BUILDING INCLUSIVE LAWS FOR FAMILY FORMATION IN NEW SOUTH WALES

SUBMISSION BY EQUALITY AUSTRALIA TO THE NSW PARLIAMENT SELECT COMMITTEE ON FERTILITY SUPPORT AND ASSISTED REPRODUCTIVE TREATMENT (AUGUST 2025)

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INTRODUCTION

Equality Australia welcomes the opportunity to make this submission to the NSW Select Committee on Fertility Support and Assisted Reproductive Treatment (**Select Committee**).

From our perspective as a national organisation dedicated to equality for LGBTIQ+ people, we consider that recognising diverse family structures and current gaps in access in New South Wales is essential.

Our laws should recognise and reflect the reality of modern family life in New South Wales, including the many ways in which people form and care for their families. Reflecting this diversity and ensuring the laws are modern and inclusive, ensures that all children in New South Wales enjoy the same security, stability and dignity, regardless of how their family was formed. Our submission provides recommendations to modernise and improve the practical effect of laws involving assisted reproduction in New South Wales.

In recent years, Equality Australia has advocated for equitable pathways to parenthood for all and made several submissions to law reform processes involving surrogacy and assisted reproductive technology.

Our submission will focus on four of the key areas the subject of this inquiry, being:

- Current options for assisted reproduction in New South Wales (**Topic 1(e)**) - We briefly outline the range of treatments available and provide a data snapshot on who accesses assisted reproductive technology and donor conception in Australia.
- Barriers to accessing assisted reproductive treatment including in vitro fertilisation (IVF) technology and surrogacy (**Topic 1(f)**) - We identify legal barriers that limit access and recognition for LGBTQ+ parented families including solo parents by choice. Key issues include outdated terminology, restrictive eligibility requirements, donor and storage limits, and constraints on recognising multiple or co-parenting arrangements.
- Changes to New South Wales government policies and procedures to better support families and surrogates through surrogacy (**Topic 1(i)**) - We highlight how current surrogacy laws create unnecessary delays, legal uncertainty, and burdens for surrogates and intended parents. We recommend reforms to prioritise the child's best interests, allow earlier recognition of parentage, provide fair compensation for surrogates, and streamline processes for families, including those formed through overseas arrangements.
- Relevant national and international laws that impact on surrogacy arrangements in New South Wales, including consideration of a model national legal framework for surrogacy arrangements (**Topic 1(j)**) - We argue for a consistent, national framework for ART and surrogacy to reduce legal uncertainty and administrative burdens. This includes a single national donor register, harmonised eligibility and compensation rules, safeguards for surrogates and children, and coordinated support services across jurisdictions.

OPTIONS FOR ASSISTED REPRODUCTION IN NSW (**TOPIC 1(E)**)

Under the *Assisted Reproductive Technology Act 2007* (NSW) (**ART Act**), assisted reproductive treatment (ART) covers any medical intervention aiming to achieve pregnancy via non-sexual

intercourse methods. The range of common ART interventions available in New South Wales clinics includes:

- In vitro fertilisation (**IVF**)
- Intrauterine insemination (**IUI**)
- Use of donor sperm, eggs, or embryos (either clinic-recruited, or recruited by families themselves)
- Reciprocal IVF (e.g., in lesbian couples sharing genetic and carrying roles)
- Surrogacy arrangements (where altruistic in nature).

Outside of clinical settings, families may also use at-home insemination to have children using a known donor. A known donor may be a friend, family member or acquaintance.

It is important to understand what assisted reproductive treatment (**ART**), and particularly conception involving donor gametes, looks like in 2025. Shifts in how infertility is defined, the growing use of ART by LGBTQ+ people and solo parents, and trends in recruitment of donors, all reflect the diversity of families being formed today. Increasing openness in donor conception, and 40 years of developmental research on children's outcomes provide essential context for considering how best to support families and prospective parents.

SNAPSHOT: ASSISTED REPRODUCTIVE CONCEPTION IN AUSTRALIA

- 1 in 6 people in their lifetime will experience medical infertility, demonstrating the need to increase access to affordable, high-quality fertility care.[1]
- A new consensus definition of 'infertility' in Australia expanded the meaning to include 'the inability to achieve a successful pregnancy based on a patient's medical, sexual, and reproductive history, age, physical findings, diagnostic testing, or any combination of these factors', requiring 'medical intervention/s… to achieve a successful pregnancy either as an individual or with a partner.'[2]
- Fertility treatments using donor gametes and surrogacy are increasingly being used by LGBTQ+ people and solo parents by choice.[3] In 2021, 11.9% of all cycles were undertaken by single women, and 4.1% by lesbian couples.[4]
- Donor conception in fertility treatments is predominantly accessed by single parents (53%) and same-sex couples (36%), with heterosexual couples now the smallest group, accounting for around 11%.[5]

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[1] World Health Organisation, *Infertility Prevalence Estimates, 1990–2021* (Global report, 3 April 2023) xi.

[2] RANZCOG, Australian and New Zealand Society of Reproductive Endocrinology and Infertility, Australian and New Zealand Society for Reproductive Endocrinology and Infertility, 'Definition of Infertility: Consensus Statement' (Consensus Statement, August 2024, amended May 2025) https://anzsrei.com/wp-content/uploads/2024/08/ANZSREI_Consensus-statement_extended-definition_02082024.pdf.

[3] A solo parent by choice may also be LGBTQ+. While Australian data was unavailable (particularly as this cohort was not identifiable through Census data), we are aware anecdotally that the community of solo parents is growing. A US study of solo parents by choice, indicated that lesbian and gay people were more open to and had more positive attitudes towards independently planned parenthood - see Doyle P Tate, 'Independently Planned Parenthood: Sexual Identity and Evaluations of Single-Parenthood-by-Choice' (2023) 37(8) *Journal of Family Psychology* 1266, 1266–1271.

[4] Greg Hunt and Rachel Smith, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Report, Fertility Society of Australia and New Zealand, 12 December 2024) 38 https://apo.org.au/node/331086.

[5] Victorian Assisted Reproductive Treatment Authority, *Annual Report 2022-23* (Report, 2023) 16 https://www.varta.org.au/resources/annual-reports. While state-specific data for New South Wales is limited, Victorian figures from the now abolished Victorian Assisted Reproductive

- Most egg donors (78%) are recruited by prospective parents, with only 6% recruited through in Australia clinics, and 16% from overseas egg banks.[6]
- Most sperm donors (62%) are Australian donors recruited through a clinic, with 6% of donors coming from overseas, with 32% recruited by prospective parents themselves.[7]
- Embryos donors are mostly recruited by prospective parents (65%), with the remaining 35% recruited through a clinic.[8]
- Since 2004, donors' details are no longer private, and children born from de-identified sperm or egg donation can obtain identifying information at age 18 (or younger with consent),[9] and openness about a child's conception story is strongly encouraged from a very young age, reinforced by mandatory counselling pre-conception.[10]
- Most families have one or two children from the same donor.[11]
- Research consistently shows that donor-conceived children are thriving (regardless of whether donor is 'known' to them or not),[12] with outcomes strongly linked to openness and supportive family environments rather than donor conception itself.[13]
- Concerns that a lack of genetic or gestational connection between parents and children causes harm are not supported by evidence from the relevant developmental literature.[14]
- Donor registers are increasingly being used by parents early in their child's life to help build donor-linked networks (including of children born from the same donor), particularly among solo parent by choice families.[15]

Treatment Authority (VARTA) provides the most reliable benchmark and are likely to reflect similar patterns of donor use in ART treatments in New South Wales.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] In 2004, the National Health and Medical Research Council (**NHMRC**) first *released Ethical guidelines on the use of assisted reproductive technology*, which prevented the use of anonymous donors. These guidelines were also substantially updated in 2017. Refer to National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Report, 2017, updated 2023) 33-35 https://www.nhmrc.gov.au/guidelines-publications/e79. The requirement for disclosure is also included in legislation – see *Assisted Reproductive Technology Act 2007* (NSW) s 37.

[10] Research indicates that the ideal age is before 7 years old – Susan Golombok et al, 'A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother–Child Relationships and Child Adjustment from Infancy to Adulthood' (2023) 59(6) *Developmental Psychology* 1059, 1069.

[11] Jenni Millbank, 'Numerical Limits in Donor Conception Regimes: Genetic Links and "Extended Family" in the Era of Identity Disclosure' [2014] *UTS Law Research Series* 9; (2014) 22 *Medical Law Review* 325. We note that this data is now out of date, but it is difficult to find more recent data sources.

[12] Nicola Carone et al, 'Two Decades of Psychological Adjustment of Donor-Conceived Offspring of Lesbian Parents: Examining Donor Contact and Type' (April 2025) *Reproductive BioMedicine Online* 6-10; Susan Golombok, 'The Psychological Wellbeing of ART Children: What Have We Learned from 40 Years of Research?' (2020) 41(4) *Reproductive BioMedicine Online* 743; Susan Golombok, et al, 'Long-Term Outcomes for Families Created by Assisted Reproduction: Parents and Children at Age 20' (2023) 59(7) *Developmental Psychology* 1304.

[13] Susan Golombok et al, 'A Longitudinal Study of Families Formed Through Third-Party Assisted Reproduction: Mother–Child Relationships and Child Adjustment from Infancy to Adulthood' (2023) 59(6) *Developmental Psychology* 1059.

[14] Shahrzad Zadeh and Vasanti Jadva, 'Child Development and Family Relationships in Families Following ART' (2024) 194(15–16) *Early Child Development and Care* 1453.

[15] In 2021-22, in Victoria, 60% of people using the Voluntary Register were single people. In 2023-24, VARTA noted an increase in the number of parents applying to donor registers when their children are very young, with the hope of matching with donor-linked families. See Victorian Assisted Reproductive Treatment Authority, *Annual Report 2022* (Report, 2022) 2 and Victorian Assisted Reproductive Treatment Authority, *VARTA Annual Report 2024* (Report, 2024) 5.

BARRIERS TO ACCESSING ART (**TOPIC 1(F)**)

While ART is available to everyone in New South Wales, regardless of their gender identity or sexual orientation, there remain a number of barriers in the current legislative framework that prevent equal access to assisted reproductive treatment and generate ambiguity around parental recognition in New South Wales.

Recognition of diverse families

Unnecessarily specific and outdated terminology features in all New South Wales legislation involving family formation, creating legal uncertainty and potentially excluding certain people from accessing ART (such as men, and gender diverse people). Examples of these provisions include the meaning of 'ART treatment',[16] a section on maximum donor allocations,[17] and the use of gametes or embryos after the death of a gamete provider.[18]

Presumptions of parentage

Lack of clarity about parentage creates a barrier to accessing ART and also results in potential outcomes that are not in the best interest of children.

The *Status of Children Act 1996* (NSW) (**SOC Act**)[19] includes a number of presumptions regarding who is a child's legal parent, particularly when children are born as a result of assisted conception procedures (such as home insemination, donor insemination and IVF). Many of these presumptions use unnecessarily specific language and descriptors, making it unclear whether a trans parent would actually be recognised as a parent of their child.

The SOC Act presumes parentage (and that donors are not parents) arising out of use of fertilisation procedures, but refers to only the following kinds of families:

- Straight married or de facto couples
- De facto or married lesbian couples
- 'Unmarried' women using egg or sperm donors. [20]

These provisions ensure that a couple who undergo home insemination, IUI or IVF are recognised as the child's legal parents, and that any sperm or ovum donors are not the legal parents of the child. The SOC Act interacts with the Commonwealth legislation which prescribes certain state and territory legislation (including the SOC Act in NSW) to recognise parentage under federal family law.[21]

There are two concerns with the New South Wales law:

- Assumptions are made regarding the gender of birth parents, donors and couples forming families.

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[16] *Assisted Reproductive Technology Act 2007* (NSW) s 4.

[17] Ibid s 27.

[18] Ibid s 23.

[19] *Status of Children Act 1996* (NSW) pt 3, div 1.

[20] *Status of Children Act 1996* (NSW) s 14.

[21] *Family Law Act 1975* (Cth) s 60H deals with who is the parent and child in situations where a child is born as a result of artificial conception procedures, and subsection (1)(ii) refers to prescribed laws which state that a child is a child of the 'woman and of the other intended parent', including section 14 of the *Status of Children Act 1996* (NSW).

- Uncertainty remains for other families including single men and gay male couples who use a donor.

Because of the interaction between state and federal laws, all solo parents by choice (of any gender) face the situation where there is ambiguity about whether a donor used to create their family is considered a parent. Although the law in New South Wales contains a presumption that donors are not parents when single women use a donor,[22] this is inconsistent with the federal *Family Law Act 1975* (Cth), which is an issue that was identified by the Family Law Council of Australia in 2013.[23] Solo parents are the group most likely to conceive by donor insemination,[24] and are also increasingly likely to be in contact with the donor when their child is young.[25] An increased chance of early contact calls for even greater legal certainty about the status of the donor / child relationship.

The consequence is that for some families parentage may be inappropriately presumed of a donor.[26] This can raise ambiguity under family law, child support and inheritance law, particularly in situations where a family chooses to use a known donor. Uncertainty in the law can deter families from fostering the close connection they may want with a donor, out of concern it could be interpreted as supporting the donor's parental status.[27]

Further sections of the *Status of Children Act 1996* (NSW) create legal uncertainty about the position of trans parents due to unnecessarily specific language.[28]

Use of language regarding surrogates and parents

Terminology in the *Surrogacy Act 2010* (NSW) (**Surrogacy Act**) should also be updated, to reflect the actual nature of the role of parties in the surrogacy / ART process. For instance, the term used for a surrogate in the Surrogacy Act is 'birth mother'. Numerous studies have found that surrogates generally do not see themselves as the parent of the baby they are carrying[29] and are not likely to identify with the term 'birth mother'. Language that conflates the role of surrogate with that of a parent is confusing and reinforces stereotypes and misinformation about the role of surrogates.

We recommend the use of language that reflects the intention behind ART and surrogacy arrangements, being 'intended parent/s' and 'surrogate'.

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[22] *Status of Children Act 1996* (NSW) ss 14(2) and (3).

[23] Family Law Council of Australia, *Report on Parentage and the Family Law Act* (Report, 2013) recs 6-8. More recent recommendations have also been made for this matter to be urgently changed – Greg Hunt and Rachel Smith, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Report, Fertility Society of Australia and New Zealand, 12 December 2024) 25 https://apo.org.au/node/331086.

[24] Victorian data shows single women continue to be the largest group using donor sperm (53%), followed by same-sex relationships (36%) and people in heterosexual relationships (11%). Victorian Assisted Reproductive Treatment Authority, *Annual Report 2022-23* (Report, 2023) 16 https://www.varta.org.au/resources/annual-reports.

[25] Fiona Kelly and Deborah Dempsey, 'The Family Law Implications of Early Contact Between Sperm Donors and Their Donor Offspring' (Family Matters No 98, Australian Institute of Family Studies) 56 https://aifs.gov.au/sites/default/files/fm98-fkdd_0.pdf

[26] This risk arises for people who are not in a cisgender, heterosexual relationship, or are not part of a lesbian couple at the time of conception.

[27] See also the High Court of Australia decision in *Masson v Parsons & Ors* [2019] HCA 21, in which a sperm donor was determined to be a legal parent. Determination of who is a parent is a question of fact to be determined according to the ordinary, contemporary understanding of the term.

[28] See *Status of Children Act 1996* (NSW) ss 4(1)(d), 9, 10, 13; Equality Legislation Amendment (LGBTIQA+) Bill 2023, First Print, cls 19 and 20. Similarly, the *Adoption Act 2000* (NSW) also uses language such as 'birth mother', 'birth father' and 'presumptive father'.

[29] Vasanti Jadva and others, '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 and others, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646, 651–652; Ezra Kneebone and others, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: A Systematic Review' (2022) 45(4) *Reproductive BioMedicine Online* 815, 825; Samantha Yee and others, '"Not My Child to Give Away": A Qualitative Analysis of Gestational Surrogates' Experiences' (2020) 33(3) *Women and Birth* 256, 263.

RECOMMENDATIONS

- Amend the *Assisted Reproductive Technology Act*, *Status of Children Act*, *Surrogacy Act* and *Adoption Act* to ensure language is inclusive of all people who can conceive, parent or donate gametes. Consider the introduction of an interpretation provision into the *Interpretation Act 1987* (NSW) as an additional mechanism to ensure inclusivity across all NSW statutes.
- Urge the Commonwealth government to amend the *Family Law Act 1975* (Cth) to remove ambiguity that in the case of unpartnered people, donors are not presumed to be parents.
- Update the *Surrogacy Act* terminology to use "surrogate" instead of "birth mother".

Eligibility for surrogacy

Consideration should be given to amending the eligibility criteria for surrogacy in New South Wales.

INTENDED PARENT REQUIREMENTS

Intended parent(s) must meet the following criteria:[30]

- be a single person or member of a couple (includes spouses or a de facto couple); and
- have a medical or social need for the surrogacy arrangement (see below).[31]

There are no restrictions on surrogacy access based on marital status, sexual orientation or gender identity.

Where there are two intended parents who are men, social need is easily established. But there are restrictive requirements for medical or social need where one or both intended parents are women. Currently the woman (or both women) must be unable to conceive, carry or give birth to a child, be unlikely to survive a pregnancy or birth, or have her health significantly affected, be likely to conceive a child affected by a genetic donation, or have a child unlikely to survive.

While it is appropriate that eligibility is generally based on medical or social need, 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.

Another example is a trans 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 medical or social needs that should not be subject to excessive scrutiny. In addition, as highlighted above, the current drafting of the *Surrogacy Act* also leaves doubt as to how trans people are to be treated under the law.

[30] Ibid s 25(1).

[31] Ibid s 25(2).

We note that the Western Australian legislation before parliament no longer requires a medical or social need.[32]

RECOMMENDATIONS

- Ensure that medical and social need provisions do not disadvantage particular classes of people, such as women or trans people.

Donor limits

The existing donor limit provisions are framed as a restriction of '5 women' per donor. This is subject to subsection 1A, which acknowledges that same-sex female couples may use the same donor and take only one rather than 2 of the 5 allocations. [33]

However, this approach remains problematic, as it excludes families that do not have a female parent, and may restrict the ability of siblings in the same family to share a donor where children are carried by different parents. It is very unclear what it means when a single man, or two men are using a donor, for instance – who is the 'woman' in the scenario, should it be their surrogate, and what if more than one surrogate is used to create their family?

