Law Council
OF AUSTRALIA

Review of Surrogacy Laws: Issues Paper

Australian Law Reform Commission

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Table of contents

About the Law Council of Australia **3**
Acknowledgements **4**
Introduction **5**
Human rights **6**
Reimbursing and compensating surrogates **8**
Legal parentage **9**
Lack of legal certainty 10
Law Council position 11
Interaction between migration law and international surrogacy arrangements **12**
Citizenship 12
Visas 13
Harmonisation and oversight **15**

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
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Through this representation, the Law Council acts on behalf of more than 107,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

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- The Law Institute of Victoria
- The Law Society of New South Wales
- The Law Society of South Australia

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Introduction

1. The Law Council of Australia appreciates the opportunity to respond to the Issues Paper published by the Australian Law Reform Commission (**ALRC**) as part of its **Review** of Surrogacy Laws.

2. The Review—initiated by the then Commonwealth Attorney-General in December 2024—is welcome due to the significant legal uncertainty in Australia in respect of surrogacy, particularly in relation to surrogacy arrangements that occur outside of Australia. This uncertainty arises from the complicated interaction between State, Territory, and Commonwealth laws, as well as the distinct legal systems of the jurisdiction where a birth via surrogacy takes place.

3. As acknowledged by the ALRC in the comprehensive Issues Paper, the legal complexities in this area are compounded by inconsistencies across State and Territory laws governing surrogacy arrangements. This absence of uniformity has resulted in a general lack of knowledge and understanding in the community about surrogacy laws and arrangements, both domestically and overseas.

4. We acknowledge that this is a preliminary consultation and that the ALRC intends to publish a Discussion Paper in November 2025, seeking feedback on specific options for reform.[1] Consequently, the Law Council's views as set out in this submission should be regarded as preliminary.

5. Surrogacy is complex from a policy and legal perspective, noting that there is variance in approaches, both domestically and internationally. Surrogacy is currently regulated by the States and Territories, as the Commonwealth does not have the power to legislate with respect to surrogacy arrangements. However, Commonwealth legislation sets out the statutory framework for obtaining parentage orders,[2] which is supported by legislation in each State and Territory.

6. The Law Council does not seek to comment specifically on the merits of surrogacy laws in individual States and Territories, nor the appropriateness of the prohibition on commercial surrogacy in all Australian jurisdictions—recognising that there is considerable nuance to the debate.[3] Rather, this submission provides the Law Council's preliminary views on matters relating to:

   - human rights issues raised by surrogacy arrangements for children, the surrogate, and the intended parent(s);
   - reimbursing and compensating surrogates;
   - requirements and processes for obtaining legal parentage for a child born via surrogacy;
   - interactions between migration law and international surrogacy arrangements; and
   - potential avenues for harmonisation of surrogacy laws and oversight of surrogacy arrangements.

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[1] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 3.
[2] *Family Law Act 1975* (Cth) ss 60H, 60HB; see also *Family Law Regulations 2024* (Cth); *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) ss 21, 24.
[3] The legislation in almost all Australian jurisdictions uses the term 'commercial' surrogacy to refer to any surrogacy arrangement where the surrogate receives payment beyond reimbursement of reasonable expenses: ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 23.

7. In light of the unique legal and ethical issues raised by surrogacy arrangements, as identified in the Issues Paper, it would be appropriate to establish a uniform regulatory approach across all Australian jurisdictions, particularly to minimise jurisdiction shopping or 'forum shopping'. Such an approach must be sufficiently robust to place paramount consideration on the rights and interests of a child born through surrogacy, and to ensure adequate human rights protections for children, surrogates, and the intended parent(s).

8. The Law Council commends the ALRC on its progress on the Review to date, and looks forward to contributing further once the Discussion Paper is published.

Human rights

Question 3: What do you think are the key human rights issues raised by domestic and/or international surrogacy arrangements? How should these be addressed?

9. Children are one of (if not the most) vulnerable cohorts in society. Consequently, the rights of the child should be paramount in any discussion about the regulation of surrogacy.

