12 November 2025

Dear Commissioners.

Submission concerning Australia's Surrogacy Laws: Reflecting on the Intersections of Surrogacy and Birth-Related Offences

Introduction

I begin by thanking the Australian Law Reform Commission for the opportunity to contribute to reviewing Australia's surrogacy laws. As an emerging criminal law scholar and advocate for the prevention of gendered violence, I welcome the investigation. I write in my personal capacity as I continue to research the relationship between gender and the criminal justice system, including the ways in which reproductive rights may be defined, regulated and disciplined through legal frameworks.

My submission specifically responds to 'Criminal law in the surrogacy context' as explored in the Discussion Paper. I intend to share my insights about the intersection between surrogacy and infanticide, including neonaticide. Researching in Victoria, I specifically engage Victorian law to unpack my analysis. I preface my discussion by acknowledging that the Discussion Paper focusses specifically on criminal law's regulation and disciplining of prohibited commercial surrogacy. However, there may be extended implications for surrogacy in the criminal law context, infanticide and neonaticide being the key focus of my reflection. This analysis hopes to offer an additional lens to widen the scope of Proposal 9 by clarifying potential grey areas in the blackletter law.

My submission is trifold, chartering three key issues:

1. How does the *born alive rule* relate to surrogacy laws;
2. What defines a maternal duty of care in the context of surrogacy; and
3. Do criminal and surrogacy laws both regulate and discipline women without prioritising protection?

Scope

Although conceptually there is an overlap between surrogacy and infanticide, there is a gap in the literature about how they may impact one another. There appears to be a lack of clarity surrounding perinatal responsibility when gestation and parentage are split. Surrogacy contemplates a handover upon the birth of a child; criminal law concerns responsibility of the gestational mother until and after a live birth is proved.

Where a child unfortunately passes away, a lack of clarity indicates misalignment between parental recognition and criminal liability, if any. If a birth occurs unattended, delayed or outside the surrogacy legislative framework, it is unclear who owes a duty to whom, when that duty is activated and what the content of that duty is. These periods highlight a gap in existing jurisprudence. Considering these issues is essential to promote uniformity, human rights and best-interests oriented approaches as within the scope of the ALRC's inquiry.[1]

Issue One: Born Alive Rule

The intersection between surrogacy laws and infanticide and related offences begins with a consideration of the *born alive rule*. At law, birth is the threshold moment at which a foetus

[1] Australian Law Reform Commission (ALRC) *Surrogacy Issues Paper* (2025).

becomes a person capable of legal protection.[2] Concurrently, a mother becomes subject to distinct duties toward that person.[3]

In cases of infanticide, specifically neonaticide, emphasis is on when the child is born alive and whether the gestational mother's omissions caused the child's death, for example a concealed birth and a failure to seek medical help. Surrogacy laws sit somewhat uncomfortably with this criminal doctrine: whereas the law of neonaticide treats biological motherhood as rigid, surrogacy recognises that biological motherhood is transferrable.[4] That is, birth at criminal law confers responsibility.[5] Contrastingly, surrogacy terminates the gestational mother's responsibility. This contradiction leaves surrogates exposed to criminal liability for acts that, in policy and intention, they are no longer meant to perform. In the absence of criminal jurisprudence recognising when a duty of care is definitively conferred, the *born alive rule* raises complexity.

To briefly unpack the differences between criminal and surrogacy jurisdiction, in criminal law, the *born alive rule* necessitates that a victim be a person in being. At common law and under relevant *Crimes Acts*, a child is born alive upon being expelled from the gestational mother's body, showing signs of independent life such as breathing, heartbeat or movement.[6] Criminal courts thus seek physiological proof that life existed independently for criminal liability to imposed, often received via coronial or medical evidence.[7] Contrastingly, for surrogacy laws, the woman who gives birth is the legal mother at the instant of delivery, regardless of genetics or intent. The intended parents acquire parentage only later when the intended parents apply for a parentage order, upon which legal parentage transfers.[8] Consequently, during the liminal period between the moment of birth and the parentage order, the surrogate remains the sole legal parent and therefore bears all statutory duties and potential liabilities for the child's welfare. This is even she may have intended to relinquish care immediately to the intended parents.

If a neonatal death then occurs during that transitional period, criminal law may contradict parenting rules. Under criminal law, once the *born alive rule* is proven, the infant is a person, to which any negligent omission by the gestational mother can constitute homicide, infanticide (neonaticide). Under family law, the same infant may not yet have any recognised parents besides the surrogate. The intended parents have no standing until the parentage order is made. This temporal mismatch undermines consistency and fairness as promoted by surrogacy laws. It allows for full criminal responsibility to be imposed on the surrogate even though under parenting laws that obligation may be terminated to transfer responsibility. There appears to be a lack of statutory authority reconciling these tensions. My concern is that this hollow may deter surrogates from seeking timely medical assistance due to confusion, misinterpreted legal roles and a general fear of scrutiny.

Hypothetical 1.1: Complications Arising from the *Born Alive Rule*[9]
A surrogate falling outside the surrogacy framework gives birth to an infant prematurely

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[2] *R v King* [2003] NSWCCA 399; *R v Iby* [2005] NSWCCA 178.
[3] Ibid. See also Kristien Savell, 'The Legal Significance of Birth' (2006) 29(2) *University of New South Wales Law Journal* 200.
[4] Scott B. Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood' (1994) 3(2) *Southern California Review of Law and Women's Studies* 219; *Assisted Reproductive Treatment Act 2008* (Vic) ss 39–45.
[5] See n 2.
[6] Ibid.
[7] Kristin Savell, 'Is the born alive rule outdated and indefensible' (2006) 28 *Sydney Law Review* 625.
[8] *Assisted Reproductive Treatment Act 2008* (Vic) ss 40–45; *Status of Children Act 1974* (Vic) ss 22–23.
[9] This hypothetical combines Australian neonaticide and unattended birth cases such as *R v Iby* [2005] NSWCCA 178 and *R v King* [2003] NSWCCA 399 with academic criticism including Lorana Bartels, 'Safe

without medical assistance. The infant shows signs of life, suggesting that they were born alive as opposed to stillborn, but passes away before medical help arrives.

Given that child deaths are reportable deaths, a coroner may trigger a homicide investigation. But, the intended parents cannot yet be listed as legal parents. Instead, the surrogate must register the death. Family law consequences may flow inherently. It may be that the child exists for criminal law but not yet for administrative or civil purposes, creating a gap.
That is, if the baby dies during delivery or immediately thereafter, before registration or intended parent transfer, both systems risk jurisdictional ambiguity. The family court may never have a child to allocate, even though the criminal law may be uncertain whether a homicide occurred.

Even if a rare circumstance, my first submission would concern a transitional duty of care clarifying roles to overcome a timing mismatch. A provisional parentage recognition for intended parents may also be needed immediately upon live birth, creating a continuity to legal personality and care duties. Distinct labelling of infant deaths in surrogacy may also assist by providing coronial clarity.

Issue Two: Maternal Duty of Care

The next issue to consider after the *when* is the *what* and *to whom*. Considerations of a maternal duty of care considers criminal law, family law and normative reproductive ethics. In my eyes, there would be an issue of maternal omission liability within the surrogacy context, which I will unpack in this section.

For criminal law, the common law establishes a duty of care in homicides by culpable omission. Generally, a person who assumes responsibility for another's life owes a legal duty to act, and failure to do so can ground criminal liability if death results.[10] Parents are subjected to this duty automatically given their status to the child born alive.[11] A mother will have the obligation to provide necessities of life, seek help if the child is endangered and avoid acts or omissions that may adversely impact the child by causing harm. A failure to comply with these duties may constitute manslaughter by criminal negligence or infanticide where childbirth-related mental disturbance applies. The duty under surrogacy laws is different. It presupposes a transfer in legal parentage. It is assumed that the surrogate's role ends at the birth of the child, whereby the gestational mother's roles are relinquished to the intended parents. Existing legislation does not identify a transitional duty of care. This complicates compliance with the duty given that criminal law expects an ongoing protection of the newborn whilst family law contemplates that the surrogate relinquishes her obligations to the intended parents.

Hypothetical 1.2: A Maternal Duty of Care[12]
A surrogate living in Victoria enters into an altruistic surrogacy agreement with another couple. While well-intentioned, the surrogacy is not registered under the Victorian

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Haven Laws, Baby Hatches and Anonymous Birth' (2012) *36 Criminal Law Journal* 19. Family law cases on unregistered surrogacy cases were also used including *Re Evelyn* (1998) 23 Fam LR 53 and *Re Mark* (2003) 31 Fam LR 162. See also Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?' (2011) 35(1) *Melbourne University Law Review* 165.

