Response to ALRC Review of Surrogacy Laws – Discussion Paper

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I am happy for this submission to be public.

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Overview

Surrogacy is not going to go away and attempts to prohibit it (or even to prevent people crossing borders to access it) will not succeed: bans are far more likely to push parties towards 'underground' arrangements which inevitably will increase the risk of exploitation for all parties, contrary to their best interests and the interests of any children born. It is true that there are bad actors in the surrogacy world, and there are reports of bad and exploitative practice. But surrogacy performed as it should be, with informed consent from all parties and in the absence of exploitation, ought to be supported as a means of family building for people who cannot otherwise do so, for whatever reason.

Therefore, improving domestic law on surrogacy has many effects, particularly in conjunction with public and professional education about what the law is seeking to achieve. It will allow parties to enter surrogacy agreements that are lawful and the practices outlined by law as good practice should be understood as the optimal model to be followed. This legitimises a particular form of surrogacy, while removing stigma and encouraging openness (including long-term openness about origins). Hopefully, in removing barriers to domestic surrogacy, including cost barriers for both the medical procedures involved and the processes to be followed to achieve legal parenthood, more people will be encouraged to choose domestic, regulated surrogacy over other options, including international surrogacy and building in protections to the law for the surrogate (including the ability for her *not* to be recognised as the legal parent where this is her wish/intention) may result in more people coming forward to be surrogates. Having a well-regulated domestic system also means that 'other' surrogacy can be treated differently, highlighting that this is not good or less good practice, while not ignoring it entirely. What is said in law sends a message about legitimacy or otherwise.

Proposal 1

Overall I agree with the proposals in the discussion paper and the principles on which they rest. Surrogacy should be regulated nationally (or at least consistently) across Australia, to minimise confusion and risk.

Proposal 2

I believe that the proposals to create a National Regulator and Surrogacy Support Organisations is sensible. It recognises that surrogacy is not something that will go

away (even by prohibition) and is a legitimate form of family creation in the modern Australian context, that should be supported by the state. Organisations with knowledge and experience which can support people through what can be a long and difficult process, often in the face of prior adversity and suffering, are essential. These, and oversight from a national regulator, give legitimacy to a particular version of surrogacy. Regulated surrogacy, as is proposed, would result in a reduction of the (potential) harms currently associated with surrogacy. It should provide an incentive to prospective parents to undertake surrogacy in an ethical, state approved fashion, and a disincentive to travel overseas. This is particularly the case when this proposal is read in conjunction with the proposal that intended parents could achieve legal parenthood from birth (and not therefore have to go through a costly and stressful post-birth process) and the proposal that Medicare funding would be available for surrogacy-related fertility treatments.

I am pleased to see that this proposal includes not only regulatory and practical oversight of surrogacy, but also an obligation to raise public awareness and to develop guidelines and/or training for those entering and supporting arrangements, including healthcare providers. It is important that healthcare provision is also consistent.

Proposal 3
In conjunction with proposal 2, the idea of Surrogacy Support Organisations is welcome. Those seeking surrogacy (and those considering being surrogates) should have access to appropriate and accurate support. As with proposal 2, this helps to recognise the legitimacy of surrogacy more generally, incentivising prospective participants to do so in a safe, regulated and supported way. I like the title of them being 'support' organisations for this reason too.

If they are to work, I would anticipate that they should be able to advertise their services (so agree with **Proposal 11**), but also strongly believe that SSOs should be nonprofit (or even charitable) organisations, and this should be literally factual advertising so there can be no coercive or predatory advertising (could be a term of the licence). If there is consideration of SSOs being other than nonprofit then a capped fee is a more desirable option than them being for-profit – for-profit SSOs would seem to run contrary to the idea to incentivise by cutting costs of staying in Australia, such as with the Medicare proposal and also commercialises the practice. Obviously SSOs should be able to charge fees to cover their reasonable running costs and there may be different service models and therefore different 'price structures' for this (as in the UK, where costs depend on the level of involvement and services offered by different organisations), which allows for choice for intended parents and surrogates alike about who they want to work with.

As regards Question B, the only potential overlap I see is at bullet point 3 of the proposal. Given that in proposal 2 there is a mandate for the regulator to develop guidelines for professionals and training materials (including to counsellors), it would seem that this could be addressed in such guidelines and/or a code of practice maintained and updated by the regulator.

Proposals 4, 5 and 6
Agree in general terms – though does it allow for 'at home' inseminations? Pre-approval of arrangements is better for all concerned than post-birth assessment after the fact and should help to minimise risk – though already low – of things going wrong between the parties.

If in proposal 3.1 and 3.3 SSOs are part of facilitating or 'matching' and/or providing/coordinating counselling and other services then shouldn't they be involved in a more hands-on way or at an earlier stage than is envisaged by proposal 5.1 (a and b)?

I think (relates to Question C) that 'low-level' approval (where agreements are compliant – but the SSOs could help them reach compliance as suggested above) is appropriate for SSOs with the Regulator being a backstop for more complicated or appealed decisions. There would need to be clear definitions re proposal 5.4(c) as to what 'complex' means in this context.

Proposal 7
Agree strongly – such public awareness raising and educational guidance is very important, including in healthcare settings where practices and responses to surrogacy can be mixed. Misperceptions and 'surrogacy myths' abound and should be addressed.

Perhaps consideration could be given to allow the regulator to impose sanctions on those who deliberately or recklessly spread mis/disinformation about surrogacy.

Proposal 8 (with 25 and 26)
I agree that criminal sanctions or the possibility of them should be removed from the parties to a surrogacy arrangement, because this is counterproductive and stigmatising (increasing risk of people seeking surrogacy overseas or pushing surrogacy underground) – and does not align with the proposals elsewhere in this discussion paper.

However, there may be room at a high level for criminal sanctions to apply to some other actors e.g. if predatory or exploitative practices are exposed, or serial breaches. It is unlikely that this would happen in the context of a regulated system and SSOs, but possible for breach of the letter and spirit of the law to be so egregious that it should be punished more than by civil penalty (though the kinds of things I am envisioning are likely already criminal so there may be criminal law provisions elsewhere *as well* as civil penalties).

Threshold requirements (Proposals 12-)
Agree with most as they strike a good balance between respecting autonomy and choice, and protection. Presumably these are to operate within the regulated surrogacy context? What would be the implication for a surrogacy arrangement that fell outside of this context where one of the thresholds was not met (e.g. the surrogate was 24)?

Exception is **Proposal 18** – as asked in Question D – I don't know that intended parents should have a mandatory psychological assessment if they are already/also having

implications counselling (they could be offered it and submit a report as part of their application if they do take up the offer). The reason for asking the surrogate to do this is to prevent harm to *herself*. Mandating intended parents do this would seem to single them out against all other people seeking parenthood by other means (other than adoption, where this may be justified as it seeks to prevent harm to an already existing child) and contribute to stigma attached to surrogacy. People seeking e.g. gamete donation or IVF treatment do not have to submit to psychological assessments, nor those who can conceive naturally.

Proposal 19 – there should be a criminal history check in relation to relevant offences (e.g. offences against children). However, I think this should be recommended as good practice and volunteered rather than mandatory. While this opinion may seem contradictory to my response re proposal 18 (and I think so myself), what we are asking here is that these intended parents access a *state supported and sanctioned* surrogacy arrangement. With possible state payment for IVF too, I think requiring criminal checks would allay public concerns. Results should only relate to the surrogate's informed consent. The surrogate could infer what she likes from any refusal to undergo a check.

Question F – no – not unless there is a chance they could be the legal parent (which there shouldn't be).

Question G – I think a follow-up post-birth counselling session could be helpful for all parties but the option for this should be explained as being good practice and form part of the initial agreement, rather than it being made mandatory. And/or an option to do this if wanted later could be maintained. All counselling should be paid for by the intended parents.

Comments on proposals 18 and 19 also impact **Proposal 22.**

Proposal 23
Agree. This should also form part of implications counselling and legal advice.

Proposal 24
As a former contract lawyer I find the language of 'enforceable' surrogacy agreements problematic. People understand different things by enforceability – for example is it about enforceability of the financial aspects of the agreement re who pays what to whom and when (or repays, if there has been overpayment), or is it about the actual handing over of a child? I don't understand proposal 23 to include the (final) decision to hand over the child or not at birth, for example. If the former, then how is enforcement different from the proposals about reimbursing expenses?

Proposal 25
I am glad the list is wide ranging and also seems to be designed to be flexible (with words like 'including'). However I would also include recuperation/family restoration costs at the end of the surrogacy, as the UK Law Commissions recommended, e.g. for the cost of a modest recuperative break for the surrogate (and her own family if wished).

Proposal 26
Are there any comparable guidelines that guide judicial decision-making in e.g. personal injury claims? For example, in the UK, damages for certain negligently incurred injuries are assessed within a range set and published by the Judicial College.

Question M – though I understand the arguments for this my instinct is to say no. The surrogate should never be out of pocket and I am glad to see a very broad range of acceptable expenses that can be reimbursed (proposal 25, subject to comment above). If this was included I would be inclined to a) make it optional and b) cap it.

Proposal 27
Agree with the trust idea but is there a possibility of paying into that in agreed instalments where the intended parents cannot raise the full amount in one go in advance (but can e.g. prove they are employed/have a regular income).

Proposals 28 and 29
These are welcome as they both help to reduce the cost associated with surrogacy arrangements and give further strength to the idea that surrogacy is supported as a means of family creation by the state (and thus legitimacy and an incentive to follow the regulated/SSO route).

Proposal 30-32 and Question N
Agree with the proposal (again a strong incentive to follow the regulated/SSO route) especially as it reflects all parties' intentions *and* the best interests of the child as it allows those taking care of her to make e.g. medical decisions (and has various inheritance/succession implications).

Including 30(1)(b) will go some way to alleviating the fears of those who contend that the surrogate loses all rights to dispute parentage from the moment she enters the agreement. In practice I think such declarations will be rarely sought within the model proposed. If they are, then unless the parents in whose care the child is with demonstrably cannot attend to the best interests of the child then an application is unlikely to be successful.

Question P
If there are to be registered overseas surrogacy agreements (proposal 37) then this would seem to follow. But it would also seem to follow that registered overseas surrogacy agreements could only pertain to jurisdictions where a certain level of pre-birth (or preferably pre-conception) scrutiny of agreements is required.

Proposals 33-36
Whichever choice is selected should mirror what happens for donor-conceived people. It would not be right to have different records and birth certificate addendum rules for one from the other. Consideration must be given to linking the information e.g. when the surrogacy also involves egg donation (or traditional surrogacy). A national surrogacy register (option 35.1) would be preferred (or a combined national surrogacy and donor conception register). Option 36.1 is also preferred re penalties.

If one concern is about 'maximising the chances that the person becomes aware that they were born through surrogacy' (para 211) then there should be parallel recommendations that the benefits of telling children, and telling early, are highlighted in educational materials provided by the regulator and SSOs, and in implications counselling. There is much research on this in not only the surrogacy context but in other forms of family building, including gamete donation.

Proposal s37 and 38

This is difficult as – as is acknowledged – the situation in overseas jurisdictions can change overnight (e.g. Russian invasion of Ukraine, earthquake in Nepal) and also it is hard to determine in surrogacy destinations that seem (generally) OK what is actually going on behind the scenes, as evidenced by the story breaking this week about Chinese intended parents having dozens or even hundreds of children by surrogacy in California (https://www.wsj.com/us-news/chinese-billionaires-surrogacy-pregnancy-7fdfc0c3?reflink=desktopwebshare_permalink). Maybe the recommendation could be even more granular and not about destinations/jurisdictions but specific surrogacy agencies – so each is 'vetted' and effectively 'licensed' by the state in the same/a similar way as the proposed SSOs. Maybe they would have to apply to the Regulator, and be inspected?

Anywhere where anonymous gamete donation is allowed (or anonymous surrogates!) or where there can be clauses in agreements allowing procedures contrary to the surrogate's bodily autonomy (such as multiple embryo transfer when not agreed, enforced behaviour or treatments during pregnancy or birth) should not be considered 'permitted'.