10. Any regulatory framework governing surrogacy arrangements should also take into account the rights of the surrogate, the intended parent(s), and, where relevant, the rights of any donor. This approach reflects the fundamental principle that all human rights are universal, interdependent, and interconnected.

11. The Review should consider Australia's international human rights obligations, as identified in the Review's Terms of Reference, and required under the *Australian Law Reform Commission Act 1996* (Cth).[4] In addition, while not a human rights treaty, the Review should also recognise the need for compliance with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.[5]

12. The Terms of Reference and Issues Paper refer to relevant reports of the United Nations (**UN**) Special Rapporteur on the sale and sexual exploitation of children.[6] The Issues Paper also refers to the Convention on the Rights of the Child (**CRC**), including the paramountcy of the best interests of the child.[7]

13. The ALRC has identified, in the Issues Paper, the most important risks to rights arising from surrogacy arrangements.[8] In addition to the CRC, the Issues Paper cites relevant protections in the:

    - International Covenant on Civil and Political Rights (**ICCPR**);[9]

[4] *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).
[5] *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, concluded 29 May 1993 (entered into force 1 May 1995).
[6] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 5 [footnote 9].
[7] Ibid 8; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.
[8] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 8-10.
[9] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

- Convention on the Elimination of All Forms of Discrimination Against Women;[10]
- Convention on the Rights of Persons with Disabilities;[11] and
- Convention on the Elimination of All Forms of Racial Discrimination.[12]

14. A strong focus on the maintenance and upholding of those rights identified in the Issues Paper ought to be reflected in any proposed legislative reform. The ALRC may also wish to consider relevant commentary of the UN Human Rights Treaty Bodies,[13] and organisations such as UNICEF.[14]

15. The human rights risks of surrogacy arrangements—particularly for the rights of children and surrogates—are well established. These risks were canvassed in depth by the House of Representatives Standing Committee on Social Policy and Legal Affairs in its 2016 inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements, culminating in the Committee's recommendation that the practice of commercial surrogacy remain illegal in Australia.[15]

16. As identified in the Issues Paper, the ALRC should consider the rights of intended parents in its review, including as they relate to Australia's non-discrimination obligations.[16] The Issues Paper acknowledges there is disagreement as to whether the right to found a family under article 23 of the ICCPR extends to entering into surrogacy arrangements.[17]

17. In the 2017 decision of the Grand Chamber of the European Court of Human Rights in *Paradiso and Campanelli v Italy*, the judges were divided on how to apply the right to respect for family life under Article 8 of the European Convention on Human Rights.[18] The majority found that protection for family life under the Convention did not extend to those who founded a family in violation of domestic laws.[19] However, five dissenting judges expressed concern about the emphasis on legality in the majority judgment and the classification of certain families as more 'legitimate' than

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[10] *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 7.
[11] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[12] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.
[13] See, e.g., UN Human Rights Committee *General Comment No 19 on ICCPR Art 23 (rights of the family)* – (including on the definition of family at [2]; see also at [5] in *General Comment No 16* and [13] in the Committee on the Elimination of Discrimination Against Women's *General Recommendation No 21*); UN Human Rights Committee, *General Comment No 17 on ICCPR Art 24 (rights of the child)*; UN Committee on the Rights of the Child, *General Comment No 14 on 'best interests' under Art 3*; Committee on the Elimination of Discrimination Against Women *General Recommendation No. 24 on CEDAW Art 12 (women and health)*; also *Joint General Comment No 23* of the Committee on the Rights of the Child [with the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families] *on the human rights of children in the context of international migration in countries of origin, transit, destination and return*.
[14] UNICEF, *Key Considerations: Children's Rights and Surrogacy* (Briefing Note, February 2022).
[15] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Report, April 2016), Recommendation 1.
[16] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 8-10.
[17] Ibid 10.
[18] *Paradiso and Campanelli v Italy* (Application 25358/12, judgment of 24 January 2017). In this decision, a majority of the Grand Chamber of the European Court of Human Rights held that the forced removal of an infant from his surrogate parents constituted an interference with the surrogate parents' right to respect for private life under Article 8 of the Convention. However, the Grand Chamber considered that the actions taken by the Italian government were within the scope of Article 8(2) of the Convention and that there was therefore no violation of Article 8.
[19] Ibid [165].

others.[20] The dissenting judges considered that the child's removal in this case was disproportionate relative to other interests at stake.[21]

18. This case demonstrates the complexity of reconciling competing rights and interests in surrogacy arrangements under international human rights law and domestic law, and suggests that families formed in contravention of commercial surrogacy bans may fall outside the protection of the former.

Question 4: What information about the circumstances of their birth do you think children born through surrogacy should have access to? How should this be provided or facilitated?

19. Research indicates that surrogate-born children can benefit from ready access to information about their origins, and this is consistent with an approach to regulation that prioritises the rights of the child.[22] However, parental rights are also recognised in the CRC,[23] and there is legitimate debate about what may be justified in the name of 'appropriate' parental direction and guidance.[24]

20. The situation for a child of surrogacy arrangements may be further complicated by assignation of legal parentage and/or parental responsibility by the courts (elaborated on in the 'Legal parentage' section below).[25]

21. On balance, the Law Council submits that children have a right to obtain information that identifies their biological parents before they turn 18, unless the receipt of such information is demonstrably contrary to their best interests. Parents should not have the power to prevent access to such information, especially once the child enters adolescence.[26]

Reimbursing and compensating surrogates

Question 16: Do you support a) *compensated* surrogacy and/or b) *commercial* surrogacy?

22. At present, only altruistic surrogacy is permitted within Australia. In some states, such as New South Wales, Queensland, and the Australian Capital Territory, residents are prohibited from entering into commercial surrogacy arrangements.[27]

23. The Issues Paper outlines two possible approaches to compensating surrogates:[28]

    (a) 'Compensated' surrogacy—a regulatory approach where compensation is allowed within clearly defined limits (e.g., a cap on the amount of compensation, and guidelines for how it should be calculated and paid).

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[20] Ibid, Joint dissenting opinion of judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens, and Grozev.
[21] Ibid.
[22] See Elaine O'Callaghan, 'Surrogate Born Children's Access to Information About Their Origins' (2024) 38(1) *International Journal of Law, Policy and The Family* 1.
[23] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 5.
[24] See UN Committee on the Rights of the Child, *Statement on article 5 of the Convention on the Rights of the Child*, 11 October 2023.
[25] Australian Government, *Recognition of parentage in Australia* (Web Page, 2025).
[26] This view is consistent with that of John Tobin, *The CRC: The Rights and Best Interests of Children Conceived through Assisted Reproduction*, VLRC Occasional Paper, 2004, 45-46.
[27] *Surrogacy Act 2010* (NSW) s 56; *Surrogacy Act 2010* (Qld) s 41; *Parentage Act 2004* (ACT).
[28] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 16.

(b) 'Commercial' surrogacy—a non-regulatory approach, where compensation is allowed without clearly defined limits (e.g., without a cap on compensation).

24. Surrogacy legislation in Australia does not distinguish between these two approaches. Instead, 'commercial' surrogacy is used to refer to any surrogacy arrangement where the surrogate receives payment beyond reimbursement of reasonable expenses.[29]

25. We have received feedback that the binary classification of 'commercial' and 'altruistic' surrogacy oversimplifies the often-complex motivations for becoming a surrogate. Many surrogacy arrangements fall between these two classifications, indicating that there may be a need for a more nuanced regulatory approach.

26. The Law Council does not have a settled position on whether it supports compensated and/or commercial surrogacy. However, we acknowledge that the Law Society of New South Wales has previously advocated for the establishment of a regulated system of compensated surrogacy in New South Wales.[30] Noting this, we support the ALRC further considering how the rights of a child, as well as surrogates' and intended parents' rights, might be balanced within a highly regulated compensatory surrogacy framework in Australia.

