Submission to the Australian Law Reform Commission – Review of Australia's Surrogacy Laws

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?

Response:

I had, for many years, hoped to assist a couple have a child as a gestational surrogate after hearing of an acquaintance's heartbreaking experience trying to have a child. Over the years I spent time attempting to research and learn how I would connect with a couple for whom I could carry a child. This was difficult and the information available was limited.

In approximately 2017, I was told about the Facebook surrogacy groups and quickly connected with the community, attending face to face social events and learning from my peers.

I arranged counselling for myself and my husband and had medical testing to ensure I could fulfil an offer to carry a child for another couple. I found the counselling an exceptionally positive experience as did my husband. Our counsellor was an experienced person who was familiar with the community and intricacies of a surrogacy arrangement. I felt supported and prepared.

I went on to enter into a gestational arrangement. Overall, my experience was exceptional. Generally, the medical providers were supportive although particularly in the lead up to the birth, I did a lot of advocating for our 'team' and educating the hospital about what we each needed.

My counsellor remained an exceptional support and available throughout the arrangement including assisting with some mediation with my intended parents mid-way through my pregnancy.

I did find it stressful dealing with the reimbursement of reasonable expenses. This was not because my intended parents were not willing and forthcoming and proactive in providing access to funds in which to pay expenses. I simply found this stressful and awkward.

My relationship with my intended parents was positive and supportive.

I enjoyed the experience so much that I chose to again enter into a further gestational surrogacy arrangement with a second family in 2020.

I had another very positive and rewarding experience.

The only mild negativity of the second arrangement was around the hospital and birth of the child which had to be via caesarean section and the accommodation of both my spouse and intended parents being present for the birth. Ultimately, the hospital did allow the intended parents to be present for the birth however, it was stressful 'arguing' for them to be present.

Improvement could be achieved as follows:

- Further and updated guidelines and education for medical practitioners on the approach and care and management of both intended parents and surrogates who have entered into a lawful arrangement. In South Australia, SA Health have provided a clinical directive

but, arguably, most medical staff are unaware of the existence of the policy and do not adhere to it. Further, it fails to address many important matters.

- A regulated third party (i.e. Government body) managing an escrow account for management of costs.
- A mediation service for if and when problems arise in a surrogacy arrangement. While my counsellor was exceptional, she was not a qualified mediator. I would like to see an established service for teams who are parties to a surrogacy arrangement – possibly through a regulated surrogacy advisory body (Government run?).

Question 2 What reform principles should guide this Inquiry?

Response:

The guiding principle must be the best interests of the child born through the surrogacy arrangement. I agree with the ALRC's recommendations for reform.

Access to surrogacy, subject to eligibility, should be equal, inclusive, consistent and without discrimination.

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:

I agree that the human rights of all parties to the arrangement, including the child born of the arrangement, must be respected including those highlighted by the ALRC.

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:

I support and understand the importance of the child born of a donor and/or surrogacy arrangement to have access to information about their genetic connections and birth story.

All information as to the gamete donor/s and surrogate should be contained on the birth register.

While the information should be held on the register by Births, Deaths & Marriages, there should be options for the information actually printed / displayed on the Birth Certificate to be that chosen by the parents and/or the person to whom the certificate belongs (upon attaining the age of 16 years). The printed / displayed information on the Birth Certificate should be easily accessible and changeable.

The Application for a Birth Certificate could contain options for the information displayed on the Birth Certificate – 'tick a box' options. i.e. tick for names of parents and/or donor and/or surrogate to be on the Certificate. If, at a later date, there is a requirement / desire for differing information to be printed on the Certificate, it would simply be a case of applying for another copy with differing information i.e. names of parents + name of egg donor but not surrogate or names of parents + name of surrogate no donor etc.

Question 5 What do you think are the main barriers that prevent people from entering surrogacy arrangements in Australia? How could these be overcome?

Response:

Some of the barriers are as follows:

- Differing laws
- Limited information
- Limited people willing to act as a surrogate
- Costs

Uniformity of Laws

With laws differing in each State, it creates confusion, is inequitable, discriminatory and prohibitive.

