Australian Government
Australian Law Reform Commission

DISCUSSION PAPER

# REVIEW OF SURROGACY LAWS

Discussion Paper 89
November 2025

The Australian Law Reform Commission acknowledges the Traditional Owners and Custodians of Country throughout Australia and their continuing connection to land, sea, and community. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders past and present. In particular, we acknowledge the Traditional Custodians of the lands on which our offices are based: the Wurundjeri people of the Kulin Nation for our Melbourne office; and the Jagera people and Turrbal people for our Brisbane office.

Unless otherwise stated, this Discussion Paper reflects the law as at 16/10/2025.

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# This Discussion Paper

1. Surrogacy is the practice of a person carrying and giving birth to a child for another person or people. The Attorney-General of Australia has asked the Australian Law Reform Commission ('ALRC') to review Australian surrogacy laws, policies, and practices. In summary, we have been asked to make recommendations about how to better regulate surrogacy in Australia.

2. Our Issues Paper gives an overview of this Inquiry. It explains some of the problems with how surrogacy is regulated in Australia and how these problems might be solved.[1]

3. This Discussion Paper builds on the conversation we started in the Issues Paper. It outlines options to improve how surrogacy is regulated in Australia and asks for your thoughts to help us refine these options. You can tell us what you think by making a submission.

4. The feedback that we receive to this Discussion Paper will help us make recommendations for the Final Report.

5. This Discussion Paper is less detailed than the Final Report will be. It aims to present the issues in an accessible way to encourage feedback. At this stage, we have not cited all the submissions that have informed our thinking. We will do this in the Final Report, as well as explain and justify the recommendations we make in more detail.

This Discussion Paper has 8 parts:

| Part | | Here you will find… |
|---|---|---|
| **1** | **Potential reforms in overview** | A summary of the key proposals outlined in the Discussion Paper and how they would work together. |
| **2** | **Approach to reform and reform principles** | The human rights and principles we have used to guide our proposals. |
| **3** | **A supportive institutional framework** | Options for reform that would create the architecture for both regulating and reducing barriers to domestic surrogacy. |
| **4** | **Parameters of lawful surrogacy** | Options for reform that define and regulate behaviour that would fall outside the regulatory framework. |
| **5** | **Support getting started** | Options for reform that set out the requirements that would apply to intended parents and surrogates, and how their rights and obligations would be determined and enforced. |
| **6** | **Support through the surrogacy journey** | Options for reform relating to financial and other support for surrogates and intended parents. |
| **7** | **Support when the child is born** | Options for reform relating to processes after the child is born, including for people born through surrogacy. |
| **8** | **Regulating overseas surrogacy** | Options for reform to better regulate the use of overseas surrogacy by Australian citizens and permanent residents. |

1 Australian Law Reform Commission, Review of Surrogacy Laws (Issues Paper No 52, 2025).

## Key terms

6. The following are the key terms we use in this Discussion Paper. We understand that these terms can evolve, or people may not agree with the terms listed here. We welcome feedback in your submission on the best terms to use in this Inquiry.

| | |
|---|---|
| **Administrative pathway** | The proposed pathway to legal parentage for **domestic surrogacy.** Where parties have an **approved surrogacy arrangement**, and a child is born, **intended parents** are the child's **legal parents** at birth. |
| **Approved surrogacy arrangement** | A **surrogacy agreement** which complies with the legislative requirements and has been approved. Once approved, this enables the **administrative pathway** to legal parentage. |
| **Compliant surrogacy agreement** | A **surrogacy agreement** that meets the requirements for approval. |
| **Domestic surrogacy** | A **surrogacy arrangement** in Australia involving an **intended parent** who usually resides in Australia. |
| **Gestational surrogacy** | A **surrogacy arrangement** where the egg used came from an **intended parent** or an egg donor. |
| **Impermissible profit or reward** | Profit or reward for a surrogacy arrangement that is not lawful and subject to sanctions. The ALRC is still considering the precise boundaries of what should be lawful. See **Proposals 25**–**27**. |
| **Intended parent(s)** | A person or people seeking to have a child through **surrogacy**, who intend to raise the child after the birth. |
| **Judicial pathway** | The proposed pathway to parentage where a **surrogacy arrangement** has occurred, but the arrangement has not been approved. This includes all **overseas surrogacy** arrangements. Parties may apply to the Federal Circuit and Family Court of Australia for an order to transfer parentage to the **intended parent(s)** after the child is born. |
| **Legal parent(s)** | The person or people who are legally recognised as a child's parents. |
| **Overseas surrogacy** | A **surrogacy arrangement** involving **intended parent(s)** who are Australian citizens or permanent residents who usually reside in Australia and a **surrogate** who is located outside Australia. |
| **Parental responsibility** | Holding the duties, powers, and responsibilities for a child which would usually be held by a **legal parent**. For example, the power to make medical decisions for the child. However, this falls short of legal parentage. |
| **Parents through surrogacy** | A person or people who have undertaken a **surrogacy arrangement** as **intended parent(s)** through which a child has been born or still born**.** |

| | |
|---|---|
| **Prohibited surrogacy arrangement** | A **surrogacy arrangement** that is unlawful under the legislation. Specifically, a **domestic surrogacy arrangement** that is for **impermissible profit or reward**, or an **unregistered overseas surrogacy arrangement**. |
| **Registered overseas surrogacy arrangement** | An **overseas surrogacy arrangement** that has been registered with the registration entity. |
| **Surrogacy** | Surrogacy is the practice of a person becoming pregnant, carrying the pregnancy, and giving birth to a child for another person or people, intending that the other person or people will be the child's **legal parent(s)**. Surrogacy can be a **traditional surrogacy** or a **gestational surrogacy**. |
| **Surrogacy agreement** | An agreement made between the **surrogate**, the surrogate's partner (if any), and the **intended parent(s)**, setting out the parties' rights, obligations, and intentions. This may or may not be a **compliant surrogacy agreement**, and it may or may not be an agreement recognised by the common law. |
| **Surrogacy arrangement** | All the processes and procedures associated with a **surrogacy**. This may or may not include a **surrogacy agreement**. It is a general term used to describe all arrangements, regardless of whether they meet the statutory requirements. |
| **Surrogate** | A person who becomes pregnant, carries the pregnancy, and gives birth to a child for another person or people, intending that the other person or people will be the child's **legal parents**. |
| **Traditional surrogacy** | A **surrogacy arrangement** where the **surrogate** uses their own egg (also known as 'genetic' surrogacy). |
| **Unregistered overseas surrogacy arrangement** | An **overseas surrogacy arrangement** that has not been registered with the registration entity. |

## Making a submission

7. Making a submission is a way for people to contribute their experiences, expertise, and views to help the ALRC understand how the law should be changed. We welcome submissions from anyone who is interested in the Inquiry.

8. The Discussion Paper has 'proposals' and 'questions' that you may wish to comment on:

- **Proposals** — There are 41 proposals (**Proposals 1**–**41**) which propose reforms we may recommend in our Final Report. Some proposals present 'options' where we are seeking feedback to help identify the best potential reform.
- **Questions** — There are 24 questions (**Questions A**–**X**). Questions seek feedback on a reform direction, or help refine how a proposal could work.

9. A standalone document listing the proposals and questions is available on the **ALRC website**.

10. You can put your submission together in any way that works for you. For example, you can:

- choose to respond to all or just some of the proposals and questions in this Paper;
- tell us about your experience of surrogacy more generally; or

- comment on parts of our Terms of Reference, without using the proposals and questions in this Paper.

11. You do not need to respond to every proposal or question listed to make a submission.

12. To make a written submission, upload it through the **ALRC website**.

13. If you are unable to make a written submission or upload it through our website, please contact us about other ways to make a submission.

14. We will accept submissions until **Friday 19 December 2025**.

**Submission confidentiality**

When you make a submission, please tell us if you want it to be:

- **public** — this means it will be published online, along with your name;
- **de-identified** — this means it will be published online, but anonymised. We will remove your name, other names mentioned in some circumstances, and any other identifying details before we publish it; or
- **confidential** — this means it will not be published online, and your name will not be included in our list of submissions.

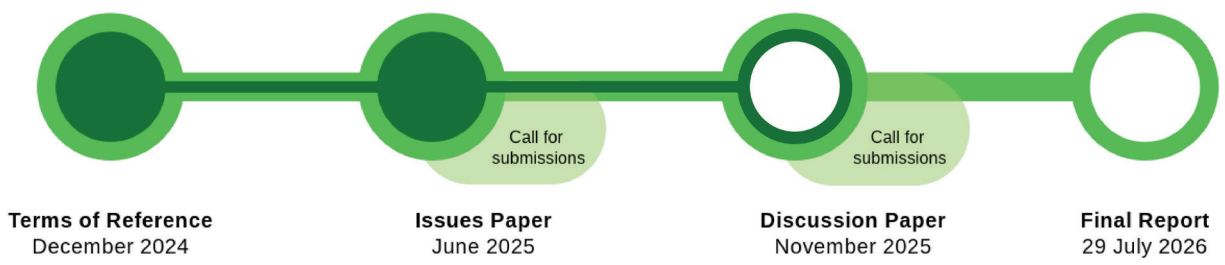
If you do not specify, we will treat your submission as a public submission, subject to any laws that apply and our **submission policy**.

We want to encourage submissions from people who have personal experience of surrogacy. This includes surrogates, intended parents, parents through surrogacy, and people born through surrogacy. However, some Australian laws prohibit us from identifying people involved in surrogacy arrangements or family court proceedings. For this reason, **we will de-identify all submissions which identify, or may identify, people involved in surrogacy arrangements**. If we determine that your submission does not need to be de-identified for this purpose, we will ask for your consent before publishing it in this form.

We will only disclose identifying information outside the parameters above if the law or a court tells us to do so. In making a submission, and given commercial surrogacy is illegal is some jurisdictions, you may want to consider whether you are disclosing information that might expose you, or others, to legal risks or consequences.

## What happens next?

15. We will publish submissions on our website, in line with the confidentiality process above and our **submission policy**.



16. The ALRC will write a Final Report that considers all the responses we receive in submissions to the Issues Paper and Discussion Paper, consultations, as well as our research. Our Final Report to the Attorney-General is due in July 2026.

## Potential reforms in overview

17. The Terms of Reference ask the ALRC to consider how to reduce barriers to accessing domestic surrogacy and other issues. The ALRC has been asked to identify legal and policy reforms that are consistent with Australia's international obligations and that protect and promote the human rights of people born through surrogacy, surrogates, intended parents, and parents through surrogacy.

18. The ALRC's approach to reform is based on the reform principles outlined **below** and informed by the following reasoning.

19. Australian surrogacy laws create a regulatory regime that permits some surrogacy arrangements and prohibits others. The dividing line between surrogacy arrangements that are permissible and those that are not is based on the idea that surrogacy arrangements that allow for profit or reward for the surrogate are more likely to be exploitative.[2] This conceptual boundary has been brought into effect by allowing surrogacy arrangements that are not for profit or reward (often labelled 'altruistic surrogacy') and prohibiting surrogacy arrangements that are for profit or reward (often labelled 'commercial surrogacy').

20. A key objective of the current legislation is to reduce the risk of exploitation.[3] The ALRC agrees with, and has based its proposals on, this objective. Environments with little or no regulation can lead to surrogacy arrangements that are unsafe, and that undermine informed consent and other fundamental human rights.[4]

21. However, the current legislation fails to meet this important objective in two ways. First, the limited availability of domestic surrogates drives intended parents to access surrogacy arrangements overseas,[5] in the context of increasing demand for surrogacy.[6] These arrangements may be exploitative,[7] and create other harms experienced in Australia for intended parents and children born through surrogacy, such as challenges obtaining legal parentage.[8]

22. The lack of available surrogates in Australia appears to be linked, in part, to an overly strict prohibition on reimbursing surrogates, which can leave the surrogate financially out of pocket.[9] The proposals in this Discussion Paper recognise that the surrogate's costs and losses can be more fully recovered without compromising the objective of prohibiting surrogacy arrangements that are for profit or reward.

23. Secondly, the current regime hinges on prohibiting surrogacy arrangements that are for profit or reward. Other measures are more likely to be effective at achieving the objective of

2 See, eg, Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23(2) *Journal of Law and Medicine* 275, 288–289.
3 See, eg, *Surrogacy Act 2022* (NT) s 5.
4 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) 27–28.
5 Ezra Kneebone et al, 'Australian Intended Parents' Decision-Making and Characteristics and Outcomes of Surrogacy Arrangements Completed in Australia and Overseas' (2023) 26(6) *Human Fertility* 1448, 1492.
6 Data provided by the Department of Home Affairs to the Australian Law Reform Commission, 17 April 2025; Stephen Page, 'Surrogacy in Australia: The "Failed Experiment"?' (2023) 174 *Precedent* 22, 25.
7 See, eg, Australian Government, 'Issues That Have Arisen from Engaging in Surrogacy Overseas', *Surrogacy in Australia* <https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas>.
8 See **Pathways to legal parentage**.
9 For a discussion on the financial impacts on surrogates, see '**Cost recovery for surrogates**'. Other reasons that appear to contribute to a lack of surrogate availability include a lack of awareness (see '**Increasing awareness and education**') and limited opportunities to connect (see '**Connecting intended parents and surrogates**').

avoiding exploitation, when compared to the current regime. The proposals aim to put into place rigorous safeguards alongside an approval process, which occur at the start of the surrogacy arrangement. People attempting to access domestic surrogacy would need to comply with this approval process, especially as access to assisted reproductive technology, critical to gestational surrogacy (the most common type of surrogacy used),[10] would depend on it.

24. The proposals further avoid exploitation by diverting Australians away from risky overseas surrogacy arrangements where there may be less robust legal frameworks for managing human rights concerns. The proposals improve access and encourage intended parents to engage in domestic surrogacy through measures such as Surrogacy Support Organisations and less restrictions on advertising.

25. Additionally, proposed mechanisms to facilitate better compliance, including a National Regulator (or alternative) and civil penalty regimes, can more effectively avoid exploitative arrangements, both in Australia and overseas. The rights and best interests of children are further reinforced by a proposed administrative pathway, to remove barriers to legal parentage, and proposals to uphold their right to identity.[11]

26. Together, the potential reforms would enable surrogates and intended parents to be involved in surrogacy arrangements within a regulatory environment that protects their rights and minimises the risk of exploitation. Similarly, people born through domestic surrogacy would be born within a system that better safeguards their rights.[12]

27. By adopting these measures, surrogacy legislation will be better enabled to meet its objective of reducing the risk of exploitation.

**What we have heard**

The ALRC received many submissions to the Issues Paper from a broad cross-section of the community. Many submissions came from people who have had personal experience of surrogacy, including surrogates, intended parents, parents through surrogacy, and people born through surrogacy. We heard from members of the public, practitioners, academics, advocacy bodies, and government agencies.

Those who made submissions had diverse views about surrogacy. Many viewed surrogacy in a positive light and were keen to contribute their experiences and ideas to improve how it is regulated. A clear theme in these submissions was that accessing domestic surrogacy, from the start of the process to securing legal parentage, often felt like a difficult, uncertain, and long journey. There was also a strong emphasis on the need for regulation to promote the best interests of people born through surrogacy. However, many submissions opposed surrogacy from a moral or ethical standpoint, challenged it as a legitimate way to have children, or expressed concerns about the risks it can bring. These submissions often called for surrogacy to be banned.

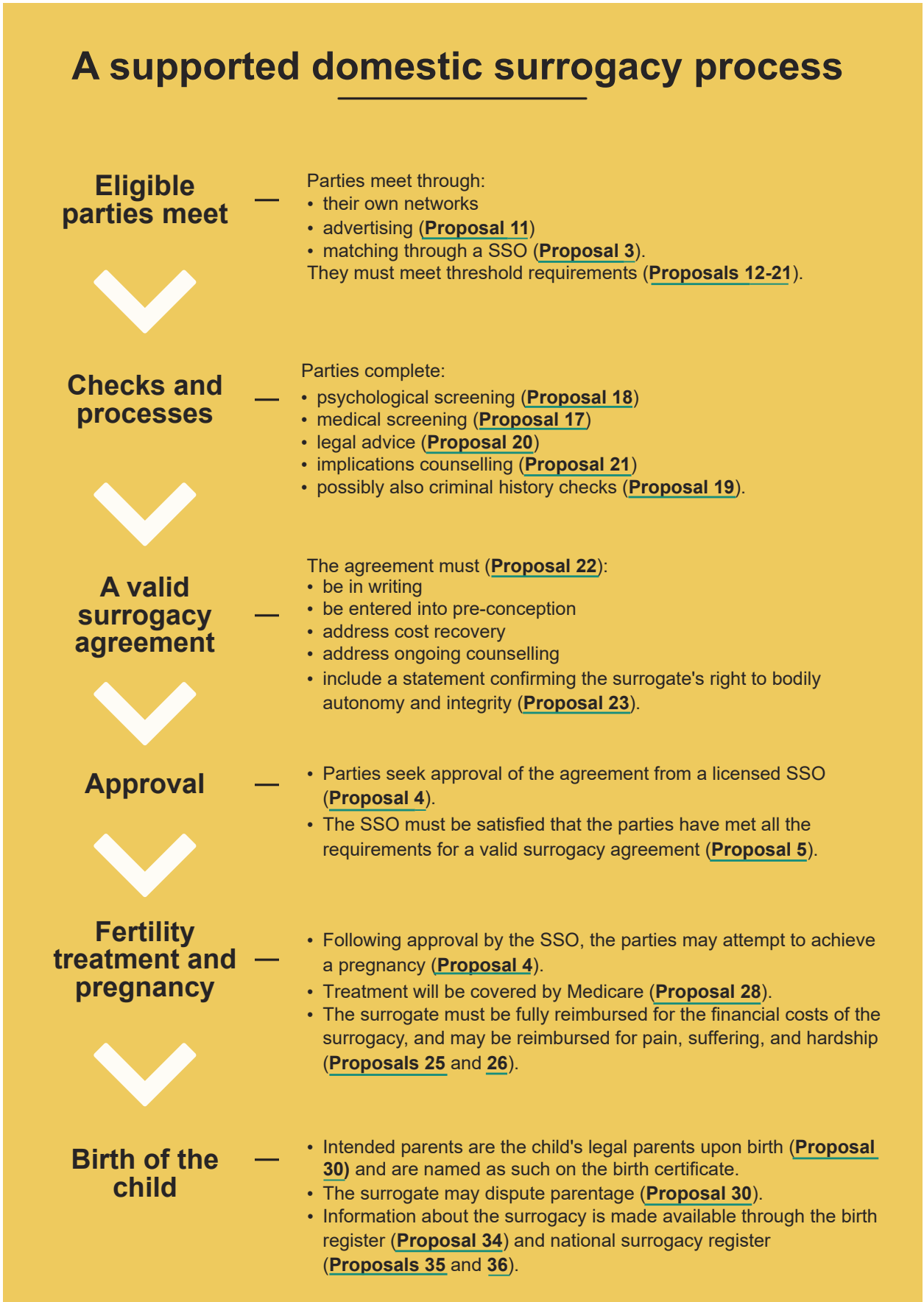
In the Final Report, we will canvass these different views in more detail. In the meantime, the ALRC wishes to thank everyone who took the time to make a submission in response to the Issues Paper.

10 See, eg, Sarah Jefford, *More Than Just a Baby: A Guide to Surrogacy for Intended Parents and Surrogates* (2020) 6–7.
11 See **Pathways to legal parentage** and **Information about a person's gestational identity**.
12 E Kneebone, *Submission 321*.

28. The proposals in this Discussion Paper put forward an improved system for regulating surrogacy in Australia. The main features of this system are:

- a nationally consistent legal and regulatory framework for surrogacy (**Proposals 1**–**2**);
- improved compliance through oversight by a National Regulator, and a civil penalty regime, if recommended (**Proposals 2**, **6**, **8**–**10** and **36**);
- a range of ways in which eligible parties (see **Proposals 13**–**16**) can meet, including through Surrogacy Support Organisations (**Proposal 3**), or less restrictive advertising (**Proposal 11**);
- safeguards that must be complied with, including medical and psychological screening (**Proposals 17**–**18**), a requirement to obtain legal advice (**Proposal 20**), undergoing implications counselling (**Proposal 21**), and obtaining a criminal history check, if required (**Proposal 19**);
- a requirement that surrogacy agreements are in writing, entered into before conception, and include particular content (**Proposal 22**);
- access to Medicare-subsidised fertility treatment (**Proposal 28**), once safeguards have been complied with (**Proposals 17**–**21**) and a compliant surrogacy agreement has been approved (**Proposals 4**–**5** and **22**–**23**);
- full coverage of the surrogate's costs and losses, including hardship payments at the surrogate's election, to recognise commonly incurred and extraordinary losses experienced as a result of the pregnancy or childbirth (**Proposal 25**–**26**);
- other supports during the surrogacy arrangement, including Medicare-subsidised ongoing counselling (**Proposal 29**);
- for approved surrogacy arrangements, an administrative pathway to legal parentage where intended parents are recognised as the legal parents of the child upon birth (**Proposal 30**);
- for unapproved domestic surrogacy arrangements and overseas surrogacy arrangements, legal parentage can only be transferred to intended parents through a court process in the Federal Circuit and Family Court of Australia (**Proposal 31**);
- for overseas surrogacy arrangements, if intended parents have gone through certain steps to register the arrangement, they can access a streamlined process for the child to obtain citizenship and passport documents (**Proposal 37**); and
- regardless of how legal parentage is achieved, information about the surrogacy arrangement is flagged on the birth certificate and available via a surrogacy register (**Proposals 33**–**34**).

*Fig 1: A supported domestic surrogacy process*



## Approach to reform and reform principles

29. While surrogacy has gained increased acceptance in society as a way to become a parent,[13] there remain concerns in the community about the practice. In this Inquiry, we have heard from groups who oppose surrogacy on moral or religious grounds. Some believe that surrogacy separates a child from their mother,[14] which is traumatic and has other negative impacts.[15] Some have compared surrogacy to 'forced adoption', as they view surrogacy as forcing a child's natural parent to give their child away.[16] There are groups that believe that surrogacy violates the rights of the child and exploits women.[17] For example, some feminists oppose surrogacy,[18] partly because they may view it as serving the interests of men at the expense of women's rights.[19] Religious groups we heard from emphasised the importance of having married, biological parents.[20] These views reflect broader debates that are happening about surrogacy, including internationally. Recently, the United Nations Special Rapporteur on Violence against Women denounced surrogacy as exploitative and violent.[21] The Special Rapporteur, and others, have called for a ban on surrogacy as a regulatory response.[22]

30. In contrast, Australian governments clearly recognise surrogacy as a legitimate practice by legislating for it. Most Australians between 18–49 years old support access to surrogacy for heterosexual and same-sex couples.[23] Longitudinal research tentatively indicates that the outcomes for children born through surrogacy are similar to natural conception.[24] Surrogacy has been viewed as a form of assisted reproductive technology,[25] now a standard medical intervention, which is generally less regulated. Other inquiries have observed that prohibiting surrogacy just results in it being 'exported' to other jurisdictions, or drives the practice underground.[26]

31. The Terms of Reference ask the ALRC how best to regulate surrogacy, rather than whether it should be allowed as a practice at all. As such, while the ALRC acknowledges that some would prefer to ban surrogacy, this Inquiry will focus on how to make current laws, policies, and practices work better for everyone involved in surrogacy arrangements.

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13 Kelton Tremellen and Sam Everingham, 'For Love or Money? Australian Attitudes to Financially Compensated (Commercial) Surrogacy' (2016) 56(6) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 558, 561. See also, Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 10.

14 See, eg, Australian Catholic Bishops Conference, *Submission 187*; Catholic Women's League Australia, *Submission 241*; Adoptee Rights Australia, *Submission 344*.

15 See, eg, Adoptee Rights Australia, *Submission 344*.

16 See, eg, P Zagarelou-Mackieson, *Submission 48*. For more on forced adoption, see Nahum Mushin, 'Adoption Law Reform: A Personal View' (2024) 12(1) *Griffith Journal of Law & Human Dignity* 88, 93.

17 Australian Christian Lobby, *Submission 104*; Abolish Surrogacy Australia, *Submission 112*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*.

18 See, eg, Feminist Legal Clinic Inc., *Submission 271*.

19 See, eg, M Somerville, *Submission 106*; Australian Feminists for Women's Rights (AF4WR), *Submission 182*.

20 See, eg, Australian Christian Lobby, *Submission 104*; Australian Catholic Bishops Conference, *Submission 187*.

21 Special Rapporteur on violence against women and girls, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 80th sess, UN Doc A/80/158 (14 July 2025) 22.

22 See, eg, Australian Christian Lobby, *Submission 104*; Abolish Surrogacy Australia, *Submission 112*; Coalition submission, made via the Affiliation of Australian Women's Advocacy Alliances (AAWAA), *Submission 155*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; Australian Catholic Bishops Conference, *Submission 187*; Catholic Women's League Australia, *Submission 241*; Feminist Legal Clinic Inc., *Submission 271*.

23 Tremellen and Everingham (n 13) 559–560. Note the majority of respondents were in their 30s and 40s.

24 Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2016) 22(2) *Human Reproduction Update* 260, 274; Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1973–1974; Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1230; but see Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653, 658.

25 For example, national ethical guidelines on the clinical practice of assisted reproductive technology include 'surrogacy' under the umbrella of assisted reproductive technology practices: National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) 42.

26 See, eg, New Zealand Law Commission, *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Report 146, 2022) 33.

32. In developing the proposals in this Discussion Paper, the ALRC has considered the human rights of people born through surrogacy, surrogates, intended parents, and parents through surrogacy, as required by our Terms of Reference, as well as other reform principles. We note that while all these rights and principles are important, they may not be equally important in every situation, and there may be a need to balance competing rights and principles. While surrogacy has been compared to adoption or gamete donation, it raises different questions to these methods of forming a family; we have ultimately approached surrogacy 'through its own lens'.[27]

33. The ALRC notes that the terms 'altruistic surrogacy' and 'commercial surrogacy' are often presented as mutually exclusive. This binary categorisation of surrogacy has been viewed as problematic and 'a fiction of law', which fails to reflect 'evidence of the reality of the practice'.[28] We agree that these terms are unhelpful and not mutually exclusive. For example, regardless of how much a surrogate is paid, they could still have an altruistic motivation or face the risk of being exploited.[29] Therefore, we have not used these terms where possible.

## A human rights approach

34. The Terms of Reference ask the ALRC 'to consider Australia's human rights obligations' in undertaking this inquiry.[30] When regulating surrogacy, it is important to consider the rights of people born through surrogacy, surrogates, intended parents, and parents through surrogacy — with the best interests of the child being a primary consideration.[31] Many submissions received in response to our Issues Paper addressed this human rights dimension.[32] The proposals aim to foreground and prioritise the rights of the child, as enshrined in the Convention on the Rights of the Child, to which Australia is a party.[33]

### *Children's rights*

35. It is clear that safeguards are critical to ensuring that surrogacy is conducted in a way that does not amount to the sale of children, in contravention of the Convention on the Rights of the Child.[34] Further, children have a right to be safe and free from harm and exploitation,[35] a right to be cared for by their parents,[36] as well as a right to privacy, family, and home.[37]

27 A similar approach was taken by the Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Comm Report No 411, Scot Law Com Report No 262, 2023) 7 [1.20].

28 Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23(2) *Journal of Law and Medicine* 333, 334.

29 Ibid.

30 See also *Australian Law Reform Commission Act 1996* (Cth) s 24(1).

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

32 See, eg, S Page, *Submission 130*; Peter McMullin Centre on Statelessness, *Submission 174*; Equality Australia, *Submission 253*; Castan Centre for Human Rights Law, *Submission 331*; Law Council of Australia, *Submission 342*. Many other submissions also cite Australia's international human rights obligations as principles to guide any reforms on surrogacy. There are also submissions that raise human rights issues to argue against surrogacy, mainly pointing out that surrogacy violates, or is not aligned with, children's and women's rights: see, eg, Centre for Bioethics and Culture (US), *Submission 90*; Australian Christian Lobby, *Submission 104*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; Australian Catholic Bishops Conference, *Submission 187*; Catholic Women's League Australia, *Submission 241*; Women's Declaration International (Australia), *Submission 296*; Stop Surrogacy Now UK and Surrogacy Concern, *Submission 303*.

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

34 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 35; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, UN Doc A/RES/54/263 (entered into force 18 January 2002) art 1; International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) 23. For a critique of the categorisation of surrogacy as constituting the sale of a child see: Equality Australia, *Submission 253*.

35 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 19, 34, 36.

36 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.

37 Ibid art 16.

36. While some may view the surrogate as the child's parent,[38] and this represents the starting point of the current law,[39] barriers to intended parents obtaining legal parentage risk violating the rights of the child discussed **above**,[40] as well as the right to be free from discrimination.[41] Such barriers prevent the child's social family from being recognised as their legal family and treat children born through surrogacy differently from other children.[42] In Australia, failure to recognise a child's intended parent(s) as their legal parent(s) may have an impact on matters such as the child's citizenship rights and ability to obtain a passport, as well as their access to medical treatment.[43] It is with a focus on the rights of the child that we have developed our proposals for reforming the law on legal parentage (for example, **Proposals 30**–**32**, **38**).

37. Finally, children born through surrogacy also have rights to preserve their identity, which manifests as a right to access information about their genetic and gestational origins,[44] as well as a right to nationality.[45] It is with these rights in mind that we propose an addendum to the child's birth certificate (**Proposal 33**), a surrogacy register (**Proposal 35**),[46] and a streamlined process for accessing Australian citizenship (**Proposal 39**).[47]

### *Surrogates' rights*

38. Views about surrogates' rights often reflect broader views about surrogacy: those who see it as a social good emphasise the surrogate's rights to autonomy and work, while some critics view it as an exploitative and degrading practice. In reality, the picture is more complex — rigidly categorising surrogacy as either human rights compliant or non-compliant is unhelpful, since compliance depends on the context. Surrogacy arrangements in jurisdictions that are unregulated or poorly regulated, or marked by significant social and economic inequality, create conditions that risk exploiting the surrogate and violating their human rights.[48]

39. Such rights include the right to be free from harm and exploitation,[49] the right to be free from discrimination (including discrimination based on race or gender),[50] and the right to be free from slavery and forced labour.[51] The rights to autonomy and bodily integrity require that people are free to make choices about their own body, including by making an informed decision about whether to act as a surrogate, without being coerced or inappropriately induced, and to receive any medical

38 See, eg, Mothers Adoption Loss Alliance, *Submission 291*.
39 See '**Pathways to Legal parentage**'.
40 See, eg, K Cox, *Submission 105*; Name withheld, *Submission 11*; Name withheld, *Submission 115*; Name withheld, *Submission 117*; S Jefford, *Submission 128*; S Page, *Submission 130*; A Whittaker, *Submission 201*.
41 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2; International Social Service (n 34) principle 3.
42 Ronli Sifris and Adiva Sifris, 'Parentage, Surrogacy and the Perplexing State of Australian Law: A Missed Opportunity' (2019) 27 *Journal of Law and Medicine* 369, 369.
43 Alexandra Harland and Cressida Limon, 'Recognition of Parentage in Surrogacy Arrangements in Australia' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge, 2015) 145, 149.
44 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) 8; International Social Service (n 34) principle 11.
45 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.
46 See, eg, Donor Conceived Families Australia, *Submission 311* which supports the creation of a federal register to store and facilitate release of information on donors and surrogates.
47 For further discussion of the right to nationality/citizenship see, eg: Peter McMullin Centre on Statelessness, *Submission 174*.
48 The Hon Chief Justice John Pascoe AC CVO, 'Sleepwalking through the Minefield: Commercial Surrogacy and the Global Response' (Speech, Blackburn Lecture, 15 May 2018).
49 See, eg, *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 6.
50 Ibid art 2; *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.
51 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) 8; Special Rapporteur on violence against women and girls, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 80th sess, UN Doc A/80/158 (14 July 2025) 14-15 [39]-[43].

treatment only with informed consent.[52] Our proposals aim to reinforce these rights; for example, by supporting surrogates to make informed decisions (**Proposals 20** and **21**) and to have their rights to autonomy and bodily integrity clearly protected (**Proposal 23**).[53] Finally, while some see compensation for the surrogate's unique contribution as an employment right,[54] others view it as a moral or ethical imperative,[55] and some consider the idea itself as deeply objectionable.[56] Our approach ensures surrogates are fully reimbursed, and their costs and losses recovered, affirming their dignity and autonomy in line with core human rights principles (**Proposal 25**–**26**).

### *Intended parents' rights*

40. Intended parents also have rights which must be taken into account. Limits on eligibility (for example, based on sex) may amount to discrimination.[57] Limits to freedom of expression, including the right to receive and impart information, may restrict intended parents' ability to make informed decisions.[58] Also relevant is the right to found a family[59] — while the meaning of this right is contested in the surrogacy context, it is clear that intended parents who are desperate for a child might be at risk of being exploited, deceived, and misinformed in their attempt to form a family.[60] Finally, people with disabilities which affect their ability to conceive or carry a child, who may rely on surrogacy to have a baby, are disproportionately affected by barriers to access.[61]

41. The proposals aim to support intended parents' rights by reducing barriers to domestic surrogacy, education, and ensuring appropriate safeguards are in place.

## Other key reform principles

42. The proposals in this Discussion Paper have been guided by a set of reform principles. These principles, which have been refined since the Issues Paper, have been shaped by our Terms of Reference, as well as submissions, consultations, and research.

- **Risk mitigation** — surrogacy can pose risks, including to safety and health. The proposals aim to mitigate these risks before they eventuate. For example, standard checks and processes must be completed (**Proposals 17**–**21**) before a surrogacy arrangement can proceed. The proposals also acknowledge that the risk of exploitation is lower in Australia compared to some other countries, and therefore aim to steer people away from countries with a higher risk of exploitation (**Proposal 37**).

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52 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; *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 16.

53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 9, 17; *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) arts 15, 16.

54 Julie Shapiro, 'For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?' (2014) 89 *Washington Law Review* 1345; Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165.

55 See, eg, Name withheld, *Submission 19*; S Jefford, *Submission 128*; Name withheld, *Submission 276*; Not published, *Submission 309*.

56 See eg, Australian Christian Lobby, *Submission 104*; Abolish Surrogacy Australia, *Submission 112*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; Australian Catholic Bishops Conference, *Submission 187*; Catholic Women's League Australia, *Submission 241*; Anglican Church Diocese of Sydney, *Submission 247*; Feminist Legal Clinic Inc., *Submission 271*.

57 See, eg, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 2; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

58 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.2.

59 Ibid art 23.

60 Sifris, Ludlow and Sifris (n 2) 290–1.

61 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

- **Respect and dignity** — the proposals aim to make sure that all parties involved in a surrogacy arrangement are treated with respect and dignity, recognising the surrogate's unique and vital role in the process, as well as the child's right to access information about their genetic and gestational origins.[62] **Proposal 26** recognises the full impact of being a surrogate, and **Proposals 33**–**35** create a system that provides more accessible and detailed information for people born through surrogacy.
- **Accessibility** — reform efforts should try to ensure laws are inclusive and do not discriminate. While some financial barriers may be unavoidable, the proposals aim to improve financial accessibility wherever possible (for example, **Proposal 28** provides for Medicare-subsidised fertility treatment).
- **Pragmatism** — the proposals take a pragmatic approach, which focuses on developing a regulatory framework that is practical and responds to societal needs and advancements in assisted reproductive technology, even where opinions differ about surrogacy.[63] This might also involve finding more effective ways to regulate surrogacy. For example, in relation to prohibited conduct, the proposals acknowledge that it is better to encourage compliance before any prohibited conduct occurs (**Proposals 4** and **5**) and that a civil penalty regime may be more likely to be enforced than criminal sanctions (**Proposals 8**–**10**).
- **Harmonisation** — there are differences between the laws that regulate surrogacy across Australia. In line with the Terms of Reference, the proposals identify ways to make the law more consistent, so that it is more efficient, fair, and certain. More consistent laws may also mean that people do not feel the need to travel to other states and territories that they think may be less restrictive. **Proposal 1** provides some options for making surrogacy laws nationally consistent.
- **Legal clarity and certainty** — it is important that surrogacy regulation provides for clear and certain laws about the rights and obligations of everyone involved 'at the earliest possible time'.[64] When the law is not clear or certain, this can create risks, such as differences in how judges might approach decisions on legal parentage.[65] Proposals on surrogacy agreements (**Proposals 22**–**24**), legal parentage (**Proposals 30**–**32**, **38**), and reimbursement of surrogates (**Proposals 25**–**27**) attempt to provide for clearer and more certain laws.
- **Principle of least restriction** — the proposals recognise that informed decisions by consenting adults should be respected by governments and remain as private arrangements as far as practicable.[66] Oversight of surrogacy arrangements should therefore be limited, rather than having a direct and ongoing role, and should be no more than is required to prevent harm.[67]

62 Peter McMullin Centre on Statelessness, *Submission 174* notes the importance that children know their origins to respect their sense of identity and belonging.

63 Elizabeth S Scott, 'Surrogacy and the Politics of Commodification' 72(3) *Law and Contemporary Problems* 109, 145–6. Scott notes that regulating rather than prohibiting is more effective at mitigating risk and 'promoting social welfare'.

64 Achieving legal clarity about parent-child relationships that result from surrogacy arrangements has been the focus of previous inquiries: New Zealand Law Commission (n 26) 93–4; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) rec 2; South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report 12, 2018) 94, citing Department of Justice (NSW), *Statutory Review: Surrogacy Act 2010* (2018) 6 [2.9]–[2.11].

65 See, eg, Sara L Ainsworth, 'Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States' (2014) 89(4) *Washington Law Review* 1077, 1112.

66 See South Australian Law Reform Institute (n 64) 94–5.

67 Arie Freiberg, *Regulation in Australia* (Federation Press, 2nd ed, 2025) 11–12.

# A supportive institutional framework

43. Many find surrogacy in Australia complex and difficult to navigate.[68] With different surrogacy and assisted reproductive technology laws in every state and territory, and some laws at the federal level, there is a 'patchwork' of inconsistent legal frameworks.[69] Intended parents and surrogates must steer themselves through this landscape successfully, or risk an adverse court decision on legal parentage. This stress and confusion adds to the barriers to accessing surrogacy in Australia.[70]

44. The proposals below would create a supportive framework for domestic surrogacy. This framework is intended to ensure that suitable and safe surrogacy arrangements can proceed with appropriate safeguards that do not create unreasonable barriers to access. Under consistent national surrogacy laws (**Proposal 1**), a National Regulator (**Proposal 2**) would provide oversight to a simplified domestic surrogacy process in which parties can be supported by a Surrogacy Support Organisation (**Proposal 3**) and receive approval before proceeding with the arrangement (**Proposals 4** and **5**).

## Promoting a nationally consistent approach through harmonisation

**Proposal 1**

1. Surrogacy should be regulated either:
   a. uniformly by Commonwealth legislation; or
   b. with substantial consistency across states and territories through a co-ordinated and harmonised set of Commonwealth, state, and territory laws.
2. This legislation should establish a National Regulator (preferred) or empower existing agencies or departments to perform the functions outlined in **Proposal 2**.
3. The regulatory framework should be structured so that:
   a. the substance of any obligation, right, entitlement, or prohibition conferred or imposed is dealt with in legislation; and
   b. any necessary corresponding detail is dealt with by delegated legislation, guidelines, or standards set by the National Regulator (or alternative) (**Proposal 2**).

68 See, eg, Name withheld, *Submission 37*; Not published, *Submission 119*; Name withheld, *Submission 126*; Name withheld, *Submission 205*; Name withheld, *Submission 278*; Not published, *Submission 329*; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (May 2019) 118.
69 Chief Justice John Pascoe AC CVO (n 48) 6.
70 Kneebone et al (n 5) 1451–2.

4. The Commonwealth, states, and territories should enter into an inter-governmental agreement to implement nationally consistent surrogacy laws through one of the following options:
   - **Option 1.1** Referring powers to the Commonwealth Parliament, followed by the Commonwealth implementing federal surrogacy legislation;
   - **Option 1.2** Developing national mirror legislation on surrogacy arrangements, to be passed by each state and territory;
   - **Option 1.3** The Commonwealth, or a state or territory, passing surrogacy legislation and each other jurisdiction legislating to apply that Act in that jurisdiction; or
   - **Option 1.4** A hybrid of the above three options.
5. Legislation developed under any of the options above should adopt consistent and updated terminology.

45. In Australia, surrogacy arrangements are regulated at the state and territory level. State and territory regulatory systems differ widely. For example, laws vary with respect to whether the criminal law applies to overseas surrogacy, and process requirements differ between jurisdictions.[71]

46. The Terms of Reference for this Inquiry note the 'current inconsistencies in legislative arrangements across Australian jurisdictions' and ask us to 'identify legal and policy reforms, particularly proposals for uniform or complementary state, territory, and Commonwealth laws'. Many submissions to our Issues Paper raised the need to harmonise surrogacy laws in a consistent way across Australia.[72]

47. Inconsistencies are reported to be confusing and create anxiety, not only among intended parents and surrogates,[73] but also professionals who provide support and services. It is now common for surrogacy arrangements to involve parties from different jurisdictions, which magnifies the problem even further.[74] Inconsistencies between jurisdictions increase the risk that Australians will engage in reproductive travel, choosing to access more favourable laws in a different jurisdiction.[75] Some submissions described complex and uncertain laws as a barrier to accessing surrogacy in Australia.[76] Ultimately, this is one of the issues that drives intended parents to seek a simpler process overseas.[77]

48. **Proposal 1** seeks to reform the surrogacy legislative landscape to increase and maintain national consistency. It would involve nationally consistent legislation incorporating the proposals made throughout this Discussion Paper. Nationally consistent legislation would make the system clearer and easier to use for parties to surrogacy arrangements and service providers, and remove a key impetus for domestic reproductive travel. It would ensure that regardless of where someone lived in Australia, they would have access to the same protections and processes. Governments should consider the following options for national uniform legislation:

71 Further detail about these discrepancies is discussed elsewhere in this Discussion Paper.
72 See, eg, Name withheld, *Submission 37*; Name withheld, *Submission 76*; K Cox, *Submission 105*; Not published, *Submission 119*; Name withheld, *Submission 127*; Name withheld, *Submission 146*; Name withheld, *Submission 166*; Health Law Group, Monash Law School, *Submission 183*; Equality Australia, *Submission 253*.
73 See, eg, Name withheld, *Submission 1*; Not published, *Submission 2*; Name withheld, *Submission 37*; Not published, *Submission 119*; Name withheld, *Submission 126*; Name withheld, *Submission 205*; ANZICA, *Submission 277*; Name withheld, *Submission 278*; Not published, *Submission 329*.
74 South Australian Law Reform Institute (n 64) 46 [4.1.1].
75 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) 5.
76 Name withheld, *Submission 28*; S Jefford, *Submission 128*.
77 Kneebone et al (n 5) 1452.

### *Option 1.1: referred legislation*

49. Under this option, the states would refer all or part of the power to regulate surrogacy to the Commonwealth.[78] The Commonwealth Government should then enact a new Surrogacy Act that adopts the proposals set out in this Discussion Paper.

50. There are precedents for family law jurisdiction being referred to the Commonwealth.[79] However, referral requires a high level of collaboration and negotiation to achieve.[80]

### *Option 1.2: mirror legislation*

51. By inter-governmental agreement, the Commonwealth, a state, or a territory could draft a model Surrogacy Bill that adopts the proposals set out in this Discussion Paper. The other states and territories would then enact this legislation in their own jurisdiction.[81] Each state and territory Surrogacy Bill should recognise the National Regulator's powers and functions (**Proposal 2**).

52. This model can lead to high levels of consistency. One disadvantage, however, is that it can be difficult to coordinate consistent future amendments.[82]

### *Option 1.3: applied legislation*

53. By inter-governmental agreement, the Commonwealth, a state, or a territory could draft a template Surrogacy Act that adopts the proposals set out in this Discussion Paper. The other states and territories could then legislate to adopt the template and apply it as the law of that state or territory. As above, state and territory legislation would recognise the National Regulator's powers and functions (**Proposal 2**).

54. Compared to referred and mirror legislation, applied legislation can be very complicated to draft, implement, and use.[83] Examples of template legislation include human embryo research laws,[84] the regulation of therapeutic goods,[85] and health practitioner laws.[86]

### *Option 1.4: hybrid legislation*

55. Hybrid legislation can be a mix of referred and applied legislation, or mirror and applied legislation. For example, gene technology laws are an example of mirror and applied legislation. The inter-governmental agreement for these laws provides an example of how states and territories can be notified of any amendments to help maintain legislative consistency over time. In this agreement, a state or territory that wishes to amend its gene technology legislation submits the proposal for Ministerial Council approval.[87] Another example of hybrid legislation is food standards legislation.[88]

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78 For states, this would be under s 51(xxxvii) of the Australian Constitution. For territories, this would involve reaching an agreement with the Commonwealth for it to legislate for them under s 122 of the Australian Constitution.

79 *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

80 Guzyal Hill, *National Uniform Legislation* (Springer Nature Singapore, 2022) 31.

81 Australasian Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (4th ed, February 2018) 3 [2.4]; Hill (n 80) 33.

82 Australasian Parliamentary Counsel's Committee (n 81) 3; Hill (n 80) 35.

83 Hill (n 80) 32–3.

84 Inter-Governmental Agreement, *Research Involving Human Embryos and Prohibition of Human Cloning Agreement* (31 March 2004) <www.federation.gov.au/about/agreements/research-involving-human-embryos-and-prohibition-human-cloning>.

85 *Therapeutic Goods Act 1989* (Cth).

86 Health practitioner laws are administered by Ahpra and the health practitioner registration National Boards, as per: Australasian Parliamentary Counsel's Committee, *Australian National Uniform Law Schemes and Associated Legislation of Participating Jurisdictions* (May 2025) 19–21, 31.

87 Inter-Governmental Agreement, *Gene Technology Agreement* (11 September 2001) <www.genetechnology.gov.au/sites/default/files/2022-01/gene-technology-agreement.pdf>.

88 Ibid; *Food Standards Australia New Zealand Act 1991* (Cth).

56. All these options, as well as the mode by which a National Regulator would be conferred and exercise its powers, raise potential constitutional questions that will need to be considered in more detail.

## Establishing a National Regulator

**Proposal 2**

1. Legislation should create a regulatory framework for surrogacy, with a National Regulator (or alternative) holding the following functions and responsibilities:

*Standard setting*

a. developing and maintaining standards, guidelines, and processes on cost recovery for surrogates (see **Proposals 25**–**27**);

b. developing a standardised draft surrogacy agreement which parties may use as a basis for an agreement that is compliant with legislative requirements (see **Proposal 22**);

*Compliance*

c. setting licence conditions for Surrogacy Support Organisations ('SSOs'), licensing SSOs, and monitoring compliance with licensing conditions (see **Proposal 3**);

d. enforcing compliance under any civil penalty regime or criminal sanctions enacted by the legislation (see **Proposals 8**–**10**);

*Oversight of surrogacy agreements*

e. reviewing SSO decisions not to approve a surrogacy agreement, at the request of parties to the surrogacy agreement (**Proposals 4** and **5**);

f. assessing complex applications to approve surrogacy agreements, at the SSO's request (**Proposals 4** and **5**);

g. keeping records of approved surrogacy arrangements, after an SSO has lodged the approval (**Proposals 4** and **5**);

h. registering overseas surrogacy arrangements and reviewing applications to engage in surrogacy in unapproved destinations (**Proposal 37**);

*Community awareness and information provision*

i. developing information to address misunderstandings about surrogacy in the community (**Proposal 7**);

j. providing public information about domestic and overseas surrogacy laws, processes, and requirements, including the potential risks that may arise in overseas surrogacy (**Proposal 7**);

k. developing guidelines on the provision of healthcare to surrogates and intended parents, to be adopted by healthcare providers, including hospitals and medical professionals (**Proposal 7**);

l. managing the surrogacy register and providing information held on the register to people born through surrogacy (see **Proposals 34**–**36**); and

m. providing or overseeing the provision of training or training materials for professionals who provide services to parties to surrogacy arrangements, such as lawyers, healthcare professionals, and counsellors.

2. Responsibility for administering the regulatory framework should sit within:
   - **Option 2.1** (**preferred**) A National Regulator for surrogacy, or assisted reproductive technology more broadly; or
   - **Option 2.2** Some responsibilities and functions placed with an existing national regulatory body or Commonwealth department, and/or some responsibilities and functions placed with state and territory health departments or other agencies, or regulated through the existing assisted reproductive technology regulatory framework.

**Question A**

What are important design principles or safeguards for any regulatory body to have? You might think about measures to ensure the body is efficient, accessible, accountable, and transparent.

57. There are gaps in the oversight of surrogacy arrangements in Australia, and where there is oversight, it often comes too late. While regulatory bodies for surrogacy arrangements have been established in Victoria and Western Australia, these bodies' responsibilities are limited to approving surrogacy agreements.[89] There is no national surrogacy oversight body. State courts only have oversight of surrogacy arrangements once a child has already been born. This can allow surrogacy arrangements to proceed that are either not appropriate or not legally compliant, leaving courts in a difficult position when needing to determine legal parentage.

58. **Proposal 2** (**Option 2.1**) would see a National Regulator established and tasked with providing oversight of surrogacy in Australia and ensuring compliance with the improved regulatory framework. A National Regulator would help ensure that Australian citizens and permanent residents undertake surrogacy in a safe and supported way. A regulatory body, ideally at a national level, is also required to implement and oversee several proposals in this Discussion Paper, such as:

- developing standards and guidelines on cost recovery, including reimbursable financial costs, the monthly allowance, and hardship payments (**Proposals 25**–**27**);
- collecting and storing information on a National Surrogacy Register, and responding to requests to access that information (**Proposals 34** and **35**);
- licensing and overseeing Surrogacy Support Organisations ('SSOs') (**Proposal 2**) — given SSOs would play a key role in facilitating surrogacy arrangements and would operate either for profit or on a capped-fees basis (**Proposal 3**), a licensing and oversight mechanism would guard against any prohibited, fraudulent, or predatory behaviour;
- improving public awareness about surrogacy in Australia, including by providing accurate information about surrogacy processes in Australia, ensuring people understand the risks in travelling to some overseas jurisdictions for surrogacy, and developing training or training materials for professionals who provide services in surrogacy arrangements (**Proposal 7**); and
- reviewing decisions not to approve surrogacy agreements, and determining complex approval applications, such as where a psychological assessment does not confirm that the arrangement should be allowed to proceed (**Proposal 5**).

89 *Assisted Reproductive Treatment Act 2008* (Vic) s 39; *Surrogacy Act 2008* (WA) s 17. However, the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA), if passed, would abolish the Western Australian Reproductive Technology Council.

59. Establishing these functions on a national level is the preferred option because it responds to the reality that many surrogacy arrangements involve more than one jurisdiction. It also recognises that surrogacy rates in Australia are relatively low, and duplicating regulatory frameworks in each jurisdiction is unnecessary.

60. The ALRC appreciates that establishing a body to regulate only surrogacy may not be considered an efficient use of limited resources. However, other regulators responsible for narrowly defined issues have been established in Australia, such as the Organ and Tissue Authority. Another option would be to regulate surrogacy through a national assisted reproductive technology regulator, or to give this responsibility to an existing national regulatory entity.

61. If a National Regulator is not the preferred option, the functions listed in the proposal should be allocated to appropriate state, territory, and Commonwealth bodies (**Proposal 2** (**Option 2.2**)). For example, state and territory departments of health or attorneys-general departments could develop standards on cost recovery, or license and provide oversight of SSOs. Existing donor registers could absorb the role of maintaining an information register for people born through surrogacy.

62. Because a single national regulator may not be the implemented option, we refer to 'the National Regulator (or alternative)' in some of our other proposals and questions.

## Permitting and regulating Surrogacy Support Organisations

**Proposal 3**

Legislation should enable Surrogacy Support Organisations ('**SSOs**') to be established to provide the following supports and safeguards for intended parents and surrogates:

1. facilitating introductions, or 'matching', of intended parents and surrogates who meet the requirements (**Proposals 13**–**16**);
2. determining requests to waive residency and citizenship requirements (**Proposal 15**);
3. providing or coordinating the counselling and other services that need to be engaged with to meet the requirements (**Proposals 17**–**21**);
4. assessing and approving surrogacy agreements that are compliant with legislative requirements (**Proposals 4** and **5**);
5. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;
6. facilitating conflict resolution between intended parents and surrogates; and
7. holding funds provided by intended parents in a trust account and managing disbursement of trust account funds to surrogates (**Proposal 27**).

**Question B**

How can we minimise overlap in functions with other organisations, such as assisted reproductive technology service providers?

63. A lack of support through the domestic surrogacy process can cause a range of issues for intended parents and surrogates. As explored under **Proposal 1,** intended parents find Australian

surrogacy laws confusing, stressful, and difficult to navigate, creating a risk that they will accidentally breach important safeguards. Further, restrictions on advertising and on professional matching services make it difficult for parties to connect.[90] As a result, intended parents often go overseas to access surrogacy because overseas surrogacy agencies make the process a lot easier and less overwhelming for them.[91]

64. **Proposal 3** involves allowing Surrogacy Support Organisations ('SSOs') to be established privately. It recognises that having local organisations to support intended parents and surrogates, and to facilitate lawful surrogacy arrangements, would reduce a key barrier to domestic surrogacy. These organisations could play a vital role to facilitate and coordinate a smooth and safe surrogacy process that complies with legal requirements.

65. SSOs would perform a range of functions, listed in **Proposal 3**, to support intended parents and surrogates through the surrogacy process. Crucially, SSOs would help connect intended parents and surrogates, removing one of the main challenges they face to accessing surrogacy arrangements in Australia.[92] Other proposed design features include:

- having both support functions for surrogacy arrangements and approval functions for surrogacy agreements, which operate separately from each other;
- operating on either a for-profit or capped fee basis (see **below**);
- being licensed to operate and subject to oversight by the National Regulator (or alternative), as well as subject to other measures such as regular audits and reporting, to ensure SSOs comply with legal and licensing requirements (see **Proposal 2**); and
- being subject to penalties for facilitating prohibited arrangements or coercing people to engage in surrogacy, including having their licence revoked, and civil penalties or criminal sanctions (see **Proposal 6**).

66. These supports would make it much easier for intended parents and surrogates to navigate the surrogacy process and comply with laws to ensure that surrogacy arrangements can go ahead safely and without exploitation.

67. We are considering whether SSOs should operate on either a capped fee or for-profit financial model. This would make establishing an SSO more commercially viable than a not-for-profit model, which may be a barrier to establishing these organisations. However, a capped fee model would also help ensure that SSOs are affordable and limit the risk that intended parents and surrogates are exploited. SSOs could be associated with existing entities, such as assisted reproductive technology service providers or surrogacy advocacy bodies, or established separately.

90 These restrictions include: *Surrogacy Act 2022* (NT) ss 49–50; *Surrogacy Act 2019* (SA) ss 24, 26; *Surrogacy Act 2008* (WA) ss 9, 10.

91 Name withheld, *Submission 15*; Name withheld, *Submission 158*; Kneebone et al (n 5) 1452.

92 See, eg, Page (n 6); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 23 [1.74]; S Jefford, *Submission 128*.

## Approving surrogacy agreements

**Proposal 4**

Legislation should provide that:

1. parties to a surrogacy agreement must obtain approval of their surrogacy agreement before attempting to achieve a pregnancy; and
2. an assisted reproductive technology service provider may only conduct an in-vitro fertilisation procedure or otherwise facilitate an attempt to achieve a pregnancy where satisfied that there is an approved surrogacy arrangement in place.

**Proposal 5**

Legislation should provide that:

1. the approval process (**Proposal 4**) should incorporate the following elements:
   a. Parties should seek approval from a Surrogacy Support Organisation ('SSO') (see **Proposal 3**). The SSO should review surrogacy agreements 'on the papers', and meetings with the parties should only take place when considered necessary.
   b. The SSO should assess all supporting evidence provided by the parties, and approve the surrogacy agreement if satisfied that the parties have met all the requirements for approval (see **Proposals 13**–**21**).
   c. There should be a presumption in favour of approving a surrogacy agreement if all the requirements are satisfied.
2. when a surrogacy agreement has been approved ('**approved surrogacy arrangement**'):
   a. approved surrogacy arrangements can proceed on the administrative pathway and intended parents will be the child's legal parents at birth (see **Proposal 30**); and
   b. the SSO should lodge the approved surrogacy arrangement with the National Regulator (or alternative) (see **Proposal 2**).
3. surrogacy arrangements that are not approved by the SSO ('**unapproved surrogacy arrangements**') cannot proceed on the administrative pathway to legal parentage (see **Proposal 30**). The judicial pathway to legal parentage will remain available (see **Proposal 31**); and
4. approval of a surrogacy arrangement should be sought from the National Regulator (or alternative) if:
   a. the medical assessment does not certify that the surrogacy arrangement should be allowed to proceed (see **Proposal 17**), and the parties wish it to proceed;
   b. the psychological assessment does not recommend that a party should be allowed to proceed with a surrogacy arrangement (see **Proposal 18**), and the parties wish it to proceed;
   c. the SSO regards it as a complex surrogacy arrangement; or
   d. the SSO denies approval and the parties to the surrogacy arrangement request a review (see **Proposal 2**).

**Question C**

Do you think it is appropriate for SSOs to approve surrogacy agreements (where they are compliant with the legislative requirements), or should this responsibility sit with a different entity, such as the National Regulator (or alternative)?

68. Under the current regulatory framework, surrogacy arrangements are generally assessed after birth, when intended parents apply to the court for a parentage order.[93] This is problematic as it does not allow for checks to ensure that important safeguards have been complied with before the surrogacy arrangement proceeds. As a result, a surrogacy arrangement may take place that is either not appropriate or not legally compliant. This outcome is not in the best interests of children born through surrogacy, as it risks legal parentage not being transferred. It can also enable surrogacy arrangements that undermine safety or wellbeing, or are otherwise problematic.

69. Pre-conception approval by an SSO would resolve this issue by providing an appropriate level of oversight early in the process. It would involve:

- **Approval before the surrogacy starts** — parties would apply for approval before attempting to achieve a pregnancy, and an assisted reproductive technology service provider cannot transfer an embryo to a surrogate without this approval.
- **Approval as the default** — if threshold requirements are met, approval should be presumed.
- **Approval puts parties on the administrative pathway to legal parentage** — once approved, intended parents would have access to the administrative pathway to parentage from birth. **Proposal 5** provides other pathways for approval for surrogacy agreements that have not been recommended to proceed, or are otherwise complex.
- **Approval decisions subject to review** — parties would also have a right to seek a review from the National Regulator (or alternative) if the SSO does not approve the surrogacy agreement.

70. During consultations, we heard mixed experiences about current pre-approval processes. Some consultees raised concerns, including that the process can be onerous, which could be a reason for some to go overseas for surrogacy. We also heard that an approval process can add to cost, and in some cases can be intrusive and intimidating. To successfully reduce barriers to domestic surrogacy, the proposed pre-approval process is intended to meet the needs of the parties involved while serving an important oversight function. For example, it begins with presuming approval if all requirements are met, and should require minimal engagement from parties after they have made an application for approval. The SSO's task is to determine whether the surrogacy agreement meets the requirements for approval, so the surrogacy arrangement can proceed. It does not decide if intended parents ought to be allowed to become parents.

93 With the exception of Victoria and Western Australia, where surrogacy arrangements must also be approved prior to pregnancy: *Assisted Reproductive Treatment Act 2008* (Vic) s 39; *Surrogacy Act 2008* (WA) ss 15, 17(e). However, this requirement will be removed in Western Australia if the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) is passed: cl 301.

## Ensuring compliance with operational requirements

**Proposal 6**

1. Legislation should prohibit Surrogacy Support Organisations ('**SSOs**') from intentionally or recklessly approving a surrogacy agreement which does not comply with the legislative requirements.
2. Compliance with the prohibition should be enforced by:
   - **Option 6.1** A civil penalty regime; or
   - **Option 6.2** Criminal sanctions; or
   - **Option 6.3** A combination of civil penalties and criminal sanctions.

71. If SSOs are established (see **Proposal 3**), it would be important to ensure the integrity of those organisations, given that they would be responsible for overseeing compliance with requirements designed to protect the rights and interests of everyone involved.

72. **Proposal 3** requires SSOs to be licensed to operate, with the National Regulator (or alternative) regularly auditing their operations for compliance (see **Proposal 2**). That proposal would also allow the National Regulator (or alternative) to revoke an SSO's licence if it fails to comply with licensing conditions.

73. Under **Proposal 6** (and also **Proposal 10**), if an SSO intentionally or recklessly fails to comply with legislative requirements, or engages in behaviour that undermines the regulatory framework or risks exploitation, it may be subject to civil penalties, criminal sanctions, or both, depending on the conduct. As with other facilitators (see **Proposal 10**), criminal sanctions may be more justified against SSOs than intended parents or surrogates, depending on the nature of the conduct. However, a civil penalty regime, enforced by a regulatory body already responsible for overseeing compliance, is likely to be more effective and efficient (see **Parameters of Lawful Surrogacy**).

## Increasing awareness and education

**Proposal 7**

1. The National Regulator (or alternative) (**Proposal 2**) should publish and promote information to:
   a. address common misunderstandings in the community about surrogacy and Australia's surrogacy laws;
   b. inform intended parents and surrogates about surrogacy in Australia and Australia's surrogacy laws; and
   c. inform intended parents about surrogacy laws, policies, and practices overseas, any associated risks, and the need to register overseas surrogacy arrangements (**Proposal 37**).

2. The National Regulator (or alternative) (**Proposal 2**) should also develop educational materials for professionals who provide services in surrogacy arrangements. This should include:

   a. guidelines for providing appropriate and inclusive care in surrogacy arrangements, to be adopted by healthcare providers such as hospitals and medical professionals; and

   b. training or training materials on surrogacy and surrogacy laws for professionals, such as lawyers, healthcare professionals, and counsellors.

74. Confusion and lack of public awareness about surrogacy in Australia can have damaging effects. Common misconceptions about surrogacy are that all surrogacy is illegal, and that parents through surrogacy are not the child's actual parents.[94] One consultee noted that misconceptions about surrogacy had led to it being demonised, which likely impacts people's willingness to consider domestic surrogacy.

75. There also appears to be confusion about the law and a lack of accessible and reliable information available for intended parents and surrogates before and during their surrogacy arrangement. It was noted in the 2016 Surrogacy Matters report that such information gaps may lead some people to access surrogacy overseas.[95] Submissions to our Issues Paper indicated that lack of accurate information persists.[96] Some intended parents may not understand the exploitation risks present in some overseas destinations before they access surrogacy there.

76. Under **Proposal 7**, the National Regulator (or alternative) would improve community awareness about surrogacy in Australia. This should be designed to:

- counter misunderstandings about surrogacy in the community by accurately representing surrogacy in Australia;
- provide up-to-date public information about domestic surrogacy, to support intended parents and surrogates before and during the surrogacy process; and
- educate potential intended parents on the exploitation risks in some overseas surrogacy destinations.

77. A useful example of this is the information on the surrogacy process for intended parents, surrogates, and health professionals published by the United Kingdom Department of Health and Social Care.[97]

78. **Proposal 7** also addresses a lack of awareness about surrogacy among professionals who provide services to parties to surrogacy arrangements. This includes in the pregnancy and birth healthcare context. Parties' roles and responsibilities during surrogacy-related births are not the same as during other births. We have heard that hospitals and medical professionals

94 Ezra Kneebone, Karin Hammarberg and Kiri Beilby, 'Surrogates', Intended Parents', and Professionals' Perspectives on Ways to Improve Access to Surrogacy in Australia' (2024) 38(1) *International Journal of Law, Policy and The Family* 1, 10.

95 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 75) 21.

96 Name withheld, *Submission 1*; Not published, *Submission 2*; Name withheld, *Submission 37*; Name withheld, *Submission 126*; Name withheld, *Submission 205*; ANZICA, *Submission 277*; Name withheld, *Submission 278*.

97 Department of Health and Social Care (UK), 'The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales', *UK Government* <www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>; Department of Health and Social Care (UK), 'Having a Child through Surrogacy', *UK Government* <www.gov.uk/government/publications/having-a-child-through-surrogacy>; Department of Health and Social Care (UK), 'Care in Surrogacy: Guidance for the Care of Surrogates and Intended Parents in Surrogate Births in England and Wales', *UK Government* <www.gov.uk/government/publications/having-a-child-through-surrogacy/care-in-surrogacy-guidance-for-the-care-of-surrogates-and-intended-parents-in-surrogate-births-in-england-and-wales>.

are sometimes unprepared for these scenarios.[98] Only the Australian Capital Territory and South Australia have developed guidelines to assist the public health system to provide care for surrogacy-related pregnancies and births.[99] Many public and private hospitals appear to lack surrogacy policies.[100] When healthcare providers are not well-informed, this has an impact on the way intended parents and surrogates are treated during surrogacy-related pregnancies and births, and can affect the health of the child. For example, intended parents have been excluded from birthing suites, and surrogates have been pressured into breastfeeding, or been refused discharge separately from the baby.[101]

79. Under **Proposal 7** the National Regulator (or alternative) would develop guidelines for providing care during surrogacy-related births. Several submissions recognised the need for inclusive and clear hospital policies on surrogacy.[102] Guidelines should be developed together with experts in surrogacy-related healthcare, and any other relevant experts or authorities. National Guidelines would prevent misunderstandings, as well as promote the health and wellbeing of children born through surrogacy.

## Parameters of lawful surrogacy

80. The proposals in this Discussion Paper seek to ensure a supportive regulatory framework for surrogacy in Australia. To uphold the integrity of this regulatory system, measures are needed to define the parameters of lawful surrogacy and to ensure compliance.

### Criminal law in the surrogacy context

81. Currently, it is a criminal offence in all Australian jurisdictions to engage in commercial surrogacy.[103] For people who usually live in the Australian Capital Territory, New South Wales, and Queensland, it is also a criminal offence to engage in commercial surrogacy overseas.[104] Most jurisdictions have also introduced offences which are directed at those who 'procure', 'facilitate', or 'induce' commercial surrogacy arrangements, or facilitate pregnancy for such arrangements.[105]

82. The application of the criminal law to surrogacy arrangements stems from a time when all forms of surrogacy were considered unethical.[106] As noted in the **Introduction**, surrogacy is increasingly recognised as a legitimate way to form a family. Concerns remain that

98 K Cox, *Submission 105*; Name withheld, *Submission 127*; Name withheld, *Submission 162*.

99 Canberra Health Services, 'Guidance in the Care of Surrogacy (Policy Document CHS24/609, November 2024)'; Government of South Australia, SA Health, *Surrogacy Management Standards in Public Health Units in SA 2021* (No CD072, Version 2, 2021).

100 Kabir Sattarshetty et al, 'Calling for Standardised Surrogacy Birth Care Policies: A Brief Report' (2025) 32(No 2, 0808) *Journal of Law and Medicine* 404, 404.

101 Jutharat Attawet, Yungjing Qiu and Micah DJ Peters, 'Towards Best Practice: Urgent Need for Surrogacy Birth Care Guidelines in Australia' (2024) 41(4) *The Australian Journal of Advanced Nursing* 1, 1 ('Towards Best Practice').

102 J Attawet, *Submission 34*; S Jefford, *Submission 128*; Name withheld, *Submission 210*; Not Published, *Submission 254*.

103 In most jurisdictions, both intended parents and surrogates are prohibited from entering commercial arrangements. The legislation in most Australian jurisdictions uses the term 'commercial' surrogacy to refer to any surrogacy arrangement where the surrogate receives payment beyond reimbursement of reasonable expenses. Victoria and Western Australia prohibit surrogates from receiving 'any material benefit or advantage' or 'reward' respectively. Penalties range from a fine to imprisonment: *Parentage Act 2004* (ACT) s 41; *Surrogacy Act 2010* (NSW) s 8; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) s 56; *Surrogacy Act 2019* (SA) s 23(1); *Surrogacy Act 2012* (Tas) s 40; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 8.

104 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54. It could also be unlawful for people who live in other jurisdictions to engage in 'commercial' surrogacy overseas, due to 'long arm' laws (for example, if an act which occurred in Australia makes up an element of the offence). See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 12. See also Allan (n 13) 172–173.

105 *Parentage Act 2004* (ACT) ss 42, 44; *Surrogacy Act 2022* (NT) ss 49 (excludes legal assistance), 51; *Surrogacy Act 2010* (Qld) s 58; *Surrogacy Act 2019* (SA) ss 24 (on applies to non-lawful arrangements), s 25; *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) ss 9 (introductions for reward), 11.

106 Millbank (n 54).

commercialisation commodifies human reproduction and can lead to exploitation.[107] However, these concerns are greater in jurisdictions where surrogacy is unlawful, or poorly regulated, and lacking in transparency.[108]

83. Questions have been raised about using the criminal law to prohibit commercial surrogacy, in terms of:

- **Effectiveness** — it is difficult to know how common commercial domestic surrogacy arrangements are, and therefore difficult to know whether domestic prohibitions effectively deter these arrangements. In those jurisdictions where commercial surrogacy is prohibited extraterritorially, it appears that while some people are deterred,[109] others may ignore the prohibition or try to evade it.[110]
- **Enforcement** — while courts have referred matters for prosecution,[111] these are rare and have not led to prosecutions.[112] Concerns have also been raised that making commercial surrogacy illegal and yet not enforcing compliance undermines the rule of law.[113] Others have stressed the need for enforcement.[114] However, penalising intended parents would impact upon the rights of the child, as it is unlikely to be in the child's best interests to be deprived of their parents or to have the circumstances of their birth penalised.[115] Penalising surrogates is at odds with the fact that the prohibition is, in part, designed to protect them.
- **Appropriateness** — other concerns raised about using the criminal law in the surrogacy context include that it: causes harm by stigmatising surrogacy,[116] is counterproductive as it may push surrogacy arrangements underground,[117] and restricts reproductive choice.[118] Some have also emphasised that the current laws do not target the 'appropriate actors' —

107 Australian Government, 'Why Australia Prohibits Commercial Surrogacy' <www.surrogacy.gov.au/human-rights-and-surrogacy/why-australia-prohibits-commercial-surrogacy>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) [1.19]; Attorney-General's Department (Cth), *Submission 153*.

108 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 27–28; Gorton (n 68) 138–139; Australian Government, 'Issues That Have Arisen from Engaging in Surrogacy Overseas' <www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas>; Department of Home Affairs, *Submission 248*.

109 See, eg, Allan (n 13) 175–176.

110 Ibid 176. See also Sam Everingham, Martyn Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 1, 3.

111 See, eg, *Dudley & Chedi* [2011] FamCA 502, *Findlay and Anor & Punyawong* [2011] FamCA 503, *Seto & Poon* [2021] FamCA 288, and *Lloyd & Compton* [2025] FedCFamC1F 28.

112 There were some initial prosecutions in Queensland, under the repealed *Surrogate Parenthood Act 1988* (Qld), which rendered all surrogacy arrangements unlawful: see Anita Stuhmcke, 'Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routeledge, 2016) 65, 70. The 2019 Allan Review noted that there have been no prosecutions under the extraterritorial laws in the Australian Capital Territory, New South Wales, or Queensland, nor had there been any prosecution in Western Australia pursuant to *Criminal Code Act Compilation Act 1913* (WA) s 12: Allan (n 13) 173. This reticence for prosecution is also seen in comparable jurisdictions overseas, such as the UK, New Zealand, and Canada: Mary Keyes, 'Surrogacy in the Anglo World: The UK, Australia, Canada and New Zealand' in Katarina Trimmings, Sharon Shakargy and Claire Achmad (eds), *Research Handbook on Surrogacy and the Law* (Edward Elgar Publishing, 2024) 376, 393.

113 See, eg, P Parkinson, *Submission 13*.

114 Name withheld, *Submission 100*. See also P Parkinson, *Submission 13*.

115 Lydia Bracken, 'Prohibiting Commercial Surrogacy in Ireland' (2025) 39(1) *International Journal of Law, Policy and The Family* 1, 14–15; Chief Justice John Pascoe AC CVO (n 48).

116 See Ronli Sifris, 'Compensation in the Context of Surrogacy: A Feminist Perspective on the Insistence on Altruism' in Becky Batagol et al (eds), *The Feminist Legislation Project: Rewriting Laws for Gender-Based Justice* (Routledge, 2024) 143, 147; Stuhmcke (n 112) 71–72. See also K Cox, *Submission 105*; A Whittaker, *Submission 201*; Equality Australia, *Submission 253*; E Kneebone, *Submission 321*.

117 Stuhmcke (n 112) 77; Human Rights Watch, 'Submission to the Special Rapporteur on the Sale and Sexual Exploitation of Children: Inputs on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements' (2019) <www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children>. See also Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Law Review* 59, 74 ('Outsourcing Ethical Dilemmas'); K Cox, *Submission 105*; S Jefford, *Submission 128*.

118 Stuhmcke (n 112) 76; Human Rights Watch (n 117).

that is, unscrupulous facilitators and 'unregulated industry players'[119] — and should target predatory practices.[120]

84. From a regulatory perspective, sanctions need to be proportionate to the conduct they seek to deter.[121] Criminal sanctions (which may include imprisonment) are the most severe way to regulate behaviour[122] and carry social stigma. In addition to deterring behaviour, criminal sanctions denounce and punish.[123] For this reason, they tend to be used for severe conduct where moral culpability is high, and where other measures have not achieved compliance.[124] By contrast, the purpose of civil penalties is not to denounce or punish. Rather, they seek to deter behaviour, through financial penalties.[125] They are imposed where a 'strong public response' is required, but the conduct is not severe enough to be truly criminal.[126] Where they are sufficiently severe, civil penalties can deter behaviour without the social stigma of a criminal conviction.[127]

85. The main aims of the proposals below are to:

- prevent domestic surrogacy which is for impermissible profit or reward ('prohibited domestic surrogacy arrangements') (see **Proposal 8**);
- prevent Australians engaging in overseas surrogacy where there is a high risk of exploitation ('unregistered overseas surrogacy arrangements') (see **Proposals 9** and **37**);
- prevent people and organisations, including Surrogacy Support Organisations, from facilitating prohibited surrogacy arrangements, or from coercing people to participate in surrogacy (see **Proposal 10**); and
- maintain the integrity of the domestic surrogacy regulatory regime (see **Proposals 1**–**5**) and overseas surrogacy registration processes (see **Proposal 37**).

86. The proposals try to achieve these aims in a way that is proportionate to the behaviour that is being deterred, and that avoids surrogacy arrangements being driven underground.

## Prohibited domestic surrogacy arrangements

**Proposal 8**

1. Legislation should prohibit intended parents and surrogates from engaging in a domestic surrogacy arrangement which is for impermissible profit or reward. Surrogacy arrangements which comply with the requirements in **Proposals 25** and **26** are not for impermissible profit or reward.
2. Compliance with the prohibition should be enforced by a civil penalty regime.
3. Existing criminal offences which prohibit commercial surrogacy should be repealed.

119 S Jefford, *Submission 128*.
120 S Page, *Submission 130*. See also Name withheld, *Submission 11*.
121 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (Discussion Paper No 65, 2002) 56.
122 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) 170.
123 See, eg, the purposes of sentencing as specified in *Sentencing Act 1991* (Vic) s 5.
124 Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction' (n 121) 52, 84.
125 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450.
126 Pamela Hanrahan, 'Chapter 6: Regulators' Enforcement Discretions and Civil Penalties', in Pamela Hanrahan, 'Regulators' Enforcement Discretions and Civil Penalties' in Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023) 109, 116.
127 Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction' (n 121) 57; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) 77.

87. As detailed **above**, it is unclear whether criminally prohibiting particular forms of domestic surrogacy effectively deters behaviour or whether it does so appropriately. Some submissions have emphasised the stigma felt by those within the surrogacy community.[128] This stigma can drive surrogacy underground — reducing transparency and increasing the risk of exploitation.[129] If the aim of the criminal prohibition is to deter behaviour and prevent exploitation, rather than to punish, then criminalising intended parents and surrogates seems to be counterproductive.[130]

88. For these reasons, while **Proposal 8** prohibits surrogacy which is for 'impermissible profit or reward',[131] it provides that the prohibition should be enforced by a civil penalty regime, rather than criminal sanctions. The ALRC recognises there are concerns that removing criminal sanctions may remove the deterrent for people to engage in domestic surrogacy for impermissible profit or reward domestically. However, the current reluctance to enforce the criminal prohibitions may be difficult to shift, and may reflect social attitudes about how proportionate the sanctions are to the conduct. By contrast, replacing criminal sanctions with a civil penalty regime is more likely to deter behaviour and prevent exploitation, while avoiding the problems with using a criminal prohibition. Civil penalties would be:

- **More likely to be enforced and so more likely to be effective** — civil penalties can act as a deterrent, if the penalties are sufficiently high.[132] They can also be easier to enforce, especially by a regulator motivated to uphold the integrity of the domestic surrogacy framework.[133]
- **Less likely to disadvantage children born through surrogacy** — unlike criminal sanctions, which in effect criminalise 'the circumstances of birth' of children born through surrogacy,[134] civil penalties are more consistent with the rights and the best interests of the child, as they do not carry the same stigma.
- **Less likely to push arrangements underground** — civil penalties may be less likely to cause people to hide surrogacy arrangements or avoid seeking legal advice and professional support, due to the lack of stigma, or risk of conviction or imprisonment.[135]

128 Name withheld, *Submission 10*; Name withheld, *Submission 28*; Name withheld, *Submission 69*; Name withheld, *Submission 71*; Not published, *Submission 123*; Name withheld, *Submission 177*; Name withheld, *Submission 259*; Name withheld, *Submission 301*.

129 Stuhmcke (n 112); Human Rights Watch (n 117); K Cox, *Submission 105*.

130 Stuhmcke (n 112) 77. See also Fenton-Glynn (n 117) 75; Human Rights Watch (n 117); S Jefford, *Submission 128*; K Cox, *Submission 105*.

131 See **Proposals 25** and **26** which specify permitted reimbursement for reasonable costs. Anything beyond reasonable (as defined by those proposals) costs may be considered profit or reward.

132 See Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction' (n 121) 57; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (n 127) 77.

133 See, eg, the Law Reform Commission of England and Wales and the Scottish Law Reform Commission, which emphasised the 'logic in having the [surrogacy] regulator and the enforcer as one and the same body', for reasons of efficiency and cost effectiveness: Law Commission of England and Wales and Scottish Law Commission (n 27) 357–8 [12.268].

134 See Ibid [12.227]; New Zealand Law Commission (n 26) [8.62].

135 See South Australian Law Reform Institute (n 64) 60 [6.1.17]; citing Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12 *Journal of Bioethical Inquiry* 477, 488.

## Unregistered overseas surrogacy arrangements

**Proposal 9**

1. Legislation should prohibit intended parents from intentionally or recklessly engaging in overseas surrogacy arrangements, unless they have registered the arrangement with a registration entity (see **Proposal 37**).
2. Compliance with the prohibition should be enforced by a civil penalty regime.
3. Existing extraterritorial criminal offences in the Australian Capital Territory, New South Wales, and Queensland, which prohibit engagement in commercial surrogacy overseas, should be repealed.

89. A significant number of surrogacy arrangements entered into by Australian intended parents take place overseas.[136] Unfortunately, a 'high proportion' of those overseas arrangements take place in destinations where surrogacy is unlawful or poorly regulated.[137] Children born through such overseas arrangements 'may face greater risks to their health and identity' than those born in domestic arrangements.[138]

90. There are global efforts underway to develop human rights-based principles for surrogacy, particularly overseas surrogacy.[139] However, in the absence of a binding convention to regulate surrogacy, Australia has a responsibility to put measures in place aimed at preventing Australians from engaging in exploitative surrogacy arrangements overseas. Currently, Australia does not have a 'comprehensive framework to manage the risks associated with offshore surrogacy.'[140]

91. As discussed **above**, three jurisdictions have responded to the risk of exploitation overseas through extraterritorial criminal prohibitions on commercial surrogacy arrangements.[141] This is unusual globally. While most countries prohibit domestic commercial surrogacy,[142] few have prohibited their citizens from engaging in it overseas.[143] Prohibitions on overseas conduct are also generally quite rare — reserved for the most heinous offences, such as war crimes and slavery.[144] Some argue that criminalisation of overseas conduct cannot be justified for matters where there is no moral consensus, such as commercial surrogacy.[145]

136 Department of Home Affairs, *Submission 248*: 'In 2023-24, 361 children born through surrogacy acquired Australian citizenship by descent. The five main countries of birth of these children were, in numerical order: United States of America, Georgia, Canada, Colombia, and Ukraine. In 2024-25 (to 30 May 2025), 333 children born through surrogacy acquired Australian citizenship by descent'.

137 Department of Home Affairs, *Submission 248*.

138 E Kneebone, *Submission 321*. For example, risks may include inferior access to healthcare, lack of transparency around genetic and gestational identity, and potential difficulties in obtaining Australian citizenship.

139 See, eg, the Hague Conference on Private International Law Parentage/Surrogacy Experts' Group, *Final Report "The Feasibility of One or More Private International Law Instruments on Legal Parentage* (2022); International Social Service (n 34).

140 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 29 [1.105].

141 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54. It could also be unlawful for people who live in other jurisdictions to engage in 'commercial' surrogacy overseas, due to 'long arm' laws (for example, if an act which occurred in Australia makes up an element of the offence). See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 12. See also Allan (n 13) 172–3.

142 Including Canada, New Zealand, and the United Kingdon: Keyes (n 112) 393.

143 Stuhmcke (n 112) 66. Italy recently prohibited surrogacy extraterritorially: BBC News, 'Italy Bans Couples from Travelling Abroad for Surrogacy' <www.bbc.com/news/articles/c62rmv63069o>. Turkey introduce a draft law with extraterritorial effect in 2017: Women's UN Report Network, 'Turkey to Toughen Laws on Surrogacy' <wunrn.com/2017/10/turkey-to-toughen-laws-on-surrogacy/>.

144 See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co., 3rd ed, 2010) 950; quoted in Stuhmcke (n 112) 65.

145 Stuhmcke (n 112) 67.

92. While some submissions support extraterritorial prohibitions,[146] others have called for them to be repealed, and for Australia to focus instead on improving access to domestic surrogacy and preventing predatory practices by facilitators.[147] Concerns about criminalising commercial surrogacy exterritorialy are similar to concerns about criminalising commercial surrogacy domestically — for example, that it does not deter behaviour, is inappropriate and stigmatising, and pushes such behaviour underground. Other concerns include that it:

- does not distinguish between jurisdictions in which surrogacy is lawful and well-regulated and those in which it is not;[148]
- targets intended parents (who are more at risk of being exploited, having likely exhausted domestic options) rather than targeting the facilitators of such arrangements;[149] and
- potentially penalises intended parents for engaging in activity which is otherwise lawful in the destination country.[150]

93. There are also other criminal laws, such as those which criminalise forced pregnancy, human trafficking, and slavery-like practices,[151] which could address exploitative surrogacy arrangements overseas.[152] These laws also focus on the conduct of the 'facilitators' of such arrangements, rather than surrogates and intended parents, which is arguably more appropriate.

94. The ALRC recognises that, depending on the jurisdiction, overseas surrogacy can create a risk of exploiting those involved. To reduce this risk, **Proposal 37** would prohibit intended parents from engaging in any overseas surrogacy arrangement, unless the arrangement has been registered with a registration entity. Intended parents would only be permitted to engage in surrogacy in approved jurisdictions, or where they are able to demonstrate that the arrangement is not exploitative. This would reduce the likelihood of intended parents engaging in surrogacy in high-risk destinations in the first place, whilst recognising the reality that Australians continue to go overseas, even when prohibitions are in place.

95. Given the concerns raised about criminalising overseas surrogacy, the ALRC proposes that the prohibition be enforced by a civil penalty regime. This would balance the need to ensure compliance with the need to remove stigma and other undesirable impacts outlined **above**. Civil penalties can be effective when enforced by a regulator which has a specific interest in maintaining the integrity of the regime it regulates (see **Proposal 2** which puts forward a National Regulator (or alternative)).

146 See, eg, Australian Christian Lobby, *Submission 104*.
147 K Cox, *Submission 105*; S Jefford, *Submission 128*; S Page, *Submission 130*; A Whittaker, *Submission 201*.
148 A Whittaker, *Submission 201*.
149 K Cox, *Submission 105*. See also S Jefford, *Submission 128*.
150 See, eg, K Cox, *Submission 105*; S Jefford, *Submission 128*; S Page, *Submission 130*.
151 *Criminal Code Act 1995* (Cth) Divs 268, 270, 271. See also Attorney-General's Department (Cth), *Submission 153*.
152 Australian Government, *Australian Government Response to the Standing Committee on Social Policy and Legal Affairs Report: Surrogacy Matters* (2018) 3; see also E Kneebone, *Submission 321*.

## Facilitation of prohibited surrogacy arrangements

**Proposal 10**

1. Legislation should prohibit individuals and organisations, including Surrogacy Support Organisations, from:
   a. intentionally or recklessly facilitating, inducing, or procuring (including by advertisement), or attempting to facilitate, induce, or procure, the involvement of a person in a prohibited domestic or unregistered overseas surrogacy arrangement (see **Proposals 8** and **9**); or
   b. intentionally or recklessly coercing or attempting to coerce (by pressure, force, or fraudulent means) the involvement of a person in any surrogacy arrangement.
2. Compliance with the prohibition should be enforced by:
   - **Option 10.1** A civil penalty regime;
   - **Option 10.2** Criminal sanctions; or
   - **Option 10.3** A combination of civil penalties and criminal sanctions

96. It is clear that those who facilitate or stand to profit from facilitating surrogacy arrangements may engage in exploitative conduct, particularly where there is a power imbalance with those seeking to enter into surrogacy arrangements.[153]

97. Most Australian jurisdictions have introduced offences which are directed at facilitators. Offences target a range of conduct, including 'procuring', 'facilitating', or 'inducing' commercial surrogacy arrangements, or facilitating pregnancy for such arrangements. However, jurisdictions differ in relation to who the provisions target, what conduct is targeted, and what penalty applies.[154]

98. It is unclear how often facilitators engage in exploitation of those seeking to engage in surrogacy, or whether non-compliance is prosecuted.[155] However, concerns raised about the risk of exploitation in submissions include, for example: organisations taking administrative fees and promoting themselves as 'matching' services (where matching is unlawful and matches are rare), and facilitating intended parents engaging in surrogacy in risky locations overseas.[156]

99. **Proposal 10** would help ensure that individuals and organisations do not facilitate prohibited surrogacy arrangements. This would help prevent surrogacy for impermissible profit or reward in Australia and surrogacy in unapproved destinations overseas. It would also ensure that intended parents and surrogates are not pressured into engaging in any form of surrogacy arrangement. This would help maintain the integrity of the domestic surrogacy system and overseas registration system, and protect intended parents, surrogates, and children born through surrogacy from being exploited.

100. Whether these prohibitions should be enforced through civil penalties or criminal sanctions may depend on the nature of the conduct and level of culpability. Criminal sanctions may be more justified against facilitators than intended parents and surrogates. However, concerns have been raised that subjecting professionals, such as lawyers and clinicians, to criminal penalties could

153 See Sifris, Ludlow and Sifris (n 2) 290–1; Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 102*.
154 *Parentage Act 2004* (ACT) ss 42, 44; *Surrogacy Act 2022* (NT) ss 49 (excludes legal assistance), 51; *Surrogacy Act 2010* (Qld) s 58; *Surrogacy Act 2019* (SA) ss 24 (on applies to non-lawful arrangements), s 25; *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) ss 9 (introductions for reward), 11.
155 P Parkinson, *Submission 13*.
156 See, eg, Not published, *Submission 31*; S Jefford, *Submission 128*; S Page, *Submission 130*; Name withheld, *Submission 78*.

cause them to fear they are committing an offence when providing 'good faith professional advice'. In turn, this might limit assistance to intended parents.[157] Civil sanctions may be appropriate in such circumstances, particularly for less severe conduct where moral culpability is low.

101. Implementation of **Option 10.1** would require repealing existing criminal offences and sanctions. Implementation of **Option 10.2** would require harmonising existing criminal offences and sanctions.

## Support Getting Started

102. For many, beginning a surrogacy arrangement can be confusing and difficult. To make domestic surrogacy easier, it is crucial that intended parents and surrogates are supported from the start of the arrangement. This includes assistance connecting with each other, ensuring that all parties meet the threshold requirements, and establishing surrogacy agreements that are comprehensive and protective. These threshold requirements, protections, and supports would help facilitate a safe and ethical surrogacy arrangement that progresses smoothly, with a greater likelihood of success.

### Connecting intended parents and surrogates

**Proposal 11**

1. Legislation should provide that advertising in relation to surrogacy is permitted, unless it relates to a prohibited surrogacy arrangement (see **Proposals 8–10**).
2. Where existing legislation prohibits all advertising in relation to surrogacy, those provisions should be repealed.

103. Most intended parents and surrogates are known to each other.[158] However, those who are not known to each other tend to connect via social media and online forums.[159] These spaces are difficult to regulate and are often unmoderated.[160] This may lead to exploitative behaviour or result in unsuitable matches. It is therefore important that there are regulated spaces that can facilitate lawful surrogacy arrangements. Under the proposed regulatory framework, potential parties to a surrogacy arrangement could meet through a Surrogacy Support Organisation (**Proposal 3**), another organisation such as an assisted reproductive technology service provider, their own networks, or through advertising.

104. **Proposal 11** strikes a balance between prohibiting advertising of prohibited conduct, which would undermine the regulatory framework, while enabling advertising that facilitates lawful surrogacy arrangements. This would increase the information circulating about surrogacy, facilitate matches between intended parents and surrogates, and increase opportunities for domestic surrogacy.[161]

105. The consequences of engaging in prohibited advertising may differ depending on the actor (see **Proposal 10**). For example, service providers who engage in predatory behaviour when advertising prohibited surrogacy arrangements may warrant a higher penalty, compared to

157 South Australian Law Reform Institute (n 64) 60 [6.1.17], citing Millbank (n 132) 488.
158 Sarah Jefford has found that approximately 80% of domestic arrangements involve friends or family, the remaining 20% are founded on social media: S Jefford, *Submission 128*.
159 S Everingham, *Submission 129*; Not published, *Submission 172*; New Zealand Law Commission (n 26) 5; South Australian Law Reform Institute (n 64) 118 [11.2.15].
160 South Australian Law Reform Institute (n 64) 118 [11.2.15].
161 K Cox, *Submission 105*.

intended parents who advertise prohibited surrogacy arrangements on social media. A regulatory focus on service providers was the approach recommended by the 2019 Victorian inquiry into assisted reproductive treatment.[162]

## Threshold requirements for a surrogacy arrangement

106. The threshold requirements for a surrogacy arrangement aim to protect the rights and interests of all parties involved, whilst giving the arrangement the best chance of succeeding. Evidence that the parties have satisfied these requirements would form a key part of the proposed approval process (**Proposals 4** and **5**). Intended parents would not be able to access the administrative pathway to legal parentage (**Proposal 30**) if they fail to meet the requirements, and parties would not be able to access fertility treatment if the surrogacy agreement has not been approved (**Proposals 4** and **5**).

107. Currently, threshold requirements for accessing surrogacy are inconsistent across jurisdictions. This makes the law complex and uncertain and leads to inefficient administrative processes. Harmonising these requirements would result in a clearer and more streamlined application process for surrogacy arrangements nationwide. These requirements should set consistent minimum standards to ensure that surrogacy arrangements are safe and ethical, and comply with anti-discrimination laws.[163] A new Bill in Western Australia addresses some of these inconsistencies and discriminatory provisions by removing requirements that limit certain groups from accessing surrogacy.[164]

### *Genetic connection between the parties and the child*

**Proposal 12**

1. Legislation should treat surrogacy arrangements in the same way, regardless of whether or not a genetic connection is present between the surrogate and the child, or the intended parent(s) and the child.
2. Victoria should legalise and treat traditional surrogacy in the same way as gestational surrogacy, consistent with the approach adopted in other jurisdictions.

#### Genetic connection between the surrogate and the child

108. In a surrogacy arrangement, a surrogate may use their own eggs ('traditional' surrogacy) or eggs belonging to the intended parent or an egg donor ('gestational' surrogacy). All jurisdictions — except Victoria — regulate traditional surrogacy in the same way as gestational surrogacy.[165] Victoria does not expressly prohibit traditional surrogacy, but it only allows gestational surrogacy arrangements to be approved and to receive services from registered assisted reproductive technology service providers.[166]

162 It was recommended that providers of assisted reproductive technology meet compliance standards in relation to advertising and be subject to a range of regulatory requirements in order to advertise their services: Gorton (n 68) rec 27.
163 Equality Australia, *Submission 253*; Not published, *Submission 116*.
164 See Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) cl 6.
165 See *Surrogacy Act 2010* (Qld) s 6(2)(b)(ii); *Surrogacy Act 2012* (Tas) s 3(2)(b)(ii).
166 *Assisted Reproductive Treatment Act 2008* (Vic) ss 39, 40(1)(ab).

109. There is a common belief that traditional surrogates are less likely to relinquish the child. However, that is not the case.[167] Differentiating between traditional and gestational surrogacy reinforces the stigma attached to traditional surrogacy and limits the support that parties to a traditional surrogacy arrangement may receive in Victoria. It creates an additional barrier to domestic surrogacy arrangements in Victoria by limiting the types of surrogacy that intended parents can access.

**Genetic connection between the intended parents and the child**

110. Some jurisdictions overseas require a genetic connection between an intended parent and the child.[168] We propose retaining the current approach in Australia, in which no jurisdiction requires a genetic link between an intended parent and the child, either as a threshold requirement or to obtain a parentage order. This position recognises the reality that a genetic connection is not essential to a parent-child relationship. Maintaining this status quo ensures that the law does not impose an additional barrier to domestic surrogacy by treating intended parents who cannot provide viable gametes differently from other intended parents.[169]

### *Requirement for a reason to access surrogacy*

**Proposal 13**

Legislation should provide that:

1. to access surrogacy, the intended parents must be unable to conceive, gestate, and birth a child for a medical, biological, or psychological reason; and
2. this requirement may be dispensed with by the National Regulator (or alternative).

111. There are two key reasons for providing that intended parents may only access surrogacy where they meet one of the prescribed reasons for doing so. The first reason is principled, because surrogates should not jeopardise their health if intended parents do not have a need for surrogacy.[170] The second is pragmatic, because where there is a limited number of available surrogates,[171] only those who truly need surrogacy should be able to access it.

112. Currently, legislation on the acceptable reason for surrogacy differs across the states and territories. Some states, such as Western Australia, take a narrower approach and only permit surrogacy for 'medical reasons'.[172] Other states take a broader approach by also allowing surrogacy where there is a 'social' need.[173]

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167 There have been cases of traditional surrogacy where the surrogate has refused to relinquish the child post-birth: *In the Matter of Baby M* (1988) 537 A.2d 1227; *Re Evelyn* (1998) 145 FLR 90. However, studies have dispelled this common belief: Vasanti Jadva et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196, 2203; Olga Van Den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21(2) *Journal of Reproductive and Infant Psychology* 145, 152.

168 See, eg, the United Kingdom: *Human Fertilisation and Embryology Act 2008* (UK) ss 54(1)(b), 54A(1)(b).

169 New South Wales Legislative Council Standing Committee on Law and Justice, *Legislation on Altruistic Surrogacy in NSW* (No 38, May 2009) 88 [5.125].

170 Many submissions spoke of the many physical and psychological risks that surrogacy poses to the surrogate. See, eg, E Cervini, *Submission 93*; S Page, *Submission 130*; Name withheld, *Submission 164*; Not published, *Submission 172*; Le Syndicat De La Famille, *Submission 218*; ARMS (Vic), *Submission 275*.

171 Sarah Jefford, 'How Do I Find a Surrogate in Australia?' <sarahjefford.com/find-a-surrogate-in-australia/>.

172 *Surrogacy Act 2008* (WA) s 19(2)(a). Note that this may change soon due to the introduction of the new Assisted Reproductive Technology and Surrogacy Bill 2025 which, if passed, would remove the requirement for people to demonstrate medical infertility to access assisted reproductive technology: Government of Western Australia, Department of Health, 'Introduction of New Assisted Reproductive Technology and Surrogacy Bill for Western Australia' <www.health.wa.gov.au/Articles/N_R/New-assisted-reproductive-technology-and-surrogacy-legislation-for-WA>.

173 For example, New South Wales, Queensland, and Tasmania permit surrogacy where there is both a 'medical' or 'social' need. See *Surrogacy Act 2010* (NSW) s 30; *Surrogacy Act 2010* (Qld) s 22(2)(d); *Surrogacy Act 2012* (Tas) s 16(2)(h).

113. The definition of 'medical need' is unclear and has been narrowly interpreted by practitioners. This makes it more difficult for intended parents to access assisted reproductive technology for the purposes of surrogacy. We have heard this is because practitioners are often unsure of the point at which a person who experiences, for example, multiple miscarriages or implantation failures is eligible to access surrogacy.[174] Similarly, there is no clear definition of social need.

114. These narrow, inconsistent, and unclear definitions on the need for surrogacy can be confusing and restrict access to domestic surrogacy. The definitions of medical, biological, and psychological reasons should be construed broadly to ensure that surrogacy is accessible and available to those who have a genuine need for it. This might include people who may be 'medically' capable of carrying a pregnancy but cannot for other reasons, such as psychological reasons.[175] It will also include women who have undergone unsuccessful fertility treatment, gay and single men, and people with tokophobia.[176]

### *Minimum age requirement for surrogates and intended parents*

**Proposal 14**

Legislation should provide that:

1. a surrogate must be at least 25 years old, unless otherwise approved by an accredited counsellor, and have the legal capacity to make an informed decision; and
2. an intended parent must be at least 18 years old and have the legal capacity to make an informed decision.

115. The decision to engage in surrogacy is a significant one with potentially life-long impacts for the parties involved. Pregnancy can have serious and potentially ongoing physical, reproductive, and psychological effects on the surrogate, and navigating the surrogacy process can be challenging for many intended parents.

116. Age-related criteria are an important safeguard to ensure that all parties to a surrogacy arrangement are mature enough to make an informed decision to enter into the arrangement. Currently, all states require the surrogate to be at least 25 years old, but the minimum age for intended parents ranges from being unspecified to at least 25 years old.[177]

117. The surrogate should be at least 25 years old to ensure that they have the maturity required to undertake a surrogacy arrangement. However, there should also be an opportunity for surrogates aged between 18 and 25 years old to enter a surrogacy arrangement if an accredited counsellor considers them to have the maturity required to become a surrogate.[178] As the intended parents

174 K Cox, *Submission 105*; S Jefford, *Submission 128*; Equality Australia, *Submission 253*.
175 S Jefford, *Submission 128*; Equality Australia, *Submission 253*.
176 Tokophobia is a pathological, intense fear of pregnancy and childbirth which may lead to the avoidance of pregnancy. See Janine Ungvarsky, 'Tokophobia' <www.ebsco.com/research-starters/women-s-studies-and-feminism/tokophobia>.
177 *Parentage Act 2004* (ACT) ss 28B, s 28C(1)-(4); *Surrogacy Act 2010* (NSW) ss 27-9; *Surrogacy Act 2022* (NT) ss 17(a), 18(1)(a); *Surrogacy Act 2010* (Qld) ss 22(f), 22(g)(i); *Surrogacy Act 2019* (SA) ss 10(3)(a), 10(4)(a); *Surrogacy Act 2012* (Tas) s 16(2)(b)-(c); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b); *Surrogacy Act 2008* (WA) ss 17(a)(i), 19(1)(a).
178 S Page, *Submission 130*.

do not undertake the same risk as the surrogate,[179] they should be at least 18 years old, to ensure that they are sufficiently mature and can provide free and informed consent to the surrogacy agreement.[180]

### *Citizenship and residency requirements*

**Proposal 15**

1. Legislation should provide that at least one intended parent must be either an Australian citizen or permanent resident, unless this requirement is dispensed with by a Surrogacy Support Organisation (see **Proposal 3**).
2. State or territory-based legislation imposing residency requirements should be repealed.

118. Some states impose residency requirements,[181] despite the fact that these requirements do not have a clear policy rationale and can have negative consequences for parties to a surrogacy arrangement and for the system regulating surrogacy more broadly. State-based residency requirements can:

- restrict treatment options for surrogates;
- make surrogacy a lot more expensive for intended parents who may need to move interstate to meet these requirements, or travel overseas to access surrogacy;[182] and
- create a barrier to domestic surrogacy by limiting the number of surrogates available.[183]

119. Removing state-based residency requirements would make surrogacy arrangements more accessible and simpler for all parties involved. Surrogates would be able to seek medical and other treatments more flexibly by staying in their home jurisdiction instead of traveling to the jurisdiction where the intended parent(s) live.

120. Retaining a requirement for Australian citizenship or permanent residency for an intended parent would help protect against 'reproductive tourism', in which intended parents who are not Australian citizens or permanent residents travel to Australia to engage in surrogacy.[184]

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179 The second reading speeches for surrogacy legislation indicated that a greater age requirement was imposed for the surrogate, compared to the intended parents, to ensure that the surrogate has sufficient maturity and understanding of the legal and psychological risks of the arrangement. The greater age for the surrogate is also designed to protect them from exploitation. See, eg, Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3505 (Tara Cheyne, Human Rights Minister); New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26544 (John Hatzistergos, Attorney-General); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2022, 3612 (Natasha Fyles, Minister for Health); Victoria, *Parliamentary Debates*, Legislative Assembly, 10 October 2008, 3441 (Rob Hulls, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 736 (Kim Hames, Minister for Health).

180 Legislation in most Australian states and territories confers the status of adulthood on individuals once they have reached the age of 18 years: *Age of Majority Act 1974* (ACT) s 5; *Minors (Property and Contracts) Act 1970* (NSW) s 9; *Age of Majority Act 1974* (NT) s 4; *Age of Majority Act 1977* (Vic) s 3; *Age of Majority Act 1973* (Tas) s 3; *Law Reform Act 1995* (Qld) s 17. This status provides adults with the legal capacity to give consent to medical treatment, to vote in elections, or get married.

181 *Surrogacy Act 2010* (Qld) s 22(g)(ii); *Surrogacy Act 2012* (Tas) s 16(2)(g); *Status of Children Act 1974* (Vic) s 20(1)(a); *Surrogacy Act 2008* (WA) s 19(1)(a).

182 See, eg, S Jefford, *Submission 128*; S Page, *Submission 130*; Equality Australia, *Submission 253*; Not published, *Submission 310*.

183 For example, we heard that the Tasmanian residency requirement is especially impractical given the small population of Tasmania and its associated lack of available surrogates: Equality Australia, Submission 253.

184 Raywat Deonandan, 'Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy' (2015) 8 *Risk Management and Healthcare Policy* 111, 111; Marcia C Inhorn and Pasquale Patrizio, 'Rethinking Reproductive "Tourism" as Reproductive "Exile"' (2009) 92(3) *Fertility and Sterility* 904, 904; Not published, *Submission 172*.

### *Requirement of previous successful pregnancy*

**Proposal 16**

Legislation should provide that:

1. the surrogate must have previously carried a pregnancy and given birth to a live child; and
2. this requirement may be dispensed with in circumstances where a medical practitioner or a psychologist is satisfied that the surrogate and intended parent(s) understand the potential risks and are making a free and informed decision to continue with the surrogacy arrangement (see **Proposals 17** and **18**).

121. The requirement that the surrogate has previously carried a pregnancy and given birth to a live child has many functions. The Australian and New Zealand Infertility Counsellors Association submitted that a previously successful birth helps reduce the risk that the surrogate or child born through surrogacy will experience medical or psychological harm.[185] Similarly, past pregnancy complications may be a predicter of future pregnancy complications.[186]

122. Only Tasmania, Victoria, and Western Australia provide that a person must have already given birth to a live child, before they can be a surrogate.[187] Dispensing with such a requirement may negatively affect the quality of the consent provided, as the surrogate would not have a reference point for the physical and psychological aspects of pregnancy and childbirth.

123. This requirement may be dispensed with if a medical practitioner (as part of the medical assessment in **Proposal 17**) or psychologist (as part of the psychological assessment in **Proposal 18**) is satisfied that the surrogate and intended parent(s) are making a free and informed decision to enter the arrangement.[188] Under this approach, surrogates who are certain that they do not want to be parents are not completely barred from being surrogates.

### *Requirement for medical screening*

**Proposal 17**

Legislation should provide that:

1. the surrogate must undergo a medical assessment by an independent medical practitioner. The independent medical practitioner must certify that the surrogacy can proceed without undue risk to the surrogate's health; and
2. the independent medical practitioner must provide their report to the surrogate, as well as to the surrogate's nominated Surrogacy Support Organisation, so that it can form part of the approval process (see **Proposals 4** and **5**).

185 ANZICA, *Submission 277*.

186 Sonia Hernandez-Diaz, Sengwee Toh and Sven Cnattingius, 'Risk of Pre-Eclampsia in First and Subsequent Pregnancies: Prospective Cohort Study' (2009) 338(7711) *BMJ* 1, 5; Courtney Phillips et al, 'Risk of Recurrent Spontaneous Preterm Birth: A Systematic Review and Meta-Analysis' (2017) 7(6) *BMJ Open* 1, 3.

187 *Surrogacy Act 2012* (Tas) s 16(2)(d); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(ac); *Surrogacy Act 2008* (WA) s 17(a)(ii). In Western Australia, an exception applies if the Reproductive Technology Council (RTC) is satisfied of exceptional circumstances. However, the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA), if passed, would remove the need for RTC approval for surrogacy.

188 S Page, *Submission 130*.

124. Medical screening is an important safeguard that makes a successful pregnancy more likely by ensuring there are no serious medical reasons why the surrogate would not be able to safely carry a pregnancy to term. It also helps identify and minimise any other health risks to the surrogate and the child born through surrogacy.[189] However, only Western Australia requires the surrogate and any donor to be assessed by a medical practitioner before becoming involved in a surrogacy arrangement.[190]

125. **Proposal 17** would make sure there is a consistent requirement in all Australian jurisdictions to assess whether the potential surrogate can safely carry a pregnancy. As many assisted reproductive technology service providers already conduct medical reviews of surrogates,[191] and because the majority of surrogacies are gestational, this requirement is unlikely to significantly increase the cost of most surrogacy arrangements. The report and certification from the medical screening would form part of the supporting evidence that the Surrogacy Support Organisation assesses as part of its approval process (**Proposals 4** and **5**).

### *Requirement for psychological screening*

**Proposal 18**

Legislation should provide that:

1. the surrogate and the intended parent(s) must undergo a psychological assessment by a psychologist who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA'), to determine their social, emotional, and psychological suitability to enter a surrogacy arrangement without undue risk to their own or another person's health or wellbeing;
2. the surrogate and the intended parent(s) must disclose any current or previous diagnosed mental health conditions to the independent psychologist; and
3. the independent psychologist must provide their report to the party, as well as to the party's nominated Surrogacy Support Organisation, including a recommendation of whether the party should be allowed to proceed with a surrogacy arrangement, so that it can form part of the approval process (see **Proposals 4** and **5**).

**Question D**

Should both the surrogate and the intended parent(s) be required to undergo a psychological assessment?

126. Psychological assessments should not be used to determine whether a person should become a parent. Rather, psychological assessments are a useful tool in determining a person's emotional and psychological capacity to safely participate in a surrogacy arrangement.[192]

127. Surrogacy may give rise to emotional, psychological, and social challenges. For example, concerns may arise where a party:

189 Not published, *Submission 172*; Annie Yau et al, 'Medical and Mental Health Implications of Gestational Surrogacy' (2021) 225(3) *American Journal of Obstetrics and Gynecology* 264, 264–5, 268.

190 *Surrogacy Act 2008* (WA) s 17(d), however the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) proposes to remove this requirement.

191 See, eg, Melbourne IVF, 'Surrogacy' <www.mivf.com.au/our-donor-bank/surrogacy>.

192 See, eg, Not published, *Submission 172*; ANZICA, *Submission 277*; Australian and New Zealand Infertility Counsellors Association, *ANZICA Surrogacy Guidelines* (October 2022).

- has a mental illness or other condition which makes them more likely to be exploited or harmed by the arrangement;[193]
- wants the arrangement to go ahead for unhealthy or harmful reasons;
- has unrealistic expectations about how the arrangement will proceed, or is unprepared for the negative outcomes that may arise during the arrangement;[194] or
- has behaved in a way that indicates the arrangement would not be in the best interests of any child born through the surrogacy arrangement.[195]

128. For these reasons, there is a view that it would not be appropriate for some people to enter into surrogacy arrangements.[196] However, the current law is unclear — counselling and reporting requirements are vague and do not indicate that a professional should be making the assessment.[197]

129. This proposal would make the psychological assessment part of the Surrogacy Support Organisation approval process (**Proposals 4** and **5**), enabling the assessment to inform whether the arrangement complies with the legislative requirements for approval. The psychological assessment would be provided to the party's nominated Surrogacy Support Organisation, to minimise the risk that a party who is unfavourably assessed 'shops around' for psychologists until they receive a favourable assessment.

130. Having each party undergo a psychological assessment would help manage the risks identified above, and ensure that the parties are able to give informed consent to enter the surrogacy arrangement. Psychological assessments could be made available to the parties' ongoing counsellors,[198] to help inform the support provided to the parties throughout the surrogacy arrangement.[199]

### *Requirement for criminal history check*

**Proposal 19**

- **Option 19.1** There should not be a requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.
- **Option 19.2** There should be a legislated requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.

193 Mental illness on the part of the surrogate or an intended parent can have a derailing effect on the whole arrangement, leading to lasting stress and emotional harm: see, eg, Name withheld, *Submission 12*; Name withheld, *Submission 59*; S Everingham, *Submission 129*; ANZICA, *Submission 277*; Not published, *Submission 341*.

194 This may include the intended parent(s) expecting to be able to control the surrogate's lifestyle and make medical decisions for the surrogate during the pregnancy (see, eg, Name withheld, *Submission 343*), or unreasonable beliefs about what will amount to reimbursable expenses (see, eg, Not published, *Submission 341*).

195 Not published, *Submission 31*; Name withheld, *Submission 59*; S Everingham, *Submission 129*; ANZICA, *Submission 277*.

196 See, eg, Not published, *Submission 31*; S Everingham, *Submission 129*; S Page, *Submission 130*; Not published, *Submission 172*; Name withheld, *Submission 211*; M Montrone, *Submission 263*; ANZICA, *Submission 277*.

197 Only New South Wales, Victoria, and Western Australia require a counsellor to indicate whether the arrangement should proceed (and even in these jurisdictions it is unclear whether this should be based on a psychological assessment or other forms of counselling): *Assisted Reproductive Technology Act 2007* (NSW) s 15A; *Assisted Reproductive Treatment Act 2008* (Vic) ss 40–43; *Surrogacy Act 2008* (WA) s 17(c)(i)–(ii). In contrast, while the other states and territories require pre-arrangement counselling, there is no assessment function prescribed in the legislation: *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2022* (NT) ss 22, 25; *Surrogacy Act 2010* (Qld) s 22(2)(ii); *Surrogacy Act 2019* (SA) ss 10(3)(e), 10(4)(e), 14; *Surrogacy Act 2012* (Tas) s 16(2)(f).

198 See **Proposal 18**.

199 See, eg, Not published, *Submission 172*; M Montrone, *Submission 263*; ANZICA, *Submission 277*.

**Question E**

If **Option 19.2** is adopted:

- should the criminal history check be limited to specific offences, such as those relating to children or violent offences?
- what should be the purpose of the criminal history check? You might want to consider if it should be provided to the surrogate to facilitate informed consent to the arrangement, to the psychologist undertaking the psychological assessments, or to the Surrogacy Support Organisation to determine if the arrangement should be approved?

131. Criminal history checks for surrogacy arrangements can be a divisive issue. Intended parents may feel that these checks are invasive and treat them differently to other parents,[200] such as people using assisted reproductive technology without surrogacy to form a family. Others argue that they are a safeguard against potential offending, such as child abuse.[201] Most submissions to date did not comment on this issue. Within submissions that did, a narrow majority endorsed mandatory criminal history checks.[202] A minority expressly opposed this option.[203]

132. Criminal history checks may aim to advance different policy goals. Some people view their purpose as preventing people who are a risk to children from becoming parents — on this view, a criminal history check could reveal convictions that would bar someone from engaging in a surrogacy arrangement.[204] Other people view criminal history checks as a way to obtain informed consent to the risks involved in the arrangement — on this view, criminal history checks could be disclosed to the parties and it would be up to a party to decide if they wish to enter a surrogacy arrangement with someone who has such a criminal history.[205]

133. Within Australia, South Australia is the only jurisdiction that still requires criminal history checks. The parties to a surrogacy arrangement are required to exchange criminal history checks, with this requirement directed to the issue of informed consent.[206] However, there is no mechanism to ensure that the checks have been exchanged before the arrangement begins.[207]

200 K Cox, *Submission 105*; Not published, *Submission 31*; Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2020, 483 (Martin Foley, Minister for Health).
201 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2019 12:20 (Ms Leuthen); South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2019 16:07 (V.A. Chapman).
202 Name withheld, *Submission 74*; Name withheld, *Submission 96*; Name withheld, *Submission 99*; Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 135*; Not published, *Submission 172*; Not published, *Submission 206*; Name withheld, *Submission 211*; J McCloy, *Submission 265*; ANZICA, *Submission 277*.
203 K Cox, *Submission 105*; Not published, *Submission 119*; S Jefford, *Submission 128*; Equality Australia, *Submission 253*.
204 See, eg, Name withheld, *Submission 99*; S Everingham, *Submission 129*; Not published, *Submission 172*.
205 See, eg, S Page, *Submission 130*.
206 *Surrogacy Act 2019* (SA) s 10(3)(f), (4)(g).
207 *Surrogacy Regulations 2020* (SA) reg 6.

### *Legal advice requirement for intended parents and surrogates*

**Proposal 20**

1. Legislation should provide that all parties must receive independent legal advice before entering a surrogacy arrangement. The advice must cover the following matters:
   a. the surrogate's right to bodily integrity, reproductive autonomy, and informed consent in relation to medical treatment or procedures that directly affect them (see **Proposal 23**);
   b. legal parentage under the domestic administrative pathway or the judicial pathway (see **Proposals 30** and **31**);
   c. the enforceability of the surrogacy agreement (see **Proposal 24**);
   d. the operation of the reimbursement provisions (see **Proposal 25**) and the optional hardship payments (see **Proposal 26**); and
   e. the right of the child born through surrogacy to know their genetic and gestational origins, including their right to access registered information (see **Proposals 33**–**35**).
2. Legislation should provide that the legal practitioner who provides the advice must provide the party with written confirmation that the matters outlined in paragraph 1 were discussed and the requisite advice provided, and that the legal practitioner believes that the party appeared to understand the advice.
3. Law societies in each jurisdiction should provide accreditation for lawyers providing legal advice on surrogacy arrangements.

134. Legal advice is key to facilitating informed consent and to ensuring that everyone involved in a surrogacy arrangement understands their own rights, and the rights of others involved in the arrangement.[208]

135. Each state and territory currently requires parties to obtain independent legal advice before they can enter into a surrogacy arrangement,[209] however:

- we have heard that the availability of legal advice is very limited in some areas, and the quality of the advice received is sometimes insufficient to facilitate informed consent;[210]
- except for the Northern Territory and Queensland, there is no guidance for practitioners on the relevant legal issues the parties must understand before entering a surrogacy arrangement;[211]
- there is no effective mechanism for enforcing the pre-arrangement legal advice requirement;[212] and

208 See '**A Human rights approach**'. See also K Cox, *Submission 105*; S Page, *Submission 130*; S Jefford, *Submission 128*.
209 *Parentage Act 2004* (ACT) s 28(1); *Surrogacy Act 2010* (NSW) s 36(1); *Surrogacy Act 2022* (NT) s 20(1); *Surrogacy Act 2010* (Qld) s 22(2)(e)(i); *Surrogacy Act 2019* (SA) s 10(5)(b); *Surrogacy Act 2012* (Tas) s 16(2)(a)(i); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 43(c); *Surrogacy Act 2008* (WA) s 17(c)(iii).
210 See, eg, Name withheld, *Submission 15*; Name withheld, *Submission 96*; Not published, *Submission 108*.
211 Any Australian legal practitioner can provide legal advice for the purposes of the current legislative requirements, and as such there is no guarantee a lawyer providing this advice will be personally familiar with the dynamics of surrogacy agreements. In Queensland and the Northern Territory, a list of prescribed legal issues needing to be discussed is included in the legislation: *Surrogacy Act 2022* (NT) s 20(2); *Surrogacy Act 2010* (Qld) s 30(1)(b).
212 Aside from Western Australia and Victoria, non-compliance with pre-arrangement legal advice requirements will only have potential legal consequences at the parentage order application stage: *Parentage Act 2004* (ACT) ss 28, 28H(1)(c); *Surrogacy Act 2010* (NSW) s 18(2); *Surrogacy Act 2022* (NT) s 22(1); *Surrogacy Act 2012* (Tas) s 16(3)(a); *Surrogacy Act 2019* (SA) ss 10, 14; *Surrogacy Act 2008* (WA) s 17(c)(i).

- we have heard that sometimes a single legal practitioner will advise all the parties to a potential surrogacy arrangement, amounting to a potential conflict of interest.[213]

136. **Proposal 20** specifies the legal issues that legal practitioners must discuss, and requires legal practitioners to confirm that they have discussed these legal issues, and that the person receiving the advice appeared to understand the advice.[214]

137. Specifying the matters that need to be discussed would help ensure more consistent quality in the advice provided. Having written confirmation as a prerequisite to approval by the Surrogacy Support Organisation (see **Proposals 4** and **5**) provides a way to check that the legal advice requirement has been met before the arrangement begins. This seeks to avoid a box-ticking approach, and minimise the risk that parties, including those with limited literacy or from linguistically diverse backgrounds, may be led into surrogacy arrangements they do not fully understand.

138. When applying for approval of the surrogacy agreement, the Surrogacy Support Organisation would check that the parties received independent advice, avoiding situations where the same legal practitioner advises all the parties. In addition to this, law societies in each jurisdiction should provide accreditation for lawyers providing legal advice on surrogacy. This would help address current concerns relating to lawyers who do not fully understand the complexities of the surrogacy legal landscape providing legal advice. Surrogacy Support Organisations could refer parties to a list of these accredited lawyers to obtain independent legal advice.

139. Confirmation that legal advice was provided and appeared to be understood would not require that any information covered by client legal privilege be included.

213 We heard that in some jurisdictions, including South Australia, there are very few practitioners who regularly represent the parties in parentage order applications, leading to the problematic consequence that sometimes a single legal practitioner will be advising several parties to an arrangement.

214 This has been drawn from the requirements in Victoria, Western Australia, the Northern Territory, and Queensland, which require the lawyer to certify that the advice has been given and that the party appeared to understand it: *Surrogacy Regulations 2009* (WA) reg 4(3); *Surrogacy Act 2010* (Qld) s 30; *Surrogacy Act 2019* (SA) s 14.

### *Implications counselling requirement for intended parents and surrogates*

**Proposal 21**

1. Legislation should provide that all parties must undergo counselling before entering a surrogacy arrangement. The counselling must:
    a. be provided by a psychologist or counsellor who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA');
    b. include at least:
        i. one independent counselling session with the intended parent(s);
        ii. one independent counselling session with the surrogate; and
        iii. a joint counselling session with all the parties present;
    c. not be provided by a psychologist who has been involved in the parties' independent psychological assessments; and
    d. include discussion of the following matters:
        i. the implications of the surrogacy arrangement for the relationships between the parties and their respective families;
        ii. the attitudes of the parties to genetic screening, possible termination of pregnancy, and any other complications that may arise during medical treatment, pregnancy, or birth;
        iii. the possibility of any party deciding not to proceed with the surrogacy arrangement, including the implications if the surrogate is already pregnant, or if the surrogate seeks a parentage declaration;
        iv. the attitudes of the parties towards the conduct of the pregnancy, including how much input the intended parent(s) should have into the surrogate's lifestyle choices during the pregnancy;
        v. the implications if the intended parents separate during the surrogacy arrangement;
        vi. the attitudes of the parties to how and when the child should be told about their genetic and gestational origins;
        vii. the attitudes of the parties to the surrogate or the surrogate's family having an ongoing relationship or contact with the child born through the surrogacy arrangement, and the extent of such contact; and
        viii. how the parties will resolve any disputes that arise during the surrogacy arrangement.
2. Legislation should provide that the counsellor must advise the parties that ongoing counselling is available to them individually and collectively throughout the course of the arrangement, and may be initiated at the reasonable election of any party to the surrogacy arrangement.
3. Legislation should provide that the counsellor must provide each party with written confirmation that the matters outlined in paragraph 1(d) were discussed and the counsellor believes that the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement.

**Question F**

Should the surrogate's partner (if any) be required to undergo implications counselling?

**Question G**

Should there be additional counselling requirements? If so, what should these requirements be? You may wish to consider whether post-birth counselling should be optional or mandatory, or for how long after the birth the intended parent(s) should be required to cover the cost of the surrogate's counselling.

140. Surrogacy arrangements can involve emotional and psychological challenges, and in extreme circumstances can lead to relationship breakdowns and serious distress for those involved.[215] Several submissions regarded counselling as the main mechanism for mitigating the social, emotional, and psychological risks inherent in surrogacy arrangements,[216] ensuring all the parties give informed consent to the arrangement, and facilitating a smooth surrogacy journey for all parties.[217] Therefore, **Proposal 21** aims to ensure that appropriate counselling is provided to all parties at the appropriate times.

141. The current mosaic of counselling-related legislative provisions across the states and territories does not facilitate comprehensive implications counselling before surrogacy arrangements begin,[218] because:

- the nature of the required counselling is vague and inconsistent between jurisdictions;
- parties sometimes receive poor-quality counselling that does not assist them to understand the risks involved or to reach a shared understanding about how these should be dealt with;[219] and
- there is no method for ensuring the parties have undertaken pre-arrangement counselling until after the child has been born; therefore, arrangements may proceed without this safeguard.[220]

142. Pre-arrangement implications counselling should only be undertaken by qualified full-members of the Australian and New Zealand Infertility Counsellors Association ('ANZICA') to ensure greater consistency in the quality and effectiveness of counselling.[221] Specifying

215 See, eg, Name withheld, *Submission 11*; Name withheld, *Submission 12*; Not published, *Submission 108*; S Everingham, *Submission 129*; Name withheld, *Submission 167*; Not published, *Submission 172*; ANZICA, *Submission 277*.

216 See, eg, Confidential, *Submission 103*; K Cox, *Submission 105*; S Everingham, *Submission 129*.

217 Name withheld, *Submission 103*; Name withheld, *Submission 126*; S Jefford, *Submission 128*; S Page, *Submission 130*; L Ransome, *Submission 144*.

218 The nature and type of counselling varies between jurisdictions, leading to inconsistent outcomes and some parties encountering poor quality counselling. Only New South Wales, Victoria, and Western Australia, have sufficient specificity to prescribe implications counselling: *Assisted Reproductive Technology Act 2007* (NSW) s 15A(5)–(6); *Assisted Reproductive Treatment Act 2008* (Vic) s 43(a)–(b); *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 10; *Surrogacy Regulations 2009* (WA) reg 4(3).

219 Many consultations and submissions have noted that the quality of counselling is highly variable, with some parties reporting poor experiences: see, eg, Name withheld, *Submission 12*; K Cox, *Submission 105*; Not published, *Submission 108*; Not published, *Submission 119*; S Jefford, *Submission 128*.

220 Aside from New South Wales, Western Australia, and Victoria, non-compliance with pre-arrangement counselling requirements will only have potential legal consequences at the parentage order application stage: see *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2022* (NT) ss 22, 25; *Surrogacy Act 2010* (Qld) ss 22(2)(e), 31; *Surrogacy Act 2019* (SA) ss 10(3)(e), 10(4)(e), 14; *Surrogacy Act 2012* (Tas) s 16(2), where compliance with pre-arrangement counselling is only enforceable at the parentage order application state, versus: *Assisted Reproductive Technology Act 2007* (NSW) s 15A; *Assisted Reproductive Treatment Act 2008* (Vic) ss 40, 43; *Surrogacy Act 2008* (WA) s 17(c), where compliance with pre-arrangement counselling is a requirement before assisted reproductive treatment can commence for the purposes of the arrangement.

221 We have heard that the quality of counselling often depends on the individual counsellor's familiarity with surrogacy arrangements: see, eg, Name withheld, *Submission 12*; Not published, *Submission 108*; Not published, *Submission 119*; Name withheld, *Submission 126*; S Jefford, *Submission 128*; Not published, *Submission 172*.

the matters that need to be discussed would also help ensure more consistent quality in the counselling provided.

143. The onus is on the counsellor to confirm that each party appeared to understand the matters discussed, and this written confirmation then forms part of the Surrogacy Support Organisation's assessment process (**Proposals 4** and **5**). This minimises the risk that implications counselling would be treated as a box-ticking exercise, and provides a way of checking that the counselling requirement has been met before there is a pregnancy to contemplate.

