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:

- I was a traditional surrogate for two male friends in a same-sex relationship.
- The entire process took place in Victoria, Australia.
- Because it was a traditional surrogacy process, we did not have to interact with any clinics and did not face any barriers as a result.
- We interacted with lawyers and counsellors and did not face any barriers in this process.
- I had a wonderfully positive experience, from conception to pregnancy and birth and count myself, the baby and the parents, extremely lucky.
- As very close friends, we had an open communication process that supported us to be honest and clear throughout the process.
- There were still some small challenges, as with any significant event, such as discussing money, appointments, and overcoming medical decisions.

- There was also an interesting challenge when we commenced in determining whether what we were considering was legal.
- As a traditional surrogate without any kids, I believe I am the exception to the norm.
- Most websites and advice seem to indicate that to be a surrogate, you must have had previously kids, which is not accurate for traditional surrogacy.
- This is one area that can definitely be improved and clearer in the communications across IVF providers and surrogacy websites.
- As a consequence, other services we interacted with assumed that I had previous children.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

Of course, the current principles of the best interest of the child remain paramount.

Additionally, the surrogate's right to bodily autonomy and all medical decisions.

Lastly, I do acknowledge there is a space for surrogacy to be considered as a work and be respected and reimbursed as such.

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: No response

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:

There should be complete transparency and honesty for the children. This should be located in a central government database for record keeping and ensuring this information is accessible.

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:

It is difficult to seek/find a surrogate because you cannot advertise or ask.

Women aren't interested in being surrogates because there is no compensation.

Perhaps a more formal and government organised surrogacy service would be helpful for people to connect. This should definitely not be run by IVF services or any for-profit service.

Women should be compensated for their effort and energy required to be a surrogate, and this may encourage women to do this service and work for others.

Eligibility requirements for surrogacy

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

Response:

Current requirements for traditional surrogates include lawyers and legal agreement and counselling. These are reasonable requirements and should remain, and no further requirements should be required. For the removal of costs associated, there could be legal templates for surrogacy provided that can be witnessed, instead of the costly requirements of engaging lawyers.

It should remain that traditional surrogates do not need to have had previous children, and perhaps this should be the case for the gestational surrogacy too – if both parties are happy to take the risk (being that they may not be able to conceive).

Of course, same sex couples should not be discriminated against and have the same rights to access surrogacy and IVF as any other couple.

Nationally consistent policy should absolutely be part of the reform.

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

Response:

As above.

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:

It shouldn't need to involve lawyers due to cost burden. It should include witnessed documents to ensure there is not coercion.

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.

I don't think enforcement is a required change. The principles of best interest of the child should always be principal and that would resolve any enforcement needs.

Response:

I don't think enforcement is a required change. The principles of best interest of the child should always be principal and that would resolve any enforcement needs.

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, I had counselling prior to and after birth. This was helpful and should be included as an option for all surrogates.
b) It should not make the agreement void, it should occur and there should be an explanation and assessment of why this process wasn't taken.
c) Yes they should. But this could occur prior to birth so that parentage can be updated at birth – not after.

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:

Not for profit surrogacy agencies could operate – but not for profit services.

The current legal agreement and counselling was sufficient and may remain. Legal advice per se is not really required, and could be a government service instead of a lawyer.

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:

They should be non-for-profit / government funded.

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:

Unsure, as my situation was through known, friends.

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:

Surrgoate should have access to the same leave as those with care of the child. It is important that the time to prepare for birth and recovery from birth is prioritied for surrogates and that they get access to the full entitlement from the government and workplaces.

I was lucky to have access to 6 weeks paid surrogacy leave from my work in the VPS, but this is insufficient, as it is needed to finish work a few weeks before birth, which means only a few weeks after birth are paid. It is important to know when birth will take place, so this is not enough time. At least 4 weeks before birth and 6 weeks after birth should be minimum.

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:

Perhaps an indexed monthly stipend (including the 4th trimester) plus medical expenses could be considered.

It was vital for my successful pregnancy and birth that I had massages, especially in the last month, pelvic floor therapy, acupuncture etc. These would be tough to negotiate potentially if you didn't know the parents. A stipend of sorts may cover these extra costs, beyond the standard medical care. Of course, any medical complications should be covered outside of the stipend to ensure that surrogates with complications aren't disadvantaged.

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:

Compensated, not commercial, surrogacy should be considered. Yes I agree with how you've explained that.

Labour is labour, work is work. Surrogates provide a vital community service and life-changing option for people. This should be compensated accordingly. Significant paid leave pre- and post-birth does offer some compensation, but it is also required for recovery and is not exactly real compensation. Additional compensation for the reasonable impact that surrogacy has for it's duration (at least 12 months) should be considered. As suggested in the form of a government-determined stipend, importantly PLUS medical costs should be considered.

The costs of clothing, specific food changes, other support items during pregnancy birth absolutely add up quickly. I would estimate at least $1000 per trimester.

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:

Compensation should cover from the initial engagement (before conception) until at 3 month after birth.

Not a limit on compensation, but an agreed amount.

Monthly instalments would be suitable

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:

It should be automatic at birth, parentage order could/should be obtained prior to birth, so the parents can commence being parents from the first minute.

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:

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:

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

Response:

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:

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:

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:

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:

The hospital system should be improved to better cater for surrogacy, allowing for additional rooms on wards for parents and baby and ensuring support people and parents are welcome at the birth, including if a caesarean.

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:

Yes it seems birth and hospital practices aren't included in the scope. There is an opportunity for improvements in the overall experience by increasing the understanding and needs to surrogacy arrangements during the birth process.

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:

I would stress the importance of including traditional surrogacy and for those like me, without kids, in the national reform. Although rare, we exist and have happily helped create life and change lives. I am happy to discuss my experience further if helpful.