Review of Surrogacy Laws
Questions in the Issues Paper

This document extracts the **27** questions contained in the Review of Surrogacy Laws Issues Paper released by the Australian Law Reform Commission ('ALRC').

Anyone is welcome to use this document when preparing a submission. You may wish to insert your responses to the questions here and submit it to the ALRC. It is not necessary to address all of the questions — you can answer as many or as few as you wish.

Read the Issues Paper

Make a submission

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:

- What parts of your experience were positive?
- What parts of your experience were negative?
- What could be improved and how?

In your response, please let us know:

a. how you were involved in the process (for example, if you were a surrogate, intended parent, or child born through surrogacy);

b. if the process took place in Australia or overseas;

c. if the process took place overseas, the country in which the surrogacy arrangement took place and what was attractive about that country; and

d. if you think you faced barriers because of certain personal characteristics (for example, if you were in a same-sex relationship or from a culturally or linguistically diverse background).

You might also want to consider the issues discussed below in your response.

Response:

NA

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

Pragmatism - As much as legislation and regulation currently prohibit the use of commercial overseas surrogacy companies, the desire for a child is extremely strong. It is happening because surrogacy is so difficult within our own state, so surrogacy arrangements need to be easier, cheaper and accessible within Australia.

Harm minimisation – it is key to protect the surrogate, the intended parents and the conceived child. Transparent processes, counselling and high quality fertility treatment can be regulated for example, single embryo transfer policies that result in healthy pregnancies and healthy babies.

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:

Child's rights - Information recording, reporting and sharing can be legislated within Australia, so the child has access to this information as an adult. I have worked in a Voluntary Register for donor conceived people. The anger within the donor conceived community about withheld or undocumented information about their genetic parentage is palpable and understandable.

Surrogate's rights – the surrogate has the right to high quality care for fertility treatment, pregnancy and post-natal care. This includes medical, financial and mental health care.

Intended parents' rights – the intended parents have the right to be allowed to be the legal parents of the child without fear of litigation, fear the child will be taken away, accessing health care for their child straight after birth and being allowed citizenship if born overseas.

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:

The option for ongoing contact may be provided if both parties are in agreement, however from age 18 years, the surrogate carried person should have access to:

- Gamete donors name and DOB (if applicable)
- Name of surrogate
- Name and address of clinic involved
- Name and address of birthplace

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 LGBTIQA+ people, people who are financially disadvantaged, or people from culturally and linguistically diverse backgrounds.

Response:

The current WA legislation means that IVF and therefore surrogacy is not available to males – straight, single, gay or couples – we are still waiting on change in legislation thanks to the extended filibustering in Parliament in 2019 WA Liberal MP Nick Goiran succeeds in surrogacy bill filibuster after a nearly 24-hour speech - ABC News

Finding a surrogate is a barrier for people, although it is not illegal in WA for an intended parent to advertise, due to the misconceptions around altruism and advertising – many think it is. It is only illegal for a clinic to advertise.

National legislation would make it easier if the surrogate lives and baby is born in another state or country. Often a relative is willing to be a surrogate but does not live in Western Australia. When the surrogate lives in another state or country, they risk going into labour early and having the baby elsewhere and making the parentage application and legalities more complicated.

Eligibility requirements for surrogacy

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

Response:

The current WA eligibility requirements are:

- have reached 25 years of age
- have given birth to a live child (exceptional circumstances may dispense with this requirement)
- have not yet become pregnant under the arrangement.

I would consider point 2 to be waivered if considered and counselled within the surrogacy arrangement for example if the surrogate was over 35 and a relative
I would consider point 3 – to have an option to encourage any "out of clinic" arrangements to be legally considered (but not encouraged) in exceptional circumstances

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

Response:

Introduce eligibility for males

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:

I come from the strict WA legislation; it would be great to have consistency across the nation. I support a surrogacy arrangement, but it just needs to be more achievable and fairer.

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 terms of enforceable - ultimately the surrogate and intended parents should be able to change their mind, but strong counselling, cooling off periods and application process must be in place to avoid this potentially devastating occurrence.

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:

a) Yes, counselling should be provided to all parties especially after the birth for the surrogate as she may unconsciously "grieve" for the baby

b) Clinic – should provide evidence for surrogacy agreements when licensed, audited or investigated. Should have “Surrogacy services” removed from RTAC licence if not compliant and fined. Out of clinic surrogacy arrangements will be hard to police.
c) It’s a bit late then if it hasn’t happened. However yes, if that is the only time it is checked in that state, especially if an overseas arrangement.
Counselling and cooling off periods are key aspect of successful surrogacy agreements. The details of counselling sessions do not need to be provided but evidence that counselling and cooling off period has taken place should be in place for a parentage application.

