

# Legal Studies 2019 v1.1

IA2 high level annotated sample response

September 2018

## Investigation — inquiry report (25%)

This sample has been compiled by the QCAA to assist and support teachers to match evidence in student responses to the characteristics described in the instrument-specific marking guide (ISMG).

### Assessment objectives

This assessment instrument is used to determine student achievement in the following objectives:

1. comprehend legal concepts, principles and/or processes of a current legal issue that may require reform to Australian and/or Queensland legislation
2. select legal information from sources relevant to Australian and/or Queensland law reform
3. analyse a legal issue involving law reform to Australian and/or Queensland legislation
4. evaluate a legal situation relevant to law reform to Australian and/or Queensland legislation
5. create a response that communicates meaning to suit the intended purpose in an inquiry report.

*This resource contains content that will require teachers to consider sensitivity of the students and the teaching context. Teachers should consult with school leaders and the school community about the suitability of any sample resources.*

# Instrument-specific marking guide (ISMG)

## Criterion: Comprehending

### Assessment objective

1. comprehend legal concepts, principles and processes of a current legal issue that may require reform to Australian and/or Queensland legislation

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"><li>• comprehensive identification of the features of an Australian and/or Queensland law reform issue</li><li>• perceptive description of legal concepts, principles and/or processes of the Australian and/or Queensland law reform issue</li><li>• precise use of legal terminology.</li></ul>	4–5
<ul style="list-style-type: none"><li>• effective identification of the features of an Australian and/or Queensland law reform issue</li><li>• effective description of legal concepts, principles and/or processes of the Australian and/or Queensland law reform issue</li><li>• adequate use of legal terminology.</li></ul>	2–3
<ul style="list-style-type: none"><li>• identification of some legal reform concepts, principles or processes of an Australian and/or Queensland law reform issue.</li></ul>	1
<ul style="list-style-type: none"><li>• does not satisfy any of the descriptors above.</li></ul>	0

## Criterion: Selecting

### Assessment objective

2. select legal information from sources relevant to Australian and/or Queensland law reform

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"><li>• discerning choice of current and relevant legal information from primary and/or secondary sources relevant to Australian and/or Queensland law reform</li><li>• perceptive use of legal information</li><li>• consistent and accurate documentation of legal information in the form of a reference list and citations.</li></ul>	3–4
<ul style="list-style-type: none"><li>• adequate choice of current and/or relevant legal information from primary and/or secondary sources relevant to Australian and/or Queensland law reform</li><li>• adequate use of legal information</li><li>• some documentation of legal information in the form of a reference list and/or citations.</li></ul>	2
<ul style="list-style-type: none"><li>• limited choice of primary and/or secondary sources relevant to Australian and/or Queensland law reform</li><li>• use of some legal information</li><li>• limited documentation of sources.</li></ul>	1
<ul style="list-style-type: none"><li>• does not satisfy any of the descriptors above.</li></ul>	0

## Criterion: Analysing

### Assessment objective

3. analyse a legal issue involving law reform to Australian and/or Queensland legislation

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"><li>perceptive application of relevant legal concepts, principles and/or processes, to determine the nature and scope of a law reform issue that involves Australian and/or Queensland legislation</li><li>interpretation of legal information to perceptively examine different viewpoints and their consequences</li><li>discerning use of evidence to support the analysis.</li></ul>	5–6
<ul style="list-style-type: none"><li>effective application of relevant legal concepts, principles and/or processes, to determine the nature and scope of a law reform issue that involves Australian and/or Queensland legislation</li><li>interpretation of legal information to effectively examine different viewpoints and their consequences</li><li>sufficient use of evidence within the analysis.</li></ul>	3–4
<ul style="list-style-type: none"><li>superficial description of legal concepts, principles and/or processes, that link to a law reform issue that involves Australian and/or Queensland legislation</li><li>description or identification of superficial viewpoints and/or consequences</li><li>narrow use of evidence.</li></ul>	1–2
<ul style="list-style-type: none"><li>does not satisfy any of the descriptors above.</li></ul>	0

## Criterion: Evaluating

### Assessment objective

4. evaluate a legal situation relevant to law reform to Australian and/or Queensland legislation

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"><li>relevant legal alternatives presented from the analysis and insightful recommendation/s proposed</li><li>synthesis of information that justifies the recommendation/s through the discerning use of legal criteria</li><li>fluent discussion of the implications of the recommendation/s.</li></ul>	5–6
<ul style="list-style-type: none"><li>relevant legal alternatives presented from the analysis and effective recommendation/s proposed</li><li>synthesis of information that justifies the recommendation/s through the effective use of legal criteria</li><li>clear discussion of the implications of the recommendation/s.</li></ul>	3–4
<ul style="list-style-type: none"><li>legal alternatives presented and/or recommendation/s proposed</li><li>some justification of the recommendation/s</li><li>discussion identifies some implications of the alternatives or recommendation/s.</li></ul>	1–2
<ul style="list-style-type: none"><li>does not satisfy any of the descriptors above.</li></ul>	0

## Criterion: Creating a response

### Assessment objective

5. create a response that communicates legal meaning to suit the intended purpose in an inquiry report

The student work has the following characteristics:	Marks
<ul style="list-style-type: none"><li>• concise expression and logical development of relevant ideas that enhance legal meaning</li><li>• features of the report genre are consistently demonstrated</li><li>• minimal errors in spelling, grammar and punctuation.</li></ul>	3–4
<ul style="list-style-type: none"><li>• adequate expression and development of ideas that convey legal meaning</li><li>• features of the report genre are demonstrated</li><li>• some errors in spelling, grammar and punctuation.</li></ul>	2
<ul style="list-style-type: none"><li>• some elements of report formatting and/or inconsistent use of language conventions.</li></ul>	1
<ul style="list-style-type: none"><li>• does not satisfy any of the descriptors above.</li></ul>	0

# Task

Create an inquiry report analysing the nature and scope of the legal issue of surrogacy in Queensland. Using this analysis, evaluate two legal alternatives and make one recommendation to reform existing laws in Queensland.

## Sample response

Criterion	Marks allocated	Result
<b>Comprehending</b> Assessment objective 1	5	5
<b>Selecting</b> Assessment objective 2	4	4
<b>Analysing</b> Assessment objective 3	6	5
<b>Evaluating</b> Assessment objective 4	6	6
<b>Creating a response</b> Assessment objective 5	4	4
<b>Total</b>	<b>25</b>	<b>24</b>

The annotations show the match to the instrument-specific marking guide (ISMG) performance-level descriptors.

**Creating a response [3–4]**

**features of the report genre are consistently demonstrated**

with a cover and contents page, headings and subheadings.

**Inquiry report**

**The legal issue of surrogacy in Queensland**

Examine the nature and scope of the legal issue of surrogacy in Queensland, and analyse the viewpoints of two groups of stakeholders regarding the commercialisation of surrogacy. Using this analysis, evaluate two legal alternatives to reform existing laws in Queensland and their implications. Provide justification for recommendations to ensure just and equitable legal outcomes.

1500 – 2000 words

March 2018

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<p><b>Comprehending [4–5]</b></p> <p><b>comprehensive identification of the features</b></p> <p>of surrogacy as an Australian law reform issue, with detailed scan linking developments in Australia and overseas</p> <p><b>Comprehending [4–5]</b></p> <p><b>perceptive description of the legal concepts, principles and/or processes</b></p> <p>adeptly moving from social and biological issues to legal issues</p> <p><b>Analysing [5–6]</b></p> <p><b>perceptive application of relevant legal ... principles... to determine the nature and scope</b></p> <p>of the surrogacy issue regarding parenthood and legal property</p> <p><b>Comprehending [4–5]</b></p> <p><b>comprehensive identification of the features</b></p> <p>of the surrogacy reform issue and the connection to the push for reform: society concerns and technology advances</p>	<p><b>Introduction</b></p> <p>The issue of surrogacy, the impregnating of a woman who carries another’s child with no intention of being a part of the child’s care or upbringing, is creating legal debate in Australia. Currently, legislation exists in every Australian state and the Australian Capital Territory that makes commercial surrogacy illegal and altruistic surrogacy legal in certain circumstances. The purpose of this report is to examine the legal concept of parenthood to determine the nature and scope of commercial surrogacy and analyse opposing viewpoints. The alternative of changing existing legislation in Queensland will be considered and a recommendation made based on the fulfilment of equity and justice.</p> <p><b>Nature and scope of the issue</b></p> <p>The concept of parenthood is a legal issue that reflects ethical and philosophical values. Perceptions of right and wrong can vary between countries and within a country, and this is demonstrated clearly with the right to be a parent in contemporary society. There is a commonality of laws in developed countries such as France and Switzerland to ban all forms of surrogacy, whereas Russia and some states in the United States of America (e.g. California) permit commercial surrogacy. In lesser developed countries (e.g. Cambodia, Thailand and India) there is an absence of such laws. Recent international debate in Thailand and India involving Australian parents have resulted in laws banning the use of commercial surrogacy by international visitors (Preiss and Shahi, 2016). Australia, the United Kingdom and Denmark have limited surrogacy, to balance the right to parenthood and strong views that babies and wombs are not the subject of commercial commoditisation.</p> <p><b><i>The concept of parenthood</i></b></p> <p>Parenthood involves specific legal rights and responsibilities to care and make decisions for a child. The legal definition of a parent once focused solely on biological factors. However, with the ability to adopt and foster children, and given technology advances enabling the donation of biological material, social concepts of parenthood extend beyond genetics. <u>This is supported by the Family Law Court findings in Groth &amp; Banks [2013] FamCA 430 whereby the court found that the definition of “the word ‘parent’ should be given its ordinary dictionary meaning”.</u> Essentially a parent is the caretaker of the child. <u>The legal duty and responsibility of being a parent is implied in the United Nations Convention on the Rights of the Child 1989 which establishes the principle that the child’s interests are greater than the interests of parents or of the state (Todres, 1998). This informs the guiding principle of the Surrogacy Act 2010 (Qld).</u></p> <p><u>The law distinguishes between people and property, meaning a baby should not be produced for commerce as it is not a commodity that may be bought or sold for gain or profit. In addition, Article 35 of the Convention on the Rights of the Child states that governments should make sure ‘children are not ... sold’ (Unicef, 1996).</u> There is also the question of whether a surrogate’s womb can be a service legally supplied. A catalyst for law reform is a movement in society’s values primarily due to technology advances that have made surrogacy an alternative path to parenthood, and societal concerns that the baby or womb is being treated as legal property.</p>
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## Viewpoints of stakeholders

### *Commercial surrogates and the parents accessing the service*

Analysing [5–6]

**interpretation of legal information to perceptively examine**

the viewpoint of the legal options to infertility and the consequences.

The right to a family is fundamental and denying this is unjust when technology exists. The Fertility Society of Australia (2018) states 'one in six couples' experience infertility in Australia and New Zealand, and this does not include single gendered couples. There are only two other options for a family. Adoption is a lengthy process and the number of children has decreased over time (Atfield, 2014). Foster care can be uncertain and does not offer legal or long term security of the arrangement. Neither option allows for one's genetic material to provide a biological connection as a family, signifying surrogacy is an important option for many couples.

Analysing [5–6]

**interpretation of legal information to perceptively examine**

the viewpoint regarding the consequences of lack of compensation. The significance of the viewpoint is supported ('60 percent').

Current Australian and international concern involves surrogacy services overseas by Australians due to the lack of domestic accessibility, as it is essential to find a woman willing to become a surrogate with very limited compensation for time and services involved. Section 11 of The Surrogacy Act 2010 Qld provides that direct medical and legal costs are the only permitted compensation, restricting the interest of potential Australian surrogates. Professor Tremellen, a professor of reproductive medicine at Flinders University and fertility specialist at an Adelaide IVF clinic, has surveyed opinions to surrogacy in Australia, finding that almost 60% considered the commercial surrogacy ban 'unjustified' (Miller, 2016) as surrogacy payments should be negotiable. The need for a legal framework with greater compensation for services (not profit) would have the effect of increasing Australian surrogates and reducing the number of Australian couples seeking surrogacies offshore, and consequently improve the legal protection of each party and minimising taking advantage of countries with less legal safety for all parties. Family Court's Chief Justice Bryant said the "Baby Gammy" case emphasized the lack of protection for overseas surrogate mothers and the grey areas around unwanted children (due to birth abnormalities) (UQ News, 2015) as particular problems with existing surrogacy laws that currently push Australian parents overseas.

