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

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Submitted by

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Introduction

This submission is made on behalf of the UWA Centre for Health Law and Policy. It reflects the authors' views on the ALRC's *Review of Surrogacy Laws: Discussion Paper*, with a particular focus on how surrogacy should be regulated, which regulatory bodies should have what functions, access to surrogacy and safeguards and pathways to parentage. Our recommendations draw on our collective expertise in family law, reproductive health law and regulatory theory. Where we have not made comment on a particular proposal, it is to be taken that we broadly agree with it.

Proposals 1 & 2 – Promoting a nationally consistent approach through harmonisation and establishing a national regulator

Surrogacy should be regulated uniformly by Commonwealth legislation. There is no reason that access requirements should be different across states and territories or why there need to be state and territory laws, beyond the complexity of the requisite referral of power (per option 1.1, discussed below).

The legislation should establish a new National Regulator, rather than empowering existing agencies/departments, provided it is adequately resourced given historic delays in the system (for example, those associated with the Western Australian Reproductive Technology Council). If the National Regulator is to be tasked with approving surrogacy arrangements – rather than Surrogacy Support Organisations (SSOs), as we suggest below – it must prioritise this function and avoid being too pedantic about the form of agreement (which will in part be helped by the provision of a template, as suggested in the Discussion Paper).

We note that the recent 'Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia' ('Rapid Review') undertaken by the federal government's Department of Health, Disability and Ageing considered a National Regulator for assisted reproductive technology (ART) but ultimately felt that this would be too lengthy a process.[1] The Rapid Review also stated that 'it is difficult to justify a standalone regulator' for ART given it is 'a relatively small part of the health sector'.[2] Given this, and the fact that the ALRC's Discussion Paper was released less than 2 months after the final report of the Rapid Review, this seems like an opportune time to consider the establishment of a National Regulator that has oversight of *both* ART and surrogacy. There is significant overlap between the two and similar matters arise with respect to both ART and surrogacy. This would also make the process of practically accessing surrogacy easier – once a surrogacy arrangement is approved, parties could be referred to ART providers, creating a more seamless process.

Matters concerning surrogacy should be dealt with by legislation where possible, particularly access and eligibility requirements. Delegated legislation, while easier to amend, adds to the complexity laypeople already find when interacting with the system.

[1] *Professor Euan M Wallace AM and Victorian Department of Health, Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia* (Report, 26 September 2025) 66–67.
[2] Ibid 67.

In terms of how nationally consistent surrogacy laws should be implemented, in our view states and territories should refer their powers to the Commonwealth Parliament (option 1.1), or one jurisdiction should pass surrogacy legislation and each other jurisdiction should legislate to apply that Act (option 1.3). Should the Commission ultimately recommend Option 1.1, consideration should be given to the impact on the Family Court of Western Australia, which currently has jurisdiction over parentage in surrogacy matters.

Question A

In our view, important design principles for the National Regulator include:

- **Transparency and accessibility**: if an arrangement is rejected, reasons must be provided to parties. These reasons must be written in clear and simple (ie, not legal) language.
- **Accountability and transparency**: It must be clear what avenues a party has if they wish to challenge a rejection or have other issues with the process. This includes being clear about who the National Regulator is accountable to. We assume the National Regulator will be accountable to the Department of Health, Disability and Ageing; however, clarification would be helpful.
- **Efficiency and transparency**: The National Regulator is being tasked with wide-ranging responsibilities and therefore more information is needed about its leadership and governance.

Proposals 3 to 5 – Permitting and regulating SSOs

SSOs should be established and provide the supports listed in the Discussion Paper, with the exception of assessing and approving surrogacy arrangements (proposals 4 and 5). From an ethical and regulatory perspective, is not appropriate for the same body that is providing information and support throughout the surrogacy arrangement to also approve the arrangement, particularly if the SSOs are for-profit. This is the case even if there are penalties associated with intentionally or recklessly approving an agreement in accordance with Proposal 6.

SSOs should also be tasked with the majority of the public education/community awareness functions given the broad range of other activities the National Regulator is likely to be responsible for.

In terms of payment, SSOs could charge fees in accordance with a scale set by regulations for their support functions (similar to family lawyers). If the National Regulator is to be responsible for approvals, a filing fee could be charged in a similar way to when court documents are filed.

Question C

As noted above, in our view the approval function should sit with the National Regulator. Applications for administrative review of rejections should then go to the appropriate court (likely the Federal Circuit and Family Court of Australia).

Proposal 7

The public education/community awareness function of the regulator is important. As noted by Ezra Kneebone, Karin Hammarberg and Kiri Beilby,[3] the lack of awareness about surrogacy in the broader community had a negative impact on the experiences of intended parents (including after the child is born). Further, as the Commission is no doubt aware, Kneebone and colleagues also suggested that broader community awareness may increase the number of women coming forward as surrogates.

However, further detail is needed about how the National Regulator (or the SSOs, as we suggest) will 'publish and promote information to address common misunderstandings in the community about surrogacy'. For example, in Western Australia the Reproductive Technology Council currently has a public education function, but apart from providing information through its website, it does not undertake other educational activities (eg, it does not run information sessions or educational community events). The problem with only making information available through a regulator's website is that the wider community does not typically come across it.

Proposal 13

We support expanding access to surrogacy beyond 'medical reasons'. We encourage the Commission to consider centring the principle of self-determination by removing the need for intended parents to provide a 'reason' or demonstrate a 'need' to access surrogacy. This was the approach taken in the recent *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ('ARTS Act') in acknowledgement of the need to remove unnecessary barriers to access. Surrogacy will rarely, if ever, be the option of first resort for people who wish to become parents. There is, therefore, no need to make access to surrogacy contingent on medical or social need – as stated in the Explanatory Memorandum of the ARTS Act, 'surrogacy should be available to all persons who seek to access it'.[4]

Proposal 18

Question D

Both the surrogate and intended parents should be required to undergo a psychological assessment. If issues are identified during the psychological assessment which mean a surrogacy arrangement will not be approved, a person should be told of this, consistent with the guiding design principle of transparency and accessibility. However, there must be safeguards around the identification/disclosure of family and domestic violence (relevant more so to intended parents). For example, evidence of coercive control may arise in the assessment – if a surrogacy arrangement is to be rejected on that basis, it may not be 'safe' for the perpetrator to learn of this.

[3] Ezra Kneebone, Karin Hammarberg and Kiri Beilby, 'Surrogates', Intended Parents', And Professionals' Perspectives On Ways To Improve Access To Surrogacy In Australia' (2024) 38(1) *International Journal of Law, Policy and the Family* 1.
[4] Explanatory Memorandum, Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) 7.

It should be made clear in legislation what is being assessed (ie, it is not the person's ability to parent but their capacity to participate safely in a surrogacy arrangement). However, we note that this can be hard to separate from whether a person has behaved in a way that indicates the arrangement would not be in the best interests of any child born through the arrangement, which is one of the concerns listed by the Commission at [127].

Proposal 19

Question E

The criminal history check should be limited to specific offences as suggested in the Discussion Paper (ie, offences involving children and violent offences). The requirement should be framed as it is in South Australia – that the parties to a surrogacy arrangement be required to exchange criminal history checks, with this issue directed to the issue of informed consent. Prior to a surrogacy arrangement beginning, the surrogate should be required to confirm that they have sighted the intended parents' criminal history check and are happy to proceed with the arrangement. The surrogate should have the opportunity to discuss this check with their psychologist and lawyer. We are of the view that this strikes an appropriate balance between safeguarding the best interests of the child born of a surrogacy arrangement and not indirectly discriminating against intended parents.[5]

Proposal 21

Questions F & G

The surrogate's partner (if any) should not be required to undergo implications counselling. While we acknowledge that requiring a surrogate's partner to undergo implications counselling may ensure that they are supportive of the arrangement, we are of the view that the associated cost and burdens on intended parents outweigh the potential benefit and are disproportionate to the risk.

First, it is unlikely that a person would agree to being a surrogate if their partner was not supportive, so the risk that is being militated against in requiring implications counselling is low.

