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:

I have been an altruistic gestational surrogate in Australia 3 times, with births in 2013, 2014 and 2022. I had my own infertility challenges, so after having my 3 children, surrogacy felt like a way to 'pay it forward' to other families.

I am also a registered midwife, and have been involved in writing surrogacy policies for my local hospital and Local Health District.

My first surrogacy was for a heterosexual couple in QLD, who had experienced multiple first and second trimester pregnancy losses. We initially met online on an egg donation forum, and around a year later I offered to be their surrogate. The IVF clinic my IPs were using in QLD had an ethics panel that needed to approve the surrogacy, and we had challenges with sourcing psychological and legal counselling where I live in regional NSW. We ended up needing to attend these in Brisbane, which added extra time, cost and inconvenience to the process. The pregnancy itself was quite challenging on an interpersonal level, as the IM understandably had a lot of trauma and fear because of her own pregnancy losses, so it was

definitely more reassuring for her to be doing a domestic surrogacy process, and having the ability to communicate daily. Our local hospital didn't have a surrogacy policy at this stage, so there was a lot of confusion about how to admit my IPs for the hospital stay, if I could be discharged separately as the birth mother, how to manage postnatal visits, and how to legally cover my IPs having the right to consent or decline newborn care. Thankfully we had a healthy baby at full term, with both parents in attendance for the birth in my local regional NSW hospital. The parents stayed in my town for around 5 days post-birth, and we attended the post-surrogacy counselling with a local practitioner prior to them returning to QLD, which wasn't really ideal as I don't think I or my family had fully processed things at that stage. During this time, we attended my local Centrelink/Medicare office with as much paperwork as we could, and received a temporary Medicare number for the baby, so the parents were able to use this for their 6 week checkup and vaccination. I ended up diagnosed with postnatal depression, and needed treatment for around 6 months, which was an unexpected challenge with young children.

Following our first surrogacy, we sought a new family to help out. At that point, gay men in QLD were not able to foster or adopt, so we decided to find a male couple to have a baby with! We met our second IPs on a surrogacy forum that I was moderating. Again we needed to attend Brisbane for psychological and legal counselling, which added to costs for my IPs, and inconvenience for us having to travel with small children. Thankfully we became pregnant from the first embryo transfer, and the fathers were at the waterbirth of their son, again at my local hospital. Their egg donor attended soon after the birth as well, which was a lovely experience to have us all there with the baby boy we had made. The parents stayed locally for 5 days, and again we needed to complete counselling prior to them returning home, although I felt better prepared this time as we knew what to expect from the first surrogacy.

Our third surrogacy was for a local male gay couple, who we knew socially through shared interests. My youngest child had only agreed to me doing one more surrogacy if it was for someone living nearby, as she missed the boys she had bonded with during my previous surrogate pregnancies. We were visiting our surrogate babies once or twice a year, but she wanted a child she could be closer to, physically and relationship-wise. Thankfully at this stage Covid had normalised communicating remotely, so all of our legal and psychological counselling, as well as most of our IVF preparation, was done by email and video calls. We only needed to travel to Brisbane for embryo transfers, as I was happy to use the clinic I had used in my second surrogacy, and their known egg donor lived in Brisbane so she was also able to meet up with us, and even attended the third and successful transfer. The IFs were able to attend my antenatal visits, and were also there for the birth. My then 13yo daughter also chose to be at the birth, and was lovingly supported by our IFs through the experience. One of my favourite photos ever is of one of our IFs sitting with his arm around my daughter, smiling proudly at her while he is holding their son. It was a perfect experience, and a perfect end to our surrogacy path! They are a much loved part of our family now, and we spend time with them all regularly.

Overall I feel gratitude for my experiences, and my role in growing these families. It has enriched my life, and taught my children about compassion, sacrifice, and the true meaning of family.

I do think the whole process could be streamlined, and money was a challenge in all three surrogacies, which I will cover in further responses.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

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:

With international surrogacy, there is justified concern over the potential (and actual) exploitation of women in developing countries, human trafficking, and lack of regulation and oversight. I think this could be addressed by legalising and regulating commercial surrogacy.

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:

Children should have access to information about their egg or sperm donors regardless of country of conception or birth, even if this is basic medical information - but preferably with an option for contact once thery are 18+. They should also have access to detail of their gestational carrier, and their country of origin if utilising overseas commercial surrogacy - maybe similar to the donor gamete database, accesible once the child is 18 years old.

