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FOR LOVE & LAW: CREATING ETHICAL, INCLUSIVE SURROGACY IN AUSTRALIA

To research best practice surrogacy law frameworks
to inform law reform in Australia.

Sarah Jefford OAM



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Report by Sarah Jefford, Churchill Fellow

2024 Churchill Fellowship

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Signed



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August 2025

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Itinerary

South Africa March 2025	International Surrogacy Forum Professor Jens Martin Scherpe, Aalborg University Professor Donrich Thalдар, University of Kwazulu-Natal
Ireland March 2025	Annette Hickey, lawyer, Poe Kiely Hogan Lanigan Solicitors Fiona Duffy, lawyer, Patrick F O'Reilly & Co Solicitors Ciara Merrigan, Irish Families Through Surrogacy Mary Seery Kearney, former Senator of the Oireachtas Dr Claire O'Connell, LGBT Ireland
England April 2025	Justice Theis, High Court (Family Division) Professor Kirsty Horsey, University of Kent Professor Nicholas Hopkins, Law Commissioner Dr Zaina Mahmoud, University of Liverpool Colin Rogerson, lawyer, Mills & Reeve Solicitors Natalie Sutherland, lawyer, Burgess Mee Natalie Gamble, lawyer, and Helen Prosser, mediator, NGA Law and Brilliant Beginnings Wes Johnson-Ellis, My Surrogacy Journey Sarah Jones, CEO, SurrogacyUK Andrew Spearman, lawyer, Hanne & Co Dr Bianca Jackson, barrister, Coram Chambers Hilka Hollmann, lawyer, Dawson Cornwell
Canada April 2025	Professor Isabel Côté, researcher, Université du Québec Sara Fehrman, surrogate and industry member Sara Cohen, lawyer, Fertility Law Canada Cindy Wasser, lawyer, Hope Springs Fertility Law Kathleen Adams, lawyer, KJ Adams Law

United States of America April-May 2025	Angela Richardson-Mook, CEO, and Madison Heggins, Legal Director, Alcea Surrogacy William Singer, lawyer, Singer & Fedun Attorneys Richard Vaughn, lawyer, International Fertility Law Group Kimberley Surratt, lawyer, Surratt Law Practice Meryl Rosenberg, lawyer and AAAA President, ART Parenting Nidhi Desai, lawyer, Desai & Miller Attorneys Ellen Trachman, lawyer, Trachman Law Center Donnye Sabo, Fertility Pathway Consulting Lisa Stark Hughes, CEO, Gestational Surrogate Moms
San Juan, Puerto Rico May 2025	Academy of Adoption & Assisted Reproduction Attorneys conference
Australia and New Zealand	Judge Alexandra Harland, Federal Circuit & Family Court of Australia Sarah-Jayne Duryea, psychologist, Happy Minds Psychology Narelle Dickinson CF, psychologist, Lotus Health & Psychology Professor Claire Fenton-Glynn, Monash University Dr Ronli Sifris, Monash University and ALRC Assistant Commissioner Simone Cureton, lawyer, Equal Justice Lawyers Dr Ezra Kneebone, researcher, The Kids Research Institute Ella McNamara, industry professional, Fertility & Family Margaret Casey KC, Mills Lane Chambers, NZ

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I feel incredibly lucky for the opportunity of a Churchill Fellowship and thank the Winston Churchill Memorial Trust for the legacy, hard work and dedication for making this possible. While I believed there was value in my project, the award of the Fellowship affirmed the importance of my research and the potential impact on the surrogacy community and Australian law reform. I am grateful for the everyday and longer-term opportunities of learning, meeting creative and clever people and viewing surrogacy through different lenses around the world.



I was struck by the generosity and support I received from people all over the world including in South Africa, Ireland, England, Canada and the United States of America. I am thankful for long heart-to-heart conversations, sharing our passion for ethical surrogacy, sharing knowledge and experiences, and their cities and communities with me. I feel a sense of solidarity and camaraderie with everyone I met and cannot express the deep gratitude for the people, community and experience.

The surrogacy community continues to nourish and motivate me, with passionate and energetic in Australia and across the world supporting me on my travels. The surrogacy community is part of me, and I am privileged to be part of it – thank you.

Judge Harland of the Federal Circuit and Family Court of Australia graciously gave me her time and support for my Fellowship, and I am indebted to her for her wisdom. I am thankful to Churchill Fellow Narelle Dickinson for her encouragement and support, and for her words of wisdom along the way.

I owe my partner, Troy, and my children a debt of gratitude for supporting me and joining me on the adventure. And of course, I wouldn't be here without having been a surrogate myself, and I am grateful for the family we helped to create and the gift and opportunities that surrogacy has given me.

For all the opportunities, I also experienced challenges during my travels, being away from my family and developing a new anxiety for long-haul flights. My friend and confidante Sarah-Jayne Duryea was a rock of support during my most challenging times, and I am forever indebted to her. Sara Fehrman gave me support in Toronto, when I need it most, and I am so grateful.

I want to extend my thanks to the Academy of Adoption and Assisted Reproduction Attorneys for welcoming me, and for its members in being so generous, kind and curious about my research.

Executive Summary

To research best practice surrogacy law frameworks, to inform law reform in Australia.

Sarah Jefford, a family creation lawyer and former surrogate, undertook a Churchill Fellowship to research best practice surrogacy law frameworks. Sarah's aim was to inform and enhance Australian law reform to make surrogacy more accessible, safer, and better regulated within Australia. The project addressed the increasing trend of Australians pursuing international surrogacy and the associated risks. The research involved studying legal and ethical standards, legal frameworks and regulation in various countries.

The report is intended for policymakers, legal practitioners, counsellors, the surrogacy community (intended parents and surrogates), medical professionals, and other stakeholders involved in surrogacy and assisted reproductive technology in Australia.

The research involved travel to South Africa, Ireland, England, Canada, and the United States, including attendance at the International Surrogacy Forum and the Academy of Adoption and Assisted Reproductive Attorneys conference.

Meetings and discussions with professionals, academics, advocates, and community members provided diverse perspectives on legal frameworks, cultural attitudes, and the lived experiences of surrogacy.

Conclusions and Recommendations

National Framework: A national surrogacy legal framework offers consistency, clarity, and promotes the rights of everyone involved.

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

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

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

Eliminate Medical/Social Need: There should be no requirement to establish a physical or medical need for surrogacy.

Australian Assisted Reproductive Treatment Commission: A national commission should be established to regulate and determine surrogacy arrangements. It should implement standards and requirements for surrogacy applications.

Pre-birth Orders: Introduce and regulate a framework for the pre-birth transfer of parentage within the Federal Circuit and Family Court of Australia.

Surrogate Consent: 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.

Compensation and Financial Management:

1. Compensated surrogacy, within a regulated framework that recognises the work of surrogacy, pregnancy, and birth, should be introduced in Australia.
2. Compensation should not be tied to the relinquishment of a child or transfer of parentage. Rates of compensation should be determined by a regulatory authority and subject to increase in accordance with a formula or CPI.
3. Non-profit escrow services should facilitate the financial arrangements between intended parents and surrogates.

Regulate Matching Services: Surrogacy services, including matching services and intermediaries, should be regulated within a licensing framework that requires adherence to established ethical standards set by the government. Services should be not-for-profit. Profit-making interests should be restricted from providing matching services.

Hospital Policies: Implement clear and specific surrogacy pregnancy and birth care policies that are inclusive of all arrangements and family creation, that recognise the integrity of the arrangement, the humanity of the parties and the rights of the surrogate and the child. Hospitals should ensure their staff are trained in caring for a surrogacy arrangement.

Medicare and Centrelink: Social services should have a surrogacy policy outlining clear and efficient mechanisms to recognise a surrogacy arrangement and to assist the parties to access services and entitlements.

Citizenship & Passports: Streamline citizenship and passport applications for children born via international surrogacy to ensure responsiveness to changing legal frameworks and landscapes in destination countries.

Repeal Geographical Nexus Clauses: Laws that criminalise international commercial surrogacy should be repealed.

Automatic Recognition of International Parentage: The Australian government should legislate to automatically recognise international instruments establishing parentage. Australian intended parents should be able to obtain documents to recognise parentage by registering international surrogacy and parentage documents.

Awareness Campaign: The Australian government should fund an awareness campaign that promotes ethical, best practice surrogacy within Australia and publish resources to inform Australians engaging in international surrogacy.

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Key Words and Glossary

Surrogacy: an arrangement where a person agrees to carry and give birth to a child for another individual or couple who will become the child's legal parents after birth.

Intended parent: (IP) the person or couple intended to be the child's parents.

Surrogate and/or Birth mother: a person who carries and gives birth to a child on behalf of another individual or couple who will become the child's legal parents.

Traditional Surrogacy: an arrangement whereby the surrogate is genetically related to the child because her own egg is used, typically through artificial insemination with the intended father's or a donor's sperm.

Gestational Surrogacy: an arrangement whereby the surrogate carries a child conceived through in vitro fertilisation using the egg and sperm of the intended parents or donors, meaning the surrogate is not a genetic parent of the child.

Parentage Order: the mechanism by which parentage is transferred from the surrogate and her partner (the birth parents) to the intended parent/s.

Introduction

I am a family creation lawyer, practising in surrogacy and assisted reproduction law across Australia. I became a parent through IVF and was later an egg donor. In 2018, I delivered a baby as a surrogate for two dads in Melbourne. I produced the Australian Surrogacy Podcast, and authored a book, *More Than Just a Baby, a guide to surrogacy for intended parents and surrogates*.

Surrogacy involves an arrangement whereby a woman (the surrogate) agrees to conceive and carry a pregnancy, with the intention that the parentage of any child born will be transferred to another person or couple (the intended parent/s).

In Australia, surrogacy regulation is fragmented across state and territory jurisdictions, each with its own requirements, processes, and legal recognition of parentage. While altruistic surrogacy is permitted in all jurisdictions, the absence of national consistency has left many intended parents and surrogates navigating a complex and often opaque system.

Surrogacy is a deeply personal yet publicly regulated practice that sits at the intersection of family, health and human rights law.

Many Australian intended parents enter surrogacy arrangements in other countries, including where surrogacy is poorly regulated and there are risks for them, the surrogate, and the child. Despite the risks, many consider it easier to engage in international surrogacy than to do so in Australia. For every child born via Australian surrogacy, there are more than three children born via international surrogacy.

The Fellowship explored best practice models of surrogacy regulation and support in several key jurisdictions, with the aim of informing and enhancing Australian law reform. The project aimed to consider ways in which surrogacy could be more accessible within Australia, to reduce the instances of intended parents travelling overseas. Safe, well-regulated, accessible surrogacy in Australia protects the rights of everyone involved and promotes the best interests of children born via surrogacy.

Global developments in surrogacy practices, law reform and ethical standards offer valuable lessons for Australian policymakers, practitioners and communities.

My travel included the International Surrogacy Forum in Cape Town and meetings with professionals, academics, advocates and community members across Ireland, England, Canada, and the United States. These experiences provided diverse perspectives on legal frameworks, cultural attitudes, and the lived realities of surrogacy arrangements.

As a surrogacy lawyer and former surrogate, I sought to balance legal analysis with lived experience, and to centre the voices of those most affected: surrogates, intended parents, and the children and people born through surrogacy.

Surrogacy in Australia

Surrogacy is an arrangement where a woman (the surrogate) agrees to carry and give birth to a child for another person or couple (the intended parent/s), with the intention that the child be raised by the intended parents.¹

The key elements of a surrogacy arrangement include that:

1. The arrangement is a pre-conception surrogacy arrangement.
2. The surrogate agrees to conceive and carry a child.
3. The parties intend that legal parentage of the child shall be transferred from the surrogate to the intended parents.
4. The parties intend that the child shall be treated as a child of the intended parents, and they shall exercise parental responsibility for the child

Surrogacy is legal across Australia and is regulated at the state and territory level. The legislative instruments are:

State/Territory	Surrogacy Legislation
Australian Capital Territory	<i>Parentage Act 2004</i> (ACT)
New South Wales	<i>Surrogacy Act 2010</i> (NSW)
Northern Territory	<i>Surrogacy Act 2022</i> (NT)
Queensland	<i>Surrogacy Act 2010</i> (QLD)
South Australia	<i>Surrogacy Act 2019</i> (SA)
Tasmania	<i>Surrogacy Act 2012</i> (Tas)
Victoria	<i>Assisted Reproductive Treatment Act 2008</i> (Vic) <i>Status of Children Act 1974</i> (Vic)
Western Australia	<i>Surrogacy Act 2008</i> (WA)

¹ *Surrogacy Act 2010* (NSW) s 5.

The federal *Family Law Act*² also regulates parentage, parenting and parental responsibility. Domestic surrogacy, including the transfer of parentage, is regulated by the states and territories.

Only altruistic surrogacy is permitted in Australia, while commercial surrogacy is illegal. For intended parents in New South Wales,³ Queensland⁴ and the Australian Capital Territory,⁵ the prohibitions extend to residents entering a commercial surrogacy arrangement in another jurisdiction.

There are about 130-150 surrogacy births across Australia each year.⁶ Almost 80% of all Australian surrogacy arrangements occur between friends and family, while the remaining 20% find each other on social media.⁷

Traditional and gestational surrogacy are legal across Australia. Many clinics refuse to facilitate traditional surrogacy. In Victoria, fertility clinics are restricted from assisting with traditional surrogacy.⁸

Gestational surrogacy

involves the surrogate conceiving with an egg from an intended parent or a donor.

Traditional surrogacy

involves the surrogate conceiving with her own egg.

Eligibility criteria

Intended parents and surrogates wishing to pursue surrogacy in Australia must meet eligibility criteria.

Medical or social need

Intended parents must have a medical or social need for surrogacy in all jurisdictions except the ACT.⁹

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. This is usually applied to women and people assigned female at birth.

² *Family Law Act 1975* (Cth).

³ *Surrogacy Act 2010* (NSW) ss 8 and 11.

⁴ *Surrogacy Act 2010* (QLD) ss 54, 56 and 57.

⁵ *Parentage Act 2004* (ACT) ss 41 and 45.

⁶ Newman JE, Paul RC and Chambers GM, *Assisted Reproductive Technology in Australia and New Zealand 2022* (Report No 2024-09, National Perinatal Epidemiology and Statistics Unit, UNSW Sydney, 2024) www.unsw.edu.au/content/dam/pdfs/medicine-health/npesu/research-reports/2024-09-npesu/2024-09-assisted-reproductive-technology-in-australia-and-new-zealand-2022.pdf, and Jefford, S, Australian Surrogacy Statistics (2024) sarahjefford.com/australian-surrogacy-statistics.

⁷ Jefford, S, 500 Australian Surrogacy Arrangements (2024) sarahjefford.com/australian-surrogacy-arrangements.

⁸ *Assisted Reproductive Treatment Act 2008* (Vic) s 40.

⁹ The *Parentage Act 2004* (ACT) does not impose a medical or social need for surrogacy on the intended parents.

Social need refers to those who may be fertile but may not be able to conceive – this applies to single men and same sex couples.

Legal criteria

Intended parents across most of Australia can access surrogacy without discrimination as to their sex, gender, relationship or marital status. However, single men and same sex male couples cannot enter a surrogacy arrangement in Western Australia.¹⁰ Law reform has been expected and promised in Western Australia for over five years.

Age requirements

Surrogates and intended parents must be over the age of 25, although ACT allows a younger surrogate to proceed if a counsellor is satisfied that the surrogate is of sufficient maturity.¹¹ There are no legislated upper age limits; most clinics will apply their own policies. Surrogates are usually under the age of 50. The decision to proceed sits with the surrogate and her treating medical practitioner and the fertility clinic.

Other criteria

In Victoria, Western Australia and Tasmania, surrogates must have previously delivered a child,¹² while elsewhere this is not a requirement.

Fertility clinics must adhere to the **National Health and Medical Research Council** Ethical guidelines on the use of assisted reproductive technology.

A surrogate may obtain medical clearance prior to becoming a surrogate, although this is not a legislative requirement. The National Health and Medical Research Council guidelines require fertility doctors to ensure a potential surrogate is medically and psychologically suitable.¹³

Tasmanian law requires that both the intended parents and the surrogate must be resident in Tasmania at the time of entering the surrogacy arrangement.¹⁴

In South Australia and the Northern Territory, the parties must be Australian citizens or permanent residents.¹⁵ In some states, it is a requirement that the intended parents are

¹⁰ *Surrogacy Act 2008* (WA) s 19.

¹¹ *Parentage Act 2004* (ACT) ss 28C (1) and (2).

¹² *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ac); *Surrogacy Act 2008* (WA) s 17; *Surrogacy Act 2012* (Tas) s 16(2)(d).

¹³ National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* at 8.9.2.

¹⁴ *Surrogacy Act 2012* (Tas) s 16.

¹⁵ *Surrogacy Act 2019* (SA) ss 10(3)(c) and (4)(c); *Surrogacy Act 2022* (NT) ss 17 and 18.

residents at the time of entering the arrangement,¹⁶ while in other states they must be resident in their respective jurisdiction at the time of applying for a parentage order.¹⁷

Enforcement of a surrogacy arrangement

Surrogacy arrangements are not enforceable in any Australian jurisdiction, save for the enforcement of the surrogate's expenses.

Surrogates retain their bodily autonomy and the power to make decisions about their health during the pregnancy and birth. In several states, this is enshrined in law¹⁸ while in others it is inferred by fact that the surrogacy arrangement is not enforceable.

Intended parents and surrogates are confused by the lack of enforceability of a surrogacy arrangement.

Unenforceability reflects a public policy approach that prioritises the rights and best interests of the child above the rights and interests of the intended parents and the surrogate.

This means that even if an agreement is signed, a surrogate cannot be compelled to relinquish the child, and intended parents cannot be compelled to assume parental responsibility if they change their minds. The courts have the ultimate authority to determine legal parentage through a post-birth parentage order, and/or parental responsibility based on the best interests of the child.

A surrogate can seek redress against the intended parents for out-of-pocket expenses regardless of the outcome of the surrogacy arrangement.

Pre-surrogacy process

While the laws differ across each jurisdiction, several conditions of the pre-surrogacy arrangement are consistent across Australia. The parties must engage in pre-surrogacy counselling with a qualified counsellor and obtain independent legal advice.

The definition of a *qualified counsellor* varies between jurisdictions.¹⁹ The requirements for counselling also vary and are ultimately determined by the practitioner. In practice,

¹⁶ For example, *Surrogacy Act 2019* (SA) requires at least one intended parent to be domiciled in South Australia at the time of entering the surrogacy arrangement.

¹⁷ For example, *Surrogacy Act 2022* (NT) s 33; *Surrogacy Act 2010* (NSW) s 32.

¹⁸ For example, *Surrogacy Act 2022* (NT) ss 6(c) and 10.

¹⁹ For example, *Surrogacy Regulation 2016* (NSW) s 6 defines *qualified counsellor* to include et al, practitioners who hold appropriate qualifications and experience such as a psychologist or psychiatrist and who may be a member of the Australian and New Zealand Infertility Counsellors Association.

THE AUSTRALIAN PRE-SURROGACY PROCESS

**Intended Parents meet
the eligibility criteria for surrogacy**

**Surrogate meets the criteria
and obtains medical clearance**

**Counselling and
psychological assessments**

**Legal advice and parties
sign a surrogacy agreement**

**Approval by the treating clinic
or regulatory authority**

Pregnancy attempts

most surrogacy counsellors are full members of the Australia and New Zealand Infertility Counsellors Association (ANZICA)²⁰ and adhere to ANZICA's guidance for providing counselling services.

In most states, a written surrogacy agreement must be signed after counselling and legal advice are completed, and prior to any pregnancy attempts.²¹

South Australian surrogacy requires the parties to exchange their respective criminal record checks prior to entering the arrangement.²²

Pre-surrogacy approval

Once the parties have completed the pre-surrogacy requirements including counselling and legal advice, they must obtain approval to proceed with the surrogacy arrangement. Approval sits with the fertility clinics, in all states except Victoria and Western Australia.

Clinics must adhere to accreditation and licensing requirements of the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia²³ and follow the National Health and Medical Research Council *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*.²⁴

Traditional surrogacy arrangements do not usually seek assistance from a fertility clinic and thus do not seek approval from a regulatory body or service.

The parties must obtain independent legal advice and complete counselling prior to pregnancy attempts. However, neither counsellors, nor lawyers are official gatekeepers for a surrogacy arrangement proceeding. It is possible for arrangements, particularly traditional surrogacy arrangements, to proceed contrary to professional advice and with no independent oversight.

Victoria's Patient Review Panel

In Victoria, the Patient Review Panel must approve any surrogacy arrangement that seeks to utilise the services of a fertility clinic.²⁵ This is limited to gestational surrogacy arrangements. Traditional surrogacy arrangements involve at-home insemination and do not require Patient Review Panel approval unless the parties wish to seek the assistance

²⁰ Australian and New Zealand Infertility Counsellors Association.

²¹ In Victoria, written surrogacy agreements are not required for approval or transfer of parentage.

²² *Surrogacy Act 2019 (SA)* ss 10(3)(f) and 10(4)(g).

²³ Reproductive Technology Accreditation Committee, *Australia and New Zealand Code of Practice* (December 2024).

²⁴ National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2017, updated 2023).

²⁵ *Assisted Reproductive Treatment Act 2008 (Vic)* s39.

of a fertility clinic. Pre-approval by the Patient Review Panel is a precondition for a parentage order in cases where a fertility clinic provided treatment.²⁶

Western Australia's Reproductive Technology Council

In Western Australia, the Reproductive Technology Council (RTC) must approve all surrogacy arrangements prior to pregnancy attempts.²⁷ Approval from the RTC is a precondition for a parentage order.²⁸ RTC approval is required for both traditional and gestational surrogacy arrangements.

Parentage orders

A parentage order is a mechanism to transfer the parentage of a child born via surrogacy, from the birth parents to the intended parents. The application cannot be commenced prior to the birth of the child, nor in the first month after the birth. The application for a parentage order must be made prior to the child being 6 months old²⁹ or twelve months old.³⁰

Less than 150 parentage orders are made across Australia each year.

Parentage order applications are heard in state and territory 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 may not have any experience in family or children's law. The *Family*

Law Act directs that transfers of parentage for a child born via surrogacy can only occur pursuant to state and territory legislation.³¹

While surrogacy laws often refer to the 'best interests of the child,' limited definitions are contained in state legislation. The *Family Law Act* provides the most comprehensive list of what should be considered when determining what is in a child's best interests.³²

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. And yet, surrogacy matters and transfers of parentage are heard in state courts.

²⁶ *Status of Children Act 1974* (Vic) s 22(1)(b).

²⁷ *Surrogacy Act 2008* (WA) s 17.

²⁸ *Surrogacy Act 2008* (WA) s 16.

²⁹ For example, *Surrogacy Act 2010* (Qld) s 21; all other states require the application prior to the child being 6 months' old, except South Australia.

³⁰ *Surrogacy Act 2019* (SA) s 18(2).

³¹ *Family Law Act 1975* (Cth) section 60HB provides that a child born under a surrogacy arrangement is a child of the parents if a State or Territory court has made an order to that effect. There is no mechanism in the *Family Law Act* to transfer parentage for a child born via international or domestic surrogacy.

³² *Family Law Act 1975* (Cth) s 60CC.

A transfer of parentage is not usually available in Australia for a child born via international surrogacy. Recent changes to the New South Wales *Surrogacy Act* allow for parentage orders to be made for children born via international surrogacy in limited circumstances.³³

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

In my professional experience, the parties and their legal representatives are often more knowledgeable about surrogacy and the requirements for a parentage order, than court staff and judicial officers. Less than 150 parentage orders are made across all eight jurisdictions each year.

Patchwork laws and transfers of parentage

In Queensland, Tasmania, New South Wales and Northern Territory, there are requirements for the parties to engage in post-surrogacy counselling.³⁴ In New South Wales, there are two separate post-birth counselling requirements to qualify for the parentage order.³⁵

Preconditions for a parentage order vary between jurisdictions. In circumstances where the parties have not met the preconditions for a parentage order, the court must consider whether making the order is in the child's best interests and there are exceptional circumstances to warrant the making of the order.³⁶ In making an order, the court may retrospectively provide tacit approval of a non-compliant surrogacy arrangement, giving a sense that the parentage order is *fait accompli* regardless of the parties' adherence to the requirements.

Parentage orders may be made in chambers with no appearances by the parties,³⁷ or made in closed court with the parties expected to attend.

³³ *Surrogacy Act 2010* (NSW) s 18.

³⁴ For example, *Surrogacy Act 2010* (QLD) s 32.

³⁵ *Surrogacy Act 2010* (NSW) ss 17 and 35(2).

³⁶ For example, *Surrogacy Act 2010* (QLD) s 23.

³⁷ *Surrogacy Act 2010* (NSW) s 47.

Australians engaging in international surrogacy

While surrogacy births remain low within Australia, more than 350 children were born via international surrogacy for Australian intended parents in the 2023-2024 financial year.³⁸ Many intended parents travel overseas for surrogacy, citing a shortage of surrogates and the complexity of surrogacy laws in Australia as their primary reasons.³⁹



Children born via surrogacy for Australian intended parents.

Residents in New South Wales, Queensland and the ACT are prohibited from engaging in international commercial surrogacy. A recent Federal Circuit and Family Court of Australia (FCFCOA) case of *Lloyd & Compton*⁴⁰ involved intended parents who had engaged in international commercial surrogacy. The Court referred the parents to the Queensland Department of Public Prosecutions for consideration for investigation for having breached the Queensland *Surrogacy Act* and prohibition against commercial surrogacy.⁴¹

The risks of unregulated industries

Australians have engaged in international surrogacy in many countries including India, Thailand, Nepal, Ukraine, Georgia, Greece, Mexico, Argentina, the United States and Canada. As each country grapples with increased surrogacy and medical tourism, regulation changes and even prohibits surrogacy for international intended parents. In what is commonly referred to as ‘Whac-a-Mole,’⁴² the international surrogacy landscape shifts; new destinations are identified and intended parents are encouraged to try another option.

Many international surrogacy destinations are attractive to intermediaries – agents, consultants and third-party surrogacy brokers – precisely because of the legal ambiguities that allow surrogacy to flourish with little scrutiny. Intended parents may be offered attractive ‘guaranteed baby’ packages with limited recourse if the agent does not deliver on their promises.

³⁸ 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>.

³⁹ Kneebone E, Hammarberg K, Everingham S and Beilby K, ‘Australian Intended Parents’ Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and Overseas’ (2023) 26(6) *Human Fertility* 1448–1458.

⁴⁰ *Lloyd & Compton* [2025] FedcFamC1F 28.

⁴¹ *Surrogacy Act 2010* (QLD) ss 54 and 56.

⁴² *Whac-a-mole* refers to a game in which players hit mechanical moles with a mallet as they pop up randomly. Metaphorically, it describes situations where one problem is temporarily resolved only for another to emerge, requiring constant, repetitive efforts to address recurring issues. See Cambridge Dictionary, ‘Whac-a-mole’.

Intended parents, surrogates and children are vulnerable to exploitation by intermediaries, who may be resident in one country while offering services in another. Surrogates and egg donors may be trafficked across international borders for the purpose of treatment, pregnancy or birth. ‘Travelling surrogates’ are recruited from some countries to act as surrogates while living temporarily in other countries, sometimes in group accommodation with other surrogates.⁴³

In many countries, there are few safeguards protecting the parties from exploitation. Surrogates may be expected to forego any medical autonomy during pregnancy and birth, and may not be appropriately screened, nor have access to adequate prenatal health care.

In some countries, the parties do not communicate in the same language, nor are they provided with independent legal counsel. Informed consent may be lacking, with surrogates subjected to medical treatment despite no access to an interpreter.

*Intended parents, surrogates and children
are at risk of exploitation in some
international surrogacy destinations.*

Lawyers who work for the agent or clinic regularly provide advice to the intended parents without declaring a conflict of interest. Surrogacy contracts are drafted to protect the agency only.⁴⁴

Despite the concerns, many agencies promote their services to Australian intended parents online and at trade shows in Australia with little government scrutiny or oversight. Intended parents who engage with a service are often unaware of the conflicts of interest between service providers who refer to each other, nor do they understand their rights and the potential consequences for engaging in international surrogacy.

When disaster strikes in international surrogacy, there may be little to no recourse with the surrogacy service providers, and intended parents rely on Australian consulate assistance in the destination country. Intermediaries are rarely accountable, provide limited assistance and often only for additional fees.

⁴³ Author’s own observations, including providing legal advice in surrogacy arrangements since 2016.

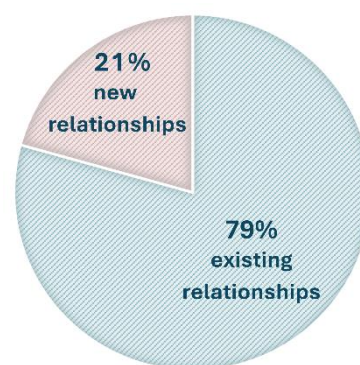
⁴⁴ Ibid.

Barriers to Australian surrogacy

If we are committed to addressing human rights concerns and reducing the number of Australians engaging in international surrogacy, we must consider why intended parents travel overseas for surrogacy. To improve accessibility, we must address the barriers to domestic surrogacy in Australia. Several barriers to domestic surrogacy result in intended parents pursuing surrogacy internationally.

Finding a surrogate

The greatest barrier faced by intended parents in Australia is finding a surrogate. Most domestic surrogacy arrangements are between family and friends.⁴⁵ In lieu of someone within their existing networks, many intended parents seek a surrogate through online communities.⁴⁶ Prohibitions on advertising and a general lack of awareness make domestic surrogacy a rarity.



Surrogacy – founding relationships

Financial barriers

Intended parents consider the financial burden of surrogacy to be prohibitive of domestic surrogacy. Australian surrogacy can cost between \$15,000 and \$100,000, with no government rebates or surrogacy-specific funding programs or loan schemes.

There are restrictions on accessing Medicare rebates for surrogacy fertility treatments.⁴⁷ 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,⁴⁸ there may be an increase in people nominating to be surrogates if it were compensated in Australia.

Inaccessible legal framework

Surrogacy laws differ between each state and territory, leading to medical and legal tourism within Australia. Tasmanian intended parents, for example, are required to have a surrogate who is also a resident of Tasmania.⁴⁹ Surrogates must have had their own child, for arrangements in Victoria, Western Australia and Tasmania.⁵⁰

⁴⁵ Sarah Jefford, 'Australian Surrogacy Arrangements', sarahjefford.com, sarahjefford.com/australian-surrogacy-arrangements/.

⁴⁶ Ibid.

⁴⁷ Medicare Benefits Schedule - Item 13218 TN.1.4.

⁴⁸ 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.

⁴⁹ *Surrogacy Act 2012* (Tas) s 16(2)(g).

⁵⁰ *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ac); *Surrogacy Act 2008* (WA) s 17; *Surrogacy Act 2012* (Tas) s 16(2)(d).

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.⁵¹ Numerous gay male couples and single men living in Western Australia have travelled overseas for surrogacy or relocated interstate.⁵² Several have availed themselves of interstate surrogacy frameworks by utilising an address in another state.

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.

Lack of legal clarity

Intended parents often cite a lack of legal clarity, including having to apply for a post-birth parentage order before being recognised as the legal parents of their child, as a reason why they pursued international surrogacy.

Unlike international destinations, there are no legitimate surrogacy matching services operating in Australia. Intended parents seek the clarity and surety of international destinations that offer everything that Australia does not.

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.

There are prevailing myths in the wider community and the infertility and surrogacy communities that surrogacy is illegal in Australia. Many people believe that the surrogate will keep the baby. Intended parents exploring surrogacy often rely on social media to fill the gaps in their knowledge.

*A popular Google search 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

⁵¹ *Surrogacy Act 2008* (WA) s 19(2).

⁵² Author’s own observations and providing legal advice since 2016.

information, it is no wonder that Australians travel overseas when credible and unbiased information is lacking for Australian surrogacy.

Best practice surrogacy

Best practice surrogacy refers to the ethical, legal, medical and psychosocial standards that ensure that surrogacy arrangements are safe and protect the human rights of everyone involved. While there is no single binding international instrument that defines best practice surrogacy, there are a growing body of international instruments, court decisions and professional guidelines that shape what is considered ‘best practice’ in surrogacy.

Best interests of the child and prevention of human trafficking

International instruments

The United Nations *Convention on the Rights of the Child* (CRC)⁵³ is a binding treaty, ratified by Australia in 1990. The CRC outlines key principles relevant for surrogacy, including that the best interests of the child should be the primary consideration for all actions concerning children (Article 3), the right to identity, nationality and to know their origins (Articles 7 and 8) and the protection from sale and trafficking (Article 35).

The UN Special Rapporteur on the Sale and Sexual Exploitation of Children published a thematic report in 2018,⁵⁴ recommending the prohibition of the sale of children, the strict regulation of surrogacy, and the protection of women and children’s rights.

The best interests of the child shall be a primary consideration.

- Article 3 of the United Nations Convention on the Rights of the Child.

In 2021, the International Social Service published the *Principles for the protection of the rights of the child born through surrogacy* (the ‘Verona Principles’), calling for the respect and protection of the human rights of children born through surrogacy.⁵⁵

Other instruments guide the surrogacy and fertility industries. The American Society of Reproductive Medicine (ASRM) has issued *Recommendations for practices using gestational carriers*.⁵⁶ The

⁵³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁵⁴ United Nations General Assembly, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 2018.

⁵⁵ International Social Services, *Principles for the protection of the rights of the child born through surrogacy*, 2021.

⁵⁶ American Society for Reproductive Medicine, ‘Recommendations for Practices Using Gestational Carriers: A Committee Opinion’ (2022) www.asrm.org/practice-guidance/practice-committee-documents/recommendations-for-practices-using-gestational-carriers-a-committee-opinion-2022/.

Recommendations provide guidance for when doctors might recommend surrogacy to intended parents, and necessary screening of surrogates to reduce complications.

Australian guidance

In Australia, clinics must adhere to the National Health and Medical Research Council *Guidelines on the use of assisted reproductive technology in clinical practice and research*.⁵⁷ The guidelines require that clinics must not facilitate treatment if there are concerns about the surrogacy arrangement not being legal or ethical.⁵⁸ The guidelines provide more specific advice about the counselling requirements for a surrogacy arrangement, and require clinics to ensure there is valid consent and information sharing between the parties.⁵⁹

Caselaw

Australian caselaw for surrogacy is limited. In the UK, however, some published cases provide guidance about what the judiciary considers important factors for an ethical surrogacy arrangement. In the case of *Re Z (Foreign Surrogacy)*, Justice Theis outlined key issues for intended parents and their lawyers to consider prior to entering an international surrogacy arrangement,⁶⁰ A subsequent case of *Re Z (Unlawful Foreign Surrogacy: Adoption)* extended the list of issues to consider.⁶¹

Women's rights

International instruments support a woman's right to choose to be a surrogate, including the right to work, free choice of employment and protection against unemployment contained within the United Nations Declaration of Human Rights (Article 23).⁶² The Convention on the Elimination of All Forms of Discrimination against Women protects the inalienable right to work and free choice of profession (Article 11)⁶³ and the International Covenant on Economic, Social and Cultural Rights protects the right to work, opportunity to gain a living as they freely choose and safe and healthy work conditions (Articles 6 and 7).⁶⁴

Balancing the rights of women and children, the international and academic consensus is that best practice, ethical surrogacy, promotes the principles of legal clarity, ethical standards, medical best practices, protections for the surrogate, and the promotion of the rights and interests of children.

⁵⁷ National Health and Medical Research Council, above n 24.

⁵⁸ Ibid at 8.9.

⁵⁹ Ibid at 8.11-8.12.

⁶⁰ *Re Z (Foreign Surrogacy)* [2024] EWFC 304.

⁶¹ *Re Z (Unlawful Foreign Surrogacy: Adoption)* [2025] EWHC 339 (Fam).

⁶² United Nations, Universal Declaration of Human Rights, art 23, GA Res 217A (III), UN Doc A/810 at 71 (1948).

⁶³ United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, art 11, GA Res 34/180, UN GAOR, 34th sess, UN Doc A/34/36 (1979).

⁶⁴ United Nations, International Covenant on Economic, Social and Cultural Rights, arts 6, 7, GA Res 2200A (XXI), UN GAOR, 21st sess, Supp No 16, UN Doc A/6316 (1966).

Legal clarity

A clear legal framework that supports the surrogacy arrangement and rights of the parties. Surrogacy frameworks should include consistent rules for eligibility, agreements, parentage and dispute resolution.

A surrogacy agreement should be a pre-conception arrangement.

There should be legal clarity with respect to the parentage of the child, and the transfer of parentage from the surrogate to the intended parents.

Ethical standards

Ethical standards include that each party should be of sufficient maturity, understanding and capacity to provide informed consent prior to entering a surrogacy arrangement.

Ethical Standards for surrogacy arrangements

Access to counselling

Each party should receive counselling with a qualified counsellor to ensure an understanding of the social and psychological implications of the surrogacy arrangement. Counselling ensures each party can provide informed consent prior to entering the arrangement.

Legal advice

Each party should obtain legal advice from independent legal counsel prior to entering the surrogacy arrangement.

Informed Consent

To ensure sufficient understanding and capacity, surrogacy documents should be in the language/s that the parties can read.

Payments for gestational services

In commercial surrogacy arrangements, payments to the surrogate should be for gestational services, and not for the relinquishment of the child or transfer of parentage. Payments should be properly regulated.

Regulated industry

Intermediaries and surrogacy services must be properly regulated. Not-for-profit services that are regulated and accountable, can reduce the risk of the parties being exploited.

Medical best practices

Surrogates should undergo thorough medical and psychological evaluations before being approved for surrogacy.

Clinics should adhere to evidence-based and ethical IVF protocols and limit the number of embryos transferred to a surrogate at any one time.

Surrogates should have access to high-quality, independent healthcare throughout prenatal, pregnancy, birth and postnatal periods.

Children should have access to high quality healthcare from birth.

Surrogate protections

Surrogates should be fairly and adequately compensated and reimbursed for expenses.

Surrogates should have access to legal advice and counselling throughout the process and be able to assert their rights and entitlements.

Surrogates should maintain their bodily autonomy, including the right to make medical and health decisions during pregnancy.

Child's rights and interests

The child's best interests must be paramount and inform any decisions regarding parentage and parental responsibility.

There must be legal clarity surrounding the surrogacy arrangement and transfer of legal parentage to the intended parents.

Every child has rights to establish their identity, obtain citizenship and access information about their birth and genetic heritage. Children have a right to family, privacy, and to be cared for by their parents.

The Fellowship

The Churchill Fellowship project, *to research best practice surrogacy to inform law reform in Australia*, came about after repeated international surrogacy incidents involving Australian intended parents. It was inspired by the advocacy, reviews and law reform campaigns in countries like Ireland and England, who are similarly concerned with their citizens engaging in international surrogacy and how to promote ethical surrogacy in their own countries.

The Fellowship was an opportunity to learn from our counterparts and explore existing and changing frameworks in Canada and the United States – two countries where Australians engage in surrogacy.

During my travels, I had the benefit of meeting with lawyers, advocates, community members and service providers who offered insights and knowledge about how to promote and protect ethical and best practice surrogacy.

International Surrogacy Forum, South Africa

I was fortunate to attend the third International Surrogacy Forum in Cape Town, South Africa, alongside industry professionals, researchers, legislators and judiciary. The Forum program included developments from across the globe including legal and policy developments, and insights into how each jurisdiction is regulating and managing surrogacy arrangements and parentage.

The forum considered how each jurisdiction recognises international surrogacy and parentage instruments and highlighted the need for international collaboration for mutual recognition across borders.

The international Working Group on Parentage/Surrogacy established by the Hague Conference on Private International Law was established in 2023 and is due to provide a final report to the Council on General Affairs in 2026. Australia is not a member of the Working Group.

Surrogacy in Ireland

Surrogacy is not formally regulated in Irish law. There are inconsistencies in how courts and administrative bodies respond to issues including parentage, parental responsibility and citizenship for people born via surrogacy. Many Irish parents engage in international surrogacy including in Ukraine, Georgia and the USA where parentage may be established in the destination country but not recognised in Ireland.

Advocacy groups, led by parents through surrogacy and including Irish Families Through Surrogacy⁶⁵ and LGBT Ireland, have campaigned for surrogacy law reform over a decade. In 2022, the *Health (Assisted Human Reproduction) Bill 2022*⁶⁶ was introduced in the Oireachtas (Irish parliament). In 2023, the Special Joint Oireachtas Committee convened to examine the regulation of surrogacy and in July 2023, published a report making recommendations for regulation of domestic and international surrogacy arrangements for Irish citizens.

