Submission to Review of Surrogacy Laws Issues Paper

I have supported close friends as they undertook a surrogacy journey which took over 5 years. My friends pursued altruistic surrogacy domestically, and when that didn't work out, overseas. While they are now wonderful and dedicated parents of two beautiful children, the journey to that point presented more challenges and setbacks than most potential parents could overcome. Some of those barriers to parenthood are directly related to sexuality, with fewer options for male same-sex couples.

In reviewing surrogacy laws, ALRC should consider that the benefits and protections afforded by each restriction are targeted, and outweigh the cumulative costs that the barriers represent. Disharmonised laws and policies create further undue barriers.

Only the most dedicated intended parents have the commitment to embark on this process, and shutting them out does a disservice to both them and the community.

Question 1

I have supported close friends as they undertook a surrogacy journey which took over 5 years. My friends pursued altruistic surrogacy domestically, and when that didn't work out, overseas (Argentina). While they are now wonderful and dedicated parents of two beautiful children, the journey to that point presented more challenges and setbacks than almost anyone could overcome.

I travelled overseas with my friends as they attended appointments for what ultimately became their successful surrogacy process.

Question 2

The reform principles on page 7 of the Issues paper are broadly appropriate. While the Issues paper notes that they may need to be balanced, I believe this line undersells how strongly application of these principles can compete. In that, to date harmonisation, pragmatism, and autonomy within surrogates' rights has not seen sufficient weight be applied.

Question 3

There is a key rights issue in domestic surrogacy, which is that an altruistic surrogate is restricted from exercising agency over their own body. Not only are they going through a pregnancy, but restrictions on compensation mean they are also financially out of pocket. Such restrictions represent an undue barrier to potential surrogates, reducing the number of those who are able to do so – a privilege reserved for the already wealthy.

There are real and important human rights issues with regards to people trafficking, and the rights of the child. I am certain these will be comprehensively commented on by others.

There are two additional layers to consider with regards to these. With some states having all overseas surrogacy illegal, there are few to no fully legal pathways for some. This is layered on top of the extreme difficulty there is currently to seek altruistic surrogacy domestically.

This vastly increases the risk of well-meaning intended parents ending up in situations and seeking surrogacy in countries where human rights are not fully respected. Safe, legal pathways which recognise the reality of intended parents and their families is the best way to minimise harm, and maximise outcomes for the children.

Further, the disjointed bureaucratic gauntlet faced by returning parents does not protect the children's identity, safety and right to parentage, and their ability to get the best healthcare. Harmonisation and pragmatism are essential principles in resolving these issues.

Question 4

At the age of 18, the children should have a right to the full records and documentation associated with the circumstances of their birth.

Prior to that, it is important to respect the individual needs of different families as a one-size-fits-all approach is not appropriate.

Question 5

Few groups have larger barriers to having a family as male same-sex couples, with only a fraction of even same-sex couples with children being male. Some of the reasons are biological reality (neither partner can bear a child) and some spring from blatent discrimination (such as access to adoption in Australia, and access to surrogacy in some states).

Some of those barriers reflect the fact that with other options not available, a broad restriction on surrogacy will disproportionately impact male same-sex couples as it is generally their one and only option to have a family.

Restrictions in compensation and in advertising, and in legal recognition across the states, and every administrative barrier therefore will reduce surrogacy among people who are fit and willing parents exercising their own autonomy and acting within the best interests of the children involved.

Question 6

It is sensible to have eligibility restrictions for surrogacy, but only where doing so genuinely will protect children and surrogates. Where a potential surrogate or intended parent have appropriate counselling, medical care and legal support, their autonomy should be respected as far as is sensible.

Question 7

Any restriction on same-sex parents is discriminatory and has no place in Australia.

All restrictions should be considered together for its cumulative impact on the ability of people to choose to enter into surrogacy arrangements.

Question 8

Valid surrogacy agreements should require professional counselling and independent legal advice as a precondition.

Question 9

People entering into a surrogacy arrangement with appropriate support, professional counselling, and independent legal advice should be able to exercise their autonomy to enter into binding agreements, that are enforceable by courts.