Analysing [5–6]

**interpretation of legal information to perceptively examine**

further consequences of the lack of compensation

Moreover, Sifris (2015) makes the point that laws that currently allow fertility clinics, doctors and lawyers to profit from surrogacy arrangements but not the surrogate themselves, are 'incoherent and inconsistent'. The worry about commercialising a surrogacy transaction shifts incidence of exploitation to the surrogate living in a developing country, who do not have a legal protection of any aspect of the surrogacy agreement and whose poverty mean they have even fewer choices. Statistics show it is low socio-economic women who are most vulnerable and have less opportunity for employment who 'rent their womb' (Millbank, 2017).

Analysing [1–2]

**description or identification of superficial viewpoints and/or consequences.**

as it is vague in the referent to 'common regulation' and unnamed 'regimes'

Overseas surrogates and their level of exploitation could be reduced by legislating commercial surrogacy with common regulation. International surrogacy also exposes intended parents to complex and uncertain legal regimes, many of which operate in contradiction to each other (Storow 2012; Hague Private Conference 2012).

Analysing [3-4]

**interpretation of legal information to effectively examine different viewpoints and their consequences**

as the link to legal viewpoints and legal consequences is mostly inferred in the paragraph

Analysing [3-4]

**interpretation of legal information to effectively examine consequences**

where consequences are clearly examined, however, the link to trafficking is only stated

Evaluating [5-6]

**relevant legal alternatives presented from the analysis**

that provide insight into the development of an insightful recommendation

**synthesis of information that justifies the recommendation/s through the discerning use of legal criteria**

in detailed justification of equitable outcomes

**fluent discussion of the implications of the recommendation/s**

Evaluating [5-6]

**relevant legal alternatives presented from the analysis**

regarding lack of local availability of surrogates, leading to the development of insightful recommendation/s

### **Opposing viewpoints against commercial surrogacy**

The right to have a family privileges the rights of intending parents (and those with the financial means) over the child, which is a problem. Dr Fronek from Griffith University, is concerned that surrogate children are not adequately considered (Miller, 2016) and notes the lack of 'research around international commercial surrogacy' to support Australia in making informed decisions around surrogacy (Snow, 2017). The issue lies with using genetic material where the surrogate has provided the egg, therefore bringing into question the legal rights of the biological mother.

Furthermore, the process has elements of a commercial transaction where a child is the commodity, and/or the surrogate is providing a service. When a child is involved in a financial transaction it is akin to human trafficking, contrary to the Convention on the Rights of the Child. While rights of the child do not exist prior to conception, the State does have an obligation to protect the rights of children who are born from a commercial arrangement.

As altruistic surrogacy is available in all states and territories (except for N.T.), the argument is that this legal option is sufficient.

### **Legal alternatives to reform existing laws**

#### **Legalise commercial surrogacy**

Without referral to the Commonwealth, reform could occur for Queensland legislation to allow a more appropriate and just compensation to surrogates. However, the issue of different state legislation creates complications to a change in Queensland laws only. For example, Queensland surrogacy contracts are not considered binding: a surrogate has the right to change her mind which can result in a legal quandary of the legal parent/s. This was seen when the Family Law Court (Lamb and Anor & Shaw [2017] FamCA 769) determined rights of both parties when the birth mother refused to relinquish her rights to the intended parents. Therefore, national change in the form of some commercial surrogacy compensation across all states is the alternative preferred as it would create consistently regulated health frameworks and stop 'regime shopping' across Australia, resulting in fairer outcomes. Further, there would be greater fairness of those who can 'profit' from surrogacy, as currently the medical and legal industry surrounding surrogacy are parties who profit from surrogacy in Australia, and the surrogates themselves cannot legally receive a just compensation. This legal change would also reduce the incidence of overseas surrogacy and protect women that may otherwise be exploited.