The Oireachtas passed the *Health (Assisted Human Reproduction) Act*⁶⁷ (the AHR Act) in July 2024. While advocates and community were hopeful that the AHR Act would commence, the Minister for Health, Jennifer Carroll MacNeill announced in May 2025 that commencement would be delayed due to concerns that the laws would conflict with anti-trafficking laws.⁶⁸

The AHR Act would regulate domestic surrogacy arrangements in Ireland, and included requirements that the arrangement must be altruistic, unenforceable, and pre-approved by the Assisted Human Reproduction Regulatory Authority (AHRRA).⁶⁹ There are specific conditions the parties would need to adhere to, and counselling and legal advice would be required prior to entering the arrangement.

The (now delayed) commencement of the AHR Act was much anticipated by the community and particularly by parents of children born via international surrogacy, who have campaigned for the law reform for over a decade.

Surrogacy in the United Kingdom

The United Kingdom first introduced surrogacy legislation in 1985 with the *Surrogacy Arrangements Act*⁷⁰ which banned commercial surrogacy. The *Human Fertilisation and Embryology Act*⁷¹ regulates assisted reproduction and allows parental orders to be made for children born through surrogacy. The current legislative framework lacks clarity and fails to adequately protect the rights of surrogates, people born and intended parents.

A *parental order* is a court order in the United Kingdom that transfers legal parenthood of a child born via surrogacy from a surrogate and her partner to the intended parents.⁷² *Parental orders* in the UK are synonymous with *parentage orders* in Australia. While the

⁶⁵ Irish Families Through Surrogacy www.irishfamiliesthroughsurrogacy.ie.

⁶⁶ *Health (Assisted Human Reproduction) Bill 2022* (Ireland).

⁶⁷ *Health (Assisted Human Reproduction) Act 2024* (Ireland).

⁶⁸ Tighe, Mark 'Irish Surrogacy Laws Now Delayed as Human Trafficking Concerns Are Raised' (*Irish Independent*, 25 May 2025) www.independent.ie/irish-news/irish-surrogacy-laws-now-delayed-as-human-trafficking-concerns-are-raised/a1988341378.html.

⁶⁹ *Health (Assisted Human Reproduction) Act 2024* (Ireland) s122.

⁷⁰ *Surrogacy Arrangements Act 1985* (United Kingdom).

⁷¹ *Human Fertilisation and Embryology Act 1990* (United Kingdom).

⁷² *Human Fertilisation and Embryology Act 1990* (United Kingdom) s 54.

language differs, the purpose and effect are the same – to recognise the intended parents as the legal parents of their child born via surrogacy.

United Kingdom *parental orders* are synonymous with Australian *parentage orders*.

Like Ireland, lawyers, advocates and the surrogacy community have campaigned for reform in the United Kingdom. The Law Commission undertook a comprehensive review of surrogacy in the UK from 2017 and in 2023, released a report containing recommendations for a new surrogacy framework.⁷³ The report includes recommendations for surrogacy pathways for both international and domestic surrogacy and the regulation of surrogacy matching services.

Campaigners including SurrogacyUK, lawyers and academics have continued to call for reform, however in May 2025 the UK government announced that surrogacy law reform would not be progressed at this time.⁷⁴

During my time in England, I met with surrogacy lawyers, service providers, campaigners and researchers.

Several aspects of the UK system, and proposals for reform caught my attention for how they might be reflected in Australian reforms. The UK, for example, regulates international surrogacy in the High Court's Family Division, with specialist family law judicial officers hearing applications for parental orders.

Parental orders for children born via international surrogacy are heard in the UK's High Court (Family Division).

The UK has also grappled with the issue of whether a surrogate's consent is required to obtain a parental order. In Australia, surrogates must consent to the making of a parentage order in all states except Western Australia.⁷⁵ Case law in the UK highlights that requiring a surrogate's consent may compromise the child's best interests.⁷⁶

Children and families benefit from judicial specialisation for surrogacy and parentage matters. Lawyers and judicial officers are familiar with surrogacy and in some cases, guidance has been published for parties to consider when engaging in international surrogacy.⁷⁷

⁷³ Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law* (Report No 244, 28 March 2023) lawcom.gov.uk/project/surrogacy/.

⁷⁴ Baroness Merron, 'Review of Surrogacy: Government Position' (Letter to Sir Peter Fraser, Chair of the Law Commission of England & Wales, 10 April 2025) cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/54/2025/04/Letter-from-Baroness-Merron.pdf.

⁷⁵ *Surrogacy Act 2008* (WA) s 21.

⁷⁶ *Re C (A Child) (Surrogacy: Consent)* [2023] EWCA Civ 16.

⁷⁷ *Re Z (Foreign Surrogacy)* [2024] EWFC 304 includes a list of matters to be considered for intended parents seeking to enter an international surrogacy arrangement.

Like Australia, many more UK intended parents travel overseas for surrogacy than engage in domestic surrogacy. While private organisations and advocates work hard to provide information about surrogacy within the UK, the government should take on a role of providing unbiased education to raise community awareness about surrogacy, including the risks and consequences of international surrogacy.

The proposed reforms to regulate the industry including introducing Regulated Surrogacy Organisations, provides a framework to assist and promote domestic surrogacy arrangements within a professionally supported environment.

Surrogacy in Canada

Canada, much like Australia, is a patchwork of surrogacy laws across the country. The *Assisted Human Reproduction Act* prohibits payments for surrogacy other than for receipted expenses,⁷⁸ and restricts intermediaries from accepted consideration for arranging the services of a surrogate.⁷⁹

While intermediaries are not permitted to accept payments, surrogacy matching services operate in a landscape of little regulation. ‘Administrative fees’ are charged instead of fees for ‘matching’ with limited recourse if the intended parents are unhappy with the service. While Canada has been a popular destination for international intended parents, the lack of regulation could be considered both a drawcard and a risk.

In Canada, payments to surrogates may be negotiated between the parties with little regulatory or judicial oversight or enforcement.

The patchwork of laws across Canada means that recognition of surrogacy and transferring parentage can differ between provinces. Fertility clinics follow guidance from the Canadian Fertility and Andrology Society, including the position statement on Ethics and Assisted Procreation.⁸⁰

During my time in Canada, I met with surrogacy lawyers and an industry professional to hear their views on the current frameworks, pitfalls and challenges of the Canadian surrogacy landscape. I was curious to hear that many of the issues we face in Australia were mirrored in Canada and there was a clear need for better regulation of surrogacy and the industry.

⁷⁸ *Assisted Human Reproduction Act*, S.C. 2004 c. 2 ss 6 and 12

⁷⁹ *Assisted Human Reproduction Act*, S.C. 2004 c. 2 ss 6(2) and (3).

⁸⁰ Canadian Fertility & Andrology Society, *Position Statement on Ethics and Assisted Procreation* (2009) cfas.ca/clinical-practice-guidelines.html.

Surrogacy in the United States

The United States does not have federal surrogacy laws, and surrogacy arrangements are regulated in each state. There is significant legal uncertainty in many states, with no specific surrogacy legislation to facilitate an arrangement or transfer of parentage. Other states however, such as California, Michigan and New York have well-regulated surrogacy legal frameworks which establish clear provisions for surrogacy arrangements to be facilitated and enforced and allows for a transfer of parentage.

California

In California, surrogacy is regulated by the *California Family Code* § 7960.⁸¹ A significant advantage to the Californian framework is the ability for intended parents to obtain a pre-birth parentage order, recognising them as the legal parents of the child and eliminating the need for post-birth adoption processes. The parties are required to obtain independent legal counsel and surrogacy agreements must be in writing. California is a popular destination for intended parents including from overseas, and costs can be over \$USD200,000.⁸²

Michigan

Michigan introduced surrogacy laws in 2024,⁸³ and like California includes key protections in its framework. The parties must obtain legal advice with independent counsel and mandates medical and psychological assessments for surrogates. Surrogate entitlements to fair compensation are enshrined in the law. Pre-birth orders allow for transfers of parentage to recognise the intended parents.

New York

Most states in the United States do not regulate the surrogacy industry. Surrogacy was outlawed in New York until the 2021 commencement of the *Child-Parent Security Act* (CPSA).⁸⁴ The new laws allow for surrogacy arrangements to be facilitated and recognised in New York and also regulates matching services and the industry. New York is the first state to introduce licensing for surrogacy services, providing added protections for intended parents and surrogates.

⁸¹ *California Family Code* § 7960 (2024).

⁸² Growing Generations, *Surrogacy Costs*, www.growinggenerations.com/intended-parents/surrogacy-costs.

⁸³ *Michigan Compiled Laws (MCL)* § 552.148.

⁸⁴ *Family Court Act* art 5-C §§ 581-101–581-703 (NY, enacted 2020).

A vision for surrogacy in Australia

The current Australia-wide review of surrogacy laws being conducted by the Australian Law Reform Commission offers a unique and exciting opportunity to rethink surrogacy in Australia. A new national framework for federal surrogacy laws could make surrogacy more accessible and promote surrogacy within Australia. Well-regulated, best practice surrogacy laws can protect the parties and the people born, provide clarity and confidence and promote the interests of everyone involved.

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.

There are many challenges with the different laws in each state and territory, which compromise the rights of the parties and people born via surrogacy. A national surrogacy legal framework offers consistency and clarity and protects and promotes the rights of everyone involved in a surrogacy arrangement.

There is a need for harmony and uniformity in Australia's surrogacy laws. Children's matters should be regulated within the *Family Law Act*,⁸⁵ just as family, children's and parentage matters are. The states and territories should exercise referral powers under the Constitution⁸⁶ and refer surrogacy matters to the Commonwealth.

In lieu of a federal framework for surrogacy, the state and territories should implement uniform surrogacy laws in each jurisdiction, with mutual recognition and consistent processes and frameworks across the country.

A specialist court for surrogacy matters

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.⁸⁷

To promote the rights and best interests of children born, all surrogacy cases should be heard in a specialised court. Children born via surrogacy should be treated equally and matters regarding their parentage and care, dealt with in the same way as for all children.

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

⁸⁵ *Family Law Act 1975* (Cth).

⁸⁶ *Australian Constitution* s51(xxxvii).

⁸⁷ *Human Fertilisation and Embryology Act 2008* (UK) s 54 and *Senior Courts Act 1981* (UK) s 31A.

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. However, if surrogacy regulation remains with the states and territories, judges in each jurisdiction should undergo training in parentage and surrogacy and applications for parentage orders be heard in specialist lists within each court.

If surrogacy regulation is to remain with the states and territories, uniform laws should also provide for uniform court rules, procedures and court fees.

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.

Eligibility

There should be no discrimination in any state or territory for intended parents seeking to pursue surrogacy. Intended parents should be free to pursue surrogacy in their home state without needing to cross borders to access treatment or legal frameworks.

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.⁸⁸ 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.

⁸⁸ *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.⁸⁹ There is little to no clarity about the definition of 'unable,' or how a medical practitioner can determine whether someone is 'unable' to be pregnant and carry a pregnancy to term. It is arguable that anyone who has a uterus is potentially 'able' to be pregnant, and it is therefore difficult for women and people assigned female at birth to qualify for surrogacy.

Clinicians may not be sufficiently aware of the legal definitions for eligibility and intended parents who have a uterus must seek a specialist who is willing to approve them for surrogacy.

Some women are told they do not qualify for surrogacy because they still have a uterus, despite a long history of infertility and/or pregnancy loss.⁹⁰ 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.

It is easier to be approved for surrogacy for someone who does not have a uterus, than for a person who has a uterus but should not, cannot or does not want to use it.

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

⁸⁹ *Surrogacy Act 2008* (WA) s 19(2)(a).

⁹⁰ Author's own observations, providing legal advice to intended parents since 2016.

American Society for Reproductive Medicine has resources that could assist with developing such guidelines.⁹¹

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.

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.

Intended mothers with psychological trauma arising from fertility treatments, failed attempts and pregnancy losses may not be approved to proceed with surrogacy. The process to establish a psychological need may of itself be traumatic.

A single man or same sex male couple qualify for surrogacy simply by choosing to pursue it. A woman or person 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 women and person AFAB, including the choice to pursue surrogacy instead of carrying a pregnancy themselves.

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.

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.

To be truly equitable, surrogacy should be available to anyone who chooses to pursue it. A person without a uterus is no more entitled to pursue surrogacy than a person with a uterus who does not wish to be pregnant.

⁹¹ 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/>

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 an independent authority.

Oversight of surrogacy arrangements

A new Australian Assisted Reproductive Treatment Commission

Surrogacy arrangements involve complex ethical, legal, and relational issues. Oversight by an independent authority provides necessary safeguards 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.

In Victoria and Western Australia, parties are required to obtain approval of their surrogacy arrangement, prior to any treatment or pregnancy attempts.⁹² Elsewhere, approval is determined by individual treating clinics, who often have a surrogacy or ethics committee. Traditional surrogacy arrangements, that do not utilise the services of a clinic, may proceed without clinic or regulatory oversight.

The Patient Review Panel – a model for national oversight

The Patient Review Panel (PRP) in Victoria provides a model for consideration for national approval of all surrogacy arrangements. The PRP is established with the *Assisted Reproductive Treatment Act*⁹³ and regulates gestational surrogacy arrangements where fertility treatment is sought in Victoria.

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.

A similar model for pre-approving surrogacy arrangements would be implemented in Ireland, if the AHR Act were to commence. Other jurisdictions, however, do not have an

⁹² *Assisted Reproductive Treatment Act 2008* (Vic) s39.

⁹³ *Assisted Reproductive Treatment Act 2008* (Vic) Part 9.

external independent authority determining whether surrogacy arrangements can proceed.

