

Australian Government

Australian Law Reform Commission

FINAL REPORT

ENHANCING RESPONSIBLE ACCESS:

AN EFFECTIVE REGULATORY FRAMEWORK FOR SURROGACY

ALRC Report 145
September 2026

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September 2026

Unless otherwise stated, this Report reflects the law as at 28 May 2026.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 14, 300 Flinders Street, Melbourne VIC 3000.

Postal Address: PO Box 209, Flinders Lane VIC 8009

Telephone: +61 03 9959 5300

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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Acknowledgement of Country

We acknowledge the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies, and community. We pay our respects to their Elders past and present, and to their community leaders, and extend that respect to all Aboriginal and Torres Strait Islander peoples.

Australian Government

Australian Law Reform Commission

The Hon Michelle Rowland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

11 September 2026

Dear Attorney-General

Review of Surrogacy Laws

On 6 December 2024, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into Australian surrogacy laws, policies, and practices. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996* (Cth), I am pleased to present you with the Final Report on this reference (ALRC Report 145, 2026).

Yours sincerely

The Hon Justice Mordecai Bromberg

President

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Terms of Reference

Review of Surrogacy Laws

I, the Hon Mark Dreyfus KC, Attorney-General of Australia, having regard to:

- surrogacy providing Australians who are unable to give birth an opportunity to have a child;
- the medically, emotionally, financially and legally complex nature of surrogacy arrangements;
- the legislative responsibilities that states and territories have with regards to surrogacy laws, and current inconsistencies in legislative arrangements across Australian jurisdictions;
- the human rights of children born of surrogacy, their surrogate mothers and intended parents, and the risks commercial surrogacy can pose to vulnerable women and children;
- the increasing access by Australians to surrogacy arrangements and services overseas.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a review of Australian surrogacy laws, policies and practices to identify legal and policy reforms, particularly proposals for uniform or complementary state, territory and Commonwealth laws, that:

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

In particular, the ALRC is asked to consider

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

In undertaking its inquiry, the ALRC should consider Australia's human rights obligations and any findings and recommendations of the 2021 *Working Group on Surrogacy Final Report to Attorneys-General and Relevant Ministers: Opportunities to achieve national consistency in surrogacy regulation in Australia*, the 2016 House of Representatives Standing Committee on Social Policy and Legal Affairs *Surrogacy Matters* report and Australian Government response, the 2013 Family Law Council report on *Parentage and the Family Law Act 1975*, the 2009 report of the Standing Committee of Attorneys-General *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, the UN Special Rapporteur on the sale and sexual exploitation of children 2019 *Thematic study of safeguards for the protection of the rights of children born from surrogacy arrangements* and 2018 *Thematic study on surrogacy and sale of children*, and relevant reviews of state and territory surrogacy legislation since 2017.

Consultation

In performing its functions in relation to this reference the ALRC will undertake public consultation, and identify and consult with key stakeholders, including relevant government departments and agencies, legal advocacy and human rights bodies in Australia, members of the legal profession and other experts who specialise in surrogacy or human rights matters, members of the medical, psychology or counselling profession who specialise in surrogacy matters, fertility industry bodies and lived experience cohorts, including surrogates, intended parents and individuals born from surrogacy arrangements.

Timeframe

The ALRC should provide its final report to the Attorney-General by 29 July 2026.

The Terms of Reference were amended by the Attorney-General on 17 July 2026, extending the deadline to 11 September 2026.

Participants

Australian Law Reform Commission

President

The Hon Justice Mordecai Bromberg

Assistant Commissioner

Associate Professor Ronli Sifris

Principal Legal Officer

Jacinth Pathmanathan

Executive Director

Ruth Barson

Inquiry Team

Senior Legal Officers

Eliza Drake
Jane Hall
Isadora Vadasz

Legal Officers

Hannah Coffey
Ellie Filkin
Celene Wong

Research Officers

Dr Leavides Domingo-Cabarrubias
Aiden Morton
Elli Murphy
Sam Warner

Communications and Media

Jez Hunghanfoo

Advisory Committee

Narelle Dickinson, Lotus Health and Psychology
Alison Gee, IVF Australia
Paula Gerber, Monash University
Michael Gorton AM, Russell Kennedy
The Hon Judge Alexandra Harland, Federal Circuit and Family Court of Australia
Sarah Jefford OAM, family creation lawyer
Jaya Keaney, University of Melbourne
Rachel Oakeley, Western Australian Bar
Stephen Page, Page Provan
Jens Scherpe, Aalborg Universitet
Ashley Scott, Rainbow Families Australia

Expert Readers

Kate Bourne, Victorian Assisted Reproductive Treatment Authority
Arie Freiberg, Monash University
Paula Gerber, Monash University
The Hon Judge Alexandra Harland, Federal Circuit and Family Court of Australia
Guzyal Hill, HWLE Lawyers
John Tobin, University of Melbourne

We acknowledge other important contributions to this report in **Appendix F**.

List of Recommendations

Chapter 2

Recommendation 1

1. Legislation should provide that intended parents and surrogates are prohibited from engaging in a domestic surrogacy arrangement for profit or reward ('prohibited domestic surrogacy arrangement').
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.
3. Existing criminal offences that prohibit 'commercial surrogacy' (or equivalent) should be repealed.

Recommendation 2

1. Legislation should provide that individuals and organisations, including Surrogacy Support Organisations (**Recommendation 8**), are prohibited from directly, intentionally or recklessly:
    a. facilitating, or attempting to facilitate, a prohibited domestic surrogacy arrangement (**Recommendation 1**); or
    b. advertising or otherwise promoting engagement in a prohibited domestic surrogacy arrangement (**Recommendation 1**).
2. Legislation should provide that the prohibitions in paragraph 1 should not apply to:
    a. a legal professional providing legal advice; or
    b. any person providing medical or other assistance to a surrogate in order to avoid or address injury or harm to the surrogate's health.
3. Legislation should provide that non-compliance with the prohibitions in paragraph 1 will result in liability to a civil penalty.
4. Existing criminal offences that prohibit the facilitation (or equivalent) or advertising (or equivalent) of surrogacy arrangements should be repealed.

Chapter 3

Recommendation 3

1. The Australian, state, and territory governments should enact a legal and regulatory framework for surrogacy that reflects the recommendations in this Report.
2. The legal and regulatory framework should be either uniform under Commonwealth legislation (preferred) or substantially consistent across state and territory laws (**Recommendation 4**).
3. This legislation should establish and empower a National Regulator to hold the responsibilities and carry out the functions outlined in **Recommendation 6**.
4. This legislation should establish a civil penalty regime and empower an appropriate court or courts to impose civil penalties and provide associated relief to address non-compliance with the prohibitions or obligations proposed by **Recommendations 1**–**2**, **33**–**35**, **38** and **40**–**45**.
5. The legal and 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 set out in delegated legislation, guidelines, or standards set by the National Regulator (**Recommendation 6**).

Recommendation 4

1. To implement the preferred approach in **Recommendation 3**, the Australian, state, and territory governments should enter into an intergovernmental agreement to refer appropriate powers to the Commonwealth Parliament. The Australian Government should then enact Commonwealth surrogacy legislation.
2. In the event that a referral of powers to the Commonwealth is not achievable, the Commonwealth, states, and territories should enter into an intergovernmental agreement to enact nationally consistent surrogacy laws through mirror, hybrid, or applied legislation.
3. Legislation developed under any of the options in paragraphs 1 or 2 should adopt consistent and updated terminology.

Recommendation 5

Legislation should require a statutory review of the operation of the legal and regulatory framework for surrogacy (**Recommendation 4**) after an appropriate period (between five to seven years).

Recommendation 6

1. Legislation should establish and empower a national regulator for surrogacy, or alternatively, empower an existing national regulator (collectively 'the National Regulator') to hold the following responsibilities and carry out the following functions:

Standard setting

a. setting licensing conditions for Surrogacy Support Organisations (**Recommendation 8**);

b. setting and maintaining a mandatory scale of maximum fees that Surrogacy Support Organisations may charge for their services;

c. developing guidelines on approving surrogacy arrangements to be applied by Surrogacy Support Organisations and the National Regulator (**Recommendation 9**);

d. developing guidelines on applications to be referred by Surrogacy Support Organisations to the National Regulator or assessed by the National Regulator (**Recommendation 9**);

e. developing and maintaining standards, guidelines, and processes on cost and loss recovery for surrogates (**Recommendations 23**–**25**);

f. developing a standardised draft surrogacy agreement that parties may use as a basis for a compliant surrogacy agreement (**Recommendation 20**);

g. developing the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**);

Compliance

h. licensing Surrogacy Support Organisations, including monitoring compliance with licensing conditions and taking appropriate action, including revoking a licence in response to any breaches of conditions that warrant revocation;

i. inspecting Surrogacy Support Organisation records for the purpose of monitoring compliance with licensing conditions;

j. accrediting Surrogacy Support Organisation staff members to conduct assessments and make decisions in relation to applications to approve surrogacy arrangements;

k. enforcing compliance through the civil penalty regime enacted by legislation (**Recommendation 3**);

Oversight of surrogacy arrangements

l. assessing applications to approve surrogacy arrangements referred by Surrogacy Support Organisations or remitting the application back to the Surrogacy Support Organisation for assessment (**Recommendation 9**);

m. reviewing Surrogacy Support Organisation decisions not to approve a surrogacy arrangement, at the request of a party to the surrogacy arrangement (**Recommendation 9**);

n. keeping records of surrogacy arrangements approved by a Surrogacy Support Organisation or the National Regulator (**Recommendation 9**);

o. establishing and managing a registration system for all overseas surrogacy arrangements (**Recommendation 37**);

p. improving research and data collection on domestic and overseas surrogacy arrangements, in particular to address any gaps in surrogacy data;

Community awareness and information provision

q. developing information and educating the public about surrogacy (**Recommendation 7**);

r. developing educational material for professionals who provide services to parties to surrogacy arrangements (**Recommendation 7**); and

s. managing the National Surrogacy Register and providing information held on the Register to people born through surrogacy (**Recommendations 31**–**32**).

2. In the event that a national regulator for surrogacy is not established or an existing national regulator is not empowered to perform the responsibilities and functions listed in paragraph 1, the Commonwealth, states, and territories should place these responsibilities and functions with existing regulatory bodies or departments. An intergovernmental agreement should be entered into to facilitate national consistency in the performance of the responsibilities and functions listed in paragraph 1 including, in particular, the standard-setting and compliance functions.

Recommendation 7

1. In carrying out its community awareness and information provision function (**Recommendation 6**), the National Regulator should publish and promote information to:

a. educate the public and increase understanding about surrogacy and address common misunderstandings about surrogacy and Australia's surrogacy laws;

b. inform intended parents and surrogates about surrogacy in Australia and Australia's surrogacy laws;

c. inform the public, and specifically intended parents, about surrogacy laws, policies, and practices overseas, and associated risks; and

d. inform the public, and specifically intended parents, about the Responsible Overseas Surrogacy Guidelines and the requirement to register their intention to engage in an overseas surrogacy arrangement (**Recommendations 37** and **38**).

2. In carrying out its community awareness and information provision function, the National Regulator 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 Surrogacy Support Organisation management and staff (**Recommendation 8**), lawyers, healthcare professionals, and counsellors.

Chapter 4

Recommendation 8

Legislation should empower the National Regulator to license Surrogacy Support Organisations to provide, in accordance with the licensing conditions set by the National Regulator (**Recommendation 6**), the following supports and implement the following safeguards for intended parents and surrogates:

a. facilitating introductions for, or 'matching' of, intended parents and surrogates who meet the requirements in **Recommendations 11**–**14**;

b. coordinating the counselling and other services that need to be engaged with to meet eligibility and process requirements (**Recommendations 15**–**19**);

c. assessing and approving compliant surrogacy arrangements, or referring 'complex applications' to the National Regulator (**Recommendation 9**);

d. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;

e. notifying parties about their right to request a psychological assessment (**Recommendation 19**); and

f. facilitating conflict resolution between intended parents and surrogates.

Recommendation 9

1. Legislation should provide that Surrogacy Support Organisations (**Recommendation 8**), and where applicable, the National Regulator (**Recommendation 6**) (collectively, 'an approval body'), should be empowered to approve compliant surrogacy arrangements.

2. Legislation should provide that to access the administrative pathway (**Recommendation 28**), parties to a surrogacy arrangement must obtain approval from an approval body before attempting to achieve a pregnancy.

3. Legislation should provide that:

    a. before granting approval to access the administrative pathway, an approval body must assess all supporting evidence provided by the parties to a surrogacy arrangement in accordance with guidelines developed by the National Regulator (**Recommendation 6**) and be satisfied that they meet all the preconditions in **Recommendations 11**–**20**;

    b. where a Surrogacy Support Organisation is not satisfied that the parties to a surrogacy arrangement have met all the preconditions in **Recommendations 11**–**20**, it must not approve the surrogacy arrangement. The parties may seek to have that arrangement reviewed by the National Regulator; and

    c. the National Regulator may dispense with a precondition in **Recommendations 11**–**20** if satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the arrangement.

4. The process for approving surrogacy arrangements in paragraph 3 should incorporate the following elements:

    a. Parties to a surrogacy arrangement may seek approval from a Surrogacy Support Organisation, regardless of whether the arrangement was facilitated by a Surrogacy Support Organisation.

    b. Surrogacy Support Organisations must refer all 'complex applications' (paragraph 7) to the National Regulator, as a condition of their licensing (**Recommendation 8**), unless the parties do not wish the arrangement to proceed.

    c. The National Regulator may remit a 'complex application' back to a Surrogacy Support Organisation for approval (**Recommendation 6**).

    d. Applications to Surrogacy Support Organisations must be assessed and determined by a staff member accredited by the National Regulator (**Recommendation 6**).

5. Legislation should provide that for a transitional period of two years from commencement, or a further period if prescribed, the National Regulator may

assess and approve primary applications submitted by the parties without the involvement of a Surrogacy Support Organisation.

6. Legislation should provide that when an approval body assesses a surrogacy arrangement for approval:

    a. the completion of a process required by an assisted reproductive technology service provider, which would also satisfy a precondition for a surrogacy arrangement, discharges that precondition;

    b. there should be a presumption in favour of approval where the parties meet all the preconditions; and

    c. an approval body should review surrogacy arrangements 'on the papers'. Meetings with the parties should only occur where an approval body considers them necessary.

7. Legislation should provide that applications should be treated as 'complex applications', and be referred by a Surrogacy Support Organisation to the National Regulator, where:

    a. as part of any psychological assessment, the psychologist recommends that the surrogacy arrangement should not proceed or the psychologist is unable to make a recommendation but identifies risk factors in their report (**Recommendation 19**); or

    b. the Surrogacy Support Organisation considers that the application otherwise raises complex issues as identified in guidelines developed by the National Regulator (**Recommendation 6**).

Recommendation 10

1. Legislation should provide that when a surrogacy arrangement has been approved ('approved surrogacy arrangement'):

    a. the approved surrogacy arrangement may proceed on the administrative pathway, and the intended parent(s) will be the child's legal parent(s) at birth (**Recommendation 28**);

    b. the Surrogacy Support Organisation must lodge the approved surrogacy arrangement with the National Regulator (**Recommendation 6**);

    c. the approval applies to any embryo transfer or attempt to achieve a pregnancy carried out as part of the approved surrogacy arrangement; and

    d. the approval body may issue a document certifying that the arrangement is an approved surrogacy arrangement for the purposes of the administrative pathway to legal parentage, and explaining that the legal consequence is that the intended parent(s) will be the child's legal parent(s) at birth.

2. Legislation should provide that a surrogacy arrangement that is not approved by the Surrogacy Support Organisation or the National Regulator ('unapproved surrogacy arrangement') cannot proceed on the administrative pathway to legal parentage, but may proceed via the judicial pathway to legal parentage (**Recommendation 29**).

Chapter 5

Recommendation 11

As a precondition for approval (**Recommendation 9**), intended parents must be unlikely to conceive, gestate, or give birth to a child for a medical, biological, or psychological reason.

Recommendation 12

As a precondition for approval (**Recommendation 9**):

a. 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

b. intended parents must be at least 18 years old and have the legal capacity to make an informed decision.

Recommendation 13

1. As a precondition for approval (**Recommendation 9**) at least one intended parent and the surrogate must be an Australian citizen or permanent resident.

2. State or territory legislation that imposes state or territory-based residency requirements should be repealed.

Recommendation 14

1. As a precondition for approval (**Recommendation 9**) the surrogate must have previously carried a pregnancy and given birth to a live child.

2. The requirement in paragraph 1 may be dispensed with in circumstances where:

    a. the obstetrician conducting the medical screening (**Recommendation 15**) is satisfied that the surrogacy can proceed without undue risk to the surrogate's health; and

    b. the counsellor conducting the implications counselling (**Recommendation 18**) is satisfied that the surrogate and the intended parent(s) understand the potential risks associated with the surrogacy arrangement and are making a free and informed decision to continue with the arrangement.

Recommendation 15

As a precondition for approval (**Recommendation 9**):

a. the surrogate must undergo a medical assessment by an independent obstetrician;

b. the obstetrician must certify that the surrogacy can proceed without undue risk to the surrogate's health; and

c. the obstetrician must provide the certification to the surrogate and the surrogate's nominated Surrogacy Support Organisation (**Recommendation 8**), so that the certification can be considered as part of the approval process (**Recommendation 9**).

Recommendation 16

As a precondition for approval (**Recommendation 9**):

a. the intended parent(s) must undergo a Nationally Coordinated Criminal History Check;

b. the report from the Nationally Coordinated Criminal History Check must indicate that no offences have been committed by the intended parent(s) against a child, including child exploitation offences; and

c. the report from the Nationally Coordinated Criminal History Check must be provided to the intended parents' nominated Surrogacy Support Organisation (**Recommendation 8**), so that the report can be considered as part of the approval process (**Recommendation 9**).

Chapter 6

Recommendation 17

1. As a precondition for approval (**Recommendation 9**), all parties must receive independent legal advice. The advice must cover:

    a. the surrogate's bodily integrity, autonomy (**Recommendation 21**), and the legal requirement for free and informed consent in relation to medical treatment or procedures that directly affect them;

    b. legal parentage under the administrative pathway or the judicial pathway, including the timing and effect of the surrogate's consent, and the right to apply for a parentage order (**Recommendations 28**–**29**);

    c. the operation and enforceability of the cost and loss recovery provisions in the surrogacy agreement (**Recommendations 23**–**24**); and

    d. the right of the child born through surrogacy to know their genetic and gestational origins, including their right to access registered information (**Recommendations 30**–**32**).

2. Legislation should provide that the legal practitioner providing the advice must provide each party with written confirmation that the matters outlined in paragraph 1 were discussed, the requisite advice was provided, and the legal practitioner believes the party appeared to understand the advice, so that it can be considered as part of the approval process (**Recommendation 9**).

3. Law societies in each jurisdiction should develop and provide accreditation for lawyers who provide legal advice on surrogacy arrangements.

Recommendation 18

1. As a precondition for approval (**Recommendation 9**), all parties, and the surrogate's partner (if any), must undergo counselling. The counselling must:

    a. be provided by a counsellor, who is a full member of the Australian and New Zealand Infertility Counsellors Association;

    b. include at least:

        i. two independent counselling sessions with the intended parent(s);

        ii. one independent counselling session with the surrogate;

        iii. one independent counselling session with the surrogate and the surrogate's partner (if any); and

        iv. a joint counselling session with the intended parent(s), the surrogate, and the surrogate's partner (if any);

    c. be provided by the same counsellor for all sessions, unless it is impracticable to do so; 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 changing their mind regarding who should parent the child born through the arrangement;

        iv. the attitudes of the parties towards the conduct of the pregnancy, including the extent to which the intended parent(s) should have input 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 relating 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;

viii. how the parties will resolve any disputes that arise during the surrogacy arrangement;

ix. where the proposed arrangement is a traditional surrogacy arrangement, the implications of a traditional surrogacy arrangement, including the surrogate's role as both surrogate and egg donor; and

x. any other circumstances relevant to assessing the suitability of the arrangement to proceed.

2. Legislation should provide that if during the counselling process the counsellor identifies risk factors that may affect whether the arrangement should be approved (**Recommendation 9**), the counsellor must notify the parties' nominated Surrogacy Support Organisation (**Recommendation 8**) of those risks.

3. 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 for up to three months following the birth of any child born (or stillborn) through the surrogacy arrangement. Ongoing counselling may be initiated at the reasonable election of any party to the surrogacy arrangement (**Recommendations 20** and **23**).

4. Legislation should provide that the counsellor must provide each party with written confirmation that the matters outlined in paragraph 1(d) were discussed, and that the counsellor believes the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement, so that it can be considered as part of the approval process (**Recommendation 9**).

Recommendation 19

1. As a precondition for approval (**Recommendation 9**), the surrogate and the intended parent(s) must undergo a psychological assessment where:

   a. any party to a proposed surrogacy arrangement requests such an assessment; or

   b. the Surrogacy Support Organisation (**Recommendation 8**) requires such an assessment (paragraph 3).

2. Legislation should provide that where a psychological assessment is required under paragraph 1, each party to the proposed surrogacy arrangement must undergo the assessment.

3. Legislation should provide that the nominated Surrogacy Support Organisation must refer the parties for psychological assessments where it is notified of identified risk factors through the counselling process (**Recommendation 18**).

4. Legislation should provide that unless unable to, the psychologist conducting the assessment must provide a recommendation to the nominated Surrogacy Support Organisation about whether the surrogacy arrangement is suitable to proceed so that the recommendation can be considered as part of the approval process (**Recommendation 9**). The recommendation should include any identified risk factors that may affect the suitability of the arrangement. If the psychologist is unable to make a recommendation, they must provide a list of identified risk factors.

5. Legislation should provide that if the psychologist recommends that the surrogacy arrangement should not proceed or is unable to make a recommendation but identifies risk factors in their report, the application is to be treated as a 'complex application' and must be referred to the National Regulator (**Recommendations 6** and **9**), if the parties wish it to proceed.

6. Legislation should provide that the psychologist must provide a copy of the full report to the party who was the subject of the assessment, and to the National Regulator when it is considering the application.

Chapter 7

Recommendation 20

As a precondition for approval (**Recommendation 9**), the parties must have signed a compliant surrogacy agreement. A compliant surrogacy agreement must:

a. be in writing and signed by the surrogate and the intended parent(s);

b. be entered into before the surrogate becomes pregnant;

c. contain provisions relating to permitted payments to the surrogate that are consistent with **Recommendations 23** and **24**;

d. state whether the surrogate elects to receive either or both of the optional payments for non-economic loss and extraordinary loss (**Recommendation 24**);

e. contain a provision that ongoing counselling must be available to the parties — individually and collectively — at the reasonable election of any party, and paid for by the intended parent(s) (**Recommendation 18**);

f. include the statement confirming the requirement to respect the surrogate's bodily integrity and autonomy (**Recommendation 21**); and

g. include a statement of intention setting out the parties' expectations of the arrangement, including their expectations for the relationship following the birth of the child.

Recommendation 21

1. Legislation should require a compliant surrogacy agreement (**Recommendation 20**) to contain a plain English statement provided by the National Regulator (**Recommendation 6**). The statement should clarify that, subject to compliance with reasonable medical advice in connection with the pregnancy or birth, the surrogate's bodily integrity and autonomy must be respected, in relation to all decisions and conduct, including:
    a. decisions and conduct that relate to the management of the pregnancy; and
    b. decisions and conduct that determine the circumstances in which the surrogate gives birth to the child.
2. Legislation should prohibit the inclusion of any provision in a surrogacy agreement that interferes with the surrogate's bodily integrity and autonomy, except to the extent that the provision requires compliance with reasonable medical advice in connection with the pregnancy or birth.

Recommendation 22

1. Legislation should provide that only the cost and loss recovery provisions in both compliant and non-compliant surrogacy agreements are enforceable. The criteria for enforceability should be made nationally consistent, including by:
    a. removing any requirement that costs and losses are enforceable only if the surrogate relinquishes the child or consents to the transfer of parentage; and
    b. providing that costs and losses are enforceable only where they are not recoverable under Medicare, health insurance, or any other scheme.
2. Legislation should provide that unlawful surrogacy agreements are void, but that surrogates in such arrangements are entitled to recover costs and losses as statutory entitlements to the extent provided for in **Recommendation 23**.

Chapter 8

Recommendation 23

1. Legislation should provide that a surrogacy arrangement that entitles surrogates to the reimbursement of payments provided for in this recommendation is not, for that reason only, for profit or reward (**Recommendation 1**).
2. Legislation should provide that consistent with this recommendation, intended parents must reimburse the surrogate for all costs and economic losses reasonably incurred by the surrogate or the surrogate's 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 required for a surrogacy arrangement to be compliant with legislative requirements and eligible for approval (**Recommendations 11**–**19**);

b. medical and wellbeing costs;

c. pregnancy-related items, including dietary items and supplements;

d. care of dependants;

e. additional assistance where the surrogate is unable to perform daily tasks;

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. healthcare costs incurred following:

   i. the birth of a child, miscarriage, or stillbirth; or

   ii. where no successful pregnancy occurs and the parties agree to cease attempts to achieve a pregnancy.

3. Legislation should provide that in relation to claims for reimbursement made for costs that are incurred beyond the three-month period following the birth of a child, miscarriage, stillbirth, or the termination of a pregnancy, the only costs payable are:

   a. costs incurred in connection with a serious medical complication experienced during the pregnancy or childbirth (**Recommendation 24**); and

   b. costs incurred with prior approval from the nominated Surrogacy Support Organisation (**Recommendation 8**), unless otherwise ordered by a court.

4. Legislation should provide that the National Regulator (**Recommendation 6**) should be empowered to develop guidelines, which clarify when costs should be regarded as reasonably incurred in relation to a surrogacy arrangement, and formulate a monthly allowance to cover commonly incurred costs for which the obtaining or keeping of receipts is difficult or inconvenient.

Recommendation 24

1. Legislation should provide that a surrogacy arrangement is not for profit or reward (**Recommendation 1**) by reason only of the entitlement to the payments provided for in this recommendation.

2. Legislation should provide that where a surrogate has elected to receive a payment to recover non-economic losses and it forms part of a compliant surrogacy agreement (**Recommendation 20**):

    a. the intended parent(s) must make a monthly payment to the surrogate to redress the commonly experienced non-economic losses resulting from pregnancy and childbirth, such as the physical and psychological impacts, and loss of amenity. The monthly payment must not exceed any maximum amount set in accordance with paragraph 2(b); and

    b. the National Regulator should be empowered to set a maximum cap for the non-economic loss payment (**Recommendation 6**).

3. Legislation should provide that, where a surrogate has elected to receive a payment to recognise an extraordinary loss, and this forms part of a compliant surrogacy agreement (**Recommendation 20**):

    a. the intended parent(s) must make an additional payment to the surrogate to redress extraordinary loss arising from any serious medical complications during the pregnancy or childbirth (including, for example, stillbirth or hysterectomy). The payment must not exceed any maximum amount set in accordance with paragraph 3(c);

    b. the National Regulator should develop guidelines to identify events that would give rise to the extraordinary loss payment (**Recommendation 6**); and

    c. the National Regulator should be empowered to set a maximum cap for permitted extraordinary loss payments (**Recommendation 6**).

Recommendation 25

1. Legislation should provide that:

    a. before parties to an approved surrogacy arrangement attempt to achieve a pregnancy, the intended parent(s) must deposit the full estimated costs of the surrogacy arrangement, excluding the non-economic loss payment and extraordinary loss payment (**Recommendations 23**–**24**) with an accountable entity;

    b. if the intended parent(s) are unable to deposit the amount required under paragraph 1(a), they may provide a bank guarantee for these costs;

    c. reimbursements to the surrogate are to be disbursed by an accountable entity within a reasonable time of the claim being made where the claim is not disputed by the intended parent(s); and

d. any funds remaining in the account managed by the accountable entity at the end of the surrogacy arrangement must be refunded to the intended parent(s).

2. Any dispute in relation to whether a claimed cost or economic loss has been reasonably incurred by the surrogate or the surrogate's partner (if any) (**Recommendation 23**) may be dealt with through conflict resolution by a Surrogacy Support Organisation (**Recommendation 8**). If the dispute is not resolved by the Surrogacy Support Organisation, an application may be made to a court with appropriate jurisdiction.

Chapter 9

Recommendation 26

The *Health Insurance (General Medical Services Table) Regulations 202*1 (Cth) should be amended to allow Medicare rebates for assisted reproductive technology services to apply to treatment carried out for the purpose of a surrogacy arrangement.

Recommendation 27

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended so that Medicare rebates are available for:

a. prearrangement counselling and psychological assessments, which are required for a surrogacy arrangement to be compliant with legislative requirements and eligible for approval (**Recommendations 18**–**19**); and

b. ongoing counselling undertaken during an approved surrogacy arrangement (**Recommendation 20**).

Chapter 10

Recommendation 28

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an approved surrogacy arrangement (**Recommendation 9**) and a child is born (or stillborn):

    a. the intended parent(s) who are parties to that arrangement are, upon the birth of the child, the legal parent(s) of the child;

    b. the surrogate may apply to the Federal Circuit and Family Court of Australia, within three months of the birth of the child, for a parentage order which recognises the surrogate and the surrogate's partner (if any) as the legal parent(s) of the child;

    c. the timeframe for the application in paragraph 1(b) may be extended to six months, in exceptional circumstances, at the discretion of the Federal Circuit and Family Court of Australia; and

d. the intended parents may still apply to the Federal Circuit and Family Court of Australia for a parentage declaration, where parentage is recognised through paragraph 1(a).

2. The Federal Circuit and Family Court of Australia should be empowered, in an application under paragraphs 1(b) or 1(d), to:

   a. consider and determine the application, taking into account all relevant considerations, but giving paramount consideration to the best interests of the child, including by reference to s 60CC of the *Family Law Act 1975* (Cth); and

   b. make any other orders necessary to give effect to the best interests of the child.

3. The Federal Circuit and Family Court of Australia should establish a specialist list for dealing with applications involving surrogacy, including applications under paragraphs 1(b) or 1(d).

Recommendation 29

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an unapproved domestic surrogacy arrangement (**Recommendation 9**) and a child is born (or stillborn) in Australia, or where there is an overseas surrogacy arrangement which has been entered into by an Australian citizen or permanent resident, and a child is born (or stillborn):

   a. the surrogate and the surrogate's partner (if any) are, upon birth, the legal parent(s) of the child;

   b. the intended parent(s) must apply to the Federal Circuit and Family Court of Australia for a parentage order, within six 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 should have full discretion to dispense with the timeframe in paragraph 1(b).

2. The Federal Circuit and Family Court of Australia should be empowered, in an application under paragraph 1(b), to:

   a. consider and determine the application, taking into account all relevant considerations, but giving paramount consideration to the best interests of the child, including by reference to s 60CC of the *Family Law Act 1975* (Cth); and

   b. make any other orders the Court considers to be appropriate.

3. Applications under paragraph 1(b) should be heard and determined within the specialist list (**Recommendation 28**).

4. The *Family Law Act 1975* (Cth) should be amended to provide that the process outlined in paragraphs 1–3 is retrospectively available in respect of children

born through surrogacy arrangements that occurred before the proposed amendments come into effect.

Chapter 11

Recommendation 30

1. Legislation should require that birth registration statements and any other documents used to register the birth of a child born in any Australian state or territory include a dedicated section to collect information relating to surrogacy-related births. The information to be collected should include the surrogate's identifying details such as their full name, place of birth, month and year of birth, and contact details.
2. Legislation should provide that where the information in paragraph 1 has been provided to a registry of births, deaths, and marriages, an addendum must be attached to each copy of the birth certificate issued to a person born through surrogacy.
3. Legislation should provide that the addendum in paragraph 2 must:
    a. state that additional information is available and may be obtained through the National Surrogacy Register (**Recommendation 31**) and the births, deaths and marriages register; and
    b. provide that counselling services are available to people born through surrogacy.

Recommendation 31

1. Legislation should establish a National Surrogacy Register. The Register should contain an entry for every person born through surrogacy after the relevant provision commences. Each entry should contain the information required in **Recommendation 32**.
2. To facilitate ease of access for people born through surrogacy and people born using donated gametes, consideration should be given to either:
    a. combining the National Surrogacy Register with a National Donor Register, to replace existing state and territory donor registers; or
    b. linking entries in the National Surrogacy Register with entries relating to the same person held in state and territory donor registers.
3. Legislation should provide that:
    a. a person born through surrogacy has a right to access the information contained in the National Surrogacy Register from the age of 16, by application to the National Regulator (**Recommendation 6**);
    b. a person born through surrogacy who is under the age of 16 may access the information contained in the Register if the National Regulator is satisfied that such access would be in the child's best interests; and

c. to inform its assessment in paragraph 3(b), the National Regulator may require the person born through surrogacy to provide a counselling certificate or similar documentation from an accredited counsellor.

4. Legislation should provide that the contact details of the surrogate or the person born through surrogacy should only be disclosed to either party where the other party has consented to the disclosure.

Recommendation 32

1. Legislation should require the following information to be provided to the National Regulator (**Recommendation 6**) for inclusion on the National Surrogacy Register (**Recommendation 31**) within six months of the birth of a child through surrogacy:

   a. Identifying information about the surrogate, including:

      i. full name;

      ii. month, year, and place of birth; and

      iii. contact details.

   b. Whether the surrogacy was a traditional surrogacy or gestational surrogacy.

   c. Details of the relevant assisted reproductive technology service provider and doctor (if any).

   d. A personal statement from the surrogate, if the surrogate elects to provide one.

   e. A copy of the parentage order, if one is obtained (**Recommendations 28**–**29**).

2. Legislation should provide that:

   a. following registration of the birth of a child born through surrogacy, state and territory births, deaths, and marriages registries must provide any information they hold that is listed under paragraph 1 to the National Regulator;

   b. if a child born through surrogacy was conceived using the services of an assisted reproductive technology service provider, that provider must provide the National Regulator with the information listed under paragraphs 1(b) and 1(c);

   c. if a parentage order is made in relation to a child born through surrogacy (**Recommendations 28**–**29**), the Federal Circuit and Family Court of Australia must provide a sealed copy of that order to the National Regulator for inclusion on the National Surrogacy Register; and

   d. parties to surrogacy arrangements, which includes surrogates and intended parents, may provide any additional information to the National

Regulator, such as the surrogate's optional personal statement in paragraph 1(d).

3. Legislation should provide that:

   a. the provision of the information listed in paragraph 1 is mandatory for surrogacy arrangements occurring after the relevant provision commences; and

   b. parties to surrogacy arrangements that occurred before commencement of the provision may provide the information listed in paragraph 1 to the National Regulator for inclusion on the National Surrogacy Register.

Chapter 12

Recommendation 33

1. Legislation should provide that Surrogacy Support Organisations (**Recommendation 8**) are prohibited from intentionally or recklessly:

   a. approving a surrogacy arrangement that does not comply with the legislative requirements (**Recommendations 11**–**20**); or

   b. receiving referral fees from services that are engaged with to assist parties to meet the legislative requirements.

2. Legislation should provide that non-compliance with the prohibitions in paragraph 1 will result in liability to a civil penalty.

Recommendation 34

1. Legislation should provide that an assisted reproductive technology service provider is prohibited from transferring an embryo, or otherwise facilitating an attempt to achieve a pregnancy for the purposes of a surrogacy arrangement (whether traditional or gestational), unless satisfied it is an 'approved surrogacy arrangement' (**Recommendation 10**).

2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

Recommendation 35

1. Legislation should provide that individuals and organisations, including Surrogacy Support Organisations (**Recommendation 8**), are prohibited from coercing, or attempting to coerce (by pressure, force, or deception), the involvement of a person in a domestic surrogacy arrangement.

2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty or a criminal sanction.

Chapter 13

Recommendation 36

The Australian Capital Territory, New South Wales, Queensland, and Western Australia should repeal criminal offences which prohibit 'commercial surrogacy' or 'surrogacy for reward' overseas.

Recommendation 37

1. Legislation should require the National Regulator (**Recommendation 6**) to:
    a. establish and manage a registration system for all overseas surrogacy arrangements;
    b. compile and maintain the Responsible Overseas Surrogacy Guidelines; and
    c. make reasonable efforts to ensure that information about the requirement to register (**Recommendation 38**) and the Responsible Overseas Surrogacy Guidelines are publicly and readily available to intended parents.
2. The Responsible Overseas Surrogacy Guidelines in paragraph 1(b) should:
    a. specify the minimum content requirements for an overseas surrogacy agreement in order to reduce the risk that a surrogacy arrangement will involve significant risk of:
        i. exploitation of the surrogate;
        ii. the sale of a child; or
        iii. the denial of the rights of the child to identity or nationality;
    b. provide guidance (either generally or in relation to specific jurisdictions) about the nature and extent of the risks specified in paragraph 2(a), including the warning signs that indicate risks and the reasonable measures that should be taken to avoid those risks;
    c. include information about the processes and evidentiary requirements for applications which are necessary for children born through overseas surrogacy to return to Australia, including applications for Australian citizenship, an Australian passport, or an Australian visa; and
    d. include information about the limitations on the Australian Government's ability to provide assistance when difficulties arise overseas, including that the Australian Government cannot intervene in the legal processes of other countries.

Recommendation 38

1. Legislation should provide that:
    a. intended parents are prohibited from engaging in overseas surrogacy without first registering their intention with the National Regulator (**Recommendation 6**);
    b. registration must occur prior to (and within 12 months of) entry into an overseas surrogacy arrangement; and
    c. registration lapses after 12 months if no overseas surrogacy arrangement has been entered into and will need to be renewed if intended parents seek to engage in overseas surrogacy after this period.
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

Recommendation 39

Legislation should require the National Regulator (**Recommendation 6**) to:

a. advise intended parents, upon registering their intention (**Recommendation 38**), that they must comply with the legal requirements set out in **Recommendations 41–45**, and that failure to comply with any of those requirements will result in liability to a civil penalty; and
b. provide intended parents, upon registering their intention, with the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**).

Recommendation 40

1. Legislation should prohibit any person involved in promoting or facilitating an overseas surrogacy arrangement from intentionally or recklessly providing misleading or deceptive information or advice in relation to the arrangement.
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

Recommendation 41

1. Legislation should provide that prior to (and within 12 months of) entry into an overseas surrogacy arrangement, intended parents must obtain legal advice from an Australian lawyer about:
    a. their obligations under Australian law in relation to engaging in overseas surrogacy; and
    b. the legal requirements for applications that are necessary for children born through overseas surrogacy to return to Australia, including applications for Australian citizenship, an Australian passport, or an Australian visa.

2. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

Recommendation 42

1. Legislation should provide that prior to (and within 12 months of) entry into an overseas surrogacy arrangement, intended parents must obtain legal advice from a lawyer in the overseas jurisdiction where the arrangement is proposed to occur about:

    a. the legality of the proposed arrangement in the overseas jurisdiction;

    b. the legal status of the intended parent(s), in relation to parentage of or parental responsibility for the child, in the overseas jurisdiction, including whether they will be recognised as the child's legal parent(s) by operation of law upon the child's birth, and if not, what steps would be required to be recognised as the child's parents;

    c. the legal status of the surrogate and the surrogate's partner (if any) in relation to parentage of, or parental responsibility for, the child; and

    d. the child's legal status, in relation to nationality (including as to any risk that the child will be stateless), and the processes and mechanisms available to support the child's right to identity.

2. Legislation should provide that to satisfy the obligation in paragraph 1, intended parents must make reasonable enquiries and be reasonably satisfied that the lawyer providing the advice is independent of any other party or person interested (such as an intermediary or agency) in the proposed surrogacy arrangement.

3. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

Recommendation 43

1. Legislation should provide that intended parents are prohibited from engaging in an overseas surrogacy arrangement unless a reasonable person, having taken into account the nature and extent of the risks specified and the guidance for avoiding those risks provided by the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**), and having otherwise made reasonable enquiries, would be satisfied that:

    a. the surrogacy arrangement will not contravene the laws of any jurisdiction in which any aspect of the surrogacy arrangement will take place;

    b. the surrogacy agreement complies with the minimum content requirements set out in the Responsible Overseas Surrogacy Guidelines; and

c. the surrogacy arrangement will not involve a significant risk of:

i. exploitation of the surrogate;

ii. the sale of a child; or

iii. the denial of the rights of the child to identity or nationality.

2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

3. Legislation should provide that in respect of any court proceeding in which a contravention of the prohibition in paragraph 1 is alleged and, for the purpose of determining whether a reasonable person having made reasonable enquiries would not have been satisfied of the matters specified in paragraph 1, relevant information in the Responsible Overseas Surrogacy Guidelines as at the time that the surrogacy arrangement was entered into is admissible as evidence of any fact asserted in the Responsible Overseas Surrogacy Guidelines, unless rebutted.

Recommendation 44

1. Legislation should provide that intended parents must update their registration (**Recommendation 38**), within three months of entering into an overseas surrogacy arrangement, by providing:

a. confirmation that they have received the legal advice required under **Recommendations 41** and **42**, with such confirmation specifying the name and contact details of the lawyers; and

b. a copy of the written surrogacy agreement (**Recommendation 37**).

2. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

Recommendation 45

1. Legislation should provide that, within six months of a child born through overseas surrogacy entering Australia, parents through overseas surrogacy must provide to the National Regulator (**Recommendation 6**), for inclusion on the National Surrogacy Register (**Recommendation 31**), the following information (where known):

a. Country where the child was born.

b. Identifying information about the surrogate, including:

i. full name;

ii. month, year, and place of birth; and

iii. contact details.

c. Identifying information about genetic origins.

d. Whether the surrogacy was a traditional or gestational surrogacy.

e. Details of the relevant surrogacy agency, assisted reproductive technology service provider, and doctor (if any).

f. A personal statement from the surrogate, if the surrogate wishes to provide one.

2. Legislation should provide that, within six months of a child born through overseas surrogacy entering Australia, the intended parent(s) must apply to the Federal Circuit and Family Court of Australia for legal parentage through the judicial pathway (**Recommendation 29**).

3. Legislation should provide that intentional or reckless failure to comply with the requirements in paragraphs 1 or 2 will result in liability to a civil penalty.

4. Legislation should empower the Federal Circuit and Family Court of Australia to order intended parents to comply with the requirements in paragraphs 1 and 2. Non-compliance will result in liability to proceedings for contempt of court.

5. Legislation should provide that if a parentage order is made in relation to a child born through overseas surrogacy, the Federal Circuit and Family Court of Australia must provide a sealed copy of the order to the National Regulator for inclusion on the National Surrogacy Register.

6. Legislation should provide that:

   a. the provision of the information listed in paragraph 1 is mandatory for overseas surrogacy arrangements occurring after the relevant provision commences; and

   b. parties to overseas surrogacy arrangements that occurred before commencement of the provision may provide the information listed in paragraph 1 to the National Regulator for inclusion on the National Surrogacy Register.

Recommendation 46

Commonwealth legislation and administrative processes that govern applications for Australian citizenship, an Australian passport, or an Australian visa for children born through surrogacy should be reviewed and reformed in order to:

a. improve data-sharing mechanisms between the Department of Home Affairs and the Department of Foreign Affairs and Trade;

b. align documentary requirements, to the extent practicable, across citizenship, passport, and visa application processes;

c. allow documents to be provided to the Australian Government once, rather than requiring separate provision for each type of application specified in paragraph b; and

d. provide clear instructions and guidelines, including by way of examples, of the documentation required for each application.

Recommendation 47

Commonwealth legislation and administrative processes should be amended, where necessary, to provide that where an intended parent is recognised as a legal parent of a child born through surrogacy, either through the administrative pathway (**Recommendation 28**) or through the judicial pathway (**Recommendation 29**), the surrogate and the surrogate's partner (if any) are not considered to be parents of, or to have parental responsibility for, the child for the purposes of a passport application or passport renewal application, unless the Federal Circuit and Family Court of Australia expressly orders otherwise.

Glossary

Administrative pathway	The recommended primary pathway to legal parentage for **domestic surrogacy**. Where parties have an **approved surrogacy arrangement** and a child is born, the **intended parent(s)** would be the child's **legal parent(s)** at birth.
Approved surrogacy arrangement	A domestic **surrogacy arrangement** that complies with the legislative requirements and has been approved by a **Surrogacy Support Organisation** or the **National Regulator**. Once approved, this would enable parties to access the **administrative pathway** to legal parentage.
Child born through surrogacy	A child born under a **surrogacy arrangement**.
Compliant surrogacy agreement	A domestic **surrogacy agreement** that meets the legislative requirements.
Compliant surrogacy arrangement	A domestic **surrogacy arrangement** that meets the legislative requirements for approval.
Domestic surrogacy	A **surrogacy arrangement** in Australia involving an **intended parent** and **surrogate** who are Australian citizens or permanent residents, and where the birth is intended to occur in Australia.
Exploitation	Occurs when a person is treated unfairly for another's gain, including through an absence of **free and informed consent**, autonomy or bodily integrity, or adequate reimbursement for costs or losses.
Free and informed consent	A safeguard against **exploitation** and other forms of harm. In practice, it means ensuring a **surrogate** understands the nature of **surrogacy**; the medical, legal, and practical risks it may involve; and is able to decide whether to proceed without undue pressure, coercion, or financial inducement.

Gestational surrogacy	A **surrogacy arrangement** where the egg used is from an **intended parent** or an egg donor, other than the **surrogate**.
Intended parent(s)	The person or people seeking to have a child through **surrogacy**, who will raise the child after the birth.
Judicial pathway	The recommended pathway to legal parentage where a **surrogacy arrangement** has occurred, but the arrangement is not an **approved surrogacy arrangement**. This includes all **overseas surrogacy** arrangements. Parties can 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.
National Regulator	The national regulatory body that would perform a range of functions related to standard setting, compliance, oversight, and information provision relating to both **domestic** and **overseas surrogacy**. References to the 'National Regulator' made throughout this Report also encompass a variety of alternative institutional arrangements, if a National Regulator is not to be established.
National Uniform Legislation	The legal and regulatory framework for **surrogacy** that is either uniform or substantially consistent across states and territories, implemented either through referral of powers, or mirror, applied, or hybrid legislation.
Non-compliant surrogacy agreement	A **surrogacy agreement** that does not comply with all the legislative requirements.
Non-compliant surrogacy arrangement	A **surrogacy arrangement** that does not comply with all the legislative requirements (such that it could not be approved by a **Surrogacy Support Organisation** or the **National Regulator**).

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 of 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. It does not establish the same familial relationship to the child, nor does the child have the same rights as they would in respect of a **legal parent**.
Parent(s) through surrogacy	A person or people who have undertaken a **surrogacy arrangement** as **intended parent(s)** through which a child has been born or stillborn.
Profit or reward	A surrogate receives profit or reward for a **surrogacy arrangement** if they receive payment or benefit exceeding those permitted by **Recommendations 23** and **24** of this Report, or receive payment other than reimbursement of reasonable expenses as defined under existing state and territory laws. Examples of profit or reward include: • reimbursement beyond the costs and economic losses reasonably incurred by the **surrogate** or their partner (if any) in relation to the **surrogacy arrangement**; • a non-economic loss payment that exceeds the maximum amount set by the **National Regulator**; and • an extraordinary loss payment that exceeds the maximum amount set by the **National Regulator**.
Prohibited surrogacy arrangement	A **surrogacy arrangement** that is unlawful under Australian legislation. Specifically, a **domestic surrogacy** arrangement that is for **profit or reward**, or an unlawful **overseas surrogacy** arrangement.

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 agreement	An agreement made between the **surrogate** 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	An arrangement under which a person agrees to attempt to become pregnant and give birth to a child with the intention that another person or people will become the child's **legal parent(s)**.
Surrogacy Support Organisation	An organisation that has been licensed by the **National Regulator** to perform a range of functions in support of parties to **domestic surrogacy arrangements**, and to approve **domestic surrogacy arrangements** for the **administrative pathway**.
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 parent(s)**.
Traditional surrogacy	A **surrogacy arrangement** where the **surrogate's** own egg is used (also known as 'genetic' surrogacy).
Unapproved surrogacy arrangement	Any surrogacy arrangement that has not been approved by a **Surrogacy Support Organisation** or the **National Regulator**. This includes all **overseas surrogacy** arrangements.
Unregistered overseas surrogacy arrangement	An **overseas surrogacy** arrangement that has not been registered with the **National Regulator**.

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1.1 Surrogacy is the practice of a person carrying and giving birth to a child for another person or people. It can involve a single intended parent or a couple, and a surrogate. In many cases, it also involves people who have donated gametes. Surrogacy provides a pathway to having a child for people who would otherwise be unable to. 'Altruistic' surrogacy — surrogacy that is not for profit or reward — is recognised as a legitimate way to form a family in every state and territory.

1.2 Increasing numbers of Australians are using surrogacy to grow their families. In 2023, the number of Australian children born through surrogacy was more than

double the number born a decade earlier. Overseas surrogacy now accounts for approximately 80% (or four in five) of Australian children born through surrogacy.[1]

1.3 When conducted in a rights-respecting and responsible way, surrogacy provides an important social good. For many people, having and raising a child is one of the most fundamental of human aspirations, central to living a fulfilling and meaningful life. Equally, surrogacy conducted in a way that is not responsible or rights-respecting carries serious risks of harm and exploitation.

1.4 The Australian Law Reform Commission ('ALRC') has been asked to make recommendations for the better regulation of surrogacy. In conducting this Inquiry, we have found that state and territory laws impede access to responsible surrogacy, provide insufficient certainty for surrogates and intended parents, and do not adequately safeguard the rights of the child, surrogates, or intended parents. Taken together, the problematic nature of Australian surrogacy laws is a major driver of intended parents going overseas, where the risk of harm and exploitation is at its highest.

1.5 The engagement by Australians in overseas surrogacy arrangements is either not regulated at all in some Australian states and territories, or ineffectively regulated in others. For most Australian children born through surrogacy, this regulatory gap means that they are born overseas into potentially unregulated, risky environments, where the unresolved or delayed resolution of difficult issues about parentage, citizenship, and identity may cause them significant harm.

1.6 In practical terms, it is largely Commonwealth institutions — the Department of Foreign Affairs and Trade, the Department of Home Affairs, and the Federal Circuit and Family Court of Australia — left responsible for managing the consequences of most surrogacy arrangements. Where state and territory laws effectively regulate only around 20% of surrogacy arrangements engaged in by Australians, and the consequences of the remaining 80% fall largely to Commonwealth institutions, the ALRC considers that surrogacy should be properly characterised and dealt with as a national issue regulated by a national regulatory regime or, at the least, by nationally consistent state and territory regimes.

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1 This estimate is approximate and indicative (**Appendix D**). Overseas surrogacy figures are derived from data provided by the Department of Home Affairs (Cth). They are based on the number of Australian citizenship by descent applications involving surrogacy arrangements, which has been used as a proxy for children born through overseas surrogacy to Australian intended parents: Email from the Department of Home Affairs (Cth) to the Australian Law Reform Commission dated 17 April 2025. Domestic figures are derived from Australian and New Zealand Assisted Reproduction Database and New Zealand Ethics Committee on Assisted Reproductive Technology reports on live births following surrogacy arrangements. The figures are not directly comparable, as they are drawn from different sources, measure different things, and use different reporting periods and methodologies. There are also limitations to the data. The domestic surrogacy data was provided by Stephen Page to the ALRC and independently verified by the ALRC: Emails from Stephen Page to the Australian Law Reform Commission dated 9 May 2026 and 30 July 2026.

1.7 The ALRC has concluded that surrogacy requires a regulatory response that both improves access to domestic surrogacy while better addressing the substantial risks of exploitation and other forms of harm associated with overseas surrogacy. Implementing the recommendations in this report will provide for a more accessible, fair, responsible, and effective regime for regulating domestic surrogacy. It will also far better ensure that Australians who engage in overseas surrogacy do so responsibly. The proposed reforms will more effectively guard against the potential for exploitation and other forms of harm to surrogates and children born through surrogacy. The reforms will also improve compliance with Australia's international human rights obligations.

Our task

1.8 The ALRC has been asked to make recommendations about how to better regulate surrogacy so that our laws are harmonised, consistent with Australia's international law obligations, and protect and promote human rights, with the best interests of children being paramount. In particular, the Terms of Reference ask us to consider:

- how to reduce barriers to domestic 'altruistic' surrogacy arrangements;
- how overseas surrogacy should be addressed by Australian law;
- how legal parentage should be recognised in Australia for children born through overseas surrogacy, and how citizenship, visa, and passport requirements for such children could be aligned; and
- the information that should be available to children born from surrogacy arrangements.

Executive summary

1.9 The ALRC's starting point, and the parameters for the reforms we have been asked to consider, are clear. First, the Terms of Reference for this Inquiry task the ALRC with making recommendations that will improve the regulatory regimes for surrogacy in each state and territory,[2] and those regimes essentially provide that surrogacy that is not for profit or reward,[3] is lawful. Consistently with our Terms of Reference and the current laws in Australia that regulate domestic surrogacy, the starting point for our recommendations is that surrogacy that is not for profit or reward is a legitimate form of family formation. Second, and again consistently with the Terms of Reference and the existing regulatory regimes in each state and territory, the ALRC does not recommend permitting domestic surrogacy for profit or reward. In other words, we do not recommend that Australia move from an 'altruistic' surrogacy regime to a 'commercial' surrogacy regime.

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2 Australian Law Reform Commission, 'Terms of Reference', *Review of Surrogacy Laws* (6 December 2024) <www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>. The Terms of Reference ask the ALRC to consider how to reduce barriers to domestic 'altruistic' surrogacy arrangements.

3 This is commonly referred to as 'altruistic' surrogacy. We discuss the use of this term below.

1.10 Surrogacy can be a legitimate form of family formation when engaged in responsibly, but it can also lead to significant exploitation and other forms of harm. The avoidance of those harms is the focus of all the recommendations made in this Report. Irresponsible surrogacy practices can result in the exploitation of surrogates, the sale of a child, the denial of the rights of the child to identity or nationality, or the best interests of the child being otherwise overridden.

1.11 These harms are far more likely to result from overseas surrogacy engaged in by Australians than from domestic surrogacy engaged in by Australians.[4] Some 80% of engagement by Australian intended parents in surrogacy is engagement in overseas surrogacy. Whilst engagement by Australians in domestic surrogacy can be better regulated (as we describe below), engagement by Australians in overseas surrogacy is either not regulated at all,[5] or is ineffectively regulated. The exploitation and other forms of harm associated with some overseas surrogacy arrangements is very significant and of great concern. That is particularly so, because the best interests of the child must be given primary consideration, and each year there are over 300 Australian children born through surrogacy who are born through overseas surrogacy arrangements.[6] This is a trend that, unless abated, will likely continue.

1.12 Within the parameters identified above, the ALRC's recommendations are designed to improve access to well-regulated domestic surrogacy and avoid the risks of exploitation and other forms of harm associated with problematic overseas surrogacy, in primarily three ways.

1.13 First, access to domestic surrogacy would be improved, including by removing or diminishing those elements of Australia's domestic surrogacy regimes that drive Australian intended parents to engage in overseas surrogacy. This would be done by providing increased support to intended parents and potential surrogates so that they can find and better engage with each other. Fairness would be enhanced and the number of potential surrogates would also likely be increased by reforms designed to ensure that surrogates do not suffer financial or other disadvantage. This would involve surrogates being reimbursed for all costs and losses reasonably incurred by them.

1.14 Recommended reforms to how the law deals with legal parentage would provide a more streamlined and certain approach, focused on the need to give the best interests of the child paramount consideration. Legislative safeguards, which help to ensure that surrogates engage in surrogacy with free and informed consent to avoid exploitation, would be strengthened and made effective, where currently they are largely ineffective. The recommended reforms would also establish a regime to protect the child's right to identity, where little or nothing is currently

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4 References to Australians throughout this Report include Australian citizens and permanent residents.

5 Four of eight states and territories do not have extraterritorial prohibitions: the Northern Territory, South Australia, Tasmania, and Victoria (see **Chapter 13**).

6 Email from the Department of Home Affairs (Cth) to the Australian Law Reform Commission dated 17 April 2025.

provided. Inconsistencies across state and territory regimes, that operate as barriers to accessing surrogacy, would be harmonised by being dealt with on a national or nationally-coordinated basis.

1.15 Second, the regulatory regime proposed for overseas surrogacy would apply to all Australians, not merely some. This would address a very substantial regulatory gap that currently exists across four of the eight state and territory jurisdictions.

1.16 Third, by empowering Australian intended parents through guidance and advice to engage responsibly in overseas surrogacy, and by imposing due diligence obligations on intended parents to act reasonably to avoid the potential harms of overseas surrogacy, the recommended regime would be proactive and focused on what Australia can control and enforce. The regulation of overseas surrogacy would therefore be effective in circumstances where, so far as it exists, it is currently ineffective. It would substantially avoid Australians engaging in overseas surrogacy arrangements where there is a significant risk of exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity or nationality. The proposed reforms would also help to protect Australian intended parents from exploitation.

A note on terminology — 'surrogacy that is for profit or reward'

Australian surrogacy laws create a regulatory regime that permits some surrogacy arrangements and prohibits others. This is reflected in the law's distinction between arrangements that are not for profit or reward (often labelled 'altruistic' surrogacy), and those that are for profit or reward (often labelled 'commercial' surrogacy).[7] The distinction rests on the idea that arrangements involving profit or reward are more likely to be exploitative, including that such surrogacy may exploit the surrogate and commodify the child born through surrogacy (**Chapter 2**).[8]

7 Most jurisdictions prohibit 'commercial' surrogacy arrangements: *Parentage Act 2004* (ACT) ss 40–1; *Surrogacy Act 2010* (NSW) ss 8–9; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) ss 10, 56; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40. In Victoria and Western Australia, the term 'commercial' is not used. In Victoria, legislation provides that '[a] surrogate must not receive any material benefit or advantage as a result of a surrogacy arrangement': *Assisted Reproductive Treatment Act 2008* (Vic) s 44. Western Australia's legislation uses the term 'for reward': *Surrogacy Act 2008* (WA) s 6; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 106–7 (this Act will commence in mid-2027).

8 See, eg, Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275, 288–9.

While the ALRC does not propose to change that dividing line, we have avoided describing surrogacy as 'altruistic' or 'commercial'. In our view this binary is artificial and unhelpful. It presents the categories as mutually exclusive when that does not reflect 'the reality of the practice'.[9] Research indicates, for example, that surrogates' motivations are often mixed, rather than being purely altruistic or purely commercial.[10] Regardless of how much a surrogate is paid, they may still face a risk of being exploited.

The binary also distracts from the more important task of designing measures that meet the key objectives of the legislation. Fixating on it as the main safeguard against exploitation and other forms of harm diverts focus away from other safeguards that could be more effective. As the 2023 Law Commission of England and Wales, and Scottish Law Commission Report observed, the binary does little to help us answer 'what payments the intended parents should be permitted to make to the surrogate'.[11]

Accordingly, this Report avoids the terms 'altruistic' and 'commercial' surrogacy wherever possible, and does not rely on this binary as the basis for recommendations. Instead, the ALRC uses the term 'surrogacy that is for profit or reward',[12] which better reflects the substance of and legislative intent behind the existing prohibition.

The reform context

The value and risks of surrogacy

1.17 Surrogacy enables people to form families in circumstances where they otherwise would not be able to. Submissions to this Inquiry highlighted the importance of surrogacy for people who are unable to have children without it:

> I am currently an intended surrogate for a loving, committed couple who are unable to carry a child due to serious and permanent health conditions. This couple has been foster carers, opening their home and hearts to children in need

9 Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 22 *Journal of Law and Medicine* 333, 334.

10 Olga Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21(2) *Journal of Reproductive and Infant Psychology* 145, 150–1.

11 Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 304 [12.5].

12 In the Discussion Paper, we proposed the prohibition of surrogacy for 'impermissible' profit or reward. This is because we were open to hearing the public's views on surrogates receiving permissible profit or reward, such as payments in recognition of time, effort, and inconvenience. However, we have recommended retaining the prohibition on any form of profit or reward. For this reason, we have omitted the word 'impermissible' in this Report.

> for years. They have so much love to give, and surrogacy is their only option to grow their family.[13]
>
> We are talking about people's lives and the shape of their families. This includes the ability to read your child a bedtime story, to see their first day at school, to be able to see them compete in sport, to get married and to have grandchildren. The thought of not having these experiences is gut wrenching but is a reality for people like me without the option of surrogacy. These are the stakes we are talking about.[14]
>
> I am a parent through surrogacy after a successful journey here in Australia in 2024. After finding out at the age of 16 that I was born with a condition called MRKH syndrome, I was faced with the reality that surrogacy would be my only option if I ever wanted to have my own child.[15]

1.18 Most people arrive at surrogacy as a last resort, including because pregnancy is medically or biologically impossible, or because other assisted reproductive pathways have been exhausted. Surrogacy also 'facilitates both traditional and new family forms'.[16] For intended parents, surrogacy may be the only way to realise their deeply held aspiration to have a child and experience family life as a parent: to welcome and raise a child from birth, form a life-long parent-child relationship, and share in the profound joys, responsibilities, and everyday experiences of parenthood and family life. For these reasons, it is important that the law facilitates surrogacy.

1.19 Surrogacy also carries risks of exploitation and other forms of harm for children born through surrogacy, surrogates, and intended parents.[17] These risks are particularly present overseas, in unregulated or poorly regulated environments, and those marked by significant social and economic disparity (**Chapter 13**).

1.20 Risks to the child include that they may be treated as the subject of a transaction, including in ways that may amount to the sale of the child (**Chapter 14**).[18]

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13 Name withheld, *Submission 302*.

14 Name withheld, *Submission 171*.

15 Name withheld, *Submission 59*.

16 Kirsty Horsey, 'How Can a Reformed Surrogacy Law Reflect Pragmatism and Respect Ethics?' in Andelka M Phillips, Thana C de Campos and Jonathan Herring (eds), *Philosophical Foundations of Medical Law* (Oxford University Press, 2019) 253, 254.

17 We received many submissions expressing concerns about surrogacy and the risks it could raise: see, eg, Australian Christian Lobby, *Submission 104*; M Somerville, *Submission 106*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; Coalition of Australian Feminist Organisations, *Submission 155*; Australian Feminists for Women's Rights (AF4WR), *Submission 182*; Australian Catholic Bishops Conference, *Submission 187*; GeneEthics, *Submission 338*; Women's Bioethics Alliance, *Submission 349*; The National Catholic Bioethics Center, *Submission 370*; M Quinlan, *Submission 381*; Active Watching Waiting, *Submission 390*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 396*; Anglican Church Diocese of Sydney, *Submission 398*; Mothers Adoption Loss Alliance, *Submission 407*; ARMS (Vic), *Submission 408*; Women's Forum Australia, *Submission 416*.

18 See, eg, concerns expressed in Australian Christian Lobby, *Submission 104*; Presbyterian Church of Australia, *Submission 122*; FINRRAGE (Australia), *Submission 180*; Australian Catholic Bishops Conference, *Submission 187*; FamilyVoice Australia, *Submission 232*; The National Catholic Bioethics Center, *Submission 370*; LifeSiteNews, *Submission 391*; GeneEthics, *Submission 425*.

Surrogacy arrangements may undermine the child's right to identity,[19] particularly where information about their genetic and gestational origins is not collected or accessible (**Chapter 14**). Surrogacy can also create uncertainty about legal parentage, particularly where the law does not promptly recognise the people caring for and intending to raise the child. That uncertainty can affect legal decision-making responsibility, the child's care and wellbeing, and the child's legal relationship with their family (**Chapter 10**). There may also be risks of child abandonment,[20] although it is unclear whether children born through surrogacy are more likely to be abandoned than children in other contexts, and general laws dealing with child abandonment would apply. In overseas surrogacy arrangements, the risks of harm may be heightened by the laws of the birth country and by difficulties satisfying evidentiary requirements, which can delay a child's return to Australia or, in some cases, create a risk of statelessness (**Chapter 13**).

1.21 Some submissions raised concerns that children may be harmed by separation from the person who gave birth to them.[21] Having regard to the current law, research, and submissions from people with personal experience of surrogacy received by the ALRC, we have not treated those concerns as substantiated and have therefore not given them significant weight in formulating our recommendations. Australian law already recognises and facilitates family forms in which children are raised by parents who are not genetically related to them, or in which legal parentage is not determined by who gave birth to the child, including in current surrogacy, gamete donation, and adoption laws. Longitudinal research tentatively indicates that children born through surrogacy have outcomes similar to children who are conceived without the assistance of assisted reproductive technology ('ART'),[22] and do not experience negative psychological adjustment.[23] Research also suggests that young adults born through surrogacy, particularly those who are made aware about their means

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19 See, eg, concerns expressed in Australian Catholic Bishops Conference, *Submission 187*; The National Catholic Bioethics Center, *Submission 370*; M Quinlan, *Submission 381*. See also Australian Christian Lobby, *Submission 104*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; World Youth Alliance, *Submission 411*.

20 Department of Foreign Affairs and Trade, *Submission 434*.

21 Australian Christian Lobby, *Submission 104*; Australian Catholic Bishops Conference, *Submission 187*; FamilyVoice Australia, *Submission 232*; Catholic Women's League Australia, *Submission 241*; Adoptee Rights Australia, *Submission 344*; Women's Bioethics Alliance, *Submission 349*; Active Watching Waiting, *Submission 390*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 396*; Anglican Church Diocese of Sydney, *Submission 398*; Mothers Adoption Loss Alliance, *Submission 407*; Women's Forum Australia, *Submission 416*.

22 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, 1973–4; Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1230. Cf 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.

23 Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' (n 22).

of conception early, do not experience negative feelings about their gestational origins.[24] This is consistent with what the ALRC heard from children born through surrogacy, who generally expressed positive views about their birth, existence, and family.[25] For example, children born through surrogacy stated that:

> I am a supporter of surrogacy as it was the reason I was born. My dads couldn't have become parents and created our family without it. I am very happy that I have two loving dads and that they've had the opportunity to have children through surrogacy. In general I think it's great that there's an avenue for people to have biological children even if it isn't possible for them to conceive a child themselves.[26]

> [o]ne of the good things about being born through surrogacy is that it made it possible for my family to exist. My dad really wanted to be a parent and surrogacy gave him that chance. I also think it shows that there are lots of different ways to make a family and all of them can be full of love. My twin sister and I know how much we were wanted and that makes us feel really special.[27]

1.22 The ALRC recognises that surrogacy may also give rise to risks of exploitation and other forms of harm for the surrogate, particularly where the surrogate has engaged in the arrangement without free and informed consent. A surrogate may be left financially disadvantaged by the arrangement, including by incurring expenses without adequate reimbursement or by losing income. They may also experience physical harms associated with pregnancy and childbirth, including pain, suffering, and life-threatening health complications (**Chapter 8**). Psychological harms may arise, including depression or from concerns associated with relinquishing the child.[28] Harm may also occur where the surrogate does not retain control over decisions affecting their body, healthcare, pregnancy, or birth. More serious harms include slavery and human trafficking (**Chapter 13**). In some circumstances, these harms can be characterised as discrimination, including where exploitation reinforces stereotypes about women's role as child-bearers. However, as discussed in **Chapter 14**, this concern is confined to surrogacy that is exploitative.

1.23 Intended parents may also be harmed by surrogacy arrangements, particularly where they enter arrangements based on information, assurances, or expectations that cannot be fulfilled. These risks appear most acute in overseas surrogacy arrangements. Intended parents may suffer financial loss where they make substantial payments to fraudulent agencies or intermediaries who seek to profit from their predicament, or through the provision of misleading information about the arrangement

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24 Vasanti Jadva et al, 'I Know It's Not Normal but It's Normal to Me, and That's All That Matters': Experiences of Young Adults Conceived through Egg Donation, Sperm Donation, and Surrogacy' (2023) 38(5) *Human Reproduction* 908, 909.

25 Name withheld (minor), *Submission 26*; Not published (minor), *Submission 27*; Name withheld (minor), *Submission 32*; Name withheld (minor), *Submission 33*; Name withheld (minor), *Submission 36*; Name withheld (minor), *Submission 42*.

26 Name withheld, *Submission 234*.

27 Name withheld (minor), *Submission 42*.

28 Ezra Kneebone, Kiri Beilby and Karin Hammarberg, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: A Systematic Review' (2022) 45(4) *RBMO* 815, 825.

(**Chapter 13**). They may also face unexpected delays in bringing the child to Australia where difficulties arise in relation to birth documentation, or if changes in the law in the birth country affect the legality of the arrangement (**Chapter 13**).

1.24 These risks do not diminish the value of surrogacy as a form of family formation. They do, however, underscore the need for a regulatory framework that facilitates surrogacy to occur in a rights-respecting and responsible way.

Surrogacy in Australia

1.25 More Australians are using surrogacy to grow their families, through both domestic and overseas surrogacy arrangements. Exact numbers are difficult to determine. However, available estimates suggest that domestic gestational surrogacy births more than tripled over the recent decade, from 27 births in 2014 to 84 births in 2023.[29] Overseas surrogacy also increased substantially over a similar period, from 246 in 2015 to 375 births in 2024, an increase of more than 40%.[30] This growth is notable because it has occurred while Australia's overall birth rate has fallen, and the fertility rate has continued to decline.[31] It suggests that surrogacy is becoming a more significant pathway to family formation, rather than merely reflecting broader growth in the number of children being born.

1.26 The increasing trend in Australians engaging in surrogacy appears to reflect a combination of social and technological factors that have made surrogacy more accepted, needed, and practically available. Surrogacy is now more recognised as a legitimate method of family formation.[32] Although comprehensive and reliable data on the attitudes of Australians to surrogacy is limited, available research suggests that most Australians aged 18–49 support access to surrogacy for heterosexual and same-sex couples,[33] and only a minority believe that surrogacy cannot be justified in any situation.[34] This suggests that the growth in surrogacy is occurring in a broader social context in which surrogacy is becoming more understood as a legitimate way for people to form families.

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29 See footnote 1, which explains how this estimate was arrived at.

30 Email from the Department of Home Affairs (Cth) to the Australian Law Reform Commission dated 17 April 2025.

31 The total fertility rate is the average number of registered births per woman aged 15 to 49 years. The Australian Bureau of Statistics notes that 'Australia's total fertility rate was 1.481 babies per woman in 2024, lower than 2023 (1.499) and the rate 10 years ago (1.795 in 2014)': Australian Bureau of Statistics, 'Births, Australia: Statistics about Births and Fertility Rates for Australia, States and Territories, and Sub-State Regions (15 October 2025)' <www.abs.gov.au/statistics/people/population/births-australia/latest-release>.

32 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 10. See also 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.

33 Tremellen and Everingham (n 32) 559–60. Note the majority of respondents were aged in their 30s and 40s.

34 Of the respondents surveyed, 9% believed that surrogacy could not be justified in any situation: ibid 558.

1.27 This broader acceptance has occurred alongside changes in how families are formed in Australia. Same-sex relationships have gained greater legal and social recognition, including through the legalisation of same-sex marriage in 2017. Between 2016 and 2021, the number of male same-sex couples with children increased by 161%, compared with a 7.9% increase in couples with children overall.[35] While census data does not reveal how those children were conceived or born, surrogacy is the only pathway through which single men or male same-sex couples can have biological children. This suggests that changing patterns of family formation are likely to be contributing to an increased need for surrogacy.

1.28 The increasing age at which people are having children may also be contributing to the need for assisted reproductive pathways, including surrogacy. The average age of mothers has risen over time, with a growing proportion of women giving birth aged 35 and over.[36] Another relevant factor is that domestic and intercountry adoption rates have fallen considerably over time.[37] While adoption and surrogacy are distinct pathways to family formation, declining adoption rates form part of the broader context in which surrogacy may be becoming more needed for people who are unable to have children without assistance.

1.29 At the same time, ART has become more mainstream,[38] with around 6% of Australian children now born through ART and use of ART expected to continue to grow.[39] Because gestational surrogacy requires ART, these developments have made surrogacy a more feasible pathway for people who cannot otherwise have children. Technological advances in ART may also improve the prospects of creating embryos for use in surrogacy.[40] These factors suggest surrogacy is becoming more practically available as a pathway to family formation.

1.30 These broader trends are accompanied by factors that push intended parents towards overseas surrogacy in particular. Research suggests that Australian intended parents pursue overseas surrogacy for a range of reasons, including a shortage of people willing to be surrogates in Australia, the perceived length and complexity of the domestic process, uncertainty associated with Australian law

35 Australian Bureau of Statistics, 'Same-Sex Couples Living Together in Australia: Examining Characteristics of Same-Sex Couples from the 2021 Census Data (2 December 2022)' <www.abs.gov.au/articles/same-sex-couples-living-together-australia>.

36 Australian Government, Australian Institute of Health and Welfare, 'More Expectant Mothers Accessing Antenatal Care' <www.aihw.gov.au/news-media/media-releases/2025/2025-july/more-expectant-mothers-accessing-antenatal-care>.

37 Australian Government, Australian Institute of Health and Welfare, 'Adoptions Australia' <www.aihw.gov.au/reports/adoptions/adoptions-australia/contents/adoptions>.

38 Allan (n 32) 10.

39 Greg Hunt and Rachel Swift, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Fertility Society of Australia and New Zealand and Reproductive Technology Accreditation Council, 2024) 6.

40 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 45 [2.22].

recognising legal parentage, greater access to donated gametes, and the broader options available overseas.[41]

1.31 The factors highlighted above will likely contribute to continued growth in surrogacy. As surrogacy becomes more accepted, more necessary to contemporary family formation, and more practically available through ART, more Australians may seek to use it to form families. If domestic surrogacy remains difficult to access, complex to navigate, or legally uncertain, intended parents are likely to continue pursuing surrogacy overseas. The increasing overseas dimension of surrogacy therefore transforms what might once have been viewed as a matter for state and territory regulation into an issue requiring a national response.

The current state of the law

1.32 The shift in how Australian society approaches family formation (discussed above) is partially reflected in the history of Australian surrogacy laws. Early responses in the late 1980s and early 1990s were cautious, ranging from measures to completely criminalise surrogacy to failing to regulate it at all.[42] However, over time, Australian jurisdictions moved towards recognising surrogacy that is not for profit or reward as a legitimate form of family formation, and establishing legal pathways to transfer legal parentage from surrogates to intended parents.[43] Recent reforms and reviews in Australian and comparable jurisdictions continue this trend towards a more open, enabling, and rights-based approach to surrogacy,[44] including by broadening access to surrogacy.[45]

1.33 All states and territories have legislation in place to regulate domestic surrogacy. State and territory legislation generally establish an enabling framework for surrogacy, by providing for a pathway from the point of entering the arrangement through to recognising the legal parentage of the child born through surrogacy

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41 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, 1452.

42 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 6–7; Ronli Sifris, 'Surrogacy' in Ben White et al (eds), *Health Law in Australia* (Thomson Reuters, 4th ed, 2023) 533, 536–7. For example, Queensland initially criminalised all forms of surrogacy, paid and unpaid: *Surrogacy Parenthood Act 1988* (Qld) s 3. New South Wales did not introduce legislation on surrogacy until 2007.

43 Millbank (n 42) 11–14.

44 See, eg, Department of Health (WA), *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Final Report, 2023); Law Commission of England and Wales and Scottish Law Commission (n 11); Te Aka Matua o te Ture | Law Commission (NZ) (n 40); Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 1, 2019).

45 Currently, same-sex couples and single men are precluded from accessing surrogacy in Western Australia: *Surrogacy Act 2008* (WA) s 19(2). However, this restriction will be removed by the new *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence mid-2027: Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 August 2025, 2235 (Meredith Hammat).

(**Chapter 10**), while defining the parameters between surrogacy that is lawful and unlawful (**Chapter 2**).

1.34 Legislation generally includes eligibility and process requirements, which we collectively refer to as 'legislative safeguards' (**Chapters 5** and **6**). For example, intended parents must have a medical or social need to enter a surrogacy arrangement in some jurisdictions in Australia (**Chapter 5**), and each party is required to obtain legal advice and counselling (**Chapter 6**). Further, each jurisdiction allows for the surrogate to be reimbursed for reasonable economic costs and loss of earnings associated with the surrogacy arrangement (**Chapter 8**), and has provided that surrogacy agreements are unenforceable, aside from provisions relating to such reimbursement (**Chapter 7**). Each state and territory has a scheme that enables the transfer of legal parentage from the surrogate to intended parents through a parentage order by a court (**Chapter 10**). Legislation specifies that in parentage decisions the child's best interests are the paramount consideration (**Chapter 10**).

1.35 All states and territories only permit 'altruistic' surrogacy, which limits payment to surrogates to reimbursement of reasonable expenses and loss of earnings. There is a consistent policy of criminalising domestic surrogacy that is for profit or reward, frequently called 'commercial' surrogacy (**Chapter 2**). Some jurisdictions extend this prohibition to overseas arrangements (**Chapter 13**).

1.36 It is mainly Commonwealth government entities responsible for the management of overseas surrogacy when children born through surrogacy seek to return to Australia, through the processing of applications for Australian citizenship, visas, and passports (**Chapter 13**). The Federal Circuit and Family Court of Australia also has a role to play in determining matters relating to legal parentage or parental responsibility in the context of both domestic and overseas surrogacy arrangements (**Chapter 10**).

1.37 The legislative framework that exists for domestic surrogacy has no equivalent for overseas surrogacy. As discussed above, approximately 80% of surrogacy arrangements undertaken by Australian intended parents therefore fall outside any dedicated Australian regulatory framework. Meanwhile, the arrangements that remain within domestic surrogacy legislation are also subject to limited proactive oversight. Legislative safeguards are generally not assessed until after a child has been born, with only one jurisdiction requiring approval before a pregnancy is attempted.[46] The practical effect is that, despite the extensive body of legislation governing surrogacy in Australia, a large proportion of arrangements involving Australian intended parents proceed without meaningful oversight, leaving both overseas surrogacy and significant parts of domestic surrogacy in a regulatory vacuum.

46 Only Victoria and Western Australia currently require approval of surrogacy arrangements before parties attempt to achieve a pregnancy. After the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) commences in mid-2027 and this requirement is abolished in Western Australia, approval will only be required in Victoria (**Chapter 4**).

Key objectives of Australian surrogacy laws

1.38 Importantly for this Inquiry, the key objectives that can be identified from the purposes, objects, and guiding principles, and provisions of Australian surrogacy legislation are:

- to protect rights, including by preventing harm and exploitation to children born through surrogacy and surrogates;[47] and
- to uphold the best interests of the child.[48]

1.39 States and territories seek to achieve these objectives in a number of ways, including by prohibiting surrogacy that is for profit or reward (**Chapter 2**), ensuring the parties' free and informed consent,[49] and providing that the paramount consideration in administering the legislation is the best interests of children born through surrogacy.[50]

1.40 The key objectives underpinning surrogacy regulation in Australia — protecting rights, with a focus on preventing harm and exploitation, and upholding the best interests of the child — are objectives the ALRC agrees with and does not seek to change. As discussed below, the recommendations in this Report aim to better realise these objectives in practice.

Overview of problems and solutions

1.41 While these key objectives are fundamental to the system for regulating surrogacy, the current legal framework often falls short of achieving them. This section provides an overview of the key problems identified in the current framework and the reforms recommended to address them. If implemented, the reforms recommended in this Report would improve access to well-regulated domestic surrogacy, and be more effective at preventing exploitation and other forms of harm, including by better avoiding the substantial risks associated with overseas surrogacy.

Domestic surrogacy accessibility: problems and solutions

1.42 A clear theme to emerge from this Inquiry is that domestic surrogacy is difficult to access. This is due to four barriers to access: a shortage of available surrogates,

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47 See, eg, *Surrogacy Act 2022* (NT) s 6(b); *Surrogacy Act 2019* (SA) s 7(1)(a); *Assisted Reproductive Treatment Act 2008* (Vic) s 5(b)(i).

48 Most jurisdictions emphasise the best interests of children in the purposes and objects of their respective surrogacy legislation: see *Surrogacy Act 2010* (NSW) s 3; *Surrogacy Act 2022* (NT) s 5; *Surrogacy Act 2010* (Qld) s 6(1); *Surrogacy Act 2019* (SA) ss 6, 7(3); *Surrogacy Act 2012* (Tas) s 3(1); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 5(2)(a) (which will commence in mid-2027). See also *Assisted Reproductive Treatment Act 2008* (Vic) s 5(2)(a).

49 *Surrogacy Act 2022* (NT) s 6(a). See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 4(b)(ii).

50 *Surrogacy Act 2010* (NSW) s 3; *Surrogacy Act 2022* (NT) s 5; *Surrogacy Act 2010* (Qld) s 6(1); *Surrogacy Act 2019* (SA) ss 6, 7(3); *Surrogacy Act 2012* (Tas) s 3(1); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 5(2)(a), 120 (which will commence in mid-2027). See also *Assisted Reproductive Treatment Act 2008* (Vic) s 5(2)(a).

a lengthy and difficult process, laws that can operate in an overly restrictive and fragmented way, and financial barriers. These barriers, and the reforms recommended to address them, are discussed below.

1.43 One of the most significant barriers to accessing domestic surrogacy is the shortage of people willing to be surrogates in Australia.[51] Most intended parents and surrogates who engage in domestic surrogacy are known to each other (**Chapter 2**). As a result, intended parents who do not have someone within their existing family or social network who is willing to act as a surrogate have limited avenues for finding a surrogate domestically. This shortage is reflected in data from a 2021 survey, in which 'I could not find a surrogate in Australia' was the second-most frequently reported reason from intended parents for choosing overseas surrogacy.[52]

1.44 This difficulty is also recognised by professionals working in surrogacy and ART who agree that finding a surrogate in Australia is a 'time-consuming and potentially fruitless process' (**Chapter 4**). This view was echoed in submissions received in this Inquiry:

> [w]e decided not to do it locally even though it is cheaper as we did not have any family or friends who would be willing to be a surrogate for us, which is how most people in Australia match with their surrogate. The rest have to try and find someone elsewhere, such as on Facebook groups. It wasn't natural for us trying to put ourselves out there to get noticed, and there are far too many [intended parents] compared to surrogates. We did not want to wait years to try and match as we didn't want to be too old before becoming parents.[53]

1.45 Overly restrictive laws in relation to reimbursement likely contribute to the shortage of surrogates in Australia. Current laws can fail to cover the full range of economic costs surrogates incur, leaving surrogates out of pocket because of the arrangement. Legislative categories of reimbursable economic costs can be too narrow or incomplete, and in practice the listed examples may be incorrectly treated as an exhaustive list. They also do not provide for reimbursement for non-economic losses associated with pregnancy and childbirth, such as physical and psychological impacts, and a loss of amenity (**Chapter 8**). As a result, surrogates may be financially disadvantaged, or required to absorb significant personal costs and experience significant loss. This unfairness makes being a surrogate potentially unattractive and not feasible for many people and may discourage potential surrogates from taking on the role (**Chapter 8**).

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51 See, eg, Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) xxx. See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 33.

52 Reported by 56% of those who were completing, planning to complete, or had completed overseas surrogacy: Kneebone et al (n 41) 1452 table 2.

53 Rainbow Families, *Submission 260*. This was a view shared with Rainbow Families as part of their own community consultations. See also Not published, *Submission 206*; Name withheld, *Submission 340*; Not published, *Submission 341*.

1.46 A related barrier is the length and difficulty of the domestic surrogacy process. In this Inquiry, people with personal experience of surrogacy described the process from initial steps through to securing legal parentage as 'impossible',[54] 'complicated',[55] and bureaucratic.[56] While domestic surrogacy would have been the preferred option for most intended parents in Australia, it is often perceived as too hard to pursue. In the 2021 survey discussed above, 92% of intended parents who were planning to engage in, or were engaging in overseas surrogacy, said they would have preferred to pursue domestic surrogacy,[57] but 69% identified the length and complexity of the domestic process as a barrier.[58] A 2013 survey reported a similar result, with the belief that domestic surrogacy was too long and complicated among the most frequently reported reasons for not considering it.[59]

1.47 The problems with the length and difficulty of the process are related to laws that overly restrict how intended parents and surrogates find each other, and how they are then supported through a surrogacy arrangement. Legislative limits stifle the development of services that would help parties navigate the process (**Chapter 4**), including by prohibiting introductions between intended parents and surrogates, and restricting advertising in relation to surrogacy (**Chapters 2** and **4**). These prohibitions leave parties with limited, often informal pathways to connect and be supported. More broadly, information about surrogacy is limited, fragmented, and inconsistent, making it hard for people to understand and access the domestic process (**Chapter 3**).

1.48 These problems are compounded by the fact that surrogacy is mainly regulated through inconsistent state or territory laws. The result is a fragmented 'patchwork' of legislative safeguards, prohibitions, pathways to legal parentage, and systems for children born through surrogacy to access information about their origins (**Chapters 3** and **11**). This makes the law confusing and difficult to navigate.[60] It also increases the complexity and cost of coordinating the services required to support arrangements, especially given surrogacy arrangements in Australia often cross state and territory borders (**Chapter 3**).[61] In those cases, parties may be exposed to inconsistent rules and friction at different stages of the same arrangement.

1.49 Financial barriers can also prevent people from pursuing domestic surrogacy. In some cases, intended parents and surrogates may have difficulty accessing

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54 Rainbow Families, *Submission 260*. This was a view shared with Rainbow Families as part of their own community consultations.
55 Name withheld, *Submission 343*.
56 Rainbow Families, *Submission 260*.
57 Kneebone et al (n 41) 1451. This study involved 320 participants.
58 Ibid 1452 table 2.
59 Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 1, 2. This study involved 259 participants.
60 For example, Dr Oxlad described the current system as 'an absolute nightmare': South Australian Law Reform Institute (n 51) 128 [13.1.1].
61 Hunt and Swift (n 39) 7.

financial entitlements that are readily available to people involved in other forms of family formation (**Chapter 9**).

1.50 An important way the recommendations in this Report aim to make domestic surrogacy easier to access is by reducing the disincentives to becoming a surrogate. **Recommendations 23** and **24** would ensure surrogates are reimbursed for all costs and losses reasonably incurred because of the arrangement, so they do not suffer financial and other disadvantage. **Recommendation 23** provides for a clearer and more consistent requirement for intended parents to reimburse surrogates for all reasonably incurred economic costs, as well as the loss of earnings, and expands the illustrative categories of reasonable costs that must be reimbursed. **Recommendation 24** would allow surrogates to elect to be reimbursed for the commonly experienced non-economic losses, such as the physical and psychological impact and loss of amenity resulting from pregnancy and childbirth, as well as any extraordinary losses arising from serious medical complications. These recommendations would make becoming a surrogate fairer and more feasible, and may increase willingness to take on the role. Reimbursement would also be made clearer and more secure by requiring intended parents to deposit, or secure a guarantee for, the full estimated economic costs of the arrangement (**Recommendation 25**).

1.51 The recommendations in this Report also aim to make domestic surrogacy easier to access by improving how intended parents and surrogates find each other and are supported through an arrangement. Private, licensed Surrogacy Support Organisations ('SSOs') operating under a capped fee model would play a central role in that pathway by facilitating introductions, coordinating the services needed to meet eligibility and process requirements, and providing information, case management, and support throughout the arrangement (**Recommendation 8**). These measures would be complemented by fewer restrictions on advertising (**Chapter 2**) and better access to information about surrogacy, including for professionals involved in surrogacy arrangements (**Recommendation 7**). These reforms would also help address the shortage of surrogates by making it easier for intended parents and potential surrogates to connect.

1.52 These reforms depend on an institutional architecture that would support an accessible domestic surrogacy system. A nationally consistent legislative framework would reduce complexity and administrative burden by making legislative safeguards, prohibitions, pathways to legal parentage, and systems for access to gestational information consistent across jurisdictions.[62] This could be achieved through enacting one Commonwealth law or uniform or substantially consistent state and territory legislation (**Recommendation 3**). Where judicial involvement is necessary, centralising the legal parentage process in the Federal Circuit and Family Court of Australia would further support consistency (**Recommendations 28** and **29**). A national regulator for surrogacy, or an existing national regulator acting in that

62 It would also result in a more consistent approach (**Chapter 3**) to overseas surrogacy, which engages issues of national responsibility and concern.

role (collectively 'the National Regulator') would (in addition to its role in relation to overseas surrogacy) give practical effect to the domestic framework by regulating SSOs and acting as a central source of reliable information. If establishing a National Regulator is not viable, consideration should be given to whether the functions recommended for the National Regulator could be allocated to a mix of existing agencies or government departments at the Commonwealth, state, and territory level (**Chapter 3**). These measures would together create the institutional architecture needed to make domestic surrogacy a more accessible pathway to family formation.

1.53 Access to Medicare-subsidised fertility treatment carried out for the purpose of surrogacy (**Recommendation 26**) would help address some of the financial barriers to accessing domestic surrogacy.

Domestic surrogacy legal certainty: problems and solutions

1.54 Another issue that makes domestic surrogacy difficult is the uncertainty, stress, and difficulty associated with recognising legal parentage in Australia. Of those who responded to the 2021 survey discussed above, 43% selected 'in Australia, the surrogate has the right to keep the child if she changes her mind' as a reason for choosing overseas surrogacy.[63] Similarly, 'concern that the surrogate might decide to keep the child' was the most frequently reported reason that respondents to the 2013 survey discussed above chose overseas surrogacy.[64] The uncertainty is compounded by the difficulty of the legal parentage process itself, which intended parents and parents through surrogacy have described as unnecessary, expensive, and bureaucratic.[65] In this Inquiry, we heard that the current process to transfer legal parentage is a major source of stress and anxiety for all parties (**Chapter 10**).

1.55 This issue stems from the current law which, as a starting point, recognises the surrogate and their partner (if any) as the legal parents of the child upon birth. That position is inconsistent with the parties' intentions under the surrogacy arrangement. Even where those intentions are clear and aligned, and statutory safeguards have been met, the parties must still go to court to reverse the legal position (**Chapter 10**). This makes recognition of legal parentage less certain and more difficult than it needs to be.

1.56 Concerns about the uncertainty and difficulty of recognising legal parentage would be largely addressed through a more certain and streamlined approval process for surrogacy arrangements, facilitated by SSOs (**Recommendation 9**). Approved arrangements (**Recommendation 10**), having met legislative safeguards (see below), would be able to proceed with greater certainty through an administrative pathway to legal parentage, under which intended parents are recognised as the child's legal parents from birth (**Recommendation 28**). This would shift the starting

63 Kneebone et al (n 41) 1452 table 2.
64 Everingham, Stafford-Bell and Hammarberg (n 59) 2.
65 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, 12.

position of the law, by aligning legal parentage with parties' intentions when entering the arrangement. It would replace a process that currently operates after the fact through the courts, with one that operates in advance and administratively, making recognition of legal parentage more certain and less difficult. The change in approach would help remove a potential barrier for people who may consider becoming surrogates but are concerned they could be left legally responsible for the child, and create a strong incentive for intended parents to pursue surrogacy domestically rather than overseas (**Chapter 10**). Importantly, it would ensure that children born through surrogacy have their functional and social family legally recognised from birth, consistent with the best interests of the child (**Chapter 10**).

1.57 However, no regulatory framework can provide complete certainty, given the rights of everyone involved. The recommendations in this Report therefore preserve an important safeguard for the surrogate. They allow the surrogate to apply for a parentage order recognising them (and their partner, if any) as the child's legal parent or parents within three months of the child's birth, extendable to six months in exceptional circumstances (**Recommendation 28**). Where there is no approved arrangement, the judicial pathway would remain available so that legal parentage can still be determined in accordance with the child's best interests, rather than being unavailable due to non-compliance alone (**Recommendation 29**).

Domestic surrogacy harm prevention: problems and solutions

1.58 Domestic surrogacy can create risks of harm for children, surrogates, and intended parents if the regulatory framework does not provide sufficiently comprehensive, consistent, or effective safeguards. For children, these risks include uncertainty about legal parentage, which can create gaps in decision-making authority in matters affecting their care and wellbeing, and fail to reflect their family relationships (**Chapter 10**). There is also limited protection of identity rights, with most jurisdictions providing only limited access to information for people born through surrogacy about their gestational origins (**Chapter 11**). Further, inadequate mechanisms exist to identify any risks to child safety before conception (**Chapter 5**). For surrogates, current laws can result in financial and other disadvantage (**Chapter 8**), and do not consistently protect their autonomy or uphold free and informed consent (**Chapters 5**, **6**, and **7**). More broadly, the law does not consistently ensure that foreseeable challenges are identified and addressed before an arrangement proceeds, which can have serious consequences for the parties, including relationship breakdowns (**Chapter 6**). Intended parents may also be exposed to harm where reimbursement obligations are unclear or inadequately supervised, creating a risk that one party to an arrangement may financially exploit another (**Chapter 8**).

1.59 These risks arise in part because legislative safeguards are not as comprehensive or extensive as they should be. They are inconsistent across jurisdictions, with some jurisdictions imposing stronger legislative safeguards while others adopt weaker requirements or no equivalent requirement (**Chapters 5** and **6**). As a result, the level of protection afforded to children born through surrogacy,

surrogates, and intended parents, depends on where the arrangement occurs. These requirements therefore do not reliably protect rights or prevent exploitation and other forms of harm in the way they are designed to do.

1.60 These problems are compounded by the absence of effective oversight. Compliance with legislative safeguards is generally not assessed until an application for legal parentage is made, after the child has already been born (**Chapters 4** and **10**). There is therefore no earlier opportunity to ensure, for example, that the surrogate gave free and informed consent, reimbursement arrangements were fair, or issues relevant to the child's best interests were identified before conception. By that stage, it is usually too late to remedy any non-compliance, or for requirements to have any operation or useful effect (**Chapters 4** and **10**).

1.61 Enforcement is a further weakness in the current framework. Surrogacy prohibitions rely on criminal sanctions which, in this context, are an inadequate tool for preventing exploitation and other forms of harm. They are not used (**Chapters 2** and **12**), and can discourage people from seeking support or information for fear of criminal liability.[66] This makes arrangements less visible,[67] increasing rather than reducing the risk of harm.[68]

1.62 However, harmful outcomes are not inherent to surrogacy. A well-regulated system can reduce these risks, through clear safeguards and protections for those involved, as well as effective oversight.[69]

1.63 For children, the ALRC's recommendations aim to protect their rights and interests by ensuring that legal parentage reflects, as early as possible, the family in which it is in their best interests to be raised. As discussed above, where there is an approved surrogacy arrangement, unless a court determines otherwise by reference to the best interests of the child, intended parents would be recognised as the child's legal parents from birth, consistently with the free and informed intentions of all the parties to the surrogacy arrangement (**Recommendations 10** and **28**). This would reduce legal uncertainty and support timely decision making about the child's care and wellbeing.

1.64 The recommendations also establish, for the first time, a nationally consistent system for recording and accessing information about a child's gestational origins (**Recommendations 30**–**32**). They move beyond ad hoc and incomplete

66 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* (Routledge, 2015) 65, 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; Name withheld, *Submission 44*; K Cox, *Submission 105*; S Jefford, *Submission 128*; K Horsey, *Submission 418*.

67 See, eg, Not published, *Submission 123*; Name withheld, *Submission 177*.

68 Human Rights Watch (n 66).

69 See, eg, A Whittaker, C Volks, A Molas (et al), *Submission 201*.

state-based arrangements by requiring relevant information to be collected at birth, flagged through a birth certificate addendum, and stored on a National Surrogacy Register. In practical terms, this creates a new framework to help children born through surrogacy understand their origins and better realise their right to identity (**Chapters 11** and **14**).

1.65 To help protect the best interests of any children born through surrogacy, intended parents would be required to undergo a Nationally Coordinated Criminal History Check. For the surrogacy arrangement to be approved (**Recommendation 9**), the report must indicate that no offences have been committed by the intended parent(s) against a child (**Recommendation 16**). This would enable any foreseeable and serious risks of harm to be identified and mitigated before the child is conceived.

1.66 In relation to surrogates, financial reimbursement is critical to ensuring they are treated fairly. A surrogate should not be left financially or otherwise disadvantaged because of the arrangement. At the same time, payments should not become an inducement to act as a surrogate, particularly where that may undermine free and informed consent. The ALRC's recommendations maintain this balance by allowing reimbursement for costs and losses connected with the arrangement (**Recommendations 23** and **24**), while continuing to prohibit domestic surrogacy that is for profit or reward (**Recommendation 1**). Payments are therefore permitted to avoid unfairness to the surrogate, but not to create a financial incentive to enter the arrangement, or to reward gestational services. This maintains the current distinction between reimbursement for costs and losses and surrogacy that is for profit or reward, and is directed at addressing existing legislative objectives (**Chapter 2**). As discussed below, however, that distinction may warrant reconsideration in the future.

1.67 The ALRC's recommendations also include additional measures to preserve these safeguards for surrogates in practice. In particular, the National Regulator (**Recommendation 6**) would set a maximum cap for payments for non-economic loss and extraordinary loss (**Recommendation 24**). This would better ensure that those payments are used for the purpose of reimbursing actual non-economic and extraordinary losses, rather than becoming a disguised form of profit or reward. Other prohibitions are intended to close off pathways to surrogacy for inappropriate financial inducement or profit or reward. This includes a prohibition on the facilitation or advertising of domestic surrogacy that is for profit or reward (**Recommendation 2**).

1.68 In designing a well-regulated surrogacy system, the ALRC has placed particular emphasis on protecting surrogates' autonomy through 'free and informed consent'. This is a central safeguard against exploitation and other forms of harm, including protecting the best interests of the child.

'Free and informed consent' — the cornerstone of protecting against exploitation and other forms of harm

A surrogacy arrangement based on the surrogate's free and informed consent ensures genuinely voluntary participation and reflects the 'existence of the conditions in which true, meaningful choice is able to be exercised'.[70] In practice, that means ensuring a surrogate understands the nature of surrogacy[71] and the medical, legal, and practical risks it may involve, and is able to decide whether to proceed without undue pressure,[72] coercion, or financial inducement. Where these conditions are present, the surrogate's autonomy and rights are respected and the central concern about exploitation and other forms of harm is substantially addressed.

The recommendations in this Report are intended to help secure those conditions through legislative safeguards, and by prohibiting coercion and domestic surrogacy that is for profit or reward.

This emphasis on free and informed consent also informs the Report's 'least restrictive' approach to regulation (see below). Where a surrogate and intended parents have made a free and informed decision to enter a surrogacy arrangement, the law should generally respect that decision and limit its intervention. Interference with the arrangement should be confined to circumstances where it is necessary to protect the rights and interests of others; for example, where there is a risk of the sale of a child or other harm.

We recognise that the terms 'consent' and 'informed consent' ordinarily imply that consent is given freely and voluntarily. However, this Report uses the phrase 'free and informed consent' to underscore the particular importance of consent in the context of surrogacy being both informed and free from undue pressure, coercion, or financial inducement.

1.69 The recommendations aim to reduce the risks of exploitation and other forms of harm, including by ensuring free and informed consent and protecting the best interests of children born through surrogacy. These objectives are pursued through a series of requirements that must be met before a surrogacy arrangement could be approved (**Recommendation 9**), following which parties would be able to attempt to achieve a pregnancy and proceed on the administrative pathway to legal parentage (**Recommendation 10**). These legislative safeguards draw together existing protections across Australian jurisdictions and build on them. The result would be a

70 Horsey (n 16) 257.

71 Neil C Manson, 'Informed Consent' in Hugh LaFollette (ed) *The International Encyclopedia of Ethics* (Blackwell Publishing Ltd, 2013) 2616, 2626.

72 See National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) 27; Francoise Shenfield et al, 'Ethical Considerations on Surrogacy' (2025) 40(3) *Human Reproduction* 420, 421.

higher and more consistent standard of protection than currently exists in any single jurisdiction. They include the following:

- Intended parents must be unlikely to be able to conceive, gestate, or give birth to a child, for a medical, biological, or psychological reason (**Recommendation 11**). This would help ensure that surrogacy is used where there is a genuine basis for it and that the risks that surrogacy may involve are not imposed without sufficient justification.
- To support free and informed consent and reduce the risk of coercion or exploitation, a surrogate must be at least 25 years old and intended parents must be at least 18 years old before an arrangement can be approved (**Recommendation 12**). These age requirements would help ensure that parties are sufficiently mature to understand and navigate the complexities and challenges of surrogacy.
- To support free and informed consent and reduce the risk of harm, the surrogate must have previously carried a pregnancy and given birth to a live child (**Recommendation 14**), and an obstetrician must certify that the arrangement can proceed without undue risk to the surrogate's health (**Recommendation 15**). These requirements would help ensure that the risks of surrogacy are understood and appropriately managed before an arrangement proceeds.
- To support free and informed consent, all parties must receive independent legal advice and counselling about significant issues raised by the arrangement (**Recommendations 17** and **18**). This would help ensure that each party understands the nature and implications of the arrangement. It also would help ensure that foreseeable challenges are identified and addressed before an arrangement proceeds.
- To support free and informed consent, the parties must enter into a signed, compliant surrogacy agreement (**Recommendation 20**). The agreement must address significant matters, including cost and loss recovery, the surrogate's bodily integrity and autonomy, and the parties' expectations about their relationship following the birth of the child. This would reduce the scope for misunderstanding or disputes, and help ensure the arrangement proceeds on a shared understanding of each party's rights and obligations.

1.70 The legislative safeguards also include citizenship or residency requirements (**Recommendation 13**). In some circumstances, the parties may also be required to undergo psychological assessment (**Recommendation 19**). These requirements are not intended to operate inflexibly. In certain circumstances, they may be dispensed with as part of the approval process (**Recommendation 9**). This feature would allow for flexibility or additional scrutiny where the circumstances require it.

1.71 To protect intended parents, **Recommendation 23** restricts claims for reimbursement where costs are incurred beyond the three-month period following the birth of a child, miscarriage, stillbirth, or termination of a pregnancy. Claims made after that period are only payable if they were incurred in connection with a serious

medical complication experienced during pregnancy or childbirth, or were incurred with prior approval from the nominated SSO (**Recommendation 24**), unless a court orders otherwise.

1.72 Nationally consistent legislation, supported by a National Regulator (**Recommendation 3**), would help ensure the recommended safeguards operate consistently. It would mean that intended parents, surrogates, and children are subject to the same requirements and protected by the same safeguards, rather than being treated differently because of inconsistent state and territory laws. A National Regulator (**Recommendation 6**) would support this consistency by overseeing SSOs (**Recommendation 8**), supporting proper decision making about approval of surrogacy arrangements (**Recommendation 9**), and helping parties understand their rights and responsibilities (**Recommendation 7**). In this way, the recommendations would replace an uneven system of safeguards with a system in which safeguards operate more consistently and comprehensively.

1.73 To strengthen and make safeguards more effective, the recommendations would move oversight to the start of the domestic surrogacy process, and create strong incentives and high levels of compliance with safeguards before the arrangement begins. First, parties would need approval to proceed with the arrangement before attempting to achieve a pregnancy (**Recommendation 9**). Because ART is essential for gestational surrogacy, which is the most common form of surrogacy,[73] this is expected to produce high levels of compliance with legislative requirements. This structure would be reinforced by prohibiting approval of arrangements that do not comply with legislative requirements (**Recommendation 33**), and by prohibiting ART service providers from facilitating a pregnancy unless satisfied that an approved surrogacy arrangement is in place (**Recommendation 34**).

1.74 Second, approval would also be the gateway to the administrative pathway to legal parentage. Parties who have not received approval would need to seek a transfer of legal parentage through the judicial pathway (**Recommendations 10** and **29**). This would give parties a further incentive to comply with the safeguards before conception, making them more effective. Further, because approval would be required before parties can proceed with an embryo transfer or otherwise attempt to achieve a pregnancy, and most surrogacy arrangements rely on ART, the ALRC expects high levels of engagement with the administrative pathway. This is significant because that pathway gives effect to the child's best interests.

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73 See, eg, Sarah Jefford, *More Than Just a Baby: A Guide to Surrogacy for Intended Parents and Surrogates* (2020) 6–7. Gestational surrogacy uses an egg other than the surrogate's own, while traditional surrogacy uses the surrogate's own egg. Practitioner data provided to the ALRC suggests that traditional surrogacy is a minority of domestic arrangements: Sarah Jefford, a surrogacy lawyer, reported that 13% of approximately 600 domestic surrogacy matters in which she had acted over the previous four years involved traditional surrogacy; Narelle Dickinson, a psychologist and reproductive counsellor, reported that approximately 10% of around 280 matters in which she had been involved were traditional surrogacy arrangements. While not comprehensive national data, these figures suggest that gestational surrogacy is the predominant form of surrogacy used, possibly accounting for upwards of 85% of arrangements.

1.75 These features would result in earlier and more effective oversight. By requiring approval before any attempt to achieve a pregnancy, and making approval the gateway to the administrative pathway to legal parentage, the recommendations would bring most domestic arrangements into the regulatory framework before conception. This would allow risks, lack of free and informed consent, or other issues to be identified while harm can still be prevented, rather than only after the birth when non-compliance may be much harder, or impossible, to resolve. In that way, safeguards are more likely to operate meaningfully, rather than being considered too late to have any real protective effect (**Chapter 4**).

1.76 More generally, the recommendations would replace criminal sanctions for conduct relating to domestic (and overseas) surrogacy with civil penalties, enforced by the National Regulator across a range of prohibitions (**Chapter 12**). This is intended to make enforcement more likely, effective, and proportionate. Civil penalties are subject to a lower standard of proof and can be enforced by a regulator heavily invested in maintaining the integrity of the scheme. Because of this, they are easier to enforce and likely to be just as effective as, if not more effective than, criminal sanctions in supporting compliance and protecting against harm and exploitation. Civil penalties would also preserve the objective of deterrence, while being less stigmatising.

Overseas surrogacy harm prevention: problems and solutions

1.77 The conditions created by the current regulatory framework push intended parents towards overseas surrogacy, and the number doing so appears to be rising (see above). This can expose surrogates, children, and intended parents to risks of harm and exploitation (**Chapter 13**). In some destinations, concerns arise about medical care and living conditions,[74] as well as gaps in protections for surrogates. This includes safeguards for free and informed consent, such as access to counselling, and protections for bodily integrity and autonomy, such as limits on embryo transfers.[75] There are instances where surrogates have been inadequately reimbursed, had their freedom of movement restricted, or been subject to human trafficking and slavery-like conditions (**Chapter 13**). For children, overseas arrangements can create a lack of certainty about legal parentage or citizenship, and challenges in accessing information about the surrogate (**Chapter 13**), which are relevant to their right to a parent-child relationship, nationality, and identity. They may also raise risks under international law, including contravening the prohibition on the sale of a child (**Chapter 14**). Intended parents may also be harmed in overseas surrogacy arrangements, including through misleading information or assurances, financial losses, and through unexpected delays caused by problems with paperwork, birth documentation, or changes in the law (**Chapter 13**).

74 Kirsty Horsey and Zaina Mahmoud, 'Surrogates' and Intended Parents' Experiences of Surrogacy Arrangements: A Systematic Review' (2023) 46(1) *RBMO* 7, 7–8.

75 Kneebone et al (n 41) 1454.

1.78 While not all overseas arrangements raise these concerns, they are heightened in jurisdictions that are unregulated or poorly regulated, or marked by significant social and economic disparity (**Chapter 13**). These risks are significant and should not be understated. However, the current approach to regulating surrogacy is not adequate to address them and may, in some cases, contribute to the very harm and exploitation the laws seek to prevent. As a submission from a couple who were intended parents observed, the 'intent is to prevent exploitation, but in reality, it mainly drives Australians to seek surrogacy in secret or abroad, with no oversight'.[76]

1.79 There are several reasons the current approach is inadequate (**Chapter 13**). Australians' engagement in overseas surrogacy is not regulated at all in four of eight states and territories, creating a significant regulatory gap. Other jurisdictions regulate these arrangements through extraterritorial prohibitions, which do not appear to be sufficiently effective and are not enforced. Australians are treated differently in relation to the same overseas conduct depending on where they live. While some Australians can legally access overseas surrogacy to form a family, others may be criminally liable for doing so. Further, the current approach relies on state and territory-based laws and enforcement mechanisms that are not well suited to conduct beyond Australia's borders. A response focused on proving and sanctioning prohibited conduct overseas is difficult to effect, given Australia's limited influence and investigative capacity in such situations. Finally, the current approach fails to distinguish between lawful, well-regulated arrangements and those that are not. Not all overseas surrogacy arrangements that are for profit or reward are exploitative. Imposing a blanket prohibition in these circumstances is therefore a blunt response to a nuanced problem. As more Australians pursue overseas surrogacy, this uneven, ineffective, and one-size-fits-all approach is a pressing concern.

1.80 Other issues relating to the regulation of overseas surrogacy include that there is no requirement, where children are born through an overseas surrogacy arrangement, for details of the child's birth — including both gestational and genetic origins — to be recorded and made accessible to them in Australia (**Chapter 13**). This is inconsistent with the child's rights to identity (**Chapter 14**). There is also no requirement for intended parents to obtain confirmation of their legal relationship to the child (**Chapter 13**). As discussed in **Chapter 10**, recognition of legal parentage is important for both practical reasons and a child's sense of identity, and is the source from which many rights and obligations are derived. Finally, intended parents can face practical hurdles when seeking to return to Australia with children born through overseas surrogacy and to obtain the surrogate's consent for an initial passport and passport renewal (**Chapter 13**).

1.81 The ALRC's recommendations aim to make domestic surrogacy a more viable and preferred pathway, reducing the need for intended parents to look overseas. However, the current regulatory response also does too little to influence conduct in overseas arrangements. Whether or not Australia has extraterritorial legal obligations, the ALRC considers that as a matter of good policy Australia should,

76 Name withheld, *Submission 37*.

where practicable, regulate to reduce the risk of Australians entering overseas arrangements that may undermine the human rights of those involved (**Chapter 14**). A new, proactive national approach, targeted at conduct that can be more effectively regulated, is required.

1.82 The recommendations therefore seek to engage with overseas surrogacy more proactively, responsibly, and effectively. The proposed regime would steer Australian intended parents, through guidance and advice, to responsible overseas arrangements, rather than relying only on sanctions after an arrangement has occurred. By focusing on conduct within Australia, the framework would target what Australia can control, making breaches easier to investigate and enforce, and supporting more effective deterrence. It would allow lawful, well-regulated arrangements to proceed, while helping to avoid arrangements involving a significant risk of exploitation of the surrogate, the sale of a child, or the denial of the child's rights to identity or nationality. The proposed reforms would also help to protect Australian intended parents from exploitation.

1.83 Intended parents would be required to engage with the National Regulator (**Recommendation 6**) before and during an overseas arrangement, receive clear guidance and legal advice before entering it, and take reasonable steps to act responsibly when choosing to engage in an overseas surrogacy arrangement. Specifically, intended parents would be required to:

- register their intention to engage in overseas surrogacy with the National Regulator (**Recommendation 38**);
- obtain guidance from the National Regulator ('Responsible Overseas Surrogacy Guidelines') about the general risks involved to the surrogate, the child, and themselves, and what steps they are legally required to take to responsibly engage in overseas surrogacy (**Recommendation 37**);
- obtain legal advice from a lawyer in Australia and in the overseas destination, to ensure the arrangement is lawful and that they understand their legal obligations (**Recommendations 41** and **42**);
- take reasonable steps to act responsibly in choosing to engage in an overseas surrogacy arrangement (**Recommendation 43**), including by following the guidance in the Responsible Overseas Surrogacy Guidelines, the legal advice obtained, and the information obtained after further reasonable enquiries. This is to avoid engaging in an overseas surrogacy arrangement which is unlawful in the overseas jurisdiction, fails to meet minimum content requirements specified by Australian law, and involves significant risk of the exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity or nationality; and
- update their registration to confirm that legal advice was obtained and to provide a copy of the surrogacy agreement (**Recommendation 44**).

1.84 To help ensure the guidance provided in the Responsible Overseas Surrogacy Guidelines is not undermined by misinformation, and to protect intended parents from harm or exploitation, those who seek to facilitate or arrange overseas arrangements

would be prohibited from intentionally or recklessly providing intended parents with incorrect or misleading information or advice (**Recommendation 40**).

1.85 Repealing extraterritorial criminal prohibitions (**Recommendation 36**) and introducing nationally consistent legislation (**Recommendation 3**), supported by a National Regulator (**Recommendation 6**), would enable a national approach to regulating overseas surrogacy, address the substantial regulatory gap that currently exists across four of the eight states and territories, and support these recommendations in practice. A national approach is especially appropriate where a scheme seeks to influence conduct overseas, better aligning regulation with the national and international character of surrogacy. It would also enable consistent guidance, expectations, monitoring, and use of civil penalties where appropriate. This would make surrogacy regulation more consistent and effective than the current patchwork of inconsistent laws.

1.86 After a child is born, the ALRC's recommendations would better protect a child's right to birth registration, nationality, and a parent-child relationship, and to preserve their identity (**Chapter 14**). To achieve this, information about the circumstances of the child's birth would be recorded on the National Surrogacy Register (**Recommendation 45**), and Australian citizenship, passport, and visa processes would be better aligned (**Recommendation 46**). The recommendations would also require intended parents to apply for legal parentage through the judicial pathway to have their relationship with the child recognised (**Recommendations 29** and **45**). **Recommendation 47** would simplify passport renewals.

1.87 This new approach to overseas surrogacy would place higher expectations on intended parents who choose to go overseas. It would require them to be informed and take practical steps to reduce the risk of exploitation and other forms of harm, with clear consequences for non-compliance in the form of a civil penalty. Providing intended parents with a lawful and regulated pathway is more likely to reduce the risk of harm than a blanket prohibition on Australians engaging in overseas surrogacy for profit or reward. Over time, this may help to change how Australians engage in overseas surrogacy: by moving from an unregulated pathway to one in which responsible engagement is understood as part of the process from the start.

Figure 1.1: A supported and responsible domestic surrogacy process

A supported and responsible domestic surrogacy process

Eligible parties meet

Parties meet through:
- their own networks;
- advertising (**Recommendation 2**); or
- matching through an SSO (**Recommendation 8**).

Parties must meet eligibility requirements (**Recommendations 11–14**).

Checks and processes

Parties complete:
- medical screening (**Recommendation 15**);
- legal advice (**Recommendation 17**);
- implications counselling (**Recommendation 18**);
- psychological screening (where necessary) (**Recommendation 19**); and
- criminal history checks (intended parents only) (**Recommendation 16**).

A compliant surrogacy agreement

Agreement must:
- be in writing;
- be entered into before conception;
- address cost and loss recovery;
- address ongoing counselling;
- include include a statement confirming the surrogate's bodily integrity and autonomy; and
- include a statement of intention setting out the parties' expectations of the arrangement (**Recommendation 20**).

Approval

- Parties seek approval from a licenced SSO.
- SSO must be satisfied that the parties have met all the requirements for a compliant surrogacy arrangement (**Recommendations 9** and **10**).
- SSO must refer all 'complex applications' to the National Regulator for assessment and approval.

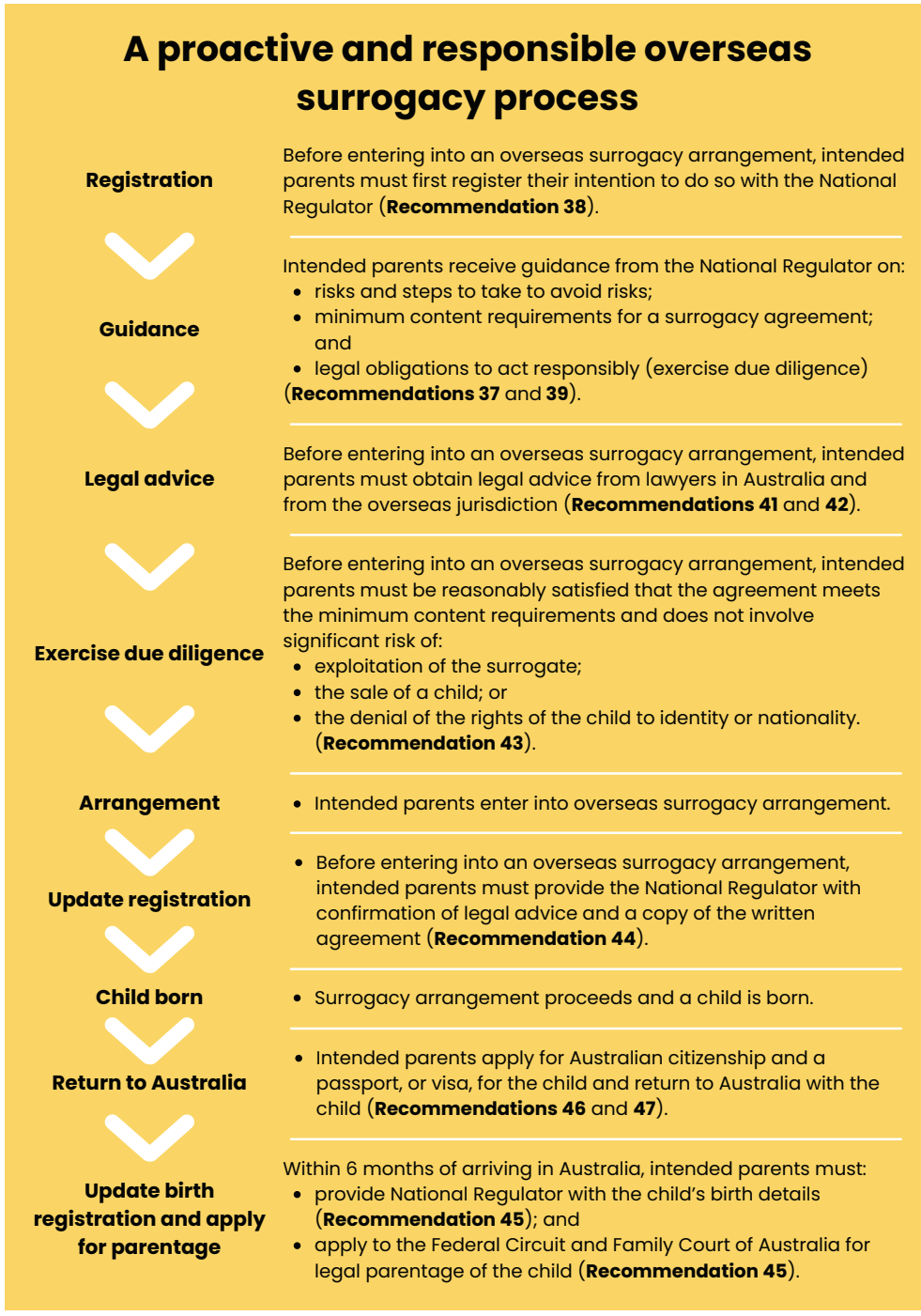
Fertility treatment and pregnancy

- Following approval by SSO, the parties may attempt to achieve pregnancy.
- Treatment will be covered by Medicare (**Recommendation 26**).
- Surrogate must be fully reimbursed for all costs and economic losses reasonably incurred by the surrogate or their partner (if any) in relation to the surrogacy arrangement (**Recommendation 23**).
- Surrogate may be entitled to receive a payment to recover non-economic losses and extraordinary losses (if relevant) (**Recommendation 24**).

Birth of the child

- Intended parents are the child's legal parents upon birth and are named as such on the birth certificate (**Recommendation 28**).
- Surrogate may apply to the Federal Circuit and Family Court of Australia for parentage. Best interests of the child is the paramount consideration (**Recommendation 28**).
- Information about the surrogacy is made available through the birth register and National Surrogacy Register (**Recommendations 30–32**).

Figure 1.2: A proactive and responsible overseas surrogacy process



The ALRC's approach to reform

1.88 The following section outlines the main reform approaches and principles that have shaped the recommendations in this Report. In summary, the ALRC has:

- aimed to make surrogacy more accessible and more responsible;
- made recommendations compliant with Australia's international human rights obligations;
- sought to ensure that the law is harmonised and clear; and
- taken a pragmatic and least restrictive approach to regulation.

Making surrogacy more accessible and responsible

1.89 The ALRC's approach is to facilitate access to the benefits of surrogacy while better preventing the harms it can involve. Making domestic surrogacy easier to access and navigate is an important part of that approach. Surrogacy provides an important pathway to family formation for people who would otherwise be unable to have children, and improving access to it helps ensure those benefits can be realised. Making domestic surrogacy more accessible is also a protective reform because it would reduce reliance on overseas surrogacy and the risks associated with it. Many intended parents in Australia would have preferred to pursue domestic surrogacy had it been easier to access.[77] A viable domestic surrogacy pathway is therefore a form of harm reduction: it gives intended parents a regulated, local alternative to going overseas, supported by Australian legal protections, healthcare, and support services.[78]

1.90 At the same time, improving access to surrogacy must be accompanied by a more responsible regulatory framework. If domestic surrogacy is to become easier to access and more common in Australia, the law should facilitate it in a way that protects the rights and interests of surrogates, intended parents, and children born through surrogacy. This requires accompanying protections that reduce the risk of exploitation and other forms of harm, support free and informed consent, and promote the best interests of children. It also requires a more responsible approach to overseas surrogacy, so that Australians who continue to pursue arrangements overseas are better supported to do so in ways that reduce the risk of harm and exploitation. As such, this Report makes recommendations that increase the accessibility of domestic surrogacy and promote a responsible approach to surrogacy.

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77 Kneebone et al (n 41) 1451. Among respondents to this 2021 survey who were considering surrogacy 'overseas' or 'in Australia *and* overseas' only 8% said that overseas surrogacy was their first choice.

78 A Whittaker, C Volks, A Molas (et al), *Submission 201*.

Compliance with international human rights obligations

1.91 Section 24(1)(b) of the *Australian Law Reform Commission Act 1996* (Cth) requires the ALRC to ensure that in performing its functions

> the laws, proposals and recommendations it reviews, considers or makes: are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter.

1.92 This requirement to take account of Australia's international obligations is reinforced in the Terms of Reference, which focus on the importance of viewing surrogacy, and any reforms to surrogacy laws, policy, and practice, through a human rights lens. For example, the Terms of Reference ask the ALRC to:

- have regard to 'the human rights of children born of surrogacy, [surrogates], and intended parents';
- identify legal and policy reforms that are consistent with Australia's obligations under international law and conventions, and protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates, and intended parents, noting that the best interests of children are paramount; and
- consider Australia's human rights obligations.[79]

1.93 Compliance with international obligations and human rights considerations have been foregrounded throughout this Inquiry and form the basis of its recommendations. The rights of the surrogate, intended parents, and children born through surrogacy are all protected by the recommendations in this Report, with the rights of children being a primary consideration. **Chapter 14** contains a detailed analysis of the rights of the child, the rights of the surrogate, and the rights of intended parents, and explains how the recommendations in this Report uphold these rights, including where such rights intersect.

A harmonised and clear legal framework

1.94 'Harmonisation' is a key reform principle relevant to achieving uniform or complementary Commonwealth, state, and territory laws, as required by the Terms of Reference. In line with the Terms of Reference, the recommendations identify ways to make surrogacy laws more consistent between jurisdictions, so that they operate in a fairer, more protective, and more effective way. The current legislative landscape creates inequality in access, protections, and outcomes for children born through surrogacy, surrogates, and intended parents, while adding complexity to arrangements that often cross state and territory borders (**Chapter 3**). Greater national consistency would help ensure that access to surrogacy and key legislative safeguards do not depend on where people live and make domestic surrogacy easier to navigate (**Chapter 3**). National consistency is also important to the successful implementation of the recommendations in this Report. Less national consistency

79 Australian Law Reform Commission, *Terms of Reference* (n 2).

across jurisdictions may dilute the impact of the recommendations and, in some cases, make existing problems of inconsistency worse.

1.95 In addition to harmonised laws, 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', before an arrangement begins and after a child is born through surrogacy.[80] Legal clarity can protect the rights and interests of parties to a surrogacy arrangement, support compliance,[81] and reduce the risk of misunderstandings and disputes.[82] Legal clarity can also support consistency in how the law is applied. When the law is not clear or certain, this can create risks, such as differences in how judges might approach decisions on legal parentage.[83] As discussed above, uncertainty can push intended parents to pursue surrogacy overseas, which can bring with it greater risks than domestic surrogacy.

A pragmatic and 'least restrictive' approach to reform

1.96 A pragmatic approach to surrogacy focuses on developing a regulatory framework that is workable in practice and responds to societal needs and advancements in ART, even where opinions differ about surrogacy.[84] In this Inquiry the ALRC has taken a pragmatic approach in several areas, such as by recognising that Australians will continue to engage in overseas surrogacy and focusing on creating a framework that supports responsible engagement (**Recommendations 37**–**45**). Our recommendations also seek to minimise unnecessary compliance burdens and costs that would undermine the accessibility of surrogacy by streamlining processes where possible and requiring additional regulation only where necessary, to manage identified risks or protect the rights and interests of those involved. This approach is also reflected in the way the recommendations align ART and surrogacy regulatory frameworks, so that they operate in a streamlined and complementary way, rather than imposing unnecessary duplication or friction (for example, see **Recommendation 9(6)(a)**).

1.97 A pragmatic approach is related to an approach of least restriction, where informed decisions by consenting adults are generally respected by governments

80 Achieving legal clarity about parent-child relationships that result from surrogacy arrangements has been the focus of previous inquiries: see, eg, Te Aka Matua o te Ture | Law Commission (NZ) (n 40) 93–4 [3.91]–[3.95]; 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) rec 2; South Australian Law Reform Institute (n 51) 94 [9.6.1], citing Department of Justice (NSW), *Statutory Review: Surrogacy Act 2010* (2018) 6 [2.9]–[2.11].

81 Arie Freiberg, *Regulation in Australia* (The Federation Press, 2nd ed, 2025) 197.

82 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.

83 Ibid.

84 Scott argues that regulating rather than prohibiting is more effective at mitigating risk and 'promoting social welfare': Elizabeth S Scott, 'Surrogacy and the Politics of Commodification' (2009) 72(3) *Law and Contemporary Problems* 109, 145–6.

and remain as private arrangements as far as practicable.[85] Taking this approach, oversight of surrogacy arrangements should be limited, rather than having a direct and ongoing role,[86] especially where the surrogate has engaged in the arrangement with free and informed consent (see above). Regulatory intervention should also be proportionate to the risks it seeks to address and no more than is required to meet the regulatory objective.[87] Consistent with this approach, the ALRC has taken a more facilitative approach where arrangements are routine, while retaining more targeted oversight and proportionate enforcement where this is justified.

Further reform

1.98 At this stage, the ALRC has not recommended the payment of surrogates beyond the parameters described above, namely we have not recommended payments that are for profit and reward. The ALRC has taken a cautious approach, having regard to the Terms of Reference (which ask us to address barriers to 'altruistic' surrogacy). We also recognise that surrogacy for profit or reward could, without sufficient and effective safeguards, operate as a financial inducement, which could undermine free and informed consent and thus increase the risk of exploitation and other forms of harm. However, the ALRC also recognises that a blanket prohibition on profit or reward may not be necessary in the future to guard against such risks.

1.99 Whether a blanket prohibition on profit or reward remains necessary warrants reconsideration in the future. A prohibition on all forms of remuneration may limit the number of people willing to act as surrogates in Australia, resulting in intended parents continuing to pursue overseas arrangements that carry greater risks of exploitation and other forms of harm (**Chapter 2**). It may also raise concerns about compliance with Australia's international obligations (**Chapter 14**). A prohibition on profit or reward may not be necessary to protect against financial inducement, exploitation, or the sale of a child, particularly where legislative safeguards effectively address those risks. In those circumstances, the prohibition may unjustifiably limit the surrogate's human right to autonomy and reproductive freedom. For now, the ALRC considers that a cautious approach is warranted while the recommended legislative safeguards are implemented and their effectiveness tested. **Recommendation 5** provides an opportunity for a statutory review of the new legislative framework for surrogacy after an appropriate period of operation and a reconsideration of this position.

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85 See South Australian Law Reform Institute (n 51) 94–5 [9.71]–[9.73]. Taking a least restrictive approach (for example, by providing for a proportionate response to regulation) has been emphasised as a reform approach in other reform efforts and inquiries related to surrogacy and ART more broadly: see, eg, ibid 89 [9.2.7]; Gorton (n 51) 24; Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) 2.

86 Freiberg (n 81) 11–12.

87 Ibid 189–90.

1.100 Another issue that may affect the viability of domestic surrogacy is access to donor eggs. Donor eggs are commonly used in surrogacy arrangements,[88] but there is a shortage of egg donors in Australia.[89] Australian law does not permit gamete donation if it is for profit and reward,[90] and research indicates that demand for donor gametes now outstrips supply.[91] This can make it difficult for intended parents to access donor eggs unless they can find a willing donor.[92] For some, the need to access donor eggs may therefore be another reason to pursue overseas surrogacy.[93]

1.101 To an extent, the potential for domestic surrogacy to develop in Australia, and for intended parents to pursue it as an option instead of overseas surrogacy (see above), will depend on the availability of donor eggs, an issue that is beyond the scope of this Inquiry.

Inquiry process

Submissions and consultations

1.102 In June 2025, the ALRC released an Issues Paper with 27 questions and invited submissions to inform the ALRC's understanding of the problems with how surrogacy is regulated in Australia and how these problems might be solved.[94] The ALRC received 374 unique submissions in response to the Issues Paper, which were published on our website. We conducted 42 consultations to inform the Issues Paper and after it was published (see **Appendices A** and **B**). Submissions and consultations from this phase of the Inquiry informed the development of draft proposals for reform.

1.103 The ALRC also identified approximately 1, 241 submissions generated in response to a campaign template disseminated by the Australian Christian

88 Kneebone, Hammarberg and Beilby (n 65) 2; Theresa Glennon, 'Legal Regulation of Family Creation through Gamete Donation: Access, Identity and Parentage' in Susan Golombok et al (eds), *Regulating Reproductive Donation* (Cambridge University Press, 2015) 60, 61.

89 Kneebone, Hammarberg and Beilby (n 65) 2, 13; Genia Rozen et al, 'Barriers to Reproductive Treatments in Australia' (2023) 52(3) *Australian Journal of General Practice* 109, 111; Giuliana Fuscaldo et al, 'Getting Eggs "out of the Basket": Facilitating Decisions about Surplus Frozen Eggs' (2025) 51(1) *Reproductive BioMedicine Online* 1, 2.

90 *Human Cloning for Reproduction Act 2002* (Cth) s 21.

91 Rosemarie G Hogan et al, '"Battery Hens" or "Nuggets of Gold": A Qualitative Study on the Barriers and Enablers for Altruistic Egg Donation' (2022) 25(4) *Human Fertility* 688, 693.

92 Rozen et al (n 89) 111; Stephen Page, 'Surrogacy in Australia: The "Failed Experiment"?' (2023) 174 *Precedent* 22, 27. See also 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, 2.

93 Kneebone et al (n 41) 1451–2; Genia Rozen et al, 'Barriers to Reproductive Treatments in Australia' (2023) 52(3) *Australian Journal of General Practice* 109, 111. See also Martyn Stafford-Bell, Sam Everingham and Karin Hammarberg, 'Outcomes of Surrogacy Undertaken by Australians Overseas' (2014) 201(6) *Medical Journal of Australia* 1, 2–3.

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

Lobby. A sample of these submissions was published on the ALRC's website.[95] These submissions were derived from generated statements that were selected by submitters through an online form and generated into an email.[96] Responses from these submissions generally advocated for surrogacy to be prohibited due to concerns about exploitation or other forms of harm. As discussed above, while the ALRC acknowledges this perspective, the Inquiry is directed to how surrogacy should be regulated rather than whether it should be lawful, with concerns about harm addressed through the recommendations and in **Chapter 14**.

1.104 In November 2025, the ALRC published a Discussion Paper which included 41 proposals for reform to improve the regulation of surrogacy in Australia and asked for feedback to help refine these proposals.[97] The ALRC received 85 unique submissions in this phase, which were published on our website, and conducted 19 consultations (see **Appendices A** and **B**). Submissions and consultations from this phase of the Inquiry informed refinement of the proposals in the Discussion Paper and the development of recommendations in this Report.

1.105 Submissions were published in line with the confidentiality process and our **submission policy**. Only a sample of template submissions was published due to resourcing constraints and given these submissions were substantively similar.

1.106 Some Australian laws prohibit the identification of people involved in surrogacy arrangements or family court proceedings, and some jurisdictions criminalise surrogacy for profit or reward overseas. The ALRC also received feedback that fear of prosecution may have deterred some intended parents, and parents through surrogacy, from making a submission. To comply with relevant laws, and to support people to engage with the Inquiry, the ALRC deidentified submissions that identified, or could identify, people involved in surrogacy arrangements, unless consent was obtained before publication. As a result, many submissions in this Report are labelled 'Name withheld' or 'Not published'. Submissions from children born through surrogacy are generally labelled 'Name withheld (minor)' to protect their identity while recognising their status as children.

1.107 Across the Inquiry, the ALRC consulted with surrogacy organisations, health professionals, psychologists and counsellors, lawyers, judicial officers, academics and surrogacy experts, and government agencies. Consultees were based in Australian states and territories, as well as the United Kingdom, the United States, Canada, New Zealand, Denmark, Ireland, Israel, and South Africa. Consultations were held online, with some conducted as roundtables to explore specific themes and perspectives, including with state and territory government agencies, births,

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95 A Fouche, *Submission 98*; K Q Ho, *Submission 101*; P Kerrison, *Submission 354*; C Elias, *Submission 460*; D Griffiths, *Submission 461*; I Murray, *Submission 462*; J Moss, *Submission 463*; J Shelley, *Submission 464*; M Crowley, *Submission 465*; M Rose, *Submission 466*; R Chong, *Submission 467*; R Roy, *Submission 468*.

96 Some of these generated statements were manually edited by the submitter.

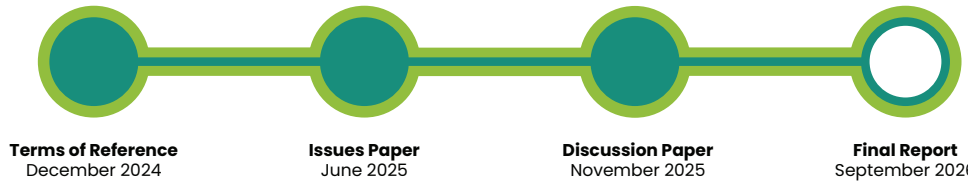
97 Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper 89, 2025).

deaths and marriages registries, donor registries, feminist organisations, and Christian groups.

1.108 The ALRC also provided presentations on this Inquiry at the ANZ Fertility Law and Ethics Symposium from 9–10 October 2025 in Melbourne and the Australasian Association of Bioethics and Health Law Conference, 7–9 December 2025 in Christchurch, New Zealand.

1.109 The Inquiry's Terms of Reference were amended on 17 July 2026 by the Attorney-General, extending the deadline from 29 July 2026 to 11 September 2026.

Figure 1.3: Inquiry milestones and timeline



Advisory Committee

1.110 The Inquiry was informed by a group of 11 people who comprised the Advisory Committee (see **Participants**). The Advisory Committee brought together people with different experience and expertise in surrogacy. The Advisory Committee's function is to provide advice to, and to share their views with, the ALRC. The Advisory Committee's advice and views are informative and not determinative.

1.111 The ALRC formally met with the Advisory Committee three times. The ALRC also met with some Advisory Committee members in consultations or roundtables and received written input from some members, including submissions.

1.112 This Inquiry benefited greatly from Advisory Committee members' depth of knowledge and expertise, and advice. The ALRC sincerely thanks the Advisory Committee for contributing their time and their commitment to this Inquiry.

Research, analysis, and review

1.113 This Report reflects the ALRC's research, analysis, and conclusions, based on the totality of the evidence base. That evidence base included material gathered through the processes above, including submissions and consultations, as well as research on Australian laws and practice and relevant overseas approaches. It included legislation, case law, academic literature, and reports of previous inquiries or reviews. The ALRC also considered publicly available quantitative data, and data provided by some organisations and individuals.

1.114 In assessing that evidence base, the ALRC considered the relevance, source, and context of the material, and the weight that should properly be given to it. This included considering whether the material was provided by a person or organisation with direct experience of surrogacy, relevant professional or subject-matter expertise, or institutional responsibility in the area. The ALRC also considered whether particular views and accounts were supported by, or differed from, other material in the evidence base.

1.115 Some chapters of this Report were read by expert reviewers, who provided feedback based on their experience and expertise (see **Participants**).

1.116 Artificial Intelligence ('AI') tools were used to support aspects of the research, editing, and proofreading of this Report. AI was not used for legal reasoning, decision making, or in the development of findings or recommendations. All AI-generated outputs were reviewed and approved by ALRC staff.

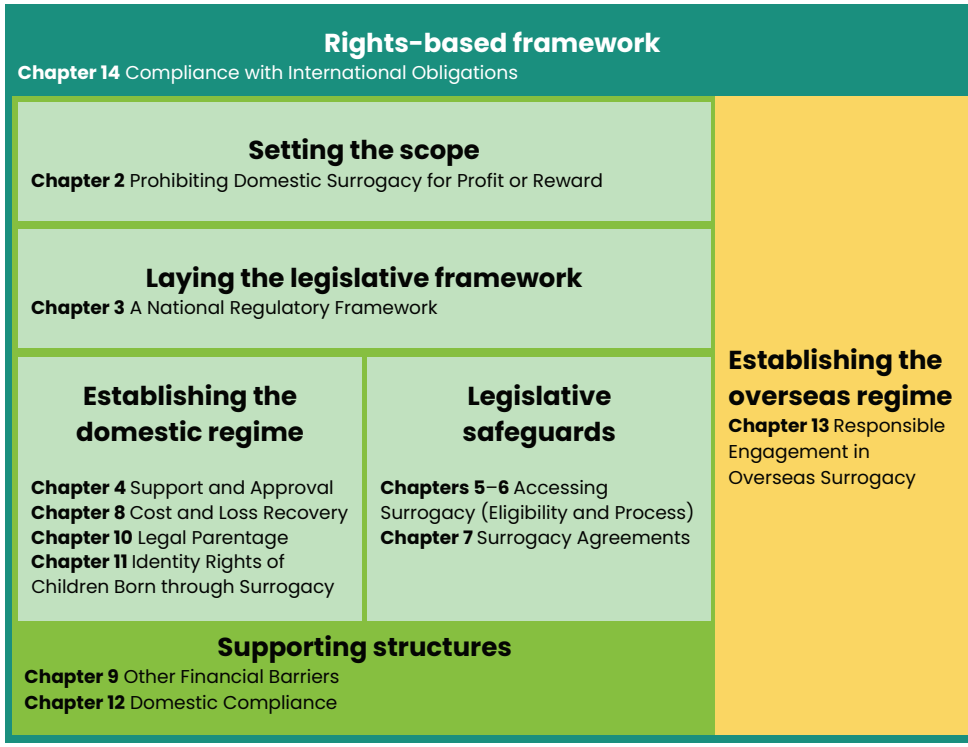
Acknowledgement

1.117 The ALRC sincerely thanks the organisations and individuals, who have contributed to this Inquiry, particularly those with personal experience of surrogacy, including children born through surrogacy, surrogates, parents through surrogacy, and intended parents. Their contributions have brought depth, and personal and practical insight to this Report, and enriched its recommendations.

Navigating the Report

1.118 This Report has 14 chapters, which set out a recommended regime for regulating domestic and overseas surrogacy.

Figure 1.4: Guide to the Final Report chapters



2. Prohibiting Domestic Surrogacy that is for Profit or Reward

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Introduction

2.1 The recommendations in this report seek to establish a responsible and supportive framework for surrogacy in Australia. To allow this, the parameters of what constitutes lawful domestic surrogacy in Australia must be clearly defined.[1] This chapter sets out those parameters. It makes two recommendations:

- **Recommendation 1** provides that surrogacy which is for profit or reward should be prohibited. Non-compliance would result in liability to a civil penalty.[2] As discussed below, this recommendation is based on the same rationale for and reflects the existing legislation in each jurisdiction, that prohibits 'commercial' surrogacy.
- **Recommendation 2** provides that the facilitation or promotion of surrogacy arrangements that are for profit or reward should be prohibited. Non-compliance would result in liability to a civil penalty. As discussed below, this would continue current restrictions on the facilitation or promotion of unlawful surrogacy arrangements, but would remove the restrictions for lawful surrogacy, thereby removing barriers to lawful surrogacy.

2.2 The recommendations in this chapter respond to the Terms of Reference, which recognise the current inconsistencies in legislative arrangements across Australian jurisdictions. They ask the ALRC to 'reduce barriers to altruistic domestic

1 The parameters for lawful overseas surrogacy are set out in **Chapter 13**.
2 The rationale for a civil penalty scheme is discussed in **Chapter 12**.

surrogacy', and to ensure 'surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy'. The Terms of Reference also require the ALRC to identify reforms that are 'consistent with Australia's obligations under international law and conventions'.

2.3 This chapter also includes a discussion as to whether the prohibition of surrogacy for profit or reward is entirely justifiable.

Prohibiting domestic surrogacy for profit or reward

Recommendation 1

1. Legislation should provide that intended parents and surrogates are prohibited from engaging in a domestic surrogacy arrangement for profit or reward ('prohibited domestic surrogacy arrangement').
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.
3. Existing criminal offences that prohibit 'commercial surrogacy' (or equivalent) should be repealed.

Current prohibition of 'commercial' surrogacy

2.4 It is currently a criminal offence in all Australian jurisdictions to engage in a domestic surrogacy arrangement which is for profit or reward.[3] In enacting this offence, 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 costs (which includes loss of earnings).[4] However, two jurisdictions do not use this term. Western Australia prohibits surrogacy that is 'for reward'.[5] In Victoria, surrogates are prohibited from *receiving* a 'material benefit or advantage'.[6] Some jurisdictions also prohibit 'offering' or 'purporting' to enter such an agreement,[7] and some impose a higher threshold by requiring that the parties

3 Some jurisdictions have extended this offence to overseas surrogacy arrangements. See **Chapter 13**.

4 *Parentage Act 2004* (ACT) ss 40–1; *Surrogacy Act 2010* (NSW) ss 8–9; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) ss 10, 56; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40.

5 *Surrogacy Act 2008* (WA) s 8. Western Australia has recently passed new legislation, which retains this prohibition: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 112. This Act commences in mid-2027.

6 *Assisted Reproductive Treatment Act 2008* (Vic) s 44. It was recommended in the 2019 Gorton Review Report that the prohibition should apply to all parties entering the arrangement: Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) rec 15.

7 *Surrogacy Act 2010* (NSW) s 8 ('offer'); *Surrogacy Act 2022* (NT) s 48 ('offer'); *Surrogacy Act 2010* (Qld) s 56 ('offer'); *Surrogacy Act 2019* (SA) s 23 ('purport').

must have 'intentionally' entered (or offered to enter) the agreement.[8] All jurisdictions permit surrogacy that is not for profit or reward. This is often described as 'altruistic' surrogacy.

Why 'commercial' surrogacy is currently prohibited

2.5 The surrogacy laws in each of the states and territories identify the lawful parameters for a surrogacy arrangement. In all jurisdictions, the lawful parameters are identified not by what is lawful, but by what is prohibited and therefore unlawful. All of those prohibitions are of the same nature. Although they adopt different descriptors or labels, they are all directed at identifying the lawful parameters for a surrogacy arrangement as an arrangement from which the surrogate will gain no profit or reward. In other words, that the arrangement will not be a 'commercial' arrangement providing a financial advantage to the surrogate. The fair inference that may be drawn from the legislative context, including relevant parliamentary materials (second reading speeches and explanatory memoranda), is that the discrimen between lawful 'altruistic' surrogacy and unlawful 'commercial' surrogacy was regarded to be the provision to the surrogate of financial advantage, or, in other words, commercial gain.[9]

2.6 The initial regulation of surrogacy was defined by 'moral panic' and the perception that surrogacy was a 'threat.'[10] The enactment of the existing legislation in each state and territory involved a policy shift from perceiving surrogacy as unethical — most clearly reflected in Queensland's initial prohibition of all forms of surrogacy[11] — to the prohibition of 'commercial' surrogacy only (as discussed above). 'Altruistic' surrogacy is accepted as lawful. Various reasons were given in

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8 *Parentage Act 2004* (ACT) s 41; *Surrogacy Act 2022* (NT) s 48.

9 See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1730–1 (Terry Connolly); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 November 2007, 3645 (Reba Meagher); New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26547 (John Hatzistergos); Queensland, *Parliamentary Debates*, Legislative Assembly, 23 March 1988, 5546 (PR McKechnie); South Australia, *Parliamentary Debates*, Legislative Council, 16 February 1988, 2763 (KT Griffin); Tasmania, *Parliamentary Debates*, House of Assembly, 11 November 1992, 45–6 (Roger Groom); Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 1984, 1389 (Robert Fordham).

10 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 6–7.

11 *Surrogate Parenthood Act 1988* (Qld) s 3. The legislative intent behind this Act was to prevent the commodification of children. Specifically, it was stated that '[i]t is the strong belief of members of the Queensland Government that to use or to pay another human being to reproduce is the ultimate in dehumanisation': Queensland, *Parliamentary Debates*, Legislative Assembly, 23 March 1988, 5546 (PR McKechnie). This Act was repealed on 1 June 2010, and replaced by *Surrogacy Act 2010* (Qld), which only prohibits 'commercial' surrogacy: ss 10, 56. This legislation followed the Investigation into Altruistic Surrogacy Committee's 2008 Report, which recommended decriminalising altruistic surrogacy: Investigation into Altruistic Surrogacy Committee (Qld), *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008) rec 3. The Explanatory Note to the Surrogacy Bill 2009 noted that Queensland was the only jurisdiction to criminalise altruistic surrogacy at that time: Explanatory Note, Surrogacy Bill 2009 (Qld) 4. The second reading speech does not provide a specific reason for retaining the prohibition on commercial surrogacy.

the parliamentary materials as to why commercial gain needed to be prohibited. It is difficult, in some jurisdictions, to clearly discern the underlying mischief that the prohibition of 'commercial' surrogacy was targeting.[12] It is clear enough, where the underlying mischief was identified, that the commodification of children was consistently regarded as the principal reason for the prohibition.[13] Other concerns related to the risk of exploitation of the surrogate.[14]

Why domestic surrogacy for profit or reward should remain prohibited

2.7 **Recommendation 1**, like existing legislation in each state and territory, is based on the principle that surrogacy arrangements for 'commercial' gain should be prohibited.[15] **Recommendation 1** continues the prohibition of 'commercial' surrogacy in Australia, but adopts the terminology of 'profit and reward', which better reflects the substance of and legislative intent behind the existing prohibition.

2.8 **Recommendation 1** and **Recommendations 23**–**24**, are directed to achieving the same objective, and at addressing the discernible mischiefs, to which the existing legislation is directed. These recommendations seek to ensure that the surrogate does not receive any profit or reward, including remuneration of any kind. This is done to avoid the risk that a surrogacy arrangement would involve the sale of a child or the exploitation of the surrogate.

2.9 Both the existing legislation and **Recommendations 23**–**24** (which deal with cost and loss recovery) make it permissible for the surrogacy arrangement to

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12 For example, in Victoria, Parliamentary debates do not indicate why this prohibition was introduced, but note that making surrogacy contracts unenforceable likely declared the existing position at common law: Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 1984, 1389 (Robert Fordham). In South Australia, Parliamentary debates refer to a select committee report, which opposed surrogacy 'on principle' (the principle appears to be that a surrogate, who is the legal mother at birth, can only relinquish parental responsibility through adoption): South Australia, *Parliamentary Debates*, Legislative Council, 11 February 1988, 2691 (CJ Sumner); South Australia, *Parliamentary Debates*, Legislative Council, 16 February 1988, 2763 (KT Griffin).

13 See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1730–1 (Terry Connolly); New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 November 2007, 3645 (Reba Meagher); New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26547 (John Hatzistergos); Queensland, *Parliamentary Debates*, Legislative Assembly, 23 March 1988, 5546 (PR McKechnie); Tasmania, *Parliamentary Debates*, House of Assembly, 11 November 1992, 45–6 (Roger Groom).

14 New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010. The Attorney General quoted the Standing Committee of Attorneys-General 2009 discussion paper, which stated 'commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones': Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) 4–5.

15 As discussed in **Chapter 1**, the labels 'commercial' and 'altruistic' are not accurate. The term 'commercial' — which is utilised in the parliamentary debates on the enactment of the existing legislation — is somewhat flawed. Commercial surrogacy and altruistic surrogacy are not mutually exclusive. A commercial surrogacy arrangement can still be motivated by altruism.

rectify disadvantage (costs and losses) experienced by the surrogate as a result of the surrogacy arrangement. However, as set out in **Chapter 8**, currently there are inconsistencies between the various jurisdictions as to the categories of costs and losses permissibly recoverable by a surrogate, and a lack of clarity about what constitutes a reasonable cost. This prevents disadvantage experienced by the surrogate being fully rectified and is inconsistent with the rationale behind the existing legislation and the reform aims in the Terms of Reference.

2.10 The approach we recommend differs from the existing legislation in two respects. First, national consistency is sought to be achieved. Second, in order to provide greater fairness to surrogates, a more comprehensive approach is taken to rectifying the disadvantage experienced by surrogates. **Recommendations 23**–**24** permit the surrogate to recover the full range of costs and losses (including non-economic losses) reasonably incurred or experienced (see **Chapter 8**).

2.11 This wider, more fulsome approach to rectifying the disadvantage experienced by surrogates does not compromise the existing legislative objective (reflected in **Recommendation 1**) of prohibiting any financial advantage being provided to the surrogate. **Recommendations 1**, **23** and **24** are therefore consistent with the part of the Terms of Reference which asks the ALRC to consider 'how to reduce barriers to domestic altruistic surrogacy arrangements in Australia'.

Is the total prohibition of remuneration necessary?

2.12 **Recommendation 1** would impose a total prohibition on all profit or reward paid or provided to a surrogate. This includes remuneration. If any remuneration of the surrogate were permitted, the non-commercial or 'altruistic' character of the proposed regime would be lost.

2.13 By tasking the ALRC with reducing barriers to 'domestic altruistic surrogacy arrangements', the ALRC considers that the Terms of Reference intend that the recommendations we make should not include a recommendation that a surrogate be remunerated. This is because such remuneration would expand permissible surrogacy arrangements beyond the 'altruistic' arrangements to which we have been asked to improve access.

2.14 **Recommendation 1** adheres to that limitation or restriction which we consider the Terms of Reference impose. However, it is prudent to draw attention to the possibility that it may not be necessary to totally prohibit the payment of remuneration to surrogates in order to achieve the objective of a prohibition on profit or reward, which is to avoid the sale of a child or the exploitation of the surrogate. We make that observation with two concerns in mind.

2.15 First, a regulatory regime that does not permit remuneration of the surrogate is likely to impose a substantial limitation on the number of people willing to be surrogates. Despite our view that removing the disadvantages currently experienced by surrogates (as is proposed) will likely increase the number of available surrogates,

we cannot say that the likely increase will be sufficient. As discussed in **Chapters 1** and **13**, the unavailability of domestic surrogates is a major driver for Australians to engage in overseas surrogacy arrangements. As is discussed in **Chapter 13**, those arrangements are far more likely than well-regulated domestic arrangements to involve the sale of a child or the exploitation of surrogates.

2.16 Second, we are concerned that, if the total prohibition of remuneration of a surrogate is unnecessary, it may constitute unjustified interference with a surrogate's human right to autonomy and reproductive freedom.[16] As such, there may be a consequential failure to comply with Australia's international obligations.

2.17 The right to autonomy and reproductive freedom, as well as the prohibition on the sale of a child, imposed by the United Nations Convention on the Rights of the Child ('CRC') and its Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography ('Optional Protocol'),[17] are discussed in **Chapter 14**. That chapter also discusses the circumstances in which limitations may be imposed on human rights which intersect. It also discusses the views expressed by the Committee on the Rights of the Child[18] and the former Special Rapporteur on the sale and sexual exploitation of children[19] to the effect that not all forms of 'commercial' surrogacy involve the sale of a child. In particular, in well-regulated regimes, where remuneration or other reward provided to the

16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

17 *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) arts 1–2.

18 Committee on the Rights of the Child, *Concluding observations on the combined 3rd to 6th periodic reports of the Lao People's Democratic Republic*, 79th sess, UN Doc CRC/C/LAO/CO/3-6 (1 November 2018) 13 [44]; Committee on the Rights of the Child, *Concluding observations on the 2nd periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography*, 62nd sess, 1748th mtg, UN Doc CRC/C/OPSC/USA/CO/2 (2 July 2013) 8 [29(b)]; Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of India*, 66th sess, 1901st mtg, UN Doc CRC/C/IND/CO/3-4 (7 July 2014) 13 [58(d)]; Committee on the Rights of the Child, *Concluding observations on the report submitted by Georgia under article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 82nd sess, 2430th mtg, UN Doc CRC/C/OPSC/GEO/CO/1 (30 October 2019) 4 [22].

19 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) 17 [72]. The former Special Rapporteur went on to detail conditions that must be satisfied to ensure commercial surrogacy does not amount to sale of children: Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic study on safeguards for the protection of the rights of children born from surrogacy arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) 15–16 [73]–[79].

surrogate is completely divorced from the 'transfer'[20] of the child from the surrogate to the intended parents, it is concluded that the prohibition of the sale of a child is not infringed. The rationale for that view is that the payment of remuneration made to the surrogate is not payment for the child.

2.18 On that view, and applying the principles for resolving apparent tension between two human rights, a well-regulated regime — which includes mechanisms that ensure that any payment to a surrogate is completely divorced from the transfer of the child — need not prohibit the payment of all forms of remuneration to the surrogate in order to accommodate and comply with the CRC and its Optional Protocol.

2.19 Under the domestic surrogacy regime that we propose, 'transfer' of the child would occur by operation of law. Transfer is not by reference to, or contingent upon, any payment made to the surrogate. It is therefore arguable that by prohibiting all forms of profit or reward provided to a surrogate, including those that are completely divorced from the transfer of the child, the proposed regime imposes an impermissible limitation on a surrogate's rights to autonomy and reproductive freedom and, in that respect, is not compliant with Australia's international law obligations.

2.20 That would not be so if the prohibition of all forms of remuneration was otherwise justified. It may be contended that the prohibition is necessary to guard against the exploitation of the surrogate and the consequential impairment of the surrogate's right to non-discrimination, a right also discussed in **Chapter 14**. That argument would have merit if the prohibition on any remuneration was accepted as a measure necessary to guard against the surrogate's capacity to make a free and informed decision to engage in surrogacy, being undermined by a financial inducement.

2.21 It is arguable that the prohibition of all remuneration is a necessary measure to avoid the undermining of a surrogate's capacity to engage in surrogacy in a free and informed manner. It is equally arguable in the context of the proposed regime — which provides sufficient protection of a surrogate's capacity to make free and informed decisions through the effective operation of legislative safeguards (see **Chapters 4**–**7**) — that a total prohibition on the surrogate receiving remuneration which is entirely divorced from the transfer of the child is unnecessary and thus unjustifiable.

2.22 There is some merit in the idea that a cautionary approach should be taken. The need for a cautionary approach in relation to a new system, in which guardrails such as the legislative safeguards are yet to demonstrate their effectiveness, is defensible. However, there is also a need to recognise that if and when caution no

20 The term 'transfer' is drawn from the definition of the 'sale of child' in the *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 2(a).

longer provides a justification for maintaining a total prohibition on the remuneration of a surrogate, the imposition of such a prohibition should be reviewed.

2.23 We consider that the need to take a cautionary approach justifies the total prohibition of remuneration and thus the prohibition by **Recommendation 1** of all profit or reward. On that basis, upon its implementation, **Recommendation 1** would be compliant with Australia's international law obligations. Whether that compliance is maintained over time and whether, as a matter of good policy, the prohibition should be qualified to allow for some remuneration are matters that we suggest should be the subject of review at a later time.

How the recommended prohibition would work

2.24 Implementation of **Recommendation 1** would require each state and territory to repeal existing criminal offences which prohibit 'commercial surrogacy' (or equivalent).[21] A new provision prohibiting engagement in a surrogacy arrangement that is 'for profit or reward', would need to be introduced into national uniform legislation (as discussed in **Chapter 3**). As discussed in **Chapter 8**, the term 'profit or reward' is intended to cover anything which falls outside the parameters set by **Recommendations 23**–**24**.

2.25 To deter non-compliance with the prohibition, the ALRC recommends that non-compliance be addressed by a civil penalty. The rationale for imposing a civil penalty, rather than a criminal sanction, is discussed in detail in **Chapter 12**.

21 The following provisions would need to be repealed (and any necessary consequential amendments made): *Parentage Act 2004* (ACT) ss 40–1; *Surrogacy Act 2010* (NSW) ss 8–9; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) ss 10, 56; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 8; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107, 112.

Prohibiting the facilitation and promotion of prohibited arrangements

Recommendation 2

1. Legislation should provide that individuals and organisations, including Surrogacy Support Organisations (**Recommendation 8**), are prohibited from directly, intentionally or recklessly:
   a. facilitating, or attempting to facilitate, a prohibited domestic surrogacy arrangement (**Recommendation 1**); or
   b. advertising or otherwise promoting engagement in a prohibited domestic surrogacy arrangement (**Recommendation 1**).
2. Legislation should provide that the prohibitions in paragraph 1 should not apply to:
   a. a legal professional providing legal advice; or
   b. any person providing medical or other assistance to a surrogate in order to avoid or address injury or harm to the surrogate's health.
3. Legislation should provide that non-compliance with the prohibitions in paragraph 1 will result in liability to a civil penalty.
4. Existing criminal offences that prohibit the facilitation (or equivalent) or advertising (or equivalent) of surrogacy arrangements should be repealed.

Current prohibitions on facilitating or advertising surrogacy

2.26 Most Australian jurisdictions have introduced offences that are directed at facilitators of surrogacy arrangements. However, jurisdictions differ significantly in terms of:

- the conduct they prohibit — for example, offences include: procuring 'commercial' surrogacy arrangements;[22] offering or providing assistance (for reward) to enter into a surrogacy arrangement;[23] facilitating introductions or negotiating surrogacy arrangements;[24] providing services connected with

22 *Parentage Act 2004* (ACT) s 42.
23 *Surrogacy Act 2022* (NT) s 49(1)(b).
24 *Surrogacy Act 2019* (SA) s 24; *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) s 9. Western Australia has recently passed new legislation that does not retain this prohibition. Rather, the new Act permits intended parents and licensees to recruit surrogates for arrangements which are not for reward, provided they do not do so for valuable consideration: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 113. This Act commences in mid-2027.

a 'for reward' surrogacy arrangement;[25] and providing technical, medical or professional services for the purposes of facilitating pregnancy for 'commercial' surrogacy arrangements;[26]

- who the prohibitions apply to — for example, whether there are carve-outs for lawyers or medical professionals;[27]
- which surrogacy arrangements the prohibitions apply to — for example, whether the prohibition applies to only 'commercial' surrogacy arrangements,[28] or all arrangements where the 'facilitation' was provided in return for a reward or substantial consideration;[29] and
- whether there is a fault element (such as intention or recklessness).[30]

2.27 Advertising in relation to surrogacy is generally prohibited across Australian states and territories. The prohibitions generally apply to any person publishing an advertisement, which can include professional service providers, intended parents, and surrogates. However, as with facilitation offences, jurisdictions differ in relation to which conduct is prohibited, whether there is a fault element, and what penalty applies.[31] Importantly, jurisdictions differ as to whether they prohibit advertising in relation to any surrogacy arrangement, advertising of prohibited arrangements only, or paid advertising only. For example:

- in Victoria and Queensland, advertising for prohibited surrogacy and permitted surrogacy is a criminal offence;[32]
- in Tasmania, paid advertising for prohibited surrogacy and permitted surrogacy is a criminal offence;[33] and

25 *Surrogacy Act 2008* (WA) s 11. However, the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which commences mid-2027, does not contain this prohibition.

26 *Parentage Act 2004* (ACT) s 44. See also *Surrogacy Act 2022* (NT) s 51; *Surrogacy Act 2010* (Qld) s 58.

27 See, eg, *Surrogacy Act 2022* (NT) s 49(1)(d) (excludes legal practitioners); *Surrogacy Act 2008* (WA) s 11 (excludes health service provision to the surrogate once pregnant).

28 *Parentage Act 2004* (ACT) ss 42, 44; *Surrogacy Act 2010* (Qld) s 58; *Surrogacy Act 2008* (WA) s 11(2).

29 *Surrogacy Act 2022* (NT) ss 49, 51; *Surrogacy Act 2019* (SA) s 24 (excludes intended parents engaging in lawful arrangements); *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) s 9.

30 See, eg, *Parentage Act 2004* (ACT) s 44; *Surrogacy Act 2022* (NT) s 49.

31 Penalties vary significantly, ranging from a fine only (South Australia and Tasmania), up to imprisonment for two years, or both: *Parentage Act 2004* (ACT) s 43; *Surrogacy Act 2010* (NSW) s 10 (a higher penalty applies for advertising a commercial arrangement; no penalty applies for unpaid advertising of a non-commercial arrangement); *Surrogacy Act 2022* (NT) s 50; *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2019* (SA) s 26; *Surrogacy Act 2012* (Tas) s 41; *Assisted Reproductive Treatment Act 2008* (Vic) s 45; *Surrogacy Act 2008* (WA) s 10; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 152. This Act commences mid-2027.

32 *Surrogacy Act 2010* (Qld) s 55; *Assisted Reproductive Treatment Act 2008* (Vic) s 45.

33 *Surrogacy Act 2012* (Tas) s 41.

- in New South Wales, advertising for prohibited surrogacy is a criminal offence.[34] Unpaid advertising for 'altruistic' surrogacy arrangements is permitted.[35]

Problems with the current prohibitions on facilitation and advertising

2.28 As outlined above, few jurisdictions restrict the prohibition on advertising to prohibited surrogacy arrangements.[36] Further, in some jurisdictions it is prohibited for anyone to facilitate introductions (for reward),[37] or to assist parties to enter into any surrogacy arrangement, including lawful arrangements.[38]

2.29 This is problematic for two reasons:

- First, as a matter of principle, it places a restriction on conduct (facilitation, promotion or advertising) which is for a lawful purpose (a lawful surrogacy arrangement).
- Second, on a practical level, it presents a key barrier to the provision of support, and in turn creates a barrier to engagement in lawful surrogacy.

2.30 As existing laws recognise, surrogacy can be a legitimate form of family formation (see **Chapter 1**). As a matter of principle, unless there is good reason, the law should not interfere with the capacity of people to engage in a lawful activity and the law's approach should be consistent across all lawful activities. Surrogacy laws in Australia currently differentiate between acceptable surrogacy arrangements (which are regarded as lawful) and unacceptable surrogacy arrangements (which are rendered unlawful). Prohibiting conduct that encourages and facilitates wrongdoing has a logical, valid, and principled basis. Conversely, it is difficult to justify prohibiting conduct that encourages or facilitates conduct that the law does not regard as involving any wrongdoing.[39]

2.31 As discussed above, the rationale for these prohibitions may stem from historical concerns about the ethics of surrogacy. However, the laws of each jurisdiction now

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34 *Surrogacy Act 2010* (NSW) s 10. The rationale behind this prohibition was that paid advertisements for altruistic surrogacy may increase the risk of commercial surrogacy arrangements: New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26547 (John Hatzistergos).

35 *Surrogacy Act 2010* (NSW) s 10(2).

36 *Parentage Act 2004* (ACT) s 43; *Surrogacy Act 2022* (NT) s 50; *Surrogacy Act 2019* (SA) s 26.

37 *Surrogacy Act 2008* (WA) s 9. Western Australia has recently passed new legislation that does not retain this prohibition. Rather, the new Act permits intended parents and licensees to recruit surrogates for arrangements which are not for reward, provided they do not do so for valuable consideration: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 113. This Act commences in mid-2027.

38 See, eg, *Surrogacy Act 2022* (NT) s 49, which provides that it is an offence to intentionally provide or offer services for payment or reward, or to assist another person to enter any surrogacy arrangement. Legal practitioners providing legal advice are exempted from the prohibition.

39 This creates a legal inconsistency in which it is illegal for a person to advertise their willingness to do something legal: Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 143; Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference Joint Working Group (n 14) 21.

expressly permit certain surrogacy arrangements. As discussed in **Chapter 1**, this reflects changes in social norms, which accept that arrangements that are not for profit or reward are a valid form of family formation. In light of this transition, in the ALRC's view, there is no principled basis available to justify continuing a prohibition on the facilitation or promotion of lawful surrogacy. Further, for the reasons discussed below, the current prohibitions on promoting and facilitating lawful surrogacy are a barrier to domestic 'altruistic' surrogacy in Australia. The Terms of Reference call for the removal of such barriers.

2.32 Parties who wish to engage in a lawful surrogacy arrangement should be able to lawfully connect with each other or be lawfully connected with each other by others. Currently there is a vacuum in terms of support for people who wish to engage in lawful domestic surrogacy, including support in connecting parties so that they can engage in lawful surrogacy (see **Chapter 4**). Most intended parents and surrogates who engage in domestic surrogacy are known to each other.[40] However, for those who are not, prohibitions on advertising and the absence of professional matching services are key barriers to connecting.[41]

2.33 Specifically in relation to the prohibitions on advertising, we have heard that because the prohibition extends (in some jurisdictions) to advertising or promoting this can be confusing.[42] It can increase misinformation about surrogacy and cause significant delays for intended parents who lack the connections or the know-how to find a surrogate.[43] As a result, most intended parents and surrogates rely on social media and online forums to connect.[44] Some intended parents find it stressful, having to share their highly personal experiences on online forums, in an effort to connect with a surrogate.[45] As one intended parent explained:

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40 Anecdotally, 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*.

41 Name withheld, *Submission 22*; K Cox, *Submission 105*; Name withheld, *Submission 113*; S Jefford, *Submission 128*; Name withheld, *Submission 135*; Name withheld, *Submission 141*; L Ransome, *Submission 144*; Name withheld, *Submission 146*; Name withheld, *Submission 147*; Name withheld, *Submission 160*; Not published, *Submission 172*; Name withheld, *Submission 173*; Not published, *Submission 179*; Name withheld, *Submission 193*; Name withheld, *Submission 196*; Name withheld, *Submission 210*; Gorton (n 6) 135–6. See also 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 [1.15].

42 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 41) 5 [1.15].

43 See K Cox, *Submission 105*; Name withheld, *Submission 169*; Not published, *Submission 179*.

44 S Jefford, *Submission 128*; S Everingham, *Submission 129*; Not published, *Submission 172*. South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 117–18 [11.2.12]. See also Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 311 [10.42]–[10.45].

45 Allan (n 39) 142.

> it's been four years, and we are no closer. The laws are so restrictive that we've found ourselves hoping someone will respond to our Facebook story and offer to be a surrogate. Sadly, I don't think this response will ever happen.[46]

2.34 These online spaces are difficult to regulate and are often unmoderated,[47] which may result in unsuitable matches or exploitative behaviour.[48]

2.35 An absence of legal mechanisms for promoting or facilitating lawful surrogacy stifles the development of professional support services that could assist parties, making it harder to access surrogacy in Australia.[49] It can result in parties relying on informal channels or unregulated intermediaries and creates the opportunity for exploitation. For example, one submission raised concerns about conflicts of interest in the surrogacy industry,[50] and another raised concerns about organisations taking 'administrative fees' and promoting themselves as 'matching' services, despite knowing matches are not guaranteed.[51] Due to challenges finding a surrogate, which are compounded by the absence of professional organisations lawfully providing matching services and restrictions on advertising and promotion, intended parents may seek to engage in less transparent arrangements, including overseas arrangements,[52] which may have more certainty but lack oversight and regulatory safeguards, increasing the risks of harm and exploitation (see **Chapter 13**).

Why facilitation and promotion of unlawful surrogacy should be prohibited

2.36 In order to avoid wrongdoing, the law commonly prohibits conduct which promotes or facilitates the wrongdoing that the law seeks to avoid. Those who promote and facilitate wrongdoing are justifiably prohibited from engaging in that conduct and justifiably regarded by the law as wrongdoers whose conduct needs to be deterred. There is no reason why that common and principled approach, taken by the law, should not apply in relation to the promotion and facilitation of unlawful surrogacy.

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46 Name withheld, *Submission 169*. Another cited experiencing 'feelings of helplessness and despair': Name withheld, *Submission 146*.

47 Michael Gorton, *Review of Assisted Reproductive Treatment: Consultation Paper* (Victoria State Government, 2018) 22.

48 K Cox, *Submission 105*; S Everingham, *Submission 129*.

49 Emeritus Professor Millbank highlights the value of professional assistance and intermediation: '[p]rofessional support services such as counselling, information-giving, and legal advice may make an important contribution to informed consent and fair agreements if they are provided by high quality and genuinely independent sources. There is no reason that such services have to be provided solely or mostly by private for-profit entities, although the contrast between the United States of America and the United Kingdom highlights that it is unreasonable to expect them to be provided by unfunded non-profit groups': see Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12(3) *Journal of Bioethical Inquiry* 477, 485. See also **Chapter 4**.

50 See, eg, Not published, *Submission 31*.

51 See, eg, S Jefford, *Submission 128*.

52 Not published, *Submission 2*; Name withheld, *Submission 22*; Not published, *Submission 103*; K Cox, *Submission 105*; S Jefford, *Submission 128*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Not published, *Submission 179*; Name withheld, *Submission 193*.

2.37 It is unclear how often facilitators seek to facilitate prohibited surrogacy arrangements, and if they do occur, it does not appear that non-compliance is prosecuted. However, it is clear that there is a risk of facilitators encouraging parties to enter into for-profit arrangements — particularly where parties are vulnerable (having exhausted other options) or where there is a power imbalance[53] — as such arrangements are likely to be more profitable for facilitators. Such conduct must be deterred. **Recommendation 1** and its implementation will set the parameters of unlawful domestic surrogacy. To support the effectiveness of that prohibition, **Recommendation 2** prohibits the promotion (including by advertising) and the facilitation of the unlawful conduct identified by **Recommendation 1**. This is necessary to reduce the risk of intended parents or surrogates being encouraged or facilitated to engage in unlawful surrogacy and thus avoids the risks of exploitation and harm that the prohibition of surrogacy for profit or reward is intended to avoid (see **Chapter 1**).

2.38 By confining the prohibition to unlawful surrogacy, in conjunction with calling for the repeal of the existing prohibitions, **Recommendation 2** addresses the problems identified above. As discussed earlier, this would reduce barriers to lawful surrogacy by making it easier for intended parents and surrogates to connect, and increase the accessibility of lawful domestic surrogacy. It would reduce stigma and facilitate the circulation of information about surrogacy (see **Recommendation 7**). It would also enable the creation of more transparent and better regulated spaces in which people can connect to engage in lawful surrogacy arrangements.[54] This would also allow for the establishment of Surrogacy Support Organisations ('SSOs') (see **Recommendation 8**) and for the viability of their proposed functions, helping to address the current lack of professional supports available for people seeking to engage in lawful surrogacy arrangements. Under the proposed regulatory framework, potential parties to a surrogacy arrangement could meet through and be supported by an SSO to engage in a lawful surrogacy arrangement. If implemented, this would provide safe ways for people to connect, be matched, and reach a lawful arrangement. In turn, the risk of harm and exploitation would be reduced.

2.39 For the reasons outlined above, the ALRC considers that a civil penalty regime can provide the deterrence necessary to discourage non-compliance with the prohibitions on facilitation and promotion of prohibited domestic arrangements.[55] While the ALRC recognises that the conduct of facilitators may be more egregious than that of intended parents and surrogates, in line with the principles which

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53 See Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275, 290–1; Australian Christian Lobby, *Submission 104*. See also Allan (n 39) 146.

54 Many submissions supported the need for such spaces: see Name withheld, *Submission 11*; Name withheld, *Submission 19*; Not published, *Submission 108*; Name withheld, *Submission 113*; S Everingham, *Submission 129*; Name withheld, *Submission 173*; Not published, *Submission 209*; Not published, *Submission 393*.

55 There was support for this among submissions: see, eg, Equality Australia, *Submission 253*. See also the 2019 Gorton Review, which recommended the advertising of non-prohibited ('altruistic') surrogacy arrangements be permitted: Gorton (n 6) rec 73.

guide the use of criminal sanctions (see **Chapter 12**), the ALRC is of the view that, unlike coercion (see **Recommendation 35**), neither promotion nor facilitation are sufficiently egregious (in terms of the risk of harm they pose) to warrant a criminal sanction. We also consider that a civil penalty regime is likely to be more effective in discouraging non-compliance (see **Chapter 12**).

Scope of the recommended prohibitions

2.40 Implementation of **Recommendation 2(a)** would require each state and territory to repeal existing criminal offences that prohibit 'facilitation' (or equivalent) of any form of surrogacy arrangement. Implementation of **Recommendation 2(b)** would require each state and territory to repeal existing criminal offences that prohibit 'advertising' (or equivalent) of any form of surrogacy arrangement.

2.41 The legislation that is introduced to implement these recommendations would provide that 'intentionally or recklessly facilitating (or attempting to facilitate), advertising, or otherwise promoting' a prohibited surrogacy arrangement is prohibited, with liability to a civil penalty for non-compliance.

2.42 The prohibitions would apply to anyone, including organisations, who 'facilitates' or 'advertises or otherwise promotes' a prohibited arrangement. 'Facilitation' and 'advertising or otherwise promoting' are broad expressions intended to capture all manner of conduct that falls within those descriptions.

2.43 However, there must be a close and direct connection, or nexus, between the act of facilitating and the prohibited surrogacy arrangement. An act that is remote from the facilitation of a prohibited surrogacy arrangement, like driving the surrogate to a medical appointment with an obstetrician, would not be captured.

2.44 Additionally, **Recommendation 2** would except from liability the conduct of a professional providing legal advice, or providing medical or other assistance to the surrogate in order to avoid or address injury or harm to the surrogate's health. The purpose of that exception is to better enable assistance of that kind to be provided, by making it clear that the assistance can be provided without fear that its provision may result in a contravention of the law.

2.45 The prohibitions would apply only to conduct which was 'intentional or reckless'. This is to ensure that unintentional conduct is not captured, but conduct by persons who should have reasonably known that the conduct being facilitated is unlawful, and were recklessly indifferent to that awareness, is captured. The ALRC also recommends that the prohibition extends to 'attempts', to capture those who have taken significant steps towards breaching the prohibition. This is to deter the risk of future attempts which could be successful.

3. A National Regulatory Framework

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Introduction

3.1 This chapter outlines the proposed reorientation of surrogacy regulation in Australia. It recommends replacing the fragmented, inconsistent, state and territory specific regulation of conduct mainly engaged in by Australians at a national and international level, with national or nationally-coordinated oversight and support. This would achieve more consistency and greater alignment with the national character of the subject of the regulation. That reorientation would result in regulation that is far more effective. A responsible and supportive national regulatory framework would be overseen by (preferably) a National Regulator which performs a range of functions (**Recommendation 6**), including facilitating nationally consistent practices such as by issuing guidelines and standards (**Recommendation 6 (a)–(g)**), effectuating compliance (**Recommendation 6 (h)–(k)**), overseeing surrogacy arrangements and nationally consistent support services (**Recommendation 6 (l)–(p)**), and educating

and increasing awareness about how Australians can engage in responsible surrogacy in Australia and overseas (**Recommendation 6 (q)**–**(s)**).

3.2 A National Regulator or, at a minimum, the national coordination of the functions the ALRC proposes for a National Regulator, is a central element of the reforms made throughout this Report. As discussed in this chapter, the ALRC appreciates that the engagement of Australians in surrogacy is a limited field and a standalone National Regulator for surrogacy may not be feasible. This chapter presents options, which may provide economies of scale. The discussion that follows should be read with this in mind.

3.3 The Terms of Reference for this Inquiry ask the ALRC to have regard to 'current inconsistencies in legislative arrangements across Australian jurisdictions' and review Australian surrogacy laws, policies, and practices, to identify legal and policy reforms, particularly 'proposals for uniform or complementary state, territory and Commonwealth laws'. **Recommendations 3**–**5** address this element of the Terms of Reference directly by responding to inconsistencies identified in this chapter and making recommendations for uniform surrogacy laws.

3.4 In addition, the Terms of Reference ask the ALRC to ensure that the practice of surrogacy in Australia protects and promotes the rights of parties to a surrogacy arrangement. Many of the recommendations made in this Report contribute to the creation of a regulatory regime which would protect and promote the human rights of the parties to a surrogacy arrangement, as well as the rights of children born through surrogacy. The recommendations in this chapter would facilitate the effectiveness of that regime and thus indirectly protect and promote those rights, consistently with the Terms of Reference.

3.5 For similar reasons, the recommendations in this chapter would facilitate, and thus indirectly respond to, the call made by the Terms of Reference to 'reduce barriers to domestic altruistic surrogacy in Australia'.

Promoting a nationally consistent approach through harmonisation

Recommendation 3

1. The Australian, state, and territory governments should enact a legal and regulatory framework for surrogacy that reflects the recommendations in this Report.
2. The legal and regulatory framework should be either uniform under Commonwealth legislation (preferred) or substantially consistent across state and territory laws (**Recommendation 4**).
3. This legislation should establish and empower a National Regulator to hold the responsibilities and carry out the functions outlined in **Recommendation 6**.
4. This legislation should establish a civil penalty regime and empower an appropriate court or courts to impose civil penalties and provide associated relief to address non-compliance with the prohibitions or obligations proposed by **Recommendations 1**–**2**, **33**–**35**, **38** and **40**–**45**.
5. The legal and 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 set out in delegated legislation, guidelines, or standards set by the National Regulator (**Recommendation 6**).

Recommendation 4

1. To implement the preferred approach in **Recommendation 3**, the Australian, state, and territory governments should enter into an intergovernmental agreement to refer appropriate powers to the Commonwealth Parliament. The Australian Government should then enact Commonwealth surrogacy legislation.
2. In the event that a referral of powers to the Commonwealth is not achievable, the Commonwealth, states, and territories should enter into an intergovernmental agreement to enact nationally consistent surrogacy laws through mirror, hybrid, or applied legislation.
3. Legislation developed under any of the options in paragraphs 1 or 2 should adopt consistent and updated terminology.

Recommendation 5

Legislation should require a statutory review of the operation of the legal and regulatory framework for surrogacy (**Recommendation 4**) after an appropriate period (between five to seven years).

A 'patchwork' of state and territory legal frameworks

3.6 In Australia, surrogacy arrangements are regulated predominantly at the state and territory level. Following passage of legislation in the Northern Territory in 2022,[1] all states and territories now regulate surrogacy via legislation.[2]

3.7 Surrogacy laws in Australia have developed through a complex combination of political pressures, influential events and social change. Surrogacy laws have evolved in distinct stages of reform, each shaped by differing concerns.[3] The first stage, emerging in the late 1980s and early 1990s, largely responded to public anxiety about the implications of newly-developed assisted reproductive technology ('ART'). Often described as a period of 'moral panic', lawmakers responded cautiously and conservatively, varying between policy approaches that prohibited surrogacy arrangements or regulated them restrictively.[4] During this period there was limited or no ability to transfer legal parentage from surrogates to intended parents.[5] The second stage emerged in the mid-to-late 2000s, marking a significant shift which 'moved the law from refusing to countenance any form of surrogacy to… endorsing altruistic surrogacy'.[6] At this time, public discourse and national efforts encouraged reform by promoting a more consistent and permissive approach across jurisdictions.[7]

3.8 As a result, there is now a degree of similarity in surrogacy legislation among states and territories. For example, the following policy settings are largely the same in most states and territories:

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1 *Surrogacy Act 2022* (NT).

2 *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (Qld); *Surrogacy Act 2019* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic). In Western Australia, the current Act is the *Surrogacy Act 2008* (WA). However, this will be repealed in mid-2027 and replaced by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA).

3 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 170.

4 Ibid 170–1.

5 Ibid 173–4.

6 Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275, 280.

7 Millbank (n 3) 176.

- Permitting traditional and gestational surrogacy arrangements.[8]
- Allowing intended parents who are single or in a couple to be eligible parties to a surrogacy arrangement, regardless of gender or sexual orientation.[9]
- Requiring a medical or social need for intended parents to be eligible parties to a surrogacy arrangement.[10]
- Making surrogacy arrangements unenforceable, with the exception of reimbursing the surrogate's reasonable costs.[11]
- Requiring the surrogacy arrangement to be entered into pre-conception.[12]
- Requiring each party to obtain legal advice[13] and counselling.[14]

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8 With the exception of Victoria, which does not expressly prohibit traditional surrogacy, but allows only gestational surrogacy arrangements to be approved and to receive services from registered assisted reproductive technology service providers: *Assisted Reproductive Treatment Act 2008* (Vic) ss 39, 40(1)(ab).

9 *Parentage Act 2004* (ACT) ss 23, 27; *Surrogacy Act 2010* (NSW) ss 5(6), 25; *Surrogacy Act 2022* (NT) ss 3, 16; *Surrogacy Act 2010* (Qld) s 9; *Surrogacy Act 2019* (SA) s 10(2)(b); *Surrogacy Act 2012* (Tas) s 5(1)(b); *Status of Children Act 1974* (Vic) s 17. With the exception of Western Australia, where intended parents must be either a heterosexual couple or single woman: *Surrogacy Act 2008* (WA) s 19(2). However, this requirement will be removed by new laws set to commence in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109.

10 *Surrogacy Act 2010* (NSW) s 30; *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2010* (Qld) ss 14, 22(2)(d); *Surrogacy Act 2019* (SA) s 10(4)(f); *Surrogacy Act 2012* (Tas) ss 7, 16(2)(h); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a). Western Australia currently requires intended parents to have a 'medical need' but has recently removed this requirement completely, effective from mid-2027: *Surrogacy Act 2008* (WA) s 19(2); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) part 6. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 September 2025, 2780 (Dr Jags Krishnan).

11 *Surrogacy Act 2010* (NSW) s 6; *Surrogacy Act 2022* (NT) ss 11, 12(3); *Surrogacy Act 2010* (Qld) s 15; *Surrogacy Act 2019* (SA) s 13; *Surrogacy Act 2012* (Tas) s 10; *Assisted Reproductive Treatment Act 2008* (Vic) s 44. In Western Australia, this is currently *Surrogacy Act 2008* (WA) s 7, however this will be amended by the following provision, set to commence in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 111. Legislation in the Australian Capital Territory does not specify whether surrogacy agreements are enforceable.

12 *Surrogacy Act 2010* (NSW) s 24(1); *Surrogacy Act 2022* (NT) s 15; *Surrogacy Act 2010* (Qld) s 22(2)(e)(iv). In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) s 17(e), however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(f).

13 *Parentage Act 2004* (ACT) s 28; *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2022* (NT) ss 20–1; *Surrogacy Act 2010* (Qld) s 22(2)(e)(i); *Surrogacy Act 2019* (SA) s 10(5); *Surrogacy Act 2012* (Tas) s 16(2)(a)(i); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), (2)(b), 43(c); *Status of Children Act 1974* (Vic) s 23(2)(b)(iii). In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) ss 17(c)(iii), 21(2)(c), however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(ii).

14 *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2010* (NSW) s 35; *Surrogacy Act 2022* (NT) ss 22–3, 25; *Surrogacy Act 2010* (Qld) ss 22(2)(e)(ii), 31; *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14, 15; *Surrogacy Act 2012* (Tas) s 16(2)(f); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), (2)(a)–(b), 43; *Status of Children Act 1974* (Vic) ss 23(2)(b)(i)–(ii), (3)(a). In Western Australia, this is currently *Surrogacy Act 2008* (WA) ss 17(c)(i)–(ii), 21(2)(b), however once new legislation commences in mid-2027 it will be the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(i).

- Reimbursing surrogates for reasonable costs and loss of earnings,[15] with variation in what constitutes a reasonable expense (see **Chapter 8**).
- Automatically attaching legal parentage to the surrogate and their partner (if any),[16] and requiring a parentage order to transfer legal parentage to the intended parents.[17]
- The timeframe for making an application for a parentage order.[18]
- Prohibiting 'commercial' surrogacy arrangements.[19]

15 *Parentage Act 2004* (ACT) ss 24, 28D; *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. In Western Australia, this is currently *Surrogacy Act 2008* (WA) s 6, however once new legislation commences in mid-2027 it will be the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 107.

16 The gestating person will be a legal parent: *Parentage Act 2004* (ACT) ss 11(1)–(2); *Status of Children Act 1996* (NSW) ss 14(1)(b), (1A)(b), (4); *Status of Children Act 1978* (NT) s 5C; *Status of Children Act 1978* (Qld) ss 19(2)(a), 19E(2)(a), 23(2)(a); *Family Relationships Act 1975* (SA) s 10C(1); *Status of Children Act 1974* (Tas) s 10C(3); *Status of Children Act 1974* (Vic) ss 10E(2)(a), 13(1)(a), 14(1)(a), 15(1)(a), 16(1)(a). In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) s 14 (meaning of 'birth parents'), however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 32(1).

17 *Parentage Act 2004* (ACT) s 29; *Surrogacy Act 2010* (NSW) s 39; *Surrogacy Act 2022* (NT) s 37; *Surrogacy Act 2010* (Qld) s 39; *Surrogacy Act 2019* (SA) s 18; *Surrogacy Act 2012* (Tas) s 26; *Status of Children Act 1974* (Vic) s 21. In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) s 26, however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 119. We also note Victoria calls these orders 'substitute parentage orders': *Status of Children Act 1974* (Vic) s 22.

18 Applications generally cannot be made until one month post-birth: *Parentage Act 2004* (ACT) ss 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). In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) ss 20(2)–(3), however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 122(2).

19 The legislation in most Australian jurisdictions uses the term 'commercial' surrogacy, and generally defines it to mean a surrogacy arrangement where the surrogate receives payment beyond reimbursement of reasonable expenses: *Parentage Act 2004* (ACT) ss 40–1; *Surrogacy Act 2010* (NSW) ss 7–9; *Surrogacy Act 2022* (NT) ss 12, 48; *Surrogacy Act 2010* (Qld) ss 10, 11, 56–7; *Surrogacy Act 2019* (SA) ss 11, 23; *Surrogacy Act 2012* (Tas) ss 8, 9, 40. Victoria and Western Australia do not use the terminology 'commercial' surrogacy. Rather, Victoria prohibits surrogacy for 'benefit or material advantage' or is 'for reward', respectively: *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 8. Western Australia has recently passed the new legislation which retains this prohibition (and increases the fine, but removes imprisonment as a sanction): *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107, 112. However, it should be noted that this Act has been passed but is not yet in force.

- Prohibiting advertising of surrogacy arrangements in certain circumstances.[20]
- Making decisions as to parentage that are in the best interests of the child.[21]

3.9 However, significant variation remains between each state and territory's regulatory framework for surrogacy. This can be attributed to variations in the 'history, politics and policies of that particular State or Territory, regarding surrogacy and the regulation of fertility treatment more broadly'.[22] Despite the similarities identified in the previous paragraph, state and territory legislation diverge in a number of ways, including:

- Only Victoria and Western Australia currently require approval of surrogacy arrangements before parties attempt to achieve a pregnancy.[23] After legislation commences in mid-2027 to abolish this requirement in Western Australia,[24] approval will only be required in Victoria.
- The terminology used in legislation varies, with some referring to surrogates as the 'birth parent',[25] 'birth mother',[26] or 'surrogate mother'.[27] While most states and territories employ the term 'intended parent',[28] some use 'arranged parent'.[29]

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20 Penalties vary significantly, ranging from a fine only (South Australia, Tasmania), up to imprisonment for three years, or both: *Parentage Act 2004* (ACT) s 43 (commercial arrangement only); *Surrogacy Act 2010* (NSW) s 10 (any arrangement; higher penalty for commercial arrangement; no penalty if unpaid advertising for non-commercial arrangement); *Surrogacy Act 2022* (NT) s 50 (commercial arrangement only); *Surrogacy Act 2010* (Qld) s 55 (any surrogacy arrangement); *Surrogacy Act 2019* (SA) s 26 (where advertising is for valuable consideration); *Surrogacy Act 2012* (Tas) s 41 (any surrogacy arrangement, where advertising is for, or in anticipation of, payment); *Assisted Reproductive Treatment Act 2008* (Vic) s 45 (any surrogacy arrangement); *Surrogacy Act 2008* (WA) s 10 (surrogacy arrangement for reward only); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 152 (surrogacy arrangement for reward only). It should be noted that this Act has been passed but is not yet in force.

21 *Parentage Act 2004* (ACT) s 28H; *Surrogacy Act 2010* (NSW) s 22; *Surrogacy Act 2022* (NT) s 34; *Surrogacy Act 2010* (Qld) s 22; *Surrogacy Act 2019* (SA) s 18(5); *Surrogacy Act 2012* (Tas) s 16(2)(k); *Status of Children Act 1974* (Vic) s 22. In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) s 21(2)(g), however once new legislation commences in mid-2027 it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 123(1)(a).

22 Ronli Sifris, 'Surrogacy' in Ben White et al (eds), *Health Law in Australia* (Thomson Reuters, 4th ed, 2023) 533, 539.

23 *Assisted Reproductive Treatment Act 2008* (Vic) s 39; *Surrogacy Act 2008* (WA) s 16.

24 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 306.

25 See, eg, *Parentage Act 2004* (ACT) s 23; *Surrogacy Act 2012* (Tas) s 6(2).

26 See, eg, *Surrogacy Act 2010* (NSW) s 5(5); *Surrogacy Act 2010* (Qld) s 8; *Surrogacy Act 2012* (Tas) s 5; *Surrogacy Act 2008* (WA) s 3. However, Western Australia will use the term 'birth parent' following commencement of new legislation in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 12(1).

27 *Surrogacy Act 2022* (NT) s 3; *Surrogacy Act 2019* (SA) s 10; *Assisted Reproductive Treatment Act 2008* (Vic) s 40.

28 *Parentage Act 2004* (ACT) s 23; *Surrogacy Act 2010* (NSW) s 5(6); *Surrogacy Act 2022* (NT) s 3; *Surrogacy Act 2010* (Qld) s 9(1); *Surrogacy Act 2019* (SA) s 10; *Surrogacy Act 2012* (Tas) s 5(1).

29 *Surrogacy Act 2008* (WA) s 3. However, new legislation set to commence in mid-2027 uses the term 'intended parent': *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 16(1).

- The minimum age of surrogates and intended parents varies between 18 years old in some states and territories,[30] and 21 or 25 in others (see **Chapter 5**).[31]
- In most states and territories intended parents must be living in the respective jurisdiction,[32] while the Northern Territory simply requires intended parents to be Australian citizens or residents.[33] Many states and territories do not stipulate citizenship or residency requirements for surrogates, but those that do require surrogates to be Australian citizens or permanent residents (see **Chapter 5**).[34]
- Only Tasmania, Victoria, and the current Western Australian laws require surrogates to have given birth previously (see **Chapter 5**).[35]
- While most jurisdictions do not require a criminal history check of intended parents or surrogates, South Australia requires intended parents to provide surrogates with a criminal history report (see **Chapter 5**).[36]
- While every state and territory requires parties to obtain legal advice, some allow this requirement to be waived or prescribe different matters to be covered by advice (see **Chapter 6**).[37]

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30 *Parentage Act 2004* (ACT) ss 28B, 28C(1). However, in certain states and territories, the parties can only be under 25 years old with the approval of a counsellor or the local court: ibid s 28C(2); *Surrogacy Act 2010* (NSW) ss 27–9; *Surrogacy Act 2022* (NT) ss 17(2), 18(1)(a), 34(2), (3).

31 *Surrogacy Act 2010* (NSW) s 27(1); *Surrogacy Act 2010* (Qld) ss 22(2)(f), 22(2)(g)(i); *Surrogacy Act 2019* (SA) ss 10(3)(a), (4)(a); *Surrogacy Act 2012* (Tas) ss 16(2)(b)–(c); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b); *Surrogacy Act 2008* (WA) s 17(a)(i). We note that in Tasmania the minimum age for surrogates is 25 but the minimum age for intended parents is 21: *Surrogacy Act 2012* (Tas) ss 16(2)(b)–(c). In Victoria there does not appear to be a minimum age for intended parents. Under the current law in Western Australia the minimum age for surrogates is 25 years, and at least one intended parent must be at least 25 years old: *Surrogacy Act 2008* (WA) ss 17(a)(i), 19(1)(a). However, this will be amended to 18 years for all parties by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1), which will commence in mid-2027.

32 *Surrogacy Act 2010* (NSW) s 32; *Surrogacy Act 2010* (Qld) ss 22(2)(g)(ii), 23(2)(a); *Surrogacy Act 2019* (SA) ss 10(4)(c), (d); *Surrogacy Act 2012* (Tas) s 16(2)(g); *Status of Children Act 1974* (Vic) s 20(1). Currently, Western Australia requires intended parents to reside in Western Australia when the parentage order is sought: *Surrogacy Act 2008* (WA) s 19(1)(a). The new Western Australian Act, once commenced in mid-2027, will continue this position: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 123(1)(c).

33 *Surrogacy Act 2022* (NT) s 18(1)(b).

34 Ibid s 17(b); *Surrogacy Act 2019* (SA) s 10(3)(c).

35 *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). However, this requirement was recently removed in Western Australia by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

36 *Surrogacy Act 2019* (SA) s 10(4)(g).

37 *Parentage Act 2004* (ACT) s 28; *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2022* (NT) s 20; *Surrogacy Act 2010* (Qld) s 22(2)(e)(i); *Surrogacy Act 2019* (SA) ss 4, 10(5)(b); *Surrogacy Act 2012* (Tas) s 16(2)(a); *Assisted Reproductive Treatment Act 2008* (Vic) s 43. In Western Australia, the provision is currently *Surrogacy Act 2008* (WA) s 17(c)(iii). However, under new legislation set to commence in mid-2027, this will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(ii).

- In all states and territories except for Queensland, Victoria and Western Australia, there is a requirement for surrogacy agreements to be in writing (see **Chapter 7**).[38]
- There are inconsistencies between jurisdictions as to the range of categories of expenses incurred by a surrogate which are recoverable (see **Chapter 8**).
- The parentage order process, including the prerequisites for an order to be made, which requirements may be dispensed with and why, and which requirements may not be dispensed with, differs between jurisdictions (see **Chapter 10**).[39]
- Only some states and territories have established pathways for people born through surrogacy to access information about their gestational origins (see **Chapter 11**).[40]
- Overseas commercial surrogacy arrangements are prohibited in the Australian Capital Territory, New South Wales, and Queensland, but not elsewhere (see **Chapter 13**).[41]

3.10 Subsequent chapters of this Report compare different elements of the legislation in greater detail.

3.11 There is an additional layer of regulation at the Commonwealth level. In circumstances where state or territory laws do not enable the intended parents to become the child's legal parents, the *Family Law Act 1975* (Cth) may, in some circumstances, provide an alternative vehicle, at least for orders of parental responsibility if not legal parentage.[42] Commonwealth laws also regulate citizenship and passports for children born through overseas surrogacy (see **Chapter 13**). Finally, Commonwealth laws are also relevant in the context of Medicare subsidies to ART services (see **Chapter 9**).

This system creates fragmentation and confusion

3.12 The ALRC has heard consistently from people with personal experience of surrogacy that this 'patchwork' of Australian surrogacy laws creates a range of difficulties and inequalities for surrogates and intended parents.

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38 *Parentage Act 2004* (ACT) s 26; *Surrogacy Act 2010* (NSW) s 34; *Surrogacy Act 2022* (NT) s 14(1); *Surrogacy Act 2010* (Qld) s 22(2)(e)(v); *Surrogacy Act 2019* (SA) s 10(5)(a); *Surrogacy Act 2012* (Tas) s 16(2)(e); *Surrogacy Act 2008* (WA) s 17(b); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 109(1)(c)–(d).

39 The precise formulation varies slightly between the states and territories, but generally includes 'exceptional circumstances' and/or 'best interests of the child': see, eg, *Parentage Act 2004* (ACT) s 28H(3)(b); *Surrogacy Act 2010* (NSW) s 18(2).

40 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 25D(3); *Assisted Reproductive Technology Act 2007* (NSW) ss 41C, 41E, 41F; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28N(3); *Births, Deaths and Marriages Registration Act 2023* (Qld) s 23; *Assisted Reproductive Technology Act 2024* (Qld) s 44; *Assisted Reproductive Treatment Act 2008* (Vic) s 147; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 12, 97.

41 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b). A prohibition will come into effect In Western Australia when new legislation commences in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151.

42 For a detailed discussion of Commonwealth parentage laws see **Chapter 10**.

3.13 The complexity of the legislative landscape is challenging to navigate and confusing for surrogates, intended parents and those considering surrogacy. This experience, and the resulting stress and anxiety, was frequently reported in submissions.[43] For example, we heard that

> having completed a successful journey…I've come to fully appreciate just how complex and inconsistent our surrogacy laws are across Australia .... The patchwork of laws across the country creates inconsistency, confusion, and discrimination.[44]
>
> [i]nconsistent laws create legal and administrative burdens on the parties, and undermine the efficiency of the domestic system. In some cases, this may drive intended parents to pursue surrogacy overseas.[45]
>
> [t]hrough my personal experience and my current role supporting many intended parents across Australia, I have seen firsthand how confusing and inconsistent state laws can be.[46]
>
> [i]nconsistency of laws ... can also lead to unintended outcomes, when individuals rely on information erroneously which is not applicable in their residing state or territory. The LGBTIQA+ community often relies on peer-to-peer advice and Switchboard's members have observed how misinformation can easily be passed around in spaces for LGBTIQA+ people interested in starting a family.[47]

3.14 Research and commentary have also recognised this problem. In a 2024 survey of surrogates, intended parents, and surrogacy professionals, participants reported finding the differences between state and territory laws frustrating.[48] The 2018 South Australian Law Reform Institute Report on surrogacy noted widespread complaints about complex and inaccessible surrogacy laws, including one academic labelling them an 'absolute nightmare'.[49] Professor Millbank has described a high degree of confusion among intended parents and surrogacy professionals, evident from media reporting and case law, particularly relating to parentage.[50]

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43 Name withheld, *Submission 161*; Name withheld, *Submission 162*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Name withheld, *Submission 185*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 204*; Name withheld, *Submission 207*; Not published, *Submission 209*; Not published, *Submission 217*; Not published, *Submission 220*; S Swanepoel, *Submission 226*; Equality Australia, *Submission 253*; Name withheld, *Submission 259*; ANZICA, *Submission 277*; Name withheld, *Submission 278*; Name withheld, *Submission 279*; Switchboard Victoria, *Submission 285*; Name withheld, *Submission 335*; Name withheld, *Submission 383*.

44 Name withheld, *Submission 279*.

45 Equality Australia, *Submission 253*.

46 S Swanepoel, *Submission 226*.

47 Switchboard Victoria, *Submission 285*.

48 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, 11.

49 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 128 [13.1.1].

50 Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 1, 24.

3.15 The problem of fragmented and inconsistent laws is compounded by the inter-jurisdictional nature of surrogacy in Australia. It is now common for surrogacy arrangements in Australia to take place across state and territory borders.[51] This may be because friends or family members reside in different states, or because intended parents were only able to find a surrogate who lives in another jurisdiction. Gamete donors or ART service providers may, for a range of reasons, be located in a different jurisdiction from intended parents or surrogates. It is also not uncommon for parties to re-locate to access surrogacy in a state or territory with 'more favourable' surrogacy laws.[52] We heard through submissions that, in the context of inter-jurisdictional surrogacy arrangements, inconsistent laws are confusing and can exacerbate parties' anxiety.[53] As noted by the 2016 Surrogacy Matters Report, differences in laws applying to inter-jurisdictional arrangements can undermine important safeguards in the surrogacy process,[54] particularly if parties travel to avoid certain safeguards.

3.16 The inconsistent legislative landscape also leads to inequality of access, protections, and outcomes for intended parents and surrogates across Australia. The 2016 Surrogacy Matters Report found that surrogacy legislation 'varies widely in scope and application', which leads to inequality through discriminatory provisions, and minimal process requirements in some jurisdictions.[55] Legislative inconsistency means that the rights and protections available to parties may be different depending on where they live or where the arrangement takes place. This inequality may disproportionately affect groups who already face additional barriers to family formation, including LGBTIQA+ individuals, people with disabilities, and those in regional or remote areas, for whom navigating inconsistent laws across jurisdictions may be particularly burdensome. Moreover, as discussed above, these disparities have emerged due to reactive and piecemeal reforms to surrogacy laws.

3.17 This inequality is inconsistent with the principle that all Australians should have equal access to legal protections and entitlements regardless of their state

51 South Australian Law Reform Institute (n 49) 46 [4.1.1].

52 As noted in: Name withheld, *Submission 37*; Not published, *Submission 215*; Not published, *Submission 337*; 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 [1.13]; Kneebone, Hammarberg and Beilby (n 48) 12; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 118.

53 Name withheld, *Submission 196*; ANZICA, *Submission 277*; Name withheld, *Submission 279*; Virtus Health, *Submission 397*.

54 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 52) 7 [1.22].

55 Ibid 3 [1.9], 5 [1.12].

or territory of residence.[56] It is also difficult to reconcile with Australia's obligations under international human rights instruments, including the child's right to identity.[57] Children born through surrogacy are particularly affected by this fragmentation, as their legal parentage, identity rights, and access to information about their gestational origins differ depending on the jurisdiction in which the arrangement takes place (see **Chapters 10** and **11**).

3.18 To summarise, legislative inconsistency among the current 'patchwork' of state and territory surrogacy laws is not serving children born through surrogacy or Australian surrogates and intended parents, and presents a barrier to domestic surrogacy arrangements in Australia. Some submissions described these complex and uncertain laws as a barrier to accessing surrogacy in Australia.[58] Ultimately, this may drive intended parents to seek a simpler process overseas.[59] Fragmentation and inconsistency also place a significant burden on intended parents, surrogates, and surrogacy professionals to steer through the regulatory landscape successfully, or risk an adverse court decision on parentage,[60] which is not in the best interests of children born through surrogacy. More broadly, this also increases the likelihood of accidental non-compliance with important laws and safeguards intended to protect parties' rights.[61]

3.19 Further, and importantly, existing laws vary across jurisdictions in relation to the engagement by Australians in overseas surrogacy. The variation is extreme: some jurisdictions impose a blanket prohibition on overseas commercial surrogacy,[62] while others say nothing at all. This is a particularly troubling variation. First, because there can be no justification for the law treating the overseas conduct of one Australian differently to the same overseas conduct of another Australian, on the basis of the state or territory in which they reside. That result should be regarded as antithetical to the very creation of Australia as a federation. Secondly, given that the majority of the engagement in surrogacy by Australians is engagement in overseas surrogacy,

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56 Dr Opeskin argues that 'diversity between State laws may be acceptable in some matters'' but that 'certain laws protecting public health ought to be available to all Australians on an equal basis irrespective of their State of residence': Brian R Opeskin, 'The Architecture of Public Health Law Reform: Harmonisation of Law in a Federal System' (1998) 22(2) *Melbourne University Law Review* 337, 357. International human rights instruments to which Australia is a party protect the right to equality before the law: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 3.

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

58 Name withheld, *Submission 28*; S Jefford, *Submission 128*; ANZSREI, *Submission 346*.

59 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, 1452; Name withheld, *Submission 279*; Not published, *Submission 337*; Law Council of Australia, *Submission 342*; ANZSREI, *Submission 346*.

60 See **Chapter 10**.

61 Arie Freiberg, *Regulation in Australia* (Federation Press, 2nd ed, 2025) 197.

62 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b). A prohibition will come into effect in Western Australia when new legislation commences in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151.

this inconsistency between jurisdictions is apt to be regarded as the most significant inconsistency of all. This problem is dealt with in greater detail in **Chapter 13**.

Reasons for a nationally consistent surrogacy framework

3.20 Surrogacy laws in Australia are fragmented, confusing, and challenging to navigate for parties in surrogacy arrangements. This also results in unequal protections and outcomes for Australians, with unequal access to surrogacy (including overseas surrogacy) depending on the jurisdiction in which parties reside and inconsistent application of safeguards aimed at protecting the rights of intended parents, surrogates, and children born through surrogacy.

3.21 A new unified framework is required to institute a clear, consistent, responsible, and supported surrogacy regime for domestic surrogacy. A regime equally applicable to all Australians is also required to better ensure responsible engagement by Australians in overseas surrogacy. This would be a meaningful reorientation of Australia's surrogacy framework:

> [n]ationally consistent surrogacy laws would provide stakeholders and the wider community with assurances that surrogacy is a safe and supported path to parenthood where the surrogate, intended parent(s), and child's rights, autonomy, and dignity are carefully considered and preserved.[63]

> [a] national framework supported by an oversight body … is essential to ensure greater clarity, accessibility and accountability for surrogacy in Australia.[64]

3.22 **Recommendation 3** seeks to establish a reformed regulatory regime for surrogacy, with a high degree of national consistency. This must involve legislation that is substantially consistent across all state and territories and, preferably, addressed on a national level by one act of the Commonwealth Parliament. It should preferably involve a single National Regulator with the powers and functions discussed below in relation to **Recommendation 6**. It should also establish a civil penalty regime and empower a court (or courts) to impose civil penalties and provide associated relief to deal with non-compliance with the prohibitions and obligations proposed by **Recommendations 1**–**2**, **33**–**35**, **38**, and **40**–**45**. This part of **Recommendation 3** is discussed in **Chapters 2** and **12**.

3.23 The recommendations made throughout this Report would create a supported and responsible framework for the practice of domestic and overseas surrogacy. They have been designed to overcome identified issues in existing surrogacy laws and significantly improve the way Australians access and engage in surrogacy. These laws and mechanisms must be adopted consistently across Australia, both to fulfil their objectives and to avoid recreating the problems arising from the existing fragmented framework.

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63 Australian Nursing and Midwifery Federation, *Submission 375*.
64 Equality Australia, *Submission 253*.

3.24 Australia's domestic surrogacy process would be strengthened if all Australian states and territories adopted a uniform approach to the recommendations in this Report. If inconsistencies between jurisdictions remain, the benefits discussed above would be diminished. In particular, inconsistency would limit the potential impact of reforms aimed at improving surrogacy practices in Australia, such as reducing their ability to facilitate matches between intended parents and surrogates. National consistency would also better ensure that legislative safeguards that protect the rights of parties and children born through surrogacy are applied consistently across the board.

3.25 It is important to appreciate that the functions proposed for the National Regulator are significant and in many respects critical to the effective operation of the proposed regime. Much of the regulatory detail will be provided by the National Regulator exercising its standard setting and guidance functions, as discussed below. The allocation of those functions to a single entity, rather than several, would enable ongoing national consistency. However, this does not preclude those functions being carried out by a regulatory entity with a remit that extends beyond surrogacy alone. Ultimately, nationally consistent laws are crucial for establishing this regulatory authority.

3.26 Obviously, achieving the implementation of a reformed national and consistent regulatory framework will require high-level cooperation between the Australian, state, and territory governments.

3.27 National consistency would have the overarching benefit of enhancing Australians' confidence in the domestic surrogacy process, and improving the navigability of surrogacy in Australia. It would strengthen domestic surrogacy options, and encourage Australians to rely on domestic surrogacy, rather than the more problematic overseas surrogacy pathways (see **Chapter 1**).

3.28 Surrogacy needs to be better recognised as a national issue requiring national, or at the least nationally consistent, regulation. State and territory-based regulation may have been appropriate at an earlier time but is no longer justifiable. As discussed above, it is now common for surrogacy arrangements to take place across state and territory borders, and Australians mostly engage in surrogacy beyond Australia's borders.