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:

One of the main barriers for surrogates is the lack of financial and physical support during pregnancy, and postnatally. I believe compenating surrogate fairly would ease some of these issues

For IPs, there can be financial barriers as well, due to the high cost of surrogacy, both domestic and international. I believe there should be regulation around costs that IVF clinics, lawyers and psychologists can charge. And there should be Medicare rebates available for surrogacy costs!

From what I have seen in online forums, some IPs do not want a relationship with the surrogate, and are more comfortable with a commercial 'transactional' process where they 'pay' with money rather than social connection. They may also want to preserve their privacy, and find this easier and less complicated with an overseas surrogacy.

Eligibility requirements for surrogacy

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

Response:

Age and capacity for decision making, preferably people who have completed family or don't want own children. Consideration of medical and health conditions, of surrogates and also IP, including mental health.

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:

I think the current arrangements seem to be well balanced, in NSW and QLD at least as I have only completed surrogacies under these legislations. Financial costs to be covered could be more clear, there are too many costs that are ambiguous and lead to surrogates not being fully covered for their expenses.

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:

I have only completed surrogacies in NSW and QLD, and fully support the requirement for legal and psychological counselling prior to entering an agreement, and post-birth. I believe this should be required for parentage applications to proceed.

If not completed prior to entering the surrogacy agreement, I believe this should take place prior to parentage orders being entered at the very least – this would hopefully then cover traditional surrogacy arrangements as well.

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:

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 for surrogates should be allowed, it seems unfair that people without willing family or friends are unable to connect with potential surrogates, I believe that IPs should be able to advertise in any form of media, provided they meet legal advertising guidelines.

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:

Medicare rebates should be available for gamete collection for same sex couples, it is discriminatory for only certain people to have access to these rebates. Surrogacy related medical costs should also be covered by Medicare rebates.

Surrogates and their partners, as well as IPs, should be covered by standard parental leave available through their workplace or from Centrelink. Surrogates are still people who are pregnant and give birth, and should be entitled to recovery time for this. IPs should be supported to be home and caring for their new babies to the same extent as all other families.

I believe there should be Federal legislation around the acceptable cost range for surrogacy-related fees, such as the IVF costs, legal agreements and counselling. At the moment providers seem free to charge what they want, which can lead to excessive and unregulated fees, charged to vulnerable people who often feel they have no choice if they want a child.

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:

All costs related to the surrogacy should be covered by the IPs, as is already legislated in NSW and QLD. However I feel there needs to be more clarity around what these costs are – in my experience the medical costs, time off work, travel and accommodation were included without dispute, but there was a lot of 'grey zone' around things such as clothing, feminine hygiene products, and even allied healthcare such as physiotherapy and chiropractor care. Every surrogate I am friends with has been out of pocket following their surrogacy journey. I find it ironic that people express concern for surrogates being exploited, while in Australia we are the ones who are making the sacrifices every day to make, grow, birth and recover from these babies, but don't receive any compensation for it. Yet the IVF clinics, lawyers, counsellors, midwives and even birth photographers receive financial benefit from our bodies! If surrogates were compensated, they could choose to have takeaway, hire a cleaner, pay for a massage, etc., with feeling any guilt, or that they have to seek 'permission' to spend the IPs money.

I think it would work well for an amount to be placed in a trust prior to the pregnancy, with surrogates paid a regular allowance, maybe weekly or fortnightly.

In my first surrogacy, my IM was always talking about how expensive it was and how they were struggling with the surrogacy costs. We were a single income family ourselves, and money was tight, but I felt guilty asking IPs to pay for 'grey zone' items so we covered them ourselves. My best friend was going to be my support person for the birth, however she was unable to come up, so I wanted a doula as my support.

My IM made it clear that this would be at my cost, as this was something I personally wanted and not a necessity in her eyes.

In my second surrogacy, my IFs said they were told by their lawyer not to pay anything except clearly surrogacy related costs – medical, travel, lost wages, etc. And that if it was shown they paid for 'comfort' thing like massages or takeaway, they may not get parentage orders.

In my third surrogacy, my IFs were local so brought me home cooked meals to freeze, and provided a cleaner for the later stages of my pregnancy as I was a shiftworking single parent by this point and had made it clear I would need extra support. I took paid maternity leave from my workplace, however as a midwife in NSW, my

base wage is quite low, and it is only through penalty rates and overtime that I am able to earn a liveable income. The maternity leave was calculated on my base rate of pay, so it was not enough to live off during my 12 weeks and I needed to dip heavily into my savings to afford to stay home and recover.