[5] This issue has been discussed at length in the context of ART. For example, prior to its repeal, the presumption against treatment in s 14 of the Victorian *Assisted Reproductive Treatment Act* required individuals to undergo a criminal record check. If this revealed that the woman or her partner (where relevant) had been convicted of a sexual or violent offence, or a child protection order had been made and a child had been removed from the care of the woman or her partner, a barrier to treatment arose. The presumption was said to be incompatible with the right to equality in s 8(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on the basis that it indirectly discriminated against intended parents based on sexual orientation or marital status, given the presumption affected a couple who could only conceive through ART more than a heterosexual couple. See, e.g. Michelle de Souza, 'Should people with criminal records be able to access assisted reproductive technology? The law in Victoria, Australia' (21 September 2020, Issue #1064) *BioNews* <https://www.progress.org.uk/should-people-with-criminal-records-be-able-to-access-assisted-reproductive-technology-the-law-in-victoria-australia/>.

Second, the surrogate's partner would also need to be a party to the agreement. In this regard, we are mindful of the petition cited to at footnote 225 of the Discussion Paper where 64 surrogates and their partners signed a petition to 'remove partners from the picture altogether'.

Thirdly, a requirement of this sort might also lead to intended parents preferring surrogates who do not have partners if they are required to pay for implications counselling (given they would be paying for one person rather than two if the surrogate did not have a partner). This risks indirectly reducing the pool of accessible and affordable surrogacy arrangements in the context of an existing lack of supply.

Finally, while there is research suggesting that existing children of surrogates experience negative emotions associated with the surrogacy arrangement, there is no similar research with respect to partners of surrogates.[6] In the absence of such research, implications counselling for a surrogate's partner should be encouraged and promoted but not mandated.

Further, post-birth counselling for a surrogate should be optional not mandatory to again avoid unnecessary costs to intended parents and an overly paternalistic approach to surrogacy more generally. More research is needed into whether post-birth counselling is necessary and the period it is generally required before requiring intended parents to cover the cost for a set duration.

Proposal 22

In our view, guidance should be provided as to the order in which to undertake each of the legal advice, implications counselling, medical assessment, psychological assessment and criminal history requirements. This guidance can be provided in the form of an infographic by either the National Regulator or SSOs. Common sense would dictate that medical and psychological assessments, and the criminal history check should happen first (with the criminal history check informing the psychological assessment, if required). It should also be made clear to parties contemplating entering a surrogacy arrangement that they can seek advice/support from an SSO if something comes up at any of those junctures.

Proposal 26

Question M

Before an additional support payment is introduced, the operation of Proposal 26, and more specifically the impact of the monthly payment that recognises the ordinary pain and discomfort of pregnancy, should be evaluated. This is already an important shift away from the current system and it may be that an additional payment that recognises a surrogate's time, effort, inconvenience and unique contribution is not needed to improve access to surrogacy.

[6] Mary P Riddle, 'The Psychological Impact Of Surrogacy On The Families Of Gestational Surrogates: Implications For Clinical Practice' (2022) 43(2) *Journal of Psychosomatic Obstetrics & Gynecology* 122.

Proposal 30

Question N

In our view, a surrogate should have a right to seek a parentage declaration in accordance with Proposal 30(1)(b). This recognises that there may be instances where intended parents do not ultimately act as the child's functional parent. In those circumstances, there needs to be a safeguard that does not unduly burden the autonomy of the intended parents.

Proposal 32

Question P

There should be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement and are recognised in the birth country as the legal parents of the child. Parentage in those circumstances could be approved by the National Regulator and then appeals from any refusals dealt with by the suggested specialist list of the Federal Circuit and Family Court of Australia.

Proposal 37

Question S

The entity responsible for the registration process should be either the National Regulator or an SSO (whichever body ends up being responsible for approving surrogacy arrangements more broadly). It seems unnecessary to involve further government departments or third-party entities – such involvement risks creating the problem many have complained of in the context of ART: that there are too many different organisations involved, creating a patchwork of regulation.

Further, in our view, the registration process will work only if there is a simplified pathway to legal parentage, as suggested in our response to Question P.

Intended parents should be required to give reasons for why they want to engage in an overseas surrogacy arrangement, rather than necessarily needing to show they have made 'reasonable efforts' to engage in domestic surrogacy. This better reflects the fact that there may be a range of reasons why intended parent(s) might prefer to enter into an overseas surrogacy arrangement (including, for example, that their support network is overseas).