Submission to the Australian Law Reform Commission

In response to the Issues Paper: Review of Australia's surrogacy laws

Sarah Jefford OAM

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Introduction

My name is Sarah Jefford, and I offer this submission in response to the Issues Paper. I consent to my submission being identified and to be published.

About Sarah Jefford

I am a surrogacy lawyer, practising in surrogacy and donor law across Australia. I was an IVF parent, and later became an egg donor and a surrogate, delivering a baby for two dads in Melbourne in 2018. I am the only lawyer practising exclusively in surrogacy and donor conception in Australia.

I have published a book, *More Than Just a Baby*, a guide to surrogacy for intended parents and surrogates,[1] and I produced the *Australian Surrogacy Podcast*, sharing stories from intended parents and surrogates around Australia. I am a founder of the *Surrogacy Sisterhood Retreats* and care packages for Australian surrogates.[2]

I provide advice to intended parents and surrogates pursuing surrogacy within Australia, and to intended parents considering options for international surrogacy arrangements. I provide advice to over 400 clients each year, across all states and territories, including over 140 domestic surrogacy arrangements per year.

In 2023 I was awarded the medal of the Order of Australia for services to the law, and for my work with the surrogacy and donor communities. In 2024 I was awarded a Churchill Fellowship, to research best practice surrogacy frameworks, to inform law reform in Australia. My Fellowship report will be published in 2025.

Personal experience of surrogacy

My personal experience of surrogacy was wholly positive and rewarding. My family and I enjoy a fulfilling and close relationship with the family we helped to grow, and I credit the experience as a highlight of my life. I am incredibly proud of myself, my partner and the intended parents for navigating complex relationships and remaining focused on the best interests of the children in our families.

> *I did not 'give away' a baby; children are not possessions or gifts. What I gave was the possibility, experience and responsibility of parenthood.*

Surrogacy challenges societal expectations of womanhood and motherhood. Being a surrogate is a feminist act; it is an act of reproductive autonomy which I experienced as more empowering than anything else I have done in my lifetime.

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[1] Jefford, Sarah, *More Than Just a Baby: a guide to surrogacy for intended parents and surrogates* (2020).
[2] Jefford, Sarah, "The Surrogacy Sisterhood" sarahjefford.com/surrogacy-sisterhood/.

Views about surrogacy

While my experience was positive, I recognise that surrogacy is complex and challenging, and that it can be exploitative and harmful to the people involved and persons born. I have experience providing legal advice in over 2,000 domestic and international surrogacy arrangements over the last 9 years and have seen many examples of poor experiences and outcomes.

I consider that surrogacy would be improved through greater education, awareness and appropriate regulation, both in Australia and internationally.

Opponents of surrogacy claim that all surrogacy is exploitative and that it commodifies women and children. I agree that surrogacy can be exploitative. However, I know that Australian surrogates are empowered, well-informed women, capable of making decisions about their bodies and reproductive health. We intentionally conceive and carry a child that we do not wish to raise and doing so, we challenge the societal expectations of motherhood and womanhood. Any argument that all surrogates are exploited is patronising and reductive and denies our rights to autonomy.

> *Surrogates intentionally conceive and carry a child that we do not wish to raise and doing so, we challenge the societal expectations of motherhood and womanhood*.

Some opponents will call for surrogacy to be banned in Australia. They claim all surrogates are exploited while patronising us that they can speak on our behalf. They do not speak for me, nor the vast majority of surrogates in Australia. Banning surrogacy does not further the rights of women. Prohibition is another form of control over our reproductive decision-making.

There are many reasons why Australian surrogacy laws must be overhauled. Women who wish to be surrogates should be supported and empowered to do so, in a safe, well-regulated framework that recognises our rights to make informed reproductive decisions.

Children deserve to have their rights protected, and the best way to do that is to encourage and facilitate domestic surrogacy to reduce the instances of intended parents travelling overseas for surrogacy.

I encourage the Commission to give appropriate weight to submissions from those with lived experience of surrogacy and persons born via surrogacy, as well as the professionals who work in the field. Submissions from the industry should be scrutinised for vested, financial and conflicts of interest, which are prevalent in the industry.

Human Rights and Reform Principles

The Australian state and federal governments have a responsibility to ensure that ethical, best practice surrogacy is accessible in Australia, to reduce the instances of Australian citizens engaging in international surrogacy including in jurisdictions which are poorly regulated and where the parties and persons born may be exploited by the industry.

Law reform should focus on promoting the rights of persons born, the autonomy and welfare of women who choose to be surrogates, and the protection of the parties from harm and exploitation.

A legal framework should provide clarity with respect to parties' rights and responsibilities and promote the best interests of children and persons born.

> *People born through surrogacy have rights to identity, birth registration, citizenship, family and privacy, as well as access to information about their birth and genetic heritage*

Any reforms should promote and protect the rights of persons born through surrogacy.

A person who chooses to become a surrogate should have their rights protected. This includes the rights to make autonomous decisions about reproduction and health and during pregnancy and birth.

Intended parents should be able to make informed decisions about how to grow their family, free from discrimination across Australia.

Surrogacy laws should be inclusive of all family types, gender identities, sexuality and relationships. Legislation and policy should use language that fosters inclusivity and respects the integrity and humanity of everyone involved.

Barriers to domestic surrogacy

While between 130-150 surrogacy births occur in Australia each year,[3] up to 400 children are born via international surrogacy for Australian intended parents.[4] Many children are born in jurisdictions where surrogacy is poorly regulated, and there are many instances and allegations of exploitation, human trafficking and unethical practices. Nevertheless, many intended parents view international surrogacy as a more viable and realistic option than domestic surrogacy.

> *80% of Australian surrogacy arrangements are between friends and family.*

92% of intended parents who engage in international surrogacy would prefer to pursue domestic surrogacy, if they thought it was a viable option.[5]

Finding a surrogate

It is difficult to engage in surrogacy in Australia, with almost 80% of domestic arrangements involving friends or family.[6] The remaining 20% are founded on social media. Unless intended parents have a female relative or close friend willing to be their surrogate, it is often considered easier to travel overseas for surrogacy.[7] There are many more intended parents than there are surrogates in Australia.

> *Guaranteed baby overseas, or hope to find a surrogate in Australia: which would you choose?*

Intended parents understand that their best option for finding a surrogate in Australia is within their existing networks. Without a female relative or friend willing to offer, they know their only other option is to seek a stranger on social media.

Prohibitions on advertising

There are prohibitions on advertising for a surrogate or intended parents in several states. This only adds to the stigma and mystery of domestic surrogacy and reduces the overall community awareness of surrogacy.

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[3] Jefford, Sarah. "500 Australian Surrogacy Arrangements." sarahjefford.com/australian-surrogacy-arrangements/.
[4] Department of Home Affairs, *Administration of the Immigration and Citizenship Programs* (14th ed, February 2025) https://immi.homeaffairs.gov.au/programs-subsite/files/administration-immigration-programs-14th-edition.pdf
[5] Kneebone, Ezra, et al. "Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and Overseas." *Human Fertility*, vol. 26, no. 6, 2023, pp. 1448–1458.
[6] Jefford, above n 3.
[7] Kneebone, above n 5.

In Victoria, the prohibition on advertising prohibits any publication, statement, advertisement, notice or document the intention to find or become a surrogate, including via newspaper, television, radio or the internet.[8] Intended parents have faced police investigation for sharing their story with the media.

It is no wonder that finding a surrogate is difficult, if even sharing a story on social media may result in criminal repercussions.

Financial barriers

Intended parents consider the financial burden of surrogacy to be prohibitive of domestic surrogacy. This is made more difficult by restrictions on accessing Medicare rebates for surrogacy fertility treatments.[9] Additionally, post-birth expenses are a significant barrier for intended parents who may need $5,000 to $20,000 to meet the parentage order requirements.

Conversely, there are a lack of surrogates in Australia, because it is unpaid and expenses are tightly regulated. While most surrogates are not motivated by money,[10] there may be an increase in people nominating to be surrogates if it were compensated in Australia.

Inaccessible legal framework

The clear and obvious barrier for men in Western Australia is the discrimination inherent in the *Surrogacy Act* which only allows for surrogacy for *eligible women* and their partners.[11] Numerous gay male couples and single men living in Western Australia have travelled overseas for surrogacy or relocated interstate. Several have availed themselves of interstate surrogacy frameworks by utilising an address in another state.

> *Western Australia, 2025: single men and gay couples still cannot pursue surrogacy.*

The lack of consistency and harmony between state surrogacy laws are another likely barrier. This leads to confusion amongst the surrogacy community and likely leads intended parents to seek the clarity and surety of an international surrogacy arrangement instead.

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[8] *Assisted Reproductive Treatment Act 2008* (Victoria) s 45.
[9] Medicare Benefits Schedule - Item 13218 TN.1.4.
[10] Ana Martinez-Lopez and Beatriz Gomez, 'Surrogacy in the United States: Analysis of Sociodemographic Profiles and Motivations of Surrogates' (2024) Reproductive BioMedicine Online Volume 49, Issue 4, 104302.
[11] *Surrogacy Act 2008* (WA) s 19(2).

Lack of legal clarity

Intended parents view the lack of legal clarity surrounding parentage of their future child as a barrier to domestic surrogacy.[12] Many intended parents are confused and troubled by the idea that someone else will be the legal parent of their genetic child, and that a time-consuming and expensive parentage order process must be undertaken post-birth, and with the surrogate's consent.

Many intended parents cite the surrogate being listed on the birth certificate and a belief that she 'might keep the baby' as reasons why they lack confidence with domestic surrogacy.

Lack of matching services

There are no legitimate matching services in Australia, unlike in other jurisdictions such as the United States of America. Surrogacy Australia purports to match intended parents with surrogates[13] despite significant cost to intended parents and no guaranteed positive outcomes. Surrogates are outnumbered by intended parents, and Surrogacy Australia claims to have matched only thirteen arrangements in over 6 years.[14] These matches account for less than half a percent of all arrangements across Australia.[15]

> *Surrogacy Australia claims to have matched only thirteen arrangements in over 6 years.*

The facilitation of a surrogacy arrangement by a third-party, including introducing parties for the purpose of surrogacy, is restricted in several jurisdictions including South Australia,[16] Northern Territory[17] and Western Australia.[18]

Lack of awareness

There is a general lack of awareness of the availability and options for surrogacy in Australia. It may be easier for intended parents to find information from overseas surrogacy providers who are resourced enough to promote themselves to Australian intended parents. The Australian government website at www.surrogacy.gov.au is new and lacks detail.

The lack of awareness leads to prevailing myths in the wider community and the infertility and surrogacy communities. Many people believe that surrogacy is illegal, or that the

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[12] Kneebone, above n 5.
[13] Surrogacy Australia Support Service Register www.surrogacyaustralia.org/register.
[14] Surrogacy Australia Support Service Monthly Report, www.surrogacyaustralia.org/sass-monthly-report/ accessed 14 July 2024.
[15] Jefford, above n 3.
[16] *Surrogacy Act 2019* (SA) s24.
[17] *Surrogacy Act 2022* (NT) s 49.
[18] *Surrogacy Act 2008* (WA) s9.

surrogate will keep the baby. Intended parents exploring surrogacy often rely on social media to fill the gaps in their knowledge.

> *The most popular search about surrogacy is 'is surrogacy legal in Australia?'*

Trade shows run by Australian and international providers offer glossy marketing and 'guaranteed' babies which likely attract intended parents who may be unaware of local options. International services promise clarity and a smooth process, as well as offering egg donor options and quick turn-around for finding a surrogate. In a vacuum of information, it is no wonder that Australians travel overseas when credible and unbiased information is lacking for Australian surrogacy.