This problem was highlighted in a statutory review of the ART Act 12 years ago:

> *There is also potential for the limits to cause issues in other situations. For example, if an infertile man had used donated sperm with his first partner but later sought to use donated sperm from the same donor with a second partner, if the five women limit had been reached, the man and his second partner would be prevented from using the same donor's sperm. Similar difficulties may also arise if a couple sought to use two different surrogates to carry a foetus created using the same donor's gametes if the five women limit had been reached.*[34]

The current drafting also attempts to include the donor's own family or families within the limit, which is both overly complicated and practically very difficult to enforce, particularly where a donor has children with more than one partner. If the main goal is to avoid consanguinity, there is little benefit to including the donor's family/ies because the children will be known to one another anyway.

Consistent with recommendations made on the 2013 statutory review of the ART Act, a more sensible approach would be to apply the limit on a **per family basis**, ensuring consistency for all families, regardless of their composition.[35]

Further, Australian limits can ensure that an appropriate number of families are formed within the whole country, rather than taking a state-by-state approach which could lead to arbitrary results.

RECOMMENDATIONS

- Replace the current 'five women per donor' rule with a family-based limit, applying consistently to all families regardless of their composition.
- Consider the introduction of a 10-family Australian limit, rather than retaining a state-based limit.

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[32] Assisted Reproductive Technology and Surrogacy Bill 2025 (WA).

[33] *Assisted Reproductive Technology Act 2007* (NSW) s 27.

[34] Ministry of Health (NSW), *Report on the Statutory Review of the Assisted Reproductive Technology Act 2007* (Statutory Review Report, 2013) 16-18 https://www.parliament.nsw.gov.au/tp/files/7891/Review%20of%20Assisted%20Reproductive%20Technology%20Act%202007.pdf.

[35] Ibid - recommendation 7. This recommendation was not taken up, and instead (1A) was inserted into *Assisted Reproductive Technology Act 2007* (NSW) s 27 to make it clearer that lesbian couples are to be counted once for the purpose of the 5 women limit, but that did not resolve other concerns with the section. See Assisted Reproductive Technology Amendment Bill 2016 cl 6, amending s 27.

- Exclude the donor's own family from the calculation of family limits.

Storage limits

Currently, an ART provider cannot use gametes or embryos more than 15 years after their donation, unless special authorisation is granted on 'reasonable grounds'.[36] While 15 years may sound generous, in practice, staggered allocation of gametes to 5 families over time might mean the practical window will be much shorter, e.g. a donor may be allocated after 5 years, with only 10 years remaining. In practice, this can lead to arbitrary time limits to complete families.[37]

For people experiencing medical infertility, it is not uncommon to spend a decade trying to conceive even one child. Embryos may also be created much earlier than the family are able to transfer them, either for personal or medical reasons, such as when a person is undergoing chemotherapy. The law should avoid placing families in an unreasonable and distressing situation of having to destroy embryos that are viable because of the passage of time.

Having a time limit places unreasonable pressure on families to have children close together and can make it harder for siblings to share the same donor. Once a child has been born from a donor, there should be no time limit on using gametes from that donor to have siblings, since it is in the best interests of the child, and beneficial to the family to have a genetic link between the siblings, if this is a desired outcome. It is also in the best interests of all children, and ensures reproductive justice for parents, to allow families to choose the appropriate spacing between siblings.

While a 2013 statutory review of the legislation led to an increase from 10 to 15 years, similar issues can remain with a longer timeframe.[38] The 'reasonable grounds' exception could be retained for other situations, if there are concerns about having no limits at all.

RECOMMENDATIONS

- Remove the 15-year storage limit where gametes or embryos have already resulted in the birth of a child, allowing their continued use to create genetically linked siblings.
- Retain the "reasonable grounds" exception for other situations.

Co-parenting arrangements

The law should be updated to ensure that all parents are recognised equally and from birth or soon thereafter, providing certainty and dignity for both children and their parents. While many arrangements are clearly that of a donor and parents (with no intent for the donor to take on a parenting role, even when they are known to the child from birth), other families have an intention from birth to co-parent a child, for example, two mothers and one father.

New South Wales law recognises that a child can have up to two legal parents.[39] This model of parentage does not allow recognition for rainbow families (and other families) in co-parenting

[36] *Assisted Reproductive Technology Act 2007* (NSW) s 26.

[37] We note that in a review of the ART Act in 2013, it was found in relation to the newly imposed 5 women limit that women were being arbitrarily prevented from completing their families, and it was recommended that the ART Act be amended to avoid this outcome. Refer to Ministry of Health (NSW), *Report on the Statutory Review of the Assisted Reproductive Technology Act 2007* (Statutory Review Report, 2013) rec 6 https://www.parliament.nsw.gov.au/tp/files/7891/Review%20of%20Assisted%20Reproductive%20Technology%20Act%202007.pdf.

[38] Ibid – rec 8. The legislation was changed from 10 to 15 years in response – refer to Assisted Reproductive Technology Amendment Bill 2016 cl 4, amending s 25.