3.29 Legislative frameworks for surrogacy exist to mitigate the risk that surrogacy practices engaged in by Australians would be exploitative or problematic. Australians' engagement in potentially exploitative practices overseas is clearly a matter of national concern that requires a national response. Further, whether or not Australians engage in surrogacy overseas responsibly, overseas surrogacy engages issues of national responsibility and concern, such as visas, passports, and the grant of citizenship to children born through overseas surrogacy. Most Australian children born through surrogacy are born overseas, indicating the need for national, or at the least, nationally consistent, legislation. That is particularly so given Australia's international obligations in relation to the rights of a child.

3.30 Harmonising Australia's surrogacy laws received overwhelming support in submissions.[65] More specifically, submissions highlighted several benefits to harmonisation, including:

- establishing a surrogacy system that is clear, consistent and reduces legal uncertainty;[66]
- reducing administrative burdens and making surrogacy simpler and more efficient;[67]
- removing the impetus to 'forum shop', including by travelling overseas to access surrogacy;[68] and
- providing fair and equal access to domestic surrogacy regardless of the jurisdiction in which it takes place.[69]

3.31 The practice of surrogacy involves the application of health law, family law, and other areas of law. There are examples of Australian states, territories, and the Commonwealth having collaborated to harmonise laws in these areas when considered appropriate or necessary, which serve as strong foundations and precedents for the harmonisation of Australia's surrogacy laws.

3.32 In the 1980s, all states and territories except for Western Australia referred legislative powers in relation to children to the Commonwealth Parliament.[70] This was done to address gaps that had become evident in the Commonwealth's existing powers relating to children, which meant that Commonwealth laws could only be used in relation to proceedings involving children of a marriage, but not ex-nuptial children.[71] Together with the Commonwealth Parliament's constitutional powers, the referrals have enabled a national system (excluding Western Australia) for comprehensively regulating marriage, divorce, the maintenance, custody, and parentage of children, and family property upon separation.[72] That process could be utilised for surrogacy law reform.

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65 See, eg, Name withheld, *Submission 158*; Name withheld, *Submission 196*; Name withheld, *Submission 205*; Not published, *Submission 274*; Switchboard Victoria, *Submission 285*; Law Council of Australia, *Submission 342*; Virtus Health, *Submission 397*.

66 Name withheld, *Submission 81*; Not published, *Submission 184*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 207*; Not published, *Submission 209*; Equality Australia, *Submission 253*; Name withheld, *Submission 259*; Name withheld, *Submission 279*; Name withheld, *Submission 329*; ANZICA, *Submission 368*; Not published, *Submission 385*.

67 Not published, *Submission 184*; Not published, *Submission 209*.

68 A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 274*; Name withheld, *Submission 279*; Name withheld, *Submission 329*.

69 Not published, *Submission 184*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 259*; Not published, *Submission 274*; Name withheld, *Submission 279*; Name withheld, *Submission 343*; ANZICA, *Submission 368*; Not published, *Submission 385*.

70 Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 19.

71 CCH Australia, *Master Family Law Guide* (online at 1 August 2025) [¶1-030].

72 *Australian Constitution 1901* (Cth) ss 51(xxi), (xxii); *Commonwealth Powers (Family Law — Children) Act 1986* (NSW); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic). South Australia's referral does not include the parentage of children: *Commonwealth Powers (Family Law) Act 1986* (SA).

3.33 Several areas of Australian health law operate as 'national uniform regulation'. Each provides a legislative model that could be utilised for surrogacy. These legislative models include gene technology laws,[73] therapeutic goods laws,[74] health practitioner regulation,[75] food regulation,[76] and laws dealing with research involving human embryos and human cloning.[77] **Appendix E** sets these out in greater detail, including the corresponding structure used to establish a national regulator in each legislative scheme. This is also further discussed below.

3.34 There are circumstances when differences in the law between states and territories are appropriate. For example, environmental differences across Australia may necessitate environmental and construction laws that are tailored to local weather conditions.[78] The multiplicity of lawmakers across the Australian federation may also enable new laws and new approaches to be trialled in one state, before their adoption nationally.[79] However, the circumstances in which surrogacy occurs are largely uniform across Australia. The needs and behaviours of parties to a surrogacy arrangement do not vary widely between states and territories. The relevant social norms and values are largely consistent across the nation. Additionally, taking a uniform, national approach to the regulatory framework is appropriate for surrogacy because it so frequently takes place across state and territory borders and beyond Australia's borders.

3.35 Consistent calls to harmonise surrogacy laws have been made over many decades, from the 2009 Standing Committee of Attorneys-General Report,[80] through to the 2016 Surrogacy Matters Report,[81] and the 2018 South Australian Law Reform Institute Report.[82] Consistency of Australian surrogacy laws has repeatedly been highlighted as a necessary area for reform.

3.36 Further, the recommendations for national consistency in this Report have been made alongside recognition of the need for greater harmonisation of health-

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73 Gene technology is an example of national uniform legislation that uses a hybrid structure of applied and mirror legislation: Australasian Parliamentary Counsel's Committee, *Australian National Uniform Law Schemes and Associated Legislation of Participating Jurisdictions* (2020) 18–19.

74 Therapeutic goods legislation is an example of national uniform legislation that uses applied legislation: ibid 31.

75 Health practitioner regulation is an example of national uniform legislation that uses applied legislation: ibid 19.

76 Food regulation is an example of national uniform legislation that uses a hybrid structure of applied and mirror legislation: ibid 17–18.

77 Ibid 20–1.

78 Guzyal Hill, *National Uniform Legislation* (Springer, 2022) 91–2.

79 Stephen Duckett, 'Australia' in Katherine Fierlbeck and Howard A Palley (eds), *Comparative Health Care Federalism* (Routledge, 2015) 123, 123; Opeskin (n 56) 357–8.

80 Standing Committee of Attorneys General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009) 2.

81 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) rec 2.

82 South Australian Law Reform Institute (n 49) 48.

related laws more broadly. There are economic and equity benefits to harmonising health law,[83] and maintaining diversity through multiple state and territory regulatory regimes unnecessarily results in administrative and regulatory complexity.[84] Both the 2023 Ending the Postcode Lottery Report,[85] and the 2025 Rapid Review of Assisted Reproductive Technology Report,[86] have recently recommended increased regulative harmonisation in the field of ART. The ALRC's findings in this inquiry echo those findings and support the harmonisation of Australia's surrogacy laws.

Embedding flexibility in the regulatory framework for surrogacy

3.37 Good legislative design, including the appropriate use of delegated legislation, is vital for embedding flexibility in a regulatory framework.[87] **Recommendation 3** recommends the enactment of new surrogacy legislation that is structured according to modern principles of legislative design.[88] Those principles enable law to maintain its currency by responding to changed circumstances as effectively and efficiently as possible. Based on those principles, this recommendation proposes a legislative hierarchy in which primary obligations, rights, entitlements and prohibitions are dealt with by an act of Parliament, and prescriptive and corresponding detail, which helps to implement the obligations, rights, entitlements, and prohibitions in the act are dealt with in delegated legislation (regulations or other legislative instruments) or guidelines, codes of practice, or standards set or developed by a national regulator.

3.38 This reflects principles of good legislative design that modern legislative drafting practices largely follow. The ALRC has previously published on the principles of good legislative design, applicable to reforming the law,[89] some of which will be summarised here.

3.39 Collectively, primary and delegated legislation form a 'legislative hierarchy'.[90] Primary legislation refers to the legislation enacted by Parliament. Primary legislation may permit the making of delegated legislation. Delegated legislation is made by law

83 Opeskin (n 56) 357.

84 Gareth Griffith, *Commonwealth-State Responsibilities for Health: 'Big Bang' or Incremental Reform?* (Briefing Paper No 17/06, 2006) 66.

85 Greg Hunt and Rachel Swift, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Fertility Society of Australia and New Zealand and Reproductive Technology Accreditation Council, 2024) rec 1.

86 Euan M Wallace and Department of Health (Vic), *Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia* (Final Report, 2025) 66.

87 The ALRC has previously published on the principles of good legislative design in the Financial Services Legislation Inquiry. Many of these principles are applicable to reforming new human tissue legislation: see generally Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Final Report No 141, 2023) chs 4, 6.

88 See generally ibid; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

89 See generally Australian Law Reform Commission (n 87) chs 4, 6; Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

90 Australian Law Reform Commission (n 87) ch 6.

makers other than Parliament, in accordance with the delegation of legislative power identified by the primary legislation.

3.40 Primary legislation should contain provisions that should only be enacted by Parliament, usually matters of significant policy and principle.[91] A non-exhaustive list of matters that should go in primary legislation include provisions about:

- obligations, rights, entitlements, and prohibitions;
- criminal offences, civil penalties and coercive powers of a regulator;
- matters that have significant impact on human and civil rights; and
- creating powers to make delegated legislation in appropriate circumstances.[92]

3.41 Delegated legislation should contain provisions on technical matters and prescriptive detail that operationalises the intent of the primary act.[93] Regulations, guidelines and codes of practice, developed by a national regulator, would mostly concentrate on administering the law and helping users in interpreting the law.

3.42 **Recommendation 6** deals with regulatory content that is appropriate to be dealt with by a national regulator, without the need to engage the legislature. Illustrative examples include:

- appropriate licensing conditions for Surrogacy Support Organisations ('SSOs');
- the accreditation required for SSO staff who assess and approve surrogacy arrangements;
- the mandatory scale of maximum fees that SSOs may charge for their services;
- whether to approve surrogacy arrangements, and which applications should be referred by SSOs to the National Regulator or assessed by the National Regulator;
- what constitutes a reasonable cost incurred by surrogates, and how to determine this;
- the setting of an incidental costs allowance and maximum caps on the recovery of loss incurred by surrogates;
- the form and substance of a standardised draft surrogacy agreement; and
- guidance on responsible engagement in overseas surrogacy.

3.43 Many of these illustrative examples deal with regulation that requires regular updating in order that changed economic or other circumstances are addressed in a timely and efficient manner. For instance, the Responsible Overseas Surrogacy Guidelines would need to be updated as the laws and practices in overseas jurisdictions change, as they regularly do.

3.44 This recommended structure should provide a principled basis for a flexible and efficient legislative framework that can give effect to the recommendations for

91 Ibid 293–4.
92 Ibid 294–5.
93 Ibid 293–4.

reform made in this Report. It would be capable of addressing future reform in a manner which properly aligns the significance of the reform with the most appropriate law-making process for its implementation.

How national consistency can be achieved

3.45 **Recommendation 4** provides alternative options for how the proposed surrogacy legislation could be implemented to achieve uniform or substantially consistent laws. While any one of those alternative structures can achieve consistency, referred legislation affords the highest degree of harmonisation and provides the most stability and consistency over time.[94] It is the ALRC's preferred option.

3.46 To assist the Commonwealth and each of the states and territories in coming to a decision about the best structure to utilise, this section outlines what we heard in this Inquiry, and the advantages and disadvantages of each structure based on our research. The ALRC acknowledges that achieving nationally consistent surrogacy laws could pose a challenge due to the high degree of collaboration required between the Commonwealth, state, and territory governments, and because states may have different views about the extent of their legislative autonomy that should be retained. Legislative consistency across most, but not all, states and territories would compromise, but not necessarily defeat, the opportunity for harmonised surrogacy laws to be of significant utility to most Australians.

3.47 In addition, research suggests that high levels of legal consistency can be maintained if:[95]

- a national regulator is established;[96]
- the states and territories all implement national uniform legislation, and at a similar time;
- some legal consistency already exists, and governments and stakeholders are willing to cooperate to remove or reduce the remaining legal differences;[97]
- the reasons for law reform are driven by either the growth of the public sector, growth of business, changes in social values or the economy, or changes in science and technology;[98] and

94 Guzyal Hill, Yakub Sebastian and Ittai Bar-Siman-Tov, 'Modelling Sustainable Uniformity of the Australian National Uniform Legislation through Ordinal Regression' (2023) 11(3) *The Theory and Practice of Legislation* 232, 238.

95 The authors used an ordinal regression model on 69 national uniform legislation models, including mirror, applied, and hybrid (referred/applied or mirror/applied) legislation: Hill, Sebastian and Bar-Siman-Tov (n 94).

96 Hill, *National Uniform Legislation* (n 78) 107–8.

97 See generally ibid 129–30.

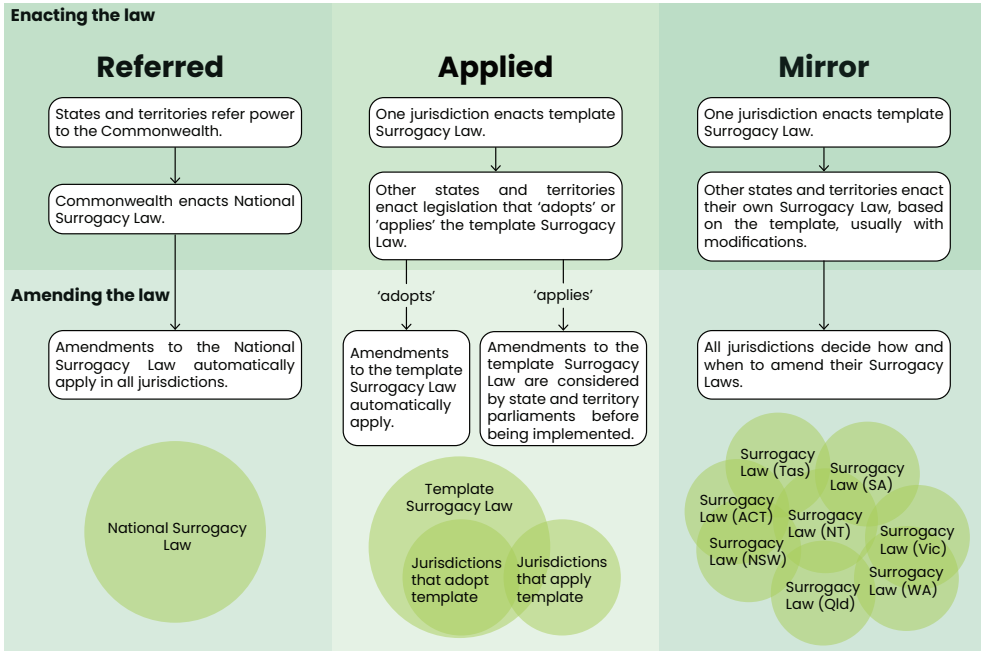
98 However, if the law reform was driven by changes due to a particular technology, there was less likelihood for high consistency to be found: Hill, Sebastian and Bar-Siman-Tov (n 94) 249–50.

- procedures are in place to ensure that any future amendments are implemented by all jurisdictions.[99]

3.48 Some of the submissions we received supported harmonisation generally with no expressed preference as to the structure of national uniform legislation implemented.[100] For these stakeholders, enacting uniform or substantially consistent surrogacy laws is the most important objective. Harmonised legislation was also generally supported in consultations, with some consultees preferring a referral of powers as the means to achieve such harmonisation.

3.49 **Figure 3.1** illustrates the central elements of three options for enacting national uniform legislation: referral of powers, applied legislation, and mirror legislation. The fourth option, hybrid legislation, is a combination of any of the first three options.

Figure 3.1: Referred, applied, and mirror legislation



99 Guzyal Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (2019) 31(1) *Bond Law Review* 81, 84, 106, 108; Hill, Sebastian and Bar-Siman-Tov (n 94) 240–1, 246–7.

100 See, eg, Name withheld, *Submission 158*; Name withheld, *Submission 196*; Name withheld, *Submission 205*; Switchboard Victoria, *Submission 285*; Not published, *Submission 274*; Law Council of Australia, *Submission 342*; Virtus Health, *Submission 397*.

Referred legislation

3.50 Some submissions expressed a preference for a legislative structure which involves a single Commonwealth Surrogacy Act through referral of state powers designed to provide greater legal certainty and consistency, though many also noted that this could be difficult to achieve.[101]

3.51 Referred legislation is a label used to describe legislation enacted by the Commonwealth Parliament under s 51(xxxvii) of the *Australian Constitution* in reliance on a referral of matters from state parliaments. The Commonwealth Parliament may extend referred legislation to the territories in reliance on s 122 of the *Australian Constitution*, commonly referred to as the 'territories power'.[102] Referred legislation is commonly facilitated and underpinned by an intergovernmental agreement, such as the type contemplated by **Recommendation 4**.[103]

3.52 There are several reasons why a referral of powers is the ALRC's preferred option for harmonising surrogacy laws. It would:

- achieve the highest degree of consistency;
- best promote the objectives of harmonisation by preventing variations from emerging over time;
- reflect and accommodate the inter-jurisdictional context of surrogacy;
- achieve a more efficient use of resources than separate state and territory laws; and
- align with the existing Commonwealth family law framework in relation to parentage.[104]

3.53 An additional benefit of a referral of powers is that it simplifies enforcement and regulation. Without a referral, there is a risk that a patchwork of constitutional heads of power may create gaps or uncertainty over whether and when federal or state regulators can enforce the law. To support enforcement with mirror and applied legislation, it may be necessary to rely upon provisions which confer powers to Commonwealth officials.

Applied legislation

3.54 Harmonisation through applied legislation involves a host jurisdiction drafting and enacting a template Act. This template is then enacted and applied in every other jurisdiction as an Act of the Parliament of that jurisdiction. For example, the

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101 S Jefford, *Submission 359*; ANZICA, *Submission 368*; L Ransome, *Submission 380*; K Cox, *Submission 389*; Not published, *Submission 393*; Virtus Health, *Submission 397*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*.

102 Hill, 'Referred, Applied and Mirror Legislation as Primary Structures of National Uniform Legislation' (n 99) 99.

103 Hill, *National Uniform Legislation* (n 78) 28.

104 *Australian Constitution 1901* (Cth) ss 51(xxi), (xxii); *Commonwealth Powers (Family Law — Children) Act 1986* (NSW); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic).

national regulation of health practitioners was achieved through applied legislation. This involved Queensland passing legislation as the host jurisdiction, and other states and territories passing legislation stating that the Queensland Act 'applied' or had been adopted in that state or territory.[105]

3.55 Applied legislation can be complicated to implement in comparison to referred and mirror legislation,[106] particularly in relation to amendments. This is because legislation can be applied in two different ways. Some states and territories adopt the legislation so that future amendments are adopted automatically. Others apply the legislation so that future amendments pass through the state or territory's parliament before being implemented. Either way, each jurisdiction retains the power to amend the applied Act. The intergovernmental agreement cannot specify a time limit for applying the initial template Act or amendments or require a state or territory to automatically adopt amendments. Doing so would infringe on the sovereignty of the state and risk the intergovernmental agreement being unconstitutional.[107] This means that if applied legislation is implemented, reform of new surrogacy legislation could occur at different times across Australia, and allow for some variations to emerge.[108]

3.56 The regulation of other areas of health law has seen a high degree of success in harmonisation using applied legislation or a hybrid of applied and mirror legislation, as opposed to mirror legislation alone. There has also been a record of these laws retaining substantial consistency over time because the relative rigidity of the applied structure limits amendments.[109] This would be an important feature to keep in mind if the power to make surrogacy laws is not referred to the Commonwealth.

3.57 Even though there is no referral of power, applied legislation could still be made with a Commonwealth template Act by using multiple heads of power under the *Australian Constitution*. If applied legislation is the preferred approach, the intergovernmental agreement must take into account the need for a constitutional basis to establish the National Regulator (**Recommendation 6**), and implement the legal parentage recommendations (**Recommendations 28** and **29**) (see discussion below).

Mirror legislation

3.58 Harmonisation through mirror legislation involves a host jurisdiction or the Australian Parliamentary Counsel's Committee drafting and enacting model

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105 See, eg, *Health Practitioner Regulation (National Uniform Legislation) Act 2010* (NT); *Health Practitioner Regulation National Law Act 2009* (Qld); *Health Practitioner Regulation National Law* (WA).

106 Hill, *National Uniform Legislation* (n 78) 32–3.

107 Guzyal Hill, 'Avoiding a "Catch 22": Major Lessons from a Meta-Analysis of Reports of the Parliament of Western Australia on Threats to Sovereignty by National Uniform Legislation' (2021) 33(1) *Bond Law Review* 37, 60–2.

108 Western Australia in particular is usually slower to implement national uniform legislation, and applied legislation in particular, due to the parliamentary processes that must be followed to meet their democratic accountability requirements: ibid 60–1.

109 Guzyal Hill, 'How Does the Area of Law Predict the Prospects of Harmonisation?' (2020) 41(1) *Adelaide Law Review* 267, 301–2.

legislation. The other states and territories then enact this legislation in their own jurisdiction, usually with some modifications.[110] Model surrogacy legislation was recommended in the 2016 Surrogacy Matters Report.[111]

3.59 This legislative structure can achieve high levels of initial consistency in the law but is at risk of diminishing in consistency over time. This is because it can be difficult to co-ordinate future amendments, and states and territories can make amendments and repeal their legislation at any time after enactment.[112] As the new surrogacy regulatory regime will likely require regular updating, mainly through use of delegated legislation and the standard setting role of the National Regulator, maintaining consistency of laws and regulations implemented through mirror legislation would be challenging and administratively burdensome for states and territories.

Hybrid legislation

3.60 If the necessary referral of powers by states and territories is not achievable for all states and territories, it remains open to some states and territories to refer while others could use applied legislation. If all states and territories prefer applied or mirror legislation, a limited referral could still be made to best effectuate some of the proposed reforms, like the establishment of a National Regulator and to confer jurisdiction on the Federal Circuit and Family Court of Australia. Each of these proposals is further discussed below.

3.61 As the hybrid structure is usually adopted when some jurisdictions wish to retain greater autonomy, that structure has the inherent disadvantage of encouraging inconsistencies.[113] This would not best meet the objectives of **Recommendation 3**, and is not the ALRC's recommended option.

Constitutional considerations

3.62 If the referred legislative model is not achievable, particular attention would need to be given to three elements of the proposed surrogacy framework, which should operate nationally:

- the National Regulator (**Recommendation 6**);
- implementing the administrative and judicial pathways to parentage, which would involve amendments to the *Family Law Act 1975* (Cth) (**Recommendations 28** and **29**); and
- implementing the Responsible Overseas Surrogacy Framework (**Recommendations 36**–**47**).

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110 Australasian Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (4th ed, 2018) 3; Hill, *National Uniform Legislation* (n 78) 33.

111 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 52) rec 3.

112 Australasian Parliamentary Counsel's Committee (n 110) 3; Hill, *National Uniform Legislation* (n 78) 33.

113 Hill, *National Uniform Legislation* (n 78) 35.

3.63 The importance of these three elements of the proposed regime and the importance of each operating at a national level is elsewhere discussed.

3.64 With a referral of powers, the Commonwealth Parliament would have a clear Constitutional basis to establish the National Regulator with all its proposed functions — including establishing and managing a registration system for all overseas surrogacy arrangements — and to amend the *Family Law Act 1975* (Cth).

3.65 However, without such a referral, the capacity of the Commonwealth Parliament is less straightforward. If applied, mirror, or hybrid legislation were utilised, states and territories would need to agree upon a platform to establish the National Regulator and confer power to officials of the National Regulator, including standing to institute proceedings in relation to the civil penalty provisions contemplated by the ALRC's recommendations. Examples of regulatory bodies established by applied, mirror, and hybrid legislation are provided in **Appendix E**.

3.66 By contrast, the implementation of **Recommendations 28** and **29** would require the enactment of Commonwealth laws. This would involve amending the *Family Law Act 1975* (Cth) to provide that:

- intended parents are the child's legal parents if there is an approved surrogacy arrangement;
- surrogates are the legal parents of children born through surrogacy if there is no approved surrogacy arrangement, and intended parents must apply to the Federal Circuit and Family Court of Australia for an order transferring parentage; and
- the Federal Circuit and Family Court of Australia has jurisdiction to determine such applications.

3.67 In the absence of a referral of powers, consideration will need to be given to whether the Commonwealth is already empowered via existing referrals of power to make the amendments required to the *Family Law Act 1975* (Cth). All states and territories except for Western Australia have referred the power to legislate in relation to children (including maintenance, custody, guardianship, access, and parentage) to the Commonwealth.[114] Laws regarding parentage must be for the purposes of the law of the Commonwealth.[115] It is unclear whether these powers could accommodate the making of laws relating to parentage in surrogacy arrangements, especially in the context of South Australia's limited referral. The *Family Law Act 1975* (Cth) already contains provisions relating to parentage for the purposes of children born using

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114 *Commonwealth Powers (Family Law — Children) Act 1986* (NSW); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic). Noting that South Australia's referral legislation does not include parentage: *Commonwealth Powers (Family Law) Act 1986* (SA).

115 *Commonwealth Powers (Family Law — Children) Act 1986* (NSW) s 3(1)(c); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld) s 3(1)(c); *Commonwealth Powers (Family Law) Act 1987* (Tas) s 3(1)(c); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic) s 3(1)(c).

donated gametes.[116] This is a question that should be further explored by constitutional experts and with the collaboration of state and territory governments. Consideration should also be given to whether an existing head of power (for example, the external affairs power)[117] or a patchwork of heads of power would support the Commonwealth Parliament to enact the amendments required.

3.68 In terms of implementation of the Responsible Overseas Surrogacy Framework — which would require extraterritorial regulation of Australian citizens and permanent residents — this may already be supported by the external affairs power.[118] The external affairs power provides the capacity to support Commonwealth legislation which attaches legal consequences in Australia to events outside Australia.[119]

3.69 The ALRC has not had the opportunity to resolve these questions. In any event, they are best resolved when the position of all the respective states and territories and that of the Commonwealth is better appreciated.

Incorporating contemporary terminology

3.70 As discussed above, there is a lack of consistency in the terminology used in legislation to refer to intended parents and surrogates. Several submissions called for the terms used in legislation to be consistent, commonly understood, inclusive, and reflect the intentions of parties to arrangements.[120]

3.71 State and territory legislation refers to surrogates variously as the 'birth parent',[121] 'birth mother',[122] or 'surrogate mother'.[123] However, people who act as surrogates generally do not consider themselves to be the child's parent. For example, one submission from a person who has acted as a surrogate noted that their role does not create any 'mothering' relationship, and calling herself the mother creates confusion and is disrespectful to intended mothers.[124] Equality

116 *Family Law Act 1975* (Cth) s 60H.
117 See **Chapter 10**.
118 *Australian Constitution 1901* (Cth) s 51 (xxix).
119 The High Court has held (in the context of an Australian citizen charged with engaging in child exploitation outside Australia contrary to the *Crimes Act 1914* (Cth)) that geographic externality is sufficient to regulate an external matter, even where statutory provisions apply only to acts committed outside Australia by Australian citizens or residents: *XYZ v Commonwealth* (2006) 227 CLR 532, 538–539 [8]–[10] (Gleeson CJ); 546 [30], 549–551 [39]–[45] (Gummow, Hayne and Crennan JJ).
120 S Jefford, *Submission 128*; Australian Nursing and Midwifery Federation, *Submission 145*; Attorney-General's Department (Cth), *Submission 153*; Equality Australia, *Submission 253*; Name withheld, *Submission 259*; Donor Conceived Families Australia, *Submission 311*.
121 See, eg, *Parentage Act 2004* (ACT) s 23.
122 See, eg, *Surrogacy Act 2010* (NSW) s 5(5); *Surrogacy Act 2010* (Qld) s 8; *Surrogacy Act 2012* (Tas) s 5; *Surrogacy Act 2008* (WA) s 3. However, Western Australia will use the term 'birth parent' following commencement of new legislation in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 12(1).
123 *Surrogacy Act 2022* (NT) s 3; *Surrogacy Act 2019* (SA) s 10; *Assisted Reproductive Treatment Act 2008* (Vic) s 17(1).
124 Not published, *Submission 293*.

Australia submitted that referring to surrogates as mothers or parents reinforces misunderstandings of the practice of surrogacy.[125] A large proportion of submissions used the term 'surrogate', including a large number of submissions from people who have been surrogates themselves.[126] By contrast, those opposed to the term 'surrogate' argue that it diminishes the role of women and their connection to the child, and is 'dehumanising'.[127]

3.72 The ALRC takes the view that new legislation should use terminology that reflects the language used by people involved in surrogacy arrangements and adopt the term 'surrogate', which is commonly used within the surrogacy community. People involved in surrogacy arrangements will likely regard this term as clearer, more accurate, and gender inclusive, and as better reflecting the intention behind the surrogacy arrangements.[128]

3.73 Most states and territories employ the term 'intended parents', which is also the term used widely in submissions.[129] This term is appropriate as it reflects the nature of surrogacy arrangements and is already broadly in use.

3.74 **Recommendation 4** would require the harmonisation process to incorporate appropriate terminology. We recommend that the preferred terms in legislation should be 'the surrogate', 'intended parents', and 'child/ren born through surrogacy' or 'people born through surrogacy', as appropriate.

Reviewing the legislative framework

3.75 **Recommendation 5** would involve a statutory review of the new legislative framework for surrogacy after an appropriate period of operation. A statutory review would be an important mechanism to better ensure the legislation is achieving its aims. Evaluating the operation of the legal framework would allow for continuous improvement of the regulation of surrogacy in Australia. A review of this kind should be regarded as standard best practice for any significant law reform exercise.

3.76 The time after which the statutory review must be conducted is a matter for governments to determine. It should be set at a period that allows for the legal framework to become operational for long enough to have generated meaningful data for the review. This could be in the range of five to seven years after passage of the new laws.

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125 Equality Australia, *Submission 253*.

126 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 19*; Name withheld, *Submission 21*; Name withheld, *Submission 44*; Name withheld, *Submission 62*; Name withheld, *Submission 96*; Name withheld, *Submission 127*; S Jefford, *Submission 128*; Name withheld, *Submission 219*; S Cureton, *Submission 351*.

127 R Rowland, *Submission 257*; P Harper, *Submission 290*.

128 Equality Australia, *Submission 253*; Donor Conceived Families Australia, *Submission 311*.

129 See, eg, Name withheld, *Submission 23*; Name withheld, *Submission 45*; Name withheld, *Submission 111*; S Everingham, *Submission 129*; Name withheld, *Submission 146*; Name withheld, *Submission 185*; T Trevor, *Submission 258*; Name withheld, *Submission 286*; Name withheld, *Submission 312*.

Establishing a National Regulator

Recommendation 6

1. Legislation should establish and empower a national regulator for surrogacy, or alternatively, empower an existing national regulator (collectively 'the National Regulator') to hold the following responsibilities and carry out the following functions:

Standard setting

a. setting licensing conditions for Surrogacy Support Organisations (**Recommendation 8**);

b. setting and maintaining a mandatory scale of maximum fees that Surrogacy Support Organisations may charge for their services;

c. developing guidelines on approving surrogacy arrangements to be applied by Surrogacy Support Organisations and the National Regulator (**Recommendation 9**);

d. developing guidelines on applications to be referred by Surrogacy Support Organisations to the National Regulator or assessed by the National Regulator (**Recommendation 9**);

e. developing and maintaining standards, guidelines, and processes on cost and loss recovery for surrogates (**Recommendations 23**–**25**);

f. developing a standardised draft surrogacy agreement that parties may use as a basis for a compliant surrogacy agreement (**Recommendation 20**);

g. developing the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**);

Compliance

h. licensing Surrogacy Support Organisations, including monitoring compliance with licensing conditions and taking appropriate action, including revoking a licence in response to any breaches of conditions that warrant revocation;

i. inspecting Surrogacy Support Organisation records for the purpose of monitoring compliance with licensing conditions;

j. accrediting Surrogacy Support Organisation staff members to conduct assessments and make decisions in relation to applications to approve surrogacy arrangements;

k. enforcing compliance through the civil penalty regime enacted by legislation (**Recommendation 3**);

Oversight of surrogacy arrangements

l. assessing applications to approve surrogacy arrangements referred by Surrogacy Support Organisations or remitting the application back to the Surrogacy Support Organisation for assessment (**Recommendation 9**);

m. reviewing Surrogacy Support Organisation decisions not to approve a surrogacy arrangement, at the request of a party to the surrogacy arrangement (**Recommendation 9**);

n. keeping records of surrogacy arrangements approved by a Surrogacy Support Organisation or the National Regulator (**Recommendation 9**);

o. establishing and managing a registration system for all overseas surrogacy arrangements (**Recommendation 37**);

p. improving research and data collection on domestic and overseas surrogacy arrangements, in particular to address any gaps in surrogacy data;

Community awareness and information provision

q. developing information and educating the public about surrogacy (**Recommendation 7**);

r. developing educational material for professionals who provide services to parties to surrogacy arrangements (**Recommendation 7**); and

s. managing the National Surrogacy Register and providing information held on the Register to people born through surrogacy (**Recommendations 31**–**32**).

2. In the event that a national regulator for surrogacy is not established or an existing national regulator is not empowered to perform the responsibilities and functions listed in paragraph 1, the Commonwealth, states, and territories should place these responsibilities and functions with existing regulatory bodies or departments. An intergovernmental agreement should be entered into to facilitate national consistency in the performance of the responsibilities and functions listed in paragraph 1 including, in particular, the standard-setting and compliance functions.

Current regulation of surrogacy arrangements

3.77 Consistently with current legislation as well as the Terms of Reference, this Inquiry recognises surrogacy as a legitimate way to form a family. The recommended

regulatory framework would facilitate family formation through surrogacy that protects and promotes the human rights of all involved. To provide that protection, various regulatory safeguards need to be incorporated. Guidance, support and oversight need to be available to better ensure that the safeguards are both accessible and effective.

3.78 The existing regimes regulating surrogacy fail to provide guidance, support and oversight to the extent required to make existing safeguards accessible and effective. One of the main problems with existing regimes is that there is either no oversight to help ensure that legislative safeguards are observed, or the oversight comes too late to be effective.

3.79 When intended parents apply for a parentage order with the respective state or territory court, the court will assess whether parties have complied with specific prerequisites such as counselling and legal advice,[130] some of which can be dispensed with if it is in the best interests of the child or in exceptional circumstances.[131] Beyond this, in most states and territories, there is no official body responsible for overseeing or regulating the surrogacy process. This means that in most Australian jurisdictions, the only point at which an official authority has oversight of a surrogacy arrangement occurs after the child has been born and by that time the oversight has little or no capacity to be effective.

3.80 There is currently some oversight for surrogacy arrangements that take place in Victoria and Western Australia. In those states, legislation requires pre-conception approval of surrogacy arrangements by a regulatory body. In Victoria, parties must obtain approval from the Patient Review Panel before a registered ART service provider can carry out a treatment procedure as part of a surrogacy arrangement.[132] Similarly, in Western Australia, a parentage order cannot be made in respect of a child unless the arrangement has been approved by the Reproductive Technology Council.[133] Legislation commencing in mid-2027 will abolish the Western Australia Reproductive Technology Council,[134] removing the requirement for surrogacy arrangements to be approved in that state.

3.81 In almost all Australian states and territories, oversight of surrogacy arrangements, including oversight of legislative safeguards, only takes place after a child has been born. There is no official support or oversight as parties navigate entry into a surrogacy arrangement, or travel through the conception and pregnancy processes. Some submissions described their experience attempting this complex process without appropriate support:

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130 See **Chapters 5**, **6**, and **7**.

131 The precise formulation varies slightly between the states and territories, but generally includes 'exceptional circumstances' and/or 'best interests of the child': see, eg, *Parentage Act 2004* (ACT) s 28H(3)(b); *Surrogacy Act 2010* (NSW) s 18(2).

132 *Assisted Reproductive Treatment Act 2008* (Vic) s 39.

133 *Surrogacy Act 2008* (WA) s 15.

134 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 306.

> [w]e initially explored altruistic surrogacy in Queensland with a family member, but quickly discovered that there is no meaningful framework in place to support domestic arrangements. The process was informal, unregulated and confusing.[135]

> [i]t's an incredibly complex system to navigate, and when you don't know what you don't know, and with no government or national body to guide you it's an overwhelming and confusing process to try to understand.[136]

3.82 Further, of the jurisdictions that have implemented an element of regulatory oversight in surrogacy arrangements, the roles of the Patient Review Panel and Reproductive Technology Council in relation to surrogacy are essentially limited to approval of arrangements.[137] While this is important, these bodies do not have responsibilities regarding the broader regulation of domestic and overseas surrogacy.

3.83 In the absence of official government regulation, oversight of surrogacy arrangements can fall to ART service providers determining whether to proceed with ART services in surrogacy arrangements. However, the approach differs between ART service providers and there is no clear regulatory framework applied nationwide. As a result, the ALRC considers this should not be the only source of oversight.

3.84 Currently absent from the legal and regulatory framework for surrogacy are important sources of oversight, guidance, and support such as:

- consistent and early oversight of domestic and overseas surrogacy arrangements;
- guidance to assist parties on the meaning of 'reasonable costs';
- regulation of professional 'agency' services currently providing support in surrogacy arrangements;
- training or educational materials for professionals supporting parties to surrogacy arrangements, such as lawyers, counsellors, and medical professionals;
- materials to foster an accurate understanding and raise awareness of surrogacy in the community, to promote more positive interactions and experiences;
- a comprehensive source of information and education on the Australian surrogacy process, and to inform Australians considering overseas surrogacy;
- record-keeping and information access mechanisms to support the rights of people born through surrogacy to access information about their gestational origins;
- dedicated investigation and enforcement of laws that prohibit certain behaviours; and

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135 Name withheld, *Submission 161*.

136 Name withheld, *Submission 185*.

137 *Assisted Reproductive Treatment Act 2008* (Vic) s 85; *Human Reproductive Technology Act 1991* (WA) s 14 (though this provision does allow the Council to advise the Minister and the CEO about matters connected with reproductive technology and administration and enforcement of the Act).

- sufficient oversight to identify and address problems in the way surrogacy laws and practices are operating.

3.85 These gaps mean that parties do not have sufficient support to navigate the complex interpersonal relationships, legal requirements, and intermediaries involved in both the domestic and overseas surrogacy processes. They can make the domestic surrogacy process more difficult, or increase the risk of unintended consequences, including accidental non-compliance, failure to comply with eligibility and process requirements, unsuitable surrogacy arrangements proceeding, incorrect professional advice, and unscrupulous or illegal behaviour by organisations, such as those that advise people to use unregulated overseas surrogacy pathways, or charge excessive fees.[138]

Establishing a National Regulator for surrogacy

3.86 The gaps in oversight and compliance discussed above risk undermining the regulation of surrogacy in Australia. Those failures need to be addressed, and a National Regulator is best placed to do that.

3.87 Further, a large number of additional measures that would be introduced if some of the recommendations in this Report are implemented require oversight and practical implementation by a regulator, preferably a National Regulator. In particular, oversight of SSOs (**Chapter 3**) would be crucial, as well as dedicated enforcement of the prohibitions recommended in **Chapters 2**, **12**, and **13**. Additionally, it is necessary for the present lack of information and education about surrogacy to be addressed through consistent, accessible and accurate materials developed by a body with appropriate expertise and resources. These measures are central to upholding the integrity of the supported and responsible surrogacy framework and protect the rights of those involved in surrogacy arrangements.

3.88 **Recommendation 6** would involve creating a regulatory mechanism for responding to these needs. It calls for the establishment of a National Regulator that would operationalise a supported and responsible legislative regime for surrogacy both domestically and in relation to the engagement of Australians in surrogacy overseas. The key role of a National Regulator in that regime would also be to centralise, promote and maintain consistency and equality before the law for all Australians, irrespective of the state or territory in which they may reside.

3.89 **Recommendation 6** is necessary to provide the regulation required to ensure that Australians engage in surrogacy in a supported and responsible way. Regulation is an important tool to prevent harm to individuals.[139] It aims to protect

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138 Several submissions raised this problem: Not published, *Submission 178*; Name withheld, *Submission 334*; Not published, *Submission 337*; K Cox, *Submission 389*.

139 The Australian Government defines regulation as 'sets of rules established by government authorities to deliver better economic, social, and environmental outcomes for Australians and businesses': Department of Finance (Cth), *Regulatory Policy, Practice & Performance Framework* (2026) 4.

public interests, ensure the efficient delivery of services, manage compliance, and improve trust, safety and wellbeing in the community.[140] These objectives have clear application to the practice of surrogacy. Though surrogacy can generally be a rights-respecting and responsible way to form a family for those who are not otherwise able to, **Chapter 1** explains that it can at times, particularly when insufficiently regulated, result in harm and exploitation. It can also involve complex interpersonal relationships and impacts on health and wellbeing, and inherently concerns the care of children. As one submission from an intended parent articulated:

> [t]ransparency and oversight by a central regulatory body would ensure ethical standards are upheld, while access to support services throughout the process would protect the welfare of surrogates and intended parents. Such an approach would modernise Australia's surrogacy laws, reflect international human rights standards, and provide a safe, respectful pathway to parenthood.[141]

3.90 The ALRC considers there is a strong public policy argument for an improved level of government oversight and regulation. At the same time, **Recommendation 6** has been designed to take a least restrictive approach (see **Chapter 1**), providing parties to surrogacy arrangements with the tools and oversight necessary to engage in surrogacy in a safe, responsible and supported way, without being unduly burdensome or inappropriately restricting freedom.

3.91 Many submissions supported the concept of a National Regulator for surrogacy,[142] including because it would enhance safety,[143] provide clarity, consistency, and guidance,[144] and protect people's rights.[145] Further, the ALRC agrees with the Law Council of Australia that

> the benefit of these independent regulators is that they are not aligned with any involved party—noting that the legal practitioners, counsellors, and fertility clinics are engaged by a party for a specific purpose.[146]

3.92 Submissions opposed to a National Regulator generally took this view because they were opposed to surrogacy more broadly.[147]

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140 Ibid.

141 Name withheld, *Submission 185*.

142 Name withheld, *Submission 11*; Name withheld, *Submission 69*; Name withheld, *Submission 196*; Not published, *Submission 209*; Name withheld, *Submission 211*; Not published, *Submission 254*; Name withheld, *Submission 330*; Law Council of Australia, *Submission 342*; Victorian Women Lawyers, *Submission 352*; J Attawet, *Submission 360*; S Page, *Submission 365*; B Tobin, *Submission 367*; D Adams, *Submission 382*; Not published, *Submission 393*; Virtus Health, *Submission 397*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*; Relationships Australia, *Submission 404*; Australian Christian Lobby, *Submission 419*.

143 Name withheld, *Submission 37*; Name withheld, *Submission 185*; Not published, *Submission 274*.

144 P Hadfield-Jia, *Submission 71*; Australian Christian Lobby, *Submission 104*; E Kendal, *Submission 166*; Not published, *Submission 178*; ANZICA, *Submission 277*; Not published, *Submission 280*; Not published, *Submission 385*.

145 Not published, *Submission 184*; Name withheld, *Submission 185*; Name withheld, *Submission 259*; Not published, *Submission 274*; Name withheld, *Submission 347*.

146 Law Council of Australia, *Submission 342*.

147 Centre for Bioethics and Culture (US), *Submission 90*; FINRRAGE (Australia), *Submission 180*.

3.93 The 2023 Law Commission of England and Wales, and Scottish Law Commission Report also considered it necessary to recommend that a regulatory body provide oversight to regulated surrogacy organisations and ART service providers.[148] Similarly, in 2024 Ireland established via legislation the Assisted Human Reproduction Regulatory Authority to perform a range of functions similar to those listed in **Recommendation 6**.[149] The regulatory authority was determined to be the 'foundational element' of the improved regulation of surrogacy in Ireland, in order to 'adjudicate, decide and provide certainty on … complex issues'.[150]

The National Regulator's functions

3.94 **Recommendation 6** lists the proposed functions the National Regulator should perform, categorised as: standard setting, compliance, oversight of surrogacy arrangements, and improving public awareness and information. This section discusses each of these categories, as well as the Regulator's role in collecting surrogacy data. Many of the functions are discussed in greater depth in other chapters of this Report. For instance, the National Regulator's critical role in both promoting and effectuating the responsible engagement by Australians in overseas surrogacy, is discussed in **Chapter 13**.

Standard setting

3.95 The National Regulator's standard setting function would involve developing regulations and guidelines to support the operation of the domestic supported surrogacy regime. These relate to the proper functioning of SSOs, such as setting licensing conditions and guidelines for the approval of surrogacy arrangements (**Recommendations 8**–**9**). The National Regulator would also set standards more broadly, including by providing greater detail on the cost and loss recovery process for surrogate reimbursement (**Recommendations 23**–**25**), and developing a standardised draft surrogacy agreement that parties may use as a template for a surrogacy agreement that complies with legislative requirements (**Recommendation 20**). Importantly, the National Regulator would play a critical role in developing Responsible Overseas Surrogacy Guidelines to support responsible engagement in overseas surrogacy (**Recommendation 37**). The standard setting functions would help to ensure that all parties and entities involved in surrogacy arrangements have adequate information to make informed decisions that accord with the obligations imposed and the entitlements provided by the regulatory scheme.

3.96 Some of these standards, such as the mandatory scale of fees that SSOs may charge, will need to be legally binding to be effective. That will need to be done through delegated legislation. Whether legislation should empower the National

148 Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law: A Joint Consultation Paper* (Law Commission Report Nos 244 & 167, 2019) rec 24, 173–5 [7.1]–[7.20].

149 *Health (Assisted Human Reproduction) Act 2024* (Ire) ss 122–3.

150 Ireland, *Parliamentary Debates*, Houses of the Oireachtas/Tithe an Oireachtais, 23 March 2022, (Anne Rabbitte).

Regulator to make delegated legislation (such as regulations), or alternatively, that a Minister of State should be empowered to do so on the recommendation of the National Regulator, or whether another mechanism should be utilised to meet the objective of ensuring that standards set by the National Regulator are legally binding, is not a question that can be conveniently determined now. This would depend upon which legislative structure (referred, applied, mirror, or hybrid) is to be utilised.

Compliance

3.97 Compliance would be a critical function of the National Regulator. It involves having oversight of the responsible and supportive surrogacy regime to better ensure that surrogacy is taking place within the parameters of what is lawful, and taking action to ensure enforcement of the law where appropriate. This would be integral to upholding the integrity of the regime for responsible surrogacy in Australia and the responsible engagement of Australians in overseas surrogacy.

3.98 There would be two main elements to the National Regulator's compliance function. The first element concerns the proper functioning of SSOs. SSOs would be private organisations that have responsibility for approving compliant surrogacy arrangements (**Recommendation 9**) and thus for ensuring that the legislative safeguards provided for domestically are observed. They would also provide professional support services in relation to surrogacy arrangements. Thus, the role of SSOs is an important component of the regulatory regime and vital to its effectiveness. Oversight ought not be left to self-regulation[151] and is better done by a governmental entity that oversees, regulates, and holds SSOs legally accountable. This would involve licensing SSOs, monitoring compliance with licensing conditions, and taking appropriate action if conditions are not complied with, including revoking a licence when necessary. As part of SSOs' licensing conditions, assessing and making decisions in relation to applications for approval of a surrogacy arrangement would only be conducted by a member of staff accredited by the National Regulator. This would involve the National Regulator assessing the staff member's qualifications and fitness to make these decisions. This could also involve training on decision-making if appropriate. The National Regulator's compliance functions in relation to SSOs are discussed in greater detail in **Chapter 4**.

3.99 The second element of the National Regulator's compliance functions would be to enforce compliance with the prohibitions and requirements proposed in **Recommendations 1**–**2**, **33**–**35**, **38** and **40**–**45** of this Report, including enforcement of the civil penalty regime that would give effect to **Recommendations 1**–**2**, **33**–**35**, **38**, and **40**–**45**. The National Regulator's role would be to better effectuate compliance with these prohibitions and requirements by maintaining oversight, investigating alleged non-compliance, and initiating proceedings where appropriate (see **Chapters 2** and **12**).

151 Accreditation of ART service providers is currently industry-led, however the 2025 Rapid Review Report recommended that the Australian Commission on Safety and Quality in Health Care develop standards and take over responsibility for accrediting service providers: Wallace and Department of Health (Vic) (n 86) 60–1.

3.100 The National Regulator must be established with appropriate regulatory powers to ensure compliance with legislative and regulatory requirements, and respond to instances of non-compliance. How that is best achieved will, again, be best determined once the legislative structure (referred, applied, mirror, or hybrid) is determined. However, irrespective of the structure adopted, consideration should be given to the standard suite of powers outlined in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which include powers to monitor, investigate, apply to a court for a civil penalty or injunction, issue infringement notices, and accept and seek enforcement of undertakings. The National Regulator should also be empowered to impose administrative sanctions (such as licence revocation, suspension, restriction, or amendment) to enforce SSO compliance with licensing conditions, as well as to have ancillary powers, processes to handle complaints, and appeal and review procedures.

Direct engagement with surrogacy arrangements

3.101 As discussed above, SSOs would be empowered to assess and approve compliant surrogacy arrangements. It is proposed that the National Regulator assess complex arrangements and, where requested, review applications that have been rejected by SSOs. Further, the National Regulator would keep a record of all approved surrogacy arrangements. **Chapter 4** provides further detail on the delineation between the National Regulator and SSOs' roles in relation to approving arrangements. In addition, in relation to overseas surrogacy, the National Regulator would provide oversight of surrogacy arrangements by managing the registration of overseas surrogacy arrangements involving intended parents who are Australian citizens or permanent residents (see **Chapter 13**).

Community awareness and information provision

3.102 The National Regulator's community awareness and information provision function would broaden the National Regulator's remit to encompass community outreach and education. As discussed below, this function is important for improving the quality of parties' experiences of surrogacy, as it aims to address lingering stigma and misunderstandings surrounding surrogacy, and ensure parties have sufficient information as they progress through the surrogacy process. These functions are discussed in greater detail below in relation to **Recommendation 7**.

3.103 A nationally consistent approach to surrogacy education coordinated by the National Regulator would enable the information and training delivered to be uniform and updated efficiently in response to developments in reproductive technology, evolving social attitudes, and emerging best practice. This would help ensure that all parties to surrogacy arrangements receive informed and competent support regardless of where in Australia the arrangement takes place. It would also ensure that intended parents and surrogates do not have unequal access to information dependent on the state or territory in which they live.

3.104 Another important element of the National Regulator's community awareness and information provision role would be management and oversight of the National

Surrogacy Register (**Recommendations 31**–**32**). The National Regulator would be the appropriate body to collect information about the gestational origins of people born through surrogacy, and facilitate access to this information.

Filling gaps in surrogacy data

3.105 Comprehensive and reliable data on surrogacy in Australia and overseas is limited. Surrogacy data that is available is not collated or published in a consistent way. For example, only Queensland, Victoria, and Western Australia collect data on surrogacy.[152] In Queensland this is based on the number of parentage orders made.[153] In Western Australia it is drawn from the number of children born.[154] In Victoria both figures were, until recently, published.[155] It is unclear whether the Victorian Department of Health, as the new regulator, will continue to collate and publish data on the number of children born through surrogacy in Victoria.

3.106 At a national level, the Australia and New Zealand Reproduction Database publishes data on the number of gestational surrogacy births from domestic ART service providers.[156] However, the Database only publishes combined Australian and New Zealand figures, and there is no data available on traditional surrogacy births.

3.107 The Commonwealth Department of Home Affairs collects, but does not publish, data on the number of children born to Australians via overseas surrogacy. These figures are based on applications for Australian citizenship, not the actual number of children born.

3.108 The gaps and lack of uniformity in data collection and publication make it difficult to accurately capture important information about surrogacy arrangements, such as the number of children born through domestic surrogacy (both gestational and traditional), the number of children born through overseas surrogacy, the number of parentage order applications made and granted nationally, the number of citizenship or visa applications made and granted, and more nuanced qualitative and quantitative data on all of the above.

3.109 Some submissions, particularly that of family and fertility lawyer, Stephen Page, raised this issue and called for more rigorous collection of data on surrogacy

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152 Stephen Page, 'Australia Can Stop Living the Failed Surrogacy Experiment' (2025) 34(1) *Australian Family Lawyer* 39, 41.

153 See, eg, Childrens Court of Queensland, *Annual Report 2024-25* (2025) 36.

154 See, eg, Western Australian Reproductive Technology Council, *Annual Report: 1 July 2023 to 30 June 2024* (2024) 9.

155 See, eg, County Court of Victoria, *Annual Report 2024-25* (2025) 37; Victorian Assisted Reproductive Treatment Authority (VARTA), *2024 Annual Report* (2024) 25.

156 See, eg, Damian P Kotevski et al, *Assisted Reproductive Technology in Australia and New Zealand 2023* (2025). There are two limitations to the utility of this source. First, determining the individual Australian figure requires consultation of the annual Advisory Committee on Assisted Reproductive Technology (NZ) reports, which separately publish the New Zealand figure. Second, publication of these figures occurs after a delay (the latest being from 2023), making it difficult to access current figures.

arrangements.[157] Page contrasted the extensive data available on adoptions with the paucity of data on surrogacy, despite surrogacy being used more commonly to found a family.

3.110 In light of this, one of the National Regulator's functions would be to improve research and data collection on domestic and overseas surrogacy arrangements, with a particular focus on addressing any gaps in surrogacy data. The National Regulator would have oversight of approvals of compliant surrogacy arrangements, and registration of overseas arrangements, and parentage orders would be determined only by the Federal Circuit and Family Court of Australia, which would make the collection of key data points more streamlined and consistent.

3.111 Improving the evidence base available would help to build an accurate picture of how Australians are engaging with surrogacy and ensure that the development of surrogacy laws and regulations is informed and able to be adapted as needed.

Regulation of surrogacy at the national level

3.112 Regulatory oversight of surrogacy should take place at the national level. Having one surrogacy regulator operating nationally received support in submissions from the Australian Christian Lobby, Law Council of Australia, and Equality Australia, among others.[158] Equality Australia submitted that national oversight 'would ensure effective coordination and efficient use of resources instead of creating several state and territory bodies'.[159] There are additional benefits to a national regulatory agency for surrogacy:

- It would help to ensure consistent laws and consistent application of laws, and prevent variations emerging that could result in inconsistent processes, obligations, entitlements, prohibitions and sanctions. All Australians are entitled to equal treatment by the law.
- As a frequently inter-jurisdictional domestic practice, surrogacy is a matter of national concern. A National Regulator would better enable a nationally-coordinated response.
- A National Regulator would drive regulatory best practice and innovation in the surrogacy field.
- A National Regulator is appropriate when the regulatory scheme seeks to regulate activities that take place overseas. This is especially pertinent in relation to surrogacy as Australians engage in overseas surrogacy much more than they engage in domestic surrogacy.

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157 S Page, *Submission 130*; Name withheld, *Submission 211*; Name withheld, *Submission 278*; Not published, *Submission 280*; Name withheld, *Submission 323*.

158 P Hadfield-Jia, *Submission 71*; Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 111*; Not published, *Submission 178*; Name withheld, *Submission 196*; Not published, *Submission 209*; Equality Australia, *Submission 253*; ANZICA, *Submission 368*; Law Council of Australia, *Submission 342*; J Attawet, *Submission 360*; Relationships Australia, *Submission 404*.

159 Equality Australia, *Submission 253*.

- Having a National Regulator with responsibility for compliance is likely to provide for far more effective compliance than if responsibility for compliance is given to authorities (such as police) whose responsibilities are not specific to surrogacy and, unlike a National Regulator for surrogacy, would not be specifically invested in maintaining the integrity of the regulatory regime for surrogacy.

3.113 A national body to help regulate uniform surrogacy laws across Australia is also consistent with other recommendations for national-level mechanisms, such as applications for parentage to be made at the federal level (**Recommendation 29**), and the National Surrogacy Register (**Recommendations 31** and **32**).

The viability of establishing a National Regulator

3.114 The ALRC appreciates that establishing a body to regulate a limited field may not be considered an efficient use of finite resources. Engagement in surrogacy may be regarded as a limited field given the extent of the current use of surrogacy by Australians.[160] However, as a social issue, surrogacy attracts a great deal of public attention.[161] That suggests that in terms of priority rather than merely efficiency, the effective regulation of surrogacy would likely be regarded as useful and important by many Australians. Additionally, rates of domestic surrogacy continue to increase,[162] and it is anticipated that implementation of the recommendations in this Report would lead to a sharper increase.

3.115 Further, other considerations support the establishment of a National Regulator, despite the low levels of engagement in surrogacy. The National Regulator need not be a stand-alone regulator. If the field of regulatory operation is too small to justify the set-up and recurrent overhead costs of a stand-alone agency, consideration should be given to other options which offer economies of scale.

3.116 The financial viability of the recommendation for a National Regulator would be bolstered if the agency's remit combined multiple fields, such as ART and surrogacy, or other parts of the health sector more broadly. The ALRC encourages consideration of a National Regulator that encompasses a related range of areas in the health sector. Submissions from the Australian and New Zealand Infertility Counsellors Association, and academics from the Global Reproductive Futures

160 While it is difficult to ascertain the exact numbers, it is estimated that 84 children were born through domestic gestational surrogacy and 375 to overseas surrogacy in 2023, according to data provided by Stephen Page to the Australian Law Reform Commission. This figure was derived from both the Australian and New Zealand Assisted Reproduction Database and the New Zealand Ethics Committee on Assisted Reproductive Technology, which use slightly different data collection methodologies, so this number should be viewed as an approximate.

161 As evidenced by the large number of submissions to this Inquiry.

162 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.

Research Group at Monash University, argued for a national regulatory body with oversight of ART and surrogacy.[163]

3.117 A standalone National Regulator for surrogacy was by far stakeholders' preferred option, and we did not receive extensive feedback on appropriate alternative options. However, one submission suggested that an existing regulator, such as the Organ and Tissue Authority, could perform these functions instead of a stand-alone National Regulator for surrogacy.[164]

3.118 Further, in considering the financial viability of establishing a National Regulator, consideration should be given to the financial savings that would be made available by replacing the existing state based regulatory mechanisms with one national body.

Alternatives to a National Regulator

3.119 If establishing a National Regulator (whether standalone or in combination with other fields) is not considered to be viable, consideration should be given to whether the functions proposed for the National Regulator could be allocated to a mix of existing agencies or government departments. Much would depend upon the legislative structure (referred, applied, mirror or hybrid) adopted. In light of that uncertainty, the ALRC has not explored appropriate options in depth. However, the following possibilities have been identified:

- Surrogacy lawyer, Stephen Page raised the possibility of the Reproductive Technology Accreditation Committee becoming involved in surrogacy regulation.[165] For example, the Committee could provide oversight to SSOs in the case that a National Regulator is not established.
- The Australian Commission of Safety and Quality in Healthcare could regulate SSOs (functions **(a)**–**(d)**, **(h)**–**(j)** of **Recommendation 6**). This may be appropriate as the 2025 Rapid Review Report recommended that the Commission assume responsibility for the accreditation of ART service providers.[166]
- Legislation could give standing to a state or territory body, such as the office of public prosecutions, or a state and territory health regulator, to bring proceedings in the case of alleged prohibited conduct (function **(k)** of **Recommendation 6**).

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163 A Whittaker, C Volks, A Molas (et al), *Submission 201*; ANZICA, *Submission 368*. The 2025 Rapid Review of Assisted Reproductive Technology Report declined to recommend a national regulator for the ART sector. The report considered that this could not be justified for one relatively small part of the health sector (based on revenue), and would involve a lengthy process: Wallace and Department of Health (Vic) (n 86) 61.

164 Name withheld, *Submission 421*.

165 S Page, *Submission 130*.

166 Wallace and Department of Health (Vic) (n 86) 61.

- The Commonwealth Department of Foreign Affairs and Trade could develop and maintain the Responsible Overseas Surrogacy Guidelines (function **(g)** of **Recommendation 6**. See also **Recommendation 37**).
- Commonwealth, or state and territory, departments of justice could develop guidelines on cost and loss recovery (function **(e)** of **Recommendation 6**) and publish material to improve community awareness and information provision (functions **(q)** and **(r)** of **Recommendation 6**).
- The Commonwealth, or state and territory, departments of health could hold responsibility for approving surrogacy arrangements (functions **(l)**–**(n)** of **Recommendation 6**);
- The Commonwealth Department of Foreign Affairs and Trade, or Department of Home Affairs, could manage a registration system for overseas surrogacy arrangements (function **(o)** of **Recommendation 6**).
- Existing state and territory donor conception registers could incorporate information about surrogacy (function **(s)** of **Recommendation 6**).

3.120 We do not consider that splitting the functions of the intended National Regulator among a multitude of agencies is a desirable solution. Fragmented regulation and oversight would add to confusion for parties, diminish the benefits of the proposed reforms, and be an inefficient use of resources. One central coordinating body is preferred for all of the reasons already discussed.

Structure and composition of National Regulator

3.121 How regulators are created, and their structure, purpose, and responsibilities, may vary. A regulator is 'any public or government organisation whose function is to achieve the public policy objectives assigned to it by using the resources of' government.[167] A regulator is 'empowered or authorised by law' to administer legislation.[168] They can be empowered to do this through a wide variety of powers or functions including:

- making and enforcing rules or setting standards;
- investigating, dispute resolution, and resolving complaints;
- issuing and monitoring compliance with licenses and accreditation;
- providing education and training materials or courses;
- cooperation and coordination with other government bodies; and
- policy development and review.[169]

3.122 There are multiple forms a regulator can take. Regulatory bodies can be hosted within a government department, in which case they are not a separate

167 Freiberg (n 61) 78–9.
168 Ibid 78. See also Productivity Commission, *Regulator Engagement with Small Business* (Research Report, 2013) 34.
169 Freiberg (n 61) 78; Productivity Commission (n 166) 34.

legal entity and usually employ staff from the public service.[170] They can also be established as a statutory authority, which often involves a degree of independence from government, although its directors or governing board may be appointed by a minister or Governor in Council.[171]

3.123 The governance arrangements of a regulator can also vary widely and will be influenced by the form it takes and the scope of their powers and functions.[172] Governance generally refers to the nature of the relationship between the Minister and the regulator, the management structure, the process for appointment and employment arrangements, funding arrangements, and arrangements to ensure compliance with legislation that ensures accountability of the regulator.[173] Regulatory bodies can be governed by a board, led by a commissioner, or consist of a single member directly responsible to a minister.[174]

3.124 The ALRC is not providing detailed recommendations on the National Regulator's structure, design, or governance. We note, however, that the National Regulator must be empowered to undertake the functions listed in **Recommendation 6**. We have detailed below some features, supported in submissions, that should be prioritised during the regulatory design process.

Independence

3.125 Many submissions called for a National Regulator that is independent from government and industry, with some citing concerns about conflicts of interest if there is overlap with industry.[175] An independent regulator could be more trusted because it is less susceptible to external influences, including from the government of the day, while still being accountable to the executive and legislature.[176] The ALRC agrees that independence from industry and government would be preferable for the National Regulator for surrogacy.

Accountability

3.126 Accountability is also important when fostering trust in a regulator.[177] Some submissions mentioned that the National Regulator should be accountable to an oversight board.[178] One submission suggested that the board's membership should include representatives of the fertility industry, counselling services, people with

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170 Freiberg (n 61) 79.
171 Ibid 80.
172 Ibid 86–7.
173 Ibid 87.
174 Ibid 88.
175 Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 126*; E Kendal, *Submission 166*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 274*; Name withheld, *Submission 330*; Not published, *Submission 337*; Not published, *Submission 345*; S Jefford, *Submission 359*; S Everingham, *Submission 378*.
176 Freiberg (n 61) 84.
177 Ibid 100.
178 S Page, *Submission 365*; B Tobin, *Submission 367*; Name withheld, *Submission 421*.

personal experience of surrogacy, and a legal professional.[179] Another submission recommended the Irish model, where legislation established the Assisted Human Reproduction Regulatory Authority, an independent regulatory body overseeing surrogacy, ART service providers, and gamete donation. Its structure includes a board assisted by committees that provide advice on different topics.[180] Other methods for ensuring accountability include:

- public service compliance requirements, including independent audits and reporting obligations to parliament; and
- transparent and consultative processes when carrying out the regulator's compliance functions.[181]

Incorporating personal experience of surrogacy

3.127 The National Regulator's operations should be informed by the views and experiences of people with personal experience of surrogacy.[182] With only government and industry involvement, gaps could emerge between the way the regulator functions and community needs and expectations. Incorporating personal experience views, either via a board, advisory committee, or consultations, would ensure the National Regulator is responding to the needs of those who are most affected by the responsible and supportive surrogacy regime. The National Regulator should seek the views and experiences of intended parents, surrogates, and people born through surrogacy, including those from diverse backgrounds and communities for whom surrogacy may be an important pathway to family formation, such as the LGBTIQA+ community and people with disabilities.

Guided by key principles

3.128 The ALRC also suggests that the National Regulator could be guided by the following key principles, which have been informed by the submission received from the Commonwealth Department of Health, Disability and Ageing:

- **Non-discrimination** — A person's characteristics, such as sexual orientation or living with disability, should not impact access to, or treatment by, the National Regulator.
- **Accessibility** — Guidance and services should be designed so people of all backgrounds can access them.
- **Representation** — Diverse perspectives should be embedded in decision-making and oversight.
- **The best interests of the child, and child welfare** — The best interests of the child should be prioritised at every stage.
- **Human rights-centred** — The National Regulator's functions should always seek to promote and protect people's human rights.

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179 S Page, *Submission 365*.
180 B Tobin, *Submission 367*; *Health (Assisted Human Reproduction) Act 2024* (Ire) pt 9 chs 2–3.
181 Freiberg (n 61) 100.
182 S Jefford, *Submission 359*; S Page, *Submission 365*.

- **Trauma-informed** — The National Regulator should recognise and respond to the wide-ranging trauma that people accessing the National Regulator's services may have experienced, including pregnancy loss, discrimination, or living with disability.[183]

Useful regulatory models

3.129 Some existing regulators in the health field serve as examples of the form and governance structure that the National Regulator for surrogacy could take.

3.130 In 2001, the Australian, state, and territory governments entered into the Gene Technology Agreement, establishing a nationally consistent scheme to regulate gene technology 'to protect the health and safety of people and to protect the environment'.[184] The regulatory model includes a hybrid structure of applied and mirror legislation, and governance by the Gene Technology Minister's Meeting, a ministerial body comprising ministers from the states and territories.[185] A Gene Technology Regulator, supported by the Office of the Gene Technology Regulator, consists of scientific, legal, policy and administrative staff.[186] The Gene Technology Regulator consults with Advisory Committees who provide technical, scientific, ethics, and community advice, and takes a 'cooperative compliance' approach to regulation, working with organisations who are regulated by gene technology laws to achieve compliance.[187]

3.131 The Therapeutic Goods Administration ('TGA') administers the *Therapeutic Goods Act 1989* (Cth) to provide a 'national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods'.[188] The TGA is a national regulator established using applied legislation enacted in each state and territory, and operates within the Commonwealth Department of Health.[189] The TGA has a broad range of regulatory powers to ensure compliance, including management of a national register (the Australian Register of Therapeutic Goods), licensing functions, and powers to enforce their functions including through civil penalties and

183 Department of Health, Disability and Ageing (Cth), *Submission 420*.
184 Intergovernmental Agreement between the Commonwealth, States and Territories, *Gene Technology Agreement* (2001) 3.
185 Office of the Gene Technology Regulator, Department of Health, Disability and Ageing (Cth), *Annual Report 2024–25* (2025) 10; Department of Health (Cth), *The Third Review of the National Gene Technology Scheme* (Final Report, 2018) 18.
186 Hill, *National Uniform Legislation* (n 78) 107; Freiberg (n 61) 88; Office of the Gene Technology Regulator, Department of Health, Disability and Ageing (Cth) (n 183) 13.
187 Office of the Gene Technology Regulator, Department of Health, Disability and Ageing (Cth), 'Overview of GMO Monitoring and Compliance' <www.ogtr.gov.au/ongoing-regulatory-compliance/overview-gmo-monitoring-and-compliance>.
188 *Therapeutic Goods Act 1989* (Cth) s 4(1)(a).
189 Australasian Parliamentary Counsel's Committee (n 73) 31.

criminal offences.[190] It takes a risk-based approach to regulation, aiming to minimise the potential risk when a therapeutic good is used.[191]

Increasing awareness and education

Recommendation 7

1. In carrying out its community awareness and information provision function (**Recommendation 6**), the National Regulator should publish and promote information to:
    a. educate the public and increase understanding about surrogacy and address common misunderstandings about surrogacy and Australia's surrogacy laws;
    b. inform intended parents and surrogates about surrogacy in Australia and Australia's surrogacy laws;
    c. inform the public, and specifically intended parents, about surrogacy laws, policies, and practices overseas, and associated risks; and
    d. inform the public, and specifically intended parents, about the Responsible Overseas Surrogacy Guidelines and the requirement to register their intention to engage in an overseas surrogacy arrangement (**Recommendations 37** and **38**).
2. In carrying out its community awareness and information provision function, the National Regulator 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 Surrogacy Support Organisation management and staff (**Recommendation 8**), lawyers, healthcare professionals, and counsellors.

190 *Therapeutic Goods Act 1989* (Cth) chs 2, 3, 5A.

191 Therapeutic Goods Administration, Department of Health, Disability and Ageing (Cth), 'Our Regulatory Framework' <www.tga.gov.au/products/regulations-all-products/regulation-essentials/regulation-basics/our-regulatory-framework>. See generally Freiberg (n 61) 603; Eric Windholz, *Governing Through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018) 240.

Gaps in information about the surrogacy process

3.132 There is no central source of information about surrogacy in Australia. The fragmented nature of information can make understanding and accessing domestic surrogacy difficult. As a result, surrogates and intended parents have to base their decisions on limited and inconsistent information:

> [w]hen beginning my research into altruistic surrogacy in Australia, I discovered just how complex and challenging the process would be. Navigating the legal system, finding reputable resources of information about surrogacy, engaging 'qualified' persons and building a support system outside of my direct family and friends' network was extremely time consuming and challenging.[192]

3.133 Information about surrogacy in Australia is provided on a largely informal basis and sourced from online communities, professionals with surrogacy-related expertise (such as doctors and lawyers), and organisations dedicated to providing surrogacy-related information.[193] While these sources play an important role in filling current information gaps, they are unofficial and often based on personal experience or word of mouth; and in some cases, run by parties with vested interests.[194] This can mean that the information provided is not always reliable or accurate. The Australian government recently created a 'Surrogacy in Australia' website as a central knowledge hub.[195] However, it has been noted that the site lacks detail.[196] The ALRC views the website as a positive starting point that the government could build upon to provide more extensive and in-depth information.

3.134 The ALRC has heard that the limited availability of accessible and reliable information about surrogacy in Australia has contributed to confusion about what is and is not legal,[197] a lack of awareness about available options,[198] and increased vulnerability of intended parents and surrogates to commercial interests.[199] Limited access to information can add stress to an already challenging process,[200] and lead to issues around unintentional non-compliance. Difficulty accessing accurate and reliable information about surrogacy in Australia, and a lack of education about the risks associated with overseas surrogacy, may also lead some people to pursue

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192 Name withheld, *Submission 339*.

193 See, eg, Name withheld, *Submission 49*; S Jefford, *Submission 128*; A Whittaker, C Volks, A Molas (et al), *Submission 201*.

194 See, eg, Name withheld, *Submission 146*; Not published, *Submission 172*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 278*.

195 Australian Government, 'Surrogacy in Australia' <www.surrogacy.gov.au/>.

196 See, eg, S Jefford, *Submission 128*; Name withheld, *Submission 278*; MRKH Australia, *Submission 350*.

197 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 52*; J Taylor, *Submission 55*; Name withheld, *Submission 94*; Name withheld, *Submission 135*; Name withheld, *Submission 160*; Not published, *Submission 345*.

198 See, eg, Name withheld, *Submission 127*; S Jefford, *Submission 128*.

199 See, eg, S Jefford, *Submission 128*; Not published, *Submission 172*; Not published, *Submission 178*.

200 See, eg, T Trevor, *Submission 58*, Name withheld, *Submission 62*; Not published, *Submission 82*.

surrogacy outside of Australia.[201] For further discussion of overseas surrogacy see **Chapter 13**.

Public misconceptions around surrogacy

3.135 Public understanding of surrogacy appears to be limited.[202] The absence of public education and accessible information has contributed to a general lack of awareness about surrogacy and allowed misconceptions about surrogacy to perpetuate.[203] As a result, intended parents and surrogates are often met with lingering and outdated perceptions,[204] which the ALRC has heard can be stigmatising and stressful:

> [w]hen we told people we were pursuing surrogacy here in Australia, we were met (even from well-meaning people) with disbelief, confusion, and sometimes outright misinformation.
>
> Some people were shocked that surrogacy was even legal here. Others confidently (and wrongly) told us that what we were doing was illegal. We constantly found ourselves explaining that Australia allows *altruistic surrogacy*, and that we were carefully following every legal, ethical, and medical requirement. Having to repeatedly defend the legitimacy of our own family-building journey was exhausting, and at times, deeply hurtful.[205]

3.136 Submissions from children born through surrogacy raised similar experiences of limited awareness and misunderstanding,[206] and some mentioned experiences of bullying.[207] Several noted they often play the role of educator:

> [w]hen I tell my story people are confused or have limited understanding.[208]

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201 See, eg, Name withheld, *Submission 28*; Name withheld, *Submission 52*; Name withheld, *Submission 135*. See also Kneebone et al (n 59) 1451–2.

202 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, 15. As noted in the article this is largely anecdotal as 'empirical investigation into the Australian public's knowledge has not been conducted': ibid 15. Similar sentiment was reflected in submissions to this Inquiry. Anecdotal reports also noted that awareness appears to have increased over time: M Montrone, *Submission 263*.

203 See, eg, Name withheld, *Submission 49*; Name withheld, *Submission 62*; Not published, *Submission 108*; Not published, *Submission 172*; Name withheld, *Submission 173*; Name withheld, *Submission 225*.

204 See, eg, Name withheld, *Submission 49*; Name withheld, *Submission 171*; Name withheld, *Submission 173*; Not published, *Submission 206*; T Trevor, *Submission 258*.

205 Name withheld, *Submission 49* (emphasis in original). Other submissions reflect similar experiences: see also Not published, *Submission 206*; Rainbow Families, *Submission 260*; Not published, *Submission 345*.

206 See, eg, Name withheld (minor), *Submission 17*; Name withheld (minor) *Submission 18*; Name withheld (minor), *Submission 26*; Not published (minor), *Submission 27*; Name withheld (minor), *Submission 30*; Name withheld (minor), *Submission 32*; Name withheld (minor), *Submission 33*; Name withheld (minor), *Submission 36*; Name withheld (minor), *Submission 42*; Name withheld (minor), *Submission 110*.

207 See, eg, Name withheld (minor), *Submission 17*; Name withheld (minor) *Submission 18*; Name withheld (minor), *Submission 26*.

208 Name withheld (minor), *Submission 36*.

> I have to explain so many times how I was born to my friends, so I made a powerpoint. It would be really helpful if they were already educated on that so I don't have to show my powerpoint.[209]

3.137 It has also been noted that the lack of education and perpetuation of misconceptions may be impacting the availability of surrogacy in Australia by limiting the number of people interested in being a surrogate, or who are aware that it is an option.[210]

Providing professional support for surrogacy arrangements

3.138 Surrogacy arrangements can raise unique circumstances and dynamics that may be unfamiliar for professionals who provide services during the surrogacy process. The ALRC has heard there is a lack of awareness about surrogacy among some professional groups.[211] Surrogates and intended parents raised that they were often required to educate the professionals and advocate for inclusive treatment.[212] Some surrogates and intended parents reported experiencing reactions of confusion, misunderstanding, or judgement:

> [t]hroughout this process, we were met with silence and confusion. Too few professionals understand the legal, emotional, and medical complexities of surrogacy. Education is urgently needed across the system.[213]

3.139 It was identified that better awareness and education for healthcare professionals would be particularly beneficial given they are often a first point of contact for people considering surrogacy and are involved throughout the pregnancy and birth. The ALRC heard that hospitals and medical professionals are sometimes unprepared for surrogacy-related births,[214] given the difference from other births, as the intended parents are the child's parents, not the surrogate.[215] For example,

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209 Name withheld (minor), *Submission 26*.

210 See Name withheld, *Submission 28*; Name withheld, *Submission 81*; Name withheld, *Submission 96*; J Holder, *Submission 142*; Not published, *Submission 341*; Kneebone, Hammarberg and Beilby (n 200) 10.

211 See, eg, Name withheld, *Submission 49*; Name withheld, *Submission 62*; P Hadfield-Jia, *Submission 71*; Not published, *Submission 82*; Name withheld, *Submission 173*; Not published, *Submission 184*; Name withheld, *Submission 203*; Not published, *Submission 206*; Not published, *Submission 254*; Virtus Health, *Submission 397*. For further discussion of the professional requirements for lawyers and counsellors see **Chapter 6**.

212 See, eg, Name withheld, *Submission 49*; Name withheld, *Submission 52*; Name withheld, *Submission 62*; Name withheld, *Submission 162*; Name withheld, *Submission 203*; Name withheld, *Submission 205*; Not published, *Submission 206*; Name withheld, *Submission 335*; S Cureton, *Submission 351*.

213 Name withheld, *Submission 173*. See also Name withheld, *Submission 49*; Name withheld, *Submission 225*; E Kneebone, *Submission 321*; Name withheld, *Submission 329*; Name withheld, *Submission 335*.

214 See, eg, Name withheld, *Submission 49*; Name withheld, *Submission 52*; K Cox, *Submission 105*; Name withheld, *Submission 127*; Name withheld, *Submission 162*; T Trevor, *Submission 258*; Name withheld, *Submission 329*; Name withheld, *Submission 335*.

215 For further discussion of legal parentage in surrogacy arrangements see **Chapter 10**.

parties have had to argue for intended parents to be included in the birthing suite, and surrogates have been refused discharge separately from the baby.[216]

3.140 According to Attawet et al, the healthcare system is not equipped to manage 'the unique challenges associated with surrogacy birth care' because of a current lack of 'cohesive, evidence-based policies to guide surrogacy birth practices'.[217] The absence of a policy or guidelines can mean that care is not always appropriately tailored:

> [o]ur local hospital didn't have a surrogacy policy at this stage, so there was a lot of confusion about how to admit my [intended parents] for the hospital stay, if I could be discharged separately as the birth mother, how to manage postnatal visits, and how to legally cover my [intended parents] having the right to consent or decline newborn care.[218]

3.141 Not all hospitals in Australia have official surrogacy policies, and those that do differ in scope and detail.[219] Researchers have observed that inconsistent or unstructured approaches to care in surrogacy arrangements can lead to disparities in treatment and can impose unnecessary stress on surrogates and intended parents.[220]

Improving awareness and education

Public information and education

3.142 As outlined above, the present lack of information and education about surrogacy in Australia has made the process difficult to navigate and contributed to the perpetuation of misconceptions and stigma. The ALRC considers that the National Regulator would be well positioned to address these issues by providing consistent, accessible, and accurate education and information. By implementing **Recommendation 7(2)** it is intended that the National Regulator would develop materials to:

- promote the Australian community's awareness and understanding of responsible surrogacy as a valid way to form a family;
- counter misunderstandings about surrogacy in the community by accurately representing surrogacy in Australia;

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216 See, eg, Name withheld, *Submission 162*; Name withheld, *Submission 335*; S Cureton, *Submission 351*. See also Jutharat Attawet, Yungjing Qiu and Micah DJ Peters, 'Towards Best Practice: Urgent Need for Surrogacy Birth Care Guidelines in Australia' (2024) 41(4) *Australian Journal of Advanced Nursing* 1, 1.

217 Attawet, Qiu and Peters (n 214) 1.

218 Name withheld, *Submission 329*.

219 See Kabir Sattarshetty et al, 'Calling for Standardised Surrogacy Birth Care Policies: A Brief Report' (2025) 32 *Journal of Law and Medicine* 404, 405–6. For an example of public hospital policies see: SA Health, *Surrogacy Management Standards in Public Health Units in SA 2021* (No Clinical Directive CD072, Version 2, 2021); Canberra Health Services, *Guidance in the Care of Surrogacy* (ACT Government, Policy Document CHS24/609, 2024).

220 Attawet, Qiu and Peters (n 214) 1; Sattarshetty et al (n 217) 405–6.

- provide up-to-date public information about domestic surrogacy, to support intended parents and surrogates before, during, and after the surrogacy process; and
- educate potential intended parents on the laws, practices and potential risks of overseas surrogacy, including by publishing Responsible Overseas Surrogacy Guidelines.

3.143 Accurately representing and raising awareness of surrogacy could help to normalise responsible surrogacy in Australia and promote more positive interactions and experiences.[221] Broader awareness of surrogacy may also encourage greater participation and increase the availability of surrogates.[222] Research by Kneebone et al highlighted that it is common for surrogates to be motivated by 'indirect' or 'second-hand' experiences of infertility through work or close friends.[223] It is suggested that broader representation and understanding of surrogacy may therefore generate more interest in people seeking to become surrogates.[224] For example, Canadian research found that 'visible representation of surrogacy on social media' influenced surrogates' 'decision to pursue surrogacy'.[225]

3.144 Improving awareness and education would also make domestic surrogacy easier to navigate and better support interested parties to enter into compliant surrogacy arrangements through the administrative pathway.[226] To facilitate informed decision-making, people interested in surrogacy should be able to access robust information about current laws, processes, requirements, and risks, while understanding their rights, interests, and obligations. In conjunction with other measures, increasing the quality and accessibility of information about surrogacy in Australia may act as a preventative measure and reduce the likelihood of intended parents seeking surrogacy overseas because of confusion about domestic law.[227]

3.145 As discussed in **Chapter 13**, overseas surrogacy carries risks. As part of its educative role, the National Regulator should be required to publish information (known as the Responsible Overseas Surrogacy Guidelines) for intended parents on the risks of engaging in overseas surrogacy, as well as their legal responsibilities if they choose to do so.

3.146 Additionally, to support the right to identity for children born through surrogacy, the National Regulator should also develop materials for parents through surrogacy

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221 E Kneebone, *Submission 321*.
222 Ibid; Name withheld, *Submission 81*; Name withheld, *Submission 96*; J Holder, *Submission 142*.
223 Kneebone, Hammarberg and Beilby (n 200) 10.
224 E Kneebone, *Submission 415*.
225 Kneebone, Hammarberg and Beilby (n 200), citing Sophia Fantus and Peter A Newman, 'Motivations to Pursue Surrogacy for Gay Fathers in Canada: A Qualitative Investigation' (2019) 15(4) *Journal of GLBT Family Studies* 342, 342–56.
226 For further information about the administrative pathway see **Recommendation 28**.
227 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 81) 21 [1.65]–[1.67]. See also Not published, *Submission 2*; Not published, *Submission 31*; K Cox, *Submission 105*; Not published, *Submission 309*; Name withheld, *Submission 343*; S Cureton, *Submission 351*.

on the importance of facilitating appropriate and timely conversations with children about their gestational origins (see **Chapter 11**). This should also include guidance for intended parents on how to effectively communicate this information in an age-appropriate way.

3.147 The ALRC received strong support for improved public awareness and education.[228] In addition to providing information on their website, the National Regulator should consider how best to disseminate information (for example, through social media, by running information sessions or webinars, hosting community events, or creating resources for the public to use). Submissions from children born through surrogacy also indicated that education in schools would be beneficial.[229] The National Regulator should consider developing resources that could be incorporated into existing programmes for school-aged children. The National Regulator should ensure that materials are tailored to, and accessible for, all groups in the community.

Professional guidance and training

3.148 It is important that intended parents and surrogates feel supported and receive inclusive and informed care and advice from the professionals they interact with throughout the surrogacy process. **Recommendation 7(2)** aims to enhance awareness about surrogacy among professionals through nationally regulated guidance and training to improve the quality and consistency of care and advice provided. It is intended that the National Regulator provide these resources for a range of professionals including SSO management and staff and healthcare workers. Uniform training materials, developed as a natural extension of uniform legislation (**Recommendations 3**–**5**), would provide an effective mechanism for ensuring that professionals, across all jurisdictions maintain current and consistent knowledge in this field.

3.149 Standardised guidelines in healthcare settings would support the provision of consistent and appropriate care for surrogates, intended parents, and children born through surrogacy across Australia. This would assist in minimising confusion or judgement about circumstances particular to surrogacy arrangements, and help to ensure inclusive and compassionate care.[230] The National Regulator should ensure that the guidelines are comprehensive, and include tools or protocols necessary for practitioners to confidently manage surrogacy cases. Guidelines for healthcare settings should reflect the parties' rights and their roles in the child's care, and take

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228 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 62*; Name withheld, *Submission 69*; Not published, *Submission 116*; Name withheld, *Submission 126*; Name withheld, *Submission 146*; E Kendal, *Submission 166*; L Tripodi, *Submission 168*; Not published, *Submission 217*; S Swanepoel, *Submission 226*; Not published, *Submission 345*; J Attawet, *Submission 360*; E Kneebone, *Submission 415*; K Horsey, *Submission 418*.

229 See, eg, Name withheld (minor) *Submission 18*; Name withheld (minor), *Submission 26*; Not published (minor), *Submission 27*; Name withheld (minor), *Submission 30*; Name withheld (minor), *Submission 32*; Name withheld (minor), *Submission 33*; Name withheld (minor), *Submission 36*; Name withheld (minor), *Submission 42*; Name withheld (minor), *Submission 110*. See also Name withheld, *Submission 76*; K Cox, *Submission 389*.

230 Attawet, Qiu and Peters (n 214) 2.

into account reforms to surrogacy parentage laws that, once implemented, would deem intended parents the legal parents of children born through an approved surrogacy arrangement from birth (**Recommendation 28**).

3.150 The guidelines could be modelled on existing examples such as Canberra Health Service's 'Guidance in the Care of Surrogacy' or the United Kingdom Department of Health and Social Care's 'Care in Surrogacy' guidance.[231] These resources cover the relevant social and legal context, key language, and administrative processes, and set out care requirements for the surrogate, intended parents, and the child born through surrogacy before, during, and after birth.[232] The National Regulator should work with healthcare providers to ensure the guidelines are adopted and applied.

3.151 More broadly, professionals providing services to parties to a surrogacy arrangement, such as SSO management and staff and healthcare professionals, should have access to tailored training. This should include education about the social context relevant to surrogacy, legal requirements, and other information relevant to their role within the surrogacy process. This is particularly important for SSO management and staff as they would be intimately involved and relied upon throughout the surrogacy process (**Chapter 4**). Like the guidance material, training would help to ensure surrogates and intended parents are receiving high quality and consistent information and advice, and support professionals provide their services in an informed and respectful manner. Other professions such as counsellors and lawyers are required to have separate membership or accreditation to practice in this area (**Chapter 7**). The National Regulator could provide additional training to complement this if needed.

3.152 All training and guidance materials should be developed in collaboration with professionals and experts in those fields, and people with personal experience of surrogacy, to ensure they are appropriately tailored.

231 Canberra Health Services (n 217); 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>.

232 The guidance also includes useful checklists for surrogacy documentation and surrogacy birth plans.

4. Support and Approval

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Introduction

4.1 This chapter contains three recommendations relating to the establishment, role, and regulation of Surrogacy Support Organisations ('SSOs'). This is a central component of the ALRC's proposed responsible domestic surrogacy regime outlined in this Report. SSOs would provide the practical mechanism for operationalising the ALRC's recommended safeguards (including eligibility and process requirements: see **Chapters 5** and **6**), and legal parentage reforms (**Chapter 10**). Along with the National Regulator (**Chapter 3**), SSOs would form part of the key supportive architecture for accessible and responsible domestic surrogacy envisioned in this Report. Specifically:

- **Recommendation 8** would allow private, licensed SSOs to be established and regulated under a capped fee model, with the objective of performing four main functions: first, to facilitate introductions between intended parents and potential surrogates; second, to support intended parents and surrogates to understand and undertake the requirements set out in **Chapters 5**, **6**, and **7** (together referred to as 'legislative safeguards'); third, to oversee compliance with those safeguards; and fourth, to approve the surrogacy arrangement proceeding.
- **Recommendation 9** sets out the SSO 'approval gateway function'. This recommendation would empower SSOs to approve surrogacy arrangements once compliance with the legislative safeguards is met. Approval would be required before parties can access assisted reproductive technology ('ART') services to attempt to achieve a pregnancy, and before they can access the administrative pathway to parentage. More complex surrogacy applications would be directed to the National Regulator.

- **Recommendation 10** deals with the consequences of approval, including that intended parents would be the legal parents at birth of children born through approved surrogacy arrangements.

4.2 One of the primary tasks set by the Terms of Reference is considering how to 'reduce barriers to domestic altruistic surrogacy arrangements in Australia'. Responding to this, **Recommendations 8**–**10** are designed to address features of the existing system that make domestic surrogacy difficult to access and navigate, limit the ability of intended parents and surrogates to connect, and leave key safeguards without sufficient or early enough oversight, thus rendering them largely ineffective. If implemented, the recommendations in this chapter would substantially improve the effectiveness of the legislative safeguards and thereby lead to improved protections and harmonised relations for all parties to surrogacy arrangements. Together with the increased support provided to enable introductions and facilitate the surrogacy arrangement, this would increase access to domestic surrogacy arrangements, thereby reducing the incentive for intended parents to pursue overseas surrogacy.

4.3 This chapter proceeds in three parts. The first part discusses **Recommendation 8**, which provides for the establishment of SSOs, and focusses the discussion on the support and coordination functions of SSOs. The second part discusses **Recommendations 9** and **10**, which address the approval functions of SSOs and the consequences of approval and non-approval. The third part discusses the role of the National Regulator in licensing and regulating SSOs, and other safeguards designed to prevent problematic practices that have been associated with unregulated intermediaries overseas.

Permitting and regulating Surrogacy Support Organisations

Recommendation 8

Legislation should empower the National Regulator to license Surrogacy Support Organisations to provide, in accordance with the licensing conditions set by the National Regulator (**Recommendation 6**), the following supports and implement the following safeguards for intended parents and surrogates:

a. facilitating introductions for, or 'matching' of, intended parents and surrogates who meet the requirements in **Recommendations 11**–**14**;

b. coordinating the counselling and other services that need to be engaged with to meet eligibility and process requirements (**Recommendations 15**–**19**);

c. assessing and approving compliant surrogacy arrangements, or referring 'complex applications' to the National Regulator (**Recommendation 9**);

d. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;

e. notifying parties about their right to request a psychological assessment (**Recommendation 19**); and

f. facilitating conflict resolution between intended parents and surrogates.

The domestic surrogacy support gap

4.4 Surrogacy arrangements are inherently complex, requiring careful agreement between intended parents and surrogates on significant emotional, psychological, physical, ethical, and financial matters. They not only involve potentially competing interests of the parties to the arrangement, but must also take into account, as a primary consideration, the best interests of the child born through the arrangement.

4.5 This complexity is compounded by state and territory laws that restrict the support and coordination third parties may provide to intended parents and surrogates, limiting the availability of professional assistance throughout the domestic surrogacy process. Currently:

- in the Northern Territory, it is a criminal offence to provide or offer services for reward that involve assisting a person to enter into a surrogacy arrangement, with the exception of legal practitioners;[1]
- in South Australia, receiving profit to negotiate or offer to negotiate a surrogacy arrangement on behalf of another person is prohibited;[2]
- Tasmania prohibits negotiating or offering to negotiate a surrogacy arrangement in exchange for payment;[3]
- Victorian legislation prohibits a person from publishing information that indicates a willingness to arrange a surrogacy arrangement;[4] and
- in the Australian Capital Territory and Queensland, and under current Western Australian laws, limits are only placed on certain actions in relation to 'commercial' or 'for reward' surrogacy arrangements.[5]

4.6 Some state and territory legislation also imposes limits on how intended parents and surrogates connect in Australia. Facilitating introductions between

1 *Surrogacy Act 2022* (NT) s 49.
2 *Surrogacy Act 2019* (SA) s 24.
3 *Surrogacy Act 2012* (Tas) s 41.
4 *Assisted Reproductive Treatment Act 2008* (Vic) s 45(c).
5 *Parentage Act 2004* (ACT) ss 42, 44; *Surrogacy Act 2010* (Qld) s 58; *Surrogacy Act 2008* (WA) s 11. The new Western Australian law commencing in mid-2027 does not include an equivalent provision.

potential parties to surrogacy arrangements for reward is illegal in South Australia and under the current Western Australia law.[6] In addition, and as discussed in **Chapter 2**, advertising in relation to surrogacy (including lawful surrogacy) is generally prohibited in every Australian state and territory, though there is variation in the exact conduct that is prohibited.[7] These offences apply to any person advertising in relation to a surrogacy arrangement, including intended parents, potential surrogates, and intermediaries.

4.7 **Table 4.1** illustrates, at a high level, which jurisdictions have legislated to prohibit behaviour that supports, facilitates, or seeks to 'match' parties in surrogacy arrangements.

Table 4.1: Prohibitions on support and facilitating introductions

Prohibited behaviour	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
Support, negotiation, or facilitation	✓ (surrogacy for reward)		✓	✓ (surrogacy for reward)	✓	✓	✓ (publishing information)	✓ (surrogacy for reward)	
Facilitating introductions for reward					✓			✓	

4.8 These provisions effectively prevent third parties from being remunerated for facilitating a surrogacy arrangement, or helping potential parties to connect for the purpose of entering such an arrangement. In addition to discouraging support, the current provisions place limitations on the ability for potential intended parents and surrogates to connect.

Support services are permitted and available in international jurisdictions

4.9 Professional surrogacy agencies and matching services operating in overseas jurisdictions are an attractive prospect for Australians who are unable to access surrogacy in Australia. Overseas agencies — or intermediaries — are typically, but not always,[8] profit-making bodies that perform a range of services to coordinate surrogacy arrangements, match surrogates and intended parents, and support parties through the surrogacy process. Professional surrogacy agencies operate in several overseas jurisdictions, including the United States of America and Canada,

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6 *Surrogacy Act 2019* (SA) s 24; *Surrogacy Act 2008* (WA) s 9.

7 *Parentage Act 2004* (ACT) s 43; *Surrogacy Act 2010* (NSW) s 10; *Surrogacy Act 2022* (NT) s 50; *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2019* (SA) s 26; *Surrogacy Act 2012* (Tas) s 41; *Assisted Reproductive Treatment Act 2008* (Vic) s 45; *Surrogacy Act 2008* (WA) s 10. For a more in-depth discussion of the laws relating to advertising, see **Chapter 2**.

8 In the United Kingdom, for example, legislation only allows 'non-profit making bodies' to receive reasonable payment from parties to a surrogacy arrangement: *Surrogacy Arrangements Act 1985* (UK) ss 2(1), (2A), (5), (5A).

two of the most popular destinations for Australian intended parents,[9] as well as the United Kingdom.

4.10 In California, for example, professional agencies perform screening of intended parents and surrogates, and matching of parties.[10] The screening process usually involves an assessment of intended parents' finances and psychological readiness for surrogacy,[11] as well as background checks, medical history checks, and physiological and psychological assessments for surrogates.[12] Beyond screening and matching, agencies typically facilitate a range of services for all parties, including counselling, case management, conflict resolution, and access to support groups.[13]

4.11 Despite a prohibition on the provision of paid matching services in Canada, the ALRC understands that it is similarly commonplace for surrogacy agencies to facilitate matching of intended parents and surrogates.[14] Agencies in Canada perform some screening functions, and provide support to parties through the surrogacy process, including the management of reimbursements to surrogates,[15] providing guidance, and facilitating communication between surrogates and intended parents.[16]

4.12 The United Kingdom allows surrogacy agencies to operate on a not-for-profit basis.[17] Agencies offer avenues for matching parties, either by arranging matches directly,[18] or providing a forum for surrogates and intended parents to connect.[19] Agencies typically also conduct screening of surrogates and intended parents

9 Email from the Home Affairs (Cth) to the Australian Law Reform Commission, 17 April 2025.

10 'The Program', *Surrogate Parenting Services* <www.surrogateparenting.com/the-program/>; 'Gestational Surrogacy Services', *Emmy Life Center* <www.californiasurrogacycenter.com/gestational-surrogacy-services/>; 'Our Agency', *West Coast Surrogacy* <www.westcoastsurrogacy.com/our-surrogacy-agency>. See also Leah Kennedy, 'Can I Have Your Baby? Paternalism, Autonomy, And Money in California's "Surrogacy-Friendly" Statutory Scheme' (2022) 33(1) *Stanford Law & Policy Review* 187, 213–14.

11 Naomi Cahn and June Carbone, 'Surrogacy in the United States of America' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 307, 326.

12 Ibid 325.

13 See, eg, ibid 323; Kennedy (n 10) 203; Gestlife, 'Surrogacy Agreement Disputes: Consequences and Resolution Pathways' (2026) <www.gestlifesurrogacy.com/en/blog/surrogacy-agreement-disputes/>.

14 Stefanie Carsley, 'Surrogacy Agencies in Canada: Intended Parents' Experiences' (2025) 36(2) *Canadian Journal of Family Law* 6, 19.

15 Ibid 34.

16 Ibid 16–18.

17 *Surrogacy Arrangements Act 1985* (UK) ss 2(1), (2A), (5), (5A).

18 See, eg, 'UK Surrogacy Pathway', *Brilliant Beginnings* <www.brilliantbeginnings.co.uk/uk-surrogacy-pathway/>; 'Intended Parents', *My Surrogacy Journey UK* <www.mysurrogacyjourney.com/intended-parents/>.

19 See, eg, 'Application Guide for Intended Parents', *SurrogacyUK* <www.surrogacyuk.org/wp-content/uploads/2026/04/Information-Guide-for-Intended-Parents-2026-2.pdf>.

prior to matching,[20] and provide a wide range of supports throughout the surrogacy arrangement, including managing support groups and coordinating with lawyers, counselling and medical professionals.[21] The ALRC heard from a United Kingdom professional during consultations that requiring agencies to be not-for-profit limits the incentive to establish agencies, and is difficult to sustain when agencies' operations are complex and time-consuming (this is discussed further below).

Responding to the domestic surrogacy support gap

4.13 **Recommendation 8** would permit the establishment of SSOs as regulated bodies performing the following core functions: facilitating introductions between intended parents and potential surrogates; guiding parties through the legislative safeguards required to access ART services and the administrative pathway to parentage; and overseeing and approving surrogacy arrangements (discussed below). SSOs would provide the support, oversight, and lawful facilitation currently missing from the domestic surrogacy system. In doing so, the establishment of SSOs would help to address two significant barriers to domestic surrogacy in Australia: the lack of support to navigate the process, and the difficulty of finding a surrogate (**Chapter 1**). These barriers are dealt with in turn.

4.14 Currently, parties must complete the surrogacy process with limited guidance and support, with surrogates and intended parents reporting that they find the domestic surrogacy process challenging, stressful, and difficult to navigate.[22] One parent through surrogacy submitted that upon

> receiving signoff to proceed with a surrogacy arrangement, I was registered with a clinic and given some high-level information and a list of steps to complete, no guidance no support. It was left to me to do my own extensive research to find appropriate and qualified practitioners experienced with surrogacy … It's an incredibly complex system to navigate, and when you don't know what you don't know, and with no government or national body to guide you it's an overwhelming and confusing process to try to understand.[23]

4.15 This lack of support can result in negative outcomes. It can lead to parties relying on informal and potentially inaccurate or unreliable advice, or engaging professionals without expertise in surrogacy. Lack of support can also risk the success

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20 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>. See also *UK Surrogacy Pathway* (n 18); 'Join as an Intended Parent', *SurrogacyUK* <www.surrogacyuk.org/join-as-an-intended-parent/>; 'Join as a Surrogate', *SurrogacyUK* <www.surrogacyuk.org/join-as-a-surrogate/>; 'UK Surrogacy', *My Surrogacy Journey UK* <www.mysurrogacyjourney.com/uk-surrogacy/>.

21 *UK Surrogacy Pathway* (n 18); *Intended Parents* (n 18); *Application Guide for Intended Parents* (n 19).

22 P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 225*; Name withheld, *Submission 278*; Not published, *Submission 322*.

23 Name withheld, *Submission 185*.

of the surrogacy arrangement. For example, parties may not access appropriate implications counselling resulting in deficient expectation management and possibly an absence of true free and informed consent.

4.16 The lack of support also drives intended parents overseas. Of the 203 Australian parents through overseas surrogacy who responded to a 2023 survey, 46% went overseas because professional surrogacy providers screen potential surrogates and help to facilitate the arrangement.[24] In the same survey, 71% of intended parents stated that '[a] surrogacy provider which met all [their] needs' was the main reason they chose to pursue surrogacy in a particular country.[25] Due to the availability of support services in countries like Canada and the United States of America, overseas surrogacy is often seen as a more accessible option.[26] This is reflected in the submissions received from intended parents, many of which explain that they felt they had no other choice but to travel overseas for surrogacy because of the lack of support or that they were unable to find a surrogate match in Australia.[27] Equally, some submissions suggested that establishing domestic surrogacy agencies would reduce the reliance on overseas surrogacy.[28]

4.17 In addition to a lack of support, the difficulty finding a surrogate also leads intended parents to travel overseas. In the 2023 survey discussed above, the inability to find a surrogate was the second most common reason given for choosing overseas surrogacy.[29] Professionals working in surrogacy or ART, including clinicians, lawyers, counsellors, and health policy regulators, agree that finding a surrogate in Australia is a 'time-consuming and potentially fruitless process'.[30] The difficulty in finding a surrogate in Australia reflects not only an availability issue, (partially addressed by reducing the financial disadvantage currently experienced by surrogates — see our recommended cost and loss recovery reforms (**Recommendations 23**–**25**)), but is also due to the absence of structured, lawful mechanisms for intended parents and potential surrogates to find one another.

4.18 This sentiment was echoed in submissions received in this Inquiry,[31] which indicated that many intended parents and surrogates rely on surrogacy community

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24 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, 1452.

25 Ibid 1453.

26 See ibid 1454.

27 Not published, *Submission 2*; Not published, *Submission 123*; Name withheld, *Submission 173*; Name withheld, *Submission 278*; Not published, *Submission 309*.

28 Name withheld, *Submission 1*; Name withheld, *Submission 22*; Name withheld, *Submission 343*.

29 As reported by 56% of those who were completing, planning to complete or had completed overseas surrogacy: Kneebone et al (n 24) 1452.

30 Lana Zannettino et al, 'Untangling the Threads: Stakeholder Perspectives of the Legal and Ethical Issues Involved in Preparing Australian Consumers for Commercial Surrogacy Overseas' (2019) 27(1) *Journal of Law and Medicine* 94, 98.

31 Name withheld, *Submission 113*; Name withheld, *Submission 146*; Not published, *Submission 206*; Name withheld, *Submission 210*; Rainbow Families, *Submission 260*; Name withheld, *Submission 281*; Not published, *Submission 341*.

networks, often operating online, for information provision, support, and matching.[32] One submission noted that '[f]or many intended parents, this is currently the only means of connecting with potential surrogates'.[33] We heard that matching via informal surrogacy communities is time-consuming, highly competitive, and there are significantly more intended parents than potential surrogates.[34] It was also noted in submissions that informal matching platforms may not always support safe and ethical matching.[35]

4.19 There are a small number of Australian organisations that provide 'agency-style' support such as education, mentoring, guidance through the surrogacy process, and in some cases, offer to connect intended parents with potential surrogates.[36] However, these are very limited, likely due to the legislative prohibition on supporting or facilitating surrogacy arrangements that is in place in some jurisdictions, and the prohibition on advertising that effectively prevents intermediaries from offering a 'matching' service (see above). Additionally, there is no government oversight or regulation of these organisations other than the requirement to comply with legislative prohibitions relating to coordination and matching in surrogacy arrangements.

4.20 People with personal experience of surrogacy broadly agreed on the need for professional services for parties to surrogacy arrangements,[37] particularly if they would be subject to regulation or oversight.[38] Some professional and community groups with expertise in surrogacy also highlighted the benefit of professional surrogacy support bodies in submissions. For example, one medical industry society submitted that professional services should facilitate

> adequate professional screening and matching processes, ideally via independent surrogacy agencies or authorised clinics, to protect vulnerable parties and ensure compatibility between surrogates and intended parents.[39]

4.21 Similarly, Rainbow Families highlighted that the

> surrogacy process is confusing and complex for many parents, and it can be hard to find a surrogate where a family member or friend is not an option. Currently in Australia there is a need for more professional services supporting surrogates and parents on the surrogacy journey. This would take the burden of

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32 See Not published, *Submission 179*; Name withheld, *Submission 185*; Name withheld, *Submission 343*; K Cox, *Submission 389*.

