Surrogacy ALRC submission by [redacted]
Please de-identify this submission.

Question 1
I am writing this submission from my own recent experience as a surrogate. I gave birth to a child in [redacted] 2025. The arranged parents are close friends who I had known for a number of years. We all reside in Western Australia, therefore the legislation relevant to my experience is the Surrogacy Act WA 2008.

Positive aspects:

1. Being a surrogate was one of the hardest things I have ever done, however I see it as one of the greatest achievements in my life. I have helped my close friends complete their family in circumstances where they were unable medically to do this themselves. I have no regrets at all about being a surrogate for my friends.
2. Option of an approved plan in WA (s21 and 22 of Surrogacy Act WA) – this plan sets out the agreement between the birth parents and the arranged parents for contact with the child until he/she turns 18.
3. Surrogate retaining bodily autonomy. Throughout the pregnancy, I retained bodily autonomy. While I personally discussed medications, medical procedures etc with the arranged parents, it was ultimately my decision. At no stage did the arranged parents have the ability to compel me to do anything. As a team we discussed our views to ensure that we all had the same views on matters such as alcohol, medications, vaccinations, grounds to consider termination etc. This discussion was in preparation for our counselling sessions prior to surrogacy.

Negative aspects:

1. Substantial loss of income. This was a result of being unwell throughout the pregnancy. As I am self employed it was not possible to accurately calculate the lost income. For clarity I did not seek reimbursement from the arranged parents.

What could be improved:

1. Greater flexibility for financial remuneration for surrogates. Even if the arranged parents had reimbursed me for every expense allowed under legislation, my family would still have lost money through this process. If the surrogate is not in a financial position to wear such a loss, this would be a significant barrier to being a surrogate. The costs cannot be easily listed and documented. The costs could include:
   A) increased grocery costs due to the surrogate eating a healthier diet during pregnancy;
   B) Time off work for the partner or support person outside of the circumstances listed in legislation; and
   C) Time off work for the surrogate late in pregnancy and following the birth where that exceeds two months.

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?

I will answer this question only addressing the rights and interests of the surrogate mother. In my view, the question of whether surrogacy is ethical is not answered by whether the surrogacy was commercial or altruistic. I believe it is about having minimum protections for the surrogate mother and her family. I would like to see a requirement for all surrogates, regardless of whether they are involved in domestic or international surrogacy, to have minimum protections including:

1. Psychological screening to assess their suitability to be a surrogate;
2. Access to counselling / psychological support in a culturally appropriate manner, both prior to pregnancy, during pregnancy and for a suitable duration after separation from baby;
3. The surrogate having access to suitable standards for health care;
4. The surrogate not being 'out of pocket' due to the surrogacy, and if financial promises are made to the surrogate, those payments are received by the surrogate;
5. The surrogate receiving independent legal advice as to their contract with the surrogacy agency (if relevant) as well as their contract with the intended parents;
6. Surrogate retaining bodily autonomy, and payment to the surrogate not being structured in a way that could cause the surrogate to unduly risk her health; and
7. Any promises of the intended parents which form part of the contract being met – eg if the surrogate requests and the intended parents agree to a period of two weeks post birth where surrogate sees the baby daily, has this been met? If not, is there sufficient justification for breaking this promise?

If we see these protections as being necessary for a surrogate who lives in Australia, then why are these same protections not relevant for a surrogate who lives overseas? There are various ways this could be achieved, some ideas include:

1. requiring parents through surrogacy to provide evidence of health, mental health and financial standards being met as a condition of the parentage order being granted within Australia;
2. international surrogacy agencies having the option of applying for and receiving accreditation recognising that they meet these minimum standards. This can help Australians considering surrogacy agencies to choose an agency that meets these standards. Agencies will then have a financial motivation to ensure that their surrogates are treated appropriately. Complaints can be made to the body responsible for accreditation by a surrogate or intended parent allowing the body to review the accreditation if there is a serious breaches or a pattern of breaches;
3. a register within Australia that intended parents can access to see the track record of an overseas surrogacy agency – so if an agency has failed to meet minimum standards in one surrogacy, that information is deidentified (in terms of identity of surrogate and child) and made available for future potential parents to access. At the moment intended parents rely on their own online research, word of mouth etc, with the potential for the surrogacy agency to be paying for referrals.

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.

Barriers to surrogacy within Australia include financial barriers, lack of awareness, poor outcomes for previous surrogates, and state based additional criteria.

Financial barriers for a potential surrogate:

1. The current state based legislation focuses on the surrogate not receiving a financial reward, rather than focusing on the surrogate being in the same financial position as if they had not undertaken the surrogacy. There is uncertainty as to which expenses are reimbursable, and which are not, with the intended parents possibly fearing prosecution if they get it wrong. Erring on the side of caution results in the surrogate being out of pocket. Examples of expenses include the surrogate eating a healthier diet which costs more, physio while pregnant where it's unclear if the pregnancy caused or contributed to the need for physio, and long term health care where the surrogate has ongoing postnatal depression or gynaecological complications which the pregnancy contributed to.
2. Surrogates are entitled to paid parental leave from Centrelink if they meet the eligibility criteria. This is excellent. However, there are additional restrictions on a surrogate such as the entitlement ends once the surrogate does any paid work – I returned to work however was not sufficiently recovered to work full time due to postnatal depression. I am therefore out of pocket, the arranged parents are not permitted to pay the lost income outside of a two month period. I am not permitted to use the balance of my unclaimed PPL days.

Poor outcomes for previous surrogates:

1. Prior to being a surrogate, I researched surrogacy including listening to podcasts where Australian surrogates were interviewed and first hand written accounts of other Australian surrogates online. While most of the stories were positive, there were a number of stories where the surrogate was blocked from having contact with the child after the parentage order came through. This was in circumstances where the relationship between the surrogate and the intended parent deteriorated. As a surrogate, I have a strong emotional connection to the child I gave birth to. I would be devastated if the parents chose to exclude me from the child's life. The ability of parents in most jurisdictions to cut contact between surrogate and child is a barrier for some potential surrogates.

State based additional criteria (mainly effecting the intended/arranged parents):

1. Some intended parents need to move interstate to be able to pursue Australian based surrogacy. Eg same sex male couple or single male intended parents are not eligible in WA (s19 Surrogacy Act 2008), and Tasmanian intended parents can only use a surrogate who lives in Tasmania.
2. In Western Australia the Reproductive Technology Council receive and decide on applications for surrogacy arrangement approvals. Prior to making the application, the arranged parents incur the costs of legal advice, medical advice, psychological

screening and counselling. This can easily be $10,000. There is a lack of publicly available information on the policies under which the RTC make decisions, and how the RTC have previously decided in cases which are not clearcut such as unexplained infertility where the doctor is unable to explain why the intended mother is unable to successfully carry any pregnancy, or whether the council will dispense with the requirement for the surrogate to have given birth to a live child in the particular scenario. It would be helpful if preliminary decisions could be made on these questions by the RTC prior to the full cost of the application is incurred.

Eligibility requirements for surrogacy

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

Yes, I think they should. I consider the following to be important:

1. Age of surrogate to ensure surrogate is sufficiently mature to make this decision. 25 years old is reasonable;
2. Written agreement prior to conception;
3. Independent legal advice;
4. Medical approval regarding the surrogate's medical suitability.

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

Having given birth to a live child should not be a prerequisite, psychological screening can address whether a potential surrogate who has not given birth is psychologically suitable.

I went through the process in WA. While the legal implications were explained to me by a lawyer, I was never advised of the IVF process such as what is involved in a medicated IVF cycle, possible side effects of the medications in IVF, what the IVF process may be like etc. I believe that this information should be explained much earlier in the process.

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.

Financial agreements should be enforceable. Where the financial agreement purports to limit reimbursement greater than what is in legislation, this should be clearly identified and initialled by the parties.

Any agreement to the surrogate having ongoing contact with the child after birth should be enforceable provided that the interests of the child remain paramount. This could be done through an approved plan as per Surrogacy Act WA s 21(2)(f) and s22. This would reduce the risk of intended parents from making promises they do not intend to keep regarding contact with the future child.

Conditions that unduly limit the surrogates bodily autonomy or add barriers to reimbursement should be unenforceable. In Australia, the surrogacy agreement is generally prepared by the intended parents' lawyer, and the surrogate and her partner receive advice on it. There are some surrogacy lawyers who add clauses that purport to restrict the surrogate's financial entitlement to less than what is permitted under the legislation, or add clauses that try to restrict the surrogate's bodily autonomy. By way of example, the draft surrogacy agreement presented to me in 2023 contained a restriction on my exercise to low impact non contact exercise, limited international travel, and requiring me to comply with the arranged parents decisions regarding any medical treatment of the foetus while in utero, and set prerequisites on steps to be taken before claiming reimbursements (eg using the IVF clinic's counsellor first, providing a doctor's note for when I was too sick to attend work).