[39] Whether that assumption is correct for the purposes of the *Family Law Act 1975* (Cth), and thereby under most Commonwealth law, is not clear: see *Masson v Parsons* [2019] HCA 21 [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

arrangements where not all the parents are members of a couple. The Family Court has been required to resolve these matters from time to time,[40] but it would be preferable if legal parentage is very clear from the outset.

The consequences of non-recognition are that the child potentially misses out on legal rights and obligations which would otherwise be owed to them if all parent-child relationships were legally recognised. This means that the non-recognised parent(s) will not be considered as a parent of the child for all legal purposes and instead may be forced to rely on ad hoc definitions in federal and state laws that extend rights and entitlements to people who are functionally in the position of a parent.[41] This may have consequences for situations such as:

- the child's right to inherit or receive property or superannuation without adverse tax implications;[42] and
- who owes duties to the child.[43]

Some states in Canada and the United States now allow more than two parents to be listed and recognised on a child's birth certificate.[44] It is time for New South Wales to consider a simple administrative process that enables a child to have their third or fourth parent recognised as a legal parent, where all parties consent.

RECOMMENDATIONS

- Amend the *Status of Children Act 1996* and *Births, Deaths and Marriages Registration Act 1995* to enable recognition of more than two parents, where all parties (including the child, where mature enough) consent.
- Introduce an administrative process to allow additional parents or donors to be listed on a child's birth certificate at or soon after birth, with the consent of all parents.

BETTER SUPPORTING FAMILIES AND SURROGATES THROUGH SURROGACY (**TOPIC 1(I)**)

The current surrogacy framework in New South Wales fails to place children's best interests at the centre of decision-making, with requirements that leave some families in legal limbo. These laws create unnecessary barriers to parentage recognition, impose avoidable burdens on surrogates and their partners, and restrict pathways for families formed through surrogacy. Reform is urgently needed to ensure children are legally connected to the parents who care for them from birth, while also safeguarding surrogates and providing fair recognition of their role.

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[40] See, eg, *Martine & Carmona* [2024] FedCFamC2F 800. The Family Court determined in a matter involving two mothers who had a written agreement with a man that they 'intended to be primary parents' and that the man was to be 'involved in a secondary role', that he should not be characterised as only a 'donor', but rather a practical parent within the ordinary meaning of the word, granting shared responsibility to one of the mothers and the father.

[41] See, eg, *Health Insurance Act 1973* (Cth) ss 10AA(1), (7); *National Health Act 1953* (Cth) ss 84B(1), (4).

[42] See, eg, *Succession Act 2006* (Cth) s 127; *Duties Act 1997* (NSW) s 68; *Income Tax Assessment Act 1997* (Cth) ss 302.195(1)(b)-(d) (definition of 'dependant') 302.60-302.75; *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10(1) (definitions of 'dependant' and 'child') and 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth) r 6.17A.

[43] Such as under s 43A of the *Crimes Act 1900* (NSW).

[44] Courtney Joslin and Douglas NeJaime, 'The next normal: States will recognize multiparent families', *The Washington Post* (online, 28 January 2022) https://www.washingtonpost.com/outlook/2022/01/28/next-normal-family-law/; Verity Stevenson, 'Quebec families with more than 2 parents fight for recognition', *CBC News* (online, 12 May 2018) https://www.cbc.ca/news/canada/montreal/quebec-families-with-more-than-2-parents-fight-for-recognition-1.4659522.

Centring child's best interests when determining parentage

Due to prescriptive requirements in the law, where all preconditions have not been met in relation to a surrogacy arrangement, the result may be that a court is unable to use their discretion to grant an order of parentage, even if this is disadvantageous to the child's rights and wellbeing.

In our submission last year to the New South Wales Department of Communities and Justice Review of the Surrogacy Act,[45] we recommended that the Supreme Court be given the discretion to make a parentage order when it is in the best interests of the child and it would be appropriate to do so (having regard to the circumstances of the surrogate and the intended parent(s), and the surrogacy arrangement), notwithstanding that one or more of the technical requirements of the scheme have not been met, or fully met.

This would still allow the Court to consider whether a surrogacy arrangement was one which should not be given the imprimatur of the Court but otherwise ensure that the child's interests are the paramount consideration.

Amending the law in this way would recognise that a child's best interests are best served when the person or people raising them are properly recognised as their parents for all purposes, but including to ensure access to Medicare, passports, child support, and rights under inheritance law.

RECOMMENDATIONS

- Amend the *Surrogacy Act 2010* to give the Court discretion to grant a parentage order when it is in the best interests of the child, notwithstanding technical non-compliance with preconditions.

Earlier recognition of parentage

The process of transferring legal parentage in New South Wales is a significant barrier to local surrogacy, and along with limitations on reimbursement and compensation for surrogates, this is a major factor driving families overseas.

The *Surrogacy Act* requires applications for surrogacy parentage orders to be made between 30 days and 6 months after the birth of the child, unless exceptional circumstances exist.[46] In practice, this means that surrogates can remain the default decision-makers for a newborn baby 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.[47] Former surrogates have described their

[45] Equality Australia, Submission to the NSW Department of Communities and Justice, *Review of the Surrogacy Act 2020 and the Status of Children Act 1996* (August 2024) https://equalityaustralia.org.au/resources/recognising-our-families-equally-submission/.

[46] *Surrogacy Act 2010* (NSW) s 16.

[47] Vasanti Jadva and others, '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 and others, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646, 651–652; Ezra Kneebone and others, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: A Systematic Review' (2022) 45(4) *Reproductive BioMedicine Online* 815, 825.

experience of the surrogacy role as that of a "babysitter", "custodian", or looking after a foetus until they are "ready to meet their parents".[48]

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.[49] 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.[50] 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 court delays, stress 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).
- 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. We have recently recommended options to recognise parents of a child born through surrogacy from birth, or soon after, in a way that still ensures appropriate safeguards for all parties. Details of our proposed pathways to parental recognition can be found in our recent submission to the Australian Law Reform Commission on its review of surrogacy law nationally.[51]

RECOMMENDATIONS

- Introduce a pathway for recognition of intended parents from birth, or immediately after birth, with appropriate safeguards.
- Simplify and streamline the court process for parentage orders, reducing cost and delay.

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[48] Samantha Yee and others, '"Not My Child to Give Away": A Qualitative Analysis of Gestational Surrogates' Experiences' (2020) 33(3) *Women and Birth* 256, 263.

[49] 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.

[50] Nishita Lamba and others, 'The Psychological Well-Being and Prenatal Bonding of Gestational Surrogates' (2018) 33(4) *Human Reproduction* 646, 652.

[51] Equality Australia, Submission to the Australian Law Reform Commission, *Review of Surrogacy laws* (11 July 2025) 17 – 25 https://equalityaustralia.org.au/resources/submission-recognising-all-australian-families/.

- Ensure children are not left in legal limbo by requiring that intended parents, not surrogates, are recognised as the child's legal parents as early as possible.

Recognition of parents when surrogacy entered into outside of Australia

The Surrogacy Act was recently amended with the intention of providing parental recognition for some parents where they have entered into commercial surrogacy arrangements outside Australia.[52] As currently drafted, there remain barriers that will prevent families in this situation from securing parentage orders, contrary to the stated objectives of reform which was to empower the courts to issue parentage orders if in the best interests of a child.[53]

There are three issues with how the recent amendments to the Act interact with existing provisions in the legislation, as follows:

1) **Mandatory counselling report**: the Surrogacy Act requires a mandatory report prepared by an independent qualified counsellor about whether the proposed parentage order is in the best interests of the child.[54] This cannot practically be done retrospectively, as it would involve the participation of the surrogacy and their partner (in some cases, years after the fact).
2) **Lost contact with surrogate and/or their partner:** Division 4 of the *Surrogacy Act* sets out preconditions to the making of a parentage order, one of these being the need for all 'affected parties' to consent to the making of a parentage order.[55] Section 31 requires the consent of the surrogate and their partner to the parentage order because they are listed in the act as 'affected parties' under section 4. The Act currently provides only limited exceptions, for example where the surrogate has died or cannot be located after reasonable endeavours.[56] While this might cover some overseas surrogacy scenarios, it does not address more common situations where the surrogate can be located but refuses to engage, or demands payment in exchange for her consent. Due to the passage of time, the surrogate may also no longer be in a relationship with the same partner, adding an extra layer of difficulty.
3) **Children older than 6 months:** The amendments section 18(2)(b) make clear that, for children born prior to 30 June 2025, the Court should apply a 'best interests' test rather than require strict compliance with all preconditions. This reform was designed to capture families created through overseas surrogacy. However, because these children will inevitably be older than six months by the time an application is made, section 16(3) requires the Court to apply an 'exceptional circumstances' test to extend the time limit beyond 6 months. This is a considerably higher bar than a best interests test, and the Supreme Court

[52] *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) sch 8.

[53] New South Wales, *Parliamentary Debate*s, Legislative Assembly, 24 August 2023, 6 (Alex Greenwich). 'My bill would not lift the ban on commercial surrogacy in the State, but it would remove a ban on commercial surrogacy arrangements outside of New South Wales and empower the courts to issue parentage orders to intending parents of children born from these arrangements, if it is in the child's best interests to do so. The bill would also give the Supreme Court the power to issue a parentage order once a child has reached the age of 18 to ensure adult children can have their parents recognised for legal purposes like wills and powers of attorney.' New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 October 2024, 11 (Chris Minns, Premier). 'It is time that this legislation is passed in the New South Wales Parliament. In relation to the issue of commercial surrogacy in the bill, some support it and others oppose it. But regardless of how we approach the issue, it is hardly the child's fault. It is perfectly reasonable that the legislation reflects that, if it is in the best interests of the child that a parenting order be issued, the courts are in a position to do that.'