Legal parentage

Questions 18 and 19:

- **What are the main problems with the requirements and processes for obtaining legal parentage for a child born through domestic and/or international surrogacy?**
- **How could the process for intended parents to become the legal parents of children born through surrogacy be improved?**

27. The current processes for obtaining legal parentage are unsatisfactory and require national uniformity. The inconsistencies in processes and requirements across Australian jurisdictions creates uncertainty for intended parents, as well as the possibility of 'forum shopping', where individuals deliberately choose to pursue a surrogacy arrangement in a particular State, Territory, or overseas jurisdiction because the legal requirements there are more favourable, or better align with their personal circumstances.[31]

28. Each State and Territory has distinct processes for obtaining parentage for a child born through surrogacy. However, in all cases, a court order is required for the transfer of parentage from the birth parent to the intended parent(s). For example, in NSW, the intended parent(s) can apply to the NSW Supreme Court for a parentage order under the *Surrogacy Act 2010* (NSW).[32] As identified in the Issues Paper, there have been recent examples in NSW where the Court has refused a

[29] Ibid 23.
[30] Law Society of New South Wales, *Discussion paper – Review of the Surrogacy Act 2010 and the Status of Children Act 1996* (Submission to the Department of Communities and Justice, 6 August 2024).
[31] Also known as 'Reproductive Tourism': See Ezra Kneebone, Kiri Beilby and Karin Hammarberg, 'Experiences of surrogates and intended parents of surrogacy arrangements: a systematic review' (2022) 45(4) *Reproductive BioMedicine Online*, 815-830.
[32] *Surrogacy Act 2010* (NSW) s 12.

parentage order in circumstances where the intended parents have failed to meet the statutory requirements for the making of such an order.[33]

Lack of legal certainty

29. There is legal uncertainty for children born because of a surrogacy arrangement that does not meet the relevant requirements under the applicable State or Territory legislation—most typically, if the child was born pursuant to a commercial surrogacy arrangement, or a surrogacy arrangement overseas.

30. Where the intended parents are not eligible to obtain legal parentage orders in their State or Territory, there does not appear to be an avenue for obtaining legal parentage under the *Family Law Act 1975* (Cth).

31. Section 60HB of the Family Law Act provides that, where a court of a State or Territory has made an order creating a parent–child relationship under 'prescribed' state or territory provisions, that order is to be considered effective for the purposes of the Family Law Act.

32. In *Bernieres v Dhopal*,[34] Berman J held that section 60HB 'covers the field' with respect to surrogacy arrangements under the Family Law Act.[35] This was confirmed on appeal by the Full Court of the Family Court of Australia.[36] In that case, the child was born overseas through a commercial surrogacy arrangement, and the intended parents sought a declaration of legal parentage. The Full Court found that such a declaration was not available under the Family Law Act, but instead granted a parenting order to the applicant under section 65C.

33. Parenting orders—which end when the child reaches the age of 18—are to be distinguished from legal parentage. It is unclear whether *Bernieres* is affected by the High Court of Australia decision of *Masson v Parsons*,[37] where the plurality held that the word 'parent' under the Family Law Act should take on its ordinary meaning, unless there is an applicable provision of the Family Law Act that provides otherwise.

34. In the Federal Circuit and Family Court of Australia case of *Tickner v Rodda*,[38] Aldridge J cited *Masson v Parsons* and made a declaration of legal parentage under section 69VA of the Family Law Act in favour of an intended parent of a child born as the result of an altruistic surrogacy agreement. This was despite the fact that the intended parent could not obtain a parentage order under the *Surrogacy Act 2010* (NSW).

35. This lack of certainty in the case law as to the availability of parentage orders under the Family Law Act compounds a need for legislative clarification.