Eligibility for surrogacy

There should be no discrimination in any state or territory for intended parents seeking to pursue surrogacy. It is frustrating that intended parents still feel, in 2025, that they must relocate interstate, or travel overseas to pursue surrogacy because their own state laws are prohibitive.

> *Everyone should be free to pursue surrogacy in their home state, free from discrimination.*

Age

Eligibility requirements should include age provisions that can be waived, for example that intended parents must be over 25 unless a counsellor has assessed them to be of sufficient maturity.[19] Birth parents likewise should have minimum age requirements that are applied consistently.

Equality

There should be no limitations applied that discriminate on relationship status, gender identity or sexuality. There should be clarity about any upper age limits, noting that fertility clinics often apply their own policies for upper age limits for intended parents and surrogates, neither of which are legislated.

[19] *Surrogacy Act 2010* (NSW) ss 27 and 28.

Previous births

Most states do not require a surrogate to have previously delivered a child before being a surrogate. Some surrogates choose to carry a child and have not previously had a child themselves.

Decisions about a surrogate's physical health and fertility should be determined between her and a treating medical practitioner. Informed consent does not require previous experience of pregnancy and birth.

Medical need

Current legislation requires intended parents to have a medical or social need for surrogacy in all jurisdictions except the ACT. *Medical need* is broadly defined as someone who is unable to conceive, or carry a pregnancy to term, or to do so is risky for them or the baby.

Some legislation define medical need as being '*unable'* to conceive or carry.[20] But what does 'unable' mean in the context of subfertility? Who decides at which point someone is 'unable' to carry a pregnancy? Arguably anyone who has a uterus is still 'able' to be pregnant.

Clinicians may not be sufficiently aware of the legal definitions for eligibility, and intended parents who have a uterus often need to seek out a specialist who is willing to approve them for surrogacy. Intended parents are in a lottery to find a specialist willing to provide such an assessment.

Should fertility doctors and clinics be the arbiters of who can or cannot proceed to surrogacy? Should surrogacy only be available once someone has established that they are completely infertile and unable to carry a pregnancy?

> *It is easier for cis men to qualify for surrogacy than for women and people AFAB.*

There are no guidelines or laws that requires a certain number of pregnancy losses before someone is eligible for surrogacy. Many intended mothers are denied approval for surrogacy because their doctor lacks understanding of the eligibility criteria. Others are approved but only because they have someone who has offered to be their surrogate. Approval for surrogacy should not be based on whether a surrogate is available.

It is easier to be approved for surrogacy if the intended parent/s do not have a uterus, than for a person who has a uterus but should not, cannot, or does not want to use it. By definition, this means cis-gendered men find it easier to meet eligibility criteria than women and people assigned female at birth.

There should be explicit and clear guidelines for medical practitioners about eligibility for surrogacy and the legal requirements for them to make a recommendation. The

[20] *Surrogacy Act 2008* (WA) s 19(2)(a).

American Society for Reproductive Medicine has resources that could assist with developing such guidelines.[21]

Social surrogacy

What is often termed as 'social' surrogacy includes that which involves intended parents who have opted to pursue surrogacy without being medically infertile. This includes women and people assigned female at birth (AFAB) who do not wish to carry a pregnancy, for a variety of reasons including career, body dysphoria and mental health.

> *Everyone with a uterus should be free to decide*
> *whether to be pregnant to grow their family,*
> *or to help someone else grow theirs.*

People with a psychological reason to pursue surrogacy, including those with tokophobia (fear of pregnancy) and those who are trans or gender diverse also face barriers, by having to prove their 'need' for surrogacy more so than someone with a physical risk or incapacity for pregnancy.

Medical practitioners often believe that if a patient has a uterus, they are not eligible for surrogacy. There are no clear guidelines for establishing if someone has a psychological need.

> *"My doctor said I had 'only' had seven miscarriages,*
> *and that as long as I still had a uterus,*
> *I was not able to pursue surrogacy."*

Intended mothers with a psychological need arising from the stress and trauma of fertility treatments, failed attempts and pregnancy losses are unlikely to be approved to proceed with surrogacy. The process to establish a psychological need may of itself be traumatic and inequitable.

We must consider why it is that a single man or same sex male couple qualify for surrogacy simply by choosing to pursue it, while a woman or someone AFAB must fight for the same option. Possession of a uterus should not burden someone to make use of it against their wellbeing or wishes.

As a surrogate and mother of two children, I made empowered choices to conceive and carry each pregnancy to term. The same reproductive choices should be available to every other woman and person AFAB, including the choice to pursue surrogacy instead of carrying a pregnancy themselves.

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[21] American Society of Reproductive Medicine, Recommendations for practices using gestational carriers: a committee opinion, 2022 https://www.asrm.org/practice-guidance/practice-committee-documents/recommendations-for-practices-using-gestational-carriers-a-committee-opinion-2022/

Opponents of surrogacy may argue against ‘social surrogacy’ for people who have a uterus and do not wish to use it. One argument is that they should not be allowed to ‘use’ someone else’s uterus when their own is functional.

I believe that the decision to be a surrogate extends to a choice about who to carry for, including to carry for someone who opts for social surrogacy.

> *Forced pregnancy is misogynistic and patriarchal.*

Critics of social surrogacy may argue that pregnancy is risky for surrogates, and that no one should be able to ‘opt-out’ of pregnancy if they have no medical need. Such a view reduces women to their reproductive organs and denies their agency and autonomy.

There is no difference between a person with a uterus and a person without, both making decisions to pursue surrogacy to grow their family. Men are no more entitled to make a decision to pursue surrogacy than women and people AFAB.

RECOMMENDATION: Uniform, consistent and harmonious surrogacy laws should be accessible across the country.

RECOMMENDATION: Anyone who wishes to engage in surrogacy in Australia should be subject to safeguards designed to protect the parties and people born without discrimination.

RECOMMENDATION: There should be no requirement to establish a physical or medical need for surrogacy.

RECOMMENDATION: Any requirement for there to be a ‘medical need’ to pursue surrogacy should be based on standards established and reviewable by independent authority.

Enforceability

There is confusion amongst the community about the intent and reasoning of the unenforceability of a surrogacy agreement. There is a need to protect the surrogate's autonomy including to make decisions during pregnancy and birth. There is also a need to protect a surrogate's interest in enforcing the payment of expenses. Further, a child's rights and best interests should be promoted above any adult's interests including that of the intended parents.

It is possible to establish a framework that simultaneously protects a surrogate's right to autonomy, ensures her expenses are recoverable, and provides the intended parents with some clarity as to the legal parentage of a child born via surrogacy. Surrogates do not wish to be the legal parent of the child they are carrying and would appreciate knowing the arrangement can be enforced.

> *A surrogate does not wish to be the legal parent of the child they are carrying.*

A pre-birth parentage order mechanism may provide such a framework whereby the default position is that the intended parents will be the legal parents of the child, and if the surrogate chooses to renege then the onus is on her to dispute the transfer of parentage.

A surrogate should always feel secure that her autonomy and interests are protected and that she cannot be forced to compromise her autonomy to please the intended parents.

Enforceable surrogacy agreements must protect the surrogate's rights and the rights of the child above the interests of the intended parents.

RECOMMENDATION: Enforcement of a surrogacy agreement should not compromise the surrogate's autonomy and agency nor the child's best interests.

Process requirements

Ethical, best practice surrogacy that protects the rights and interests of the parties and the persons born can be achieved through ensuring the parties have access to counselling and psychological assessment, and independent legal advice.

> *Safeguards including counselling and legal advice protect the interests of the parties and the rights of the child.*

All parties to a domestic surrogacy arrangement should engage with counselling with a sufficiently experienced and qualified surrogacy counsellor, who is a full member of the Australia & New Zealand Infertility Counsellors Association (ANZICA).

All parties should obtain legal advice with independent legal practitioners. Informed consent from each party can only be assured after counselling and independent legal advice.

Surrogacy arrangements should obtain approval from an independent regulatory authority similar to Victoria's Patient Review Panel. The authority should be tasked with ensuring the parties have received legal advice and counselling and psychological assessment. Further discussion continues below with respect to oversight mechanisms.

There should be legislative mechanisms to allow for a transfer of parentage for those arrangements that have not met the pre-surrogacy criteria or obtained approval. Such mechanisms should focus on the best interests of the child born and exceptional circumstances that might give rise to such an application.

Applications for a parentage order should require evidence of counselling having been completed and legal advice having been obtained. Certificates from respective professionals should be sufficient as evidence, noting the privilege of legal advice.

RECOMMENDATION: An Assisted Reproduction Commission should regulate surrogacy in Australia, including determining whether a surrogacy arrangement should proceed.

RECOMMENDATION: All parties to a surrogacy arrangement should complete counselling and obtain independent legal advice prior to entering a surrogacy arrangement.

Written surrogacy agreements

Most states require the parties to sign a written surrogacy agreement after counselling and legal advice, and prior to any pregnancy attempts. No jurisdiction prescribes the contents of a surrogacy agreement, only that it is evidence of the surrogacy arrangement and a prerequisite for the parentage order.

Nothing in a written surrogacy agreement is binding on the parties, save for that the intended parents are liable for the payment of the surrogate's expenses. Despite this, some agreements are drafted as if they are binding, with clauses purporting to control the surrogate's conduct including controlling her food intake, exercise regime and travel. Other clauses go so far as to place blame on a surrogate when a miscarriage occurs:

> *The intended parents shall indemnify and keep indemnified the surrogate from any liability for said death, unless the death of the foetus is caused by the surrogate's own wanton recklessness, failure to comply with the terms of this surrogacy arrangement, failure to reasonably follow all prescribed medical regimens, or other conduct intended to harm the foetus*.

It cannot be said that clauses such as this are conducive to a positive relationship between the parties or protect the surrogate's autonomy. Nor is it enforceable, in a

country that protects the right to abortion and women's autonomy. To suggest that a pregnancy loss could be due to 'wanton recklessness' is offensive to all women.

There are no professional guidelines for drafting a surrogacy agreement, and it is common for the parties to cut and paste a version they have found on social media, or for practitioners to copy and paste from another jurisdiction.

Surrogacy agreements are not enforceable, but they are required in most states and are prerequisites for a parentage order. The community generally lacks understanding about the importance, and limitations, of a written surrogacy agreement.

Professional services

Surrogacy matching services

One of the main barriers to surrogacy in Australia is the difficulty in finding a surrogate. Parties are left to navigate the requirements and processes of surrogacy themselves, often relying on social media for information. Parties may seek to enter a surrogacy arrangement that they are not psychologically equipped and/or do not meet the legal requirements for. Parties can become invested in a surrogacy arrangement that is not in their best interests or that of the child.

In overseas jurisdictions and most particularly in the United States of America, hundreds of matching services operate in what is generally an under-regulated free market. Former surrogates and intended parents are free to start a matching service, despite lacking business skills or professional qualifications.

Poor regulation in the United States has resulted in allegations of human trafficking as recently as July 2025.[22]

In Australia, several states prohibit advertising for and/or facilitating a surrogacy arrangement.[23] Despite these restrictions, Surrogacy Australia founded the Surrogacy Australia Support Service in 2019, promoting itself as facilitating matches between intended parents and surrogates. The Service does not adhere to any professional code of conduct, ethical standards or guidelines.

Professionals such as lawyers, counsellors and clinicians are all heavily regulated in their respective fields; Surrogacy Australia is a consumer body with no regulatory oversight. The Service is not required to guarantee a match, nor promote the rights of the parties or people born. Surrogacy Australia is not required to ensure a match meets the legal requirements for a surrogacy arrangement or a parentage order.

> *Surrogacy matching services should be regulated and licensed in Australia.*

Surrogacy Australia claims to have matched a mere 13 arrangements in over 6 years,[24] accounting for less than half a percent of all surrogacy arrangements across the country.[25] Many more intended parents have joined the Service and paid the considerable membership fees, despite there being no available surrogates and no guaranteed match.

Many intended parents have sought refunds and been denied. Surrogacy Australia claims the fees paid are 'administrative fees.' This is similar to the controversial practice in Canada, where agencies are not allowed to charge a fee for 'matching' and instead

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[22] Live Action News, 'Surrogacy agency labeled "national security threat"', *Live Action* (online, 6 July 2025) https://www.liveaction.org/news/surrogacy-agency-national-security-threat/.
[23] *Surrogacy Act 2019* (SA) s 24; *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2008* (WA) s 9.
[24] Surrogacy Australia Support Service Monthly Report, www.surrogacyaustralia.org/sass-monthly-report/ accessed 8 July 2025.
[25] Jefford, above n 3.

charge considerable 'administrative fees' which are not refunded when services do not meet expectations.

A new framework: licensed, non-profit matching services

In New York, a licensing framework was introduced in 2021 pursuant to the *Child-Parent Security Act* (CPSA).[26] Surrogacy matching services must be licensed by the Department of Health and are required to meet strict standards for compliance including for financial management and adherence to regulation. The licensing system provides some protection for surrogates and intended parents, including ensuring the parties are well-informed and supported throughout the process.

Additionally, the CPSA implements a Surrogate's Bill of Rights, protecting and promoting surrogates' rights to autonomy, independent legal counsel, health and life insurance, mental health support and counselling and the right to terminate the arrangement.[27]

> *Matching services should be not-for-profit, to protect the interests of the parties.*

A licensing framework for matching services in Australia would reduce barriers to domestic surrogacy in Australia, while protecting the interests of the parties. Such a framework could be regulated by the Department of Health or a government regulatory authority such as an Assisted Reproductive Treatment Commission.

Surrogacy matching services should be regulated, licensed not-for profit services to ensure that financial interests do not compromise best practice ethical standards and the protection of the parties' rights and interests of persons born.

RECOMMENDATION: Surrogacy matching services should be regulated and licensed non-profits overseen by a regulatory authority.

Counselling services

Counselling is provided by surrogacy counsellors of varying qualifications and experience. There is no consistent requirements, although most counsellors are registered members of the Australia & New Zealand Infertility Counsellors Association (ANZICA). ANZICA is a body within the Fertility Society of Australia, and while it provides training and support for fertility counsellors, it is not a regulatory body and is not empowered to regulate counselling services. Counsellors hold membership with regulatory bodies such as the Australian Psychological Society.

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[26] *Family Court Act* art 5-C §§ 581-101–581-703 (NY, enacted 2020).
[27] *Family Court Act* art 5-C, Part 6 (NY, enacted 2020).

There are no legislative standards for fertility or surrogacy counsellors. Most legislation defines a qualified counsellor[28] and the requirements for surrogacy counselling including, for example, 'about the surrogacy arrangement and its social and psychological implications.'[29]

Ultimately, a counsellor can hold themselves out as practicing in surrogacy counselling with very little oversight or scrutiny beyond membership of ANZICA, which is not empowered to regulate the profession.

A regulatory authority should establish standards for all surrogacy counselling across the country and license practitioners to provide counselling for surrogacy arrangements. Fertility and surrogacy counselling is specialised, and there are very few practitioners qualified and sufficiently experienced to provide services.

The Fertility Society of Australia is an industry-led body that should not be regulating the industry it serves. An independent, not-for-profit regulator should have oversight over all fertility and surrogacy services.

Surrogacy counselling services should be independent of fertility clinics. There are inconsistencies between state legislation, but in practice most surrogacy counselling is provided by independent counsellors except in Victoria.

Clinic-employed counsellors are conflicted in the services and support they can provide. Specialised fertility and surrogacy counsellors outside the clinics can provide independent support and assessment for the parties without being accountable to a fertility services provider.

Clinics determine treatment and services for most surrogacy arrangements. These should not be conflicted by counselling and assessments provided by their own employees.

RECOMMENDATION: Surrogacy counsellors should be appropriately qualified and subject to scrutiny by a regulator.

RECOMMENDATION: Surrogacy counsellors should adhere to regulated standards for the provision of surrogacy counselling.

[28] See for example, *Surrogacy Act 2010* (NSW) s 4.
[29] See for example, *Surrogacy Act 2010* (NSW) s 35.

Advertising and regulation

There is no good reason for continuing the prohibitions on advertising for surrogates or for intended parents. While such laws serve to frighten the community, they are not upheld or policed. An online search reveals multiple advertisements for international surrogacy providers with no regulation. In the modern world where so much communication occurs online and via social media, it is pointless to prohibit communication about surrogacy or to seek a surrogate or intended parents.

> *Removing prohibitions on advertising may improve awareness and destigmatise surrogacy in Australia.*

Allowing advertising for a surrogate or intended parents may serve to raise the profile of surrogacy in Australia and contribute to open discourse about surrogacy, in turn reducing stigma and mystery.

While the community should not be restricted from publishing and advertising, services including fertility clinics and matching services should be restricted.

Media reporting

There are prohibitions on publishing identifying details about a surrogacy arrangement and parentage order proceedings without the consent of the parties, in most states.[30] Most media are unaware of the prohibitions.

Requests from media often pitch a story in a positive light; there is no guarantee that the final article will not pit intended parents against conservative pundits[31] and often without informed consent from the families involved. Intended parents and surrogates are not trained in handling media, are often unaware of the prohibitions on reporting, and are powerless to control the final story or resulting commentary.

Commercial media like *A Current Affair* and Sky News are not interested in promoting the best interests of children or protecting the privacy and integrity of the parties. Even the ABC will exploit a family for a story.

There should be continued restrictions on media reporting of surrogacy.

RECOMMENDATION: Advertising for a surrogate or intended parents should be permitted, save for ensuring compliance with laws for compensation/commercial surrogacy.

RECOMMENDATION: Media reporting of surrogacy should be regulated and limited.

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[30] For example, *Surrogacy Act 2010* (NSW) s 52.

[31] Schubert, S., & Bell, J. (2025, June 28). *Debate grows over Australia's surrogacy laws as more couples look overseas*. ABC News. https://www.abc.net.au/news/2025-06-28/surrogacy-laws-review-commercial-surrogacy-in-australia/105431798.

Access to Medicare and Parental Leave

Medicare rebates for surrogacy fertility treatments

Medicare rebates are available for people accessing assisted reproductive treatments for infertility. This includes many different treatments for infertility, making treatments more affordable and accessible for those experiencing infertility.

However, the rebates are not available for those relying assisted reproductive treatments if it is associated with a surrogacy arrangement.

> *Restricting Medicare rebates for surrogacy discriminates against people without a uterus. No uterus, no rebate.*

The Medicare Benefits Schedule, Category 3 Therapeutic procedures Note TN1.4, which states:

> *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'.*[32]

The exclusion of surrogacy from the MBS discriminates against people who cannot conceive or carry a child themselves, and such discrimination is not applied fairly within that cohort. Below are two scenarios that illustrate the issue.

> **Scenario 1:** A woman and her partner experiencing infertility, seek treatment to create embryos. They can access Medicare rebates for the treatment because it is considered that the woman will use the embryos to achieve a pregnancy herself.

> **Scenario 2:** A woman and her partner seek treatment to create embryos. The woman is infertile due to previous cancer diagnosis and hysterectomy. They cannot access Medicare rebates by reason of needing a surrogate to achieve a pregnancy.

[32] Australian Government Department of Health and Aged Care, *Medicare Benefits Schedule: Category 3 – Therapeutic Procedures Note TN.1.4.*

The fertility treatment provided to the women in both scenarios is exactly the same. The only difference is that the woman in the first scenario can potentially achieve a pregnancy herself, and the woman in the second scenario cannot.

Notably, the woman in the first scenario may go on to need a surrogate, if she cannot achieve a pregnancy herself. However, as she created embryos before the diagnosed need for surrogacy, she and her partner can access Medicare rebates.

Fertility clinics have the discretion to classify fertility treatment as *fertility preservation* or *in conjunction with a surrogacy arrangement*. The difference in classification results in a disparity between those who can access Medicare rebates and those who cannot and is often determined at the discretion of a clinician.

The exclusion of surrogacy from the MBS impacts very few people, but the impact is significant for those people. Including fertility treatments rendered in conjunction with a surrogacy arrangement would have very little impact on the budget, but it could be life-changing for the people who need it.

There is no justification for refusing access to Medicare rebates for treatment in conjunction with a surrogacy arrangement. The impact of the current exclusion is to discriminate against those who cannot carry a child themselves. It is right and fair that anyone accessing fertility treatment should be able to access the same Medicare rebates without discrimination.

RECOMMENDATION: Remove the exclusion contained in TN1.4 and allow Medicare rebates for fertility treatment provided in conjunction with a surrogacy arrangement.

Parental leave - Centrelink

Services Australia provides that a person who has become a parent via surrogacy may be eligible to claim the government's Paid Parental Leave.[33] A surrogate may also be eligible, noting that she needs to take time off work to deliver the child and recover.

In practice, however, Centrelink staff are often not aware of the policy and will regularly impart their (false) opinions that: -

1. The intended parent is not eligible for PPL because they did not deliver the child.
2. The surrogate is not eligible for PPL because she is not caring for the child.
3. The surrogate and the intended parent must 'share' the PPL between them.
4. The intended parent cannot obtain PPL until a parentage order is made.

It is common for parties to apply for PPL and either or both be denied, only to appeal the decision and be approved. Requirements to provide a copy of the parentage order are inconsistent, lack understanding of the parentage order process and timeline, and deny

[33] Department of Social Services. (2025, May 12). *1.1.S.100 Surrogacy arrangement*. Paid Parental Leave Guide. https://guides.dss.gov.au/paid-parental-leave-guide/1/1/s/100.

that the child is in the care of the intended parents regardless of whether a parentage order has been made.

Centrelink requests for parentage orders are ignorant of laws that restrict access to court documents[34] and place additional, discriminatory requirements on parents through surrogacy.

Centrelink staff lack training and knowledge about surrogacy laws in Australia, and their own PPL policies.

RECOMMENDATION: Services Australia should develop clear and consistent policies for surrogacy births and provide education and training for their staff.

RECOMMENDATION: Specific surrogacy teams should be established within Services Australia to manage services for children born via surrogacy.

Parental Leave – employee benefits

Most employers in Australia have a parental leave policy that rarely mentions surrogacy. Adoption policies may be applied in circumstances involving surrogacy. Employers have little understanding of surrogacy or how to apply existing policies to employees who are intended parents or surrogates.

The New South Wales Department of Education is widely known for demanding that employee paid parental leave can only be granted on production of a parentage order made for an altruistic surrogacy arrangement. No other New South Wales government department applies this policy. Intended parent couples where one works for the Department of Education has been denied employee paid parental leave, while their partner who works for a different government department, is paid the entirety of their benefits.

> *The New South Wales Department of Education is the only government department that refuses paid parental leave for employees who have engaged in international surrogacy.*

Parental leave eligibility should be based on the need to recover from pregnancy and birth, and/or caring responsibilities for a newborn. Giving birth is not synonymous with caring for a newborn. The NSW Department of Education approach discriminates against parents who have had a child born via surrogacy, generally, and particularly for those born via international surrogacy. It is not the Department's job to police surrogacy arrangements or family planning of their staff.

[34] For example, *Surrogacy Act 2010* (NSW) s 53; *Surrogacy Act 2010* (QLD) s 52; *Status of Children Act 1974* (VIC) s 33.

A parentage order should not be used as evidence to claim parental leave, noting that most legislation requires that the proceedings remain confidential, and that the parties to the agreement are entitled to their privacy.

In case we thought the NSW Department of Education was an outlier, the federal government's Department of Home Affairs has required its employees to produce a copy of the parentage order before granting paid parental leave, including for children born via

> *Government departments are the most egregious in denying access to parental leave for employees who have entered a surrogacy arrangement.*

domestic surrogacy. This is despite advice that the parentage order proceedings were confidential and access to court documents are restricted,[35] that the surrogate was not a Department employee and that the parties are entitled to their privacy. The child is entitled to their privacy.

The parentage order application and hearing could take 6-12 months. What then, for an intended parent at home caring for their newborn, on unpaid leave, while waiting for the parentage order? Why are their colleagues who can gestate, able to access parental leave immediately, while they must prove that they have legal parentage of the child by producing a confidential court document?

It cannot be said that discriminatory parental leave policies benefit the children born via surrogacy. If our government is concerned with ensuring that children have the very best care from their parents, then policies for parental leave should be accessible for all parents, not just those with reproductive capabilities.

Some employers make value judgements that discriminate against intended parents who have welcomed their child via surrogacy. Government employers are often the most egregious and the most inflexible.

Employers have a responsibility to respect the privacy of their employees and to ensure employee leave policies are applied equally and without discrimination.

Surrogates' access to parental leave

Surrogate's access to employee parental leave during a surrogacy pregnancy and after the birth is often a point of confusion amongst the parties and the surrogate's employer.

> *Surrogates are told they can only have two weeks leave before returning to work because they "aren't caring for a newborn."*

[35] *Surrogacy Act 2010* (NSW) s 53.

A pregnant surrogate is no different from any other pregnant person and should be treated as such during the pregnancy – including being able to access leave entitlements.

Some employment policies stipulate that parental leave is only accessible as long as the baby is in the care of the employee. This archaic phrasing denies that a pregnant person must recover from the birth regardless of whether they have newborn in their care.

The *Fair Work Act* prohibits an employer from compelling an employee to return to work earlier than 6 weeks after delivering a baby. Employers are generally unaware of the impact of pregnancy and birth and completely unaware of their obligations to their employees.

RECOMMENDATION: State and federal governments should develop clear, consistent, inclusive and accessible parental leave policies for intended parents and surrogates, including for parents who have welcomed their child via international surrogacy.

Affordability

A major barrier to engaging in surrogacy is the financial burden on intended parents. We regularly speak of the costs of surrogacy in Australia being between $15,000 and $80,000, with some being over $100,000. Variables include the cost and success of infertility treatment, the surrogate's expenses including for time off work due to bedrest, legal fees, counselling and post-birth parentage expenses.

> *Surrogacy is expensive and not everyone can afford it.*
>
> *Medicare rebates for fertility treatment would help.*

International surrogacy can exceed $200,000.

Many intended parents seek early access to their superannuation, draw on equity in their home, personal loans and financial support from their families and friends.

One argument against introducing compensated surrogacy in Australia is that it will make it less affordable for many intended parents. The financial burden of surrogacy should not be placed on altruistic surrogates.

Government subsidies for counselling services might also be considered, as well as loan schemes that specifically address the affordability of surrogacy.

Pre-birth parentage orders that do not require post-birth counselling or extraordinary legal fees would also assist with the affordability and accessibility of surrogacy in Australia.

RECOMMENDATION: Medicare rebates should be available for all fertility treatments including for surrogacy.

Reimbursing and Compensating surrogates

There will be many who consider that only altruistic surrogacy should be legal in Australia. I too, once considered that surrogates should not be paid, and I was not motivated to be a surrogate for financial reasons. I considered that I should not be paid, and that the child born should not be bought or sold.

However, it is established fact that surrogates who are compensated, are also motivated by altruism, empathy and a desire to help people.[36] Compensation for gestational services can be ethical, regulated and not conditional or connected to the relinquishment of a child or transfer of parentage.

The fertility and surrogacy industries are multi-million-dollar industries, where every professional is paid. Fertility specialists, lawyers, counsellors, obstetricians, midwives and birth photographers are all paid for their involvement in a surrogacy arrangement. The one person taking most of the risk and giving many hundreds of hours of their time to surrogacy, pregnancy and birth, is the surrogate, and she is unpaid. While critics consider that commercial surrogacy exploits women, it is a fact that the industry benefits from the unpaid labour of altruistic surrogates in Australia.

> *Altruistic surrogacy exploits the unpaid labour of women.*

There are many examples of the risks that women take when pregnant. In surrogacy, intended parents can cover prescribed expenses including for medical expenses arising from the birth. However, there is no compensation for the time it takes to recover from birth injuries or post-partum recovery.

While there is concern that people born through compensated surrogacy may perceive their conception as transactional, equal attention must be paid to the broader issue—that women are too often conditioned to perform labour for free while others profit from their efforts.

It is right and fair that surrogates are compensated for their time, commitment and the risks they take when carrying a baby for someone else. Surrogates can be simultaneously motivated by empathy and altruism and compensated for their time. The two are not mutually exclusive.

Compensating surrogates will lead to an increase in surrogacy in Australia, which addresses some issues of accessibility and lowers the chances of intended parents travelling overseas for surrogacy. In turn, the risks of cross-border surrogacy are reduced, and the instance of exploitation is lowered.

Australia cannot continue to criminalise our citizens for engaging in international commercial surrogacy while failing to provide an accessible framework for surrogacy in our own country. We have a responsibility to the women and children globally, to ensure

[36] Martinez-Lopez above n 10.

our citizens – intended parents and industry business – are not exploiting people in other countries.

Allegations of exploitation should be directed at unregulated industry players—such as intermediaries, agencies, and trade show organisers - who operate without oversight. Intended parents are just as likely to be exploited as surrogates and should be protected from the industry that makes money from their desperation to be parents.

> *Allegations of exploitation should be directed at the industry. Let's regulate the players.*

There are ways to safeguard surrogates and the persons born, while compensating surrogates. Safeguards should include access to counselling and legal advice. Income earning, or eligibility for social security payments, should not determine whether a woman can become a surrogate.

The consequences of altruistic surrogacy

There are many that believe only altruistic surrogacy should be allowed in Australia. My professional colleagues – lawyers and counsellors – will have differing views. We can all agree that most disputes during surrogacy arrangements are primarily about payment of expenses. Altruistic does not mean problem-free.

The prescribed expenses in existing legislation is often used to deny payments for legitimate expenses.

Surrogates are, more often than not, out of pocket. They are lucky to break even. A surrogate should not be reliant on luck as to whether she is left out of pocket.

By way of example:

> The parties agreed, prior to entering the arrangement, that the intended parents would pay for birth photography for the surrogacy birth.
>
> During the latter part of the pregnancy, the intended parents changed their minds about paying for birth photography. The lawyer for the intended parents advised that payment for birth photography was outside the law and therefore a 'commercial' payment. The intended parents relied on this advice to renege.
>
> As a consequence, an altruistic surrogate had to pay for birth photography, if she wished to have a photographic record of the momentous event. The intended parents could restrict her from publishing the photographs without their consent.

Birth photography, while outside the list of prescribed expenses, does not amount to commercial surrogacy. It is not paid for in exchange for the relinquishment of the child. The same can be said for occasional meal deliveries, doula and birth supports and café meals at hospital appointments.

Surrogate's partner's expenses are not explicitly included in most legislation beyond the Victorian regulations.[37] Payment for the surrogate's partner's expenses, including time off work, relies on the good faith of the parties and their lawyers to negotiate what is reasonable and required in the circumstances.

As long as we have altruistic surrogacy and prescribed expenses, there will be disputes about finances.

Altruistic surrogacy is not best practice and does not negate exploitation. Altruistic motivations and compensation are not mutually exclusive.

Tying payments to the transfer of parentage

The current framework for the payment of surrogate expenses leave the parties open to exploitation by the other parties and can lead to breakdowns in relationships. Differences in expectations are managed privately, between the parties' lawyers or with counsellors. Ultimately, any disputes about finances may be tied to whether the surrogate will consent to a parentage order, leaving the welfare of the child at risk.

Intended parents can feel obliged to meet their surrogate's demands for expenses that are not reasonable; surrogates may feel their value is tied to their submission to the intended parents and feel pressured to keep costs low.

When a surrogate feels undervalued or unsupported within this framework, she might find subtle ways to seek acknowledgment or redress—such as asking for payments that stretch the definition of "reasonable expenses." Examples might include luxury wardrobe purchases or seeking extended time off work without medical reason.

Equally, the intended parents may make promises to meet the surrogate's expenses during the pre-surrogacy stage, only to refuse or attempt to re-negotiate once a pregnancy is established. Some intended parents seek a parentage order at the earliest opportunity, so that they can stop all further expense payments to their surrogate.

Regardless of the framework, some people consider surrogacy is a transaction and are not minded or sufficiently aware to place the needs of the child, or the other parties, above their own interests.

> *It cannot be said that altruistic surrogacy is ethical, or best practice, when the current system is open to exploitation and risks the relationships and wellbeing of the parties.*

It is in a child's best interests that their parents and the birth parents maintain an ongoing relationship well beyond their birth. Disputes about finances undermine and risk the relationships at the cost of the child knowing their birth parents and at the parties' wellbeing.

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[37] *Assisted Reproductive Treatment Regulations 2024* (Victoria) 11A.

The case of *Lamb & Shaw*[38] can be considered an example of how financial disputes contributed to the breakdown in the parties' relationships.

Compensation framework

It is possible to regulate surrogacy financial compensation while not compromising on the rights for a surrogate to maintain bodily autonomy and decision-making during pregnancy and birth. Compensation that is not tied to the relinquishment of a child or transfer of parentage also protects the rights and interests of the child.

Payments for gestational services may include instalments for every week or month of pregnancy. Regulated, capped amounts determined by a government authority, may serve to manage the expectations of the parties and safeguard against exploitation.

> *Regulated, compensated surrogacy in Australia will reduce the instances of exploitation of women in other countries.*

In a free market and where there are many more intended parents than surrogates, compensation may be determined by a surrogate, and this leads to increased costs and unreasonable expectations in the community. Surrogacy in the United States, for example, has become financially out of reach for many intended parents, as surrogates set their own compensation rates. A regulated system of compensation would assist in protecting the parties and ensuring accessibility.

Prescribed expenses and compensation

Recent public discourse about the introduction of commercial surrogacy in Australia illustrates a lack of awareness and understanding of the nuance of compensating surrogates for gestational services, as opposed to 'buying babies' and human trafficking.[39]

> *Compensated surrogacy is no more exploitative than paying people to clean houses, work in the mines or do police and emergency services work.*

Some critics claim that commercial surrogacy is exploitative but ignore that altruistic surrogacy exploits the unpaid labour of women. Critics claim surrogates are exploited but fail to see that blame should be placed squarely on the industry that is unregulated.

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[38] *Lamb and Anor & Shaw* [2017] FamCA 769 paragraphs 21, 29, 41.
[39] Schubert and Bell, above n 32.

I am very well aware of the laws against human trafficking and the risks of exploitation. It is disheartening to see media and public commentary dismiss all commercial surrogacy as exploitative while denying that altruistic surrogacy can also be exploitative and failing to consider that a clear way to improve accessibility of surrogacy in Australia is to compensate surrogates.

It is patronising to tell a woman she cannot decide what she does with her own body, or that to be paid is exploitative. Everyone has a right to work, the opportunity to gain a living as they freely choose, fair wages and safe and healthy work conditions.[40]

> *Everyone has the right to the opportunity to gain a living by work which they freely chooses or accepts: ICESCR article 6.*

For this reason, I suggest framing any recommendations for law reform in favour of compensation, and not commercial surrogacy, and to include compensation as a 'prescribed expense' to be clear that payments are not in exchange for relinquishing a child or the transfer of parentage.

Compensation: what does it look like?

In the United Kingdom, some advocates promote gifts and 'recuperation holidays' payable by intended parents to show appreciation for their surrogate. Such payments are almost entirely unregulated, with courts giving retrospective approval of payments only after the child is born. No cases have found payments to go beyond what is considered 'reasonable.'

Gestational services can be included within the prescribed expenses clauses of legislation. Such a provision may be:

> The reasonable payment of gestational services, additional to costs incurred, of up to $1,000 per fortnight of pregnancy and for 12 weeks after the birth, amounting to no more than $26,000.

Pregnancy length should be framed in weeks, not months, to avoid ambiguity.

Compensation amounts should be regulated to avoid the free market that risks commodifying surrogates and exploiting intended parents.

A framework that recognises pregnancy as work reflects that pregnancy length varies and that surrogates would receive payments for gestational services based on the length of pregnancy and not for relinquishing the child or transferring parentage.

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[40] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 6–7.

Tax implications must also be considered. If payments are to be treated as taxable income, the parties must obtain tax advice about the implications of paying and receiving funds for the purpose of surrogacy gestational services.

Escrow services

Noting the difficulties in altruistic and compensated surrogacy, independent, not-for-profit escrow services can manage payments and reimbursements between the intended parents and the surrogate. Services could be optional for arrangements between friends and family and required for arrangements formed through matching services.

Escrow services can assist in managing and resolving disputes between the parties, ensure adherence to regulatory requirements and agreements. Services can protect the parties from exploitation and ensure the surrogate has access to ongoing support including counselling and legal advice.

RECOMMENDATION: Compensated surrogacy, within a regulated framework that recognises the work of surrogacy, pregnancy and birth, should be introduced in Australia.

RECOMMENDATION: Compensation should not be tied to the relinquishment of a child or transfer of parentage.

RECOMMENDATION: Compensation should be included in existing provisions for prescribed expenses.

RECOMMENDATION: Rates of compensation should be determined by a regulatory authority and subject to increase in accordance to a formula or CPI.

RECOMMENDATION: Non-profit escrow services should facilitate the financial arrangements between intended parents and surrogates.

Legal Parentage

There are many problems with existing frameworks for transferring parentage and recognition of parentage for children born through surrogacy.

Post-birth transfers of parentage have consequences for all parties to a surrogacy arrangement and for the child. Issues include:

1. Hospital care and lack of recognition of the intended parents and forced parental responsibility on a surrogate.
2. Succession and estate planning for all parties.
3. Parentage order applications
    a. Post-birth counselling.
    b. Costs and evidentiary requirements.
    c. Surrogate & Partner's consent.
4. Access to Medicare and medical treatment for the child.
5. Access to Centrelink and workplace parental leave schemes.
6. Passports and travel.

Hospital care of a surrogacy birth

The current parentage order process results in legal ambiguity with respect to the child's care, including in hospital after the birth, and parental responsibility. Post-birth transfers of parentage result in uncertainty with hospitals providing prenatal, pregnancy and birth care. Hospital staff are unsure about the rights and responsibilities of the parties, often requiring the surrogate's consent to the baby's treatment, and refusing access to hospital care and accommodation to the intended parents. Intended parents have been denied a hospital room to care for their newborn, having to sleep in a chair or on the floor of the surrogate's room.

Surrogates have been told that they must 'teach' the intended parents how to care for the child, including preparing bottles of formula, as the hospital only recognises the surrogate as the patient and does not extend a duty of care to the intended parents.

> *"The legal mother may handover the baby to the intended parents in the carpark"*
> *(Hospital management).*

Surrogates and intended parents are often advised that the physical hand-over of the child must occur outside the hospital. It is wholly inappropriate and unacceptable that children born via surrogacy must be handed over in hospital carparks, with a sense of shame and stigma associated with their birth.

Hospital policies lack clarity, place unacceptable expectations on the parties, and illustrate a lack of understanding of surrogacy legal frameworks. Outdated hospital policies require that intended parents must not be left unsupervised with the baby, while simultaneously declaring that the surrogate must not breastfeed the child.

Hospitals will try and send intended parents home once visiting hours have ended, leaving the surrogate to care for a child she does not want to parent until the intended parents return the following day.

Advocacy for the intended parents to be included in the birth and care of the child relies on the surrogate – heavily pregnant, in labour, or having recently delivered.

Succession & Estate Planning

Post-birth transfers of parentage risk the estate of the surrogate and her dependents. In some cases, a parentage order was not made until well after the child's first birthday meaning that for the first year or their life, they were cared for by the intended parents while recognised in law as the child of the surrogate and her partner. Had the surrogate died intestate during that time, the child would have a claim on their estate.

While legal advice to the parties will consider estate planning and Will execution, presumptions of parentage may override a Will.

It is wholly unacceptable that a surrogate and her partner are the legal parents of a child they had no intention of caring for, and that the intended parents are caring for a child while not being recognised as the legal parents, for months and sometimes over a year after the birth.

Pre-birth orders would resolve this issue by protecting the parties' estates and providing clarity and comfort for everyone.

Parentage order applications

Current frameworks differ between jurisdictions for the parentage order process including variations in the post-birth requirements, evidentiary requirements and even the court fees. These differences lead to inequity for parties seeking a parentage order and a postcode lottery for how cumbersome and expensive it will be.

The New South Wales Supreme Court filing fee for a parentage order application is $1,384, while it's free to apply in ACT, NT, SA and WA. An application in the Tasmanian Magistrates Court is minimal paperwork signed by the parties and the application fee is $125. New South Wales and Queensland require affidavits from all parties, as well as lawyers and counsellors. Queensland requires an affidavit from a medical practitioner, but only for those with a medical need for surrogacy.

Post-birth counselling

Post-birth counselling is required in four of the eight Australian jurisdictions. New South Wales places two post-birth counselling obligations on the parties, under section 35(2) and section 17.[41] The process is confusing to the parties, and places further burden on the birth parents who have to complete both counselling requirements. *Re N* is an example of the parties, their lawyers and the counsellors misunderstanding the post-birth counselling requirements.[42]

With respect to my colleagues who practice in surrogacy counselling, post-birth surrogacy counselling is important and valuable. However, it should not be a prerequisite for a parentage order. No other jurisdiction in the world requires the parties to participate in post-birth counselling as a prerequisite for a transfer of parentage.

> *Post-birth counselling is valuable.*
>
> *But it should not be required for the parentage order.*

Noting the pre-surrogacy counselling requirements, a parentage order should be made on the basis that the parties have completed pre-surrogacy requirements and that the child conceived pursuant to the surrogacy arrangement is intended to be raised by the intended parents.

Post-birth counselling may be useful to support the parties to transition to their post-surrogacy relationships. But this counselling should not be linked with an application for parentage order.

None of Western Australia, Victoria, South Australia or ACT require post-birth counselling. It cannot be said that states where it is required have better outcomes because of requirements for post-birth counselling.

Feedback from surrogacy arrangements is that the post-birth counselling is a 'tick-a-box' that they find expensive, inequitable, frustrating and superfluous. The intention to have a child through surrogacy was well-established prior to the conception – there is no need to revisit the arrangement after the birth.

I support the provisions of the South Australian *Surrogacy Act,* which ensures a surrogate has access to counselling for up to 12 months post-birth at the expense of the intended parents. Such counselling is not mandated nor tied to the parentage order.

My colleagues may argue that post-birth counselling is vital to the wellbeing of the parties. I do not disagree. However, I question the connection between post-birth counselling and the transfer of parentage. I have not yet, ever, had a situation where the parties believed post-birth counselling would change the outcome of the parentage order application. I query whether a counsellor has ever refused to recommend a transfer of parentage where all pre-surrogacy requirements have been met.

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[41] *Surrogacy Act 2010* (NSW) ss 35(2) and 17.
[42] *Re N* [2025] NSWSC 409.

Post-birth counselling would be more beneficial to the parties if it were not seen as a tick-a-box exercise and not connected to the transfer of parentage.

Surrogate's consent

Parentage orders are obtainable in Australia with explicit consent from the surrogate. In Western Australia, a surrogate's consent is not required where the arrangement involved gestational surrogacy. In other states, a surrogate's consent may be dispensed with in limited circumstances, including where she has died, is incapacitated or cannot be located.[43]

> *Consent should never be at the expense of the child's best interests.*

In all other aspects of family law proceedings involving children, orders can be made with or without a parent's consent. Consent is not required to determine what is in a child's best interests. And yet, in surrogacy, a transfer of parentage can only occur where the surrogate has provided her consent.

If a parentage order is to be made because it is in the child's best interest, it cannot be compromised because one party has failed or refused to provide their consent. Courts must be empowered to make a parentage order, dispensing with the surrogate's consent if it is in the child's best interests to do so.

There should be a mechanism for the transfer of parentage in lieu of a surrogate's consent, while maintaining her rights to autonomy, enforcing the payment of her expenses, and promoting the best interests of the child.

Surrogate's partner's consent

While I believe a surrogate's partner is an integral part of a surrogacy arrangement, I do not believe their consent should be necessary for the transfer of parentage. Surrogate's partners are often bewildered by having to be listed as a parent on the child's birth certificate, engage in post-birth counselling, swear an affidavit to support the parentage order and attend court proceedings. The presumptions of parentage are confusing for the parties, who know that the intention is not for the surrogate's partner to be a legal parent.

> *"I listed the intended father on the birth registration but was told that was wrong. But that doesn't make sense? He is the father. My partner didn't do anything to make this baby. Why is he on the birth certificate?" Surrogate, 2025.*

[43] *Surrogacy Act 2010* (NSW) s 31(2).

Parties are often so confused by the legal presumptions of parentage and consequences that they will list the surrogate and the genetic father on the original birth certificate. This leads to further confusion at the time of applying for the parentage order.

Existing presumptions of parentage are not reflective of the reality or societal expectations of a surrogacy arrangement or legal parentage.

Evidentiary requirements

Affidavits from legal practitioners

Applications for parentage orders in New South Wales and Queensland rely in part of affidavits filed from the respective legal practitioners. These conditions are burdensome, frustrating and potentially difficult to meet, often years after the legal advice has been obtained. Requirements for affidavits should be repealed. Evidence of legal advice can be provided through certificates issued at the pre-surrogacy stage.

Affidavits from medical practitioners

In Queensland, an application for a parentage order must be supported by affidavit evidence from a medical practitioner confirming the medical need for surrogacy.[44] This is not required for cases involving single men or same sex male couples. The reality is that a clinician will have already supported a female patient to proceed with surrogacy for them to progress with an arrangement. That a doctor must later swear an affidavit confirming their previous support is frustrating and burdensome. The requirement is another sobering reminder for intended mothers of their infertility, which men do not have to prove.

> *I don't want to sign any more affidavits.*
>
> *Sarah Jefford, 2025.*

Certificates confirming legal advice provided pre-surrogacy should be sufficient.

Medicare and medical treatment

Many intended parents report struggles with having the child listed on their Medicare cards prior to the making of a parentage order. Medicare defaults to placing the child on the Medicare card of the person/s listed on the child's birth certificate. Some intended parents are able to have the child placed on their Medicare shortly after the birth, while others are advised that they must wait until the parentage order has been made. Medicare staff do not understand surrogacy and do not recognise the importance of the child being listed on the parent's cards.

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[44] *Surrogacy Act 2010* (QLD) s 25(j).

Not having a child listed on the intended parents' Medicare cards means that they have to explain this to medical treatment providers, who also do not understand surrogacy.

Legal parentage with the surrogate means that medical treatment of the child is meant be reliant on the surrogate's consent. Medical professionals are unaware of this, so in practice the surrogate is rarely asked for her consent once the baby leaves the hospital.

It is a lottery whether the parents are able to have the child listed on their Medicare card before or after the parentage order is made. Once again, bureaucracy tells intended parents they are less than or different, and surrogates are responsible for a child they do not wish to care for.

A new way to recognise parentage: pre-birth orders

An alternative to the current patchwork of processes and requirements could be a framework for the pre-birth transfer of parentage. A regulated system for recognising the intended parents as the legal parents from birth supports the parties to a surrogacy arrangement.

> *Pre-birth orders recognise the intentions of the parties, protect the rights of the surrogate and promote the interests of the child.*

The parties can apply for the order during the pregnancy, often in the second trimester, providing evidence of the surrogacy arrangement and pregnancy, and the consent of the parties. The pre-birth order establishes that once the baby arrives, the intended parents are the legal parents of the child. The surrogate is not responsible for the child and can leave hospital when she's ready, and the intended parents can provide all care for the baby at birth.

Pre-birth orders provide clarity for healthcare providers and hospitals to ensure the surrogate is provided with the necessary pregnancy and birth care, and that the intended parents can exercise parental responsibility from birth. Pre-birth orders do not compromise the surrogate's autonomy while she is pregnant; the child becomes the legal child of the intended parents *at birth*, and not before.

With many intended parents citing the lack of legal clarity as reason for why they pursued surrogacy outside Australia, pre-birth orders may give comfort which might lead to an increase in domestic surrogacy.

A pre-birth order process could involve consent orders filed in the FCFCOA, with registrar oversight. Alternatively, an 'auto-recognition' process might be considered, such that orders are not required and the child's birth is registered without any judicial oversight. Such a process may be open to exploitation and quasi-surrogacy arrangements involving coercion and false records. A judicial process recognises the gravity of the process of

transferring parentage and the rights of the child; in the same way we treat all children in the family law system. An adoption process would never be a simple administrative process and nor should a surrogacy transfer of parentage.

Various international bodies raise concerns that pre-birth transfers of parentage may be linked to payments, coercion and human trafficking. A parentage order, whether made pre- or post-birth, can still be discharged and should still be subject to scrutiny. An order does not take effect until the child is born. Safeguards – counselling, legal advice and informed consent – are still prerequisites for a pre-birth order. It is simplistic to declare that pre-birth parentage orders equate to human trafficking when safeguards protect the surrogate and the child from exploitation.

Transfers of parentage should be based on pre-surrogacy intentions and criteria being met. They should not be connected to or reliant on post-birth counselling.

RECOMMENDATION: A framework for the pre-birth transfer of parentage should be introduced in Australia and regulated within the Federal Circuit and Family Court of Australia.

RECOMMENDATION: A surrogate's consent to a transfer of parentage, and that of their partner, should be able to be dispensed with if to do so is in the child's best interests.

RECOMMENDATION: A pre-birth transfer of parentage should be reliant on evidence of preconditions having been met. Evidentiary requirements on professionals should be dispensed with.

RECOMMENDATION: Post-birth counselling requirements should be repealed.

RECOMMENDATION: Hospitals and healthcare providers should have established consistent and best practice guidelines for assisting with a surrogacy pregnancy and birth and provide education for their staff.

Citizenship, passports and visas

Up to 400 children are born via international surrogacy each year for Australian intended parents.[45] The process to return home varies between countries and depends on the exit process in the destination country including access to passports, visas and visa waivers.

In some countries including Georgia, Mexico and Argentina, Australian intended parents apply for their child to be recognised as an Australian citizen and obtain an Australian passport prior to returning home. This means that children born in those countries arrive in Australia on an Australian passport. The process to obtain citizenship and a passport can take several weeks or many months and can depend on the local process timeframe for obtaining a birth certificate and the processing time for Australian citizenship.

Historically, children born via US and Canadian surrogacy can return to Australia on an American or Canadian passport and an ESTA or visa, often within weeks of the birth. The parents apply for Australian citizenship upon arrival in Australia.

At the time of writing, US President Trump's Executive Order to abolish birthright citizenship is being considered in the US Supreme Court. If the Executive Order is upheld, this could mean that children born via surrogacy in the US are not entitled to a US passport. If that occurs, Australian intended parents will be stranded in the US with their newborn, waiting on Australian citizenship to be granted. Their children will be born stateless, which breaches their human rights.

> *The Australian government should provide an efficient, streamlined process for obtaining citizenship shortly after the birth.*

Feedback from intended parents engaging in surrogacy in various countries have found the Australian consulate staff to be interrogatory, accusatory and unhelpful. Some same-sex intended parents believe they are treated differently to their opposite-sex counterparts.

The Australian government should implement an efficient, consistent and timely process for processing applications for Australian citizenship for children born via surrogacy. Given these children's births are expected, it seems ridiculous that applications for citizenship cannot be lodged, at least in part, prior to the child's birth. Provision should be made to consider an application for citizenship in lieu of evidence of a final birth certificate, noting that local civil registries may delay issuing a birth certificate for many months.

Government resources should be directed to education and awareness for its staff to understand surrogacy laws including parentage and family law in Australia.

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[45] Department of Home Affairs, above n 4.

Passports

The Australian Passports office applies a strict, and often incorrect, view of family law, parentage and surrogacy. Applications for a child's passport and renewal require evidence from the birth parent/s to consent to the issuing of a passport. This approach may be applied 5, 10 or 15 years after the birth, and contrary to evidence of the intended parents' parentage and parental relationship of the child.

Applications for passports have been requisitioned by Passports staff, seeking that the intended parents obtain a "Family Court order" to confirm they are the parents of the child. These requests are made while the parents are in the destination country with their newborn. That Passports staff consider that Family Court proceedings should be issued in Australia, from another country, and that such an order will be made in any reasonable time, ignores all experience and understanding of the Family Court requirements and processes and a misunderstanding of the surrogacy provisions of the Family Law Rules.

> *The Passports office lacks understanding of Australia's family and surrogacy laws.*

Passport applications for a child born via surrogacy require the consent of the surrogate and her partner, many years later. This is due to Passports staff believing, often incorrectly, that the birth parents are always the legal parents of the child. Intended parents who have had their child via domestic surrogacy, obtained a parentage order in their state court, are still asked to provide evidence of the surrogate's consent when applying for a passport for their child.

Passport applications for children born via surrogacy are often inexplicably delayed and disappear into the ether of the Passports office 'special cases' team. Families planning on taking their 10-year-old on a holiday to Bali are subject to extraordinary delays waiting on a passport renewal for their child, simply because they were born via surrogacy a decade earlier.

The message to parents via surrogacy is clear: you are less than and different from other parents and always to be considered a special case by reason of your inability to carry your own child. This directly impacts their ability to exercise parental responsibility and care for their child, which in turn infringes on the child's rights.

Passports office staff should undergo training about the reality of surrogacy-born children and the transfer of parentage. Passport applications for children born via surrogacy should be assisted by evidence of the birth certificate, any transfer of parentage in the international jurisdiction. Requirements for a surrogate's consent should be easily dispensed with upon evidence of the surrogacy arrangement.

Aotearoa New Zealand

There are surrogacy arrangements between Australian residents and that of our nearest neighbour, Aotearoa New Zealand. These are between Australian and New Zealand

citizens who live in both countries – including Australians living in New Zealand and New Zealanders living in Australia.

We are fortunate that New Zealand laws allow for arrangements to occur, however the legal logistics are complex depending on where the parties live, where the treatment will occur and where the birth will occur.

We should seek reciprocal recognition with New Zealand for surrogacy arrangements that cross our borders. This should include consideration for access to treatment, birth and parentage in either country being recognised by the other.

RECOMMENDATION: Australian government officers processing applications for citizenship for children born overseas should be resourced to ensure an efficient, equitable and clear pathway home for parents and their newborns.

RECOMMENDATION: Citizenship and passport applications for children born via international surrogacy should be streamlined to ensure responsiveness to changing legal frameworks and landscapes in destination countries.

RECOMMENDATION: Passports Office staff should undergo training in Australian family and surrogacy law.

RECOMMENDATION: Passport applications for children born via surrogacy should be not be reliant on the consent of the surrogate.

Harmonisation and regulation

Surrogacy is regulated in a patchwork of laws that lack harmony, mutual recognition and consistency between borders. Consequentially, Australians engage in legal and medical tourism within their own country.

Parentage order applications are heard in each states' District or Supreme Courts, and very rarely are domestic surrogacy cases dealt with in the Federal Circuit and Family Court of Australia (FCFCOA). Judicial officers in state and territory jurisdictions may not have any experience in family or children's law. The *Family Law Act* does not provide for a transfer of parentage for a child born via surrogacy.

While surrogacy legislation often refers to the 'best interests of the child,' limited definitions are contained in state legislation. The *Family Law Act 1975* (Cth) provides the most comprehensive list of what should be considered when determining what is in a child's best interests.[46]

Parenting matters are regulated within the *Family Law Act*. Matters of parenting, including who the child should live with, spend time with and arrangements for their care are dealt with in the federal jurisdiction. It seems counterintuitive that surrogacy matters and transfers of parentage are heard in state courts.

> *It's time we had federal surrogacy laws and all parentage matters dealt in a specialised list within the family law courts.*

No specialist training or professional development about surrogacy is provided to judicial officers in Australia. Each state and territory jurisdiction implements its own procedural rules which vary significantly across the country.

It has been my professional experience that the parties and their legal representatives are more knowledgeable about surrogacy and the conditions of seeking a parentage order, than court staff and judicial officers. This is not surprising, with less than 150 parentage orders across all eight jurisdictions each year.

In the United Kingdom, parental orders for children born via international surrogacy are dealt with in the High Court (Family Division) by specialist judges experienced in family law and children's matters.[47]

To promote the rights and best interests of children born, all surrogacy cases should be heard in a specialist court. Children born via surrogacy should be treated equally and matters regarding their parentage and care, dealt with in the same way as all children. For that to occur, the states and territories would need to exercise referral powers under the Constitution[48] and refer surrogacy matters to the Commonwealth.

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[46] *Family Law Act 1975* (Commonwealth) s 60CC.
[47] *Human Fertilisation and Embryology Act 2008* (UK) s 54 and *Senior Courts Act 1981* (UK) s 31A.
[48] *Australian Constitution* s51(xxxvii).

Specialist judges practising in family and children's law should be determining the parentage of children born via domestic and international surrogacy. This is consistent with other family law matters and also ensures consistency across each state and territory. There is no reason for surrogacy matters to remain with the state and territory jurisdictions, and continuing to do so may compromise on the rights and best interests of children.

> *The states and territories should refer their powers to the Commonwealth and federal surrogacy laws implemented.*

RECOMMENDATION: The Australian states and territories should refer their powers with respect to surrogacy and parentage matters to the Commonwealth. The federal government should legislate surrogacy matters to apply a consistent surrogacy law framework across Australia.

RECOMMENDATION: Surrogacy matters should be legislated within the jurisdiction of the Federal Circuit and Family Court of Australia, in a specialised list, managed by dedicated and trained judicial officers and staff.

RECOMMENDATION: Judicial officers should complete specialist training to understand the complexities of surrogacy arrangements and parentage applications.

Relationship changes

There should be clarity as to any changes in relationship status of the intended parents or birth parents during the process to ensure the surrogacy arrangement and transfer of parentage are not impacted by a new relationship, separation or divorce amongst the parties.

The relationships of the intended parent/s may change between entering the surrogacy arrangement and applying for a parentage order. A single person may commence a relationship after entering the surrogacy arrangement; their partner can be involved and parenting the child but not be recognised as a parent in the parentage order.[49] There should be discretion for an order to be made that reflects changing relationships that ultimately recognises the best interests of the child.

The South Australian *Surrogacy Act* excludes the surrogate's partner from the legal process of surrogacy, such that the surrogate is the legal parent at birth, and not her partner. This is inconsistent with the presumptions of parentage within the *Family Law Act* and all other surrogacy legislation. However, it might be a blueprint to consider for the rest of the country.

[49] Unreported case, Victoria (2024).

Surrogate's partners should be involved in the pre-surrogacy process for counselling and legal advice, but their consent should not be required for the transfer of parentage.

Residency and citizenship

South Australia and Northern Territory require parties to be Australian citizens or permanent residents. While the criteria might be intended to prevent international parties from engaging in surrogacy in Australia, it is unclear whether it also restricts New Zealand residents living in Australia from engaging in surrogacy. I am aware of New Zealanders having to apply for Australian citizenship to meet this requirement, at considerable expense.

There are inconsistencies with the conditions that a person must be resident in a state when they apply for a parentage order. New South Wales requires that the intended parents must be resident at the time of applying for a parentage order.[50] South Australia requires that residency must be established at the time of entering the surrogacy arrangement.[51] Victorian applications for a parentage order require evidence of residency in Victoria, including a certified copy of a driver's license.[52]

RECOMMENDATION: Residency requirements should be consistent across the country.

Interstate recognition

State laws do not recognise surrogacy arrangements made in other states. Intended parents who live in Queensland when they enter a surrogacy arrangement, are not eligible to apply for a parentage order in Victoria if they relocate during the pregnancy. But they are no longer eligible to apply for a parentage order in Queensland. There is no discretion to apply in Victoria because the treatment did not occur there,[53] and they must rely on discretion to apply in Queensland.[54] The case of *RPR v TMK* illustrates this point.[55]

Victoria does not recognise interstate parentage orders. In practice, children born in Victoria for New South Wales intended parents are able to obtain an NSW birth certificate once a parentage order is granted. The same cannot be said for children born in Victoria for Queensland intended parents, who must register the Queensland parentage order in Victoria through a new application to the County Court before the Victorian Registry of Births Deaths and Marriages will issue a new birth certificate.[56] Victoria is the only state that does not offer automatic recognition of an interstate parentage order.

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[50] *Surrogacy Act 2010* (NSW) s 32.
[51] *Surrogacy Act 2019* (SA) s 10(4)(d).
[52] County Court of Victoria, Common Law Division Practice Note, PNCLD 1-2025, 31.100(g).
[53] *Status of Children Act 1974* (Victoria) s 20(1)(a).
[54] *Surrogacy Act 2010* (QLD) s 23.
[55] *RPR & Anor v TMK & Anor* [2021] QChC 4.
[56]

Treatment requirements

Applications for a parentage order in Victoria require evidence that the child was conceived as a result of a procedure carried out in Victoria.[57] For gestational surrogacy arrangements, this can be proven with evidence from a Victorian fertility services provider.

For Victorian traditional surrogacy, which cannot seek treatment with a fertility services provider, conception must occur outside the clinic.[58] The parties must give evidence that they performed an at-home insemination at a Victorian address. This absurd requirement ignores that surrogates can live interstate and requires them to travel to Victoria to perform the private procedure of inseminating themselves, so they can swear an affidavit of having done so.

Requirements to obtain treatment in the state where the intended parents live only exist in Victoria and Western Australia. 2024 reforms in the ACT allow their residents to seek treatment in other states. Requirements for state-based treatments deny autonomy to parties to choose their provider and ignores that egg donors and surrogates may live interstate. Embryos may be stored in another state or country and may not be transportable.

RECOMMENDATION: Requirements for treatment to occur in a particular jurisdiction should be repealed. Parties should be free to choose their treatment providers.

Intercountry surrogacy

If there are to be conditions of residency or citizenship, provision should be made for parties who are Australians living overseas, or international residents who have an Australian-based surrogate. In a global community, it is not unusual for an Australian citizen living in another country to wish for their Australian-based family member to be their surrogate. Our laws should facilitate such an arrangement and seek reciprocal recognition with other countries.

Criminal Record Checks

South Australia requires the parties to provide criminal record checks to each other, prior to entering a surrogacy arrangement. This should be repealed. Criminal record checks provide a safeguard but should not prevent anyone from progressing with a surrogacy arrangement. Informed consent can be ensured by sharing information between the parties, including criminal history records.

While a surrogacy matching service might place such safeguards on an arrangement, it is discriminatory to require criminal record checks of parties to surrogacy and not to

[57] *Status of Children Act 1974* (Victoria) s 20(1)(a).
[58] *Assisted Reproductive Treatment Act 2008* (Victoria) ss 40(1)(ab) and 41.

other people growing their families. Similar provisions were repealed in Victoria after community backlash.

RECOMMENDATION: Criminal record checks should not be a legislated barrier to pursuing surrogacy in Australia.

Oversight of surrogacy arrangements

Surrogacy arrangements involve complex ethical, legal, and relational issues. Oversight by an independent authority provides a necessary safeguard to ensure that all parties have freely given informed consent, that arrangements comply with the law, and that the welfare of the child is prioritised.

I have advised parties to surrogacy arrangements that raise concerns of ethics and legality. Counsellors have approved surrogacy arrangements despite the concerns, and clinics will treat parties based on counsellor recommendations.

Some examples include:

1. Exploitation and human trafficking, including where a surrogate lacked sufficient English and understanding to provide informed consent. Counselling did not involve a qualified interpreter.
2. Intended parents under the age of 25, that did not meet the legal requirement for 'exceptional circumstances' but proceeded despite the risk of not obtaining a parentage order.
3. Parties proceeding to counselling and legal advice less than two weeks after meeting each other online.

In most states and both territories, there are no regulatory authorities determining whether a surrogacy arrangement should proceed. Authority to approve a surrogacy arrangement lies with the counsellor, and the fertility clinic where the parties seek

> *Love it or hate it, the PRP provides independent oversight of surrogacy arrangements and protects the parties and the persons born.*

treatment. Some counsellors are naïve as to their role in assessing whether a surrogacy arrangement should proceed, and nervous being a gatekeeper. Clinics may determine to proceed with treatment in spite of a counsellor's recommendation, making a business decision over an ethical one.

An independent authority, operating at the national level, should be empowered to assess and determine whether a surrogacy arrangement can proceed.

Victoria's Patient Review Panel (PRP) offers a clear, workable example of how this oversight can be implemented. The PRP is an independent statutory body that reviews surrogacy arrangements before pregnancy attempts can proceed. It ensures that all legal requirements have been met, that counselling and legal advice have been provided, and that the parties understand their rights and responsibilities. Importantly, the PRP provides a consistent, expert-led decision-making process that balances the interests of the surrogate, the intended parents, and the future child.

Community experience of the PRP model may not always be positive, noting that some believe it is a level of scrutiny of whether the intended parents are capable of being good parents. No gestationally-fertile couples are subject to the same scrutiny. However, that is not the scope or purpose of the PRP and is this view ignores the complexity of surrogacy and the intention and need to protect all parties and the persons born.

A national framework based on the PRP model would deliver consistency and fairness across all Australian jurisdictions. It would help prevent forum-shopping between states and reduce uncertainty about the validity of arrangements. National oversight would also

> *A national Assisted Reproduction Commission should oversee and approve surrogacy arrangements.*

support best practice by requiring all parties to meet the same clear standards, while giving them the benefit of an independent, supportive review process.

The Victorian Patient Review Panel shows that oversight can be both protective and facilitative - upholding the best interests of everyone involved while respecting the autonomy of surrogates and intended parents. A national approach based on this model would be an important step towards a safer, more consistent surrogacy system in Australia.

Gestational and traditional surrogacy arrangements should be subject to the same oversight, noting that while they are different in form, they are not different in intent or process. Traditional surrogacy arrangements may be vulnerable to coercion and exploitation and should be protected by the same regulation as gestational surrogacy.

Counsellors should be accountable to the authority and not to the parties, to ensure independence and adherence with professional and legal requirements.

A certificate of approval from a regulatory authority could offer license for the parties to obtain a pre-birth order by providing that they have completed prerequisite counselling and legal advice.

RECOMMENDATION: An Assisted Reproduction Commission should be established to regulate and determine surrogacy arrangements.

Discouraging or prohibiting certain forms of surrogacy

Traditional surrogacy

Traditional surrogacy has long been stigmatised as 'illegal' and particularly by fertility clinics whose business model benefits only from gestational surrogacy. Traditional surrogacy is not more or less complex than gestational surrogacy and should be regulated in the same way.[59] As most traditional surrogacy occurs in private, prohibiting the practice does not further the interests of the parties or the rights of children born.

Victorian legislation prevents the PRP from approving a traditional surrogacy arrangement other than in exceptional circumstances.[60] I am not aware of any traditional surrogacy arrangement seeking or being approved by the PRP. The differential treatment enables fertility providers to advertise that gestational surrogacy is the only legal type of surrogacy that is legal in Victoria, which stigmatises traditional surrogacy.

Traditional surrogates, children and persons born via traditional surrogacy should not be stigmatised by reason of ignorance or differences in the law.

Presumptions of parentage arising from intent and conception

Surrogacy is an intentional legal process completed prior to the conception and birth of a child. Adoption is an intention established after conception. Sexual intercourse between two people is not surrogacy. The Queensland case of *CDA & Anor v TRA & Anor*[61] sets a disappointing precedent and undermines the legitimacy of surrogacy arrangements. International colleagues were disturbed by the precedent it may set.

Legislation should clarify presumptions of parentage arising from such situations and provide definitions for the method of conception.

International commercial surrogacy

Most of the 300+ children born overseas each year for Australian intended parents are pursuant to commercial surrogacy arrangements. New South Wales, Queensland and ACT criminalise their residents for engaging in international commercial surrogacy. Most other jurisdictions do not include such a clause.

Over the years, I have provided legal advice to people engaging in commercial surrogacy from their homes in New South Wales, Queensland and ACT. This includes police officers, teachers, doctors, lawyers, politicians and staffers, public servants with high-level security clearance, media personalities and high-profile personalities. Clearly, the prohibition against engaging in international commercial surrogacy is ineffective if it does not deter a member of the police force. But the laws do stigmatise and frighten people and criminalises an act that is legal in the country of destination.

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[59] Dickinson, Narelle, Topsfield, Alana and Hawthorne, Fiona "I'm just the oven: examining the experience of Australian Traditional Surrogates" (2023).
[60] *Assisted Reproductive Treatment Act 2008* (Victoria) ss 40 and 41.
[61] *CDA & Anor v TRA & Anor* [2024] QChC 12.

Geographical nexus clauses should be repealed. There have been no prosecutions of parents who have engaged in international commercial surrogacy; the police resources are better directed elsewhere.

Prohibitions do not deter intended parents from pursuing commercial surrogacy overseas; it only serves to stigmatise the children born via surrogacy and supports a veil of secrecy and shame for their parents.

> *Rendering commercial surrogacy illegal will not promote openness and transparency. If criminal law will not stop the practice the result is that it will be driven underground.*[62]

Notably, academics and judicial officers find the prohibition of commercial surrogacy problematic when considering the paramountcy of the best interests of the child:

> *…the laws banning commercial surrogacy are ineffective…Because judges have to apply the principle that the best interests of the child is the paramount consideration, there do not appear to have been many cases…where a court has refused to make a parenting order…*[63]

If we are prioritising the best interests of the children born, then criminalising their parents for engaging in something that is legal in the country of destination does not serve that purpose.

> *If the child's best interests are paramount, it should not matter that they were born via commercial surrogacy.*

The recent case of *Lloyd & Compton*[64] highlights the need to repeal geographical nexus clauses. It also highlights that parents via international commercial surrogacy should avoid seeking relief from the Australian court system, as to do so risks prosecution.

