

Review of Surrogacy Laws Proposals and Questions in the Discussion Paper

This document extracts the 41 proposals and 24 questions contained in the Review of Surrogacy Laws Discussion 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 the questions — you can answer as many or as few as you wish.

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Promoting a nationally consistent approach through harmonisation

Proposal 1

1. Surrogacy should be regulated either:
 - a. uniformly by Commonwealth legislation; or
 - b. with substantial consistency across states and territories through a co-ordinated and harmonised set of Commonwealth, state, and territory laws.
2. This legislation should establish a National Regulator (preferred) or empower existing agencies or departments to perform the functions outlined in **Proposal 2**.
3. The regulatory framework should be structured so that:
 - a. the substance of any obligation, right, entitlement, or prohibition conferred or imposed is dealt with in legislation; and
 - b. any necessary corresponding detail is dealt with by delegated legislation, guidelines, or standards set by the National Regulator (or alternative) (**Proposal 2**).
4. The Commonwealth, states, and territories should enter into an inter-governmental agreement to implement nationally consistent surrogacy laws through one of the following options:
 - **Option 1.1** Referring powers to the Commonwealth Parliament, followed by the Commonwealth implementing federal surrogacy legislation;
 - **Option 1.2** Developing national mirror legislation on surrogacy arrangements, to be passed by each state and territory;
 - **Option 1.3** The Commonwealth, or a state or territory, passing surrogacy legislation and each other jurisdiction legislating to apply that Act in that jurisdiction; or
 - **Option 1.4** A hybrid of the above three options.
5. Legislation developed under any of the options above should adopt consistent and updated terminology.

Establishing a National Regulator

Proposal 2

1. Legislation should create a regulatory framework for surrogacy, with a National Regulator (or alternative) holding the following functions and responsibilities:

Standard setting

- a. developing and maintaining standards, guidelines, and processes on cost recovery for surrogates (see **Proposals 25–27**);
- b. developing a standardised draft surrogacy agreement which parties may use as a basis for an agreement that is compliant with legislative requirements (see **Proposal 22**);

Compliance

- c. setting licence conditions for Surrogacy Support Organisations ('SSOs'), licensing SSOs, and monitoring compliance with licensing conditions (see **Proposal 3**);
- d. enforcing compliance under any civil penalty regime or criminal sanctions enacted by the legislation (see **Proposals 8–10**);

Oversight of surrogacy agreements

- e. reviewing SSO decisions not to approve a surrogacy agreement, at the request of parties to the surrogacy agreement (**Proposals 4** and **5**);
- f. assessing complex applications to approve surrogacy agreements, at the SSO's request (**Proposals 4** and **5**);
- g. keeping records of approved surrogacy arrangements, after an SSO has lodged the approval (**Proposals 4** and **5**);
- h. registering overseas surrogacy arrangements and reviewing applications to engage in surrogacy in unapproved destinations (**Proposal 37**);

Community awareness and information provision

- i. developing information to address misunderstandings about surrogacy in the community (**Proposal 7**);
- j. providing public information about domestic and overseas surrogacy laws, processes, and requirements, including the potential risks that may arise in overseas surrogacy (**Proposal 7**);
- k. developing guidelines on the provision of healthcare to surrogates and intended parents, to be adopted by healthcare providers, including hospitals and medical professionals (**Proposal 7**);
- l. managing the surrogacy register and providing information held on the register to people born through surrogacy (see **Proposals 34–36**); and
- m. providing or overseeing the provision of training or training materials for professionals who provide services to parties to surrogacy arrangements, such as lawyers, healthcare professionals, and counsellors.

2. Responsibility for administering the regulatory framework should sit within:
 - **Option 2.1 (preferred)** A National Regulator for surrogacy, or assisted reproductive technology more broadly; or
 - **Option 2.2** Some responsibilities and functions placed with an existing national regulatory body or Commonwealth department, and/or some responsibilities and functions placed with state and territory health departments or other agencies, or regulated through the existing assisted reproductive technology regulatory framework.

Question A

What are important design principles or safeguards for any regulatory body to have? You might think about measures to ensure the body is efficient, accessible, accountable, and transparent.

Permitting and regulating Surrogacy Support Organisations

Proposal 3

Legislation should enable Surrogacy Support Organisations ('SSOs') to be established to provide the following supports and safeguards for intended parents and surrogates:

1. facilitating introductions, or 'matching', of intended parents and surrogates who meet the requirements (**Proposals 13–16**);
2. determining requests to waive residency and citizenship requirements (**Proposal 15**);
3. providing or coordinating the counselling and other services that need to be engaged with to meet the requirements (**Proposals 17–21**);
4. assessing and approving surrogacy agreements that are compliant with legislative requirements (**Proposals 4 and 5**);
5. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;
6. facilitating conflict resolution between intended parents and surrogates; and
7. holding funds provided by intended parents in a trust account and managing disbursement of trust account funds to surrogates (**Proposal 27**).

Question B

How can we minimise overlap in functions with other organisations, such as assisted reproductive technology service providers?

Approving surrogacy agreements

Proposal 4

Legislation should provide that:

1. parties to a surrogacy agreement must obtain approval of their surrogacy agreement before attempting to achieve a pregnancy; and
2. an assisted reproductive technology service provider may only conduct an in-vitro fertilisation procedure or otherwise facilitate an attempt to achieve a pregnancy where satisfied that there is an approved surrogacy arrangement in place.

Proposal 5

Legislation should provide that:

1. the approval process (**Proposal 4**) should incorporate the following elements:
 - a. Parties should seek approval from a Surrogacy Support Organisation ('SSO') (see **Proposal 3**). The SSO should review surrogacy agreements 'on the papers', and meetings with the parties should only take place when considered necessary.
 - b. The SSO should assess all supporting evidence provided by the parties, and approve the surrogacy agreement if satisfied that the parties have met all the requirements for approval (see **Proposals 13–21**).
 - c. There should be a presumption in favour of approving a surrogacy agreement if all the requirements are satisfied.
2. when a surrogacy agreement has been approved ('**approved surrogacy arrangement**'):
 - a. the approved surrogacy arrangement can proceed on the administrative pathway and intended parents will be the child's legal parents at birth (see **Proposal 30**); and
 - b. the SSO should lodge the approved surrogacy arrangement with the National Regulator (or alternative) (see **Proposal 2**).
3. surrogacy arrangements that are not approved by the SSO ('**unapproved surrogacy arrangements**') cannot proceed on the administrative pathway to legal parentage (see **Proposal 30**). The judicial pathway to legal parentage will remain available (see **Proposal 31**); and
4. approval of a surrogacy arrangement should be sought from the National Regulator (or alternative) if:
 - a. the medical assessment does not certify that the surrogacy arrangement should be allowed to proceed (see **Proposal 17**), and the parties wish it to proceed;
 - b. the psychological assessment does not recommend that a party should be allowed to proceed with a surrogacy arrangement (see **Proposal 18**), and the parties wish it to proceed;
 - c. the SSO regards it as a complex surrogacy arrangement; or
 - d. the SSO denies approval and the parties to the surrogacy arrangement request a review (see **Proposal 2**).

Question C

Do you think it is appropriate for SSOs to approve surrogacy agreements (where they are compliant with the legislative requirements), or should this responsibility sit with a different entity, such as the National Regulator (or alternative)?

Ensuring compliance with operational requirements

Proposal 6

1. Legislation should prohibit Surrogacy Support Organisations ('SSOs') from intentionally or recklessly approving a surrogacy agreement which does not comply with the legislative requirements.
2. Compliance with the prohibition should be enforced by:
 - **Option 6.1** A civil penalty regime; or
 - **Option 6.2** Criminal sanctions; or
 - **Option 6.3** A combination of civil penalties and criminal sanctions.

Increasing awareness and education

Proposal 7

1. The National Regulator (or alternative) (**Proposal 2**) should publish and promote information to:
 - a. address common misunderstandings in the community about surrogacy and Australia's surrogacy laws;
 - b. inform intended parents and surrogates about surrogacy in Australia and Australia's surrogacy laws; and
 - c. inform intended parents about surrogacy laws, policies, and practices overseas, any associated risks, and the need to register overseas surrogacy arrangements (**Proposal 37**).
2. The National Regulator (or alternative) (**Proposal 2**) should also develop educational materials for professionals who provide services in surrogacy arrangements. This should include:
 - a. guidelines for providing appropriate and inclusive care in surrogacy arrangements, to be adopted by healthcare providers such as hospitals and medical professionals; and
 - b. training or training materials on surrogacy and surrogacy laws for professionals, such as lawyers, healthcare professionals, and counsellors.

Prohibited domestic surrogacy arrangements

Proposal 8

1. Legislation should prohibit intended parents and surrogates from engaging in a domestic surrogacy arrangement which is for impermissible profit or reward. Surrogacy arrangements which comply with the requirements in **Proposals 25** and **26** are not for impermissible profit or reward.
2. Compliance with the prohibition should be enforced by a civil penalty regime.
3. Existing criminal offences which prohibit commercial surrogacy should be repealed.

Unregistered overseas surrogacy arrangements

Proposal 9

1. Legislation should prohibit intended parents from intentionally or recklessly engaging in overseas surrogacy arrangements, unless they have registered the arrangement with a registration entity (see **Proposal 37**).
2. Compliance with the prohibition should be enforced by a civil penalty regime.
3. Existing extraterritorial criminal offences in the Australian Capital Territory, New South Wales, and Queensland, which prohibit engagement in commercial surrogacy overseas, should be repealed.

Facilitation of prohibited surrogacy arrangements

Proposal 10

1. Legislation should prohibit individuals and organisations, including Surrogacy Support Organisations, from:
 - a. intentionally or recklessly facilitating, inducing, or procuring (including by advertisement), or attempting to facilitate, induce or procure, the involvement of a person in a prohibited domestic or unregistered overseas surrogacy arrangement (see **Proposals 8** and **9**); or
 - b. intentionally or recklessly coercing or attempting to coerce (by pressure, force, or fraudulent means) the involvement of a person in any surrogacy arrangement.
2. Compliance with the prohibition should be enforced by:
 - **Option 10.1** A civil penalty regime;
 - **Option 10.2** Criminal sanctions; or
 - **Option 10.3** A combination of civil penalties and criminal sanctions

Connecting intended parents and surrogates

Proposal 11

1. Legislation should provide that advertising in relation to surrogacy is permitted, unless it relates to a prohibited surrogacy arrangement (see **Proposals 8–10**).
2. Where existing legislation prohibits all advertising in relation to surrogacy, those provisions should be repealed.

Genetic connection between the parties and the child

Proposal 12

1. Legislation should treat surrogacy arrangements in the same way, regardless of whether or not a genetic connection is present between the surrogate and the child, or the intended parent(s) and the child.
2. Victoria should legalise and treat traditional surrogacy in the same way as gestational surrogacy, consistent with the approach adopted in other jurisdictions.

Requirement for a reason to access surrogacy

Proposal 13

Legislation should provide that:

1. to access surrogacy, the intended parents must be unable to conceive, gestate, and birth a child for a medical, biological or psychological reason; and
2. this requirement may be dispensed with by the National Regulator (or alternative).

Minimum age requirement for surrogates and intended parents

Proposal 14

Legislation should provide that:

1. a surrogate must be at least 25 years old, unless otherwise approved by an accredited counsellor, and have the legal capacity to make an informed decision; and
2. an intended parent must be at least 18 years old and have the legal capacity to make an informed decision.

Citizenship and residency requirements

Proposal 15

1. Legislation should provide that at least one intended parent must be either an Australian citizen or permanent resident, unless this requirement is dispensed with by a Surrogacy Support Organisation (see **Proposal 3**).
2. State or territory-based legislation imposing residency requirements should be repealed.

Requirement of previous successful pregnancy

Proposal 16

Legislation should provide that:

1. the surrogate must have previously carried a pregnancy and given birth to a live child; and
2. this requirement may be dispensed with in circumstances where a medical practitioner or a psychologist is satisfied that the surrogate and intended parent(s) understand the potential risks and are making a free and informed decision to continue with the surrogacy arrangement (see **Proposals 17 and 18**).

Requirement for medical screening

Proposal 17

Legislation should provide that:

1. the surrogate must undergo a medical assessment by an independent medical practitioner. The independent medical practitioner must certify that the surrogacy can proceed without undue risk to the surrogate's health; and
2. the independent medical practitioner must provide their report to the surrogate, as well as to the surrogate's nominated Surrogacy Support Organisation, so that it can form part of the approval process (see **Proposals 4 and 5**).

Requirement for psychological screening

Proposal 18

Legislation should provide that:

1. the surrogate and the intended parent(s) must undergo a psychological assessment by a psychologist who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA'), to determine their social, emotional, and psychological suitability to enter a surrogacy arrangement without undue risk to their own or another person's health or wellbeing;
2. the surrogate and the intended parent(s) must disclose any current or previous diagnosed mental health conditions to the independent psychologist; and
3. the independent psychologist must provide their report to the party, as well as to the party's nominated Surrogacy Support Organisation, including a recommendation of whether the party should be allowed to proceed with a surrogacy arrangement, so that it can form part of the approval process (see **Proposals 4 and 5**).

Question D

Should both the surrogate and the intended parent(s) be required to undergo a psychological assessment?

Requirement for criminal history check

Proposal 19

- **Option 19.1** There should not be a requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.
- **Option 19.2** There should be a legislated requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.

Question E

If Option 19.2 is adopted:

- should the criminal history check be limited to specific offences, such as those relating to children or violent offences?; and
- what should be the purpose of the criminal history check? You might want to consider if it should be provided to the surrogate to facilitate informed consent to the arrangement, to the psychologist undertaking the psychological assessments, or to the Surrogacy Support Organisation to determine if the arrangement should be approved.

Legal advice requirement for intended parents and surrogates

Proposal 20

1. Legislation should provide that all parties must receive independent legal advice before entering a surrogacy arrangement. The advice must cover the following matters:
 - a. the surrogate's right to bodily integrity, reproductive autonomy, and informed consent in relation to medical treatment or procedures that directly affect them (see **Proposal 23**);
 - b. legal parentage under the domestic administrative pathway or the judicial pathway (see **Proposals 30** and **31**);
 - c. the enforceability of the surrogacy agreement (see **Proposal 24**);
 - d. the operation of the reimbursement provisions (see **Proposal 25**) and the optional hardship payments (see **Proposal 26**); and
 - e. the right of the child born through surrogacy to know their genetic and gestational origins, including their right to access registered information (see **Proposals 33–35**).
2. Legislation should provide that the legal practitioner who provides the advice must provide the party with written confirmation that the matters outlined in paragraph 1 were discussed and the requisite advice provided, and that the legal practitioner believes that the party appeared to understand the advice.
3. Law societies in each jurisdiction should provide accreditation for lawyers providing legal advice on surrogacy arrangements.

Implications counselling requirement for intended parents and surrogates

Proposal 21

1. Legislation should provide that all parties must undergo counselling before entering a surrogacy arrangement. The counselling must:
 - a. be provided by a psychologist or counsellor who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA');
 - b. include at least:
 - i. one independent counselling session with the intended parent(s);
 - ii. one independent counselling session with the surrogate; and
 - iii. a joint counselling session with all the parties present;
 - c. not be provided by a psychologist who has been involved in the parties' independent psychological assessments; and
 - d. include discussion of the following matters:
 - i. the implications of the surrogacy arrangement for the relationships between the parties and their respective families;
 - ii. the attitudes of the parties to genetic screening, possible termination of pregnancy, and any other complications that may arise during medical treatment, pregnancy, or birth;
 - iii. the possibility of any party deciding not to proceed with the surrogacy arrangement, including the implications if the surrogate is already pregnant, or if the surrogate seeks a parentage declaration;
 - iv. the attitudes of the parties towards the conduct of the pregnancy, including how much input the intended parent(s) should have into the surrogate's lifestyle choices during the pregnancy;
 - v. the implications if the intended parents separate during the surrogacy arrangement;
 - vi. the attitudes of the parties to how and when the child should be told about their genetic and gestational origins;
 - vii. the attitudes of the parties to the surrogate or the surrogate's family having an ongoing relationship or contact with the child born through the surrogacy arrangement, and the extent of such contact; and
 - viii. how the parties will resolve any disputes that arise during the surrogacy arrangement.
2. Legislation should provide that the counsellor must advise the parties that ongoing counselling is available to them individually and collectively throughout the course of the arrangement, and may be initiated at the reasonable election of any party to the surrogacy arrangement.
3. Legislation should provide that the counsellor must provide each party with written confirmation that the matters outlined in paragraph 1(d) were discussed and the counsellor believes that the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement.

Question F

Should the surrogate's partner (if any) be required to undergo implications counselling?