144. **Proposal 21** requires the counsellor to ensure the parties are aware of the right in the surrogacy agreement to further counselling where that request is reasonable.[222] This includes individual counselling or joint sessions, throughout the arrangement. This is important for managing ongoing risks or concerns, as there are many reasons why parties may require counselling during the surrogacy journey, particularly if they are faced with adverse events such as miscarriage or a problematic pregnancy scan.[223]

145. There are differing views about the appropriate role of the surrogate's partner (if any) in the counselling process. On the one hand, we have heard that engaging the surrogate's partner in pre-agreement counselling may help ensure the surrogate is supported by their partner throughout the arrangement.[224] However, others consider that the surrogate's partner falls outside the arrangement's scope and should not have to be included.[225]

## Surrogacy agreements

### *Requirements for a compliant surrogacy agreement*

**Proposal 22**

1. Legislation should provide that for a surrogacy agreement to be compliant and eligible for approval, it must:
    a. be in writing and signed by the surrogate, the surrogate's partner (if any), and the intended parent(s);
    b. be entered into before the surrogate attempts to achieve a pregnancy;
    c. contain provisions relating to permitted payments to the surrogate that are consistent with **Proposals 25** and **26**;
    d. state whether the surrogate elects to receive either or both of the optional hardship payments (see **Proposal 26**);
    e. contain a provision that ongoing counselling must be available to the parties, both individually and at joint sessions, at the reasonable election of any party, and paid for by the intended parent(s) (see **Proposal 21**);
    f. include the statement required by **Proposal 23**; and

222 See also **Proposal 22**.
223 See, eg, Name withheld, *Submission 12*; Not published, *Submission 108*; Not published, *Submission 172*.
224 See, eg, Name withheld, *Submission 12*; Not published, *Submission 108*; S Everingham, *Submission 129*.
225 See, eg, Name withheld, *Submission 15*; see also Law Commission of England and Wales and Scottish Law Commission (n 27) 84–5 [4.137], where a petition of 64 surrogates and their partners indicated surrogates' husbands should be 'removed from the picture altogether'.

g. identify the following threshold requirements and confirm that they have been satisfied:
   i. legal advice requirements have been met (see **Proposal 20**);
   ii. counselling requirements have been met (see **Proposal 21**);
   iii. a medical assessment has been conducted, and the medical practitioner has certified that the surrogacy arrangement can proceed (see **Proposal 17**);
   iv. a psychological assessment has been conducted, and the psychologist recommended that the surrogacy arrangement can proceed (see **Proposal 18**); and
   v. intended parents have completed a criminal history check (if this becomes a proposed requirement (see **Proposal 19**)).

2. Legislation should provide that evidence that the requirements in paragraph 1(g) have been met must be attached to the surrogacy agreement.

**Question H**

In relation to surrogacy agreements, should:

- any other subject matter or requirements be included?
- any of the subject matter or requirements identified be removed?
- any clauses be prohibited, taking into account **Proposal 23**?

146. Surrogacy agreements should encourage clear and transparent dialogue, secure and protective arrangements, and mutual understanding, to ensure that all parties agree on their legal rights and obligations. Currently, the requirements for a lawful domestic surrogacy agreement differ across Australia in relation to form and content.[226] The different standards reduce the scope for such agreements to protect parties from harm and unfairness.

147. Requiring all surrogacy agreements to follow certain minimum standards aims to consistently ensure that surrogacy arrangements are safe, ethical, and equitable. This involves including important clauses on cost recovery and ongoing counselling in all surrogacy agreements, for example. Knowing that these protections are in place from the start of the surrogacy arrangement may also give parties more confidence to engage in domestic surrogacy.

148. Attaching evidence to the surrogacy agreement that threshold requirements have been met demonstrates compliance with these requirements and would make the approval process simpler (see **Proposals 4** and **5**).[227] Evidence that legal advice has been provided only requires the lawyer to certify that the advice has been provided — they do not need to provide a copy of the privileged letter of advice itself.

226 Most jurisdictions require agreements to be entered into in writing and signed by all parties. Beyond this, few jurisdictions mandate the inclusion of specific requirements in the agreement, and only two jurisdictions require evidence of counselling and legal advice to be attached to the agreement: *Parentage Act 2004* (ACT) ss 26, 27; *Surrogacy Act 2010* (NSW) s 34; *Surrogacy Act 2022* (NT) ss 14, 16; *Surrogacy Act 2010* (Qld) s 22(2)(e)(v); *Surrogacy Act 2019* (SA) s 10; *Surrogacy Act 2012* (Tas) s 5(6); *Surrogacy Act 2008* (WA) s 17(b).

227 This was recommended by the Law Commission of England and Wales and Scottish Law Commission, and many stakeholders support this proposal: Law Commission of England and Wales and Scottish Law Commission (n 27) 243-4 [9.15]-[9.16] see K Cox, *Submission 105*; Not published, *Submission 172*; ANZICA, *Submission 277*.

### *Prohibited provisions in a surrogacy agreement*

**Proposal 23**

1. Legislation should prohibit the inclusion of, and invalidate, any provision in a surrogacy agreement that inhibits the surrogate's right to autonomy, bodily integrity, and informed consent in relation to medical treatment or procedures that affect them.
2. Legislation should require that a statement confirming these rights must be included in a surrogacy agreement for the agreement to be compliant.

149. We have heard that surrogacy agreements should respect the autonomy and bodily integrity of the surrogate.[228] As such, legislation should prohibit and invalidate any provision that interferes with these rights, and require that these protections are included in all surrogacy agreements. This would assist in ensuring that intended parents understand that entering a surrogacy arrangement does not mean assuming control over the surrogate's body and decision-making capacity, and would help to guard against exploitation and mistreatment.

150. The inclusion of the rights statement in all surrogacy agreements helps ensure that all surrogates are aware of their rights to autonomy and bodily integrity. This may empower surrogates to advocate for themselves or seek legal advice in situations where there may be an attempt to infringe upon these rights.

### *Enforcing surrogacy agreements*

**Proposal 24**

Legislation should provide that surrogacy agreements that comply with the legislative requirements are enforceable. Provisions that are prohibited (see **Proposal 23**) or otherwise unlawful are not enforceable.

**Question I**

Should the following be enforceable:

- surrogacy agreements that do not comply with the legislative requirements but are otherwise lawful?
- certain provisions within unlawful surrogacy agreements, for example, cost recovery provisions?

**Question J**

For otherwise compliant surrogacy agreements, should there be any provisions that are unenforceable, other than those captured by **Proposal 23**?

**Question K**

What is the best method of enforcement? For example, by a court?

228 K Cox, *Submission 105*; S Jefford, *Submission 128*; S Everingham, *Submission 129*; S Page, *Submission 130*; Not published, *Submission 172*; Equality Australia, *Submission 253*; ANZICA, *Submission 277*.

151. There are three types of surrogacy agreements contemplated by these proposals:

- compliant surrogacy agreements (agreements which comply with the legislative requirements);
- non-compliant surrogacy agreements (those that have not met all the requirements in **Proposal 22**) but are nevertheless lawful; and
- prohibited surrogacy agreements (agreements for impermissible profit or reward) (**Proposal 8**).

152. With respect to compliant surrogacy agreements, the agreement should be enforceable except for provisions prohibited in **Proposal 23** or otherwise prohibited by law. Currently, in most jurisdictions, only cost-recovery provisions in surrogacy agreements are enforceable — all other provisions are unenforceable.[229] This introduces uncertainty into a surrogacy arrangement and weakens the agreement's potential to protect the parties, especially where the relationship breaks down. As a result, parties may feel less confident to enter a surrogacy arrangement — they cannot be assured that their interests will be protected and their mutually agreed-upon terms upheld.[230] Ensuring that the surrogacy agreement is enforceable would help build trust between the parties and provide a strong legal foundation for a safe and secure surrogacy arrangement.[231]

153. We have asked for feedback on whether non-compliant but otherwise lawful surrogacy agreements should be enforceable. It is arguable that, to protect the agreed-upon rights and responsibilities of the parties, such surrogacy agreements should be enforced similarly to compliant surrogacy agreements.

154. We have also asked for feedback on whether prohibited surrogacy agreements should be enforceable, or whether certain clauses in such agreements should be enforceable. For example, it may be appropriate for the legislation to provide that the entitlements to reimbursements and other payments in **Proposals 25** and **26** should be enforceable as statutory entitlements, so that the surrogate is not unreasonably disadvantaged.

155. The method of enforcement of surrogacy agreements remains an open question. Currently, cost recovery provisions are enforceable in a court of competent jurisdiction in some states.[232] However, beyond this, the enforcement method is often set by the contract and the parties involved. This may make dispute resolution difficult, especially if the enforcement method is not specified. Having a system to enforce all surrogacy agreements may promote a more consistent and legally certain approach for the parties involved.

## Support through the surrogacy journey

156. Surrogates play a crucial role in helping intended parents create a family. However, there are gaps in the current system for reimbursement, which can leave surrogates out of pocket and unrecognised for all the costs and losses they have incurred. This is unfair, and is likely to discourage some people from being surrogates.

229 *Surrogacy Act 2010* (NSW) s 6(2); *Surrogacy Act 2022* (NT) s 12(3); *Surrogacy Act 2010* (Qld) s 15(2); *Surrogacy Act 2019* (SA) s 13(2); *Surrogacy Act 2012* (Tas) s 10(2); *Surrogacy Act 2008* (WA) s 7(3); *Assisted Reproductive Treatment Act 2008* (Vic) s 44(2).

230 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 96*; K Cox, *Submission 105*; Name withheld, *Submission 216*; Name withheld, *Submission 307*.

231 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 15*; Name withheld, *Submission 96*; S Everingham, *Submission 129*; S Page, *Submission 130*; Name withheld, *Submission 167*; Name withheld, *Submission 216*; Name withheld, *Submission 307*.

232 *Surrogacy Act 2019* (SA) s 13(2).

157. This part of the Discussion Paper proposes ways to improve the current system to better ensure that all expenses, costs, or losses reasonably incurred by a surrogate are reimbursed or provided for by intended parents. It is proposed that this would be done by:

- recognising all of the financial costs reasonably incurred by the surrogate;
- recognising the commonly experienced discomfort, pain, and suffering, as well as extraordinary medical complications, that may arise during pregnancy or childbirth, through two optional hardship payments that may be made to the surrogate; and
- better securing reimbursement of the surrogate by requiring funds to go through a trust account.

158. In addition, this part addresses the problem of intended parents incurring medical costs that should be subject to Medicare rebates.

## Cost recovery for surrogates

### *Reimbursing surrogates for expenses*

**Proposal 25**

Legislation should provide that:

1. a surrogacy arrangement that entitles surrogates to the reimbursement of payments provided for in this proposal is not, for that reason only, for impermissible profit or reward;
2. consistent with this proposal, intended parents must reimburse the surrogate for all expenses reasonably incurred by the surrogate or their partner (if any) in relation to the surrogacy arrangement. This must include, but is not limited to:
    a. costs related to assessments and other preconditions that are required for a surrogacy agreement to be compliant with the legislative requirements and eligible for approval (such as counselling, medical and psychological assessments, and legal advice);
    b. medical and wellbeing costs;
    c. pregnancy-related items, including dietary items and supplements;
    d. care of dependants;
    e. additional assistance if unable to perform daily tasks (such as meal delivery and house cleaning);
    f. travel and accommodation for the surrogate and any necessary support person;
    g. loss of earnings (including superannuation contributions);
    h. health, life, and income protection insurance during the surrogacy arrangement and following the birth of a child, miscarriage, or stillbirth;
    i. birth support;
    j. any product or service recommended by the surrogate's healthcare provider; and
    k. medical expenses following:
        i. the birth of a child, miscarriage, or stillbirth (such as counselling or physiotherapy); and
        ii. in the case of no successful pregnancy occurring, parties agreeing to cease attempts to achieve a pregnancy.

3. the period during which intended parents must reimburse the surrogate's reasonable expenses must be agreed upon by the parties to a surrogacy arrangement, but may be extended after commencement of the agreement if all parties agree; and

4. the National Regulator (or alternative) (see **Proposal 2**) should be empowered to develop standards and guidelines in relation to the expenses, costs, or losses which are to be regarded as reasonably incurred in relation to a surrogacy arrangement, as well as formulate a monthly allowance to cover any common incidental expenses for which receipts are difficult or inconvenient to obtain.

**Question L**

Should the National Regulator (or alternative) set caps on the amounts that can be recovered for specific costs, and for the monthly allowance?

159. We propose continuing to prohibit reimbursement or payment to surrogates that goes beyond what is allowed under legislation (see **Proposal 8**). Anything a surrogate receives that is not recovery of an entitlement provided for in the legislation as set out in **Proposals 25** and **26** should be considered impermissible profit or reward.

160. Each state and territory's legislation currently outlines the reasonable expenses for which intended parents can reimburse the surrogate.[233] However, 'reasonable expenses' is not uniformly defined. For example, not all jurisdictions allow reimbursement to surrogates for travel, accommodation,[234] and loss of income.[235] Surrogates can be left out of pocket, and therefore financially disadvantaged as a direct result of their role as a surrogate. Submissions received from surrogates recount a wide range of costs incurred in relation to the surrogacy arrangement for which they were not reimbursed, such as hospital parking, childcare during labour, and post-partum vitamins.[236]

161. **Proposal 25** would help ensure that surrogates are not financially disadvantaged as a result of the surrogacy arrangement by requiring that they are reimbursed for a wider range of reasonable costs beyond medical expenses. Intended parents would be required to reimburse these costs if they are incurred in relation to the surrogacy agreement, including in connection with fertility treatment, pregnancy, birth, and post-birth recovery. This proposal provides a consistent, clear, broad approach to reimbursing surrogate expenses to acknowledge the full scope of the financial costs involved. This would reduce a key barrier to becoming a surrogate.

162. The legislation should contain broad categories for reasonable expenses and a monthly allowance for incidental expenses for which receipts are not provided (such as babysitting, and fuel used to drive to appointments). The National Regulator (or alternative) (**Proposal 2**) would be tasked with developing further detail and guidance about the reimbursement process and

233 *Parentage Act 2004* (ACT) s 24; *Parentage Regulation 2024* (ACT) reg 4; *Surrogacy Act 2010* (NSW) s 7; *Surrogacy Act 2022* (NT) s 12; *Surrogacy Act 2010* (Qld) s 11; *Surrogacy Act 2019* (SA) s 11; *Surrogacy Regulations 2020* (SA) reg 5; *Surrogacy Act 2012* (Tas) s 9; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11-11A; *Surrogacy Act 2008* (WA) s 6.

234 Travel and accommodation are not reimbursable expenses in Western Australia: *Surrogacy Act 2008* (WA) s 6(3). If passed, cl 107(2)(f) of the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) would allow reimbursement for travel and accommodation expenses in that jurisdiction. South Australia allows reimbursement for 'reasonable out of pocket expenses incurred by the surrogate mother in relation to the lawful surrogacy agreement', but travel and accommodation expenses are not explicitly provided for: *Surrogacy Act 2019* (SA) s 11(1)(a)(v).

235 Only South Australia allows reimbursement for loss of income: *Surrogacy Regulations 2020* (SA) reg 5(a).

236 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 21*.

the monthly allowance amount. This would mean broader fundamental entitlements would be recognised in legislation, but a flexible approach could be taken to the exact items, services, and amounts that may be reimbursed, which could be readily updated over time. Details about reimbursement would then be contained in surrogacy agreements (**Proposal 22**). We are considering whether the National Regulator (or alternative) should set caps on the reimbursable amount under each category.

163. The period during which intended parents would be required to reimburse the surrogate's reasonable expenses would be agreed upon by the parties, though this can be extended by agreement. The duration should include fertility procedures, pregnancy, and birth, and should cover a reasonable period following the birth or conclusion of attempts to achieve a pregnancy. For example, it would be appropriate for the surrogate's life and health insurance to be covered for approximately a year post-birth.

### *Reimbursement for hardship, at the surrogate's election*

**Proposal 26**

1. Legislation should provide that a surrogacy arrangement is not for impermissible profit or reward by reason only of the entitlement to the hardship payments provided for in this proposal.
2. Legislation should provide that, where a surrogate has elected to receive one or both of the hardship payments listed below, the intended parents must pay the surrogate:
    a. a payment to recognise loss incurred by reason of the commonly experienced discomfort, pain, suffering, and assumption of risk involved in pregnancy and childbirth;
    b. an additional payment made to acknowledge an extraordinary loss associated with the surrogacy arrangement, including pain and suffering caused by serious medical complications arising from the pregnancy or childbirth (such as stillbirth or hysterectomy). This is only payable if and when extraordinary loss occurs.
3. The National Regulator (or alternative) (see **Proposal 2**) should be empowered to set a maximum cap for the hardship payment (see paragraph 2(a)). This should be set at a level that fairly approximates the likely loss experienced by a surrogate.
4. The National Regulator (or alternative) should also be empowered to develop guidelines to identify events that would give rise to the hardship payment (see paragraph 2(b)), and set a maximum cap for permitted payments. This should be set at a level that fairly approximates a surrogate's loss in a given situation.

**Question M**

Should legislation allow intended parents to pay the surrogate an additional support payment beyond reimbursement for the costs and losses outlined in **Proposals 25** and **26**, to recognise the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement?

164. Although the law differs between Australian jurisdictions, one common feature is that intended parents may only reimburse surrogates for expenses.[237] As a result, the law does not currently allow payment that recognises the full range of costs and losses associated with being a surrogate. It fails to acknowledge the significant physical, emotional, and sometimes ongoing costs to the surrogate. It can also symbolise a lack of respect for the surrogate within a highly monetised system, where many others are paid. Not having the full cost of the arrangement recognised may discourage Australians from acting as surrogates.[238]

165. **Proposal 26** aims to reimburse the surrogate for more of the real costs and losses of surrogacy, if the surrogate chooses. This is in the form of the following hardship payments, that can be made at the surrogate's election:

- an optional monthly payment to recognise the ordinary pain and discomfort of pregnancy; and
- an optional payment to be made only if extraordinary medical complications arise.

166. Surrogates may elect to receive one or both of these payments. It is anticipated that not all surrogates would request the payments. For example, in some arrangements that occur between family members, the surrogate may choose to forgo the monthly hardship payment.

167. **Proposal 26** allows the surrogate to recover the physical and emotional costs of the surrogacy, without profiting from the arrangement. Legislation would make it clear that making a hardship payment to the surrogate that is compliant with the law does not make the surrogacy for impermissible profit or reward.

168. **Proposal 26** would allow optional reimbursement for the loss the surrogate experiences due to pregnancy and childbirth. It would also promote fairness in domestic surrogacy arrangements and help mitigate the risk that surrogates are exploited, which may occur where the costs and losses to the surrogate far outweigh the reimbursement they receive.[239] Hardship payments would formalise and dignify the surrogate's role, and the significant undertaking they carry out. Similarly, the hardship payment for extraordinary events would recognise cases where a surrogate's health is severely compromised due to the surrogacy, beyond the usual pain and discomfort of pregnancy. In addition, when the costs and losses of being a surrogate are more appropriately recognised, it is expected that more Australians would be open to this role.

169. The National Regulator (or alternative) would develop standards to set the maximum reimbursement amount for these payments. The monthly payment amount should not be high enough to pay for the surrogate's services, allow a surrogate to profit from the arrangement, or induce someone to be a surrogate. It also should not be so high that it creates a significant barrier for intended parents to access domestic surrogacy. Some submissions have suggested maximum amounts for the monthly hardship payment, ranging from $1000 to $2000 per month during a pregnancy and for a short time after a birth.[240] We anticipate that the maximum amount could fall somewhere around this range.

170. **Question M** asks for feedback on whether legislation should provide for another optional support payment, in addition to those made to recover the costs and losses listed in **Proposals 25** and **26.** This payment could be made in recognition of the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement.

237 *Parentage Act 2004* (ACT) s 24; *Parentage Regulation 2024* (ACT) reg 4; *Surrogacy Act 2010* (NSW) s 7; *Surrogacy Act 2022* (NT) s 12; *Surrogacy Act 2010* (Qld) s 11; *Surrogacy Act 2019* (SA) s 11; *Surrogacy Regulations 2020* (SA) reg 5; *Surrogacy Act 2012* (Tas) s 9; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11-11A; *Surrogacy Act 2008* (WA) s 6.

238 J Attawet, *Submission 34*; Name withheld, *Submission 114*; S Page, *Submission 130*; A Whittaker, *Submission 201*; Rainbow Families, *Submission 260*.

239 As argued by the Castan Centre for Human Rights Law, *Submission 331*.

240 S Jefford, *Submission 128*; A Whittaker, *Submission 201*.

171. Additional optional payment would be a substantial shift from the current system for compensating surrogates, in which prohibiting profit or reward is intended to address the risk that surrogates will be exploited. However, the proposals in this Discussion Paper will significantly reduce the risk that Australians will be exploited, coerced, or induced to act as surrogates. In particular, **Proposals 4** and **5** would not allow a surrogacy arrangement to begin unless all requirements and safeguards have been met. With these concerns addressed, an additional payment could provide greater recognition of the surrogate's contribution without increasing the risk of exploitation. This is likely to improve access to surrogacy in Australia. It would also align more with the payments allowable in some international jurisdictions.[241] However, we note that there are different views on whether this is appropriate in the Australian context.[242]

### *Holding the funds in a trust account*

**Proposal 27**

Legislation should provide that:

1. before parties to a surrogacy arrangement attempt to achieve a pregnancy, intended parents should pay an agreed upon sum of money (set in **Proposals 25** and **26(2)(a)**) into the trust account managed by their Surrogacy Support Organisation (see **Proposal 3**) or other body;
2. the sum of money should cover the full estimated cost of the approved surrogacy arrangement, excluding the hardship payment for extraordinary complications (see **Proposal 26(2)(b)**); and
3. the disbursements to the surrogate are to be made by the Surrogacy Support Organisation from this trust account as costs are accrued (see **Proposal 25**) or in the case of the monthly hardship payment and monthly allowance, in monthly instalments (**Proposals 25** and **26**).

172. State and territory legislation does not currently regulate the process for reimbursing expenses. As a result, this appears to take place in an ad hoc way between the intended parents and the surrogate. We have heard that the process can cause tension between intended parents and surrogates. Parties can become confused about whether specific items are reimbursable, or intended parents may be reluctant to reimburse the surrogate for some items.[243] This may create interpersonal difficulties between the parties, or leave the surrogate out of pocket.

173. Establishing a system for reimbursement via a trust account would avoid these difficulties. It would provide certainty that enough funds are available at the start of a surrogacy arrangement. It would make the process more streamlined and efficient.

174. If a Surrogacy Support Organisation is not used, the trust account can be managed by a different third party, such as a lawyer.

241 Such as some parts of the United States, and Israel: Naomi Cahn and June Carbone, 'United States of America' in *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 307, 311; Rhona Schuz, 'Surrogacy in Israel' in *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 165, 166.

242 Name withheld, *Submission 11*; Australian Christian Lobby, *Submission 104*; K Cox, *Submission 105*; S Page, *Submission 130*; National Health and Medical Research Council, *Submission 175*.

243 Name withheld, *Submission 12*; Name withheld, *Submission 126*; Not published, *Submission 172*.

## Medicare entitlements

**Proposal 28**

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended to allow Medicare rebates for assisted reproductive services to apply to treatment carried out for the purpose of surrogacy.

**Proposal 29**

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended so that Medicare rebates are available for psychological assessments and pre-arrangement counselling undertaken in pursuit of a surrogacy agreement which complies with the legislative requirements for approval, as well as counselling undertaken during an approved surrogacy arrangement.

175. Medicare rebates are explicitly not allowed for assisted reproductive services provided in connection with a surrogacy arrangement.[244] When rebates for assisted reproductive technology were introduced, surrogacy was still illegal in some states, and therefore the exclusion of surrogacy-related services was inserted to accommodate this.[245] Given these prohibitions have since been repealed and surrogacy is now legal in all the states and territories, the rationale for excluding surrogacy treatments from Medicare no longer exists. A federal review of reproductive healthcare has also recommended the surrogacy exclusion be removed from the legislation.[246]

176. We have heard that having to pay the full amount for surrogacy-related treatment and support creates a major financial barrier to accessing surrogacy arrangements.[247] This includes related processes, like mandatory counselling.[248] Of the submissions received to date that mention Medicare rebates, the overwhelming majority supported extending Medicare access to surrogacy arrangements.[249]

177. **Proposal 28** reduces the financial barriers associated with accessing surrogacy by allowing Medicare rebates for assisted reproductive services to apply to treatment carried out for the purpose of surrogacy. To access the Medicare rebate parties would need to comply with the threshold requirements and other safeguards (**Proposals 12**–**24**), as **Proposals 4** and **5** make access to assisted reproductive services in connection with a surrogacy arrangement contingent on having the agreement approved.

244 *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) sch 1, reg 5.2.6; Department of Health and Aged Care (Cth), 'Medicare Benefits Schedule — Note TN.1.4'; *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) sch 1, reg 5,2,6.

245 See Senate Community Affairs References Committee, Parliament of Australia, *Ending the Postcode Lottery: Addressing Barriers to Sexual, Maternity and Reproductive Healthcare in Australia* (2023) [4.87]; Medicare Benefits Review Taskforce, *Taskforce Report on Gynaecology MBS Items* (2020) 222; see also S Page, *Submission 130*.

246 Senate Community Affairs References Committee, Parliament of Australia (n 245) rec 33.

247 See, eg, Name withheld, *Submission 1*; Name withheld, *Submission 11*; K Cox, *Submission 105*; Name withheld, *Submission 107*; Name withheld, *Submission 117*.

248 See, eg, Name withheld, *Submission 28*; Name withheld, *Submission 49*; Name withheld, *Submission 97*; K Cox, *Submission 105*; Name withheld, *Submission 324*.

