

**From:** [REDACTED]  
**To:** [Surrogacy](#)  
**Cc:** [REDACTED]  
**Subject:** Re: Submission to the Review of Australian Surrogacy Laws – Legal Parentage and Child-Centric Reform  
**Date:** Monday, 7 July 2025 4:50:26 PM  
**Attachments:** [Individual Reflection – March 2022.pdf](#)  
[Research Proposal – April 2025.pdf](#)  
[Research Essay – April 2025.pdf](#)

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To whom it may concern,

I write in response to the Australian Law Reform Commission's review of surrogacy laws, policies, and practices across Australia. As both a legal researcher and a parent through altruistic surrogacy, I wish to offer a submission that draws upon both my academic work and lived experience. This submission includes three attached documents:

1. *Individual Reflection – March 2022*
2. *Research Proposal – April 2025*
3. *Research Essay – April 2025*

NB -

- The footnoting is a little off in the first document, as I hadn't quite mastered that skillset in 2022.
- The second document was meant to inform the third, however, upon commencing my research into the matter, I found I had to significantly reduce the scope. That said, both documents (all three documents) contain information that is highly-relevant to your review.

Together, the papers I have authored and attached herein seek to inform the Commission's deliberations on how best to ensure Australia's surrogacy laws uphold the human rights of children, surrogates, and Intended Parents (IPs), in accordance with international obligations — particularly the *Convention on the Rights of the Child*.

My submission reflects both academic investigation and personal experience, demonstrating that Australia's current legal approach — though well-intentioned — does not serve the best interests of children born via surrogacy. It is time to adopt a harmonised, child-centred model that ensures legal parentage reflects lived family realities from birth.

I am grateful for the opportunity to contribute to this important inquiry and would welcome the chance to engage further in any consultation processes.

Thank you,

[REDACTED]

On 03 February 2022, my husband and I celebrated the birth of our firstborn child, who was born to us through a surrogacy arrangement, pursuant to the *Surrogacy Act 2010* (NSW). Drawing on personal experiences and extant legislation, this paper will highlight the legal complexities involved with surrogacy, discuss the inequities often endured by Intended Parents (IP), and consider how the various laws at hand might evolve to better realise the common intent amongst them.

The two primary statutes concerning surrogacy in NSW were constructed on the guiding principle that the best interests of a surrogate-child are paramount and should therefore be protected<sup>1 2</sup>; however, in practice, the current legal process could not be further from that overarching intent. The process is time-consuming, restrictive, costly, and confusing. For example, a legal surrogacy arrangement in NSW must be altruistic in nature, cannot be sought by way of paid advertising, and requires both mandatory pre-surrogacy and post-surrogacy counselling, as well as independent legal advices, for all persons party to the surrogacy arrangement<sup>3</sup>. Furthermore, while the legislation mandates a range of requirements, the only enforceable provision of a surrogacy arrangement is that the IP are to cover all reasonable costs related to the surrogacy, including those of the surrogate and her partner (the birth parents)<sup>4</sup>.

The highly-regulated surrogacy process compounds an arduous journey with an unnecessary amount of administrative hurdles and, at times, absurd requirements, which appear to be blatantly exploiting IP. For example, in my experience, whenever a gamete donor, the fertility clinic, or the surrogate were to change, this would result in an entirely new bout of mandatory counselling (including pre-existing baseline counselling for the IP). With few alternative options available to them, IP have little choice but to comply with such demands and press ahead in pursuit of their family goals. With that said, the legal process only gets more confusing once a surrogate-child is born to its IP.

When a surrogate-child is born and the surrogate relinquishes care of it (*if* she relinquishes care of it), the IP take custody of and care for their child; however, the birth parents (some/all of whom would share no biological linkages with the child) are listed on the child's birth certificate and therefore retain the legal authority to make decisions on behalf of the child, including the medical treatment of the child<sup>5 6 7</sup>. Such complexities remain extant until such time as the Supreme Court of NSW issues a Parentage Order, which effectively transfers legal custody of the child from the birth parents to its IP<sup>8 9</sup>. The Parentage Order process imposes another suite of time-consuming, restrictive, and costly requirements upon the IP

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<sup>1</sup> *The Surrogacy Act 2010* (NSW) pt 1 s 3.

<sup>2</sup> *The Assisted Reproductive Technology Act 2007* (NSW) pt 1 s 3.

<sup>3</sup> *The Surrogacy Act 2010* (NSW).

<sup>4</sup> *Ibid* pt 2 div 1 ss 6(1)-(2).

<sup>5</sup> *Ibid* pt 3 div 5 s 42.

<sup>6</sup> *The Births Deaths and Marriages Registration Act 1995* (NSW) pt 4A.

<sup>7</sup> *The Status of Children Act 1996* (NSW) pt 3 div 1 s 11.

<sup>8</sup> *The Surrogacy Act 2010* (NSW) pt 3 div 1 s 12(2).

<sup>9</sup> *The Births Deaths and Marriages Registration Act 1995* (NSW) pt 4A.

(mandatory counselling, strict timeframes, legal fees, etc), and the Order itself takes several months post-birth to be issued<sup>10</sup>. As a direct result of current legislation, surrogate-children are born in to a legally-uncertain environment, where their rights to identity, citizenship, health, and education are, in fact, compromised<sup>11</sup>. Such an outcome cannot be said to meet the intent of the legislation.

In line with my own views, legal experts, senior academics, and community advocates from NSW and greater Australia, and other common law jurisdictions, including New Zealand and the United Kingdom, have petitioned for the reform of surrogacy laws in their respective states. With the need for surrogacy steadily increasing across the globe, judges have described current surrogacy legislation as both “creaky and inadequate”<sup>12</sup> and “irreconcilably conflicting”<sup>13</sup>. To improve the system and provide for greater legal certainty for surrogate-children and their IP, responsible ministers are being urged to lift the prohibitions both on commercial surrogacy arrangements and paid advertising of such arrangements<sup>14 15 16</sup>, and to abolish the lengthy timeframes associated with the transference of legal parentage<sup>17 18 19 20</sup>.

Current surrogacy legislation in NSW fails to function as it was initially intended and as such, it requires immediate reform. As societal values and norms evolve, so too must the common law<sup>21 22</sup>. Reform in this space is long overdue.

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<sup>10</sup> *The Surrogacy Act 2010* (NSW) pt 3 div 2 s 16(1).

<sup>11</sup> Debra Wilson, Annick Masselot and Martha Ceballos, ‘Who are my Parents? Why New Zealand’s ‘Creaky’ Surrogacy Laws are Overdue for Major Reform’ (2021) <<https://theconversation.com/who-are-my-parents-why-new-zealands-creaky-surrogacy-laws-are-overdue-for-major-reform-166745>>.

<sup>12</sup> *Ibid* (4).

<sup>13</sup> NGA Law, ‘How UK Surrogacy Law Needs to Change’ (2019) <https://www.ngalaw.co.uk/knowledge-centre/how-uk-surrogacy-law-needs-to-change>.

<sup>14</sup> Lucy Hughes Jones, ‘NSW: NSW Govt Considers Surrogacy Law Overhaul’ (2015) <<https://www.proquest.com/docview/1713828461?pq-origsite=primo>>.

<sup>15</sup> Wilson, Masselot and Ceballos (n 11).

<sup>16</sup> NGA Law (n 13).

<sup>17</sup> Hughes Jones (n 14).

<sup>18</sup> Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Parts 1 & 2, January 2019).

<sup>19</sup> Wilson, Masselot and Ceballos (n 11).

<sup>20</sup> NGA Law (n 13).

<sup>21</sup> Robin Creyke, David Hamer, Patrick O’Mara, Belinda Smith and Tristan Taylor, *Laying Down the Law* (LexisNexis, 11<sup>th</sup> ed, 2021).

<sup>22</sup> *History of Law – Where do Laws Come From?* (Philosophy of Law, Part 1, 2018) <<https://www.youtube.com/watch?v=hmr0AvkKBiW&t=3s>>.

# RESEARCH PROPOSAL

## Research Topic Selection

### Title:

*Legal Parentage at Birth in Surrogacy: A Comparative Analysis of Common Law Jurisdictions and Its Impact on Children Born via Surrogacy*

### Topic Overview and Significance:

This research explores how legal parentage is recognised at birth in surrogacy arrangements across five common law jurisdictions: Australia, the United Kingdom (UK), Canada, New Zealand (NZ), and the United States (US). It examines the consequences that differing legal frameworks have for children born via surrogacy. This focus stems from both academic interest and lived experience.

My husband and I are parents to two daughters born through altruistic surrogacy in New South Wales, Australia. Our journey spanned more than seven years without pause and was marked by medical complications, legislative hurdles, discrimination, and a system that often felt more obstructive than supportive. Despite the intentions underpinning Australia's surrogacy laws – namely, to serve the best interests of the child<sup>1</sup> – we found ourselves trapped in a process that failed to meet that standard.

Most significantly, following the birth of each of our daughters, we had to apply for a mandated Parentage Order through the Supreme Court of New South Wales<sup>2</sup> – a process that was expensive, legally complex, emotionally draining, and largely unnecessary. For about a year following their respective births, our daughters lived in a legal limbo. Though they shared no genetic material with their birth mothers, they were legally registered as their children.<sup>3</sup> Meanwhile, despite being their biological father, I had no legal parental status.<sup>4</sup> This disconnect created major issues in securing citizenship, managing medical care, accessing childcare rebates, and arranging private health insurance – complications that contradict the very principles the law purports to uphold.<sup>5</sup> Furthermore, the existing system fosters an environment where Intended Parents (IP) are inescapably susceptible to financial exploitation by the various approval authorities embedded in the surrogacy ecosystem. Financial and emotional strain can become overwhelming, further complicating what should be a joyous and life-affirming journey.

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<sup>1</sup> *Parentage Act 2004* (ACT); *Assisted Reproductive Treatment Act 2008* (Vic); *Surrogacy Act 2008* (WA); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2012* (Tas); *Surrogacy Act 2019* (SA).

<sup>2</sup> *Surrogacy Act* (NSW) (n 1).

<sup>3</sup> *Surrogacy Act* (NSW) (n 1); *Status of Children Act 1996* (NSW).

<sup>4</sup> Ibid.

<sup>5</sup> *Surrogacy Act* (NSW) (n 1).

This research is timely given the evolving legal and social landscape surrounding Assisted Reproductive Technologies (ART).<sup>6</sup> Despite recent legislative reviews in several Australian jurisdictions,<sup>7</sup> surrogacy laws remain disjointed and continue to disadvantage the most vulnerable stakeholders – children born through these arrangements. Through this research, I aim to present a compelling case for harmonising Australian law with best-practice international models that ensure a child's legal identity and protection are established at birth.

This topic is deeply personal but also reflects a broader systemic failure in Australian family law. By comparing Australia's model with jurisdictions that already provide for legal parentage at or before birth, this research will argue for reform. It aims to show how timely recognition of IPs enhances the wellbeing of children born via surrogacy and better upholds their rights to identity, care, and stability from birth.

This research aims to fill a gap in Australian legal scholarship by evaluating comparative legal frameworks from the perspective of the child – often lost in the administrative complexity of surrogacy law. While much discussion centres on the rights of both Intended and Birth Parents or ethical concerns surrounding reproductive technologies, this research repositions the child as the central legal subject. It asks whether current laws meaningfully protect the lived rights of the surrogate-born child.

In choosing this topic, I also hope to contribute to national policy discourse – particularly in light of ongoing discussions arising from the 2019 Australian Law Reform Commission (ALRC) report and NSW's 2024 review.<sup>8</sup> These discussions acknowledge, but have yet to resolve, growing evidence that delayed parentage undermines the legal clarity children need from birth. My family's story is not an exception; it reflects a systemic failure to align intention with legal reality. As a legal researcher, a father, and a stakeholder in the law's future, I feel compelled to ensure no child begins life with their rights deferred.

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<sup>6</sup> *Mitochondrial Donation Law Reform (Maeve's Law) Act 2022* (Cth); Fertility Society of Australia and New Zealand, 'Expert Review Calls for National Fertility Plan to Secure and Strengthen Australia's ART & IVF Sector for the Future' (Media Release, 15 September 2024) <<https://www.fertilitysociety.com.au/news-item/17994/expert-review-calls-for-national-fertility-plan-to-secure-and-strengthen-australias-art-ivf-sector-for-the-future>>; Louise Johnson, 'Regulation of Assisted Reproductive Treatment (ART) in Australia & Current Ethical Issues' (2014) 140 (Supplement) *The Indian Journal of Medical Research* 9 <<https://web-s-ebshost-com.ezproxy.canberra.edu.au/ehost/pdfviewer/pdfviewer?vid=0&sid=a54c17fe-9404-43f5-9753-5ef506365623%40redis>>.

<sup>7</sup> *Assisted Reproductive Treatment Amendment Act 2021* (Vic); *Maeve's Law* (n 6); *Assisted Reproductive Technology Act 2024* (Qld); *Assisted Reproductive Treatment Act 1988* (SA); South Australian Government, 'Donor Conception Records and the Law' (Web Page) <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/services/commu+and+specialised+services/donor+conception+register/about+the+dcr/understanding+donor+conception+and+the+law/donor+conception+records+and+the+law>>; Australian Law Reform Commission, 'Review of Surrogacy Laws' (Web Page, 6 December 2024) <<https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/>>.

<sup>8</sup> Australian Law Reform Commission, *Review of Surrogacy Laws*, Terms of Reference, (Web Page, 6 December 2024) <<https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>>; NSW Department of Communities and Justice, *Review of the Surrogacy Act 2010 and the Status of Children Act 1996*, Discussion Paper, (Web Page, June 2024) <<https://www.nsw.gov.au/sites/default/files/2024-07/discussion-paper-review-of-the-surrogacy-act-and-status-of-children-act.pdf>>.

## Research Questions

### Main Research Question:

How do legal frameworks in Australia, the UK, Canada, NZ, and the US differ in recognising legal parentage at the time of birth in surrogacy arrangements, and what are the implications of these differences for the rights and welfare of children born via surrogacy?

### Sub-Questions:

1. What are the current legal processes for recognising IPs as legal parents at or before birth in each jurisdiction?
2. What legal, administrative, and practical consequences arise for children when IPs are not immediately recognised as their legal parents?
3. How do the legal inconsistencies align or conflict with international child rights frameworks, particularly Article 7 of the UN Convention on the Rights of the Child (UNCRC)?
4. What models of best practice exist in jurisdictions that recognise IPs at birth, and how might they inform legislative reform in Australia?
5. What reforms could be implemented in Australian law to provide for the immediate or pre-birth legal recognition of IPs?

## Methodology

This research will employ a comparative doctrinal legal research methodology, drawing on primary and secondary sources to explore legal principles, statutory provisions, case law, and scholarly commentary across the selected jurisdictions.

### Rationale and Suitability:

- Doctrinal research enables a structured examination of existing laws, analysing their application, coherence, and connection to broader legal principles.<sup>9</sup>
- A comparative approach facilitates the identification of best practices in other common law systems, informing reform pathways for Australian law.<sup>10</sup>
- This methodology supports evaluation of how each jurisdiction interprets and prioritises the “best interests of the child”, particularly in light of obligations under the UNCRC.

### Research Steps Include:

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<sup>9</sup> Jay Sanderson, Drossos Stamboulakis, and Kim Kelly, *A Practical Guide to Legal Research* (Lawbook Co., Thomson Reuters, 5th ed, 2021), 1-4; Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co., 4th ed, 2018), 43-65.

<sup>10</sup> Hutchinson (n 9), 8.

- Analysing legislation, case law, and law reform reports.
- Reviewing academic literature on surrogacy, family law, and child rights.
- Mapping key jurisdictional differences and evaluating their impact on surrogate-born children.
- Coding themes from reform proposals to compare international policy trends.

A law-in-context element will explore how cultural norms, institutional practices, and political influences shape legal outcomes. The project adopts a child-centric lens, guided by Articles 3, 7, and 8 of the UNCRC, to assess how legal regimes uphold children's rights to identity, care, and stability.

A critical legal perspective will examine whether current frameworks prioritise legal formalities over children's lived realities – particularly in Australia and NZ, where court-based models delay recognition. Lived experiences, including my own, will support a socially responsive legal critique.