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:

a. Personally, I don’t support surrogacy agencies.
b. ANZICA could provide requirements for counselling in surrogacy as they do for donation https://www.fertilitysociety.com.au/wp-content/uploads/Guidelines-for-Professional-Standards-of-Practice-Infertility-Counselling-December-2023.pdf
It would be useful to require the equivalent for legal advice ie a list of specialised and experienced lawyers that can provide requirements for information that cover surrogacy arrangements.

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:

a & b. It would be great to have a national government surrogacy body to regulate, provide advice and lists of experienced services for intended parents, involved professionals, clinics and birthing hospitals.

c. I support that all fertility clinics providing surrogacy in WA have a dedicated surrogacy coordinator and affiliated experienced counsellors.

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:

I support that intended parents can advertise for a surrogate and link them into a clinic. It would be near impossible to regulate where they can advertise so I would support all three suggestions in d.

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:

I support

a) Yes, Medicare rebates for IVF treatments for surrogacy arrangements
b) Yes, access to paid maternity leave (for a shorter period of time)
c) Widen the term medical eligibility to allow people who require a surrogate to access Medicare

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:

a. **Time** for all the appointments the fertility treatment including the counselling, the initial appts, the egg collection cycle (ie all the attendance for bloods, ultrasounds, OPU and/or ET day), the legal appointments, the pregnancy (ie all the bloods, appointments, scans) and the birth (ie hospital stay, leave from work etc).

As well as the current ones approved by WA Surrogacy Act 2008 Section 6 (3).

b. the above mentioned items can all be calculated roughly, for example

Treatment - blood test – 1 hour each, U/S – 1 hour each, OPU – 1 day (8 hours), ET – ½ day (4 hours), counselling – 4 hours
Legal appointments – 3 hours
Pregnancy – each scan/ appt – 1 hour
Hospital stay and work leave covered by Medicare maternity leave

c. Yes have a maximum and minimum limit eg for blood tests – minimum could be 3 and maximum 6, discuss with clinic staff who would know average requirements
d. Payment for each stage could be made in advance, any extra requires receipts or medical certificates

e. UK has a compensated model for donation.

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:

a) Compensated surrogacy – strongly agree (and support this for donation as well). It will ensure the surrogate is not left out of pocket, she can meet her own and her family's needs during the time. It values the contribution of the surrogate while not enhancing the idea that babies can be bought or sold.
b) Strongly disagree with commercial surrogacy. No amount of money will ever reach the amount, to pay for the incredible gift that the surrogate is giving with her body. It is too close to buying a baby and creates a vulnerable industry.

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:

Often the surrogate is left out of pocket as she does not wish to claim all the minor expenses involved in treatment or pregnancy. She is usually a friend/ relative of the intended parent/s and knows how much cost they are already outlaying and does not wish to provide receipts or impose on every occasion.

There should a guideline for a calculated and excepted amount for each step (compensated surrogacy) including:

- the fertility treatment including the counselling, the initial appts, the egg collection cycle (ie all the attendance for bloods, medications, ultrasounds, OPU and/ or ET day),
- the legal appointments
- the pregnancy (ie all the bloods, appointments, scans) and
- the birth (ie hospital stay, leave from work etc).

The payment should be calculated on set minimum and maximum amounts (maybe use jury duty rates), these could be updated each year with CPI. Do not to make it too complicated and don't ask for receipts for everything, very draining for the surrogate and clinics. An acceptable range could be suggested for some more fluid expenses for example maternity clothes to cover a range of expectations and financial ability.

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:

I do not feel experienced enough in this area to comment

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:

I do not feel experienced enough in this area to comment

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 do not feel experienced enough in this area to comment

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

Response:

I do not feel experienced enough in this area to comment

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:

In WA, we have the *WA Human Reproductive Technology Act 1991* and *Surrogacy Act 2008*, these have been under review since 2018 and are yet to get into Parliament. I strongly support national legislation that overrides all the states – if you wait for all states to amend their own legislation to make it consistent, it will never happen!

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:

a. If there is national legislation, there could be a national regulator and administrative body that deals with regulation and oversight of surrogacy applications.
b. Currently all WA surrogacy applications require submission by the clinic and approval by the Reproductive Technology Council. This is excessive, the experience and competency of the Council can fluctuate.
c. More auditing and licensing requirements can be required for clinics, counsellors and legal firms that provide surrogacy services.

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: I do not feel experienced enough in this area to comment

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: Yes, many couples think surrogacy is illegal in WA (it is only illegal for men) and seek treatment overseas because of this and due to arduous WA application and approval process

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: It is out of scope, but I would support compensated donation as well as compensated surrogacy so we can expand our donor sources within Australia.

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: Nothing further to add, thank you.