# Review of Surrogacy Laws

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**Surrogate and IP Support Manager for SASS (Surrogacy Australia's Support Service)**

**Question 1**

**Response:**

I have been involved with the local (South Australian) and national surrogacy (and egg donation) communities since August 2016.

I birthed as a surrogate in September 2020 for two Dads ([redacted]) who were previously strangers. We had a little boy ([redacted]) who was created with donor eggs from on of their friends, making me a gestational surrogate. It was a 2.5 year journey for our team as we had some failed embryo transfers and needed a second egg collection. It cost the dads about $60,000 for the process – and none of that was for loss of wages for me.

I have been an egg donor three times where two of those families also needed a surrogate. Two hetero families (one in Adelaide, one in Brisbane) and once for a single mum whose son is a double donor child.

I am a high school maths teacher as one of my part time jobs, and the other is working for Surrogacy Australia to run SASS (Surrogacy Australia's Support Service). SASS is the first agency to support people through surrogacy. We launched in January 2019 so have been running for 6.5 years. We are available to those who are looking to connect with each other, both IPs (Intended Parents) and surrogates, and to support teams who already know each other.

I run a Mentor program within SASS. In every capital city, and some regional centres, we have a gay dad, mum and surrogate who meet with SASS applicants in a one-on-one setting to share their journey and to answer questions.

I run free, fortnightly webinars to educate people about how surrogacy works in Australia. I have been doing that since April 2021. I am joined by a co-host each time (gay dad, mum, surrogate, lawyer, doctor, counsellor, small groups on a topic etc) and the recordings are kept on a YouTube channel and as a podcast. There are now over 110 episodes on the Surrogacy Australia Conversations podcast.

I have been involved with research with surrogates, government enquiries on surrogacy reform and provide talks at annual surrogacy conferences. I speak annually at the Rainbow Families 'Making Rainbow Families' seminar. I have spoken with 3rd year midwives as part of their course to prepare them for when they engage with surrogacy teams in their work.

I was previously the head of the volunteer admin team for one of the national surrogacy Facebook groups ASC (Australian Surrogacy Community) and the surrogates only group. I have collected data since 2018 from surrogates to track things like new/existing relationships with surrogacy teams, local/long distance, public/private system for birth, number of embryo transfers it took to a live birth, providing milk post birth and for how long, vaginal/C-section birth, age of surrogates at birth etc.

I run social media for Surrogacy Australia (Facebook, Instagram, TikTok) to provide free education, dispel myths, share articles etc.

## Reform principles

**Question 2** What reform principles should guide this Inquiry?

I agree with the reform principles contained within the ALRC's Issues Paper

## Human rights

## Barriers to domestic surrogacy

**Question 5** What do you think are the main barriers that prevent people from entering surrogacy arrangements in Australia?

**Response:**

There are eight key barriers preventing Australians from engaging domestically[1]

- Difficulties in finding an altruistic surrogate
- The lack of professional screening and support for surrogates and intended parents
- Lack of consistency with the laws across states
- The prohibition of modest compensation to a surrogate
- The 'messy' parentage order process after birth, meaning the surrogate is still the legal parent for many months post birth

## Eligibility requirements for surrogacy

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

**Response:**

No intended parent or surrogate should be allowed to engage in surrogacy unless they are over the age of 25 years given the emotional and psychological complexities inherent in these arrangements.

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

**Response:**

Eligibility requirements which restrict single males and gay couples from engaging in surrogacy who are WA residents should be removed as this requirement forces this group offshore and is contrary to the Commonwealth anti-discrimination legislation.

## Surrogacy agreements — validity and enforceability

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

[1] Kneebone E. et al, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and overseas' (2023) 26 (6) *Human Fertility* 1448–1458.

**Response:**

In all states and territories, to be valid, surrogacy agreements should be in written form and have been entered into before conception.

**Question 9** Should surrogacy agreements be enforceable?

**Response:**

The surrogate expenses and compensation should be enforceable. We modelled SASS from a group called Surrogacy UK (SUK). They shared their time, resources and documents to help us set up SASS. Their model is one which could work in Australia. Essentially where the agency helps the team to establish reasonable expenses, and once agreed upon, a monthly amount is transferred to the surrogate around the time of pregnancy attempts/success.

## Process requirements for surrogacy

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

**Response:**

The current structure in most states with 2 lawyers drawing up a legal agreement and mandatory counselling is a good structure.

I would like to see ongoing counselling mandated for surrogacy team. A model we promote is for the surrogate and IPs to have solo sessions each trimester of pregnancy, and for the team to have a group session in the final trimester.

Professional counselling should also be made available to the surrogate during pregnancy and pregnancy attempts at no cost to the surrogate.

Part of our SASS model sees the IPs pay for ongoing counselling ahead of time so their surrogate can access sessions without having to ask (and the burden of being aware of the extra cost this puts on the IPs). When the allocated amount is close to being used, I contact the IPs to ask for a 'top up' amount to cover, say, another 6 hours of counselling. This counselling is available to the surrogate until 12 months post birth.

## Professional services, including legal and counselling services

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

**Response:**

Running SASS as the first agency style support for surrogacy in Australia, I know there is a need for it. We operate within the rules of legislation of each state because the point of payment does not occur at the point of a match. IPs are paying for the model of support (Stage 1 and Stage 2). This is similar to how they operate in the UK and Canada.

To have more clarity within legislation would be preferable so that we can dispel the myths for those who are reluctant to join our service if they feel it is against their state laws.

**Question 12** How should professional services operate in Australia?

**Response:**

Surrogacy agencies should be available in Australia to ensure the availability of professional recruitment, screening, education, reimbursement and support of surrogates, and the support and education of intended parents.

Such agencies must be independent from IVF clinics. They should be staffed by those with past professional or lived experience of surrogacy. Eg ANZICA-accredited counsellors, past domestic surrogates, past parents who engaged in surrogacy.

Professional support can assist with harm minimisation, expectation setting, expenses management, logistical issues and problem-solving for surrogates, their partners and intended parents.

Such agencies should have a mixed funding model – partly user pays (50%) and partly government funded. The justification for this is to reduce the overall costs to Australians, and so discourage reliance on cheaper, yet less ethical international surrogacy programs.

Surrogacy-related counselling services should be independent from IVF clinics because

- there is a conflict of interest is having counsellors who approve and support surrogacy arrangements being paid by the IVF clinic.
- IVF clinics are profit-focussed entities so there is a risk they may divert counselling resources to the more common patient groups such as donor-IVF, neglecting the high needs surrogacy client group

Some surrogacy teams require significantly more professional support than others owing to factors such as distance, communication styles, access to services and prior experience.

Hence professional surrogacy support needs to be attuned to these differences, be able to identify higher-risk arrangements and put in place management plans to reduce conflict, misunderstanding and tension. Telehealth-based services will be an essential tool in servicing this population, given Australian surrogates and their recipients are can live in different locations.

In relation to whether such organisations should be non-profit or for-profit, we currently run a not-for-profit model with SASS. In terms of stability of income though, most of our income for Surrogacy Australia comes from IPs paying to join SASS. When there are months with low numbers of new applicants, this makes it challenging to run a small business. Having grants or government support would help significantly and allow us to grow our model.

The USA has long been regarded as the ‘gold standard’ for commercial surrogacy arrangements. They have decades of experience (although their price tag for IPs is enormous). One part of their model I hear is that a surrogate can access counselling years, decades even, after completing a journey. This is a fantastic model as there are many surrogacy challenges that arise for surrogates even years post birth – things like navigating the friendship and how the surrogate ‘fits’ into the family dynamic.

I have done data gathering on how much surrogacy costs in Australia (I don't believe anyone else has formalised data gathering on this). The range is $35,000 - $90,000 with an average of $60,000. We recognise that adding in the cost of an agency will increase how much IPs are already paying for surrogacy. It is certainly a middle class luxury to be able to afford surrogacy to have a family, both in Australia and overseas.

## Limits on advertising

**Question 13** How should surrogacy advertising be regulated?

**Response:**

There has been a long history (over 12 years) of potential Australian surrogates connecting with possible intended parents as strangers in online forums. For many intended parents, this is currently the only means of connecting with potential surrogates (or options like SASS) or family members who offer to carry.

In the interests of harm minimisation, surrogates should not be allowed to pay to advertise their services independently, given it is vital that potential surrogates are psychologically and medically screened before they are introduced to intended parents.

Having said that, regardless of laws, neither intended parents nor surrogates can be prevented from advertising and connecting in online forums. Indeed a strong theme to emerge in SALRI's consultation with intended parents and surrogates is that the law should not interfere with the ability of parties to get in touch, crucially by online means[2].

However education should be made available to raise awareness of the risks of such an approach.

Intended parents should also be discouraged from advertising in public forums that they are seeking a surrogate, given experience has shown that 'desperation' often clouds clear judgement about the suitability of a match. Paid independent advertising by intended parents should not be available, given the potential for exploitation of their need.

Instead, to better protect the interests of all parties and reduce the reliance on a 'dating app' process where only the most 'engaging' intended parent find a match, professional surrogacy agencies should be allowed to advertise their services to both potential surrogates and intended parents.

The establishment of a surrogacy register has been legislated in the past in South Australia. A 'register' suggests that healthcare professionals might be able to contact surrogates on such a database. Such a concept illustrates a lack of understanding of the need for professional matching services. In the South Australian context, such a register proved both impractical and unpopular with surrogates, who do not believe the government should have a role in the process.

[2] Plater D, Thompson M, Moulds S, Williams J and Brunacci A. Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA) (South Australian Law Reform Institute, Adelaide, 2018)

## Access to Medicare and parental leave

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

**Response:**

Medicare rebates for fertility treatments, specifically egg retrieval and embryo creation.

## Reimbursing and compensating surrogates

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

**Response:**

'Good' surrogacy teams have a card linked to the IPs bank account which the surrogate keeps and uses to 'tap' and pay for items as they come up. However many surrogates absorb the smaller costs because they are acutely aware of how much surrogacy has cost their IPs.

Instead, to allow for these additional out-of-pocket expenses, while avoiding surrogates being left out-of-pocket, a set monthly allowance (of around AU$2,000) should be agreed upfront and paid on a monthly basis to the surrogate from the time of commencing pregnancy attempts until two to three months post birth. Such monies should be kept in trust by either the lawyer or surrogacy agency and paid out monthly direct to the surrogate, as occurs for example in Canada and in many US arrangements.

**Question 16** Do you support a) *compensated* surrogacy and/or b) '*commercial*' surrogacy?

**Response:**

Surrogacy Australia supports compensated surrogacy, where payments recognise not just expense re-imbursements but compensation for the pain, discomfort and labour involved in pregnancy and birth.

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

**Response:**

At SASS, we have created an Expenses Calculator. The surrogate works through this with her Mentor, and they can work through reasonable expenses. Surrogates are notorious for underestimating pregnancy and surrogacy related costs. The Calculator is then shared with the whole surrogacy team (be that a SASS matched team or a self matched team) and it is used as a tool to guide the uncomfortable money conversations. We created this model with guidance from SUK (Surrogacy UK).

The idea is that the total forms a basis for how much that particular surrogate will 'cost' on the journey. If we took on a compensated model, this total cost could be assumed to happen, and the total amount could be divided by 12 to recognise the months of pregnancy and post birth. The surrogate could then be paid an amount into her account monthly, perhaps $1000 - 2000 a month for example.

There would need to be discussions about extra expenses, for example if the surrogate was issued with bedrest for 20 weeks of pregnancy and the IPs needed to cover her loss of wages. This would be an extra expense that the IPs would need to cover. Hence the need for a group like SASS to facilitate these uncomfortable conversations!

We also strongly support the recommendations in the submission by Andrea Whittaker after the workshop that we were involved with. Their response to Question 17 is very detailed with great suggestions, summarised below.

- Identify the 'big-ticket' items that should be paid separately either upfront or reimbursed by IPs, such as IVF costs, lost wages, large travel costs if the surrogate has to travel interstate and legal, counselling and medical expenses including health insurance expenses, birth hospital and physio/birth classes.
- Other reasonable costs which would be expected to occur in a pregnancy can be calculated through information available from surrogates (such as through Surrogacy Australia) plus an additional "compensation" element to recognize the time and effort involved and can be an additional monthly payment to surrogates accessible through a debit card.
- A reasonable monthly stipend "compensation" amount was estimated by participants in the range of between $1000-$2000 /month [or between 20%-50% of the minimum wage of $49,296.00] to cover day-to-day time and effort starting from medical preparations for embryo transfer to three months following the birth.
- It is recognised that depending on the number of embryo transfers required some surrogacy arrangements may last longer than others.
- It would be necessary to consider whether the compensation amount should be a set figure or variable based on factors like location.
- Implications counsellors and legal advisers should assist in making the financial aspects clear and can be part of the surrogacy agreement prior to conception.
- It was recommended that a third-party body or agency manages the financial aspects of surrogacy arrangements to prevent exploitation by ensuring escrow accounts for surrogates so they do not have to approach IPs to ensure or chase payments.
- IPs must have prepared contingent financial arrangements and insurance in case of unforeseen increased medical costs, lost wages, pregnancy related health issues such as post-natal depression, birth injuries, death etc.

The figure of around $10 000-$24 000 has been suggested as a possible base figure for the compensation for a surrogate (or a percentage of the National Minimum Wage) but it was also noted that in some cases, for example with difficult pregnancies, the need for extended bed rest, birth injury or long-term morbidity the impact and costs to the surrogate's family of lost wages, health costs and stress may be far greater. Given that currently domestic surrogacy arrangements were estimated to cost between $35 000 to $90 000, it was also recognised that additional fees and an agency fee would be an additional financial burden upon IPs.

## 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:**

Internationally – parents being recognised as the legal parents from birth. Restrictions need to be removed in some states which deems it illegal for parents to engage in overseas commercial surrogacy.

Domestically – a lengthy parentage order process

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

**Response:**

To speed up the process. If at birth, the surrogate is still happy for the IPs to be the legal parents, there could be a swifter process at this stage. A pre-birth administrative order could be written into the surrogacy agreement.