## Literature Review

This research is underpinned by a comprehensive review of legal and scholarly sources, including:

1. **Terry Hutchinson, *Researching and Writing in Law* (4th ed)<sup>11</sup>** – Foundational to doctrinal and comparative legal research methodologies, this work provides essential structure for interpreting primary legal texts.
2. **Dave Snow, 'Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act' (2017) 32(3) *Canadian Journal of Law and Society* 329<sup>12</sup>** – Analyses how legal activism, strategic equality rights framing, and governmental responses to judicial rulings enabled parentage law reform, offering context for how legal frameworks can better protect the rights and welfare of children born via surrogacy.
3. **Stefanie Carsley, 'Surrogacy Agencies in Canada: IPs' Experience' (forthcoming) *Canadian Journal of Family Law*<sup>13</sup>** – Offers a qualitative analysis of IPs' interactions with surrogacy agencies in Canada, highlighting the need for regulatory oversight to protect all parties involved and ensure ethical practices in surrogacy arrangements.
4. **Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law* (Report No 244, 29 March 2023)<sup>14</sup>** – Presents a reform of

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<sup>11</sup> Ibid.

<sup>12</sup> Dave Snow, 'Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act' (2017) 32(3) *Canadian Journal of Law and Society* 329 <<https://www.proquest.com/docview/1980710225?parentSessionId=h94uxKbYwh5%2FGFZIYmS6EgzGl8Zzf17lkHB6FluSVsA%3D&pqorigsite=primo&accountid=28889&sourcetype=Scholarly%20Journals>>.

<sup>13</sup> Stefanie Carsley, 'Surrogacy Agencies in Canada: IPs' Experiences' (forthcoming) *Canadian Journal of Family Law* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4961684](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4961684)>.

<sup>14</sup> Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law* (Report No 244, 29 March 2023) vol 1-3 <<https://lawcom.gov.uk/project/surrogacy/>>.

UK surrogacy law, recommending a framework that prioritises the child's best interests, grants IPs legal status from birth, and includes safeguards for all parties.

5. **Charles Kindregan and Maureen McBrien, "The Use of Prebirth Parentage Orders in Surrogacy Proceedings"**<sup>15</sup> – Outlines how US states have adopted pre-birth parentage orders to circumvent postnatal legal limbo, particularly protecting the child's best interests from birth.
6. **Sarah Jefford, *The Australian Surrogacy Handbook*, and blog (2023)**<sup>16</sup> – Provides critical insights into practical challenges faced by IPs in Australia. Jefford calls for reform to streamline parentage transfer and mitigate unintended legal consequences.
7. **UNCRC (1989)**<sup>17</sup> – Especially Article 7, which mandates a child's right to know and be cared for by their parents and to have legal recognition of their identity.
8. **Page Provan Lawyers, "Quick Overview of Canadian Surrogacy Laws"**<sup>18</sup> – Details Canada's best-practice approach in jurisdictions like Ontario, where parentage can be established at birth without judicial intervention.
9. **ALRC, *Review of the Family Law System (2019)***<sup>19</sup> and state surrogacy reviews (e.g., **NSW 2024 Discussion Paper**)<sup>20</sup> – Outline existing legal inconsistencies and propose harmonisation based on child-centred reforms.
10. **NZ Law Commission, *Review of the Adoption Laws and Surrogacy Reform Proposals (2022)***<sup>21</sup> – Highlights the challenges posed by NZ's reliance on post-birth adoption for IP recognition and the effect this has on legal certainty for children born via surrogacy.
11. **Ronli Sifris and Stephen Page, 'Australian Surrogacy Law: Recommendations for Reform' (2021)**<sup>22</sup> – Critically examines Australia's inconsistent surrogacy laws, arguing that banning compensated surrogacy and lacking uniform recognition for IPs undermines children's rights. Advocates for a nationally consistent, human rights-based framework aligned with intended parentage.

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<sup>15</sup> Charles P Kindregan Jr and Maureen McBrien, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2006) 39(3) *Family Law Quarterly* 601 <<https://open.mitchellhamline.edu/facsch/231/>>.

<sup>16</sup> Sarah Jefford, OAM, *The Australian Surrogacy Handbook* (Self-published, 2023) <<https://sarahjefford.com/surrogacy-handbook/>>.

<sup>17</sup> *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <<https://www.ohchr.org/sites/default/files/crc.pdf>>.

<sup>18</sup> Page Provan, 'Quick Overview of Canadian Surrogacy Laws' (Web Page, 2023) <https://pageprovan.com.au/quick-overview-of-canadian-surrogacy-laws/>.

<sup>19</sup> Australian Law Reform Commission, *Review of the Family Law System: Final Report* (Report No 135, March 2019) <<https://www.alrc.gov.au/publication/family-law-report/>>.

<sup>20</sup> *Assisted Reproductive Treatment Amendment Act* (Vic) (n 7); *Maeve's Law* (n 6); *Assisted Reproductive Technology Act* (Qld) (n 7); *Assisted Reproductive Treatment Act* (SA) (n 7); South Australian Government, 'Donor Conception Records and the Law' (Web Page) (n 7); NSW Department of Communities and Justice, *Review of the Surrogacy Act 2010 and the Status of Children Act 1996*, Discussion Paper, (Web Page, June 2024) (n 8).

<sup>21</sup> New Zealand Law Commission, *Review of the Adoption Laws and Surrogacy Reform Proposals* (Issues Paper No 45, 2022) <<https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R146.pdf>>.

<sup>22</sup> Ronli Sifris and Stephen Page, 'Australian Surrogacy Law: Recommendations for Reform' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia* (Thomson Lawbook Co, 2021) vol 2, 81 <<https://ebookcentral.proquest.com/lib/canberra/reader.action?docID=7031240&pgg=126>>.

12. **Courtney G. Joslin, ‘Protecting Children(?): Marriage, Gender, and ART’ (2003)<sup>23</sup>** – Critically examines how parentage laws privileging heterosexual marriage fail to protect children born through ART in diverse families. Joslin argues for reforms recognising intentional parentage to better uphold children’s best interests.
13. **Australian Human Rights Commission, *Children’s Rights Report – In Their Own Right* (2019)<sup>24</sup>** – This report discusses emerging risks to children’s legal identity and inclusion due to legislative gaps in family law and ART. It offers a strong human rights rationale for removing post-birth delays to legal parentage recognition.

These sources reflect a global shift toward models that prioritise immediate legal recognition of IPs, reducing the child’s vulnerability. In contrast, Australia's reliance on delayed, court-based parentage often undermines the rights it aims to protect.

### **Thematic Synthesis:**

The literature consistently supports legal models that:

- Prioritise the child’s immediate parental security.
- Minimise judicial intervention through administrative recognition.
- Treat surrogate-born children as equal legal subjects.

They also expose the ethical disconnect between legislative intent and practice, particularly in Australia's post-birth order regime, despite valid pre-conception surrogacy agreements.

## **Expected Results and Conclusion**

### **Expected Results:**

This research is expected to show that jurisdictions recognising legal parentage at or before birth, such as Ontario and several US states, offer:

- Greater stability for the child from birth.
- Clearer administrative processes (e.g., birth registration, citizenship, and healthcare).
- Fewer legal and financial burdens on IPs.
- Better alignment with the UNCRC, particularly regarding identity and best interests.

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<sup>23</sup> Courtney G Joslin, ‘Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology’ (2010) 83(4) *Southern California Law Review* 1177 <<https://heinonline.org.ezproxy.canberra.edu.au/HOL/Page?handle=hein.journals/scal83&id=1189&collection=journals&index=>>>.

<sup>24</sup> Australian Human Rights Commission, *Children’s Rights Report – In Their Own Right 2019* (Report, 2019) <[https://humanrights.gov.au/sites/default/files/document/publication/childrensrightsreport\\_2019\\_ahrc.pdf](https://humanrights.gov.au/sites/default/files/document/publication/childrensrightsreport_2019_ahrc.pdf)>.

By contrast, jurisdictions like Australia, the UK, and NZ – where parentage is granted only post-birth via court order or adoption – risk:

- Delaying a child's access to essential rights and protections.
- Imposing emotionally and financially taxing legal procedures.
- Undermining surrogacy laws intended to prioritise child welfare.

**Recommendations may include:**

- A national surrogacy framework with consistent provisions for legal parentage.
- Legislation enabling IPs to be named on birth certificates from birth, subject to a pre-approved surrogacy agreement.
- Replacing mandatory court processes with administrative systems.
- Introducing oversight mechanisms (e.g., ethics panels) to confirm consent and legitimacy.
- Streamlining procedures to avoid delays that disadvantage the child.

The research is likely to demonstrate that pre-birth or immediate birth recognition – when based on a verified, ethical agreement – better upholds children's rights, meets international obligations, and relieves undue burdens on families. It also avoids legal incongruence, where children are socially and genetically recognised by their IPs but legally tied to their surrogate. This undermines core principles of family law by treating surrogacy-born children as exceptions rather than equals.

**Conclusion:**

This research brings both legal insight and lived experience to a critical issue in family law reform. By focusing on a child's legal status at birth, it exposes a fundamental inconsistency with widespread consequences. The project aims to influence policy and legal discourse by centring the child's rights and stability within surrogacy law.

In addition to comparative and doctrinal analysis, the research will humanise the issue – illustrating how legislative delay impacts real families. Drawing on international best practices, it advocates for a more compassionate, coherent, and child-focused surrogacy framework that ensures no child begins life in legal uncertainty.

# Legal Parentage at Birth in Surrogacy:

## A Comparative Analysis of Legal Approaches in Australia and Ontario, Canada

### Introduction

Surrogacy arrangements challenge traditional legal definitions of parentage by separating genetic, gestational, and intending parent roles. In the absence of uniform laws, jurisdictions vary in determining who is recognised as a child's legal parents at birth. Australia's surrogacy laws generally grant legal parentage to the surrogate (and her partner, if any) at birth, with Intended Parents (IP) only becoming legal parents after obtaining a parentage order through the courts several months later.<sup>1</sup> By contrast, Ontario, Canada, through recent reforms, allows IP to be recognised as legal parents from the moment of birth (subject to certain procedural safeguards).<sup>2</sup> This essay examines these two approaches and their implications for children's rights and welfare. It analyses the legal frameworks in Australia and Ontario, reviews key literature and reform proposals, and considers how delays versus immediacy in parentage recognition affect the best interests of children born via surrogacy. The comparative focus on Australia and Ontario provides a lens to evaluate whether Australia's current post-birth transfer model should be reformed in line with emerging best practices that prioritise a child's legal security from birth.

### Literature Review

Legal scholarship and law reform bodies increasingly argue that children born via surrogacy are best served when the law recognises their IP as legal parents without delay. Sifris and Page critique Australia's inconsistent surrogacy regimes across states and territories and the prohibition on compensated surrogacy, concluding that the lack of uniform, immediate parentage recognition undermines the rights of surrogate-born children.<sup>3</sup> They advocate a nationally consistent framework centred on intended parentage and children's human rights. Snow's analysis of Ontario's parentage reforms shows how litigation and LGBTQ+ advocacy led to the *All Families Are Equal Act 2016* (Ontario), which modernised parentage laws to protect children's equality and welfare in diverse family structures.<sup>4</sup> The reforms in Ontario are presented as a model that avoids treating surrogate-born children as legal exceptions and instead ensures they have secure legal parent-child bonds from birth.

