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 am a parent through international surrogacy that occurred in Thailand in 2014. We had a great experience, and had every confidence in the understanding and wellbeing of our Thai surrogates and our egg donor through the process. Thailand was an excellent location due to the top class medical system.

Entering into such an arrangement transnationally did require us as intended parents to be very well educated and informed about various matters, so that we could make appropriate choices in the surrogates, egg donors, children and our own best-interests. Clear guidelines and laws to facilitate this would be preferable. Australian law's difficulty in recognising the legal parentage of children born through surrogacy would be the main area that needs improvement.

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

Pragmatism, harm minimisation, and human rights are great principles to inform the inquiry, and this needs to be done in a way that balances needs and risks to all parties.

What must be avoided in black-and-white largely incorrect interpretations of certain rights, that are sometimes used by political activists in this space that are strategically used to backup religious or other strong personal views that should not unduly be imposed on others.

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:

While there are unique human rights considerations that are vitally important in the area of surrogacy, this should be covered by legislation only insofar as there are real needs with regards to harm minimisation and risk management. Children born through conventional means also have many rights that the state does not intervene on except where vitally necessary. For example, the state does not mandate DNA tests to ascertain the father in all cases of natural pregnancies – and many would consider that an invasion of privacy. So why we can say that all children should have a right to know their genetic parentage – if we do not impose this on the majority, why should it be imposed on the minority.

There should be careful consideration of where proposed requirements for surrogacy do not equivalently apply to natural pregnancies, whether such a requirement is truly needed, or whether it is unnecessary discrimination on families constructed in this way.

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:

From a personal perspective, I do not think that any aspects of the story of their birth should be hidden from children. Where possible, they should have some information regarding who their sperm and egg came from, and who carried the pregnancy, from a very young age. However, I think the most impo.rtant aspect here is that the children's actual parents (the ones who raise them) are provided clear legal recognition. Whether the state has a role to mandate anything else is unclear, unless we are also proposing that the state will mandate this for all parents including children born through natural births

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:

A key barrier is the lack of support in the process from experts, and over-reliance on community advice and support. This could be better addressed by allowing organisations to facilitate the process in a stronger way – and this would potentially improve outcomes for all.

Eligibility requirements for surrogacy

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

Response:

With regard to intended parents, I do not believe that there should be any eligibility requirements. Parents through natural pregnancies do not have such requirements, so it would be discriminatory to impose these on parents through surrogacy.

And person who would be allowed to raise a child born through natural pregnancy should have equivalent right to pursue surrogacy.

With regard to surrogates, there may be reason to impose restrictions on age, and potentially even on whether they have carried their own pregnancies or intend further children.

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

Response:

Restrictions on single parents and same-sex couples should certainly be removed.

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:

Surrogacy agreements should be enforceable, to better clarify and protect the rights of surrogates, children and parents through surrogacy.

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, they should be enforceable, to better clarify and protect the rights of surrogates, children and parents through surrogacy.

All parts should be enforceable,.

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 and legal advice should be required, and these could likely be enforced in part by IVF clinics and others requiring such evidenced to progress arrangements. Where such processes have not been adequately followed, the best interests of children already born (or conceived) should be paramount.

Professional services, including legal and counselling services

Question 11 What are the gaps in professional services for surrogacy in Australia? You might want to consider:

a. if surrogacy agencies should operate in Australia; and

b. the availability, accessibility, and subject matter to be covered in legal advice and counselling sessions.

Response:

Surrogacy agencies should be allowed to operate, to better protect the rights of all parties through their expertise and comprehensive support.

Subject matter to be covered should not be legislated, but should be based on best-practice professional guidelines, which may evolve over time.

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:

Services should best be offered in an integrated and comprehensive form, as there are important connections between advice regarding IVF, counselling, legal, and more that should be addressed cohesively.

There should not be restrictions on how they should be funded or organised in terms of profits, above and beyond what there might be already for other health care services.

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 limitations should not lessened from their current state, which can cause uncertainty for example whether talking in private online communities about looking for a surrogate is a problem. We may not want overzealous advertisements from for-profit entities in this space however. But for private individuals, it should be clear that there are no restrictions.

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 preferably be available to those pursuing surrogacy that are equivalent to other intended parents – though some of the more unique costs to the process should well be borne by intended parents.

Parental leave has dual purposes related to care for a child, and for someone who has given birth to recover. As such, they should be appropriately made available through government programs and enterprise agreements. This should be encouraged, but may not be controllable. There are many enterprise agreements that might in unintended ways discriminate against other male parents who are primary caregivers, or might discriminate or bias against shared-parenting arrangements through the need to determine a 'primary caregiver'. So surrogacy is clearly not the only issue in this space.

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:

The reimbursable expenses should be a much higher category than currently. Not just core expenses such as medical costs, but also new maternity clothes, or domestic support where surrogates capacity to undertake certain tasks, should be included.

Beyond that, there should not be any limits on compensation in any case.

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 both compensated surrogacy and 'commercial' surrogacy. I think the distinction is not helpful, and would use the phrase 'compensated surrogacy' for both. The distinction is really just based on what types and levels of compensation are allowed, so there is no clear line where a distinction can usefully be made.

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:

There should be no restrictions on the amount of compensation.

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:

Children have a right to having their parentage adequately recognised in law.

For this reason, legal parentage should be transferred prior to birth. The surrogate (and her partner) should not be considered legal parents at any point, as is currently the case. This law is outdated and has not kept up with technological progress.

For children born through surrogacy overseas, their parentage should be legally recognised immediately and without complex process.

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:

a) **Where a surrogacy agreement has been entered into before birth, the legal parentage should be transferred already at immediately birth.**
b) **This should be an administrative process.**
c) **It should be automatic.**
d) **The process should not be different – children should not be disadvantages by the process of their birth.**
e) **Of course not, that question is strangely sexist to even be asked.**
f) **Where process compliance is an issue, it may be that additional oversight is required rather than automatic – but it would in most cases not impact the parentage decision in the child's best interest.**

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:

In our experience the processes for citizenship and passport applications have been reasonable in most ways.

Where it is a passport renewal, it may be better to make it clearer what lower level of information is required, as current process creates uncertainty regarding whether it will be approved.

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

Response:

Currently, where there is no ongoing contact with surrogate, it seems unnecessary that their permission is sought for every single passport renewal. The process for renewals should be streamlined further compared to the initial application. It already is in practice, but in terms of policy and documents this could be clarified to avoid confusion, risk and fear.

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:

Harmonisation of processes over time would be useful for domestic surrogacy arrangements and coordination.

States that have criminal law applying to international surrogacy should remove these, as they are clearly problematic.

How important harmonisation is in general is beyond my knowledge.

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:

Consistent guidelines and practices should certainly be adopted, but whether this requires formal oversight I'm not sure.

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:

Criminal law should not be used to regulate surrogacy.

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.

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:

No.

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:

N/A