Australian Government

Attorney-General's Department

July 2025

Submission of the Attorney-General's Department

to the Australian Law Reform Commission in response to the Issues Paper for the inquiry into surrogacy laws

1. Introduction

On 6 December 2024, the Attorney-General announced that the Australian Law Reform Commission (ALRC) would conduct an inquiry into Australian surrogacy laws, policies and practices. The Attorney-General's Department thanks the ALRC for its work to date in progressing this review.

The terms of reference ask the ALRC to examine Australian surrogacy laws, policies and practices to identify legal and policy reforms, particularly proposals for uniform or complementary state, territory and Commonwealth laws that:

- are consistent with Australia's obligations under international law and conventions; and
- protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.

In particular, the ALRC is asked to consider:

- how to reduce barriers to domestic altruistic surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy;
- how surrogacy arrangements made outside Australia should be addressed by Australian law;
- what is the appropriate recognition of legal parentage in Australia for children born of surrogacy overseas, and how may citizenship, visa and passport requirements for children born of surrogacy overseas be aligned; and
- the information that should be available to children born from surrogacy arrangements, including what information should be included on a child's birth certificate in order to meet Australia's human rights obligations under the Convention on the Rights of the Child.

The Issues Paper sets out the ALRC's interpretation of the terms of reference, its approach to the inquiry, key dates for submissions, background, and asks 27 questions for further consideration.

Surrogacy raises issues across a range of Commonwealth portfolios, including Foreign Affairs and Trade, Home Affairs, Health and Social Services, as well as the Attorney-General's portfolio.

This submission does not address each item raised in the Issues Paper but instead seeks to highlight key issues and areas within the Attorney-General's portfolio for the ALRC's consideration.

2. Inquiry principles

The department supports the ALRC's reform principles noting that human rights should be integral in all reform proposals.

The department supports the ALRC's statement that it will use an evidence-based and principled approach to recommend reform options. The department is supportive of the inquiry including 'evidence-based' as a principle among the existing list of reform principles included at paragraph 29 of the Issues Paper.[1]

In paragraph 4 of the Issues Paper, the ALRC outlines its interpretation of the matters it has been asked to consider under the terms of reference, including considering 'how to reduce barriers to surrogacy arrangements within Australia'.[2] The department notes the terms of reference specifically ask the ALRC to consider 'how to reduce barriers to *domestic altruistic* surrogacy arrangements in Australia' (emphasis added).[3] It is the department's understanding that this particular wording reflects an intention for the ALRC to focus on reducing barriers specifically related to *domestic altruistic* surrogacy arrangements in Australia.

3. Key terms

The department supports the ALRC's consideration of the best terminology to use for the purpose of the inquiry.[4] Clearly-defined, consistently-used, and commonly understood terms are important to ensure there is no ambiguity when discussing surrogacy concepts.

The department would like to draw the ALRC's attention to the definitions outlined on the Surrogacy in Australia website, noting that the website was developed in consultation with relevant state, territory and Commonwealth agencies.[5]

The department notes that the ALRC's Issues Paper does not use or define the term *altruistic surrogacy* which is the terminology used in the terms of reference. Altruistic surrogacy refers to arrangements where a surrogate agrees to carry and give birth to a child on behalf of another person or persons, without commercial reward or profit. Generally, an altruistic surrogacy arrangement can provide for the payment or reimbursement of the surrogate's reasonable costs of trying to become pregnant, being pregnant, giving birth and entering into the surrogacy agreement. States and territories have varied definitions of reasonable costs.

By comparison, a commercial surrogacy arrangement involves providing the surrogate with a financial profit, gain or reward for the surrogacy which exceeds or is in addition to their reasonable costs.[6] Altruistic surrogacy is distinct from commercial surrogacy, with commercial arrangements being illegal in all Australian states and territories. This submission uses the definition of commercial surrogacy as outlined in this paragraph.

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[1] Australian Law Reform Commission, *Review of Surrogacy Laws* (Issues Paper No 52, June 2025), page 7-8, [29].
[2] Australian Law Reform Commission, *Review of Surrogacy Laws* (Issues Paper No 52, June 2025), page 1, [4].
[3] Australian Law Reform Commission, 'Review of Surrogacy Laws – Terms of Reference', *Australian Law Reform Commission* (Web Page, 2024) < https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>.
[4] Australian Law Reform Commission, *Review of Surrogacy Laws* (Issues Paper No 52, June 2025), page 3, [18].
[5] Australian Government, 'Terminology', *Surrogacy in Australia, (*Web Page, 2025*)* <https://www.surrogacy.gov.au/terminology>.
[6] Australian Government, 'Terminology', *Surrogacy in Australia, (*Web Page, 2025*)* <https://www.surrogacy.gov.au/terminology#commercial-surrogacy>.

The department is of the view that the Issues Paper outlines two potential models that would be prohibited under Australia's current legislative framework because they represent commercial surrogacy arrangements. The Issues Paper terms these two models: 'compensated surrogacy' (which has regulation or limits on the compensation involved) and 'commercial surrogacy' (which has no regulation or limits on the compensation involved). The department notes that ALRC's proposed definition of 'commercial surrogacy' may create confusion given the commonly understood broader definition of commercial surrogacy.

4. Australia's legal framework and responsibilities for surrogacy

State and territory jurisdictions regulate surrogacy in Australia. All states and territories have legislation that addresses and provides for domestic altruistic surrogacy, and criminalises commercial surrogacy. The Australian Capital Territory, New South Wales and Queensland also prohibit engagement by residents in international commercial surrogacy.

At a federal level, there are number of key departments which have responsibility for aspects of policy which intersect with surrogacy:

- The Department of Home Affairs has responsibility for determining Australian citizenship by descent applications and visa applications made by persons born through surrogacy arrangements.
- The Department of Foreign Affairs and Trade is responsible for issuing Australian passports and for consular assistance matters.
- The Department of Health, Disability and Ageing is responsible for federal health policy, including matters related to the Medicare Benefits Schedule. Within the Department of Health portfolio, the National Health and Medical Research Council administers the 'Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research', which includes ethical guidance on surrogacy practice in Australia.
- The Department of Social Services has responsibility for policy and legislation in relation to family payments, paid parental leave and child support.
- The Attorney-General's Department has responsibility for federal family law, modern slavery and human trafficking, private international law, human rights policy, and public international law including human rights obligations. The department also coordinates Australia's engagement with the Hague Conference on Private International Law (HCCH) and acts as the Australian Central Authority for the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Depending on the proposed reforms recommended, there may be other Commonwealth departments and agencies with relevant responsibilities.

The Attorney-General's Department maintains the website, Surrogacy in Australia, which provides an overview of the legal issues and human rights considerations associated with surrogacy, and guidance on

where to find specific advice depending on a person's circumstances and the state or territory in which they reside. The website was launched in April 2024, and is a whole-of-government initiative, developed in consultation with relevant state, territory and Commonwealth agencies. The recent establishment of the Surrogacy in Australia website is relevant to the ALRC's considerations in relation to surrogacy awareness and education.

The Attorney-General's Department is continuing to consider the work on parentage and surrogacy being progressed by HCCH.

5. Key issues for the Attorney-General's Department regarding surrogacy arrangements

International law including Australia's human rights obligations

In conducting its surrogacy inquiry, the ALRC has been asked to consider legal and policy reforms that are consistent with Australia's obligations under international law and conventions, and which protect and promote the human rights of surrogate children, surrogates and intended parents, noting that the best interests of children are paramount. The ALRC must also aim to ensure that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.[7]

There is no convention in international law that is specifically dedicated to regulating surrogacy.[8] Nevertheless, Australia is party to a range of international instruments that establish human rights obligations relevant to surrogacy. These include: the Convention on the Rights of the Child (CRC),[9] the International Covenant on Civil and Political Rights (ICCPR),[10] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[11] and the Convention on the Elimination of Discrimination against Women (CEDAW),[12] the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the

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[7] *Australian Law Reform Commission Act 1996* (Cth), s 24(1)(b).

[8] The HCCH Working Group on Parentage and Surrogacy is currently exploring draft provisions for a possible international instrument on legal parentage, including legal parentage arising from international surrogacy arrangements. This Working Group was established in 2023 and is a continuation of the work conducted by the Experts' Group between 2016 and 2022. For further information on the Working Group mandate, see *Conclusions and Recommendations of the 2023 meeting of the Council on General Affairs and Policy of the HCCH*, March 2023, Nos 4-5. Available from: https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf.

[9] United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (*'Convention on the Rights of the Child')*.

[10] International Covenant on Civil and Political Rights, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). ('*ICCPR*')

[11] International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR'*).

[12] United Nations Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1978, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW'*).

Elimination of All Forms of Racial Discrimination (CERD). Australia is also a party to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.[13]

Australia's international human rights obligations frame its response to surrogacy, although the extent to which these obligations are engaged will vary depending on the circumstances.

The Issues Paper sets out a number of rights that may be engaged in the context of surrogacy. In some places, the department considers that the relevant right could be more clearly articulated. In particular:

- At page 8, the Issues Paper refers to '[t]he rights of the child as paramount', citing Article 3 of the CRC. This appears to combine Article 3 of the CRC (which states that 'the best interests of the child shall be a *primary* consideration [in all actions concerning children]') and Article 21 of the CRC (which provides with respect to adoption, that 'the best interests of the child shall be the *paramount* consideration) (emphasis added). For clarity, the department recommends reframing this text to more closely align with the text of Article 3.
- At page 8, the Issues Paper notes 'the prohibition on the sale of children', citing the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. For completeness, the department notes that Article 35 of the CRC also obliges States Parties to take all appropriate measures 'to prevent the abduction of, the sale of or traffic in children for any purpose or in any form'. The ALRC may also wish to reference this provision.
- At page 8, the Issues Paper refers to the right of the child to preserve their identity and nationality (citing Article 8 of the CRC), and notes that 'this right raises questions about the information people born through surrogacy should be entitled to'. This appears to combine Article 8 of the CRC (which refers to 'the right of the child to preserve his or her identity, including nationality, name and family relations') and Article 7 of the CRC (which provides, *inter alia*, that a child has 'as far as possible, the right to know … his or her parents'). For clarity, the department suggests that these rights be addressed separately.
- At page 9, the Issues Paper notes that 'there is a risk that surrogacy arrangements may perpetuate gender or racial inequality' for surrogates, citing Article 7 of CEDAW and Article 5 of the CERD. Noting that the scope of Article 7 of CEDAW is limited to the elimination of discrimination 'in political and public life', the department queries whether Article 2 of CEDAW – which is framed in broader terms and sets out States' overarching obligations with respect to the elimination of discrimination against women – may be more relevant.
- At page 9, the Issues Paper also refers to surrogates' 'right to autonomy', citing several obligations under the ICCPR (right to privacy) and CEDAW (women's equality before the law, and obligation on States to take measures to eliminate discrimination against women in all matters relating to marriage and family relations). For clarity, the department recommends addressing these rights separately,

[13] United Nations Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography', opened for signature 25 May 2000, 2171 UNTS 217 (entered into force 8 January 2007) ('*Optional Protocol').*

noting that the current framing risks combining several separate obligations under international human rights law.

- At page 9, the Issues Paper refers to surrogates' 'right to bodily integrity', citing Article 9 (right to liberty and security of the person) and Article 17 (right to privacy). Noting that Article 9 of the ICCPR is primarily concerned with the prevention of arbitrary detention, the department notes that this provision does not seem to be directly relevant to surrogates' bodily integrity. The department therefore suggests that the reference to Article 9 be omitted, and the reference to Article 17 retained – noting that the right to privacy extends to a right to one's own body, and that right is manifested in the protection of one's bodily integrity.
- The Issues Paper cites the Universal Declaration of Human Rights at footnote 25 (in relation to intended parents' right to freedom from discrimination), footnote 27 (in relation to intended parents' right to privacy), footnote 28 (in relation to intended parents' right to receive and impart information) and footnote 29 (in relation to the intended parents' right to share in and benefit from scientific advancements). Noting that the Universal Declaration of Human Rights is a non-binding political commitment, the department suggests omitting these references and focusing on the binding treaty obligations from which these rights derive.
- The department recommends clarifying how the intended parents' right to privacy 'intersects with the right of the child to know their identity' as stated at page 9 of the Issues Paper.
- At page 10, the Issues Paper refers to 'the right to receive and impart information', citing Article 19(2) of the ICCPR. For clarity, the department notes that the relevant right is the 'right to freedom of expression', which includes 'the freedom to seek, receive and impart information and ideas of all kinds…'.

In addition to the rights identified in the Issues Paper, the Inquiry may also wish to consider the following rights, which may be engaged by surrogacy arrangements:

- The rights of a child to parental contact,[14] and to be safe and free from harm or exploitation.[15]
- A surrogate's right to be free from harm or exploitation,[16] to sexual and reproductive health,[17] and to access to information about the surrogacy arrangement.[18]

[14] See, for example, the right of a child to not be separated from his or her parents against their will (article 9 of the CRC).
[15] See, for example, the obligation to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (article 19 of the CRC), to protect children from sexual exploitation and abuse (article 34 of the CRC), to prevent abduction, sale, or traffic in children (article 35 of the CRC), and to protect children against forms of exploitation prejudicial to any aspects of their welfare (article 36 of the CRC).
[16] See for example, the obligation to suppress all forms of traffic in women (article 6 of the CEDAW).
[17] See, for example, the right to health (article 12 of the ICESCR), and the obligation to eliminate discrimination against women in relation to accessing health care services and facilities (articles 12 and 14 of the CEDAW).
[18] See, for example, the right to freedom of expression (article 19 of the ICCPR).

In relation to the rights of the intended parents', we note there is no 'right to a child' under international law.[19]

Australia's international human rights obligations generally only apply within Australia. Although there are exceptions to this, these exceptions are unlikely to apply in the context of surrogacy. The relevant international human rights obligations for parties who engage in surrogacy outside of Australia will generally be those of the country in which the practice occurs. Whether a particular surrogacy arrangement risks violating the rights of the child, the surrogate, or the intended parents will ultimately turn on the specific circumstances of that arrangement and the individuals involved.

Any reform to Australia's legal and policy framework for surrogacy should be consistent with Australia's human rights obligations under these instruments.

Australia's position on commercial surrogacy

All Australian states and territories have legislation that addresses and provides for domestic altruistic surrogacy, and criminalises commercial surrogacy. While the states and territories have varied definitions of reasonable costs, domestic altruistic surrogacy includes reimbursement of the surrogate's reasonable costs of trying to become pregnant, being pregnant, giving birth and entering into the surrogacy agreement. Commercial surrogacy where a surrogate receives a financial profit, gain or reward for the surrogacy that is more than reasonable costs is prohibited in Australia.

Australian states and territories prohibit commercial surrogacy in Australia to protect the rights of each of the people involved in a surrogacy arrangement. Commercial surrogacy raises a number of human rights concerns, particularly in relation to the exploitation of women and children, and the focus on the wishes of the commissioning parents in such arrangements, ahead of the best interests of the child [20] and the human rights of the surrogate.

Both the Australian Parliament and the United Nations have published reports on the issues, concerns and human rights risks that have arisen from commercial surrogacy. [21] From December 2015 to May 2016, the House of Representatives Standing Committee on Social Policy and Legal Affairs conducted an inquiry into the

[19] See, for example, discussion in United Nations Human Rights Council, Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, UN Doc A/HRC/37/60 (15 January 2018), page 15, paragraph 64, available at: https://docs.un.org/en/A/HRC/37/60.

[20] Australian Government, 'Why Australia prohibits commercial surrogacy', *Surrogacy in Australia, (*Web Page, 2025*)* <https://www.surrogacy.gov.au/human-rights-and-surrogacy/why-australia-prohibits-commercial-surrogacy>.

[21] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016); UN Women, *Progress of the World's Women 2019-2020* (Report, 2019); United Nations Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other Child Sexual Abuse Material*, UN Doc A/HRC/37/60 (15 January 2018).

regulation and legislative aspects of international and domestic surrogacy arrangements'.[22] The Committee's final report included a recommendation that 'the practice of commercial surrogacy remain illegal in Australia.' This recommendation was informed by the view that, 'even if a regulated system of commercial surrogacy could be implemented, the risk of exploitation of both surrogates and children remains significant.'[23] Similar observations have been made in a report by the UN Special Rapporteur on the Sale and Exploitation of Children which noted the presence of 'abusive practices' in 'both unregulated and regulated contexts'.[24]

In circumstances of international commercial surrogacy, and particularly in countries that lack legal frameworks for surrogacy, there are greater risks of slavery-like practices, human trafficking, the exploitation of women and children, and breaches of human rights. For example, in its 2019 report, Families in a Changing World, UN Women noted that 'abusive' conditions have been reported in some instances, including problematic recruitment practices, serious impediments to informed consent, implantations of an excessive number of embryos, delayed access to potentially health-preserving (and even life-saving) abortions, coerced abortions when prospective parents change their minds, and the routine use of caesarean births to facilitate prospective parents needs, even when medically unnecessary.[25] UN Women have also noted that surrogacy can 'reinforce socio-economic inequalities: it is invariably women from the poorer social groups in developing countries who enter international commercial surrogacy arrangements to bear children for those from the more affluent countries and groups who are unable or unwilling to do so themselves.'[26] The Surrogacy in Australia website provides a further overview of some of the issues that have arisen in circumstances of international surrogacy.[27]

The United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material (Special Rapporteur) has also provided reports on surrogacy and sale of children. A 2018 Thematic study on surrogacy and sale of children, presented

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[22] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) (*'Surrogacy Matters')*.

[23] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) (*'Surrogacy Matters'),* page 6 [1.19].

[24] See United Nations Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children*, *including Child Prostitution, Child Pornography and other Child Sexual Abuse Material*, UN Doc A/HRC/37/60 (15 January 2018), page 3 [9], page 9 [30-33], available at: https://docs.un.org/en/A/HRC/37/60

[25] UN Women, 'Families in a Changing World', 2019, 96. Available from: https://www.unwomen.org/en/digital-library/publications/2019/06/progress-of-the-worlds-women-2019-2020. (*'Families in a Changing World').* See also John Pascoe, 'Sleepwalking through the minefield: legal and ethical issues in surrogacy (2018) 30 *Singapore Academy of Law Journal*, 455, 455-483.

[26] UN Women, 'Families in a Changing World', 2019, 36. Available from: https://www.unwomen.org/en/digital-library/publications/2019/06/progress-of-the-worlds-women-2019-2020.

[27] Australian Government, 'Issues that have arisen from engaging in surrogacy overseas', *Surrogacy in Australia* (Web Page, 2025) <https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas>. See also John Pascoe, 'Sleepwalking through the minefield: legal and ethical issues in surrogacy (2018) 30 *Singapore Academy of Law Journal* 455,455-483.

to the 37th session of the UN Human Rights Council (2018 Thematic study) noted that 'commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law.'[28] As part of that report, the Special Rapporteur provided recommended safeguards to prevent the sale of children in the context of commercial surrogacy.[29] A 2019 Thematic study by the Special Rapporteur on safeguards for the protection of the rights of children born from surrogacy arrangements presented to the UN General Assembly restated the themes in the 2018 Thematic study and further noted 'the real threat of exploitation and commodification of children, and potentially of surrogates, is often related to the role of intermediaries. In general, this is due to the for-profit motives of private intermediaries, who have, as a guiding motive, the successful completion of the surrogacy agreement with little to no regard for the rights of those involved.'[30] The Special Rapporteur reiterated previous recommendations in relation to protecting children from sale, abuse and exploitation, including the close regulation of intermediaries. Further detail in relation to some of the risks associated with using third party organisations are also outlined on the Surrogacy in Australia website.[31]