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<sup>1</sup> *Surrogacy Act 2010* (NSW) ss 8, 35.

<sup>2</sup> Children's Law Reform Act, RSO 1990, c C.12, ss 10-11 (as amended by All Families Are Equal Act 2016 (Ont)).

<sup>3</sup> Ronli Sifris and Stephen Page, 'Australian Surrogacy Law: Recommendations for Reform' in Paula Gerber and Melissa Castan (eds), *Critical Perspectives on Human Rights Law in Australia*, vol 2 (Thomson Reuters, 2021) 81, 83-85 <<https://ebookscentral.proquest.com/lib/canberra/reader.action?docID=7031240&ppg=126>>.

<sup>4</sup> Dave Snow, 'Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act' (2017) 32(3) *Canadian Journal of Law and Society* 329, 331-33 <[https://www.proquest.com/docview/1980710225?parentSessionId=h94uxKbYwh5%2FGFZIY\\_mS6EgzGl8Zzf17lkHB6FluSVsA%3D&pqorigsite=primo&accounted=28889&sourceType=Scholarly%20Journals](https://www.proquest.com/docview/1980710225?parentSessionId=h94uxKbYwh5%2FGFZIY_mS6EgzGl8Zzf17lkHB6FluSVsA%3D&pqorigsite=primo&accounted=28889&sourceType=Scholarly%20Journals)>.

Internationally, a trend toward pre-birth or immediate post-birth parentage orders is evident. The Law Commission of England and Wales, with the Scottish Law Commission, recently recommended that UK law be reformed to give IP legal status from birth (subject to a short period in which the surrogate can object), as a means of better prioritising the child's best interests and providing clarity for all parties.<sup>5</sup> In the United States, many jurisdictions have long used pre-birth parentage orders to similar effect, avoiding postnatal limbo for the child.<sup>6</sup> Australian commentators like Jefford – a surrogacy lawyer and former surrogate – underscore the practical and emotional strain caused by Australia's post-birth court processes, noting that the most burdensome steps occur after the child's birth and calling for removal of the court intervention to streamline parentage transfer.<sup>7</sup> Human rights reports also support reform: the Australian Human Rights Commission's 2019 Children's Rights Report observed that legislative gaps in family law, including delayed parentage in surrogacy, risk a child's right to identity and legal protection.<sup>8</sup> Likewise, a New Zealand law review highlighted how requiring an adoptive order for surrogacy (a post-birth mechanism) creates uncertainty for children during a crucial period of early life.<sup>9</sup>

Across the literature, key themes emerge. First, children's welfare is maximised when they have legal stability from birth, meaning the law should, as far as possible, immediately recognise the people who will raise the child as the legal parents.<sup>10</sup> Second, administrative or at-birth recognition processes (with appropriate safeguards such as pre-conception approval of the surrogacy arrangement and consent of the surrogate) are favoured over court-driven procedures that delay parentage determination.<sup>11</sup> Third, scholars emphasise the disconnect between the intentions of surrogacy laws – often justified as protecting children – and the practical outcomes of delay, which can inadvertently undermine a child's rights. There is broad consensus that reforms should treat surrogate-born children no differently than other children in terms of the immediacy of legal parent-child relationships.<sup>12</sup> This scholarship provides a foundation for analysing how Australia and Ontario implement these principles in practice.

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<sup>5</sup> Law Commission of England and Wales and Scottish Law Commission, *Building Families Through Surrogacy: A New Law* (Report No 244, 2023) ch 5 <<https://lawcom.gov.uk/project/surrogacy/>>.

<sup>6</sup> Charles P. Kindregan Jr and Maureen McBrien, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2012) 39 *Family Law Quarterly* 157 <<https://open.mitchellhamline.edu/facsch/231/>>.

<sup>7</sup> Sarah Jefford, *The Australian Surrogacy Handbook* (1st ed, 2023) 120–22; Sarah Jefford, "Surrogacy law reform in Australia" (Blog, 3 May 2023) <<https://sarahjefford.com/what-should-australian-surrogacy-laws-look-like/>>.

<sup>8</sup> Australian Human Rights Commission, *In Their Own Right: Children's Rights in Australia* (National Children's Rights Report, 2019) 152–55 <[https://humanrights.gov.au/sites/default/files/document/publication/childrensrightsreport\\_2019\\_ahrc.pdf](https://humanrights.gov.au/sites/default/files/document/publication/childrensrightsreport_2019_ahrc.pdf)>.

<sup>9</sup> New Zealand Law Commission, *Review of Surrogacy* (Issues Paper 47, 2022) 27–30 <<https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R146.pdf>>.

<sup>10</sup> Sifris and Page (n 3), 95–96.

<sup>11</sup> Law Commission (UK) (n 5), 11–12; Jefford (n 7).

<sup>12</sup> Snow (n 4), 335; Australian Human Rights Commission (n 8), 159.

## Jurisdictional Analysis

### Australia

In Australia, surrogacy is regulated by state and territory laws. Altruistic (unpaid) surrogacy is permitted nationwide (with only reimbursement of a surrogate's medical and other reasonable expenses allowed), while commercial surrogacy is uniformly banned.<sup>13</sup> A consistent feature of Australian surrogacy statutes is that the woman who gives birth (the surrogate) and her spouse (if applicable) are deemed the legal parents at birth, irrespective of genetic parentage.<sup>14</sup> The IP must then apply to a state court for a parentage order to transfer legal parentage from the surrogate to themselves. For example, under the *Surrogacy Act 2010* (NSW), such an order cannot be made until at least 30 days after birth.<sup>15</sup> The court will grant the order if various conditions are met – for instance, the surrogacy was altruistic and agreed before conception, at least one IP is genetically related to the child, all parties had requisite counselling and legal advice, and the surrogate provides informed consent after birth.<sup>16</sup> Once the order is made, the intended parents are legally recognised and a new birth certificate is issued naming them as the parents.