Clinics in the United States rely on guidance from the American Society of Reproductive Medicine (ASRM)⁹⁴ and matching services may follow industry ethical standards developed by the Society of Ethics in Egg Donation and Surrogacy (SEEDS).⁹⁵

Canada does not have an independent approval body to determine surrogacy arrangements, with clinics regulated by the *Assisted Human Reproduction Act* (AHR).⁹⁶

An independent approval body can be empowered to make decisions without reference to business or personal interests. Decisions can be made based on whether the arrangement has met preconditions and the parties have completed counselling and obtained legal advice. The body can check that safeguards are in place to ensure the parties have capacity for informed consent and that their rights, and that of the people born, are protected and promoted. Counsellors and lawyers can be accountable to the authority and to the court, rather than to the parties or each other for approval.

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

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.

⁹⁴ American Society for Reproductive Medicine, 'Recommendations for Practices Using Gestational Carriers: A Committee Opinion' (2022), www.asrm.org/practice-guidance/practice-committee-documents/recommendations-for-practices-using-gestational-carriers-a-committee-opinion-2022/.

⁹⁵ Society of Ethics in Egg Donation and Surrogacy (SEEDS), *SEEDs Agency Standards*, seedsethics.org/seeds-agency-standards/.

⁹⁶ *Assisted Human Reproduction Act*, S.C. (Canada) 2004, c. 2.

RECOMMENDATION: A national Australian Assisted Reproduction Commission should be established to regulate and determine surrogacy arrangements.

RECOMMENDATION: The Australian Assisted Reproduction Commission should implement standards and requirements for surrogacy applications.

Surrogacy matching services and regulating the industry

One way to reduce barriers to domestic surrogacy and increase the chances of intended parents finding a surrogate is to allow for surrogacy matching services to operate in Australia.

Advertising for a surrogate or intended parents, or to offer surrogacy matching services is prohibited in several Australian states.⁹⁷ Given the low number of surrogacy arrangements in Australia, and that nearly 80% of arrangements occur between friends and family,⁹⁸ we must consider whether surrogacy matching services should be supported and regulated in Australia.

Matching services could facilitate surrogacy matching between intended parents and surrogates, potentially increasing the number of surrogacy arrangements and births in Australia. Any increase in surrogacy in Australia could reduce the number of intended parents who travel overseas for surrogacy.

Where intended parents may not find a surrogate within their existing networks, they often turn to social media, including Facebook groups such as the Australian Surrogacy Community.⁹⁹ These groups and platforms provide community and support, but are entirely volunteer run in an unregulated environment with no access to government resources or oversight by any professional body. A regulated framework for matching services could bridge the gap between the existing landscape of unregulated social media and intended parents travelling overseas.

The United Kingdom recommendations for law reform

While current UK surrogacy laws prohibit commercial surrogacy and advertising,¹⁰⁰ surrogacy matching services can operate with limited oversight or regulation. Several non-profit matching services have been established, including Brilliant Beginnings,¹⁰¹ My

⁹⁷ *Surrogacy Act 2019 (SA)* s 24; *Surrogacy Act 2022 (NT)* s 49; *Surrogacy Act 2008 (WA)* s 9.

⁹⁸ Jefford, Sarah 500 *Australian surrogacy arrangements*, above n 7.

⁹⁹ Australian Surrogacy Community, Facebook group, www.facebook.com/groups/ftsaustralia.

¹⁰⁰ *Surrogacy Arrangements Act 1985* ss 2 and 3.

¹⁰¹ Brilliant Beginnings www.brilliantbeginnings.co.uk.

Surrogacy Journey¹⁰² and community organisations including SurrogacyUK.¹⁰³ In lieu of strict regulatory frameworks, organisations offer matching services and/or opportunities for prospective surrogates and intended parents to meet and develop relationships, with the ultimate potential for entering a surrogacy arrangement together.

The UK Law Commission proposed a framework for the creation of Regulated Surrogacy Organisations (RSOs) that would allow for licensing, practice standards and regulation of service providers who offer surrogacy matching services.¹⁰⁴ The RSOs would be regulated by the Human Fertilisation and Embryology Authority (the HFEA). The HFEA currently regulates fertility clinics and the register of donor conceived people in the UK.

The RSO framework proposed by the Law Commission would provide clarity for the parties and promote best practice surrogacy. The RSOs would be responsible for ensuring a surrogacy arrangement meets the eligibility conditions and safeguard requirements of a surrogacy arrangement. RSOs would be accountable to the HFEA for record-keeping and adherence to a Code of Practice.

Where a surrogacy arrangement is facilitated by an RSO, the parties and the RSO would be required to sign a Regulated Surrogacy Statement¹⁰⁵ to confirm that the arrangement meets the requirements of a surrogacy arrangement. The Statement would ensure that a parental order is not required to transfer parentage of the child, if the arrangement meets all other conditions.¹⁰⁶ In this way, the intended parents are the legal parents of the child at birth.

The surrogacy free market

The only service that currently exists in Australia is the Surrogacy Australia Support Service, which operates nationally. Despite restrictions on advertising, facilitating introductions and matches between surrogates and intended parents,¹⁰⁷ Surrogacy Australia ‘makes introductions’.¹⁰⁸ Surrogacy Australia also claims that joining their service “...does give you a far better chance of being introduced to a well-suited Australian surrogate if you do not have a family member or friend who has offered to carry.”¹⁰⁹ This claim is false, noting that less than 0.5% of surrogacy arrangements in

¹⁰² My Surrogacy Journey www.mysurrogacyjourney.com.

¹⁰³ SurrogacyUK www.surrogacyuk.org.

¹⁰⁴ Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law Summary Report* (Report No 244, 28 March 2023) lawcom.gov.uk/project/surrogacy/ page 17.

¹⁰⁵ *Ibid* page 14.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Surrogacy Act 2019* (SA) s 24; *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2008* (WA) s 9.

¹⁰⁸ Surrogacy Australia Support Service Register www.surrogacyaustralia.org/register.

¹⁰⁹ Surrogacy Australia Support Service FAQs www.surrogacyaustralia.org/faqsass/.

Australia were matched by Surrogacy Australia and by their own records, there have been only 13 purported surrogacy matches by the service since January 2019.¹¹⁰

In lieu of regulatory oversight in Australia, there are no requirements for Surrogacy Australia or any other service provider to adhere to best practice standards or codes of conduct, nor offer services with qualified professionals in the legal or counselling fields. The service is under no obligation to ensure that arrangements it facilitates protect the rights and integrity of the parties or the rights and best interests of any children born.

Other organisations occasionally enter the Australian industry but are rarely successful. Feedback during my travels indicated that this experience is common across the world, with new agencies and businesses opening, often operated by former surrogates and intended parents, and having varying levels of success and often closing within two years. In Australia, there are no requirements for a service provider to have any professional qualifications or skills in business, law or psychology and Surrogacy Australia has none.

Matching services and regulation in the United States of America

In the United States, surrogacy matching services, or ‘agencies’ operate with little regulatory oversight. Services operate in a free market, offering services to intended parents with very few required safeguards for the welfare of the parties or children born. There have been various instances of services not meeting the expectations of the parties, including instances of illegality and unethical conduct by agency owners and staff.¹¹¹

The Society for Ethics in Egg Donation and Surrogacy (SEEDS) was established in the United States as a non-profit organisation intended to define ethical practices for egg donation and surrogacy programs and in particular, matching services.¹¹² SEEDS seeks to provide a self-regulation framework for service providers to adhere to ethical standards established by the membership. In lieu of federal laws regulating the surrogacy industry, SEEDS aims to establish standards for service providers to adhere to but is wholly unenforceable outside the organisation.

SEEDS membership requires adherence to standards established by the member organisation. SEEDS Standards include the members must declare and manage conflicts

¹¹⁰ Surrogacy Australia Support Service Monthly Report, www.surrogacyaustralia.org/sass-monthly-report/ accessed 14 July 2024.

¹¹¹ ABC News, 'Hope and Heartbreak: Families Allege Surrogacy Escrow Company Stole', ABC News, abcnews.go.com/US/hope-heartbreak-families-allege-surrogacy-escrow-company-stole/story?id=112409927, accessed 21 July 2025.

¹¹² Society for Ethics in Egg Donation and Surrogacy (SEEDS) www.seedsethics.org.

of interest, provide services in a non-discriminatory manner, manage confidential information appropriately, and be transparent about surrogate compensation.¹¹³

New York: A roadmap for regulation?

In New York, a regulated framework for surrogacy service providers was introduced in 2020 with the passing of the *Child-Parent Security Act* (CPSA).¹¹⁴ The CPSA legalised compensated surrogacy in New York, regulating surrogacy agencies and implementing a licensing process for service providers. Surrogacy matching services must be licensed and comply with professional standards to offer services in New York.

The New York licensing system provides some protections for surrogates and intended parents, including that they ensure the parties are well-informed and supported throughout the process.

Service providers and lawyers in New York expressed confidence in the framework, indicating that they appreciated the standards of best practice and protections for the parties. The industry itself sees value in regulation, to weed out bad actors and protect the integrity of the industry and the parties.

New York's **Surrogate's Bill of Rights** promotes a surrogate's rights to autonomy, independent legal counsel, health and life insurance, mental health support and counselling and the right to terminate the agreement.

- *Child-Parent Security Act*.

Should we regulate matching services in Australia?

There is a need to safeguard the parties by regulating the industry to ensure matching services are accountable and providing best practice services that promote the rights of the parties and the people born via surrogacy.

With surrogacy matching services largely restricted from operating in Australia, we have an opportunity to consider if, and how we allow services to operate, and what regulation is necessary to protect the parties and uphold best practice and ethical standards in surrogacy services and arrangements.

I spoke to professionals on my travels, some of whom consider that regulating the surrogacy industry is unnecessary, paternalistic, reduces competition, and increases costs for intended parents. In a free market, there may be increased access and availability, competitive pricing, innovation and improved service quality. A less regulated

¹¹³ Society for Ethics in Egg Donation and Surrogacy (SEEDS) Standards seedsethics.org/seeds-agency-standards.

¹¹⁴ *Family Court Act* art 5-C §§ 581-101–581-703 (NY, enacted 2020).

industry may support a surrogate's ability to negotiate the terms and conditions of her surrogacy arrangement.

A free market may also reduce the instances of surrogacy practices operating outside the law. In several states of the United States, surrogacy is governed by contract law and medical standards. The industry grapples with the increased competition and costs between surrogates and intended parents.

However, we can also see the consequences of the free market and poor regulation including in allegations of child trafficking, exploitation and fraud.¹¹⁵

“Left to their own devices, the greed takes over and the decision-making becomes a business decision versus best practice.”

- Industry professional, USA, on why the industry needs to be regulated.

While surrogacy matching services are not currently regulated in Australia, professional services are. Lawyers,¹¹⁶ counsellors¹¹⁷ and clinicians¹¹⁸ all must adhere to strict regulation within their respective industries, including practice standards, codes of conduct and licensing requirements.

Notwithstanding the positive feedback about the New York licensing framework, the industry is still open to exploitation by business and private equity companies which are focused on profit. Intended parents may be required to put forward significant funds to secure services and the option of a surrogate. Some businesses rely on those funds to earn interest, which then fund business running costs. With that in mind, any regulation of surrogacy matching services should consider not-for-profit models to ensure the interests of the parties are not competing with or compromised by business interests.

Surrogacy is a complex legal process that intersects with human rights. It is imperative that the industry that profits from surrogacy is regulated, to protect and promote the human rights of everyone involved and particularly the people born.

¹¹⁵ For example, The Independent, 'Surrogates Speak Out in California Couple Investigation', The Independent, <https://www.independent.co.uk/news/world/americas/california-surrogacy-southern-california-arcadia-los-angeles-b2792034.html>.

¹¹⁶ For example, *Legal Profession Uniform Law 2014* (NSW).

¹¹⁷ Fertility Society of Australia, *Code of Conduct*.

¹¹⁸ Reproductive Technology Accreditation Committee, *Australia and New Zealand Code of Practice* (December 2024); National Health and Medical Research Council, *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (2017, updated 2023).

RECOMMENDATION: Surrogacy services including matching services and intermediaries should be regulated within a licensing framework that require adherence to established ethical standards, set by government.

RECOMMENDATION: Surrogacy matching services should be established as not-for-profit services where all financial interests are declared and conflicts of interest managed. Profit-making interests should be restricted from providing matching services.

Regulating the industry

While residents of some 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,¹¹⁹ Ukraine¹²⁰ and Greece.¹²¹

Growing Families is an Australian business that provides surrogacy consulting and runs trade shows in Australia and abroad. Growing Families charges fees to consult with intended parents about engaging in international surrogacy. When disaster strikes, Growing Families offers intended parents assistance to exit the country with their 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 who engage in international surrogacy and take no responsibility when the local laws do not support the arrangement.¹²² ‘Ethical standards’ advertised by Growing Families are not binding on the services that sponsor their events.

¹¹⁹ ABC News *India to ban surrogacy services to foreigners through Supreme Court* 28 October 2015 www.abc.net.au/news/2015-10-28/india-to-ban-booming-surrogacy-service-to-foreigners/6894104 accessed 23 July 2024.

¹²⁰ ABC 7:30 *Australian parents warn reality of Ukrainian surrogacy doesn’t always match the dream*, 21 August 2019 www.abc.net.au/news/2019-08-21/australian-parents-warn-about-ukraine-surrogacy-lotus/11426396 accessed 23 July 2024

¹²¹ ABC News, *Australian parents left in limbo after surrogacy scandal in Greece*, 24 August 2023 www.abc.net.au/news/2023-08-24/parents-left-in-limbo-after-raid-at-surrogacy-clinic/102773230 accessed 23 July 2024.

¹²² LISTNR (2024) *By Any Means* [Audio podcast series]. In *Secrets We Keep*. <https://play.listnr.com/podcast/secrets-we-keep/episode/introducing-by-any-means>.

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. The Australian government has a responsibility to our own citizens, and to women and children abroad, to regulate the industry.

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

RECOMMENDATION: Advertising for surrogacy-associated services should be regulated to ensure transparency and accountability.

Managing conflicts of interest

Conflicts of interest are prevalent in the domestic and international surrogacy industries. Professionals and industry representatives often operate on cross-referrals and quid-pro-quo support for each other, without declaring the conflict of interest to the intended parents or surrogates. Sponsorship of surrogacy trade shows compromises the integrity of the services provided.

Many international colleagues raised concerns about conflicts of interests in the industry and the impact on ethics, integrity and the interests of the parties involved in a surrogacy arrangement. Professionals felt they were required to make a decision between ethics and profit, particularly when attending or sponsoring trade shows or meeting with agency and clinic representatives.

Conflicts of interest can be managed by establishing clear, enforceable standards that promote transparency, accountability and the protection of all parties.

A licensing framework ensures that lawyers, counsellors, fertility clinics, and surrogacy agencies are independent, accredited, and subject to ethical guidelines and disciplinary processes.

While existing laws and practices may be sufficient, explicit prohibitions on professionals from acting for both the surrogate and intended parents, or from providing both counselling and recruitment services, avoids divided loyalties and conflicted interests.

Conflicts can also be managed by requiring full disclosure of financial interests, referral relationships, and potential benefits received by professionals or agencies. Businesses should be transparent and publish a register of interests.

Counsellors, lawyers and other professionals should be independent of each other and of any service providing fertility treatment. All professionals should be free from influence by commercial entities. Each professional has an obligation to question our loyalties and whether our professional involvement is compromised by other interests.

Advertising, and particularly advertising by service providers, should be regulated to prevent coercion, exploitation and misleading claims. Services should be accountable to an independent authority that can receive complaints and manage disputes.

Surrogacy matching services should be mandated to provide clear information about fees and expenses, with independent auditing to prevent profiteering or undue pressure.

By embedding these safeguards in law, regulation can help maintain trust in surrogacy arrangements and protect the integrity of the process.

RECOMMENDATION: Services should be regulated to declare and manage conflicts of interest. Laws should require independence of legal and counselling services.

Financial management and regulation

Surrogacy arrangements in Australia are organised between the parties, with guidance by lawyers, counsellors and fertility clinics. Financial management of the surrogate's expenses falls to the parties with little to no oversight. While intended parents are obliged to cover the surrogate's prescribed expenses, any disputes about payments and finances are managed privately and/or with the ad hoc assistance of legal and counselling professionals. There is minimal, if any, scrutiny of payments and expenses even after the arrangement is complete and parentage order is made.

While there are very few cases in Australia where a surrogate has refused to relinquish the child, there are many instances where the parties have experienced a dispute about finances which may continue well after the child is born and parentage proceedings completed.¹²³

Intended parents must cover the surrogate's out of pocket expenses including the reasonable cost of the surrogate obtaining legal advice.¹²⁴ While these provisions protect the surrogate's right to legal advice, in practice it is difficult to ensure the surrogate's legal fees are covered and gives rise to potential conflicts of interest.

¹²³ Author's own observations, providing legal advice in domestic surrogacy arrangements.

¹²⁴ For example, *Surrogacy Act 2010* (NSW) s 7(4)(b).

The surrogate's lawyer must be independent, while the intended parents are liable for the payment of the surrogate's legal costs. In times of dispute, the intended parents may refuse to cover the cost of the surrogate's legal advice, putting the surrogate at disadvantage should she need to enforce a claim – including for the cost of legal advice. This may leave a surrogate vulnerable and without legal counsel or relying on pro bono legal advice.

In practice, the financial burden often falls to the surrogate, or to her lawyer.

This concern can likewise be applied to the intended parents' obligation to pay for the reasonable costs of the surrogate and their partner accessing counselling before, during and after the surrogacy arrangement. There are many instances where a surrogate has felt the need for counselling and support, and the intended parents have refused to cover the counsellor's fees.

There are a lack of parameters and oversight, and the parties are often left to determine what is 'reasonable' and what is required of them in times of dispute.

Surrogate expenses include maternity clothing, ancillary healthcare such as massage, acupuncture and chiropractic treatment, cleaning and housekeeping, childcare, and lost income. While the respective state and territory laws may prescribe these expenses, there are limited mechanism to enforce payment. Other expenses are not prescribed, including birth photography, meal deliveries and the surrogate's partner's expenses. There is considerable room for misunderstanding and dispute between the parties.

Escrow 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.

In other jurisdictions and particularly the United States of America, surrogacy financial management is often delegated to independent escrow companies. Escrow involves an independent neutral party holding funds from the intended parents and distributing them to the surrogate to pay or reimburse prescribed expenses. Escrow companies offer services including accessible smart phone applications to record and manage expenses and receipts.

Despite the benefits of independent escrow companies in the United States, there have been instances of fraud and theft involving escrow companies and their owners.¹²⁵ These instances illustrate the need for regulation and highlights the pitfalls of the free market.

If escrow companies do not fall within existing Australian regulation of financial services, then specific laws should be introduced to ensure adherence to best practice financial management and adherence to ethical and transparent financial practices.

A regulated escrow system in Australia would provide security for the parties. Intended parents could be required to provide funds upfront, and surrogates can access the funds if they meet the requirements under the surrogacy arrangement. This would also appropriately manage any conflicts of interest for lawyers providing advice to the surrogate and ensure access to legal advice and counselling.

An escrow company could mediate disputes and be required to adhere to regulatory standards when receiving and distributing funds.

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.

RECOMMENDATION: Independent escrow services should assist with financial management for surrogacy arrangements.

Compensated surrogacy

Commercial and altruistic surrogacy

When discussing surrogacy, a dichotomy is often presented between altruistic and commercial surrogacy. Altruistic surrogacy, where a surrogate is not paid but where her expenses may be covered, is often touted as an act of love, self-sacrifice and intimacy¹²⁶ and the only ethical version of surrogacy. Commercial surrogacy is often conflated with surrogacy that is exploitative, involves human trafficking and may be seen as unethical, or less ethical than altruistic surrogacy.¹²⁷

There are many varied definitions and understandings of altruistic, commercial and compensated surrogacy. Commercial surrogacy might involve a surrogate abiding by contractual obligations, including the relinquishment of the child, in exchange for payment. The term is also often applied to arrangements where surrogates are

¹²⁵ *United States v Markowitz* (US Dist Ct, SD Cal, Case No 24-CR-0904-TWR, filed 1 May 2024).

¹²⁶ Stuhmcke, A, 'For Love or Money: The Legal Regulation of Surrogate Motherhood' (1996) 3(1) *Australian Journal of Family Law* 1.

¹²⁷ Allan, S, 'The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations' in Gerber, P and O'Bryne, K (eds) *Surrogacy, Law and Human Rights* (Ashgate Publishing, 2015) 113-143.

compensated for *gestational services* which are not linked directly to relinquishment. Likewise, there are many variations of what defines altruistic surrogacy, and the fact of not receiving a fee or payment does not equate to an ethical surrogacy arrangement.

Recent studies establish that surrogates who are paid are often motivated by non-financial factors including the desire to help someone have a family¹²⁸ and empathy and altruism.¹²⁹

*Altruistic motivations and compensation
are not mutually exclusive.*

The Verona Principles provide that states should prohibit surrogacy arrangements that promote the sale of children.¹³⁰ Sale and trafficking is defined, in the surrogacy context, as including three elements – transfer, payment and exchange.¹³¹ The Principles recognise that some countries allow for commercial surrogacy and consider that payments should be for *gestational services* and separate from payments for the transfer of the child, or parentage.¹³²

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 industry

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.

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.

¹²⁸ Calder, Vanessa Brown, 'Defending Gestational Surrogacy: Addressing Misconceptions and Criticisms' (Briefing Paper No 171, Cato Institute, December 2023).

¹²⁹ Martínez-López, José Ángel and Pilar Munuera-Gómez, 'Motivations and Sociodemographic Profile of American Surrogates: Empathy and Altruism in Commercial Surrogacy Arrangements' (2024) *Reproductive BioMedicine Online*.

¹³⁰ International Social Services, *Principles for the protection of the rights of the child* (n 3) Principle 14.1.

¹³¹ *Ibid*, Principle 14.2.

¹³² *Ibid*, Principle 14.2-14.7.

Compensated surrogacy and safeguards

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.

By increasing the number of surrogacy arrangements in Australia, the risks of cross-border surrogacy are reduced, and the instance of exploitation is lowered.

Tying payments to the transfer of parentage

The current Australian framework for the payment of surrogate expenses leave the parties open to exploitation and can lead to breakdowns in relationships. Differences in expectations are managed privately, between the parties' lawyers or with counsellors. Disputes about finances may be associated with the surrogate's 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 payment of unreasonable expenses; surrogates may feel their value is tied to submission to the intended parents and feel pressured to keep costs low.

If 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 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 they can stop all further expense payments to their surrogate.

Regardless of the framework, some people consider surrogacy as 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 is in a child's best interests that their parents and the birth parents maintain an amicable 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.

Compensation framework

It is possible to regulate surrogacy compensation while not compromising the rights of 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.

In a free market and where there are many more intended parents than surrogates, compensation may be determined by a surrogate. 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.

Payments for **gestational services** may involve instalments for every week of pregnancy.

Regulated, capped amounts determined by government authority, may serve to manage expectations of the parties and safeguard against exploitation.

Prescribed expenses and compensation

Recent public discourse about the introduction of commercial surrogacy in Australia demonstrates a lack of awareness and understanding of the nuance of compensating surrogates for gestational services. Public discourse includes allegations that compensated surrogacy is 'buying babies' and involves human trafficking.¹³³

Critics claim that commercial surrogacy is exploitative but ignore that altruistic surrogacy exploits the unpaid labour of women. Allegations of exploitation should be placed squarely on the unregulated industry.

¹³³ Schubert and Bell, Debate grows over Australia's surrogacy laws as more couples look overseas, ABC Central Victoria 28 June 2025 www.abc.net.au/news/2025-06-28/surrogacy-laws-review-commercial-surrogacy-in-australia/105431798.

I am 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.¹³⁴

For these reasons, I believe that regulated compensation should be legislated in Australia and that payments be included as ‘prescribed expenses’ 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.’¹³⁵

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. Provision should be made for milestone payments, to ensure surrogates are not punished for pregnancy losses or pre-term births. Payments should commence in the pre-conception stage and during pregnancy attempts to recognise the work of pre-pregnancy.

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.

¹³⁴ 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.

¹³⁵ Brilliant Beginnings, *How much can a UK surrogate get paid?* brilliantbeginnings.co.uk/how-much-can-a-uk-surrogate-get-paid/.

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. Surrogates should not be penalised for receiving surrogacy compensation that places them in a higher tax bracket.

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

When a child is born via surrogacy in Australia, they are the legal child of the birth parents. The birth parents are named on the child's birth certificate. The intended parents must apply for a parentage order to transfer parentage from the birth parents, between one month and six months of the birth (or twelve months in South Australia).

The process for applying for a parentage order differs between states and can be relatively administrative (such as in Tasmania), involve several court hearings (Northern Territory and ACT) and may involve post-birth counselling (New South Wales, Tasmania, Northern Territory and Queensland).

The parties find the parentage order process cumbersome, inconvenient and frustrating, as well as expensive.

The existing framework leads to legal ambiguity with respect to the child's care, including in hospital after the birth, and parental responsibility. Intended parents often have difficulty accessing Centrelink benefits, placing their child on their Medicare card, enrolling the baby in childcare and travelling with the baby. Intended parents and birth parents may face legal ambiguity with estate and succession planning.

Pre-birth orders

In some jurisdictions, the transfer of parentage occurs prior to the birth, in what is commonly referred to as pre-birth orders. The parties can apply for the order during the pregnancy, often in the second trimester. The application involves 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 is ready, and the intended parents can provide all care for the baby at birth.

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. If auto-recognition mechanisms are legislated, it should be based on pre-surrogacy approval from an Assisted Reproduction Treatment Commission.

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.

Dispensing with a surrogate’s consent

In most jurisdictions in Australia, the transfer of parentage relies on the surrogate and her partner’s consent. This condition can only be dispensed with, in very limited

circumstances, including when the surrogate is deceased, incapacitated, or cannot be located.¹³⁶ Only Western Australia allows for the transfer of parentage in gestational surrogacy cases, without the birth parents required to consent.¹³⁷ Parental orders for surrogacy in the United Kingdom rely on the birth parents' consent to the making of the order.¹³⁸

Caselaw in the United Kingdom has highlighted the need for reform to allow for a transfer of parentage without, or in lieu of, a surrogate's explicit consent.¹³⁹

In my professional experience of surrogacy arrangements in Australia, the requirement for a surrogate's consent for a parentage order can and does lead to tensions between the parties and delays in a parentage order being made. A surrogate's consent is rarely withheld because she does not wish to relinquish the child or because it is in the child's best interests, but can be withheld due to breakdowns in the parties' relationships.

If we consider that the child's rights and best interests are paramount, it is contrary to that point that a surrogate's consent is a mandatory requirement for the transfer of parentage. The UK Law Commission recommends allowing for the surrogate's consent to be dispensed with in cases where the child's welfare requires it.¹⁴⁰ Australian surrogacy laws should provide for judicial discretion to make a parentage order without a surrogate's consent, where such an order is considered to be in the child's best interests.

A child's best interests should never be compromised by someone withholding consent.

