Submission regarding Surrogacy Inquiry ALRC: Sally Nicholes Managing Partner Nicholes Family Lawyers

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

a. the ways in which surrogacy regulation is inconsistent between jurisdictions;

b. if these inconsistencies are problematic;

c. any impacts of the differences between federal legal regimes (for example, citizenship law and family law);

d. if a judicial process for transferring legal parentage is retained, whether applications for parentage should be determined in state courts, the Federal Circuit Court and Family Court of Australia, or both;

e. how important it is that the approaches are harmonised or made more consistent; and

f. how any harmonisation could be achieved (for example, by regulating surrogacy at a federal level or through uniform or substantively consistent state legislation).

Introduction

This submission advocates for nationally consistent reform of Australia's surrogacy laws to better protect the rights, identity, and welfare of children born through surrogacy. It responds to persistent concerns about legal inconsistencies across jurisdictions, limited recognition of intended parentage, and the lack of clear, equitable regulation for altruistic arrangements. To address these challenges, the submission proposes a referral of powers to the Commonwealth to enable uniform national legislation. It further recommends a dual-register model that preserves the original birth record while introducing a separate parenting certificate to reflect legal caregiving responsibility.

Jurisdictional Inconsistencies in Australian Surrogacy Regulation

Surrogacy laws in Australia are regulated at the state and territory level, resulting in significant legislative inconsistencies across jurisdictions. This legal fragmentation creates substantial confusion and complexity for intended parents, surrogates, and legal practitioners alike. In practice, difficulties frequently arise where the surrogate and intended parents reside in different jurisdictions, or where a parentage order is sought in a state or territory other than

where the child was born. This can lead to conflicting legal requirements, uncertainty in process, and delayed recognition of legal parentage.

Although some jurisdictions have sought to address aspects of this issue, for example, section 25B of the *Births, Deaths and Marriages Registration Act 1995 (NSW)* permits the registration of an interstate parentage order in New South Wales, the absence of a nationally consistent framework continues to result in legal and procedural ambiguity. These challenges are compounded in jurisdictions with particularly strict eligibility criteria or narrower definitions of reimbursable expenses. A harmonised national approach is essential to ensure equity, legal clarity, and consistent protection for all parties to surrogacy, regardless of jurisdiction. The rationale for uniform reform is outlined below.

Problematic effects of inconsistent legislation between Australian Jurisdictions

A) Commercial Surrogacy

Commercial surrogacy, where a surrogate is paid beyond the reimbursement of reasonable expenses, is illegal across Australia. This prohibition not only reduces the accessibility of surrogates for intending parents, but also has the unintended consequence of pushing intended parents to pursue surrogacy arrangements overseas, often in countries with weak or minimal regulatory frameworks resulting in sometimes significantly harmful consequences for all parties involved.

In Australia, participation in international commercial surrogacy arrangements is explicitly criminalised in Queensland, New South Wales, and the Australian Capital Territory. In contrast, no such prohibition applies in Victoria, South Australia, Tasmania, Western Australia, or the Northern Territory. This inconsistency results in unequal access to legal recognition and protections for intended parents, reinforcing the urgent need for national harmonisation to ensure fairness, clarity, and consistent legal outcomes across all jurisdictions.

Despite the strict prohibition on commercial surrogacy, many intended parents continue to seek overseas arrangements. When Australian residents engage in international commercial surrogacy, complex legal issues often arise. In many cases, the overseas surrogate remains the legal mother under Australian law, and the intended parents are not automatically recognised as the legal parents. This can result in legal uncertainty regarding parentage, inheritance,

citizenship, and the ongoing welfare of the child. These issues are examined in further detail later in this submission.

While the ultimate goal of reform should be the harmonisation of surrogacy laws across all states and territories, at a minimum there should be a dedicated government agency responsible for maintaining a comprehensive and accessible public resource on surrogacy. This resource should include a website that clearly outlines the legal frameworks governing surrogacy both within Australia and in key international jurisdictions. It should also highlight the legal, ethical, and social considerations associated with surrogacy. Such a resource would be especially valuable for intended parents considering international commercial surrogacy arrangements, assisting both intended parents and potential surrogates to make informed decisions based on a realistic understanding of the risks and complexities involved.

A high-profile case that exemplifies the risks associated with surrogacy in jurisdictions with little to no regulatory oversight is the "Baby Gammy" case. In this case, Australian intended parents entered into a commercial surrogacy arrangement in Thailand. When one of the twins was born with Down syndrome, the intended parents returned to Australia with only the non-disabled child, leaving Baby Gammy in the care of the Thai surrogate. This case starkly highlights the vulnerability of both surrogates and children in poorly regulated international arrangements and underscores the pressing need for comprehensive domestic reform.

While fully decriminalising commercial surrogacy may not be feasible in the near term, adopting a unified national approach combined with clearer and more supportive regulations surrounding altruistic surrogacy is essential to reduce the number of Australians resorting to risky and unregulated overseas arrangements.

B) Compensatory payment

Altruistic surrogacy, where surrogates receive no profit and only reimbursement for reasonable expenses, is currently permitted across Australia. While commercial surrogacy is prohibited in all states and territories, each jurisdiction applies its own interpretation and regulation regarding which costs may be compensated. For example, Victorian legislation stipulates that a surrogate mother "must not receive any material benefit or advantage" as a result of a

surrogacy arrangement, a provision that has been interpreted broadly to include reimbursement of expenses (Assisted Reproductive Treatment Act 2008, s 44 (VIC)). By contrast, Queensland's *Surrogacy Act 2010* reflects a narrower interpretation: costs must be supported by receipts and must not constitute a profit or reward. The statutory requirement of 'reasonableness' in Queensland further complicates matters, making it difficult to determine which expenses are recoverable.

These inconsistencies are highlighted by the differences in other jurisdictions. Tasmania provides a detailed list of allowable expenses, including travel, accommodation, and actual loss of earnings for specified periods. Conversely, South Australia restricts reimbursable expenses to those directly connected with the pregnancy, birth, or care of the child, counselling or medical services related to the surrogacy agreement, and legal services connected with the agreement. In practice, these narrow and inconsistent frameworks deter many potential surrogates and limit the availability of domestic surrogacy options for intended parents.

To enhance the viability of altruistic surrogacy within Australia, reforms should broaden the scope of reimbursable expenses to include all reasonable costs associated with pregnancy, such as maternity clothing, legal fees, postnatal care, and childcare during medical appointments. Moreover, compensation should also acknowledge and address the physical and emotional toll of pregnancy. Given evidence of disputes arising from intended parents refusing reimbursement or contesting specific costs, the law should require intended parents to cover expenses upfront rather than relying on reimbursement mechanisms. Such an approach would provide greater clarity and certainty in the allocation and use of funds. These reforms should be standardised through a national guideline to promote consistency and fairness across jurisdictions.

By ensuring fair treatment of surrogates and making domestic surrogacy arrangements more accessible, these reforms would reduce reliance on international commercial surrogacy and help prevent Australians from entering unsafe or exploitative arrangements abroad, thereby avoiding the adverse consequences previously discussed.

C) Cross-Border Surrogacy

Australian states and territories maintain separate legislative and regulatory regimes governing the registration of births within their jurisdictions. Each jurisdiction imposes obligations on relevant persons to register births occurring within their territory. However, this fragmented approach creates significant legal challenges for Australian intended parents involved in international surrogacy arrangements seeking recognition of their parentage.

Currently, some states and territories permit intended parents to apply for parentage or equivalent orders even when the child was born through surrogacy overseas, while others either restrict or prohibit such recognition. The inconsistency in legal frameworks across jurisdictions is summarised as follows:

Jurisdiction	**Orders for International Surrogacy?**	**Relevant Legislation**	**Notes**
Victoria	No	*Assisted Reproductive Treatment Act 2008 (Vic)*	No explicit provision for international cases; possible limited recognition via adoption or parenting orders.
New South Wales	Yes (if non-commercial)	*Surrogacy Act 2010 (NSW)*	Commercial international surrogacy is criminalised; altruistic overseas surrogacy may be eligible for parentage orders.
Queensland	No	*Surrogacy Act 2010 (Qld)*	Parentage orders apply only to surrogacy in Qld. Overseas commercial surrogacy is criminalised.
South Australia	No	*Family Relationships Act 1975 (SA)* (as amended in 2015)	Parentage orders only for domestic arrangements; international cases require parenting orders or adoption.
Western Australia	No	*Surrogacy Act 2008 (WA)*	Only domestic surrogacy eligible for parentage orders. Federal parenting orders available instead.
Tasmania	No	*Surrogacy Act 2012 (Tas)*	Parentage orders only apply to Tasmanian arrangements; overseas surrogacy not recognised.
ACT	No	*Parentage Act 2004 (ACT)*	Parentage orders limited to altruistic surrogacy conducted under ACT law.
Northern Territory	No (no surrogacy legislation)	*(No surrogacy legislation)*	No parentage orders available; must rely on federal parenting orders or adoption.

This jurisdictional inconsistency may result in children born through international surrogacy arrangements being left in a state of legal uncertainty regarding their parentage and associated rights, resulting in adverse impacts on healthcare decision-making, inheritance rights and overall legal security. There is need for reform to enable recognition of international surrogacy

arrangements where there is clear evidence of consent, ethical practice, and alignment with the best interests of the child.

Proposed Reform

A Dual-Register Model of Child-Centred Recognition

Drawing inspiration from a joint paper I wrote in 2016 with Timothy North SC for the International Centre for Family Law, Policy and Practice,[1] my final proposal is that the *Family Law Act 1975 (Cth)* should provide the Family Court with unequivocal jurisdiction to make declarations of parentage in surrogacy cases where the Court considers such orders to be in the best interests of the child. Such federal authority should apply to all surrogacy cases, including domestic arrangements, which may require the referral of powers from the states and territories to the Commonwealth.

In 2006, Australia enacted significant reforms to the Family Law Act, marking a decisive shift away from the proprietorial concepts of "custody" and "access" and instead embedding the language and principle of "parental responsibility." This is now known as "decision making on major long-term issues." The legal and psychological impetus to amend a child's birth certificate, a practice which can obscure the child's identity and history therefore begins to fall away. Rather than continuing to rely on a single, mutable document to record both biological and caregiving relationships, we propose that the birth certificate remain a permanent and transparent record of the circumstances of birth, including donor or surrogate details where applicable, in accordance with Articles 7.1 and 8.1 of the Convention on the Rights of the Child. Under this proposed model, both parents would initially be recorded on separate but linked registers upon the child's birth. Any subsequent legal alterations to parental responsibility would update the secondary register, while the primary register would remain unchanged to preserve the historical record. This new "parenting certificate" could be introduced to identify those adults responsible for the child's day-to-day care and decision-making. This certificate would serve as the primary document for institutional recognition, used by Medicare, schools, the passport office and others. Both registers would be created at birth and only the parenting register would be subject to change over time, to achieve this, a

[1] Sally Nicholes and Timothy North SC, 'Who is a parent in the Australian federation and do its laws concerning parentage and families in our modern world give rise to conflicting outcomes or fail to pay appropriate regard to each child's right to know his or her identity?' International Family Law, Policy and Practice (2016) 4 IFLPP 2, ISSN 2055-4802.

referral of powers to the Commonwealth remains ideal. its political viability is uncertain given entrenched state sovereignty. This dual-register approach may seem radical, and it departs from existing adoption practices, but that should be embraced as progress.

Conveniently, this approach implements key aspects of the Verona Principles, which places emphasis on the importance of ensuring a child's right to preserve their identity (including their name, nationality and family origins). Specifically, Principle 12 provides clear normative guidance on the processes of birth notification, registration and certification for all children, including those born through surrogacy. It underscores the imperative that such registration occurs immediately and without discrimination, ensuring the child's legal existence and access to fundamental rights.

By enabling a dual-register approach that acknowledges both biological origins and legal parental responsibility, this model affirms a child's multifaceted identity and responds to the increasing complexity of modern families, including those formed through assisted reproductive technologies, surrogacy or same-sex parenting. This approach directly aligns with Principle 12.3 and 12.4, which call for the comprehensive recording of identifying information (ie who the surrogate, intending parents and any donors are) while also mandating the establishment of national registries that preserve such data in accordance with privacy and data protection law.

This model would not only uphold a child's right to identity but also promote harmonisation between state and federal laws by offering a consistent and nationally recognised structure for recording and acknowledging legal parentage and parental responsibility. While a referral of powers to the Commonwealth remains ideal, entrenched state sovereignty may present challenges. Nonetheless, this proposal offers a principled and practical alternative to the current legal fragmentation. Though it departs from traditional adoption frameworks, the dual-register approach should be embraced as progressive reform, one that reflects the evolving understanding of family, identity, and child-centred justice.

Conclusion:

Australia's inconsistent state and territory surrogacy laws create legal uncertainty and inequity for intended parents, surrogates, and children. A nationally harmonised framework is essential to ensure clarity, fairness, and protection for all parties.

Key reforms should include:

(1) National harmonisation of surrogacy laws;

(2) Expanded and standardised reimbursable expenses for altruistic surrogacy;

(3) A central government information resource;

(4) Recognition of international surrogacy parentage where appropriate; and

(5) A modernised birth registration model.