For examples are:

In Tasmania, the intended parents can only pursue surrogacy with a surrogate who is domiciled in Tasmania.

In Western Australia the lack of access to surrogacy for single and gay men in Western Australia.

In New South Wales & Queensland, the requirement for an independent psychological opinion and preparation of a Surrogacy Guidance Report. This requirement increases costs associated with the surrogacy arrangement and application for a Parentage Order.

Uniformity in laws across Australia would provide clarity, make one information repository possible and ensure there is no discrimination.

Limited Information

There is currently a government website Surrogacy in Australia however the information is limited. This website should be built upon and should provide Fact Sheets, resources, further guidelines around reimbursable costs, names of ANZICA accredited counsellors and legal professionals. It should contain information for medical providers seeking guidance notes or clinical practice directives.

Any such website should provide information about international surrogacy.

Limited people willing to act as a surrogate

I would like to see a government run, independent service not only providing information as above under the heading '*Limited Information*' but also providing services such as holding a register of people hoping to act as a surrogate, mediation services, an escrow account for regulation of surrogacy expenses, an approval / regulatory panel who considers applications and provides approval (similar to the Patient Review Panel in Victoria) for surrogacy arrangements.

As mentioned, the panel would hold a register of surrogates.

Costs

Lack of access to Medicare rebates for some people accessing fertility treatment and assisted reproductive treatments such as IVF is inequitable and discriminatory. It is already an exceptionally expensive process for intended parents and the lack of rebates for some serves only to increases costs.

There should be rebates / funding towards counselling not dissimilar to a mental health plan.

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

Response:

Most State legislation includes a requirement for intended parents to be 'eligible' for surrogacy on the basis that there is a medical or social need. I agree with the eligibility requirement but would like to see eligibility on the basis of a recognised psychological condition such as anxiety manifesting as tokophobia.

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

Response:

Medical Eligibility of Intended Parents

Currently the medical need (in most State legislation) is such that a person is unlikely to become pregnant or give birth or there is risk of harm in doing so. I think there must be further clarification / guidance for medical practitioners / fertility specialists as to the eligibility.

As above at question 6, the medical need for surrogacy should include eligibility as a result of a psychiatric condition/s.

Age

Each State has an age requirement (which differs depending on the State). The age should be 25 years for both intended parents and surrogates with discretion for consideration of 18 years or above based on an assessment of maturity (similar to s29 of the *Surrogacy Act 2010* (NSW)).

Surrogate – Previous Birth and Medical Eligibility

Surrogate should undergo health screening and receive advice from an independent obstetrician (i.e. a health practitioner independent of the treating fertility clinic) regarding medical suitability to enter into a surrogacy arrangement (similar to s17(d) of the *Surrogacy Act 2008* (WA)).

There should be no requirement for a person wishing to be a surrogate to have previously given birth following them receiving medical advice to ensure an informed decision can be made.

Surrogate Partner / Spouse

If the surrogate has a spouse/partner, they should be a party to the arrangement and should participate in counselling and receiving legal advice. This is not currently a requirement of the *Surrogacy Act 2019* (SA).

Requirements for Counselling and Legal Advice

The requirement for pre-surrogacy arrangement counselling with an ANZICA accredited counsellor in accordance with ANZICA guidelines should remain and should include, as a minimum, individual and group counselling for all parties to the arrangement.

Independent legal advice for both surrogate and their partner/spouse and independent parents with a requirement for a written legal agreement.

Permanent Resident / Citizen

Whilst all parties to the arrangement should be residing in Australia, there should be no requirement for parties to be a permanent resident or Australia citizen such as required in the *Surrogacy Act 2019* (SA) at s10(3)(c) & s10(4)(c).

Criminal History Reports

There should be no requirement for the exchange / provision of criminal history reports as is a requirement of the *Surrogacy Act 2019* (SA) (s10(3)(f) & s10(4)(g)).

