Australian Government

Australian Law Reform Commission

Surrogacy Inquiry Discussion Paper – Explainer

What is this Inquiry about?

1.1 Surrogacy involves a person carrying and giving birth to a child for another person or couple. Australian surrogacy laws exist in all states and territories, which permit some surrogacy arrangements and prohibit others.

1.2 The Australian Law Reform Commission (ALRC) has been asked to review Australian surrogacy laws, policies, and practices. We have been asked to make recommendations about how to better regulate surrogacy in Australia so that our laws are harmonised, consistent with Australia's international law obligations, and protect and promote human rights, with particular importance given to the rights and best interests of the child.

1.3 Two of the main policy objectives of current surrogacy laws are to prevent surrogates, intended parents, and children born through surrogacy, from being exploited; and to promote the best interests of children. The ALRC agrees with these objectives and the proposals in the Discussion Paper do not seek to change them — rather, the proposals aim to improve the laws so that they better meet these policy objectives.

1.4 The ALRC has not been asked to consider whether surrogacy should be permitted or banned. The first jurisdictions in Australia started regulating surrogacy as a permissible practice in the 1980s. It is also a permissible practice in comparable jurisdictions, such as the UK, New Zealand, and Canada.

Surrogacy in Australia today

1.5 The number of Australians using surrogacy to form a family is increasing. It is hard to know the exact number of surrogate births each year, but it has been reported that in 2020 about 76 children were born through domestic surrogacy (around 20 per cent of surrogacies) and 275 children were born through overseas surrogacy (around 80 per cent of surrogacies). In 2023-24, the number of children born through surrogacy overseas is estimated to be 361 children. Gestational surrogacy, which requires assisted reproductive technology, is the most common type of surrogacy used.

The ALRC's ideas for reform

1.6 While surrogacy laws are different in every state and territory, they rely on similar approaches. These approaches:

- unnecessarily prohibit the extent to which surrogates can be reimbursed, resulting in surrogates being unable to fully recover financial and non-financial costs and losses — this likely contributes to the lack of surrogates available in Australia;
- overly rely on prohibiting surrogacy arrangements that allow the surrogate to profit from the arrangement — other measures are available and may be more effective at achieving the objective of avoiding exploitation;
- make it difficult for intended parents to access domestic surrogacy arrangements — for example, there are laws that restrict advertising and professional agencies are prohibited;
- require a judicial process for intended parents to become the child's legal parents — a process that is expensive, time consuming and stressful; and
- rely on a model of criminal sanctions to support compliance that is ineffective.

1.7 Given the above, the ALRC is of the view that Australia's existing surrogacy regulatory regime does not adequately meet its policy intent and is confusing, restrictive and not fit for purpose. The fact that most Australians choose to access surrogacy overseas, where there are more surrogates available and processes that are easier to navigate, points to the regime's ineffectiveness.

1.8 Overseas surrogacy arrangements can be unregulated and exploitative and create other harms — for example, intended parents may not be recognised as the child's legal parents when they return to Australia. This means that the current laws are not meeting the important objective of avoiding exploitation overall, and in many instances, are not giving primacy to the rights and best interests of the child.

1.9 The Discussion Paper puts forward ideas for reform that aim to prevent exploitation and create a fair and accessible system that protects the rights and interests of all involved, with priority given to the best interests of the child. Key features of the proposed system are:

- A nationally consistent legal and regulatory framework for surrogacy.
- Full coverage of surrogates' costs and losses — in doing so the ALRC has not described surrogacy based on whether it is 'altruistic' or 'commercial' as this binary is incorrect and unhelpful (a commercial surrogacy arrangement can be primarily motivated by altruism; and altruism is no guarantee that the arrangement will not be exploitative); and distracts us from putting in place measures that are effective and meet the laws' policy objectives.
- A range of ways in which eligible parties can meet, including through Surrogacy Support Organisations or less restrictive advertising.
- Safeguards that must be complied with at the start of a surrogacy arrangement, including requirements for medical and psychological screening and legal advice.
- Access to Medicare-subsidised fertility treatment, once safeguards have been complied with and a compliant surrogacy agreement has been approved.
- For approved surrogacy arrangements, an administrative pathway to legal parentage where intended parents are recognised as the legal parents of the child upon birth. For unapproved domestic surrogacy arrangements and overseas surrogacy arrangements, legal parentage can only be transferred to intended parents through a court process in the Federal Circuit and Family Court of Australia.
- Improved compliance through oversight by a National Regulator and a civil penalty regime — such measures are more likely to be effective than criminal sanctions which have so far been ineffective.
- For overseas surrogacy arrangements, by improving compliance, diverting intended parents away from exploitative overseas surrogacy arrangements, as well as a streamlined process for the child to obtain citizenship and passport documents.
- Regardless of how legal parentage is achieved, information about the surrogacy arrangement is flagged as an addendum to the birth certificate and available via a surrogacy register.