36. Associate Professor Adiva Sifris has suggested that the absence of legal parentage in such cases is unsatisfactory, not only for the child (in terms of the public validation of their family structure and culture), but also due to the impacts on intergenerational relationships and entitlements, noting how the law of succession and rights on

[33] ALRC, *Review of Surrogacy Laws – Issues Paper* (Issues Paper 52, June 2025) 18; *Re N* [2025] NSWSC 409.
[34] (2014) 53 Fam LR 547; [2015] FamCA 736.
[35] Ibid.
[36] *Bernieres & Dhopal* [2017] FamCAFC 180.
[37] [2019] HCA 21.
[38] [2021] FedcFamC1F 279.

intestacy rest on proof of kinship.[39] The Law Council agrees that it is unsatisfactory that there is no avenue for legal parentage for intended parents who do not meet strict State or Territory requirements for parentage orders.

37. There are matters (at the State/Territory and federal levels) where a parent's or child's rights and entitlements are determined by legal parentage. For example, child support obligations only fall on legal parents.[40] In addition, there are various sections under the Family Law Act that treat legal parents differently to non-parents.[41] This means that, if the intended parents separate at any time, children can be left vulnerable.

38. Uncertainty about legal parentage under the Family Law Act and the *Child Support (Assessment) Act 1989* (Cth) means that obtaining financial support and other orders relating to children may involve complex and lengthy legal proceedings, or may not be possible under current laws.

Law Council position

39. The Law Council supports the introduction of uniform parentage laws that ensure the ongoing care and financial support of children born via surrogacy arrangements. There must be, at a minimum, a framework for addressing the needs of children born as the result of commercial surrogacy arrangements who cannot be subject to a State or Territory parentage order.

40. In any system, a balanced and proportionate process should exist for recognising parentage in surrogacy arrangements, emphasising timely processes that cater to the circumstances before and after the child's birth. A clear, legislated pathway to recognise parentage is crucial to prevent unintended consequences that might affect the legal rights of the child, the surrogate, and the intended parents. All decisions should prioritise the best interests of the child, in line with the paramountcy principle outlined in the Family Law Act.

41. To ensure clarity and consistency, and to obviate the need for 'forum shopping', there should be harmonisation of laws related to legal parentage for children born via surrogacy arrangements across Australian jurisdictions. This could be achieved either by way of:

    (a) enactment of uniform legislation at a State and Territory level; or

    (b) referral of power by the States and Territories, allowing the Commonwealth to legislate amendments to the Family Law Act that provide a single avenue for obtaining legal parentage in surrogacy arrangements.[42]

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[39] Adiva Sifris, 'Overseas Compensated Surrogacy Arrangements and the Family Court of Australia: What About the Children?' (2020) 14 *Court of Conscience* 44, 44-47.
[40] *Child Support (Assessment) Act 1989* (Cth) s 5.
[41] See, e.g., *Family Law Act 1975* (Cth) s 60CC(2), where the parent-child relationship is a consideration in determining what is in a child's best interests.
[42] See, e.g., *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2003* (SA); *Commonwealth Powers (De Facto Relationships) Act 2003* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2003* (Vic).

Interaction between migration law and international surrogacy arrangements

Questions 20 and 21:

- **What, if any, are the main problems with obtaining the following documents for a child born through international surrogacy:**
  - **a) Australian citizenship;**
  - **b) an Australian passport; or**
  - **c) an Australian visa.**
- **How could the process for obtaining these documents be improved?**

42. The Law Council emphasises the critical need for a balanced and proportionate framework to address existing challenges relating to obtaining and accessing documents relating to citizenship, passport materials, and immigration.

43. Noting that children born overseas require either a visa or citizenship to enter Australia, clearer guidelines and streamlined procedures are required in order to obtain documents (e.g., citizenship, an Australian passport, and an Australian visa) for children born through international surrogacy.

44. In addition, proactive efforts are required to improve communication and coordination between Commonwealth agencies that are involved in the processing of applications for these documents.

Citizenship

45. Children born overseas may be eligible for Australian citizenship in the following ways:

    (a) Adoption outside Australia by an Australian citizen (i.e., at least one parent must be an Australian citizen) in accordance with the Hague Convention on Intercountry Adoption, or a bilateral agreement.[43] We understand that this is a less common pathway to citizenship.

    (b) Citizenship by descent pursuant to section 16(2) of the *Australian Citizenship Act* 2007 (Cth). To be eligible (among other requirements), the person must have a parent who was an Australian citizen at the time of birth. We understand that this is a more common pathway to citizenship.