[54] *Surrogacy Act 2010* (NSW) s 17.

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

[56] Ibid s 31(2)

has already made clear that the exceptional circumstances test will be applied strictly.[57] This inconsistency risks shutting out precisely the families the reform was intended to benefit.

RECOMMENDATIONS

- Give the court discretion to waive the requirement in section 17 of the *Surrogacy Act 2010* to provide a counselling report generally, or specifically in relation to overseas commercial arrangements.
- Replace the exceptional circumstances test in section 16(3) with a 'best interests' test across the board, or at the very least, to provide that for matters falling under section 18(2)(b), a best interests test applies to out-of-time applications.
- Allow the Court to infer consent where a surrogate has signed an overseas surrogacy agreement.
- Remove the requirement for consent of the surrogate's partner generally, or specifically in relation to overseas surrogacy.

Reimbursement and compensation for surrogates

At present, New South Wales 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.

Unfortunately, because of restrictions on what surrogates may be paid by intended parents, we hear about situations in which surrogates end up out of pocket because of their generous decision to help a family through altruistic surrogacy. This situation calls for an overhaul of what is considered to be 'reasonable expenses' for a surrogate, while also considering the option of a one-off or series of payments to a surrogate to compensate for the physical labour and emotional toll of trying to conceive, pregnancy, and birthing the child.

There should be greater clarity that a surrogate can be paid for loss of income because of medical appointments relating to the pregnancy – such is the case in South Australia.[58] Secondly, there should be further clarity that a surrogate can be paid for loss of income due to inability to work due to medical grounds relating to the pregnancy, not only limited to the time *during* the pregnancy.[59]

Further, 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:

[57] Refer to *Re N* [2025] NSWSC 409.

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

[59] See Tasmania, which allows for reimbursement for earnings both during and after the pregnancy, for actual lost earnings because of leave taken - *Surrogacy Act 2012* (Tas) s 9(3)(f)(ii).

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.[60] 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.[61] This outcome reflected the results of similar studies where economic reasons were not the primary reason for becoming a surrogate.[62]

While research on surrogacy has identified most surrogates report their experience as overall positive,[63] dissatisfaction can be expressed in relation to the side effects of pregnancy that involve physical discomfort.[64] As with all pregnancies, surrogates face the risk of medical complications. 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.[65] Further, New York state laws provide that compensation must be negotiated reasonably and in good faith between the parties.[66] In Washington state, a surrogacy agreement may provide for payment for time, emotional and physical investment and labour.[67]

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.

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[60] 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.

[61] 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.

[62] 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.

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

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

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

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

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

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

- Expand the definition of 'reasonable expenses' to explicitly include loss of income during pregnancy and recovery, and incidental costs associated with medical care at times other than during the pregnancy itself.
- Legislate a regulated framework for compensated surrogacy that allows surrogates to receive capped payments recognising their time, labour, risks and emotional commitment, while prohibiting unregulated commercial surrogacy.
- Ensure safeguards are in place to prevent exploitation and to uphold the voluntariness and autonomy of surrogates.

MODEL NATIONAL LEGAL FRAMEWORK (**TOPIC 1(J)**)

Equality Australia supports a federal approach to ART and surrogacy, as recently outlined in our submission to the Australian Law Reform Commission.[68]

We consider that a national framework for surrogacy regulation, and a consistent approach to donor conception regulation including a single national register 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. Surrogacy and ART 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 are 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. 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.

RECOMMENDATIONS

- Develop a national framework for ART and surrogacy, either through uniform state and territory laws or referral of powers to the Commonwealth, to ensure consistency across Australia.
- Establish a single federal body to oversee ART and surrogacy, including the administration of a national donor conception register, provision of information, counselling, and support services for families, surrogates, and donor-conceived children.
- Ensure the national framework includes clear guidelines for cross-border ART and surrogacy arrangements to reduce legal uncertainty and administrative burden.

[68] Equality Australia, Submission to the Australian Law Reform Commission, *Review of Surrogacy laws* (11 July 2025) 26 https://equalityaustralia.org.au/resources/submission-recognising-all-australian-families/.

- Harmonise eligibility, donor limits, storage limits, parentage recognition, and surrogate compensation provisions across jurisdictions, informed by best practice from other Australian states and comparable international models.
- Embed safeguards to protect surrogates, children, and intended parents, including independent legal advice, counselling, mediation services, and transparent dispute resolution processes.