Question G

Should there be additional counselling requirements? If so, what should these requirements be? You may wish to consider whether post-birth counselling should be optional or mandatory, or for how long after the birth the intended parent(s) should be required to cover the cost of the surrogate's counselling.

Surrogacy agreements

Requirements for a compliant surrogacy agreement

Proposal 22

1. Legislation should provide that for a surrogacy agreement to be compliant and eligible for approval, it must:
 - a. be in writing and signed by the surrogate, the surrogate's partner (if any), and the intended parent(s);
 - b. be entered into before the surrogate becomes pregnant;
 - c. contain provisions relating to permitted payments to the surrogate that are consistent with **Proposals 25 and 26**;
 - d. state whether the surrogate elects to receive either or both of the optional hardship payments (see **Proposal 26**);
 - e. contain a provision that ongoing counselling must be available to the parties, both individually and at joint sessions, at the reasonable election of any party, and paid for by the intended parent(s) (see **Proposal 21**);
 - f. include the statement required by **Proposal 23**; and
 - g. identify the following threshold requirements and confirm that they have been satisfied:
 - i. legal advice requirements have been met (see **Proposal 20**);
 - ii. counselling requirements have been met (see **Proposal 21**);
 - iii. a medical assessment has been conducted, and the medical practitioner has certified that the surrogacy arrangement can proceed (see **Proposal 17**);
 - iv. a psychological assessment has been conducted, and the psychologist recommended that the surrogacy arrangement can proceed (see **Proposal 18**); and
 - v. intended parents have completed a criminal history check (if this becomes a proposed requirement (see **Proposal 19**)).
2. Legislation should provide that evidence that the requirements in paragraph 1(g) have been met must be attached to the surrogacy agreement.

Question H

In relation to surrogacy agreements, should:

- any other subject matter or requirements be included;
- any of the subject matter or requirements identified be removed; or
- any clauses be prohibited, taking into account **Proposal 23**?

Prohibited provisions in a surrogacy agreement

Proposal 23

1. Legislation should prohibit the inclusion of, and invalidate any provision in a surrogacy agreement that inhibits the surrogate's right to autonomy, bodily integrity, and informed consent in relation to medical treatment or procedures that affect them.
2. Legislation should require that a statement confirming these rights must be included in a surrogacy agreement for the agreement to be compliant.

Enforcing surrogacy agreements

Proposal 24

Legislation should provide that surrogacy agreements that comply with the legislative requirements are enforceable. Provisions that are prohibited (see **Proposal 23**) or otherwise unlawful are not enforceable.

Question I

Should the following be enforceable:

- Surrogacy agreements that do not comply with the legislative requirements but are otherwise lawful?
- Certain provisions within unlawful surrogacy agreements, for example, cost recovery provisions?

Question J

For otherwise compliant surrogacy agreements, should there be any provisions that are unenforceable, other than those captured by **Proposal 23**?

Question K

What is the best method of enforcement? For example, by a court?

Cost recovery for surrogates

Reimbursing surrogates for expenses

Proposal 25

Legislation should provide that:

1. a surrogacy arrangement that entitles surrogates to the reimbursement of payments provided for in this proposal is not, for that reason only, for impermissible profit or reward;
2. consistent with this proposal, intended parents must reimburse the surrogate for all expenses reasonably incurred by the surrogate or their partner (if any) in relation to the surrogacy arrangement. This must include, but is not limited to:
 - a. costs related to assessments and other preconditions that are required for a surrogacy agreement to be compliant with the legislative requirements and eligible for approval (such as counselling, medical and psychological assessments, and legal advice);
 - b. medical and wellbeing costs;
 - c. pregnancy-related items, including dietary items and supplements;
 - d. care of dependants;
 - e. additional assistance if unable to perform daily tasks (such as meal delivery and house cleaning);
 - f. travel and accommodation for the surrogate and any necessary support person;
 - g. loss of earnings (including superannuation contributions);
 - h. health, life, and income protection insurance during the surrogacy arrangement and following the birth of a child, miscarriage, or stillbirth;
 - i. birth support;
 - j. any product or service recommended by the surrogate's healthcare provider; and
 - k. medical expenses following:
 - i. the birth of a child, miscarriage, or stillbirth (such as counselling or physiotherapy); and
 - ii. in the case of no successful pregnancy occurring, parties agreeing to cease attempts to achieve a pregnancy.
3. the period during which intended parents must reimburse the surrogate's reasonable expenses must be agreed upon by the parties to a surrogacy arrangement, but may be extended after commencement of the agreement if all parties agree; and
4. the National Regulator (or alternative) (see **Proposal 2**) should be empowered to develop standards and guidelines in relation to the expenses, costs, or losses which are to be regarded as reasonably incurred in relation to a surrogacy arrangement, as well as formulate a monthly allowance to cover any common incidental expenses for which receipts are difficult or inconvenient to obtain.