33 A McKie, *Submission 264*.

34 Name withheld, *Submission 146*; Name withheld, *Submission 185*; Name withheld, *Submission 343*.

35 Not published, *Submission 179*; Not published, *Submission 184*; Name withheld, *Submission 278*.

36 See, eg, organisations such as the Surrogacy Australia Support Service, and Growing Families: 'Support Service Details', *Surrogacy Australia* <www.surrogacyaustralia.org/register/>; *Growing Families* <www.growingfamilies.org/>.

37 Not published, *Submission 103*; Name withheld, *Submission 177*.

38 Name withheld, *Submission 11*; Name withheld, *Submission 113*; Name withheld, *Submission 170*; Name withheld, *Submission 173*; Not published, *Submission 179*; Not published, *Submission 184*; Not published, *Submission 209*; Name withheld, *Submission 210*; Not published, *Submission 254*; Name withheld, *Submission 259*; Name withheld, *Submission 343*.

39 Name withheld, *Submission 347*.

> managing the entire process off parents, contributing to making surrogacy more viable within Australia.[40]

4.22 As noted by one parent through surrogacy, professional services in Australia

> would be responsible for initial screening of surrogates and intended parents, facilitating matches between the two, and guiding both parties throughout the process. ... [This] model would be feasible and effective.[41]

4.23 An intended parent in Kneebone et al's study explained that this is because having 'an agency in place moderates some of the behaviour, because [surrogates and intended parents] have to deal with the third party who can say "No, don't do that. You shouldn't be doing that and this is why"'.[42]

4.24 The ALRC also received some submissions opposing the establishment of SSOs. Opposition, which generally came from organisations that are opposed to surrogacy, was based on two arguments. First, some submissions argued that allowing professional support for surrogacy would amount to 'commercial' surrogacy.[43] The ALRC disagrees that paid professional support for parties during the surrogacy process is synonymous with surrogacy for profit or reward. Under existing laws, parties to surrogacy arrangements are already required to pay for professional support by seeking the services of counsellors, lawyers, and medical professionals. Secondly, some submissions disagreed with professional support and guidance because it would 'normalise' or 'legitimise' domestic surrogacy.[44] That view fails to appreciate that surrogacy is already normalised as a legitimate means of forming a family under existing laws (see **Chapter 1**).

4.25 Finally, we note that the 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report considered but did not recommend private intermediaries, on the basis that its other recommendations would help to make it easier to find surrogates, and that agencies would increase the cost of surrogacy.[45] SSOs' functions would go beyond matching and provide additional benefits, including screening, support, guidance, oversight and an approvals function (discussed below). Although SSOs could add to the cost of surrogacy in Australia, using an SSO to coordinate a surrogacy arrangement would not be mandatory (although SSO approval, or approval by the National Regulator, would be mandatory for accessing ART services and the administrative pathway). Costs would also be capped and are therefore would be likely to be lower than those charged by private agencies operating in certain other

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40 Rainbow Families, *Submission 260*.

41 Name withheld, *Submission 177*.

42 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, 11.

43 See S Allen, *Submission 371*; Child Identity Protection, *Submission 388*; FINRRAGE, *Submission 410*.

44 Centre for Bioethics and Culture, *Submission 379*; Active Watching Waiting, *Submission 390*; ARMS (Vic), *Submission 408*; Women's Forum Australia, *Submission 416*.

45 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 319 [10.84]–[10.86].

jurisdictions, such as the United States of America. Overall, by supporting intended parents and surrogates to connect, navigate and comply with requirements, and proceed with appropriate oversight, SSOs would reduce key barriers to surrogacy in Australia and make responsible domestic surrogacy arrangements more viable.

The functions SSOs would perform

4.26 **Recommendation 8** lists the functions that SSOs would be permitted to perform. These functions have been selected to achieve one of this Inquiry's reform aims of reducing barriers to domestic surrogacy, and also respond to the gaps in support identified in submissions and consultations. They would be performed in accordance with the SSO's licensing conditions (discussed below) and the legislative prohibitions proposed in **Recommendations 1**, **2** and **33**. The ALRC envisages that SSOs would be comprised of staff holding qualifications that enable them to effectively provide these services (such as project management, legal or medical qualifications, mediation, or social work) as well as staff accredited by the National Regulator to perform the approval function (see below).

Assessing and approving surrogacy arrangements

4.27 One of the principal roles for SSOs would be the power to approve surrogacy arrangements if they comply with all legislative requirements, or refer 'complex applications' to the National Regulator for assessment. Approval would act as the gateway to ART services for any attempt to achieve a pregnancy, and the administrative pathway to parentage (**Recommendation 28**). Approval decisions would only be made by staff members accredited to do so by the National Regulator. This function is discussed in greater detail below in relation to **Recommendation 9**.

Facilitating introductions between intended parents and surrogates

4.28 Under this function, SSOs would introduce intended parents and surrogates who may be well-suited to go through the surrogacy process together. This would likely involve an initial assessment of whether intended parents and surrogates meet particular eligibility requirements (**Recommendations 11**–**16**). For example, SSOs would check whether parties meet age and citizenship or residency requirements (**Recommendations 12** and **13**), and, where relevant, review intended parents' criminal history checks (**Recommendation 16**). SSOs would then facilitate suitable introductions. These assessments are essential to protect parties' health and wellbeing and minimise the risk of harm by ensuring they are appropriate candidates for surrogacy.

4.29 This function would be possible following the implementation of **Recommendation 2**, which would remove barriers to SSOs' ability to advertise or otherwise promote engagement in lawful surrogacy arrangements (see **Chapter 2**). Importantly, this would allow SSOs to foster awareness about surrogacy in the community, particularly among prospective surrogates. In addition, SSOs may consider establishing a shared internal database of potential surrogates to facilitate

introductions between intended parents and surrogates working with different SSOs. While acknowledging that, from the perspective of an SSO's internal business interests, there may be practical impediments to implementation, this would enhance access to domestic surrogacy by allowing intended parents to connect with a wider pool of potential surrogates if there are limited options with the SSO they are working with.

4.30 This function would support intended parents and surrogates to make an appropriate match, responding to a key barrier to accessing surrogacy in Australia, as outlined above. Facilitating connections between intended parents and surrogates was the reason most frequently given in submissions for why professional intermediaries should be established.[46] As mentioned in the 2023 Law Commission of England and Wales, and Scottish Law Commission Report when recommending Regulated Surrogacy Organisations ('RSOs'), '[w]e see the core work, and unique role, of RSOs under our recommendations as facilitating surrogacy arrangements between surrogates and intended parents, sometimes in the form of actively "matching" the parties'.[47]

Coordinating services to meet eligibility and process requirements

4.31 This function responds to the burden currently placed on parties to navigate a complex array of eligibility and process requirements. It allows a third party to be remunerated for guiding intended parents and surrogates through these requirements and coordinating the surrogacy process. For example, once intended parents and surrogates have formed a surrogacy 'team', SSOs would assist them by referring them to appropriate services to fulfil any remaining legislative safeguards, that the SSO did not initially assess, such as counselling, and legal advice (**Recommendations 15**–**19**). Importantly, services such as legal advice and counselling should not be provided in-house.[48] Rather, to better ensure the provision of independent and high-quality services, SSOs would refer parties to qualified outside providers. **Recommendation 33**, under which SSOs would be prohibited from earning referral fees from these service providers, will assist in ensuring that referrals are based solely on merit.

Information, case management, and support

4.32 This function would see SSOs providing end-to-end coordination and support for surrogacy arrangements.[49] Under this function, SSOs would be responsible for managing surrogacy arrangements and ensuring parties are adequately supported and have the necessary resources for the arrangement to be successful. This might

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46 See, eg, Name withheld, *Submission 1*; Name withheld, *Submission 11*; Name withheld, *Submission 22*; L Ransome, *Submission 144*; Name withheld, *Submission 173*; Not published, *Submission 179*; Not published, *Submission 209*; Not published, *Submission 220*; Name withheld, *Submission 278*; Name withheld, *Submission 343*; Name withheld, *Submission 347*.

47 Law Commission of England and Wales, and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 420 [14.19].

48 As some submissions suggested: ANZICA, *Submission 368*; L Ransome, *Submission 380*.

49 Not published, *Submission 209*.

involve ensuring parties know what to expect, providing information about the approval process, connecting parties with a support network, and ensuring that intended parents have complied with the requirement to ensure availability of adequate funds pursuant to **Recommendation 25**. This would alleviate the administrative burden on parties, as well as the risk of unintentional non-compliance with requirements. It would also support positive and successful surrogacy arrangements by managing parties' expectations; for example, around consideration of what constitutes reasonable costs that the surrogate is entitled to claim, and acting as an intermediary between intended parents and surrogates where necessary.

The right to request a psychological assessment

4.33 **Recommendation 19** would require psychological assessments to be conducted in relation to surrogates and intended parents in some circumstances, including if a party requests an assessment. Where parties are not well known to each other, or have any concerns about whether particular 'red flags' may be present, it is important that any individual party (whether it is one of the intended parents or the surrogate) can require all parties to the arrangement to undergo an assessment. This can provide peace of mind, as well as allowing parties to proactively address concerns that may not otherwise have been detected during implications counselling. Under this function, SSOs would notify surrogates and intended parents of their right to request that psychological assessments take place. This is discussed in more detail in **Chapter 6**.

Resolution of disagreements

4.34 SSOs could assist, where appropriate, in the resolution of disagreements between intended parents and surrogates. As an experienced and well-informed intermediary independent of any of the parties, SSOs would be well-positioned to encourage respectful and constructive discussion and help to resolve any disagreements that may emerge. Some submissions mentioned specifically that conflict resolution is a function parties to surrogacy arrangements should have access to.[50] While legislative safeguards such as counselling and legal advice reduce the risk that parties will have disagreements, they can arise in contexts involving complex interpersonal relationships and stress. For example, disagreements could emerge over whether a cost incurred by the surrogate is reasonable and must therefore be reimbursed (see **Recommendation 25**), or over the level of involvement intended parents would like to have in matters relating to the surrogate's health, wellbeing, or lifestyle during pregnancy. While some disputes may require mediation or further counselling, SSOs are well placed to assist parties towards resolution.

50 Name withheld, *Submission 19*; S Everingham, *Submission 129*; Name withheld, *Submission 421*.

Approving surrogacy agreements

Recommendation 9

1. Legislation should provide that Surrogacy Support Organisations (**Recommendation 8**), and where applicable, the National Regulator (**Recommendation 6**) (collectively, 'an approval body'), should be empowered to approve compliant surrogacy arrangements.
2. Legislation should provide that to access the administrative pathway (**Recommendation 28**), parties to a surrogacy arrangement must obtain approval from an approval body before attempting to achieve a pregnancy.
3. Legislation should provide that:
    a. before granting approval to access the administrative pathway, an approval body must assess all supporting evidence provided by the parties to a surrogacy arrangement in accordance with guidelines developed by the National Regulator (**Recommendation 6**) and be satisfied that they meet all the preconditions in **Recommendations 11**–**20**;
    b. where a Surrogacy Support Organisation is not satisfied that the parties to a surrogacy arrangement have met all the preconditions in **Recommendations 11**–**20**, it must not approve the surrogacy arrangement. The parties may seek to have that arrangement reviewed by the National Regulator; and
    c. the National Regulator may dispense with a precondition in **Recommendations 11**–**20** if satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the arrangement.
4. The process for approving surrogacy arrangements in paragraph 3 should incorporate the following elements:
    a. Parties to a surrogacy arrangement may seek approval from a Surrogacy Support Organisation, regardless of whether the arrangement was facilitated by a Surrogacy Support Organisation.
    b. Surrogacy Support Organisations must refer all 'complex applications' (paragraph 7) to the National Regulator, as a condition of their licensing (**Recommendation 8**), unless the parties do not wish the arrangement to proceed.

c. The National Regulator may remit a 'complex application' back to a Surrogacy Support Organisation for approval (**Recommendation 6**).

d. Applications to Surrogacy Support Organisations must be assessed and determined by a staff member accredited by the National Regulator (**Recommendation 6**).

5. Legislation should provide that for a transitional period of two years from commencement, or a further period if prescribed, the National Regulator may assess and approve primary applications submitted by the parties without the involvement of a Surrogacy Support Organisation.

6. Legislation should provide that when an approval body assesses a surrogacy arrangement for approval:

   a. the completion of a process required by an assisted reproductive technology service provider, which would also satisfy a precondition for a surrogacy arrangement, discharges that precondition;

   b. there should be a presumption in favour of approval where the parties meet all the preconditions; and

   c. an approval body should review surrogacy arrangements 'on the papers'. Meetings with the parties should only occur where an approval body considers them necessary.

7. Legislation should provide that applications should be treated as 'complex applications', and be referred by a Surrogacy Support Organisation to the National Regulator, where:

   a. as part of any psychological assessment, the psychologist recommends that the surrogacy arrangement should not proceed or the psychologist is unable to make a recommendation but identifies risk factors in their report (**Recommendation 19**); or

   b. the Surrogacy Support Organisation considers that the application otherwise raises complex issues as identified in guidelines developed by the National Regulator (**Recommendation 6**).

Recommendation 10

1. Legislation should provide that when a surrogacy arrangement has been approved ('approved surrogacy arrangement'):
    a. the approved surrogacy arrangement may proceed on the administrative pathway, and the intended parent(s) will be the child's legal parent(s) at birth (**Recommendation 28**);
    b. the Surrogacy Support Organisation must lodge the approved surrogacy arrangement with the National Regulator (**Recommendation 6**);
    c. the approval applies to any embryo transfer or attempt to achieve a pregnancy carried out as part of the approved surrogacy arrangement; and
    d. the approval body may issue a document certifying that the arrangement is an approved surrogacy arrangement for the purposes of the administrative pathway to legal parentage, and explaining that the legal consequence is that the intended parent(s) will be the child's legal parent(s) at birth.
2. Legislation should provide that a surrogacy arrangement that is not approved by the Surrogacy Support Organisation or the National Regulator ('unapproved surrogacy arrangement') cannot proceed on the administrative pathway to legal parentage, but may proceed via the judicial pathway to legal parentage (**Recommendation 29**).

Current oversight of legislative safeguards is largely ineffective

4.35 In most Australian jurisdictions, oversight of surrogacy arrangements occurs only after the child is born, when intended parents apply to a state or territory court for a parentage order. At that stage, the court assesses whether the parties have complied with legislative safeguards such as counselling and legal advice, some of which may be dispensed with in the child's best interests or in exceptional circumstances (**Chapter 10**).[51] If a parentage order is granted, this transfers legal parentage from the surrogate and their partner (if any) to the intended parents.[52] Beyond this, in most states and territories, there is no formal oversight of surrogacy arrangements before birth.

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51 The precise formulation varies slightly between the states and territories, but generally includes 'exceptional circumstances' and/or 'best interests of the child': see, eg, *Parentage Act 2004* (ACT) s 28H(3)(b); *Surrogacy Act 2010* (NSW) s 18(2).

52 *Parentage Act 2004* (ACT) s 29; *Surrogacy Act 2010* (NSW) s 39; *Surrogacy Act 2022* (NT) s 37; *Surrogacy Act 2010* (Qld) s 39; *Surrogacy Act 2019* (SA) s 18; *Surrogacy Act 2012* (Tas) s 26; *Status of Children Act 1974* (Vic) s 22; *Surrogacy Act 2008* (WA) s 26. Under new Western Australian legislation set to commence in mid-2027, the relevant provision will be: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 126. We also note Victoria calls these orders 'substitute parentage orders': *Status of Children Act 1974* (Vic) s 22.

4.36 The exceptions to this are in Victoria and Western Australia, where legislation requires pre-conception approval of surrogacy arrangements by a regulatory body. In Victoria, parties must obtain approval from the Patient Review Panel before a registered ART service provider can carry out a treatment procedure as part of a surrogacy arrangement.[53] Similarly, in Western Australia, a parentage order cannot be made in respect of a child unless the arrangement has been approved by the Reproductive Technology Council.[54] Legislation commencing in mid-2027 will abolish the Western Australia Reproductive Technology Council,[55] removing the requirement for surrogacy arrangements to be approved in that state. The effectiveness of the Victorian and Western Australian models is discussed below.

4.37 In all other Australian states and territories, oversight of surrogacy arrangements only takes place after a child is born. This model has significant limitations as it means there is generally no mechanism for confirming, at the outset, whether important eligibility and process requirements have been satisfied before the arrangement proceeds. As a result, arrangements could proceed in the absence of important, protective legislative safeguards which seek to facilitate free and informed decision-making by all parties to the arrangement. This could have potentially significant consequences. For instance, if parties do not fulfil counselling requirements, expectations about their relationship post-birth may be misaligned, or they may have divergent views on terminating the pregnancy in the case of severe complications. If an arrangement proceeds without proper legal advice it could lead to disputes over parentage.

4.38 The parentage order application stage is too late to effectively remedy non-compliance, or for a requirement or safeguard to have any operation or useful effect, as by that point the surrogacy arrangement has proceeded and there is a child born through surrogacy who has a right to have their family legally recognised (see **Chapter 14**). If the court has discretion, it may dispense with the requirement (rendering it effectively redundant) and make a parentage order regardless. However, when the court lacks discretion, or determines not to dispense with a requirement, a parentage order will not be made. The child's functional and social parents will not be recognised as their legal parents, and the surrogate will remain legally responsible for the child, contravening the intentions and interests of all parties and the rights and best interests of the child (see **Chapter 14**). In these cases, in Australia the intended parents would likely need to apply to the Federal Circuit and Family Court of Australia for a parentage order, with uncertain results (see **Chapter 10** for a more in-depth discussion of parentage laws). Legal academic, Dr Wilson, explains that this leaves judges

> in the difficult position of needing to decide between two competing policies, and resulting in a high level of uncertainty and stress for the intended parents at a time when they should be bonding with their new child. Such a model is also arguably not in the best interests of the child, who should be able to start his or

53 *Assisted Reproductive Treatment Act 2008* (Vic) s 39.
54 *Surrogacy Act 2008* (WA) s 16.
55 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 306.

> her life in a secure, loving, environment and with a clear and identifiable place in his or her family and wider community.[56]

4.39 This view was echoed in the 2019 UN Special Rapporteur on the Sale and Sexual Exploitation of Children Report, which identified the ineffectiveness of evaluating the child's best interests once they have already been born.[57]

Requiring pre-conception approval

4.40 Introducing oversight and approval prior to conception is a more effective safeguard for the rights of intended parents, surrogates, and children born through surrogacy, when compared to an assessment of compliance after a child has been born. An early approval model has the benefit of providing oversight when oversight can be effective. It also enables the early identification of potential risks so that concerns can be effectively addressed.[58] It will help to ensure that parties enter the arrangement well-informed, with a clear understanding of their rights, responsibilities, and expectations, reducing the likelihood that unresolved issues arise after birth when they will be difficult to resolve.

4.41 **Recommendations 9** and **10** would introduce oversight and approval of surrogacy arrangements earlier in the surrogacy process and before any pregnancy is attempted. Empowering SSOs (and the National Regulator in certain circumstances) to approve surrogacy arrangements is a central element of the recommended supported and responsible domestic surrogacy regime. It is necessary to operationalise the requirements and legislative safeguards recommended throughout the Report (see **Recommendations 11**–**21** in particular) that are key to ensuring surrogacy in Australia is practised safely and protects all parties' human rights. Crucially, a pre-conception approval requirement would strengthen protections by better ensuring that surrogates are exercising free and informed consent, before the arrangement progresses.

4.42 Under **Recommendation 9**, the assessment of parties' compliance with these safeguards would move from a post-birth court process, to administrative regulation through pre-conception approval.[59] SSO approval would act as the gateway to two important processes: attempting to achieve a pregnancy via an ART service provider, and the administrative pathway to parentage (**Recommendation 28**).

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56 Debra Wilson, 'Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications' (2012) 7(3) *UC Irvine Law Review* 653, 676–7.

57 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born From Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) 12 [57].

58 Wilson (n 56) 655–77.

59 Apart from in Victoria, where pre-conception approval is already required. Western Australia, where the requirement for approval is soon to be abolished, would need to re-establish this process.

4.43 ART service providers would not be permitted to conduct a procedure that attempts to achieve a pregnancy (such as an embryo transfer: see **Recommendation 34**) unless the surrogacy arrangement has been approved by an SSO. This critical prohibition creates a strong practical incentive for parties to comply with eligibility and process requirements, as ART is essential to gestational surrogacy, which is the most common form of surrogacy (**Chapter 1**). This would present an effective barrier against surrogacy arrangements proceeding where parties have not complied with the legislative safeguards. Traditional surrogacy arrangements, facilitated with or without an ART service provider, would also be able to apply for approval from an SSO.

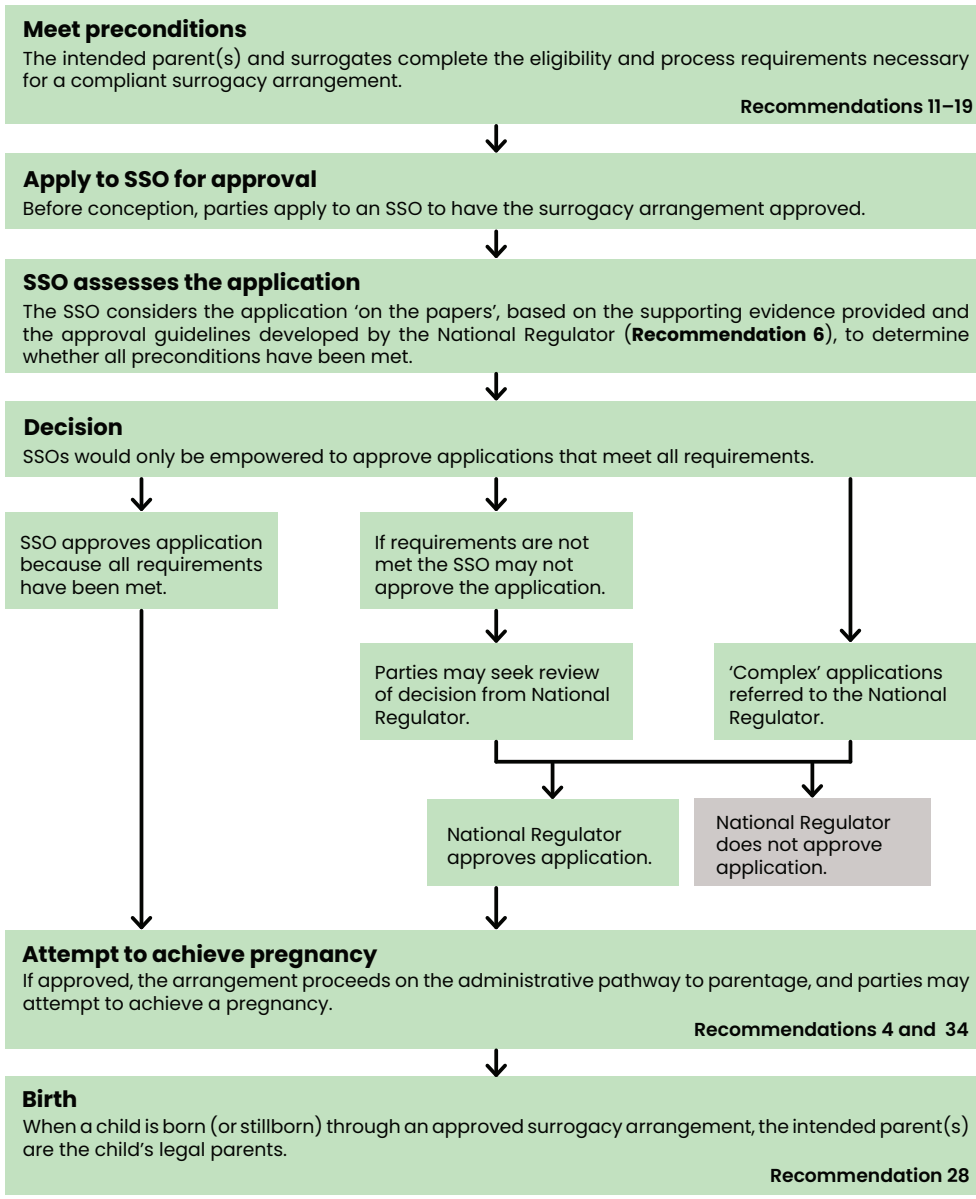
4.44 Approval would also be a precondition for accessing the administrative pathway to legal parentage (**Recommendation 28**). This will also incentivise compliance with the legislative safeguards and better ensure that the requisite preconditions are satisfied before parties attempt to achieve a pregnancy.

4.45 **Recommendations 9** and **10** have been developed to balance appropriate safeguards and risk mitigation alongside accessibility, efficiency, and a 'least restrictive' approach (see **Chapter 1**). The approvals process would involve a two-tiered system with decision-making responsibility divided between SSOs and the National Regulator. This would recognise the need for efficient decision-making while ensuring that decisions are made at a level that reflects the complexity of each arrangement. It would allow for straightforward arrangements to be considered by SSOs, and oversight at a higher level when necessary.

4.46 Beyond SSOs, the ALRC considered a range of entities for providing early oversight on the administrative pathway, including the National Regulator and a judicial body. The ALRC concluded that SSOs would be best placed to perform this function. Their role would be multifaceted and, beyond the approvals function, would include supporting parties to meet the relevant legislative safeguards and overseeing compliance with them. The ALRC envisages SSOs operating in a range of locations (similar to ART service providers), and to have processes that do not have the formality of a regulator or court. Placing approval responsibility with one national body such as the National Regulator or Federal Circuit and Family Court of Australia would risk delay and complexity.

4.47 **Figure 4.1** illustrates how this process would generally operate. The elements of the approval process are discussed in greater detail below.

Figure 4.1: Approval of surrogacy arrangements



4.48 Many submissions supported the idea of approval, though some raised concerns. Support was provided on the basis that early oversight is sensible, would effectively prevent exploitation, and protects parties' rights.[60] For example, the Australian Human Rights Commission submitted that:

> [f]rom a child-centred and preventative perspective, prospective approval of surrogacy agreements has merit. Evidence before the Surrogacy Matters Inquiry demonstrated that reliance on post-birth court orders places children in legally precarious positions and constrains judicial discretion once a child has already been born. Prospective approval aligns with international best practice by shifting regulatory attention to informed consent, eligibility and safeguards before irreversible consequences arise.[61]

4.49 Some submissions were opposed to approval on the basis that it would cause delays, undermine surrogates' autonomy, and unnecessarily limit intended parents' reproductive freedom.[62] The ALRC recognises that delay may itself be a barrier to domestic surrogacy, and addresses this below. However, the ALRC considers that any limitation on rights imposed by the approval process is justified, proportionate, and directed to the legitimate aim of preventing harm before it occurs. Approval provides an important safeguard against arrangements that are exploitative or high-risk.

4.50 **Recommendations 9** and **10** align with frameworks already in place in some international jurisdictions, and as indicated below, in Victoria and Western Australia. Assessing compliance pre-conception is the preferred approach in several international jurisdictions, including New Zealand,[63] Israel,[64] South Africa,[65] Greece,[66] and some parts of the United States of America.[67] Legislation that commenced recently in Ireland introduced a requirement for pre-conception approval of surrogacy arrangements by a regulatory authority.[68] The shift to pre-conception approval was deemed necessary to ensure the surrogate was suitable, and exercising free and informed consent.[69] A similar approach was recently recommended for parts of the United Kingdom, after the 2023 Law Commission of England and Wales, and Scottish Law Commission Report recommended that surrogacy agreements require

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60 Name withheld, *Submission 19*; L Ransome, *Submission 144*; Name withheld, *Submission 146*; L Tripodi, *Submission 168*; MRKH Australia, *Submission 350*; S Jefford, *Submission 359*; Virtus Health, *Submission 397*.

61 Australian Human Rights Commission, *Submission 433*.

62 S Page, *Submission 130*; Not published, *Submission 215*; Not published, *Submission 345*.

63 *Human Assisted Reproductive Technology Act 2004* (NZ) s 16.

64 Rhona Schuz, 'Surrogacy in Israel' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 165, 166–7.

65 *Children's Act 38 of 2005* (South Africa) s 292.

66 Eleni Zervogianni, 'Surrogacy in Greece' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 147, 149.

67 Cahn and Carbone (n 11) 319.

68 *Health (Assisted Human Reproduction) Act 2024* (Ire) s 53.

69 Ireland, *Parliamentary Debates*, Houses of the Oireachtas/Tithe an Oireachtais, 23 March 2022 (Anne Rabbittee, Minister of State).

pre-conception approval from a Regulated Surrogacy Organisation in order to proceed.[70] This recommendation was made on the same basis as the ALRC's conclusion: that the current law introduces scrutiny of surrogacy arrangements too late in the process, and the lack of early screening creates a range of risks.[71] Finally, the 2019 UN Special Rapporteur on the Sale and Sexual Exploitation of Children Report also highlights the importance of approval of surrogacy arrangements, especially in jurisdictions such as Australia where at least some parts of the agreement are enforceable.[72]

Existing early oversight processes are broadly effective

4.51 Evaluations and feedback from jurisdictions with existing approval processes indicate that early oversight has been an effective and efficient mechanism, particularly in ensuring legislative safeguards are complied with and reducing complications after children have been born through surrogacy. In New Zealand, for example, approval from the Ethics Committee on Assisted Reproductive Technology ('ECART') must be provided before an assisted reproductive procedure may be performed in relation to gestational surrogacy arrangements.[73] The 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report examined the effectiveness of the ECART approval process, concluding that:

- it was evident that prior approval is an effective safeguard protecting the rights and interests of all parties as it reduces the risk of problems arising during and after the pregnancy;[74]
- New Zealand's approval process 'reduces the need for a prescriptive post-birth process to establish legal parenthood' because it ensures that each surrogacy arrangement is appropriate to proceed;[75] and
- the ECART approval model was preferred over other models going forward because it is a more effective form of regulation than post-birth regulation.[76]

4.52 Similarly, in Israel, all surrogacy arrangements must receive authorisation from a Surrogacy Approvals Committee. Applications must fulfil a range of criteria, and the Committee will grant approval of the arrangement if satisfied that all parties have entered into the agreement voluntarily, there is no risk to the health of the surrogate or the welfare of the child, and the agreement does not contain any conditions that would harm the rights of the child or the parties.[77] Israel's domestic

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70 Law Commission of England and Wales, and Scottish Law Commission (n 47) rec 1.
71 Ibid 31–2 [2.11].
72 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born From Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) 11 [52].
73 *Human Assisted Reproductive Technology Act 2004* (NZ) s 16.
74 Te Aka Matua o te Ture | Law Commission (NZ) (n 45) 114 [4.62].
75 Ibid 115 [4.62].
76 Ibid 114–15 [4.62].
77 Schuz (n 64) 167.

surrogacy framework has been assessed to work well, and surrogates have reported finding the experience rewarding.[78]

4.53 While approval is provided by an administrative body in New Zealand and Israel, approval of surrogacy arrangements in Greece is conducted by a judicial body. Before parties proceed to embryo transfer, a written surrogacy agreement must be submitted to the court, which provides 'jurisdictional authorisation' if all legislated conditions have been met.[79] If authorisation is granted, intended parents are automatically named as the legal parents upon the birth of a child through surrogacy. Assistant Professor Zervogianni notes that the surrogacy legal framework in Greece is considered to be liberal, innovative, and workable in practice, and that pre-conception court authorisation 'is seen as particularly successful'.[80] The introduction of the approval mechanism has led to a decline in court proceedings to resolve complex ethical problems in that jurisdiction.[81]

4.54 As mentioned above, in Victoria and Western Australia, approval processes similar in principle to **Recommendation 9** have been in place for some time. There have been mixed responses to these systems. In Victoria, the 2019 Gorton Review Report concluded that it remained appropriate for the Patient Review Panel to provide oversight and approval of surrogacy arrangements.[82] Some submissions to the current Inquiry noted that the Victorian approval process was necessary and important.[83] On the other hand, the ALRC heard a significant amount of criticism of the Patient Review Panel process. These criticisms almost exclusively focus on procedural issues such as delay, onerous requirements, and high levels of scrutiny.[84] Similarly, one submission from a parent through surrogacy described the Western Australian Reproductive Technology Council approval process as 'too onerous'.[85] The 2023 Western Australia Ministerial Expert Panel Report concluded that the application process for approval was 'over-regulated … cumbersome and has lengthy delays built into the system',[86] and recommended that the requirement for preapproval be removed.[87]

4.55 Approval of surrogacy arrangements is not new in Australia, and the ALRC understands that the experience with existing models in Victoria and Western Australia has not always been positive. However, much of the criticism has been directed not

78 Ibid 183.
79 Zervogianni (n 66) 149.
80 Ibid 163.
81 Ibid 163.
82 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 138.
83 See Name withheld, *Submission 146*; Name withheld, *Submission 162*.
84 Name withheld, *Submission 63*; S Page, *Submission 130*; Name withheld, *Submission 162*; Name withheld, *Submission 171*; Name withheld, *Submission 205*; Name withheld, *Submission 324*; Not published, *Submission 325*; Not published, *Submission 337*.
85 Name withheld, *Submission 343*.
86 Department of Health (WA), *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Final Report, 2023) 40.
87 Ibid 41.

at approval in itself, but at the way the process operates in practice. Poorly designed processes can undermine the aims of approval by creating unnecessary barriers and delay. Even so, the ALRC considers that the core benefits of approval — namely, ensuring the surrogacy arrangement is appropriate to proceed prior to the birth of the child — should be retained. Approval is especially important in the context of our recommended administrative pathway to parentage. The ALRC has considered this in the development of **Recommendation 9**, which is addressed in more detail below.

The approval process

4.56 This section outlines the approval process in detail, with reference to where certain elements have been shaped by submissions, experiences of existing approval processes, and research. At a high level, this process has been designed to ensure compliance with important legislative safeguards (**Recommendations 11**–**20**) alongside accessibility and efficiency.

Application stage

4.57 **Recommendation 9** provides that parties would apply to an SSO for approval before attempting to achieve a pregnancy. Parties must apply to an SSO for approval to access the administrative pathway to parentage, even if they have not engaged the SSO for matching or coordination support. Approval should be sought regardless of whether there is a genetic connection between the child born through surrogacy and the intended parents or surrogate. There should be no distinction between traditional and gestational surrogacy arrangements in the administrative pathway to parentage.

4.58 The application must contain supporting evidence that demonstrates that the parties meet all the preconditions (legislative safeguards) in **Recommendations 11**–**20**. This would typically include:

- evidence addressing the basis upon which the intended parents satisfy the requirement that they are unlikely to conceive, gestate, or give birth to a child for a medical, biological, or psychological reason (**Recommendation 11**);
- evidence that the surrogate and intended parents meet minimum age requirements (**Recommendation 12**);
- evidence of citizenship or permanent residency of at least one intended parent and the surrogate (**Recommendation 13**);
- evidence the surrogate has previously carried a pregnancy and given birth to a live child (**Recommendation 14**);
- certification from an obstetrician that the surrogacy would proceed without undue risk to the surrogate's health (**Recommendation 15**);
- intended parents' criminal history checks (**Recommendation 16**);
- written confirmation from legal practitioners that each party has received legal advice, and the practitioner believes that the party appeared to understand the advice (**Recommendation 17**);

- written confirmation from counsellors that each party has undergone counselling, and that the counsellor believes the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement (**Recommendation 18**);
- if parties underwent a psychological assessment, the outcome of each assessment (**Recommendation 19**); and
- a compliant surrogacy agreement (**Recommendation 20**).

4.59 Some consultees raised concerns that parties may seek multiple opinions from medical professionals, psychologists, or counsellors so as to obtain a favourable report, including where an earlier assessment had found that a party or arrangement was unsuitable for surrogacy, or move to a different SSO to commence a new application if adverse recommendations had been made previously. To address this risk, several recommendations involve a requirement for the professional to provide certification or a notification directly to the parties' nominated SSO. For example, under **Recommendations 15** (requirement that surrogacy can proceed only without undue risk to surrogate's health) and **18** (implications counselling) the relevant professional must provide certification directly to the nominated SSO. Under **Recommendation 19** (psychological screening), the psychologist must provide a recommendation to the nominated SSO, or in some circumstances, a copy of the full report to the National Regulator. This ensures the approval body is aware that these requirements have been completed, regardless of the outcome. In addition, in the interests of transparency, the ALRC suggests that SSOs use a shared, secure database to which all applications, notifications, certifications, and recommendations are uploaded. For reasons of privacy, it would not be necessary for the full contents of any reports to be uploaded.

4.60 **Recommendation 9** also addresses transitional arrangements for the approval process. It provides that for two years from the commencement of the relevant legislation, the National Regulator should be empowered to receive and determine primary applications for approval. This is to allow sufficient time for the SSOs to be established, operative and accessible.

Assessment stage

4.61 **Recommendation 9** requires the accredited decision-makers within SSOs to assess applications and provide approval if the application meets all preconditions in **Recommendations 11**–**20**. The Patient Review Panel process in Victoria has been criticised for going beyond what is strictly necessary for assessing surrogacy applications, taking an 'investigative approach' to assessments, and interrogating matters outside of what the legislation requires, leading to high levels of stress and anxiety among applicants.[88] As the 2019 Gorton Review Report also recommended,[89] **Recommendation 9** involves a presumption of approval if all preconditions are met.

88 Gorton (n 82) 138; S Page, *Submission 130*; Name withheld, *Submission 171*; Name withheld, *Submission 205*; Not published, *Submission 325*.

89 Gorton (n 82) 138.

It would not be the SSO's role to determine whether intended parents are 'fit' to be parents. Rather, the SSO's task would be to assess whether the parties have properly fulfilled the legislative safeguards to proceed with a surrogacy arrangement.

4.62 Assessments would be made 'on the papers' and only require additional involvement from the parties if the SSO considers this necessary. This is likely to prevent the delays experienced in New Zealand and Western Australia, where in-person hearings take place.[90]

Decision

4.63 **Recommendation 9** provides three decision-making outcomes for the SSO following assessment: approve the application; not approve the application because the legislative safeguards have not been met; or determine that the application is 'complex'. If safeguards and preconditions are not met, the SSO would not approve the application. For example, the surrogate may not have previously carried a pregnancy, or intended parents may not clearly fulfil one of the reasons to access surrogacy. Where the SSO does not approve the application, the parties may apply for a review of the decision by the National Regulator, who could dispense with the need to comply with the safeguard in certain circumstances. The SSO should advise the parties that they are entitled to have the decision reviewed.

4.64 The SSO would be required to refer all complex applications to the National Regulator. There are two scenarios in which an application could be deemed complex. First, an application would be complex if a psychologist recommends that the arrangement should not proceed, or identifies risk factors. Alternatively, if the arrangement involves other complexities as determined with reference to the National Regulator's guidelines (see **Recommendation 6**), it must also be referred to the National Regulator. The guidelines should provide examples of these complexities, for instance that the SSO suspects some coercion or fraud in the arrangement, and this was not identified when completing process requirements.

4.65 The National Regulator would then either approve or deny approval of complex arrangements and applications for review, but may also send the application back to the SSO for approval, such as in cases where the Regulator does not identify any complexity. In determining the application, the National Regulator would also be empowered to dispense with any of the preconditions in **Recommendations 11**–**20**, if satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the arrangement. While the National Regulator should develop internal procedures for determining applications, this could involve requesting further information or meeting with the parties where appropriate.

90 Te Aka Matua o te Ture | Law Commission (NZ) (n 45) 104 [4.22]; Department of Health (WA) (n 86) 40.

Outcome

4.66 Under **Recommendation 9**, if an application is approved by an SSO or the National Regulator, it would mean that:

- parties are able to attempt to achieve a pregnancy, which may involve an ART service provider performing a procedure such as embryo transfer or insemination;
- the approval applies to all procedures connected to that surrogacy arrangement that seek to achieve a pregnancy. This means that, for example, if an embryo transfer is unsuccessful, the ART service provider may perform subsequent transfers without obtaining additional approvals;
- the process requirements parties have fulfilled will satisfy any similar requirements set by an ART service provider, and vice versa. ART service providers usually require parties to obtain legal advice, and undergo counselling and medical screenings before conducting procedures to achieve a pregnancy through surrogacy. Any duplication should be avoided,[91] and ART service providers should accept the approval requirements as satisfying their own requirements, if adequately fulfilled;
- intended parents are on the administrative pathway to parentage, and would be the legal parents of the child born through the approved surrogacy arrangement at birth (**Recommendation 28**). However, the SSO would advise the surrogate of their post-birth right to apply to the Federal Circuit and Family Court of Australia for a parentage order;[92] and
- the SSO or National Regulator may issue a document certifying that the arrangement has been approved for the administrative pathway and explaining that the intended parents will be the legal parents upon the child's birth. Such a document would serve several purposes. Importantly, it would enable an ART service provider to be confident that it may legally perform a procedure that attempts to achieve a pregnancy for the purposes of a surrogacy arrangement. The document could also be relied upon for the purposes of determining legal obligations and responsibilities in medical settings after the birth; for example in allowing the child to be discharged with intended parents, when registering the child's birth (see **Chapter 11**), and determining eligibility for parental leave (see **Chapter 9**).

Regulating SSOs

4.67 SSOs would play a central role in ensuring surrogacy in Australia is carried out in a safe and supported way. Given the breadth and significance of their functions, and the known risks associated with for-profit intermediary involvement in surrogacy

91 As suggested in submissions: Not published, *Submission 393*; Virtus Health, *Submission 397*.

92 This reflects international best practice: International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) principle 10.5.

arrangements,[93] the ALRC has concluded that SSOs should be subject to careful regulation. The principal concern is that, without appropriate regulation, SSOs' financial interests could conflict with their responsibility to assess arrangements independently and ensure that all legislative safeguards have been satisfied before approval is granted. To ensure best practice and mitigate risks, the ALRC has incorporated safeguards into **Recommendations 8**–**10**.

4.68 Submissions received by the ALRC supported the regulation of intermediaries.[94] For example, Relationships Australia submitted:

> [a]ny reforms emerging from this Inquiry, which reduce barriers to domestic surrogacy, must be scaffolded with proportionate safeguards to prevent the exploitations and commodification of children, surrogates and intended parents … Roles, functions and responsibilities of SSOs - and, indeed, of all professionals involved in surrogacy - must be developed with children's rights, interests and safety at the forefront.[95]

4.69 Similarly, international commentary, often focused on unethical practices by unregulated intermediaries operating in socioeconomically disadvantaged countries, supports the need for regulation of SSOs. The 2019 UN Special Rapporteur on the Sale and Sexual Exploitation of Children Report recommended that safeguards focus on the role of intermediaries.[96] The Verona Principles also state that '[i]n States where surrogacy is permitted, all intermediaries should be subject to authorisation and regulation by a designated competent authority'.[97] They go on to list what the criteria for authorisation and compliance should cover, which the ALRC's recommendations align with.[98] Similarly, the 2023 Law Commission of England and Wales, and Scottish Law Commission Report recommended regulatory oversight of Regulated Surrogacy Organisations to ensure that all parties are 'properly safeguarded'.[99]

4.70 Some submissions highlighted the positive example set by the Society for Ethics in Egg Donation and Surrogacy ('SEEDS') framework operating in New York state.[100] SEEDS is a national non-profit industry group for egg donation and surrogacy agencies that has created mandatory ethical standards for its members.[101] The SEEDS standards set out comprehensive requirements that must be met by

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93 Risks are most commonly raised in international contexts where intermediaries have been criticised for seeking to profit from successful surrogacy arrangements at the expense of the human rights of children, surrogates, and intended parents.

94 Name withheld, *Submission 102*; Not published, *Submission 345*; Not published, *Submission 394*.

95 Relationships Australia, *Submission 404*.

96 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born From Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) 16 [78]–[79].

97 International Social Service (n 92) principle 16.2.

98 This includes: (a) financial and administrative probity; (b) relevant competencies; (c) legality of contractual arrangements; and (d) ethical standards of overall operations.

99 Law Commission of England and Wales, and Scottish Law Commission (n 47) 194 [7.116].

100 Name withheld, *Submission 102*; S Jefford, *Submission 128*.

101 Society for Ethics in Egg Donation and Surrogacy, *Standards of Ethical Conduct for SEEDS Member Agencies* (2022).

agencies at all stages of their work. The mandatory standards involve compliance with licensing requirements and conditions such as:

- operating without 'coercion, fraud, misrepresentation, or unethical conduct';[102]
- bringing to the attention of the parties any conflicts of interest the agency may have and providing parties with the opportunity to waive any such conflicts;[103] and
- ensuring that parties have satisfied comprehensive screening requirements, including receiving counselling and having the opportunity to seek legal advice, prior to the commencement of a cycle.[104]

4.71 Pursuant to **Recommendations 8**–**10**, SSOs would be subject to a high level of regulation and oversight, making them distinct from the agencies operating in overseas jurisdictions, such as those in the United States of America and Canada, that largely operate in response to market forces. The following sections detail the regulatory safeguards the ALRC recommends.

Licensing

4.72 Under **Recommendation 8**, an SSO would only be established if licensed, and would only be permitted to operate according to the conditions of their licence. The National Regulator would have responsibility for regulating SSOs, including by managing licensing (discussed in **Chapter 3**). To this end, **Recommendation 6** provides that the National Regulator would be empowered to:

- develop licensing conditions for SSOs;
- license SSOs and monitor compliance with licensing conditions, including taking appropriate action in response to breaches of licensing conditions;
- accredit SSO staff members to conduct assessments and make decisions in relation to applications to approve arrangements (discussed below in relation to **Recommendation 9**); and
- set a mandatory scale of maximum fees that SSOs may charge.

4.73 The National Regulator would be empowered to take a range of measures to ensure SSOs' compliance (see **Chapter 3**), including amending an SSO's licensing conditions, requiring enhanced monitoring of compliance, and revocation of licenses when necessary. SSOs may also be subject to penalties for breaches of a number of prohibitions, including facilitating surrogacy that is for profit or reward, intentionally or recklessly approving non-compliant arrangements, receiving a reward for referring parties to services, and coercive conduct (see **Recommendations 2**, **33** and **35**).

Capped fees

4.74 The ALRC recommends that licensing conditions require SSOs to operate under a capped fee financial model, as opposed to being entirely for-profit or

102 Ibid standard 3.
103 Ibid standards 5, 10.
104 Ibid standards 14, 22–4.

not-for-profit. Some submissions and consultees considered that SSOs should be for-profit as this would encourage professionalism and high standards of service provision.[105] In addition, allowing SSOs to charge market-based fees would ensure SSOs are financially viable. By contrast, there was also support in submissions for the not-for-profit model,[106] as this was considered to remove perceived conflicts of interest between SSOs' business imperatives and their responsibilities towards the parties.[107] However, the ALRC has concerns about the viability of establishing SSOs on a not-for-profit basis. A funding model that renders SSOs financially unviable may deter suitably qualified professionals from establishing them, thereby limiting the availability of this crucial service that could significantly reduce barriers to domestic surrogacy. Not-for-profit SSOs would also be at odds with the existing profit-based legal and medical industries providing services in ART and surrogacy arrangements.

4.75 Taking account of these considerations, the ALRC recommends that SSOs be permitted to charge fees in accordance with a scale of fees set by the National Regulator (see **Recommendation 6**). A capped fee model would allow SSOs to charge fees above cost recovery, supporting their financial viability, while preventing unreasonably high fees that could undermine accessibility. The safeguards discussed below in relation to SSOs' approval functions would guard against the risk that approval decisions are influenced by financial considerations.

Safeguarding the approval function

4.76 In response to the ALRC's Discussion Paper Proposal, many submissions agreed that SSOs should hold the approvals function, with regulatory safeguards in place.[108] For example, nursing academic Dr Attawet agreed that arrangements could be approved by an SSO if they are 'licensed, audited, and staffed by designated officers',[109] and the Australian Nursing and Midwifery Foundation provided support for

> SSOs handling the approval process prior to birth, provided the SSOs are accredited to a high standard and operate within a framework that ensures national consistency.[110]

4.77 Some submissions disagreed with SSOs assessing surrogacy arrangements for approval, mostly due to a perceived conflict between that function and their business interests.[111] For instance, Relationships Australia observed that such

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105 S Jefford, *Submission 359*; ANZICA, *Submission 368*; Not published, *Submission 385*.
106 D Adams, *Submission 382*; Relationships Australia, *Submission 404*; K Horsey, *Submission 418*.
107 J Attawet, *Submission 360*; M Quinlan, *Submission 381*; Relationships Australia, *Submission 404*.
108 S Jefford, *Submission 359*; J Attawet, *Submission 360*; S Page, *Submission 365*; Australian Nursing and Midwifery Federation, *Submission 375*; S Everingham, *Submission 378*; Name withheld, *Submission 392*; Not published, *Submission 395*; Surrogacy Australia, *Submission 417*.
109 J Attawet, *Submission 360*.
110 Australian Nursing and Midwifery Federation, *Submission 375*.
111 Name withheld, *Submission 372*; M Montrone, *Submission 374*; M Quinlan, *Submission 381*; Not published, *Submission 394*; Virtus Health, *Submission 397*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*; Relationships Australia, *Submission 404*; Name withheld, *Submission 422*.

> powers, functions and responsibilities, with their profound human rights implications, must not be conferred on profit-making entities the principal obligations of which may be to shareholders, or to one set of stakeholders in preference to another.[112]

4.78 We also heard concerns from the Australian Human Rights Commission that decisions involving evaluations of consent, voluntariness, and compliance should only be made by bodies with public accountability.[113]

4.79 The ALRC acknowledges these concerns, and has tailored the system created by **Recommendations 9** and **10** to incorporate a range of safeguards:

- SSOs would be prohibited from intentionally or recklessly approving surrogacy arrangements that do not comply with the legal requirements set out in **Recommendations 11**–**20**, and liable for a civil penalty for breaching this prohibition (see **Recommendation 33**).
- SSOs would only be empowered to approve arrangements that clearly meet all preconditions and legislative safeguards. All 'complex' arrangements must be referred to the National Regulator for approval. This characterisation would be controlled by the National Regulator's approvals guidelines (see **Recommendation 6**). This framework is discussed in greater detail above. If the SSO receives an application for approval that is complex, it would not be authorised to determine that application. This limits the SSOs' role to approving non-complex applications, which would not require the exercise of discretion.
- Assessment of an arrangement's compliance with legislative safeguards would only be conducted by accredited staff (discussed in more detail below). This would support a good standard of decision making.
- SSOs would be subject to strict licensing conditions in order to operate, with regular audits and reporting overseen by the National Regulator (see above).

4.80 Building this framework of checks and balances into the approval process ensures the benefits of an approval process can be retained, while also supporting a rigorous standard of decision-making that prioritises the protection of rights, addressing the concerns raised in submissions.

Accredited decision-makers

4.81 It is important to ensure that those assessing and approving surrogacy arrangements are equipped and appropriate to perform this role. Under **Recommendation 6**, the National Regulator would accredit SSO staff members before they would be permitted to make decisions regarding applications for approval of surrogacy arrangements. Under the SSO's licensing conditions, only accredited staff members would be permitted to make these decisions. This condition is intended to secure a baseline of professionalism and accountability when SSOs acquit this significant responsibility.

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112 Relationships Australia, *Submission 404*.
113 Australian Human Rights Commission, *Submission 433*.

4.82 The ALRC has not included prescriptive details of the accreditation process as this is a matter best left to the National Regulator. Accreditation could be based on the staff member's qualifications and experience, or consideration of whether they are a fit and proper person. It could also require training of the staff member where necessary.

4.83 The ALRC did not include this requirement when this proposal was contemplated in the Discussion Paper, however, we received compelling feedback in submissions calling for minimum standards for SSO decision-makers.[114] For example, the Australian Nursing and Midwifery Federation submitted that SSOs 'must employ designated and accountable officers with relevant qualifications' to make 'such serious assessments'.[115]

Monitoring compliance

4.84 Careful oversight of SSOs' compliance with licensing conditions would be required to uphold the integrity of the regulatory system, promote accountability, and ensure that safeguards for intended parents, surrogates, and children born through surrogacy are meaningfully enforced. To enforce compliance, **Recommendation 6** involves empowering the National Regulator to monitor SSOs' compliance with licensing requirements. At the very least, this should involve regular audits of SSOs' operations, and annual reporting requirements. This would be akin to the auditing and reporting requirements currently placed on ART service providers, and the recommendations recently made for improving oversight in the ART industry.[116]

114 ANZICA, *Submission 368*; Not published, *Submission 385*; Name withheld, *Submission 422*.
115 Australian Nursing and Midwifery Federation, *Submission 375*.
116 See Euan M Wallace and Department of Health (Vic), *Rapid Review of Assisted Reproductive Technology and In Vitro Fertilisation Regulation and Accreditation in Australia* (Final Report, 2025).

5. Accessing Surrogacy — Eligibility

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Introduction

5.1 This chapter discusses recommended reforms to the eligibility requirements that intended parents and surrogates must generally satisfy to access surrogacy before a surrogacy arrangement can be approved and a pregnancy attempted (**Recommendation 9**), and before the parties can access the administrative pathway to legal parentage (**Recommendation 28**). These requirements are designed to operate as safeguards that support free and informed decision making, protect the welfare of those involved, and maintain fair and equitable access to surrogacy.

5.2 The recommendations in this chapter provide for more stringent eligibility requirements, compared to the current requirements across Australia. This is especially important if surrogacy is to become easier to access, better facilitated, and more common in Australia (see **Chapter 1**). A more accessible pathway, including through an administrative pathway to legal parentage, should be matched with protections that reduce the risk of exploitation and other forms of harm, and promote the best interests of children.

5.3 Taken together, these recommendations:

- support free and informed decision making by surrogates and intended parents;
- safeguard against the risk of exploitation and other forms of harm to the surrogate;
- ensure surrogacy arrangements are reserved for people with a genuine need for surrogacy;
- guard against Australia becoming a 'surrogacy destination' where intended parents from other countries seek to access surrogacy here; and
- guard against risks of exploitation and other forms of harm to children born through surrogacy.

5.4 This chapter contains five recommendations dealing with preconditions for the approval of a surrogacy arrangement:

- **Recommendation 11** requires intended parents to be unlikely to conceive, gestate, or give birth to a child for a medical, biological, or psychological reason.
- **Recommendation 12** requires the surrogate to be at least 25 years old, unless otherwise approved by an accredited counsellor, and have the legal capacity to make an informed decision to enter a surrogacy arrangement. It also requires intended parents to be at least 18 years old and have the legal capacity to make an informed decision to enter the arrangement.
- **Recommendation 13** requires at least one intended parent and the surrogate to be an Australian citizen or permanent resident. It also recommends the repeal of state or territory-based legislation that imposes state or territory residency requirements.
- **Recommendation 14** requires the surrogate to have previously carried a pregnancy and given birth to a live child. However, this may be dispensed with in certain circumstances where the obstetrician conducting the medical screening and the counsellor conducting implications counselling are satisfied that the parties understand the risks and are providing free and informed consent.
- **Recommendation 15** requires the surrogate to undergo a medical assessment by an obstetrician who must determine whether or not to certify that the surrogacy can proceed without undue risk to the surrogate's health.

- **Recommendation 16** requires each of the intended parents to undergo a Nationally Coordinated Criminal History Check, the results of which demonstrate that they have not committed any offence against a child.

5.5 These recommendations operate on the basis that a genetic connection between the child born through surrogacy and the intended parents is not a pre-requisite for a successful surrogacy arrangement, and should not influence the eligibility requirements for surrogacy.[1] Relatedly, the recommendations in this Report do not draw any distinction between traditional and gestational surrogacy.

5.6 If parties fail to meet these eligibility requirements, as well as other preconditions (**Recommendations 17**–**20**), and the surrogacy arrangement is not approved, they would be unable to access Assisted Reproductive Technology ('ART') services aimed at facilitating a surrogacy-related pregnancy (**Recommendation 34**). They would also be unable to access the administrative pathway to legal parentage (**Recommendation 28**). However, the National Regulator may dispense with any of these requirements if satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the arrangement (**Recommendation 9**).

5.7 If intended parents do not meet these eligibility requirements they would still be able to apply for parentage through the judicial pathway (**Recommendation 29**). This avoids the problem under current laws, where non-compliance may prevent legal parentage from being granted unless the court exercises the discretion to waive the requirement. As discussed in **Chapter 10**, legal parentage should turn on the best interests of the child, not legislative compliance. In practice, most domestic surrogacy arrangements will still need approval because most will require ART services (**Chapter 1**).

5.8 The Terms of Reference ask this Inquiry to provide 'proposals for uniform or complementary state, territory and Commonwealth laws'. In response, the recommendations in this chapter would standardise the eligibility requirements for surrogacy arrangements across Australia. Some of the eligibility requirements in this chapter are designed to 'reduce barriers to domestic altruistic surrogacy arrangements in Australia', also in line with the Terms of Reference of this Inquiry. For example, **Recommendation 11** provides a sufficiently broad basis for access to surrogacy so that intended parents with a genuine need are able to access it. Additionally, **Recommendation 13** would repeal state or territory-based legislation that imposes state or territory residency requirements on intended parents and surrogates, facilitating better access to surrogacy.

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1 There is a common belief that traditional surrogates — who have a genetic connection with the child born through surrogacy — are less likely to relinquish the child. There have been a few legal cases where this has occurred: *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.

5.9 The Terms of Reference also ask the ALRC to 'protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents'. The eligibility requirements in this chapter ensure the surrogate has provided free and informed consent prior to entering into the surrogacy arrangement, reducing the risk of exploitation and other forms of harm. They also safeguard the rights of children by ensuring intended parents have no criminal history involving child-related offences (**Recommendation 16**), and mitigate against the risk of Australia becoming a surrogacy destination (**Recommendation 13**).[2]

Requirement for a reason to access surrogacy

Recommendation 11

As a precondition for approval (**Recommendation 9**), intended parents must be unlikely to conceive, gestate, or give birth to a child for a medical, biological, or psychological reason.

Current requirement for a reason to access surrogacy

5.10 The current law in most jurisdictions requires intended parents to have a 'reason' or a 'need' to access surrogacy. The legislative rationale for this requirement, where it was provided, was to prevent the risk of exploitation and other forms of harm,[3] by making surrogacy 'a limited option'.[4] The Australian Capital Territory does not have a requirement for a reason to access surrogacy. Western Australia has recently enacted legislation that removes this requirement completely, which will come into effect in mid-2027.[5]

5.11 Where a reason to access surrogacy is required, the way the requirement is framed differs across jurisdictions. Some refer to an inability to conceive a child,[6] while others focus on the broader standard of being 'unlikely' to conceive.[7] Most jurisdictions limit access to circumstances involving a defined 'medical' or 'social'

2 See **Chapter 14** for a more detailed discussion of how our recommendations uphold Australia's international law obligations.
3 Explanatory Statement, Surrogacy Bill 2022 (NT) 6.
4 See, eg, ibid; Explanatory Note, Surrogacy Bill 2009 (Qld) 14.
5 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 September 2025, 2780 (Dr Jags Krishnan). The current Western Australian legislation only permits intended parents to access surrogacy where there is a 'medical reason': *Surrogacy Act 2008* (WA) s 19(2).
6 *Surrogacy Act 2010* (NSW) s 30(3)(a); *Surrogacy Act 2010* (Qld) s 14(2)(a); *Surrogacy Act 2012* (Tas) s 7(2)(a); *Surrogacy Act 2008* (WA) s 19(2).
7 *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2019* (SA) s 10(4)(f); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a)(i).

need, or equivalent criteria.[8] **Table 5.1** below sets out the legislative requirements in the various state and territory legislation.

Table 5.1: Requirement for a reason to access surrogacy in each jurisdiction

Reason to access surrogacy	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
'Medical' need		✓	✓	✓	✓	✓	✓	✓	
'Social' need, or equivalent		✓	✓	✓	✓	✓	✓		
No requirement	✓								✓

5.12 The approach to defining 'medical need' varies across jurisdictions. Some jurisdictions do not define the term but provide guiding examples, while others define it. The Northern Territory does not provide a definition of 'medical reason' but provides two examples of where a 'medical reason' would exist. These are where there is a 'risk of transmission of a serious genetic defect, serious disease or serious illness to a child born to an intended parent' or in cases where a woman 'is unlikely to survive childbirth or will suffer significant harm from childbirth'.[9] New South Wales, Queensland, South Australia, Tasmania, and Victoria take a more comprehensive approach to defining 'medical need'. The definition in these jurisdictions includes when a woman is unable to conceive a child, carry a pregnancy, or give birth on medical grounds, and situations in which the child is unlikely to survive the pregnancy or birth, or will be affected by a genetic condition.[10]

5.13 Similarly, 'social need' is not explicitly defined in New South Wales, Queensland, or Tasmania. Instead, a social need for a surrogacy arrangement is deemed to be satisfied in circumstances where gay or single men are seeking to form a family through surrogacy.[11] In other jurisdictions, such as the Northern Territory, South Australia, and Victoria, the term 'social need' is not used. Instead,

8 *Surrogacy Act 2010* (NSW) s 30; *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2010* (Qld) ss 14, 22(2)(d); *Surrogacy Act 2019* (SA) s 10(4)(f); *Surrogacy Act 2012* (Tas) ss 7, 16(2)(h); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a).

9 *Surrogacy Act 2022* (NT) s 19.

10 Although the terminology and wording is slightly different in each jurisdiction, the definition of 'medical need' is substantively similar: *Surrogacy Act 2010* (NSW) s 30(3); *Surrogacy Act 2010* (Qld) s 14(2); *Surrogacy Act 2019* (SA) s 10(4)(f); *Surrogacy Act 2012* (Tas) s 7(2); *Assisted Reproductive Treatment Amendment Act 2020* (Vic) s 40(1)(a).

11 Legislation in these jurisdictions states that 'there is a social need for surrogacy if … there is only one intended parent under the surrogacy arrangement and the intended parent is a man' or 'there are 2 intended parents under the surrogacy arrangements' and they are '2 men': *Surrogacy Act 2010* (NSW) ss 30(2)(a), (s)(b)(ii); *Surrogacy Act 2010* (Qld) ss 14(1)(a), (1)(b)(ii); *Surrogacy Act 2012* (Tas) ss 7(1)(a), (2)(b)(ii).

these circumstances are included in legislation in other ways. For example, 'reason for surrogacy' in the Northern Territory legislation includes situations where it is

> unlikely because of other circumstances that the intended parent or intended parents would become pregnant, be able to carry a pregnancy or give birth (whether because of gender identity, sexuality or any other reason).[12]

Problems with current requirement for a reason to access surrogacy

5.14 Requirements for a reason to access surrogacy are inconsistent across jurisdictions and lack clarity. These requirements may cause confusion and complexity, including for medical practitioners making a determination about whether they have been met, potentially resulting in unfair and inconsistent outcomes. For example, stakeholders reported that the concept of 'medical need' is susceptible to narrow and varying interpretations by medical practitioners.[13] In particular, the phrase 'unable to conceive a child' can be interpreted literally, as the term 'unable' conveys a definitive standard that may require evidence of infertility.[14] In practice, this interpretation can impose unreasonable requirements on transgender men, and cisgender women with reproductive organs, who may nevertheless face significant barriers to conception. Such women may be required to undergo multiple invitro fertilization ('IVF') cycles despite experiencing repeated implantation failure or miscarriage.[15] Katie Cox, a fertility and family creation lawyer and parent through surrogacy, shared that

> individuals with documented infertility … may still be denied access to surrogacy unless they have undergone [a] hysterectomy or other definitive interventions.[16]

5.15 The lack of clarity surrounding the concept of 'medical need' can therefore impose significant emotional, physical, and financial burdens. In practice, satisfying this requirement may be difficult, protracted, and in some cases, harmful.

5.16 Additionally, the phrase 'social need' is not sufficiently clear or confined. In some jurisdictions, it appears to be used to capture circumstances where single men or men in same-sex relationships are unable, as a matter of biology, to conceive, gestate, or give birth to a child. At the same time, the phrase may also be broad enough to capture circumstances that fall outside the rationale for requiring a reason to access surrogacy. For example, the current definition of social need in the

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12 *Surrogacy Act 2022* (NT) s 19. This is substantively similar to *Surrogacy Act 2019* (SA) s 10(4)(f)(iv). Victorian legislation states that a doctor must form an opinion that 'in the circumstances, the commissioning parent is unlikely to become pregnant, be able to carry a pregnancy or give birth', which has been interpreted to encompass single men or two men in a same-sex relationship: *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(a)(i).

13 K Cox, *Submission 105*; Not published, *Submission 108*.

14 S Jefford, *Submission 359*.

15 See K Cox, *Submission 105*.

16 Ibid.

Northern Territory encompasses 'any other reason',[17] which could be interpreted to include a wide range of scenarios, such as where intended parents do not want to undergo pregnancy due to the potential impacts on their career. Such scenarios are inconsistent with the rationale of this requirement: to limit surrogacy to those with a reasonable and *genuine* need for it.

5.17 Finally, the wording of all the current legislative provisions relating to a need for surrogacy is not broad enough to encompass all scenarios in which intended parents have a reasonable and genuine need for surrogacy. These include situations where intended parents are physically capable of conceiving, gestating, or birthing a child but this would be inappropriate or unrealistic due to psychological reasons, such as tokophobia, significant psychological distress regarding pregnancy or birth, or trauma associated with sexual violence.[18] There is a lack of clarity or certainty about whether mental health conditions would satisfy the current requirements for a reason for surrogacy. This may unfairly prevent intended parents from engaging in surrogacy, where pregnancy or birth are not safe or viable pathways for them.

5.18 Taken together, the lack of consistency in legislative criteria for accessing surrogacy creates unnecessary barriers for intended parents. It may drive individuals to pursue surrogacy arrangements overseas, where access is more readily available but often less regulated, and can impose inequitable burdens on women with reproductive organs. More broadly, this undermines the coherence and effectiveness of the domestic regulatory framework by failing to clearly delineate who should be able to access surrogacy arrangements.

A clearer and fairer approach to a reason to access surrogacy

5.19 **Recommendation 11** requires intended parents to be 'unlikely to conceive, gestate, or give birth a child for a medical, biological, or psychological reason' as a precondition for approval to access the administrative pathway to legal parentage (**Recommendation 28**).

5.20 The ALRC has used the phrase '*unlikely* to conceive' to address the concerns discussed above. In particular, the term 'unlikely' is less restrictive and provides a lower threshold for intended parents to meet, compared to the phrase 'unable to conceive'. This is designed to make it easier for parties, such as cisgender women with reproductive organs who experience fertility issues, to meet this requirement.[19] Additionally, we have used the language 'conceive, gestate, or give birth' in recognition of the distinct stages of birthing a child, each of which may pose a barrier for intended parents. This is designed to ensure that eligibility for access to surrogacy

17 *Surrogacy Act 2022* (NT) s 19(b).

18 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>.

19 This view was shared by the Advisory Committee and in S Jefford, *Submission 359*.

can accommodate intended parents with a reasonable and genuine need for access, while being largely consistent with how existing legislation is framed.[20]

5.21 The ALRC has adopted the language of 'medical, biological, or psychological reason' to keep this requirement sufficiently wide to encompass the diversity of scenarios in which intended parents would have a reasonable and genuine need to access surrogacy.[21] Specifically, we have replaced the phrase 'social need' with 'biological need' to address concerns regarding the ambiguity of the phrase 'social need', as discussed above. 'Biological need' has a clearer and more confined scope; it is inclusive of single men and men in same-sex relationships,[22] but does not have the potentially wider application of the term 'social need'. We have also included 'psychological reason' to encompass situations where a person experiences a psychological condition or psychological distress, which may make it unlikely for them to 'conceive, gestate, or birth a child'.

5.22 The ALRC suggests that the Australian Government consult with medical and other health professionals to develop clear and precise definitions of 'medical need', 'biological need' and 'psychological need'. These definitions may be codified in legislation or set out in guidelines. We propose that the definition of each phrase be sufficiently broad so that intended parents are not unfairly barred from accessing surrogacy when they have a reasonable and genuine reason, and are not required to compromise their health and wellbeing to become eligible. As general guidance:

- 'Medical need' should be broad enough to include cisgender women with reproductive organs who have accessed fertility treatment but have been unable to sustain a pregnancy.[23] Such women should not be required to undergo an unreasonable number of IVF cycles to prove that they cannot sustain a pregnancy.

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20 Most existing legislation uses language that is substantively similar to 'conceive, gestate, or birth': *Surrogacy Act 2010* (NSW) s 30(3); *Surrogacy Act 2022* (NT) s 19; *Surrogacy Act 2010* (Qld) s 14(2); *Surrogacy Act 2019* (SA) s 10(4)(f); *Surrogacy Act 2012* (Tas) s 7; *Assisted Reproductive Treatment Amendment Act 2020* (Vic) s 40(1)(a).

21 This broad and inclusive approach is supported by a 'consensus statement' published by the Australian and New Zealand Society for Reproductive Endocrinology and Infertility, and endorsed by the Fertility Society of Australia and New Zealand and the Royal Australian and New Zealand College of Obstetricians and Gynaecologists. This statement provides a revised definition of infertility 'to improve inclusiveness and equitable access to reproductive care irrespective of relationship status, sexual orientation or gender identity': Australian and New Zealand Society of Reproductive Endocrinology and Infertility, *Definition of Infertility: Consensus Statement* (August 2024).

22 The Australian and New Zealand Society for Reproductive Endocrinology and Infertility's 'consensus statement' states that infertility is characterised by the 'need for medical intervention, including, but not limited to, the use of donor gametes or donor embryos in order to achieve a successful pregnancy either as an individual or with a partner', which is substantively similar to a 'biological need' for surrogacy: ibid.

23 This was supported by many surrogacy professionals and those with personal experiences of surrogacy: Not published, *Submission 103*; K Cox, *Submission 105*; Not published, *Submission 108*; Name withheld, *Submission 147*; Name withheld, *Submission 372*; K Cox, *Submission 389*.

- 'Biological need' may include individuals who are biologically unable to have children, such as women without a uterus, men in a same-sex relationship, or single men.
- 'Psychological need' may include individuals who are unable to conceive, gestate or birth a child due to a psychological condition or the psychological repercussions of pregnancy. Intended parents with a 'psychological need' for surrogacy may include those with psychological trauma from a previous pregnancy or birth, tokophobia, gender dysphoria associated with pregnancy, a mental health condition that would make pregnancy unsafe, or severe anxiety about pregnancy complications.[24]

5.23 The ALRC did hear some views suggesting the requirement for a reason to access surrogacy be removed on the basis that people should have the freedom to choose to access surrogacy as a matter of reproductive choice.[25] As noted above, Western Australia has removed this precondition,[26] and the Australian Capital Territory has never required intended parents to have a reason to access surrogacy. The ALRC takes the view that this requirement should be retained in order to exclude access where there is no reasonable or genuine basis to support it. A dispensation of the requirement is discussed below. This strikes an appropriate balance between recognising the potential risks to surrogates, and improving the availability of surrogacy. Overall, having a clear, broad, and harmonised approach to the reason for surrogacy across Australia would limit surrogacy to cases where there is a genuine need for it, while reducing unnecessary barriers to surrogacy.

How the requirement for a reason to access surrogacy would operate

5.24 To satisfy this requirement, the Surrogacy Support Organisation ('SSO') (or National Regulator, where applicable) must be satisfied that intended parents are unlikely to 'conceive, gestate, or give birth' to a child for any of the three reasons: medical, biological, or psychological (**Recommendations 9** and **11**). This would be done with the assistance of appropriate expert advice, for instance, a medical opinion from a suitably qualified practitioner that intended parents are unlikely to conceive for a medical reason. However, as with the other eligibility requirements, the National Regulator may dispense with this requirement if satisfied that a minor procedural irregularity has occurred, or if exceptional circumstances exist that justify approval of the arrangement (**Recommendation 9**). This avenue for dispensation provides an added layer of flexibility, which allows unique and exceptional circumstances to be taken into account without undermining the objective of this precondition for access to surrogacy.

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24 See also S Jefford, *Submission 128*; Not published, *Submission 393*.

25 S Jefford, *Submission 128*; S Jefford, *Submission 359*.

26 Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 September 2025, 2780 (Jags Krishnan).

Requirements for a minimum age

Recommendation 12

As a precondition for approval (**Recommendation 9**):

a. 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

b. intended parents must be at least 18 years old and have the legal capacity to make an informed decision.

Current minimum age requirements

5.25 Minimum age requirements are an important safeguard that seek to ensure that surrogates and intended parents are mature enough to understand the risks of surrogacy and can provide their informed consent to an arrangement.[27] In relation to surrogates specifically, this guards against harm, including because of coercion or exploitation.[28] Age requirements recognise that the decision to engage in surrogacy is a significant one, with potential lifelong impacts for all parties. For surrogates, pregnancy can have serious and potentially ongoing physical, reproductive, and psychological effects. Navigating the surrogacy process can also be challenging for many intended parents.

5.26 **Table 5.2** below sets out the minimum age requirements for surrogates across the states and territories. Currently, this requirement differs across jurisdictions:

- In most jurisdictions, the surrogate must be 25 years old, without exception.[29]
- In the Australian Capital Territory, the surrogate can be between 18 and 25 years old if they have received counselling about the surrogacy arrangement, and the counsellor is satisfied that the surrogate was of

27 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2022, 3614 (Natasha Fyles). See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne); Explanatory Statement, Parentage (Surrogacy) Amendment Bill 2023 (ACT) 1–2; New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26546 (John Hatzistergos).

28 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2022, 3614 (Natasha Fyles); Explanatory Statement, Surrogacy Bill 2022 (NT) 5; Victoria, *Parliamentary Debates*, Legislative Assembly, 10 October 2008, 4186–7 (Gavin Jennings); Explanatory Memorandum, Assisted Reproductive Treatment Bill 2008 (Vic) 19.

29 *Surrogacy Act 2010* (NSW) s 27(1); *Surrogacy Act 2010* (Qld) s 22(2)(f); *Surrogacy Act 2019* (SA) s 10(3)(a); *Surrogacy Act 2012* (Tas) s 16(2)(c); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b); *Surrogacy Act 2008* (WA) s 17(a)(i).

sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.[30]

- In the Northern Territory, the surrogate must be at least 25 years old, unless the Local Court makes an exception where the surrogate is at least 18 years old, a counsellor has certified that exceptional circumstances exist, and the Court is satisfied that exceptional circumstances justify making the parentage order.[31]
- Although the current requirement in Western Australia is for the surrogate to be at least 25 years old,[32] this has been amended to 18 years old by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.[33]

Table 5.2: Minimum age requirements for the surrogate in each jurisdiction

Minimum age requirement for surrogates	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
At least 25 years old		✓		✓	✓	✓	✓	✓	
At least 25 years old, with exceptions	✓		✓						
At least 18 years old									✓

5.27 **Table 5.3** below sets out the minimum age requirements for intended parents across the states and territories. Currently, this requirement differs across jurisdictions and ranges from unspecified to at least 25 years old.[34]

- In the Australian Capital Territory, intended parents must be at least 18 years old.[35]
- In New South Wales, intended parents must be at least 18 years old. Further, if they are under 25 years old, they must receive counselling about the surrogacy arrangement, and the counsellor must be satisfied that the intended parents

30 *Parentage Act 2004* (ACT) s 28C.
31 *Surrogacy Act 2022* (NT) ss 17(a), 34(2).
32 *Surrogacy Act 2008* (WA) s 17(a)(i).
33 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1).
34 *Parentage Act 2004* (ACT) s 28B; *Surrogacy Act 2010* (NSW) ss 28–9; *Surrogacy Act 2022* (NT) s 18(1)(a); *Surrogacy Act 2010* (Qld) s 22(g)(i); *Surrogacy Act 2019* (SA) s 10(4)(a); *Surrogacy Act 2012* (Tas) s 16(2)(b); *Surrogacy Act 2008* (WA) s 19(1)(a); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1).
35 *Parentage Act 2004* (ACT) s 28B.

are of sufficient maturity to understand the surrogacy arrangement and its social and psychological implications.[36]

- In the Northern Territory, intended parents must be at least 25 years old. The Local Court may make an exception where an intended parent is at least 18 years old, a counsellor has certified that they are sufficiently mature to understand the implications of the surrogacy arrangement, and the Court is satisfied that they are sufficiently mature to understand the implications of the parentage order.[37]
- In Queensland and South Australia, intended parents must be at least 25 years old.[38]
- In Tasmania, intended parents must be at least 21 years old.[39]
- In Victoria, the age requirement for intended parents is unspecified.
- Although the current requirement in Western Australia is for one intended parent to be at least 25 years old,[40] the age requirement for intended parents will be amended to 18 years old by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.[41]

Table 5.3: Minimum age requirements for intended parents in each jurisdiction

Minimum age for intended parents	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
At least 25 years old				✓	✓			✓	
At least 25 years old, with exceptions		✓	✓						
At least 21 years old						✓			
At least 18 years old	✓								✓
Unspecified							✓		

36 *Surrogacy Act 2010* (NSW) ss 28–9.
37 *Surrogacy Act 2022* (NT) ss 18(1)(a), 34(3).
38 *Surrogacy Act 2010* (Qld) s 22(g)(i); *Surrogacy Act 2019* (SA) s 10(4)(a).
39 *Surrogacy Act 2012* (Tas) s 16(2)(b).
40 *Surrogacy Act 2008* (WA) s 19(1)(a).
41 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1).

Problems with current minimum age requirements

5.28 As observed in some submissions, suboptimal age requirements, particularly age requirements that are too low, may weaken the informed consent provided by the parties to the arrangement and result in surrogacy arrangements proceeding when they may not be appropriate.[42] On the other hand, as observed in other submissions, minimum age requirements that are too stringent or those that lack flexibility may unjustifiably reduce the accessibility of surrogacy in Australia (see **Chapter 14**).[43]

5.29 The ALRC has taken the view that current age requirements for the surrogate are too low in some jurisdictions and too inflexible in others. The new *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) in Western Australia, which will commence in mid-2027, sets a minimum age requirement of 18 years old for the surrogate.[44] Given the need to identify an age requirement that will have general application, scientific studies suggest that 25 is safer than 18, to better ensure that all surrogates possess the requisite maturity to make a free and informed decision to engage in surrogacy.[45] On the other hand, most jurisdictions require that the surrogate be 25 years old to enter an arrangement, but do not allow for any exceptions.[46] This may be too inflexible because it would exclude surrogates who are under 25 years old, but are sufficiently mature to fully understand the nature and consequences of becoming a surrogate, from entering an arrangement.

5.30 Age requirements for intended parents are not specified in Victoria. The absence of an age requirement for intended parents may give rise to unsuitable surrogacy arrangements where intended parents enter these arrangements without being sufficiently mature to navigate the complexities and potential challenges of the process. At the same time, in Queensland, South Australia, and currently in Western Australia, an intended parent must be 25 years old to enter a surrogacy

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42 See S Page, *Submission 130*; Virtus Health, *Submission 397*.

43 See S Jefford, *Submission 128*; Not published, *Submission 393*.

44 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1).

45 Scientific studies have demonstrated that 'brain maturation' and neural 'rewiring' occur until around 25 years of age. In particular, the prefrontal cortex — which is responsible for cognitive analysis, abstract thought, impulsive control, and emotional regulation — is one of the last regions of the brain to reach maturation. This may impact the ability of an individual under 25 years old to make significant and potentially life-changing decisions, such as undertaking surrogacy: Mariam Arain et al, 'Maturation of the Adolescent Brain' (2013) 9 *Neuropsychiatric Disease and Treatment* 449, 450, 451, 459; Grace Icenogle et al, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample' (2019) 43(1) *Law and Human Behavior* 69, 72; Kathryn C Monahan et al, 'Psychosocial (Im)Maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persisting Antisocial Behaviour' (2013) 25 *Development and Psychopathology* 1093, 1096.

46 *Surrogacy Act 2010* (NSW) s 27(1); *Surrogacy Act 2010* (Qld) s 22(f); *Surrogacy Act 2019* (SA) s 10(3)(a); *Surrogacy Act 2012* (Tas) s 16(2)(c); *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(b); *Surrogacy Act 2008* (WA) s 17(a)(i).

arrangement.[47] The ALRC has heard that this requirement is too high,[48] especially since intended parents do not assume the same physical and psychological risks as the surrogate.

Recommended minimum age requirements

5.31 **Recommendation 12** requires the minimum age requirement for surrogates to be 25 years old and the minimum age requirement for intended parents to be 18 years old as preconditions for approval to access the administrative pathway to legal parentage (**Recommendation 28**). Harmonising these age requirements would establish a minimum, consistent standard that would help ensure that all parties to surrogacy arrangements have made a free and informed decision to enter an arrangement. This has a protective function by reducing the risk of harm, including coercion or exploitation,[49] and ensures that parties are sufficiently mature to navigate the complexities and challenges of surrogacy.

5.32 Requiring the surrogate to be at least 25 years old would help ensure that the surrogate has the requisite maturity to understand the nature and consequences of agreeing to be a surrogate,[50] and avoid the risk of harm and exploitation. However, an accredited counsellor may waive this requirement if they deem the surrogate to be sufficiently mature to provide their free and informed consent to the arrangement. This reflects the reality that maturity levels are not always correlated with age and some individuals under 25 years old are capable of fully understanding the nature and consequences of being a surrogate.[51] As a result, the available number of surrogates may be increased, without compromising the need to have free and informed consent of the surrogate.

5.33 Some stakeholders suggested that the minimum age requirement for the surrogate should be 18 years old, based on legal capacity and to achieve parity in age requirements between the parties.[52] As discussed above, this is currently the law in some jurisdictions. However, scientific evidence suggests that the age requirement of 25 is safer than 18 to better ensure that all surrogates possess the

47 *Surrogacy Act 2010* (Qld) s 22(g)(i); *Surrogacy Act 2019* (SA) s 10(4)(a). Although the current requirement in Western Australia is for one intended parent to be at least 25 years old, the age requirement for intended parents will be amended to 18 years of age by the *Assisted Reproductive Technology and Surrogacy Act 2025*, which will commence in mid-2027: *Surrogacy Act 2008* (WA) s 17(a)(i); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1).

48 See K Cox, *Submission 105*; Name withheld, *Submission 158*; K Cox, *Submission 389*; Not published, *Submission 393*.

49 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2022, 3614 (Natasha Fyles); Explanatory Statement, Surrogacy Bill 2022 (NT) 5; Victoria, *Parliamentary Debates*, Legislative Assembly, 10 October 2008, 4186–7 (Gavin Jennings); Explanatory Memorandum, Assisted Reproductive Treatment Bill 2008 (Vic) 19. See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 144 [14.4.13].

50 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 March 2022, 3614 (Natasha Fyles).

51 See S Jefford, *Submission 128*; S Page, *Submission 130*; Not published, *Submission 393*.

52 K Cox, *Submission 105*; Name withheld, *Submission 158*.

requisite maturity to make a free and informed decision to engage in surrogacy.[53] The ALRC has also received strong feedback from surrogacy and medical experts that the minimum age for surrogates should be greater than 18 years old.[54] Having regard to the harm that may be suffered where a surrogate's decision to participate is not free and well informed, the ALRC prefers an age requirement of 25 years old to better ensure that a free and informed decision is always made.[55] This approach is consistent with the rationale for the Australian Capital Territory amendment, which treated 25 years old as an age at which a surrogate is generally more likely to have the maturity needed to understand the physical, legal, and psychological consequences of entering a surrogacy arrangement.[56]

5.34 The ALRC also considers that intended parents should be at least 18 years old to access surrogacy. A lower age requirement for intended parents, compared to the surrogate, is justified because intended parents do not assume the same health risks as the surrogate. A lower standard of maturity will suffice to ensure that their free and informed consent is present. That observation is consistent with the age of 18 having been chosen as the age of adulthood and the age of legal capacity, including to give consent to medical treatment, vote in elections, or get married.[57]

5.35 Lastly, both intended parents and surrogates must also have the legal capacity to make an informed decision to enter the arrangement. This is consistent with general legal principles aimed at facilitating informed consent.

5.36 The age requirements may also be dispensed with by the National Regulator in cases of a minor procedural irregularity or exceptional circumstances, although such situations are unlikely to arise in relation to age requirements (see **Recommendation 12**).

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53 See Arain et al (n 45) 451; Icenogle et al (n 45) 86.

54 S Everingham, *Submission 129*; B Tobin, *Submission 367*; L Ransome, *Submission 380*; K Cox, *Submission 389*; Not published, *Submission 393*; Virtus Health, *Submission 397*.

55 See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne); New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2010, 26546 (John Hatzistergos); Explanatory Note, Surrogacy Bill 2009 (Qld) 14.

56 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne).

57 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; *Law Reform Act 1995* (Qld) s 17; *Age of Majority Act 1973* (Tas) s 3; *Age of Majority Act 1977* (Vic) s 3.

Requirements for citizenship and residency

Recommendation 13

1. As a precondition for approval (**Recommendation 9**) at least one intended parent and the surrogate must be an Australian citizen or permanent resident.
2. State or territory legislation that imposes state or territory-based residency requirements should be repealed.

Current citizenship and residency requirements

5.37 Citizenship and state and territory-based residency requirements impose geographical limitations on where parties can access medical procedures for surrogacy or apply for a parentage order. Such limitations may require the parties to reside in a particular jurisdiction, or they may require the parties to be Australian citizens or permanent residents. These requirements may apply to intended parents, surrogates, or both. One of the purposes of state and territory residency requirements is to 'ensure that intended parents do not forum shop'.[58] Beyond this, the purpose and policy rationale for state and territory residency requirements are unclear.[59]

5.38 **Table 5.4** below sets out the citizenship and residency requirements across the states and territories. Most jurisdictions impose some form of residency requirement for both or one of the parties:

- New South Wales legislation requires intended parents to be resident in New South Wales at the time of the hearing of the parentage application.[60] However, this requirement may be dispensed with in certain circumstances.[61]
- Queensland legislation requires that intended parents reside in Queensland at the time they enter the agreement for a parentage order to be granted.[62] However, the requirement may be dispensed with if the court is satisfied that there are exceptional circumstances for dispensation.[63]
- South Australian legislation requires at least one intended parent to be domiciled in South Australia at the time the lawful surrogacy agreement is entered into.[64]

58 Explanatory Note, Surrogacy Bill 2009 (Qld) 13.
59 Extrinsic materials for surrogacy legislation in other states and territories do not address the legislative rationale for this requirement.
60 *Surrogacy Act 2010* (NSW) ss 18, 32.
61 Ibid s 18(2).
62 *Surrogacy Act 2010* (Qld) ss 22(g)(ii), 23(2).
63 Ibid s 23(2).
64 *Surrogacy Act 2019* (SA) s 10(4)(d).

- Tasmanian legislation requires that each party to a surrogacy arrangement must have resided in Tasmania at the time the arrangement was made in order for a parentage order to be granted.[65]
- Victorian legislation requires that the medical procedure for surrogacy occur in Victoria, and that intended parents live in Victoria at the time of making the parentage application.[66]
- Current Western Australian legislation requires intended parents to reside in Western Australia when the parentage order is sought.[67] The new *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027, requires the Family Court of Western Australia to be satisfied that 'intended parents live in the State and, when the order is to be made, will have lived in the State for at least 12 months'.[68]

5.39 In some Australian jurisdictions, such as the Northern Territory and South Australia, there is a requirement for both parties to be Australian citizens or permanent residents to enter an arrangement or when making a parentage order.[69]

Table 5.4: Citizenship and residency requirements in each jurisdiction

Citizenship and residency requirement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
All parties to the arrangement must reside in the jurisdiction						✓			
Intended parents must be residents of that jurisdiction		✓		✓			✓	✓	✓
At least one intended parent must be domiciled in that jurisdiction					✓				

65 *Surrogacy Act 2012* (Tas) s 16(2)(g).
66 *Status of Children Act 1974* (Vic) ss 20(1)(a)–(b).
67 *Surrogacy Act 2008* (WA) s 19(1)(a).
68 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 123(1)(c).
69 *Surrogacy Act 2022* (NT) ss 17(b), 18(1)(b), 33(1); *Surrogacy Act 2019* (SA) ss 10(3)(c), (4)(c).

Citizenship and residency requirement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
Medical procedure for the surrogate must occur in that jurisdiction							✓		
Both parties must be Australian citizens or permanent residents			✓		✓				
Unspecified	✓								

Problems with current state and territory residency requirements

5.40 State and territory residency requirements cause significant disruption to intended parents and pose an impediment to accessing surrogacy.[70] In practice, these requirements can prevent intended parents from entering arrangements with surrogates who live in another jurisdiction, require parties to travel or relocate, and add cost and delay to an already complex process. Tasmania, in particular, is an example of a jurisdiction with stringent residency requirements and a small population, making it challenging for intended parents to find a surrogate.[71] As a result, such requirements may encourage intended parents to access surrogacy overseas.[72]

Recommended citizenship and residency requirements

5.41 **Recommendation 13** requires at least one intended parent to be either an Australian citizen or permanent resident as a precondition for approval to access the administrative pathway to legal parentage (**Recommendation 28**). **Recommendation 13** is designed to protect against 'reproductive tourism' in which intended parents who are not Australian citizens or permanent residents travel to

70 S Everingham, *Submission 129*; Equality Australia, *Submission 253*. See also J Holder, *Submission 142*.

71 See, eg, S Everingham, *Submission 129*; Equality Australia, *Submission 253*; Virtus Health, *Submission 397*.

72 S Page, *Submission 130*.

Australia to engage in surrogacy.[73] Access to domestic surrogacy is already limited and it should be reserved for intended parents with a sufficient connection to Australia.

5.42 **Recommendation 13** also requires the surrogate to be an Australian citizen or permanent resident, to reduce the risk that people will be brought into Australia for the purpose of acting as surrogates, which may involve exploitation and other forms of harm.[74] However, in general, the ALRC does not see a difficulty with intended parents with overseas friends or relatives willing to be surrogates, embarking on such surrogacy arrangements. Such cases may be permitted on a case-by-case basis by the National Regulator, as part of their ability to dispense with a requirement in cases of a minor procedural irregularity or exceptional circumstances (see **Recommendation 9**).[75]

5.43 Additionally, repealing current state and territory residency requirements would simplify the surrogacy process for the parties involved, and benefit the overall surrogacy system for two key reasons. First, retaining state or territory-based residency requirements is inconsistent with our recommendation of establishing a national surrogacy regime (**Chapter 3**) and the rationale underpinning our Terms of Reference: the design of a unified and harmonised approach to surrogacy. Second, allowing intended parents and surrogates to reside in different jurisdictions and obtain medical treatment in their home jurisdiction provides flexibility for the parties and minimises disruption, cost, and the need to travel.[76] This may increase the accessibility of surrogacy, facilitate a greater number of matches between intended parents and surrogates, and encourage domestic surrogacy.[77]

5.44 In our Discussion Paper, the ALRC proposed that SSOs would be able to dispense with the requirement that at least one of the intended parents be a citizen or permanent resident. However, the ALRC received feedback from stakeholders that the requirement should only be dispensed with by the National Regulator due

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73 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*; Not published, *Submission 393*; Virtus Health, *Submission 397*.

74 See **Chapter 14** for a discussion on exploitation and other forms of harm to the surrogate.

75 However, the ALRC has received feedback from our Advisory Committee and in a submission that there is currently no suitable visa for overseas surrogates to travel to and reside in Australia for the purpose of a surrogacy arrangement; Name withheld, *Submission 422*. The criteria for the 'Medical Treatment visa' (subclass 602) which allows 'people to travel to or remain longer in Australia for medical treatment' explicitly precludes 'surrogate motherhood' from constituting a medical treatment: 'Medical Treatment Visa' <www.immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/medical-treatment-602>; *Migration Regulations 1994* (Cth) reg 602.212(2)(a). Thus, in implementing **Recommendation 13**, the Australian Government may wish to consider providing overseas surrogates with an appropriate legal basis to travel to and reside in Australia for the duration of the surrogacy arrangement, bearing in mind the importance of safeguarding against human trafficking. This may include a reciprocal arrangement with New Zealand for cross-border surrogacy arrangements, due to their prevalence.

76 S Page, *Submission 130*.

77 See Not published, *Submission 116*; J Holder, *Submission 142*.

to a potential conflict of interest whereby SSOs are able to determine whether an arrangement should proceed, while also standing to profit from that arrangement.[78]

5.45 Further, as these determinations could have implications for Australia's potential to become a 'reproductive tourism' destination, they would be better made by a public entity with national responsibility. The ALRC has recommended that the National Regulator be empowered to dispense with this requirement if it is satisfied that a minor procedural irregularity has occurred, or if exceptional circumstances exist that justify approval of the arrangement (see **Recommendation 9**).

Requirement for previous successful pregnancy

Recommendation 14

1. As a precondition for approval (**Recommendation 9**) the surrogate must have previously carried a pregnancy and given birth to a live child.
2. The requirement in paragraph 1 may be dispensed with in circumstances where:
   a. the obstetrician conducting the medical screening (**Recommendation 15**) is satisfied that the surrogacy can proceed without undue risk to the surrogate's health; and
   b. the counsellor conducting the implications counselling (**Recommendation 18**) is satisfied that the surrogate and the intended parent(s) understand the potential risks associated with the surrogacy arrangement and are making a free and informed decision to continue with the arrangement.

Current requirement for previous successful pregnancy

5.46 The requirement for the surrogate to have previously carried a pregnancy and given birth to a live child facilitates the surrogate's informed consent and protects against pregnancy complications. However, only three states currently have this requirement: Tasmania, Victoria, and Western Australia.[79] This requirement was recently removed in Western Australia by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

78 Virtus Health, *Submission 397*. See also Relationships Australia, *Submission 404*; Australian Christian Lobby, *Submission 419*.

79 *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).

Problems with current requirement for previous successful pregnancy

5.47 Some submissions to this Inquiry observed that the absence of this requirement in some jurisdictions may negatively affect the quality of the surrogate's consent, as they would not have a reference point for the physical and psychological aspects of pregnancy and childbirth.[80] Similarly, given that past pregnancy complications may be a predictor of future pregnancy complications,[81] the absence of this requirement may limit the information available to assess the risk of the arrangement proceeding and increase the risk of harm to the surrogate.

5.48 In jurisdictions where this requirement applies, it applies rigidly and there is no option to dispense with it. While this requirement may generally be justifiable as a protective measure, it is currently assumed to be necessary in all cases. For example, a person who does not want to have a child of their own would currently be barred from entering a surrogacy arrangement. That would be so despite the existence of a well-reasoned basis for believing that the experience of having a prior successful pregnancy is not always necessary to ensure that a well-informed decision is able to be made.

Recommended requirement for previous successful pregnancy

5.49 **Recommendation 14** would impose a consistent requirement in all Australian jurisdictions for the surrogate to have previously carried a pregnancy and given birth to a live child to access the administrative pathway to legal parentage (**Recommendation 28**). This requirement addresses the deficiencies mentioned above, by helping to ensure that the surrogate is proceeding with informed consent, including from their own experience of pregnancy.[82] This requirement would also operate as a measure to reduce risk that the surrogate or a child born through surrogacy will experience medical harm. For example, a history of pre-eclampsia[83] or pre-term birth may indicate an increased risk of complications in a future pregnancy.[84] In addition to reducing the risk of medical harm, the Australian and New Zealand Infertility Counsellors Association observed that a previously successful birth also helps reduce the risk of psychological harm.[85]

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80 Australian Christian Lobby, *Submission 104*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

81 Sonia Hernández-Díaz, 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. See also S Page, *Submission 130*; Virtus Health, *Submission 397*.

82 See, eg, Not published, *Submission 393*; Virtus Health, *Submission 397*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*.

83 Hernández-Díaz, Toh and Cnattingius (n 81) 5.

84 Phillips et al (n 81) 3.

85 ANZICA, *Submission 277*. See also Name withheld, *Submission 126*; Not published, *Submission 393*; Virtus Health, *Submission 397*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

5.50 However, this requirement may be dispensed with in circumstances where the surrogate has undergone a medical assessment and the obstetrician conducting the medical screening (**Recommendation 15**) is satisfied that the surrogacy can proceed without undue risk to the surrogate's health, and additionally, the counsellor conducting the implications counselling 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. The ALRC has taken the view that a more flexible approach, which can accommodate a sensible dispensation, would strike an appropriate balance by only insisting on this requirement where necessary to achieve the protection it is directed at providing. So long as undue risk to the surrogate's health is avoided and the surrogate is able to make an informed decision, this dispensation recognises the surrogate's right to make an autonomous decision about their body and assert their reproductive freedom.

5.51 Some stakeholders in the fertility and assisted reproductive technology field suggested removing this requirement altogether as it may not be facilitative of informed consent given 'the circumstances of a surrogacy pregnancy differ significantly from prior pregnancies' and 'prior experience may not meaningfully enhance informed decision-making'.[86] Others viewed this requirement as paternalistic as it restricts a women's bodily and reproductive autonomy to make informed decisions about their bodies.[87] However, the ALRC has taken the view that, although previous pregnancies may not provide a comprehensive prediction of subsequent pregnancies, they are nevertheless likely to be informative and thus helpful to the surrogate's ability to make a well-informed decision. Further, the qualified capacity for the requirement to be dispensed with (**Recommendation 9**) provides appropriate flexibility and recognition of the surrogate's right to bodily autonomy.

86 E Kneebone, *Submission 415*. See also L Ransome, *Submission 144*.
87 L Ransome, *Submission 144*; Name withheld, *Submission 147*; Name withheld, *Submission 372*.

Requirement that surrogacy proceed without undue risk

Recommendation 15

As a precondition for approval (**Recommendation 9**):

a. the surrogate must undergo a medical assessment by an independent obstetrician;

b. the obstetrician must certify that the surrogacy can proceed without undue risk to the surrogate's health; and

c. the obstetrician must provide the certification to the surrogate and the surrogate's nominated Surrogacy Support Organisation (**Recommendation 8**), so that the certification can be considered as part of the approval process (**Recommendation 9**).

Current requirement for medical screening

5.52 Medical screening for the surrogate is designed to identify and minimise health risks to the surrogate and child born through surrogacy and helps ensure that the surrogacy arrangement proceeds smoothly.[88] Currently, only Western Australia requires the surrogate and any donor to be assessed by a medical practitioner.[89] However, this requirement has been removed by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

5.53 Although there may not be any legislative requirement to do so, many ART service providers already require routine medical screening of surrogates and donors prior to providing treatment.[90] This is to check that the surrogacy meets the internal eligibility rules of the ART service provider, including to ensure that the surrogate is physically healthy, is leading a healthy lifestyle, and can carry a pregnancy.[91]

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88 The 2023 Law Commission of England and Wales, and Scottish Law Commission Report recommended 'stringent medical scrutiny of the surrogate's medical history', including medical screening, to ensure that 'women do not undertake pregnancies beyond their physical capability': Law Commission of England and Wales, and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 148 [6.55].

89 *Surrogacy Act 2008* (WA) s 17(d).

90 See Melbourne IVF, 'Surrogacy' <www.mivf.com.au/our-donor-bank/surrogacy>; Surrogacy Australia, *Submission 417*; Rainbow Families, *Submission 429*.

91 Victorian Assisted Reproductive Treatment Authority (VARTA), 'Surrogacy Explained' <www.varta.org.au/surrogacy/surrogacy-explained>; Create Fertility, 'Surrogacy Melbourne' <www.createfertility.com.au/donors-surrogacy/surrogacy/>.

Problems with current requirement for medical screening

5.54 The absence of a legislated requirement for medical screening in Australia increases the risk that a surrogacy arrangement will result in detrimental health consequences for the surrogate. It may result in a surrogacy arrangement proceeding despite it being foreseeable that serious medical complications with long lasting health implications for the surrogate are likely. The absence of a medical screening safeguard also undermines the surrogate's ability to provide informed consent, as medical screening will provide the surrogate with the medical information required to properly evaluate the risk to their health. It may also help identify any foreseeable risks to the health of any child born through surrogacy.

Recommended requirement that surrogacy proceed without undue risk

5.55 **Recommendation 15** would impose a consistent requirement in all Australian jurisdictions to assess, through medical screening, whether the surrogacy arrangement can proceed without undue risk to the surrogate to access the administrative pathway to legal parentage (**Recommendation 28**).[92] This requirement would better ensure that surrogates or children born through surrogacy are not exposed to foreseeable and significant risks to their health. For the reasons already discussed, the requirement would also facilitate the potential surrogate's ability to provide free and informed consent by ensuring their decision to proceed is informed by an obstetric assessment. Many stakeholders supported this requirement and its protective function.[93]

5.56 Certification from the medical screening would form part of the supporting evidence that the SSO (**Recommendation 8**) assesses as part of its approval process (**Recommendation 9**).

5.57 In our Discussion Paper, the ALRC recommended that a medical practitioner conduct the medical screening. However, we received feedback that an obstetrician would be best placed to provide the screening due to their pregnancy-specific expertise. That feedback is reflected in **Recommendation 15**. We have also amended **Recommendation 15** to require a 'certification' of the medical screening, instead of a 'report' to be provided to the SSO. This is for privacy reasons, to help ensure that

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92 In addition to protecting the surrogate, the 2023 Law Commission of England and Wales, and Scottish Law Commission Report recommended health screening on the basis that such screening would also 'be in the interests of the surrogate-born child's lifelong welfare': Law Commission of England and Wales, and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Joint Consultation Paper)* (Law Commission Consultation Paper 244, Scottish Law Commission Discussion Paper 167, 2019) 30 [2.35].

93 Name withheld, *Submission 146*; B Tobin, *Submission 367*; Name withheld, *Submission 372*; M Quinlan, *Submission 381*; Name withheld, *Submission 383*; Not published, *Submission 393*; Surrogacy Australia, *Submission 417*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*. See also Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 126*; D Kooyong, *Submission 151*.

the surrogate's confidential medical results are not shared with the organisation. A full medical report must still be provided to the surrogate upon request, as is the case with other medical documents.[94]

5.58 It is already common practice for ART service providers to require surrogates to undergo medical screening, even though they are not required to by law.[95] Where ART is being utilised in a surrogacy arrangement, it would be preferable that medical screening be carried out as part of the ART service provider's existing processes (if any), rather than subjecting the surrogate to an additional medical screening for surrogacy. This would avoid unnecessary duplication, which can increase costs and cause delay for the parties and the ART service provider, without a corresponding improvement in safety or outcomes.[96] **Recommendation 9** would enable the process for ART service providers to be streamlined with the process for approval.

5.59 As with other eligibility requirements, the National Regulator may dispense with this requirement if they are satisfied that a minor procedural irregularity has occurred, or if exceptional circumstances exist that justify approval of the arrangement (**Recommendation 9**).

Requirement for a criminal history check

Recommendation 16

As a precondition for approval (**Recommendation 9**):

a. the intended parent(s) must undergo a Nationally Coordinated Criminal History Check;

b. the report from the Nationally Coordinated Criminal History Check must indicate that no offences have been committed by the intended parent(s) against a child, including child exploitation offences; and

c. the report from the Nationally Coordinated Criminal History Check must be provided to the intended parents' nominated Surrogacy Support Organisation (**Recommendation 8**), so that the report can be considered as part of the approval process (**Recommendation 9**).

94 Medical records are considered personal information under the *Privacy Act 1988* (Cth): Office of the Australian Information Commissioner, 'What Is Personal Information?' <www.oaic.gov.au/privacy/your-privacy-rights/your-personal-information/what-is-personal-information>. The *Privacy Act 1988* (Cth) requires entities that hold personal information about an individual to provide that individual access to that information on request: *Privacy Act 1988* (Cth) sch 1 cl 12.

95 Create Fertility (n 91); Melbourne IVF (n 90); Victorian Assisted Reproductive Treatment Authority (VARTA) (n 91); Fertility Society of Australia and New Zealand, 'Surrogacy' <www.fertilitysociety.com.au/resources/surrogacy/>. See also Surrogacy Australia, *Submission 417*; Rainbow Families, *Submission 429*.

96 K Cox, *Submission 389*.

Current requirement for a criminal history check

5.60 Criminal history checks provide a summary of a person's criminal history in Australia, and are often required by employers, organisations, and regulators to determine a person's suitability for a role.[97] In the context of surrogacy, they have been used as an eligibility requirement by preventing people with particular criminal histories from accessing assisted reproductive services. They have also been used to facilitate informed consent between parties to a surrogacy arrangement by requiring that parties have access to each other's checks before commencing the arrangement.

5.61 Within Australia, South Australia is the only jurisdiction that requires criminal history checks.[98] The parties to a surrogacy arrangement are required to exchange criminal history checks before entering an arrangement, with this requirement directed to the issue of informed consent, rather than eligibility to enter into a surrogacy arrangement.[99] The exchange of criminal history checks is a mandatory precondition for the granting of a parentage order and cannot be dispensed with by the court even in exceptional circumstances or in the best interests of the child.[100] However, there is no mechanism to ensure that the checks have been exchanged before the surrogacy arrangement begins.[101]

5.62 Victoria is the only other jurisdiction to have recently required criminal history checks for surrogacy arrangements.[102] The requirement was part of a broader

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97 Australian Criminal Intelligence Commission, 'How the Service Works' <www.acic.gov.au/how-service-works>. In Australia this is conducted at a national level across all states and territories: Australian Federal Police, 'Apply for a National Police Certificate' <www.afp.gov.au/our-services/national-police-checks>.

98 In 2018, the South Australian Law Reform Institute recommended that there be 'full and frank exchange of information between the parties ... and the Accredited Independent Counsellor(s)', including 'if possible … either a Working with Children Check or a National Criminal History Check': South Australian Law Reform Institute (n 49) rec 32. This recommendation was not included in the earliest draft of the Surrogacy Bill 2019 (SA). Hansard records indicate it was only introduced after Ms Paula Luethen (the member for King) raised the risk of child sex offenders using surrogacy arrangements to gain unlimited access to children: South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2019, 7047 (Paula Luethen); South Australia, *Parliamentary Debates*, House of Assembly, 26 September 2019, 7674 (Paula Luethen).

99 *Surrogacy Act 2019* (SA) ss 10(3)(f), (4)(g).

100 *Surrogacy Regulations 2020* (SA) reg 6.

101 Ibid.

102 The Department of Justice (NSW) also considered the issue of criminal history checks in its review of the *Surrogacy Act 2010* (NSW). The Department did not recommend implementing criminal record checks, citing several reasons including that arrangements are often between family members or friends, and that adding such a requirement may cause inconvenience and distress: Department of Justice (NSW), *Statutory Review: Surrogacy Act 2010* (2018) [3.38]. In Western Australia, the decision not to include criminal history checks in the Assisted Reproductive Technology and Surrogacy Bill 2025 (WA) was debated in parliament. Several members raised safety concerns and proposed amendments to include criminal history checks, however the government reiterated that it was sufficient for a counsellor or medical practitioner to require a check to be undertaken if they think it is 'appropriate in a particular given circumstance': Western Australia, *Parliamentary Debates*, Legislative Council, 20 November 2025, 4587 (Matthew Swinbourn).

presumption against allowing access to ART for people with particular criminal histories.[103] The presumption was removed following community criticism and a suggestion to reconsider its necessity by the 2019 Gorton Review Report.[104]

Problems with current requirement for a criminal history check

5.63 Under current laws requiring criminal history checks there is only oversight at the parentage order stage, at which point the court looks closely at whether granting a parentage order is in the best interests of the child (see **Chapter 10**). This enables limited oversight. It comes very late, after the child is born. Its effectiveness is compromised, because the potential risk to the child's safety is only revealed and can only be addressed after the child is born, and after a relationship with the person posing the risk has been established. At that point, the law is left to manage an existing risk rather than prevent the risk from arising.

5.64 Further, the late receipt of the information means that information potentially relevant to whether a surrogacy arrangement should be made is not available to inform the decision to proceed, and the capacity of the parties to provide informed consent is potentially diminished.

Recommended requirement for a criminal history check

5.65 **Recommendation 16** would require intended parents to undergo a Nationally Coordinated Criminal History Check, which provides a report of all disclosable police records of an individual at a particular point in time. The criminal history check would be provided to the nominated SSO to review as part of the approval process (**Recommendation 9**). If the criminal history check identified any offence against a child (including child exploitation) by any intended parent, then the arrangement would not be able to proceed.

5.66 Opinion is broadly split between whether and for whom criminal history checks should be required, and if so, what their role should be in the surrogacy process. The ALRC received submissions both in favour of, and against, criminal history checks.

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103 In 2007, the Victorian Law Reform Commission recommended that there be a presumption against treatment in circumstances where intended parents or surrogates had a criminal history of particular sexual or violent offences. It was recommended that parties disclose this through a statutory declaration provided to fertility clinics. It was intended that this be considered by the review panel: Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption* (Final Report, 2007) 102, recs 12–14. However, when legislated, criminal history checks were introduced as opposed to statutory declarations.

104 While it was outside its scope, the Review suggested that the presumption against treatment be reconsidered after receiving extensive feedback that it caused increased 'costs, burden, delay, and distress': Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 176–7. Following further consultation with stakeholders, the Victorian Government removed the requirement noting that this would alleviate 'unnecessary delay, cost and distress': Jacinta Allan MP, 'Removing Police Checks To Make IVF Fairer And Easier' (Media Release, 19 February 2020).

Some stakeholders viewed such checks as necessary to properly safeguard the best interests of the child.[105] As the Australian Human Rights Commission summarised:

> [t]his safeguard is essential to ensure that children born through surrogacy are not placed at foreseeable risk of harm and that, in circumstances where parental responsibility is being consciously transferred or created through a legal process, appropriate screening occurs.[106]

5.67 Other stakeholders proposed that criminal history checks were unnecessary for a variety of reasons, including that they are discriminatory, given people who can conceive naturally do not need to undertake them, and that they are no longer a requirement to access ART services.[107] Some intended parents reflected that the experience of undergoing criminal history checks was invasive and onerous, explaining that

> we were made to feel our fitness to parent was being interrogated simply because we needed medical assistance to have a child. This requirement introduced an emotional burden and sense of stigma at an already vulnerable time.[108]

5.68 The ALRC acknowledges the views of those opposed to criminal history checks but considers that the better view is that criminal history checks be required. Article 3 of the United Nations Convention on the Rights of the Child ('CRC') requires the state to ensure that the best interests of the child are a primary consideration in all administrative and legislative measures concerning children.[109] This requirement extends to consideration of the child's safety and the possibility of future risk or harm.[110] The ALRC does not suggest that children born through surrogacy are at greater risk compared with other children. However, because the recommended regulatory regime would involve the state facilitating surrogacy as a means of family formation, and because that regime would provide a practical opportunity to guard against what could be a very substantial risk to the child, it is appropriate to establish

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105 S Page, *Submission 365*; Name withheld, *Submission 372*; M Quinlan, *Submission 381*; D Adams, *Submission 382*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*; Relationships Australia, *Submission 404*; J Tritton, *Submission 406*; Z Mahmoud, *Submission 414*; Surrogacy Australia, *Submission 417*; K Horsey, *Submission 418*; Name withheld, *Submission 422*; AF4WR, *Submission 424*; Australian Human Rights Commission, *Submission 433*; Department of Foreign Affairs and Trade, *Submission 434*. See further discussion of the best interests of the child in **Chapter 14**.

106 Australian Human Rights Commission, *Submission 433*.

107 K Cox, *Submission 105*; Not published, *Submission 119*; Equality Australia, *Submission 253*; S Cureton, *Submission 351*; ANZICA, *Submission 368*; Australian Nursing and Midwifery Federation, *Submission 375*; L Ransome, *Submission 380*; Not published, *Submission 393*; Virtus Health, *Submission 397*; Equality Australia, *Submission 435*.

108 K Cox, *Submission 105*.

109 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3. For further discussion of the relationship between surrogacy and human rights, see **Chapter 14**.

110 Ibid art 3(2); Committee on the Rights of the Child, *General Comment No. 14 (2013) on the Right of the Child to have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [73]–[74].

a mechanism for protecting the best interests of the child and addressing any safety concerns.

5.69 The ALRC is of the view that introducing criminal history checks as part of the approvals process is a reasonable and proportionate response to the potential risk being addressed. It is not discriminatory as it is not a requirement that treats intended parents differently because they are regarded as riskier or less suitable parents than parents of children not born through surrogacy. It is a measure with no discriminatory intent, motivated solely by the existence of a practical opportunity to avert foreseeable risk.

5.70 Criminal history checks would help to identify and mitigate potential harm by ensuring people who have a record of offences against children are barred from accessing surrogacy as a general rule. They would also protect surrogacy as a legitimate form of family formation by safeguarding the integrity and long-term viability of the recommended regulatory regime, reinforcing that domestic surrogacy is a lawful, well regulated, and trusted pathway to family formation, as well as a safer alternative to overseas surrogacy.

5.71 Internationally, criminal history checks in surrogacy arrangements are not uncommon. In New Zealand, police background checks for intended parents form part of the surrogacy arrangement approval process.[111] In England and Wales, there is no statutory requirement for a criminal history check before entering a surrogacy arrangement but they can form part of the parental order process,[112] and are used by surrogacy organisations.[113] The Law Commission of England and Wales, and Scottish Law Commission recently recommended that more comprehensive police checks be adopted as a requirement to access surrogacy for the surrogate (and any partner), the intended parents, and any adult over the age of 18 who lives with the intended parents.[114] Similarly, criminal history checks are not mandated in Canada or the United States of America, but they are commonplace with most surrogacy

111 In New Zealand, surrogacy arrangements must be approved prior to conception by the Ethics Committee on Assisted Reproductive Technology ('ECART'). As part of this process, ECART must receive confirmation from the Oranga Tamariki (Ministry for Children) that the parents are 'suitable' to adopt a child born as a result of IVF. The Oranga Tamariki's assessment involves, among other things, a police check: Organa Tamariki, Ministry for Children, 'Adoption – Domestic IVF Surrogacy Adoption' <https://practice.orangatamariki.govt.nz/policy/adoption-domestic-in-vitro-fertilisation-ivf-surrogacy-adoption>. See also 2022 Te Aka Matua o te Ture | Law Commission, which sets out a new model for how background checks should be conducted under the surrogacy approval process: Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) ch 5.

112 Law Commission of England and Wales, and Scottish Law Commission (n 88) [8.109]. See also *Human Fertilisation and Embryology Act 2008* (UK); *Family Procedure Rules 2010* (UK) SI 2010/2955 r 16.35.

113 Law Commission of England and Wales, and Scottish Law Commission (n 88) 214–15 [8.110]. This applies to both intended parents and surrogates. Fertility clinics also require parties to disclose any criminal convictions.

114 Ibid rec 32.

agencies requiring them for both intended parents and surrogates to proceed with a surrogacy arrangement.[115]

5.72 As discussed above, the purpose of criminal history checks has differed between states and territories. Submissions were similarly divided on the role such checks should play. Some submissions were of the view that criminal history checks should not be mandatory, but be available as a tool to facilitate informed consent between intended parents and surrogates.[116] Others thought that checks should act as an eligibility requirement to prevent people who are a risk to children from entering into a surrogacy arrangement.[117] The ALRC considers that criminal history checks would be most effective as an eligibility requirement where they can best maximise the opportunity to guard against risk. An abundance of caution must be taken to ensure that the rights and best interests of the child are safeguarded from child abuse or exploitation. For reasons explained above, guarding against this risk is most effective if it can be done at the start of a surrogacy arrangement and before the child is conceived. The ALRC's approval process (**Recommendation 9**) and administrative pathway (**Recommendation 28**) accommodate that objective, and would require an SSO to refuse to approve a surrogacy arrangement from proceeding where either intended parent has a criminal history involving offending against a child. This requirement would also indirectly facilitate free and informed consent, because if the approved surrogacy arrangement is not disqualified from proceeding, all the parties would know that there has been no relevant offending against children by the intended parents.

5.73 In addition, the ALRC recommends that, as with other eligibility requirements, criminal history checks be mandatory. Submissions were largely split on whether criminal history checks should be compulsory or voluntary. For example, some viewed that whether or not a criminal history check is conducted should be left to the discretion of SSOs or addressed in counselling.[118] The ALRC considers that making criminal history checks mandatory would best guard against risk and best preserve the integrity of the recommended regime. As the Australian Human Rights Commission noted, standardised screening is likely to have the greatest benefit:

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115 See, eg, Brilliant Beginnings, 'Who Can Become a Parent through US Surrogacy?' <www.brilliantbeginnings.co.uk/who-can-become-a-parent-through-usa-surrogacy/>; Brilliant Beginnings, 'Screening and Other Requirements for US Surrogates' <www.brilliantbeginnings.co.uk/screening-and-other-requirements-for-us-surrogates/>; Proud Fertility, 'Intended Parent Qualifications' <www.proudfertility.com/intended-parent-qualification/>; Proud Fertility, 'Surrogate Mother Requirements' <www.proudfertility.com/surrogate-mother-requirements/>.

116 S Everingham, *Submission 378*; Not published, *Submission 393*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*; K Horsey, *Submission 418*.

117 See, eg, Australian Christian Lobby, *Submission 104*; M Quinlan, *Submission 381*.

118 Submissions that support mandatory criminal history checks included: Relationships Australia, *Submission 404*; J Tritton, *Submission 406*; Z Mahmoud, *Submission 414*; Name withheld, *Submission 422*; AF4WR, *Submission 424*; Australian Human Rights Commission, *Submission 33*; Department of Foreign Affairs and Trade, *Submission 434*. Submissions that supported voluntary criminal history checks included: S Jefford, *Submission 359*; Australian Nursing and Midwifery Federation, *Submission 375*; L Ransome, *Submission 380*; Not published, *Submission 385*; Not published, *Submission 393*; M Eason, *Submission 412*; K Horsey, *Submission 418*; Rainbow Families, *Submission 429*; Equality Australia, *Submission 435*.

> [a] requirement to conduct such checks in all cases is likely to be of significant benefit if it is effective in some cases in identifying people who should not be granted approval (or if such people are discouraged from making an application to be approved as an intended parent).[119]

5.74 Submissions also differed on whether the requirement should only be for intended parents,[120] or whether it should extend to surrogates (and their partner, if any).[121] As it is the intention of the parties for the intended parents to raise the child and the recommended administrative pathway to parentage results in the intended parents being recognised as the legal parents on the birth of the child, the ALRC does not consider it is necessary for surrogates (and their partner, if any) to complete a criminal history check at the outset of a surrogacy arrangement. If, however, in accordance with **Recommendation 28** the surrogate applies to the Federal Circuit and Family Court of Australia for a parentage order, any prior offending against children by the surrogate and their partner (if any) would be a relevant consideration. In that way, the best interests of the child would be guarded against any relevant risk from the surrogate or the surrogate's partner. Further, the ALRC is also conscious of not creating further barriers for potential surrogates to access surrogacy by imposing unnecessarily on individuals' privacy.

5.75 As the purpose of **Recommendation 16** is to protect the best interests of the child, the ALRC considers it appropriate for the requirement to focus on serious and relevant offending that indicates a potential risk to the child. The ALRC received varied feedback on whether there should be limitations placed on the offences taken into account by SSOs. Some submissions were supportive of checks being limited to offences involving children,[122] while other submissions believed that **Recommendation 16** should extend to any drug, fraud, or financial offences, or those involving violence.[123] It was also proposed that a person's entire criminal history be reviewable.[124] The ALRC is of the view that limiting consideration to offences against the child provides a suitably targeted safeguard without creating unnecessary barriers for intended parents, or the requirement becoming more of a general test of character.

5.76 As previously noted, **Recommendation 9** would allow for the National Regulator to dispense with preconditions if it is satisfied that procedural irregularities or exceptional circumstances exist which justify approval of the agreement. In

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119 Australian Human Rights Commission, Submission No 67 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into Surrogacy* (17 February 2016) 21–2 [104].

120 See, eg, Equality Australia, *Submission 435*.

121 See, eg, S Jefford, *Submission 359*.

122 Name withheld, *Submission 372*; S Everingham, *Submission 378*; Not published, *Submission 393*; Centre for Health Law & Policy, University of WA Law School, *Submission 401*; Relationships Australia, *Submission 404*; Australian Human Rights Commission, *Submission 433*; Department of Foreign Affairs and Trade, *Submission 434*.

123 See, eg, Not published, *Submission 364*; Relationships Australia, *Submission 404*; Fertility & Family, *Submission 427*.

124 S Page, *Submission 365*.

the context of criminal history checks, the National Regulator may consider the circumstances of the offending and make a bespoke assessment of risk, based on evidence that intended parents can put before the National Regulator. In practical terms, any dispensation would need to be supported by the surrogate who by this stage would have been made well aware of the offending in question.

5.77 The ALRC recognises potential limitations to the utility of criminal history checks. Many people who have engaged in child sexual abuse do not have a criminal record and spent convictions may not be recorded by a criminal history check.[125] However, the ALRC considers criminal history checks to be a valuable way to guard against a surrogacy resulting in a child being exposed to a significant risk of harm. The ALRC considers that this reduction in risk is worthwhile as a measure to enhance the safety of children and maintain the integrity of the recommended regime.

5.78 In relation to spent convictions, most states and territories have a specific exception for sexual offences which enables them to be identified in criminal history checks.[126] Some jurisdictions also have exemptions for some agencies, like adoption services, which enable those agencies to receive spent conviction information.[127] The implementation of **Recommendation 16** should lead to states and territories giving consideration to providing such an exemption to SSOs.

125 See, eg, Not published, *Submission 393*. See also Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 29.

126 See, eg, *Spent Convictions Act 2000* (ACT) s 11(2)(b); *Criminal Records Act 1991* (NSW) s 7(1)(b); *Criminal Records (Spent Convictions) Act 1992* (NT) s 5(a); *Spent Convictions Act 2009* (SA) s 5(2)(b); *Annulled Convictions Act 2003* (Tas) ss 3 (definition of 'minor conviction'), 6; *Spent Convictions Act 2021* (Vic) s 3 (definition of 'serious conviction').

127 See, eg, *Spent Convictions Regulations 2021* (Vic) regs 5 table 1, 13–14 table 4; *Spent Convictions Act 1988* (WA) sch 3 cls 1(5), 2(1).

6. Accessing Surrogacy — Process Requirements

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Introduction

6.1 This chapter discusses recommended reforms to improve the process requirements that intended parents and surrogates must follow to enter into an approved surrogacy arrangement, access assisted reproductive technology for surrogacy (**Recommendation 34**), and proceed upon the administrative pathway to legal parentage (**Recommendation 28**). Alongside the eligibility requirements discussed in **Chapter 5** and the requirement for a compliant surrogacy agreement in **Chapter 7**, the recommendations in this chapter are intended to function as critical legislative safeguards, ensuring that parties to a surrogacy arrangement follow processes that support free and informed decision-making and the welfare of those involved, while maintaining fair and equitable access to surrogacy. The recommendations provide for consistent, more stringent, and clearer process requirements, compared to the current requirements across Australia. This is important if surrogacy is to become easier to access, better facilitated, and more common in Australia (see **Chapter 1**). A more accessible pathway, including to legal parentage, should be accompanied by legislative safeguards that reduce the risk of harm and exploitation, and promote the best interests of children.

6.2 Taken together, these recommendations:

- promote transparency and expectation management between the parties;
- safeguard against the risk of harm to all parties by promoting their free and informed consent before entering a surrogacy arrangement;
- provide opportunities during the process leading to a surrogacy arrangement to identify circumstances where it would be inappropriate for the arrangement to proceed; and
- guard against risks of harm to the child.

6.3 This chapter discusses three recommendations dealing with minimum process requirements that parties must undertake to facilitate a safe and ethical surrogacy arrangement:[1]

- **Recommendation 17** requires all parties to obtain independent legal advice before entering a surrogacy arrangement and identifies key legal issues that must be addressed by that advice.
- **Recommendation 18** requires all parties to participate in implications counselling before entering a surrogacy arrangement. It addresses the minimum qualifications of counsellors and identifies critical matters that implications counselling must cover.
- **Recommendation 19** identifies when a surrogate and intended parents must undertake psychological assessment before commencing a surrogacy arrangement. In summary, it provides that psychological assessment must occur upon the request of any party to a proposed surrogacy arrangement or when any 'red flags' have been identified during the implications counselling process in accordance with **Recommendation 18**.

6.4 The process requirements in this chapter provide for important legislative safeguards and must be met as preconditions for the approval of a surrogacy arrangement. If parties fail to meet these requirements and the surrogacy arrangement is not approved, they would be unable to access fertility treatment aimed at facilitating a surrogacy-related pregnancy (**Recommendation 34**). They would also be unable to access the administrative pathway to legal parentage (**Recommendation 28**). However, the National Regulator may dispense with any of these requirements if satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the arrangement (**Recommendation 9**).

6.5 In accordance with the Terms of Reference, this chapter aims to harmonise process requirements across Australia. It seeks to promote the rights and interests of parties to prospective surrogacy arrangements by addressing risks of harm, and ensuring each party gives informed consent before the arrangement commences.

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1 Our reform principle of adopting the least restrictive approach has shaped **Recommendations 17–19** to set the mandatory minimum, rather than providing for the more onerous and comprehensive requirements endorsed by some stakeholders.

Legal advice

Recommendation 17

1. As a precondition for approval (**Recommendation 9**), all parties must receive independent legal advice. The advice must cover:
   a. the surrogate's bodily integrity, autonomy (**Recommendation 21**), and the legal requirement for free and informed consent in relation to medical treatment or procedures that directly affect them;
   b. legal parentage under the administrative pathway or the judicial pathway, including the timing and effect of the surrogate's consent, and the right to apply for a parentage order (**Recommendations 28**–**29**);
   c. the operation and enforceability of the cost and loss recovery provisions in the surrogacy agreement (**Recommendations 23**–**24**); and
   d. the right of the child born through surrogacy to know their genetic and gestational origins, including their right to access registered information (**Recommendations 30**–**32**).
2. Legislation should provide that the legal practitioner providing the advice must provide each party with written confirmation that the matters outlined in paragraph 1 were discussed, the requisite advice was provided, and the legal practitioner believes the party appeared to understand the advice, so that it can be considered as part of the approval process (**Recommendation 9**).
3. Law societies in each jurisdiction should develop and provide accreditation for lawyers who provide legal advice on surrogacy arrangements.

The current law on legal advice

6.6 Surrogacy legislation is complex, involving a range of participants with varying rights and responsibilities. Many aspects of surrogacy law do not align with parties' expectations about surrogacy arrangements.[2]

6.7 Pre-arrangement legal advice is important for ensuring parties understand the rights and obligations of everyone involved in a surrogacy arrangement and

2 For example, many parties are surprised to learn that the surrogate will be the legal parent and listed on the birth certificate, or that the mandatory written surrogacy agreement is mostly unenforceable: see, eg, Name withheld, *Submission 22*; Name withheld, *Submission 115*; Name withheld, *Submission 158*; A-R Crispin, *Submission 167*; Name withheld, *Submission 236*; Name withheld, *Submission 278*; Not published, *Submission 345*.

facilitating the giving of informed consent to the arrangement. As one submission observed, the safeguard of legal advice

> ensures that participants are negotiating from an informed position and that their rights, obligations, and legal risks are well understood. When sensitively delivered, legal advice fosters transparency, mutual respect, and collaborative problem-solving … In our experience, it supported alignment of expectations and clarified important issues without disrupting the relationship between the intended parents and our surrogate. This aspect of the process was one of the most valuable in preparing us for the journey ahead.[3]

6.8 While each state and territory requires parties to obtain legal advice before entering a surrogacy arrangement,[4] there are some key differences:

- Most jurisdictions do not specify issues that legal advice should address, referring only to the 'effect' or 'implications' of a surrogacy arrangement, or 'the implications of a parentage order'.[5] Only the Northern Territory and Queensland are prescriptive about the range of matters that must be addressed by legal advice.[6]
- Only some jurisdictions specify what is meant by 'independent' legal advice: some refer to independence as between the lawyers providing advice to the intended parents and the surrogate (and their partner, if any),[7] and the Northern Territory specifies independence from any business providing fertility services.[8]

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3 K Cox, *Submission 105*.

4 *Parentage Act 2004* (ACT) s 28; *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2022* (NT) s 20; *Surrogacy Act 2010* (Qld) s 22(2)(e); *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). The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) will come into effect in mid-2027 and retains this requirement: ibid s 109(1)(e)(ii).

5 *Parentage Act 2004* (ACT) s 28(1); *Surrogacy Act 2010* (NSW) s 36(1); *Surrogacy Act 2010* (Qld) s 22(2)(e)(i); *Surrogacy Act 2012* (Tas) s 16(2)(a)(i); *Status of Children Act 1974* (Vic) s 23(2)(b)(iii); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 43(c); *Surrogacy Act 2008* (WA) s 21(2)(c). Note, amendments due to come into effect in mid-2027 in Western Australia will soon change this position by prescribing matters to be covered by legal advice: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(2).

6 *Surrogacy Act 2022* (NT) s 20(2); *Surrogacy Act 2010* (Qld) s 30(1)(b). Note, forthcoming amendments in Western Australia will provide more prescriptive guidance on the contents of legal advice: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(2).

7 *Parentage Act 2004* (ACT) ss 28(2)–(4); *Surrogacy Act 2010* (NSW) s 36(2); *Surrogacy Act 2022* (NT) s 20(4); *Surrogacy Act 2008* (WA) s 14; Western Australian amendments due to come into effect in mid-2027 will retain this requirement: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(3).

8 *Surrogacy Act 2022* (NT) s 20(3).

- In some jurisdictions, pre-arrangement legal advice is a mandatory precondition for a parentage order;[9] in others it can be dispensed with in the best interests of the child or exceptional circumstances.[10]
- Most Australian jurisdictions include an obligation that is met by the parties obtaining legal advice.[11] However, some jurisdictions also or alternatively include an evidentiary requirement by mandating the provision of a lawyer's certificate or affidavit to confirm that advice has been obtained.[12] Of these latter jurisdictions, two require the lawyer to confirm that the recipient appeared to understand the legal advice provided.[13]

Problems with the current law on legal advice

6.9 While the importance and value of legal advice was widely acknowledged in submissions,[14] parties to current and previous surrogacy arrangements primarily raised concerns relating to inconsistent legal requirements between jurisdictions,

9 Ibid s 34(1)(b); *Surrogacy Act 2019* (SA) ss 10(5)(b), 18(7); *Surrogacy Regulations 2020* (SA) reg 6(1)(d); *Surrogacy Act 2008* (WA) s 17(c)(iii). Note, forthcoming amendments in Western Australia will allow for the legal advice requirement to be dispensed with: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 133(2)(b), 134. In Victoria there are alternative mandatory provisions depending on whether the arrangement proceeds with the assistance of an assisted reproductive treatment service provider: *Assisted Reproductive Treatment Act 2008* (Vic) s 40(1)(c), 43(c); *Status of Children Act 1974* (Vic) s 23(2)(b)(iii).

10 *Parentage Act 2004* (ACT) s 28H(3)(b)(ii); *Surrogacy Act 2010* (NSW) ss 18(2)(a), 36; *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Act 2012* (Tas) s 16(3)(a). While the legal advice requirement is not accompanied by a dispensation power under the current Western Australian legislation, a dispensation power is included in forthcoming legislation due to come into effect in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 133(2)(b), 134.

11 *Parentage Act 2004* (ACT) s 28; *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2010* (Qld) s 22(2)(e); *Surrogacy Act 2012* (Tas) s 16(2)(a)(i); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 43(c); *Status of Children Act 1974* (Vic) s 23(2)(b)(iii) (noting this provision requires 'legal information' and not 'legal advice', which may be a lower threshold for arrangements proceeding without the assistance of an ART service provider); *Surrogacy Act 2008* (WA) s 17(c)(iii). Western Australian legislation due to come into effect in mid-2027 will retain this requirement: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(ii). We note that South Australia lacks an explicit conduct obligation, although it may be implied from the evidentiary obligation: see *Surrogacy Act 2019* (SA) s 10(5)(b).

12 *Surrogacy Act 2022* (NT) ss 14(2), 21; *Surrogacy Act 2010* (Qld) ss 25(1)(g), 30. We note the South Australian provision contains only an evidentiary obligation, and no conduct obligation: *Surrogacy Act 2019* (SA) s 10(5)(b). The current Western Australian surrogacy legislation does not contain an evidentiary provision relating to legal advice, however a written evidence requirement is specified in legislation due to come into effect in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(ii). While no evidentiary requirement is specified in the other state and territory legislative schemes, in practice other jurisdictions require the parties to produce some evidence of the performative obligation being fulfilled: see, eg, Not published, *Submission 119*; S Jefford, *Submission 128*; S Page, *Submission 130*; Name withheld, *Submission 347*.

13 *Surrogacy Act 2022* (NT) s 21(2)(d); *Surrogacy Act 2010* (Qld) s 30(1)(c).

14 See, eg, Name withheld, *Submission 126*; Name withheld, *Submission 135*; L Ransome, *Submission 144*; Name withheld, *Submission 154*.

and lack of consistent quality in legal advice delivered between practitioners.[15] Inconsistency between jurisdictions, especially when parties reside in different jurisdictions, leads to confusion and frustration among parties seeking to comply with the requirement to obtain legal advice.[16] Further, we have heard that sometimes lawyers with limited familiarity with surrogacy law give poor quality legal advice.[17] Poor quality legal advice may be insufficient to facilitate informed consent.[18]

6.10 Legislation does not currently require any surrogacy-specific expertise or experience on the part of the lawyer providing legal advice.[19] Some submissions noted that only a small number of specialist surrogacy lawyers are available in each jurisdiction.[20] We have also heard that the lack of specialist lawyers has sometimes led to a single legal practitioner attempting to represent all the parties to an arrangement, compromising independence and giving rise to conflicts of interest.[21]

6.11 Problematically, in some cases, parties are being required to waive the right to legal professional privilege in order to demonstrate that they have met statutory obligations to obtain independent legal advice.[22] There are strong policy reasons for protecting the right to legal professional privilege, including to ensure clients can speak freely and honestly, without fear of disclosure.[23]

6.12 In most Australian jurisdictions, there is currently no mechanism to inform the parties of their obligation to obtain legal advice before a surrogacy arrangement

15 See, eg, Name withheld, *Submission 11*; Not published, *Submission 108*; Name withheld, *Submission 160*; Name withheld, *Submission 161*; Not published, *Submission 172*; Name withheld, *Submission 173*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 220*.

16 See, eg, Name withheld, *Submission 11*; Not published, *Submission 108*; Name withheld, *Submission 160*; Name withheld, *Submission 161*; Not published, *Submission 172*; Name withheld, *Submission 173*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 220*.

17 See, eg, Name withheld, *Submission 11*; Not published, *Submission 108*; Not published, *Submission 172*; Not published, *Submission 220*; T Trevor, *Submission 258*.

18 See, eg, Name withheld, *Submission 96*; Not published, *Submission 108*.

19 The need for lawyers to have special expertise in surrogacy matters was commented upon by several submissions, including Not published, *Submission 108*; L Ransome, *Submission 144*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Name withheld, *Submission 211*.

20 See, eg, E Kendal, *Submission 166*; Name withheld, *Submission 171*; Not published, *Submission 172*; Not published, *Submission 220*.

21 See, eg, S Jefford, *Submission 359*.

22 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 131; Patient Review Panel (Vic), 'Applications for Approval of a Surrogacy Arrangement: Guidance Note' 9–10 [4.4]. Patient Review Pannel Surrogacy Guidance Note 189 [4.4].

23 See generally Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2015) ch 12.

begins.[24] Furthermore, the requirement to obtain legal advice is generally only enforced at the parentage order stage.[25] This means that parties sometimes commence a surrogacy arrangement before becoming aware of the obligation to obtain legal advice, meaning some never obtain advice, or only do so after the point in time when it would have been of greatest benefit.[26] More problematic still is the fact that the child's parentage can be jeopardised by this oversight (see **Chapter 10**).[27]

Improving legal advice as a safeguard

6.13 **Recommendation 17** creates a harmonised legal advice requirement, which sets the minimum standard for matters that must be covered by legal advice to facilitate informed consent to a surrogacy arrangement. It also sets out how compliance should be documented, including a requirement that legal practitioners confirm that clients appeared to understand the advice provided.

6.14 As noted above, most surrogacy legislation does not identify the range of legal issues that may arise. **Recommendation 17** responds to this problem by identifying the key legal issues that need to be covered to facilitate informed consent to a surrogacy arrangement. Better identification of key legal issues should help improve the consistency and quality of legal advice, thereby better facilitating informed consent.

6.15 The list of topics for advice in **Recommendation 17** has been adapted from those specified in the Northern Territory and Queensland legislation,[28] and refined based on feedback received in consultations and submissions.[29] They have been selected to ensure that legal advice covers matters that may give rise to divergence, conflict, or misunderstanding during the course of a surrogacy arrangement, as well

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24 Cf Victoria and Western Australia, both of which currently have an approval process in place before arrangements commence; however only in Victoria is an ART service provider prevented from treating a surrogate until the arrangement has been approved: *Assisted Reproductive Treatment Act 2008* (Vic) s 39; *Surrogacy Act 2008* (WA) s 16. Additionally, Western Australia will soon remove their approval process through new legislation set to commence in mid-2027: see *Assisted Reproductive Technology and Surrogacy Act 2025* (WA).

25 In the Australian Capital Territory, New South Wales, the Northern Territory, South Australia, and Tasmania, there is no legal mechanism to confirm legal advice has been obtained until the parentage order stage: see *Parentage Act 2004* (ACT) ss 28, 28H(3)(b)(ii); *Surrogacy Act 2010* (NSW) s 36; *Surrogacy Act 2022* (NT) ss 20, 21; *Surrogacy Act 2010* (Qld) s 22(2)(e)(i); *Surrogacy Act 2019* (SA) ss 10(5)(b), 18; *Surrogacy Act 2012* (Tas) s 16(2).

26 S Page, *Submission 130*; T Trevor, *Submission 258*.

27 In the Northern Territory and South Australia, the pre-arrangement legal advice requirement cannot be dispensed with, even in exceptional circumstances or the best interests of the child: *Surrogacy Act 2022* (NT) s 34(1)(b); *Surrogacy Act 2019* (SA) ss 10(5)(b), 18(7); *Surrogacy Regulations 2020* (SA) reg 6(1)(d). Under current Western Australian legislation legal advice cannot be dispensed with, but dispensing with this requirement will be possible under legislation due to come into effect in mid-2027: *Surrogacy Act 2008* (WA) ss 16, 17(c)(iii); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 133(2)(b), 134.

28 *Surrogacy Act 2022* (NT) s 20(2); *Surrogacy Act 2010* (Qld) s 30(1)(b).

29 See, eg, Name withheld, *Submission 126*; Not published, *Submission 172*; A Whittaker, C Volks, A Molas (et al), *Submission 201*.

as ensuring that matters pertaining to the rights and best interests of the child are understood. Each topic is briefly outlined below.

6.16 By requiring written confirmation that legal advice has been provided as a precondition for having a surrogacy arrangement approved (see **Chapter 4**, **Recommendations 8**–**13**), **Recommendation 17** minimises the risk that parties will enter an arrangement without a complete understanding of their rights and responsibilities. This is reinforced by the prohibition on ART service providers transferring an embryo, or otherwise facilitating an attempt to achieve a pregnancy for the purposes of a surrogacy arrangement, unless satisfied there is an 'approved surrogacy arrangement' (**Recommendation 34**). Given that the vast majority of surrogacy arrangements involve assisted reproductive technology, this will ensure that most parties have obtained legal advice before commencing a surrogacy arrangement. As noted further below, Surrogacy Support Organisations ('SSOs') may also help to ensure that parties are made aware of the requirement to obtain legal advice before commencing a surrogacy arrangement.

6.17 **Recommendation 17** requires that the parties receive independent legal advice. It is in the interests of all parties to understand their respective legal rights and obligations; ensuring advice is given by an independent legal practitioner facilitates this. Legal practitioners should be independent of any business providing other services related to the surrogacy arrangement (including SSOs and fertility clinics), given these businesses may have a conflicting financial interest in the arrangement proceeding. The legal practitioner providing advice to intended parents should also be independent of the legal practitioner advising the surrogate.[30] Independence in this respect is necessary due to the potential for diverging legal interests between the intended parents and surrogate.[31]

6.18 **Recommendation 17** also requires a legal practitioner to provide written confirmation that the specified matters were discussed, advice was provided, and the legal practitioner believes the party appeared to understand the advice.[32] This would resolve inconsistency in the existing legislation. It also responds to concerns that legal advice might be treated as a 'box ticking exercise',[33] or that some vulnerable

30 We have not gone so far as to recommend that each intended parent receive independent legal advice. While there is the possibility that the intended parents' relationship may break down during the course of the arrangement, their rights and obligations will remain fundamentally consistent with pre-arrangement legal advice. Any benefits from additional independence requirements are outweighed by the added expense and burden such a requirement would pose to the accessibility of surrogacy in Australia.

31 Some intended parents and surrogacy lawyers proposed that the parties should be able to undertake a combined legal advice session to minimise the costs associated with this requirement: see, eg, Name withheld, *Submission 208*. However, the value of independent legal advice was recognised by the majority of stakeholders: Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 158*; L Tripodi, *Submission 168*.

32 This is adapted from the requirements in the Northern Territory and Queensland: *Surrogacy Act 2022* (NT) s 21(2)(d); *Surrogacy Act 2010* (Qld) s 30(1)(c).

33 See, eg, K Cox, *Submission 105*; A-R Crispin, *Submission 167*.

parties may be led into surrogacy arrangements they do not fully understand due to language, cultural, or intellectual barriers.[34]

6.19 Law societies in each jurisdiction should provide accreditation for lawyers to advise on surrogacy arrangements. Specialist accreditation schemes are currently offered in several areas of law, such as family law, immigration law, and succession law.[35] These schemes typically require practitioners to demonstrate significant experience and knowledge in a relevant field, and incorporate ongoing learning and eligibility requirements. Surrogacy accreditation would help to address the issue of lawyers lacking relevant expertise, and providing incomplete or inadequate advice. Improving the quality of advice would in turn strengthen the informed consent the parties provide.[36] Surrogacy accreditation may be included as part of a broader accreditation standard, for example, as part of a family law accreditation.[37]

6.20 Some stakeholders thought that parentage orders should only be made after the parties received independent legal advice.[38] One submission even went so far as to suggest the child should be removed from their parents if these process requirements were not followed.[39] While we agree that legal advice is an important requirement, noncompliance does not justify infringement of the child's right to be cared for by their parents (see **Chapter 14**). Therefore, even where arrangements do not meet the requirements for the administrative pathway (**Recommendation 28**), including the requirements relating to obtaining legal advice, the child should still be able to have their family legally recognised through the judicial pathway (**Recommendation 29**).

How the legal advice safeguard would work

6.21 As part of their coordination role (see **Recommendation 8**), SSOs may inform parties considering a surrogacy arrangement of the requirement to obtain legal advice and provide a list of accredited legal practitioners.[40] This would help to overcome the problem that surrogacy arrangements proceed without legal advice being obtained. The cost of the surrogate's lawyer, which they may freely choose, must be reimbursed by the intended parents (see **Chapter 8**).

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34 See, eg, Name withheld, *Submission 154*.

35 See, eg, Queensland Law Society, 'Specialist Accreditation' <www.qls.com.au/professional-development/specialist-accreditation>.

36 Several submissions endorsed a surrogacy lawyer accreditation, see, eg, Name withheld, *Submission 19*; L Ransome, *Submission 144*; Name withheld, *Submission 196*.

37 See, eg, Law Institute of Victoria, 'LIV Accredited Specialisation' <www.liv.asn.au/specialisation?srsltid=AfmBOorhQcJae-mLIX3NtJ_chYnLixa_zHDdbIKnry-A_sjK35psPvVt>.

38 See, eg, Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 126*; Not published, *Submission 172*.

39 Australian Christian Lobby, *Submission 104*.

40 Several people with personal experience of surrogacy noted that having a list of qualified, independent lawyers would be helpful: see, eg, Not published, *Submission 172*; Name withheld, *Submission 177*; Name withheld, *Submission 196*.

6.22 In providing legal advice, the legal practitioner would be required to advise the parties of their rights and responsibilities in relation to each of the matters listed in **Recommendation 17**:

- **The surrogate's bodily integrity** — This includes their reproductive autonomy and the law relating to informed consent as it pertains to medical treatment. Legal advice should make clear that the existence of a surrogacy arrangement does not affect the general law relating to informed consent or reproductive autonomy.
- **Legal parentage** — Parties must understand that complying with the established safeguards (including obtaining legal advice), and having the arrangement approved, entitles them to access the administrative pathway to legal parentage (**Recommendation 28**). This means that the intended parents are deemed the child's legal parents at birth, and there is no need for the parties to go through a judicial process to obtain a parentage order. The surrogate retains the right to apply for a parentage order, which will be determined in the best interests of the child. In unapproved surrogacy arrangements the surrogate (and their partner, if any) are the child's legal parents at birth and the intended parents must apply for a parentage order in order to become the child's legal parents (see **Recommendation 29** and **Chapter 10**).
- **Enforceability and reimbursement** — The parties can include a range of provisions in their written surrogacy agreement, which can help to set expectations and affirm common intentions. However, it is important that the parties are advised, and understand, that the only provisions that can be legally enforced are those relating to cost and loss recovery. The surrogate will need to elect whether they wish to receive reimbursement for non-economic and/or extraordinary loss (see **Recommendation 24**), which will need to be specified in the written surrogacy agreement. The operation of the reimbursement provisions, and the optional non-economic and extraordinary loss payments (see **Recommendations 23**–**25**), should be explained to the parties, to ensure that surrogates are aware of their rights and that intended parents understand their financial obligations throughout the arrangement.
- **Gestational information** — Article 8 of the United Nations Convention on the Rights of the Child ('CRC'), which Australia has ratified, stipulates that 'States Parties undertake to respect the right of the child to preserve his or her identity'.[41] In the surrogacy context, this has been interpreted as including a right to access information about their genetic and gestational origins (see **Chapter 14**

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

for further detail).[42] Reflecting those rights, we propose an addendum to the child's birth certificate notifying them that further information about their birth is available (**Recommendation 30**), and the creation of a National Surrogacy Register that would contain an entry with further information for every person born through surrogacy (**Recommendation 31**).[43] Access to this information is crucial to a person's sense of identity (see **Recommendations 30**–**32**).[44] Therefore, it is important that the parties each understand that, in support of the rights and interests of the child, certain information about the child's gestational origins will be made available to the child in the future.

6.23 The legal practitioners would provide the parties' nominated SSO with a written statement, confirming that the required matters had been included in legal advice, and confirming that the legal practitioner believed that the party appeared to understand the advice provided. The actual contents of the legal advice would not need to be provided, thereby protecting the party's right to legal professional privilege. This would allow the SSO to confirm that the parties have met the legal advice requirement, as a precondition for approving the arrangement (**Recommendation 9**). In the event of minor procedural irregularities or exceptional circumstances that justify approval of the arrangement, the National Regulator would have discretion to dispense with the legal advice requirement (**Recommendation 9**).

42 See, eg, Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Georgia*, 74th sess, 2193rd mtg, UN Doc CRC/C/GEO/CO/4 (9 March 2017) [19(b)]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, 71st sess, 2104th mtg, UN Doc CRC/C/IRL/CO/3-4 (1 March 2016) [34(a)]; Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) [34]. See, eg, International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) principle 11.

43 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.

44 See generally Alexandra Harland, 'Surrogacy, Identity, Parentage and Children's Rights: Through the Eyes of a Child' (2021) 59(1) *Family Court Review* 121; John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281.

Implications counselling

Recommendation 18

1. As a precondition for approval (**Recommendation 9**), all parties, and the surrogate's partner (if any), must undergo counselling. The counselling must:
    a. be provided by a counsellor, who is a full member of the Australian and New Zealand Infertility Counsellors Association;
    b. include at least:
        i. two independent counselling sessions with the intended parent(s);
        ii. one independent counselling session with the surrogate;
        iii. one independent counselling session with the surrogate and the surrogate's partner (if any); and
        iv. a joint counselling session with the intended parent(s), the surrogate, and the surrogate's partner (if any);
    c. be provided by the same counsellor for all sessions, unless it is impracticable to do so; 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 changing their mind regarding who should parent the child born through the arrangement;
        iv. the attitudes of the parties towards the conduct of the pregnancy, including the extent to which the intended parent(s) should have input 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 relating 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;

viii. how the parties will resolve any disputes that arise during the surrogacy arrangement;

ix. where the proposed arrangement is a traditional surrogacy arrangement, the implications of a traditional surrogacy arrangement, including the surrogate's role as both surrogate and egg donor; and

x. any other circumstances relevant to assessing the suitability of the arrangement to proceed.

2. Legislation should provide that if during the counselling process the counsellor identifies risk factors that may affect whether the arrangement should be approved (**Recommendation 9**), the counsellor must notify the parties' nominated Surrogacy Support Organisation (**Recommendation 8**) of those risks.

3. 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 for up to three months following the birth of any child born (or stillborn) through the surrogacy arrangement. Ongoing counselling may be initiated at the reasonable election of any party to the surrogacy arrangement (**Recommendations 20** and **23**).

4. Legislation should provide that the counsellor must provide each party with written confirmation that the matters outlined in paragraph 1(d) were discussed, and that the counsellor believes the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement, so that it can be considered as part of the approval process (**Recommendation 9**).

The current law on implications counselling

6.24 Counselling is the key safeguard aimed at addressing social, emotional, and psychological risks associated with a surrogacy arrangement.[45] These risks are unlikely to be identified or addressed by any of the other recommended mandatory

45 See generally ME Montrone and KA Sherman, 'Psychosocial Assessment of Interpersonal Relationships in Altruistic Surrogacy Counselling' (2026) 29(1) *Human Fertility* 1. See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 31 October 2023, 3506 (Tara Cheyne); South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6968 (Vickie Chapman).

safeguards. This is because they do not have a psychosocial focus, and are therefore unlikely to detect risks going to the parties' relationships and mental or emotional wellbeing.[46]

6.25 Ensuring that the parties are aware of risks that might materialise during the arrangement is critical for each party to give informed consent prior to entering the arrangement. Implications counselling allows the parties to discuss and ventilate their approach to challenging issues that may arise during the course of a surrogacy arrangement. This enables parties to determine the extent to which they are aligned (or misaligned) and to determine whether they agree on how these matters should be handled. The parties may wish to proceed with an arrangement despite minor disagreements on certain matters, however informed consent requires everyone to be aware of, and comfortable with, the additional risk of conflict such disagreements may lead to later in the arrangement. Among stakeholders with lived experience, counselling was broadly acknowledged as crucial to helping the parties reach a common understanding about how the arrangement would proceed, including how potential issues would be handled if they arose.[47]

6.26 Implications counselling is distinct from other forms of counselling that may be of benefit to parties to a surrogacy arrangement. It involves the counsellor discussing the implications of various aspects of a surrogacy arrangement, so that the parties can explore how those events might affect their decision-making and wellbeing.[48]

6.27 Much like the legislative requirements for legal advice, each state and territory requires the parties to a surrogacy arrangement to obtain counselling.[49] Differences between jurisdictions centre upon:

46 See generally Montrone and Sherman (n 45).

47 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 15*; Name withheld, *Submission 102*; K Cox, *Submission 105*; Not published, *Submission 119*; Name withheld, *Submission 126*; S Everingham, *Submission 129*; Name withheld, *Submission 141*; Name withheld, *Submission 154*; Name withheld, *Submission 170*; Not published, *Submission 172*; Name withheld, *Submission 173*.

48 See generally Australian and New Zealand Infertility Counsellors Association, *ANZICA Surrogacy Guidelines* (2022). See also K Cox, *Submission 105*; Not published, *Submission 172*.

49 *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2010* (NSW) s 35; *Surrogacy Act 2022* (NT) ss 22, 23; *Surrogacy Act 2010* (Qld) s 22(2)(e)(ii); *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14; *Surrogacy Act 2012* (Tas) s 16(2)(f); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c),43; *Status of Children Act 1974* (Vic) s 23(2)(b); *Surrogacy Act 2008* (WA) ss 17(c)(i), 21(2)(b). This requirement will be retained in Western Australian legislation due to come into effect in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(i).

- whether the matters to be included in counselling are prescribed, or left to the discretion of the individual counsellor;[50]
- whether the obligation is performative only, and met through the action of the parties undertaking counselling,[51] or performative and evidentiary, where there is an obligation to obtain a certificate or affidavit confirming that counselling has taken place and include such confirmation with the surrogacy agreement or parentage order application;[52]
- the degree of independence required by the counsellor;[53]
- the required qualifications of the counsellor;[54]

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50 The Northern Territory, Queensland, South Australia, Victoria, and Western Australia prescribe the matters to be discussed during counselling beyond the implications of the arrangement or parentage order generally: *Surrogacy Act 2022* (NT) s 25(3); *Surrogacy Act 2010* (Qld) s 32; *Surrogacy Act 2019* (SA) s 14(1)(b), (2)(c); *Assisted Reproductive Treatment Act 2008* (Vic) s 43(a); *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 10; *Status of Children Act 1974* (Vic) ss 23(2)(b)(i)–(ii); *Surrogacy Act 2008* (WA) s 17(c)(i); *Surrogacy Regulations 2009* (WA) reg 4. This requirement will be retained in Western Australian legislation due to come into effect in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(2). Northern Territory legislation also allows for the regulations to prescribe 'required matters' for counselling, however this power has not been exercised: *Surrogacy Act 2022* (NT) s 22(4)(e).

51 *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2010* (NSW) s 35; *Surrogacy Act 2010* (Qld) s 22(2)(e); *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14; *Surrogacy Act 2012* (Tas) s 16(2)(f); *Assisted Reproductive Treatment Act 2008* (Vic) ss 40(1)(c), 43; *Status of Children Act 1974* (Vic) s 23(2)(b); *Surrogacy Act 2008* (WA) ss 17(c)(i), 21(2)(b). This requirement will be retained in Western Australian legislation due to come into effect in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(e)(i).

52 *Assisted Reproductive Technology Act 2007* (NSW) s 15A; *Surrogacy Act 2022* (NT) ss 22(3)–(4), 24; *Surrogacy Act 2010* (Qld) ss 31–2; *Surrogacy Act 2019* (SA) s 10(5)(c); *Surrogacy Act 2012* (Tas) s 18; *Assisted Reproductive Treatment Act 2008* (Vic) s 40(2); *Surrogacy Regulations 2009* (WA) regs 4(3), 5(2)(e). It is unclear whether delegated legislation made under the new Western Australian legislation due to come into effect in mid-2027 will contain a similar provision to the current regulations.

53 Some jurisdictions specify that the counsellor must be independent of any business providing fertility services: *Parentage Act 2004* (ACT) s 28A(4); *Surrogacy Act 2010* (NSW) s 17(7)(b); *Assisted Reproductive Technology Act 2007* (NSW) s 15A(4); *Surrogacy Act 2022* (NT) s 25(2); *Surrogacy Act 2010* (Qld) s 19. In Victoria, the counsellor must be providing counselling on behalf of a registered ART provider: *Status of Children Act 1974* (Vic) s 23(3); *Assisted Reproductive Treatment Act 2008* (Vic) s 43(a). The Australian Capital Territory, New South Wales, and South Australia require each intended parent, and the surrogate and their partner (if any) to each receive at least one counselling session separate from the other: *Parentage Act 2004* (ACT) ss 28A(2)–(3); *Surrogacy Act 2010* (NSW) s 17(7)(a); *Surrogacy Act 2019* (SA) s 14(2)(b).

54 Each state and territory provides some form of qualification requirement, and discrepancies between jurisdictions can limit the accessibility of counsellors where a party resides in a jurisdiction with few practitioners: *Parentage Act 2004* (ACT) s 25; *Parentage Regulation 2024* (ACT) reg 5; *Surrogacy Regulations 2016* (NSW) regs 6–6B; *Surrogacy Act 2022* (NT) s 25(1); *Surrogacy Act 2010* (Qld) s 19 (meaning of 'appropriately qualified'); *Surrogacy Act 2019* (SA) ss 4(1), 14(1)(a), (2)(a); *Surrogacy Regulations 2020* (SA) reg 4; *Surrogacy Act 2012* (Tas) s 47; *Surrogacy Regulations 2009* (WA) reg 3.

- whether this precondition for a parentage order is mandatory,[55] or can be dispensed with in the best interests of the child or exceptional circumstances;[56] and
- whether further counselling sessions, in addition to pre-arrangement counselling, are required by legislation.[57]

Problems with the current law on implications counselling

6.28 Like the legal advice safeguard discussed above, inconsistency between jurisdictions is a key problem with the law on implications counselling. Inconsistencies between jurisdictions can create confusion and frustration, especially when the parties reside in different states or territories.[58]

6.29 Current legislation does not consistently or clearly identify the type of counselling that is required and the ultimate objective counselling is meant to serve. Existing provisions refer generally to therapeutic, preparatory, or screening objectives, which are not always wholly compatible with one another.[59] Sometimes, an evaluative function is conferred on a counsellor, who may not be qualified to undertake a formal psychological assessment as part of their broader counselling services.[60]

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55 See *Surrogacy Act 2022* (NT) ss 22, 25; *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14; *Surrogacy Regulations 2020* (SA) reg 6; *Surrogacy Act 2008* (WA) s 17. See also *Re N* [2025] NSWSC 409.

56 *Parentage Act 2004* (ACT) s 28H(3)(b)(iii); *Surrogacy Act 2010* (NSW) s 18(2)(a); *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Act 2012* (Tas) s 16(3)(a); *Assisted Reproductive Treatment Act 2008* (Vic) s 41; *Surrogacy Act 2008* (WA) s 21(3); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 133(2)(b), 134.

57 Several jurisdictions mandate post-birth counselling before a parentage order application can be granted: see *Surrogacy Act 2010* (NSW) s 35(2); *Surrogacy Act 2022* (NT) s 23; *Surrogacy Act 2012* (Tas) s 16(2)(f)(ii); *Surrogacy Act 2008* (WA) s 21(2)(b); *Surrogacy Regulations 2009* (WA) reg 6. In South Australia, intended parents must take reasonable steps to ensure the surrogate and their partner have access to additional counselling up to six months post-birth, failure to do so being an offence: *Surrogacy Act 2019* (SA) s 15. The new Western Australian legislation, due to come into effect in mid-2027, does not contain a post-birth counselling requirement.

58 See, eg, Name withheld, *Submission 10*; K Cox, *Submission 105*; Not published, *Submission 108*; L Ransome, *Submission 144*.

59 Different forms of counselling serve different purposes: see generally Australian and New Zealand Infertility Counsellors Association (n 48). Some jurisdictions indicate that counselling should be to assist the parties in understanding the arrangement: see, eg, *Assisted Reproductive Treatment Act 2008* (Vic) s 43. Others indicate therapeutic objectives: see, eg, *Surrogacy Act 2019* (SA) s 15. Others still indicate that counselling should be used to assess whether parties should be allowed to participate in a surrogacy arrangement: see, eg, *Assisted Reproductive Treatment Act 2008* (Vic) s 40(2)(a). A lack of consistent understanding of the purpose of surrogacy counselling contributes to inconsistent service provision: Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 136 [5.57]; Not published, *Submission 172*.

60 Several jurisdictions prescribe an evaluative function be performed by a counsellor: *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) s 24; *Surrogacy Act 2010* (Qld) s 32; *Surrogacy Act 2019* (SA) s 18(10); *Surrogacy Act 2012* (Tas) s 18; *Assisted Reproductive Treatment Act 2008* (Vic) s 40(2); *Surrogacy Act 2008* (WA) s 17(c)(ii). Note the new Western Australian legislation, due to commence in mid-2027, does not contain an assessment or reporting function for counsellors.

6.30 Submissions indicate that existing counselling requirements do not fulfill the objective of ensuring that parties understand the challenges that may arise in surrogacy arrangements or to reach a shared understanding about how those challenges should be dealt with should they arise.[61] This can stem from a range of issues, from the counsellor not being familiar with the dynamics and risks involved in surrogacy arrangements,[62] to the parties feeling judged or criticised by the counsellor,[63] or not feeling comfortable to frankly discuss their thoughts and concerns.[64] As one submission highlighted, existing counselling requirements do not appear to achieve their objectives:

> [t]he mandatory counselling and psychological assessment phase was among the most alienating elements of the process. Despite full compliance with all requirements, we found the sessions unhelpful, poorly trauma-informed, and lacking in emotional or practical guidance … The report generated from this process served bureaucratic needs rather than therapeutic ones, and did not offer meaningful preparation or support for either the surrogate or us.[65]

6.31 In most Australian jurisdictions there is no mechanism for ensuring the parties have undertaken pre-arrangement counselling until the parentage order application stage.[66] As a result, surrogacy arrangements may proceed without this safeguard, with the parties not becoming aware of the omission until it is too late to remedy non-compliance.[67] In some jurisdictions, a parentage order cannot be made unless the parties received pre-arrangement counselling. This means, depending on location, some children cannot have their family legally recognised due to conduct taking place before they were born.[68]

6.32 Entering a surrogacy arrangement unprepared can have serious negative consequences for the parties. We have heard from several people who experienced relationship breakdowns during the course of a surrogacy arrangement, including the relationship between intended parents, between the intended parents and the

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61 See, eg, Not published, *Submission 119*; Name withheld, *Submission 171*.

62 Not published, *Submission 172*; Not published, *Submission 220*.

63 See eg, K Cox, *Submission 105*; Not published, *Submission 220*.

64 See, eg, K Cox, *Submission 105*; Not published, *Submission 119*.

65 K Cox, *Submission 105*.

66 With the exception of Victoria and Western Australia (pending reforms to remove its preapproval process: see *Assisted Reproductive Technology and Surrogacy Act 2025* (WA)), which require proof of compliance with prerequisites including counselling prior to approval: *Assisted Reproductive Treatment Act 2008* (Vic) ss 39, 40, 43; *Surrogacy Act 2008* (WA) ss 16–17.

67 Complex, inconsistent, and confusing counselling obligations are apt to lead to accidental noncompliance or uncertainty as to whether compliance has been met: see, eg, Name withheld, *Submission 115*; S Everingham, *Submission 129*; Australian Nursing and Midwifery Federation, *Submission 145*; Name withheld, *Submission 146*.

68 *Surrogacy Act 2022* (NT) ss 22, 25; *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14; *Surrogacy Regulations 2020* (SA) reg 6; *Surrogacy Act 2008* (WA) s 17(c)(i). Under Western Australian legislation due to come into effect in mid-2027, pre-arrangement counselling can be dispensed with by the court: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 109(1)(e)(i), 123(2), 133(2)(b), 134.

surrogate, and between the surrogate and their partner.[69] This can cause significant emotional distress and trauma to those involved, and lead to lasting rifts in families and social groups.[70] Often, these former parties stressed that there were factors associated with the arrangement which in hindsight should have prevented the arrangement from proceeding.[71]

Improving implications counselling as a safeguard

6.33 **Recommendation 18** addresses the problem of inconsistency by creating a harmonised requirement for implications counselling. It also improves clarity in the law by setting out the core topics that must be addressed, individually and collectively, to facilitate the parties' informed consent to a surrogacy arrangement. This would ensure that parties receive more consistent quality in counselling services, and ensure that surrogacy counsellors are aware of the core topics that need to be discussed. These topics are chosen to minimise the risk of relationship breakdowns, as noted above, by helping the parties discuss and reach a shared understanding on matters that may lead to conflict during the arrangement or, alternatively, helping parties to understand that they are not well suited to embark upon a surrogacy arrangement together. This facilitates free and informed consent before the arrangement proceeds.

6.34 Implications counselling provides an opportunity to identify any 'red flags', such as beliefs and expectations about surrogacy, a history of harmful behaviour, or personal circumstances on the part of either party that makes the arrangement fundamentally inappropriate or unsafe to proceed. Examples from recent case law where parties' relationships have broken down during the arrangement include circumstances where participants have:

- highly controlling personalities;[72]
- a history of infertility trauma affecting how a party interacts during the arrangement;[73]
- problematic motivations behind entering the arrangement;[74]
- substance abuse issues;[75]
- feelings of ambivalence relating to the surrogacy arrangement;[76] and
- a history of neglect, abuse, and trauma.[77]

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69 Name withheld, *Submission 12*; Name withheld, *Submission 19*; Not published, *Submission 221*; Surrogacy Australia, *Submission 417*.
70 Not published, *Submission 221*.
71 Name withheld, *Submission 12*; Name withheld, *Submission 19*.
72 *Lamb & Shaw* [2017] FamCA 769 [18]–[19].
73 Ibid [19]. See also Name withheld, *Submission 12*; Name withheld, *Submission 126*.
74 For example, motivations that are separate from the desire to help others have children, and may include motivations based on material inducements or the prospect of future favours or profits: see, eg,*Seto & Poon* [2021] FamCA 288 [2].
75 *Taggart & Gowden* [2026] FedCFamC2F 673 [50]–[64].
76 Ibid [42], [45], [48].
77 Ibid [39]–[40], [46], [65]–[76].

6.35 The implications counsellor would be the professional best placed to identify these issues.

6.36 **Recommendation 18** would require the counsellor to notify the parties' nominated SSO of any risk factors they identify during the counselling process that may affect whether the arrangement should proceed (**Recommendation 8**). Where this occurs, each of the parties would be required to undergo a psychological assessment (discussed in the context of **Recommendation 19** below) so that a psychologist's recommendation about whether the arrangement is suitable to proceed can be considered as part of the approval process. This would provide an additional safeguard for situations where 'red flags' are identified, while relatively straightforward arrangements may proceed without it, in line with the principle that the least restrictive approach be adopted to achieve the objective (see **Chapter 1**).

6.37 By requiring full membership of the Australian and New Zealand Infertility Counsellors Association ('ANZICA'), **Recommendation 18** ensures that counsellors providing implications counselling have fertility counselling experience. ANZICA is the leading fertility counselling accreditation body in Australia, membership of which is conditional upon reproductive counselling experience.[78] It sets the standards for reproductive counselling through its guidelines.[79] We heard concerns that, as an industry-led body, ANZICA cannot enforce its standards among its members, and it would be ideal to have a statutory authority with such powers.[80] However, no such authority exists, and it is beyond the remit of this Inquiry to reform fertility counselling generally.

6.38 **Recommendation 18** also specifies the core matters that need to be discussed in counselling to promote greater consistency in quality between counsellors, and to ensure the key matters have been discussed by the parties, both individually and collectively. As outlined further below,[81] some topics are known to be sources of potential disagreement and conflict if the parties have different beliefs and expectations about how the arrangement will proceed. This aspect of **Recommendation 18** would be supported by **Recommendation 6**, which provides that the National Regulator should develop educational materials and training for professionals who provide services in connection with a surrogacy arrangement, including counsellors.

6.39 The surrogate's partner (if any) must take part in the implications counselling process, as their support for the arrangement and how it will proceed is critical.[82] The surrogate's partner is likely to be the surrogate's key support person during pregnancy, and their lack of commitment to the surrogacy arrangement could lead

78 Australian and New Zealand Infertility Counsellors Association, *ANZICA Membership Criteria* (2021).

79 While ANZICA membership guarantees a minimum amount of fertility-counselling experience, it does not directly require experience with surrogacy matters: see S Jefford, *Submission 128*; Not published, *Submission 178*.

80 See, eg, Name withheld, *Submission 19*; S Jefford, *Submission 128*.

81 See 'How the implications counselling safeguard would work' below.

82 See, eg, Name withheld, *Submission 15*; Not published, *Submission 172*; Not published, *Submission 393*; Relationships Australia, *Submission 404*; Surrogacy Australia, *Submission 417*.

to emotional distress, conflict during the course of the arrangement, or relationship breakdown.[83] Counselling also provides the opportunity to identify any pressure the surrogate may be experiencing, including from their partner, and any potential for harm posed by the surrogate's partner such as a heightened risk of domestic violence.[84] This requirement only applies to the surrogate's current partner; surrogates who have separated, although not yet divorced, from their partner do not need to involve their former partner in the process.

6.40 The ALRC has recommended an additional Medicare Rebate Schedule item be added specifically for counselling and assessments that need to take place before pregnancy can be attempted (**Recommendation 27**). However, any excess or cost not covered by Medicare for counselling in connection with a surrogacy arrangement must be paid for by intended parents (see **Chapter 8**).

6.41 Through **Recommendation 18**, the ALRC has set a baseline requirement for counselling, rather than mandating more extensive counselling that may only benefit more complex arrangements. Although some stakeholders supported additional counselling at key stages, or different forms of counselling, these measures will not be necessary in every case. Consistent with the principle of adopting the least restrictive approach necessary to achieve the objective (see **Chapter 1**) and the goal of promoting access to surrogacy in Australia, the law should require only what is necessary to protect the rights of all involved. Some parties may wish to engage in additional counselling, either individually or with the other parties to the arrangement, to address conflicts or concerns. In some arrangements, parties have found additional counselling to be beneficial, both for their individual wellbeing and to protect the relationship between the parties.[85] For this reason, the counsellor who provides the implications counselling must also inform the parties that any one of them can require additional counselling sessions during the course of the arrangement, to be paid for by the intended parents.

How the implications counselling safeguard would work

6.42 While parties can choose any counsellor who is a full ANZICA member to meet the implications counselling requirement, including those who may be referred by an SSO (**Recommendation 8**), in practice the relevant counsellor may often be a counsellor associated with the parties' ART service provider. The same

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83 See, eg, Not published, *Submission 172*; T Trevor, *Submission 258*.

84 See Monica Campo, *Domestic and Family Violence in Pregnancy and Early Parenthood: Overview and Emerging Interventions* (Practitioner Resource, Australian Institute of Family Studies, 2015) 1. This concern was also raised in some submissions see, eg, S Everingham, *Submission 129*; Not published, *Submission 172*; Not published, *Submission 230*; ANZICA, *Submission 277*; Surrogacy Australia, *Submission 417*.

85 Additional counselling was endorsed in several submissions: see, eg, Name withheld, *Submission 12*; Name withheld, *Submission 15*; Not published, *Submission 103*; Not published, *Submission 119*; Name withheld, *Submission 126*; S Everingham, *Submission 129*; Name withheld, *Submission 141*; Not published, *Submission 172*; Name withheld, *Submission 173*; Name withheld, *Submission 196*; A Whittaker, C Volks, A Molas (et al), *Submission 201*.

counsellor should conduct all the implications counselling sessions, if possible. This is considered best practice, to allow the counsellor to better understand the dynamics between the parties.[86] However, there may be circumstances where this is not practicable, so while this is best practice, having implications counselling completed by more than one counsellor should not invalidate compliance with the legislative requirement.

6.43 In the Discussion Paper, we indicated that the psychologist who undertakes a psychological assessment should not be involved in the provision of implications counselling. This is because the assessment and gatekeeping function of a psychological assessment is sometimes considered inconsistent with the therapeutic relationship needed to provide counselling.[87] However, while having a separate counsellor provide implications counselling from the psychologist performing a psychological assessment may be best practice, there could be situations where this is not feasible due to the shortage of qualified counsellors to provide services in relation to surrogacy arrangements. Therefore, while we acknowledge that this remains best practice, we have not recommended that legislation incorporate this limitation.

6.44 Both individual and group counselling is required, so that the counsellor can ensure each party individually understands the risks and dynamics involved, and that they discuss any differences in opinions or expectations.[88] ANZICA's current surrogacy counselling guidelines indicate that each side of the arrangement should undertake two counselling sessions by themselves followed by a joint counselling session with all the parties present.[89] We have specified that where the surrogate has a partner, one of those separate counselling sessions should take place without their partner present, to safeguard against the possibility of pressure or coercion from the partner, or to allow the surrogate to raise any concerns about their partner's conduct without them present. The number of sessions recommended is higher than the number proposed in the Discussion Paper, to reflect the fact that a psychological assessment will not be required for all arrangements. The increased number of sessions provides an opportunity for the counsellor to identify any 'red flags', which, as discussed above, will now be an additional responsibility for the counsellor.

6.45 The listed matters to be discussed in implications counselling have been adapted from those specified in Victorian and South Australian legislation,[90] in

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86 See, eg, Not published, *Submission 172*; ANZICA, *Submission 277*; Australian and New Zealand Infertility Counsellors Association (n 48) 7.

87 See Australian and New Zealand Infertility Counsellors Association (n 48) 3–5. See also M Montrone, *Submission 263*.

88 Australian and New Zealand Infertility Counsellors Association (n 48) 4, 7. See also K Cox, *Submission 105*; Not published, *Submission 119*; L Ransome, *Submission 144*; Name withheld, *Submission 170*.

89 See generally Australian and New Zealand Infertility Counsellors Association (n 48). A standard counselling session is 50 minutes to one hour in duration.

90 *Surrogacy Act 2019* (SA) ss 14(1)(b)–(c), (2)(c)–(d); *Assisted Reproductive Treatment Act 2008* (Vic) s 43.

ANZICA's surrogacy counselling guidelines,[91] and refined in response to feedback in submissions.[92] These matters reflect topics that parties have identified as creating an increased risk of conflict, misunderstanding, or unanticipated risks to wellbeing during the arrangement:

- **The implications of the surrogacy arrangement for the relationships between the parties and their respective families** — Despite best intentions, some people with personal experience of surrogacy report relationship breakdowns as a consequence of a surrogacy arrangement.[93] Where the surrogate and intended parents are part of close social or family networks, this can also affect broader relationships.[94] Some submissions have raised concerns about the effect of a surrogacy arrangement on the surrogate's other children.[95] Although research suggests no, or only limited, negative effects, it may still be helpful to consider how all children connected to the arrangement can be supported.[96]
- **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** — Attitudes towards genetic testing and termination can be polarised. While the surrogate alone has the right to decide whether to terminate a pregnancy (**Recommendation 21**), any misalignment with intended parents on this issue creates a high risk of conflict, and the potential for highly distressing outcomes for all involved.
- **The possibility of any party changing their mind regarding who should parent the child born through the arrangement** — Under the current law (and under the recommended judicial pathway, see **Recommendation 29**), the surrogate and their partner (if any) are the legal parents of the child from birth.[97] Under our recommended administrative pathway (**Recommendation 28**),

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91 Australian and New Zealand Infertility Counsellors Association (n 48) 5–6.

92 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 126*; E Kendal, *Submission 166*; Not published, *Submission 172*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Name withheld, *Submission 185*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 209*.

93 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Not published, *Submission 221*; Name withheld, *Submission 307*; Surrogacy Australia, *Submission 417*.

94 See, eg, Name withheld, *Submission 19*; Not published, *Submission 221*.

95 See, eg, M Somerville, *Submission 106*; Not published, *Submission 172*; Surrogacy Australia, *Submission 417*; Australian Christian Lobby, *Submission 419*. See also Australian and New Zealand Infertility Counsellors Association (n 48) 3.

96 See generally Mary P Riddle, 'An Investigation into the Psychological Well-Being of the Biological Children of Surrogates' (2017) 4(1) *Cogent Psychology* 1; Vasanti Jadva and Susan Imrie, 'Children of Surrogate Mothers: Psychological Well-Being, Family Relationships and Experiences of Surrogacy' (2014) 29(1) *Human Reproduction* 90.

97 *Parentage Act 2004* (ACT) ss 11(1)–(2); *Status of Children Act 1996* (NSW) ss 14(1)(b), (1A)(b), (4); *Status of Children Act 1978* (NT) s 5C; *Status of Children Act 1978* (Qld) ss 19(2)(a), 19E(2)(a), 23(2)(a); *Family Relationships Act 1975* (SA) s 10C(1); *Status of Children Act 1974* (Tas) s 10C(3); *Status of Children Act 1974* (Vic) ss 10E(2)(a), 13(1)(a), 14(1)(a), 15(1)(a), 16(1)(a), 19; *Artificial Conception Act 1985* (WA) ss 5–6A; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 32(1), which will come into effect in mid-2027.

the intended parents would be the legal parents from the time of birth. The consequence would be that once the surrogate is pregnant pursuant to an approved surrogacy arrangement, they cannot simply change their mind and decide they wish to parent the child they are gestating (although they may apply for a parentage order after the child is born). Similarly, if the intended parents change their mind, the law would apply in the same way it does when any other parent abandons their child.[98] Ultimately, the child may be taken into the care of the state, and potentially fostered or put up for adoption (see **Chapter 10**).[99]

- **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** — Lifestyle choices during pregnancy can affect the developing foetus and the child's wellbeing. **Recommendation 21** stipulates that legislation should prohibit the inclusion of any provision in a surrogacy agreement that interferes with the surrogate's bodily integrity and autonomy, except to the extent that the provision requires compliance with reasonable medical advice in connection with the pregnancy or birth. While such a provision would be unenforceable, it would assist in aligning the parties' expectations and in facilitating informed consent. Counselling should include a discussion of the expectations of the intended parents regarding the lifestyle of the surrogate insofar as this may be reasonably expected to affect the pregnancy. Differences in views on matters like dietary choices, substance use, medication, or exercise may create the potential for conflict, and even have lasting impacts on the health and wellbeing of the child born as a result of the arrangement.[100] It is therefore essential that such matters be covered as part of the counselling process.
- **The implications if the intended parents separate during the surrogacy arrangement** — If there is more than one intended parent under an approved surrogacy arrangement, they would both be legal parents when the child is born (**Recommendation 28**). This would occur regardless of whether the intended parents are still partnered or have separated. The surrogate may feel less comfortable handing the child to parents who are no longer in a relationship, or one parent may feel less inclined to continue with the arrangement after their relationship has ended. These possibilities should be fully ventilated, as the legal position would not be altered by the intended parents separating during the arrangement.

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98 Each state and territory has specific legislation which provides for temporary care of a child in need of care and protection: see, eg, *Children and Young People Act 2008* (ACT) ss 345, 406, 409–10, 424–5; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 34, 69–71, 79.

99 See, eg, *Children and Young People Act 2008* (ACT) s 354; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

100 We heard from several parties who found disagreements about the surrogate's lifestyle decisions to be a source of conflict and distress. See, eg, Name withheld, *Submission 59*; Not published, *Submission 172*; Name withheld, *Submission 177*; Name withheld, *Submission 216*; Name withheld, *Submission 343*.

- **The attitudes of the parties to how and when the child should be told about their genetic and gestational origins** — It is in the child's best interests that they be made aware of their genetic and gestational origins, and be informed in an age-appropriate manner (see **Chapter 11**).[101] In fact, as discussed above and in **Chapters 11** and **14**, the identity rights of the child are enshrined in art 8 of the CRC.[102] Often at the outset of an arrangement parties will intend for the surrogate to have some ongoing relationship with the child as an 'aunt' or family friend, however this does not always end up occurring after the child is born.[103] Relationship breakdowns, particularly when associated with traumatic circumstances or emotional harm, can leave the parties estranged after the child is born. Even under these circumstances, it is important that the parties understand the importance of the child being provided with this information. The surrogate should feel comfortable with how and when the intended parents will address this matter with the child.
- **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** — The ALRC has heard from surrogates who entered surrogacy arrangements on the understanding that they would have an ongoing, non-parental relationship with the child, and experienced emotional distress when this did not occur.[104] However, as the surrogate has no legal right to ongoing contact, it is important that all parties are aligned on expectations about their future relationship, while recognising the risk that such intentions may change over time. Western Australia's recent reforms have adopted a different approach, by requiring the parties to include an enforceable plan for any future contact between the surrogate (and their family, if relevant) and the child.[105] While the ALRC has not recommended this approach, on the basis that parties' views about post-birth contact may change over time, thereby reducing the value of making such a provision enforceable, we recognise the significance of this issue and have therefore required its inclusion in implications counselling as well as in the surrogacy agreement (**Recommendation 20**).
- **How the parties will resolve any disputes that arise during the surrogacy arrangement** — All of the topics discussed above can create conflict if the parties' intentions, beliefs, and expectations diverge. Surrogacy arrangements can be stressful, and even the best prepared parties may experience some tension. Parties should therefore discuss how they will handle disagreements, including conflict resolution strategies, and when

101 See generally Harland (n 44); Tobin and Todres (n 44).

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

103 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Surrogacy Australia, *Submission 417*.

104 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Surrogacy Australia, *Submission 417*; Name withheld, *Submission 307*.

105 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 116–18. Cf *Surrogacy Act 2008* (WA) ss 21(2)(f), 22.

counselling may assist.[106] They should be aware that any party can request additional counselling, individually or collectively, to address concerns during the arrangement (**Recommendation 18**) at the expense of the intended parents (**Recommendation 23**).

- **The unique implications of traditional surrogacy** — In the Discussion Paper, we did not suggest different safeguards for traditional surrogacy arrangements, because research indicates that outcomes are not statistically different between traditional and gestational surrogacy arrangements.[107] However, for the purposes of implications counselling, it is useful to discuss the different social and cultural understandings of genetic origin compared to only gestational origin. It is important for both the surrogate and the intended parents to understand that the surrogate's genetic connection to the child may have specific implications that differ from the gestational connection.[108] For example, a genetic connection between the surrogate and child may have significant implications for the child's future health, due to genetic risk factors or inheritable conditions. Furthermore, there may be circumstances where it is in the child's best interests to maintain a connection with their inherited culture, language, and traditional entitlements.[109]

6.46 The counsellor may become aware of social, emotional or psychological risks that may make the arrangement unsafe to proceed. We have heard from a range of former parties who identified risk factors that should prevent an arrangement from proceeding. These include domestic violence, controlling or coercive personality types, infertility trauma that is projected onto the surrogate, a history of serious mental health problems, and lack of family support for the arrangement, to name just a few.[110]

6.47 It would not be necessary for the counsellor to determine whether the arrangement should be approved to proceed. Such a determination may be beyond the counsellor's training or expertise, and we have heard that an evaluative function can undermine the ongoing therapeutic relationship needed to provide ongoing

106 The importance of having an established dispute resolution plan in place was noted in several submissions: see eg, Name withheld, *Submission 19*; Name withheld, *Submission 126*; Not published, *Submission 172*; Name withheld, *Submission 173*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 205*.

107 See, eg, Jadva and Imrie (n 96); Susan Imrie and Vasanti Jadva, 'The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements' (2014) 29(4) *Reproductive BioMedicine Online* 424.

108 See generally Harland (n 44); Tobin and Todres (n 44). See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8.

109 The concern that a child might be disconnected from their ancestral culture or language was also raised in some submissions: see, eg, P Zagarelou-Mackieson, *Submission 48*; Name withheld, *Submission 189*; Catholic Women's League Australia, *Submission 241*; Women's Bioethics Alliance, *Submission 349*; Relationships Australia, *Submission 404*.

110 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; S Everingham, *Submission 129*; Not published, *Submission 172*; Name withheld, *Submission 177*; A Whittaker, C Volks, A Molas (et al), *Submission 201*.

counselling support throughout the arrangement.[111] If any concerns are identified during implications counselling, the counsellor must notify the parties' nominated SSO, which will then organise for each party to undergo a psychological assessment (see **Recommendation 19**).

6.48 Once the implications counselling has been completed, the counsellor would provide the parties' nominated SSO with written confirmation, which would be a prerequisite for approval (**Recommendation 9**). This mechanism ensures that counselling has been obtained before the arrangement commences, minimises the risk that arrangements will commence before the parties understand the social, emotional and psychological risks involved, and ensures that parties may not 'shop around' for a counsellor who does not raise concerns about the arrangement proceeding (since the SSO can be notified directly by the counsellor). By requiring the counsellor to confirm that the listed matters have been discussed, and that parties appeared to understand the counselling provided and personal consequences of the arrangement, the recommendation seeks to avoid a 'box ticking approach', but without requiring the confidential contents of the counselling to be directly disclosed.

6.49 Imperfect compliance with the implications counselling requirement may be dispensed with by the National Regulator where a minor procedural irregularity has occurred or there are exceptional circumstances (**Recommendation 9**). In some cases, substantial compliance or unanticipated circumstances may make it appropriate to allow the arrangement to proceed.[112]

111 Different counselling roles fulfil different outcomes: Australian and New Zealand Infertility Counsellors Association (n 48) 3; Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia, *Australian Standards of Practice for Family Assessments and Reporting* (2015) 16 [13]. Several parties noted that psychological assessments or evaluations can be stressful or alienating experiences: see, eg, K Cox, *Submission 105*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Rainbow Families, *Submission 260*; Name withheld, *Submission 372*.

112 Some former parties noted that intended parents who have already engaged in extensive fertility counselling may receive limited benefit from additional mandated counselling sessions: see, eg, K Cox, *Submission 105*; Not published, *Submission 220*. This is reflected in **Recommendation 9**, which states that completion of a process requirement by an assisted reproductive technology service provider which also satisfies a precondition for having a surrogacy arrangement approved will be sufficient to discharge that precondition.

Psychological assessment

Recommendation 19

1. As a precondition for approval (**Recommendation 9**), the surrogate and the intended parent(s) must undergo a psychological assessment where:
   a. any party to a proposed surrogacy arrangement requests such an assessment; or
   b. the Surrogacy Support Organisation (**Recommendation 8**) requires such an assessment (paragraph 3).
2. Legislation should provide that where a psychological assessment is required under paragraph 1, each party to the proposed surrogacy arrangement must undergo the assessment.
3. Legislation should provide that the nominated Surrogacy Support Organisation must refer the parties for psychological assessments where it is notified of identified risk factors through the counselling process (**Recommendation 18**).
4. Legislation should provide that unless unable to, the psychologist conducting the assessment must provide a recommendation to the nominated Surrogacy Support Organisation about whether the surrogacy arrangement is suitable to proceed so that the recommendation can be considered as part of the approval process (**Recommendation 9**). The recommendation should include any identified risk factors that may affect the suitability of the arrangement. If the psychologist is unable to make a recommendation, they must provide a list of identified risk factors.
5. Legislation should provide that if the psychologist recommends that the surrogacy arrangement should not proceed or is unable to make a recommendation but identifies risk factors in their report, the application is to be treated as a 'complex application' and must be referred to the National Regulator (**Recommendations 6** and **9**), if the parties wish it to proceed.
6. Legislation should provide that the psychologist must provide a copy of the full report to the party who was the subject of the assessment, and to the National Regulator when it is considering the application.

The current law on psychological assessment

6.50 Psychological assessments can take several forms and serve multiple objectives. The relevant ANZICA Guidelines describe such an evaluation as including

> a personality assessment to exclude psychopathology, consideration of the connections between the parties to the proposal, reproductive history and any history of trauma or loss, possible coercion or financial inducement (explicit or implicit) and expectations of a surrogacy pregnancy and delivery and the implications of medical or psychological complications.[113]

6.51 Current state and territory legislation is sometimes ambiguous about whether or when a psychological assessment may be required. Some jurisdictions simply specify that pre-arrangement counselling is required, but are silent as to whether a psychological assessment should form a part of that safeguard.[114] Others specify that some sort of evaluation or report needs to be provided by a counsellor, sometimes before the arrangement commences to determine whether it should proceed,[115] or more commonly post-birth to determine whether a proposed parentage order would be in the best interests of the child.[116] Under these provisions, it is unclear what is required to underpin these reports, whether a formal psychological assessment is required, and if so what sort of psychological assessment would be appropriate. As an additional layer of ambiguity, the legislation refers to a 'counsellor'; however, only a psychologist or psychiatrist can administer a psychological assessment.[117] That is, the legislation refers to someone — a counsellor — who may or may not be qualified to perform the psychological assessment.[118]

6.52 While legislation may be ambiguous about psychological assessment requirements, some ART service providers may have their own policies about when such assessments will be required before treatment may commence. We have also heard that psychological assessments are often a standard requirement for some surrogacy agencies operating in overseas jurisdictions.[119]

Problems with the current law on psychological assessment

6.53 The lack of clarity around when psychological assessments are required creates the potential for inconsistent treatment between surrogacy arrangements.[120] As discussed above, legislation is often ambiguous about when a psychological assessment may be required. Some jurisdictions require evaluative reports as

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113 Australian and New Zealand Infertility Counsellors Association (n 48) 3.

114 Several jurisdictions do not specify the type of counselling that may be included as part of the pre-arrangement counselling requirement, leaving the possibility of including a psychological assessment to the discretion of the individual counsellor: see, eg, *Parentage Act 2004* (ACT) s 28A; *Surrogacy Act 2022* (NT) s 22.

115 *Assisted Reproductive Technology Act 2007* (NSW) s 15A; *Surrogacy Act 2008* (WA) s 17(c)(ii). Note that this requirement in Western Australia will be removed in new legislation due to come into effect in mid-2027: see *Assisted Reproductive Technology and Surrogacy Act 2025* (WA).

116 *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) s 24; *Surrogacy Act 2010* (Qld) ss 22(i), 32; *Surrogacy Act 2019* (SA) s 18(10); *Surrogacy Act 2012* (Tas) s 18.

117 This was noted by several psychologists in consultations and submissions to this Inquiry: see, eg, Name withheld, *Submission 173*; L Ransome, *Submission 380*.

118 *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) s 24; *Surrogacy Act 2010* (Qld) ss 22(i), 32; *Surrogacy Act 2019* (SA) s 18(10); *Surrogacy Act 2012* (Tas) s 18.

119 See, eg, S Everingham, *Submission 129*; S Page, *Submission 130*.

120 See, eg, Name withheld, *Submission 11*.

part of parentage order applications, however the basis for such evaluations is not specified.[121]

6.54 Submissions were divided on the value of psychological assessments. A range of stakeholders stated that they are useful in identifying risk factors that may cause an arrangement to derail or cause harm to the parties.[122] Others suggest that psychological assessments are unnecessarily invasive, expensive, and discriminatory, given that people whose method of family formation does not involve surrogacy are not expected to 'prove' they should be allowed to be parents.[123] Assessments for the purposes of proposed parentage orders are generally conducted after the child is born and is already being raised by intended parents, potentially rendering such assessments redundant because the child will already be bonding with the intended parents.[124] Stakeholder feedback also noted that in the majority of arrangements, psychological assessments do not provide any material benefit, but simply add another expensive, time-consuming hurdle to what is already an arduous process.[125]

6.55 In some circumstances, a person should not participate in a surrogacy arrangement despite meeting the eligibility criteria.[126] This may include situations involving high-risk personality profiles, complex personal circumstances, or problematic motivations in relation to surrogacy. Psychological assessment, conducted before a surrogacy arrangement commences, provides an opportunity to identify these circumstances and can help safeguard the rights and wellbeing of everyone involved. As discussed above, we have expanded the list of matters to be covered by implications counselling under **Recommendation 18** to ensure the implications counsellor is able to detect 'red flags' which warrant the parties undergoing further assessment.

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121 The following provisions specify an evaluative report should be provided by a counsellor, without specifying the basis for the evaluation: *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) s 24; *Surrogacy Act 2010* (Qld) ss 22(i), 32; *Surrogacy Act 2019* (SA) s 18(10); *Surrogacy Act 2012* (Tas) s 18.

122 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; S Everingham, *Submission 129*; Not published, *Submission 172*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Not published, *Submission 178*; Not published, *Submission 184*; Name withheld, *Submission 185*.

123 See, eg, K Cox, *Submission 105*; Name withheld, *Submission 127*; Name withheld, *Submission 171*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; J Attawet, *Submission 360*; Australian Nursing and Midwifery Federation, *Submission 375*.

124 In the following jurisdictions, reports, relevant for the purposes of a parentage order application, must only be prepared after the child is born and there is a specific parentage order application: *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) ss 24–5; *Surrogacy Act 2010* (Qld) ss 22(2)(i), 32; *Surrogacy Act 2019* (SA) s 18(10); *Surrogacy Act 2012* (Tas) s 18.

125 See, eg, K Cox, *Submission 105*; Name withheld, *Submission 114*; Name withheld, *Submission 127*; Name withheld, *Submission 171*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 238*.

126 This was broadly acknowledged in submissions, with stakeholders noting that some social, emotional or psychological risk factors should prevent an arrangement from proceeding: see, eg, S Everingham, Submission 129; ANZICA, Submission 277.

When psychological assessment will be required

6.56 Criminal history checks (**Recommendation 16**), implications counselling, and a psychological assessment are the only means for an approval body to be made aware of critical risks or concerns that should prevent the arrangement from proceeding.

6.57 In the Discussion Paper, we proposed to make psychological assessments part of the standard procedural safeguards that need to be undertaken by all parties before commencing a surrogacy arrangement (see Proposal 15). In response to feedback (discussed above) we have adapted **Recommendation 19** to only require a psychological assessment in two circumstances. First, where one of the parties requests an assessment be undertaken. Pursuant to **Recommendation 8**, SSOs are required to notify parties of their right to a psychological assessment. Second, where the implications counsellor identifies concerns that relate to the arrangement proceeding. This approach ensures that psychological assessments are required in circumstances where they will provide the greatest protective value to the parties, but are not needlessly imposed in most arrangements where any benefits are outweighed by the cost, inconvenience and invasive nature of such assessments. In light of the reduced circumstances where a psychological assessment will be needed, additional counselling sessions are included under the implications counselling requirement (see **Recommendation 21**).

6.58 Psychological assessment should not attempt to determine whether someone is fit to be a parent.[127] Rather, it is the appropriate role of surrogacy legislation to seek to ensure that surrogacy arrangements only proceed when the rights and interests of everyone involved are sufficiently protected. Therefore, where a psychological assessment is needed, the focus should be on each party's psychological capacity to safely participate in a surrogacy arrangement.

6.59 Where parties are not well known to each other, or have any concerns about whether particular 'red flags' may be present, it is important that any individual party (whether it is one of the intended parents or the surrogate) can require all parties to the arrangement to undergo an assessment. This can provide peace of mind, as well as allowing parties to proactively address concerns that may not otherwise have been detected during implications counselling. Similarly, 'red flags' identified by the implications counsellor should be explored fully before any approval decision is made.

How psychological assessment would work

6.60 When parties request a psychological assessment, or if required arising out of the counselling process, the SSO would organise for each party to undertake a psychological assessment. It is immaterial if only one party has given rise to the

127 See, eg, K Cox, *Submission 105*; Name withheld, *Submission 114*; A Whittaker, C Volks, A Molas (et al), *Submission 201*. See also **Chapter 14**.

concern raised by the implications counsellor; all the parties to that arrangement would need to undertake an assessment. This is because the risk posed by the participation of any individual party must be understood in the context of the other parties' vulnerabilities or resilience.[128]

6.61 A psychological assessment should be conducted by an appropriately qualified psychologist with relevant experience. Ideally, the same psychologist should assess all the parties, to take into account any interactions of risks in their report. They should also be familiar with the ANZICA Guidelines on the relevant risks and processes involved in surrogacy arrangements.[129]

6.62 Parties should disclose any current or previous diagnosed mental health conditions to the psychologist administering a psychological assessment. While a mental health diagnosis is not a disqualifying factor, it is relevant to assessing the risks of harm to everyone impacted by the arrangement. For example, a surrogate with a history of recurrent substance abuse disorder may pose a risk to the pregnancy; a substance abuse disorder may also lead to tension between the parties.[130] An intended parent with a history of infertility trauma leading to anxiety and depression may struggle to watch another person gestate their child, leading to resentment and hostility toward of the surrogate.[131] It should be reiterated that a mental health diagnosis is not an ineligibility criterion, however it is relevant for the purposes of the broader assessment.

6.63 The ALRC has not specified a particular psychological assessment that should be used in all circumstances. This is because different forms of assessment will be more or less appropriate under different circumstances.[132] To ensure this safeguard is most effective, discretion is left to the individual psychologist to choose which test to administer.

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128 ANZICA recommends that assessment counselling requires the same practitioner to see each of the parties: Australian and New Zealand Infertility Counsellors Association (n 48) 4. See also Family Court of Australia, Federal Circuit Court of Australia and Family Court of Western Australia (n 111) 16–17 [14].

129 See generally Australian and New Zealand Infertility Counsellors Association (n 48).

130 We have heard from intended parents who felt powerless to intervene when the surrogate started engaging in substance misuse during the pregnancy: see, eg, Name withheld, *Submission 59*; Name withheld, *Submission 343*.

131 We heard from some parties who felt that infertility trauma harmed the relationship between the parties, leading to unhealthy behaviours and harmful outcomes: see, eg, Name withheld, *Submission 12*; S Everingham, *Submission 129*; Name withheld, *Submission 211*; Not published, *Submission 221*; Name withheld, *Submission 329*; Name withheld, *Submission 335*; Not published, *Submission 337*; Name withheld, *Submission 362*. This was also identified as a factor contributing to dysfunctional arrangement dynamics in *Lamb & Shaw* [2017] FamCA 769.

132 Common psychological assessments that may be used include: the Minnesota Multiphasic Personality Inventory-2, the Personality Assessment Inventory, and the Personality Entitlement Scale: see Hilary Hanafin, 'Surrogacy and Gestational Carrier Participants' in Linda Hammer Burns and Sharon N Covington (eds), *Infertility Counseling: A Comprehensive Handbook for Clinicians* (Cambridge University Press, 2nd ed, 2006) 370, 378; Montrone and Sherman (n 45) 3–4.

6.64 The psychologist would prepare a report based on the results of the psychological assessment. The report must include a recommendation about whether the arrangement should be approved to proceed, unless the psychologist feels unable to do so. If the psychologist is unable to make a recommendation, they must include in the report any identified risk factors. If the psychologist recommends that the surrogacy arrangement should not proceed or is unable to make a recommendation, this renders the application a 'complex application', which can only be approved by the National Regulator based on its guidelines for approval (see **Chapter 4** and **Recommendation 9**). The National Regulator would either approve or deny approval of a complex application, but may also send the application back to the SSO for approval (see **Chapter 4**).

6.65 Some consultees raised concerns that parties may seek multiple opinions from psychologists so as to obtain a favourable report, including where an earlier assessment had found that a party or arrangement was unsuitable for surrogacy. To address this risk, the ALRC suggests that SSOs use a shared, secure database to which all applications, notifications, certifications, and recommendations are uploaded. This would ensure the approval body is aware that a requirement has been completed, regardless of the outcome. The contents of a psychological assessment are confidential medical information and would not be uploaded; maintaining this confidence is important to protect the parties' privacy. A full copy of the report is only provided to the party who was the subject of the assessment, and the National Regulator, where it is considering the application. The parties may choose to share their reports with each other, and with their counsellor, however they cannot be compelled to do so.

7. Surrogacy Agreements

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Introduction

7.1 In this chapter, the ALRC recommends the standardisation of the requirements, content, and enforceability of surrogacy agreements across jurisdictions, to facilitate safe and supported surrogacy arrangements. Importantly, the recommendations in this chapter seek to give effect to the entitlements and safeguards in our recommended regime that protect against harm and exploitation, by requiring a surrogacy agreement to explicitly address these protections. Taken together, these recommendations are designed to ensure that surrogacy agreements form a key part of the compliance process for the administrative pathway to parentage (**Recommendation 28**) and facilitate a safe and robust surrogacy arrangement.

7.2 This chapter commences with an overview of the purpose of surrogacy agreements, including their protective functions and their ability to facilitate informed consent, transparency and mutual understanding between the parties. To ensure that these goals are achieved, **Recommendations 20–22** would standardise the requirements, content, and enforceability of surrogacy agreements across jurisdictions:

- **Recommendation 20** specifies various rights, obligations, and requirements for a compliant surrogacy agreement.

- **Recommendation 21** requires a compliant surrogacy agreement to contain a statement upholding the surrogate's bodily integrity and autonomy, and prohibits the inclusion of any provision that interferes with the surrogate's bodily integrity and autonomy.
- **Recommendation 22** provides that the surrogate can enforce the cost and loss recovery provisions in a surrogacy agreement.

7.3 The Terms of Reference ask the ALRC to 'reduce barriers to domestic altruistic surrogacy arrangements in Australia'. The recommendations in this chapter further this aim by recommending mandatory content for surrogacy agreements, which facilitate free and informed engagement and an improved understanding of the rights and obligations of the parties to the surrogacy arrangement.

7.4 The Terms of Reference also ask the ALRC to 'protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents'. The recommendations in this chapter address this in several ways. First, **Recommendation 20** protects the fundamental human rights of the surrogate by explicitly prohibiting provisions that infringe the surrogate's right to bodily autonomy and integrity (see **Chapter 14**). Second, a compliant surrogacy agreement (**Recommendation 21**) is a precondition for approval to access the administrative pathway to legal parentage (**Recommendation 28**), and facilitates access to a pathway that includes various safeguards. These safeguards are designed to enhance free and informed decision making and facilitate the enjoyment of various rights including the surrogate's right to freedom from discrimination (see **Chapter 14**).[1]

How surrogacy agreements operate

7.5 Surrogacy agreements are agreements between intended parents and surrogates. They are usually entered into before conception and recorded in writing. Under the current legislative regime, agreements generally identify that a surrogate will become pregnant with the intention that the intended parents will be the legal parents of the child born through surrogacy.[2] They can also set out other matters, such as those relating to reimbursement of the surrogate's costs or evidence that the

1 The link between consent, exploitation, and the right of the surrogate to be free from discrimination is discussed in **Chapter 14**.

2 Some states and territories use the term 'surrogacy arrangement', while others use 'surrogacy agreement': *Parentage Act 2004* (ACT) Dictionary (definition of 'surrogacy arrangement'); *Surrogacy Act 2010* (NSW) s 5; *Surrogacy Act 2022* (NT) s 3 (definition of 'surrogacy arrangement'); *Surrogacy Act 2010* (Qld) s 7; *Surrogacy Act 2019* (SA) s 4 (definition of 'surrogacy agreement'); *Surrogacy Act 2012* (Tas) s 5(1); *Assisted Reproductive Treatment Act 2008* (Vic) s 3 (definition of 'surrogacy arrangement'); *Surrogacy Act 2008* (WA) s 3 (definition of 'surrogacy arrangement'); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 16. The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) will commence in mid-2027.

parties have attended counselling.[3] Beyond the compulsory requirements outlined in legislation, as discussed below, parties can agree to include provisions in the surrogacy agreement that encompass a wide range of matters, such as which hospital the surrogate will give birth at or the surrogate's insurance.

7.6 Surrogacy agreements are capable of facilitating fair and harmonious relations between parties to the surrogacy arrangement. They are an important means of promoting clarity, transparency, and mutual understanding between the parties, and are designed to ensure that parties are on the same page regarding what they are agreeing to, their obligations, and their rights. This helps prevent misunderstanding and miscommunication between the parties and mitigates the risk of conflict arising during the arrangement. Surrogacy agreements also facilitate informed consent and are a vehicle for building trust between the parties, while providing a degree of security. The ALRC heard that surrogacy agreements can facilitate open and ongoing communication between the parties. For example, Katie Cox, a fertility and family creation lawyer and parent through surrogacy, shared that

> [f]rom our personal experience, the surrogacy agreement — negotiated with the support of legal counsel — was pivotal. It enabled clear and open dialogue about legal obligations and interpersonal expectations, fostering transparency, security, and mutual trust.[4]

3 Some states allow agreements to deal with 'other matters': *Surrogacy Act 2010* (NSW) s 5(3); *Surrogacy Act 2010* (Qld) s 7(3); *Surrogacy Act 2012* (Tas) s 5(4). South Australia specifically requires the inclusion of 'provisions setting out the arrangements for the payment of reasonable surrogacy costs' and 'a counsellor's certificate in respect of the surrogate mother and each intended parent': *Surrogacy Act 2019* (SA) ss 10(5)(c)–(d).

4 K Cox, *Submission 105*.

Requirements for a compliant surrogacy agreement

Recommendation 20

As a precondition for approval (**Recommendation 9**), the parties must have signed a compliant surrogacy agreement. A compliant surrogacy agreement must:

a. be in writing and signed by the surrogate and the intended parent(s);

b. be entered into before the surrogate becomes pregnant;

c. contain provisions relating to permitted payments to the surrogate that are consistent with **Recommendations 23** and **24**;

d. state whether the surrogate elects to receive either or both of the optional payments for non-economic loss and extraordinary loss (**Recommendation 24**);

e. contain a provision that ongoing counselling must be available to the parties — individually and collectively — at the reasonable election of any party, and paid for by the intended parent(s) (**Recommendation 18**);

f. include the statement confirming the requirement to respect the surrogate's bodily integrity and autonomy (**Recommendation 21**); and

g. include a statement of intention setting out the parties' expectations of the arrangement, including their expectations for the relationship following the birth of the child.

Current requirements for surrogacy agreements

7.7 Currently, legislated requirements for a legally enforceable surrogacy agreement differ across jurisdictions. Legislation in most jurisdictions specifies that the parties to a surrogacy agreement must include the surrogate's partner or spouse, if any.[5] Most jurisdictions require agreements to be entered into in writing.[6] Some

5 *Parentage Act 2004* (ACT) s 27(b); *Surrogacy Act 2010* (NSW) s 34(1); *Surrogacy Act 2022* (NT) s 16(b); *Surrogacy Act 2010* (Qld) s 22(e)(iii); *Surrogacy Act 2008* (WA) s 17(b)(ii). However, this will be amended to remove the need for the surrogate's partner, if any, to be a party to the agreement by the new *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

6 *Parentage Act 2004* (ACT) s 26; *Surrogacy Act 2010* (NSW) s 34; *Surrogacy Act 2022* (NT) s 14(1); *Surrogacy Act 2010* (Qld) s 22(2)(e)(v); *Surrogacy Act 2019* (SA) s 10(5)(a); *Surrogacy Act 2012* (Tas) s 16(2)(e); *Surrogacy Act 2008* (WA) s 17(b); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(c), which will commence in mid-2027.

jurisdictions also require agreements to be entered into before conception.[7] Beyond this, few jurisdictions mandate the inclusion of specific provisions in the agreement.[8] These differences are set out in **Table 7.1** below.

Table 7.1: Requirements for a legally enforceable surrogacy agreement

Requirement	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
Include the surrogate's partner, if any	✓	✓	✓	✓				✓	
In writing	✓	✓	✓	✓	✓			✓	✓
Made prior to conception		✓	✓	✓					✓
Mandatory provisions					✓				✓

7.8 The patchwork approach to the form and content of a surrogacy agreement is problematic for multiple reasons:

- Inconsistency across jurisdictions regarding timing, writing, signing, and the inclusion of specific provisions can cause confusion and uncertainty,[9] especially when parties live in different jurisdictions and may be unaware of inconsistent requirements.[10]

7 *Surrogacy Act 2010* (NSW) s 24(1); *Surrogacy Act 2022* (NT) s 15; *Surrogacy Act 2010* (Qld) s 22(2)(e)(v); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 109(1)(f). The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) will commence in mid-2027.

8 In South Australia, the surrogacy agreement must contain 'provisions setting out the arrangements for the payment of reasonable surrogacy costs' and 'provisions setting out the Court orders…that the intended parents will be likely to seek following the birth of a child under the lawful surrogacy agreement': *Surrogacy Act 2019* (SA) ss 10(5)(d)–(e). The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027, requires a surrogacy agreement to provide for the obligations of the parties to the agreement, such as the 'surrogate's agreement for each intended parent to be a parent of, and to raise, the child' and 'each intended parent's agreement to pay or reimburse the surrogate's reasonable surrogacy expenses that are specified in the arrangement': *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 110(1)(a)(iii), (b)(ii).

9 Name withheld, *Submission 37*; P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 205*.

10 Katie Cox shared that '[i]ntended parents and surrogates often face legal uncertainty about the validity of agreements…[a] nationally harmonised surrogacy law is urgently needed': K Cox, *Submission 105*.

- Some states require the surrogate's partner (if any) to be a party to the surrogacy agreement.[11] This is primarily because under the current system, the surrogate and their partner are the legal parents of the child born through surrogacy pending a transfer of legal parentage (**Chapter 10**). Including the surrogate's partner as a party to the surrogacy agreement may cause complications for the arrangement in circumstances where the surrogate and their partner have separated or separate during the course of the arrangement.
- Not all jurisdictions require an agreement to be in writing. Tasmania allows a surrogacy arrangement to be made orally or in writing, but the court may only transfer parentage if satisfied that the surrogacy arrangement is in writing.[12] In Victoria a surrogacy arrangement may be 'formal or informal'.[13] Oral agreements are problematic because they can be less clear, transparent, and precise about what the parties agreed to.[14]
- Not all jurisdictions require a written agreement to be made before conception. The absence of a written agreement before a surrogacy arrangement can result in parties proceeding with an arrangement without their rights, obligations, and expectations being properly defined.
- The ALRC heard from a variety of stakeholders, including parents through surrogacy and former surrogates, that there are many issues that should be agreed upon between the parties, such as the hospital at which the surrogate will give birth or the post-birth relationship between the parties.[15] However, there is no nationally consistent, legislative approach to the matters that need to be included in the agreement.[16] This may result in the parties' neglecting to discuss and agree upon such matters, potentially causing conflict as the arrangement progresses.

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11 *Parentage Act 2004* (ACT) s 27(b); *Surrogacy Act 2010* (NSW) s 34(1); *Surrogacy Act 2022* (NT) s 16(b); *Surrogacy Act 2010* (Qld) s 22(e)(iii); *Surrogacy Act 2008* (WA) s 17(b)(ii). However, this will be amended to remove the need for the surrogate's partner, if any, to be a party to the agreement by the new *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

12 *Surrogacy Act 2012* (Tas) ss 5(6), 16(2)(e).

13 *Assisted Reproductive Treatment Amendment Act 2020* (Vic) s 3 (definition of 'surrogacy arrangement').

14 The Department of Health, Disability and Ageing (Cth) also emphasised the need for surrogacy agreements to be written in 'clear, concise and in plain language not in legal jargon' so that they are accessible and understandable, including for people with a disability or limited English language skills: Department of Health, Disability and Ageing (Cth), *Submission 420*.

15 Name withheld, *Submission 69*; P Hadfield-Jia, *Submission 71*; E Kendal, *Submission 166*; Name withheld, *Submission 173*; Name withheld, *Submission 301*; Name withheld, *Submission 307*; Not published, *Submission 345*.

16 Western Australia is the only jurisdiction that provides legislative guidance on the matters that must be included in the agreement. The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) requires the parties to agree to a relationship plan that sets out the parties' intentions about 'whether the child and the child's intended parents are to have an ongoing relationship with the surrogate or another person after the parentage order is made' and, if so, to also include 'matters relating to the ongoing relationship or relationships': *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 116(1)(b). It should be noted that this Act has been passed but will commence in mid-2027.

7.9 Additionally, legislation in most jurisdictions only permits provisions relating to reimbursement in surrogacy agreements to be enforceable (discussed further below).[17]

Why minimum requirements should be expanded and harmonised

7.10 **Recommendation 20** would require the parties to sign a compliant surrogacy agreement as a precondition for approval (see **Recommendation 9**). To be compliant, the agreement must meet all the listed requirements, such as being in writing, and include a Statement of Intention setting out the parties' expectations of the arrangement. **Recommendation 20** would achieve multiple objectives, including:

- ensuring that parties are aware of their rights and obligations, such as those relating to cost and loss recovery, and counselling;
- documenting the parties' mutual understanding of key aspects of the surrogacy arrangement, informed by discussions undertaken during counselling;
- protecting the surrogate by detailing cost and loss recovery provisions and ensuring that the right to ongoing counselling and the surrogate's autonomy are explicitly addressed;
- reducing the risk of disputes and relationship breakdown by requiring parties to discuss their expectations and agree to key issues in the Statement of Intention; and
- ensuring that, in the vast majority of cases, parties only proceed if they have a compliant surrogacy agreement in place.

7.11 Harmonising the minimum requirements for surrogacy agreements promotes the consistent protection of rights across Australia. Various stakeholders supported a nationally consistent approach to surrogacy agreements. For example, those with personal experience of surrogacy, as well as professionals involved in surrogacy, supported standardisation of both the formal requirements for surrogacy agreements and their content.[18] Stakeholders were also supportive of expanding

17 *Surrogacy Act 2010* (NSW) s 6; *Surrogacy Act 2022* (NT) ss 11, 12(3); *Surrogacy Act 2010* (Qld) s 15; *Surrogacy Act 2019* (SA) s 13; *Surrogacy Act 2012* (Tas) s 10(2); *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 7; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 111. The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) will commence in mid-2027. Legislation in the Australian Capital Territory does not specify whether surrogacy agreements are enforceable.

18 Name withheld, *Submission 68*; P Hadfield-Jia, *Submission 71*; K Cox, *Submission 105*; Name withheld, *Submission 205*; Not published, *Submission 345*; Australian Nursing and Midwifery Federation, *Submission 375*.

minimum requirements more broadly, and the proposed requirements included in **Recommendation 20**.[19] As stated by a person who has been a surrogate:

> [a] surrogacy agreement needs to clarify the roles, responsibilities and expectations of all parties involved, to help prevent misunderstandings and disputes.[20]

7.12 Recent reviews into surrogacy have also recommended several of the requirements in **Recommendation 20**. For example, the 2018 South Australian Law Reform Institute Report recommended surrogacy agreements be entered into prior to conception.[21] The 2016 Surrogacy Matters Report recommended the ALRC develop a 'model national law to regulate altruistic surrogacy', and, in doing so, consider the requirement that all parties to a surrogacy must enter into a written, non-binding agreement'.[22]

7.13 Some submissions proposed the mandatory inclusion of other provisions, such as a birthing plan, decision-making protocols, or provisions addressing the guardianship of the child if their parents pass away.[23] However, **Recommendation 20** aims to strike a balance between prescription and flexibility. The requirements set out in **Recommendation 20** are *minimum* requirements; parties are free to include other provisions in the agreement that go above and beyond the mandatory requirements in **Recommendation 20**, subject to **Recommendation 21**.

How minimum requirements would work

7.14 Legislation should require that agreements meet several minimum requirements:

- **Made in writing** — A written agreement is clearer, more transparent, and more certain than one that is unwritten.[24] It reduces the risk of misunderstandings

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19 Name withheld, *Submission 37*; Name withheld, *Submission 69*; P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 74*; K Cox, *Submission 105*; S Everingham, *Submission 129*; Not published, *Submission 172*; J Sliwka, *Submission 242*; Equality Australia, *Submission 253*; ANZICA, *Submission 277*; Name withheld, *Submission 295*; Name withheld, *Submission 301*; Name withheld, *Submission 307*; S Everingham, *Submission 378*; K Cox, *Submission 389*; Relationships Australia, *Submission 404*; Australian Christian Lobby, *Submission 419*; Equality Australia, *Submission 435*.

20 Name withheld, *Submission 12*.

21 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) rec 20.

22 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (2016) v–vi, 12 [1.41].

23 P Hadfield-Jia, *Submission 71*; E Kendal, *Submission 166*; Not published, *Submission 393*; Name withheld, *Submission 421*.

24 The 2022 Te aka Matua o te Ture | Law Commission Report also recommended that all surrogacy plans should be in writing as 'this could provide greater certainty, minimise the risk of disagreement and assist the parties to resolve any disputes in the future': Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 133 [5.43].

arising, makes it more likely that the parties can be held accountable, and makes enforcement easier if disputes arise by providing evidence of the parties' intentions and agreement on key issues, including cost recovery provisions.

- **Signed** — Requiring the parties to sign the agreement would affirm their commitment to the agreement and its provisions.[25] It would also provide evidence of the parties' consent to the arrangement and acknowledgement of their obligations within the agreement.
- **Entered into before the surrogate becomes pregnant** — Requiring the agreement to be entered into before conception seeks to ensure that the parties reach agreement on key issues and are aware of their rights and responsibilities from the outset of the arrangement. This would better enable the arrangement to proceed smoothly and would help ensure that any significant differences are resolved before the surrogate becomes pregnant, after which point it becomes more difficult to end the arrangement.[26]

7.15 The ALRC has not required the surrogate's partner to be a party to the surrogacy agreement. Under the proposed administrative pathway (**Recommendation 28**), intended parents would be the legal parents of a child upon birth, not the surrogate and their partner. This obviates the need for the surrogate's partner to actively consent to the arrangement by being a party to the surrogacy agreement.

7.16 Beyond these requirements, the actual form of the surrogacy agreement can be decided by the parties, noting that the ALRC has recommended that the National Regulator develop a standardised draft surrogacy agreement that parties may use as a basis for a compliant agreement (**Recommendation 6**). A standardised template was also recommended in the 2023 Law Commission of England and Wales, and Scottish Law Commission Report.[27]

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25 This was also recommended by the 2023 Law Commission of England and Wales, and Scottish Law Commission Report. The report stated that '[t]his would be a critical element, to confirm not only that the stated information and safeguarding requirements have been fulfilled, but also to indicate the intention of the parties to proceed with this surrogacy agreement': Law Commission of England and Wales, and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 248 [9.38].

26 As stated in the 2018 South Australian Law Reform Institute Report: 'it is effectively shutting the stable door after the horse has bolted to seek to define the responsibilities and positions of the parties after fertility treatment has commenced': South Australian Law Reform Institute (n 21) 134 [14.2.2].

27 The 2023 Law Commission of England and Wales, and Scottish Law Commission Report stated that a 'standardised form should be required for entry into the new pathway … called the Regulated Surrogacy Statement'. The format of such a form would be prescribed in secondary legislation: Law Commission of England and Wales, and Scottish Law Commission (n 25) 242 [9.7]. Many submissions also supported a standardised template for surrogacy agreements: see, eg, Name withheld, *Submission 11*; Equality Australia, *Submission 253*; Not published, *Submission 345*; Name withheld, *Submission 283*; Name withheld, *Submission 317*; Name withheld, *Submission 339*; Name withheld, *Submission 343*.

7.17 The surrogacy agreement must outline the parties' agreed-upon approach to cost and loss recovery, consistent with **Recommendations 23** and **24**. Cost and (where relevant) loss recovery provisions must be included in the surrogacy agreement to provide clarity and certainty to the parties, as well as an enforceable right for the surrogate to be reimbursed. First, the surrogacy agreement should acknowledge that the surrogate is entitled to reimbursement of the expenses outlined in **Recommendation 23**. Second, the surrogacy agreement should address whether the surrogate elects to receive either (or both) of the optional payments set out in **Recommendation 24**, which seeks to ensure that the parties are aligned as to any additional payments that the surrogate will receive throughout the arrangement. Together, both of these requirements would reinforce the intended parents' commitment to reimburse costs and losses incurred by the surrogate and draw the surrogate's attention to the costs and losses they are entitled to recover. It would also reduce the risk of the surrogate being left out of pocket. Finally, cost and loss recovery provisions in the surrogacy agreement will also provide evidence of the parties' intentions in any alternative dispute resolution or court proceedings to enforce these provisions (see **Recommendation 22**).

7.18 Additionally, counselling provisions must be included in the surrogacy agreement to draw attention to the availability of ongoing counselling, which is a critical support for the parties in times of difficulty or conflict. Including this provision in the agreement aims to ensure that intended parents are aware of their obligation to pay for the surrogate's ongoing counselling (if required) and draws the surrogate's attention to their corresponding right (see **Recommendation 18**).

7.19 A Statement of Intention must also be included in the surrogacy agreement. The Statement of Intention is not binding but is a vehicle to help ensure that the parties discuss and come to some agreement on how key issues will be managed throughout the arrangement, including the nature of the parties' post-birth relationship. Adopting a transparent and upfront approach to discussing these issues may reduce the likelihood of disagreement and disputes occurring throughout the arrangement.

7.20 The Statement of Intention must include a provision setting out the parties' vision of their post-birth relationship. The ALRC heard that the fear of post-birth conflict and uncertainty over the nature of the post-birth relationship can weigh heavily on the parties.[28] The current lack of guidelines on managing ongoing relationships may lead to emotional fatigue or conflict.[29] Encouraging parties to give careful consideration to the question of post-birth contact is a mechanism for managing the risk of relationship disintegration.

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28 K Cox, *Submission 105*; Surrogacy Australia, *Submission 417*. Many submissions were supportive of including a mandatory provision on the post-birth relationship between the parties: Name withheld, *Submission 69*; P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 301*; Name withheld, *Submission 307*; Not published, *Submission 393*; Surrogacy Australia, *Submission 417*.

29 K Cox, *Submission 105*; Name withheld, *Submission 173*.

7.21 Beyond this, parties can elect to include other matters in their Statement of Intention. This may include provisions on communication and decision-making protocols, appointing guardianship for the child in situations in which intended parents have died, or birth plans. Alternatively, a Statement of Intention may be used to address which hospital the surrogate will give birth in, or whether aspects of the surrogacy should be kept confidential.[30] Lastly, the statement required by **Recommendation 21** affirming the surrogate's bodily integrity and autonomy is intended to better ensure that the surrogate is aware of the prohibition precluding interference with the above where connected with the pregnancy and birth.

7.22 A surrogacy agreement that complies with the requirements in **Recommendation 20** would be a precondition for approval of the surrogacy arrangement (**Recommendation 9**) and therefore a precondition for parties to be able to access the administrative pathway to legal parentage (**Recommendation 28**). These requirements could be dispensed with by the National Regulator if it is satisfied that a minor procedural irregularity has occurred, or that exceptional circumstances exist justifying approval of the agreement (**Recommendation 9**).

Prohibited provisions in a surrogacy agreement

Recommendation 21

1. Legislation should require a compliant surrogacy agreement (**Recommendation 20**) to contain a plain English statement provided by the National Regulator (**Recommendation 6**). The statement should clarify that, subject to compliance with reasonable medical advice in connection with the pregnancy or birth, the surrogate's bodily integrity and autonomy must be respected, in relation to all decisions and conduct, including:
    a. decisions and conduct that relate to the management of the pregnancy; and
    b. decisions and conduct that determine the circumstances in which the surrogate gives birth to the child.
2. Legislation should prohibit the inclusion of any provision in a surrogacy agreement that interferes with the surrogate's bodily integrity and autonomy, except to the extent that the provision requires compliance with reasonable medical advice in connection with the pregnancy or birth.

30 See S Page, *Submission 365*.

Why some provisions should be prohibited

7.23 **Recommendation 21** is designed to safeguard the surrogate by prohibiting the inclusion of provisions in a surrogacy agreement that inhibit the surrogate's bodily integrity and autonomy, except to the extent that the provision requires compliance with reasonable medical advice in connection with the pregnancy or birth. Currently, under the general law, a person with legal capacity must provide their consent to access medical treatment that affects them.[31] So far as **Recommendation 21** addresses the issue of consent, its implementation would not change existing law but would help to draw the attention of the parties to that law.

7.24 Currently, Australian legislation does not prohibit certain subject-matter from being included in a surrogacy agreement. Surrogacy agreements may therefore include provisions that infringe the surrogate's bodily integrity and autonomy.[32] For example, a surrogacy agreement may include a provision requiring the surrogate to attempt a vaginal birth.[33] While such provisions are not enforceable (see below), that may not be understood by the surrogate and the surrogate may feel compelled to comply with these provisions because they appear in the agreement or out of a concern that failure to do so will impact their rights, such as those relating to cost and loss recovery. **Recommendation 21** seeks to protect the surrogate's bodily integrity and autonomy and guards against potential exploitation and mistreatment of the surrogate. The ALRC received broad support for **Recommendation 21**, especially from people with personal experience of surrogacy.[34]

7.25 **Recommendation 21** operates to protect the surrogate's bodily integrity and autonomy in two ways. First, this recommendation draws the attention of the parties to the importance of the surrogate's bodily integrity and autonomy, in relation to all decisions and conduct, by requiring a statement confirming this to be included in a surrogacy agreement for the agreement to be compliant (**Recommendation 20**). This statement would be included in the National Regulator's template surrogacy agreement and drafted in plain English and in accessible language to help ensure that the surrogate understands what the agreement can and cannot include (**Recommendation 6**). Second, it prohibits the inclusion of any prohibited provisions that are included in the agreement, as discussed above.

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31 See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218; *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88, 88–9.

32 See **Chapter 14** for an overview of the surrogate's human rights.

33 This example was given in a submission: Not published, *Submission 393*.

34 Name withheld, *Submission 28*; Name withheld, *Submission 52*; Name withheld, *Submission 62*; Name withheld, *Submission 69*; Name withheld, *Submission 102*; S Everingham, *Submission 129*; Not published, *Submission 172*; Not published, *Submission 206*; Name withheld, *Submission 219*; M Montrone, *Submission 263*; ANZICA, *Submission 277*; Name withheld, *Submission 306*; Name withheld, *Submission 307*; Name withheld, *Submission 312*; Name withheld, *Submission 318*; Name withheld, *Submission 330*; Not published, *Submission 337*; Name withheld, *Submission 339*; MRKH Australia, *Submission 350*; S Cureton, *Submission 351*; J Attawet, *Submission 360*; Not published, *Submission 363*; Virtus Health, *Submission 397*; K Horsey, *Submission 418*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 422*.

7.26 Lastly, although the surrogate's bodily integrity and autonomy must be respected in relation to all decisions and conduct, **Recommendation 21** requires the surrogate to comply with reasonable medical advice in connection with the pregnancy or birth. For example, this may include directions from an obstetrician for bed rest to try to avoid premature delivery. This is designed to strike a balance between ensuring the surrogate retains agency, bodily integrity, and autonomy, while protecting the surrogate's health and the best interests of the child.

Enforceable provisions in surrogacy agreements

Recommendation 22

1. Legislation should provide that only the cost and loss recovery provisions in both compliant and non-compliant surrogacy agreements are enforceable. The criteria for enforceability should be made nationally consistent, including by:
   a. removing any requirement that costs and losses are enforceable only if the surrogate relinquishes the child or consents to the transfer of parentage; and
   b. providing that costs and losses are enforceable only where they are not recoverable under Medicare, health insurance, or any other scheme.
2. Legislation should provide that unlawful surrogacy agreements are void, but that surrogates in such arrangements are entitled to recover costs and losses as statutory entitlements to the extent provided for in **Recommendation 23**.

Current law on the legal enforceability of surrogacy agreements

7.27 Agreements are ordinarily enforceable under the general law, such as the law of contract. Accordingly, the enforceability of agreements is generally not dependent upon legislation as recourse to the courts is provided by the general law. However, surrogacy agreements are regulated differently in Australia; legislation in most jurisdictions only allows for provisions relating to reimbursement to be enforceable. All other provisions are unenforceable.[35]

35 *Surrogacy Act 2010* (NSW) s 6; *Surrogacy Act 2022* (NT) ss 11, 12(3); *Surrogacy Act 2010* (Qld) s 15; *Surrogacy Act 2019* (SA) s 13; *Surrogacy Act 2012* (Tas) s 10; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 7; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 111. The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) will commence in mid-2027. Legislation in the Australian Capital Territory does not specify whether surrogacy agreements are enforceable.

Binding and enforceable provisions in surrogacy agreements

7.28 The ALRC received mixed feedback on the question of which, if any, provisions in a surrogacy agreement should be enforceable. Many stakeholders recommended that the entire agreement be enforceable or that other provisions, beyond cost recovery provisions, be enforceable.[36] Others supported the status quo of limiting enforceability to cost recovery provisions.[37] As discussed above, some stakeholders raised that certain provisions in a surrogacy agreement would be difficult and undesirable to enforce.[38] Having considered these submissions and other matters discussed below, the ALRC concluded that only cost and loss recovery provisions should be enforceable.

7.29 **Recommendation 22** is in line with the conclusion reached by various inquiries, and also consistent with the regulation of surrogacy in many international jurisdictions:

- Few international jurisdictions permit the enforceability of surrogacy agreements beyond cost recovery. California is an example of such a jurisdiction.[39]
- Surrogacy agreements in jurisdictions comparable to Australia from a social, political, and economic standpoint — such as New Zealand and the United Kingdom — are wholly unenforceable.[40]
- Recent inquiries into surrogacy have recommended that only cost recovery provisions in a surrogacy agreement should be enforceable, including the 2019 Allan Review Report, 2023 Western Australia Ministerial Expert Panel Report, 2018 South Australian Law Reform Institute Report, 2023 Law Commission of

36 See Name withheld, *Submission 12*; Name withheld, *Submission 15*; Name withheld, *Submission 16*; Name withheld, *Submission 19*; Name withheld, *Submission 41*; Name withheld, *Submission 52*; Not published, *Submission 108*; Name withheld, *Submission 126*; S Everingham, *Submission 129*; Name withheld, *Submission 135*; Name withheld, *Submission 147*; L Tripodi, *Submission 168*; Name withheld, *Submission 177*; Name withheld, *Submission 203*; Not published, *Submission 209*; Name withheld, *Submission 212*; Name withheld, *Submission 219*; Name withheld, *Submission 225*; Name withheld, *Submission 231*; Name withheld, *Submission 237*.

37 Name withheld, *Submission 76*; Not published, *Submission 119*; E Kendal, *Submission 166*; A McKie, *Submission 264*; Name withheld, *Submission 312*.

38 Name withheld, *Submission 28*; Name withheld, *Submission 62*; S Everingham, *Submission 129*; Australian Nursing and Midwifery Federation, *Submission 375*.

39 In the United States of America, regulation of surrogacy is undertaken at the state level. Several states allow the entire surrogacy agreement to be enforceable, as long as the prescribed requirements have been met. For example, California permits the surrogacy agreement to be enforceable if statutory requirements (writing, timing, execution, escrow for compensation, witnessing, minimum terms) have been satisfied: *California Family Code*, Cal Fam Code, 7962 (2025).

40 *Human Assisted Reproductive Technology Act 2004* (NZ) s 14(1); *Surrogacy Arrangements Act 1985* (UK) s 1A.

England and Wales, and Scottish Law Commission Report, and 2022 Te aka Matua o te Ture | Law Commission Report.[41]

7.30 Although it could provide greater certainty to the parties, it is undesirable for the law to provide that provisions in a surrogacy agreement, beyond those providing for cost and loss recovery, are legally enforceable. Surrogacy agreements are different from a standard commercial contract. Surrogacy agreements can, and commonly do, deal with personal matters of great sensitivity, where the need for contractual certainty is outweighed by the need for a more flexible approach to the usual binding nature of what is agreed between parties to a contract. Sensitive subject matter may be better dealt with as expressions of a non-binding preference, rather than as binding commitments enforceable under the law.

7.31 There are a wide range of personal and sensitive issues that arise in the context of a surrogacy arrangement, which a binding and enforceable agreement could address. However, those issues are often better determined by the surrogate alone rather than by a binding and enforceable agreement. For example, a surrogate's commitment given at the time of the making of a contract, that the intended parents can attend the birth, should not be enforced.[42] If given binding effect, such a clause may result in unexpected or unforeseen emotional or psychological damage to the surrogate. A surrogate should not be legally bound to engage in activities that may cause psychological harm. Another example is the choice of the doctor who will supervise the pregnancy and deliver the child. Given the personal and highly sensitive relations between the surrogate and their doctor, the choice of the doctor should be left to the surrogate and not be imposed by the contract.

7.32 In contrast, the commitment given by the intended parents to reimburse the costs or losses incurred by the surrogate should be binding and enforceable. That commitment is purely transactional, is not of a personal or sensitive nature, and the surrogate who has incurred the cost or suffered the loss is entitled to the certainty that a binding commitment provides.

Preconditions for the enforceability of cost or loss recovery provisions

7.33 The precondition in Queensland and South Australia that costs should only be enforceable if the surrogate relinquishes the child or consents to the transfer of parentage should not be included in the proposed legislation.[43] The cost and loss recovery provisions in **Recommendations 23** and **24** are intended to reimburse

41 Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) rec 37; Department of Health (WA), *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Final Report, 2023) rec 24; South Australian Law Reform Institute (n 21) rec 51; Law Commission of England and Wales and Scottish Law Commission (n 25) rec 58; Te Aka Matua o te Ture | Law Commission (NZ) (n 24) rec 48.

42 See, eg, S Jefford, *Submission 359*.

43 *Surrogacy Act 2010* (Qld) s 15(2); *Surrogacy Act 2019* (SA) s 13(3).

the surrogate for the economic and non-economic costs and losses arising out of the pregnancy. As the Law Commission of England and Wales, and Scottish Law Commission have concluded, these payments recognise the expenses and impacts associated with pregnancy and birth, and are not contingent on the purpose of the surrogacy arrangement being fulfilled.[44] Such an approach accords with the broader human rights framework, discussed in **Chapter 14** of this Report. Various reports in Australia and New Zealand, and England, Wales, and Scotland have also rejected a precondition of this kind.[45]

7.34 The requirement that costs are only enforceable, and thus only recoverable, if they are not recoverable under Medicare, health insurance, or any other scheme should be included as a precondition. This requirement would ease the cost burden on intended parents, without affecting the surrogate's ability to be fully reimbursed.

The process for enforcement

7.35 Under **Recommendation 22**, alternative dispute resolution would likely be the default mechanism for resolving conflict related to the surrogate's cost recovery, and this could be provided for in the agreement. This approach was well supported in submissions and has many benefits.[46] Parties would be free to decide how they would like to proceed, including who will mediate. Alternatively, alternative dispute resolution, including mediation, could be facilitated by Surrogacy Support Organisations (**Recommendation 8**). This has additional benefits for the parties: since the organisation has worked closely with the parties and is familiar with their case, they can take a well-informed and personalised approach to resolving any issues.

7.36 For cost or loss recovery provisions, if alternative dispute resolution fails to resolve the issue, the parties may have recourse to state and territory courts with civil jurisdiction for debt or cost recovery matters. While pursuant to **Recommendations 28** and **29** the Federal Circuit and Family Court of Australia is empowered to determine questions of legal parentage in surrogacy cases, state and territory courts are more appropriate forums for enforcement of cost recovery provisions as such claims are generally straightforward and do not require the expertise of the Federal Circuit and Family Court of Australia. The 2023 Law Commission of England and Wales, and Scottish Law Commission Report took a similar approach, stating that

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44 The 2023 Law Commission of England and Wales, and Scottish Law Commission Report stated that 'as the permitted costs arise from the pregnancy and birth, the surrogate will still be able to recover payments against the intended parents even if she withdraws her consent on the new pathway, or does not provide her consent to the making of a parental order, or if the pregnancy does not progress ... the payments are for costs arising from the fact of being pregnant, regardless of whether the purposes of the surrogacy agreement are fulfilled': Law Commission of England and Wales and Scottish Law Commission (n 25) 349 [12.222].

45 Department of Health (WA) (n 41) 46; South Australian Law Reform Institute (n 21) 264 [23.4.1]; Te Aka Matua o te Ture | Law Commission (NZ) (n 24) 263–4 [8.60]; Law Commission of England and Wales and Scottish Law Commission (n 25) 349 [12.222], rec 58.

46 Name withheld, *Submission 28*; P Hadfield-Jia, *Submission 71*; Australian Nursing and Midwifery Federation, *Submission 375*; Name withheld, *Submission 421*; Name withheld, *Submission 422*.

'the discretionary and inquisitorial nature of the family court' is not required for the 'relatively straightforward matter of enforcing a debt'.[47]

Enforcing non-compliant and unlawful surrogacy agreements

7.37 Non-compliant surrogacy agreements are those that have not complied with all the legal requirements in **Recommendation 20**. For example, the agreement may not include the requisite statement required by **Recommendation 21**. They should be enforced in the same way as compliant agreements: by enforcing cost and loss recovery provisions only. This would help ensure that the surrogate is not financially disadvantaged and is still able to recover for the economic and non-economic costs and losses associated with the surrogacy experience.

7.38 If a surrogacy agreement is made in relation to an arrangement that is prohibited, such as a domestic surrogacy arrangement that is for profit or reward, this would be an unlawful surrogacy agreement. These agreements would be void due to the unlawfulness of the arrangement (see **Recommendation 1**). However, legislation should specify that surrogates in these arrangements are entitled to the cost recovery provisions in **Recommendation 23** as a statutory entitlement. This means that the surrogate's right to reimbursement would be conferred by legislation and all surrogates would be entitled to it, irrespective of the legality or illegality of their individual surrogacy agreements. This approach ensures that surrogates would be reimbursed for the reasonable expenses actually incurred but would not be able to recover any unlawful entitlement to profit or reward.

47 Law Commission of England and Wales and Scottish Law Commission (n 25) 348 [12.217].

8. Cost and Loss Recovery

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Introduction

8.1 This chapter discusses improvements to the way surrogates recover the costs and losses they incur during the surrogacy process. The recommendations in this chapter are designed to address issues of fairness, protecting surrogates' rights — including by better ensuring that their participation in surrogacy occurs with their free and informed consent — and enhancing the accessibility of surrogacy in Australia. The chapter puts forward a modernised, fairer, and more cohesive cost and loss recovery system for domestic surrogacy. Taken together, the recommendations adopt a uniform approach to ensuring that surrogates are not financially disadvantaged by the surrogacy arrangement, while still prohibiting surrogacy in Australia that is for profit or reward. This serves to guard against the risk of exploitation caused by financial inducements which may undermine the free and informed consent of the surrogate.

8.2 This chapter contains three recommendations:

- **Recommendation 23** requires intended parents to reimburse surrogates for all economic costs and losses (such as loss of earnings) reasonably incurred in relation to the surrogacy arrangement.
- **Recommendation 24** introduces two optional payments. The first would enable surrogates to recover the non-economic loss commonly experienced by a surrogate, including the physical and psychological impacts and loss of amenity associated with pregnancy and childbirth. The second optional payment would enable surrogates to recover for non-economic loss arising from extraordinary medical complications ('extraordinary losses').

- **Recommendation 25** deals with better securing and facilitating the reimbursement of the costs incurred by a surrogate.

8.3 The Terms of Reference ask this Inquiry to consider

> how to reduce barriers to domestic altruistic surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical, and other expenses incurred as a consequence of the surrogacy.

8.4 In response, the recommendations in this chapter have been designed to better ensure that surrogates are adequately and fairly reimbursed for all reasonably incurred costs and losses associated with being a surrogate. By avoiding Australian surrogates' exposure to financial disadvantage, the reforms in this chapter would support surrogates' participation in the fair and safe domestic surrogacy process the ALRC recommends in this Report. That, in turn, would likely decrease the number of Australian intended parents engaging in overseas surrogacy arrangements. The substantial benefits and importance of that objective are discussed in **Chapter 13**.

8.5 The Terms of Reference also ask this Inquiry to have regard to the need to protect and promote human rights, and ensure consistency with Australia's obligations under international law. The cost and loss recovery measures proposed are intended to ensure that surrogates are treated fairly and are not financially disadvantaged through their role as a surrogate. They are intended to provide that protection without compromising the need to ensure that surrogates are not financially induced to engage in an exploitative arrangement, which would undermine either their right to non-discrimination or their right to autonomy (see **Chapter 14**).

8.6 Free and informed consent is a necessary precondition to protecting surrogates' rights, which can be undermined if individuals are financially induced to perform this role.[1] A surrogate must not be exposed to the risk of exploitation caused by a financial inducement, which will undermine free and informed consent. **Recommendations 23** and **24** provide for payments made to reimburse a surrogate's reasonably incurred costs or to redress a loss suffered in relation to the surrogacy. These payments are made to address financial disadvantage and are not payments which provide a financial advantage to the surrogate. Therefore, these payments are not financial inducement and do not carry the risk (which is addressed by **Recommendation 1**) of compromising free and informed consent and thus exposing the surrogate to exploitation.

8.7 To further protect against any risk of exploitation, the responsible and supported surrogacy regime proposed in this Report includes legislative safeguards to better ensure that surrogates engage with surrogacy with free and informed consent (see **Recommendations 11**–**21**).

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1 See, eg, Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 356 [12.256].

Reimbursing surrogates for expenses

Recommendation 23

1. Legislation should provide that a surrogacy arrangement that entitles surrogates to the reimbursement of payments provided for in this recommendation is not, for that reason only, for profit or reward (**Recommendation 1**).
2. Legislation should provide that consistent with this recommendation, intended parents must reimburse the surrogate for all costs and economic losses reasonably incurred by the surrogate or the surrogate's 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 required for a surrogacy arrangement to be compliant with legislative requirements and eligible for approval (**Recommendations 11**–**19**);
    b. medical and wellbeing costs;
    c. pregnancy-related items, including dietary items and supplements;
    d. care of dependants;
    e. additional assistance where the surrogate is unable to perform daily tasks;
    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. healthcare costs incurred following:
        i. the birth of a child, miscarriage, or stillbirth; or
        ii. where no successful pregnancy occurs and the parties agree to cease attempts to achieve a pregnancy.

3. Legislation should provide that in relation to claims for reimbursement made for costs that are incurred beyond the three-month period following the birth of a child, miscarriage, stillbirth, or the termination of a pregnancy, the only costs payable are:

   a. costs incurred in connection with a serious medical complication experienced during the pregnancy or childbirth (**Recommendation 24**); and

   b. costs incurred with prior approval from the nominated Surrogacy Support Organisation (**Recommendation 8**), unless otherwise ordered by a court.

4. Legislation should provide that the National Regulator (**Recommendation 6**) should be empowered to develop guidelines, which clarify when costs should be regarded as reasonably incurred in relation to a surrogacy arrangement, and formulate a monthly allowance to cover commonly incurred costs for which the obtaining or keeping of receipts is difficult or inconvenient.

Reimbursing surrogates under current state and territory laws

8.8 Only 'altruistic' surrogacy is permitted in Australia. It is a criminal offence in all Australian jurisdictions to engage in a domestic surrogacy arrangement in which surrogates receive payment beyond the reimbursement of reasonable expenses, or for profit or reward.[2] The rationale for this framing is discussed in **Chapters 1** and **2**. Broadly stated, the current law provides that surrogates can be reimbursed for reasonable economic costs (and the loss of earnings) associated with entering or being a party to a surrogacy arrangement, becoming or trying to become pregnant, and pregnancy and birth.[3] The legislation does not impose a cap on the amount that may be reimbursed.

2 The legislation in most Australian jurisdictions uses the term 'commercial' surrogacy, and generally defines it to mean a surrogacy arrangement where the surrogate receives payment other than reimbursement of reasonable expenses: *Parentage Act 2004* (ACT) ss 40, 41; *Surrogacy Act 2010* (NSW) ss 8, 9; *Surrogacy Act 2022* (NT) ss 12, 48; *Surrogacy Act 2010* (Qld) ss 10, 56, 57; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40. Victoria and Western Australia do not use the terminology 'commercial' surrogacy. Rather, Victoria prohibits surrogacy for 'benefit or material advantage' and Western Australia prohibits surrogacy that is 'for reward': *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) ss 6, 8. In Western Australia, new legislation commencing in mid-2027 retains this prohibition: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107, 112.

3 *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; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107–8. It should be noted that this Act has been passed but it not yet in force. Section 6 is the relevant provision of the Act currently in force: *Surrogacy Act 2008* (WA).

8.9 Each state and territory's legislation provides for the reimbursement of at least some costs or expenses.[4] In most jurisdictions, the legislation provides that all reasonable costs incurred are payable and sets out a non-exhaustive list of the recoverable categories of costs.[5] In other jurisdictions the legislation does not require that all reasonable costs be reimbursed but specifies exhaustively the categories of costs which are recoverable.[6] As further discussed below, even though the categories of reasonable costs are non-exhaustive in most jurisdictions, in practice these lists are often treated as exhaustive, and cost recovery is confined to those costs expressly identified by the legislation.

8.10 When the costs categories expressly identified by legislation are compared, there is a degree of consistency in that all state and territory legislation includes reimbursement for the costs of medical treatment, legal advice, and counselling.[7] However, there is inconsistency and some notable omissions. For example:

- South Australia is the only jurisdiction that does not refer to travel and accommodation costs, which are frequently incurred while attending appointments, or the expense of the surrogate's health, life and disability insurance.[8]

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4 Except for Victoria which employs the term 'prescribed expenses': *Assisted Reproductive Treatment Act 2008* (Vic) s 44.

5 *Surrogacy Act 2010* (NSW) s 7; *Surrogacy Act 2022* (NT) s 12; *Surrogacy Act 2010* (Qld) s 11; *Surrogacy Act 2012* (Tas) s 9. In Western Australia, the current Act provides an exhaustive list (*Surrogacy Act 2008* (WA) s 6(3)), however this will be amended by the new Act, which has been passed but it not yet in force: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 108.

6 *Parentage Act 2004* (ACT) s 24; *Parentage Regulation 2024* (ACT) reg 4; *Surrogacy Act 2019* (SA) s 11; *Surrogacy Regulations 2020* (SA) reg 5; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11–11A.

7 *Parentage Regulation 2024* (ACT) regs 4(1)(a), (2)(a), (2)(b); *Surrogacy Act 2010* (NSW) ss 7(1), 7(4)(a)–(b); *Surrogacy Act 2022* (NT) ss 12(2)(b), (c); *Surrogacy Act 2010* (Qld) ss 11(2)(a), (d), (e); *Surrogacy Act 2019* (SA) ss 11(1)(a)(i), (ii), (iv); *Surrogacy Act 2012* (Tas) ss 9(3)(a), (d)–(c); *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11(1)(a)–(c). The relevant provision of the current Western Australian Act is *Surrogacy Act 2008* (WA) ss 6(3)(a), (c). However, once new Western Australian legislation commences in mid-2027, it will become *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107(2)(a), (d), (h).

8 *Parentage Regulation 2024* (ACT) regs 4(1)(b), (c); *Surrogacy Act 2010* (NSW) ss 7(3)(b), (c); *Surrogacy Act 2022* (NT) s 12(2)(e), (g); *Surrogacy Act 2010* (Qld) ss 11(2)(c), (g); *Surrogacy Act 2012* (Tas) ss 9(3)(c), (g); *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11(1)(d), (f); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 108(2)(e), (f) (it should be noted that this Act has been passed but it not yet in force. The Act currently in force does not refer to these expenses, except for insurance). We note that the South Australian Law Reform Institute recommended that legislation be amended to include travel and accommodation costs and insurance costs: South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) rec 53.

- All states and territories allow for the recovery of the surrogate's loss of earnings on medical grounds or at the time of the birth,[9] though only the Australian Capital Territory and Victoria allow for reimbursement for the loss of the surrogate's partner's earnings due to unpaid leave taken to care for the surrogate.[10]
- South Australia is the only jurisdiction to explicitly provide for the surrogate's loss of income when attending medical appointments.[11]

8.11 **Table 8.1** depicts at a high level the categories of costs that each state and territory's legislation expressly provides for. It is not clear why some jurisdictions chose to expressly include some costs and not others.

Table 8.1: Categories of costs expressly included in state and territory legislation

Permitted costs	ACT	NSW	NT	Qld	SA	Tas	Vic	WA (old)	WA (new)
Medical, legal, counselling	✓	✓	✓	✓	✓	✓	✓	✓	
Medical costs for child born through surrogacy	✓	✓	✓	✓	✓	✓	✓	✓	
Travel and accommodation	✓	✓	✓	✓		✓	✓		✓
Insurance premiums	✓	✓	✓	✓		✓	✓	✓	
Lost earnings	✓	✓	✓	✓	✓	✓	✓	✓	
Partner's lost earnings	✓						✓		

9 *Parentage Regulation 2024* (ACT) regs 4(1)(d), (e), (g); *Surrogacy Act 2010* (NSW) s 7(3)(e); *Surrogacy Act 2022* (NT) s 12(2)(f); *Surrogacy Act 2010* (Qld) s 11(2)(f); *Surrogacy Act 2019* (SA) s 11(1)(b); *Surrogacy Act 2012* (Tas) s 9(3)(f); *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 11(1)(e); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 107(2)(c). It should be noted that the Western Australian Act has been passed but is not yet in force. The relevant provision of the current Act is: *Surrogacy Act 2008* (WA) s 6(3)(b).

10 *Parentage Regulation 2024* (ACT) reg 4(1)(g); *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 11A(1)(d).

11 *Surrogacy Regulations 2020* (SA) reg 5(a).

Surrogates are left out of pocket

8.12 Surrogates are often left out of pocket, and therefore financially disadvantaged, as a direct result of their role as a surrogate. This can occur for a range of reasons.

8.13 First, surrogates should be reimbursed for all costs (as well as lost earnings) reasonably incurred by reason of the surrogacy. As demonstrated above, the reasonable costs listed in legislation differ across jurisdictions, so a surrogate may not be reimbursed in relation to a category of cost that is expressly identified as reasonable elsewhere. A surrogate would not have incurred costs such as the expenses of travel, accommodation, and insurance premiums if it were not for the surrogacy arrangement, an arrangement which is made and carried out for the benefit of the intended parents.

8.14 In those jurisdictions that do not require all costs reasonably incurred to be payable, recovery is confined to those categories of costs expressly specified. The specified categories are limited and do not cover all costs reasonably incurred. Consequently, for some costs that are reasonably incurred, surrogates are unfairly required to bear those costs themselves.

8.15 Second, as stated earlier, in most states and territories the legislation allows for reimbursement of any cost associated with entering or giving effect to the surrogacy arrangement, as long as the cost is reasonably incurred.[12] This broad requirement is then exemplified by the inclusion of what is intended to be a non-exhaustive list of categories of costs.[13] However, in practice, emphasis is placed on the list of examples when parties to a surrogacy agreement construe whether particular costs incurred by the surrogate are reasonable costs that may be recovered. The intended non-exhaustive list is thereby treated as exhaustive and the surrogate is unfairly left to pay for any reasonably-incurred costs that are not expressly listed.

8.16 We have heard that surrogates are left out of pocket for expenses incurred as a direct result of the surrogacy if the costs do not clearly fall within a stipulated category.[14] Submissions recounted instances where surrogates were left out of pocket, usually due to confusion or disagreement about reimbursable expenses,[15]

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12 *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; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 108. It should be noted that the Western Australian Act has been passed but is not yet in force. The relevant provision of the current Act is: *Surrogacy Act 2008* (WA) s 6.

13 With the exception of the Australian Capital Territory, South Australia, and Victoria, where reasonable costs are limited to the costs listed in legislation: *Parentage Act 2004* (ACT) s 24; *Parentage Regulation 2024* (ACT) reg 4; *Surrogacy Act 2019* (SA) s 11; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Assisted Reproductive Treatment Regulations 2019* (Vic) regs 11–11A.

14 S Jefford, *Submission 128*.

15 Name withheld, *Submission 21*; Name withheld, *Submission 62*; M Montrone, *Submission 263*; Name withheld, *Submission 286*; Name withheld, *Submission 347*.

including in relation to post-partum vitamins and hormone-balancing supplements,[16] and psychological support for a surrogate's partner.[17] Some submissions remarked that costs directly connected to the surrogacy, such as maternity clothing, are often not reimbursed because they are not explicitly referred to in legislation.[18] Intended parents may err on the side of caution not necessarily because they do not want to reimburse the surrogate, but due to concern that paying for costs that the legislation does not expressly permit could result in the surrogacy arrangement being categorised as unlawful, which may lead to them being denied legal parentage.[19]

8.17 The stress created by fear of misinterpretation and the confusion due to a lack of clarity about what constitutes a reasonable cost was also frequently raised in submissions.[20] For example, one submission from a parent through surrogacy noted that

> navigating what expenses were 'reasonable' for reimbursement was unclear and stressful. There is no national guideline, which can leave surrogates unprotected and intended parents unsure.[21]

8.18 Another submission from a surrogate observed that the current system 'creates confusion and anxiety for both surrogates and intended parents, and leaves too much room for misinterpretation or even legal risk'.[22] Empirical research conducted by Kneebone et al echoes these sentiments, finding surrogates can be left out of pocket due to disagreements about reasonable expenses.[23]

8.19 Given that surrogates are engaging in an act of profound generosity, it is concerning that they commonly absorb some of the economic costs of the surrogacy arrangement. Further, this failure to fully cover the economic cost associated with being a surrogate is also likely a barrier to Australians considering acting as surrogates, as observed by one anthropologist during consultations.

8.20 The way in which surrogates are reimbursed also contributes to this phenomenon, as it frequently relies on surrogates requesting reimbursement directly from intended parents. This is discussed in greater detail below (**Recommendation 25**).

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16 Name withheld, *Submission 21*.
17 Name withheld, *Submission 339*.
18 T Trevor, *Submission 258*; M Montrone, *Submission 263*.
19 Name withheld, *Submission 347*.
20 T Trevor, *Submission 258*; Switchboard Victoria, *Submission 285*; Name withheld, *Submission 329*; Name withheld, *Submission 339*.
21 Name withheld, *Submission 66*.
22 Name withheld, *Submission 117*.
23 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, 13.

A broader, clearer, and more consistent approach

8.21 **Recommendation 23** adopts the principle that surrogates should never be left out of pocket for reasonable costs (and loss of earnings) incurred in relation to the surrogacy arrangement. It responds to the deficiencies described above, and:

- requires intended parents to reimburse surrogates for all costs reasonably incurred in relation to the arrangement;
- expands the illustrative list of categories of reasonable costs; and
- provides for prior approval for the recovery of costs incurred three months or more following a birth, miscarriage, stillbirth, or the termination of a pregnancy.

8.22 The ALRC also recommends that the National Regulator develop guidelines providing clarity in relation to which costs are to be treated as reasonably incurred (**Recommendation 6**).

8.23 The proposed legislation would to an extent mirror existing cost recovery provisions, with some notable divergence. As is already the case in most states and territories, the proposed legislation would allow reimbursement of any reasonable cost incurred in relation to the surrogacy arrangement as well as loss of earnings. However, this recommendation reflects the need for legislation in all states and territories to provide that all costs reasonably incurred are recoverable and for greater clarity and consistency about the categories of costs that are to be treated as reasonably incurred. As parties frequently refer to the legislated list of costs to interpret the meaning of 'reasonable cost', the costs listed should be as exhaustive as practicable. By expressly identifying a broad range of reasonable costs, the recommendation mitigates the risk that surrogates will not be reimbursed for costs that often fall into 'grey areas' not explicitly mentioned in legislation, such as maternity clothes and pregnancy supplements.

8.24 Reimbursing surrogates for the reasonable costs outlined in **Recommendation 23** would not make a surrogacy arrangement for profit or reward. **Recommendation 1** would continue the current prohibition on surrogacy arrangements that are for profit or reward. **Recommendation 23**, as well as **Recommendation 24** dealing with the recovery of non-economic loss, would work in tandem with **Recommendation 1**. The proposed legislation would only permit the recovery of reasonably incurred costs and losses. It would prohibit payments made to reward the surrogate for providing any service or work in relation to gestation, birth or any other function carried out in relation to the surrogacy. The rationale for this position is discussed above, and in **Chapter 2**. To address situations where intended parents do not reimburse surrogates, including where they are unsure about what is lawful, **Recommendation 23** is structured to permit reimbursement of all reasonable expenses. Parties would be supported to determine what is reasonable with the help of guidance from the National Regulator.

Preventing surrogates from being out of pocket

8.25 As discussed above, it is generally acknowledged that the limited categories of cost set out in the current legislation can lead to surrogates using their own finances to support the arrangement. The ALRC takes the view that surrogates should not be left financially disadvantaged as a result of the surrogacy arrangement. **Recommendation 23** addresses the risk of unfairness and exploitation that can arise in situations where the surrogate is made to pay for expenses incurred in relation to the surrogacy arrangement. A consistent, clear, unambiguous approach must be adopted for reimbursement of costs to acknowledge the full scope of the reasonably incurred costs involved.

8.26 The approach to reimbursement of costs should be consistent across Australia, ensuring that surrogates have the same entitlements no matter where they reside, to improve fairness and consistency. Providing a broad and comprehensive list of categories of reasonable costs will help to remove ambiguity as to what is or is not a reasonably incurred cost. This will help to ensure surrogates are treated fairly as well as reduce the tensions that can arise due to ambiguity. Making reimbursement easier to navigate not only protects the parties to the arrangement, but also children born through surrogacy. As family creation lawyer, Sarah Jefford, noted in her submission:

> [i]t is in a child's best interests that their parents and the birth parents maintain an ongoing relationship well beyond their birth. Disputes about finances undermine and risk the relationships at the cost of the child knowing their birth parents and at the parties' wellbeing.[24]

8.27 Improving the clarity of reimbursement provisions received broad support in submissions,[25] as did better defining reasonable costs uniformly across the country, as a way to make domestic surrogacy easier to navigate.[26]

8.28 A consistent, clear, and unambiguous approach to reasonable costs has been recommended or adopted in previous inquiries and internationally:

- In 2023, the Western Australian Ministerial Expert Panel Report recommended that reasonable costs should be expanded 'to reflect modern practice', and that surrogates be reimbursed for actual costs incurred.[27]
- The 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report took a similar approach, recommending that intended parents should be able to reimburse surrogates for any cost that would not otherwise have been incurred, with

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24 S Jefford, *Submission 128*.

25 See, eg, Name withheld, *Submission 28*; Name withheld, *Submission 44*; Name withheld, *Submission 52*; Name withheld, *Submission 138*; Name withheld, *Submission 148*; Name withheld, *Submission 161*; Name withheld, *Submission 185*; Name withheld, *Submission 238*; ANZICA, *Submission 277*; Name withheld, *Submission 329*; Name withheld, *Submission 343*; Not published, *Submission 345*; Virtus Health, *Submission 397*; E Kneebone, *Submission 415*; Australian Human Rights Commission, *Submission 433*.

26 Name withheld, *Submission 44*; Name withheld, *Submission 146*.

27 Department of Health (WA), *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy* (Final Report, 2023) 46, rec 26.

reference to a list of commonly incurred expenses, and further guidance to be provided.[28]

- In Canada, reimbursement must occur in accordance with regulations that provide for a wide range of reimbursable costs, including: travel; care of dependents or pets; counselling and legal services; products or services recommended by an authorised person; services of a midwife or doula; insurance; and loss of income.[29]
- In the United Kingdom, the 2023 Law Commission of England and Wales, and Scottish Law Commission Report recommended a comprehensive approach to reimbursement that permitted intended parents to pay the surrogate for costs that included: pregnancy-related items; domestic support; travel and accommodation; and lost earnings.[30]

Reasonable costs

8.29 The non-exhaustive list of reasonable costs categories provided in **Recommendation 23** has been developed by building on the existing categories in state and territory legislation. At their broadest, these include: medical, legal, and counselling costs, travel and accommodation, health, life, and income protection insurance, lost earnings, the surrogate's partner's (if any) lost earnings, and the surrogate's partner's (if any) costs in relation to legal advice and counselling. We have taken these costs as a baseline to which we have added other commonly incurred reasonable expenses.

8.30 Additional categories have been added as appropriate, with reference to the costs categories raised in submissions, recommendations made in previous inquiries, and some extrinsic materials. It was noted in consultations that Canada's broad approach to reasonable expenses (discussed above) is an appropriate model, and the ALRC agrees with many of the categories put forward by the 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report.[31] Submissions raised a wide range of costs that should be included in legislation, and they will not all be canvassed here. Of particular assistance were Surrogacy Australia's expenses list,[32] and the costs listed on family creation lawyer, Sarah Jefford's, website.[33] To the existing categories already commonly found in legislation, **Recommendation 23** would add:

- pregnancy-related items;[34]

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28 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) recs 46–7.

29 *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, regs 4, 5, 8.

30 Law Commission of England and Wales and Scottish Law Commission (n 1) recs 55(1)–(2).

31 Te Aka Matua o te Ture | Law Commission (NZ) (n 28) rec 47.

32 Surrogacy Australia, *Submission 417*.

33 Sarah Jefford, 'Surrogacy Costs in Australia' <www.sarahjefford.com/surrogacy-costs-in-australia/>.

34 Name withheld, *Submission 28*; Name withheld, *Submission 96*; S Everingham, *Submission 129*; L Tripodi, *Submission 168*; Not published, *Submission 220*.

- wellbeing costs;[35]
- care of dependants;[36]
- additional assistance where the surrogate is unable to perform daily tasks;[37]
- travel and accommodation for any necessary support person;
- birth support;[38]
- any product or service recommended by the surrogate's healthcare provider;[39] and
- healthcare expenses following the birth of the child, a miscarriage, or stillbirth.[40]

8.31 The ALRC recommends that legislation require intended parents to also reimburse the surrogate's partner (if any) for any of the (relevant) reasonable expenses incurred in relation to the surrogacy arrangement, as these would also not have been incurred were it not for the arrangement. This may include lost earnings while undertaking caring duties, or travel and accommodation while accompanying the surrogate to medical appointments and counselling.[41]

8.32 We also recommend that legislation provide for a monthly allowance to cover incidental expenses, and that the National Regulator should be empowered to develop standards, such as an appropriate cap, in relation to this allowance. The monthly allowance would reimburse surrogates for common incidental expenses for which receipts are difficult to obtain. It is also intended to lessen the burden of record-keeping for costs that are low in value or difficult to prove, or amounts that are difficult to quantify. It would cover costs such as fuel used to drive to appointments, parking, or a bottle of water from a vending machine while attending an appointment. This allowance should be subject to a cap set by the National Regulator due to the need for clarity around a category that is otherwise highly open to interpretation.[42] The National Regulator should also develop guidelines to assist parties to understand what the monthly allowance should be used for, and what should be the subject of a reimbursement. The ALRC does not anticipate that the amount of this allowance would be significant.

8.33 Under this approach, beyond the requirement that all costs reasonably incurred be payable, the broad categories of reasonable costs would be contained in legislation. The National Regulator would be tasked with developing further guidance about what falls within the legislative description of 'all costs and economic loss reasonably incurred'. The guidance would not be binding but would assist parties

35 Law Commission of England and Wales and Scottish Law Commission (n 1) recs 55(1)–(2).
36 Name withheld, *Submission 28*; Name withheld, *Submission 96*; K Cox, *Submission 105*; Name withheld, *Submission 113*; S Everingham, *Submission 129*; L Tripodi, *Submission 168*; Not published, *Submission 220*.
37 Name withheld, *Submission 96*; S Everingham, *Submission 129*.
38 S Everingham, *Submission 129*.
39 Ibid 13; *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, regs 4, 5, 8.
40 Name withheld, *Submission 28*; K Cox, *Submission 105*.
41 Equality Australia, *Submission 253*.
42 J Attawet, *Submission 360*.

to understand what the legislation requires. The 2018 South Australian Law Reform Institute Report similarly recommended that broad categories of entitlements are contained in legislation, supplemented by further information on the typical range of costs in a surrogacy arrangement.[43]

8.34 To aid understanding of the recommended categories, **Table 8.2** provides a range of examples that would likely come under each category.

Table 8.2: Examples of reasonable expenses

Category	Examples
Costs related to assessments and other preconditions that are required for a surrogacy agreement to be compliant with the legislative requirements for approval	Legal advice, medical assessments, counselling, psychological assessments
Medical and wellbeing costs	Pregnancy tests, physiotherapy appointments, pre-natal classes, GP or OBGYN appointments, pregnancy massages, maternity pads, breast pump hire
Pregnancy-related items, including dietary items and supplements	Folic acid and other supplements, maternity clothing, body pillows or heat packs
Care of dependants	Childcare during appointments and hospital stays
Additional assistance if unable to perform daily tasks	Meal or grocery delivery, house cleaning
Travel and accommodation for the surrogate and any necessary support person	Petrol, parking, or transport fares when attending appointments, accommodation if appointments are away from home
Loss of earnings	Earnings lost as a result of being unable to work This also applies to the surrogate's partner (if any), and includes superannuation that would have accrued
Health, life, and income protection insurance	This will include insurance premiums both during the surrogacy arrangement and following the birth of a child, miscarriage, or stillbirth

43 South Australian Law Reform Institute (n 8) recs 53, 55.

Category	Examples
Birth support	A doula, private midwife, hospital costs
Any product or service recommended by the surrogate's healthcare provider	Such as allied health services
Post-birth healthcare	Post-birth counselling, supplements, pain relief

Alternative views

8.35 The ALRC received some submissions disagreeing with the idea that all reasonable costs should be recoverable, arguing that the recovery of all costs makes surrogacy arrangements commercial, can act as an inappropriate incentive, or risks financial abuse of intended parents by surrogates.[44] These submissions appear to prefer a system in which surrogates bear certain costs themselves. However, no clear explanation is provided to support the view that reimbursement of all reasonable economic costs constitutes 'commercial surrogacy'. In the ALRC's view, there is no justification for this assertion, or the view that the recovery of costs already incurred would provide an inappropriate incentive. While those assertions may be valid if surrogates were profiting from the arrangements, for the reasons already discussed, an arrangement for profit or reward is very different in nature and effect to an arrangement involving reimbursement of costs and losses. Such reimbursement cannot be sensibly characterised as involving a commercial transaction, nor does it provide a financially advantageous inducement.

8.36 By limiting reimbursement to those costs that are reasonably incurred, **Recommendation 23** will disallow unreasonable claims upon intended parents. There is no risk of exploitation of intended parents brought about by requiring them to pay all the reasonable costs incurred by a surrogate.

8.37 Nevertheless, the ALRC is aware that the cost of surrogacy in Australia can already be high, and that this can be a barrier to domestic surrogacy. Depending on the number of IVF cycles needed, we have heard that surrogacy in Australia often costs between $15,000 and $100,000,[45] with a possible average of approximately $85,000.[46] Providing greater clarity in relation to claimable reasonable expenses may add to this cost as parties will have a more comprehensive understanding of the costs for which surrogates must be reimbursed. The costs payable by intended parents may not change significantly and, if they do, the change is justified because unfairness and potential exploitation of the surrogate should not be a basis for costs savings to intended parents. We also note that other recommendations in this Report

44 FamilyVoice Australia, *Submission 232*; Stop Surrogacy Now UK and Surrogacy Concern, *Submission 303*; Australian Christian Lobby, *Submission 419*.
45 S Jefford, *Submission 128*; S Page, *Submission 130*.
46 S Everingham, *Submission 129*.

are aimed in part at making surrogacy more financially accessible, such as those relating to Medicare rebates for assisted reproductive technology ('ART') services, psychological assessments, and counselling (**Recommendations 26–27**), and removing the need for intended parents to incur legal expenses and court fees where parties are on the administrative pathway to legal parentage (**Recommendation 28**).

Reimbursement in practice

8.38 The ALRC recommends that the timeframe for reimbursement commence once the agreement is approved or otherwise entered into (if on the judicial pathway). Expenses will be incurred before this point, for example in relation to medical screening. These can be reimbursed either once the agreement is approved, directly between the parties as they occur, or Surrogacy Support Organisations ('SSOs') can manage reimbursements of costs relating to early screening and safeguard requirements as part of their internal processes.

8.39 Surrogates will continue to incur reasonable costs after the birth of the child. The Australian Nursing and Midwifery Federation suggested in its submission that reimbursement of reasonable costs continue for three to six months post birth.[47] Similarly, a representative of Surrogacy Australia submitted that it extend to two or three months post birth.[48] The ALRC recommends that the reimbursement process continue to take place in the same way as it had done during the pregnancy, for three months after the birth of a child (or the point at which the arrangement concludes in another way).This period is often referred to as the 'fourth trimester'.

8.40 However, we consider that the process for the reimbursement of costs (other than costs associated with serious injury) should be altered to protect against claims for reimbursement which are not reasonable. Where costs have been reasonably incurred with the prior approval of the SSO, the costs will be payable. To be payable the costs must have been reasonably incurred and, despite the prior approval of the SSO, if the intended parents dispute the claim the surrogate will nevertheless be required to prove that the costs were reasonably incurred. However, where the prior approval of the SSO has not been obtained, the costs incurred will not be payable unless a court is satisfied that the costs were reasonably incurred. We would expect that most disputes will be reasonably resolved with the assistance of the SSO and with regard to the different approach to when costs are payable provided for by this recommendation.

8.41 In our Discussion Paper, we asked whether the National Regulator should be empowered to set caps on the amounts that can be recovered for specific costs, and for the monthly allowance. Consistent with our principle that the surrogate should not be financially disadvantaged as a result of the surrogacy arrangement, we do not recommend that the National Regulator place caps on each category of reasonable expenses, except for the monthly allowance discussed above, as this

47 Australian Nursing and Midwifery Federation, *Submission 375*.
48 A McKie, *Submission 264*.

could leave surrogates out of pocket for reasonable costs above the set cap. The requirement for costs to be 'reasonable' is a safeguard against unreasonable claims. The National Regulator would provide additional guidance on determining whether a cost is 'reasonable' (see **Recommendation 6**) to support parties to comply with this requirement.

Optional reimbursement for non-economic and extraordinary loss

Recommendation 24

1. Legislation should provide that a surrogacy arrangement is not for profit or reward (**Recommendation 1**) by reason only of the entitlement to the payments provided for in this recommendation.
2. Legislation should provide that where a surrogate has elected to receive a payment to recover non-economic losses and it forms part of a compliant surrogacy agreement (**Recommendation 20**):
    a. the intended parent(s) must make a monthly payment to the surrogate to redress the commonly experienced non-economic losses resulting from pregnancy and childbirth, such as the physical and psychological impacts, and loss of amenity. The monthly payment must not exceed any maximum amount set in accordance with paragraph 2(b); and
    b. the National Regulator should be empowered to set a maximum cap for the non-economic loss payment (**Recommendation 6**).
3. Legislation should provide that, where a surrogate has elected to receive a payment to recognise an extraordinary loss, and this forms part of a compliant surrogacy agreement (**Recommendation 20**):
    a. the intended parent(s) must make an additional payment to the surrogate to redress extraordinary loss arising from any serious medical complications during the pregnancy or childbirth (including, for example, stillbirth or hysterectomy). The payment must not exceed any maximum amount set in accordance with paragraph 3(c);
    b. the National Regulator should develop guidelines to identify events that would give rise to the extraordinary loss payment (**Recommendation 6**); and
    c. the National Regulator should be empowered to set a maximum cap for permitted extraordinary loss payments (**Recommendation 6**).

Non-economic and extraordinary losses not currently recognised

8.42 As discussed above, all states and territories permit the reimbursement of costs, but the extent to which costs must be reimbursed varies. Most states and territories permit the recovery of economic loss limited to loss of earnings. Reimbursing surrogates for any costs or losses incurred beyond legislated reasonable costs is prohibited.[49]

8.43 Australia's current policy settings in relation to cost and loss recovery mean that surrogates are not able to recoup non-economic losses sustained through agreeing to carry a pregnancy for intended parents. As discussed above, the implementation of **Recommendation 23** would entitle surrogates to reimbursement for the full range of economic costs reasonably incurred. However, the impacts of pregnancy and birth extend beyond economic costs to considerable non-economic loss that surrogates sustain as a direct result of their role as a surrogate. The common law recognises a wide range of categories of non-economic loss, some of which are relatable to the experiences of pregnancy and childbirth. Under the category of 'pain and suffering', the common law recognises not just pain, but associated harm such as discomfort, inconvenience and frustration.[50] In addition, the common law can provide redress for loss of amenity, which is the loss of capacity to lead the life the person ordinarily would have led, such as engaging in their hobbies, sport, or work.[51]

8.44 There is common law precedent for recognising the physical and psychological impacts and loss of amenity experienced during pregnancy and childbirth.[52] In the case of *Melchior v Cattanach*, damages in the amount of $30,000 were awarded in relation to non-economic loss arising from a pregnancy and birth resulting from medical negligence.[53] These damages recognised that there is 'inevitably a degree of pain, discomfort, and inconvenience associated with any pregnancy and birth', which included 'the usual back aches and morning sickness and loss of agility'.[54] Of the amount awarded, an unspecified proportion was to cover additional health concerns experienced by the plaintiff over and above the inevitable pain and loss of amenity.[55] The Supreme Court of Queensland Court of Appeal subsequently upheld this decision.[56]

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49 *Parentage Act 2004* (ACT) ss 40, 41; *Surrogacy Act 2010* (NSW) ss 8, 9; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) ss 10, 56, 57; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40; *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) ss 6, 8. New Western Australian legislation commencing in mid-2027 will retain this: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107, 112.

50 *Admiralski v Stehbens* [1960] Qd R 510; *Wickham v Treloar* [1960] NSWR 86.

51 Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 2016) 395.

52 *Melchior v Cattanach* (2001) 217 ALR 640. See also Paul Vout, *Torts – The Laws of Australia* (Thomson Reuters, 2016) 877.

53 *Melchior v Cattanach* [2000] QSC 285 [63]–[72].

54 Ibid [63].

55 Ibid [72].

56 *Melchior v Cattanach* (2001) 217 ALR 640 [139]–[141].

8.45 We received many submissions that offered a less legalistic description of the impacts of pregnancy and childbirth, for example:

- the 'physical, emotional, and logistical toll';[57]
- the 'intangible costs to the surrogate that can't be quantified. … She gives up little pieces of herself throughout the entire process, before, during and after the actual pregnancy and birth';[58] and
- the act of the surrogate 'put[ting] her body and life on the line'.[59]

8.46 More broadly, a large number of submissions recognised that pregnancy and childbirth involve physical and emotional sacrifices.[60] While experiences of pregnancy vary greatly, it is usual for many people to suffer morning sickness, high levels of fatigue, body aches and pains, cramps, swelling, difficulty sleeping, and changes in behaviour and mood.[61] Further, it is well established that childbirth can involve significant physical pain.[62]

8.47 In addition, pregnancy and birth are processes that can sometimes present serious or life-threatening health complications, also known as obstetric emergencies. There are a range of obstetric emergencies that can arise, such as ectopic pregnancy, preeclampsia, and rupture of the uterus.[63] These conditions can lead to complications that are not always able to be predicted. The surrogate may not be out of pocket for the direct medical costs associated with these complications. Nevertheless, in the case of extraordinary medical complications, surrogates are left with significant pain, suffering, and loss, without any redress.

8.48 Australia's current surrogacy laws leave surrogates unable to recover these non-economic losses. As a result, the current system does not recognise or provide redress for the full range of costs and losses associated with being a surrogate. Just as where a surrogate incurs a cost or economic loss, when a surrogate suffers non-economic loss arising from the surrogacy, that is suffered for the benefit of others, and so fairness and equity require that the persons who take that benefit should bear the burden of the cost as well as the loss suffered or incurred.

8.49 The current law's failure to recognise and redress the full detrimental impact of the surrogacy arrangement on the surrogate also has a chilling effect on Australians'

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57 Name withheld, *Submission 126*.

58 Name withheld, *Submission 160*.

59 Name withheld, *Submission 22*.

60 See, eg, Name withheld, *Submission 28*; Name withheld, *Submission 61*; Name withheld, *Submission 69*; Not published, *Submission 82*; Name withheld, *Submission 97*; Equality Australia, *Submission 253*; Name withheld, *Submission 278*; Donor Conceived Families Australia, *Submission 311*; Not published, *Submission 358*.

61 Department of Health (Vic), 'Pregnancy Stages and Changes' <www.betterhealth.vic.gov.au/health/healthyliving/pregnancy-stages-and-changes>.

62 Ruchika Garg (ed), *Labour and Delivery: An Updated Guide* (Springer Nature Singapore, 2023) 168–9. See also *Melchior v Cattanach* [2000] QSC 285 [37]–[63].

63 Department of Health (Vic), 'Pregnancy and Birth-Related Emergencies' <www.betterhealth.vic.gov.au/health/healthyliving/pregnancy-and-birth-related-emergencies>.

willingness to act as surrogates.[64] If a person considering being a surrogate is assured that they will not be financially disadvantaged or be burdened with the cost and loss of being a surrogate that person is more likely to become a surrogate. This was a point consistently made in submissions.[65] One submission aptly illustrated this view:

> [e]xpecting women to undertake the physical, emotional, and logistical burden of pregnancy — including time off work, medical risks, and long-term bodily changes — with no compensation beyond expenses is neither fair nor sustainable. It places an unreasonable expectation on surrogates to give so much of themselves purely out of generosity, and ultimately discourages many women who might otherwise consider becoming a surrogate if their contribution were properly recognised.[66]

Recognising surrogates' non-economic and extraordinary losses

8.50 **Recommendation 24** allows the surrogate to be recognised and elect to be provided redress for the physical and psychological impacts of the surrogacy, without profiting from the arrangement or being induced to act as a surrogate. It does so by reference to categories of non-economic loss recognised by the common law and discussed above, including the pain and suffering and loss of amenity resulting from pregnancy and childbirth. The recognition and redress would be provided by two payments that can be made at the surrogate's election:

- **A non-economic loss payment for commonly experienced loss** — An optional monthly payment to recognise and provide redress for non-economic loss commonly experienced by a surrogate. For example, this would recognise any physical and psychological impacts and loss of amenity associated with pregnancy and childbirth.
- **An extraordinary loss payment** — An optional payment to be made to recognise and provide redress for non-economic loss arising from extraordinary medical complications.

8.51 Legislation should make it clear these payments do not infringe the prohibition on payments made for profit or reward.[67] It is important that the parties to a surrogacy arrangement understand that such payments are permitted.

8.52 Surrogates may elect to receive one or both of these payments. If the surrogate elects to receive either payment, this would be included in the surrogacy agreement

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64 J Attawet, *Submission 34*; Name withheld, *Submission 114*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Rainbow Families, *Submission 260*.

65 Name withheld, *Submission 10*; Name withheld, *Submission 162*; Name withheld, *Submission 207*; Name withheld, *Submission 210*; Name withheld, *Submission 259*.

66 Name withheld, *Submission 259*.

67 The National Health and Medical Research Council's Ethical Guidelines would also need to be updated to reflect this, as ART service providers must comply with the Guidelines in order to operate.

(**Recommendation 20**). 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 these payments.

8.53 Although the payments were differently labelled and described in the Discussion Paper, there was significant support in submissions for the idea underpinning non-economic loss and extraordinary loss payments.[68] Most opposition came from those opposed to surrogacy more broadly.[69]

Maximising key objectives without increasing risks

8.54 The two optional payments align with the existing policy objectives of Australia's surrogacy framework, including that surrogates should not profit, but equally should not suffer loss as a result of the surrogacy arrangement, although the current legislation fails to fully recognise the costs and losses incurred by being a surrogate. The recommended optional payments are payments in recognition of actual losses incurred by surrogates, expanding upon the categories already provided for in legislation.

8.55 The optional payments support several important outcomes. First, reimbursing surrogates for more of the actual losses of surrogacy promotes fairness. Constraining reimbursement and recovery for loss for acting as a surrogate could be viewed as itself exploitative. In an industry where many people profit — the doctors, the lawyers, the ART service providers, the counsellors — it may be viewed as inherently exploitative to insist that the person taking the greatest risk and shouldering the most acute impacts cannot fully recoup the cost and loss experienced as a direct result of being a surrogate. Submissions frequently highlighted this unfairness.[70] Importantly, the failure to recognise and redress these detriments may be exploitative of the surrogate's act of generosity.[71]

8.56 Furthermore, this recommendation as well as **Recommendation 23** have the additional benefit of addressing one of the key barriers to domestic surrogacy: the difficulty of finding a surrogate. As widely discussed in this Report, intended parents currently have difficulty finding a surrogate if a family member or friend is not willing and

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68 See, eg, Not published, *Submission 358*; J Attawet, *Submission 360*; Name withheld, *Submission 372*; Australian Nursing and Midwifery Federation, *Submission 375*; K Hammarberg, *Submission 377*; M Quinlan, *Submission 381*; Name withheld, *Submission 383*; K Cox, *Submission 389*; Virtus Health, *Submission 397*; Relationships Australia, *Submission 404*; Z Mahmoud, *Submission 414*; E Kneebone, *Submission 415*.

69 Child Identity Protection, *Submission 388*; Australian Catholic Bishops Conference, *Submission 403*; Feminist Legal Clinic Inc., *Submission 409*; FINRRAGE, *Submission 410*; Women's Forum Australia, *Submission 416*.

70 See, eg, Name withheld, *Submission 22*; Name withheld, *Submission 54*; J Holder, *Submission 142*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Name withheld, *Submission 207*; S Swanepoel, *Submission 226*; Rainbow Families, *Submission 260*.

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

able to assist them.[72] The dearth of surrogates is one of the main reasons Australian intended parents turn to overseas surrogacy.[73] Promoting fairness and protecting surrogates' financial interests by recognising the economic costs and non-economic losses associated with being a surrogate is likely to make becoming a surrogate in Australia more appealing. In 2023, the Law Commission of England Wales, and Scottish Law Commission, came to a similar conclusion. The Commissions' Report noted that it is possible that non-commercial reimbursement could be enough to improve the availability of surrogates, because potential surrogates would not need to fund the cost of the pregnancy for the intended parents.[74] Several submissions to this Inquiry also supported this view.[75] As we heard in a submission from a person who has been a surrogate:

> I have often described it as something akin to live organ donation — a selfless act of compassion and care to help another person create life. Just as we do not expect people to be paid for donating a kidney or part of their liver, I never felt I should be paid for helping to bring her child into the world.
>
> That said, I also recognise the challenges others face when considering surrogacy. The current altruistic model, while ethically grounded, can place significant emotional, physical, and financial strain on surrogates — particularly those who may not have access to adequate support, leave entitlements, or financial flexibility. For some, compensation could offer recognition of the toll the process can take, and could open the door for more women to consider becoming surrogates when they might otherwise be unable to afford to do so.[76]

8.57 We note, however, that despite the strong anecdotal evidence there is little available empirical evidence as to whether a fairer system of cost and loss recovery will have this effect.

8.58 The ALRC anticipates that **Recommendation 24** could raise concerns for some about departing from Australia's stance in relation to altruistic surrogacy, and the risk of financial inducement, as discussed above. For the same reasons as those expressed above, the ALRC considers that concerns that payments which redress non-economic loss are commercial or act as an undue inducement are not justified.

8.59 We note further that there are specific and valid concerns about the impact that compensation levels can have on women experiencing marginalisation, for example, due to economic status or ethnicity.[77] The 2025 UN Special Rapporteur on Violence Against Women and Girls Report found that exploitation occurs because surrogates

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72 Kneebone et al found that more than half of those who chose overseas surrogacy did so because they could not find a surrogate in Australia: 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, 1452.

73 Kneebone et al (n 72).

74 Law Commission of England and Wales and Scottish Law Commission (n 1) 17 [1.65].

75 P Hadfield-Jia, *Submission 71*; S Nicholes, *Submission 79*; Name withheld, *Submission 137*.

76 Name withheld, *Submission 279*.

77 Karen Busby and Delaney Vun, 'Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26(1) *Canadian Journal of Family Law* 13, 41–2.

are often vulnerable women experiencing financial disadvantage and discrimination, who become trapped in 'unequal power dynamics'.[78] However, empirical studies from economically and socially comparable jurisdictions to Australia, including the United Kingdom and United States of America, indicate that in general, people who choose to be surrogates in those countries are not economically or socially vulnerable.[79] By contrast, one study from the United States of America found that, even within the context of a commercial surrogacy system, the vast majority of surrogates are motivated by 'altruistic or prosocial' reasons.[80] This indicates that many of the concerns about exploitation relate to the practice of 'commercial' surrogacy in overseas jurisdictions with significant income inequality and insufficient regulation, conditions that are not present in Australia currently and which will be further avoided if the regime proposed by the ALRC is implemented.

8.60 The recommendations in this Report create a supported surrogacy framework in which protecting surrogates' rights is a central objective at every stage. Appropriate eligibility and process requirements, such as the surrogate receiving independent legal advice (**Recommendation 17**) and counselling (**Recommendation 18**) would work together to better ensure that a potential surrogate makes a free and well-informed decision as to whether to participate in surrogacy and thus act as a safeguard against inducement and potential exploitation. A further safeguard, which imposes caps on the maximum amounts of the payments permitted under **Recommendation 24**, is discussed below.

8.61 The recommendations in this chapter have been carefully tailored to ensure surrogacy does not amount to the sale of children in contravention of the Convention on the Rights of the Child.[81] As discussed in **Chapter 14**, **Recommendations 23** and **24** have been carefully tailored to ensure surrogacy does not amount to the sale of children. They do not authorise any 'act or transaction whereby a child is transferred … to another for remuneration or any other consideration'.[82] Rather, these recommendations are aimed at ensuring that the surrogate is reimbursed for reasonable costs and losses connected to being a surrogate. Therefore, any reimbursement is directly referable to the cost or loss experienced by the surrogate and cannot be construed as remuneration or consideration, let alone remuneration paid or consideration provided *for* the child. This is bolstered by **Recommendation 1**, which would prohibit domestic surrogacy for profit or reward.

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78 Reem Alsalem, 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) 10 [23]. See also **Chapter 14**, which addresses this report in greater detail.

79 José Ángel Martínez-López and Pilar Munuera-Gómez, 'Surrogacy in the United States: Analysis of Sociodemographic Profiles and Motivations of Surrogates' (2024) 49(4) *Reproductive BioMedicine Online* 1, 8–9; Busby and Vun (n 77) 42–4.

80 Martínez-López and Munuera-Gómez (n 79) 5.

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

82 *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 2.

The process for recovering non-economic and extraordinary loss

8.62 In practice, if surrogates wish to be reimbursed for non-economic and extraordinary losses, this should be indicated before the surrogacy arrangement commences, and included in the parties' surrogacy agreement (see **Chapter 7**). If it forms part of a surrogacy agreement, the non-economic loss payment for commonly experienced loss would be made to the surrogate on a monthly basis from the start of fertility treatment (or in cases where ART services are not used, when the surrogate becomes pregnant), and the extraordinary loss payment would only be made if and when the loss arises. Recovery of costs and losses would be a legislative entitlement and an enforceable element of the surrogacy agreement (see **Chapter 7**).

8.63 The National Regulator would play a central role in regulating the commonly experienced non-economic loss payment and the extraordinary loss payment. It should be empowered to develop and maintain binding standards, setting the maximum amount for each of the payments. A primary purpose of setting a maximum amount is to maintain the integrity of the prohibition on a surrogate receiving a payment that equates to profit or reward. The cap will serve as a safeguard against a payment for profit or reward being disguised as a payment for non-economic loss. Accommodating the payment amounts in regulations rather than legislation would provide an appropriate level of flexibility in the context of shifting economic conditions.

8.64 While determining the amounts for each payment would be a matter for the National Regulator, we have outlined some factors that we consider to be centrally relevant in this process in relation to the **commonly experienced non-economic loss payment**:

- First, the process must focus upon the purpose of this payment. It is not a payment made to the surrogate for gestational services or for the provision of any other service or good. It is purely intended to redress the non-economic loss commonly experienced by a surrogate. As it is not practical to set a cap by reference to the actual loss incurred by each individual surrogate, the cap will need to be set by reference to the commonly experienced level of loss. The ALRC suggests that this could be done with the aid of those with expertise in the impacts of pregnancy and childbirth, and consideration of the common law recognition of the pain, suffering and loss of amenity arising from pregnancy and childbirth. A comprehensive survey of relevant cases should be undertaken. The National Regulator could be guided by the amount of $30,000 awarded for pain and suffering and loss of amenity in the case of *Melchior v Cattanach*,[83] which would amount to monthly payments of $2,500. Bearing in mind that the award for pain and suffering in that case also accounted for additional medical complications suffered by the plaintiff, the portion attributable to the common effects of pregnancy and birth would

83 *Melchior v Cattanach* [2000] QSC 285; *Melchior v Cattanach* (2001) 217 ALR 640.

necessarily be lower than this figure. However, some adjustment would also need to be made for the fact that the assessment was made 25 years ago.

- Second, in fixing a maximum amount an assessment will need to be made as to the appropriate monetary value of the loss in question. The National Regulator should be guided by the common law's evaluation of the value of non-economic loss, noting that the common law recognises that both physical and psychological pain and suffering constitute loss, as well as loss of amenities.[84]
- Third, and to facilitate the purpose of setting a cap, the maximum payment available must be set purely to address a loss rather than be, or be seen to be, allowing for a remunerative inducement. As discussed already, a financial inducement would serve to undermine the need for free and informed consent, and this should be avoided.

8.65 We note that the National Health and Medical Research Council outlines a range of principles to be applied in Australia when determining the level of compensation paid to people who participate in medical research.[85] In the medical research field, 'payment' is limited to reimbursement for expenses and non-economic losses such as time and inconvenience.[86] These principles are broadly applicable here. In particular, the ALRC considers the following principles to be of assistance:

- Payment should not act as an undue influence or inducement.
- Payment should reflect the burden imposed.
- Payment should not undermine free and informed consent.
- A person should not be influenced to accept a burden that they would not ordinarily accept in their everyday life, or compromise their values.[87]

8.66 In relation to the **extraordinary loss payment**, the National Regulator should also be guided by the assessment of non-economic loss by the common law and should apply the principle that the extraordinary loss payment should not act as an inducement when setting caps for this payment.

8.67 It would be appropriate for the National Regulator to conduct additional empirical research to delve further into these questions to support the development of payment standards. In addition, as observed by Kneebone et al, the National Regulator should conduct this process in consultation with representatives of the surrogacy community.[88]

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84 See, eg, LexisNexis, *Halsbury's Laws of Australia* (at 25 November 2024) 135 Damages, '8 Damages for Personal Injury' [135-875], [135-980]–[135-995]; Vout (n 52) 888–9.

85 National Health and Medical Research Council, Payment of Participants in Research: Information for Researchers, HRECs and Other Ethics Review Bodies (2019) 2–3 [1.1]–[1.10].

86 Ibid 2 [1.1]–[1.2].

87 Ibid 2 [1.2].

88 Kneebone, Hammarberg and Beilby (n 23) 16.

Securing funds with an accountable entity

Recommendation 25

1. Legislation should provide that:
   a. before parties to an approved surrogacy arrangement attempt to achieve a pregnancy, the intended parent(s) must deposit the full estimated costs of the surrogacy arrangement, excluding the non-economic loss payment and extraordinary loss payment (**Recommendations 23**–**24**) with an accountable entity;
   b. if the intended parent(s) are unable to deposit the amount required under paragraph 1(a), they may provide a bank guarantee for these costs;
   c. reimbursements to the surrogate are to be disbursed by an accountable entity within a reasonable time of the claim being made where the claim is not disputed by the intended parent(s); and
   d. any funds remaining in the account managed by the accountable entity at the end of the surrogacy arrangement must be refunded to the intended parent(s).
2. Any dispute in relation to whether a claimed cost or economic loss has been reasonably incurred by the surrogate or the surrogate's partner (if any) (**Recommendation 23**) may be dealt with through conflict resolution by a Surrogacy Support Organisation (**Recommendation 8**). If the dispute is not resolved by the Surrogacy Support Organisation, an application may be made to a court with appropriate jurisdiction.

The disbursement of funds to surrogates is unregulated

8.68 State and territory legislation does not currently provide any safeguards to help ensure that costs which must be reimbursed to a surrogate are actually received. The ALRC has heard that payments are made in a range of ways. In some arrangements, surrogates provide receipts to intended parents as they accrue costs, and intended parents reimburse the surrogate for each individual expense. In other instances, parties will set up a debit account holding funds that the surrogate may use to pay for reasonable expenses, with receipts provided.[89] Sometimes a legal practitioner will disburse funds to the surrogate through their trust account.[90]

89 Name withheld, *Submission 53*; Name withheld, *Submission 62*; K Cox, *Submission 105*; S Everingham, *Submission 129*; Name withheld, *Submission 205*; Not published, *Submission 206*; Name withheld, *Submission 208*; Name withheld, *Submission 339*.

90 S Page, *Submission 130*.

8.69 In most arrangements, disbursements are managed directly between intended parents and surrogates. This can create a range of sub-optimal or unfair outcomes. First, it requires surrogates to directly claim reimbursement from the intended parents for every expense. We have heard that this dynamic is unpleasant and awkward for surrogates, who often forgo reimbursement to avoid this dynamic, or because they feel a sense of guilt that they are adding to the already significant costs borne by the intended parents.[91] This dynamic is well-illustrated in the following examples provided in submissions:

> surrogates, like all of us, can feel uncomfortable in asking for money and so may hesitate to mention a cost that should be reimbursed. I recall one surrogate saying that it felt petty to ask for reimbursement for Bio Oil which she used to alleviate stretch marks, another who said that she didn't feel like she could ask for the lost penalty rates when she wasn't working, and a third who said that she felt uncomfortable asking for money for a new maternity dress …[92]

> [i]n my experience as a surrogate, there were often times where I felt I needed to ask permission, justify or felt guilty purchasing some pregnancy related items/expenses. Maintaining a strong relationship with my intended parents throughout and after the surrogacy was extremely important to me, and I did not want any financial conflicts [to] jeopardise us … sometimes I felt it was just easier if I paid for things myself.[93]

8.70 Tension between intended parents and surrogates can also arise if there is a disagreement about expenses,[94] as the meaning of 'reasonable cost' is often interpreted by the parties themselves. A lack of oversight creates the risk that one party to a surrogacy arrangement may seek to financially exploit another party. For instance, there is no entity to resolve complaints or disputes if a surrogate demands unreasonable costs, or is intentionally denied reasonable costs.

8.71 Ultimately, the management of disbursements frequently threatens the relationship between intended parents and surrogates, which is not in the best interests of children born through surrogacy as it could pose barriers to the child's future relationship with the person who gave birth to them. It also increases the likelihood that surrogates are left out of pocket for their reasonable surrogacy-related expenses. As noted in a submission from a person who has been a surrogate:

> [t]he current system relies heavily on a surrogate's ability to advocate for herself and navigate uncomfortable conversations, at a time when they are feeling incredibly vulnerable. For those without a strong pre-existing relationship, this ambiguity can lead to tension, unfair financial outcomes, and even breakdowns in the surrogacy arrangement.[95]

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91 S Everingham, *Submission 129*; Not published, *Submission 172*; Name withheld, *Submission 339*; S Cureton, *Submission 351*.

92 M Montrone, *Submission 263*.

93 Name withheld, *Submission 339*.

94 M Montrone, *Submission 263*; Name withheld, *Submission 347*.

95 Name withheld, *Submission 62*.

8.72 The 2016 Surrogacy Matters Report also highlighted this issue, noting in addition that even though some expenses that are not reimbursed are of low value, these accumulate over time.[96]

Independent management of surrogacy costs

8.73 Responding to the problems inherent in parties managing reimbursement between themselves, **Recommendation 25** requires an accountable entity to assist in managing this process. This would avoid the issues described above. It would provide more certainty around the existence of sufficient available funds at the start of a surrogacy arrangement, and have the additional advantages of:

- streamlining the reimbursement process;
- providing financial protection to the surrogate; and
- reducing administration time for intended parents, who would not be responsible for coordinating disbursements.

8.74 We acknowledge that independent management of disbursements presents an additional expense for intended parents, but view it as a necessary safeguard and as contributing to a smooth surrogacy journey.

8.75 Rather than developing a detailed system under which reimbursement must occur, the ALRC has instead opted to outline a principle-based process. This allows for flexibility in developing a process for the responsible and independent management of recovery of costs and losses, and provides an opportunity for those with expertise in financial management to determine how the system should function.

8.76 As provided in **Recommendation 25**, the mechanism for reimbursing surrogates should, at a high level, operate as follows:

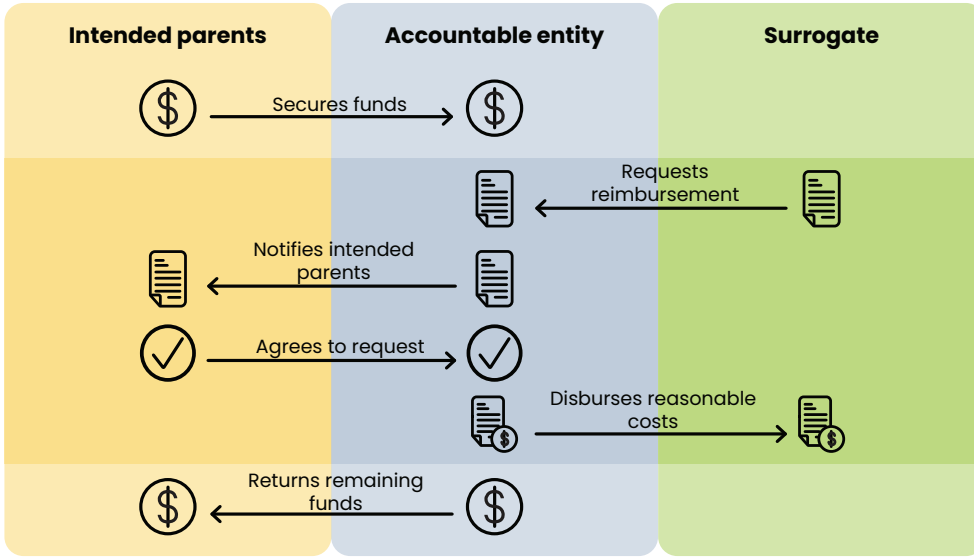
- **Securing funds** — Intended parents deposit the estimated total of the surrogate's economic costs (**Recommendation 23**) with an accountable entity (see below). If intended parents are unable to deposit the full amount required, they may secure the funds via a bank guarantee or similar.
- **Requesting reimbursement** — Surrogates request reimbursement from the accountable entity.
- **Intended parents notified** — The accountable entity notifies intended parents that a request has been made, and intended parents are given an opportunity to dispute the cost if they do not believe it is reasonable.
- **Disbursements** — If there is no dispute, the accountable entity makes the disbursement to the surrogate.
- **Disputes** — If intended parents do dispute the reimbursement request, and this cannot be managed between the parties, an SSO should attempt to resolve

96 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) 15 [1.52].

the dispute between the parties by recommending whether the cost should be reimbursed. If the dispute still cannot be resolved, the surrogate may apply to a court of competent jurisdiction for enforcement based on the legislative requirements and the cost and loss recovery provisions in the agreement (see **Recommendation 22**).

8.77 **Figure 8.1** illustrates how the reimbursement process would function in practice. The process for making the optional monthly payments outlined in **Recommendation 24** is not included in this figure. However, these payments could also be made through the accountable entity.

Figure 8.1: The process for making disbursements to surrogates



8.78 Intended parents would be required to deposit the surrogate's full estimated costs with the accountable entity (less the optional payments), or have a bank guarantee for this sum. While depositing the full amount upfront protects the surrogate in cases where intended parents' financial circumstances change, a bank guarantee or similar could be used to provide certainty that funds to cover the surrogate's costs are available if intended parents are not able to provide the full amount upfront.

8.79 While we received some submissions that argued that this approach could make surrogacy financially prohibitive for some intended parents,[97] we consider it an important protection for surrogates in circumstances where there are disputes about costs, and to avoid situations where intended parents experience financial difficulties part-way through the arrangement. To ease the upfront financial burden,

97 Name withheld, *Submission 372*; E Kneebone, *Submission 415*; K Horsey, *Submission 418*.

any non-economic loss payments and extraordinary loss payments would not need to be deposited at the outset. The non-economic loss payments can instead be deposited in instalments, and disbursed to surrogates as required, and the extraordinary loss payments can be deposited and disbursed if required.

An accountable entity to hold surrogacy funds

8.80 In the Discussion Paper, we proposed a system involving reimbursement through a trust account held and managed by SSOs. However, we have subsequently heard reports of surrogacy agencies in the United States of America misappropriating or mishandling escrow funds,[98] and related concerns from stakeholders.[99]

8.81 The ALRC recognises the risks inherent in third parties managing funds on the parties' behalf. However, we consider that these risks can be managed with rigorous safeguards and sufficient oversight. **Recommendation 25** does not prescribe the particular entity responsible for holding funds for the purposes of disbursements to surrogates. This is a matter to be determined upon implementation of the recommendations in this Report, and with input from those with expertise in financial arrangements of this nature. The ALRC has identified some possible options for fulfilling this role:

- **The National Regulator** — A trust account system could be independently administered by the National Regulator, in a similar way to the current system for the management of residential tenancy bonds by bond authorities.
- **SSOs** — The operation of SSOs in Australia would differ to those in the United States of America due to the higher level of regulation; for example, through strict licensing conditions and oversight by the National Regulator. Given this, it may be appropriate for SSOs to manage trust accounts on behalf of parties to surrogacy arrangements with sufficient safeguards in place.
- **Independent escrow services** — Escrow refers to a financial mechanism by which an impartial third party holds money to be turned over to another party upon the fulfilment of conditions. Privately-managed escrow services do not appear to be widely available in Australia, however they could be established for this purpose.
- **Legal professionals** — In the legal profession, clients' money is held by legal practices to be used in the course of legal services provided to the client. Legal professionals are subject to strict conditions on the use of trust moneys.

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98 Sarah Grunau, 'Lawsuit Alleges Houston-Based Escrow Company Stole Millions from Families Seeking Surrogates', *Houston Public Media* (27 June 2024) <www.houstonpublicmedia.org/articles/news/health-science/2024/06/27/492094/lawsuit-alleges-houston-based-escrow-company-stole-millions-from-families-seeking-surrogates/>; Kenzi Abou-Sabe et al, 'How a Top-Tier Surrogacy Agency Became an FBI Target', *NBC News* <www.nbcnews.com/news/investigations/surrogacy-agency-washington-became-fbi-target-rcna248883>; United States Attorney's Office, District of Maryland, 'Owner of The Surrogacy Group Sentenced in Maryland to 32 Months in Federal Prison for Defrauding Clients of Fees Paid to Find and Support a Pregnancy Surrogate' (Press Release 2021) <www.justice.gov/usao-md/pr/owner-surrogacy-group-sentenced-maryland-32-months-federal-prison-defrauding-clients-fees>.

99 K Cox, *Submission 389*; Name withheld, *Submission 422*.

While legal professionals might find this administratively burdensome, it could remain an option for those who wish to perform this role.

8.82 Wherever the funds are held, it is important that the accountable entity is subject to fiduciary duties, professional obligations, or other accountability mechanisms that reduce the risk of the funds being misused. The entity should be independent in that it does not have any obligations towards a particular party to the agreement over another. There are a number of international models that could be considered during implementation. In consultations, the Canadian system was raised as an appropriate model. In Canada, money is held in escrow and if the expense receipts are provided, the surrogate is reimbursed for these expenses. The ALRC has heard that a similar process takes place in the United States of America. There, escrow funds are typically managed by the intended parents' legal representative, surrogacy agency, or a specialised escrow service. We also heard in consultations that in Israel the surrogacy Approvals Committee will not approve an agreement unless there is proof that funds have been put in trust for the surrogate. Other consultees have noted that this is a promising approach.

9. Other Financial Barriers to Surrogacy

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Introduction

9.1 The Terms of Reference direct the ALRC to identify ways of 'reducing barriers to domestic altruistic surrogacy'. This includes financial barriers, which we have heard prevent many people from pursuing a surrogacy arrangement. Parties to surrogacy arrangements sometimes face difficulties accessing financial entitlements that are readily available to people involved in other forms of family creation. These difficulties are a barrier to surrogacy for people with limited financial means. As one submission stated:

> [w]e found the process of accessing Medicare, Centrelink, and Paid Parental Leave to be confusing, difficult, and at times discriminatory. We were forced to jump through hoops to access entitlements that other parents can usually obtain without question. … Improving access and understanding around Medicare and parental leave is not just a matter of policy — it's a matter of dignity, equality, and respect for parents and surrogates alike.[1]

9.2 Facilitating equitable access to financial entitlements is also consistent with the human rights approach adopted by this Inquiry (see **Chapter 14**). Limiting entitlement to Medicare rebates in connection with a surrogacy arrangement, when those limitations do not exist for other forms of family creation, may disproportionately disadvantage people based on relationship status, sexuality or gender identity, or disability, and constitute discrimination.[2] Further, while we have previously noted that

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1 Name withheld, *Submission 259*.

2 In relation to the right to freedom from discrimination, these are protected groups, and people in these classes involved in family creation disproportionately rely on surrogacy to have children: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26. It should be noted that sexuality has been included in the art 26 category of 'other status': see Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994, adopted 31 March 1994) ('*Toonen v Australia*'). See also **Chapter 14**.

the scope of the right to found a family is unsettled,[3] its potentially wide operation may mean that diminished access to surrogacy will infringe this right. Access should not be unnecessarily restricted where there are sufficient safeguards in place to protect the rights of the child and the surrogate.[4]

9.3 This chapter discusses two categories of financial entitlements, access to which should be improved to diminish existing barriers to surrogacy.

9.4 The ALRC makes two recommendations in this chapter to allow intended parents to access the same Medicare rebates as other parents requiring assisted reproductive technology ('ART') to have a child. While the ALRC has not made specific recommendations relating to parental leave, we identify some issues reported by parents through surrogacy, which could be subject to further investigation in the future.

Medicare entitlements

Recommendation 26

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

Recommendation 27

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended so that Medicare rebates are available for:

a. prearrangement counselling and psychological assessments, which are required for a surrogacy arrangement to be compliant with legislative requirements and eligible for approval (**Recommendations 18**–**19**); and

b. ongoing counselling undertaken during an approved surrogacy arrangement (**Recommendation 20**).

3 See **Chapter 14**.

4 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 87 [3.69]. See also United Nations, *Programme of Action of the International Conference on Population and Development*, UN Doc A/CONF.171/13/Rev.1 (18 October 1994) [7.6], [7.14].

Current limitations on Medicare rebates for surrogacy

9.5 Medicare rebates are generally unavailable where a fertility treatment is performed in connection with a surrogacy arrangement. The Medicare Benefits Schedule ('MBS') includes several items for 'Assisted Reproductive Services', including egg retrieval, preparation of embryos, and implantation.[5] However, ART-related Medicare benefits are not payable for services provided in relation to a surrogacy arrangement.[6]

9.6 The surrogacy exclusion is applied differently between service providers. Some ART service providers adopt a looser interpretation and will claim a rebate for any eligible treatment performed that is not directly connected to facilitating a pregnancy.[7] For example, they may claim the rebate for egg retrieval or embryo formation, regardless of whether or not it is related to a surrogacy arrangement. Other ART service providers adopt a stricter interpretation and will refuse to claim a rebate for any treatment directly or implicitly connected to a surrogacy arrangement.[8] For example, they will not claim the rebate for any treatment carried out for single men or gay male couples, as it is clear that surrogacy will be required in these circumstances. Stakeholders find these inconsistencies frustrating and unfair:

> [d]espite undergoing medical procedures for a legitimate reproductive health issue (infertility), my intended parents are not eligible for Medicare rebates simply because the treatment is for the purposes of surrogacy.[9]

> [f]ertility clinics have the discretion to classify fertility treatment as *fertility preservation* or *in conjunction with a surrogacy arrangement*. The difference in classification results in a disparity between those who can access Medicare rebates and those who cannot and is often determined at the discretion of a clinician.[10]

> [t]here are differences between IVF clinics as to how the exclusion applies. Some clinics take the view that if it appears that there will be surrogacy (for example, a gay couple seek to produce embryos), then no rebate will be claimed. Other clinics are happy to claim the rebate for embryo creation prior to the surrogacy arrangement being entered into. It is a lottery.[11]

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5 Department of Health, Disability and Ageing (Cth), *MBS Online: Medicare Benefits Schedule* (2026) items 13200–13221.

6 *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) reg 5.2.6.

7 See Senate Community Affairs References Committee, Parliament of Australia, *Ending the Postcode Lottery: Addressing Barriers to Sexual, Maternity and Reproductive Healthcare in Australia* (2023) 98–100 [4.81]–[4.88]. See also K Cox, *Submission 105*; Name withheld, *Submission 107*.

8 See Senate Community Affairs References Committee, Parliament of Australia (n 7) 98–100 [4.81]–[4.88]. See also K Cox, *Submission 105*; Name withheld, *Submission 107*.

9 Name withheld, *Submission 117*.

10 S Jefford, *Submission 128* (emphasis in original).

11 S Page, *Submission 130*.

9.7 Financial disadvantage also arises from rigid rebate rules and structures. Many ART service MBS items are 'global items',[12] providing a single rebate amount for a range of treatments grouped as a single item. The rebate for MBS item 13218, '[p]reparation of frozen or donated embryos or donated oocytes for transfer to the uterus or fallopian tubes', covers 'quantitative estimation of hormones and all treatment counselling'.[13] Because these services are bundled into a single item, if intended parents are ineligible for a rebate for the main ART service, they are rendered ineligible for a rebate for all of the treatments or services bundled into that single item.[14] This has a particular impact on intended parents because fertility counselling, which is required by state and territory legislation at various stages of the surrogacy journey, is bundled with other treatments or services for which they are ineligible to claim a rebate.[15]

Financial consequences of the lack of Medicare rebates for surrogacy

9.8 ART treatments are notoriously expensive, and add to the financial burden for people who require surrogacy to become parents.[16] We heard from several stakeholders that in vitro fertilisation ('IVF') often amounts to the most expensive part of a surrogacy journey,[17] with fees ranging from $10,000–$20,000 per IVF cycle.[18] Limited access to Medicare rebates for ART exacerbates this problem of financial accessibility. For example:

> The lack of Medicare benefits added approximately $50,000 to our overall costs due to multiple failed IVF cycles and unexpected costs associated with miscarriages.[19]

9.9 The ALRC has heard from stakeholders that the out-of-pocket cost of ART treatments makes it difficult for low-income intended parents to pursue a surrogacy

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12 Services Australia, 'Assisted Reproductive Technology Services' <www.servicesaustralia.gov.au/mbs-billing-for-assisted-reproductive-technology-services?context=20>.

13 Department of Health and Aged Care (Cth), 'Medicare Benefits Schedule — Item 13218', *MBS Online* (2026) <www9.health.gov.au/mbs/fullDisplay.cfm?type=item&qt=ItemID&q=13218>.

14 Department of Health and Aged Care (Cth), 'Medicare Benefits Schedule — Note TN.1.4'.

15 Several stakeholders noted that mandatory counselling and psychological assessments increase the already prohibitively expensive cost of surrogacy: see Name withheld, *Submission 15*; Name withheld, *Submission 97*; K Cox, *Submission 105*; Not published, *Submission 179*; Name withheld, *Submission 211*; Not published, *Submission 220*; Name withheld, *Submission 320*; Name withheld, *Submission 324*; Name withheld, *Submission 329*; Name withheld, *Submission 392*.

16 Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 69, 72.

17 See Name withheld, *Submission 11*; Name withheld, *Submission 54*; Not published, *Submission 82*; Name withheld, *Submission 107*; Name withheld, *Submission 117*; Not published, *Submission 172*; Not published, *Submission 337*.

18 See Greg Hunt and Rachel Swift, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Fertility Society of Australia and New Zealand and Reproductive Technology Accreditation Council, 2024) 5. See also Name withheld, *Submission 54*; Name withheld, *Submission 81*; S Everingham, *Submission 129*.

19 T Trevor, *Submission 258*.

arrangement.[20] We have heard of intended parents spending their life savings, taking out loans, and selling or mortgaging their homes to pay for these treatments.[21] Intended parents face greater financial impacts due to their infertility compared with others accessing the same treatment:

> I am not choosing to not be pregnant, I would love to be pregnant and have a healthy baby. The fact that surrogacy is our only option is challenge enough, coupled with no rebate for appointments makes it very expensive process.[22]

> This exclusion punishes people like me, those unable to carry a pregnancy due to cancer or medical conditions, despite being taxpayers and fully deserving of equitable access to healthcare.[23]

> People who are experiencing unexplained infertility — with no known medical condition — are entitled to Medicare rebates for all IVF treatment. Yet, because I had a medically necessary hysterectomy due to cancer and now require a surrogate, I am excluded from this same support. I don't begrudge others receiving help — but please don't deny me the same assistance when I have no chance of ever carrying a child myself.[24]

9.10 The ALRC has heard many people turn to surrogacy following years of attempting to become pregnant themselves, only to discover that they would no longer be able to access the Medicare benefit going forward.[25] This compounded the grief they were already experiencing as they accepted the reality that they would not be able to gestate their own child. For example:

> Medicare rebates were available to Rob and I as we completed IVF cycles when I was trying to get pregnant. However, these rebates were not available when we started treatment for the purpose of surrogacy. This felt very discriminatory and made an already stressful situation even more stressful.[26]

> This felt deeply unfair. We had already spent upwards of $80,000–$90,000 on IVF and fertility treatment, and to then be excluded from access to Medicare rebate because we required a surrogate was disheartening and discriminatory.[27]

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20 See, eg, Not published, *Submission 172*; Not published, *Submission 179*; Not published, *Submission 220*; T Trevor, *Submission 258*; Donor Conceived Families Australia, *Submission 311*; Name withheld, *Submission 323*; Name withheld, *Submission 334*; Not published, *Submission 337*; Not published, *Submission 363*.

21 See, eg, Name withheld, *Submission 54*; T Trevor, *Submission 258*; Name withheld, *Submission 323*; Name withheld, *Submission 334*; Not published, *Submission 337*.

22 Name withheld, *Submission 15*.

23 Name withheld, *Submission 205*.

24 Name withheld, *Submission 317*.

25 See, eg, Name withheld, *Submission 52*; Name withheld, *Submission 143*; Health Law Group, Monash Law School, *Submission 183*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 206*; Name withheld, *Submission 219*; Name withheld, *Submission 256*; Name withheld, *Submission 320*; Name withheld, *Submission 323*; Name withheld, *Submission 334*; Name withheld, *Submission 335*.

26 Name withheld, *Submission 256*.

27 Name withheld, *Submission 52*.

Historical basis for exclusion overtaken by changed circumstances

9.11 The lack of a Medicare rebate for surrogacy reflects a policy position in place since 1990 that has not kept pace with subsequent legal and social change. ART treatments were first added to the MBS in 1990, however surrogacy-related treatments were excluded from these listings from the outset.[28] At the time, surrogacy was treated exceptionally, in light of its political and social contentiousness, which is reflected in political records from this time,[29] as well as the position taken by some jurisdictions that prohibited surrogacy entirely (**Chapter 1**). That rationale no longer reflects contemporary conditions. Since then, the legal and social contexts have changed significantly (**Chapter 1**). Surrogacy is now legal and regulated in all Australian states and territories and is better accepted as a legitimate form of family formation. The continued exclusion of surrogacy-related treatment from Medicare is therefore difficult to justify as a matter of contemporary policy.

Introducing Medicare rebates for surrogacy

9.12 **Recommendations 26** and **27** would allow intended parents to access the same Medicare rebates as any other parents requiring ART to have a child. This would remove the current unfairness and, as discussed above, the potentially discriminatory effect of the current legislative exclusion, which financially disadvantages people involved in family formation who cannot gestate or give birth to their own child. The implementation of these recommendations would improve access and equality in reproductive healthcare, and reduce barriers to domestic surrogacy, in line with the Terms of Reference:

> Australia has committed to non-discrimination in access to health, family formation, and equal treatment under the law. Yet, current laws exclude or disadvantage gay male couples from access to ART and surrogacy services, [and] deny Medicare/PBS-funded treatment to male couples who cannot produce eggs or gestate a pregnancy.[30]
>
> As a country that recognises same-sex marriage and advocates for equality, excluding gay couples from Medicare-funded reproductive services raises serious equity concerns. This gap in financial support drives many intended parents to consider overseas surrogacy, where costs may be clearer or perceived as more manageable despite additional ethical risks. By failing to

28 Department of Community Services and Health, *Supplement to Medicare Benefits Schedule Book of 1 May 1990* (1 November 1990) [22]; Commonwealth, *Parliamentary Debates*, Estimates Committee, 25 September 1990, 373 (Peter Baume).

29 Commonwealth, *Parliamentary Debates*, Estimates Committee, 25 September 1990, 373 (Peter Baume); Commonwealth, *Parliamentary Debates*, Senate, 14 November 1990, 4185 (Brian Harradine); Commonwealth, *Parliamentary Debates*, Senate, 15 November 1990, 4214–5 (Michael Tate and Brian Harradine); National Bioethics Consultative Committee, *Surrogacy Report 1* (Final Report, April 1990) 1.

30 Name withheld, *Submission 278*.

> support all family forms equally, current policy settings undermine national values of inclusion and fairness.[31]

9.13 **Recommendation 26** is consistent with recommendations made under previous reviews of reproductive healthcare in Australia, which have already endorsed extending rebates to surrogacy-related treatments,[32] and which the government has already agreed to in principle.[33]

9.14 Only approved surrogacy arrangements would be eligible for Medicare-subsidised ART treatments aimed at facilitating a pregnancy (see **Recommendation 34**). Treatments that support fertility preservation, including gamete retrieval and embryo formation, would not be affected by this preapproval requirement.[34]

9.15 However, the ALRC has also recommended that counselling and, in some cases, psychological assessments occur before an arrangement can be approved (see **Recommendations 18** and **19**). **Recommendation 27** has been made so that new items be added to the MBS to cover these processes. As discussed above, fertility counselling is only covered by a rebate insofar as it is connected to a global ART item. Where the parties are not yet eligible to undertake these global ART services due to lack of approval, another item is needed.

9.16 Medicare rebates should also be available for ongoing counselling undertaken during the course of an approved surrogacy arrangement. For most arrangements, this will already be captured under the global ART item claimed to achieve pregnancy. However, for some parties, such as parties to an approved surrogacy arrangement who proceed with an at-home insemination without the intervention of ART service providers, a separate Medicare item for ongoing counselling will be necessary. These matters are also addressed by **Recommendation 27**.

9.17 Among submissions that discussed extending the Medicare rebate to surrogacy-related treatments, the overwhelming majority were supportive of this approach.[35] Those that objected generally did so on the basis that they did not want

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31 J Attawet, *Submission 34*.

32 See Senate Community Affairs References Committee, Parliament of Australia (n 7) 99–100 [4.86]–[4.91]; Medicare Benefits Review Taskforce, *Taskforce Report on Gynaecology MBS Items* (2020) 222.

33 Australian Government, *Australian Government Response to the Senate Community Affairs References Committee Report: Ending the Postcode Lottery — Addressing Barriers to Sexual, Maternity and Reproductive Healthcare in Australia* (2025) 43. See also Department of Health, Disability and Ageing (Cth), *Submission 420*.

34 Some fertility service providers noted that it was crucial that the preapproval process not limit access to fertility preservation treatments: see, eg, Virtus Health, *Submission 397*.

35 Of submissions that commented on Medicare eligibility, 128 endorsed removing the surrogacy exclusion, compared to 14 opposed to this reform. Submissions that endorsed the removal of the exclusion include: Not published, *Submission 103*; K Cox, *Submission 105*; Name withheld, *Submission 126*; Australian Nursing and Midwifery Federation, *Submission 145*; Health Law Group, Monash Law School, *Submission 183*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 217*; Equality Australia, *Submission 253*; ANZICA, *Submission 277*.

surrogacy to be made more accessible in Australia.[36] Others argued that people who morally object to surrogacy should not have to indirectly contribute to these arrangements through taxation, which funds Medicare.[37] This argument is not novel to surrogacy and has been raised in relation to several forms of reproductive healthcare in the past.[38] Such arguments have not prevented access to rebates for other forms of reproductive healthcare, and there is no compelling reason to single out surrogacy on this basis.

Parental leave entitlements

Current leave entitlements for surrogacy

9.18 There are broadly three categories of 'parental' leave entitlements under Australian federal law:

- unpaid parental leave under the National Employment Standards;
- Centrelink paid parental leave under the *Paid Parental Leave Act 2010* (Cth); and
- additional parental leave in Modern Awards and Enterprise Agreements.

9.19 Access to each of these categories of leave can be complicated and can cause difficulty for both parents through surrogacy and surrogates. However, submissions received by the ALRC have not led us to conclude that the difficulties are widespread or unable to be resolved without the law being changed.

9.20 Submissions strongly supported the proposition that parties to a surrogacy arrangement should be entitled to leave after a surrogacy birth, just like other

36 Centre for Bioethics and Culture (US), *Submission 90*; Australian Christian Lobby, *Submission 104*; Abolish Surrogacy Australia, *Submission 112*; FINRRAGE (Australia), *Submission 180*; GeneEthics, *Submission 338*; M Quinlan, *Submission 381*; ARMS (Vic), *Submission 408*; R West, *Submission 426*.

37 See Centre for Bioethics and Culture (US), *Submission 90*; Women's Forum Australia, *Submission 348*; Australian Catholic Bishops Conference, *Submission 403*; ARMS (Vic), *Submission 408*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

38 See generally Senate Community Affairs References Committee, Parliament of Australia (n 7) 8–9 [1.39]–[1.44]; Edward Hughes and Mita Giacomini, 'Funding in Vitro Fertilization Treatment for Persistent Subfertility: The Pain and the Politics' (2001) 76(3) *Fertility and Sterility* 431.

parents.[39] Few submissions were opposed to the surrogate or parents through surrogacy having leave entitlements generally.[40]

9.21 Compared to the other issues identified in this Report, specific problems in relation to accessing parental leave were only raised by a few stakeholders.

9.22 The Terms of Reference direct this Inquiry to identify ways of 'reducing barriers to domestic altruistic surrogacy'. It is possible that access to parental leave entitlements for surrogates and intended parents under current arrangements may be a barrier to domestic altruistic surrogacy. However, the submissions received did not identify problems or difficulties with the current arrangements which were either sufficiently significant, or sufficiently experienced as problems or difficulties in practice, to warrant access to parental leave being regarded as a barrier to surrogacy which requires changes to the law. Accordingly, the ALRC has not made recommendations in relation to parental leave legislation. However, the observations and issues reported in submissions are canvassed below, should there be a need to revisit them in the future.

9.23 The ALRC acknowledges that the term 'parental leave' does not accurately reflect the experience of surrogates taking leave to recover from the birth. However, as this is the language used in the legislation and government policy documents, it is used here for consistency.

Unpaid parental leave

9.24 Under the National Employment Standards in the *Fair Work Act 2009* (Cth), any eligible employee[41] is entitled to 12 months of unpaid parental leave,[42] extendable to 24 months if requested and approved,[43] in connection with 'the birth of a child of the employee or the employee's spouse or de facto partner' (birth-related leave), or placement of a child with the employee for adoption (placement-related leave).[44]

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39 See, eg, Name withheld, *Submission 10*; Name withheld, *Submission 11*; Name withheld, *Submission 15*; Name withheld, *Submission 19*; Name withheld, *Submission 28*; Name withheld, *Submission 102*; Name withheld, *Submission 114*; Name withheld, *Submission 126*; Name withheld, *Submission 135*; J Holder, *Submission 142*; L Ransome, *Submission 144*; Name withheld, *Submission 146*; Name withheld, *Submission 158*; E Kendal, *Submission 166*; Not published, *Submission 172*; Name withheld, *Submission 198*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 206*; Name withheld, *Submission 207*; Name withheld, *Submission 208*; Name withheld, *Submission 210*; Rainbow Families, *Submission 260*; Names withheld, *Submission 270*; Name withheld, *Submission 272*; Name withheld, *Submission 278*; Name withheld, *Submission 286*.

40 Of submissions that were opposed to the surrogate or parents through surrogacy having access to parental leave, objections were based on not wanting surrogacy to become more accessible, and wanting intended parents to cover all expenses associated with the arrangement: see, eg, Abolish Surrogacy Australia, *Submission 112*; FINRRAGE (Australia), *Submission 180*.

41 The employee generally must have been employed by their employer for at least 12 continuous months to be eligible for unpaid parental leave: *Fair Work Act 2009* (Cth) s 67.

42 Ibid s 70. The leave must be taken in a single continuous period: ibid s 71(2).

43 *Fair Work Act 2009* (Cth) s 76.

44 Ibid s 70.

A pregnant employee can access leave from six weeks before their due date.[45] If an employee is no longer responsible for the care of the child, their employer can request that they return to work, but not before six weeks after the birth.[46]

9.25 There is some indication that a parentage order may be required by employers before this leave can be accessed.[47] However, in practice, parents through surrogacy seem to be able to access this leave without such an order in place.[48]

9.26 Under the current law, a surrogate could be required to return to work six weeks following the birth,[49] as they would no longer be responsible for the care of the child (see above). Some surrogates have expressed the view that six weeks is an insufficient period for effective recovery from pregnancy and birth.[50]

Government Paid Parental Leave

9.27 The Government Paid Parental Leave Policy is quite clear: if the relevant eligibility requirements are met,[51] the surrogate individually,[52] and the parents through surrogacy jointly,[53] can each access the full amount of government paid leave; for a child born after 1 July 2026, this amount is 130 days of paid parental leave for a child.[54]

9.28 Some parents through surrogacy reported accessing government paid parental leave without encountering any barriers as a result of the surrogacy arrangement.[55] For example:

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45 Ibid ss 71(3)(a), 73.
46 Ibid s 78.
47 Fair Work Ombudsman, 'Unpaid Parental Leave for Surrogate and Intended Parents' <https://library.fairwork.gov.au/viewer/?krn=K600431>.
48 See, eg, Name withheld, *Submission 11*; Not published, *Submission 220*.
49 *Fair Work Act 2009* (Cth) s 78(3).
50 See, eg, Name withheld, *Submission 147*; Name withheld, *Submission 210*; Name withheld, *Submission 318*.
51 *Paid Parental Leave Act 2010* (Cth) pt 2–3, ss 31AA, 31AB, 54; *Paid Parental Leave Rules 2021* (Cth) rr 9, 13, 21, 21A, 27.
52 The surrogate can take leave from six weeks or earlier before their due date: *Fair Work Act 2009* (Cth) s 71(3). They are also able to share parental leave days with their partner only while they are caring for the child: Department of Social Services (Cth), '2.5 Caring for a Child (Version 1.99, 1 July 2026)', *Paid Parental Leave Guide* <https://guides.dss.gov.au/paid-parental-leave-guide/2/5>; Services Australia, 'Claiming Payments for Children Leaving Care as Part of the Process of Adoption, Surrogacy Arrangement, or a Child Removed by State/Territory Child Protection Agency 007-02010010' <https://operational.servicesaustralia.gov.au/public/Pages/families/007-02010010-01.html>.
53 Split between them, from when they receive the child: see Services Australia, 'Claiming Payments for Children Entrusted to Care as Part of the Process of Adoption or Surrogacy 007-07010010' <https://operational.servicesaustralia.gov.au/public/Pages/families/007-07010010-01.html>; Department of Social Services (Cth), '2.6.3 PPL Claimant in Exceptional Circumstances - Gaining Parent in a Surrogacy Arrangement (Version 1.99, 1 July 2026)', *Paid Parental Leave Guide* <https://guides.dss.gov.au/paid-parental-leave-guide/2/6/3>.
54 *Paid Parental Leave Act 2010* (Cth) s 31ABA(1)(d).
55 See, eg, Name withheld, *Submission 111*; Name withheld, *Submission 238*.

> Having the option of 'parent via surrogacy' within the parental leave application process also gave us, as intended parents, access to paid leave to care for our child. The access of our surrogate to obtain this entitlement also enabled her physical and emotional recovery without financial pressures. Again, equal access to basic entitlements is what this country prides itself on.[56]

9.29 Despite this clarity in the law and policy, we heard from several parents through surrogacy and surrogates who found accessing government paid parental leave challenging. Several reported encountering a significant administrative burden or being incorrectly denied access to government paid parental leave.[57] Several parents through surrogacy and their supporters endorsed additional training for Centrelink staff and improved processes for applications.[58] Parents' experiences included:

> [d]ealing with Centrelink to try to obtain Paid Parental leave was a nightmare, the staff didn't even know their own process and I probably invested 20 hours waiting on hold to Centrelink and talking to people going around and around in circles in order to gain access to Government Funded Paid Parental leave.[59]

> I spent 16 hours on hold, 3 applications that kept getting rejected for no reason and about 6 emails with personal details to sort out my parental leave that I applied for 3 months before due date to be organized.[60]

> [i]t took months of online forms that didn't fit my situation, phone calls to clarify, and hours waiting in the Centrelink office as no one knew what documentation was required to approve my claim. This was such a time-consuming process, which is clearly made very difficult with a newborn. I also really needed to receive the parental leave payment to assist with essential living expenses. It was evident that Centrelink employees had almost no knowledge about surrogacy laws in Australia or even their own Paid Parental Leave requirements. I would suggest that all government agencies develop clear pathways and polices for surrogacy births and ensure that there is adequate training provided to their staff.[61]

9.30 Delays in accessing paid parental leave can have serious financial consequences for the parties to a surrogacy arrangement. Back payment is not an adequate solution, if it means that in the interim the parents through surrogacy or

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56 Name withheld, *Submission 111*.

57 See, eg, Name withheld, *Submission 22*; Name withheld, *Submission 107*; Name withheld, *Submission 114*; Name withheld, *Submission 161*; Name withheld, *Submission 162*; Name withheld, *Submission 259*; Name withheld, *Submission 283*.

58 See, eg, Not published, *Submission 119*; Australian Nursing and Midwifery Federation, *Submission 145*; Name withheld, *Submission 147*; Name withheld, *Submission 161*; Not published, *Submission 172*; Name withheld, *Submission 219*; Name withheld, *Submission 259*.

59 Name withheld, *Submission 107*.

60 Name withheld, *Submission 22*.

61 Name withheld, *Submission 256*.

surrogate struggle to meet basic cost of living expenses.[62] Some intended parents also found the gendered language in the application process to be discriminatory:[63]

> I was told that I was not eligible for Paid Parental Leave and that my 'wife' should be the one applying. As a gay father in a same-sex couple, I was shocked and insulted by this assumption. The staff member's lack of understanding was not just a personal affront — it was indicative of systemic gaps in training and internal processes when it comes to recognising diverse families and surrogacy arrangements.[64]

9.31 The ALRC has since consulted with Services Australia and raised the issues canvassed above. We understand that Services Australia has taken additional measures to clarify the surrogacy Government Paid Parental Leave Policy among staff.[65]

Additional parental leave entitlements under Modern Awards and Enterprise Agreements

9.32 Employees may be entitled to additional leave entitlements under their Enterprise Agreement with their employer or under the Modern Award which covers their employment.[66] Often these leave entitlements are broken up into categories that do not easily apply to all parties in a surrogacy arrangement (including birth-related leave, placement-related leave, or supporting partner or secondary carer leave categories).[67] This form of leave may be the only form of paid parental leave available to parties earning above the income threshold for Government Paid Parental Leave.

9.33 The vast majority of Enterprise Agreements do not specifically provide for surrogacy arrangements (of 72,105 approved Enterprise Agreements, only 175 mention 'surrogacy').[68] It is often unclear how general parental leave provisions apply to parties to a surrogacy arrangement, leading to inconsistent outcomes. One parent through surrogacy noted:

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62 See, eg, Not published, *Submission 119*; Name withheld, *Submission 205*; Name withheld, *Submission 256*; Name withheld, *Submission 259*; Name withheld, *Submission 283*.

63 See, eg, Name withheld, *Submission 161*; Name withheld, *Submission 259*.

64 Name withheld, *Submission 259*.

65 Consultation with Services Australia.

66 Enterprise agreements and modern awards can expand upon the minimum leave requirements in the National Employment Standards: *Fair Work Act 2009* (Cth) ss 139(1)(h), 193–193A. In practice, most additional leave entitlements are included in enterprise agreements, with the overwhelming majority of modern awards only containing the model provision referring back to the National Employment Standards: Fair Work Commission, *Variation on the Commission's Own Motion — Flexible Work Amendments and Unpaid Parental Leave* (Statement No AM2023/8, 2023).

67 See, eg, K Cox, *Submission 105*; Not published, *Submission 220*.

68 See also Lolita Wikander et al, 'Australian Higher Education Enterprise Agreements and the Provisions for Surrogates: A Short Debate' [2025] *Journal of Public Health* 1; Name withheld, *Submission 219*; Not published, *Submission 220*.

> I am a medical practitioner and surrogacy is not included in our EBA. I had to involve the AMA in order for my employer to approve primary parental leave as a 'non birthing parent'. The process was discriminatory and showed a lack of empathy and understanding for our situation. The EBAs and laws need to be updated to reflect surrogacy.[69]

9.34 Some surrogates and parents through surrogacy indicate that they accessed additional leave entitlements without complication.[70] Others found the process challenging. For example, we heard of some employers requiring proof of a parentage order before approving additional leave.[71] Where such proof is sought, some parties to overseas arrangements or non-compliant domestic arrangements are denied parental leave entitlements under some Enterprise Agreements.

9.35 Several submissions endorsed a uniform approach to surrogacy-related leave across sectors and employers, either as a mandatory term of Enterprise Agreements, or as a matter of implementation.[72]

9.36 The observations made above in relation to the parental leave entitlements of intended parents have been made without reviewing the full range of relevant provisions in Enterprise Agreements and on the presumption that where those Agreements provide for parental leave entitlements, those entitlements extend to intended parents. However, as noted above, some difficulties have been experienced by intended parents when some employers have insisted on proof of parentage. Where employers insist on proof of parentage prior to approving access to parental leave, the implementation of the ALRC's recommendations in relation to legal parentage, including that intended parents would be deemed by law to be the legal parents upon the birth of the child where the surrogacy has been approved to proceed on the administrative pathway (see **Recommendations 10** and **28**), should help to avoid difficulty. A more efficient regime for court-based recognition of parentage, as provided for by **Recommendation 29**, would also assist.

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69 Rainbow Families, *Submission 260*.

70 See, eg, Name withheld, *Submission 147*; Name withheld, *Submission 210*; Name withheld, *Submission 211*.

71 See, eg, Department of Education (NSW), *Teachers Handbook* (May 2026) [4.2.6]; Premier of New South Wales, *M2018-02 — Support for Employees Engaged in Altruistic Surrogacy and Permanent out of Home Care Parenting Arrangements* (Premier's Memorandum, 11 December 2024); *Long v Secretary, Department of Education* [2023] NSWCATAP 14; Not published, *Submission 217*; Equality Australia, *Submission 53*.

72 *See, eg,* Name withheld, *Submission 11;* Australian Nursing and Midwifery Federation, *Submission 145;* Equality Australia, *Submission 253.*

10. Legal Parentage

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Introduction

10.1 Legal parentage is a distinct concept from social and cultural understandings of parenthood. In a surrogacy arrangement, while the intended parents are recognised as the 'functional' and 'social' parents of a child born through surrogacy, they are not always recognised as the child's 'legal' parents. This has consequences for the rights and interests of everyone involved — the child, the surrogate, and the intended parents.

10.2 This chapter considers the importance of legal parentage, explains how it is currently determined for children born through domestic and overseas surrogacy, and recommends two new pathways for recognition of legal parentage for children born through surrogacy.

10.3 The current law recognises the surrogate and their partner (if any) as the legal parents of the child upon birth. This is inconsistent with the intention of the parties to the surrogacy arrangement and can only be displaced by court order. In domestic arrangements, transferring legal parentage to intended parents can take months,[1] and may not be possible for arrangements that do not comply with the legislative requirements.[2] In overseas arrangements — which make up the

1 Applications generally cannot be made until one month after birth: *Parentage Act 2004* (ACT) ss 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) ss 20(2)–(3). See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 122, which will commence in mid-2027.

2 See, eg, *Altimari & Altimari* [2024] FedCFamC1F 3.

majority of surrogacy arrangements entered into by Australians[3] — intended parents may never be recognised as the child's legal parents[4] (or even as having parental responsibility)[5] under Australian law.[6] This means that for most Australian children born through surrogacy, their functional and social parents are not recognised as their legal parents. For the reasons discussed below, this is inconsistent with the rights and best interests of the child.

10.4 The recommendations in this chapter establish two pathways to parentage for children born through surrogacy. These pathways aim to simplify the process and ensure that legal parentage can be determined in the child's best interests, regardless of type of the surrogacy arrangement:

- **Administrative pathway** — Where a domestic surrogacy arrangement has been approved,[7] intended parents will be recognised as the child's legal parents upon birth (**Recommendation 28**). The Federal Circuit and Family Court of Australia would only be required to determine legal parentage if the surrogate applies for a parentage order after the birth. It is anticipated that such circumstances will be rare. A court order, made in the best interests of the child, will be required for legal parentage to be transferred to the surrogate and their partner (if any). For most domestic surrogacy arrangements this would provide a clearer, simpler pathway for intended parents to obtain legal parentage where legislative safeguards have been met (**Recommendations 11**–**21**), while still ensuring judicial oversight is available for more complicated situations.
- **Judicial pathway** — Where there is a surrogacy arrangement that has not been approved (**Recommendation 9**), or an overseas surrogacy arrangement, the surrogate and their partner (if any) would continue to be recognised as the child's legal parents upon birth. The Federal Circuit and Family Court of Australia would be required to determine legal parentage for all such arrangements. A court order, made in the best interests of the child, would be required for legal parentage to be transferred to the intended parents (**Recommendation 29**). Judicial oversight is needed to safeguard the interests of everyone involved,

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3 See **Chapter 1**, which explains that, on the data available, overseas surrogacy appears to account for about 80% of children born through surrogacy to Australian intended parents. The number of children born is not insignificant, with over 1,300 children born through overseas surrogacy granted Australian citizenship by descent in the last five financial years: Department of Foreign Affairs and Trade, *Submission 434*.

4 *Surrogacy Act 2022* (NT) s 17(b); *Surrogacy Act 2019* (SA) s 10(3)(c); *Surrogacy Regulations 2020* (SA) reg 6; *Surrogacy Act 2012* (Tas) s 16(2)(g); *Status of Children Act 1974* (Vic) s 20(1)(a).

5 Parental responsibility refers to 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': *Family Law Act 1975* (Cth) s 61B. See, eg, *Lloyd & Compton* [2025] FedCFamC1F 28, in which Carew J held that the intended 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. However, this outcome does not appear to be consistent with s 65C(c) of the *Family Law Act 1975* (Cth), which allows for parental responsibility to be applied for by 'any other person concerned with the care, welfare or development of the child'.

6 See discussion of overseas parentage below.

7 Approved surrogacy arrangements will have complied with rigorous safeguards: see **Recommendations 9**, **11**–**21**.

including the child's best interests, because these arrangements are not subject to the same legislative safeguards (**Recommendations 11**–**21**) as approved domestic arrangements (**Recommendation 9**). This process would be retrospectively available in respect of children born through surrogacy arrangements that occur before the ALRC's recommendations come into effect, to help ensure people born through surrogacy have their functional and social family legally recognised.

10.5 The ALRC recommends the Federal Circuit and Family Court of Australia be responsible for determining applications for legal parentage where a court order is required, and that a specialist list be created for this purpose. This is in recognition of the fact that the Federal Circuit and Family Court of Australia is the national specialist family law court and to ensure a uniform approach to legal parentage determinations across Australia.

10.6 Together, these recommendations address the Terms of Reference, which require the ALRC to recommend uniform or complementary laws which:

- 'protect and promote the human rights of children born [through] surrogacy arrangements, surrogates, and intend[ed] parents, noting that the best interests of the child are paramount';
- 'reduce barriers to domestic altruistic surrogacy arrangements in Australia'; and
- 'ensure appropriate recognition of legal parentage in Australia for children born [through] surrogacy overseas'.

10.7 The recommendations in this chapter also give effect to the key reform principles of legal certainty and clarity. They balance the need for efficiency and certainty with the importance of having safeguards which protect the parties' individual rights and interests, while ensuring the rights and best interests of the child are paramount. If implemented, these recommendations would provide for compliance with Australia's international obligations. For example, pursuant to both the administrative pathway and the judicial pathway, the best interests of the child are a primary consideration. Further, these recommendations would uphold the child's rights to be cared for by their parents as well as the rights of intended parents to form a family. For a more detailed discussion of the applicable rights, see **Chapter 14**.

The importance of legal parentage

10.8 As mentioned above, 'parentage' is a legal term with a specific meaning, which is distinct from broader social understandings of what it means to be a 'parent'.[8] The term 'parent' is not explicitly defined in Commonwealth, state, or territory legislation

8 See generally Linda C McClain and Daniel Cere, *What Is Parenthood?: Contemporary Debates about the Family* (NYU Press, 2013).

relevant for the purposes of surrogacy.[9] Broadly, in Australia, it refers to a person, or two people,[10] who hold the legal role of 'parent' in relation to another person.[11]

10.9 'Legal parentage' refers to the legally recognised relationship between a parent and child.[12] It can be understood as a

> gateway … through which many of the obligations owed by adults to children flow, and it is therefore a legal status from which children derive many important rights, including rights established in international law.[13]

10.10 Under the United Nations Convention on the Rights of the Child ('CRC'), a child has the right to know and be cared for by their parents.[14] Closely connected are

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9 While the various legislative schemes relating to surrogacy, family law, and assisted reproductive technology ('ART') provide consequential definitions of 'parent' (such as the meaning of 'intended parent' or 'birth parent'), there is no authoritative, exhaustive definition of who a parent is, or the meaning of 'parentage': see, eg, *Family Law Act 1975* (Cth) s 4 (definition of 'parent').

10 In Australia, the two-parent rule is a necessary implication of various legislative provisions. The parentage presumptions following ART procedures in various legislation deem the pregnant person and their 'partner' (singular) to be the legal parents: see, eg, *Parentage Act 2004* (ACT) ss 11(2), (5); *Status of Children Act 1996* (NSW) ss 14(1), (1A); *Status of Children Act 1978* (NT) ss 5C, 5D, 5DA; *Status of Children Act 1978* (Qld) ss 17(2)(a), 18(2)(a), 19(2)(a), (c), (d)(i), 19C(3), 19D(3), 19E(2)(a), (3); *Family Relationships Act 1975* (SA) ss 10C(1), (3); *Status of Children Act 1974* (Tas) ss 10C(1), (1A), (3); *Status of Children Act 1974* (Vic) ss 10C(2)(a), 10D(2)(a), 10E(2)(a), (c)–(d)(i), (e), (f)(iii), 13(1)(a)–(b), 14(1)(a)–(b). Births, Deaths, and Marriages legislation in each state and territory refers to 'either' or 'both' parents, or one parent consulting 'the other': see, eg, *Births, Deaths and Marriages Registration Act 1997* (ACT) ss 8(2)(b), 9(2)(a), (4)(b), 12(b), 13; *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 15(1), 18; *Births, Deaths and Marriages Registration Act 1996* (NT) ss 15(1), 19(1)(b), 20(2)(b); *Births, Deaths and Marriages Registration Act 2023* (Qld) s 8; *Births, Deaths and Marriages Registration Act 1996* (SA) ss 15(1), 18(1); *Births, Deaths and Marriages Registration Act 1999* (Tas) ss 14(1), 17(1)(b); *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 15(1), 16(1)(b); *Births, Deaths and Marriages Registration Act 1998* (WA) ss 15(1), 18(1)(b). Both the Australian Capital Territory and Queensland expressly prevent more than two parents being legally recognised: *Parentage Act 2004* (ACT) s 14; *Births, Deaths and Marriages Registration Act 2023* (Qld) s 12(1)(b). See also Paula Gerber and Phoebe Irving Lindner, 'Modern Families: Should Children Be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victorian University Law and Justice Journal* 34; Adiva Sifris, 'Gay and Lesbian Parenting: The Legislative Response' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 89, 98.

11 Family Law Council, *Report on Parentage and the Family Law Act* (2013) xx.

12 Through this relationship, a child also has a legally recognised relationship with extended family members such as siblings or grandparents: Alexandra Harland, 'Surrogacy, Identity, Parentage and Children's Rights: Through the Eyes of a Child' (2021) 59(1) *Family Court Review* 121, 124. See also *Allbring & Barsotti* [2026] FedCFamC2F 602 [7]–[8].

13 Hague Conference on Private International Law, 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (Preliminary Document No. 3 B of April 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference) 10 [18]. Rights which children secure through legal parentage include citizenship, access to a passport, government benefits, entitlements upon the death of a parent including inheritance, access to medical treatment, and importantly, the 'obligations of adults to care for them': Harland (n 12) 124.

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

the right to be free from discrimination[15] and the right to privacy, family, and home (**Chapter 14**).[16] As discussed below, it is clear that barriers to recognising intended parents as legal parents risk violating the rights of the child.

10.11 Separate from the concept of 'legal parentage' is the concept of 'parental responsibility'. Parental responsibility is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[17] This includes being able to make medical decisions for the child or enrol the child in school. Ordinarily, legal parents will also hold parental responsibility for their child.[18] However, while only two people can be a child's legal parents, multiple people can be recognised as holding parental responsibility for a child (in addition to or instead of the child's legal parents).[19] For example, a child's grandparents may be granted parental responsibility in addition to or instead of one or both of the child's legal parents.[20]

10.12 In essence, recognition of parental responsibility allows a person to make legal decisions on behalf of the child and makes them legally responsible for the child's care and safety. However, it is not a substitute for recognition of legal parentage. It does not establish the same familial relationship to the child, nor does the child have the same rights as they would in respect of a legal parent. For example, unlike legal parentage, parental responsibility:

- only continues until the child is 18 years old (rather than indefinitely);[21] and
- only establishes a legal relationship between the child and the person holding parental responsibility (rather than establishing a legal relationship between the child and extended family members, as legal parentage does).

10.13 This has ongoing legal implications. For example, a child would be legally entitled to receive inheritance or child support from a legal parent, or to make medical decisions for them in certain circumstances, a child would not have the same entitlements in respect of a person who holds parental responsibility for them.[22]

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15 Ibid art 2; International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) principle 3.

16 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.

17 *Family Law Act 1975* (Cth) s 61B.

18 However see, eg, *Lamb & Shaw* [2018] FamCA 629, which found the biological intended father was a legal parent, but with no parental responsibility. Parental responsibility can also be removed from a legal parent: see, eg, *Family Law Act 1975* (Cth) ss 61C(3), 61D(2); *Children, Youth and Families Act 2005* (Vic) s 321(1)(a).

19 *Family Law Act 1975* (Cth) ss 61C, 61D.

20 See, eg, *Child Protection Act 1999* (Qld) s 11; *Children, Youth and Families Act 2005* (Vic) s 321(1)(a).

21 *Family Law Act 1975* (Cth) s 65H.

22 Harland (n 12) 124.

10.14 Further, the significance of recognition of legal parentage 'goes beyond legal entitlements' for the child, or obligations on a legal parent to care for them: '[i]t is just as important for a child's sense of identity and belonging throughout their lives'.[23]

Current approach to legal parentage for children born through surrogacy

10.15 Under current Australian law, gestation determines legal parentage.[24] As a consequence, legal parentage automatically attaches to the surrogate (and their partner (if any)),[25] as it is the surrogate who gestated and gave birth to the child.[26] For domestic arrangements, this is reflected on the birth certificate (**Chapter 11**).[27] While some overseas jurisdictions may recognise the intended parents as having legal parentage upon birth, and record them on the child's birth certificate, this generally does not reflect the legal position when they return to Australia.[28]

10.16 To give effect to the intention behind a surrogacy arrangement, judicial intervention is required. Until this occurs, intended parents are unable to make legal decisions for the child, including decisions about medical treatment, unless a valid power of attorney is in place or parental responsibility is recognised.[29]

10.17 There are three ways intended parents can seek to establish legal parentage over their child, or have it recognised:

- a parentage order under state or territory legislation;
- a parentage declaration under the *Family Law Act 1975* (Cth) ('the Act'); or
- by operation of a parentage presumption under the Act.

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23 Ibid.

24 The gestating person will be a legal parent: *Parentage Act 2004* (ACT) ss 11(1)–(2); *Status of Children Act 1996* (NSW) ss 14(1)(b), (1A)(b), (4); *Status of Children Act 1978* (NT) s 5C; *Status of Children Act 1978* (Qld) ss 19(2)(a), (3), 19E(2)(a), 23(2)(a); *Family Relationships Act 1975* (SA) s 10C(1); *Status of Children Act 1974* (Tas) s 10C(3); *Status of Children Act 1974* (Vic) ss 10E(2)(a), 13(1)(a), 14(1)(a), 15(1)(a), 16(1)(a); *Surrogacy Act 2008* (WA) s 14 (definition of 'birth parents'). See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 32(1), which will commence in mid-2027.

25 *Parentage Act 2004* (ACT) ss 11(2), (5); *Status of Children Act 1996* (NSW) ss 14(1), (1A); *Status of Children Act 1978* (NT) ss 5C, 5D, 5DA; *Status of Children Act 1978* (Qld) ss 17(2)(a), 18(2)(a), 19(2)(a), (c), (d)(i), 19C(3), 19D(3), 19E(2)(a), (3); *Family Relationships Act 1975* (SA) ss 10C(1), (3); *Status of Children Act 1974* (Tas) ss 10C(1), (1A), (3); *Status of Children Act 1974* (Vic) ss 10C(2)(a), 10D(2)(a), 10E(2)(a), (c)–(d)(i), (e), (f), 13(1)(a)–(b), 14(1)(a)–(b).

26 In some circumstances, the surrogate's partner may not be deemed a legal parent if they did not consent to the artificial conception procedure: see, eg, *Seto & Poon* [2021] FamCA 288.

27 See, eg, *Births, Deaths and Marriages Registration Act 2023* (Qld) ss 11(2)(ii), (4), 23; *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 17A, 19A, 19B.

28 See below for a more detailed discussion of the effect and status of the federal parentage presumptions.

29 This experience has been raised in several submissions: see, eg, Not published, *Submission 108*; Name withheld, *Submission 115*; Not published, *Submission 119*; Name withheld, *Submission 126*; Name withheld, *Submission 127*; S Jefford, *Submission 128*; S Everingham, *Submission 129*; S Page, *Submission 130*; Australian Nursing and Midwifery Federation, *Submission 145*; Name withheld, *Submission 162*; Name withheld, *Submission 205*; Not published, *Submission 220*.

10.18 These processes have varying degrees of legal certainty, and none provides a comprehensive pathway for all children born through surrogacy to have their families legally recognised. Each of these mechanisms for recognising the intended parents as the legal parents of children born through surrogacy is discussed below.

State or territory parentage orders

10.19 Each state and territory in Australia has legislation to allow for a transfer of legal parentage from the surrogate and their partner (if any) to the intended parents after the birth of the child.[30] Applications must be made to the relevant state or territory court.[31] The judge determines whether the requirements for a parentage order have been met, taking into account the evidence before the court.[32] There is a limited window of time within which intended parents can apply for a parentage order. An application cannot be made until a month has passed following the birth, but must be made before the child is six months old.[33]

10.20 The parentage order process varies by jurisdiction. Each jurisdiction specifies prerequisites for making an order, many of which must be completed before the child was conceived.[34] Some requirements can be dispensed with by the court, in

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30 *Parentage Act 2004* (ACT) s 29; *Surrogacy Act 2010* (NSW) s 39; *Surrogacy Act 2022* (NT) s 37; *Surrogacy Act 2010* (Qld) s 39; *Surrogacy Act 2019* (SA) s 18; *Surrogacy Act 2012* (Tas) s 26; *Status of Children Act 1974* (Vic) s 22 (though they are termed 'substitute parentage orders'); *Surrogacy Act 2008* (WA) s 26. See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 126, which will commence in mid-2027.

31 *Parentage Act 2004* (ACT) s 6; *Surrogacy Act 2010* (NSW) ss 4 (definition of 'court'), 12; *Surrogacy Act 2022* (NT) s 26(1); *Surrogacy Act 2010* (Qld) ss 13, 21; *Surrogacy Act 2019* (SA) ss 4 (definition of 'court'), 18; *Surrogacy Act 2012* (Tas) ss 4 (definition of 'court'), 13; *Status of Children Act 1974* (Vic) s 18; *Surrogacy Act 2008* (WA) ss 14 (definition of 'court'), 20. See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 119, which will commence in mid-2027.

32 Note that different jurisdictions have rules about what evidence should be filed alongside a parentage order application, with many jurisdictions requiring specific reports or certificates to be included: *Surrogacy Act 2010* (NSW) s 17; *Surrogacy Act 2022* (NT) s 28; *Surrogacy Act 2010* (Qld) s 25; *Surrogacy Act 2019* (SA) ss 18(3), (10); *Surrogacy Act 2012* (Tas) s 18; *Status of Children Act 1974* (Vic) s 20(3); *Surrogacy Act 2008* (WA) s 20(5). See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 122(4), which will commence in mid-2027. Under the Victorian and current Western Australia preapproval models, some similar requirements may apply to the approval application state: *Assisted Reproductive Treatment Act 2008* (Vic) s 40(2); *Surrogacy Act 2008* (WA) s 17(c). Note the Western Australian preapproval model will be repealed by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

33 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) ss 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) ss 20(2)–(3). See also *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 122(2)–(3), which commences in mid-2027. Family and fertility lawyer, Stephen Page, highlighted that due to the difficulty of navigating legal proceedings while caring for a newborn, intended parents often do not apply until four to five months after the birth. Unforeseen circumstances may also require a longer period than currently allowed: S Page, *Submission 130*.

34 See **Chapters 5**–**7**.

the best interests of the child and in exceptional circumstances.[35] However, some requirements cannot be dispensed with under any circumstances.[36] If the parties have failed to comply with an indispensable requirement (for example, to obtain legal advice[37] or engage in counselling)[38] they cannot obtain a transfer of legal parentage and the surrogate and their partner (if any) will remain the legal parents of the child.[39]

10.21 Most surrogacy arrangements undertaken by Australian parents occur overseas,[40] and are ineligible for a domestic parentage order.[41] As discussed above, some domestic surrogacy arrangements are ineligible due to non-compliance.[42] This means that most Australian children born through surrogacy fall outside the scope of these orders, due to a significant gap in state and territory legislation.

Parentage declaration under the Family Law Act 1975 *(Cth)*

10.22 If a state or territory parentage order is not available, intended parents may seek a Commonwealth parentage declaration in the Federal Circuit and Family Court of Australia, recognising them as the child's legal parents. However, unlike a

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35 The precise formulation varies slightly between the states and territories, but generally includes 'exceptional circumstances' and/or 'best interests of the child': see, eg, *Parentage Act 2004* (ACT) s 28H(3)(b); *Surrogacy Act 2010* (NSW) s 18(2); *Surrogacy Act 2022* (NT) s 34; *Surrogacy Act 2010* (Qld) s 23(2); *Surrogacy Act 2019* (SA) s 18(6); *Surrogacy Act 2012* (Tas) s 16(3).

36 Some of the relevant Acts take an inclusive approach (where every precondition is mandatory unless a dispensation power is attached): see, eg, *Surrogacy Act 2022* (NT) ss 32–4. Others take an exclusive approach (where every precondition can be dispensed with unless it is stated to be mandatory): see, eg, *Surrogacy Act 2010* (NSW) s 18.

37 *Surrogacy Act 2022* (NT) ss 20, 21; *Surrogacy Act 2019* (SA) ss 10(5), 18(7); *Surrogacy Regulations 2020* (SA) reg 6.

38 These are not mandatory preconditions in every state and territory. However, in the Northern Territory and South Australia, these preconditions cannot be dispensed with by the court: *Surrogacy Act 2022* (NT) ss 22, 25, 32–4; *Surrogacy Act 2019* (SA) ss 10(3)(e), (4)(e), 14, 18(7); *Surrogacy Regulations 2020* (SA) reg 6.

39 See, eg, *Altimari & Altimari* [2024] FedCFamC1F 3; *Re N* [2025] NSWSC 409.

40 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.

41 Overseas surrogacy arrangements are generally excluded from the state and territory surrogacy legislation. Some jurisdictions require the surrogate to be an Australian citizen or permanent resident, or otherwise live within a jurisdiction in Australia: *Surrogacy Act 2022* (NT) s 17(b); *Surrogacy Act 2019* (SA) s 10(3)(c); *Surrogacy Regulations 2020* (SA) reg 6; *Surrogacy Act 2012* (Tas) s 16(2)(g). Victoria specifically requires the ART procedure to have been carried out within Victoria: *Status of Children Act 1974* (Vic) s 20(1)(a). Otherwise, many overseas arrangements are for profit or reward, which is a disqualifying factor for a parentage order in most of the states and territories: *Surrogacy Act 2022* (NT) s 34(1)(a); *Surrogacy Act 2010* (Qld) ss 22(2)(e)(vi), 23(1); *Surrogacy Act 2019* (SA) s 11; *Surrogacy Act 2012* (Tas) s 16(2)(ii); *Status of Children Act 1974* (Vic) s 22(1)(d). Note that recent amendments to the Australian Capital Territory and New South Wales legislation allow for parentage orders to be made in cases of overseas 'commercial' surrogacy in specific circumstances: *Parentage Act 2004* (ACT) s 28F(2); *Surrogacy Act 2010* (NSW) s 23(2). A similar provision will come into effect in Western Australia in mid-2027: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 134. However, each of these jurisdictions prohibit 'commercial surrogacy' or surrogacy 'for reward' extraterritorially, meaning obtaining an order for such arrangements will require admitting to criminal conduct before the court: see **Chapter 12**.

42 See, eg, *Altimari & Altimari* [2024] FedCFamC1F 3; *Re N* [2025] NSWSC 409.

parentage order which transfers legal parentage, a parentage declaration declares where parentage already resides.[43]

10.23 The Federal Circuit and Family Court of Australia can only make a parentage declaration if parentage is a fact in dispute in proceedings, as s 69VA of the Act is not a standalone power.[44] Even where available to the Court, the provision has been applied in a restrictive way in surrogacy cases.[45] This means that most intended parents will not be able to be recognised as legal parents through this process.

10.24 Section 60HB of the Act further provides that state or territory parentage orders are determinative of parentage of children born through surrogacy for the purposes of the Act.[46] The interaction between ss 69VA and 60HB has been contested. Some judges have found that s 60HB, which is limited to giving effect to state and territory parentage orders, limits the jurisdiction of the court to otherwise make parentage declarations in surrogacy matters.[47] Other judges have not interpreted s 69VA as being limited by s 60HB.[48] The matter was settled by the Full Court of the Family Court of Australia, in the decision of *Bernieres v Dhopal* ('*Bernieres*'). The Full Court held that s 60HB intended to 'cover the field' for parentage of children born through surrogacy for the purposes of the Act,[49] and therefore the Court could not make parentage declarations under s 69VA for children born through surrogacy.[50]

10.25 In *Bernieres*, the Full Court held that it could not make a parentage declaration for the intended parents of a child born through 'commercial' overseas surrogacy, on the basis that:

- the general parentage declaration power in s 69VA was limited in the context of surrogacy by the more specific rule in s 60HB;[51] and
- section 60HB made it clear that determinations of parentage for children born through surrogacy were intended to be left to state and territory legislation.[52]

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43 For a discussion of the meaning and nature of declaratory relief, see eg, Former Justice RS French, 'Declarations — Homer Simpson's Remedy — Is There Anything They Cannot Do?' (Speech, University of Western Australia, Perth, 30 November 2007).

44 *Re Bima* [2014] FamCA 1170 [17]–[22]. See also *Bernieres v Dhopal* (2017) 324 FLR 21 [18]–[20].

45 In judgments where a parentage declaration has been made in a surrogacy matter, it has only been available to intended fathers with a genetic connection with the child born through the surrogacy arrangement: see, eg, *Gallo & Ruiz* [2024] FedCFamC1F 893; *Seto & Poon* [2021] FamCA 288; *Green-Wilson & Bishop* [2014] FamCA 1031.

46 *Family Law Act 1975* (Cth) s 60HB.

47 See, eg, *Farnell & Chanbua* [2016] FCWA 17 [208]; *Mason & Mason* [2013] FamCA 424 [33].

48 Some decisions held that the declaration power could be used to declare the parentage of a biological father through surrogacy: *Green-Wilson & Bishop* [2014] FamCA 1031 [37]–[47]; *Ellison & Karnchanit* [2012] FamCA 602.

49 *Bernieres v Dhopal* (2017) 324 FLR 21 [62] (Bryant CJ, Strickland and Ryan JJ).

50 Ibid [63].

51 Ibid [50]–[52].

52 Ibid [52]–[53].

10.26 The Full Court recognised that, on the facts of the case:

> [t]he unfortunate result is that the parentage of the child here is in doubt. There is no order made under the relevant State legislation … There is no question that the father is the child's biological father, but that does not translate into him being a parent for the purposes of the Act. Further, the mother is not even the biological mother, and thus is even less likely to be the 'legal parent'.[53]

10.27 The Full Court ultimately held that although state legislation does not permit parentage orders to be made following a 'commercial' overseas arrangement, the Family Court of Australia did not have the power to step in to fill the gap.[54] The Full Court dismissed the appeal, allowing the original decision which granted equal parental responsibility for the child to the intended parents (but not legal parentage) to stand.[55]

10.28 The subsequent High Court decision of *Masson v Parsons* ('*Masson*'),[56] while not involving surrogacy, further clarified the scope of legal parentage in Australia, with potential implications for surrogacy arrangements. The High Court of Australia adopted a common meaning for the term 'parent', and held the Act intended for 'parent' to be broadly construed.[57] In this case, the High Court held that s 60H expanded (rather than constricted) the meaning of 'parent'.[58] It found that ultimately a parentage declaration was justified in respect of the applicant, on the basis that: the applicant had a biological connection with the child (having provided his sperm to a couple for the child's conception); had a pre-conception intention to parent the child; and parented the child upon birth.[59] The Court held that on this basis, the applicant was a parent, not a gamete donor.

10.29 The principles relied upon in *Masson*, which expanded the meaning of 'parent' based on pre-conception intent and post-birth parenting, are relevant to surrogacy arrangements. However, application of these principles to subsequent surrogacy cases where a parentage declaration has been sought has been inconsistent, given the tension with the decision in *Bernieres* which held s 60HB covers the field. For example:

- In *Seto v Poon*, a non-compliant domestic surrogacy arrangement resulted in the biological father being granted a parentage declaration over twin children, consistent with the principles in *Masson*, with the Family Court finding that he was the 'parent' within the ordinary Australian meaning of the term.[60]
- In *Gallo & Ruiz*, a biological single father of twins born through an overseas surrogacy arrangement was granted a parentage declaration, consistent with

53 Ibid [64]–[65].
54 Ibid [53].
55 See *Bernieres & Dhopal* [2015] FamCA 736.
56 *Masson v Parsons* (2019) 266 CLR 554.
57 Ibid [26], [29], [44]–[45].
58 Ibid [24]–[29], [44].
59 Ibid [26], [29], [54]. See also *Ophoven & Berzina* [2025] FedCFamC1A 97.
60 *Seto & Poon* [2021] FamCA 288 [54]–[55].

the principles in *Masson*, finding that he was their parent in the 'natural and ordinary' meaning of the word.[61]

- In *Lloyd & Compton*, parentage was a required fact to be made out in the applicant's application for leave to apply for a step-parent adoption.[62] The Federal Circuit and Family Court of Australia found that, regardless of the definition of 'parent' adopted in *Masson*, it was nonetheless bound by *Bernieres*, and therefore could not establish the applicant's parentage.[63]

Parentage presumptions under the Family Law Act 1975 *(Cth)*

10.30 There are several rebuttable presumptions in the Act which may be relevant to some parents through surrogacy.[64] These include the presumption that persons named on a child's birth certificate and birth registration are the child's legal parents (s 69R),[65] and the presumption that people recognised in an international court order as a child's legal parents are the child's legal parents under Australian law (s 69T).[66]

10.31 Rebuttable presumptions set the onus of proof if a party disputes parentage;[67] they do not create new legal rights and responsibilities.[68] We have heard from several parents through surrogacy who are relying on documentation such as an international birth certificate or parentage order, who may not realise this does not automatically equate to legal parentage in Australia. Rebuttable presumptions based on the existence of such documentation would also likely be overridden by other irrebuttable presumptions. These include, for example, s 60H (which deems the person who becomes pregnant as a result of an assisted reproductive technology ('ART') procedure, and their partner if they consented to the procedure, to be the legal parents of any child born as a consequence), and s 60HB (which gives effect to state and territory parentage orders, and has been interpreted as 'covering the field' for surrogacy parentage matters).[69] It should be noted that at the time *Bernieres* was decided, no country was prescribed in the regulations for the purposes of ss 69R or 69T. Several countries have since been prescribed.[70] Section 69R has since been applied in the surrogacy context and resulted in a parentage declaration being made

61 *Gallo & Ruiz* [2024] FedCFamC1F 893 [20].
62 Step-parent adoptions are only available if the primary parent already has legal parentage: *Family Law Act 1975* (Cth) ss 4 (definition of 'prescribed adopting parent'), 60G.
63 *Lloyd & Compton* [2025] FedCFamC1F 28 [52].
64 These presumptions are all contained in pt VII div 12 subdiv D. They are all rebuttable on the balance of probabilities: *Family Law Act 1975* (Cth) s 69U.
65 Ibid s 69R.
66 Ibid ss 69S, 69T.
67 Michelle Fernando et al, *Family Law in Australia* (LexisNexis Butterworths, 11th ed, 2025) 335 [7.10].
68 *Masson v Parsons* (2019) 266 CLR 554 [32]–[39]. See also Fernando et al (n 67) ch 7.
69 *Bernieres v Dhopal* (2017) 324 FLR 21 [58]. Cf some submissions interpret the rebuttable presumptions as conferring legal parentage: S Page, *Submission 130*; Equality Australia, *Submission 253*.
70 *Family Law Regulations 2024* (Cth) reg 10, sch 4.

in favour of the intended parents.[71] However, as noted by the Federal Circuit and Family Court of Australia:

> [i]t is not clear whether the legislators turned their minds to the effect of having overseas prescribed jurisdictions tied to section 69R. Whilst recognising overseas parentage orders from some jurisdictions is unlikely to raise concerns, there may be concerns about the circumstances behind the parentage order being made in places where there is little or no regulation of surrogacy and concerns about human rights abuses and exploitation.[72]

10.32 There is therefore some ambiguity as to the intended operation of this provision. However, even if this presumption applies, and is not overridden by s 60HB, it still only applies to children born in prescribed jurisdictions, and still appears to require confirmation through a court order.

10.33 Parentage presumptions therefore do not completely resolve the gap in pathways to legal parentage for all children born through non-compliant domestic surrogacy arrangements or overseas surrogacy arrangements.

Alternatives

10.34 While there are alternatives to applying for legal parentage, these options are inferior. For example, an intended parent may seek to register an overseas child order, where birth information is registered overseas. However, this is only an option for children born in specified countries, and only where the order is not solely for the purposes of parentage.[73]

10.35 Adoption was also raised by several stakeholders.[74] For example, an intended parent could apply to adopt their child through step-parent adoption proceedings. However, these proceedings are complex, as leave of the Federal Circuit and Family Court of Australia is required before an application can be made in a state or territory court. They are also inadequate, as one intended parent must already be recognised as a legal parent,[75] and generally an application can only be made after the adopting parent has maintained a relationship with the legal parent for several years.

Why the current approach to parentage is inadequate

10.36 As mentioned above, barriers to intended parents obtaining legal parentage risk violating the rights of the child.[76] The piecemeal mechanisms for having legal parentage recognised or transferred in Australia for children born through surrogacy

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71 *Allbring & Barsotti* [2026] FedCFamC2F 602 [18]. Noting that this judgment did not directly consider the interaction between ss 69R and 60HB of the Act.

72 Federal Circuit and Family Court of Australia, *Submission 428*.

73 *Family Law Act 1975* (Cth) s 70G; *Family Law Regulations 2024* (Cth) reg 72, sch 4.

74 See, eg, Not published, *Submission 2*; Name withheld, *Submission 22*; Name withheld, *Submission 38*; Name withheld, *Submission 115*; S Page, *Submission 130*; Not published, *Submission 309*.

75 *Family Law Act 1975* (Cth) ss 4(1) (meaning of 'prescribed adopting parent'), 60G. See also *Bernieres v Dhopal* (2017) 324 FLR 21 [87].

76 See **Chapter 14**.

leave significant gaps. Currently, access to legal parentage following surrogacy is tied to the legality of the surrogacy arrangement. Despite legislation providing that the child's best interests is the paramount consideration,[77] the courts often lack discretion to make an order in the child's best interests when the arrangement does not comply with various eligibility and process requirements.[78] In many cases, the child may have no means of having their relationship with their functional and social family legally recognised in Australia. As discussed above, the inability of intended parents to make decisions for their child[79] can have serious implications for the child's care and wellbeing,[80] and consequences for the child's legal entitlements[81] and sense of identity.

10.37 In addition to contravening the rights and best interests of the child, the current laws do not give effect to the intention behind the surrogacy arrangement. From birth, and unless displaced by a court order, the surrogate and their partner (if any) are legally responsible for the child. This default legal position is contrary to the intention behind the agreement and the wishes of everyone involved.[82]

10.38 The current default is premised on a concern that the surrogate may not wish to relinquish the child to the intended parents upon birth. However, the ALRC understands this is extremely rare, and that it is more likely (though still uncommon) for the intended parents to change their minds. This would put the surrogate at risk

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77 *Surrogacy Act 2010* (NSW) s 22; *Surrogacy Act 2022* (NT) ss 5, 34(1)(a); *Surrogacy Act 2010* (Qld) ss 6(1), 22(2)(a), 23(1); *Surrogacy Act 2019* (SA) ss 6, 18(5)(a); *Surrogacy Act 2012* (Tas) ss 3(1), 16(2)(k); *Surrogacy Act 2008* (WA) ss 13, 21(2)(g); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 120. Others, while not using the language of 'paramount consideration', require that the best interests of the child be a key consideration that cannot be dispensed with by the court: *Parentage Act 2004* (ACT) ss 28H(1)(a), (2)(a); *Status of Children Act 1974* (Vic) s 22(1)(a).

78 See **Chapters 5** and **6**.

79 See, eg, Not published, *Submission 108*; Name withheld, *Submission 115*; Not published, *Submission 119*; Not published, *Submission 123*; Name withheld, *Submission 126*; Name withheld, *Submission 127*; S Jefford, *Submission 128*; S Everingham, *Submission 129*; S Page, *Submission 130*; Australian Nursing and Midwifery Federation, *Submission 145*; Name withheld, *Submission 162*; Name withheld, *Submission 205*; Not published, *Submission 220*.

80 See, eg, Not published, *Submission 108*; Name withheld, *Submission 127*.

81 Several submissions noted that access to child support can be complicated following a surrogacy arrangement: Name withheld, *Submission 19*; FamilyVoice Australia, *Submission 232*; Equality Australia, *Submission 253*; Legal Aid NSW, *Submission 336*; Law Council of Australia, *Submission 342*; Australian Human Rights Commission, *Submission 433*. Some submissions noted that a child's right to inheritance may be affected if they are not recognised as a legal child of their parent: Name withheld, *Submission 29*; D Caruso, *Submission 35*; S Nicholes, *Submission 79*; Name withheld, *Submission 115*; S Everingham, *Submission 129*; Name withheld, *Submission 173*; Name withheld, *Submission 205*; Equality Australia, *Submission 253*; Name withheld, *Submission 318*; Name withheld, *Submission 343*; K Horsey, *Submission 418*; Australian Human Rights Commission, *Submission 433*.

82 We have heard from a range of intended parents, parents through surrogacy, and surrogates, that the default position of the surrogate being the legal parent is not what any of the parties wants: Name withheld, *Submission 117*; Not published, *Submission 119*; S Jefford, *Submission 128*; J Holder, *Submission 142*; Name withheld, *Submission 147*; Name withheld, *Submission 162*; Equality Australia, *Submission 253*. Cf some surrogates wanted to be recognised at a birth parent and included on the birth certificate: see, eg, Name withheld, *Submission 216*.

of being responsible for a child they never intended to parent.[83] We have heard that the current legal position, in which a time-consuming and expensive court process is required to facilitate a transfer of parentage, is a major source of stress and anxiety for all parties.[84]

10.39 Intended parents may be distressed or frustrated by the need for a court process, or (in the case of children born through overseas surrogacy) the lack of certainty about whether they are in fact recognised in Australia as the legal parents of their children.[85] As one submission noted:

> [a]t various stages of the process, I experienced strong emotions in response to the legal framework, which initially did not recognise me as a parent — despite the child being genetically mine.[86]

10.40 It can also create uncertainty for surrogates, who may be concerned that they will be left legally responsible for a child they never intended to parent. This can also have consequences in terms of liability to pay child support and inheritance rights (for example, the child would be entitled to a share of the surrogate's estate). As one submission noted:

> [a]s the surrogate, I am not the genetic parent and have no intention of raising the child — yet I would be listed on the birth certificate and considered the legal parent at birth. This process fails to reflect the reality of modern families and places stress on all parties during what should be a joyful time.[87]

10.41 Parents through surrogacy who cannot obtain legal parentage may be able to obtain parental responsibility orders to enable them to make decisions for the care and welfare of the child.[88] However, as discussed above, this is inferior to recognition of legal parentage, and lacks certainty and security.[89]

Limitations specific to domestic arrangements

10.42 Parentage order regimes vary significantly between the states and territories, which can lead to inconsistent outcomes in whether a parentage order is granted,[90] and confusion about what is required for a lawful surrogacy arrangement.[91] Some

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83 See, eg, Name withheld, *Submission 117*; Name withheld, *Submission 188*; Name withheld, *Submission 339*.

84 See, eg, Name withheld, *Submission 23*; K Cox, *Submission 105*; Not published, *Submission 108*; Name withheld, *Submission 115*; Not published, *Submission 119*; Not published, *Submission 123*; A-R Crispin, *Submission 167*; Name withheld, *Submission 173*.

85 See, eg, Name withheld, *Submission 161*; Name withheld, *Submission 173*; Name withheld, *Submission 259*; Rainbow Families, *Submission 260*.

86 K Cox, *Submission 105*.

87 Name withheld, *Submission 117*.

88 *Family Law Act 1975* (Cth) ss 61D, 65C. See, eg, Not published, *Submission 2*; P Parkinson, *Submission 13*. However, see *Lloyd & Compton* [2025] FedCFamC1F 28 where recognition of parental responsibility was refused.

89 See, eg, *Farnell & Chanbua* [2016] FCWA 17.

90 See, eg, S Jefford, *Submission 128*; Not published, *Submission 215*; Not published, *Submission 393*. See also Name withheld, *Submission 212*.

91 See **Chapter 3**.

parties do not seek legal advice before embarking on a surrogacy journey,[92] and only Victoria (and Western Australia, until recently enacted reforms come into effect) has a proactive mechanism, which requires proof of compliance with pre-arrangement conditions before the arrangement can commence.[93] This means that, for most domestic arrangements, non-compliance may only be identified at the parentage order application stage, when the child is already born and in the intended parents' care. At this point, it is effectively too late to remedy the non-compliance, or for the requirement or safeguard to have any operation or useful effect.[94] If the court has discretion, it may dispense with the requirement (rendering the safeguard effectively redundant) and make a parentage order. However, if the court lacks discretion, or determines not to dispense with a requirement, a parentage order will not be made. The child's functional and social parents will not be recognised as their legal parents, and the surrogate will remain legally responsible for the child, despite the intentions and interests of all parties.

10.43 We have heard that the parentage order process is unnecessarily stressful and burdensome.[95] There is a limited window of time for the parties to apply for a parentage order. As one parent through surrogacy noted:

> [m]y husband and I want to be giving all of our time and energy to [our child] but unfortunately we are spending a lot of time, money and energy trying to navigate getting this parentage order processed.[96]

10.44 The gap between the child being born and a parentage order being granted may prevent the intended parents from making legal decisions for their child during the first months of their life (unless there is a power of attorney in place or parental responsibility has been recognised), burdening the surrogate with this responsibility.[97] During this time the surrogate may be called upon to make legal or medical decisions for the child. Submissions from surrogates have raised their discomfort with this situation.[98] One submission from a surrogate noted:

> [d]elays create confusion and distress, particularly for the surrogate, who may be asked to make decisions for a child who is not hers to parent. There have also been cases where babies have been placed in special care nurseries, not

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92 See S Page, *Submission 130*.

93 *Status of Children Act 1974* (Vic) s 22(1)(b); *Surrogacy Act 2008* (WA) s 16. Note the Western Australian preapproval system will be repealed by the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), which will commence in mid-2027.

94 See, eg, *Altimari & Altimari* [2024] FedCFamC1F 3.

95 See, eg, Not published, *Submission 108*; Name withheld, *Submission 117*; Name withheld, *Submission 126*; Name withheld, *Submission 127*; S Jefford, *Submission 128*; Not published, *Submission 274*; Name withheld, *Submission 278*.

96 A-R Crispin, *Submission 167*.

97 See, eg, Not published, *Submission 108*; Name withheld, *Submission 162*; Name withheld, *Submission 219*; Equality Australia, *Submission 253*.

98 See, eg, Name withheld, *Submission 62*; Name withheld, *Submission 87*; Name withheld, *Submission 117*; Not published, *Submission 119*; S Jefford, *Submission 128*; Name withheld, *Submission 302*; Name withheld, *Submission 307*; Name withheld, *Submission 318*; Name withheld, *Submission 339*.

> because of medical need but because the surrogate could not remain with the child, and the intended parents were not yet recognised legally.[99]

10.45 The timeframe also fails to accommodate unexpected circumstances that can occur while raising a newborn, especially following a complicated pregnancy or birth.[100]

10.46 We have also heard that the parentage order process can be expensive, taking into account court fees, lawyers' fees, and the cost of commissioning additional reports or evidence required for a successful order.[101] As one submission from an intended parent noted:

> [t]he current legal process of transferring parentage after birth often coincides with one of the most stressful and financially challenging periods in a new parent's life - returning to work, caring for a newborn, managing household expenses, and simultaneously navigating legal fees, court appearances, and the uncertainty of delayed legal recognition. This prolonged legal limbo places an unnecessary and significant strain on the mental health and wellbeing of intended parents.[102]

10.47 Where the surrogacy arrangement results in a stillbirth, or the child dies before a parentage order can be obtained, it appears that there is currently no mechanism for intended parents to become the legal parents of the child.[103] Aside from lack of recognition as the child's legal parents potentially adding to their grief, this can have legal consequences, including for leave entitlements[104] and in relation to deciding what should be done with the child's remains.[105]

Limitations specific to overseas arrangements

10.48 The rights and interests of children born through overseas surrogacy arrangements are particularly vulnerable, as there is a significant risk that their

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99 Name withheld, *Submission 127*.

100 See, eg, Name withheld, *Submission 422*. See also S Page, *Submission 365*.

101 See, eg, Not published, *Submission 108*; Name withheld, *Submission 111*; Name withheld, *Submission 115*; Not published, *Submission 119*; S Jefford, *Submission 128*; S Everingham, *Submission 129*; S Page, *Submission 130*; A-R Crispin, *Submission 167*. We note that court filing fees for intended parents seeking a parentage order vary significantly between Australian jurisdictions. For example, it is free to apply to the Australian Capital Territory Supreme Court, whereas it cost $1,442.55 to apply to the New South Wales Supreme Court in the 2026–27 financial year: *Court Procedures (Fees) Determination 2018* (ACT) sch 1, pt C, item 1108; *Civil Procedure Regulation 2017* (NSW) s 4, sch 1 pt 1, sch 3 cl 2. Ordering a new birth certificate reflecting the parentage order also incurs an additional expense.

102 Name withheld, *Submission 23*.

103 See, eg, *A v X; Re Z* [2022] NSWSC 971.

104 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 31AA, 276–7. However, 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.

105 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 91, 97; *Cremations Act 2003* (Qld) Dictionary (definition of 'close relative', 'human remains').

family relationships will never be legally recognised in Australia. This is because, as discussed above, Australian law does not provide a pathway to legal parentage for the majority of children born through surrogacy overseas. As one submission, from a parent through surrogacy, noted:

> [i]t's extremely distressing to go through the journey of infertility and surrogacy and then have your child not be recognised as yours, to not be a legal parent and you can feel very helpless and even inferior to not be able to take your child to the doctor; it's invalidating and in some cases humiliating … There needs to be a process to legalise the Australian children being born overseas to Australian parents. They are loved children who have a right to have their parentage recognised and anything less is not good enough.[106]

10.49 None of the alternative options (discussed above) is an adequate substitute for legal parentage.[107]

10.50 Under Australian law, the surrogate and their partner (if any) are the child's legal parents. This is problematic, as they do not reside in Australia, did not intend to parent the child, do not consider themselves to be the child's parents, and the child is not in their care. It is impractical for intended parents, when making decisions for their child such as applying for a passport, to obtain the surrogate's consent, particularly if the surrogate (who is overseas) cannot be contacted.[108] It may also be that the child's birth country does not recognise the surrogate as the child's legal parent,[109] meaning no country can enforce the parentage of the child, making the parties' rights and obligations inconsistent between jurisdictions. As submissions from one family formed through overseas surrogacy raised:[110]

> [i]n the US a pre-birth court order was obtained which named both of us as our children's parents … So [in the US] we are immediately considered our children's legal parents. However … the moment we return home to Australia, that recognition evaporates.
>
> [i]n the eyes of Australian law, as I understand it, our children's surrogates and maybe even their husbands would be deemed to be the legal parents.[111]
>
> [m]y dads are legally recognised in California as my parents through a court order that declares them my sole parents. My surrogate has no legal rights over me. I'm aware … Australian law doesn't fully recognise my dads as my legal parents. I think this is ridiculous as they've raised me since the day I was

106 Name withheld, *Submission 343*.

107 See generally 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.

108 In some circumstances, it may not be possible to contact the surrogate. See **Chapter 13**. See also **Recommendation 47**.

109 See S Page, *Submission 365*.

110 See also Name withheld, *Submission 177*, in which a parent through surrogacy described the outcome of being recognised as the legal parent of her child the United States of America, but not Australia, as 'unjust and burdensome' for both the intended parents and the surrogate. Despite the presumption in s 69R of the Act, a judicial process is required to confirm parentage in Australia.

111 Name withheld, *Submission 231*.

> born. … I think it's illogical that a woman I've only met a few times is still my legal parent due to Australian law, instead of my two dads who I consider my real parents.[112]
>
> [i]t seems crazy when my dads are the ones raising me for someone on the other side of the world to have to agree for me to have a passport or make other decisions about me.[113]

10.51 In some Australian jurisdictions, it is an offence to engage in 'commercial surrogacy' or 'surrogacy for reward' overseas.[114] This means that some intended parents may never seek formal recognition of parentage, for fear of a criminal sanction.[115] Three jurisdictions have recently introduced amendments which permit a parentage order to be made in certain circumstances despite the existence of an unlawful overseas surrogacy arrangement.[116] However, despite these provisions, intended parents are unlikely to seek recognition of their relationship with their child under Australian law, as doing so would require them to admit to the commission of a criminal offence. This adds to the stigma around surrogacy, and links access to legal parentage to the legality of the arrangement, rather than the best interests of the child (see **Chapter 12**).

10.52 As discussed in **Chapter 13**, overseas surrogacy arrangements can carry greater risks to everyone involved, due to lack of safeguards, oversight and transparency in some arrangements. For this reason, it is appropriate to require oversight before legal parentage is recognised in Australia, to ensure there was a surrogacy arrangement in place and the surrogate has genuinely relinquished the child based on free and informed consent. However, there still needs to be a pathway for legal recognition where it is in the child's best interests. From the perspective of the child's identity and sense of belonging to the broader Australian community, a failure to legally recognise their family enhances the stigma already attached to surrogacy and could create distress.[117]

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112 Name withheld, *Submission 234*.

113 Name withheld, *Submission 235*.

114 *Parentage Act 2004* (ACT) ss 41, 45; *Surrogacy Act 2010* (NSW) ss 8, 11; *Surrogacy Act 2010* (Qld) ss 54, 56. Western Australia has also recently introduced an extraterritorial prohibition: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151. This Act commences mid-2027.

115 For example, in *Lloyd & Compton*, the Federal and Family Circuit Court of Australia observed that '[i]t has long been the approach of this Court to refer such matters to the appropriate authorities' and referred the intended parents under an overseas commercial surrogacy arrangement to the Office of the Director of Public Prosecutions: *Lloyd & Compton* [2025] FedCFamC1F 28 [74].

116 *Parentage Act 2004* (ACT) s 28F(2); *Surrogacy Act 2010* (NSW) s 23(2). A similar allowance will soon come into effect in Western Australia: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 123(2), 134.

117 See, eg, K Cox, *Submission 105*; Not published, *Submission 123*; S Jefford, *Submission 128*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Not published, *Submission 220*; Rainbow Families, *Submission 260*.

New pathways to legal parentage

10.53 The recommendations in this chapter, if implemented, would ensure all children born through surrogacy have the opportunity to have their family legally recognised in Australia, irrespective of the type of surrogacy arrangement involved. This will ensure children born through surrogacy are not disadvantaged by the circumstances of their birth.

10.54 As set out above, two pathways are recommended:

- **The administrative pathway** — This pathway would be for all domestic surrogacy arrangements which comply with the approval process established by **Recommendation 9**. Intended parents would be recognised as the child's parents upon birth, consistent with the intention of the parties to the surrogacy agreement. The surrogate would not have a legal relationship to the child. Judicial oversight is not needed, due to the safeguards built into the approval process. However, in the rare instance that a surrogate decided to apply for legal parentage of the child, a judicial process would be available, and would be required, to transfer parentage to the surrogate, where it is in the best interests of the child.
- **The judicial pathway** — This pathway would be for all surrogacy arrangements where the administrative pathway is unavailable, including all overseas arrangements. The surrogate and their partner (if any) would be recognised as the child's parent upon birth, and a judicial process would be required to transfer parentage to the intended parents, where it is in the best interests of the child. Judicial oversight would be needed for these arrangements, as (unlike in arrangements on the administrative pathway) compliance with essential safeguards may be lacking.

10.55 These pathways are discussed in detail below.

General constitutional considerations

10.56 The recommendations in this chapter are based on the presumption that, where judicial involvement is required, the Federal Circuit and Family Court of Australia will have exclusive jurisdiction to determine legal parentage for children born through surrogacy. The ALRC recognises that this raises constitutional considerations and would require the cooperation of each jurisdiction.

10.57 The Federal Circuit and Family Court of Australia would need to be vested with jurisdiction through Commonwealth legislation,[118] and the Commonwealth Parliament can only legislate on matters falling under one of the constitutional heads of power.[119]

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118 *Australian Constitution* ch III. See generally Robert French, 'The Kable Legacy: Its Impact on the Australian Judicial System' in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law* (The Federation Press, 2020).

119 *Australian Constitution* s 51.

10.58 Most states and territories have already referred the power to legislate on some family law matters to the Commonwealth Parliament under the referral power in s 51(xxxvii) of the *Australian Constitution*.[120] These referrals allow the Commonwealth Parliament to legislate on child custody and maintenance, and to a limited extent the determination of parentage,[121] however adoption is explicitly excluded.[122] It is unclear whether the scope of these existing referrals is sufficient to enable the Federal Circuit and Family Court of Australia to exercise exclusive jurisdiction over legal parentage for children born through surrogacy.[123] Further, South Australia does not include parentage in their referrals,[124] and Western Australia has never referred legislative power in relation to family law to the Commonwealth. The ALRC recognises that further referral may be required, before the recommended pathways in this chapter could be implemented.

10.59 In the event that there is no such referral, the Commonwealth Parliament may be able to legislate on surrogacy matters, including by vesting the Federal Circuit and Family Court of Australia with the power to determine parentage orders, through the external affairs power.[125] There are two primary avenues pursuant to which the external affairs head of power may provide the constitutional basis for the court's jurisdiction. First, for overseas surrogacy arrangements, there is a clear nexus with matters beyond Australia's borders. Second, and of relevance to both domestic and overseas surrogacy arrangements, Australia has ratified the CRC, according to which Australia must prioritise the best interests of the child and safeguard the child's right to know and be cared for by their parents (see **Chapter 14**). Parentage order applications by married intended parents likely fall within the matrimonial clauses power, which covers 'parental rights, and the custody and guardianship of infants' within the context of a marriage or divorce, however this would only cover some arrangements.[126]

10.60 Ultimately, whether a new referral of state powers would be required, or whether there is already a federal power to legislate on surrogacy matters, is a matter that needs to be considered further during implementation (see **Chapter 3**).

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

121 Only four states have referred the power to determine parentage matters: *Commonwealth Powers (Family Law — Children) Act 1986* (NSW) s 3(1)(c); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld) s 3(1)(c); *Commonwealth Powers (Family Law — Children) Act 1987* (Tas) s 3(1)(c); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic) s 3(1)(c).

122 See *Commonwealth Powers (Family Law — Children) Act 1986* (NSW) s 3(2); *Commonwealth Powers (Family Law — Children) Act 1990* (Qld) s 3(2); *Commonwealth Powers (Family Law) Act 1986* (SA) s 3(2); *Commonwealth Powers (Family Law — Children) Act 1987* (Tas) s 3(2); *Commonwealth Powers (Family Law — Children) Act 1986* (Vic) s 3(2).

123 The referral wording indicates power to 'determine' the child's parentage. It does not use the term 'transfer': see, eg, 'the determination of a child's parentage for the purposes of the law of the Commonwealth': *Commonwealth Powers (Family Law — Children) Act 1986* (NSW) s 3(2).

124 *Commonwealth Powers (Family Law) Act 1986* (SA).

125 *Australian Constitution* s 51(xxix).

126 Ibid s 51(xxii).

Why the Federal Circuit and Family Court of Australia

10.61 The ALRC recommends that where a parentage order is required (whether under the administrative or judicial pathway) these applications should be determined by the Federal Circuit and Family Court of Australia, in a specialist list. As Australia's specialist family law court, it is best placed to:

- determine what is in the best interests of the child, as it already applies this standard in other family law proceedings;[127] and
- develop a coherent body of case law on how the best interests of the child should be determined, consistently between the administrative and judicial pathways, promoting national consistency and predictability.

10.62 Further, as the court may wish to make other orders alongside a parentage order, such as recovery orders or parental responsibility orders, it is logical for the application to be heard in the Federal Circuit and Family Court of Australia, which is empowered to make such orders.[128]

10.63 A specialist list is appropriate because of the unique considerations which arise in surrogacy parentage matters, and their potential complexity. Given the relatively small number of applications, there is a risk a coherent approach may not develop if they are determined in the general list, unlike a specialist list in which judges can develop expertise.

10.64 The Federal Circuit and Family Court of Australia supports this recommendation, including the recommendation for the establishment of a specialist list, on the basis that it:

> would aim to produce greater certainty and consistency of outcomes. This area is a complex and specialist area of law, and these cases are not always well articulated by lawyers.[129]

10.65 In the Discussion Paper, we asked what matters should be taken into account by the Federal Circuit and Family Court of Australia in determining the best interests of the child.[130] Having some legislative criteria is desirable to promote consistency in decision-making, but without being so prescriptive as to limit the range of matters that may be relevant to the determination. Section 60CC of the Act lists mandatory, but non-exhaustive, considerations for determining the best interests of the child in parental responsibility applications. Considerations include: promoting the safety of the child; providing for their developmental, psychological, and emotional needs; and the benefit to the child of having a relationship with significant people and enjoying

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127 Most notably parental responsibility order applications: *Family Law Act 1975* (Cth) pt VII div 2.

128 Recovery orders require a person to return a child to a specified person: ibid s 67Q. A parenting order may cover a range of matters relating to the care of the child, including who the child should live with, if they are to spend time with other persons, and who is responsible for making major decisions for the child: ibid 64B.

129 Federal Circuit and Family Court of Australia, *Submission 428*.

130 Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper 89, 2025), 59 (Question O).

their culture. This provision should apply to surrogacy parentage determinations for consistency.

Administrative pathway to legal parentage

Recommendation 28

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an approved surrogacy arrangement (**Recommendation 9**) and a child is born (or stillborn):
    a. the intended parent(s) who are parties to that arrangement are, upon the birth of the child, the legal parent(s) of the child;
    b. the surrogate may apply to the Federal Circuit and Family Court of Australia, within three months of the birth of the child, for a parentage order which recognises the surrogate and the surrogate's partner (if any) as the legal parent(s) of the child;
    c. the timeframe for the application in paragraph 1(b) may be extended to six months, in exceptional circumstances, at the discretion of the Federal Circuit and Family Court of Australia; and
    d. the intended parents may still apply to the Federal Circuit and Family Court of Australia for a parentage declaration, where parentage is recognised through paragraph 1(a).
2. The Federal Circuit and Family Court of Australia should be empowered, in an application under paragraphs 1(b) or 1(d), to:
    a. consider and determine the application, taking into account all relevant considerations, but giving paramount consideration to the best interests of the child, including by reference to s 60CC of the *Family Law Act 1975* (Cth); and
    b. make any other orders necessary to give effect to the best interests of the child.
3. The Federal Circuit and Family Court of Australia should establish a specialist list for dealing with applications involving surrogacy, including applications under paragraphs 1(b) or 1(d).

10.66 As discussed above, there are significant shortcomings in the existing state and territory parentage order frameworks. The pathway to legal parentage should align with what is in the best interests of the child born through surrogacy. It should

be clear, certain, and consistent with the intention of the parties to the arrangement. This was raised in many submissions to this Inquiry.[131]

10.67 **Recommendations 11**–**21** establish safeguards which must be met before a domestic surrogacy arrangement can be approved. These include minimum age requirements for all the parties, medical screening for the surrogate, counselling and legal advice for all the parties, and a compliant surrogacy agreement. The safeguards are designed to ensure the arrangement is based on free and informed consent, and risks of harm are proactively addressed and minimised. **Recommendation 34** provides that an ART service provider cannot facilitate an attempt to achieve a pregnancy until an arrangement is approved.

10.68 Approved arrangements proceed on the administrative pathway (**Recommendation 28**), which provides that, by operation of law, the intended parents are the legal parents of the child upon birth. This outcome:

- ensures a child's functional and social parents are recognised as their legal parents upon birth, consistent with their right to be cared for by their family;
- ensures that parents through surrogacy can make decisions for their child from birth;
- is consistent with the intention of everyone when they entered into the surrogacy arrangement;
- ensures that the surrogate is not burdened with unwanted legal responsibility; and
- avoids unnecessary legal proceedings for parentage to be transferred, by aligning the default legal position with the intent of the parties to the arrangement.

10.69 The administrative pathway would uphold the right of a child born through surrogacy to be cared for by their family, by ensuring their parents are legally recognised from birth, and would ensure they are not discriminated against based on the circumstances of their birth. The Federal Circuit and Family Court of Australia supported the administrative pathway, as it would reduce legal uncertainty following the birth of the child, and allow the intended parents to make legal decisions on behalf of the child from birth.[132]

10.70 It is justified to remove the requirement for judicial oversight for approved arrangements, as there has been compliance with robust oversight, eligibility, and process requirements. These safeguards help to ensure the informed consent of everyone involved and the approval process proactively identifies and manages risk before the child is born. If the requirements are not met, the arrangement will not be approved, thus better ensuring that surrogacy arrangements only proceed where appropriate.

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131 See, eg, Not published, *Submission 2*; K Cox, *Submission 105*; Name withheld, *Submission 117*; S Page, *Submission 130*; Name withheld, *Submission 161*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Not published, *Submission 204*.

132 Federal Circuit and Family Court of Australia, *Submission 428*.

10.71 It is appropriate for intended parents to be recognised as the child's legal parents upon birth under the administrative pathway, as the parties informed consent to, and shared intention for, this outcome are clearly established (with oversight) before the arrangement commences.[133] By entering into the approved agreement — in the knowledge that the legal consequence of the agreement being fulfilled is that, by operation of law, the intended parents will be the legal parents — the surrogate agrees to the intended parents being recognised as the legal parents of the child upon birth, subject to the surrogate's capacity to apply for a parentage order. However, other than in relation to the recovery of costs and loss, the surrogacy agreement is not legally binding (see **Chapter 7**). The surrogate can end the arrangement any time before becoming pregnant. If the surrogate changes their mind after becoming pregnant, they can:

- terminate the pregnancy (where lawful). The surrogate's right to autonomy and bodily integrity over the pregnancy is uncompromised (see also **Recommendations 17**, **20**, **21**); or
- apply for a parentage order once the child is born. Where this is in the child's best interests, the application will be granted.

10.72 This approach is in contrast to the current process in most jurisdictions, where judicial oversight is necessary because consent and shared intention regarding parentage are only established as part of post-birth legal proceedings.[134]

10.73 The administrative pathway would provide greater certainty and predictability to the parties to an approved arrangement. The parties can be confident that their intention when entering the approved arrangement — that the intended parents will be the child's legal parents — will be reflected upon the birth of the child. This would likely remove any potential barriers for those who might consider being surrogates, but are concerned they may be left responsible for the child, and reduce the likelihood of intended parents engaging in overseas arrangements which can carry a higher risk of exploitation.[135] As the Federal Circuit and Family Court of Australia acknowledged, the administrative pathway would provide a 'powerful incentive' for intended parents to undertake surrogacy domestically.[136]

133 See **Recommendations 17**–**18**.

134 *Parentage Act 2004* (ACT) ss 28H(1)(b), (2)(c); *Surrogacy Act 2010* (NSW) s 31; *Surrogacy Act 2022* (NT) s 32; *Surrogacy Act 2010* (Qld) s 22(2)(h); *Surrogacy Act 2019* (SA) ss 18(5)(c)–(d); *Surrogacy Act 2012* (Tas) s 16(2)(j)(iii); *Status of Children Act 1974* (Vic) ss 22(1)(e), (3); *Surrogacy Act 2008* (WA) s 21(2)(d); *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 123(1)(d).

135 See **Chapter 13**.

136 Federal Circuit and Family Court of Australia, *Submission 428*.

10.74 Among stakeholders who support surrogacy, there was significant support for the proposed administrative pathway.[137] Many submissions advocated for an expedited pathway to parentage.[138]

10.75 In arriving at this recommendation, the ALRC considered a range of alternative mechanisms for recognising legal parentage. Submissions were varied in the mechanisms they proposed:

- Some advocated for a pre-birth judicial process,[139] such as those available in some American states[140] that would allow the parties to apply for a parentage order towards the end of the pregnancy, recognising the intended parents as the legal parents. The ALRC has recommended an administrative process, rather than a pre-birth judicial process, to avoid the need for costly legal proceedings. Judicial oversight is unnecessary where sufficient safeguards are in place and there is no dispute about parentage.
- Some stakeholders specifically endorsed an administrative pathway, including pointing to the recent recommendations from the Te Aka Matua o te Ture | Law Commission (NZ), and the Law Commission of England and Wales, and Scottish Law Commission, which recommended alternative forms of an administrative pathway.[141]

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137 See, eg, S Jefford, *Submission 359*; J Attawet, *Submission 360*; S Page, *Submission 365*; Name withheld, *Submission 372*; Australian Nursing and Midwifery Federation, *Submission 375*; Name withheld, *Submission 383*; Not published, *Submission 393*; E Kneebone, *Submission 415*; Surrogacy Australia, *Submission 417*; K Horsey, *Submission 418*; Federal Circuit and Family Court of Australia, *Submission 428*; Rainbow Families, *Submission 429*; Equality Australia, *Submission 435*.

138 See, eg, Name withheld, *Submission 114*; Not published, *Submission 116*; Name withheld, *Submission 117*; Not published, *Submission 119*; Not published, *Submission 123*; Name withheld, *Submission 127*; Name withheld, *Submission 137*; Name withheld, *Submission 138*; Name withheld, *Submission 148*; Name withheld, *Submission 173*.

139 See, eg, Name withheld, *Submission 1*; Name withheld, *Submission 11*; K Cox, *Submission 105*; Name withheld, *Submission 107*; Not published, *Submission 108*; Name withheld, *Submission 126*; S Jefford, *Submission 128*; S Page, *Submission 130*; Name withheld, *Submission 135*; Name withheld, *Submission 141*; L Ransome, *Submission 144*; Name withheld, *Submission 147*; Name withheld, *Submission 162*.

140 See generally Evelina Manvelyan et al, 'Navigating the Gestational Surrogacy Seas: The Legalities and Complexities of Gestational Carrier Services' (2024) 41 *Journal of Assisted Reproduction and Genetics* 3013. See also Name withheld, *Submission 102*; Name withheld, *Submission 231*; Name withheld, *Submission 234*; Name withheld, *Submission 259*.

141 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) ch 6, recs 17–36; Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) ch 4, recs 1–9.

10.76 Some submissions raised concerns with the proposed administrative pathway.[142] These included concerns about:

- lack of judicial oversight;
- what happens if the surrogate experiences a 'change of mind'; and
- whether there is a realistic prospect of a surrogate's application for legal parentage being granted.

10.77 The ALRC is of the view that it is in the child's best interests to have their social and functional family legally recognised from birth. As recognised by her Honour Judge Harland, speaking extra-curially:

> [r]ecognition of the intended parents as the child's legal parents at birth promotes the best interests of the child, particularly in a context where significant safeguards have been met upfront.[143]

10.78 The safeguards recommended by the ALRC are far greater than the existing safeguards, and would be proactively enforced. This mitigates the need for judicial oversight and the already low risk that the surrogate will experience a change of mind. The law should set the default process based on the most common cases, rather than exceptional cases. Further, in the exceptional situation where a surrogate has experienced a change of mind, a surrogate's application for legal parentage would be granted if this is in the best interests of the child. This is consistent with the approach adopted throughout this Report which prioritises the rights and interests of children born through surrogacy.

How the administrative pathway would work

10.79 This process would replace the existing parentage order processes in each state and territory. A court order transferring parentage would not be required for approved surrogacy arrangements (see **Chapter 3**). Intended parents would be recognised, by operation of law, as the child's legal parents upon birth and recorded on the child's birth certificate.[144]

10.80 The ALRC heard that, without a court order, intended parents may face practical difficulties being recognised as the legal parents of their child overseas. For this reason, the ALRC recommends that intended parents should be able to elect to obtain a declaration of parentage (even though they are recognised in Australia as

142 See, eg, Name withheld, *Submission 362*; B Tobin, *Submission 367*; Centre for Bioethics and Culture, *Submission 379*; M Quinlan, *Submission 381*; Active Watching Waiting, *Submission 390*; Australian Catholic Bishops Conference, *Submission 403*; Mothers Adoption Loss Alliance, *Submission 407*; ARMS (Vic), *Submission 408*; FINRRAGE, *Submission 410*; World Youth Alliance, *Submission 411*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*; AF4WR, *Submission 424*; R West, *Submission 426*.

143 Extra-curial conversation with her Honour Judge Harland, dated 6 May 2026.

144 See also **Recommendations 30**–**32**.

legal parents by operation of law) to provide additional certainty when travelling or moving overseas with the child.[145]

Surrogate's right to apply for a parentage order post-birth

10.81 In recognition of the surrogate's unique and crucial role in the creation of the child, it remains an option for the surrogate to apply for legal parentage of the child once born. Any application would be determined by a judge in the best interests of the child. The complexity of this determination, and its consequences for the legal rights and obligations of everyone involved, means this must be a judicial, rather than administrative, determination. The surrogate's right to apply for a parentage order is important to protect the rights of everyone involved.[146]

10.82 Legal certainty regarding parentage is in the child's best interests, as well as in the interests of all parties. For this reason, a time limit of three months after the birth has been set for the surrogate to lodge a parentage order application. In exceptional circumstances, the court could extend this deadline to six months. This is a shift from Proposal 30 in the Discussion Paper. We heard from a range of stakeholders that an inflexible three-month time limit is too short a period to account for the range of unforeseen circumstances that might delay a surrogate in lodging an application.[147] When deciding whether to pursue this right, the surrogate would have access to counselling (see **Recommendation 18**).

10.83 Some stakeholders have questioned whether it is fair to make the surrogate financially responsible for commencing legal proceedings,[148] which may be costly.[149] To alleviate these concerns, the legal aid commissions may wish to make special provision for assisting surrogates in matters of this kind.[150]

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145 This approach was supported by several stakeholders. It also appears to be adopted in practice in some overseas jurisdictions that allow for an administrative process: see, eg, S Page, *Submission 130*; Name withheld, *Submission 161*; Not published, *Submission 292*.

146 The Federal Circuit and Family Court of Australia supported the surrogate being entitled to apply, within three months, for a parentage order: Federal Circuit and Family Court of Australia, *Submission 428*.

147 This accounts for circumstances where the surrogate has a particularly challenging post-birth recovery, for example. We heard from a range of stakeholders that three months was too short a period to account for all circumstances where the surrogate may wish to seek an order: see, eg, Name withheld, *Submission 4*; B Tobin, *Submission 367*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 396*; ARMS (Vic), *Submission 408*; Name withheld, *Submission 422*; AF4WR, *Submission 424*.

148 See, eg, B Tobin, *Submission 367*.

149 We have heard that obtaining psychological reports and psychological assessments for court proceedings (to determine the best interests of the child) can be expensive, especially when combined with lawyers' fees and court filing fees: Name withheld, *Submission 111*; Name withheld, *Submission 127*; Not published, *Submission 108*; Name withheld, *Submission 162*.

150 Parentage matters covered by legal aid are often limited to paternity disputes: see, eg, Legal Aid ACT, *Legal Assistance Guidelines* (August 2025) 23–4, part 2, guideline 8; Legal Aid Queensland, 'Guidelines - Commonwealth - Family', *Grants Policy Manual* guideline 8 <www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/Guidelines-Commonwealth-Family>. However, surrogates may be able to obtain assistance under other guidelines relating to public interest or exceptional circumstances.

What if the intended parents refuse to take the child into their care, or die before or after the child is born?

10.84 Concerns were raised by some stakeholders about what would happen if the intended parents refused to take the child into their care upon birth.[151] The risk of child abandonment exists for any child and is not unique to children born through surrogacy. By operation of law, the intended parents would be the legal parents of the child upon birth. The law would therefore apply in the same way it does when any other parent abandons their child. Temporary measures would be made for the child's care until formal orders are made in terms of parental responsibility for the child.[152] Ultimately, the child may be taken into the care of the state, and potentially fostered or put up for adoption.[153]

10.85 Concerns were also raised by some stakeholders about what would happen if the intended parents died before or after the child is born.[154] This same risk exists for any child. Under the current law, any person concerned with the care, welfare, or development of the child can apply for a parental responsibility order, to be made in the best interests of the child.[155] This would likely include family members of the intended parents, or any guardian appointed by the intended parents while they were still alive. There is no need to establish a unique system for children born through surrogacy.[156]

What happens if the surrogate refuses to relinquish the child?

10.86 Concerns were raised by some stakeholders about what would happen if the surrogate refused to relinquish the child to the intended parents.[157] Unlike the intended parents, the surrogate would have no legal relationship to the child upon birth. If the surrogate refused to relinquish the child, the intended parents would be

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151 See, eg, Australian Christian Lobby, *Submission 104*; Name withheld, *Submission 196*; Name withheld, *Submission 421*.

152 Each state and territory has specific legislation which provides for temporary care of a child in need of care and protection: see, eg, *Children and Young People Act 2008* (ACT) ss 345, 406, 409–10, 424–5; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 34, 69–71, 79.

153 See, eg, *Children and Young People Act 2008* (ACT) s 354; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

154 See, eg, Name withheld, *Submission 421*.

155 *Family Law Act 1975* (Cth) pt VII div 2, s 60CC.

156 Note the Law Commission of England and Wales, Scottish Law Commission, and Te Aka Matua o te Ture | Law Commission (NZ), provide more specific recommendations regarding who may become responsible for a child if the intended parents become unable to accept them into their care: see Law Commission of England and Wales and Scottish Law Commission (n 141) recs 7–8; Te Aka Matua o te Ture | Law Commission (NZ) (n 141) recs 32, 34.

157 See, eg, M Somerville, *Submission 106*; Not published, *Submission 108*; E Kendal, *Submission 166*; Name withheld, *Submission 196*; Name withheld, *Submission 235*; Name withheld, *Submission 278*; P Harper, *Submission 290*; Mothers Adoption Loss Alliance, *Submission 291*; Not published, *Submission 358*; M Quinlan, *Submission 381*; J Tritton, *Submission 406*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*; Name withheld, *Submission 422*; R West, *Submission 426*. See also FamilyVoice Australia, *Submission 232*; Name withheld, *Submission 362*.

able to apply for an order to recover the child, and the surrogate would be compelled to relinquish the child, where it is in the child's best interests.[158] The only way for the surrogate to be recognised as the child's legal parent, or as having any parental responsibility for the child, would be through a court order.

Judicial pathway to legal parentage

Recommendation 29

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an unapproved domestic surrogacy arrangement (**Recommendation 9**) and a child is born (or stillborn) in Australia, or where there is an overseas surrogacy arrangement which has been entered into by an Australian citizen or permanent resident, and a child is born (or stillborn):
    a. the surrogate and the surrogate's partner (if any) are, upon birth, the legal parent(s) of the child;
    b. the intended parent(s) must apply to the Federal Circuit and Family Court of Australia for a parentage order, within six 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 should have full discretion to dispense with the timeframe in paragraph 1(b).
2. The Federal Circuit and Family Court of Australia should be empowered, in an application under paragraph 1(b), to:
    a. consider and determine the application, taking into account all relevant considerations, but giving paramount consideration to the best interests of the child, including by reference to s 60CC of the *Family Law Act 1975* (Cth); and
    b. make any other orders the Court considers to be appropriate.
3. Applications under paragraph 1(b) should be heard and determined within the specialist list (**Recommendation 28**).
4. The *Family Law Act 1975* (Cth) should be amended to provide that the process outlined in paragraphs 1–3 is retrospectively available in respect of children born through surrogacy arrangements that occurred before the proposed amendments come into effect.

158 *Family Law Act 1975* (Cth) ss 67J–67Y.

10.87 As discussed above, most Australian children born through surrogacy arrangements are not eligible for a domestic parentage order,[159] and alternative mechanisms for children born through non-compliant surrogacy arrangements to have their family legally recognised are limited and uncertain.

10.88 The administrative pathway (**Recommendation 28**) will only address parentage for approved domestic arrangements. For all other arrangements, including overseas arrangements, an alternative pathway is needed. Access to legal parentage should not depend on the type or legality of the surrogacy arrangement undertaken, as this may undermine the best interests of the child.

10.89 Under the judicial pathway, the surrogate and their partner (if any) would be the legal parents upon the birth of the child. The intended parents would need to apply to the Federal Circuit and Family Court of Australia for a parentage order to transfer legal parentage to them.

10.90 It will generally be in a child's best interests to have their functional and social parents recognised as their legal parents.[160] However, judicial oversight is required because these arrangements may not have complied with robust safeguards prior to the child's birth, such as counselling or legal advice, which are important for ensuring informed consent and shared intention.

10.91 Oversight is particularly important for overseas surrogacy arrangements, which carry a greater risk of harm or exploitation (see **Chapter 13**). For this reason, all intended parents who engage in surrogacy overseas would need to apply for recognition of legal parentage in Australia, within six months of returning with the child (**Recommendation 45**), even if they are recognised as the child's legal parents in the child's country of birth.

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159 As noted above, most surrogacy arrangements undertaken by Australian parents occur overseas, and are therefore excluded from the state and territory surrogacy legislation. Some jurisdictions specifically require the surrogate to be an Australian citizen or permanent resident, or otherwise live within Australia: *Surrogacy Act 2022* (NT) s 17(b); *Surrogacy Act 2019* (SA) s 10(3)(c); *Surrogacy Regulations 2020* (SA) reg 6; *Surrogacy Act 2012* (Tas) s 16(2)(g). Victoria specifically requires the ART procedure to have been carried out in Victoria: *Status of Children Act 1974* (Vic) s 20(1)(a). Otherwise, most overseas arrangements are for profit or reward, which is a disqualifying factor for a parentage order in most of the states and territories: *Surrogacy Act 2022* (NT) s 34(1)(a); *Surrogacy Act 2010* (Qld) ss 22(2)(e)(vi), 23(1); *Surrogacy Act 2019* (SA) s 11; *Surrogacy Act 2012* (Tas) s 16(2)(ii); *Status of Children Act 1974* (Vic) s 22(1)(d).

160 *Bouvet v France* (European Court of Human Rights, Chamber, Application Nos 9063/13 and 10410/14, 21 July 2016); *Mennesson v France* (2014) 3 Eur Court HR 255; *Labassee v France* (European Court of Human Rights, Chamber, Application No 65941/11, 26 September 2014); *Laborie v France* (European Court of Human Rights, Committee, Application No 44024/13, 19 January 2017); *CE v France* (European Court of Human Rights, Chamber, Application Nos 29775/18 and 29693/19, 5 September 2022). See also European Court of Human Rights, *Information Note on the Court's Case-Law No. 175* (Legal Summary, June 2014); European Court of Human Rights, *Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent-Child Relationship between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother* (Advisory Opinion, 10 April 2019).

10.92 The judicial pathway (**Recommendation 29**) would allow parentage to be determined in the best interests of the child, irrespective of compliance with eligibility or process requirements before the child was born, or whether the arrangement was lawful or exploitative. This recognises that parentage goes to the rights of the child and that denial of the child's rights, to encourage compliance (or punish non-compliance) by intended parents, is not appropriate.

10.93 Other recommendations in this Report aim to encourage compliance and discourage non-compliance through other mechanisms, including:[161]

- prohibiting access to ART in connection with a surrogacy arrangement unless the arrangement has been approved (**Recommendation 34**). Given that most domestic surrogacy arrangements require access to ART (see **Chapter 1**),[162] this is a powerful compliance mechanism; and
- ensuring intended parents receive Responsible Overseas Surrogacy Guidelines and are obliged to act responsibly to discourage engagement in potentially exploitative overseas arrangements (**Recommendations 37** and **43**).

10.94 There are clear policy reasons for wanting to incentivise Australians to engage in lawful surrogacy within Australia, where the regulatory framework can minimise the risks of harm to everyone involved (see **Chapters 12** and **13**). Requiring all arrangements falling outside the administrative pathway to undergo a judicial process would:

- incentivise parties to go through the domestic preapproval process; and
- disincentivise non-compliant domestic arrangements and overseas arrangements — crucially, this disincentive would not be at the expense of the child's rights, as a pathway to parentage remains.

10.95 There was support for the judicial pathway in submissions to the Discussion Paper. Stakeholders generally acknowledged the need for judicial oversight where an arrangement falls outside of lawful safeguards.[163]

10.96 In arriving at this recommendation, the ALRC considered a range of alternative mechanisms for recognising legal parentage for unapproved surrogacy arrangements, and concerns raised by stakeholders about the proposed judicial pathway:

- Some suggested the court should be provided with a dispensation power to make a parentage order, despite non-compliance with legislative requirements,

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161 See generally **Chapters 12** and **13**.

162 See **Chapter 1**.

163 See, eg, K Cox, *Submission 389*; Not published, *Submission 393*; R West, *Submission 426*. See also Relationships Australia, *Submission 404*. The Federal Circuit and Family Court of Australia did not raise any concerns about the proposed judicial pathway, and supported the introduction of a specialist list: Federal Circuit and Family Court of Australia, *Submission 428*.

where doing so is in the best interests of the child.[164] This would require that a judge interrogate non-compliance with each requirement. This approach would increase the burden on the applicants, and still ultimately come down to a determination based on the child's best interests regardless of whether the arrangement was compliant or not.

- Some advocated for an easier way to have legal parentage recognised in Australia for children born through overseas surrogacy, where it has already been recognised in the country of birth. The ALRC is of the view that it is inappropriate for international arrangements to be given an expedited pathway to parentage given the risks associated with some overseas surrogacy arrangements. It is also not feasible to designate permitted destinations for automatic recognition. Laws in destination countries can fluctuate and while some arrangements in a particular destination may be lawful and well-evidenced, others may not be (see **Chapter 13**).[165] Allowing automatic or simplified recognition of arrangements pursued outside the supported surrogacy framework would undermine the administrative pathway.
- Some were concerned that providing a judicial pathway for unapproved arrangements effectively 'condones' this behaviour and disincentivises compliance with the administrative pathway.[166] However, as discussed above, it is necessary to provide a pathway to uphold the rights of the child. When the court is faced with the reality of a child born through such an arrangement, it needs to be empowered to make a decision which is in the best interests of the child, irrespective of the lawfulness of the arrangement.[167] To ensure this, intended parents who engage in overseas surrogacy would need to obtain a parentage order when they return to Australia and would be liable to a civil penalty if they fail to do so (see **Recommendation 45**).

How the judicial pathway would work

10.97 The judicial pathway (**Recommendation 29**) would be accessible for all children born in Australia through surrogacy, irrespective of the immigration status of the intended parent(s). This is to ensure the rights of all children born in Australia through surrogacy are upheld. It is not intended to permit persons ordinarily resident

164 See, eg, S Everingham, *Submission 129*; Equality Australia, *Submission 253*; Name withheld, *Submission 278*. See also Not published, *Submission 254*.

165 The Federal Circuit and Family Court of Australia acknowledged '[t]here is likely to be resistance to there being an administrative approach for this as there may be concerns about the level of oversight in other jurisdictions and what checks and balances have been in place. Listing approved countries in a register could also be problematic as the conditions under which surrogacy arrangements take place can change rapidly': Federal Circuit and Family Court of Australia, *Submission 428*.