With all of my surrogacies, I purchased gifts and spoiled my children as a thanks for everything they had sacrificed during the pregnancy and recovery, which was something my IPs hadn't considered, but I felt they deserved.

As a consequence of my surrogacy births, I ended up with a rectocele, cystocele, and perineal damage that was not repaired adequately. I have ongoing physical issues as a result, but cannot afford the costs of the surgery, or the time off work, to repair these issues. I have personally paid for physiotherapy support, but am at the stage where only surgery can fix the remaining issues.

At my age I am never going to do another surrogacy, but I would absolutely hate to see any future surrogates bearing the financial and physical costs that I have. Women who do this are kind and generous, and they should be appropriately supported. They should not be the only people who are not compensated for surrogacy.

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 strongly support compensated surrogacy, where surrogates receive payment to compensate for their time and the physical challenges of pregnancy, birth and recovery.

I believe that a well-regulated system for commercial surrogacy in other countries has merit, however I think the priority should be overcoming barriers to finding surrogates in Australia.

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:

I believe there should be a limit on the amount a surrogate is compensated, and that this should be regulated. I'm not really sure how much would be appropriate. When I was doing my surrogacies, I thought it would have been nice to have a regular weekly or fortnightly payment, that was enough to cover me getting a cleaner, buying takeaway when I was too tired to cook, getting a massage. Or having the option to choose to put the money aside, and take my family away for a holiday afterwards to thank them for all that they had sacrificed as well. This need to be balanced with not putting surrogacy further out of reach of ordinary people, it should not just be a privilege for the wealthy.

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:

Its a long process, and requires extra steps when you just want to rest and recover from the pregnancy and birth. Having to do counselling and affidavits within the first couple of weeks postnatally was a challenge, and I feel like some of these step could have been commenced prior to the birth, obviously with the legal option to withdraw consent post-birth if circumstances change.

It is also confusing and complicated for the newborn receiving medical care. Care providers can be confused about who has legal right for decision making and consent, as strictly speaking, until parentage is ordered, the surrogate would need to be the person consenting to newborn interventions, admissions, vaccinations, and potentially end of life decisions if there are complications. It would be helpful from my midwifery perspective to have a legal agreement implemented prior to birth that ensures the parents are entitled to make these decisions, unless consent is explicitly withdrawn by the surrogate.

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:

I think some of the process could start during the pregnancy, or even pre-conception once the surrogacy agreement has been completed. I think it could be hekpful for parentage to be assumed, with a legal surrogacy agreement, unless consent is withdrawn by the surrogate. This would still allow for the surrogate to have personal determination, but may simplify the process for the vast majority of people whose surrogacy journeys end in parentage orders for their IPs.

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:

I believe surrogacy should fall under Federal jurisdiction, with National regulation. This would improve consistency and reduce confusion, and prevent IPs from having to travel out of their own states to be legally allowed to participate in surrogacy. It would also be helpful in assisting IPs to anticipate the costs of surrogacy. I am not sure of the legal implications, however other family issues such as parenting arrangements go through the Federal Circuit and Family Court of Australia, so it seems a reasonable option.

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:

I think there should be some kind of regulatory body, but I don't have clear ideas on how it would work. I think one of the challenges would be ensuring that it doesn't unfairly restrict people from becoming parents, while also providing protections.

In terms of international commercial surrogacy, I believe strongly that this should be legalised and regulated. It has already been shown that IPs will travel overseas for surrogacy even when it is against the law, but that surrogates and IPs are open for exploitation in these circumstances, with no real recourse when challenges arise.

Personally, I would love to see a regulatory body established, that assesses surrogacy agencies overseas and ensures that they are being run ethically, and regularly checks that surrogates are not being exploited - that they are consenting, compensated, and cared for. This would also allow Australian IPs to have a list of ethical and safe agencies to approach, knowing that they will be supporting their surrogates fairly, and that they will have their own child at the end of the journey.

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:

There is definitely room for improvement here! I am regularly told by people that surrogacy is not legal in Australia, despite having birthed three surrogate babies myself! This impacts women being willing to act as surrogates, a well as restricting the options for people who are unable to carry and birth their own children.

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: