Review of Surrogacy Laws

Submission from [redacted] and [redacted]
(intended same-sex parents, Melbourne)

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:

We are a married gay couple living in Melbourne who have wanted to have children of our own for some years now.

Since falling in love in New York in 2016 all we have ever wanted is to make our own family. Mindful of the cost we would likely incur in having a family as a same-sex couple, we started saving furiously from early on in the relationship.

We investigated surrogacy in the United States while living there, which is commonplace and well regulated. A number of our friends have gone through the process. Psychological testing of both intended parents and surrogates is extensive, the surrogate is well remunerated, and medical care is first class. The legal process post birth for intended parents is clear and unambiguous in most states. However, in the U.S. healthcare system this all comes at a significant cost. Often insurers do not cover the cost of the surrogate or baby's healthcare. This cost issue is fast changing but remains difficult for non-U.S. residents. While we did explore a surrogacy arrangement with a U.S. based family member back in 2017, ultimately the ask was too much for them and we were unable to proceed.

We moved back to Australia in 2019 with some modest savings under our belt. Knowing that commercial surrogacy wasn't possible in Australia, we initially explored altruistic surrogacy through Surrogacy Australia, an organisation that matches intended parents with women willing and able to be a surrogate for intended parrents altruistically. However, it became clear that despite Surrogacy Australia's best efforts, such women were few and far between

(understandably) and there were far more intended parents than surrogates. We concluded the process was unlikely to enable us to start a family anytime soon.

Exploring overseas surrogacy agencies that we could engage from Australia was our only other viable option. We were relieved and excited to discover an Israel headquartered international surrogacy agency's surrogacy program in Bogota, Colombia to pursue our dream to have a family. The agency had a number of staff based in Australia and held various seminars in Melbourne, which gave us the comfort we sought. We engaged the agency in March 2022 on a single 'guaranteed' surrogacy journey, with promises from the agency that a live birth would be completed within 18-24 months and that the agency would take care of the logistics of the entire journey, including coordinating all medical procedures, sourcing an egg donor and sourcing a surrogate. The total cost of the journey was US$69,500 (AUD ~$105,000 based on current exchange rates), payable in instalments over various milestones in the journey, not including the costs associated with travelling expenses. Importantly, the program was presented as an affordable and realistic legal alternative to a difficult landscape here in Australia.

We visited the clinic in Bogota in January 2023. The clinic appeared clean and well run. We underwent brief psychological testing. We were informed that surrogates were well looked after and were provided with job opportunities post the surrogacy journey through a charity.

However, over three years later and after paying the agency US$42,966.50 (over A$65,000 based on current exchange rates), as we write this submission we are nowhere near having a viable pregnancy, much less a baby. We have endured multiple failures during our journey, including failed egg retrievals, three failed embryo transfers, destruction of two viable and healthy embryos during thawing, in addition to many months of unreasonable delays and postulating by the surrogacy agency.

The process was made worse by the lack of communication with medical professionals at the clinic and direct access to the necessary personnel. The only updates we received were from the agency's Australian based staff with no medical training or experience in the health profession. Often updates would take weeks to be provided to the Australian staff from the clinic. Given this was such a personal and emotional process, it made the surrogacy journey extremely difficult for us, especially when critical setbacks, such as failed embryo transfers occurred, and we were unable to understand why. Importantly, it was difficult to overcome the thought that our genetic material – a deeply personal and intimate aspect of our journey – is being handled by strangers that sit behind layers of information and communication barriers.

The financial and emotional toll of this surrogacy process has been significant to both of us.

We asked to stop the process earlier this year and sought a refund of our money because we decided as a couple that we cannot endure further pain through this protracted process. The overseas agency refused to refund any of the money we paid, despite us making multiple requests, noting the emotional stress and outlining the surrogacy journey failures. Notably, the agency has taken US$14,250 (~AUD$26,630 based on today's exchange rates) in agency fees from the US$42,966.50 we paid, representing approximately 33% of the money and meaning that only 66% of what we paid went to the medical clinic, paying egg donors and the potential surrogate. The agency has denied any lability on the basis that, among other things, they were only acting as an intermediary and had no responsibility for the surrogacy journey or its failures. The agency further threatened us, warning that if we initiate legal action, they would stop our surrogacy journey.

Safe to say we never would have signed up and paid the significant sum of money we did if we knew the significant emotional and mental distress we would endure as a result.

In a recent article on our journey published in a major metropolitan newspaper, an overwhelming number of the online comments were ‘they should just adopt’. If anyone has even begun to look at this process, they will know it is extremely difficult and complex process for heterosexual couples and increasingly so for same-sex couples. Commercial Surrogacy, for most people in our situation, is the only realistic way to have a family. After the experiences noted above, we are back at ‘square one’ with planning our next steps in creating a family.

