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

My answers are in blue:

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 *N/A*

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 intended parents, a gay married couple from Melbourne. Meeting new people and support from the surrogacy community has been great, but that has nothing to do with the government, quite the opposite. The ridiculous law prohibiting advertising for a surrogate makes it incredibly hard to meet one in Australia coupled with the prohibitively difficult access to affordable surrogacy services in general in Australia, the excessive costs of overseas surrogacy and a very difficult Australian fostering and adoption system also makes that much less of a viable option for us. Most people like us thus have few choices and are forced to remain childless. Australia should allow advertising for a surrogate – it

is unreasonable to prohibit this and creates unnecessary barriers for good people who could make wonderful parents and who contribute to their societies; allow IP's (intended parents) and surrogates to register with agencies to be matched with each other. We have been trying to find a surrogate in Australia and are really struggling. We live in Victoria but could not move to WA despite an opportunity there because same gendered male couples are still not allowed to access surrogacy there – why is there inconsistency across the states regarding the human right to be treated equally and fairly in your own country.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

The fact that most babies born by surrogacy to Australian parents, happens by overseas surrogacy arrangements, indicates a glaring problem with the status quo and that the system is clearly not working and is not meeting a fundamental social need. The goal should be to make surrogacy legally accessible to any Australian, with the freedom to advertise for a surrogate, and with IVF and support services available to help facilitate this. Of course surrogacy needs to be done responsibly, but when a system is inconsistent between states and overly controlled or prohibitive, one can end up 'throwing the baby out with the bathwater' which has happened with the hopes and dreams of so many of Australia's intended parents, who cannot afford overseas surrogacy, and who are not able to access assistance with meeting a potential surrogate and navigating the process.

This inquiry should also address the rights of the biological parent, who currently may have to give up their baby to the surrogate, despite the fact that she has no biological connection to the child, aside from an umbilical cord. How can IP's be allowed to pay for the pregnancy, support the surrogate and then potentially lose their beloved baby because the surrogate chose to go back on their agreement and keep a baby that *is not hers biologically*? How can this be fair and just? The surrogate does have rights to her body, yes, but once the baby is born, it should belong to the intended parents according to a surrogacy agreement and be legally enforceable, just as remuneration of costs by the IP's should be enforceable.

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:

Human trafficking must of course be avoided, or exploitation of women by these kinds of arrangements. Production of children for human trafficking purposes MUST be avoided of course and can be prevented by making IP's and surrogates go through counselling and various legal steps to safeguard against this. But – a balance must be reached where the rights of good people wanting to legally use surrogacy to have children legitimately are NOT trampled upon due to the above concerns that can be managed and avoided by a diligent and controlled surrogacy system.

Fairness to both the IP's and the surrogate and fundamentally the welfare of the child are of paramount importance. Research has clearly shown that children want to know who their parents are, even many years after being happily adopted, yet Australian law allows the surrogate to keep a baby that isn't hers if she so chooses? How is this fair and legal and in the long-term interests of the non-biological child? It makes no sense.

I would address these concerns by allowing trained representatives and surrogacy specialists to guide IP's and surrogates through a process of counselling, character vetting, assessments and due diligence (similar to how one would with adoption) to ensure that the arrangement is legitimate and mutually agreed and understood by all parties. Once this happens and the legal documents etc are all prepared and signed, I would suggest the surrogacy proceeds with the IP's paying for the surrogate's expenses, or whatever financial aspects were agreed to freely by all parties, and then make the contract enforceable upon birth.

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:

I would suggest the name and details of the surrogate be kept on record and the child can access them should they wish to above a certain age, much the same as for sperm or egg donations. There's no need to reinvent the wheel here.

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 main barriers are:

1) IP's and surrogates are not able to legally advertise. Instead, they have to go through convoluted ways to meet each other and aren't able to easily broach the topic. This can be overcome by allowing advertising through certain controlled channels, like surrogacy agencies, or a government body or website, basically a central point where surrogates and IP's can be vetted and can then meet each other safely, without the fears that led to this crazy law in the first place.

2) No commercial surrogacy: because commercial surrogacy is prohibited in any form, this limits the number of women who would possible be willing to surrogate. Allow women to exercise their own true autonomy of their body and finances without government overreach. A vetting process by approved surrogacy agencies could allow for legitimate surrogates and IP's to meet and negotiate arrangements beneficial to both parties, as is done overseas.
3) Women are also required to have had a child before: this limits the number of available surrogates. If a women is willing and able to surrogate but does NOT want a child of her own, why is government interfering? Provide the right counselling and access to information to inform people about these matters, and let them make up their own minds.
4) Gay men definitely face barriers to surrogacy in Australia and in some states it is illegal to pursue overseas surrogacy. Thus, Australia is literally discriminating against some of its own citizens by limiting their options to have a child on every front. How would you feel in this situation? I would ensure all states allow local and international surrogacy for any Australian (anti-discrimination laws to this effect) and allow limited commercial surrogacy (i.e. a capped maximum amount to be negotiated if the surrogacy is not altruistic).

Eligibility requirements for surrogacy

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

Response:

Yes. Both IP's and surrogates should be of good character (this can be vetted as is done for so many jobs and roles in our society already), they should be required to go to counselling alone and together as a group (IP's and surrogates both) and they should be legally and physically able to support a child and themselves. I would follow a similar principle to adoptions or sperm / egg donations.