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.

In WA the IVF clinic is required to provide access to counselling at certain milestone, however in my experience, this was not encouraged by the clinic, it required me to actively seek the counselling. We therefore did not attend counselling other than prior to entering into the surrogacy agreement. In hindsight I regret this. I would prefer that counselling at various milestones be compulsory.

Counselling post birth is required in some states, but is not compulsory in WA. This should be compulsory to identify any mental health issues and assist the surrogacy team with the complex emotions and unique relationship dynamic that comes with surrogacy.

b. what should happen if legal advice and counselling are not provided before entering a surrogacy agreement?
If a pathway for obtaining a parentage order is made in circumstances where the Australian based parties fail to comply with the legislative prerequisites, this will lead to problems. The legislation aims to protect the parties and limit the circumstances in which surrogacy can occur. If an intended parent was desperate enough, they may enter into an informal agreement with a traditional surrogate who may not be suitable for surrogacy.

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.

In my view surrogacy agencies can be beneficial in assisting potential surrogates to meet intended parents. The assistance of an experienced person to guide the process can be very helpful. The agency could also provide a service of holding funds in trust to meet the surrogacy expenses. I prefer that such fees be capped to avoid situations where running a surrogacy agency is a cash cow.

The current model of legal advice in WA is fine. The requirement for a certificate from a lawyer stating that the advice has been given should remain.

The process of counselling could be improved. There could be guidelines for counsellors to follow as to what should be covered as a minimum.

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.

I believe that advertising should be permitted with appropriate limits. A social media post introducing the intended parents and them expressing their desire to find a surrogate should be permitted.
Currently there are private facebook groups where members of the surrogacy community support each other and surrogates and intended parents get to know each other. Local catch ups between surrogates, potential surrogates, parents through surrogacy and intended parents occur throughout the country. This is working. It should not be complicated by red tape.
The concept of a surrogacy register is of limited additional value.

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.

Medicare should be available for IVF for surrogates. It is unfair to base the eligibility for IVF rebates on the question of whether the surrogate medically requires IVF to get pregnant as opposed to whether the intended parents have a need for a surrogate.

Parental leave for surrogates – currently many employers are only required to give a minimum of 6 weeks leave for a surrogate. In my view this is not enough. The minimum should be raised to 12 weeks, with the option of the surrogate agreeing to return earlier.

I do not think that employers should be obligated to provide paid leave for a surrogate, however employers should be encouraged to have clear policies that state whether a surrogate is entitled to payment from the employer while on leave after giving birth.

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.

In Western Australia, the Surrogacy Act 2008 sets out what expenses are "reasonable expenses" in section 6. The expenses are limited to areas of medical expenses, earnings foregone, counselling, legal advice and insurances. Based on this section, reimbursement of expenses such as maternity clothes, a housecleaner to assist when the surrogate finds it difficult to do their normal domestic tasks due to the pregnancy symptoms, paid parking at the hospital for all of the medical appointments and the birth and numerous other expenses incurred by the surrogate potentially fall outside of "reasonable expenses". Under section 8 of the Surrogacy Act 2008, payment to the surrogate for expenses that fall outside of the defined "reasonable expenses" is an offence with a penalty of $24,000 or two years imprisonment. It is therefore inevitable that a surrogate under the WA legislation will be out of pocket. As a surrogate under the WA legislation, many of my own expenses resulting from the pregnancy were not permitted to be reimbursed by the arranged parents. I would be unwilling to incur this expense again for any other person seeking a surrogate.

Surrogates and intended parents should be able to negotiate what system works for them – whether the surrogate has a bank card linked to an account just for this, or if the surrogate submits receipts for reimbursement.

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.

I am in favour of compensated surrogacy as defined in the paper. I believe that parties should have the option of agreeing to provide compensation up to a defined amount, or agreeing that it will be limited to reimbursements only.

In the surrogacy process, the IVF clinic, medical staff, hospital, lawyer, psychologist and counsellor all received payment for their services. However as the surrogate, my contribution was greater than any other individual. For 9 months I had morning sickness, fatigue, I got gestational diabetes, I was too sick to go on a family holiday, and had terrible reflux. Giving birth and recovering from giving birth involves pain, discomfort and sacrifice. I

have zero regrets about doing this. While I wouldn't have asked for compensation, I find it offensive that people consider it unethical for a surrogate to receive compensation.

