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:

A: We were the Intended Parents (same sex couple M/M)

B: United States

C: California – proven surrogacy laws and processes, with a higher rate of "ethical surrogacy" as opposed to surrogacy in developing countries with little/no surrogacy laws

D: No. Although the options are limited through the surrogacy agency network as some countries to not allow same sex surrogacy.

Positive: That we were able to pursue surrogacy legally in the USA not requiring us to wait/find an altruistic surrogacy in Australia. The laws in the USA (California) afford some piece of mind when taking on such a big opportunity/risk. Having an intermediary service

(paid) also helped navigate the USA surrogacy system, although that just added to the extraordinary cost.

Negative: Not being able to pursue commercial surrogacy here in Australia. Having to navigate USA laws and having to "trust" those laws would work in favour for all parties involved. The cost associated with undertaking surrogacy in the USA is huge, when you factor in currency conversion, legal fees, medical insurance and travel/accommodation for an undetermined period of time. Then having to navigate the USA system to have a USA passport issued for our child, then coming back on a Visa not knowing how long it would take to address citizenship here in AU.

What could be improved: Ideally, local commercial surrogacy here in Australia, or only as a distant second, a more structured legal/ethical relationship between USA and Australia on matters of surrogacy to improve the ease of international surrogacy with the USA.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

- Commercial Surrogacy in Australia
- Ethical Surrogacy
- Regulatory framework
- Commercial reality (how much AUD$ is spent outside of Australia on international surrogacy by AU IP.

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:

Ethical surrogacy principles

Capitalist approach to commercial surrogacy

Agency and support for surrogate and IP

Regulation against surrogacy in developing countries where surrogates are more likely to engage under economic pressure. Although a woman should have the right to become a surrogate and be appropriately, ethically compensated beyond cost coverage.

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:

Should be an agreement between the surrogate and the IP before embryo transfer. Children should be afforded the right to all information regarding the surrogacy process they were born in to, or limited as per the agreement between parties before embryo. There should be

a clause to allow the decision made at the time if circumstances / relationships change between parties over time.

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:

Commercial surrogacy is not legal, therefore there is not legislation or regulation that supports genuine, ethical surrogacy.

Needs to be a national framework, not fragmented at a state level.

M/M partners almost always have to go international to access surrogacy. Where F/F can access local sperm donorship and reproductive services, without the burden or stigma of surrogacy.

International surrogacy is effectively a paywall for having children for IP. You really need to be wealthy to do it.

Parenting laws – who is the parent. Lack of pre-birth orders, or equivalent

Eligibility requirements for surrogacy

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

Response:

Yes

- Psychological assessment / engagement of potential surrogates and IP's
- Health assessment (including reproductive health) or all parties
- Genetic testing eggs, sperm, embryos before transfer
- Intention test to ensure surrogates are not under duress of significant economic distress
- Surrogate must have had children
- Strict limits on the number of transfers, births, terminations, miscarriages a surrogate may have during their. Eg: no more than two live births as a surrogate, to avoid related ethical issues related to multiple surrogacy births.
- Surrogate should not be biologically related to the child born.

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

Response:

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:

Rights of IP: Pre-birth order must be the responsible parents before birth ensuring the shild born has legal guardians. Rights to terminate pregnancy based on qualified health advice due to significant health issues detected during pregnancy,

Rights of Surrogate: termination on basis of surrogate health. Rights to refuse future contact with IP and children born from a surrogacy birth

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:

Yes

It should be enforceable under Federal Laws and regulations.

Should be a GSA contract between the surrogate and IP.

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: Should be offered by default as part of the GSA to the surrogate and paid for by the IP as part of the upfront commercial arrangement. Surrogate may opt not to undertake counselling, regardless of GSA/payment.

B: the surrogacy arrangement should not be entered in t until legal advice and counselling has been undertaken by surrogate and Ips

C: Yes there should be proof, maybe just by statutory declaration?

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: yes they should, and they should be registered and have legislated and regulatory requirements to monitor compliance, safety and ethics.

B: Readily available, highly accessible legal advice and counselling. Should cover roles and processes related to surrogacy, parenting rights, ethical considerations, what if scenarios. Informed consent.

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: non-profit preferably, funded primarily through payments incorporated in to the agreement from the IP, with possible subsidy from government

C: all services should be independent and not have any commercial/business relationship with each other, although a surrogacy agent may have a panel of providers to support quality and efficiency practices

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:

A: No. It should be a service that is initially engaged through conversation with a party's GP or counsellor.

B: Service providers may be able to promote their services and value proposition indirectly through the surrogacy agency

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:

A: Medicare rebates means-tested. GSA's to include episodic private health coverage for service such as hospital, specialists, and allied health, paid for by IP on behalf of surrogate.

B: Yes surrogates should be entitled to paid and unpaid leave, limited to 4 o 6 weeks paid, and up to 52 weeks unpaid.

C: Not sure that it needs to be made more affordable per say as the currency conversation and reduced travel/accommodation costs would do this anyway.

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: Maternity clothes, general sanitary items related to pregnancy, GP/OBGYN visits, reasonable living adjustments at home/work.

B/C/D: Predetermined and capped before surrogacy agreement is signed. Monies paid in advance in to escrow and drawn upon as required and within agreed limits and time periods. Surrogacy agency to oversee process and payments.

E: USA agreement included payment in to an escrow account and a list of services and general costs related that were agreed to.

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:

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:

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:

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:

Pre-birth order should be in place before the child is born, making the IP's the legal parents of the child. It should be consistent regardless of the circumstances of the surrogacy arrangement. IP's should be treated the same regardless of sex, gender, sexual orientation, relationship status.

We had a pre-birth order in place in Oregon where our child was born by surrogacy. The challenge was that initially after the birth the surrogate was listed on the birth certificate. A legal/admin process had to occur after the birth certificate was issued to change the us IP's to the parents on

the Birth certificate. This was a clumpsy process that could be improved administratively, but may be specific to the state administrative systems where our child was born.

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:

A: There is a lot of paperwork to collated to complete the AU citizenship application.

B: easy to get a passport once citizenship is approved. However, it was clumpsy that we needed to have our child on a US passport to get back home to apply for citizenship.

C: There should be a specific Visa Class for newborns/children that are born from international surrogacy arrangement where the IP's are Australian, and intend to live in Australia/apply for citizenship for the child

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

Response:

Generally the process was ok for us, but we are well educated and have English as our first language, which may have helped

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:

Nationalise surrogacy laws, and/or harmonise state laws so that they are consistent nationally, and do no discriminate based on location. For example the laws around the legality of international surrogacy differs in across states today.

Determination of parentage / parenting orders should be dealt with federally either through the family court or the Federal Circuit. State courts could harmonise but will inevitably start to differ over time.

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:

Yes. Definitely there should be oversight by a regulator/commissioner at a federal level.

Oversight should cover

- Surrogacy Agencies
- Health Providers registered to provide surrogacy related services
- Professional Providers registered to provide surrogacy related/adjacent services

Should be an administrative body.

Court system to be the "tribunal"

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:

Yes.

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:

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: