



The Program Manager
Reproductive Technology Unit
Patient Safety & Clinical Quality
Clinical Excellence Division
Department of Health
189 Royal Street PERTH WA 6004

To whom it may concern;

Re: Submission in relation to the Independent review of the Human Reproductive Technology Act 1991 and Surrogacy Act 2008.

ORGANISATION BACKGROUND

Surrogacy Australia (Australian Families Through Gestational Surrogacy) was founded in January 2011 and is registered as a not-for-profit organisation. The organisation is a member-based entity run by a volunteer management committee made up of parents through surrogacy, surrogates and lawyers.

Surrogacy Australia has over 900 financial members and hosts active social media forums. Our first two Australian conferences on surrogacy practice became a template for Families Through Surrogacy's global conference program, which has delivered best practice education to surrogates, intended parents and professionals globally.

Surrogacy Australia has conducted two large research studies of how Australian engage with Surrogacy in 2012/2013. The results of these have been published by the Australian Institute of Family Studies and the Medical Journal of Australia. Surrogacy Australia has regular interaction with hundreds of Australian intended parents. These intended parents come from a wide variety of backgrounds – teachers, journalists, doctors, policemen, IT professionals and café owners. All have a common desire to raise children.

COMMITTEE CREDENTIALS

This submission is authored by representatives from Surrogacy Australia, consisting of association president Sam Everingham and WA representative and surrogate Hayley Christidis. Sam Everingham is a parent through surrogacy, founded Surrogacy Australia and has an academic background in psychology, research and a Masters in Public Health. Hayley Christidis is a mother of two children, a midwife and gave birth as an altruistic surrogate in Perth in 2017. She has spoken at Families Through Surrogacy conferences, helps co-ordinate Western Australia's surrogacy community and strives to raise awareness of surrogacy in WA.

RELEVANT CONTEXTUAL ISSUES

The use of surrogacy as a means of family formation has increased significantly in Australia in recent years. Currently over 80% of Australians seeking surrogacy travel overseas to do so. Australian Government data shows that 170 such newborns entered Australia in 2016/17. A range of factors mean the use of overseas surrogacy arrangements for Australians is very likely not only to continue but to increase in prevalence. Some of these factors (summarised below) result from inappropriate and discriminatory government policies and legislation.

- tight policy restrictions (e.g. red tape, cost, selection criteria) and long wait times restricting the availability of national and international adoptions;
- the tendency of most intended parents not to choose permanent foster care arrangements as a path to parenthood;
- the strong desire to parent amongst many who cannot carry a child themselves;
- increasing age of women before attempting pregnancy leading to higher rates of age-based infertility;
- growth in single men and male same sex couples desiring to raise a family;
- increase in the availability of assisted reproductive technology; and
- increasing awareness and knowledge about access to surrogacy arrangements.

CURRENT PROBLEMS

Barriers to Locating a Surrogate or Gamete Provider

The Western Australian Surrogacy Act and related legislation is prohibitive in its articulation. The result being that it forces people to undertake surrogacy outside of Western Australia.

The effect of section 30 of the Human Tissue and Transplant Act 1992 (WA) means it is an offence to advertise for an egg donor. It is an offence under section 10 of the Surrogacy Act to 'publish willingness to make surrogacy arrangement that is for reward'. This leaves a lot of intending parents feeling frightened to advertise for a surrogate, even if it is under an altruistic model. Most Australian intending parents would rather undertake surrogacy with an Australian surrogate than with overseas surrogates. However, locating a suitable surrogate is made very difficult under current law. There needs to be clear guidance regarding advertising for a surrogate in Western Australia.

It is an offence under Section 21 of the Prohibition of Human Cloning for Reproduction Act (2002; Commonwealth) to pay an egg or sperm donor anything other than 'reasonable expenses incurred'.

Intended parents in Western Australia faced with this restriction and a shortage of local gamete donors are undertaking gamete donation overseas. The legislation is motivating intended parents to undertake arrangements in overseas jurisdictions.

Discrimination

Gay male couples cannot undertake surrogacy in Western Australia even if they wanted to because the law does not allow this.

This discrimination may be contrary to the Commonwealth anti-discrimination legislation.

There are no such restrictions in most other Australian state and territory legislation. At the least this restriction is sexist. This restriction forces single men and gay male couples to pursue surrogacy and egg donation in overseas jurisdictions.

Failure of State-based Criminalisation Provisions to Change Behaviour

Research by Surrogacy Australia & Monash University in 2013 with parents or intended parents through surrogacy showed that half of those in states with criminalisation laws would enter an overseas contract regardless of these laws. Another 30% would move interstate in order to access overseas surrogacy.

Surrogacy Australia's data collected from international agencies shows there has been only a slight downturn in the number of surrogacy arrangements entered into overseas each month since some states introduced criminalisation laws.

Such evidence makes it clear that state-based laws criminalising those entering overseas arrangements fail to have significant effect in deterring intended parents. In addition, criminal legislation risks the following adverse effects:

- Making it more likely families who can do so will conceal the nature of their child's origins to others and potentially to the child themselves.
- Creating potential self-esteem issues for children growing up under legislation which discriminates against them on the basis of decisions made by their parents.
- Motivating families to engage with overseas clinics which do not have regulated processes and documentation in place, in order to reduce the likelihood of prosecution.

None of the above consequences of the legislation are in the best interests of children born through surrogacy arrangements, despite the intention of this legislation to place the best interests of the child as paramount.

It is a modern-day reality that children are increasingly being born through surrogacy arrangements. Australia is obliged, under the UN Convention on the Rights of the Child (Article 21) to ensure that the interests of children are paramount.

A well-ordered legal system that appropriately recognised parents would aid in ameliorating these undesirable effects. For the reasons above, legislation governing how Australians can access surrogacy requires urgent review.

Inconsistencies in Legal Determination of Parentage

Despite being named on an overseas birth certificate as the father or mother, and being recognised under the Australian Citizenship Act 2007 as a parent, under Australian law, the biological intended parent(s) are recognised simply as gamete providers/donors, and have no legal status as a parent under the Status of Children Acts. Where a third-party gamete was sourced, the non-biological parent also has no status as a parent at law.

Recognising parents through surrogacy as legal parents is in the best interests of children, because it facilitates transparency and avoids motivations of parents to conceal/not be open about their use of surrogacy, which is damaging to children.

Undesirable consequences of the lack of legal parental status include;

- potential barriers to making decisions in the public healthcare and school systems
- the possibility of orders being made about parentage in Australia (e.g. through divorce proceedings) that are contradictory to the law in other countries

In the latter case, the current absence of legal parenthood in Australia might mean a child could be moved back to the country in which the intended parent is legally recognised to circumvent Australian law.

Costly & time-consuming Parenting Orders rarely used

Parents utilising surrogacy arrangements in the US can list both their names on the birth certificate. This has also been the case for heterosexual couples using India. Such a practice, as well as the granting of an Australian passport under Citizenship by Descent processes, gives the clear majority of parent's sufficient security not to bother applying for parenting orders.

Even in cases where one intended parent is not named on the foreign birth certificate, parenting orders are rarely applied for given the need to do this through the court system and the large amount of time, cost and often stress associated with such a process,

In the UK, there has been a noticeable increase in parental order applications being made (and granted) in the High Court to parents engaging in overseas surrogacy. However as with Australia, this is a legal process which incurs considerable time and cost to intended parents. (A typical case will take six months before it is heard by a UK court).

The problems above have already left more than 2000 Australian children with their social parents not recognised as their legal parents in Australia. This is despite one or more of their social parents being a biological parent. This is not in the best interests of children, or families. It is important that the more than 2000 Australian children born via overseas surrogacy each year do not suffer from stigmatization or some sense of not being a legal part of the family that worked so hard to have them.

Currently the only avenue for non-biological parents through surrogacy to be recognised as a legal parent is through step-parent adoption – a process incurring unnecessary cost, uncertainty and time for a party who has parented the child concerned since birth.

SOLUTIONS

1. Removal of discrimination

The Surrogacy Act needs to allow single and same-sex couples access to well-regulated surrogacy in WA.

2. Facilitating Access to Australian Surrogates and Donors

The WA legislative environment needs provide for an independent body to assist with Intended parent- surrogate recruitment, screening and matching. The absence of such a service forces intended parents to rely on unregulated social media forums and when they fail, to look overseas for potential surrogates. This state or federally empowered body needs to be funded to:

- manage surrogate & intended parent screening and matching
- provide improved pre-agreement counselling
- provide ongoing counselling support to all parties in surrogacy arrangements

3. The ability to compensate both gamete providers and surrogates

If gamete donation is to be effective in Western Australia legislation needs to be effectively reviewed and proactive strategies developed to support intended parents to find donors within Western Australia.

Surrogates in Western Australia should be able to receive payments/compensation. Regulation of commercial surrogacy in the United States has proven to be very effective. In several overseas jurisdictions this has been successfully occurring for over 30 years. Commercial surrogacy in Western Australia could occur with appropriate safeguards that protect the surrogate, children, intended parent/s, as well as the gamete donors. Current legislation drives surrogacy arrangements underground, placing all at risk, or drives intended parents overseas, where, unregulated, greater risks abound.

Regardless, legislation within an Australian context, needs to support intended parents locally and internationally to be able to pay/compensate surrogates for their valued contribution and undertaking risk.

4. Surrogate Matching

Better access to surrogacy within Australia would require far greater access to Australian surrogates.

A key change required is the establishment of a not-for-profit agency to act as a centralized database for potential surrogates and intended parents to register. This model might allow registered Australian ART providers to access the database and facilitate meetings between potential surrogates and intended parents.

5. Allowing financial compensation of Australian surrogates to a capped value

Many others involved in altruistic surrogacy arrangements in Australia have the right to charge for their services including the counsellors, lawyers and IVF clinics. The central person in these arrangements is prohibited from earning money – it could be argued that lawyers, IVF clinics and counsellors are in fact making money out of surrogates' altruism. This is exploitative and unfair. Compensated (and not commercial) surrogacy is a fair option. Intending parents are willing to pay surrogates for their work and in fact benefit from being allowed to offer a token sum of money as a gift in exchange for the priceless gift of their own child.

Research by Surrogacy Australia and academic researchers has shown evidence that intended parents are often uncomfortable accepting the 'gift' of surrogacy in the absence of any financial compensation beyond expenses. Research with surrogate mothers shows that most countries offering paid arrangements are motivated by a mix of altruism and financial betterment.

Appropriate capped compensation could include a significant gift (such as a family holiday) for the surrogate mother which recognises her labour, physical discomfort and restrictions, managed by a third party.

In Canada for example, costs are allowed for 'time and effort', which takes into account not only medical, ART, legal and counselling costs, but an additional amount for the effort required to undertake surrogacy.

6. A Surrogate Support Network

Medical practitioners, church leaders and social workers understand their work as vocational. In these professions, as with surrogacy, the job requires individuals to give time and emotional energy that goes beyond their job requirements. To choose surrogacy work should be understood as a vocational choice with a huge emotional, physical and time commitment.

Women who make this choice should be supported, as one Australian surrogate explains:

"we surrogates are a breed unto our own ... so having someone to talk them through it and to simply tell them that what they are experiencing is normal and that they are actually sane is what I would call essential. Not simply during and after the pregnancy but through the entire process and for months or even years after. most of the people who had negative experiences simply didn't have the support network they needed. It's just too hard to express everything you are going through with your recipient"

If legislators are keen to protect the best interests of Australian surrogates it would make sense to have such a network funded as are other community funded groups, given its potential to build capacity for best-practice surrogacy arrangements within Australia.

Such an organisation would provide specific knowledge, experience and access to individuals and communities engaging in surrogacy arrangements. Its roles could include workforce advancement through specialised education, policy development and intersectoral networking.