I consider that its important that compensation is limited to an amount that does not create a financial motivation to be a surrogate for the financial windfall.

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.

Compensation should be structured in a way that does not lead a surrogate to make decisions based on payment. Eg if it is recommended to deliver early for baby's health, the surrogate does not end up with less payment than if she declines the early intervention.

In my view, compensation of $10,000 is suitable for a pregnancy that reaches third trimester, and pro-rata amount for a pregnancy that ends in miscarriage/termination. Compensation of up to $500 per IVF cycle would be reasonable.

I do not see a need for funds to be held in trust, unless the parties specifically want this. Doing so is likely to add extra costs to the process.

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?
Domestic surrogacy -
Receiving a birth certificate in the mail for the surrogate child with my name and my husband's name listed as the mother and father was confronting. This was difficult for me as I do not consider myself or my husband as the parents of the child. This is even harder emotionally on the arranged parents.

Being the legal parent of the child between birth and the parentage order meant that I was the one to give consent to the child's hearing test in hospital (and at a follow up appointment), consent for the child to receive formula feeding in hospital etc. These are decisions that should be made by the arranged parents, not the surrogate. While consent for formula is not significant, decisions regarding life saving procedures / surgeries prior to the parentage order etc should be made by the arranged parents, not the surrogate. The need to obtain the surrogates consent for formula, medical procedures etc would be very

challenging for many arranged parents. Each parent who becomes a parent through surrogacy should be able to be respected and treated as the real parent of the child regardless of that parent needing the help of a surrogate.

Inheritance issue when either the arranged parents or the surrogate / surrogate's partner pass away before the parentage order is made. Legislation ought to address whether a child born through surrogacy inherits under the surrogate's estate if she passes away before the parentage order. Likewise the inheritance laws for intended parents who die intestate do not adequately address the issue of an unborn child via surrogacy.

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.

Having the ability for the court to grant the parentage order prior to birth may improve the experience of the intended parents and resolve issues around consent for procedures for the child. Alternatively legislation recognising the intended parents as being the legal guardian of the child with the authority to consent to medical procedures between birth and parentage order could be a suitable middle ground.

The downside of granting the order prior to birth is that compliance with matters such as counselling post birth cannot be a prerequisite for the order being made.

If the surrogate mother has a legal ability to oppose the parentage order, then the application should not be able to be made until at least a month after birth. Hormones during pregnancy and following birth impact a woman emotionally and cognitively. To preserve the surrogate's ability to make a considered decision on whether to consent to the orders or oppose the orders, she needs time.

In my view, traditional surrogates should have the right to oppose the parentage order. Gestational surrogates should have the right to oppose the parentage order when they are of the view that it is not in the best interests of the child or other exceptional circumstances exist.

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).

I consider that the family court is appropriate for transferring legal parentage as the best interests of the child are paramount. Family court judges are experienced in assessing the best interests of a child.

My experience of surrogacy under the WA system was reasonable, and not unduly time consuming. I received the decision of the RTC quickly, and as WA has a cooling off period, there was no delay at all from the RTC being involved. I consider that a regulatory body checking that all criteria are met prior to transfer of any embryos is important. IVF clinics have a financial interest in these decisions. The current decision making process in WA could be improved as the RTC lacks transparency. The decisions of the RTC should remain confidential, however the policies the RTC follow should be available for the public to view. A lack of publication of those policies leads to uncertainty as to whether the RTC interpret and apply the legislation in a consistent manner, or if the composition of the RTC impacts on which applications are successful.

I am therefore of the view that independent oversight bodies should be a prerequisite for each jurisdiction.

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).

Oversight by an independent body is important. Legislation limiting surrogacy aims to protect and balance the interests of the surrogate, the child born through surrogacy and the intended parents. Having an independent body assess whether the legislation has been complied with prior to embryo transfer is protective. Not all women are suitable to be surrogates, regardless of their desire to be a surrogate. The independent body has the role of declining approval when the risks are too great. This should not be decided within the IVF clinic itself as some clinics may only have a couple of surrogacies per year.

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.

I visited a GP while pregnant. He initially was concerned that he was unable to prescribe medication to me without the consent of the arranged parents. This was resolved by me informing the doctor that surrogates retain bodily autonomy throughout the process. As surrogacy is very limited in WA, I do not expect this information to be known by most GPs. Any education on this topic could be targeted towards midwives and obstetricians. I am aware of some surrogates being invited to speak at universities to medical students or student midwives.