The Attorney-General's Department supports the ALRC in its intention to engage with people with lived experience of surrogacy as part of this inquiry.[32] The department considers that it is particularly important to ensure balance in the range of perspectives included, and that the inquiry considers not only the experience of Australians accessing and navigating a surrogacy arrangement, but also the experiences of children and surrogates, particularly children born of surrogacy overseas, and surrogates overseas. This is an important consideration in light of the potential for greater risks of exploitation, human trafficking and human rights abuses that can occur in the context of commercial surrogacy. There may also be valuable insights or lessons learned by examining overseas models and considering the diverse approaches to surrogacy internationally.

The department notes that the terms of reference for the inquiry outline that any recommendations for reform (including any recommendations in relation to commercial surrogacy) must be consistent with Australia's obligations under international law and conventions and must protect and promote the human

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[28] See United Nations Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other Child Sexual Abuse Material*, UN Doc A/HRC/37/60 (15 January 2018), page 12 [41], available at: https://docs.un.org/en/A/HRC/37/60. For a summary, see: https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy. The UN Committee on the Rights of the Child has also consistently expressed concern that commercial surrogacy, if not properly regulated, can lead to the sale of children. For links to examples, see: Australian Government, 'Why Australia prohibits commercial surrogacy', *Surrogacy in Australia, (*Web Page, 2025*)* <https://www.surrogacy.gov.au/human-rights-and-surrogacy/why-australia-prohibits-commercial-surrogacy>.

[29] See United Nations Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and other Child Sexual Abuse Material*, UN Doc A/HRC/37/60 (15 January 2018), page 19-20, available at: https://docs.un.org/en/A/HRC/37/60. For a summary, see: https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy.

[30] United Nations General Assembly, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children – Study on safeguards for the protection of the rights of children born from surrogacy arrangements*, UN Doc A/74/162 (15 July 2019), page 16, available at: https://docs.un.org/en/A/74/162.

[31] Australian Government, 'Risks with using third party organisations' *Surrogacy in Australia* (Web Page, 2025)<https://www.surrogacy.gov.au/surrogacy-overseas/risks-using-third-party-organisations>.

[32] Australian Law Reform Commission, *Review of Surrogacy Laws* (Issues Paper No 52, June 2025), page 6.

rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.

Work towards an international instrument on parentage

In 2015, the HCCH Council on General Affairs and Policy (CGAP) established an Experts' Group on Parentage and Surrogacy to consider the feasibility of developing an international instrument on legal parentage, including legal parentage arising from international surrogacy arrangements. Following the final report of the Experts' Group of November 2022 and presented to CGAP at its 2023 meeting, a Working Group was established to continue the project, exploring draft provisions for a possible international instrument. The Working Group will next report to CGAP in March 2026.

Australia previously participated in the HCCH Experts' Group until its conclusion in November 2022. Australia is not a member of the Working Group, but is a member of the HCCH, and is continuing to monitor the progress of the Working Group through its annual reports to CGAP.

Australia's human trafficking and slavery offences and potential application to surrogacy arrangements

Australia has comprehensively criminalised human trafficking, slavery and slavery-like practices, including forced labour, deceptive recruitment and child trafficking, which may apply to some commercial surrogacy situations that involve exploitation. Consideration of these issues would also be required if proposing commercial surrogacy in Australia.

Australia's laws criminalising human trafficking and slavery are contained within Divisions 270 and 271 of the Commonwealth *Criminal Code Act 1995* (Criminal Code). Division 271 of the Criminal Code contains specific offences for trafficking in persons, including for trafficking people into, out of and within Australia, and specific provisions for domestic trafficking and trafficking in children.