Question L

Should the National Regulator (or alternative) set caps on the amounts that can be recovered for specific costs, and for the monthly allowance?

Reimbursement for hardship, at the surrogate's election

Proposal 26

1. Legislation should provide that a surrogacy arrangement is not for impermissible profit or reward by reason only of the entitlement to the hardship payments provided for in this proposal.
2. Legislation should provide that, where a surrogate has elected to receive one or both of the hardship payments listed below, the intended parents must pay the surrogate:
 - a. a payment to recognise loss incurred by reason of the commonly experienced discomfort, pain, suffering, and assumption of risk involved in pregnancy and childbirth;
 - b. an additional payment made to acknowledge an extraordinary loss associated with the surrogacy arrangement, including pain and suffering caused by serious medical complications arising from the pregnancy or childbirth (such as stillbirth or hysterectomy). This is only payable if and when extraordinary loss occurs.
3. The National Regulator (or alternative) (see **Proposal 2**) should be empowered to set a maximum cap for the hardship payment (see paragraph 2(a)). This should be set at a level that fairly approximates the likely loss experienced by a surrogate.
4. The National Regulator (or alternative) should also be empowered to develop guidelines to identify events that would give rise to the hardship payment (see paragraph 2(b)), and set a maximum cap for permitted payments. This should be set at a level that fairly approximates a surrogate's loss in a given situation.

Question M

Should legislation allow intended parents to pay the surrogate an additional support payment beyond reimbursement for the costs and losses outlined in **Proposals 25** and **26**, to recognise the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement?

Holding the funds in a trust account

Proposal 27

Legislation should provide that:

1. before parties to a surrogacy arrangement attempt to achieve a pregnancy, intended parents should pay an agreed upon sum of money (set in **Proposals 25** and **26(2)(a)**) into the trust account managed by their Surrogacy Support Organisation (see **Proposal 3**) or other body;
2. the sum of money should cover the full estimated cost of the approved surrogacy arrangement, excluding the hardship payment for extraordinary complications (see **Proposal 26(2)(b)**); and
3. the disbursements to the surrogate are to be made by the Surrogacy Support Organisation from this trust account as costs are accrued (see **Proposal 25**) or in the case of the monthly hardship payment and monthly allowance, in monthly instalments (**Proposals 25** and **26**).

Medicare entitlements

Proposal 28

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended to allow Medicare rebates for assisted reproductive services to apply to treatment carried out for the purpose of surrogacy.

Proposal 29

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended so that Medicare rebates are available for psychological assessments and pre-arrangement counselling undertaken in pursuit of a surrogacy agreement which complies with the legislative requirements for approval, as well as counselling undertaken during an approved surrogacy arrangement.

Administrative pathway to legal parentage

Proposal 30

1. The *Family Law Act 1975* (Cth) should be amended to provide that:
 - a. where there is an approved surrogacy arrangement and a child is born, the intended parent(s) who are parties to that agreement are, upon birth (including stillbirth), the legal parent(s) of the child;
 - b. within three months of the birth (or stillbirth) of the child, the surrogate may apply for a declaration that the surrogate (and the surrogate's partner, if any) be declared the legal parent(s) of the child; and
 - c. the Federal Circuit and Family Court of Australia is empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.
2. The Federal Circuit and Family Court of Australia should create a specialist list for dealing with surrogacy-related applications.

Question N

In relation to approved surrogacy arrangements, where intended parents are the legal parents upon the birth of the child, should the surrogate have a right to seek a declaration that they are the parent (per **Proposal 30(1)(b)**)?