249 See, eg, Name withheld, *Submission 1*; K Cox, *Submission 105*; Name withheld, *Submission 107*; Not published, *Submission 108*; Name withheld, *Submission 11*; Name withheld, *Submission 111*; Name withheld, *Submission 117*; Name withheld, *Submission 126*; S Jefford, *Submission 128*; S Everingham, *Submission 129*; S Page, *Submission 130*; Australian Nursing and Midwifery Federation (ANMF), *Submission 145*; Health Law Group, Monash Law School, *Submission 183*; A Whittaker, *Submission 201*; Equality Australia, *Submission 253*; Rainbow Families NSW, *Submission 217*; ANZICA, *Submission 277*. Cf Australian Christian Lobby, *Submission 104*; Abolish Surrogacy Australia, *Submission 112*; FINRRAGE (Australia); *Submission 180*; GeneEthics, *Submission 338*; Centre for Bioethics and Culture (US), *Submission 90*.

178. It is likely that treatments obtained for the purposes of approval (like psychological assessments and counselling) would not be eligible for Medicare rebates.[250] **Proposal 29** allows for a separate Medicare rebate item to support parties who are undertaking these preliminary steps before beginning assisted reproductive treatment.

## Support when the child is born

179. While the birth of the child may seem like the end of the surrogacy arrangement, it is often when many legal and practical issues arise. The child's legal parentage must be confirmed, and the process for doing this will vary depending on a range of factors. Surrogates and parents through surrogacy may be eligible for leave, to support recovery for surrogates, and to give parents time to care for and bond with the child. But navigating these processes can be complex and overwhelming. The proposals aim to make these processes clearer and simpler.

180. It is also at this point, when the child is born, that the child's rights and interests come into sharper focus. Beyond removing barriers to legal parentage and parental leave — which is in the child's best interests — the proposals aim to uphold their right to access information about their genetic and gestational origins. This is through improving access to detailed and meaningful information for people born through surrogacy.

### Pathways to legal parentage

181. The rights and best interests of children born through surrogacy require a clear and efficient pathway for their functional parents to be recognised as their legal parents. In Australia, the current pathway to recognising legal parentage for intended parents is complex, time consuming, and expensive. In domestic surrogacy arrangements, the surrogate (and the surrogate's partner, if any) is presumed to be the child's legal parent upon birth and is recorded on the child's birth certificate as such.[251] This is inconsistent with the intention of the parties to the surrogacy agreement and can only be displaced by court order. Transferring legal parentage to intended parents can take months for lawful domestic surrogacy arrangements,[252] and may not be available at all for domestic arrangements which do not fully comply with legislative requirements.[253] In overseas surrogacy arrangements, intended parents may never be recognised as legal parents (or even as having parental responsibility) under Australian law.[254] The current law results in intended parents not being able to make decisions about the child in their care and is inconsistent with the rights and best interests of the child to have their functional parents recognised as their legal parents.[255]

250 Most assisted reproductive technology rebates are 'global items' in the rebate schedule, meaning that a lump sum is provided to cover all associated treatments (including 'treatment counselling'); the costs for preliminary treatments, like pre-arrangement counselling and assessments, will likely be incurred before the individual is eligible for the general rebate to cover the assisted reproductive treatment itself: see *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) regs 5.2.4-5.2.6, Subgroup 3-Assisted reproductive services; Services Australia and Australian Government, 'Assisted Reproductive Technology Services', *Billing rules for procedures and services* (15 April 2025) <www.servicesaustralia.gov.au/mbs-billing-for-assisted-reproductive-technology-services?context=20>.

251 *Parentage Act 2004* (ACT) ss 11, 13(3); *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1978* (NT) pt 3 div 2 subdiv 2–3; *Status of Children Act 1978* (Qld) pt 3 div 2; *Family Relationships Act 1975* (SA) s 10C; *Status of Children Act 1974* (Tas) ss 10C, 20; *Status of Children Act 1974* (Vic) s 19; *Artificial Conception Act 1985* (WA) ss 5-7.

252 Each state and territory provides that an application for a parentage order can only be made a month after the birth, and it may take weeks to months following the application for the order to be finalised: *Parentage Act 2004* (ACT) s 28G(3)-(4); *Surrogacy Act 2010* (NSW) s 16; *Surrogacy Act 2022* (NT) s 26(2); *Surrogacy Act 2010* (Qld) s 21(1); *Surrogacy Act 2019* (SA) s 18(2); *Surrogacy Act 2012* (Tas) s 15; *Status of Children Act 1974* (Vic) s 20(2); *Surrogacy Act 2008* (WA) s 20(2)-(3). S Page, *Submission 130* highlighted that due to the difficulty of navigating legal proceedings while caring for a newborn, often intended parents do not apply until four to five months after the birth.

253 *Re N* [2025] NSWSC 409.

254 *Bernieres v Dhopal* (2017) 324 FLR 21, (in which the full court (Bryant CJ, Strickland and Ryan JJ) refused applications for leave to commence adoption proceedings and an application for a declaration of parentage, but granted an application for parenting order granting parental responsibility). See also *Lloyd and Compton* [2025] FedCFamC1F 28, (in which Carew J held the parents did not have standing to bring an application for parental responsibility, or for the purposes of making an application for leave to commence adoption proceedings).

255 See also '**A human rights approach**'.

182. The proposed pathways to parentage simplify the process and ensure that legal parentage can be granted in the child's best interests, regardless of the type of surrogacy arrangement.

- **Administrative pathway** — for approved surrogacy arrangements,[256] intended parents would be recognised as the child's legal parents upon birth. A court is only required to determine parentage, in the best interests of the child, where the surrogate seeks a declaration of legal parentage. For most domestic surrogacy arrangements this would provide a simpler pathway for intended parents to obtain legal parentage, while still ensuring judicial oversight where appropriate.
- **Judicial pathway** — for unapproved surrogacy arrangements (which include all overseas surrogacy arrangements), the surrogate (and the surrogate's partner, if any) would continue to be recognised as the child's parent upon birth. A court order, to be made in the best interests of the child, would be required before legal parentage can be transferred to intended parents. Judicial oversight is needed because these arrangements are not subject to the same legislative safeguards as approved surrogacy arrangements.

183. The ALRC proposes that, where a court order is required, a specialist list of the Federal Circuit and Family Court of Australia should be responsible for determining applications for legal parentage.

184. The ALRC recognises that using federal legislation to govern pathways to legal parentage may present constitutional challenges, given current limited conferrals of state legislative power. The ALRC will continue to consider this issue further. **Proposal 1** discusses options for harmonisation.

### *Administrative pathway to legal parentage*

**Proposal 30**

1. The *Family Law Act 1975* (Cth) should be amended to provide that:
   a. where there is an approved surrogacy arrangement and a child is born, the intended parent(s) who are parties to that agreement are, upon birth (including stillbirth), the legal parent(s) of the child;
   b. within three months of the birth (or stillbirth) of the child, the surrogate may apply for a declaration that the surrogate (and the surrogate's partner, if any) are the legal parent(s) of the child; and
   c. the Federal Circuit and Family Court of Australia is empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.
2. The Federal Circuit and Family Court of Australia should create a specialist list for dealing with surrogacy-related applications.

**Question N**

In relation to approved surrogacy arrangements, where intended parents are the legal parents upon the birth of the child, should the surrogate have a right to seek a declaration that they are the parent (per **Proposal 30(1)(b)**)?

256 Approved surrogacy arrangements will have complied with rigorous threshold requirements and procedural safeguards: see **Proposals 13**–**24** (threshold requirements and surrogacy agreements) and **Proposals 4** and **5** (approval process).

185. In all Australian jurisdictions, a court application is required before legal parentage can be transferred from the surrogate to the intended parent(s). This application generally cannot be made earlier than four weeks or later than six months after the child is born. Applications can take between weeks and months to finalise.[257] Intended parents are required to undertake legal proceedings, which can be expensive and time consuming, while caring for a newborn. During this time, intended parents cannot make legal decisions for the child, including decisions about medical treatment, unless a valid power of attorney is in place.[258] Instead, the surrogate remains legally responsible for the child, against the surrogate's intention and wishes.[259]

186. Currently, where a child is stillborn, or dies before a legal parentage order is made, there is no process for intended parents to have their relationship to the child legally recognised.[260] This can have profound emotional and practical consequences, including for leave entitlements,[261] and in relation to deciding what should be done with the child's remains.[262]

187. Submissions to the Issues Paper called for simpler and more certain processes for determining parentage.[263] Concerns with the current process can motivate intended parents to seek overseas surrogacy arrangements in jurisdictions where processes for recognising legal parentage are more certain for intended parents.[264]

188. **Proposal 30** ensures that it is clear from birth that the child's functional parents are recognised as the child's legal parents. It is the ALRC's intention that the intended parents would therefore be able to register the child's birth and be recorded on the birth certificate as the child's parents. This is important for the child's identity, and consistent with the rights of the child to be cared for by their parents,[265] and to privacy, family, and home.[266]

189. **Proposal 30**, considered with **Proposal 31**, provides a strong incentive for people to engage in surrogacy domestically, through an approved surrogacy arrangement. By directing those who engage in surrogacy to the safest and fairest pathway available, the underlying aims of the regulatory system would be better achieved. This is because the administrative pathway ensures the threshold requirements and safeguards are complied with by addressing these upfront and before the child is born (see **Proposals 13** to **24**). This contrasts with the current system, where non-compliance may not be identified until after the child is born, at which point it is effectively too late for the requirement or safeguard to have any operation or useful effect.[267]

257 Each state and territory provides that an application for a parentage order can only be made a month after the birth, and it may take weeks to months following the application for the order to be finalised: *Parentage Act 2004* (ACT) s 28G(3)-(4); *Surrogacy Act 2010* (NSW) s 16; *Surrogacy Act 2022* (NT) s 26(2); *Surrogacy Act 2010* (Qld) s 21(1); *Surrogacy Act 2019* (SA) s 18(2); *Surrogacy Act 2012* (Tas) s 15; *Status of Children Act 1974* (Vic) s 20(2); *Surrogacy Act 2008* (WA) s 20(2)-(3).

258 This experience has been raised in several submissions: see, eg, Not published, *Submission 108*; S Page, *Submission 130*; Name withheld, *Submission 205*; Not published, *Submission 220*.

259 Not published, *Submission 119*; S Jefford, *Submission 128*; Name withheld, *Submission 142*; Australian Nursing and Midwifery Federation (ANMF), *Submission 145*; Name withheld, *Submission 147*; Equality Australia, *Submission 253*.

260 The statutory requirements for transferring parentage generally require the child to be 'born' from the arrangement, and be currently living with the intended parents, requirements that cannot be satisfied following a stillbirth: see, eg, *A v X; Re Z* [2022] NSWSC 971.

261 While it appears that the intended parents would still be eligible for paid parental leave following the stillbirth or death of the child (*Paid Parental Leave Act 2010* (Cth) ss 276-7) their eligibility for unpaid parental leave under the National Employment Standards appears to hinge on whether the child has been placed with the intended parents: *Fair Work Act 2009* (Cth) s 77A.

262 As the legal parent, the surrogate has legal responsibility to determine what happens with the stillborn child's remains, including whether an autopsy is performed, and whether the body is buried or cremated. See, eg, *Births, Deaths and Marriages Registration Act 2023* (Qld) ss 6-8; *Cremations Act 2003* (Qld).

263 See, eg, S Page, *Submission 130*; Name withheld, *Submission 147*; Australian Nursing and Midwifery Federation (ANMF), *Submission 145*.

264 Kneebone et al (n 5). See also K Cox, *Submission 105*; Name withheld, *Submission 278*.

265 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.

266 Ibid art 16. See also '**A human rights approach**'.

267 *Altimari v Altimari* [2024] FedCFamC1F 3.

190. The right of surrogates to seek a declaration that they are the legal parent is an additional safeguard. In these circumstances, a judge would determine parentage, with the primary consideration being the best interests of the child. Where the surrogate seeks a declaration, we propose that the Federal Circuit and Family Court of Australia is the appropriate jurisdiction to determine the application, because:

- it is the specialist family court in Australia;
- it already deals with applications for parentage declarations and parental responsibility orders;[268] and
- it would help promote national consistency in how surrogacy laws are applied.

191. Introducing a specialist surrogacy list within the Federal Circuit and Family Court of Australia would allow expertise to develop and for consistent decision-making.

192. Given the rigorous threshold requirements and processes parties must undergo for their surrogacy agreement to be approved, we seek feedback about whether a safeguard relating to the surrogate's right to seek a declaration is needed (see **Question N**).

### *Judicial pathway to legal parentage*

**Proposal 31**

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an unapproved surrogacy arrangement (which includes all overseas surrogacy arrangements) (see **Proposals 4** and **5**) and a child is born:
   a. the surrogate, and the surrogate's partner (if any) are, upon birth (or stillbirth), the legal parents of the child;
   b. the intended parents must make an application for a declaration of legal parentage to the Federal Circuit and Family Court of Australia, within three months of the child being born (for domestic arrangements) or entering Australia (for overseas arrangements); and
   c. the Federal Circuit and Family Court of Australia is empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.
2. The application should be heard and determined in the specialist list (see **Proposal 30(2)**).

**Proposal 32**

Legislation should provide that the process outlined in **Proposal 31** is retrospectively available in respect of children born through surrogacy arrangements that occurred before the proposed amendments come into effect.

268 See, eg, *Masson v Parsons* (2019) 266 CLR 554; *Bernieres v Dhopal* (2017) 324 FLR 21; *Lloyd and Compton* [2025] FedCFamC1F 28; *Seto & Poon* [2021] FamCA 288; *Gallo & Ruiz* [2024] FedCFamC1F 893.

**Question O**

When there is an application to determine legal parentage (see **Proposals 30**, **31**, and **32**), should judicial officers of the Federal Circuit and Family Court of Australia be required to consider any specific factors when determining the application? If so, what should those factors be?

**Question P**

Should there be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement (see **Proposal 37**); and are recognised in the birth country as the legal parents of the child? For example, should legal parentage be recognised in Australia without the need for a court order?

193. Currently, in circumstances where surrogacy arrangements do not comply with state or territory law, the outcome can be complicated.

- Under most state and territory laws, intended parents will often not be able to have legal parentage recognised.[269] The Australian Capital Territory and New South Wales have recently introduced laws that allow parentage orders to be made following a (prohibited) commercial surrogacy arrangement, but only in limited circumstances.[270]
- Federal alternatives are limited and uncertain. The Federal Circuit and Family Court of Australia[271] has been reluctant to make decisions which may undermine state and territory law, or to recognise legal parentage in overseas surrogacy matters.[272] In *Bernieres v Dhopal,* the Full Court refused to make a parentage declaration in favour of intended parents who had engaged in commercial surrogacy overseas.[273] However, the Court has not taken a consistent approach in subsequent cases.[274]

194. While there are alternatives to applying for legal parentage, these options are inferior.

- Parental responsibility orders provide intended parents with the authority to make decisions for the child's care and welfare, but do not recognise them as the child's legal parents.[275]
- Registering overseas child orders and orders confirming parentage, where birth information is registered overseas, are only an option for children born in specified countries.[276]
- Step-parent adoption proceedings are complex and require one intended parent to already have recognised legal parentage.[277]

195. Limiting access to legal parentage aims to encourage compliance with the legislative requirements. However, this ignores the reality that children continue to be born from surrogacy arrangements that do not comply with the law. Preventing access to legal parentage in these

269 See, eg, *Altimari v Altimari* [2024] FedCFamC1F 3; *Re N* [2025] NSWSC 409.
270 See, eg, *Parentage Act 2004* (ACT) ss 28F(2), 28H(2). These recently introduced provisions allow parentage orders to be made following commercial surrogacy arrangements, provided the intended parents can demonstrate the child would face a 'pressing disadvantage' if the order were not made. However, these provisions do not preclude criminal liability under section 41 of the Act. NSW has introduced similar provisions: *Surrogacy Act 2010* (NSW) ss 18(2), 23(2).
271 Formerly the Family Court of Australia.
272 See, eg, *Bernieres v Dhopal* (2017) 324 FLR 21.
273 Ibid.
274 In *Masson v Parsons* (2019) 266 CLR 554, the High Court of Australia adopted a broad interpretation of 'parent' in the context of children conceived through assisted reproductive technology. This decision was relied upon in *Gallo & Ruiz* [2024] FedCFamC1F 893 where legal parentage was granted to an intended parent of a child born through an overseas commercial surrogacy arrangement. In contrast, in *Lloyd and Compton* [2025] FedCFamC1F 28 the court took the position that it was bound by the decision of the Full Court in *Bernieres v Dhopal* (2017) 324 FLR 21 (but also found that the intended parents did not even have standing to apply for a parenting order).
275 See, eg, *Seto & Poon* [2021] FamCA 288.
276 *Family Law Act 1975* (Cth) ss 69R, 70G; *Family Law Regulations 2024* (Cth) reg 72, schedule 4.
277 *Family Law Act 1975* (Cth) ss 4(1), 60G; see also *Bernieres v Dhopal* (2017) 324 FLR 21 36–7 [87].

cases contravenes the rights and best interests of the child and treats them differently based on the mode of gestation.[278] Failure to recognise the child's functional parents as their legal parents can have social or psychological impacts on the child's wellbeing; create practical problems in relation to the child's care;[279] and affect the child's rights and entitlements, including those related to child support and inheritance.[280]

196. **Proposal 31** would allow intended parents to be recognised as the legal parents of the child. It is generally in a child's best interests to have their functional parents recognised as their legal parents.[281] However, in contrast to surrogacy undertaken under an approved surrogacy arrangement, court oversight is desirable given the potential lack of safeguards to protect the rights and interests of everyone involved.[282]

197. A simpler process may be justified, in circumstances where intended parents have engaged in a registered overseas surrogacy arrangement (**Proposal 37**) and have also been recognised as the child's legal parents in the child's country of birth. Because there has already been a degree of oversight, it arguably makes sense to recognise the intended parents as the legal parents of the child in Australia, without the need for an Australian court order (see **Question P**).

198. There are also Australian children born through overseas surrogacy, whose functional parents are still not recognised as their legal parents.[283] **Proposal 32** would provide these families with a pathway to have their relationships legally recognised.

### *What if a federal process is not adopted?*

199. If **Proposals 30**–**32** were not adopted, and the Federal Circuit and Family Court of Australia was not responsible for determining parentage in surrogacy matters, similar outcomes may be achieved by other means. Some potential options may include:

- enacting a process, similar to the one outlined in **Proposal 30**, in each state and territory for approved domestic surrogacy arrangements;[284]
- allowing judges in each state and territory to have more discretion to grant legal parentage where this is in the child's best interests, despite the existence of non-compliant or prohibited surrogacy arrangements (including all overseas surrogacy arrangements), similar to the process in **Proposals 31**–**32**;[285]
- enacting carve-outs for recognising overseas surrogacy arrangements;[286] or
- introducing legislative amendments to support interstate arrangements or orders.[287]

200. See **Proposal 1** for a discussion on options for greater harmonisation.

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278 Alexandra Harland, 'Surrogacy, Identity, Parentage and Children's Rights – Through the Eyes of a Child' (2021) 59(1) *Family Court Review* 121; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 7, 8. See also Castan Centre for Human Rights Law, *Submission 331*.

279 Harland (n 278).

280 Adiva Sifris, 'The Family Courts and Parentage of Children Conceived through Overseas Commercial Surrogacy Arrangements: A Child-Centred Approach' (2015) 23 *Journal of Law and Medicine* 396, 407.

281 Ibid 405.

282 See, eg, Allan (n 13) rec 46.

283 Sifris and Sifris (n 42) 386.

284 For example, through model legislation.

285 For example, by allowing for discretion to still grant parentage even when the pre-conditions, such as the threshold or process requirements, have not been met, e.g. where the parties failed to obtain legal advice or implications counselling, or the surrogate had not had a previous successful pregnancy: see, eg, *Surrogacy Act 2019* (SA) s 18(7); *Surrogacy Regulations 2020* (SA) reg 6.

286 For example, provide an alternative model under state and territory legislation to allow parentage in international surrogacy arrangements to be recognised, as is seen in the Australian Capital Territory and New South Wales: *Parentage Act 2004* (ACT) s 28F(2); *Surrogacy Act 2010* (NSW) ss 18(2), 23(2).

287 For example, each state and territory adopt legislation recognising parentage orders made in another Australian state or territory, see, eg, South Australian Law Reform Institute (n 64) rec 4.

## Parental leave entitlements

**Question Q**

What changes (if any) should be made to laws, policies, or practices to ensure that intended parent(s) have access to fair and adequate parental leave and surrogates have access to fair and adequate leave to recover from pregnancy and childbirth?

201. Access to leave following the child's birth is important, both to allow the person who has given birth time to recover, and to allow new parents time to care for and bond with their newborn. This can be a stressful and emotionally-intense time for everyone involved.[288] Leave should be accessible following a child's birth, regardless of the mode of gestation.

202. Currently, intended parents can access 12 months of unpaid parental leave under the National Employment Standards provided for by the *Fair Work Act 2009* (Cth). Surrogates can access a lesser amount of unpaid leave under these standards, ranging from six weeks before the due date to at least six weeks following the birth.[289] Intended parents[290] and surrogates[291] are potentially eligible for Centrelink's Paid Parental Leave scheme, which is based on the national minimum wage, for up to 24 weeks for a child born in the current financial year.[292] The parties may also be eligible for additional leave under industrial awards or enterprise agreements applicable to their employment, but this is highly variable.

203. We have heard that there are some issues with intended parents and surrogates accessing leave after the child is born. For example:

- it is unclear if surrogates' minimum leave entitlements under the National Employment Standards are adequate to allow the surrogate to recover from the pregnancy and birth;
- it is unclear how parental leave entitlements in enterprise agreements and modern awards apply to parties to a surrogacy arrangement;[293] and
- intended parents and surrogates have experienced challenges in engaging with Centrelink staff to access paid parental leave.[294]

## Information about a person's gestational history

204. We have heard from submissions and consultations about how important it is for people born through surrogacy to have access to information about their gestational history.[295] For example, some people born through surrogacy may want to contact the surrogate who gave birth to them. For others, it may help them better understand their heritage and form their identity.

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288 We have heard from several stakeholders that being expected to navigate complex legal processes while recovering from giving birth or while caring for a newborn, is an unreasonable expectation; as far as possible this time should be uninterrupted as it would be for parents who conceived naturally: see, eg, Name withheld, *Submission 107*; S Page, *Submission 130*; Name withheld, *Submission 162*.

289 *Fair Work Act 2009* (Cth) ss 70–2, 78.

290 The intended parent(s) are able to apply through a 'special PPL claim': *Paid Parental Leave Act 2010* (Cth) ss 36A, 47, 54(1)(g); *Paid Parental Leave Rules 2021* (Cth) r 27. Note the definition of 'parent' under the Paid Parental Leave Act 2010 (Cth) explicitly includes a parent under a parentage order, per s 60HB of the *Family Law Act 2010* (Cth).

291 *Paid Parental Leave Act 2010* (Cth) s 31AA(4)(e); *Paid Parental Leave Rules 2021* (Cth) rr 9(2)(b)(i), (3)(b)(i), 13(2)(ii). The surrogate must apply within 24 weeks of the day of the birth: r 13(1)(b)(iii).

292 *Paid Parental Leave Act 2010* (Cth) ss 31ABA, 65(2).

293 See, eg, Lolita Wikander et al, 'Australian Higher Education Enterprise Agreements and the Provisions for Surrogates: A Short Debate' [2025] *Journal of Public Health* 1; S Jefford, *Submission 128*.

294 See, eg, Name withheld, *Submission 11*; Name withheld, *Submission 107*; Not published, *Submission 119*; S Jefford, *Submission 128*; Australian Nursing and Midwifery Federation (ANMF), *Submission 145*; Name withheld, *Submission 147*.

295 Name withheld, *Submission 158*; Not published, *Submission 172*; FINRRAGE (Australia), *Submission 180*; FamilyVoice Australia, *Submission 232*; Not published, *Submission 341*.

205. Australia has an obligation under the Convention on the Rights of the Child to ensure people born through surrogacy have access to information about their gestational history. Under the Convention, a child has the right to preserve their identity, including nationality, name, and family relations.[296]

206. In most Australian jurisdictions, there is no system for people born through surrogacy to access details about the surrogate who gave birth to them. The proposals outlined below create a system that enables people born through surrogacy to access appropriate information via two intersecting avenues: birth certificates, and through a surrogacy register. The proposals address similar issues to the need for donor-conceived people to access information about their gamete donors — the proposals below align with current processes for donor conception where possible.

### *Information available through birth certificates*

**Proposal 33**

1. Legislation should require birth registration statements and other documents seeking to register the birth of a child born in any Australian state or territory to include a section to collect information about surrogacy-related births. Information collected should include the surrogate's identifying details such as full name, address, and date and place of birth.
2. Legislation should provide that where the above information has been provided to the registry of births, deaths, and marriages, an addendum — stating that additional information is available and may be obtained via the national surrogacy register (or relevant state or territory-based register) (see **Proposal 35**) — must be attached to either:
   - **Option 33.1** Every copy of the birth certificate issued to the person born through surrogacy from birth; or
   - **Option 33.2** Every copy of the birth certificate issued to the person born through surrogacy after they have reached the age of 16.

207. Most states and territories have not legislated a system for collecting and giving access to information about surrogacy arrangements through birth registers.[297] Only New South Wales, the Northern Territory, and South Australia have systems in place to notify a person born through surrogacy that there is more information held on the birth register, and provide access to the original entry.[298] As a result, in most states and territories, it is possible that people born through surrogacy will never learn about their birth circumstances from the births, deaths and marriages register.