Division 270 of the Criminal Code criminalises slavery, the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. The slavery offences have universal jurisdiction, which means that they apply whether or not the conduct occurred in Australia, and whether or not the victim or the offender are Australian citizens or residents. Division 270 also criminalises slavery-like practices, including servitude, forced labour, and deceptive recruiting for labour or services. These offences can apply to the exploitation of a person's labour or services in any industry, or to exploitation within intimate relationships. The slavery-like offences in Division 270 have extended geographic jurisdiction, and can apply where the conduct occurred in Australia, or where the conduct occurred outside Australia but the offender was an Australian corporation, citizen or resident. None of the offences in Division 270 require the victim to be moved across or within Australia's borders.

Parentage and parental responsibility in Australia for children born through surrogacy arrangements

The terms of reference for this inquiry include a request for the ALRC to consider a series of issues, including:

- how to reduce barriers to domestic altruistic surrogacy arrangements in Australia;
- how surrogacy arrangements made outside Australia should be addressed by Australian law; and
- what is the appropriate recognition of legal parentage in Australia for children born of surrogacy overseas

In Australia, the legal parentage of children born through a surrogacy arrangement is primarily determined by state and territory legislation. All jurisdictions provide for domestic altruistic surrogacy and criminalise commercial surrogacy. While there are similarities across states and territories, the rules for determining parentage of a child born via a surrogacy arrangement vary in each.

Generally, the birth mother and her partner (if applicable) will have legal parentage over a child born of a surrogacy arrangement until legal parentage is transferred by a court order. State and territory laws provide for court orders to authorise a transfer of legal parentage to the intended parents where particular requirements have been met. Legal parentage is usually not recognised in Australia for parents who commission a child under a commercial surrogacy arrangement, or who have not followed the relevant state and territory requirements. In some jurisdictions, in exceptional or limited circumstances, a judge may have discretion to order the transfer of legal parentage from a surrogate to the intended parents.

Section 60HB of the *Family Law Act 1975* (Cth) recognises the parentage orders made by state and territory courts under their surrogacy laws, where these laws have been prescribed by the *Family Law Regulations 2024*. When the state or territory law does not recognise parentage for the intending parents, orders for parental responsibility can be sought from the Commonwealth family law courts.[33] Parental responsibility refers to the duties, powers, responsibilities and authority which, by law, parents have in relation to children, but it is not an order of legal parentage.

Recent decisions in the family law courts have demonstrated some of the challenges arising in cases of international commercial surrogacy, and the ensuing complexities associated with parentage, the best interests of the child, and the illegality of the intending parents' conduct.[34]

Registration of overseas child orders under the Family Law Act

Australians can obtain an order for parental responsibility in Australia by application to the family law courts. If intending parents have an overseas court order that gives them parentage or parental responsibility for a

[33] *Bernieres and Dhopal* (2017) 324 FLR 21; [2017] FamCAFC 180.
[34] See, eg, *Ellison and Anor & Karnchanit* [2012] FamCA 602; *Mason & Mason and Anor* [2013] FamCA 424; *Lloyd & Compton* [2025] FedCFamC1F 28.

child, Australian family law courts may be able to register the parts of those overseas orders that provide for parental responsibility, so that they are enforceable in Australia.

The power to register overseas child orders from certain jurisdictions comes from Regulation 72 of the *Family Law Regulations 2024* or Regulation 12 of the *Family Law (Child Protection Convention) Regulations 2003*. Orders that have the effect of establishing, declaring or transferring parentage are excluded from being registered (and therefore from being enforced) under these provisions.

This means overseas orders transferring parentage from birth parents to intending parents will not be registered and enforced in Australia. Overseas child orders or parts of orders which relate to parental responsibility (which could include information about who a child lives with) may be considered for registration. However, judges have some discretion over whether or not to register overseas child orders.

Conclusion

The department looks forward to the ALRC's further exploration of these issues.