    Neither option is available unless at least one parent is an Australian citizen (permanent residency does not suffice).

46. The Law Council has received anecdotal feedback that obtaining a grant of citizenship by descent for children born via international surrogacy arrangements is exceptionally complicated and time-consuming. Further, in cases where there is a requirement for parental DNA testing, the process can be complex, especially in cases of gestational surrogacy involving third-party genetic material. The intended parents can face large evidence requests that can hinder family reunification, and the child may be potentially left stateless and without care, in contravention of the

[43] *Australian Citizenship Act 2007* (Cth) s 19C.

child's right under the CRC to be cared for by their parents, and their fundamental right to family and a home.[44]

47. The question of who qualifies as a 'parent' is particularly important for the purposes of obtaining citizenship for the child born via international surrogacy arrangements, particularly when there is no biological link between the intended parent(s) and the child. In *H v Minister for Immigration and Citizenship*,[45] the Full Court of the Federal Court of Australia (**FCA**) held that a non-biological parent could be a 'parent', depending on the circumstances, with consideration to be given to social, legal, and biological factors. Relevantly, at [130], the Court stated:

> *In deciding whether a person can be properly described as the applicant's parent, the Tribunal is obliged to consider the evidence before it, including evidence as to the supposed parent's conduct before and at the time of birth and evidence as to the conduct of any other person who may be supposed to have had some relevant knowledge. Evidence as to conduct after the birth may be relevant as confirming that parentage at the time of birth. For example, evidence that a person acknowledged the applicant as his own before and at the time of birth and, thereafter, treated the applicant as his own, may justify a finding that that person was a parent of the applicant within the ordinary meaning of the word "parent" at the time of the birth.*

48. The requirement that a parent be an Australian citizen at the 'time of the birth' may also create some difficultly. In *Minister for Immigration, Citizenship and Multicultural Affairs v Su*,[46] the Full Court of the FCA stated at [21]:

> *The determination of "time of the birth", as that term is ordinarily understood, does not require an evaluative exercise of the kind required to be undertaken in determining whether the relationship of one individual to another is to be characterised as that of parent to child. It requires the identification of the time at which the child is born. The reference to "the time" in this context refers to a point in time at which an event, namely birth, might be said to occur. It does not refer to an entire day.*

49. This decision, which was consistent with the earlier FCA decision of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Koka*,[47] creates an evidentiary burden that may be difficult to overcome.

Visas

50. If a child born overseas is not eligible for Australian citizenship, the only way that they can enter Australia is by applying for a visa. For the child to be able to remain in Australia, that visa must be permanent.

51. The following permanent visas are available:

    (a) An adoption visa that allows an Australian citizen or permanent visa holder to sponsor a child adopted overseas.

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[44] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7, 16.
[45] [2010] FCAFC 119.
[46] [2024] FCAFC 68.
[47] [2020] FCA 1471.

- Obtaining an adoption visa is generally a complicated process, with the two most common ways being that a sponsor was already living overseas for 12 months, or that the child is to be adopted in accordance with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.

(b) A child visa that allows an Australian citizen or permanent visa holder to sponsor their child or step-child.

- Section 5CA of the *Migration Act 1958* (Cth) provides that a 'child of a person' has the same meaning as that under the Family Law Act.

- The granting of the child visa is subject to Public Interest Criterion 4017 under Schedule 4 of the *Migration Regulations 1994* (Cth). If a child visa is an available avenue, Public Interest Criterion 4017 requires that the Minister be satisfied that either:

  (i) the law of the applicant's home country permits their removal; or

  (ii) each person who can lawfully determine where the applicant is to live consents to the grant of the visa; or

  (iii) the grant of the visa would be consistent with any Australian child order in force in relation to the applicant.

- There can be complexity in identifying (ii)—where a child can live—although this can be overcome if the law of the country permits the child's removal, so this does not usually present a significant hurdle.