Question 9 Should surrogacy agreements be enforceable? You might want to consider:

Response:

Whilst a surrogate should always maintain bodily autonomy, the arrangement itself to an extent should be enforceable such that intended parents are presumed to be the legal parents at birth and should be recognised as the legal parents via a pre-birth parentage order.

Any dispute about the legal parentage should rest with the surrogate.

Reasonable Expenses

The payment of the surrogate's out of pocket reasonable surrogacy expenses should remain enforceable. As above, my opinion is this should be managed through a regulated escrow account managed through a third party. Further guidance should be available to intended parents and surrogates.

Question 10 What process requirements should be in place for surrogacy arrangements? You might want to consider:

Response:

Regulatory – Surrogacy Panel

My opinion is that a regulatory panel similar to the Patient Review Panel or Reproductive Technology Council should be established to provide review and approval to surrogacy teams. The approval if provided should result in the provision of a Certificate which is then used to seek a pre-birth parentage order.

The panel would ensure all requirements in the legislation both in terms of counselling and legal advice have been met, there should be consideration given to the parties' circumstances (relationships, financial, health, etc) and that sufficient and appropriate supports are in place for the surrogacy arrangement.

Pre-Arrangement Counselling

The requirement for pre-arrangement / conception should remain as per question 7 above.

My opinion is that if intended parents, surrogates and/or surrogate partner seek counselling including when counselling is not completed that a statement / report should be provided to the regulatory panel. If the counselling is not completed, there statement / report should provide reasoning as to why the counselling was not completed.

Legal Advice and Agreement

The requirement for independent legal advice should remain as per question 7 above.

Post Birth Counselling & Report

Counselling should be available post birth to the surrogate and the surrogate spouse/partner with intended parents bearing the costs– in a similar vein to s15 of the *Surrogacy Act 2019* (SA). However, counselling should not be a mandatory requirement post birth such as pursuant to s35 of the *Surrogacy Act 2010* (NSW) and should not be 'tied' to the making of a parentage order.

While the surrogate partner/spouse should be a party to the arrangement and they should participate in all pre-conception / pre-arrangement requirements of counselling and legal advice, there should not be a requirement for either counselling nor consent to the making of the parentage order post birth.

The requirement for a counsellor's or Surrogacy Guidance Report (i.e. pursuant to s17 of the *Surrogacy Act 2010* (NSW) and s32 of the *Surrogacy Act 2010* (QLD)).

Non-adherence to the pre-conception / pre-arrangement requirements

If the parties do not participate in counselling and legal advice prior to an arrangement, they should participate as soon as practicable. Such counselling and legal advice should be tailored on the basis there is already a pregnancy to ensure parties understand the legal position and are emotionally supported by a counsellor. It should not be a situation that the requirement is simply not adhered to.

The Court should have discretion to make a parentage order in circumstances in which pre-arrangement requirements such as counselling and legal advice have not been provided if it is in the child's best interests.

Proof of Legal Advice and/or Counselling

A legal practitioner should provide a statement confirming they have provided legal advice (in the absence of the other party). A letter of advice to the party should not be required to be disclosed. The Statement should cover broadly the advice provided.

A counselling report should be provided confirming counselling has been provided in accordance with ANZICA's guidelines.

Question 11 What are the gaps in professional services for surrogacy in Australia?

Response:

[redacted]

My opinion is that matching agencies have the potential to exploit parties to a surrogacy arrangement. However, I recognise the difficulties faced by intended parents in connecting with a surrogate and vice versa. I know from my own experience that I didn't know how to connect with intended parents.

I think ideally a government based register should be held of surrogates who would like to meet intended parents. But, from a practical perspective, I am unsure how information could be exchanged.

If there were matching services in Australia, they must be highly regulated and adhere to strict ethical standards by people with appropriate qualifications and experience in behaviour and relationships. I think there should be prescribed fees that can be charged for provision of services not dissimilar to, for example, the Return to Work Schedule of Sums which provides prescribed fees for practitioners (medical, financial and legal professionals) in providing advice in relation to certain parts of the *Return to Work Act 2014* (SA). The Schedule of Sums is updated on 1 January each year updating fees charged.

Question 12 How should professional services operate in Australia?

Response:

Counselling and legal advice should be independent of a treating fertility clinic.

Question 13 How should surrogacy advertising be regulated? You might want to consider:

Response:

Intended parents should be able to advertise their need for assistance to have a family through a surrogacy arrangement. It should be clear that any arrangement is a legal arrangement with no offers of payment etc.

Question 14 What entitlements, if any, should be available to surrogates and intended parents? You might want to consider:

Response:

Medicare rebates should be accessible for fertility treatments. If parties have eligibility for surrogacy, they should have access to rebates as per question 5 under the heading '*Medicare*' above.

Question 15 How could the process for reimbursing surrogates reasonable expenses be improved?

Response:

I would like to see the establishment of an escrow account maintained by an independent third party. An application for expense reimbursement provided together with any relevant evidence and reimbursement is made.

Question 16 Do you support a compensated surrogacy.

Response:

I support a compensated surrogacy model. Any payment should not be in exchange for a baby but instead a payment throughout pregnancy with the idea being to 'pick up' any loss which is not reimbursable as an 'out of pocket' expense. It would recognise the time, impact to the surrogate's life and that of any family she may have (partner / children) and acknowledge impact to her both from a psychological and physical perspective.

I am in favour of a prescribed schedule of 'compensation' which is updated yearly.

I am wholly against surrogates setting their own 'rates' of compensation and I think that payment beyond the prescribed compensation should be penalised.

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:

The current differing requirements from State to State for the application for a parentage order is not only confusing but inequitable. Uniformity of laws will alleviate this inequity.

My opinion is that there should be a presumption of parentage for the intended parents and that pre-birth parentage orders should be made. This could be an application to the Federal Circuit Court and the matter considered in chambers on the papers. If the Judge requires further information or feels a hearing is necessary, they should have that discretion.

The application would include the Panel 'approval statement' confirming the parties were approved to pursue the surrogacy arrangement.

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:

Response:

I acknowledge and support that the paramount consideration in all surrogacy arrangements must be the best interests of a child born of the arrangement. Approval of any arrangement should be made prior to the parties pursuing a pregnancy. If the arrangement is approved, there should be a presumption of parentage of the intended parents, and a pre-birth parentage order made such that the intended parents are immediately registered on the Birth Certificate.

In relation to children born through an international surrogacy arrangement, the presumption of parentage should be recognised and citizenship granted for the child born of the arrangement.

Question 22 What is the best way to approach differences in surrogacy regulation between or within jurisdictions? You might want to consider:

Response:

As per question 5 above – I support uniformity of laws creating equitable and non-discriminatory laws regardless of the State in which intended parents reside.

Question 23 Is it appropriate for surrogacy arrangements to be subject to oversight?

Response:

As per question 10 above – I wholly support and feel strongly there should be greater oversight of surrogacy arrangements. This opinion is based on my exposure to the surrogacy community and poor outcomes for all parties and my experience and exposure in assisting intended parents and surrogates from a legal perspective.

I would like to see the implementation / establishment of a Surrogacy regulatory panel similar to the Patient Review Panel or Reproductive Technology Council should be established to provide review and approval to surrogacy teams. The approval if provided should result in the provision of a Certificate which is then used to seek a pre-birth parentage order.

The panel would ensure all requirements in the legislation both in terms of counselling and legal advice have been met, there should be consideration given to the parties' circumstances (relationships, financial, health, etc) and that sufficient and appropriate supports are in place for the surrogacy arrangement.

My opinion is that this should be a supportive service with a view to assisting and supporting parties.

Question 24 Should the law have a role in discouraging or prohibiting certain forms of surrogacy? You may wish to consider:

Response:

I support decriminalisation of international surrogacy arrangements.

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:

As per question 5 I would support a government site providing accurate and up to date information, resources, services (such as mediation) and fact sheets.

I would also support independent not for profit providers assisting teams with information, mediation services and resources. I think any such service should be regulated to ensure accurate information is provided without exploiting intended parents financially.