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8 July 2025

The Hon. Justice Mark Moshinsky

Australian Law Reform Commission

Dear Commissioner

Submission for the ALRC surrogacy review

This is my submission to the surrogacy review.

I have provided expert feedback based on the experience I have had in working over the last 15 years with consumers, professionals and surrogacy frameworks in the UK, Australia, New Zealand, Ireland, Africa, India, Thailand, North, South and Central America.

It is made on the basis that my identity is disclosed and the contents published.

Insights from people with personal experience of surrogacy

Question 1

My husband & I first engaged in surrogacy in India in 2009 as intended parents. We chose India based on its apparent affordability and the fact that we met other gay couples in Melbourne who had also successfully engaged in surrogacy there.

The positive aspects included the ready availability of surrogates and the speed of embryo creation and surrogate screening.

The negative aspects were the lack of ID-release donors, the anonymous nature of donors, the practice of transferring up to three embryos per transfer without consultation and the lack of transparency. When we did finally achieve a twin pregnancy on the fourth transfer, our twin boys were born at 26 weeks. Zac was stillborn and Ben went to Intensive Care in New Delhi and passed away after six weeks.

After bringing the ashes of our cremated sons' home, there were no healthcare professionals equipped to provide support with the grief and depression I experienced.

My partner and I went on to have two girls via two different surrogates, but again double embryo transfers were performed against our wishes. Without informing us, the clinic used two different egg donors to create embryos from my sperm and transferred Donor A's embryos to one surrogate and Donor B's embryos to the other surrogate. Only years later did we discover this.

Credentials

To deal with the grief around losing twin boys, I founded the NGO Surrogacy Australia in 2010 and went on to use my research, medical and Masters of Public Health training, to conduct primary research with Australian intended parents and surrogates, to run educational conferences and provide support to others facing surrogacy as a path to parenthood. I have worked professionally in the surrogacy and donor space in Australia and internationally for the last 14 years.

I have a Bachelor of Science (Psychology) degree, a Master of Arts and a Masters in Public Health. I have worked with over 2,800 singles and couples from around the globe engaging in surrogacy over the last 13 years. I have run over 100 conferences, webinars and seminars relating to surrogacy processes, risks, managing crises and best practice.

Within this context, have interviewed 485 professionals working in the surrogacy space in 24 countries; over these years I have hosted interactive panels involving 494 parents via surrogacy, 37 teenagers and young adults born via surrogacy and 138 surrogates from 13 different countries.

Over the last 15 years, I have made submissions to 16 prior Commonwealth & state enquiries on surrogacy law reform as well as legislative reviews in Ireland and the UK. I run an International Advisory Board which monitors surrogacy laws, industry changes, pressures and patient flows internationally. This board designed best practice standards for surrogacy agencies to adhere to. I have referred to some of these standards in the submission following.

Reform principles

Question 2 What reform principles should guide this Inquiry?

I agree with the reform principles contained within the ALRC's Issues Paper

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?

I agree with the key human rights issues contained within the ALRC's Issues Paper in relation to Children and Surrogates.

In relation to children, the right to legal recognition of parentage, enshrined in *Article 7.1 of the UN Convention on the Rights of the Child (CRC) — the right of the child "to know and be cared for by his or her parents"* is currently absent.

In relation to intended parents, the right to freedom from discrimination, the right to privacy and the right to receive and impart information are important.

However, intended parents should not automatically have the right to found a family via surrogacy, given there are age considerations and psychological challenges that come with this means of family formation. Engagement in surrogacy without harming others also requires intended parents to have dealt with grief around their own infertility, to demonstrate financial readiness and be prepared to engage in a meaningful relationship with their surrogate.

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?

At a minimum, children should have access to images and family history of their surrogate and egg donor. Intended parents should be educated as to the importance of providing this level of disclosure for healthy psychological outcomes. Such details should be provided as early as possible in the child's life to enhance transparency. Where possible, children should be given contact details for their surrogate and donor by their parents by the age of sixteen years, if not already in contact.

Barriers to domestic surrogacy

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

There are a number of key barriers preventing Australians from engaging domestically[1]

- Difficulties in finding an altruistic surrogate [2].
- High rates of 'drop-out' of surrogates who make an initial offer
- The unenforceability of surrogacy arrangements
- The lack of professional screening and support for surrogates and intended parents
- The prohibition of modest compensation to a surrogate
- by assigning the surrogate as the legal parent, often for over six months after birth, this places the surrogate in a situation of having responsibility for medical and legal decision-making as well as Medicare and Centrelink paperwork in regard to an infant
- legislation which prohibits some groups (e.g. single males and same sex couples in WA) from engaging in surrogacy
- state legislation restricting in which location IVF can be carried out and how parentage can be recognised

How could these be overcome?

1. Uphold the rights of children to their identity, by a simpler and more certain process of parentage establishment. This would ideally be by revising the Australian Family Law Act so that a child born through surrogacy can efficiently have their Australian Intended Parents recognised as their legal parents. This could be an administrative process with the Registrar of Births, Deaths and Marriages for eligible surrogacy cases. It would be used when there is not a dispute as to parentage, and an order is not required.
2. End discrimination in who can access surrogacy, currently in Western Australia and Tasmania, and who is eligible for reimbursement of surrogacy-related IVF costs through Medicare.
3. Recognise that if intended parents move interstate during the journey, they can still establish parentage, either where they lived or where they now live.
4. Require either: a binding agreement; or if the surrogate or partner manifests an intention not to relinquish the child, enable the Court to make orders as to parentage that overrides the consent of the surrogate and partner, if to do so is in the child's best interests.
5. Allow surrogacy agencies, as Canada does, to ensure the availability of professional recruitment, screening, education, reimbursement and support of surrogates, and support and education of intended parents.

[1] Kneebone E. et al, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and overseas' (2023) 26 (6) *Human Fertility* 1448–1458.

[2] Everingham S, Stafford-Bell M and Hammarberg K., 'Australians' Use of Surrogacy' (2014) 201 (5) *Medical Journal of Australia* 270–273;

6. Allow compensation of surrogates for their time and effort. This should be a minimum amount paid monthly from when pregnancy attempts commence. Regulations should limit the amount able to be paid.

Eligibility requirements for surrogacy

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

No intended parent or surrogate should be allowed to engage in surrogacy unless they are over the age of 25 years and deemed psychologically suitable, given the emotional and psychological complexities inherent in these arrangements.

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

Eligibility requirements which restrict single males and gay couples from engaging in surrogacy who are WA residents should be removed as this requirement forces this group offshore and is contrary to the Commonwealth anti-discrimination legislation.

Surrogacy arrangements should be allowed where surrogates and intended parents are resident in different jurisdictions. Tasmania for example, still requires all parties to reside in Tasmania, thereby severely limiting the available surrogates[3].

Surrogacy agreements — validity and enforceability

Question 8 Are there any requirements for a valid surrogacy agreement you think should be introduced, removed, or changed?

In all states and territories, to be valid, surrogacy agreements should be in written form and have been entered into before conception.

Question 9 Should surrogacy agreements be enforceable?

Australian Surrogacy agreements need to be enforceable, so that:

- In the best interests of the child, parentage is certain, even if the child is disabled or is not of the gender sought by the intended parents.
- There is not an opportunity for surrogates or their partners to seek to extort the intended parents
- The surrogate has certainty that she will be paid her expenses, and compensation for physical & emotional demands

However, aspects that should not be enforceable are:

- Any restriction on the surrogate's health and bodily autonomy, including the pregnancy, birth and termination of pregnancy.
- Any requirement compelling the surrogate to attempt to become pregnant.

[3] *Surrogacy Act 2012* (Tas), s.16(2)(g)

An organisation managing agreed surrogate expenses and/or compensation should be tasked with monitoring timely payment.

Proceeding to first embryo transfer could be dependent on the intended parents having funded an account to cover the first four months of expenses. Transfer of parentage to the intended parents could be conditional on the timely payment of pre-agreed expenses (see Q19, p13).

Process requirements for surrogacy

Question 10 What process requirements should be in place for surrogacy arrangements?

Pre-approval of 'surrogacy teams' by an external regulatory body is not appropriate given the Patient Review Panel system in Victoria has been proven to be a particularly invasive and off-putting experience for teams exposed to such oversight.

In Western Australia, the Allen Review similarly recommended the abolition of the Reproductive Technology Council. Professor Allen's report justified this with the finding that: *"The experience of those being regulated did not reflect the stated intentions of the regulator*[4]*."*

Such bureaucratic gate-keeping can discourage intended parents from moving forward with domestic arrangements.

However, all participants should be required to undergo a psychological assessment, given the emotional and psychological maturity required to navigate these arrangements responsibly.

Whether the arrangement is domestic or international, at least two hours of pre-arrangement counselling should be undertaken by both Intended parent and surrogate before proceeding to embryo transfer. These should comprise individual sessions for intended parents and surrogate and her partner and a joint session for the entire team.

Psychological assessment reports should be prepared by a counsellor experienced in surrogacy arrangements. Where gestational surrogacy is used, such a counsellor must be independent of the IVF clinic profiting from the process. Such an approach reduces conflict of interest.

A separate psychological assessment report should be written for the surrogate (and where relevant her partner) and the intended parent(s). Along with relevant detail, these reports should clearly indicate each party's suitability for working together, with a clear three tier rating system: suitable; suitable with additional support; unsuitable.

Australian fertility counsellors working in surrogacy should adopt the ASRM guidelines in regard to surrogate acceptance or rejection[5]. Namely, criteria for rejection of a surrogate should include

- Inadequate cognitive functioning to support informed consent;

[4] https://www.health.wa.gov.au/~/media/Files/Corporate/Reports-and-publications/HRT/Review-of-HRT-and-Surrogacy-Act-Part-1.pdf at p.58.

[5] https://www.asrm.org/globalassets/_asrm/practice-guidance/practice-guidelines/pdf/recommendations-for-practices-using-gestational-carriers.pdf

- Evidence of financial or emotional coercion;
- Abnormal psychologic evaluation or testing results as determined by a qualified mental health professional;
- Unresolved or untreated alcohol and/or drug abuse or addiction, child abuse, sexual abuse, physical abuse, depression, anxiety, eating disorders, or traumatic pregnancy, labor and/or delivery;
- Current use of psychoactive medication;
- History of major depression, postpartum mood disorder, bipolar disorder, psychosis, or a clinically significant anxiety disorder with impaired functioning;
- Interpersonal or environmental instability, for example:
- Current marital or relationship instability;
- Insufficient emotional support from partner/ spouse or support system;
- Chaotic lifestyle, current major life stressor(s).
- Inability to maintain respectful and caring relationship with others;
- Evidence of an inability to emotionally separate from the child at birth;
- Failure to exhibit altruistic commitment to become a surrogate;
- Excessively stressful family demands;
- History of conflict with authority;
- Inability to perceive and understand the perspective of others;
- Motivation to use compensation to solve own infertility;
- Unresolved issues with a negative reproductive event

As per (adapted) ASRM guidelines[6], criteria for rejection of an intended parent should include

- Inability to maintain respectful and caring relationship with surrogate
- Current or previous perpetrators of sexual or physical abuse or involvement of local child welfare services and termination of parental rights;
- Gross marital or relationship instability
- inability to agree with surrogate's decision on number of embryos transferred, selective reduction, or pregnancy termination;
- Ongoing legal disputes;
- History of noncompliance or ongoing problematic interactions with medical staff;

[6] ibid

Special consideration should be given to matches where a pre-existing relationship exists, that participating as a surrogate is voluntary, without evidence of coercion, and will do no harm to the current relationship.

From a medical viewpoint, surrogates should not be approved to work with intended parents where they have conditions such as obesity given this exposes them to a higher risk of severe maternal morbidity during and after pregnancy[7].

Australian IVF clinics must have a surrogacy or ethics committee which will only authorise surrogacy-related embryo transfers where

- Both Intended parents and surrogate have been rated as suitable or suitable with additional support by an accredited independent counsellor.
- Medical clearance requirements are met

In the domestic setting, professional counselling should be made available to the surrogate during pregnancy and pregnancy attempts at no cost to the surrogate. Post-birth at least one professional counselling session for the surrogate should be encouraged as a harm minimisation tool, to screen for common issues such as post-natal depression and facilitate support where necessary.

Professional services, including legal and counselling services

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

Published research with 319 Australian parents and intended parents investing in surrogacy has shown that 46 percent of the 203 selecting an international arrangement did so partly because they wanted ' a professional surrogacy provider to screen potential surrogates and facilitate my arrangement'[8].

Surrogacy journeys require significant emotional maturity, patience, flexibility and fortitude. The current reality is that for most domestic intended parents and surrogates need to manage these processes independently. For international surrogacy, while surrogates are supported by an agency, intended parents are again left to manage on their own unless they invest in support services provided by Growing Families.

The key gaps in professional service provision in Australian domestic surrogacy arrangements include

- Psychological counselling support through the process
- Professional surrogate recruitment, screening and matching
- Surrogacy expenses management

[7] Velez M, Ivanova M, Shellenberger J, Pudwell J & Ray G, Severe Maternal and Neonatal Morbidity Among Gestational Carriers Annals Int Med . 177 (11) Nov 2024

[8] Kneebone E. et al, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and overseas' (2023) 26 (6) *Human Fertility* 1448–1458.

Agencies in countries such as the US, Canada, Georgia, Ukraine, Colombia and Mexico provide the above support services to reduce the risk of harm.

Question 12 How should professional services operate in Australia?

Surrogacy agencies should be available in Australia to ensure the availability of professional recruitment, screening, education, reimbursement and support of surrogates, and the support and education of intended parents. The lack of such support is a disincentive to engaging in Australia.

Professional support can assist with harm minimisation, expectation setting, expenses management, logistical issues and problem-solving for surrogates, their partners and intended parents.

There is precedence for this in comparable countries. For example since 2009 in the UK, non-profit organizations may charge reasonable sums to cover costs they incur in supporting surrogates and intended parents with surrogacy arrangements[9].

In my opinion, like the UK, Canada and the US, such agencies must be independent from IVF clinics. Their staff should include those with past professional or lived experience of surrogacy. E.g. ANZICA-accredited counsellors, past domestic surrogates, past parents who engaged in surrogacy.

Professional agencies should have a mixed funding model – partly user pays (50%) and partly government funded. The justification for this is to reduce the overall costs to Australians, and so discourage reliance on cheaper, yet less ethical international surrogacy programs.

Surrogacy-related counselling services should be independent from IVF clinics because

- there is a conflict of interest is having counsellors who approve and support surrogacy arrangements being paid by the IVF clinic.
- IVF clinics are profit-focussed entities so there is a risk they may divert counselling resources to the more common patient groups such as donor-IVF, neglecting the high needs surrogacy client group

Some surrogacy teams require significantly more professional support than others owing to factors such as distance, communication styles, access to services and prior experience. Hence professional surrogacy support needs to be attuned to these differences, be able to identify higher-risk arrangements and put in place management plans to ameliorate and reduce conflict, misunderstanding and tension. Telehealth-based services will be an essential tool in servicing this population, given Australian surrogates and their recipients are most commonly living in different locations.

In relation to whether such organisations should be non-profit or for-profit, the outcomes of the *volunteer-staffed* non-profit models within the UK are useful. Evidence from the UK in regard to failures of oversight where NGOs, relying largely on volunteers, managed surrogacy arrangements are alarming.

[9] Surrogacy Arrangements Act 1985, s.2(2A)

For example, a UK NGO, Childlessness Overcome Through Surrogacy (COTS) was found by the UK courts to have facilitated UK surrogacy for foreign intending parents in 21 cases who returned to their home country with the child[10]. Possibly as a result of this, another key UK surrogacy NGO, Surrogacy UK, also with a largely volunteer staff, will not manage domestic surrogacy arrangements.

Australian Professor Jenni Millbank in her evidence to the SALRI enquiry also explained the disadvantages of a model that relies primarily upon non-profit organisations with significant volunteer staffing[11]:

> *"While these groups also have the benefit of centralised experience, I suggest that their lack of professionalisation is a disadvantage. Such groups are often established by people who have experience as intended parents or surrogates, with a deep commitment to the issues but without the funds or remit to provide screening, matching, or comprehensive support services. ….. There is, as yet, no viable model of a non-profit organisation to undertake these services on a professional basis"*

In the Canadian altruistic setting, agencies can operate as for-profit entities however there is no regulatory oversight of agencies. Some Canadian agencies have been implicated in reported and unreported scandals concerning non-payment of surrogate expenses or over-charging. For example, in 2019, CBC News conducted a three-month investigation into Canada's surrogacy industry. The report uncovered a lack of oversight and mandatory transparency among surrogacy agencies[12]. Five families raised concerns about funds paid to surrogates through agency-managed trust accounts

On balance, international experience indicates that whether the tax structure is for—profit or non-for-profit, it is vital that any agencies are staffed by paid professionals and be subject to auditing and regulation.

Limits on advertising

Question 13 How should surrogacy advertising be regulated?

There has been a long history (over 14 years) of potential Australian surrogates connecting with possible intended parents as strangers in online forums. For many intended parents, this is currently the only means of connecting with potential surrogates in the absence of professional agency matching support, family members or friends who offer to carry.

However my experience has shown that in the majority of cases, 'online' independent matching results in surrogacy teams that do not progress, or are psychologically and/or

[10] https://www.theguardian.com/society/2007/dec/05/children

[11] Plater D, Thompson M, Moulds S, Williams J and Brunacci A. Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA) (South Australian Law Reform Institute, Adelaide, 2018)

[12] https://www.cbc.ca/news/health/surrogacy-agencies-expenses-costs-oversight-canada-1.5476965

demographically unsuitable, leading to major problems in communications, expectation setting and solidifying lasting relationships.

In the interests of harm minimisation, surrogates should not be allowed to pay to advertise their services independently, given it is vital that potential surrogates are psychologically and medically screened before they are introduced to intended parents.

Having said that, regardless of laws, neither intended parents nor surrogates can be prevented from advertising and connecting in online forums. Indeed a strong theme to emerge in SALRI's consultation with intended parents and surrogates is that the law should not interfere with the ability of parties to get in touch, crucially by online means[13].

However, education should be made available to raise awareness of the risks of such an approach.

Intended parents should also be discouraged from advertising in public forums that they are seeking a surrogate, given experience has shown that 'desperation' often clouds clear judgement about the suitability of a match. Paid independent advertising by intended parents should not be available, given the potential for exploitation of their need.

In regard breaches of 'paid advertising', this is a difficult area to police. Should an authority be tasked with this, they could contact parties demanding the advertising be removed. This is the model the e-Safety Commission follows. Failing to comply with a take-down notice should not result in criminal charges but could result in fines.

Instead, to better protect the interests of all parties and reduce the reliance on a 'dating app' process where only the most 'engaging' intended parent find a match, professional surrogacy agencies should be allowed to advertise their services to both potential surrogates and intended parents. They should be subject to regulations about the nature of the advertising.

If to parties do match independently, rather than via professional support, then their suitability should be the subject of extra scrutiny by the counsellor and clinic prior to proceeding to treatment.

The establishment of a surrogacy register has been legislated in the past in South Australia. A 'register' suggests that healthcare professionals might be able to contact surrogates on such a database. Such a concept illustrates a lack of understanding of the need for professional matching services. In the South Australian context, such a register proved both impractical and unpopular with surrogates, who do not believe the government should have a role in the process.

Access to Medicare and parental leave

Question 14 What entitlements, if any, should be available to surrogates and intended parents?

Currently the average Australian requiring ART will pay $6,500 in out-of-pocket costs for the IVF procedures involved in one cycle of egg & sperm retrieval, embryo creation, freezing and

[13] Plater D, Thompson M, Moulds S, Williams J and Brunacci A. Surrogacy: A Legislative Framework: A Review of Part 2B of the Family Relationships Act 1975 (SA) (South Australian Law Reform Institute, Adelaide, 2018)

transfer[14]. In comparison, those who need to rely on a surrogate, will pay ~$13,000 for the same ART treatment[15]

When Medicare started funding assisted reproductive services, surrogacy was excluded, as surrogacy was illegal in several States. Surrogacy has long been regulated, but the MBS exclusion remains[16].

Average total costs for surrogacy within Australia (including IVF, legals, counselling, expenses and travel) are around $85,000, assuming success within two IVF cycles. By the time Australians are considering surrogacy, many have spent large amounts of money on unsuccessful ART, so when they see surrogacy-related IVF available overseas for less in far shorter timeframes, it is unsurprising so many engage overseas.

Cost Implications

While increasing numbers of Australians are attempting surrogacy domestically (327 embryo transfers in 2022) these numbers remain negligible compared to regular IVF. Table One projects the annual costs of removing the discrimination in rebates for those accessing surrogacy-related IVF[17].

[14] Medicare financially assists Australians by providing rebates for an unlimited number of cycles regardless of whether donor sperm and/or eggs were used

[15] Correspondence from Assoc Professor Peter Illingworth, IVF Australia

[16] *Health Insurance (General Medical Services Table) Regulations 2021* (Cth), cl. 5.2.4.

[17] Assumes 80% of current surrogacy-related IVF is for heterosexual woman with a medical need, the remainder being for male singles and couples

Table 1: Historical Annual Cost to Medicare if Surrogacy-related IVF were rebated (2022)

	n[18]	Rebate per procedure	Total cost per year
Gestational Carrier Cycles	399	$5 590	$2,230,410
Embryo transfers for surrogacy	327	$1 641	$536,607
Total			**$2,767,017**

Expanding the MBS rebate to surrogacy-related IVF will reduce the financial barriers to accessing surrogacy and enhance equity. To this effect, the Medicare legislation needs updating.

1. The following regulation should be removed from the *Health Insurance (General Medical Services Table) Regulations 2011*:

> *2.37.7 Items relating to assisted reproductive services not to apply in certain pregnancy-related circumstances*
>
> *Items 13200 to 13221 do not apply to a service provided in relation to a patient's pregnancy, or intended pregnancy, that is, at the time of the service, the subject of an agreement, or arrangement, under which the patient makes provision for transfer to another person of the guardianship of, or custodial rights to, a child born as a result of the pregnancy.*

2. The following paragraph be removed from *Note T1.4 Assisted Reproductive Technology ART Services - (Items 13200 to 13221)* of the Medicare Benefits Schedule:

> *Medicare benefits are not payable for assisted reproductive services rendered in conjunction with surrogacy arrangements where surrogacy is defined as 'an arrangement whereby a woman agrees to become pregnant and to bear a child for another person or persons to whom she will transfer guardianship and custodial rights at or shortly after birth'.*

Reimbursing and compensating surrogates

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

Intended parents should be obliged to directly pay for all IVF-related, legal, counselling and hospital costs associated with surrogate screening, preparation, IVF, embryo transfer, legal requirements, hospital admission, birth costs and lost wages (for example during hospital admission or bedrest requirements) as soon as these are incurred. (Historically, many Australian IVF clinics mistakenly bill the surrogate for IVF services).

Other common surrogacy-related expenses include physiotherapy, childcare, house-cleaning, pre-prepared meals, maternity clothing, acupuncture, chiropracty, hypnobirthing, doula support, vitamins & supplements, pain relief, laxatives, stretch-mark treatments, breast milk

[18] Recorded numbers from ART in Australia and New Zealand 2022, UNSW, Sept 2024

pump, breast milk storage bags, travel to appointments. Currently they are typically paid by the surrogate and reimbursed by intended parents.

Over a decade's experience working with altruistic surrogates has shown that many are averse to asking for re-imbursements for such services. Some report trying to pay with debit cards provided by their intended parents only to find there are insufficient funds on the card. The collection, retention and hand-over of receipts for individual items is seen by surrogates as time-consuming, embarrassing and difficult.

Instead, to allow for these additional out-of-pocket expenses, while avoiding surrogates being left out-of-pocket, a set monthly payment should be provided.

Question 16 Do you support a) *compensated* surrogacy and/or b) '*commercial*' surrogacy?

"Commercial" surrogacy I would define as arrangements where surrogates earn a profit from such arrangements and there is no set limit to the amount which surrogates can change for their services. Instead, market demand influences surrogate payments. Such an approach has in recent years seen the typical levels of 'base compensation' payment to US surrogates reach huge sums (AU$100,000 – AU$125,000) in addition to monthly expenses, placing the process out of financial reach for most US citizens and many foreigners

Surrogates in countries such as Georgia have also in recent years doubled their compensation, as there are similarly no laws in Georgia around surrogate compensation levels. This huge rise has been driven by market forces, given Georgia is one of the few international jurisdictions with laws allowing some foreign nationals to commission surrogacy. Uncapped compensation is not a model which is ethical or inclusive and cannot be supported in Australia.

I support compensated surrogacy, where payments recognise not just expense re-imbursements but compensation for the pain, discomfort and labour involved in pregnancy. My support for this model is based on many years' experience in working with intended parents engaged in surrogacy here in Australia as well as working with professionals and parents in offshore jurisdictions which embrace compensated or commercial arrangements.

Amongst European and Asian countries with legislation allowing (altruistic) reimbursement of egg donors, many (eg UK, Greece) reference compensation for biological strain; Inconvenience; physical & emotional demands; or time and effort[19,20]. Such a concept is hugely relevant to the experience of surrogates, in whichever legal system they carry.

Such an approach is also supported by many of the leading academics and practitioners in the Australian surrogacy environment[21].

[19] Government Gazette FEK B 5524/26.10.2022: "Regulations of the National Authority for Medically Assisted Reproduction (EAIYA) on Surrogacy (Greece)

[20] londonwomensclinic.com+11tfp-fertility.com+11eggdonorsuk.co.uk+11

[21] Millbank J, Rethinking Commercial Surrogacy in Australia, UTSLRS 8; (2015) 12 Journal of Bioethical Inquiry 477 https://classic.austlii.edu.au/au/journals/UTSLRS/2015/8.html

Question 17 If Australia was to allow for compensated or 'commercial' surrogacy, how could this be implemented?

A set monthly allowance (of AU$2,000 - $3,000) should be agreed upfront and paid on a monthly basis to the surrogate from the time of commencing pregnancy attempts until three months post birth. Such monies should be utilised to pay for personal surrogacy-related expenses, as well as to compensate for time and effort, as occurs in the egg donor setting.

Monies should be kept in trust (by a lawyer or escrow provider) and paid out monthly direct to the surrogate, as occurs for example in Canada and in many US arrangements.

It is vital that compensation be capped to a certain maximum, to ensure that compensation neither unduly influences potential surrogates, nor puts the process out of reach of the average intended parent.

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?

The main problems with the requirements and processes for obtaining legal parentage for domestic surrogacy are the expensive legal fees, post-birth paperwork requirements and significant court time required for a non-adversarial process.

The main problems with the requirements and processes for obtaining legal parentage for international surrogacy are that in some cases there is no process for infants born via international surrogacy to be recognised as having a legal Australian parent, which leaves the overseas surrogate and her partner as the legal parents under Australian law[22]. Such children are not legally recognised as the child of the intended parents under a range of laws, such as inheritance or superannuation laws.[23]

Question 19 How could the process for intended parents to become the legal parents of children born through surrogacy be improved?

In all cases below, there should be no difference in approach dependent on whose genetic material was used. For example, if the arrangement was traditional surrogacy, using the surrogate's eggs, published research shows no differences in risks, intentions or parenting outcomes[24]. Likewise, for those singles and couples requiring both egg and sperm donation, the processes below should be identical.

There should be no difference in how intended mothers and intended fathers are viewed in regard to recognition of parentage.

For domestic surrogacy

[22] Millbank J, Resolving the dilemma of legal parentage for Australian engaged in international surrogacy (2013) Australian Journal of Family Law, 27 135-169

[23] See Surrogacy Act 2010 (NSW), s 39; Family Law Act 1975 (Cth), s 60HB.

[24] Golombok, S Murray C, Jadva V et al Non-genetic and non-gestational parenthood: consequences for parent–child relationships and the psychological well-being of mothers, fathers and children at age, Human Reproduction (2006) 21 (7) 1918–1924.

Establish a simpler and more certain process of parentage establishment, so that where mandatory criteria are met, there can be a pre-birth administrative order made after the written surrogacy arrangement is entered into and after the pregnancy has commenced.

This process occurs in two US states and three Canadian provinces and has been recommended by Law Commissions in both the United Kingdom and New Zealand.

Such a process would

- reduce strain on the family court system, conserving judicial resources for only those cases where an order is needed
- reduce the legal costs of surrogacy arrangements
- avoid leaving surrogate-born child without a legal parent residing with them for six to nine months
- Give peace-of-mind to Australian surrogates who have to desire to carry the responsibility of legal parentage
- upholds the child's human rights while protecting those of the surrogate and intended parents

We should consider a statutorily-prescribed standard surrogacy agreement which, if entered into by the intended parent(s) and the surrogate and their partner (if any) could automatically confer parentage on the intended parent(s) from birth if they show evidence of

- independent pre-conception legal advice
- independent pre-conception counselling of all parties
- the surrogate and their partner (if any) voluntarily and freely consenting to the agreement pre-embryo transfer
- all pre-agreed surrogate expenses or compensation covering the process (pre and post birth) has been deposited into escrow.

For international surrogacy

Australia does not have influence over surrogacy arrangements entered into in other countries. Thus, Australia cannot regulate or monitor whether these agreements involve exploitation of women or other ethical concerns. However, in recognizing the parentage issues that arise, Australia should focus on the children who are born as a result of such agreements, rather than trying to prevent or promote surrogacy abroad.

There is no good argument for penalising young Australian citizens born via international surrogacy, by denying them legal recognition under the Family Law Act. Despite changes to s69R of the Family Law Act late last year, automatically recognising parentage when births were in 19 specified countries, many young Australians (eg those born in Georgia, Argentina and Thailand) have been denied recognition of parentage given the lacunae in Australian family law[25]. This failure to provide a path to parentage is at odds with Article 7.1 of the UN Convention on the Rights of the Child — the right of the child "to know and be cared for by his or her parents". This is a Convention to which Australia is a signatory.

[25] *Family Law Act 1975* (Cth), s.69R

To address this gross oversight, government should revise the Australian Family Law Act Section 60H and 60HB so that a child born through surrogacy can efficiently have their Australian Intended Parents recognised as their legal parents. This could be an administrative process with the Registrar of Births, Deaths and Marriages for eligible surrogacy cases. This process occurs in two US states and three Canadian provinces and has been recommended by Law Commissions in both the United Kingdom and New Zealand. Its advantages are low cost, speed and certainty, it upholds the child's human rights (while protecting those of the surrogate and intended parents), and conserves judicial resources for only those cases where an order is needed.

There are three key groups to consider in relation to recognition of parentage. Children already born via international surrogacy; Australian singles and couples who have entered a surrogacy arrangement where the child has not yet been born; Australian singles and couples who have not yet entered an international arrangement.

For those children already born via surrogacy to Australian residents, or where surrogacy has already been commissioned, where section 69R of the Family Law Act does not provide for parentage, a 'grandfathering' process needs to be established to dispense with the 'eligible cases' clause, to allow them to be recognised as the legal child of the social parents who commissioned surrogacy on their behalf. This avoids intended parents having to go through lengthy and extremely costly court processes to determine parentage for a child or children where custody is uncontested.

For new international arrangements, the new streamlined process could apply in cases where Intended parents who are Australian citizens have engaged in a 'prescribed jurisdiction'. These are recommended to include only jurisdictions which have ethical systems and processes.

Jurisdictions should be prescribed if they

- Predominantly work with surrogates' resident in their country
- Have laws allowing foreigners to engage in surrogacy
- Recognise parentage of foreign intended parents following surrogacy
- Mandate pre-arrangement counselling of surrogates
- Offer psychological support to surrogates during pregnancy

These may include New Zealand, USA, Canada, Colombia, Georgia and Mexico.

Other criteria to ensure applicants are eligible for the streamlined administrative process should include

- Completion of pre-agreement psychosocial counselling with intended parent(s)
- Surrogate (and her partner where relevant) have undertaken psychological counselling in their own country in their native language prior to entering into a surrogacy arrangement.
- Evidence of a medical need for surrogacy (absence of uterus; deformed uterus; unexplained infertility; three or more failed IVF cycles); recurrent miscarriage; on medication which make it unsafe to carry a child; Scarring from endometriosis; adenomyosis)
- Each intended parent aged under 55 years at journey commencement

- Surrogate provided written consent to the process before first embryo transfer
- Surrogate provided written consent to relinquishment of parentage

For arrangements which fall outside the above guidelines, legal parentage should be available, but only via an Australian court-application within the judicial system.

However approval of parentage transfer applications should NOT require proof of legal advice and/or counselling before entering a surrogacy agreement. This is because children should not be disadvantaged in regard to recognition of parentage by the oversight of their parent(s). Instead, the absence of such prior preparation should require a longer court-based process to transfer parentage.

Countries with similar cultural norms have recently addressed these issues. For example Ireland has recently passed legislation reflecting the above[26]. Denmark has also done this in 2024 in the best interests of the child[27]. The Scottish & UK Law Commission has also recommended such an approach.[28]

[26] https://www.oireachtas.ie/en/bills/bill/2022/29/
[27] https://eapil.org/2024/10/14/political-agreement-in-denmark-on-international-surrogacy-agreements/
[28] https://lawcom.gov.uk/project/surrogacy/#3-Documents

Citizenship, passports and visas

Question 20 What, if any, are the main problems with obtaining an Australian passport for a child born through international surrogacy:

There is no significant problem in obtaining an Australian passport for a child born through international surrogacy. However where such passports for children under the age of 18 years need renewing, these cases always go to Complex Case Management and the surrogate is required to provide consent for the renewal given her ongoing legal status as a parent. Often the surrogate cannot be contacted by intended parents requiring a passport renewal, as her contact details may have changed

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

After the initial signature by the surrogate on the passport application form, there should not be a requirement for her to sign passport renewal applications. Neither should there be a requirement for Australian passport renewals for children born via international surrogacy to automatically go to Complex Case processing.

Oversight and harmonisation – Oversight

Question 23 Is it appropriate for surrogacy arrangements to be subject to oversight? If so, what is the best approach?

It is not appropriate for individual surrogacy teams to be monitored by a regulatory throughout their journeys, given the sheer time and expertise this would require.

However, it is appropriate for surrogacy organisations (rather than individual cases) to be monitored by an administrative body. This administrative body should be national rather than state-based. The justification for this is three-fold – the small number of surrogacy cases in each state does not warrant state-based bodies; there would be at most a few surrogacy organisations nationally requiring oversight. Thirdly, the fact that the surrogate is often in a different state to the intended parent makes a national body more suitable.

This oversight role should involve administering a set of minimum standards and the requirement for an annual audit of cases. Minimum standards for agencies to be audited against should include documented evidence that for each client the agency:

1. Clearly outlines the services provided, estimated costs, billing, and refund policies.
2. Ensures that all mandatory conditions under the relevant legislation have been met before progress to conception
3. Discloses facilitation policies regarding future contact among participants.
4. Conducts thorough screening of intended parents, including criminal background checks and mental health evaluations
5. Determines and respect each participant's match preferences.
6. Provides full disclosure to intended parents regarding the background and screening status of surrogates and donors.

7. Ensures there is full consent from the surrogate without any coercion and infringement on her rights or liberty.
8. Facilitates contact between intended parents and surrogates before and during pregnancy.
9. Has a process for reporting any unethical or illegal activity to the relevant authorities.
10. Are aware of the relevant laws and regulations in their jurisdiction

To avoid expensive set up fees, it could be argued that the Reproductive Technology Accreditation Committee (RTAC) which is administered by the Fertility Society of Australia & NZ, could take on this oversight role. RTAC is already charged with setting standards for the performance of ART through an audited Code of Practice and the granting of licences to practice ART within Australia. However in the interests of independence and avoiding conflicts of interest, it would be far preferable for an independent statutory body to take on this role.

The role of the criminal law

Question 24 Should the law have a role in discouraging or prohibiting certain forms of surrogacy?:

Criminalising certain forms of surrogacy (e.g. In NSW, ACT & QLD) has proven to be a failure in regard to harm minimisation and protecting the rights of the child. Criminalising those who are unable to locate a surrogate in an altruistic environment such as Australia or Canada has been shown to reduce intended parents likelihood of seeking professional support, conceal their child's means of conception and risk failure to disclose even to their child, their means of conception. A generation ago, a large cohort of donor-conceived individuals suffered much trauma on learning they were donor conceived as young adults. This occurred because IVF doctors discouraged patients from disclosing the use of donor eggs. It is tragic that current Australian criminalisation laws in relation to surrogacy may have similar effects.

Criminalisation has also led Australian policymakers to refuse to put any effort into ensuring a pathway for legal parentage, leaving thousands of children without a legal parent in Australia.

Instead of criminalisation, the government should introduce a streamlined pathway to legal parentage where certain pre-conditions are met in relation to both domestic and international surrogacy. Such pre-conditions should include pre-arrangement counselling of both intended parents and surrogate by accredited counsellors as well as engagement in an authorised jurisdiction (see answers to Q19).

Where such pre-conditions are not met, intended parents could be forced to apply for parentage via a far more lengthy and expensive court process. Such an approach could incentivise compliance with best practice, while not completely denying recognition of parentage. It is this approach which has recently been adopted by Ireland and recommended by the Law Commission of England and Wales and the Scottish Lawa Commission.[29,30]

[29] https://www.oireachtas.ie/en/bills/bill/2022/29/
[30] https://lawcom.gov.uk/project/surrogacy/#3-Documents

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?

There is a clear need to improve awareness and understanding of surrogacy laws and practices amongst professionals, the surrogacy community and the general population.

To assist with harm minimisation and education, GPs, Infertility counsellors and IVF specialists would benefit from more information about how surrogacy operates on a practical level for Australians both domestically and internationally; what are the key risks; the key decisions made and what educational resources patients can be directed to.

Amongst intended parents via surrogacy, in the absence of professionally sanctioned education and support, there has over the last 14 years, been a huge reliance on social media forums such as Facebook for information and peer support. Such forums are accessed by those wishing to engage in surrogacy both domestically and internationally[31,32].

Information shared in these forums can be well-meaning, but intended parents are commonly exposed to out-of-date information, conflicting advice and negative judgement from others. Many find this experience confusing and at times traumatic. Many are as a result afraid to ask questions.

Instead, intended parents should be encouraged to seek advice and support customised to individual circumstances, given the huge variance in intended parents' prior IVF history, personality traits, emotional stability, financial circumstances, level of trust and education. Better availability of such professionally sanctioned advice is crucial to minimise harm.

In regard to the general population, they also need to be better educated about surrogacy as a route to parenthood, for two reasons. Firstly, youngsters born via surrogacy commonly report that having to explain their means of conception repeatedly to people they meet is draining. Conflation of surrogacy with adoption as a means of conception is insulting and unacceptable. Secondly, higher levels of awareness amongst the general community may encourage more potential surrogates to come forward.

[31] Jackson E, Millbank J, Karpin I & Stuhmcke A. Learnings From Cross-Border Reproduction, Medial Law Review 2017, 25, (1) 23-46

[32] Hammarberg K, Stafford-Bell M, Everingham S. Intended Parents Motivations and Information and Support Needs When Seeking Extraterritorial Compensated Surrogacy. Rep BioMed Online (2015) 31, 689-696

Issues we consider to be out of scope

Question 26 Do you have any views about the issues we consider to be out of scope?

Surrogacy cannot be considered in the absence of the availability of donor eggs, given over 70% of surrogacy arrangements involve an egg donor. Most singles and couples engaging in surrogacy are over 40 years of age, by which time their own eggs are usually too old to consider using for embryo creation.

Where quality donor eggs are not available, the number and quality of embryos created is compromised. An absence of good quality embryos creates ethical and medical problems in commissioning surrogacy arrangements.

Given the lack of donor compensation available, there remains a dire shortage of donors here in Australia. Instead, Australian clinics have fallen back on the import of frozen eggs from markets such as the USA, Ukraine and Georgia. Such a strategy, while designed to keep patients with Australian clinics, is failing given the high costs of acquiring and transporting donor eggs, as well as less than optimal thaw rates and consequent low numbers of embryos that can be guaranteed from a frozen egg process. For example, even a low-priced donor bank program supported by Australian clinics costs AU$25,000 for the eggs alone, and guarantees just three embryos.

Given the importance of quality embryos, even if Australian jurisdictions make surrogacy law and practice more workable domestically, there will continue to be a reliance on international donor egg IVF (and hence surrogacy) unless Australia addresses its donor shortage more meaningfully.

How the UK tackled this problem was (from 1 October 2024) by raising the compensation available to donors from £750 to £985 (AU$2,060) per donation cycle. This adjustment, the first since 2011, aimed to better reflect the time, effort, and expenses involved in the donation process[33]. The HFEA maintains that this compensation is not a payment for the eggs themselves but a reimbursement for the donor's time and associated costs, such as travel and childcare. Their intent (as should be Australia's) is to support altruistic donations without commercializing the process.

Yours sincerely

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