A surrogate's right to seek compensation, reimbursement or recourse from the intended parents should never override the child's right to identity, parentage, family, a birth certificate and privacy. Dispute resolution should be the mechanism to manage any disputes between the parties, including ensuring the surrogate can enforce payment of expenses.

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 required 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 never intended for the surrogate's partner to be a legal parent.

¹³⁶ See for example, *Surrogacy Act 2010* (NSW) s 31(2).

¹³⁷ *Surrogacy Act 2008* (WA) s 21.

¹³⁸ *Human Fertilisation and Embryology Act 2008* (UK) s 54.

¹³⁹ See for example, *Re A and B (Surrogacy: Consent)* [2016] EWHC 2643 (Fam).

¹⁴⁰ *Building Families Through Surrogacy: A New Law - Summary Report* above n 104, page 15.

Parties are often so confused by the legal presumptions of parentage that they 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.

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 dispensable if to do so is in the child's best interests.

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

Parentage and hospital management of 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 lead to 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 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 car parks, with a sense of shame and stigma associated with their birth.

Hospital policies lack clarity, place unacceptable expectations on the parties and demonstrate limited 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 have sent 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.¹⁴¹

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

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.

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.

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. For the first year of the child's 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 may have a claim on their estate.

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

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

Post-birth counselling

Post-birth counselling is required in four of the eight Australian jurisdictions. New South Wales requires two post-birth counselling obligations of the parties, under section 35(2) and section 17.¹⁴² The process is confusing for the parties, and places further burden on the birth parents who have to complete both counselling requirements. *Re N* is an

¹⁴¹ Author's own observations, including advocating to hospitals on parties' behalf.

¹⁴² *Surrogacy Act 2010* (NSW) ss 35(2) and 17.

example of the parties, their lawyers and the counsellors misunderstanding the post-birth counselling requirements.¹⁴³

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.

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. The counselling should not be linked with the transfer of parentage.

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.¹⁴⁴ The intention to have a child through surrogacy was well-established prior to the conception – there is no need to revisit the intentions of 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.

Post-birth counselling may be beneficial to the wellbeing of the parties. 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 do not believe a counsellor has ever refused to recommend a transfer of parentage where all pre-surrogacy requirements have been met.

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.

¹⁴³ *Re N* [2025] NSWSC 409.

¹⁴⁴ Author’s own observations, providing legal advice for domestic surrogacy arrangements since 2016.

RECOMMENDATION: There should be no requirement for post-birth counselling. Post-birth counselling should be available and paid for by the intended parents, and optional for all parties.

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.

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 relies 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.

RECOMMENDATION: Medicare should have a surrogacy policy, outlining clear and efficient mechanisms to recognise a surrogacy arrangement and to register the child on the Medicare card of the intended parents.

Children born via international surrogacy

Returning home and citizenship

Up to 400 children are born via international surrogacy each year for Australian intended parents.¹⁴⁵ 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

¹⁴⁵ Department of Home Affairs, above n 38.

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.

US President Donald Trump has sought to end birthright citizenship for children born in the United States to foreign nationals. This has implications for children born via surrogacy for Australian intended parents.

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 removal of birthright citizenship poses risks for the child, and their parents. The child may be stateless and unable to access services or travel. This concern is not unique to the United States, with several other surrogacy destination countries not granting citizenship or passports to children born via surrogacy. This leads to delays in travel and returning home and may be in breach of the child's rights under the Convention on the Rights of the Child.¹⁴⁶

Previous incidents involving international surrogacy, including in India, Thailand and Ukraine, during the COVID-19 pandemic and subsequent travel restrictions, demonstrated that it is possible to fast-track citizenship applications and travel documents for children born via international surrogacy.

While there are no doubt many demands on Australia's immigration services, a specialist department responding to applications for children born via surrogacy would assist in streamlining and fast-tracking such applications. Applications for citizenship could be lodged in part, prior to the birth of the child, and policies applied consistently to such applications.

Some 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.

¹⁴⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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 provide clear education information for its staff to understand surrogacy laws including parentage and family law in Australia.

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.

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 conduct of the Passports Office leads parents to be treated differently, and unable to adequately exercise parental responsibility, simply because their child was born via surrogacy. This is discriminatory and may breach 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 and 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.

Intercountry surrogacy

If there are to be conditions of residency or citizenship for domestic surrogacy, 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.

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 not be reliant on the consent of the surrogate.

RECOMMENDATION: Australia should seek and implement reciprocal recognition of surrogacy and parentage with other countries and in particular for Aotearoa New Zealand.

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 prohibitions against engaging in international commercial surrogacy are 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 often legal in the country of destination.

The prohibitions against international commercial surrogacy are ineffective.

There are limited ways in which Australian legislators can regulate international surrogacy. The prohibitions on Australian residents engaging in international commercial surrogacy have been wholly ineffective, with almost 400 children born via international surrogacy each year while less than 150 are born via domestic surrogacy.

Other countries grapple with the same concerns of international surrogacy arrangements that may be exploitative, resulting in human trafficking and the commodification of women and children. While we can regulate service providers operating in our own jurisdictions, there are limited ways to regulate international service providers advertising to our citizens.

Geographical nexus provisions

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.*¹⁴⁷

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...*¹⁴⁸

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.

The recent case of *Lloyd & Compton*¹⁴⁹ 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,¹⁵⁰ 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?

Intended parents applying for parentage orders pursuant to the 2025 changes to the New South Wales *Surrogacy Act* risk prosecution, noting that the new provisions do not decriminalise commercial surrogacy.¹⁵¹

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

¹⁴⁷ 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.

¹⁴⁸ 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.

¹⁴⁹ *Lloyd & Compton* [2021] QChC 15.

¹⁵⁰ *Family Law Act 1975* (Cth) s 60CC.

¹⁵¹ *Surrogacy Act 2010* (NSW) s 8.

Recognition of parentage for international surrogacy

Nearly 400 children are born via international surrogacy for Australian intended parents each year. Some will have documents that recognise their legal parentage in the country of birth; others will have birth certificates that list the surrogate as a legal parent.

Intended parents often rely on evidence of the surrogacy, the birth certificate and other documents, including Parenting Plans, to establish that they are the parents of the child. Despite this, Australian laws generally do not recognise international instruments transferring parentage. The Australian *Family Law Act* considers that the birth parents may be the legal parents despite international court orders and other evidence.¹⁵²

Recent reforms in New South Wales provide that children born via international surrogacy can have a transfer of parentage to recognise the intended parents as the legal parents of the child. Strict, and prohibitive criteria must be met to satisfy the requirements for a parentage order. Applying for such an order is costly and relies on the discretion of the New South Wales Supreme Court.¹⁵³

In lieu of costly, additional court processes, the Australian government should legislate to automatically recognise international court orders and birth certificates that list the intended parents as the parents of children born via surrogacy. Auto-recognition would give intended parents, birth parents and children much-needed clarity about legal parentage.

RECOMMENDATION: The Australian government should legislate to automatically recognise international instruments establishing parentage.

RECOMMENDATION: Australian intended parents should be able to obtain documents to recognise parentage by registering international surrogacy and parentage documents.

Awareness and education

One reason for the low number of surrogacy births in Australia, and the higher number of children born via international surrogacy for Australian intended parents, may be the general lack of awareness about surrogacy options in Australia.

The Australian government has published a website, *Surrogacy in Australia*,¹⁵⁴ which includes some basic information about surrogacy in Australia and overseas.

¹⁵² *Family Law Act 1975* (Cth) s 60HB.

¹⁵³ At the time of writing, no applications had been heard under the new provisions.

¹⁵⁴ Surrogacy in Australia, www.surrogacy.gov.au.

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 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.

I was keen to hear from international colleagues about how governments could manage the exodus of citizens to international surrogacy destinations. Regulation of international surrogacy providers is all but impossible, with services offered online and outside the jurisdiction of the Australian government.

Case law provides some guidance to assist the industry, profession and the community to consider how the judicial system responds to international surrogacy. Case law can serve to educate and inform legal and psychological practice. Judicial officers have a role in promoting best practice surrogacy, particularly through published judgements.

In lieu of the Australian government regulating international service providers operating outside its remit, it must 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 website¹⁵⁵ 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.

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

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

Financial support for surrogacy in Australia

Surrogacy arrangements are privately funded by intended parents. Many intended parents fund their surrogacy journey by accessing equity in their home, refinancing, through personal loans, fundraising and gifts. Others have been successful in accessing their superannuation.

¹⁵⁵ Smartraveller, www.smartraveller.gov.au.

Medicare rebates for surrogacy

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.¹⁵⁶

The exclusion of surrogacy from the Medicare rebate scheme 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.

Financial accessibility

Surrogacy is financially out of reach for many people. Proponents of altruistic surrogacy may argue that introducing compensated surrogacy would make it further out of reach for many more. It should not be the surrogate that bears that burden.

The best interests of children, and the rights of surrogates, are protected by improving accessibility to surrogacy in Australia. This can be supported through access to Medicare rebates for fertility treatments and offering other financial support to intended parents.

In the United States, campaigns for financial support advocate for legislative reform for insurance coverage for fertility treatments including for surrogacy. While the health insurance frameworks in the United States are very different from Australia, access to reproductive healthcare is an issue that crosses borders and is important to people across the world.

RECOMMENDATION: Medicare rebates should be available for fertility treatments including those associated with surrogacy.

Centrelink and paid parental leave

As with Medicare, intended parents and surrogates often have challenges dealing with Centrelink and accessing the government's paid parental leave scheme. While

¹⁵⁶ Australian Government Department of Health and Aged Care, *Medicare Benefits Schedule: Category 3 – Therapeutic Procedures Note TN.1.4*.

Centrelink has a specific surrogacy policy,¹⁵⁷ it is not widely known amongst Services Australia staff. Parties to a surrogacy arrangement have to advocate for themselves, including appealing incorrect decisions when they apply for paid parental leave.

RECOMMENDATION: Services Australia should provide adequate training for their staff to understand surrogacy in Australia and facilitate the parties accessing entitlements.

RECOMMENDATION: Services Australia should publish clear policy for accessing paid parental leave for surrogates and intended parents.

Dispute resolution

In Australia, there are no requirements for the parties to engage in dispute resolution together, during pregnancy or after the birth. In practice, the parties may or may not choose to seek dispute resolution from their legal or counselling professionals. There may be engagement by one party and not the other, which can lead to a breakdown in relationships.

The UK's Brilliant Beginnings involves the support of a qualified mediator, and access to psychology professionals.¹⁵⁸ When there are disputes between the parties, the service is qualified to provide appropriate and skilled support. Other surrogacy services provide dispute resolution services through their programs, such as offering the parties with dedicated case managers and access to mental health services.

Dispute resolution practices should form a foundational part of any surrogacy arrangement, to promote the best interests of the children born and the welfare of the parties. It is in a child's best interests that they have the opportunity of contact with their birth family and any donors. For that reason, the parties should be counselled about the importance of working toward a long-term and sustained amicable relationship, well after the surrogacy arrangement has ended.

RECOMMENDATION: The Australian Assisted Reproduction Commission should offer mediation and dispute resolution services for surrogacy arrangements.

RECOMMENDATION: Specialist training should be provided to mediators offering services for surrogacy arrangements.

¹⁵⁷ 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>.

¹⁵⁸ Brilliant Beginnings, www.brilliantbeginnings.co.uk.

Hospital care of surrogacy pregnancy and birth

Hospitals and maternity healthcare practitioners lack understanding and training for managing surrogacy pregnancies and births. This leads to poor experiences for intended parents and surrogates and may compromise the rights of the child.

Research in 2025 focuses on improving hospital care of surrogacy pregnancies and births.¹⁵⁹ Less than 50% of hospitals in New South Wales and Victoria have a surrogacy policy, which vary in scope and detail.¹⁶⁰ Without clear policies, healthcare staff are uncertain about including intended parents while also promoting the rights of the surrogate and the newborn.¹⁶¹ There is little to no formal training about how to support a surrogacy pregnancy and birth.¹⁶² 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 policies for the care of surrogacy pregnancies are often lacking, outdated or non-existent.

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.

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.

RECOMMENDATION: Hospitals should implement clear and specific surrogacy pregnancy and birth care policies that are inclusive of all surrogacy arrangements and family creation, that recognise the integrity of the arrangement, the humanity of the parties and the rights of the surrogate and the child.

RECOMMENDATION: Hospitals should ensure their staff are trained in caring for a surrogacy arrangement.

¹⁵⁹ 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).

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

Training and qualifications of service providers

There are no specific qualifications to provide surrogacy, donor, fertility or family creation legal services in Australia. Some family lawyers offer surrogacy legal services, however there are no requirements for any specialist training or expertise. Caselaw in Australia demonstrates a need for training and professional development for lawyers providing surrogacy legal services.¹⁶³

The Australian and New Zealand Infertility Counsellors Association (ANZICA) is a body within the Fertility Society of Australia and New Zealand.

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.

There are no legislative standards for fertility or surrogacy counsellors. Most legislation defines a qualified counsellor¹⁶⁴ and the requirements for surrogacy counselling including, for example, ‘about the surrogacy arrangement and its social and psychological implications.’¹⁶⁵

Ultimately, a counsellor can provide surrogacy counselling services with very little oversight or scrutiny beyond membership of ANZICA, which is not empowered to regulate the profession.

There are no specialist training programs for surrogacy counselling. Research into surrogacy relationships, dynamics and the needs of the parties is limited and evolving.

There are several established bodies, predominantly in the United States of America, that bring together practitioners offering services in the field of family creation. The American Society for Reproductive Medicine (ASRM) dedicates itself to the advancement of the science and practice of reproductive medicine¹⁶⁶ and membership is open to health professionals working in the field of reproductive medicine. Similar organisations exist in Australia, including the Fertility Society of Australia and New Zealand¹⁶⁷ and ANZSREI.¹⁶⁸

¹⁶³ See for example, *Re N* [2025] NSWSC 409; *Lloyd & Compton* [2025] FedCFamC1F 28.