[10] *R v Taktak* (1988) 14 NSWLR 226; *R v Instan* (1893) 17 Cox CC 602; *R v Stone and Dobinson* [1977] QB 354.

[11] *R v Russell* [1933] VLR 59.

[12] This hypothetical is purely fictional.

framework, as parties begun surrogacy privately to avoid expenses and the publicity that comes with approval by a Patient Review Panel.

The surrogate goes into labour at thirty-six weeks alone. The intended parents are to arrive in a few days. The surrogate is reluctant to seek support due to a lack of registration and a fear of public scrutiny from her local community. The surrogate opts to deliver the child herself, intending to call an ambulance once the child is born.

The child is born alive but quickly becomes unresponsive. Panicked, the surrogate hesitates to call emergency services, afraid that doing so will expose the unapproved arrangement and jeopardise the intended parents' future custody. The child passes away.

Coronial investigation determines that the baby was born alive and that death likely resulted from perinatal asphyxia. The Coroner refers the infant's death to the Victorian Director of Public Prosecutions to potentially pursue a charge of manslaughter by criminal negligence against the surrogate.

Hypothetical 1.2 envisions a key tension when considering the maternal duty of care: can a surrogate's pre-existing intention to relinquish extinguish or mitigate her duty of care at the instant of live birth? Under criminal law, once the infant's live birth is established, the surrogate owes a duty of care to the child to provide necessities and seek medical assistance. Her omission may therefore constitute a culpable omission giving rise to a charge of manslaughter.

Conversely, through a surrogacy lens, even if unregistered or unapproved, the parties' shared intention was that the surrogate would not assume ongoing parental responsibility, relinquishing her obligations upon the infant's birth. The surrogate's hesitancy was not necessarily motivated by disregard for the infant's welfare, but rather the confusion and fear being outside a regulatory environment that criminalises informal surrogacy and is silent as to emergency and transitional perinatal duties.

The criminal law treats the surrogate as the sole legal parent and thus the only possible duty-bearer. Surrogacy law instead imagines that duty to have already shifted to the intended parents, even if informally. This inconsistency may render the surrogate criminally liable for manslaughter or infanticide even though the prosecution arose due to a lack of legislative clarity concerning responsibility at birth. In my view, this inconsistency undermines fairness for a potential accused, exacerbated given the emotional and psychological impact that infant death may have on the gestational mother and intended parents alike.

Hypothetical 1.3: Mental Disturbance and Maternal Duties of Care[13]
An altruistic surrogate has given birth in Melbourne under an approved surrogacy arrangement. The intended parents are present but completing neonatal paperwork.

The surrogate develops emotional distress post birth, feeling guilt and a struggle to detach from the child. She feels overwhelmed given changes to her body and fears never seeing the child again. She begins lactating.

[13] This hypothetical considers empirical studies on surrogates' mental disturbances post-birth.

The infant, nearby, starts struggling to breathe. The surrogate, in her distressed state, is unable to communicate and seek help immediately. Hospital staff intervene, but the child passes away.

The coroner finds that this was an avoidable death had it been reported.

Hypothetical 1.3 adds another dimension of complexity given mental health disturbances post-delivery. Under criminal law, the surrogate had a duty of care to the child, even if not under family law. The surrogate is assumed to be the continuing caregiver, and is psychologically connected to the infant given bonding, an emotional attachment and physical changes to the body including potential lactation. At trial for manslaughter, her defence raises infanticide.

Under the existing Victorian framework (and equivalent provisions in other states), infanticide introduces a humane alternative charge to murder given perinatal hormonal and psychological disturbances.[14] It recognises that such physiological changes can have a psychological impact, impairing women's judgement. Under statute, the surrogate satisfies the preconditions to infanticide: she is a woman, whose child was below the age of two, and was disturbed due to the consequences of delivery at the time the alleged offence occurred.[15] Infanticide then considers maternal mitigation, the challenge being that an intent to relinquish that parenthood under surrogacy agreements falls outside its scope. Situations analogous to the hypothetical are not rare; there is an expanding body of research recognising that surrogates as gestational mothers may experience mental disturbances.[16] Although most surrogates may adjust well, some may demonstrate postpartum disassociation, grief at relinquishment and depression or anxiety caused by separation.[17]

The legal issue is that criminal law still recognises the surrogate owes a maternal duty of care to the infant while family law insists that the surrogate is not the child's enduring mother. This means that the surrogate is trapped, in that there is a biological connection enlivening criminal responsibility even through the maternal duty would have been terminated upon the child being born alive. Criminal law recognises disturbances by reason of birth, but not by reason of relinquishment, even though both arise from the same physiological and emotional upheaval. This requires clarification in both criminal and surrogacy laws.

Issue Three: Contested Motherhood and Legal Personhood

Building on Issues One and Two, until the procedural requirements of birth registration and parentage transfer are completed, the newborn's legal identity is suspended between gestational and intended motherhood. This causes inconsistency in assignments of legal personhood. If the infant passes away, criminal law recognises it as a legal person being born alive, allowing for homicide investigations. But, family law and registrations may record that child as a stillbirth or otherwise because it died before being formally registered. A stillborn child has no separate legal personality allowing for parentage transfer.[18]

The consequences are similarly complex. If a surrogate delivers and the baby dies before registration, there may be no legally recognised child for the intended parents to

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[14] Natalia Antolak-Saper, 'The role of mercy and sentencing for infanticide: the tragic case of *R v Guode*' (2023) 35(1) *Current Issues in Criminal Justice* 65.

[15] *Crimes Act 1958* (Vic) s 6(1).

[16] See for example Viveca Söderström-Anttila et al., 'Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review' (2016) 22(2) *Human reproduction update* 260.

[17] Ibid.

[18] *Births, Deaths and Marriages Registration Act 1996* (Vic).

mourn, inherit from, or claim in insurance. The surrogate may however be liable under criminal law given that the child was born alive. Clarity is needed to prevent this *double jeopardy*, in that both the intended parents and the surrogate are being simultaneously sanctioned.

The relationship between the regulatory and disciplinary aspects of surrogacy law and punitive functions of criminal law are then activated. Prima facie, surrogacy contemplates compassion; crime concerns punishment. Yet, surrogacy laws and criminal laws are both circumstances in which female reproduction and its consequences are policed by the state. The table below clarifies the regulatory and disciplinary functions of both.

Legal Context	**Regulatory Impact**	**Legislative Basis**	**Judgement**
Criminal Law	Concealing, denying, or rejecting pregnancy; giving birth alone	Homicide, infanticide, or concealment of birth offences	Condemns and disciplines a refusal of motherhood
Surrogacy	Contracting or receiving payment for reproductive labour; advertising or brokering	s 45 *Assisted Reproductive Treatment Act 2008 (Vic)* (and equivalents)	Condemns a commodification of motherhood

Because surrogacy can be regulated through criminal law in addition to specific legal frameworks, there is an issue of approval. A key driver for so-called illegal surrogacy arrangements may be a fear of existing laws in addition to costs and publicity. It appears that both the criminal and surrogacy-specific regime rely on criminalisation as their organising logic, to which an infant's legal status becomes contingent on whether the woman's reproductive behaviour was approved. Normatively, this blurs the line; offences of rejecting motherhood and surrogacy as a way of contracting motherhood are equally punished. A woman who conceals her pregnancy is punished for rejecting motherhood as construed by law; a woman who contracts her pregnancy via surrogacy may similarly be punished for distributing her maternal role that otherwise she is expected to own. It may be that a key deliverable from proposed reforms is that the role of criminal law and surrogacy law be kept clear and distinct. Let criminal law sanction and surrogacy laws protect as opposed to prohibit, to promote safety and wellbeing.

Conclusion

I conclude my analysis here, hoping to have unpacked an otherwise underreported series of issues. I commend the ALRC's work and am eager to see what reforms unfold. I close my submission with a brief disclaimer.

In writing about surrogacy and the regulation of women's reproductive rights, I am mindful that I do so from outside the embodied experience of the women affected. My analysis is through the lens of a legal researcher, explaining the need for fairness and clarity in the law. My submission aims not to speak for women or birthing people but serves as a reflection about how the current framework may create challenges through doctrinal inconsistency.

The journey towards reproductive justice is multi-faceted, and I thank the ALRC for an opportunity to share my perspective.

Sincerely,
Arya Banerjee