Question 10

Responding to the listed requirements:

- Pre-approval by a regulatory body is an additional bureaucratic step which does not add value.
- Broad criminal history reports may be valuable to some, but not others. It is a thing which can be agreed to between the parties. Mandatory reporting of particular crimes however (such as any relating to harm of children) are valuable to all.
- A psychological assessment at a particular level may be valuable to all
- Independent legal advice, which is consistent across Australian jurisdictions is paramount.

Requirements such as legal advice should be a prerequisite to entering into agreement with a reputable organisation. Where arrangements are less formal, the Family Court of Australia should have broad powers to make decisions and champion the best interests of the child.

Question 11

I have not sought professional surrogacy services so cannot comment on their quality and availability.

There is a role for government to provide 'best practice guidance' for practitioners to increase the quality of services which are provided.

Question 12

While not-for-profit and government funded services are nice, parties should be able to choose their own private medical and/or legal professional in any case.

The ability for integrated services is also nice, but once again, parties should have the ability to choose their own professionals if they wish.

Question 13

Advertising should be allowed. While advertising should be limited to services which are lawful, too many restrictions may hinder the ability to share relevant information.

Government may wish to establish a trusted register on which to advertise, without it being the only legal avenue.

Question 14

The access of medical services for families should be consistent – regardless of whether it is a surrogacy arrangement or not.

Question 15

The feedback I have heard through friends who attempted domestic surrogacy but were not successful, is that surrogates are left out of pocket and that is a large barrier for potential surrogates.

The approach to compensation for domestic surrogacy should be much more broad, permissible, and as simple as possible.

While there are legitimate discussions around commercial surrogacy, there is no downside risk if a domestic surrogate is moderately overcompensated for her expenses and so additional regulation is an unjustified cost and barrier.

Question 16

I support compensated surrogacy.

I also support a pathway to commercial surrogacy, though I appreciate there are broader considerations in Australian law associated with that.

Question 17

For compensated surrogacy, it may be determined periodically by a pricing regulator, based on a high estimate of costs with an additional buffer.

It may be paid periodically to accommodate key milestones.

Question 18

While there are situations where it is appropriate for the Federal Circuit and Family Court of Australia to intervene, the current legal framework manages most risk by placing it on the children, who risk not having appropriate parentage.

This is not in the interests of the children, or the parents, or the surrogate.

Question 19

The process should consider that the vast majority of parents are trying to do the right thing. They are Australian citizens seeking recognition of their family, and so undue delay and paperwork is not in the interests of any of the parties.

Intended parents should not be treated differently based on gender or sexuality.

The process should also enable parents to have the right information and support at the right time. With appropriate processes and support, court attention can be spent on situations where there are legitimate disputes and legal questions.

Question 20

The current legal framework manages most risk by placing it on the children, who risk not having citizenship. This might impact available entitlements and medical care.

This is not in the interests of the children, or the parents, or the surrogate for the child to bear that risk.

Question 21

The process should consider that the vast majority of parents are trying to do the right thing. They are Australian citizens seeking recognition of their family, and so undue delay and paperwork is not in the interests of any of the parties.

The process should also enable parents to have the right information and support at the right time. With appropriate processes and support, resources can be spent on situations where there are legitimate questions.

Question 22

National Cabinet should agree to a uniform law, and then decide on most politically expeditious way this can be achieved.

In doing so, they should consider that if the laws are aligned, and then diverge again, they would risk creating the same problem they just solved.

Question 23

With national laws should come national oversight. In doing so the purpose of oversight should be to provide guidance as to how best to comply, and to work in a way that protects rather than creates additional layers of bureaucracy.

Question 24

The law should be focussed on protecting parties and children, not on punishing parents.

Question 25

There is a need to improve awareness and understanding, but the current problem is the system itself. Information and support would be useful in the very short term to help people navigate that system, but it is a poor band-aid.

Once the regime is simpler and more unified, awareness, understanding and support become an essential element to its success.