Until that transfer occurs, the child remains in a legal limbo: the IP, even if biologically related, have no legal parental status. The child's birth certificate initially lists the surrogate (and possibly her partner) as the parents, rather than the IP. The IP cannot, as of right, make certain decisions for the newborn and may face difficulties obtaining essential documents or services (such as a passport or Medicare card) because they are not yet the legal parents.<sup>17</sup> Although the *Family Law Act 1975* (Cth) ensures that once a parentage order is made it is recognised for all purposes (including federal matters like citizenship and child support),<sup>18</sup> this provides little comfort during the interim months. Australia's model prioritises caution – ensuring the surrogate's post-birth consent and guarding against impropriety – but there is scant evidence of surrogates in altruistic arrangements attempting to keep the baby. Disputes that have reached courts have typically involved misunderstandings or expense issues rather than a surrogate refusing to relinquish the child.<sup>19</sup> Thus, treating the surrogate as the default legal parent in every case appears misaligned with the usual reality of surrogacy and potentially burdensome for the children and families involved.

Momentum for reform is building. The lack of uniformity across jurisdictions adds complexity and inequity (for example, the process to obtain a parentage order is considerably more onerous in some states

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<sup>13</sup> See, e.g., *Surrogacy Act 2010* (NSW) s 6.

<sup>14</sup> *Surrogacy Act* (NSW) (n 1).

<sup>15</sup> *Surrogacy Act 2010* (NSW) s 16(1).

<sup>16</sup> *Ibid* ss 12, 16(2), 22.

<sup>17</sup> *Status of Children Act 1996* (NSW) s 14(2); Stephen Page, *Submission to the NSW Department of Justice – Review of the Surrogacy Act 2010* (2 August 2024) 11 <<https://pageprovan.com.au/wp-content/uploads/2024/09/Submission-Review-of-Surrogacy-Act-.pdf>>.

<sup>18</sup> *Family Law Act 1975* (Cth) s 60HB.

<sup>19</sup> *Lamb and Shaw* [2017] QChC 4 (Queensland Children's Court) [29]-[31]; Sarah Jefford, "When Surrogacy Goes Wrong" (Blog, 6 May 2020).

than in others).<sup>20</sup> Recognising these issues, in 2019, the Australian Law Reform Commission recommended harmonisation of surrogacy laws to better serve children's interests<sup>21</sup> and, in 2024, New South Wales launched a review of its surrogacy legislation to consider enabling parentage recognition at birth.<sup>22</sup> These developments reflect a growing view that the current post-birth transfer model does not adequately serve the best interests of the child.

## Ontario, Canada

Ontario by contrast has modernised its approach to parentage in surrogacy. In 2016, Ontario's *All Families Are Equal Act* amended the *Children's Law Reform Act* (CLRA) to allow IP to be recognised as a child's legal parents from birth, without a court process, provided certain conditions are met.<sup>23</sup> Key safeguards include that the surrogacy agreement was made before conception, each party received independent legal advice, and the surrogate has the right to change her mind within a short period after birth (seven days). If the surrogate confirms her consent after that waiting period, she ceases to have any parental status and the IPs become the only legal parents. The birth is then registered in the IPs' names via a simple administrative procedure (a statutory declaration) rather than a court order. Ontario's law is notably inclusive: it allows up to four IP to be listed if all were parties to the pre-conception agreement, and it does not require any genetic connection between the child and the IP for parentage.<sup>24</sup>

The result is that a child born under a surrogacy arrangement in Ontario has no gap in legal parentage – the IP are effectively recognised as the child's parents at birth. There is no period of uncertainty during which the caregivers lack legal authority. In the rare event the surrogate does not provide consent, or something deviates from the plan, the law provides a fallback whereby any party can apply to the court for a declaration of parentage (with the decision based on the child's best interests). Importantly, the primary system avoids the need for court involvement or delay in the vast majority of cases. This ensures that IP can immediately assume all rights and responsibilities for the newborn – for example, making medical decisions or arranging documents like passports and insurance – with no legal obstacles. Ontario's scheme has been cited as a model that upholds the child's fundamental rights: it accords with Article 7 of the UN Convention on the Rights of the Child (UNCRC) (which affirms a child's right to be registered at

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<sup>20</sup> Jefford, "Surrogacy law reform in Australia" (n 7).

<sup>21</sup> Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, 2019) 493 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_135\\_final\\_report\\_web-min\\_12\\_optimized\\_1-1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1-1.pdf)>.

<sup>22</sup> NSW Department of Communities and Justice, *Review of the Surrogacy Act 2010 (NSW) and the Status of Children Act 1996* (Discussion Paper, June 2024) 5 <<https://www.nsw.gov.au/sites/default/files/2024-07/discussion-paper-review-of-the-surrogacy-act-and-status-of-children-act.pdf>>.

<sup>23</sup> Children's Law Reform Act (Ont) (n 2).

<sup>24</sup> Children's Law Reform Act (Ont) (n 2), s 10(3); Legislative Assembly of Ontario, *Bill 28, All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, 2nd Sess, 41st Parl, Ontario, 2016 (assented to 5 December 2016) <<https://www.ola.org/en/legislative-business/bills/parliament-41/session-2/bill-28>>.

birth and to know and be cared for by their parents),<sup>25</sup> by legally affirming the child's identity and family relationships as intended from day one.

## **Implications for Children's Rights and Welfare**

The divergent approaches of Australia and Ontario carry significant implications for the rights and welfare of children born via surrogacy. Under the Australian model, the delay in legally recognising the child's IP creates a period of uncertainty in the child's life. During this time, the child's right to identity is not fully realised. Article 7 of the UNCRC provides that a child should be registered immediately after birth and has the right from birth to be cared for by his or her parents.<sup>26</sup> Thus, a surrogate-born child in Australia arguably does not fully enjoy this right, since the people who will actually care for them (the IP) are not legally recognised as parents at birth. The child's legal documentation (e.g. the birth certificate) initially names the surrogate (and possibly her partner) as the parents, rather than the IP. This misalignment can affect the child's access to services and protections. For instance, if medical consent or treatment is needed shortly after birth, the IP may face hurdles because the law does not acknowledge them as the child's parents; in an emergency, this could directly impact the child's health. The Australian Human Rights Commission has noted that such legal gaps and delays in confirming parentage may infringe upon a child's right to identity and security.<sup>27</sup> Moreover, the uncertainty can cause stress for the family – IP may feel anxious and undermined in their role during this interim – which can indirectly affect the child's well-being in the critical early weeks.

Conversely, Ontario's model prioritises the child's stability and rights. By ensuring that the IP are the legal parents from birth, the child experiences continuity between their social and legal identity. They are guaranteed the care of their IP not just in fact but in law, which immediately secures the child's entitlements to care, maintenance and inheritance from those parents. The approach in Ontario aligns with the paramountcy of the child's best interests, a principle in both Canadian and Australian family law. It is difficult to argue that maintaining a legal relationship to the surrogate – who has no intention of parenting – for any length of time after birth could benefit the child. The more logical and child-centric approach is to legally solidify the bond with the IP as soon as possible, as Ontario does.

Both jurisdictions aim to respect the surrogate's autonomy, but they balance it differently. Ontario requires the surrogate's explicit written consent after birth (and allows her a brief window to reconsider), whereas Australia's laws effectively presume the surrogate (and her partner) remains the legal parent until a court

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<sup>25</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.

<sup>26</sup> Ibid.

<sup>27</sup> Australian Human Rights Commission, *In Their Own Right: Children's Rights in Australia* (National Children's Rights Report, 2019) 152-55.

order is made. Given that surrogate refusals in altruistic surrogacy are exceedingly rare in practice,<sup>28</sup> a system like Ontario's – with pre-birth planning and a post-birth consent mechanism – can safely enable earlier parentage recognition without compromising the surrogate's rights. In fact, by removing prolonged legal ambiguity, such a system better protects all parties, especially the child.

In summary, Ontario's framework more directly upholds children's rights by avoiding any period in which a child lacks a legal tie to their IP. There is little risk of the child's access to benefits or care being compromised, and no confusion about who is responsible for the child. Australia's model, by contrast, was crafted to be protective but may inadvertently compromise certain rights of the child (notably the rights to identity and immediate parental care). Many commentators conclude that delaying legal parentage is not truly in the best interests of the child and have called for reform to correct this misalignment.

## **Recommendations**

Reform of Australian surrogacy law should move toward the Ontario model to better protect children. A first step is to create a uniform national framework (in place of the disparate state laws) so that all surrogate-born children are treated equally under the law. Most critically, the law should enable IP to be recognised as the legal parents at or near the time of birth, rather than months afterward. This could be achieved by a system of pre-birth approval (ensuring the surrogacy agreement is lawful and all parties have given informed consent) combined with an administrative process at birth to confirm parentage – for example, the surrogate signing a consent declaration about a week after delivery. If these conditions are met, the IP would be recorded on the birth certificate without a court hearing. Court involvement would be reserved only for unusual circumstances or disputes.

Such a system must retain safeguards. Surrogacy agreements would remain unenforceable against a non-consenting surrogate, preserving her right not to relinquish the child. However, once the child is born and the surrogate does consent, the IP should immediately assume legal parentage (along with all responsibilities to care for the child). Oversight mechanisms (such as ethics committees or child welfare authorities) can vet arrangements before birth to ensure they are altruistic and in the prospective child's best interests, similar to current requirements, but implemented pre-birth rather than via post-birth court review. These reforms would align Australian law with international human rights obligations – notably the child's right to identity and to be cared for by their parents from birth<sup>29</sup> – and refocus surrogacy law on the paramount interests of the child.

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<sup>28</sup> *Lamb and Shaw* (n 19); Jefford (n 19).

<sup>29</sup> Children's Law Reform Act (Ont) (n 2), s 10(3); Legislative Assembly of Ontario, *Bill 28* (n 24).

## **Conclusion**

The comparison between Australia and Ontario reveals a fundamental divergence in how the law conceptualises and protects the parent-child relationship in surrogacy. Ontario's framework demonstrates that it is feasible to accord legal parentage to IP at birth in a manner that upholds the child's rights to identity, stability, and care, while still safeguarding the surrogate's autonomy. Australia's current approach, rooted in post-birth judicial transfer of parentage, reflects caution and historical ethical concerns, but it falls short of fully prioritising the child's immediate best interests. A growing body of legal opinion and evidence suggests that the Australian model can and should be improved. By learning from Ontario and other progressive jurisdictions, Australia can redesign its surrogacy laws to ensure that no child born via a surrogate starts life in legal limbo. Implementing timely parentage recognition is not only a matter of administrative efficiency, but a fulfillment of the child's fundamental rights. The evolution of surrogacy law is clearly moving in one direction – toward recognising that the crux of any surrogacy arrangement is the child, who deserves legal certainty and the security of belonging from the moment they are born.

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