Judicial pathway to legal parentage

Proposal 31

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an unapproved surrogacy arrangement (which includes all overseas surrogacy arrangements) (see **Proposals 4 and 5**) and a child is born:
 - a. the surrogate, and the surrogate's partner (if any) are, upon birth or stillbirth, the legal parents of the child;
 - b. the intended parents must make an application for a declaration of legal parentage to the Federal Circuit and Family Court of Australia, within three months of the child being born (for domestic arrangements) or entering Australia (for overseas arrangements); and
 - c. the Federal Circuit and Family Court of Australia be empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.
2. The application should be heard and determined in the specialist list (see **Proposal 30(2)**).

Proposal 32

Legislation should provide that the process outlined in **Proposal 31** is retrospectively available in respect of children born through surrogacy arrangements that occurred before the proposed amendments come into effect.

Question O

When there is an application to determine legal parentage (see **Proposals 30, 31, and 32**), should judicial officers of the Federal Circuit and Family Court of Australia be required to consider any specific factors when determining the application? If so, what should those factors be?

Question P

Should there be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement (see **Proposal 37**); and are recognised in the birth country as the legal parents of the child? For example, should legal parentage be recognised in Australia without the need for a court order?

Parental leave entitlements

Question Q

What changes (if any) should be made to laws, policies, or practices to ensure that intended parent(s) have access to fair and adequate parental leave and surrogates have access to fair and adequate leave to recover from pregnancy and childbirth?

Information available through birth certificates

Proposal 33

1. Legislation should require birth registration statements and other documents seeking to register the birth of a child born in any Australian state or territory to include a section to collect information about surrogacy-related births. Information collected should include the surrogate's identifying details such as full name, address, and date and place of birth.
2. Legislation should provide that where the above information has been provided to the registry of births, deaths, and marriages, an addendum — stating that additional information is available and may be obtained via the national surrogacy register (or relevant state or territory-based register) (see **Proposal 35**) — must be attached to either:
 - **Option 33.1** Every copy of the birth certificate issued to the person born through surrogacy from birth; or
 - **Option 33.2** Every copy of the birth certificate issued to the person born through surrogacy after they have reached the age of 16.

Accessing information through a Surrogacy Register

Proposal 34

1. Legislation should require the following information to be provided to the National Regulator (or alternative) for inclusion on a surrogacy register (or state and territory donor conception register — see **Proposal 35**) within three months of the birth of a child through surrogacy:
 - a. identifying information about the surrogate, including:
 - i. full name;
 - ii. date and place of birth;
 - iii. home address; and
 - iv. ethnicity and physical characteristics;
 - b. whether the surrogacy was a traditional surrogacy or gestational surrogacy; and
 - c. details of the relevant fertility clinic and doctor (if any).
2. Legislation should provide that if a parentage order is obtained (see **Proposals 30 to 32**), it must be provided to the surrogacy register in addition to the information listed in paragraph 1(a) to 1(c) above.

Question R

In relation to **Proposal 34**:

- does it capture all the appropriate and relevant information that should be included on the surrogacy register; and
- who should be responsible for providing that information? For example, the relevant Surrogacy Support Organisation, assisted reproductive technology service provider, or the legal parents?

Proposal 35

1. Legislation should require the information listed in Proposal 34 to be included in either of the following:
 - **Option 35.1 (preferred)** A national surrogacy register established for this purpose; or
 - **Option 35.2** Existing state and territory donor conception registers (the Northern Territory and Tasmania, which have not established donor conception registers, should establish them).
2. Legislation should provide that:
 - a. people born through surrogacy have a right to access the information contained in the register from age 16 (or in the case of Option 35.2, the age at which the relevant legislation allows access to information held on the register); and
 - b. a person born through surrogacy who is under the age of 16 may access this information if the National Regulator (or alternative) is satisfied that such access would not be harmful to that person's welfare. The regulatory body may request that a counselling certificate or similar documentation from an accredited counsellor be provided to assist in its assessment.

Ensuring information is collected

Proposal 36

1. Legislation should impose sanctions for the failure to collect and provide information to include in the national, or state or territory-based, surrogacy register as required by **Proposal 34**.
2. Legislation should provide that failure to comply with the requirement will be enforced through:
 - **Option 36.1** A civil penalty regime; or
 - **Option 36.2** Criminal sanctions.