Yours sincerely,

Sam Everingham

President

Surrogacy Australia.

SURROGACY AUSTRALIA MEMBER FEEDBACK

This section provides direct quotes from some of our Australian members currently accessing surrogacy, about their experiences and the changes they would like to see.

We considered surrogacy within Australia, and had an arrangement with a friend but this fell through in 2011 and we were unable to find anyone else. Other options like adoption were not possible as our age was just beyond the limit. And in any case the waiting list for adoption was long and the outcome would be uncertain.

When we sought medical advice on the overseas options, consultations were terminated mid-stream as soon as we mentioned the words “overseas surrogacy”. This applied to doctors in NSW and SA, and as far as we know all of Australia. They were afraid of losing their medical licenses by even discussing this possibility. We believe the total unavailability of medical advice within Australia placed us at a greater risk.

(Intended Parent 1)

Adoption in this country is almost impossible and lengthy.. Fostering requires you to give up IVF procedures. And surrogacy seems like a swear word and you must be a criminal if you consider it.

(Intended Parent 3)

The whole process should be much more stream-lined and guilt -free.

(Intended Parent 6)

My main issue with surrogacy in Australia is the lack of Medicare support, which is prejudiced, out-dated and incredibly unfair. Not only will Medicare not cover any of the cost of the IVF cycle where there is a surrogacy arrangement in place, it also seems it is left up to the individual clinics to decide when a patient is entitled to a rebate or not....There are huge inconsistencies, much confusion, and unfair outcomes. I know of patients with a hysterectomy who have accessed Medicare rebates when clearly there is no outcome but surrogacy; the clinic has allowed it through as a 'preservation cycle' and yet other patients with a hysterectomy (such as myself) have been told an outright 'no' to accessing Medicare rebates.

(Intended Parent 11)

DEFINITIONS Surrogacy is an arrangement in which a woman gestates and gives birth to a child for another couple or person, with the intent to give said child back to his/her parents at birth. The surrogate may be the child's genetic mother (called traditional surrogacy), or she may be genetically unrelated to the child (called gestational surrogacy).

Intended parent (s) is the person(s) who initiate/seek out a surrogacy arrangement and will be the child's legal and social parent/s after the birth. Traditional surrogacy (TS) involves artificially inseminating a surrogate mother with the intended father's sperm via IUI, IVF or home insemination. With this method, the child is genetically related to its father and the surrogate. TS is relatively uncommon in Australia.

Gestational surrogacy (GS) arrangements can involve the egg of the intending mother, the sperm of the intending father and in the case of infertility or in same sex or single parent arrangements eggs or sperm from a gamete provider. The resulting child is genetically related to at least one of its intended parents while the surrogate mother has no genetic relation.

Altruistic surrogacy occurs when the surrogate receives no payment for carrying the child, except for re-imbursement of costs and loss of income

Commercial surrogacy occurs when the surrogate receives payment for carrying the child and commonly involves a contractual agreement that is generally not legally enforceable.

Unknown gamete provider - a person who provides their own eggs or sperm for the purposes of third-party reproduction but does not want to be identified to any child born thereof and hence has no intention to parent such (a) child(ren).

Known gamete provider with parenting intent - a person who provides their own eggs or sperm for the purposes of third-party reproduction and has a written agreement stating parental intent of any child(ren) that result. Such an agreement may make allowances for full parental custody - for example in cases of surrogacy - or partial custody - for example in co-parenting arrangements.

Known gamete provider without parenting intent - a person who provides their own eggs or sperm for the purposes of third-party reproduction, has agreed to provide their identifying details for the purposed of later contact by the child(ten) but has no intention of any parenting role (eg a sperm or egg provider).

Note:

In overseas commercial surrogacy arrangements surrogate rarely, if ever, use their own gametes. Hence, they are not genetically linked to the child they gestate.

In the clear majority of overseas commercial surrogacy arrangements one or both parents provide gametes in their attempt to have a child. Hence the clear majority of children born through overseas commercial surrogacy are genetically linked to at least one intended parent.