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

Response:

Some Australian states discriminate against gay men or people who perform surrogacy overseas while allowing them no other option in Australia – this should not be allowed in a democracy like ours.

Surrogates should not be required to have had 1 child before becoming a surrogate. Allow women who perhaps don't want their own children but who don't mind helping other people to participate, with full counselling in place so that they make an informed decision.

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:

The ability of a surrogate to keep the baby regardless of the surrogacy agreement is discriminatory to the IP's and is unfair to the baby who has a right to be with its biological family, the family who paid for its existence and whose DNA runs through its veins. This can be avoided by proper counselling and due diligence upfront, and enforceable surrogacy agreements.

The requirement for a surrogate to have had 1 child of her own prior to undertaking surrogacy for someone else (discussed above) should be scrapped. Let women make informed choices around their own bodies and wellbeing.

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. All parts should be enforceable because the agreement should have gone through legal scrutiny and due diligence at the onset. A judge or the authorities should enforce the agreement, the same as any other legal agreement would be resolved– the same as for any standard legal agreement.

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:

Counselling should be required before surrogacy begins, during surrogacy and after surrogacy especially for the surrogate if she needs it. Surrogacy agreements made in Australia should not be legal unless counselling has been completed and signed off by an authority. Parentage agreements should require legal advice, witnesses and are undertaken during the course of / parallel to the counselling process.

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 are much needed in Australia, but ideally would be non-profit organizations or should be monitored to avoid price gouging in desperate people.

IP's and surrogates should be required to undergo some form of training and be given reading material, as well as counselling to inform them of all aspects of the process. Legal advice and counselling by approved service providers should be mandatory.

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:

Their role should be to vet IP's and surrogates to prevent unscrupulous actors from performing surrogacy. They should introduce IP's and surrogates to each other or allow / facilitate advertising. Ideally non-profit organisations, but if necessary, profit can be allowed but with limits set to avoid exploitation of IP's and surrogates. I think a similar model to sperm and egg donations could also work. At this stage Australia has very little surrogacy – so any of the above would be a vast improvement.

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:

Advertising should be allowed. Vetted surrogates and IP's who have gone through some kind of character witness system and assessment should be allowed to advertise and kept on a register. Simple content such as a family introduction, back story and pictures should be allowed. I would prefer a surrogacy register, or a registration number that should be required to be quoted on any social media post.

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 think the same Medicare rebates that exist to current IVF laws and processes should apply. Surrogacy should be fair and equivalent to the rest of society and should not exclude or preference anybody. Surrogates should be allowed a recovery period after surrogacy, but not as long as the carer of the baby…in other words, it is not the same as maternity leave for a surrogate. Perhaps 1 month of 'post-surrogacy leave' depending on the nature of the birth e.g. natural, caesarean i.e. it would depend on the recovery time mandated by a doctor.

Just allowing more women to become surrogates without jumping through all the hoops in Australia would be a massive help to the community, as described above. I believe I've covered all this above.

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:

Any expenses relating to the pregnancy should be reimbursed by the IP's. This should all be laid out in advance in the legal agreement between the parties. Provided the surrogacy agreement is legally enforceable, the money can be paid to the surrogate as needed during the pregnancy.

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:

I support the idea of a limited commercial surrogacy that is legally controlled and has a certain cap on the amounts paid.

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 be agreed upon by legal agreement before surrogacy that allows the surrogate to perhaps earn a minimum wage up to a certain amount for any worktime lost. There should be a legal limit or suggested legal range to prevent exploitation of IP's and surrogates alike. I have no experience yet with overseas surrogacy as I can't afford it.

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:

IP's should be recognized as the legal parents when the child is born and is no longer part of the women's body.

Recognition should be automatic.

The process would be different if the surrogate is also the biological mother – in that case, she does have a say as to the future of her baby and can choose to give it up or not, the same as if it were up for adoption.

There should be no difference at all between IP's – all should be treated equally.

The best interests of the child are first and foremost to be with its biological family, unless they are unfit to parent the child.

I believe Australia could learn from South Africa's approach to surrogacy, but could even improve upon it.

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:

Unsure.

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

Response: unsure

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:

Surrogacy should be legal to anyone who wants it across Australia. It should be regulated at a Federal level. The inconsistencies are very problematic because surrogacy for gay men and overseas surrogacy arrangements are illegal in some states – can you imagine this in a 21st century democracy?

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:

Surrogacy arrangements should have a department of the government that oversees surrogacy agencies, who vet possible IP's and surrogates and who provide a surrogacy

registration number to each candidate, that should be quoted when needed as evidence of approval to advertise and pursue surrogacy – a bit like an ID or drivers license.

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:

Unless someone is performing human trafficking or something similar that demonstrably harms the child, another person or their society and is against human rights, I don't see any need to criminalise a particular form of surrogacy. Offer viable options and access to surrogacy, and this won't be a problem.

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:

I think people who need surrogacy find out what they need to on their own, but perhaps there could be a drive to promote less of a stigma against it as a means to start a family. Many people support surrogacy both as surrogates and IP's and it can be a wonderful experience for all.

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:

Not at this time.

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:

Other countries have got it right or close to right, such as South Africa, Canada and even the USA in places. I suggest Australia keeps it as simple as possible, between consenting adults and following a set of rules for approvals and contracts and make it legally enforceable. Let's open up the options for people to have families without regulating everything out of existence.