208. **Proposal 33** addresses the issue by creating a nationally consistent and streamlined system for recording surrogacy birth details and making information available in appropriate circumstances. It would facilitate access to information about the surrogate, and uphold the rights and best interests of people born through surrogacy.

209. The law currently requires parents to complete a 'birth registration statement'[299] to register a child's birth. Under the administrative pathway, it is the ALRC's intention that intended parents would be listed as the parents in these statements and on birth certificates. **Proposal 33** would

296 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8. Other relevant rights are discussed elsewhere in this Discussion Paper (see **A human rights approach**).
297 The Australian Capital Territory, Queensland, Tasmania, Victoria, and Western Australia.
298 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 25D(3); *Births, Deaths and Marriages Registration Act 1996* (NT) ss 28N(3), 28P; *Births, Deaths and Marriages Registration Act 1996* (SA) s 22A(4).
299 In Western Australia this is called a 'birth registration application'.

see details about the surrogacy arrangement and the surrogate also collected in birth registration statements and kept in the birth register.

210. **Proposal 33** largely replicates existing systems relating to donor-conceived people.[300] An addendum would be attached to the birth certificate indicating that more information is available about the birth registration entry. Including the information in an addendum, rather than on the face of the birth certificate, safeguards the privacy of people born through surrogacy, as birth certificates are needed for purposes such as enrolling in school or getting access to Medicare. It would also prevent people born through surrogacy from being viewed or treated differently. It aligns with submissions from people with personal experience of surrogacy, many of whom consider that this information should not be provided on the face of the person's birth certificate.[301]

211. There are two options listed above in relation to when the addendum is attached to the birth certificate:

- Attached to all copies issued by the register, including the first certificate issued after a child's birth (**Option 33.1**). This would maximise the chances that the person becomes aware that they were born through surrogacy (if they had not already been informed by family).
- Attached only in copies issued after the person reaches the age of 16 (**Option 33.2**). This would align with donor conception schemes, as well as the age at which the person can obtain information from the surrogacy register (**Proposal 35**). It would ensure that the person is of sufficient maturity before accessing this information. That said, it should be noted that this option relies on the person applying for a copy of their birth certificate beyond childhood.

### *Accessing information through a Surrogacy Register*

**Proposal 34**

1. Legislation should require the following information to be provided to the National Regulator (or alternative) for inclusion on a surrogacy register (or state and territory donor conception register — see **Proposal 35**) within three months of the birth of a child through surrogacy:
    a. identifying information about the surrogate, including:
        i. full name;
        ii. date and place of birth;
        iii. home address; and
        iv. ethnicity and physical characteristics;
    b. whether the surrogacy was a traditional surrogacy or gestational surrogacy; and
    c. details of the relevant fertility clinic and doctor (if any).
2. Legislation should provide that if a parentage order is obtained (see **Proposals 30–32**), it must be provided to the surrogacy register in addition to the information listed in paragraph 1(a) to 1(c) above.

300 See, eg, *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B(2).
301 Name withheld, *Submission 158*; Name withheld, *Submission 286*; Not published, *Submission 341*.

**Question R**

In relation to **Proposal 34**:

- does it capture all the appropriate and relevant information that should be included on the surrogacy register; and
- who should be responsible for providing that information? For example, the relevant Surrogacy Support Organisation, assisted reproductive technology service provider, or the legal parents?

**Proposal 35**

1. Legislation should require the information listed in **Proposal 34** to be included in either of the following:
   - **Option 35.1 (preferred)** A national surrogacy register established for this purpose; or
   - **Option 35.2** Existing state and territory donor conception registers (the Northern Territory and Tasmania, which have not established donor conception registers, should establish them).
2. Legislation should provide that:
   a. people born through surrogacy have a right to access the information contained in the register from age 16 (or in the case of **Option 35.2**, the age at which the relevant legislation allows access to information held on the register); and
   b. a person born through surrogacy who is under the age of 16 may access this information if the National Regulator (or alternative) is satisfied that such access would not be harmful to that person's welfare. The regulatory body may request that a counselling certificate or similar documentation from an accredited counsellor be provided to assist in its assessment.

212. To uphold their rights, people born through surrogacy should have access to information relating to key individuals who contributed to their birth, including surrogates. However, there are gaps in the legislative frameworks to facilitate this. Donor registers, which are in place in most states and territories,[302] give donor-conceived people the option to obtain information about their genetic history. Only the New South Wales donor register incorporates information about surrogates, and only on an optional basis.[303] In all other states and territories there is no system in place for people born through surrogacy to access detailed information about their gestational origins.

213. **Proposals 34** and **35** would create a system for collecting and providing people born through surrogacy with identifying information relating to surrogacy arrangements in all states and territories, as well as in overseas surrogacy arrangements. This would promote the right to identity for people born through surrogacy. There are two options for how this could take place:

- The preferred option is for a register to be established on a national scale, to support a consistent and accessible approach to providing this information (**Option 35.1**).

302 With the exception of the Northern Territory and Tasmania. Legislation to establish a register has been passed in Queensland, however the donor conception register system is yet to commence.

303 *Assisted Reproductive Technology Act 2007* (NSW) s 41C.

- Alternatively, this information could be incorporated into state and territory donor registers to make use of existing systems (**Option 35.2**).

214. If a national donor conception register is established, as recommended in Australia's 10 Year Fertility Roadmap,[304] it would be appropriate for that register to include information about surrogacy arrangements. Establishing a surrogacy register found support in submissions,[305] and a national register was considered the best solution.[306]

215. The categories of information listed in **Proposal 34** have been adapted from the information currently provided to donor conception registers.[307] While providing this information to the register should be mandatory after the proposal is implemented, it should also be an option for all past surrogacy arrangements. We are considering who is best placed to provide the information listed in **Proposal 34** to the National Regulator. It would be important for the person or entity responsible to do so efficiently and reliably.

216. **Proposal 35** would enable people born through surrogacy to request access to information relating to their gestational origins from the age of 16. This age reflects the reality that many young adults have high levels of maturity and agency, and this information is important to them forming their identity. It also aligns with the age at which gamete donor registers can be accessed in some states and territories.[308] Children under the age of 16 would be able to seek access to information on the register where it would not be harmful to their welfare. If **Option 35.2** is implemented, the age of access should mirror the existing process for donor conceived people.

### *Ensuring information is collected*

**Proposal 36**

1. Legislation should impose sanctions for the failure to collect and provide information to include in the national, or state or territory-based, surrogacy register as required by **Proposal 34**.
2. Legislation should provide that failure to comply with the requirement will be enforced through:
   - **Option 36.1** A civil penalty regime; or
   - **Option 36.2** Criminal sanctions.

217. **Proposal 34** envisages that a person or entity would provide information relevant to the surrogacy arrangement to the body responsible for maintaining a surrogacy register. Providing information to the register is a crucial element of the process outlined in **Proposals 34** and **35**.

218. **Proposal 36** creates a mechanism to reduce the risk that information will not be provided to the register. Whether a civil penalty or criminal sanction is imposed, and how severe it is, could depend on who is responsible for providing information to the register. For example, the penalty could be lower if parents through surrogacy are responsible, and higher if an entity is responsible. Criminal sanctions are included as an option as these currently apply to assisted reproductive

304 Professor The Hon Greg Hunt and Dr Rachel Swift, *Findings, Recommendations and Framework for Australia's 10 Year Fertility Roadmap* (Fertility Society of Australia and New Zealand, Reproductive Technology Accreditation Council, 2024) rec 3.
305 Name withheld, *Submission 19*; Name withheld, *Submission 60*; Name withheld, *Submission 158*; Not published, *Submission 274*; Name withheld, *Submission 339*.
306 Jigsaw Queensland Inc., *Submission 163*; Not published, *Submission 172*; ANZICA, *Submission 277*.
307 See, eg, *Assisted Reproductive Technology Act 2007* (NSW) s 30.
308 *Assisted Reproductive Technology Act 2024* (ACT) ss 51(1)(a), 64; *Assisted Reproductive Technology Act 2024* (Qld) s 48.

technology service providers for failure to comply with donor conception register requirements.[309] On the other hand, a civil penalty may be easier to enforce and therefore more effective (see **Parameters of lawful surrogacy**).

## Regulating overseas surrogacy

219. A significant number of surrogacy arrangements entered into by Australian intended parents take place overseas.[310] These arrangements are often commercial in nature, though some are altruistic.[311] Whether Australians should be permitted to engage in overseas surrogacy arrangements remains a debated issue. Concerns include that permitting Australians to do so is inconsistent with Australia's domestic prohibition on commercial surrogacy,[312] and that, depending on the destination, these arrangements may have a greater risk of exploitation or human trafficking.[313]

220. Currently in Australia, there is no consistent approach to regulating overseas surrogacy arrangements. Three jurisdictions prohibit commercial overseas arrangements.[314] However, it appears that while some people from those jurisdictions are deterred, some ignore the prohibition or try to evade it.[315] The prohibition is also not enforced.[316] The lack of uniformity across jurisdictions, combined with the lack of enforcement raises questions about how effective the system is.[317]

221. Where overseas surrogacy arrangements do occur, Australian border authorities are faced with the reality that intended parents seek to bring children born through these arrangements into Australia. Depending on the circumstances, applications for citizenship by descent, an Australian passport, or a visa may be required.[318] These applications can be complex, and further complicated by exit processes in the birth country.

222. Whether Australians should be prohibited from engaging in overseas surrogacy arrangements is discussed in '**Parameters of lawful surrogacy**'. Ultimately, to help mitigate the risk of exploitation while acknowledging the reality that non-exploitative arrangements can occur in

309 *Assisted Reproductive Technology Act 2024* (ACT) s 46(3); *Assisted Reproductive Technology Act 2007* (NSW) s 33; *Assisted Reproductive Technology Act 2024* (Qld) s 45; *Assisted Reproductive Treatment Act 1988* (SA) s 15(7); *Assisted Reproductive Treatment Act 2008* (Vic) s 51; *Human Reproductive Technology Act 1991* (WA) s 44.

310 Department of Home Affairs, *Submission 248*: 'In 2023-24, 361 children born through surrogacy acquired Australian citizenship by descent. The five main countries of birth of these children were, in numerical order: United States of America, Georgia, Canada, Colombia, and Ukraine. In 2024-25 (to 30 May 2025), 333 children born through surrogacy acquired Australian citizenship by descent'.

311 Australian Government, 'Surrogacy Overseas' <www.surrogacy.gov.au/surrogacy-overseas>. See also S Jefford, *Submission 128*.

312 Allan (n 13) 182.

313 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 27–8; Gorton (n 68) 138–9; Department of Home Affairs, *Submission 248*.

314 *Parentage Act 2004* (ACT) ss 41, 45; *Surrogacy Act 2010* (NSW) ss 8, 11; *Surrogacy Act 2010* (Qld) ss 54, 56. It could also be unlawful for people who live in other jurisdictions to engage in 'commercial' surrogacy overseas, due to 'long arm' laws (for example, if an act which occurred in Australia makes up an element of the offence. See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 12. See also Allan (n 13) 173.

315 See Allan (n 13) 176; Stephen Page, 'Australia Can Stop Living the Failed Surrogacy Experiment' (2025) 34(1) *Australian Family Lawyer* 39, 41; Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 1.

316 See also Allan (n 13) 174. The 2019 Allan Review noted that there have been no prosecutions under the extraterritorial laws in the ACT, NSW or Queensland, nor had there been any prosecution in WA pursuant to s 12 of the *Criminal Code 1913* (WA). This reticence for prosecution despite a prohibition is also seen in comparable jurisdictions overseas, such as the UK, New Zealand and Canada: Keyes (n 112) 393. However, the absence of prosecution does not, of itself, evidence inefficacy, as it does not indicate how many people who may otherwise have engaged in commercial surrogacy have been deterred from doing so by the risk of criminal sanctions. See Allan (n 13) 175–6.

317 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 31 [1.113]. See also P Parkinson, *Submission 13*.

318 *Australian Citizenship Act 2007* (Cth) pt 2 div 2 sub-div A; Department of Home Affairs (Cth), 'International Surrogacy Arrangements', *Immigration and Citizenship* <immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>; *Australian Passports Act 2005* (Cth) s 11; *Australian Passports Determination 2015* (Cth) 10; Australian Government, Department of Foreign Affairs and Trade, Australian Passport Office, 'International Surrogacy' <www.passports.gov.au/help/international-surrogacy>. See also Department of Home Affairs, *Submission 248*.

some jurisdictions, the ALRC proposes a partial prohibition effected through a registration system (**Proposal 37**). The intent is to limit access to overseas surrogacy to jurisdictions with regulatory systems which provide for non-exploitative surrogacy arrangements (see also **Question P**). While this might be difficult to implement (as circumstances in destination countries can change quickly) and enforce, these proposals reflect the view that Australia should seek to prevent Australians from engaging in exploitative conduct overseas. To that end, the following proposals seek to:

- encourage Australian intended parents to engage in domestic surrogacy (rather than overseas surrogacy);
- mitigate the risks that intended parents, surrogates, and children born through surrogacy arrangements may be exploited, by diverting intended parents away from high-risk destinations;
- ensure the rights and best interests of the child are the primary consideration, such as the child's right to preserve their identity;[319]
- address some of the practical concerns around children born through overseas arrangements entering Australia; and
- ensure there is a consistent approach to overseas surrogacy arrangements across Australia.

## Registering overseas surrogacy arrangements

**Proposal 37**

1. Legislation should provide that:
    a. an Australian citizen or permanent visa holder (intended parent), who is residing in Australia and is intending to engage in an overseas surrogacy arrangement, must register their intention to engage in an overseas arrangement with a registration entity before attempting to achieve a pregnancy via surrogacy. Intended parents residing outside Australia are not required to register overseas surrogacy arrangements with the registration entity;
    b. the registration entity must provide the intended parent(s) with information on surrogacy overseas, including a list of overseas jurisdictions where surrogacy is legal and generally well-regulated ('**permitted destinations**');
    c. the intended parent(s) must then advise the registration entity in which country the arrangement will occur:
        i. if it is a permitted destination, the arrangement will be registered ('**registered overseas surrogacy arrangement**');
        ii. if it is not a permitted destination, the intended parent(s) will need to satisfy the registration entity that the surrogacy arrangement is non-exploitative before it can be registered; and
    d. if the intended parent(s) intentionally or recklessly proceed with an arrangement, without registering with the registration entity ('**unregistered overseas surrogacy arrangement**'), they will be subject to a civil penalty regime (see **Proposal 9**).

319 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8. See also arts 7, 9 and 35.

2. Legislation should provide that proceeding with an unregistered overseas surrogacy arrangement will not prevent an intended parent from applying for:

   a. Australian citizenship, a passport, or a visa, on behalf of a child born from the unregistered overseas surrogacy arrangement; or

   b. legal parentage (see **Proposal 31**).

**Proposal 38**

The *Family Law Act 1975* (Cth) should be amended to provide that intended parents who have engaged in an overseas surrogacy arrangement must make an application to the Federal Circuit and Family Court of Australia for legal parentage to be recognised (see **Proposal 31**) within three months of returning to Australia with the child.

**Question S**

In relation to the registration process in **Proposal 37**:

- which entity should be responsible? For example, the National Regulator (or alternative) (see **Proposal 2**); a Surrogacy Support Organisation (see **Proposal 3**); or a different government department or entity?
- what factors should the registration entity consider, when determining which destinations should be 'permitted destinations'? For example, should these be destinations with laws that require the surrogate's informed consent, or transparent gamete donation?
- do you think the registration process would work in practice? Are there any changes you would suggest to improve how it works and its effectiveness?
- should intended parents be required to demonstrate, as a precondition to registration, that they have made reasonable efforts to engage in domestic surrogacy before they can engage in a registered overseas surrogacy arrangement?

223. As discussed above, those involved in surrogacy are more likely to be exploited in overseas jurisdictions where surrogacy is poorly regulated.[320] Despite the risks, a 'high proportion' of overseas surrogacy arrangements take place in destinations where surrogacy is unlawful or inadequately regulated.[321] These jurisdictions may not be well-regulated enough to ensure:

- the surrogate's human rights are upheld, including the right to free and informed consent and respect for bodily autonomy;
- intended parents are not subjected to unethical behaviour, financially exploited, or prevented from lawfully exiting the country with the child;
- transparency around gamete donation, consistent with the rights of the child to know their genetic identity; and
- children are not at risk of being stateless or parentless.[322]

320 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 4) 27–8; Gorton (n 68) 138–9; Department of Home Affairs, *Submission 248*.
321 Department of Home Affairs, *Submission 248*.
322 Ibid.

224. Intended parents entering such arrangements may also not understand the risks.[323]

225. It is also highly likely that intended parents may never seek to obtain legal parentage for children born of such arrangements.[324] This is because there is no clear pathway to legal parentage (see **Pathways to legal parentage**) and, in some jurisdictions, the process may require intended parents to admit to a criminal offence.[325]

226. **Proposal 37** would promote a consistent approach to overseas surrogacy arrangements by requiring that all arrangements be registered. It takes a pragmatic approach to the reality that Australian citizens and permanent residents continue to engage in overseas surrogacy. However, it seeks to mitigate risk by ensuring:

- intended parents have the information they need to make informed decisions before engaging in overseas surrogacy; and
- arrangements would only be permitted if they take place in jurisdictions where surrogacy is lawful and well-regulated, or where intended parents can demonstrate that an arrangement is not exploitative.

227. **Proposal 38** seeks to uphold the rights of the child by ensuring that intended parents must apply for legal parentage within three months after the child enters Australia. For this application to be granted, a judge must determine that it is in the best interest of the child (see **Proposal 31**).

228. For the registration process in **Proposal 37** to work, it would need to be conducted by an appropriate entity (or entities), which could:

- assess which overseas destinations are suitable;
- provide intended parents with accurate information about the need to register overseas surrogacy arrangements, what would happen if they do not register, and which overseas destinations are approved;
- review applications to engage in surrogacy in unapproved destinations;
- coordinate applications for Australian citizenship and a passport, or a visa (where required), together with the Department of Home Affairs and the Department of Foreign Affairs and Trade; and
- assist to enforce the prohibition on unregistered overseas surrogacy arrangements.

323 See, eg, the situation which unfolded in Greece in 2023: ABC News, 'Australian Woman Fears Greek Surrogacy Scandal Jeopardises Her Dream of Motherhood' <www.abc.net.au/news/2023-09-09/greek-surogacy-scandal-australian-intended-parent/102819796>.
324 Allan (n 13) 183. See also P Parkinson, *Submission 13*.
325 See, eg, *Lloyd and Compton* [2025] FedCFamC1F 28.

## Streamlining processes to return to Australia

### *Front-loading citizenship, passport and visa applications*

**Proposal 39**

Federal legislation or processes should be introduced to provide that where an Australian citizen or permanent visa holder (intended parent) has entered a registered overseas surrogacy arrangement:

1. the intended parent(s) may start applying for Australian citizenship, an Australian passport, or a visa, before the child's birth, to facilitate expedited processing of such applications upon the child's birth. This streamlined process is not available for unregistered overseas surrogacy arrangements; and
2. to access the streamlined process in paragraph 1, the intended parent(s) must provide the following documentation:
    a. before the child is born: a copy of the surrogacy agreement and the documentation required to make the application(s); and
    b. after the child is born: the surrogate's consent to relinquish the child to the intended parent(s), confirmed in a signed affidavit (in the language of the surrogate); and details of the child's birth necessary to finalise the application/s.

**Question T**

Are there other ways that the applications listed in **Proposal 39** could be streamlined or further aligned, in terms of the process or documentation required?

**Question U**

Could limiting access to this streamlined process to registered overseas surrogacy arrangements have any unintended consequences?

**Question V**

Should citizenship by descent also be recognised for children born through overseas surrogacy to Australian Permanent Residents?

**Question W**

Should there be a retrospective process for children who are stateless, who have been born through overseas surrogacy to intended parents who are Australian citizens or permanent residents, to obtain Australian citizenship? If so, how would this work?

**Question X**

Should a temporary visa, which allows children born through surrogacy to enter Australia, be introduced?

229. Intended parents can face practical hurdles when seeking to return to Australia with children born through overseas surrogacy. Citizenship, passport, and visa applications have evidentiary

requirements, which differ depending on the application and may be complicated to satisfy.[326] This can lead to families being unable to return to Australia for long periods of time,[327] and can put time pressure on the departments responsible for processing these applications.[328] If evidentiary requirements for these applications cannot be satisfied, this also puts the child's rights at risk.

230. The ALRC has heard, through submissions and consultations, that the following issues can arise with these applications:

- **Citizenship** — we heard that the process is complicated and time consuming, and can delay families from being reunited.[329] There is also a risk that a child could become stateless if they are unable to secure Australian citizenship (for example, where one or both of the intended parents is a permanent resident, but neither is an Australian citizen).
- **Passports** — we heard that obtaining a passport is more difficult than obtaining citizenship. This is because a passport application requires consent from all those who, under Australian law, are considered to have 'parental responsibility', which includes the surrogate (and potentially the surrogate's partner, if any). This can cause difficulties if the surrogate's consent cannot be obtained (for example, because she cannot be contacted). [330]
- **Visas** — if a child cannot obtain Australian citizenship, or seeks to enter Australia on a passport from the country of birth,[331] the child requires a visa. Unless the child can obtain a temporary visa to enter Australia,[332] the child must apply and wait offshore, sometimes for long periods, until a permanent visa is granted.[333] A genetic connection between the child and the intended parent making the visa application is also required, which may not be possible where a third party has donated the gametes.[334]

231. **Proposal 39** seeks to address some of these issues by: facilitating children born through registered overseas surrogacy arrangements to enter Australia, and by frontloading applications for Australian citizenship and a passport, or a visa (if required). This is to ensure any issues with these applications can be identified early and to facilitate quicker application processing after the child is born. A streamlined process for citizenship is also consistent with the right of the child to a nationality.[335] **Proposal 39** also requires that an affidavit is obtained from the surrogate, in the surrogate's native language, to ensure the surrogate's consent to relinquish the child is informed and voluntary.

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326 Law Council of Australia, *Submission 342*. These applications are administered by different departments and under different legislation. They also have different purposes, and therefore different evidentiary requirements: Department of Home Affairs, *Submission 248*.

327 For example, passport applications can take approximately 5-6 months. This is because the surrogate's consent is required and applications are automatically allocated to the complex cases team. See Name withheld, *Submission 99*; S Jefford, *Submission 128*; S Everingham, *Submission 129*. One submission indicates that the usual processing time for a citizenship application is about 1 month: S Page, *Submission 130*.

328 For example, the Department of Home Affairs indicates that it prioritises applications for Australian citizenship by descent for children born through overseas surrogacy arrangements, and may expedite processing of applications where evidence is provided of exceptional or compelling circumstances: Department of Home Affairs, *Submission 248*.

329 See, eg, Law Council of Australia, *Submission 342*.

330 *Australian Passports Act 2005* (Cth) s 11. See also Australian Passport Office, 'Parental Consent' <www.passports.gov.au/help/parental-consent>.

331 Where the child automatically acquires citizenship in the country of birth, they may obtain a passport from the country of birth and travel to Australia.

332 See, eg, *Gallo & Ruiz* [2024] FedCFamC1F 893: the father obtained tourist visas for his surrogate-born children to enter Australia. The children were then placed on bridging visas, pending the outcome of applications for permanent visas.

333 The Department of Immigration provides that currently, for a Child (subclass 101) visa, 50% of applications are processed within 23 months and 90% are processed within 29 months: Australian Government, Department of Home Affairs, Immigration and Citizenship, *Visa processing times* <immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>.

334 In these circumstances, an adoption visa would be required. See Department of Home Affairs, *Submission 248*.

335 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8.

### *Making it easier to obtain and renew passports*

**Proposal 40**

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for an initial passport application for a child born through overseas surrogacy, if the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate), and submitted as part of the application.

**Proposal 41**

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for each passport renewal for a child born through overseas surrogacy, where:

1. the intended parents are recognised in Australia as the legal parents of the child;
2. the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate); or
3. the surrogate consented to the initial passport application.

232. The ALRC has heard that passport applications and passport renewals[336] are a source of frustration.[337] This is because when the initial application is made, and every time it is renewed, consent is required from everyone considered to have parental responsibility. This includes the surrogate (and potentially the surrogate's partner, if any), who may be difficult to contact. This requirement can be waived if there is an order from an Australian court, or if the passports office dispenses with the requirement (for example, where there has been no contact between the child and the surrogate for a substantial period).[338]

233. **Proposals 40** and **41** would make passport applications and renewals more straightforward by requiring the surrogate's consent only for the initial application, and only where there is no affidavit confirming the surrogate has relinquished the child. An affidavit from the surrogate agreeing to relinquish the child to the intended parent(s) would confirm that the surrogate does not have parental responsibility for the child. This would remove the need for the surrogate's consent to the passport application.

234. This would be consistent with the intention behind the surrogacy arrangement and better respect the rights of the surrogate, who should not be burdened with decision making for a child the surrogate has voluntarily relinquished. It would also uphold the right of the child to not be subject to requirements that discriminate against them due to the circumstances of their birth.

336 Renewals are required every five years until the child is an adult.
337 See, eg, Name withheld, *Submission 71*.
338 *Australian Passports Act 2005* (Cth) s 11. See also Australian Passport Office (n 330); Allan (n 13) 171; S Everingham, *Submission 129*.