The *Family Law Act* promotes the best interests of children,[65] and the Federal Circuit and Family Court of Australia (FCFCOA) should be accessible for all families and children. Is it really accessible and equitable if an application pertaining to a child born via international surrogacy threatens the freedom of the parents?

> *Families are actively avoiding remedies available to them because they fear being referred to authorities by a judicial officer of the FCFCOA.*

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[62] Stuhmcke, A. "Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty." *Surrogacy, Law and Human Rights*, edited by Gerber P and O'Byrne K. Routledge, 2016, 77.
[63] Harland, A and Limon, C. "Recognition of Parentage in Surrogacy Arrangements in Australia." *Surrogacy, Law and Human Rights*, edited by Gerber P and O'Byrne K. Routledge, 2016, 165.
[64] *Lloyd & Compton* [2021] QChC 15.
[65] *Family Law Act 1975* (Cth) s 60CC.

Applications for parentage orders under the 2025 changes to the New South Wales *Surrogacy Act* also risk prosecution, noting that the new provisions do not decriminalise commercial surrogacy.[66]

The writer is aware of Australian intended parents being advised to amend their commercial surrogacy contracts to make them 'look altruistic.' The practice, which involves amending an international surrogacy contract such that any fees payable to the surrogate are reframed as 'reasonable expenses' is problematic and unethical, and leaves intended parents vulnerable to scrutiny and allegations of fraud.

The writer is also aware of employers, particularly government, referencing the *Surrogacy Act* and Section 11 to deny access to paid parental leave to intended parents who have engaged in international surrogacy.[67] The Department of Education in New South Wales only provides paid parental leave to employees who have engaged in altruistic surrogacy pursuant to the Act and on the provision of a parentage order.[68]

RECOMMENDATION: Laws that criminalise international commercial surrogacy should be repealed.

Regulation of service providers

While residents of several states may be criminalised for engaging in commercial surrogacy, for-profit service providers facilitate intended parents engaging in commercial surrogacy overseas and face no consequence. These organisations rely on gaps in legislation and frame themselves as 'educational,' bringing commercial surrogacy agencies and clinics to Australia to market themselves to intended parents, including residents where commercial surrogacy is criminalised.

Service providers are not qualified to give legal advice to intended parents and take no responsibility for poor outcomes, risks or consequences. Australians have been encouraged to engage in surrogacy arrangements in countries where surrogacy has proven to be unregulated, unethical, exploitative and risky including in Thailand, India,[69] Ukraine[70] and Greece.[71]

Growing Families charges fees from consulting with intended parents. When disaster strikes, Growing Families offers intended parents assistance to exit the country with their

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[66] *Surrogacy Act 2010* (NSW) s 8.
[67] Star Observer, *Gay Surrogate Dads Wage Legal Battle for Paid Parental Leave*, www.starobserver.com.au/news/gay-surrogate-dads-wage-legal-battle-for-paid-parental-leave/200978, 26 February 2021, accessed 15 July 2024.
[68] NSW Department of Education *Teachers Handbook Chapter 4 Leave: Adoption, Maternity and Parental Leave, 4.2.6 Altruistic surrogacy leave*, as updated on 28 February 2024.
[69] ABC News *India to ban surrogacy services to foreigners through Supreme Court* 28 October 2015 https://www.abc.net.au/news/2015-10-28/india-to-ban-booming-surrogacy-service-to-foreigners/6894104 accessed 23 July 2024.
[70] ABC 7:30 *Australian parents warn reality of Ukrainian surrogacy doesn't always match the dream,* 21 August 2019 https://www.abc.net.au/news/2019-08-21/australian-parents-warn-about-ukraine-surrogacy-lotus/11426396 accessed 23 July 2024
[71] ABC News, *Australian parents left in limbo after surrogacy scandal in Greece,* 24 August 2023 https://www.abc.net.au/news/2023-08-24/parents-left-in-limbo-after-raid-at-surrogacy-clinic/102773230 accessed 23 July 2024.

baby, at further significant cost. The daisy chain of businesses supporting each other, without declaring conflicts of interest, are responsible for thousands of intended parents

> *Trade shows like Growing Families operate with impunity, drawing huge profits from sponsorship from overseas surrogacy providers.*

who engage in international surrogacy and take no responsibility when the local laws do not support the arrangement. 'Ethical standards' advertised by Growing Families are not binding on the services that sponsor their events.

Conflicts of interest are prevalent in the surrogacy industry and rarely declared to the intended parents or surrogates.

While laws that prohibit intended parents from engaging in commercial surrogacy should be repealed, service providers should be tightly regulated.

RECOMMENDATION: Service providers should be regulated and licensed to operate in Australia and to adhere to ethical standards determined by a regulatory authority.

Awareness and Education

One reason for the low number of surrogacy births in Australia, and the higher number of

> *We need a Smartraveller for surrogacy: providing unbiased, credible information to inform intended parents before they embark on an international surrogacy journey.*

children born via international surrogacy for Australian intended parents, is the lack of awareness about surrogacy options in Australia.

If many intended parents have not considered or understood the risks of engaging in international surrogacy, how can we reduce the instances of Australians engaging in international surrogacy? How can we ensure that if they do travel overseas for surrogacy, they are cognisant of the consequences of engaging in surrogacy in countries where it is unregulated and the human rights of all parties are at risk?

The Australian government has published a website, *Surrogacy in Australia*,[72] which includes some basic information about surrogacy in Australia and overseas.

Where there is a lack of reliable and unbiased information provided by government or regulated not-for-profit organisations, intended parents will seek and find information from trade shows, intermediaries and international service providers. That information

[72] Surrogacy in Australia, www.surrogacy.gov.au.

may not be independently verifiable, and consumers may not be discerning enough to ensure the stability of the legal framework in the destination jurisdiction, or safeguards for themselves, the surrogate or their future child.

In lieu of the Australian government regulating international service providers operating outside its remit, it should instead provide access to reliable, unbiased and up-to-date information about travel, legal frameworks, risks and consequences of engaging in international surrogacy for each destination. The existing Smartraveller website[73] provides information about travel destinations for Australians, and limited information about surrogacy.

The government's surrogacy and Smartraveller websites should provide up-to-date and comprehensive information about all possible surrogacy destinations. Such information can be informed by Australian diplomats and immigration officials, and international bodies such as the United Nations or the International Social Service.

In lieu of reliable, credible, non-biased information provided by the Australian government, intended parents instead refer to private, profit-making services for information and advice as they navigate international surrogacy options.

RECOMMENDATION: The Australian government should fund an awareness campaign that promotes ethical, best practice surrogacy within Australia.

RECOMMENDATION: The Australian government should publish resources about surrogacy in Australia and options overseas to inform Australian engaging in international surrogacy.

[73] Smartraveller, www.smartraveller.gov.au.

Out of scope

Donor conception

I understand the ALRC considers gamete donation, and the availability of egg donors are out of scope for this review. However, many surrogacy arrangements rely on the assistance of an egg donor and gamete donation is often associated with surrogacy. The regulation of fertility clinics, gamete donation and surrogacy are interlinked and should be regulated together.

A federal Assisted Reproduction Commission could regulate fertility services, consider surrogacy arrangement applications, license surrogacy matching services and regulate donor conception.

Other issues

Hospital management of surrogacy pregnancy and birth

Hospitals regularly misunderstand the dynamics of a surrogacy arrangement and impart their own values on the care provided to a surrogacy arrangement. The lack of awareness and understanding of surrogacy has ongoing implications for the parties and the child, reinforcing for intended parents that they are different to and less than birthing parents.

Some examples of the many times that hospitals have failed to provide inclusive care of a surrogacy arrangement include:

1. An obstetrician refused to treat a surrogacy arrangement *on the day of the birth* because he believed that surrogacy was illegal for gay men – NSW public regional hospital.
2. Healthscope's policy states that the baby cannot be left with the intended parents without the birth mother being present, including that the baby cannot room in with the intended parents unless the surrogate is present.[74]
3. Healthscope policy also states that the intended mother must not breastfeed or provide breastmilk for the child and that the child's surname must be that of the surrogate.[75]
4. In a case involving Queensland intended parents and a Victorian-based surrogate, the Northern Hospital in Victoria refused to allow the intended parents to remain in the hospital after visiting hours ended. The hospital lawyer claimed that they did not recognise interstate surrogacy arrangements.

[74] Healthscope, *Surrogate Births,* Corporate Policy and Procedure: Obstetrics, 11.10, June 2017 and still applied in 2021.
[75] Ibid.

5. Monash Health in Victoria insisted that a surrogate not handover 'her baby' until discharged from the hospital. The hospital insisted that whether she chose to consent to a parentage order and her 'future plans' had no impact on the Monash Health's duty of care to her and 'her baby.'
6. Many hospitals refuse/fail to provide adequate accommodation for intended parents to remain in hospital to care for the baby. The Royal Women's Hospital in Melbourne refused to offer an intended mother a bed, instead offering her a chair to sleep in. This is not an unusual occurrence.
7. A midwife, having spent over 12 hours in the room with the labouring surrogate and the intended parents, referred to the surrogate as 'mum' and said, "say hi to your mum!" to the baby. Hospitals regularly mislabel the parties. This includes references to the surrogate as 'mum' and 'mother' despite requests from the surrogate to avoid that language.

   This might seem like a small issue, but using incorrect language has ongoing impact on the parties – intended parents are constantly reminded that they have 'failed' at carrying a pregnancy and that their family is less than and different from other families. Surrogates feel pressured to feel differently about being called 'mum' despite clear intentions not to mother the child they are carrying.

Public hospitals are statistically more likely to be inflexible and unsupportive of a surrogacy arrangement than private hospitals. I have written many letters advocating for inclusive hospital care for a surrogacy arrangement and every single letter has been written to a public hospital; I have never had cause to write to a private hospital. Why are our public hospitals allowing their staff to exclude surrogacy pregnancies from their care?

Research in 2025 focuses on improving hospital care of surrogacy pregnancies and births.[76] Less than 50% of hospitals in New South Wales and Victoria have a surrogacy policy, which vary in scope and detail.[77] Without clear policies, healthcare staff are uncertain about including intended parents while also promoting the rights of the surrogate and the newborn.[78] There is little to no formal training about how to support a surrogacy pregnancy and birth.[79] I have delivered and participated in training to midwifery students in recent years, but this is reliant on the university provider valuing such training.

Hospital care of a surrogacy pregnancy and birth would be assisted by clear, consistent legislation, inclusive and responsive hospital policies and improved education and awareness.

Hospital staff are often frightened of supporting surrogacy arrangements contrary to insurance provisions due to legal recognition of the surrogate as the legal parent of the child.

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[76] Kabir Sattershetty, Yunjing Qiu, Sarah Jefford, Mark Brady, Emily Delahunty and Jutharat Attawet, 'Calling for Standardised Surrogacy Birth Care Policies: A Brief Report' (2025) *Journal of Law and Medicine* (forthcoming).
[77] Ibid.
[78] Ibid.
[79] Ibid.

While hospital care, of itself, may be considered out of scope for this review, recommendations for a pre-birth transfer of parentage would assist in clarifying the roles and responsibilities of each of the parties and ensure the best care for children born via surrogacy. Hospitals would be assisted by having clarity about the parties' legal obligations which in turn ensures the best care for the child and the recognition of the needs and autonomy of the surrogate.

Final thoughts.

The 2025 Australian Law Reform Commission review of Australia's surrogacy laws provides an opportunity to overhaul our surrogacy law frameworks to provide consistent, harmonised laws that offer ethical, best practice surrogacy within Australia. A framework that regulates the industry, protects the rights of children, supports intended parents and empowers surrogates will reduce the instances of exploitation that occurs when our citizens engage in international surrogacy in unregulated jurisdictions.

I encourage the Commission to be visionary and bold in their recommendations.