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:

My husband and I are intended parents and have no experience of the surrogacy process outside of research, education and networking both domestically and internationally. We have found barriers to surrogacy exclude us of the process for various reasons including internationally where considerations of getting the child home (citizenship, legal ramifications) are unanswerable and domestically where strict rules of advertising and facilitating surrogacy and intended parent relationships make these arrangements more "underground."

Reform principles

Question 2 What reform principles should guide this Inquiry?

Response:

Legal clarity for international and domestic arrangements, reduced barriers to enter into arrangements (obviously with all the checks and balances that ensure appropriate parties are the only ones able to enter into arrangements), access to commercial surrogacy arrangements and considerations of international country partnering for more regulated international arrangements.

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:

International surrogacy can be exploitative and unregulated. This could potentially be addressed with international country partnering for arrangements (much like the Intercountry Adoption Australia program) where countries of similar values, laws and regulations can more effectively oversee and manage these arrangements.

I have no opinion on domestic. The barriers to access make the sample size too small.

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:

A child born through surrogacy arrangements should have all information available. There should be no shame in these birth journeys which I think the current practices create. Perhaps this information sharing could be a condition of entering into an arrangement or an inclusion on the birth certificate recognising the surrogate could be enforced. Maybe a registry or something official on a pre-existing government website?

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:

Having specific rules around advertising and how to find people that can enter into these arrangements are the most profound barrier in my experience. I also believe not being able

to compensate appropriately (i.e. commercial) make it an unattractive idea to potential surrogates where their personal cost might be more than their financial one.

Eligibility requirements for surrogacy

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

Response:

Yes, there should be requirements. Requirements that contribute to all parties (including the child's) wellbeing and safety should be paramount including:

- long term relationships for intended parents
- informed decision making practices
- financial stability of intended parents

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

Response:

Removal of needing a pre-existing relationship with surrogates and amendments that mean interstate arrangements can be more easily made.

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:

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:

Not necessarily. I think decisions need to be made with the child's best interests at heart. I think in most cases this will be for the child to be with the intended parents or biological parents. This should be enforced how legally binding contacts are already enforced.

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:

All essential elements of a contract should be met. This could be addressed on an individual basis where parties could decide what "consideration" could look like, for example. This would be done with a surrogacy agency or lawyer.

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 would be a good option to facilitate regulated and fair arrangements that protect all parties' interests.

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:

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 should be allowed freely, and especially encouraged through surrogacy registers. This would help reduce barriers and the stigma about people entering these arrangements.

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:

All natural pregnancy entitlements should be included, and further contributions by intended parents to address potential burdens on the system. Fertility treatments should probably not be fully covered due to the volatile nature of the results and the barriers this might create for others wishing to attempt fertility treatment.

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:

All pregnancy related expenses should be reimbursable and this should be addressed as part of entering into the surrogacy contract, including an agreed upon reserve/sum for costs that might not be predicted. I like the process of a Ukraine agency I explored where they store the majority of the sum in a trust for all initial treatments, and then pay incrementally at different stages of the pregnancy (based on what costs are associated at the stage) with the last of the amount being paid a few weeks before the birth. Remains of the reserve are to be re-distributed to the surrogate for post-partum recovery or back to the intended parents if an uncomplicated delivery is achieved.

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 but favour commercial as it introduces a more legal nature into the arrangement where there is precedent for where services provided are the nature of a contract. Arguably, I feel like you could say *everything* during the pregnancy could be compensated as it is the surrogate's whole life for 9 months that is impacted which I don't think is very practical as it opens a lot of other questions about to what extent do you compensate for. I also just like the idea of properly reimbursing (not just pregnancy related factors) someone for providing such a big service.

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:

Implemented through legal frameworks that are administered through a government department.

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:

Obtaining travel documents and recognition of the child as the intended parents' child whilst in another country and essentially bringing baby home at all seems the most difficult from what I can tell according to other experiences. It sounds like bureaucratic red tape keeps the child away from Australia longer than they should be.

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:

This should be part of preliminary discussions when entering the contract and would be based on individual circumstances such as genetic links.

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:

Length of time and getting those documents especially in a conflict zone. I have heard stories of people in Ukraine who have to travel to Poland away from their child and partner to get these documents.

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

Response:

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:

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:

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:

No, it should not have a role. The law already discourages these arrangements (especially internationally) which do not stop them from occurring as it is. It just ensures these arrangements are made without the lens of the law and government oversight which can lead to exploitation and unsafe practices.

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:

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:

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: