RECOGNISING ALL AUSTRALIAN FAMILIES

SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION'S REVIEW OF SURROGACY LAWS: ISSUES PAPER (2025)

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INTRODUCTION

Equality Australia welcomes the opportunity to contribute to the Australian Law Reform Commission's (**ALRC**) Review of Surrogacy Laws (**Review**). While Equality Australia does not speak from direct personal experience, we represent and work closely with LGBTQ+ families, many of whom have engaged with surrogacy in Australia and overseas.

Every child deserves the emotional, legal and financial security that comes with recognition of their family. No child should be discriminated against or disadvantaged because of how they were conceived. All families should be able to access legal frameworks that affirm their relationships, uphold the rights of surrogates, and support the best interests of children.

BACKGROUND

Surrogacy in Australia is addressed by legislation at the state and territory level but there is significant inconsistency between these laws. Each of the Australian jurisdictions criminalises commercial surrogacy whilst permitting altruistic surrogacy, noting relevantly that Western Australia also does not permit same-sex male couples and single men to access surrogacy at all.[1]

It is important to place the consideration of Australian surrogacy laws in the context surrogacy in practice. As the ALRC's Issues Paper on its Review of Surrogacy Laws (**Issues Paper**) observes, surrogacy is used by a range of people, including, but not limited to, same-sex male couples, single men, or other people who cannot sustain a pregnancy.[2]

The Issues Paper cites that an estimated 76 children were born through domestic surrogacy in 2020, and that 275 children born through international surrogacy in 2020, with an increase to 375 in 2023.[3] Figures released from the Australian and New Zealand Assisted Reproduction Database (**ANZARD**) in 2024 recorded there were 131 surrogacy live births in Australia and New Zealand in 2022,[4] the latest available figure for domestic surrogacy births, and that Department of Home Affairs data reported this year allow for estimates of the number of overseas surrogacy births being 213 in 2022, 236 in 2023 and 376 in 2024.[5]

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

[2] Australian Law Reform Commission, 'Issues Paper: Review of Surrogacy Laws' (Issues Paper 52, June 2025) (**Issues Paper**).

[3] Issues Paper, 5 citing Stephen Page, 'Surrogacy in Australia: The 'Failed Experiment'?' (2023) 172 *Precedent* 22, and Data provided by the Department of Home Affairs to the Australian Law Reform Commission, 17 April 2025.

[4] Jade E Newman et al (National Perinatal Epidemiology and Statistics Unit, University of New South Wales, Sydney), 'Assisted Reproductive Technology in Australia and New Zealand 2022' (September 2024) 4.

[5] Stephen Page, 'Australia can stop living the failed surrogacy experiment' (May 2025) 34(1) *Australian Family Lawyer* 39, 41-2. The number of children born to Australians via overseas surrogacy arrangements is not directly collected, but rather, it was estimated based on the number of children born by descent, overseas through surrogacy, for whom an application for Australian Citizenship is made: this data is kept by the Department of Home Affairs and has been obtained by prominent Family Law practitioner, Stephen Page. At page 41 of the same article, Page observes that "[o]nly three States collate data as to the number of surrogacy births – Queensland through the annual report of the Children's Court of Queensland as to the number of parentage orders made; Victoria through the then Victorian Assisted Reproductive Treatment Authority, as to the number of children born via surrogacy and the County Court as to the number of substitute parentage orders made; and Western Australia through the annual reports of the Reproductive Technology Council of the number of children born. The **other States and Territories do not collate data**." (Emphasis added)

Recognising that different terms are used for participants in surrogacy arrangements, as explored at page 28 below, this submission adopts (consistent with the Issues Paper) the terms '**surrogate**' for the person who is intended to be pregnant and give birth to the child under the surrogacy arrangement, and '**intended parent(s)**' for the person or persons intended to become the child's parents. However, recognising that a parent is no longer "intending" to be one after the child is born, we use the term '**parent**' (rather than intended parent) in relation to the post-birth period.

SUMMARY OF KEY POINTS

Australia's current surrogacy laws are fragmented, outdated, and overly restrictive. They fail to provide equitable access to surrogacy for many families, encourage people overseas at significant cost, and leave children born through surrogacy in legal limbo. These consequences disproportionately affect LGBTQ+ families and single parents.

Equality Australia supports national surrogacy framework that:

- centres the rights of children, including to legal recognition of their families,
- respects and upholds the autonomy and agency of surrogates, and
- improves access to domestic surrogacy through safe, ethical and affordable arrangements here in Australia.

In this submission we contend that:

- The process for **obtaining legal parentage** (Q18, 19) must be clarified and streamlined. Children should not be left in legal limbo after birth, and parents should be recognised as legal parents from the outset where appropriate safeguards are in place. We propose multiple pathways to parentage that include pre-birth orders, automatic recognition under regulated agreements, a streamlined post-birth order regime, and recognition of international court orders in jurisdictions with comparable standards.
- Surrogates should be **fairly compensated** (Q15-17). Current laws that restrict payments to out-of-pocket expenses undervalue the physical, emotional and time-based contributions of surrogates. We support a carefully regulated model of compensated surrogacy that avoids exploitation while acknowledging pregnancy as a form of labour.
- **Eligibility criteria** (Q6-7) should not discriminate on the basis of sex, gender identity, relationship status, or sexual orientation. All other requirements should be evidence-based and proportionate.
- Criminal penalties for **advertising** (Q13) should be replaced with a nationally consistent, regulated model that supports ethical connection between surrogates and intended parents.
- Equitable access to **Medicare and parental leave entitlements** (Q14) (for both parents and surrogates) is needed to keep costs down and encourage local surrogacy.
- **A national framework** supported by an **oversight body** (Q22-23) is essential to ensure greater clarity, accessibility and accountability for surrogacy in Australia.

- **Criminalisation** of surrogacy-related conduct (Q24) should be avoided and replaced by a regulatory approach that is better placed to safeguard the rights and wellbeing of all parties involved.

Together, these reforms will help ensure that every child is born into legal certainty, every surrogate is treated with dignity and fairness, and every family has the opportunity to create a family, safely and ethically, in Australia.

PART 2: REFORM PRINCIPLES

RELEVANT HUMAN RIGHTS (Q3)

The Issues Paper accurately identifies the key human rights considerations.

However, we strongly reject the idea that surrogacy engages the prohibition on the sale of children or that the two activities are, by definition, equivalent in nature. We note the Issues Paper cites in relation to this matter, a report submitted to the UN Human Rights Council Special Rapporteur on the sale and sexual exploitation of children, including prostitution, child pornography and other child sexual abuse.[6]

Surrogacy should not be equated to the 'sale of children' as framed in the Special Rapporteur's report which states that "[c]ommercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law" – this is a stigmatising and inaccurate framing. While we accept there are some instances where surrogacy arrangements involve exploitation of surrogates, children, the intended parents (or a combination of these) by bad actors, State laws need to target such conduct without resorting to blanket bans on surrogacy arrangements when the vast majority of surrogacy arrangements are entered into by consenting, willing, informed parties acting in good faith.

We consider further human rights considerations posited in the Issues Paper throughout this submission, such as work rights for surrogates.

CHILD'S RIGHT TO INFORMATION (Q4)

All people born through surrogacy (and where relevant, donor conception) should have access to information about their genetic and gestational origins, including the identity of the surrogate who birthed them.

This information should be securely stored in a central, nationally coordinated database, accessible across state and territory lines. Although some states operate donor conception registers, surrogacy and donation frequently occur across jurisdictions, including internationally. A national register would ensure consistency, prevent information loss, and uphold every child's

[6] Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60, (15 January 2018) 12–17, [41]–[72].

right to know about their origins, regardless of where they were born. We discuss this further in relation to question 23 on oversight on page 25.

Importantly, accessing this information should not be a passive process. Resources should be provided to support young people and adults accessing information, including counselling and age-appropriate guidance, so that they can engage with their story in a way that is safe, supported and empowering.

PART 3: INSIGHTS ABOUT THE KEY ISSUES AND POTENTIAL REFORM OPTIONS

BARRIERS TO DOMESTIC SURROGACY (Q5)

Domestic surrogacy in Australia is currently hindered by a range of significant barriers, which may be contributing to some intended parents seeking surrogacy arrangements overseas. These barriers include:

- complex and onerous legal processes, with parentage orders that are costly, slow, and intimidating, and which do not necessarily reflect the best interests of children born through surrogacy
- inadequate compensation, with surrogates generally limited to reimbursement of out-of-pocket expenses, with no recognition of the time, risk, and emotional and physical labour involved
- discriminatory or unnecessarily restrictive eligibility criteria for intended parents, which create additional hurdles for LGBTQ+ individuals and single people in some jurisdictions
- paternalistic requirements regarding surrogate eligibility, for example age-related restrictions, whether the person has previously given birth, and whether the surrogate is also an egg donor ('traditional' surrogacy)
- restrictive, inflexible laws, such as the criminalisation of advertising for a surrogate, or mandatory pre-conditions to parental recognition
- high costs, with fertility treatment not covered by Medicare.

Each of these barriers is addressed in more detail in the sections that follow.

ELIGIBILITY (Q6–7)

Discriminatory eligibility requirements for intended parents

In Western Australia, access to surrogacy is restricted to heterosexual couples and single women who are deemed medically infertile.[7] This excludes many LGBTQ+ people and families from

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

pursuing surrogacy within the state. These restrictions are outdated and discriminatory, and fail to reflect contemporary understandings of family diversity.

No discriminatory criteria based on relationship status, sex, sexual orientation or gender identity should apply in any circumstances.

Medical or social need

While it is appropriate that eligibility is generally based on medical or social need, women (including lesbian couples or single women), or trans people who retain the capacity to birth a child, should not be subject to more restrictive criteria than men in similar circumstances. Because women and people assigned female at birth are often assumed to be capable of carrying a child themselves, regardless of whether that is medically or practically the case, they may face additional barriers to accessing surrogacy.

For example, a woman who has undergone multiple failed IVF cycles or has a health condition that makes pregnancy unsafe may still be required to undergo invasive testing or face scepticism from clinics or decision-makers, whereas a single man or gay couple may more readily meet the threshold for surrogacy without the same level of scrutiny. This inequity reinforces gendered assumptions and can unfairly limit women's access to family formation pathways.

Another example is a trans or non-binary person who may be technically capable of carrying a child, but for whom doing so would involve significant psychological distress – for example, due to gender dysphoria, or the need to cease hormone treatment to undergo fertility treatment. These are valid social needs that should not be subject to excessive scrutiny.

Unjustified age restrictions for surrogates and parents

Nearly all jurisdictions restrict surrogates from being under the age of 25. Australian Capital Territory is the exception, allowing surrogates aged 18 to 24 to participate with additional safeguards, including maturity assessments by counsellors.[8] Again, there is no clear evidence base to support 25 years of age as the appropriate age threshold. Many people under 25 make informed decisions about pregnancy and parenthood, and the law should recognise this capacity — particularly when strong pre-conditions like counselling and legal advice are in place.

Age restrictions on intended parents also present barriers. In all jurisdictions except the Australian Capital Territory and Victoria,[9] people under the age of 25 are excluded from being intended parents. This is hard to justify given that other major life decisions — including becoming a parent, entering contracts, or consenting to medical procedures — can be made from the age of 18. Aside from limiting surrogacy based on gender and relationship status (as discussed in the section above), postmenopausal women are ineligible to pursue a surrogacy arrangement which also indirectly imposes an unnecessary and unfair age-related restriction.[10]

If a person is capable of making informed decisions and has access to independent legal and counselling support, they should not be excluded as surrogates or intended parents based solely on age.

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[8] *Parentage Act 2004* (ACT) ss 28C(1)-(2).

[9] *Parentage Act 2004* (ACT) s 28B; no age limit is explicitly set out for intended parents in the *Assisted Reproductive Treatment Act 2008* (Vic).

[10] *Surrogacy Act 2008* (WA) s 19(3); *Human Reproductive Technology Act 1991* (WA) s 23(1)(d).

Restrictions on traditional surrogacy in Victoria

Victoria currently restricts the use of clinics facilitating traditional surrogacy, where the surrogate uses their own egg,[11] which creates unnecessary barriers for intended parents who may require both a surrogate and an egg donor. While home insemination is an option for some people, it is not a viable option for everyone and may have limitations particularly where the surrogate is older or and may need IVF to fall pregnant in a reasonable timeframe. This restriction is based on the assumption that traditional surrogates may find it harder to relinquish the baby due to their genetic connection. However, research indicates that surrogates, whether or not they are traditional surrogates, generally do not experience significant difficulties in handing over the baby.[12]

Limiting traditional surrogacy to home settings particularly affects people in LGBTQ+ families and others who may be seeking to engage a known and trusted surrogate (such as a friend or family member) who is also willing to use their own egg.

Restrictions on interstate surrogacy arrangements

Impractical state-based requirements also restrict surrogacy occurring within Australia. Where parties are in different jurisdictions inflexible provisions on residence and access to clinics can restrict treatment options and freedom of movement, including where one party needs to move interstate during the process.

For example, in Tasmania, the intended parents and surrogates must all reside in the state to enter a surrogacy arrangement.[13] This is impractical given that surrogates may reside in other jurisdictions, particularly given the small population in that state. The result is extremely low surrogacy uptake in Tasmania, and calls for reform have already been raised, including by recent media coverage noting the near impossibility of arranging surrogacy within the state.[14]

In effect, because of the requirements of the oversight panels in Western Australia and Victoria,[15] people are required to only have fertility treatment in their own state,[16] which can also create issues when surrogates and intended parents live in different states or territories. Additionally, Victoria requires that the surrogacy procedure is carried out in that state to be eligible for a parenting order.[17]

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[11] *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ab).

[12] For example, this study found that surrogates do not generally experience major problems in their relationship with the commissioning couple, in handing over the baby, or from the reactions of those around them – most of the sample were 'genetic' surrogates – refer to Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196, 2203-4.. In another study, all traditional surrogates rated a genetic link to the child as unimportant, while most gestational surrogates disagreed with this – indicating that surrogates self-select the type of surrogate that aligns with their beliefs and values – refer to Janice C. Ciccarelli and Linda J. Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy', (2005) 61(1) *Journal of Social Issues* 21, 43 referring to Olga van den Akker , 'The Acceptable Face of Parenthood: The Relative Status of Biological and Cultural Interpretations of Offspring in Infertility Treatment' (2001) 3(2) *Psychology, Evolution & Gender* 137.

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

[14] Manika Champ, 'Meagan White chose surrogacy in order to become a mother, and now has two children', *Australian Broadcasting Corporation News* (online, 8 June 2025) <https://www.abc.net.au/news/2025-06-08/surrogacy-tasmania-calls-for-law-reform/105387582>.

[15] In Victoria, this is the Patient Review Board, and in Western Australia this is the Reproductive Technology Council.

[16] *Human Reproductive Technology Act 1991* (WA) s 7(1)(b)(ii); *Assisted Reproductive Treatment Act 2008* (Vic) pt 4.

[17] See *Status of Children Act 1974* (Vic) s 20(1)(a).

Requirements that vary across state and territory borders deter domestic surrogacy and should not be retained – later in this submission we argue for harmonious federal laws to supplant the inconsistent legislation throughout Australia (see our response to Q22 Harmonisation on page 25).

Requirement that surrogates have previously given birth

Victoria, Western Australia and Tasmania require that a surrogate must have previously had a live birth in order to be eligible.[18] This requirement is paternalistic and not evidence-based. It excludes people who may be fully informed of the risks and willing to carry a pregnancy for someone else who may not wish to ever have children of their own. The average maternal age of first birth in Australia is rising,[19] meaning this restriction also unnecessarily narrows the eligible surrogate pool and increases pregnancy-related risks for those who undertake surrogacy later in life.

Mandatory criminal history checks in South Australia

South Australia is the only jurisdiction that requires surrogates and intended parents to exchange criminal history checks as a statutory precondition to entering a surrogacy agreement.[20] While we recognise the importance of safeguarding the welfare of children, we do not support blanket requirements for police checks where they are not linked to a risk assessment or specific concerns.

Requiring every surrogate and intended parent to obtain and exchange police checks assumes risk without evidence, introduces delays and costs, and can create barriers — especially for people with minor or historical convictions that are irrelevant to parenting or pregnancy. This approach risks further marginalising people from disadvantaged or over-policed communities, including Aboriginal and Torres Strait Islander people and LGBTQ+ individuals.

RECOMMENDATIONS:

In relation to eligibility criteria, we recommend the following:

- access to surrogacy and assisted reproductive technology should not be restricted based on sex, gender identity, sexual orientation, or relationship status or other protected characteristics.
- a minimum age of 18 should be set for all parties, with safeguards in place for legal advice and counselling.
- traditional surrogacy should be permitted in clinical settings.
- no requirements for the surrogate having given birth prior to becoming a surrogate are needed.

[18] *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ac), *Surrogacy Act 2008* (WA) s 17(a)(ii), *Surrogacy Act 2012* (Tas) s 16(2)(d).

[19] The Australian Institute of Health and Welfare notes that the average maternal age for first-time mothers has risen from 28.3 in 2010 to 29.8 to 2022. See Australian Institute of Health and Welfare, 'Demographics of mothers and babies: Maternal age', *Australia's mothers and babies* (Web report, Last Updated 14 May 2025) <https://www.aihw.gov.au/reports/mothers-babies/australias-mothers-babies/contents/overview-and-demographics/maternal-age>.

[20] *Surrogacy Act 2019* (SA) s 10(3)(f), 10(4)(g).

- there should be no requirements for criminal history checks to enter into a surrogacy arrangement.

SURROGACY AGREEMENTS (Q8-9)

This topic is explored in more detail under Q18 regarding legal parentage on page 17.

We consider that there is merit in encouraging the use of prescribed standard agreements that set out enforceable elements and may be used as the basis for the recognition of parentage from birth. Standard terms could include obligations for reimbursement and the surrogate's right to manage their own pregnancy and birth. Certain terms that are contrary to public policy, such as any that may violate the surrogate's bodily autonomy, could be prohibited or deemed unenforceable.

Written agreements should be encouraged and supported with resources — but the absence of one, or the failure to include a particular term, should not disadvantage the child by limiting the capacity for someone to be recognised as their parent. Pre-birth or post-birth orders should remain available to recognise parentage in these circumstances.

ADVERTISING (Q13)

We support nationally consistent regulations for surrogacy to better enable surrogates and intended parents to connect within Australia. Current laws may prohibit potential surrogates from expressing that they are open to being a surrogate, or from intended parents indicating that they are seeking a surrogate. Professional surrogacy agencies can also be unnecessarily limited by these restrictions in their ability to connect surrogates and intended parents. If the aim is to encourage surrogacy arrangements in Australia, rather than overseas, then reforming outdated advertising laws is necessary.

Advertising, whether paid or unpaid, for commercial surrogacy is prohibited in Australian Capital Territory, New South Wales, Northern Territory and South Australia.[21] New South Wales has the highest penalties for this offence, being a maximum penalty of either $275,000 for corporations, or $110,000 or 2 years' imprisonment for individuals.[22] Additionally, advertising for a fee is prohibited in New South Wales and Tasmania, regardless of whether the surrogacy arrangement is altruistic or commercial.[23]

Queensland and Victoria have a blanket ban against advertising whether paid or unpaid and whether the surrogacy is altruistic or commercial.[24] Prohibitions on advertising in all states and territories are enforced through criminal penalties. Further, it is an offence in South Australia, Tasmania and Western Australia for a person to be paid to negotiate for or link prospective parties

[21] *Parentage Act 2004* (ACT) s 43(1), *Surrogacy Act 2010* (NSW) s 10(1), *Surrogacy Act 2022* (NT) s 50. *Surrogacy Act 2019* (SA) s 26(1).

[22] *Surrogacy Act 2010* (NSW) s 10(1). The value of a penalty unit is $110 as provided by s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

[23] *Surrogacy Act 2010* (NSW) ss 10(1)-(2), *Surrogacy Act 2012* (Tas) s 41.

[24] *Assisted Reproductive Treatment Act 2008* (Vic) s 45; *Surrogacy Act 2010* (Qld) s 55(1).

to a surrogacy arrangement (whether altruistic or commercial).[25] South Australia and Tasmania's laws cover instances where a person offers to do this for payment.[26]

These confusing and arbitrary inconsistencies between states on the rules for advertising for a surrogate (some applying even for altruistic surrogacy), make it difficult for parties to navigate and are not enforced currently, to the best of our knowledge. This is especially the case if people are trying to link up with a person located somewhere else in Australia; this is an important consideration given the presently limited number of prospective surrogates across Australia as noted at page 3.

Unpaid advertising

We consider that there are benefits in allowing for unpaid advertising for surrogates by all parties to a surrogacy arrangement and not having individuals seeking to start a family or show their willingness to be a surrogate being subjected to disproportionate criminal penalties. The reality is that advertising bans are difficult to enforce, and this is particularly the case for unpaid advertising by prospective parties to a surrogacy arrangement on social media and other online forums. In any case, these laws prevent people from simply connecting in the first instance, well before any surrogacy arrangement is negotiated or drafted. Therefore, unpaid advertising should not subject to any penalties.

Paid advertising

We support the underlying policy intent of deterring paid advertising by surrogates or intended parents, to minimise either the exploitation of intended parents desperate to find a pathway to parenthood or the vulnerability of prospective surrogates seeking to help others.

However, criminal penalties are entirely inappropriate. Instead, we propose that a future surrogacy oversight body is vested with functions and powers to monitor and issue a take-down notice of paid advertising by intended parents or prospective surrogates within 48 hours of being notified. It should only be if there is a failure to comply with the notice that a fine is imposed. We consider that it is heavy-handed for advertising to be criminalised in the first instance, and instead should be treated as being unlawful and subject to civil penalties for non-compliance with takedown notices. This approach is similar to that taken by the Commonwealth e-Safety Commissioner in relation to certain prescribed content online, under the *Online Safety Act 2021* (Cth).[27] Rather than only targeting end users, social media platforms could also be subject to penalties for failure to respond to take-down notices.

Professional surrogacy agencies, but not surrogacy clinics (as they have a conflict of interest between advertising for matches for surrogacy arrangements and providing medical services to facilitate surrogacy), should be permitted to advertise, subject to their registration with an oversight body. We recommend that advertising by professional surrogacy agencies is subject to regulation that ensures their advertising is not misleading or deceptive.

[25] *Surrogacy Act 2019* (SA) ss 24(1)(a)-(c); *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) s 9.

[26] *Surrogacy Act 2019* (SA) ss 24(1)(a)-(c); *Surrogacy Act 2012* (Tas) s 41.

[27] See e.g. *Online Safety Act 2021* (Cth) ss 65-67.

RECOMMENDATIONS:

In relation to advertising, we recommend removing criminal penalties on advertising and instead have a national tiered, regulated approach with civil penalties for breaches, whereby:

- restrictions are removed on unpaid advertising by surrogates and intended parents.
- surrogacy oversight bodies are empowered to monitor for paid advertising by surrogates or intended parents online, issue take-down notices to both end users and social media companies where these adverts are detected, and be able to issue fines for non-compliance with these notices.
- professional surrogacy agencies are permitted to advertise, but that advertising is monitored by a surrogacy oversight body ensuring that advertising is not misleading or deceptive.

MEDICARE REBATES AND PARENTAL LEAVE (Q14)

Medicare benefits

Although the government has recently expanded Medicare eligibility for assisted reproductive technology treatments to all people carrying their own pregnancies (including couples and single people), these benefits remain unavailable to people conceiving through surrogacy.

A carve-out in the Medicare regulations[28] which has been present in some form since the 1990s creates inconsistency and unjustifiable exclusion. Medicare support is available for other forms of conception, but not for those relying on surrogacy, even though altruistic surrogacy has been lawful for many years in Australia. The exclusion significantly increases out-of-pocket costs for intended parents and undermines equitable access to reproductive healthcare, disincentivising participation in surrogacy within Australia.

Failure to remove this carve-out continues to result in inequitable outcomes for gay men in particular, and is inconsistent with the *Sex Discrimination Act 1984* (Cth), which protects people from discrimination on the basis of sexual orientation in the provision of goods, services and facilities.

Parental leave

Surrogates and intended parents should be entitled to:

- Paid parental leave for surrogates (post-birth recovery, both emotionally and physically) and intended parents (bonding and care).
- Broader recognition of surrogacy within workplace and government leave schemes.

LEAVE FOR SURROGATES

We agree with the proposition in the Issues Paper that ensuring that surrogates have adequate leave is an important way to make domestic surrogacy arrangements more accessible.

[28] *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) sch 1, reg 5.2.6

Beyond a minimum recovery period from the physical labour, sufficient leave is required to ensure adequate time to prepare for birth and for the emotional recovery following the birth. The longer that a surrogate is on leave, the increased chance that they will have the appropriate time to emotionally recover. Longer periods of leave may also facilitate sharing of breast milk from the surrogate if parties choose to do so.

The Issues Paper notes that surrogates may access Centrelink's Parental Leave Pay (**PLP**) scheme to take time to recover from the birth.[29] The Department of Social Services' Paid Parental Leave Guide (**Paid Parental Leave Guide**) provides that surrogates can be eligible for the maximum PLP entitlement for the child for the applicable year in which the child was born.[30] Relevantly, where the child was born on or after 1 July 2025, the maximum number of days is 120 (or roughly, 17 weeks), and for a child born on or after 1 July 2026, the maximum number of days is 130 (or roughly, 18.5 weeks).[31]

We note that the length of time for PLP for surrogates in New Zealand is 26 weeks.[32] On reviewing its domestic legislation, the New Zealand Law Commission recommended that surrogates continue to access the same entitlements as other pregnant people, and that the government should publish guidance materials to make this clearer.[33] This approach would both ensure ongoing equitable access to entitlements for surrogates, and minimise prospective surrogates within Australia being deterred from entering into surrogacy arrangements based on a perception that they may not be eligible for fair parental leave entitlements.

Two key eligibility requirements for PLP which the Issues Paper raises are: (1) the income test, and (2) the work test. The income limit to receive Centrelink's Paid Parental Leave in the income year 2024-25 is $180,007, noting that the indexed figure for the income year 2025-26 is yet to be released.[34]

The work test for surrogates needs to be reconsidered in light of the fact that surrogates are engaging in a form of labour to enable a family to have a child. The current work test requires a claimant to have performed at least 330 hours of qualifying work over a period spanning at least 295 days within the 392-day period prior to the expected or actual date of birth of the child. We note that New Zealand's work requirements are lower, with the need for a claimant to have worked at least 10 hours, each week over any of the 26 of the 52 weeks before the baby's due date, totalling 260 hours of work, which is 21.2% lower than the total required hours in Australia.

We are in support of reforms to ensure a longer period of time for PLP for surrogates to account for both physical and emotional recovery in the period prior to and following the pregnancy.

Access to paid leave is entirely dependent on the industry in which the surrogate works. Aside from the minimum PLP scheme, we consider the need for the ALRC to take into account the

[29] Issues Paper at 15 citing Department of Social Services, 'Guides to Social Policy Law: Paid Parental Leave Guide', "2.9 Maximum PLP Entitlements" (Version 1.88, 12 May 2025); *Fair Work Act 2009* (Cth) ss 70–72.

[30] Paid Parental Leave Guide, 2.9 Maximum PLP Entitlements (Version 1.90, 1 July 2025).

[31] Paid Parental Leave Guide, 2.9 Maximum PLP Entitlements (Version 1.90, 1 July 2025).

[32] See 'Parental leave payments', *Employment New Zealand* (Web page) <https://www.employment.govt.nz/pay-and-hours/pay-and-wages/leave-and-holiday-pay/parental-leave-payments>.

[33] Te Aka Matua o te Ture, *Te Kōpū Whāngai: He Arotake, Review of Surrogacy* (NZLC Report No. 146, 2022) 25.

[34] Paid Parental Leave Guide, 1.1.I.55 Individual PPL Income Limit (Version 1.90, 1 July 2025).

prospects of standardising employer obligations around paid parental leave for surrogates – we understand that there is a variety of allowances throughout different enterprise agreements or employment contracts.

LEAVE FOR PARENTS

We are in favour of required reforms being undertaken to ensure that the payment rate and duration of PLP to which parents through surrogacy are entitled is consistent with other parents, such that they are provided with equivalent monetary support and time to bond with their child. This is consistent with the liberalisation of surrogacy laws to ensure equitable access for parties needing to utilise surrogacy as their pathway to parenthood.

Having different leave allowances for primary care givers depending on how their child was conceived could amount to discrimination (such as sexual orientation discrimination against gay couples). Surrogacy leave should allow for the same entitlements as other parenting leave.

Parents through domestic and overseas surrogacy arrangements should have access to the same parental leave entitlements. To ensure equitable access to these entitlements, evidentiary requirements for parents through overseas surrogacy should account for the length of time they may require in other countries to obtain proof of birth. Therefore, we would be in favour of a temporary statutory declaration regarding the birth of the child, and a requirement for the parents to submit the child's proof of birth within a certain period following birth.

We are also in favour of ensuring that parents who simply happen to be public servants are not restricted from accessing parental leave entitlements through their employers, on the basis of the surrogacy arrangement being overseas or compensated.[35]

RECOMMENDATIONS:

In relation to the entitlements of surrogates and parents, we consider the following changes should be made:

- Amend the *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) sch 1 to remove reg 5.2.6.
- Ensure surrogates have adequate time for physical and emotional recovery, and reconsider the number of hours required for surrogates to have worked prior to birth.
- Consider explicit inclusion of unpaid surrogacy leave as a type of parental leave (for surrogates) as a minimum employment entitlement under the National Employment Standards in the *Fair Work Act 2009* (Cth).
- Ensure that parents through surrogacy are not disadvantaged for having availed themselves of surrogacy, in relation to their paid parental leave requirements.
- Parents who have entered into overseas surrogacy arrangements be provided the same parental leave entitlements as parents who have entered into domestic surrogacy arrangements.

[35] See *Long v Secretary, Department of Education* [2022] NSWCATAD 131.

REIMBURSEMENT AND COMPENSATION (Q15, 16 & 17)

Reimbursement

Reimbursement involves the payment to surrogates for reasonable expenses or losses incurred in relation to the pregnancy, including medical costs, legal fees, counselling fees, related out of pockets costs, change in insurance premiums as a result of the surrogacy, time off work (including unpaid leave as well as needing to use non-surrogacy / parental specific leave entitlements).

LOSS OF EARNINGS

All states and territories in Australia provide for the reimbursement of surrogates for the loss of income in relation to the pregnancy, with similar coverage and requirements. The respective jurisdictions' positions as to the scope of circumstances in which loss of income may be reimbursed is set out in the table in Appendix A of this submission.

For comparison, in Canada, federal regulation provides for the reimbursement of the loss of work-related income, including for periods unable to be worked as certified by a medical practitioner whereby continued work may have posed a health risk to the surrogate or that of the embryo or foetus.[36]

Australian jurisdictions are at a good baseline for reimbursement of lost earnings, however, there are some improvements that could assist in making the reimbursement more equitable for surrogates:

- Removing the requirement that reimbursement is limited to unpaid leave taken. If a surrogate utilises paid leave that is not specifically provided for pregnancies, such as personal or annual leave, that should be reimbursed, given the paid leave is a benefit that generally accrues during the time of the surrogate's employment at their given workplace where they are employed full-time or part-time or are otherwise provided these leave entitlements under their employment contract.
- Ensuring that reimbursement extends to the loss of earnings due to leave taken on medical grounds related to the pregnancy, after the pregnancy, as provided for in Tasmanian surrogacy law as set out in the table in Appendix A.
- Consideration could also be given to reimbursement or allowances for a surrogate's spouse, to encourage partners to take time off work to support the surrogate in the post-birth period. This would particularly be helpful for surrogates with caring responsibilities who need help at home.

We support efforts to build a framework for the reimbursement of surrogates for the loss of opportunities to progress their career, beyond the mere loss of earnings. We consider that this is one aspect that can be dealt with by allowing for compensated surrogacy, which is discussed in detail in the following section.

[36] Reimbursement Related to Assisted Human Reproduction Regulations, SOR/2019-193, s 8.

Compensation beyond reasonable expenses

We support the legalisation of compensated surrogacy, provided it operates within a carefully regulated framework. Such a system should allow surrogates to receive fair compensation that recognises the significant time, effort, and emotional and physical labour involved, including in some cases the loss of career opportunities, beyond mere reimbursement of out-of-pocket expenses. We do not support unregulated or profit-driven commercial surrogacy arrangements.

There is a meaningful and important distinction between compensated and commercial surrogacy:

Commercial surrogacy is typically characterised by profit-making arrangements, no cap on payments, and weak or non-existent safeguards for the surrogate, child, or intended parents. It often involves intermediaries or brokers profiting from the process.

Compensated surrogacy, by contrast, would occur within a regulated framework, with a cap or fixed range for compensation and strong legal safeguards. Compensation would reflect the surrogate's non-financial contributions including the physical toll, emotional impact, and labour associated with the pregnancy, without commodifying the child or the process.

Surrogacy can be altruistic and properly compensated at the same time. The most common motivation for surrogacy is altruistic – surrogates are highly motivated by the desire to help childless couples, often influenced by their own positive experiences being pregnant and parenting.[37] In a recent study of surrogates from various US states (some in which compensation is permitted), it was found that, consistent with previous research, altruism and empathy were the primary motivations for participating in surrogacy, rather than poverty or social status.[38] This outcome reflected the results of similar studies where economic reasons were not the primary reason for becoming a surrogate.[39]

Currently, Australian laws only permit reimbursement of "reasonable expenses", meaning surrogates are expected to undergo fertility treatment, carry a pregnancy, and give birth without any acknowledgment of the immense commitment this requires. Conversely, all others in the process are paid – clinics, counsellors and lawyers. A system that only reimburses for expenses leaves surrogates exposed to exploitation, particularly where there are unanticipated costs. As discussed in the section on harmonisation and oversight on page 25 of this submission, there are not nationally consistent laws on reimbursement either.

While research on surrogacy has identified most surrogates report their experience as overall positive,[40] dissatisfaction can be expressed in relation to the side effects of pregnancy that involve physical discomfort.[41] As with all pregnancies, surrogates face the risk of medical complications.

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[37] Susan Imrie and Vasanti Jadva, 'The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements' (2014) 29(4) *Reproductive BioMedicine Online* 424, 433.

[38] In the study, less than 10% cited an economic reason for engaging in surrogacy, with the nearly 90% entering into it for pro-social and altruistic reasons. See José Ángel Martínez-López and Pilar Munuera-Gómez, 'Surrogacy in the United States: analysis of sociodemographic profiles and motivations of surrogates' (2024) 49(4) *Reproductive BioMedicine Online* 1, 5.

[39] For example, Andrea Mechanick Braverman and Stephen L. Corson, 'Characteristics of participants in a gestational carrier program' (1992) 9(4) *Journal of Assisted Reproduction and Genetics*, 353.

[40] Emotions expressed by surrogates reflecting on their experience in numerous studies suggest that surrogacy enhances self-confidence, self-worth and personal values – Refer to Samantha Yee et al, '"Not my child to give away": A qualitative analysis of gestational surrogates' experiences' (2020) 33(3) *Women and Birth* 256, 263.

[41] Janice C. Ciccarelli and Linda J. Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy', (2005) 61(1) *Journal of Social Issues* 21, 33.

However, where there are ongoing health issues, pain, or even the possibility of such outcomes, current payment structures do not account for these risks or provide adequate support should they eventuate.

In jurisdictions that permit compensated surrogacy, there is greater recognition of the physical, emotional and logistical demands of pregnancy and childbirth, acknowledging it as a form of labour that requires appropriate consideration. For instance, in New York state, compensation can be paid based on medical risks, physical discomfort, inconvenience and responsibilities to undertake assisted reproduction.[42] Further, New York state laws provide that compensation must be negotiated reasonably and in good faith between the parties.[43] In Washington state, a surrogacy agreement may provide for payment for time, emotional and physical investment and labour.[44]

Important safeguards in the development of compensated agreements include requirements for independent legal advice, and ensuring the availability of counselling and mediation services, to ensure equal bargaining power in the negotiations.

To ensure the security and reliability of the financial arrangement, we support surrogates being paid in stages throughout the surrogacy process, ideally with funds held in trust or administered through a regulated mechanism.

We consider that a lack of regulated compensated surrogacy in Australia is a key factor driving parents overseas, given the relative lack of value being placed on the physical labour and emotional toll of pregnancy for surrogates in Australia.

RECOMMENDATIONS:

Compensated surrogacy should be made lawful in Australia through a regulated scheme that involves:

- a broader approach to reimbursement that calculates the surrogate's input fairly, and considers factors beyond "reasonable expenses"
- capped amounts of compensation (responsive to inflation)
- requirements for independent legal advice and counselling, and the availability of mediation services if required
- staged payments to surrogates from funds securely held in trust
- optional take up, with surrogates being able to decline compensation.

LEGAL PARENTAGE (Q18, 19)

The process of transferring legal parentage in Australia is another significant barrier to local surrogacy and may be another major factor driving families overseas.

[42] *Family Court Act of 1962* , ch 686, § 581-502, NY Laws.

[43] *Family Court Act of 1962* , ch 686, § 581-502, NY Laws.

[44] Wash Rev Code §26.26A.715(2)(a) (2018).

Delayed recognition or unclear parentage leaves parents and surrogates legally vulnerable and exposed to major stress. For months, surrogates can remain the default decision-makers for a newborn they never intended to raise, while parents carry full day-to-day responsibility with no recognised authority. This can create a heavy and unnecessary administrative burden on surrogates – it may mean that they are being required to sign-off on everything from vaccination, to getting a passport, to enrolment into childcare.

The current system is structured, in part, to guard against the possibility that a surrogate may be coerced or may change their mind after birth and refuse to relinquish the baby. However, this rationale is not well-supported by research, and based on the research and anecdotal evidence appears to be a very rare scenario. Studies on surrogacy from around the world have shown that surrogates almost never see the foetus they are carrying as their own.[45] Former surrogates have described their experience of the surrogacy role as that of a "babysitter", "custodian", or looking after a foetus until they are "ready to meet their parents".[46]

A systematic review on surrogacy arrangements found that surrogates have little difficulty separating from children born as a result of the arrangement, and there is no evidence of harm to children.[47] Research on the prenatal bonding of gestational surrogates indicates lower emotional connection, but greater care towards healthy growth of a foetus when compared with pregnant people generally.[48] This distinction reflects a different kind of connection — one rooted in duty and commitment to the safe carriage of the child, rather than parental identification — and supports the conclusion that fears about surrogates forming unmanageable emotional bonds are overstated and not evidence-based.

These misplaced assumptions about surrogates' emotional attachment contribute to an overly cautious legal framework that ultimately places children at risk of harm.

In the current system, children are left in legal limbo, with the surrogate and sometimes the surrogate's partner inappropriately listed as their legal parents for months until the matter is resolved. It cannot be in the best interest of the child to deny them the clear protection of the parents responsible for their care, health, wellbeing and development. Waiting for a court to finalise a parentage order confirming a child's legal parents can delay decisions about medical care, travel, inheritance and social-security claims.

Further concerns include:

- unreasonable delays and uncertainty for families during this wait period.
- the burden of expensive, stressful and time-consuming court processes during a vulnerable time post-birth (for parents and surrogates alike).

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[45] Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196, 2203; Yuri Hibino and Yosuke Shimazono, 'Becoming a surrogate online: "Message Board" surrogacy in Thailand' (2013) 5(1) *Asian Bioethics Review* 56, 65-66; Nishita Lamba et al, 'The Psychological Well-being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646, 651-2. Ezra Kneebone et al, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: a Systematic Review' (2022) 45(4) *Reproductive BioMedicine Online* 815, 825.

[46] Samantha Yee et al, '"Not my child to give away": A qualitative analysis of gestational surrogates' experiences' (2020) 33(3) *Women and Birth* 256, 263.

[47] Viveca Soderstrom-Anttila et al, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families—a systematic review' (2015) 22(2) *Human Reproduction Update* 260, 272-4. – We take note that the research to date has been limited and not considered cross-border surrogacy.

[48] Nishita Lamba et al, 'The Psychological Well-being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646, 652.

- the lack of recognition of international orders, even where jurisdictions are comparable to Australia.
- children's rights being denied when adults fail to meet complex pre-conditions, which are inconsistent between jurisdictions.

Reforms are clearly needed to streamline the process and make it more accessible for all parties.

Recommended pathways to parentage (that can co-exist)

PATHWAY	WHEN USED	HOW IT WORKS	SAFEGUARDS
A. Pre-birth "interim" parentage order	Once a pregnancy is clinically confirmed (or after 12 weeks gestation), as an alternative to relying on a surrogacy agreement process (see Pathway B.)	• Court makes an order that takes effect at birth, either automatically, or provided the parties sign an uncomplicated post-birth confirmation (e.g. within 60 days).	• Consent of all parties Independent legal advice & counselling • Court retains power to pause/revoke if dispute arises. Potential mandatory inclusion in a national surrogacy register
B. Statutory "standard surrogacy agreement" with automatic recognition at birth	For all low-risk, supported arrangements (as an alternative to the pre-birth order in Pathway A.).	• Parties sign a prescribed agreement that automatically recognises legal parentage of parents at birth without needing to appear in court. • Parentage transfer occurs after birth by operation of legislation, rather than by court order. • Surrogate reaffirms consent post-birth, and where this does not occur due to death/incapacity/unavailability, the court can dispense with consent.	• Agreement must contain mandatory protective clauses (reimbursement rules, surrogate's bodily autonomy, access to donor/surrogacy register, dispute-resolution clause, etc.) • Independent legal advice required for all parties. • Post-birth consent of surrogate still confirmed via statutory declaration (rather than a court process). –Central lodgement and inclusion in a national surrogacy register could be required to ensure sufficient oversight
C. More flexible post-birth court order	Where no pre-birth step taken (neither the interim order nor standard surrogacy agreement), or technical requirements unmet. Ideally made within 6 months of birth but discretion to extend.	Court must be able to make an order whenever it is in the child's best interests and all parties consent – even if some technical eligibility criteria were missed, or surrogate's consent cannot be obtained, but child lives with parents.	• Best-interests test • Consideration of surrogate's rights and voluntariness • Include provisions to dispense with the surrogate's consent, particularly when the child is living with parents.
D. Recognition of prescribed overseas orders	Child born under an overseas scheme with comparable protections, and parentage not already presumed under Family Law Act s 69R.	If the foreign court order satisfies minimum safeguards, recognition is automatic in Australia (with a simple registration step). Additional administrative process for non-biological parents who are not recognised internationally as parents.	Refusal power where evidence of coercion or trafficking.

Options for reform are set out in the above table, with further descriptions of the options as follow.

A. PRE-BIRTH "INTERIM" PARENTAGE ORDERS

State laws currently require that applications for parentage in relation to altruistic surrogacy are made between one month and six months after the birth of the child, unless exceptional circumstances exist. There is a gap in protection for all parties, firstly created by the minimum period before an order can be applied for, and then during the period waiting for a court order to be made.

We acknowledge that the period between birth and the commencement of the timeframe to lodge an application for a parentage order is intended to provide a safeguard in the rare event that a surrogate changes her mind and wishes to parent the child. However, in practice, this concern appears overstated. Our understanding is that it is far more common for surrogates to be concerned that the parents might not accept the child, rather than seeking to raise the child themselves.

Ultimately, long delays create major practical issues for everyone involved. The parents have no legal powers or responsibilities for their child from birth for several months. For example, if a child needs medical treatment, they must obtain the consent of the surrogate or her partner (if any), who remain the legal parents until the parentage order is made. Even for a healthy child in routine postnatal care before even leaving the hospital, several immediate decisions must be made about vaccinations, hearing tests, and the administration of a vitamin K injection. This imposes a practical and emotional burden on surrogates and their partners, who are asked to make decisions and respond to administrative matters for a child they are not raising, while simultaneously recovering from the physical and emotional impacts of birth.

Further, the process for seeking a parentage order occurs in the period where the intended parent(s) most need to be recognised as parent(s) for purposes such as registering a child for Medicare.

To improve upon the current legal framework, which focuses on resolving parentage only after birth, we recommend introducing the option for a court to make an interim parentage order once a viable pregnancy has been established. This approach would enable the parents to assume parental responsibility from the moment of birth, ensuring greater clarity, legal certainty, and alignment with the child's best interests.

The ideal time for a court to consider the matter would be during the second trimester, once the risk of miscarriage is significantly lower.

Ideally, all regulation of surrogacy should be governed by federal law, and parentage orders should be determined in the Federal Circuit and Family Court of Australia (**Family Court**) through a specialist list, rather than through state courts that usually do not have the relevant expertise for these matters, or deal with them so rarely that it is difficult to build up that expertise.

The purpose of this proposal is to give certainty for both the surrogate and their partner (if any) and the intended parent(s) as to the legal parentage of a child born through surrogacy.

Here is how we propose this mechanism would work:

- An application for an interim parentage order in the Family Court would be allowed from the point of a viable pregnancy (or alternatively, from 12 weeks pregnant).

- The relevant court could make an interim parentage order which becomes effective only upon the birth of the child / children (even if stillborn). This preserves the rights of a surrogate to manage their pregnancy and birth.
- The effect of an interim parentage order would be to transfer legal parentage to the intended parent(s) from the surrogate and their partner (if any) from birth on the relinquishment of the child.
- To make an interim parentage order, the court must be satisfied of the same requirements for a final parentage order, save for those that assume that a child has already been born.
- The parentage order would automatically become a final order 60 days after the birth, save for situations of a dispute, such as a very rare but possible scenario where the surrogate withdraws their consent - at which point the matter would proceed back to court on application by any party.

If it is considered that for sufficient oversight of surrogacy arrangements there needs to be an additional post-birth step, we suggest an additional administrative process as follows:

- The interim parentage order would become a final parentage order 60 days after birth of the child provided that affected parties fill out a form that includes a standard statutory declaration and lodge it with the relevant registry confirming prescribed matters relevant to the birth of the child (such as registration of the child's birth, registration of genetic/gestational information etc.) and that the surrogate and their partner (if any) do not dispute the parentage order becoming final.
- If the form is duly completed, the relevant court must make a parentage order without a further hearing (or otherwise the matter can be listed for hearing if there is a dispute).

In either case, whether the additional post-birth step is incorporated, or not:

- If there is a dispute, the court should have the power to:
    - make a parentage order if the statutory conditions are met.
    - revoke the interim parentage order and reinstate the rights of the surrogate and their partner (if any).
    - order the amendment of details on the births register (and reissuing of birth certificate with corrected details).
    - make such other orders as it sees fit.
- If an interim parentage order is revoked, there should be a statutory provision that states the revocation does not affect any actions taken by third parties on the authority of the parents relying on the interim parentage order while it was in place. For example, a doctor who performs a medical procedure on the child with the consent of the parents when the interim parentage order was in place does not then become liable for assault by having failed to get consent to the procedure from the surrogate and their partner (if any).

B. STATUTORY "STANDARD SURROGACY AGREEMENT" WITH AUTOMATIC RECOGNITION AT BIRTH

Another option, which could be available as an alternative pathway to pre-birth parentage orders (Pathway A above) is the potential to enter into a regulated surrogacy agreement, lodged with and overseen by a surrogacy oversight body.

Our suggestion is generally aligned with the recommendations of the UK Law Reform Commission in their report *Building families through surrogacy: a new law.*[49] Some jurisdictions internationally also have automatic recognition through surrogacy agreement entered into pre-conception. An example of legislation that provides for the recognition of parentage from birth is British Columbia's Family Law Act.[50] Where an agreement is entered into before conception, and all parents intend that the surrogate will not be a legal parent, the law allows the parents to be recognised immediately from birth, so long as safeguards are met:

- A written surrogacy agreement has been signed before conception, clearly stating the surrogate will not be the legal parent and will give the child to the intended parents.
- No party has withdrawn from the agreement before conception.
- Written post-birth consent has been provided from the surrogate affirming the parents' role.
- The parents have taken the child into their care after birth.

If the surrogate cannot provide post-birth consent due to incapacity, death, or cannot be located after reasonable efforts, the relevant court may waive that requirement.

A review of New Zealand legislation also recommended a similar requirement for the surrogate to provide post-birth written consent via a standard form statutory declaration to relinquish their claim to legal parenthood. The suggested model involved the surrogate giving consent *from* seven days after the birth, with the added security that the parents are immediately recognised as guardians of the child in the interim period.[51]

A similar framework could be adopted in Australia to resolve the legal uncertainty created by the current reliance on post-birth parentage orders. In effect, the only matters which would then need go to court would involve any kind of dispute, or situations where the surrogate is unable to sign their consent.

Adapting this to an Australian context, we propose that this model be further strengthened by requiring statutorily-prescribed standard surrogacy agreements which, if entered into prior to conception by the intended parent(s) and the surrogate and their partner (if any) could confer parentage on the intended parent(s) from birth; provided that the surrogate and their partner (if any) have voluntarily and freely consented to the agreement without fraud, undue pressure or influence.

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[49] Law Commission of England and Wales and Scottish Law Commission, 'Building families through Surrogacy: a New Law, Volume II: Full Report' (Law Com No. 411, March 2023) 5 <https://lawcom.gov.uk/project/surrogacy/>.

[50] *Family Law Act*, SBC, 2011, c 25, s 29.

[51] Te Aka Matua o te Ture, *Te Kōpū Whāngai: He Arotake, Review of Surrogacy* (NZLC Report No. 146, 2022) 20-21.

The standard surrogacy agreement could set in place minimum standards and guarantees to protect all parties, including the child born under such an agreement. The laws could also prohibit any additional terms that are inconsistent with the standard terms, meaning that surrogacy agreements are better regulated to avoid terms that are oppressive or contrary to public policy.

Establishing such a scheme would not require all the standards terms to be set out ahead of legislation. Instead, principal legislation could put in place a power to prescribe regulations that set out minimum terms and conditions. Those prescribed terms and conditions could include:

- obligations regarding the reimbursement of reasonable expenses / compensation.
- the surrogate's right to manage their pregnancy and birth.
- arrangements for ensuring the genetic origins of the child and the existence of the surrogacy are recorded, and for the provision of information, including health information, to the child.

This option might offer people considering surrogacy a scaffold for an agreement that protects everyone's rights and provides certainty. It would also ensure transparency for the terms that were contained in a surrogacy agreement, providing a greater level of oversight into the agreements being reached to ensure everyone is protected. It should also reduce the legal costs associated with the surrogacy process given the statutory agreement provides the starting point.

In this model, most matters would not have to proceed to court at all. While there would be no month-long 'cooling off' period for a surrogate before the parents are recognised, it should nonetheless still be possible for any party apply for court resolution of a matter of involving legal parentage, or to address a scenario where the surrogate hasn't reaffirmed their consent after the birth for some reason. Dispensation of the surrogate's consent or any disputes arising post-birth would need to be resolved by the Family Court.

C. MORE FLEXIBLE POST-BIRTH COURT ORDERS

While commercial surrogacy arrangements are prohibited, we know that children have been and will continue to be born through these arrangements overseas. The hurdles in place for recognition of parentage may well be intended to create a deterrent effect, but we do not see the evidence that this is currently working to prevent families going overseas for surrogacy.

Some children who are born through commercial surrogacy arrangements may never be able to have their intended parent(s) legally recognised. The legal parentage will depend on the laws of the country in which the child is born, leading to inconsistent and arbitrary outcomes that are clearly not in the best interest of the child. As noted in the Issues Paper, the approach of courts has varied, creating real uncertainty for the parents and child. The consequences are both emotional and practical for the family and child. Difficulties can include – obtaining passports, accessing Medicare, obtaining child support, and rights under inheritance law.

Whatever the arguments for or against commercial or compensated surrogacy, a child should not be discriminated against because of the circumstances in which they were conceived. This is particularly so where they were conceived under a surrogacy arrangement that is lawful overseas and in circumstances where the surrogate parent has consented in a fully informed and non-coerced way to the arrangement and the relinquishing of the child to the parents.

Procedural barriers to applying for a parentage order are currently too high. They prevent people who have failed to meet the highly technical requirements of the scheme from being eligible to

apply for a parentage order. Technical requirements that may not have been met during overseas surrogacy may include: that there is a written surrogacy agreement, that counselling and legal advice were obtained *prior* to entering a surrogacy agreement, that the birth mother be over 25, and the place of residence of the parents and the child. While these may be based on sound policy objectives, failure to comply with pre-conditions should not result in a lack of recognition of parentage, which is contrary to the child's best interests.

We recommend that the Family Court be given a clear discretion to make a parentage order in relation to all children who were born via surrogacy in circumstances where it is overall in the best interests of the child, even where not all of these prerequisites have been met. One model for this is the ACT legislation that was updated in 2024 to allow the court to make an order in circumstances of commercial surrogacy, if there is a *pressing disadvantage* that would be alleviated by making the order, including consideration of where the child resides.[52]

At a minimum, the gap in time between the birth and the order of parentage should be significantly narrowed. While there has been a policy intention in Australian laws to allow a one-month cooling-off period for surrogates post-birth, the reality is that surrogates changing their mind is extremely rare, and can be dealt with in ways other than subjecting all families to months-long waits until parentage is settled. Post-birth orders should be available to be applied for immediately after the birth, and after an application is received these matters should be brought on urgently to resolve the matter for all parties – preferably within seven days.

D. AUTOMATIC RECOGNITION OF OVERSEAS REGISTRATION OF BIRTH REGISTRATION, COURT ORDERS OR AGREEMENTS

Section 69R of the *Family Law Act 1975* (Cth) recognises that where a person's name is entered into the birth or parentage register in prescribed overseas countries, the person is presumed to be a parent of the child. Until recently, no countries were prescribed, but this has recently changed from 13 December 2024[53] to include a number of countries, including jurisdictions where Australians travel for surrogacy overseas, e.g. USA, Canada and Mexico.

We anticipate that this change will mean that many more parents will be presumed to be parents of their children, noting that the presumption is rebuttable under section 69U (which could act as a safeguard in circumstances where there is evidence of trafficking or coercion). As we consider that no child should be disadvantaged by a decision of their parent(s) to engage in surrogacy overseas, we think there is merit in replacing the word 'prescribed' with 'an', meaning it would then apply to all countries.

However, we note that in some of countries it may still remain impossible for parentage to be recognised on the child's registration of birth – particularly in the case of same-sex couples where one parent has no genetic link to the child. For example, in Thailand, the biological father and the surrogate will be shown as the parents on the birth certificate, leaving no recognition for the non-biological father.

In these cases, there still needs to be a process for recognition of the second parent (and/or removal of the surrogate from the birth certificate) – this could be through a post-birth order (as

[52] *Parentage Act 2004* (ACT) s 28H(1).

[53] As a result of the *Family Law Regulations 2024* (Cth) s 10.

discussed in Pathway C above) or by an additional administrative process that could be developed to address the situations where one parent is not recognised.

Whether or not our suggestion for amending section 69R is taken up, there remains a vital need to create a new process to ensure recognition of both parents. Determining parentage could involve consideration of surrogacy agreements and foreign court orders (if there are any). If an administrative process is created, it would be important to give the relevant minister the power to refuse to acknowledge parentage where evidence of coercion or trafficking exists.

RECOMMENDATIONS:

We recommend that there be various pathways to recognising parentage as follows (noting that all options should be available, allowing for flexibility of approach depending on the circumstances):

- Interim parentage orders made during pregnancy and finalised post-birth.
- Recognition of parentage from birth via a standard surrogacy agreement with the safeguard of a post-birth reaffirmation of consent by the surrogate soon after birth.
- Updated post-birth court order regime, reducing the minimum period to apply to seven days, and ensuring courts are given clear discretion to make orders in the child's best interest even if pre-conditions are not met in relation to the surrogacy arrangement.
- Recognition of overseas court orders, surrogacy agreements and birth certificates where parentage has already been established in a foreign jurisdiction, and an additional post-birth recognition process where parentage was not recognised overseas.

HARMONISATION AND OVERSIGHT (Q22, 23)

We consider that a national framework for surrogacy regulation is the ideal approach. This could be achieved either through the referral of powers by the states and territories to the Commonwealth, or by developing uniform state and territory laws. Waiting for individual jurisdictions to amend their laws to achieve national consistency is unlikely, since surrogacy law is often not a legislative priority, or is mired in controversy that politicians may seek to avoid.

Surrogacy laws in Australia are highly inconsistent across states and territories, reflecting significant variations in eligibility criteria, processes, and penalties. Examples of inconsistency include:

- Eligibility criteria such as age or residence requirements for parties to surrogacy.
- Whether a surrogate must have had a previous live birth.
- Whether traditional surrogacy is permitted in clinical settings.
- Time limits on application for a parentage order.[54]

[54] South Australia allows for an application for transfer of parentage within 12 months of birth, whereas other states and territories have a 6-month time limit.

- Advertising restrictions (including whether allowed for altruistic surrogacy).[55]
- Whether specific penalties exist for international commercial surrogacy.
- Where there is oversight by a regulatory body.[56]

These differences highlight the need for a more unified national framework to ensure equitable access and consistent regulation of surrogacy practices.

Surrogacy frequently occurs across state and territory borders, especially as many intended parents and surrogates connect online. Inconsistent laws create legal and administrative burdens on the parties, and undermine the efficiency of the domestic system. In some cases, this may drive intended parents to pursue surrogacy overseas.

If increased oversight and monitoring is determined to be necessary, we support the establishment of a single federal body — ideally the same body that administers a national donor conception register. This would ensure effective coordination and efficient use of resources instead of creating several state and territory bodies. If our recommendation for the automatic recognition of statutory standard surrogacy agreements is adopted, this body could also receive and register such agreements.

In addition, the body could play a role similar to the former Victorian Assisted Reproductive Treatment Authority by providing information, counselling and support to families, surrogates and children born through surrogacy, as well as education and guidance for professionals.

Where court involvement is required, the Family Court is best placed to determine legal parentage. See also our responses to Questions 18 and 19 at page 1717.

RECOMMENDATIONS:

To ensure harmonious operation of Australian laws and sufficient oversight, we recommend:

- A central regulatory body to provide information, education, counselling and support, to maintain a register of surrogacy arrangements, and to retain vital information for people conceived through surrogacy.
- Consistent rules on all aspects including eligibility, advertising, parental recognition, reimbursement/compensation.

CRIMINALISATION (Q24)

It is a criminal offence to engage in commercial surrogacy in all jurisdictions, and in Australian Capital Territory, New South Wales and Queensland the law applies extra-territorially. As noted in the Issues Paper, while the policy reason for such laws is to deter overseas surrogacy and prevent exploitation, these laws are not enforced, and in practice may lead to reduced oversight and regulation, and discrimination against children born via surrogacy.

[55] See also, our response in relation to Advertising (Q13) on page 10.

[56] Most states or territories do not have an oversight body, but Victoria has a Patient Review Panel and Western Australia has a Reproductive Technology Council.

Criminalisation of commercial surrogacy has not worked as a deterrent, as children continue to be born overseas through surrogacy.

Criminal penalties on matters domestically, such as making it an offence to advertise for a surrogate, are also not easily enforceable, and in practice are never enforced.

Overall, the blanket criminalisation of international surrogacy has failed because it:

- does not deter international surrogacy (as evidenced by the growing numbers of children born through overseas surrogacy arrangements).
- frames all international surrogacy as being inherently exploitative, without regard to the specific circumstances of individual surrogacy arrangements.
- forces families into secrecy.
- creates practical barriers for families in their everyday lives (where parental recognition can't be achieved).
- delays recognition of families and parentage, contrary to the child's best interests.
- increases stigma for children born through surrogacy.

In place of criminalisation, a regulated compensated domestic approach could offer greater benefits to children, surrogates and intended parent(s), including by:

- ensuring minimum safeguards in surrogacy arrangements that protect the child, surrogate and intended parents.
- ensuring the collection and recording of information about a child's genetic and gestational heritage, so that the child can access this information when they reach maturity.
- ensuring the person who is pregnant with the child has their rights to manage the pregnancy and birth of the child recognised and respected.
- minimising the risks of unnecessary travel and distance, including access to healthcare in more than one jurisdiction, conflicts of laws and immigration and citizenship difficulties.
- ensuring the costs and processes involved in surrogacy are not prohibitive for intended parents who would otherwise consider the option if they could afford to.

For clarity, we do not support overseas surrogacy arrangements entered into that consist of forced pregnancy, human trafficking, slavery or slavery-like practices. However, we consider that such acts are captured by criminal laws, and where there are gaps, these ought to be dealt with specifically under the *Criminal Code*, and there is no requirement for a blanket ban on all overseas commercial surrogacy.

RECOMMENDATION:

All blanket bans on commercial surrogacy should be removed, and the law should focus on regulation, education and support services for all parties to surrogacy.

OTHER ISSUES – TERMINOLOGY (Q27)

Terminology is important, and at the moment, no state jurisdiction has it right. Victoria uses the term "surrogate mother",[57] while all other states and territories use the terms "birth mother" and / or "birth parent" as applicable.[58]

Victoria uses "commissioning parents",[59] Western Australia uses "arranged parents",[60] while all other states and territories use "intended parent".[61]

We recommend the use of language that reflects the intention behind surrogacy arrangements, being "intended parent/s" (and once the child is born, "parent/s"), and "surrogate". Further, the gender neutral nature of these terms are inclusive of surrogates in particular who may be of any gender.

Surrogates do not see themselves as the parent of the foetus they are carrying, and are not likely to identify with the term "birth mother". Language that conflates the role of surrogate with parent is confusing and reinforces stereotypes and misinformation about the role of surrogates.

RECOMMENDATION:

Terminology in legislation should be updated to better reflect the intention behind surrogacy arrangements and ensure national consistency.

[57] *Assisted Reproductive Treatment Act 2008* (Vic).

[58] *Parentage Act 2004* (ACT) div 2.5, *Surrogacy Act 2010* (NSW), *Surrogacy Act 2022* (NT), *Surrogacy Act 2010* (Qld), *Surrogacy Act 2019* (SA), *Surrogacy Act 2012* (Tas) and *Surrogacy Act 2008* (WA).

[59] *Assisted Reproductive Treatment Act 2008* (Vic).

[60] *Surrogacy Act 2008* (WA).

[61] *Parentage Act 2004* (ACT) div 2.5, *Surrogacy Act 2010* (NSW), *Surrogacy Act 2022* (NT), *Surrogacy Act 2010* (Qld), *Surrogacy Act 2019* (SA) and *Surrogacy Act 2012* (Tas).

APPENDIX A

Table 1: States and territories' positions on reimbursement of loss of income

Jurisdiction	Loss of income because of medical appointments relating to pregnancy	Loss of income due to inability to work due to medical grounds relating to the pregnancy	Loss of income due to inability to work on medical grounds relating to end of pregnancy, in period in which birth occurred or was expected to occur
Australian Capital Territory	Not specifically provided for	Yes, limited to during pregnancy, for unpaid leave taken[62]	Yes, period of up to two months, for unpaid leave taken[63]
New South Wales	Not specifically provided for	Yes, limited to during pregnancy, if unpaid leave taken[64]	Yes, period of two months for unpaid leave taken[65]
Northern Territory	Not specifically provided for	Yes[66]	Yes, for taking up to two months unpaid leave for the birth[67]
Queensland	Not specifically provided for	Yes, limited to during pregnancy for actual lost earnings because of leave taken[68]	Yes, period of two months for actual lost earnings because of leave taken[69]
South Australia	Yes[70]	Yes, limited to during pregnancy[71]	Yes, for period of up to two months for leave taken[72]

[62] *Parentage Act 2004* (ACT) s 24(2); *Parentage Regulation 2024* (ACT) reg 4(1)(e)(ii).

[63] *Parentage Act 2004* (ACT) s 24(2); *Parentage Regulation 2024* (ACT) reg 4(1)(e)(i).

[64] *Surrogacy Act 2010* (NSW) s 7(3)(e)(ii).

[65] *Surrogacy Act 2010* (NSW) s 7(3)(e)(i).

[66] *Surrogacy Act 2022* (NT) s 12(2)(f).

[67] *Surrogacy Act 2022* (NT) s 12(2)(f).

[68] *Surrogacy Act 2010* (Qld) s 11(2)(f)(ii).

[69] *Surrogacy Act 2010* (Qld) s 11(2)(f)(i).

[70] *Surrogacy Act 2019* (SA) s 11(1)(a)(vi); *Surrogacy Regulations 2020* (SA) reg 5(a).

[71] *Surrogacy Act 2019* (SA) s 11(1)(a)(vi); *Surrogacy Regulations 2020* (SA) reg 5(b).

[72] *Surrogacy Act 2019* (SA) s 11(1)(a)(vi); *Surrogacy Regulations 2020* (SA) reg 5(c). We note the framing of provisions such as this are ambiguous as to whether the leave taken has to be unpaid, in light of paid leave such as annual leave also being an employment entitlement, which may in some circumstances need to be undertaken by surrogates for certainty of cashflow, rather than awaiting reimbursement from the intended parents after undertaking unpaid leave.

Tasmania	Not specifically provided for	Yes, includes both during and ***after*** the pregnancy, for actual lost earnings because of leave taken[73]	Yes, for period of up to two months for actual lost earnings because of leave taken[74]
Victoria	Not specifically provided for	Yes, if unpaid leave taken and limited to during pregnancy[75]	Yes, period of up to two months for unpaid leave[76]
Western Australia	Not specifically provided for	Yes, limited to during the pregnancy, for earnings foregone because of leave taken[77]	Yes, period of two months for earnings foregone because of leave taken[78]

[73] *Surrogacy Act 2012* (Tas) s 9(3)(f)(ii).

[74] *Surrogacy Act 2012* (Tas) s 9(3)(f)(i).

[75] *Assisted Reproductive Technology Regulations 2019* (Vic) reg 11(1)(e)(ii).

[76] *Assisted Reproductive Technology Regulations 2019* (Vic) reg 11(1)(e)(i), but noting that the regulation does not apply to earnings lost that are recoverable under insurance or any other scheme: at reg 11(2).

[77] *Surrogacy Act 2008* (WA) s 6(3)(b)(ii).

[78] *Surrogacy Act 2008* (WA) s 6(3)(b)(i).