52. Two other notable criteria apply to both adoption and child visas, and are applicable to all children applying for either category of visa:

(a) Both visas are subject to a health criterion, namely Public Interest Criterion 4007.[48]

- This is a discretionary criterion that allows the Minister to refuse a visa on the basis that it will likely result in a significant cost to the Australian community in the areas of health care and community services, or prejudice the access of an Australian citizen or permanent resident to such care and services.

(b) Both visas are subject to a discretion to request an Assurance of Support (**AOS**) and refuse the visa if an Assurance is not provided.

- An AOS is a promise to financially support the child and make repayments if the child receives financial support. The challenge often lies in the fact that, to provide an AOS, a person must have a specific income. This amount varies, depending on the number of people giving the Assurance, and how many dependents they have.

[48] *Migration Regulations 1994* (Cth) sch 4.

Harmonisation and oversight

Question 22: What is the best way to approach differences in surrogacy regulation between or within jurisdictions?

53. As noted earlier, the existing legislative framework for surrogacy is complex, and requires parties to navigate both Commonwealth and State/Territory laws. These complexities are creating conditions that may lead people to seek unregulated surrogacy services overseas.

54. Each State and Territory typically has differing requirements, parameters, and mechanisms with respect to eligibility, process (e.g., counselling and legal advice), and reimbursing the surrogate's reasonable expenses. For example, the age that the surrogate must be, and the age that the intended parents must be, differs in various jurisdictions. In the Australian Capital Territory, the surrogate and intended parents must both be 18 years of age.[49] In NSW, the surrogate and intended parents must be at least 25 years old, which can be lowered in exceptional circumstances.[50] In Victoria, the surrogate must be at least 25 years old, and the intended parents must be at least 18 years of age.[51]

55. To promote certainty and to reduce the potential for 'forum shopping', the Law Council supports national surrogacy laws that would promote a uniform approach to surrogacy across all States and Territories. As outlined earlier in this submission, this would require enactment of uniform legislation at a State and Territory level, or the referral of powers to the Commonwealth.

56. The Report of the 2016 Parliamentary inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements was supportive of greater national consistency on surrogacy laws, specifically domestic altruistic surrogacy arrangements.[52] In its response to the Report in 2018, the then Government agreed, in principle, with this proposal.[53]

57. As a starting point, a harmonised legislative framework should consider the inclusion of:

- clear guidelines about the eligibility requirements for surrogates and the intended parent(s) that aim to remove unnecessary and discriminatory barriers;
- provisions relating to the use of advertising for a surrogate;
- a uniform list of expenses that can be covered under a surrogacy agreement;
- a simplified and consistent process for obtaining a legal parentage order, including consideration of whether an application for a parentage order can be commenced prior to the child's birth;
- guidance on the means by which a surrogate mother can be recognised in other legal documents, separate to a birth certificate; and

[49] *Parentage Act 2004* (ACT) ss 7, 8, 9, 11.
[50] *Surrogacy Act 2010* (NSW) ss 27-29.
[51] *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b).
[52] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements* (Report, April 2016), Recommendations 2-5.
[53] Australian Government, *Australian Government response to the Standing Committee on Social Policy and Legal Affairs report: Surrogacy Matters* (November 2018) 3-4.

- clarity on the recognition of the parentage of children born via international surrogacy arrangements.

Question 23: Is it appropriate for surrogacy arrangements to be subject to oversight? If so, what is the best approach?

58. The Patient Review Panel and the Reproductive Technology Council act as regulators of surrogacy in Victoria and Western Australia, respectively. The benefit of these independent regulators is that they are not aligned with any involved party—noting that the legal practitioners, counsellors, and fertility clinics are engaged by a party for a specific purpose.

59. The Law Council, therefore, supports establishing a streamlined regulatory authority, preferably at the Commonwealth level, to support compliance with, and oversight of, surrogacy arrangements. This oversight body could have responsibility for:

- processes governing eligibility;
- compliance;
- practical harmonisation across jurisdictions;
- provision of education and guidance materials to parties (and the community more broadly); and
- facilitating access to specialised dispute resolution processes.