Registering overseas surrogacy arrangements

Proposal 37

1. Legislation should provide that:
 - a. an Australian citizen or permanent visa holder (intended parent), who is residing in Australia and is intending to engage in an overseas surrogacy arrangement, must register their intention to engage in an overseas arrangement with a registration entity before attempting to achieve a pregnancy via surrogacy. Intended parents residing outside Australia are not required to register overseas surrogacy arrangements with the registration entity;
 - b. the registration entity must provide the intended parent(s) with information on surrogacy overseas, including a list of overseas jurisdictions where surrogacy is legal and generally well-regulated ('**permitted destinations**');
 - c. the intended parent(s) must then advise the registration entity in which country the arrangement will occur:
 - i. if it is a permitted destination, the arrangement will be registered ('**registered overseas surrogacy arrangement**');
 - ii. if it is not a permitted destination, the intended parent(s) will need to satisfy the registration entity that the surrogacy arrangement is non-exploitative before it can be registered; and
 - d. if the intended parent(s) intentionally or recklessly proceed with an arrangement, without registering with the registration entity ('**unregistered overseas surrogacy arrangement**'), they will be subject to a civil penalty regime (see **Proposal 9**).
2. Legislation should provide that proceeding with an unregistered overseas surrogacy arrangement will not prevent an intended parent from applying for:
 - a. Australian citizenship, a passport, or a visa, on behalf of a child born from the unregistered overseas surrogacy arrangement; or
 - b. legal parentage (see **Proposal 31**).

Proposal 38

The *Family Law Act 1975* (Cth) should be amended to provide that intended parents who have engaged in an overseas surrogacy arrangement must make an application to the Federal Circuit and Family Court of Australia for legal parentage to be recognised (see **Proposal 31**) within three months of returning to Australia with the child.

Question S

In relation to the registration process in **Proposal 37**:

- which entity should be responsible? For example, the National Regulator (or alternative) (see **Proposal 2**); a Surrogacy Support Organisation (see **Proposal 3**); or a different government department or entity?
- what factors should the registration entity consider, when determining which destinations should be ‘permitted destinations’? For example, should these be destinations with laws that require the surrogate’s informed consent, or transparent gamete donation?
- do you think the registration process would work in practice? Are there any changes you would suggest to improve how it works and its effectiveness?
- should intended parents be required to demonstrate, as a precondition to registration, that they have made reasonable efforts to engage in domestic surrogacy before they can engage in a registered overseas surrogacy arrangement?

Streamlining processes to return to Australia

Front-loading citizenship, passport and visa applications

Proposal 39

Federal legislation or processes should be introduced to provide that where an Australian citizen or permanent visa holder (intended parent) has entered a registered overseas surrogacy arrangement:

1. the intended parent(s) may start applying for Australian citizenship, an Australian passport, or a visa, before the child’s birth, to facilitate expedited processing of such applications upon the child’s birth. This streamlined process is not available for unregistered overseas surrogacy arrangements; and
2. to access the streamlined process in paragraph 1, the intended parent(s) must provide the following documentation:
 - a. before the child is born: a copy of the surrogacy agreement and the documentation required to make the application(s); and
 - b. after the child is born: the surrogate’s consent to relinquish the child to the intended parent(s), confirmed in a signed affidavit (in the language of the surrogate); and details of the child’s birth necessary to finalise the application/s.

Question T

Are there other ways that the applications listed in **Proposal 39** could be streamlined or further aligned, in terms of the process or documentation required?

Question U

Could limiting access to this streamlined process to registered overseas surrogacy arrangements have any unintended consequences?

Question V

Should citizenship by descent also be recognised for children born through overseas surrogacy to Australian Permanent Residents?

Question W

Should there be a retrospective process for children who are stateless, who have been born through overseas surrogacy to intended parents who are Australian citizens or permanent residents, to obtain Australian citizenship? If so, how would this work?

Question X

Should a temporary visa, which allows children born through surrogacy to enter Australia, be introduced?

Making it easier to obtain and renew passports**Proposal 40**

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for an initial passport application for a child born through overseas surrogacy, if the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate), and submitted as part of the application.

Proposal 41

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for each passport renewal for a child born through overseas surrogacy, where:

1. the intended parents are recognised in Australia as the legal parents of the child;
2. the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate); or
3. the surrogate consented to the initial passport application.