#### **Support for overseas access to commercial surrogacy**

A second potential solution is to repeal state laws which prohibit the immigration of a child born to an overseas surrogate, known as intercountry surrogacy. Currently in Queensland, NSW and ACT it is illegal to travel overseas to engage in commercial surrogacy (Department of Home Affairs, 2018). There is no prohibition in the other states and territories, which provides Queensland parents with a loophole: change residency to another state and then access surrogacy overseas. The issue, however, is the legal acknowledgement of the child as an Australian resident upon immigration and who the legal parent/s are, in direct



**discerning use of legal criteria**

in considering just and equitable outcomes in depth

**Evaluating [5–6]**

**insightful recommendation/s proposed**

and includes complexities raised by state verses national powers

**synthesis of information that justifies the recommendations through the discerning use of legal criteria**

including the further safeguards to increase equity and fairness

**fluent discussion of the implications of the recommendations**

contravention of the Convention on the Rights of the Child. This was seen in the Family Court of Australia ruling that the parents of a child born in India to a paid surrogate, could not be recognised as parents under the Family Law Act 1975 (Cwth). Instead the court made an order of parental responsibility to the couple (Clure, 2017). The implications of unjust outcomes are obvious as these surrogacy children are denied parents within the meaning of existing domestic family laws, and this is not an outcome that has equity to the process of adopting a child from overseas, through existing inter-country adoption legal processes (Intercountry Adoption Australia, 2018).

**Recommendation**

It is recommended that a limited commercial surrogacy be permitted by implementing national legislation as the issue is a national not a state issue, with national rather than state consequences and implications. To achieve this, it is recommended that states and territories refer their legal authority to the Commonwealth, to allow for the most straightforward avenue of s 109 of the AC and national consistency. This is further supported by Justice Bryant's comments that "laws should be standardised to avoid complex court cases and to end uncertainty" (UQ News, 2015).

To provide further safeguards, guidelines used by states in the United States who currently allow commercial surrogacy can be included. For example, guidelines which require a set fee (plus medical expenses) provided for equity purposes which in Australia would be equivalent to the minimum annual income (pro rata for a 9-month period, approximately \$27,000, similar to a wage not a 'profit'); a birth parent can only be available twice in her lifetime to be a surrogate and there must be a gap of at least 12 months between pregnancies (ABC Radio News, 2014). Those willing to be a surrogate could advertise and the medical provider (IVF clinic) could be legally obligated to ensure that a valid contract has been made through a solicitor before proceeding, increasing the fairness and equity of the process. This is supported by Professor Tremellen's study that found over 60% of Australians favour legislative change on the provision that "professional guidelines" are implemented (Miller, 2016).

**Conclusion**

The ability to have a family is often taken for granted, but for those where biology has made this impossible, technology has advanced to allow all couples to achieve a family. In Australia, this is a legal problem with a range of different altruistic surrogacy laws across the states and territories, and the end result is uncertainty about the law. This inconsistency is causing complications. However, it is evident that ratifying limited commercial surrogacy domestically can provide a supported environment in which all parties will be considered. This will ensure that the avenues of exploitation are reduced, providing the strict regulations of the process recommended are implemented. As Justice Bryant says, 'The law must keep up with scientific and societal changes' (UQ, 2015).

## Note

### Comprehending [4–5]

**precise use of legal terminology** throughout the report.

### Selecting [3–4]

**discerning choice of current and relevant legal information from primary and/or secondary sources relevant to Australian and/or Queensland law reform**

**perceptive use of legal information** throughout the report

**consistent and accurate documentation of legal information in the form of citations** throughout the report.

### Analysing [5–6]

**discerning use of evidence to support the analysis** throughout the report.

### Creating a response [3–4]

**concise expression and logical development of relevant ideas that enhance legal meaning** suited to the intended purpose throughout the whole report, demonstrated both with the order of main points and elaborations within paragraphs. Report is within the word count.

**features of the report genre are consistently demonstrated through a cover page**, table of contents, heading and subheadings. The introduction describes the aims of the report, establishes the importance of the issue, and succinctly outlines the report. The conclusion is consistent and summarises the analytical and evaluation main points.

**minimal errors in spelling, grammar and punctuation.**

### Selecting [3–4]

**consistent and accurate documentation of legal information in the form of a reference list**

in alphabetical order and using relevant information in a recognised system of referencing

## References

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