all cases, the best interests of the child born through surrogacy should take precedence, but courts should take care not to exaggerate the significance of any financial disparity between parties to the contract (e.g., it is discriminatory to assume the child's best interests are automatically served by assigning legal parentage to the wealthier person/couple).

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.

Given the extremely negative consequences of statelessness, an assumption toward granting citizenship for children who are born overseas through surrogacy should prevail once a connection to the Australian intended parent/s is established and the surrogate's intentions with the pregnancy confirmed. However, the focus should be on avoiding any ambiguity regarding citizenship occurring in the first place, through educational campaigns and increasing domestic options.

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

The process could be started early, with evidence of connection with the intended parents provided in advance. However, Australian citizenship cannot be granted before the overseas surrogate has made the final decision to relinquish, as otherwise the child would need to carry their matching citizenship at birth.

22. What is the best way to approach differences in surrogacy regulation between or within jurisdictions?

A federalised system for handling all matters regarding surrogacy arrangements, parentage and citizenship is the most likely to be effective. This will also concentrate expertise in the one system, rather than needing teams in every state.

23. Is it appropriate for surrogacy arrangements to be subject to oversight? If so, what is the best approach?

    Yes, oversight by a national body is appropriate, whether that be the federal government agency or independent not-for-profit. Oversight should be at the national level for consistency.

24. Should the law have a role in discouraging or prohibiting certain forms of surrogacy?

    If suboptimal or illegal arrangements occur, any legal response should focus on unscrupulous brokers and for-profit service providers, rather than penalising intended parents or any surrogate involved. This is because the latter are more vulnerable to exploitation by the former, whereas imposing penalties on the former reduces the likelihood this exploitation occurs.

25. Do you think there is a need to improve awareness and understanding of surrogacy laws, policies, and practices?

    Yes, educational campaigns are necessary to explain both the current state of surrogacy in Australia and any changes this commission bring about. Medical professionals likely to interact with clients who might seek surrogacy services should also have targeted educational programs made available.

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

    It is important that any changes to compensation for surrogacy are not used to argue that egg or sperm donors should be paid for their gametes. While reimbursement for expenses involved (e.g., missing work to attend a clinic) could be tolerated, Australia's stance on prohibiting the sale of human tissues has served us well in many areas, including improving the quality of our donated blood supply. Financial incentives to donate gametes will also exacerbate

existing issues with over-donation that are already causing problems in IVF clinics.

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?

One issue is properly compensating pregnant people who are not surrogates for their gestational labour. It is possible setting a fee for each period of completed gestation in a surrogacy arrangement might lead to similar calculations being used in other contexts, e.g., in divorce court. While gestating parents and primary caregivers are often given consideration when dividing assets, to take into account past loss of income and future loss of income potential, as this is not the purpose of the current review, it could be good to make the exclusion of non-surrogacy pregnancies clear throughout. Another issue is the need for grandfathering clauses for intended parents who may have already started a surrogacy arrangement under existing rules, including having gametes stored overseas. Given assisted reproduction projects can take years to complete, it is important that existing plans are given due consideration.

Thank you for considering my submission.

Yours Faithfully,

Dr Evie Kendal