¹⁶⁴ See for example, *Surrogacy Act 2010* (NSW) s 4.

¹⁶⁵ See for example, *Surrogacy Act 2010* (NSW) s 35.

¹⁶⁶ American Society for Reproductive Medicine www.asrm.org.

¹⁶⁷ Fertility Society of Australia, www.fertilitysociety.com.au.

¹⁶⁸ Australian and New Zealand Society of Reproductive Endocrinology and Infertility, anzsrei.com.

The Academy of Adoption & Assisted Reproduction Attorneys (AAAA, often referred to as ‘Quad-A’) is a member organisation of nearly 500 ‘highly vetted’ lawyers practising in adoption and/or ART (fertility) law, primarily in America.¹⁶⁹ AAAA requires members to adhere to an Ethics Code and complete continuing professional development in the area of adoption and/or reproductive law to maintain membership.¹⁷⁰

In Australia, we have no organisation dedicated to furthering the knowledge and skills of legal practitioners providing fertility, donor or surrogacy law services. Several organisations, including the Family Law section of the Law Council of Australia, deliver professional development training for practitioners in the family law space,¹⁷¹ but not specifically in fertility or family creation law.

Inspired by the work of AAAA and SEEDS, I collaborated with the Family Law Section of the Law Council of Australia and colleagues from ANZICA and New Zealand to establish the first Australia & New Zealand Fertility Law and Ethics Symposium in Melbourne in October 2025.¹⁷²

The conference shall bring together legal and psychology professionals and researchers to develop the practice and knowledge in the field and I hope to see the event become an annual fixture.

The inaugural Australia New Zealand Fertility Law & Ethics Symposium takes place in Melbourne in October 2025.

Professional association of fertility law professionals

As the field of surrogacy, donor conception and family creation grows and changes in Australia, it is apparent that the profession must do the same. There is an opportunity for legal and psychology professionals to work together in an interdisciplinary collaboration, establishing practice and ethical standards, providing education, training and mentorship for the profession and for other practitioners in the field, including fertility and health practitioners.

Noting that the field is small, any such organisation may only include a small number of practitioners. I met with many AAAA members during my time in the United States and at the annual AAAA conference in Puerto Rico and was inspired to hear that the organisation began as an initiative of only a handful of members in 1989, primarily focused on adoption law. In 2009, a speciality division dedicated to assisted reproductive law was established, and in 2017 the two arms became one under the current title.¹⁷³

¹⁶⁹ Academy of Adoption & Assisted Reproduction Attorneys (AAAA) www.adoptionart.org.

¹⁷⁰ Ibid, ‘Ethics Code’ www.adoptionart.org/about-aaaa/governing-documents/ethics-code/.

¹⁷¹ Family Law Section, Law Council of Australia www.familylawsection.org.au.

¹⁷² 2025 Australia and New Zealand Fertility Law and Ethics Symposium (Family Law Section, Symposium, Melbourne, 9-10 October 2025).

¹⁷³ Academy of Adoption and ART Attorneys, ‘History’ adoptionart.org/about-aaaa/history, above n 164.

I was inspired, during my preparation for the Churchill Fellowship and my travels and many conversations, to establish such an entity in Australia. While we are in the early stages, I am excited to spearhead the establishment of a practice group and professional association of fertility and family creation lawyers and counsellors in the coming months.

Campaigning for change

While the main focus of the Fellowship was to consider best practice surrogacy frameworks, I was interested in campaigns for law reform and how to effect change. Surrogacy is a private, sensitive and complex pathway to parenthood. Law reform relies on families campaigning for change by drawing attention to themselves, their private journeys and their children. I was interested in how those campaigns balance the need for change with the rights and interests of children and people born through surrogacy, including the right to privacy.

The surrogacy law reform campaign in Ireland is led by groups including Irish Families Through Surrogacy, LGBT Ireland and intended parents including former Senator Mary Seery Kearney. I was struck by how organised and effective the campaign has been, and keen to hear about how they campaigned together for change. Likewise, campaigns in the UK have been led by the surrogacy community and advocates, including SurrogacyUK.

Prominent voices

There are many different ways to campaign for law reform. Hearing the voices of the community, particularly intended parents, surrogates and people born – can be crucial for law makers to understand the impact of laws and the need for reform.

In Ireland's case, the community had the benefit of a voice in the Oireachtas, with Senator Mary Seery Kearney herself a parent through surrogacy. Professionals and community members all partly credited Mary with the success of the campaign, pointing to her willingness to share her personal story to draw attention to the plight of other families and parents through surrogacy.

Likewise, law reform in New York was supported by publicity from TV show host and parent through surrogacy, Andy Cohen.¹⁷⁴

I had to wonder if Australian law reform will rely on a member of Parliament with lived experience of surrogacy willing to put their own story in the spotlight, to make any real impact.¹⁷⁵ Legal professional colleagues in the United States, who regularly campaign for

¹⁷⁴ USA Today, 'Andy Cohen reveals daughter's birth via gestational surrogacy was 'one of the first' in NY.' www.usatoday.com/story/entertainment/celebrities/2023/06/04/andy-cohen-daughter-lucy-born-gestational-surrogacy-new-york/70286590007.

¹⁷⁵ Surrogacy law reform in Australia was, in part, inspired by Labor Senator Stephen Conroy and his wife Paula Benson welcoming their daughter via surrogacy in 2006. At the time, surrogacy was illegal in Victoria, and they availed themselves of New South Wales laws instead.

law reform around access and insurance for fertility treatments, point out that campaigning on issues of women's reproductive health, fertility and infertility, may have wider reach than campaigning for surrogacy law reform.

Lived experiences and story telling

The generous advice I received from my new friends in Ireland was that lived experiences were crucial in changing hearts and minds about surrogacy. Parents and families that were willing to share their stories with the public had a real impact on the campaign. The Irish Families Through Surrogacy group were able to capitalise on public sentiments for 'Irish mams and Irish babies' and this had a significant impact on the campaign.

*Lived experience and story-telling are crucial
for impacting change.*

Story telling has always been crucial in the surrogacy community. When I started the Australian Surrogacy Podcast¹⁷⁶ in 2018, I hoped to help our community understand each other and to destigmatise surrogacy for the broader community. What I had not expected was the power that story sharing would have in affirming surrogate and intended parent stories for each other. The children and people born through surrogacy also benefit from story sharing, when they can see their own story reflected in that of others.

Strategic litigation

Strategic litigation is another form of advocacy that demonstrates the law makers and the judiciary about the need for reform. I was inspired by strategic litigation in Ireland, including that led by lawyer Annette Hickey, that highlighted the impacts of current laws on families through surrogacy. Intended parents consented to being identified so that they could share their stories publicly.

We know from experience that strategic litigation can draw attention to areas needing reform. In the surrogacy space, it can come at significant personal cost to the intended parents and the children born through surrogacy and at financial cost to the families and professionals involved. Western Australian intended fathers have opted out of strategic litigation in favour of pursuing international surrogacy, rather than waiting for the government to legalise surrogacy for single men and gay male couples.

Other forms of advocacy can lead to improvements in the surrogacy landscape. Parties and their lawyers can be guided by published case law and judgments, including judicial statements about the risks and pitfalls of international surrogacy. The cases of *Re Z*

¹⁷⁶ Sarah Jefford, The Australian Surrogacy Podcast, www.sarahjefford.com/surrogacy-podcast.

*(Foreign Surrogacy)*¹⁷⁷ and *Re Z (Unlawful Foreign Surrogacy: adoption)*¹⁷⁸ are cases in the UK which have critiqued some international pathways and outlined reasons for caution.

Children & the media

Campaigning for surrogacy law reform intersects with the privacy and intimacy of family creation, and can expose families to public attention, either wanted or unwanted. Sharing our lived experiences for the media is a powerful tool to destigmatise and raise awareness about surrogacy and can bring real stories and families into the lounge rooms of hundreds of thousands of other people. In Ireland, some parents chose to share their stories and their children with the media; others chose not to do so.

The current Australian Law Reform Commission review of Australia's surrogacy laws has sparked media and community interest. Naturally, journalists seek a human-interest story and call for intended parents to share their stories, and their children, with the media. This can come at significant cost – particularly where conservative pundits criticise surrogacy and rainbow families and liken surrogacy to slavery and human trafficking.¹⁷⁹

Reflections on campaigning

I reflect on the importance of lived experiences in informing future law reform. Experiences internationally demonstrate how impactful storytelling can have on changing hearts and minds. It is imperative that media ensure respectful reporting of surrogacy, including recognising the humanity and privacy of everyone involved. There must be a balance with the importance of storytelling with the rights and interests of the people involved, particularly children and people born through surrogacy.

Recent announcements indicate that surrogacy law reform will not be progressed in either Ireland or the United Kingdom. Previous Australian surrogacy law reviews have resulted in little to no change in the surrogacy landscape in the last decade. State law reforms have been piecemeal and limited, with small changes making little to no difference to the accessibility of surrogacy within Australia.

It is difficult to be optimistic that real change will be implemented in Australia any time soon. However, I am constantly energised by the passion and humanity of the surrogacy community, and feel inspired to keep advocating for change, for them and for the future of surrogacy in Australia.

¹⁷⁷ [2024]EWFC 304.

¹⁷⁸ [2025] EWHC 339 (Fam).

¹⁷⁹ Schubert and Bell above n 135.

Conclusion & Recommendations

Establish a National Legal Framework: Implement consistent and clear surrogacy laws at the federal level to address the current patchwork of state and territory regulations.

A Specialised Court: Designate the Federal Circuit and Family Court of Australia (FCFCOA) as the jurisdiction for surrogacy matters, ensuring judges and staff receive specialized training.

Remove Barriers and Ensure Equal Access:

1. Eliminate the requirements for intended parents to demonstrate a medical or social need to access surrogacy.
2. Remove discrimination based on relationship status or sexual orientation.

Regulate Surrogacy Services: Implement licensing and oversight for surrogacy matching services and intermediaries to ensure ethical practices and protect all parties involved.

Allow Compensated Surrogacy: Introduce regulated compensation for surrogates for their gestational services, separate from payments tied to relinquishing the child.

Establish a National Commission: Create an Australian Assisted Reproductive Treatment Commission to regulate and determine surrogacy arrangements, ensuring standards and requirements are met.

Implement Pre-Birth Orders: Establish a framework for pre-birth transfer of parentage, providing legal clarity from birth and protecting the rights of all parties.

Ensure Access to Medicare and Centrelink: Government services should have a surrogacy policy outlining clear and efficient mechanisms to register the child on the Medicare card of the intended parents and provide access to services.

Streamline Citizenship and Passport Processes: Simplify and expedite citizenship and passport applications for children born via international surrogacy.

Repeal Geographical Nexus Clauses: Remove laws that criminalise Australians engaging in commercial surrogacy overseas.

Recognise International Parentage: Automatically recognise international surrogacy court orders and documents to simplify legal parentage for children born abroad.

Increase Awareness and Education: Launch a government-funded awareness campaign about ethical surrogacy in Australia and the risks of international surrogacy.

Hospital Policies: Implement clear and specific surrogacy pregnancy and birth care policies that are inclusive of all arrangements and family creation.

The future of surrogacy in Australia

I have enjoyed deepening my knowledge and understanding of surrogacy and legal frameworks during my Fellowship studies and travel. I look forward to continuing to engage with the surrogacy community, to campaign for law reform and change to promote best practice surrogacy within Australia.

Later in 2025 I will share my learnings from my Fellowship at the inaugural Fertility Law & Ethics Symposium. The Symposium was inspired by my Fellowship research and noting a need for a collaborative conference for surrogacy and ART professionals to meet and learn from each other.

Inspired by the work of the Academy of Adoption and Assisted reproduction Attorneys, I am excited to spearhead the establishment of a practice group and professional association of fertility and family creation lawyers and counsellors in the coming months.

I am proud to have planted the seeds for a new fertility law practice group for professionals working in the surrogacy and ART spaces and look forward to developing our practice and deepening our understanding of this growing area of law and psychology. My Fellowship has deepened my knowledge and appreciation for the complexity of surrogacy and invigorated my energy for impacting change in Australia. I am excited for the future of surrogacy in Australia. Surrogates and intended parents take leaps of faith and are passionate, empowered and knowledgeable about their own futures and the future of surrogacy in Australia.

I hope my report can be shared amongst Australian and international colleagues who continue to work with integrity toward best practice, ethical surrogacy.

Recommendations for reform

Human rights principles



Equitable, accessible & non-discriminatory surrogacy across Australia

Protect the rights and interests of children



Protect the surrogate's right to autonomy

Regulation



Regulated standards for surrogacy counselling

Legal framework

Federal surrogacy laws
One country: one law



Surrogacy managed within the Family Court



A national register for surrogacy & donor births



Licensing of matching services

A national Assisted Reproduction Commission to oversee and regulate surrogacy and ART.



Parentage

Pre-birth transfers of parentage



Optional post-birth counselling



Consent to a parentage order not required



Recommendations for reform

Compensation



Compensated, regulated surrogacy payments to recognise the work of surrogacy, pregnancy and birth.



Ensure payments are not tied to the parentage order



Escrow financial management services

Awareness & Education

Education and awareness campaigns



Smartraveller for Surrogacy



Government policies and training for Centrelink, Medicare and Passports staff.

International Surrogacy



Decriminalise international commercial surrogacy



Reciprocal recognition of international surrogacy births



Streamlined citizenship and passports for children born overseas

Hospital Care for Surrogacy Pregnancy



Inclusive, responsive and best practice surrogacy hospital policies



Training and education for healthcare providers

