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:

We are a married same-sex couple and parents through surrogacy and egg donation. Our child was born via domestic surrogacy in NSW in 2022, with the Parentage Order granted in first half of 2023.

The process is daunting for intended parents, given the complexity of the legal framework, unclear lines of authority and regulation at state and federal levels, and the considerable ambiguity over how to proceed in compliance with legal obligations (for example, the ban on commercial surrogacy leaves considerable interpretation about what could be construed as a breach of financial incentives: is a Christmas gift or pamper pack for a pregnant surrogate a financial inducement? Familial and household support for a surrogate (eg hiring them a cleaner, gardener, or meal service)?

When lodging our Parentage Order, the court clerk incorrectly advised us to lodge an Adoption Order application – such was their unfamiliarity with the legal process of surrogacy within Australia.

Additionally, the process of claiming Paid Parental Leave for both our surrogate and myself as the primary carer of our child was woeful. Automated processing initially rejected our claims on the basis that two people cannot claim PPL for the same child. Only after repeated calls and site visits to Centrelink, and literally emailing both the federal legislation AND Centrelink's own PPL policy to a senior manager, was our claim successfully processed and backpaid 3 months after birth – 3 months both ourselves and our surrogate were forced to go without income.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

This Inquiry should be guided by two core principles:

- Removing legal ambiguities, state/federal overlaps and unnecessary complexities to provide transparency to all parties about what is and is not acceptable practice.
- Upholding the interests of children born of surrogacy. Involvement within the local surrogacy community has demonstrated to us that people's views on surrogacy are dominated by self-interest and ingrained religious/cultural beliefs rather than what is actually in the best interests of children brought into the world from surrogacy. Their rights and wellbeing should be paramount.

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:

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:

All information should made available. Children have a right to know where they came from, and legal permissions would cater to this access to identity, medical and biological history in the event that relationships breakdown in the future, contravening initial agreements between parties for the child to have open access.

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:

Uncertainties around Parentage Orders and legal parent status are the biggest barrier – both for intended parents and prospective surrogates. Each carries considerable worry under the current legal framework that their intended role in the journey may work out differently post-birth, leaving parents without their child or the surrogate and her family with a child they had never intended to raise, and the child torn between two families.

General uncertainties about the legality of surrogacy within Australia also limits social support structures. In our own experience, we had friends and neighbours distance themselves from us when we advised them of our domestic surrogacy journey, believing that we were flouting the law.

Eligibility requirements for surrogacy

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

Response:

Yes, eligibility requirements are strongly needed for both intended parents and surrogates. Medical and psychological screenings, police checks, and financial/credit history checks should all be mandatory. At present, much of these are voluntary disclosures between domestic surrogacy teams, which can easily be overlooked, omitted or dishonestly represented.

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:

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:

It is ridiculous that Surrogacy Agreements are legally mandated but their contents are legally unenforceable. A standard legal template should be devised, instead of leaving it open to surrogacy teams to devise their own, to ensure standardised conditions are met and agreed to, including expected cost reimbursements and the process for doing so.

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 mandatory post-birth for all parties – ideally within 1 month of the birth and again within 1 month of the Parentage Order application being lodged.

The mandatory legal advice and counselling before entering a Surrogacy Agreement is a useful framework to ensure all parties remain aligned and are entering the agreement for the right reasons. This could be further strengthen with mandatory health, police and credit history checks. Proof should be required as part of the Parentage Order application – otherwise there is limited incentive to undertake these.

It could be useful to require all parties to a Surrogacy Agreement to document their research into surrogacy to that date, in a similar way the learner divers document their driving experience. This could include formal services accessed, books and information read, events attended etc. Doing so would demonstrate parties have undertaken their own research into the process and emotional/psychological/logistical/financial commitments involved and demonstrate their commitment to proceeding.

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:

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:

All operators should operate independently within their area of expertise, to maintain unbiased focus on their clients' interests. Any referral partnerships or other potential conflicts of interest should be visibly and proactively disclosed as to what they are and what if any incentives are involved.

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:

Current rules make it ambiguous for how intended parents and prospective surrogates connect within Australia. It also helps to foster misconceptions and untruths within the wider community that surrogacy is illegal, rare and unethical.

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:

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:

There should be greater clarity for what constitutes a reimbursable expense (e.g. is a foot massage for a heavily pregnant surrogate with swollen feet a personal or a surrogacy cost? Pregnancy food cravings? Present regulations leave such things widely open to interpretation, and the fear that the judge presiding over a Parentage Order may take a differing view over reimbursements that the surrogacy team deemed entirely reasonable. Perhaps a logbook could document what expenses were incurred and when, which align with the surrogacy/pregnancy progression and allow greater visibility for common sense justifications.

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 believe that altruistic surrogacy is the preferred legal model, under a simplified legal framework with greater clarity over individual rights and responsibilities.

While there are arguments that everyone in a surrogacy journey apart from the surrogate herself profit from the process, we personally feel that any form of surrogacy that involves paying a surrogate over and above the reimbursement of all reasonable costs incurred opens the door to:

- exploitation and people entering into Surrogacy Agreements for the wrong reasons (ie financial rather than family creation and the rights of the child).
- severely skewing or even restricting professional services to those who are more financially well-off.
- disincentivising ongoing contact between the surrogate/her family and the child, once the final payment has been made, which may cause damage to the child's sense of self-identity and psychological wellbeing.

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:

Court workers themselves don't fully understand the legal requirements and processes involved, meaning there is huge scope for legal errors, unnecessary time delays, and process duplications to occur. Better training is needed for all touchpoints in all levels of government to ensure services are delivered in an efficient and effective manner.

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:

The Parentage Order should be able to be lodged before birth once viability of the baby is reasonably assured (around say 34 weeks).

This would allow for temporary legal parentage to be granted immediately from birth (subject to post-birth counselling, financial and other criteria being satisfied, at which point full parentage is conferred) and reduce complications where a newborn requires medical care and/or a passport to enter Australia.

It would also go a long way to assuage fears from all parties about the legal ambiguity of who has parental and legal rights over a newborn child via surrogacy.

And, from a basic point of view, it would minimise the complex legal paperwork being completed and lodged by sleep-deprived new parents!

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:

Yes – as previously noted, public servants within Centrelink and the court system have substantial knowledge gaps about the process of surrogacy and the legal rights of new parents, surrogates and children born via surrogacy. This lack of standardised, informed presentation from the people enforcing the law sets a poor tone for the wider community and leaves commercial and non-profit entities to fill the knowledge gap and correct unwitting mistakes.

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: