Submission to the ALRC in response to the Review of Surrogacy Laws Issues Paper

[redacted]

Please de-identify my submission.

Q2

Reform principles that should guide this Inquiry include:

- Recognition that surrogacy, when undertaken ethically, is a legitimate form of family building, one that is the only or last option for many people, and is not usually undertaken lightly. It is important that the 'message' the law sends is clear – given the highlighting of pragmatism, and the fact surrogacy will continue, well-regulated domestic surrogacy is to be preferred (which also links to education issues mentioned in QXX).
- Recognition that prohibitive restrictions on surrogacy (including access requirements, methods of achieving legal parenthood etc) push people to seek what are perceived to be 'easier' options in destinations where surrogacy is marketed to them as e.g. a 'complete package' that can achieve their aims of creating a family, or more clandestine or underground agreements at home. In both cases this can lead to human rights implications for all parties.
- Recognition that difficulties and inconsistencies in laws and practice across the country lead to uncertainty, thus increasing the likelihood that intended parents will seek surrogacy overseas in destinations where it is marketed to them as e.g. a 'complete package' or more clandestine or underground agreements at home. Uniformity/consistency of rules across states/territories would therefore be desirable.

Q3

All the human rights considerations outlined in para 31 of the Issues Paper are important, and because of that I think it is also important that there is consistency across states and territories (which also relates to Q2 and XX). I don't think it can be seen that one state/territory has a different interpretation of these rights than others. Where there is a question about hierarchy of rights, children's rights should be prioritised – but this includes their right to security in identity (which may be provided by recognising the intended parents as legal parents from birth, alongside the recording of and access to origins information).

International commercial surrogacy is not inherently bad, and can be a valuable option for some, when done ethically and with the rights of women and children in mind. However, this comes at increased financial cost to intended parents (eg California) and so inadvertently can push some towards less optimal destinations, often where there is little or no regulation. International commercial surrogacy in such destinations can and in some cases has been show to impact many of the rights outlined (for all parties). Evidence that women have been moved across borders to act as surrogates, or kept in less than optimal conditions, or had their autonomy and/or bodily integrity infringed should remind us that not all surrogacy providers have human rights of any/all parties as their forefront consideration. The generation of profit becomes paramount. All such

considerations make it important, alongside the pragmatism of recognising that surrogacy will continue whether it is restricted or not, that national laws can facilitate good, ethical surrogacy arrangements where rights are protected.

Q4

Given the commitments in the UNCRC, children born from surrogacy should be able to know and access their origins information (and any donor information, including the use of a surrogate's own egg in traditional surrogacy arrangements) at some point in their lives. I think it is debatable whether this should be at the age of majority when we know that many children are competent at understanding complex information at an earlier age (eg medical information), so perhaps a default age should be 16.

I do not think that there should be compulsory telling, nor notifications/annotations on birth certificates. Again, this is linked to the education issue (QXX) and also the 'message' sent by the law – if the law says that origins information will be available then it is hoped that people (ie parents through surrogacy) will behave accordingly, and follow evidence-based guidance that telling (and telling early) is best for children. In any case, with the rise in same sex and solo male parents through surrogacy, there is a degree of obviousness, so telling (for all parents) should be supported by law and guidance.

Q5

As with surrogacy in the UK, the barriers that prevent people entering domestic surrogacy arrangements are both real and perceived. Real barriers include eligibility requirements (for both access to surrogacy and to treatment), criminal prohibitions etc, as well as systemic barriers such as financial disadvantage and cultural norms.

Perceived barriers relate to how the law is/what it says and what it can be interpreted to mean – there are many 'surrogacy myths' and this will be especially true where laws and guidance differ between states/territories. But to take one example, the fact that people can potentially be prosecuted for engaging in commercial surrogacy arrangements from some states/territories leads to perceptions that (commercial, and perhaps all) surrogacy is considered 'wrong'. There should be no criminal penalties (other than those relating to fraud or coercion etc that already exist outside of surrogacy) that pertain to surrogates or actual or potential parents through surrogacy.

Another perceived barrier is the lack of 'certainty' (and also expressed in the Issues Paper the perceived length of the process domestically) – this relates to enforceability but also to what people are promised by (sometimes unscrupulous) agencies/brokers elsewhere – and the fact that having a baby in some jurisdictions allows the intended parents to be on the birth certificate of the child (often a corresponding lack of understanding that this does not automatically equate to legal parenthood at home).

As with the UK, it may be true that there is a shortage of women who are prepared to be surrogates – but this is also linked to the perception of surrogacy (noting that a high proportion of people believe surrogacy to be illegal (the same was true in a MORI survey in the UK).

In all cases, barriers can be reduced by, for example, aligning eligibility requirements across states/territories; education of the public and other relevant parties (judges, lawyers, healthcare providers, midwives etc) about the realities and legalities of surrogacy, so as to dispel myths (including about legal parenthood); a legal position on surrogacy that reflects that it is a legitimate (and state supported) means of having children (including for LGBTIQA+ people).

Q6 & 7
There should be eligibility requirements for surrogacy, but these should be as least restrictive as possible, while being protective of surrogates' autonomy, freedom from discrimination etc. They should also be consistent across states/territories.

There should be no restriction on same-sex couples (male or female) or single intended parents (male or female) but restrictions based on e.g the surrogate's minimum age (possibly 21+) and intended parents' age could be acceptable (debatable whether there should be an upper age limit as I think hard to justify, though clinics will tend to have upper age treatment limits).

Surrogates should also be healthy and not at higher risk of maternal morbidities or mortality (so eg it may be legitimate to say someone may not act as a surrogate if they have already had three caesarean section births, or have a heart condition, or had pregnancy complications in an earlier pregnancy) – but this may not be an 'eligibility' criteria per se, but perhaps part of a mandatory health assessment.

Q8
The answer to this depends on what 'validity' means. If it means enforceable then see Q9. But valid can just mean correctly prepared and drawn up and I do think it is good practice to have an agreement in writing before the surrogacy arrangement proceeds. This is linked to how surrogacy 'works' in practice, including whether it is supported by organisations, lawyers etc – getting all the ducks in a row before commencing with any treatment/insemination is good practice – so a 'valid' agreement would be one that comes after eg counselling, legal advice etc.

Q9
I do not think surrogacy agreements should be enforceable in the sense of an enforceable contract. I think when most people (lay people especially) speak of wanting enforceability, what they mean is certainty that a surrogate will go through with the arrangement and that they will (all else being equal) get a child. So actually I think that in many people's minds enforceability equates to legal parenthood – and if intended parents were able to achieve legal parenthood at birth then they would be less concerned about 'enforceability'.

Aspects of agreements could, however, be enforceable, such as reimbursement of expenses relating to what has already occurred, so even if the arrangement fails for some reason, a surrogate is not left out of pocket (so eg travel costs incurred getting to clinics, cost of legal advice etc). In the opposite situation, if money has been paid in

advance for expenses but not used, the intended parents should be able to recover this (perhaps for both subject to a de minimis rule).

There should be no possibility of enforcing terms that remove a surrogate's bodily autonomy, or capacity to consent (or not).

Q10
I think it is good practice to have implications counselling, independent legal advice (about potential outcomes, parenthood etc, but also wills, guardianship arrangements etc) before an agreement is finalised, and possibly psychological assessments too (maybe if indicated by the counselling). I also think pre-approval by a regulatory body (or regulated agency, as is proposed in the UK) gives a degree of credibility and legitimacy to the process – and helps to reinforce the idea that the state views surrogacy as one of many legitimate forms of family building. Where this occurs I think it is proper that the intentions and autonomy of all parties are recognised in law, making the intended parents the legal parents at birth, in the best interests of all concerned, not least the child.

If these do not happen before the agreement is entered into then I would expect there to be some subsequent (court?) scrutiny of the agreement before legal parenthood is granted to the intended parents, or at least the presumption that they are legal parents would become rebuttable.

Q11 & 12
Para 40 refers to there being specialist surrogacy agencies in Canada, the US and the UK. I think it is important to note the differences between them and I hope you hear from Canadian experts on this too. Canada and the UK both only allow 'altruistic' surrogacy (according to some definitions), but Canada allows intended parents from other jurisdictions to travel there. As far as I am aware another similarity is that healthcare (meaning eg maternity care) is state funded. I understand there to have been some difficulties with Canadian agencies, in the sense of them 'exceeding their brief' (eg seeking to claim enhanced 'expenses' on behalf of surrogates), perhaps because a) they are not regulated and b) the welcoming of international intended parents in a sense conflates altruistic with commercial models of surrogacy.

US agencies are businesses in the truest sense, operating on a profit-driven model in a commercial environment. For this reason I don't think they are directly comparable even where some of their processes are the same/similar. UK 'agencies' are by law non-profit organisations which may only charge eg membership fees that cover their reasonable running costs. They have grown up organically in a culture where surrogacy is allowed, but commerciality is criminalised. As a result they have developed models of good practice (no singular model), much of which is reflected in the recent UK reform proposals. The difference between what is proposed and what we have now is that these organisations can apply (should the reforms occur) to become regulated by the state. As I have said elsewhere, I think this can give a legitimacy to (domestic) surrogacy (that does currently exist but that many are not aware exists) by showing both state

support for it as a practice but also that safeguards are in place for the rare occasions when things go wrong.

Q13
I do not think that individuals should be able to advertise for or as a surrogate, but agencies could offer their services, as could lawyers, counsellors etc. Advertisements must comply with advertising standards legislation.

Q15
What expenses should be reimbursable should be based on good practice, along with what is allowed in other comparable jurisdictions (including within court decisions). Some of the UK surrogacy organisations have advisory sessions early in people's consideration of surrogacy, where they explain what has and hasn't been counted as a reasonable expense in the past, and I hear often that surrogates often undercalculate (because there are things they would not expect initially to be able to get back). I think a model that tries its best to ensure that surrogates are not out of pocket (no system is perfect), even temporarily, is what should be aimed for. Where there are organisations involved I like the idea that money can be kept in trust or ESCROW etc. This doesn't tend to happen in the UK (at present).

The total sum inevitably (at the outset) has to be an estimate – but contingencies (both up and down) should be allowed. But such estimates can be based on experience and good practice, and there should be an understanding that different arrangements will incur different costs, for all kinds of reasons.

So the surrogate is not out of pocket even temporarily, methods such as weekly or monthly expenses payments (up to the pre-agreed amount), or pre-paid bank cards should be considered, and used where appropriate.

Q16

a) Possibly, within limits, ie nominal payment on top of expenses to acknowledge contribution
b) No – I do not support commercial surrogacy, nor do I think this can legitimately have state backing. I agree in part with your definition but prefer the definition in the 2018 report of the SurrrogacyUK working group on law reform ('Surrogacy in the UK: Further Evidence for Reform') where commerciality is made up of a number of factors. But what, I think, primarily makes surrogacy commercial in nature is not necessarily what the surrogate gets paid over and above expenses but a situation where third-party agents and brokers profit from arranging surrogacy for others. To me this is different from lawyers, IVF doctors providing their expertise for a fee (as lawyers and doctors exist anyway) and indicates different motivations behind surrogacy.

Q17
Re 'compensated' surrogacy see answers above to Q15 and 16 re calculations, limits, payment method etc. Examples of good practice exist in the UK for expenses (generously interpreted) but not compensation per se.

Q18 & 19
The biggest issue with the current system is that children are not deemed the legal children of the people that are caring for them from birth. Assuming that in Australia, even in domestic arrangements, that like the UK very few arrangements go wrong, particularly post-birth, this seems to unfairly treat surrogate-born children and intended parents (and surrogates who do not want the legal or financial responsibility), leaving them in a kind of legal limbo (and later, potential identity issues). Unless one adheres to an essentialist view of womanhood and motherhood (and so will never accept arguments that the surrogate should not be the legal mother, even where genetically unrelated) then a reallocation of legal parenthood along the lines of the parties' intentions would seem to be a solution to this.

This would be helped if there was a regulated process which parties should follow as good practice, and/or if arrangements were pre-approved. My preference would be for this to be automatic (with a corresponding obligation on the intended parents to register the birth) but failing that an administrative rather than judicial procedure would be preferred.

In respect of overseas surrogacy this is more difficult, but could result in birth documents from some jurisdictions being automatically recognised on return to Australia, or a fast-track application process (for legal parenthood in Australia) being implemented. This could obviously be subject to being able to prove certain conditions were met, and if this cannot be done, have fallback to the existing application process of a parentage order.

There should be no difference in treatment between intended mothers and fathers, or between heterosexual and same sex intended parents, or solo intended parents, or based on biological contribution (though perhaps double donation or a solo non-biological intended parent may have to have a medical reason for not providing gametes). All origins information should be collected and stored for the benefit of the child.

Q22
I have already indicated that I think laws across all Australian states and territories should be the same, so as not to disadvantage anyone. How this is done, particularly in relation to other legal regimes such as wider family law, is a question of working it out! To an outsider, federal legislation would seem the easiest way to achieve this.

Q23
I hope that my preference for oversight of surrogacy arrangements (not commercial oversight) has been shown in my earlier answers. The model of this could be based on regulated surrogacy agencies (as is proposed in the UK), pre-authorisation committees (as in New Zealand) or something similar. I think that if there is oversight, this could be one way to make intended parents feel more secure about using domestic arrangements rather than going overseas, as it adds a sense of legitimacy. National oversight would seem the most appropriate (given that I have also said the law should be federal or at least harmonised).

Q24
It is possibly appropriate to criminalise some things in connection with surrogacy, though most of these are likely to be criminalised in law anyway (e.g. trafficking of women) – making it a criminal offence to broker a surrogacy arrangement for profit could be worthwhile if there is to be no move to commercialisation. Surrogates and (intended) parents should not be criminalised for their actions (outside of already existing criminal law), including going overseas to access commercial surrogacy. Instead the root causes of this should be fought – in which case if it is possible to criminalise overseas agencies or brokers who advertise commercial surrogacy in Australia (e.g. if they place internet adverts or attend seminars to advertise) then this should be considered.

S25
Notwithstanding surrogacy laws, people need to gain an increased understanding of what surrogacy is, who uses it and why. Surrogacy myths should be countered (e.g. that people choose surrogacy so as not to ruin their career or their figure, or that all surrogates come from poor or marginalised communities). Surrogacy could be discussed in a general sex/relationships education programme from school age upwards (age-appropriate).

Then, yes, there should be increased awareness of surrogacy laws, especially for those who are seeking information on surrogacy. A good example is the UK's Department of Health and Social Care's guidance documents (one for those going through surrogacy and one for those who care for those people). These are clear and simple and they are linked to from the regulatory body (HFEA) and various clinics' websites.

Related to the second document mentioned above, there should be surrogacy training for midwives, maternity carers, IVF treatment centres, family doctors, counsellors etc. It's important that everyone is on the same page and that myths and misconceptions are not perpetuated.

S26
Egg donation is inextricably linked with (some) surrogacy, and always in the case of its access by same sex male couples or solo male parents. While not addressing the issue closely in this inquiry is OK, it should also be possible to recommend that a further inquiry into egg donation is opened. This is especially important if it is agreed by the ALRC that origins information for surrogate born children should be stored and accessible by them at an appropriate age.

[redacted] 30 June 2025