Reform principles

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

Response:

In order:

1. Safety and health of the surrogate, above all else, including mental health screening of potential surrogates.
2. Safety and health of the child during and after pregnancy, including extensive psychological screening of intended parents.
3. Providing intended parent(s) who are not able to have a child themselves with an avenue for a child via a surrogacy that is accessible and affordable for the intended parents but also fair and reasonable for the surrogate.
4. Protection of the rights of the intended parents to their child upon birth through a simple and fast legal process without unnecessary complexity or ambiguity.
5. Ensuring the selection process to pick a viable surrogate candidate is fair and reasonable for the surrogate, with the focus on avoiding exploitation of the surrogate but also avoiding profiteering from surrogacy.
6. Avoiding third party intermediaries / “agencies” between intended parents and surrogates profiteering (refer to our experience above).
7. Providing guidance and support for both of the intended parents and surrogates and their respective families, including a framework for counselling and other support services.

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 key barrier is the inability to properly compensate the surrogate for the pregnancy journey. Understandably, very few women want to endure months of medical procedures, nine months of pregnancy and childbirth for without reasonable compensation for their

efforts. While we considered asking family members and friends to being a surrogate altruistically, ultimately, we found this a big imposition and very difficult form a psychological wellbeing perspective.

Eligibility requirements for surrogacy

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

Response:

Absolutely. This is an intimate and emotional process which needs to be carefully regulated by the relevant psychological and health authorities.

Extensive psychological testing and education is the most important component. Well informed consent needs to be given by the surrogate as part of entering into the arrangement with intended parents.

The surrogate should have had at least one or two children of their own as is practice in countries that participate in commercial surrogacy in order to avoid any unexpected emotional outcomes during pregnancy. Their homelife (whatever that may be) should be stable. Government agencies should retain the right to check-up on a surrogate during pregnancy to avoid harm to the child.

There should be limitations on the number of times a woman can be a surrogate to avoid potential for this becoming a profession and potential adverse consequences. It should remain a rare, intimate arrangement between a woman and intended parents.

Natural surrogacy, where the child is the surrogate's own, should be carefully considered if not avoided. The emotional bond may be too much. A third party egg donor should be preferred.

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

Response:

As noted, removal of the requirement that the surrogate cannot be compensated for their time.

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:

Surrogacy agencies should be permitted to operate in Australia, but with requirements to enter into an agreement which is governed by Australian law. Fees that can be charged by the agency should be regulated and should be disclosed to intended parents up front. Additionally, agencies should be mandated to provide intended parents with access to the medical professionals involved in the surrogacy journey. Our experience outlined in question 1 is illustrative of the 'profiteering' that goes on by surrogacy agencies. Overseas surrogacy agencies typically use contracts which are governed by a foreign law attempted to avenues of recourse for Australian based intended parents to the surrogacy agency and are opaque about the fees they pocket.

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:

Most Medicare rebates relating to the surrogacy should be viewed as costs of the intended parents and therefore Medicare should be structured in such a way so that intended parents access the rebates, but with the requirement that the costs of the surrogate are being fully funded (including payment of any 'gap'). This avoids any complexity around the surrogate paying for procedures in order to claim the Medicare rebate and potentially being left out of pocket or exploited by intended parents.

Intended parents and surrogates, collectively, should otherwise be afforded the same government benefits as any other pregnancy / child, having regard to the fact that some benefits may be appropriate for the surrogate (e.g. public hospital access for a birth) and others for the intended parents (e.g. childcare subsidies and parental leave). This should help to ensure that surrogacy becomes realistic and affordable in Australia.

Unpaid parental leave for the surrogate should be permitted for a short period of time before and after birth. If surrogacy is done via a compensated arrangement, our view is that paid parental leave would need to be carefully considered on a case-by-case basis having regard to how much the surrogate was being paid for the surrogacy and how much they earned in their job. One would not want an outcome where surrogates are inappropriately incentivised to enter into paid surrogacy arrangements on the basis that they could take paid parental leave of some kind before or after birth of the baby, placing a financial burden on their employer and potentially obtaining two incomes.

While it is an outcome that no one wants or expects (and should be avoided through careful regulation), should intended parents fail to fulfil their obligations to the surrogate, there should be a government 'safety net' system to ensure that the surrogate's needs are met (including

parental leave or income support, assistance with medical costs and a failsafe scheme to facilitate adoption or fostering of the child).

Reimbursing and compensating surrogates

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:

We support both terms, but prefer the term 'compensated surrogacy', because it avoids the connotation brought about by 'commercial surrogacy' that women would be entering into surrogacy arrangements for profit. Surrogacy should remain a rare, intimate process, but with the ability to compensate someone for their time and effort in agreeing to be part of someone else's family journey.

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:

Our view is that there should be a minimum amount of compensation (perhaps tied to government wage indexes) in addition to obligations on the intended parents to cover all expenses of the surrogacy or any complications associated with the surrogacy pre and post birth. We do not see that it is necessary to introduce a 'cap' on compensation – that is not the right way to regulate surrogacy. Instead, extensive psychological screening and criteria should be introduced as a means of ensuring surrogacy is being done for the appropriate reasons (and not for profit) rather than government intervention on what a surrogate can be paid – ultimately this should be a private arrangement between surrogate and intended parents.

Submission from [redacted] and [redacted]
Melbourne, Victoria
E: [redacted]