166 See, eg, Australian Christian Lobby, *Submission 419*.

167 See, eg, *Allbring & Barsotti* [2026] FedCFamC2F 602 [28], where Harland J observed: '[m]aking these orders is not endorsing surrogacy. The Court's focus must be considering the best interests of the individual child before it. The International Social [Service] published the Verona Principles in 2021 addressing the need for States to ensure the rights of children born of surrogacy are addressed regardless of the State's position about surrogacy'.

outside Australia to enter Australia for the purposes of engaging in surrogacy. The pathway would also be accessible for all children born through surrogacy overseas to intended parents who are either Australian citizens or permanent residents, to ensure those children are not discriminated against due to the circumstances of their birth.

10.98 The judicial pathway would maintain the current default position of the surrogate and their partner (if any) being the legal parents upon birth (or stillbirth), but enable intended parents to apply for a parentage order, irrespective of the nature of the surrogacy agreement.

10.99 The current parentage declaration power in s 69VA of the Act is an inappropriate mechanism to give effect to **Recommendation 29**, as it is not a standalone power,[168] and does not have the effect of transferring parentage from one person to another (as is required by the judicial pathway). Therefore, a new parentage order power would be needed to remove parentage (and parental responsibility) from the surrogate and their partner (if any) and transfer it to the intended parents.

Retrospective application

10.100 Since the first recorded ART-assisted surrogacy arrangement in Australia, thousands of Australian children have been born through surrogacy, many of whom have not had the opportunity to have their functional parents recognised as their legal parents. Adults who were born through surrogacy still have valid reasons to want to have their family legally recognised (see discussion above). We recommend that the judicial pathway should be available to all families formed through surrogacy, to facilitate access for those previously denied recognition.

10.101 The Federal Circuit and Family Court of Australia supports this approach, stating that

> [r]etrospective application of these provisions is important as there are many children who do not have the benefit of both parents being legal parents and the reality of their family circumstances being acknowledged ... This is important as there are numerous examples of cases both historically and currently where it has not been possible to grant both parents legal parentage.[169]

Implementation considerations

10.102 As discussed previously, the judicial pathway depends upon the Federal Circuit and Family Court of Australia being empowered to make parentage orders. The extent to which this is possible under existing constitutional referrals, or under other heads of power, is unclear. This would need to be resolved during implementation of the recommendations in this Report. As the ALRC recommends that all parentage order applications should be dealt with by the Federal Circuit and

168 A parentage declaration can only be made where parentage is a fact in issue in proceedings: *Re Bima* [2014] FamCA 1170 [17]–[22].

169 Federal Circuit and Family Court of Australia, *Submission 428*.

Family Court of Australia, s 60HB of the Act (which gives effect to state and territory parentage orders) would become obsolete.

10.103 As discussed above, the Federal Circuit and Family Court of Australia would be required to determine parentage in the best interests of the child. Applications are likely to proceed uncontested, and it will generally be in a child's best interests to have their functional and social parents recognised as their legal parents. However, the court must still consider the relevance of factors such as those included in s 60CC of the Act, in determining the child's best interests. A more complex assessment will occur in circumstances where the surrogate does not consent to the parentage order, or where someone submits evidence challenging the child's safety in the care of the intended parents.

10.104 The Federal Circuit and Family Court of Australia already sets out evidentiary requirements for surrogacy parentage applications in the *Federal Circuit and Family Court of Australia Rules 2021* (Cth).[170] These may need to be amended to account for the recommendations in this Report. Where the parties are already in agreement as to the parentage order application, they should be able to bypass any dispute resolution requirements in the Act.[171]

10.105 The Federal Circuit and Family Court of Australia may also wish to consider less complex matters 'on the papers' rather than requiring a full hearing. This would conserve the Court's resources and reduce the financial impact on intended parents. The Court could develop guidelines on when this was appropriate. If, in the course of reviewing such applications, any concern or complexity arises, the matter could be set down for a full hearing.

10.106 The Federal Circuit and Family Court of Australia would need to be adequately resourced to meet the increased workload associated with responsibility for all parentage order applications.[172]

What if a Commonwealth process is not adopted?

10.107 This chapter has outlined the policy justifications for the Federal Circuit and Family Court of Australia being responsible for parentage order applications. However, the ALRC recognises that there may be challenges to making this a reality. If a Commonwealth parentage order process is not implemented, some alternatives at the state and territory level may include:

- enacting a parentage order process in each state and territory that is analogous to the judicial pathway in **Recommendation 29**, allowing a parentage order to be made regardless of whether the arrangement is domestic or overseas, or complies with eligibility or safeguard requirements;

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170 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 1.10.

171 See *Family Law Act 1975* (Cth) pt VII div 5, which requires parties to undertake certain alternative dispute resolution mechanisms before lodging specific applications.

172 See, eg, S Page, *Submission 130*; Name withheld, *Submission 422*.

- amending state and territory legislation to allow the relevant court to dispense with any eligibility or process requirement for a parentage order in the best interests of the child;
- introducing 'carve-outs' for overseas arrangements (as can be seen in the Australian Capital Territory, New South Wales, and Western Australia);[173] or
- empowering the Federal Circuit and Family Court of Australia to hear parentage order applications for overseas arrangements only, given conferral of such power would likely be supported by the external affairs power.[174]

10.108 None of these options are ideal. While they may still go some way to promoting the same underlying objectives, these jurisdictional compromises would undermine the aim of national consistency, which is required by the Terms of Reference. Over time, it is likely that the states and territories would diverge in their policies and court precedents, leading to inconsistent outcomes and confusion about what is required (see **Chapter 3** and **Recommendation 7**). As discussed above, there is already a history of inconsistent court determinations across the various piecemeal mechanisms for recognising parentage following a surrogacy arrangement. The ALRC's recommended model is preferable, as a single legal regime would allow jurisprudence to develop coherently. This is consistent with key rule of law principles and the reform principles in this Inquiry, including certainty and clarity.[175]

173 *Parentage Act 2004* (ACT) s 28F(2); *Surrogacy Act 2010* (NSW) s 23(2). Recent legislation in Western Australia allows for requirements for a valid surrogacy arrangement to be dispensed with: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 134, which will come into effect in mid-2027.

174 *Australian Constitution* s 51(xxix); Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters Professional Australia Limited, 6th ed, 2024) ch 4.

175 See generally Tom Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67.

11. Identity Rights of Children Born Through Surrogacy

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Introduction

11.1 In this chapter, the ALRC recommends states and territories develop or uplift pathways for people born through surrogacy to access information about their gestational origins. The recommendations in this chapter foreground children's rights in the surrogacy process by enhancing transparency, facilitating fulfilment of the right to identity, and reducing the stigma that can sometimes be associated with surrogacy arrangements.

11.2 The Terms of Reference ask the ALRC to consider the information that should be available to children born through surrogacy, including on the child's birth certificate, in order to meet Australia's obligations under the United Nations Convention on the Rights of the Child ('CRC'). All people born through surrogacy have the right to preserve their identity, including nationality, name, and family relations (discussed below and in **Chapter 14**),[1] and yet in many Australian jurisdictions there is no formal avenue to access information that helps people understand their identity as it relates to their gestational origins. This chapter recommends a system to realise the child's right to identity under the CRC by enabling timely and appropriate access

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

to information about their gestational origins, including through the child's birth certificate.

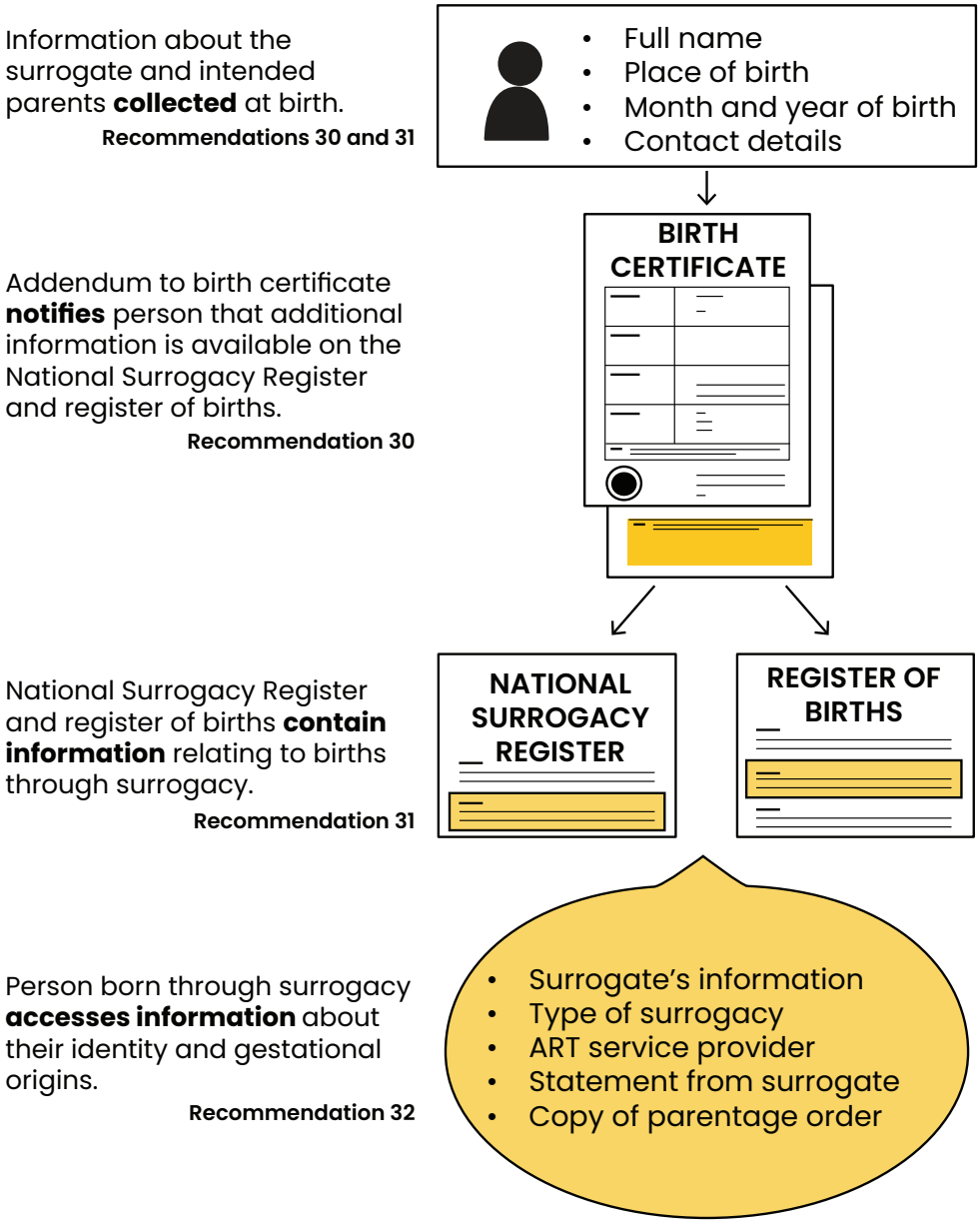
11.3 This chapter commences with an overview of the right to identity, how it is interpreted in the surrogacy context, and the importance of gestational origins in the process of identity formation. To apply this right in the surrogacy context, **Recommendations 30–32** create an integrated system for collecting, storing, and providing access to records on the gestational history of people born through surrogacy:

- **Recommendation 30** would require the surrogate and intended parents' details to be collected when the child is born, and an addendum attached to the birth certificates of people born through surrogacy indicating that there is further information available through the births, deaths, and marriages register, and the National Surrogacy Register.
- **Recommendation 31** would establish the National Surrogacy Register and outline how it can be accessed.
- **Recommendation 32** sets out the range of details pertinent to the gestational history of people born through surrogacy that must be contained on the register, and how this would be collected.

11.4 These reforms would replicate similar processes established for people born through donor conception, with some key departures where considered necessary. **Figure 11.1** demonstrates how these pathways would operate.

11.5 This chapter outlines the architecture for collecting and providing access to appropriate records. This framework will also apply to people born through overseas surrogacy, which is discussed further in **Chapter 13**.

Figure 11.1: Collecting and accessing information through birth registers and the National Surrogacy Register



Surrogacy, identity, and gestational origins

11.6 Article 8 of the CRC, to which Australia is a state party, enshrines a child's right to preserve their identity, including nationality, name, and family relations.[2] A generally accepted component of the right to identity is that children must know who has 'played a role in contributing to [their] creation and care'.[3] Indeed, the Committee on the Rights of the Child has stated categorically that States must provide children born through surrogacy with access to information about their gestational origins.[4] Therefore, Australia has an obligation to ensure people born through surrogacy have access to information about their gestational history.

11.7 According to Tobin and Todres, identity can be understood as

> a constellation of historical and evolving characteristics which can be attributed to and identified with, and by, an individual child. Collectively these characteristics provide children with an understanding of where they have come from, who they are, and the right to decide who they will become.[5]

11.8 For people born through surrogacy, the fact of having been born through surrogacy is an essential aspect of this 'constellation'. People born through surrogacy may wish to learn more about the surrogate, understand the surrogate's motivations, and have a thorough understanding of their origins and heritage. The Principles for the Protection of the Rights of the Child Born Through Surrogacy ('the Verona Principles') state that a child's genetic, gestational, and social origins have an 'on-going, lifetime impact on the child and future generations'.[6] Similarly, UNICEF explains that 'knowing one's origins is fundamental to the child's physical, psychological, cultural and spiritual development', and is a 'gateway' to accessing other fundamental rights.[7]

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2 Ibid.

3 John Tobin and Florence Seow, 'Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 237, 260. See also Alexandra Harland, 'Surrogacy, Identity, Parentage and Children's Rights — Through the Eyes of a Child' (2021) 59(1) *Family Court Review* 121, 123–4; Elaine O'Callaghan, 'Surrogacy Reform and Its Impact on the Child's Right to Birth Registration' (2021) 13 *Reproductive BioMedicine and Society Online* 46, 48.

4 Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Georgia*, 74th sess, 2193rd mtg, UN Doc CRC/C/GEO/CO/4 (9 March 2017) 6 [19(b)]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, 71st sess, 2104th mtg, UN Doc CRC/C/IRL/CO/3-4 (1 March 2016) 7–8 [34(a)]; Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) 9 [34].

5 John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 285.

6 International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) principle 11.1.

7 Child Identity Protection and UNICEF, *Key Consideration: Children's Rights & Surrogacy* (Briefing Note, February 2022) 2.

11.9 Research reinforces the importance of children being aware of their gestational origins from an early age. It indicates that, while children born through surrogacy did experience identity issues at around age seven, having an early understanding of their gestational origins helped children develop a 'secure sense of identity during middle childhood', and led to better familial relationships during adolescence.[8] In comparison, non-disclosure or delayed disclosure of gestational or genetic origins has been associated with less positive outcomes for adolescents' wellbeing and psychological development, and undermines familial connections.[9]

11.10 Similarly, the importance of the right to identity was highlighted in consultations, and we were told that children born through surrogacy should have access to information about their genetic and gestational heritage. Many submissions also highlighted the connection between information about gestational origins and identity formation.[10] For example, we heard that:

> these rights are fundamental to a child's dignity, security, and sense of self.[11]
>
> [c]hildren born through surrogacy are entitled to know how they were conceived. How each of us was conceived is unique to us — and we are entitled to know the truth.[12]
>
> [t]his is integral to [children's] psychological and physical health.[13]

11.11 Some children born through surrogacy also touched on the meaning this has for them in submissions. One young person told us that it makes them feel like they are part of a unique and special birth story.[14] Others noted that being aware that they were born through surrogacy makes them feel wanted.[15]

11.12 In addition, in a United Kingdom study involving children born through surrogacy between eight and 18 years of age, many children were of the view that it is important for people to understand their origins, and that knowing who gave birth to them is a big part of their story.[16]

11.13 It is clear that, to fulfil Australia's human rights obligations and ensure children born through surrogacy have the proper foundation to develop their identity, the

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8 Susan Golombok, 'Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction' (2021) 15(2) *Child Development Perspectives* 103, 106.

9 Ibid; Tobin and Seow (n 3) 271.

10 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Jigsaw Queensland Inc., *Submission 163*; Not published, *Submission 179*; Not published, *Submission 206*; Not published, *Submission 220*; Name withheld, *Submission 238*; Stop Surrogacy Now UK and Surrogacy Concern, *Submission 303*; Law Council of Australia, *Submission 342*; Adoptee Rights Australia, *Submission 344*; Relationships Australia, *Submission 404*.

11 Name withheld, *Submission 12*.

12 S Page, *Submission 130*.

13 Name withheld, *Submission 160*.

14 Not published (minor), *Submission 27*.

15 See, eg, Name withheld (minor), *Submission 26*; Name withheld (minor), *Submission 36*; Name withheld (minor), *Submission 42*.

16 Katherine Wade, Kirsty Horsey and Zaina Mahmoud, *Children's Voices in Surrogacy Law: Phase One Preliminary Report* (University of Leicester, 2023) 18–19.

State has a duty to provide access to information that helps children born through surrogacy understand their gestational origins. However, there are a range of ways to achieve this. Several international organisations and bodies have developed high-level principles to guide States in this area. These include:

- Surrogacy360's *International Principles for Donor Conception and Surrogacy* call for birth records to include information showing a child was either donor-conceived or born through surrogacy, and for all people who are donor-conceived or born through surrogacy to be notified of their status;[17]
- UNICEF and Child Identity Protection consider that access to identity information should be facilitated in an age-appropriate way, should include the identity of the surrogate and any donors, and that surrogacy agreements should seek the surrogate's consent to share identity information;[18]
- The *Verona Principles* call on states to collect, store, and keep up-to-date identity information in relation to surrogacy arrangements, and regulate how and when the information can be accessed;[19] and
- The 2019 UN Special Rapporteur on the Sale and Sexual Exploitation of Children highlighted the importance of maintaining State records with the details of surrogates and gamete donors.[20]

11.14 The remainder of this chapter sets out two mechanisms for fulfilling the right to identity in the surrogacy context, through birth registration information, and a National Surrogacy Register.

17 'International Principles for Donor Conception and Surrogacy' principles 9, 10 <www.surrogacy360.org/wp-content/uploads/2020/04/International-principles-for-donor-conception-and-surrogacy.pdf>.

18 Child Identity Protection and UNICEF (n 7) 3.

19 International Social Service (n 6) principle 11.

20 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic study on safeguards for the protection of the rights of children born from surrogacy arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [20].

Information available through birth certificates

Recommendation 30

1. Legislation should require that birth registration statements and any other documents used to register the birth of a child born in any Australian state or territory include a dedicated section to collect information relating to surrogacy-related births. The information to be collected should include the surrogate's identifying details such as their full name, place of birth, month and year of birth, and contact details.
2. Legislation should provide that where the information in paragraph 1 has been provided to a registry of births, deaths, and marriages, an addendum must be attached to each copy of the birth certificate issued to a person born through surrogacy.
3. Legislation should provide that the addendum in paragraph 2 must:
    a. state that additional information is available and may be obtained through the National Surrogacy Register (**Recommendation 31**) and the births, deaths and marriages register; and
    b. provide that counselling services are available to people born through surrogacy.

Birth registration and birth certificates in surrogacy arrangements

11.15 When a child is born in any Australian state or territory, information is captured and recorded in that jurisdiction's birth register. While each state and territory regulates the registration of births in its jurisdiction, the process is largely the same in each. Those responsible for the child complete a 'birth registration statement',[21] typically containing fields for the parents' full name, date of birth, and address.[22] This

21 *Births, Deaths and Marriages Registration Act 1997* (ACT) s 9; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 14; *Births, Deaths and Marriages Registration Act 1996* (NT) s 14; *Births, Deaths and Marriages Registration Act 2023* (Qld) s 9 (in Queensland, this form is called a 'birth registration application'); *Births, Deaths and Marriages Registration Act 1996* (SA) s 14; *Births, Deaths and Marriages Registration Act 1999* (Tas) s 13; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 14; *Births, Deaths and Marriages Registration Act 1998* (WA) s 14.

22 See, eg, Births, Deaths and Marriages (Tas), 'Register Your Newborn' <www.justice.tas.gov.au/bdm/newborn>; Registry of Births, Deaths and Marriages, Department of Justice and Attorney-General (Qld), 'Form 1: Register a Birth Application'.

is provided to the registrar-general of births, deaths, and marriages, who makes an entry recording the child's birth in the birth register.[23] This is known as a 'birth entry'.

11.16 In domestic surrogacy arrangements, as surrogates (and their partners, if any) are currently deemed the child's legal parents at birth, registration is carried out in the manner described above, with the surrogate listed as the parent on the birth registration statement and on any birth certificate issued in relation to the child. However, once the court makes a parentage order transferring legal parentage from the surrogate (and their partner, if any) to the intended parent(s), the registrar must update the child's birth entry to reflect the change.[24] All birth certificates subsequently issued in relation to the child reflect the updated parentage status, and do not contain the surrogate's details or any indication that the child was born through surrogacy.[25]

11.17 Most states and territories have developed legislative pathways for people born through surrogacy to access details from the original birth entry:

- In New South Wales, the Northern Territory, and Queensland, if a person born through surrogacy requests a copy of their birth certificate after reaching the age of 18, the registrar will attach an addendum to the birth certificate stating that 'further information is available'.[26] The person can contact the registrar to access details of the original birth entry.
- While such a system is not currently in place in Western Australia, the *Assisted Reproductive Technology and Surrogacy Act 2025* (WA), once commenced in mid-2027, will provide people born through surrogacy with the right to access their original birth entry.[27]

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23 *Births, Deaths and Marriages Registration Act 1997* (ACT) s 11; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 17; *Births, Deaths and Marriages Registration Act 1996* (NT) s 17; *Births, Deaths and Marriages Registration Act 2023* (Qld) ss 9-10; *Births, Deaths and Marriages Registration Act 1996* (SA) s 17; *Births, Deaths and Marriages Registration Act 1999* (Tas) s 16; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 19; *Births, Deaths and Marriages Registration Act 1998* (WA) s 17.

24 *Births, Deaths and Marriages Registration Act 1997* (ACT) s 16A; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 25B; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28M; *Births, Deaths and Marriages Registration Act 2023* (Qld) s 19; *Births, Deaths and Marriages Registration Act 1996* (SA) s 22A; *Surrogacy Act 2012* (Tas) s 34(1); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 19A; *Births, Deaths and Marriages Registration Act 1998* (WA) s 24.

25 The ALRC notes that in Tasmania and Victoria, the original birth entry is closed, but legislation does not explicitly state what information new birth certificates should contain (*Births, Deaths and Marriages Registration Act 1997* (ACT) s 16B; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 25D; *Births, Deaths and Marriages Registration Act 1996* (NT) s 28N; *Births, Deaths and Marriages Registration Act 2023* (Qld) s 19; *Births, Deaths and Marriages Registration Act 1996* (SA) s 22A(3); *Surrogacy Act 2012* (Tas) s 34(1); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 19A), and the current and soon to commence Western Australian legislation does not address this point.

26 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 25D(3); *Births, Deaths and Marriages Registration Act 1996* (NT) s 28N(3); *Births, Deaths and Marriages Registration Act 2023* (Qld) s 23.

27 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 147.

- In South Australia and Tasmania, legislation allows people born through surrogacy to apply for relevant information on the birth register.[28] In these states and Western Australia it is unclear how people born through surrogacy would be alerted to the existence of additional information as legislation does not provide for an addendum to be attached.
- There is no equivalent process legislated in the Australian Capital Territory or Victoria.

Barriers to accessing birth registration information

11.18 There are several gaps and inconsistencies in these existing frameworks:

- There does not appear to be any way for people born through surrogacy in Victoria to access their original birth record.
- It is not clear how those in South Australia, Tasmania, and Western Australia[29] would be alerted to the existence of additional information apart from through their personal connections, as legislation does not provide for an addendum or other notification mechanism.
- In all the existing frameworks, the original birth entry provides limited contextual information about the surrogacy arrangement beyond the surrogate's name, date of birth, and address being listed.[30]
- In many jurisdictions information held on the birth register may only be accessed once people born through surrogacy have reached 18 years of age, despite research pointing to the benefits of forming an early understanding of gestational origins.

11.19 These gaps and inconsistencies are problematic. In particular, it is concerning that whether a person's right to identity and information about their gestational origins is upheld depends on the jurisdiction in which they were born.[31] This creates unfairness, and has the potential to shape developmental trajectories for those with no formal way of knowing they were born through surrogacy.[32]

11.20 The 2016 Surrogacy Matters Report similarly noted that gaps in the available information about surrogates led to difficulties in identifying surrogates.[33] Providing only the surrogate's name and date of birth, when residential details are likely to be out of date, does not sufficiently support children born through surrogacy to understand their gestational origins.

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28 *Births, Deaths and Marriages Registration Act 1996* (SA) s 22A(4); *Surrogacy Act 2012* (Tas) s 39.

29 Under legislation commencing in mid-2027.

30 For example, a birth registration statement in Victoria only asks for the parents' names, residential addresses, and the names of any previous children: Births, Deaths and Marriages Victoria, 'Register a Birth' <www.bdm.vic.gov.au/register-birth>.

31 Harland (n 3) 124.

32 Golombok (n 8) 106; Tobin and Seow (n 3) 271.

33 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) 19.

11.21 At the same time, the information collected upon a child's birth and forming part of their birth entry does not currently reflect the nature of the surrogacy arrangement. We acknowledge that the surrogate is the child's legal parent under existing laws. However, birth registration statements provide no indication of the reality of the child's birth circumstances (that they were born through surrogacy), or their family formation (that the surrogate gave birth to them with the intention that they are raised by the intended parent(s)). Surrogacy births are not the same as other births, and Australia's birth registration frameworks have not adapted to reflect this. While people born through surrogacy may learn through birth registers that at one point they had a different legal parent, they are not able to access information that adequately records the circumstances of their birth.

11.22 There is a failure to uphold the right to identity and information about gestational origins in circumstances where people born through surrogacy have no access, or face unreasonable barriers to accessing, records of their gestational origins. Additionally, where the information provided is limited, and only available once a person reaches adulthood, the ALRC considers this right to be inadequately fulfilled.

Consistent information collected and made available nationwide

11.23 **Recommendation 30** recognises that people born through surrogacy must have streamlined access to complete records of their gestational origins consistently kept by the appropriate authority, regardless of the state or territory in which they were born. This recommendation has two main elements:

- upon the birth of a child through surrogacy, birth registration statements in every state and territory will collect information about parents through surrogacy and surrogates, which will be recorded on the child's birth entry; and
- all copies issued of that person's birth certificate should have an addendum attached stating that further information is available via the state or territory births, deaths, and marriages register and National Surrogacy Register.

11.24 The key differences between **Recommendation 30** and existing processes are that:

- birth registration statements would identify surrogacy-related births and collect relevant identifying information from all parties, instead of only collecting the surrogate's details, as is current practice;
- states and territories that do not already would attach an addendum to birth certificates to notify the person that further information is available; and
- all states and territories would attach the addendum to all copies of the birth certificate issued from birth.

11.25 By collecting relevant information about all parties to the arrangement and expanding the system to all states and territories, **Recommendation 30** (in conjunction with **Recommendations 31** and **32**) will support full enjoyment of the right to identity and information about gestational origins for people born through

surrogacy. It is preferable for people to learn that they were born through surrogacy from their family members.[34] This information should be delivered sensitively, at an appropriate age, so that it can form part of children's identity as they grow and develop.[35] However, there will be instances where this information is not conveyed, for example due to lingering social stigma around infertility and surrogacy. **Recommendation 30** is particularly crucial in these cases. This framework creates a safety net to ensure that those who are not told of their gestational origins are nevertheless alerted to the circumstances of their birth. Regardless of their level of knowledge, **Recommendation 30** also recognises that all people born through surrogacy have a right to access birth records that pertain to their origins and identity.

11.26 **Recommendation 30** also responds to the nature of parentage in surrogacy arrangements, and complements reforms to the law relating to legal parentage recommended in this Report (see **Recommendations 28** and **29**). It is appropriate for the details of intended parents and surrogates to be captured on birth registration statements in order to accurately reflect the circumstances of the child's birth. Further, the intention of all parties is for intended parents to be the child's legal parents and for surrogacy arrangements on the administrative pathway (**Recommendation 28**), intended parents will be the child's legal parents at birth. The ALRC therefore recommends that birth registers reflect this.

11.27 Many submissions supported people accessing original birth records held on birth registers.[36] In particular, Relationships Australia considered that this mechanism would 'promote transparency and the rights of children to information about origins and identity'.[37]

11.28 The 2016 Surrogacy Matters Report also grappled with these questions. It acknowledged that 'children have the right to know and understand the circumstances of their birth and of their genetic heritage', and that this could be facilitated by including relevant information on birth certificates.[38] Ultimately, the Committee determined that the ALRC was best placed to resolve this question.[39]

11.29 In doing so, the ALRC has sought to emulate the practices of many states and territories in relation to donated gametes. In some Australian jurisdictions, information about the use of donated gametes is provided to the birth register via birth

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34 This sentiment was reflected in some submissions: Name withheld, *Submission 19*; Name withheld, *Submission 330*; Name withheld, *Submission 339*.

35 In **Recommendation 7** we recommend the development of resources and education to support intended parents to have these conversations with their children.

36 See, eg, Name withheld, *Submission 147*; Name withheld, *Submission 158*; M Montrone, *Submission 263*; S Jefford, *Submission 359*; S Page, *Submission 365*; B Tobin, *Submission 367*; Relationships Australia, *Submission 404*; Surrogacy Australia, *Submission 417*.

37 Relationships Australia, *Submission 404*.

38 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 33) 19.

39 Ibid rec 4.

registration statements.[40] When the person born using donated gametes is issued a birth certificate, legislation provides that the registrar must attach an addendum stating that further information is available.[41] This shows that birth registration statements are capable of collecting additional information for storage alongside birth entries. The strong parallels between donor conception and surrogacy compared with unassisted reproduction, particularly the involvement of third parties with no intention of acting as parents, suggest that a similar system be adopted. Given the likelihood that people born through surrogacy will also be donor conceived, aligning these processes would have the additional benefit of supporting accessibility and reducing confusion where both types of records exist.

11.30 This recommendation aligns with the 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report's similar recommendation to promote the right to identity by including details about the surrogate on the birth register, including the surrogate's legal name, date and place of birth, last known address, ethnicity, and cultural affiliations.[42]

Collecting all parties' details

11.31 The ALRC recommends that birth registration statements in all states and territories include a dedicated section seeking information particular to surrogacy births, in addition to the usual information required. This should elicit, at a minimum, the following details in relation to the surrogate:

- full name;
- place of birth;
- month and year of birth; and
- contact details.

11.32 We consider this information appropriate as it balances the need for identifying information against the surrogate's right to privacy. This list has evolved since the publication of our Discussion Paper. Following consultations on the original proposal, we removed 'home address' due to concerns about privacy, and the likelihood that the information would be obsolete by the time the person born through surrogacy is of an age to attempt to contact the surrogate. Instead, we have added 'contact details' to allow for more practical details such as phone number and email address.

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40 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 22A; *Births, Deaths and Marriages Registration Act 1996* (SA) s 14(2); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B. While this is not currently required under Western Australian law, legislation set to commence in mid-2027 will introduce this requirement: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 311–12.

41 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 22A; *Births, Deaths and Marriages Registration Act 1996* (SA) s 14(2); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B. Western Australia's legislation, set to commence in mid-2027, does not address this point.

42 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) rec 40.

We have also changed 'date of birth' to 'month and year of birth' because of concerns about identity theft.

11.33 We do not prescribe the exact way that the information must be recorded on the birth register. However, we indicate that this will likely depend on how the child's parentage is established. For parties on the administrative pathway, birth registers should store information about the surrogate alongside the birth entry in an appropriate manner. However, if parties are on the judicial pathway to parentage (**Recommendation 29**), the original birth entry showing the surrogate (and their partner, if any) as the child's parent should be updated in a similar way to what occurs currently, after which the surrogate's details should be stored in the same way as would occur pursuant to the administrative pathway. Under either pathway, the objective is for children's birth certificates to eventually list intended parents' names only. However, by collecting and giving access to information about the surrogate, it recognises the key role and contribution surrogates have provided without ascribing the role of parent they do not wish to play, and ensures children born through surrogacy can access this information.

Notifying through birth certificates and facilitating access

11.34 **Recommendation 30** lays out an accessible framework for people to access details of surrogacy arrangements held in birth registers. By facilitating access to a broad range of details about a person's gestational origins, this framework conforms with and promotes the person's right to identity under the CRC. This framework involves an addendum being attached to all copies of the person's birth certificate issued to that person from birth, which states that:

- additional information is available and may be obtained through the National Surrogacy Register and the births, deaths, and marriages register; and
- counselling services are available to people born through surrogacy.

11.35 As demonstrated above, it is common practice for any indication that further information is available to be included in an addendum, rather than on the face of the birth certificate. We understand that the addendum is a separate piece of paper provided with the birth certificate. A birth certificate is shared with third parties for administrative purposes, and including details indicating the person was born through surrogacy on the main certificate would lead to privacy concerns, and risk possible discriminatory treatment. Many submissions echoed these concerns.[43] However, some advocated for information to be included on the face of birth certificates, rather than in an addendum, similar to the integrated birth certificates issued in the adoption context.[44] Similarly, the 2018 South Australian Law Reform Institute Report recommended a 'brief notation such as an asterisk or the term "reissue" on the birth

43 See, eg, S Page, *Submission 130*; L Ransome, *Submission 144*; Name withheld, *Submission 158*; M Montrone, *Submission 263*; Donor Conceived Families Australia, *Submission 311*; L Ransome, *Submission 380*.

44 Active Watchful Waiting Inc., *Submission 250*; Name withheld, *Submission 334*; Child Identity Protection, *Submission 388*; Feminist Legal Clinic Inc., *Submission 409*.

certificate to indicate the existence of historical records'.[45] The ALRC prefers the addendum approach as it avoids negatively impacting the child's right to be free from discrimination and right to privacy.[46]

11.36 While addenda attached to birth certificates of people born using donated gametes state simply that 'further information is available',[47] **Recommendation 30** departs from this norm in the surrogacy context for numerous reasons. If a person requests a copy of their birth certificate and it comes with an addendum stating that 'additional information is available and may be obtained through the National Surrogacy Register', they will immediately understand the context for this notification. If the person is already aware of the circumstances of their birth, it will come as no surprise. If the person is not aware that they were born through surrogacy, this notification may come as a surprise, however they will have been provided with immediate context and a clear pathway for obtaining information. However, if the addendum simply stated that 'additional information is available', this may be unnecessarily anxiety inducing as the person would have no way of knowing that the 'further information' refers to surrogacy.

11.37 Referring to surrogacy on the addendum also represents a shift away from the tendency for secrecy that can accompany surrogacy and donor conception. Instead, it enhances transparency and attempts to normalise surrogacy births. We therefore recommend that the addendum refer specifically to where information may be obtained. Recognising that in some instances the person may not be aware they were born through surrogacy, we also recommend referring to available counselling services to acknowledge the impact that such information may have on a person's mental health or emotional wellbeing. We understand that births, deaths, and marriages registers refer individuals to professional counselling services such as Relationships Australia to conduct these conversations.

11.38 In the Discussion Paper, we asked submissions to consider whether the addendum should be attached to all birth certificates issued to a person from birth, or only to copies issued after a person reaches the age of 16. If the addendum was attached to all copies of the birth certificate issued from birth, including the child's first birth certificate, this would maximise the chances that the person becomes aware that they were born through surrogacy (if family had not already informed them). There was clear support for this in submissions.[48] Submissions also argued

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45 South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) rec 59.

46 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 16.

47 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 22A; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B. With the exception of South Australia, where birth certificates will indicate that the person was born as a result of donor conception: *Births, Deaths and Marriages Registration Act 1996* (SA) s 46.

48 See, eg, Name withheld, *Submission 372*; L Ransome, *Submission 380*; D Adams, *Submission 382*; Not published, *Submission 393*; Relationships Australia, *Submission 404*; Feminist Legal Clinic Inc., *Submission 409*; Surrogacy Australia, *Submission 417*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*.

that this option respects the child's developmental maturity and autonomy,[49] and that it reduces stigma and secrecy around surrogacy.[50] On the other hand, attaching the addendum from age 16 would align more closely with existing schemes in relation to surrogacy and donor conception.[51] While consistency is an important consideration, the ALRC ultimately considers there are sound reasons to depart from this for the reasons listed above. Research outlined above supporting early disclosure of gestational origins reinforces this position. Though outside the scope of this Inquiry, the ALRC suggests that existing schemes relating to donated gametes consider adopting this policy.

11.39 **Recommendation 30** is limited to the addendum attached to birth certificates which notifies people born through surrogacy of the existence and location of further information. It does not, however, cover the age at which the information itself can be accessed from births, deaths, and marriages and the National Surrogacy Register. That question is discussed in detail below in relation to **Recommendation 31**.

Accessing information through a Surrogacy Register

Recommendation 31

1. Legislation should establish a National Surrogacy Register. The Register should contain an entry for every person born through surrogacy after the relevant provision commences. Each entry should contain the information required in **Recommendation 32**.
2. To facilitate ease of access for people born through surrogacy and people born using donated gametes, consideration should be given to either:
   a. combining the National Surrogacy Register with a National Donor Register, to replace existing state and territory donor registers; or
   b. linking entries in the National Surrogacy Register with entries relating to the same person held in state and territory donor registers.

49 Relationships Australia, *Submission 404*.
50 Name withheld, *Submission 372*; D Adams, *Submission 382*.
51 Though we note that the age of access in existing schemes is generally 18: *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 22A, 25D(3); *Births, Deaths and Marriages Registration Act 1996* (NT) s 28N(3); *Births, Deaths and Marriages Registration Act 2023* (Qld) s 23; *Surrogacy Act 2012* (Tas) s 39; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B.

3. Legislation should provide that:
   a. a person born through surrogacy has a right to access the information contained in the National Surrogacy Register from the age of 16, by application to the National Regulator (**Recommendation 6**);
   b. a person born through surrogacy who is under the age of 16 may access the information contained in the Register if the National Regulator is satisfied that such access would be in the child's best interests; and
   c. to inform its assessment in paragraph 3(b), the National Regulator may require the person born through surrogacy to provide a counselling certificate or similar documentation from an accredited counsellor.
4. Legislation should provide that the contact details of the surrogate or the person born through surrogacy should only be disclosed to either party where the other party has consented to the disclosure.

Recommendation 32

1. Legislation should require the following information to be provided to the National Regulator (**Recommendation 6**) for inclusion on the National Surrogacy Register (**Recommendation 31**) within six months of the birth of a child through surrogacy:
   a. Identifying information about the surrogate, including:
      i. full name;
      ii. month, year, and place of birth; and
      iii. contact details.
   b. Whether the surrogacy was a traditional surrogacy or gestational surrogacy.
   c. Details of the relevant assisted reproductive technology service provider and doctor (if any).
   d. A personal statement from the surrogate, if the surrogate elects to provide one.
   e. A copy of the parentage order, if one is obtained (**Recommendations 28**–**29**).

2. Legislation should provide that:
   a. following registration of the birth of a child born through surrogacy, state and territory births, deaths, and marriages registries must provide any information they hold that is listed under paragraph 1 to the National Regulator;
   b. if a child born through surrogacy was conceived using the services of an assisted reproductive technology service provider, that provider must provide the National Regulator with the information listed under paragraphs 1(b) and 1(c);
   c. if a parentage order is made in relation to a child born through surrogacy (**Recommendations 28**–**29**), the Federal Circuit and Family Court of Australia must provide a sealed copy of that order to the National Regulator for inclusion on the National Surrogacy Register; and
   d. parties to surrogacy arrangements, which includes surrogates and intended parents, may provide any additional information to the National Regulator, such as the surrogate's optional personal statement in paragraph 1(d).
3. Legislation should provide that:
   a. the provision of the information listed in paragraph 1 is mandatory for surrogacy arrangements occurring after the relevant provision commences; and
   b. parties to surrogacy arrangements that occurred before commencement of the provision may provide the information listed in paragraph 1 to the National Regulator for inclusion on the National Surrogacy Register.

Donor conception registers

11.40 Anonymous gamete donation was previously the status quo in Australia due to stigma and secrecy around infertility and assisted reproductive technology ('ART') services.[52] However, the trend towards reversing this practice in favour of identification began in the mid-2010s due to a growing recognition of the rights of people born through donor conception, particularly in relation to identity and the need to access their medical history.[53] Under the current system, when a person

52 Sonia Allan, 'Donor Identification: Victorian Legislation Gives Rights to All Donor-Conceived People' (2016) 98 *Family Matters: Australian Institute of Family Studies* 43, 43–4.
53 Ibid 44.

donates gametes in Australia, ART service providers must collect their identifying information.[54]

11.41 Donor conception registers operate in all Australian states and territories except for the Northern Territory and Tasmania. They collect and store information about the use of donated gametes so that people can access information about their genetic history and understand more about the people they are biologically related to, upholding their right to identity.

11.42 Australia's donor registers provide a blueprint for establishing rigorous collection, storage, and access to information to uphold the right to identity. Registers are established by legislation and administered by state and territory government departments.[55] The process commences by requiring ART service providers to record a range of details about gamete donors, typically including full name, home address, date and place of birth, ethnicity and physical characteristics, details of previous offspring, and relevant medical history, as well as how each donation was used, and the details of any children born through this use.[56] Service providers must then provide this information to the donor register within a certain period after becoming aware that a child has been born using donated gametes, usually two or three months.[57] Affected people, such as donors, donor-conceived people, and those related to them, may then apply to access a copy of information kept about them on the register.[58]

11.43 The applicant's age affects this process and the information subsequently provided. Depending on the jurisdiction, applicants must either be at least 16 years

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54 *Assisted Reproductive Technology Act 2024* (ACT) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 30; *Assisted Reproductive Technology Act 2024* (Qld) s 33; *Assisted Reproductive Treatment Act 1988* (SA) s 16; *Assisted Reproductive Treatment Act 2008* (Vic) s 49; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 36 (it should be noted that this Act has been passed but is not yet in force. The relevant provision in the Act currently in force is *Human Reproductive Technology Act 1991* (WA) s 44).

55 *Assisted Reproductive Technology Act 2024* (ACT) s 52; *Assisted Reproductive Technology Act 2007* (NSW) s 32A; *Assisted Reproductive Technology Act 2024* (Qld) s 42; *Assisted Reproductive Treatment Act 1988* (SA) s 15; *Assisted Reproductive Treatment Act 2008* (Vic) s 53; *Human Reproductive Technology Act 1991* (WA) s 45.

56 *Assisted Reproductive Technology Act 2024* (ACT) ss 46, 48; *Assisted Reproductive Technology Act 2007* (NSW) ss 30–1; *Assisted Reproductive Technology Act 2024* (Qld) s 33; *Assisted Reproductive Treatment Act 1988* (SA) s 16(1); *Assisted Reproductive Treatment Regulations 2024* (SA) reg 19(1); *Assisted Reproductive Treatment Act 2008* (Vic) s 49; *Human Reproductive Technology Act 1991* (WA) s 44.

57 *Assisted Reproductive Technology Act 2024* (ACT) s 53; *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) ss 44, 45.

58 *Assisted Reproductive Technology Act 2024* (ACT) part 5 div 5.4; *Assisted Reproductive Technology Act 2007* (NSW) ss 36–39; *Assisted Reproductive Technology Act 2024* (Qld) s 48; *Assisted Reproductive Treatment Regulations 2024* (SA) reg 11; *Assisted Reproductive Treatment Act 2008* (Vic) s 56; *Human Reproductive Technology Act 1991* (WA) s 46(2).

old,[59] or be an adult.[60] If younger, it is common to require a parent to apply on a donor-conceived child's behalf.[61] The registrar of births, deaths, and marriages then grants access to the information held on the register. Identifying information or contact details are usually only provided with the donor's consent.[62] Under new Western Australian legislation set to commence in mid-2027, an entry in the Register of Identity may contain a person's contact preferences, which must be complied with.[63]

11.44 As the Northern Territory and Tasmania have not established donor registers, information is only captured under requirements in the National Health and Medical Research Council's Ethical Guidelines. The Ethical Guidelines require ART service providers to establish policies and procedures for data collection, including data allowing the exchange of information between gamete donors, gamete recipients, and people born through gamete donation.[64]

11.45 New South Wales, Queensland, and Western Australia are the only Australian jurisdictions to have established pathways for storing information about surrogacy arrangements on a central register:

- In New South Wales, parties to the arrangement, gamete donors, and biological siblings may provide information about the surrogacy arrangement for inclusion on the New South Wales donor register, but this is not a requirement.[65] On application, adults born through surrogacy or the parents of children born through surrogacy will be provided with any information held about that person on the register, including the name of the surrogate and any gamete donors.[66]
- Both the current and soon-to-commence Western Australian frameworks regulate an 'identity register' containing information about people born through ART services, including surrogacy.[67] Under the new laws, the register must contain information about a person's birth parent (which includes surrogates),[68]

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59 *Assisted Reproductive Technology Act 2024* (ACT) ss 64, 66A; *Assisted Reproductive Technology Act 2024* (Qld) s 48.

60 *Assisted Reproductive Technology Act 2007* (NSW) s 37; *Assisted Reproductive Treatment Regulations 2024* (SA) regs 11, 13.

61 *Assisted Reproductive Technology Act 2024* (ACT) ss 64(2), 67; *Assisted Reproductive Technology Act 2007* (NSW) ss 36(2), 38; *Assisted Reproductive Technology Act 2024* (Qld) s 48; *Assisted Reproductive Treatment Regulations 2024* (SA) regs 11, 14; *Assisted Reproductive Treatment Act 2008* (Vic) s 59.

62 *Assisted Reproductive Technology Act 2024* (Qld) s 48; *Assisted Reproductive Treatment Regulations 2024* (SA) regs 13, 14; *Assisted Reproductive Treatment Act 2008* (Vic) s 58; *Human Reproductive Technology Act 1991* (WA) ss 46(3), 49.

63 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 98, 99.

64 National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) 59–60 [9.1].

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

66 Ibid ss 41E, 41F.

67 *Human Reproductive Technology Act 1991* (WA) s 45; *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 12, 97.

68 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 12.

including their name and other identifying particulars.[69] People born through ART services (including people born through surrogacy) then have a right to access this information at 16 years old, or a person with parental responsibility may seek the information if the person born through surrogacy is under 16.[70]

- In Queensland, when a child is born through surrogacy and donated gametes, legislation provides that the donor conception information register must contain (among other information not relevant here) the full name and date of birth of the surrogate and the intended parents,[71] which can then be accessed via the process outlined above.

11.46 We heard in consultations that the Victorian donor register also incorporates information about surrogacy arrangements, however this does not appear to be legislated and it is not clear how this process operates.

Gaps in the system impact the right to identity

11.47 The access to information landscape in Australia contains several gaps and deficiencies:

- As shown above, some states and territories do not facilitate access to a person's original birth entry.
- Most states and territories do not have a framework for providing access to information about surrogacy through a donor conception register or similar.
- Limited information about surrogacy arrangements is contained in donor conception registers, usually only name, date of birth, and address.
- Not all states and territories enable people born through surrogacy and donor conception to access donor conception records.

11.48 As a result, in most jurisdictions there is very limited information available to people born through surrogacy about their gestational origins, and in some places, none at all. People born through surrogacy in South Australia and Victoria will only be able to access details about their gamete donors, and not about their surrogate, either through the birth register or donor register. In the Northern Territory and Tasmania, people born through surrogacy will be able to access the surrogate's details only via their original birth entry, which contains limited information. While in New South Wales, Queensland, and Western Australia a person born through surrogacy may gain access to details on the donor conception register, this will only provide the surrogate's name, date of birth, and address.

11.49 The ALRC considers that even where people born through surrogacy can access their original birth entry containing the surrogate's details, this is not sufficient to uphold their right to identity. All people born through surrogacy have a right to information about their gestational origins, as this information may play an important

69 Ibid s 97.
70 Ibid s 98.
71 *Assisted Reproductive Technology Act 2024* (Qld) s 44.

role in identity formation (see above). As birth registers contain limited information about surrogacy arrangements, accessing only the name, date of birth, and a (likely outdated) home address of the surrogate who gave birth to them is inadequate for the purposes of understanding one's origins.

11.50 Many submissions also expressed the view that people born through surrogacy need access to a range of details about their gestational origins.[72] For example, the Australian and New Zealand Infertility Counsellors Association noted that 'contact, identifying and cultural information of all genetic and gestational parties involved should be provided to children born through surrogacy arrangements'.[73] Similarly, another submission observed that 'children born through surrogacy should have access to comprehensive and truthful information about the circumstances of their birth'.[74] More specifically, another submission advocated for a breadth of information that includes identifying and non-identifying details, records of the circumstances of the surrogacy, as well as photos and letters.[75]

Establishing a National Surrogacy Register

11.51 To uphold their rights, people born through surrogacy should have access to information that helps them to understand the circumstances of their conception, gestation, and birth, no matter which state or territory they were born in. While **Recommendation 30** involves collecting and storing accurate records on the birth register, to which people born through surrogacy should be entitled to access, the addendum attached to birth certificates acts primarily as a notification system to access the more fulsome information outlined in **Recommendations 31** and **32**. Storing detailed information, or anything beyond limited identifying details, does not align with the purpose of birth registers, and is therefore not appropriate through that framework.

11.52 In brief, **Recommendation 31** establishes a National Surrogacy Register, to be administered by the National Regulator, which will house and provide access to information relating to surrogacy arrangements for every person born through surrogacy following commencement of the provisions. This will apply to both domestic and overseas surrogacy arrangements (see **Recommendation 45**). The recommendation provides that people born through surrogacy should have access to information relating to them from the age of 16, though access can be granted at an earlier age if it is in the child's best interests. In addition, **Recommendation 32** establishes the pathways for an appropriate array of details to be provided to the National Regulator for inclusion on the National Surrogacy Register.

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72 See, eg, Name withheld, *Submission 28*; Name withheld, *Submission 69*; Not published, *Submission 172*; Name withheld, *Submission 210*; Not published, *Submission 274*; Name withheld, *Submission 329*.

73 ANZICA, *Submission 277*.

74 Name withheld, *Submission 339*.

75 P Hadfield-Jia, *Submission 71*.

11.53 **Recommendations 31** and **32** work together to ensure that all people born through surrogacy have access to an appropriate baseline of identifying and non-identifying details relating to the surrogacy arrangement. This will provide as full a picture, as is reasonably practicable, of the circumstances surrounding the person's birth. This is particularly important for people who were not aware they were born through surrogacy, or who do not have contact with the surrogate who gave birth to them.

11.54 Establishing a register to facilitate access to information about gestational origins received widespread support in submissions, including from some stakeholders who are ethically opposed to surrogacy.[76] Opposition towards establishing a surrogacy register was on the basis that it would legitimise the practice of surrogacy.[77] As discussed in **Chapter 1**, this Inquiry starts from the basis that surrogacy is a legitimate family formation practice.

11.55 Registers are a well-established mechanism for achieving these objectives. The Verona Principles call on states to maintain registers containing information about the gestational origins of people born through surrogacy,[78] and both the 2023 Law Commission of England and Wales, and Scottish Law Commission Report and the 2022 Te Aka Matua o te Ture | Law Commission (NZ) Report also recognised that registers resolve concerns about the right to identity for people born through surrogacy, and recommended they be established in those jurisdictions.[79] Registers containing details of surrogacy arrangements are best practice because they can contain an array of details and provide them in a sensitive way, for example through tailoring information provision to the particular psychological needs of people born through surrogacy, or facilitating the conversation with a counsellor.

11.56 Further, there is a high degree of similarity between the nature of surrogacy and donor conception, including the involvement of third parties in family formation, and related issues regarding identity. It follows that people born through surrogacy and people born using donated gametes should have similar rights and entitlements. Finally, there will be increased reliance on these frameworks if surrogacy continues to grow as a form of family formation, particularly if other reforms in this Report are implemented. For example, if Surrogacy Support Organisations are established

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76 Name withheld, *Submission 19*; Jigsaw Queensland Inc., *Submission 163*; L Tripodi, *Submission 168*; Name withheld, *Submission 173*; Not published, *Submission 178*; Not published, *Submission 184*; Name withheld, *Submission 205*; Not published, *Submission 209*; Name withheld, *Submission 210*; Equality Australia, *Submission 253*; Rainbow Families, *Submission 260*; M Montrone, *Submission 263*; ANZICA, *Submission 277*; Donor Conceived Families Australia, *Submission 311*; Name Withheld, Submission 327; B Tobin, *Submission 367*; Australian Nursing and Midwifery Federation, *Submission 375*; Child Identity Protection, *Submission 388*; Australian Christian Lobby, *Submission 419*.

77 See, eg, ARMS (Vic), *Submission 408*.

78 International Social Service (n 6) principle 11.7.

79 Law Commission of England and Wales, and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) rec 61; Te Aka Matua o te Ture | Law Commission (NZ) (n 42) rec 38.

(**Recommendation 8**) and able to match intended parents with surrogates, and some advertising is permitted (**Recommendation 2**), it will likely increase the rates of surrogacy occurring between people not previously known to each other.

A national register

11.57 The ALRC recommends that a single surrogacy register be established for all of Australia. Most importantly, this would promote consistency and accessibility by ensuring that information is consistently collected and made available no matter where the person was born.

11.58 Many stakeholders supported a national register. Federal Circuit and Family Court of Australia Judge Alexandra Harland has advocated for a comprehensive and consistent approach to maintaining records, and considers this would be best achieved on a national scale.[80] As noted by Equality Australia in their submission, surrogacy often takes place across jurisdictions, and so storing information at the national level would prevent information loss and ensure consistency, as well as inconsistent fulfilment of the child's right to identity.[81] We heard from one ART service provider that a national-level register is essential because state-based registers would create:

- access barriers for people who relocate;
- inconsistent information standards and practices;
- fragmented data, making research difficult; and
- duplication of infrastructure costs.[82]

11.59 The ALRC agrees with these arguments. In particular, reducing unnecessary regulatory costs would be logical in a relatively limited arena such as surrogacy. We also consider that establishing one national register would be simpler and more accessible for people born through surrogacy, particularly when arrangements take place across jurisdictions, and this would increase the likelihood that a person will exercise their rights. A national-level surrogacy register was by far the option preferred in submissions.[83]

11.60 However, this is at odds with existing donor registers, which operate at a state and territory level. Having a National Surrogacy Register alongside state-based donor conception information would increase fragmentation and reduce accessibility in a landscape where many people born through surrogacy were also born through donor conception. We note, however, that there have been calls to elevate donor

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80 Harland (n 3) 124.

81 Equality Australia, *Submission 253*.

82 Not published, *Submission 393*.

83 P Hadfield-Jia, *Submission 71*; Jigsaw Queensland Inc., *Submission 163*; L Tripodi, *Submission 168*; Not published, *Submission 172*; Name withheld, *Submission 205*; Equality Australia, *Submission 253*; Rainbow Families, *Submission 260*; Name Withheld, Submission 327; Name withheld, *Submission 330*; Name withheld, *Submission 339*; D Adams, *Submission 382*; Virtus Health, *Submission 397*; Relationships Australia, *Submission 404*; K Horsey, *Submission 418*; Name withheld, *Submission 422*.

registers to the national level. A 2011 Senate Inquiry into Donor Conception Practices in Australia recommended that the Australian Government 'do everything possible' to establish a national register of donors,[84] due in part to jurisdictional differences and industry compliance issues creating inequitable and inefficient outcomes.[85] The 2024 *10 Year Fertility Roadmap* echoed this call, recommending a

> single Australian National Register and genetic bank for donors and donor-conceived individuals, which provides a centralized system for tracking and accessing critical genetic information.[86]

11.61 Housing surrogacy and donor conception information separately will not create the best outcome for people born through surrogacy. Several submissions commented on the need for surrogacy and donor conception information access to work together.[87] Though access to information about genetic origins is outside the scope of this Inquiry, the ALRC notes that co-locating surrogacy and donor conception records would be best practice. Given criticism of the fragmented donor register framework, we consider that there should be one national donor and surrogacy register. Alternatively, entries in the National Surrogacy Register could be linked to related entries in state and territory donor registers. An additional alternative, while not preferred, is for information about surrogacy births to be incorporated into existing state and territory donor registers. If this option is pursued, it will be necessary for the Northern Territory and Tasmania to establish registers.

Information to be kept on the National Surrogacy Register

11.62 **Recommendation 32** lists the details that must be provided to the National Regulator for inclusion on the National Surrogacy Register. The information contained in donor registers was used as a baseline for compiling this list, with items added or removed to align with the surrogacy context and based on what we heard in submissions.

11.63 In the sections below, we detail the information to be included, why it should be provided to people born through surrogacy, and the entity responsible for providing it to the National Regulator.

Identifying and contact information about the surrogate

11.64 This includes full name, month, year and place of birth, and contact details. This information is to be provided by the relevant state or territory births, deaths, and marriages registry, who will have received these details via the birth registration

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84 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Donor Conception Practices in Australia* (2011) rec 5.

85 Ibid 37 [3.22].

86 Greg Hunt and Rachel Swift, *Findings, Recommendations and Framework for an Australian 10 Year Fertility Roadmap* (Fertility Society of Australia and New Zealand and Reproductive Technology Accreditation Council, 2024) 9, rec 6.

87 Not published, *Submission 364*; Name withheld, *Submission 372*; D Adams, *Submission 382*; Child Identity Protection, *Submission 388*; Virtus Health, *Submission 397*; Australian Christian Lobby, *Submission 419*.

statement. The information will assist people born through surrogacy to identify the surrogate, and contact them if they choose to. Contact information should only be provided with the relevant person's consent. Including identifying information was a point consistently made in submissions.[88] As discussed above, the surrogate's full date of birth has been changed to month and year of birth due to concerns about identity theft, and home address has changed to contact details to enhance the likelihood that details will be current. While 'ethnicity and physical characteristics' were initially included in the Discussion Paper, we agree with consultations and submissions that noted that this information is not as relevant in the surrogacy context as in the donor conception context. This is because most domestic surrogacy is gestational, and the surrogate has no genetic connection to the child. As a result, we have since removed this detail.[89]

Whether the surrogacy was traditional or gestational

11.65 This detail will assist people born through surrogacy to understand the context of their gestational origins. It will also indicate any biological connection they have with the surrogate or gamete donors. This is to be provided by ART service providers, as they are best placed to accurately provide this detail. If one was not used, it should be provided by intended parents. As discussed above, ART service providers are routinely required to provide information to donor registers.

Details of the relevant ART service provider or doctor (if any)

11.66 This information will assist the person to understand the context of their conception and birth. The person may also wish to access the thorough records that ART service providers are required to maintain, such as consent forms, and records of eligibility and process requirements.[90] This information will be provided by the ART service provider.

Any other information, such as a personal statement from the surrogate

11.67 It should be open to intended parents and surrogates to provide any other additional information to the National Regulator which may help the person born through surrogacy to understand their gestational origins and the context of their birth. It was suggested that the surrogacy register include information that enhances the quality of the person's understanding of their gestational origins.[91] The ALRC agrees that this would be beneficial, and recommends that it be provided on an optional basis in the form of a personal statement. A personal statement can help people born through surrogacy to understand the surrogate's motivations, life,

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88 Name withheld, *Submission 69*; P Hadfield-Jia, *Submission 71*; J Attawet, *Submission 360*; Australian Nursing and Midwifery Federation, *Submission 375*; M Quinlan, *Submission 381*; Child Identity Protection, *Submission 388*; Australian Christian Lobby, *Submission 419*; Name withheld, *Submission 421*.

89 Name withheld, *Submission 372*. In traditional surrogacy arrangements, where there is a biological connection between the surrogate and the child, donor conception laws will apply and the surrogate's (as the egg donor) information will be contained on the relevant donor conception register.

90 National Health and Medical Research Council (n 64) 59–60 [9.1.1]–[9.2.2].

91 P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 362*.

and background, adding colour to otherwise black and white information. Such a statement may improve an individual's understanding of their gestational origins. It should be provided by the surrogate to the National Regulator. Other relevant information that parties may wish to provide could be a copy of the surrogacy arrangement, communications between intended parents and the surrogate, or photographs.

A copy of the parentage order, if one is obtained

11.68 Parties to arrangements on the judicial pathway, including those that took place overseas, will be required to obtain a parentage order (**Recommendation 29**). This is a legal document that is likely to have significant symbolic value for people born through surrogacy, and the ALRC considers they should have access to this record. It should be sent by the Federal Circuit and Family Court of Australia Registry, which is the court the ALRC recommends determine parentage under the judicial pathway. The existing practice of state and territory court registries sending parentage orders to births, deaths, and marriages registries serves as precedent for this function.[92]

11.69 In the Discussion Paper, we proposed that compliance with the requirement to provide information to the National Regulator should be enforced through a civil penalty or criminal sanction. However, we have since determined that, in relation to most of the entities that would be required to provide the information, it would be unnecessary to compel compliance. This is because births, deaths, and marriages registers, the Federal Circuit and Family Court of Australia, and ART service providers have well-established pathways for sharing information and complying with administrative requirements. As a result, we did not proceed with the proposal.

Timing

11.70 This information must be provided to the National Regulator within six months after the birth of the child. While donor conception legislation usually sets this timeframe at two or three months (see above), we have departed from this as the six-month timeframe aligns with other requirements recommended in this Report (see **Recommendation 29**, which provide that parentage orders must be applied for within six months of the birth of a child), and a slightly extended window is unlikely to create harm.

11.71 To promote the right to identity, entering details of surrogacy births in the National Surrogacy Register should be mandatory for all surrogacy births occurring after commencement of legislation implementing this recommendation. Retrospective application to all surrogacy arrangements occurring over many decades would pose an overwhelming logistical and administrative challenge. Parties to past surrogacy arrangements should nevertheless have the option of providing information to the National Regulator for inclusion on the register.

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92 See, eg *Surrogacy Act 2010* (NSW) s 49; *Surrogacy Act 2022* (NT) s 46; *Status of Children Act 1974* (Vic) s 31.

Accessing gestational history through the National Surrogacy Register

11.72 People born through surrogacy should have a right to access information relating to their gestational origins stored on the National Surrogacy Register. Without prescribing the exact framework for applying for information from the register, the ALRC anticipates that this will be akin to the equivalent process under donor registers. The access framework developed should be accessible, client-centred, provide adequate supports such as referrals to counselling services, and be informed by people with personal or professional experience of surrogacy.

11.73 People born through surrogacy should be entitled to access this information from the age of 16. This aligns with the age at which gamete donor registers can be accessed in some states and territories.[93] This also recognises young people's evolving capacity to process information and act autonomously. The CRC urges states to recognise the child's independence and right to participate in decisions affecting them, in accordance with their evolving capacity, age, and maturity.[94] The Committee on the Rights of the Child defines maturity as 'the capacity of a child to express [their] views on issues in a reasonable and independent manner'.[95] This principle supports granting access to information at 16 years old, by which age most adolescents have developed sufficient maturity to understand, process, make informed choices, and 'reason and consider alternative courses of action'.[96] Providing access at this age supports the child's right to participate, respects their autonomy, and ensures that decisions impacting them are made in accordance with their capacity to engage meaningfully.

11.74 However, as **Recommendation 30** recommends that all copies of a birth certificate issued from birth notify a person born through surrogacy that further information is available through the National Surrogacy Register, it is likely that people under 16 years old will also seek access to such information. As research indicates that access to the truth about gestational origins at a young age leads to better relationships and adjustment for people born through donor-assisted human reproduction,[97] children should have every chance of accessing this information where appropriate.

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93 See, eg, *Assisted Reproductive Technology Act 2024* (ACT) ss 51(1)(a), 64; *Assisted Reproductive Technology Act 2024* (Qld) s 48.

94 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 5, 12.

95 Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [30].

96 Grace Icenogle et al, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample' (2019) 43(1) *Law and Human Behavior* 69, 85.

97 This research is summarised in Elaine O'Callaghan, 'Surrogate Born Children's Access to Information About Their Origins' (2024) 38(1) *International Journal of Law, Policy and The Family* 1, 8–9.

11.75 The ALRC does not consider that people should be denied access to important information about their gestational origins based arbitrarily on their age alone. As discussed above, the CRC provides that children's agency and responsibility should be respected in line with their evolving capacity.[98] This has been interpreted as a need to provide 'the framework for ensuring an appropriate respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood'.[99] Children develop at different rates, and maturity does not necessarily correlate with age. Adopting a blanket age restriction in this context would fail to recognise that some children will have the necessary degree of capacity and maturity to handle this information. While children's access to donor registers is often predicated on parental consent, it is arguable that parents should not have the ability to gatekeep the child's access to their rights if the child has the ability to make this choice for themselves.[100] The Law Council of Australia endorsed this argument in its submission.[101] Judge Harland has also noted that thought should be given to how and when children should be able to access this information, suggesting that it should be available 'in accordance with their evolving capacities'.[102]

11.76 The ALRC therefore recommends that children under 16 years of age should be able to access the register in appropriate circumstances. In the Discussion Paper we proposed that access could depend on the National Regulator's satisfaction that access would not be harmful to the child's welfare. However, on reflection we agree with Relationships Australia's submission that this test is 'outdated' and 'deficit-based'.[103] We adopt instead their suggestion that the National Regulator should be empowered to grant access if it is in the child's best interests.[104] This means that the National Regulator would not grant access if, for example, the child's maturity means it would have a negative psychological impact. The National Regulator should be assisted in this assessment by a counselling certificate or similar if needed.

11.77 Finally, we also recommend that the National Surrogacy Register contain information relating to Australian children born through overseas surrogacy. This process is outlined in greater detail in the discussion of **Recommendation 45**.

98 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 5.
99 O'Callaghan (n 97) 5, quoting Gerison Lansdown, *Innocenti Insight: The Evolving Capacities of the Child* (2005) 3.
100 See, eg, Tobin and Seow (n 3) 272.
101 Law Council of Australia, *Submission 342*.
102 Harland (n 3) 124.
103 Relationships Australia, *Submission 404*.
104 Ibid. See also Law Council of Australia, *Submission 342*.

12. Domestic Compliance

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Introduction

12.1 The recommendations in this Report seek to establish a responsible and supportive surrogacy regime in Australia. This regime aims to facilitate surrogacy as a legitimate form of family formation while introducing safeguards which enhance free and informed decision making, and minimise the risks of exploitation, the sale of a child, and other forms of harm.

12.2 Effective regulation is essential to uphold the integrity of the responsible and supportive domestic surrogacy regime. The parameters of lawful engagement in domestic surrogacy in Australia must be clearly defined and measures put in place to ensure compliance. **Chapter 2** sets out the parameters for lawful engagement in domestic surrogacy. This chapter considers the current compliance measures and proposes improvements.[1] It considers how the criminal law has been used to regulate surrogacy in Australia, and concludes that enforcement through a civil penalty regime, for all but the most egregious conduct, is both preferable in principle and likely to be more effective in practice.

12.3 The recommendations in this chapter respond to the Terms of Reference, which recognise current inconsistencies in legislative arrangements across Australian jurisdictions, and require the ALRC to consider 'how to reduce barriers to altruistic surrogacy arrangements in Australia' and 'protect and promote the human rights of children born [through] surrogacy, surrogates and intend[ed] parents'. Clear boundaries of what is and is not permitted — including consequences for non-compliance — are required to reduce these barriers, while protecting and promoting the rights of everyone involved.

1 The regulation of overseas surrogacy is addressed separately in **Chapter 13**.

12.4 This chapter includes three recommendations that seek to uphold the responsible and supportive domestic surrogacy regime:

- **Recommendations 33** and **34** incentivise compliance with the regime. They do so by ensuring only compliant arrangements are approved by Surrogacy Support Organisations ('SSOs') (**Recommendation 9**), and that only approved arrangements can access assisted reproductive technology ('ART') to facilitate a pregnancy. This would significantly reduce the risk of arrangements proceeding which do not comply with the legislative safeguards.
- **Recommendation 35** prohibits coercive conduct, thereby reducing the risk of a person being involved in a domestic surrogacy arrangement against their will. This recommendation bolsters **Recommendations 11**–**20**, which include legislative safeguards that are directed to better ensuring free and informed decision-making.

12.5 Each of these recommendations includes consequences for non-compliance, enforced through a civil penalty regime overseen by the National Regulator (see **Chapter 3**). The coercion prohibited by **Recommendation 35** could also be punished by a criminal sanction. The deployment of a civil penalty regime (other than for the most egregious conduct, such as coercion) better reflects the context in which the unlawfulness dealt with occurs. As discussed below, it would also better ensure effective compliance.

12.6 Collectively, the implementation of **Recommendations 33**–**35** would help to deter unlawfulness and encourage compliance with a responsible and supportive surrogacy regime; a regime that is based upon, but seeks to improve upon, the current policy objectives behind Australia's existing regime for surrogacy regulation.

The current approach to compliance

12.7 As discussed in **Chapter 2**, it is a criminal offence in all Australian jurisdictions to engage in a domestic surrogacy arrangement for profit or reward.[2] Some

2 The legislation in most Australian jurisdictions prohibits 'commercial' surrogacy, which is generally defined as a surrogacy arrangement in which the surrogate receives payment beyond reimbursement of reasonable expenses: *Parentage Act 2004* (ACT) ss 40–1; *Surrogacy Act 2010* (NSW) ss 8–9; *Surrogacy Act 2022* (NT) s 48; *Surrogacy Act 2010* (Qld) ss 10, 56–7; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) ss 8, 40. Victoria and Western Australia do not use the terminology of 'commercial' surrogacy. Rather, Victoria prohibits surrogacy for 'material benefit or advantage': *Assisted Reproductive Treatment Act 2008* (Vic) s 44. Western Australia prohibits surrogacy 'for reward': *Surrogacy Act 2008* (WA) s 8. Western Australia has recently passed new legislation which retains this prohibition (and increases the fine, but removes imprisonment as a sanction): *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 107, 112. This Act will commence in mid-2027.

jurisdictions have extended this offence to overseas surrogacy arrangements (see **Chapter 13**).[3]

12.8 All jurisdictions prohibit advertising certain surrogacy arrangements, but vary in terms of whether the prohibition applies to all surrogacy arrangements, or only to the advertising of prohibited arrangements or paid advertising.[4] Most jurisdictions have also introduced offences which are directed at those who facilitate 'commercial' surrogacy arrangements, or facilitate any arrangement in return for payment or valuable consideration.[5] South Australia prohibits 'inducement'[6] and Western Australia has recently passed legislation to prohibit 'coercion' in respect of any surrogacy arrangement.[7]

Should the criminal law be used to regulate surrogacy?

12.9 The application of the criminal law to surrogacy arrangements stems from a time when all forms of surrogacy were considered unethical.[8] However, surrogacy is no longer viewed as an inherently unethical practice that needs to be either 'restricted' or 'tolerated'. Rather, surrogacy that is not for profit or reward is now viewed as a legitimate form of family formation, which needs be properly regulated to uphold and protect the rights of everyone involved, with the interests of children born through such arrangements being the paramount consideration.[9] Therefore, the social norms that regarded all forms of surrogacy as unethical and which accounted for its criminalisation have changed. As discussed below, the use of criminal sanctions to regulate all conduct associated with surrogacy is not warranted. What is necessary

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3 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b). The *Surrogacy Act 2008* (WA) (which currently remains in force) does not contain such a provision. However, Western Australia has recently passed new legislation which extraterritorially prohibits surrogacy 'for reward': *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151. This Act will commence in mid-2027.

4 *Parentage Act 2004* (ACT) s 43; *Surrogacy Act 2010* (NSW) s 10; *Surrogacy Act 2022* (NT) s 50; *Surrogacy Act 2010* (Qld) s 55; *Surrogacy Act 2019* (SA) s 26; *Surrogacy Act 2012* (Tas) s 41; *Assisted Reproductive Treatment Act 2008* (Vic) s 45; *Surrogacy Act 2008* (WA) s 10. Western Australia's new Act retains this prohibition: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 152 (publication of 'certain information for surrogacy arrangement for reward'). This Act will commence in mid-2027.

5 Some jurisdictions prohibit facilitation of 'commercial' surrogacy: *Parentage Act 2004* (ACT) ss 42, 44; *Surrogacy Act 2010* (Qld) s 58; *Surrogacy Act 2008* (WA) s 11 (excludes health service provision to the surrogate once pregnant). Some jurisdictions prohibit facilitation of any surrogacy arrangement, where the facilitation is done in exchange for profit or reward: *Surrogacy Act 2022* (NT) ss 49 (excludes legal assistance), 51; *Surrogacy Act 2019* (SA) s 24 (excludes intended parents engaging in lawful arrangements); *Surrogacy Act 2012* (Tas) s 41; *Surrogacy Act 2008* (WA) s 9.

6 *Surrogacy Act 2019* (SA) s 25.

7 *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 153. This Act will commence in mid-2027.

8 Australia first started regulating surrogacy in the late 1980s and early 1990s. Initially, the approach to reform was defined by 'moral panic', with surrogacy viewed as a 'threat': Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 6–7.

9 See **Chapter 1**.

is a more nuanced approach which reserves the use of the criminal law to regulate surrogacy to the most egregious conduct.

12.10 Criminal sanctions (which include fines and imprisonment) are the most severe way to regulate behaviour.[10] In addition to deterring behaviour, criminal sanctions denounce and punish.[11] This is because a 'key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame'.[12] For this reason, criminal sanctions carry stigma.[13] They tend to be used for serious conduct where moral culpability is high, and where other measures are insufficient to achieve compliance.[14]

12.11 Concerns have been raised that there may be unintended but concerning consequences of using the criminal law to regulate unlawful surrogacy:

- **Criminalisation stigmatises surrogacy, which causes harm**[15] — As discussed above, criminal sanctions carry stigma. For children who are born through prohibited arrangements, the circumstances of their birth are

10 See Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2024) 16; Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) 170 [5.11]; Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction* (Discussion Paper No 65, 2002) 52 [2.39]–[2.41].

11 This is based on a combination of utilitarian and retributive theories of punishment. The utilitarian theory holds that punishment is justified by its beneficial impacts (deterrence, community protection). The retributive theory holds that punishment is an 'appropriate moral response to the voluntary commission of an offence and should be imposed regardless of its effects': Justice Cameron Macaulay, 'Socially Disadvantaged Accused: How (or Should) Courts Take This into Account?' (Speech, Deakin University, 28 August 2024) <www.supremecourt.vic.gov.au/about-the-court/speeches/socially-disadvantaged-speech>. See also Attorney-General's Department (Cth) (n 10) 16; Deniz Kayis, Eloise Gluer and Samuel Walpole (eds), *The Law of Civil Penalties* (The Federation Press, 2023) 11. See, eg, the purposes of sentencing as specified in *Sentencing Act 1991* (Vic) s 5.

12 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) 65 [2.10], quoted in Attorney-General's Department (Cth) (n 10) 16. See also Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, 2020) 192–5 [5.70]–[5.77]. See also New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report No 102, 2003) 31–2 [2.35].

13 This stigma can lead to discrimination, and have a significant impact on a person's 'opportunities, prospects and mental health': Victorian Equal Opportunity and Human Rights Commission, *Spent Conviction Discrimination Guideline: Complying with the Equal Opportunity Act 2010* (2022) 15.

14 Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction' (n 10) 52 [2.39], 84 [3.29].

15 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* (Routledge, 2015) 65, 71–2. See also 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. See also Name withheld, *Submission 69*; K Cox, *Submission 105*; Name withheld, *Submission 177*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Equality Australia, *Submission 253*; Name withheld, *Submission 259*; E Kneebone, *Submission 321*; Rainbow Families, *Submission 429*.

criminalised,[16] which may result in stigma,[17] through no fault of their own. And while many surrogacy arrangements are lawful, confusion can lead to a public perception that all surrogacy is illegal or exploitative,[18] rather than a valid form of family formation. As one submission noted:

> [m]any people (including medical professionals) are unaware that surrogacy is legal in Australia. Others still perceive it as morally questionable, which can lead to stigma or hesitancy when seeking help.[19]

- **Criminalisation may push surrogacy arrangements underground**[20] — People who are seeking to engage in surrogacy as a form of family formation may be concerned that they will face a criminal sanction for doing so. This can deter help-seeking behaviour, or result in the concealment of arrangements, reducing transparency.[21] This is counterproductive, as it can lead to 'unsafe conditions, discrimination and exploitation',[22] and can hinder the development of a 'transparent, ethical, and regulated surrogacy environment'.[23]
- **Criminal offences target the wrong actors** — Some have emphasised that the current criminal laws unfairly focus on intended parents (who are seeking to form a family) and surrogates (who want to assist them), rather than on the predatory practices of those who may seek to exploit the parties, such as unscrupulous facilitators or unregulated members of the surrogacy industry.[24]

12.12 Questions have also been raised about the effectiveness of using the criminal law to regulate surrogacy. It is difficult to know how common domestic surrogacy arrangements for profit or reward are, and therefore difficult to know whether criminal sanctions are an effective deterrent. It is easier to quantify the number of overseas

16 Department of Health and Social Security, Committee of Inquiry into Human Fertilisation and Embryology, *Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report)* (No Cmnd 9314, 1984) 46–7 [8.18]–[8.19], quoted in Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Law Review* 59, 73–4. See also Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 303 [12.3].

17 See Equality Australia, *Submission 253*; E Kneebone, *Submission 321*.

18 Many submissions raised the need for education to reduce the misinformation on and stigma associated with surrogacy: see, eg, Not published, *Submission 116*; Name withheld, *Submission 135*; Name withheld, *Submission 138*; Not published, *Submission 274*; Name withheld, *Submission 278*. See also **Recommendation 7**, which addresses the need for education and awareness.

19 Name withheld, *Submission 28*.

20 Stuhmcke (n 15) 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 Fenton-Glynn (n 16); Name withheld, *Submission 44*; K Cox, *Submission 105*; K Horsey, *Submission 418*.

21 See, eg, Not published, *Submission 123*; S Jefford, *Submission 128*; Name withheld, *Submission 177*.

22 Human Rights Watch (n 20).

23 K Cox, *Submission 105*.

24 See Name withheld, *Submission 11*; S Jefford, *Submission 128*. See also Claire Fenton-Glynn and Alexandra Harland, 'Criminalising Surrogacy in Australia' in Jens M Scherpe, Daisy Cheung, and Lene Wacher Lentz (eds), *Criminalising Surrogacy* (Edward Elgar Publishing, forthcoming).

arrangements — these make up the majority of surrogacy arrangements engaged in by Australians,[25] and are generally for profit or reward.[26] Some Australian jurisdictions criminalise 'commercial' surrogacy extraterritorially, and while it appears that some people are deterred,[27] others ignore the prohibition or try to evade it.[28] This suggests that criminal sanctions, at least in the overseas context, are not a sufficient deterrent.

12.13 It also does not appear that, where unlawful arrangements are entered into, there is a sufficient enforcement response. There have been no domestic prosecutions, other than some initial prosecutions in Queensland, under laws which prohibited all forms of surrogacy.[29] There have been a few instances where civil courts have become aware of unlawful overseas arrangements and referred the matters for prosecution.[30] However, such instances are rare, and have not resulted in any prosecutions.[31] While we do not know how many overseas surrogacy arrangements involve intended parents from Australian jurisdictions with extraterritorial prohibitions, given the number of overseas arrangements, the number is likely greater than the number which have been referred. Ultimately, it appears that prosecutors have either been unable to prosecute, or are reticent to do so. This experience — of lack of enforcement of criminal sanctions for unlawful surrogacy — is mirrored in comparable jurisdictions overseas.[32]

12.14 From a principled perspective, criminalising conduct — but failing to enforce the law where such conduct occurs — brings the law into disrepute. However, views differ on the appropriate response. Several submissions, generally from those who do not support surrogacy, emphasised the need for the retention and enforcement

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25 See **Chapter 1**, which explains that, on the data available, overseas surrogacy appears to account for about 80% of children born through surrogacy to Australian intended parents.

26 Department of Foreign Affairs and Trade (Cth), 'Going Overseas for International Surrogacy', *Smartraveller* <www.smartraveller.gov.au/before-you-go/activities/surrogacy>.

27 See, eg, Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 175–6.

28 Ibid 176. See, eg, *Lloyd & Compton* [2025] FedCFamC1F 28. See also 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) 23 [1.71]. See also Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 1, 3; Fenton-Glynn and Harland (n 24).

29 There were some initial (unsuccessful) prosecutions under the (since repealed) *Surrogate Parenthood Act 1988* (Qld). However, this Act rendered all surrogacy arrangements unlawful. See Stuhmcke (n 15) 70.

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

31 It was noted in the 2019 Allan Review Report 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 27) 173. See also P Parkinson, *Submission 13*.

32 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.

of criminal sanctions to achieve deterrence,[33] and that the absence of enforcement was not a justification for repealing these sanctions.[34] Others have recognised that enforcement of criminal sanctions could cause harm, and that mere retention of these criminal prohibitions, even if unenforced, is harmful:

> [t]he ongoing absence of any prosecution supports the view that the Australian laws are an exercise in pure symbolism. Of course … even where laws are symbolic in application, symbolism can cause great harm.[35]

12.15 It is not in the child's best interests to have the circumstances of their birth penalised, to be deprived of their functional and social parents (if a term of imprisonment was imposed), or denied legal recognition of their family, as a consequence of being born through an unlawful arrangement (see **Chapter 10**).[36] It is also counterintuitive to punish surrogates for engaging in prohibited arrangements, when one of the main justifications for the prohibition is their protection.[37]

12.16 If current criminal sanctions were to be enforced, this could also result in considerable unfairness in terms of regulatory impact, as sanctions vary widely between jurisdictions.[38] For example, if successfully prosecuted in Tasmania, a person can only be fined, whereas in South Australia, the only penalty is imprisonment.[39]

12.17 Despite concerns about appropriateness, effectiveness, and lack of enforcement, no recent inquiry in Australia, at the Commonwealth or state and territory level, has recommended decriminalising domestic surrogacy arrangements that are 'commercial'

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33 See, eg, Name withheld, *Submission 100*; ARMS (Vic), *Submission 408*; ADF International, *Submission 413*; Australian Christian Lobby, *Submission 419*. See also P Zagarelou-Mackieson, *Submission 361*; M Quinlan, *Submission 381*.

34 See, eg, Australian Catholic Bishops Conference, *Submission 403*. One submission indicated what was needed was education, rather than repeal: D Adams, *Submission 382*.

35 Stuhmcke (n 15) 71. See also Richard F Storrow, 'Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-Border Reproductive Travel' (2011) 23(5) *Reproductive BioMedicine Online* 538, 542.

36 See Lydia Bracken, 'Prohibiting Commercial Surrogacy in Ireland' (2025) 39(1) *International Journal of Law, Policy and The Family* 1, 14–15; John Pascoe, 'Sleepwalking through the Minefield: Commercial Surrogacy and the Global Response' (Speech, Blackburn Lecture, 15 May 2018). See also Storrow (n 35) 543–4, which discusses the lack of proportionality between the effect on children and the regulatory objective. See also Equality Australia, *Submission 435*. The risk of being referred for prosecution may also deter intended parents from seeking formal recognition of their relationship to their child: see, eg, *Lloyd & Compton* [2025] FedCFamC1F 28. While this was an overseas surrogacy arrangement, parties to a prohibited domestic arrangement may also fail to seek legal parentage to avoid scrutiny of the arrangement.

37 See Fenton-Glynn and Harland (n 24).

38 For example, penalties for an individual engaging in 'commercial' surrogacy range from a fine (between $16,000–$110,000) to imprisonment (between one to three years), or both, depending on the jurisdiction: *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) (imprisonment only, no fine); *Surrogacy Act 2012* (Tas) s 40 (fine only, imprisonment only); *Assisted Reproductive Treatment Act 2008* (Vic) s 44; *Surrogacy Act 2008* (WA) s 8. Western Australia's new Act imposes a fine only, imprisonment having been removed as a sanction: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 112. This Act commences mid-2027.

39 *Surrogacy Act 2012* (Tas) s 40; *Surrogacy Act 2019* (SA) s 23.

or 'for reward', citing concerns about the risk of exploitation.[40] However, even if the unintended consequences created by the criminalisation of unlawful surrogacy were justified by the need to mitigate the risk of exploitation, the criminal justice system has not proved itself effective. Further, as discussed below, there are good reasons for thinking that a civil justice regime will likely be more effective.

12.18 As a matter of principle, the use of the criminal law to regulate conduct needs to be justified. Whether the use of the criminal law is justified depends on:

- **the nature of the prohibited conduct** — Conduct is more likely to be considered criminal if it causes significant harm to other people or society, or is dishonest or fraudulent;[41] and
- **what the law is seeking to achieve** — If what is sought is denunciation and punishment of such conduct, and imprisonment may be warranted, application of the criminal law may be justified.

12.19 The ALRC is of the view that, other than for the most egregious conduct associated with surrogacy (like coercion), the nature of the harm from unlawful surrogacy does not warrant the criminalisation of such conduct. That conclusion is supported by our view that:

- responsible surrogacy is a legitimate form of family formation (as is recognised by the laws that currently regulate surrogacy);
- the primary aim of surrogacy regulation should not be to punish or denounce, but rather, to deter people from engaging in or facilitating harmful surrogacy arrangements;
- criminalisation of surrogates is at odds with a regime that is, in part, designed to protect them from harm; and
- criminalisation of intended parents is at odds with the rights and best interests of children born through surrogacy, including by stigmatising the circumstances of the child's birth.

12.20 For these reasons, and because, as will be discussed below, a civil penalty regime is regarded as likely to provide for more effective enforcement, the ALRC is of the view that use of the criminal law to regulate surrogacy is inappropriate, other than for the most egregious conduct. An alternative approach to the regulation of surrogacy is required. This approach is discussed below.

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40 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 28) rec 1; Department of Justice (NSW), *Statutory Review: Surrogacy Act 2010* (2018) 8 [2.26]–[2.27], 9 [3.6]; South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) rec 7; Allan (n 27) rec 29; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) rec 15.

41 Attorney-General's Department (Cth) (n 10) 16.

Alternative approach to compliance: a civil penalty regime

12.21 In light of the deficiencies discussed above, the ALRC is of the view that an alternative approach to encouraging compliance, and deterring non-compliance, with the regulatory scheme is required.

12.22 A civil penalty regime, with a capacity to deter unlawful conduct through the imposition of pecuniary penalties, provides a feasible alternative. Civil penalties deter non-compliance by creating a risk that a person or organisation will be liable in a court proceeding for a civil penalty,[42] most commonly a declaration of contravention and a pecuniary penalty (that is, a court-imposed monetary penalty).[43]

12.23 Civil penalties 'respond to different kinds of wrongdoing' and 'realise different regulatory and societal goals' to criminal sanctions.[44] Whereas criminal sanctions are used to both deter and punish, Australian jurisprudence has generally considered that the main purpose of civil penalties is deterrence.[45] Civil penalties tend to be imposed where a 'strong public response' is required to deter both the wrongdoer and others, but the conduct is not severe enough to be truly criminal.[46] While having a civil penalty imposed may have reputational consequences, it does not carry the same consequences or stigma as a criminal sanction — there is no risk of imprisonment and no conviction; and the finding (where proven) is one of 'contravention' rather than 'guilt'.[47]

12.24 Civil penalties can be as effective, and are potentially more effective, than criminal sanctions in deterring conduct in breach of legislative requirements:[48]

- **Civil penalties can provide specific and general deterrence** — Just as for criminal sanctions, monetary penalties can impose very significant disadvantage on those that contravene the law, and in doing so, deter the

42 Matthew Peckham et al, *Civil Penalties in Australia* (LexisNexis, 2025) 2.

43 Ibid 4. See also 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, 115.

44 Hanrahan (n 43) 114.

45 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 [15]. See also *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 [55]. See also Tim Begbie, 'The Purpose of Civil Penalties (Or, "The Road to Deterrence")' in Kayis, Gluer and Walpole (n 11) 4–10. See also Hanrahan (n 43) 116. However, see Peckham et al (n 42) v.

46 Hanrahan (n 43) 115–6.

47 Peckham et al (n 42) 6.

48 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) 77 [2.61]. See also Attorney-General's Department (Cth) (n 10). However, see New South Wales Law Reform Commission (n 12) 34 [2.45], which notes that, in the context of corporate liability, '[c]ivil sanctions lack the moral condemnatory force, and therefore possibly the deterrent effect, of criminal penalties'.

contravener from further contraventions (specific deterrence) and also deter others from contravening (general deterrence).[49]

- **Civil penalties can be imposed to neutralise any advantage gained through non-compliance** — The penalty imposed can be tailored to offset (and exceed) any benefit obtained through the wrongdoing, provided the penalty is 'fairly and reasonably … appropriate to protect the public interest from future contraventions'.[50] A civil pecuniary penalty may exceed the maximum criminal fine available. In this way, civil penalties can render non-compliance an 'economically irrational choice'.[51]
- **Civil contraventions are easier to prove** — A criminal sanction can only be imposed where the high criminal standard of proof ('beyond reasonable doubt')[52] and rigorous standards of criminal procedure have been met. By contrast, for civil contraventions, a lesser standard of proof applies ('on the balance of probabilities'), as do less complex and onerous rules of procedure,[53] simplifying investigation and enforcement proceedings and increasing the likelihood that liability for non-compliance will be established.[54] For this reason, civil penalties 'may provide more predictable, accessible and efficient remedies' than criminal sanctions.[55]
- **Civil penalty regimes facilitate the use of a regulator to instigate enforcement** — Civil penalty contraventions are often enforced by a regulator,[56] a body which is heavily invested in maintaining the integrity of the regulatory scheme it administers. By contrast, enforcement bodies such as police have general responsibility for investigating and prosecuting criminal offending, with limited resources. As such, they are likely to prioritise their efforts on the most egregious criminal conduct. This may be one explanation for the absence of prosecutions for unlawful surrogacy.

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49 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 [66]. This would include specific deterrence (of the individual wrongdoer) and general deterrence (of the broader public): Judicial College of Victoria, *Victorian Sentencing Manual* (2024) 66–73.

50 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 [71].

51 Ibid [66].

52 *Momcilovic v The Queen* (2011) 245 CLR 1 [54]. See also Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Interim Report No 127, 2015) 311–13 [11.1]–[11.9].

53 Peckham et al (n 42) 6.

54 New South Wales Law Reform Commission (n 12) 33–4 [2.41]–[2.42].

55 Ibid 34 [2.46].

56 Hanrahan (n 43) 111.

Should civil penalties be used to regulate surrogacy?

12.25 In our Discussion Paper, we proposed a range of prohibitions, and asked whether they should be enforced by a civil penalty only, a criminal sanction, or both.[57] We noted that it may be more appropriate in some circumstances to impose criminal sanctions on facilitators rather than surrogates or intended parents.

12.26 As discussed above, of the submissions received in response to these proposals from those who do not support any form of surrogacy, support was generally in favour of retaining (and expanding) the use of criminal sanctions to deter and denounce unlawful surrogacy arrangements, with some citing concerns about the effectiveness of civil penalties as a deterrent.[58]

12.27 Of the other submissions we received that responded to these proposals — including from people with lived experience of surrogacy, people who work in the surrogacy industry, academics and advocacy groups — there was general support for a move away from criminal sanctions against intended parents and surrogates who engage in prohibited domestic surrogacy arrangements (Proposal 8). Some expressly specified support for the use of civil penalties to enforce compliance with the prohibition, and some highlighted the stigma criminal offences cause.[59]

12.28 There was also general support (among the submissions which responded to this issue) for the prohibition of 'facilitation (including advertising) of prohibited arrangements' and 'coercion' (Proposal 10). However, views varied on whether civil

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57 We proposed prohibitions in respect of intended parents or surrogate entering a domestic surrogacy arrangement for 'impermissible' profit or reward (Proposal 8); facilitating (including through advertising) a domestic surrogacy arrangement for profit or reward (Proposal 10(a)); coercing someone to participate in any surrogacy arrangement (Proposal 10(b)); and SSOs approving non-compliant arrangements (Proposal 6). While not framing it as a prohibition, we also proposed that that parties to a surrogacy arrangement could only attempt to achieve a pregnancy and ART service providers could only help facilitate this, if it was an approved arrangement (Proposal 4): Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper No 89, 2025).

58 See, eg, M Quinlan, *Submission 381*; Australian Catholic Bishops Conference, *Submission 403*; ARMS (Vic), *Submission 408*; ADF International, *Submission 413*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

59 See, eg, S Jefford, *Submission 359*; S Page, *Submission 365*; B Tobin, *Submission 367*; Equality Australia, *Submission 435*. See also Relationships Australia, *Submission 404* (which supports retention of criminal sanctions for facilitators). See also Katie Cox, surrogacy lawyer and parent through surrogacy, who submitted that a civil penalty regime was 'more complex than desirable' but if designed carefully would allow for accountability and regulatory oversight: K Cox, *Submission 389*.

penalties were sufficient,[60] if criminal sanctions were required,[61] or whether both may be necessary,[62] depending on the context and seriousness of the conduct. In respect of facilitation, concerns were raised that subjecting professionals, such as lawyers and clinicians, to the risk of criminal penalties could cause them to fear they are committing an offence when providing 'good faith professional advice'. In turn, this might limit assistance to intended parents.[63] In respect of advertising, concerns were raised that the current use of criminal sanctions for advertising surrogacy, especially for the advertising of legal surrogacy, is inappropriate and 'heavy-handed'.[64]

12.29 In respect of SSOs approving non-compliant arrangements (Proposal 6), few submissions specifically engaged with the three proposed enforcement options. Of those that did, some favoured civil penalties over criminal sanctions, on the basis that they were more appropriate,[65] more likely to be enforced, and less likely to create a chilling effect on SSO development.[66] Some favoured criminal sanctions, consistent with the approach to ART service providers.[67] Several supported both civil penalties and criminal sanctions being available.[68]

12.30 Ultimately, for the reasons canvassed above, the ALRC is of the view that use of the criminal law is generally not appropriate in the surrogacy context and that a civil penalty regime can be just as, if not more, effective in helping to provide and facilitate compliance with the laws that regulate surrogacy.

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60 See, eg, K Cox, *Submission 389*.

61 See, eg, D Adams, *Submission 382*; Relationships Australia, *Submission 404*; K Horsey, *Submission 418* (supports criminal sanctions for predatory or exploitative practices, or serial breaches); Australian Christian Lobby, *Submission 419* (submitted that criminal sanctions should apply to both domestic and overseas of commercial surrogacy). See also Name withheld, *Submission 372*. Relationships Australia emphasised that 'the amount of money that can be made from exploiting surrogacy arrangements incentivises egregious breaches of human rights, and it is necessary that sanctions reflect public repugnance and States' recognition of the gravity of the harms that ensue. Social stigma should not attach to children, surrogates or intended parents who have been exploited, commodified and harmed, but it most certainly should attach to those making the billions of dollars that drive surrogacy markets and abuses that occur in service of those markets': Relationships Australia, *Submission 404*.

62 See, eg, S Jefford, *Submission 359*; Relationships Australia, *Submission 404*; Name withheld, *Submission 422*; Equality Australia, *Submission 435* (supported both civil penalties and criminal sanctions for coercion).

63 See, eg, K Cox, *Submission 389*; Equality Australia, *Submission 435*. See also Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12(3) *Journal of Bioethical Inquiry* 477, 488. However, see also surrogacy lawyer Sarah Jefford, who was not concerned that Proposal 10, as drafted, would inadvertently capture legal advice where appropriately given: S Jefford, *Submission 359*.

64 Equality Australia, *Submission 253*.

65 Not published, *Submission 393*; Rainbow Families, *Submission 429*.

66 Rainbow Families, *Submission 429*.

67 S Page, *Submission 365* (though favoured oversight by the National Regulator for complex cases); D Adams, *Submission 382* (favoured the National Regulator rather than SSOs).

68 K Cox, *Submission 389*; Relationships Australia, *Submission 404*; Name withheld, *Submission 422*; Equality Australia, *Submission 435*. However, these submissions generally favoured the approval function resting with the National Regulator rather than SSOs.

12.31 The ALRC recognises that some people are concerned that civil penalties would not be an effective deterrent, but rather, a potential penalty would just be factored in as part of the 'cost' of engaging in or facilitating prohibited surrogacy arrangements.[69] However, courts are well aware of this potential and guard against it in order to ensure that the penalty imposed is an effective deterrent. It is a well-established principle that a penalty

> must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business.[70]

12.32 Further, when considering which enforcement regime is likely to be more effective in deterring contravening conduct, it is necessary to note that a regulator with access to a civil penalty regime is more likely to address non-compliance than police, as the police are faced with the far higher prosecutorial burdens of a criminal justice regime, as well as scarce resources and competing priorities.

Implementation considerations

12.33 A civil penalty regime should be enacted in legislation that is introduced to give effect to the recommendations in this chapter (see **Recommendation 3**). Properly implemented, this would achieve the reform aim of reducing the risk of harm, including exploitation, by sufficiently deterring wrongdoing. The concerns raised above highlight the importance of a well-designed civil penalty scheme, if these recommendations are to be effective.

12.34 It is not feasible to say much more about the structure and content of the civil penalty regime (or regimes) which should be established. Much will depend upon the national uniform legislation which is chosen to implement the proposed reforms. As discussed in **Chapter 3**, it would be most effective if the civil penalty regime was established by Commonwealth legislation and enforced by a National Regulator. This would better ensure national application (without the need for each jurisdiction to separately establish a civil penalty regime). It would also better ensure fairness and equality of treatment by supporting consistent enforcement and provide for more consistent national messaging about the parameters of lawful domestic surrogacy.

12.35 The National Regulator would need to be empowered to investigate and bring proceedings, and be appropriately resourced to carry out these functions. The compliance tools which it may be appropriate to provide a regulator are further discussed in **Chapter 3**. Where applicable, the civil penalty regime should be consistent with the *Regulatory Powers (Standard Provisions) Act 2014* (Cth). For example, in terms of how an application under the regime can be brought and

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69 See, eg, D Adams, *Submission 382* (in the context of the significant cost of overseas surrogacy).

70 *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249 [62], cited in *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 [17]. See also Laura J Kerrigan et al, 'Project: The Decriminalization of Administrative Law Penalties: Civil Remedies, Alternatives, Policy, and Constitutional Implications' (1993) 45(4) *Administrative Law Review* 367, 388.

the factors which should be considered when a court determines what pecuniary penalty to impose,[71] and measures to prevent overlap between civil and criminal proceedings.[72]

12.36 Consideration should also be given to whether, beyond the imposition of pecuniary penalties, other remedies for contravening conduct should be available under the civil remedy regime established, such as orders for compensation. For example, where a service provider has intentionally or recklessly provided intended parents with misleading or deceptive information or advice (**Recommendation 40**) that has caused loss and damage. Consideration should also be given as to the appropriate court or courts upon which both jurisdiction and power should be conferred. Again, much will depend upon the National Uniform Legislation which is chosen. If Commonwealth legislation is implemented, ideally, the Federal Circuit and Family Court of Australia would be given jurisdiction (and perhaps exclusive jurisdiction). That approach may be more consistent with the recommendations in **Chapter 10**, that the Federal Circuit and Family Court of Australia be given exclusive jurisdiction over proceedings to determine legal parentage in surrogacy matters (**Recommendations 28** and **29**).

Repeal of existing criminal offences

12.37 The ALRC intends for the civil penalty scheme to replace existing criminal offences related to surrogacy (with the exception of coercion, which is discussed below). The ALRC has limited its recommendations for repeal to criminal offences for entering, facilitating, or advertising an arrangement for profit or reward. The ALRC notes that existing surrogacy legislation across the states and territories contains other criminal offences, for example, the prohibition on identifying a party to a surrogacy arrangement.[73] While the ALRC has not sought to address each criminal offence in each state or territory Act, and whether it should be repealed, if the ALRC's recommendations are implemented, these provisions would need to be considered and repealed or adjusted to be consistent with the purpose of the proposed reforms and the new domestic regulatory regime.

Prohibiting conduct that undermines the responsible and supportive regime

12.38 The first part of this chapter considered how compliance with the proposed regulatory regime can be best effectuated. This part of the chapter will consider some of the conduct that the regime should prohibit. Collectively, the prohibitions proposed below in **Recommendations 33**–**35** seek to uphold the integrity of the

71 *Regulatory Powers (Standard Provisions) Act 2014* (Cth) pt 4.

72 For example, civil proceedings should be stayed if criminal proceedings are commenced; a civil penalty should not be imposed for the same (or substantially the same) conduct for which a criminal sanction was imposed (to avoid double punishment); and evidence given in civil proceedings should generally not be admissible in criminal proceedings. See ibid div 3. See also Peckham et al (n 42) 81–2.

73 See, eg, *Surrogacy Act 2022* (NT) s 52; *Surrogacy Act 2012* (Tas) s 42.

proposed regulatory regime, by ensuring arrangements can only proceed where appropriate safeguards are met (**Recommendations 33**–**34**), and by reducing the likelihood of harmful or exploitative arrangements (**Recommendation 35**).

Unlawful conduct by Surrogacy Support Organisations

Recommendation 33

1. Legislation should provide that Surrogacy Support Organisations (**Recommendation 8**) are prohibited from intentionally or recklessly:
   a. approving a surrogacy arrangement that does not comply with the legislative requirements (**Recommendations 11**–**20**); or
   b. receiving referral fees from services that are engaged with to assist parties to meet the legislative requirements.
2. Legislation should provide that non-compliance with the prohibitions in paragraph 1 will result in liability to a civil penalty.

12.39 This recommendation seeks to better ensure that two important functions proposed to be carried out by SSOs are not undermined by illegitimate conduct. That is done by rendering such conduct to be unlawful and subject to a civil penalty. The relevant context, which identifies why these functions are important, is discussed in **Chapters 4**–**7**, and need only be briefly mentioned here.

12.40 Part of that context, discussed in detail in **Chapter 4**, is that the ALRC is proposing that SSOs be established (**Recommendation 8**) to:

- support parties to proactively engage with recommended legislative safeguards, before there is an attempt to achieve a pregnancy. This would include referring intended parents and surrogates to other service providers (such as counsellors or legal professionals) as required; and
- approve arrangements that are compliant with those safeguards — approved arrangements would then be able to access assisted reproductive technology, to facilitate a pregnancy for the purposes of the arrangement (**Recommendation 34**); and access the administrative pathway to parentage (**Recommendation 28**), which allows intended parents to be recognised as the child's legal parents upon birth.

12.41 SSOs and their approval function are central to the effectiveness of the legislative safeguards that are proposed and the functioning of the responsible and supportive surrogacy regime. In light of the importance of that function, it is essential that SSOs carry out that function properly and with integrity.

12.42 One of the functions of SSOs is to refer intended parents and surrogates to other service providers, where necessary, so they can satisfy the requirements of

the various legislative safeguards. Referrals should not be based on any financial inducement offered by a service provider, as such practices risk undermining the integrity of the responsible and supportive regime for domestic surrogacy. Referral decisions should be based on merit alone. The proposed reforms will be more effective if illegitimate practices are discouraged by the prospect of a civil penalty for non-compliance.

12.43 **Recommendation 33** would operate in conjunction with **Recommendation 6**, which provides that SSOs must be licensed by the National Regulator. The National Regulator would be empowered to revoke an SSO's licence if the SSO failed to comply with the conditions of that licence. The prospect of licence cancellation may of itself deter the illegitimate practices discussed above. However, the prospect of a civil penalty, including the capacity of such a penalty to disgorge the benefit of non-compliance, is considered necessary for effective deterrence.

Restricting access to assisted reproductive technology

Recommendation 34

1. Legislation should provide that an assisted reproductive technology service provider is prohibited from transferring an embryo, or otherwise facilitating an attempt to achieve a pregnancy for the purposes of a surrogacy arrangement (whether traditional or gestational), unless satisfied it is an 'approved surrogacy arrangement' (**Recommendation 10**).
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

The need to restrict access to assisted reproductive technology to approved surrogacy arrangements

12.44 As discussed above, in most jurisdictions there is no proactive assessment of a surrogacy arrangement's compliance with legislative safeguards before there is an attempt to achieve a pregnancy. Accordingly, the legislative safeguards are ineffective because non-compliance is generally only identified after the child is born, when a parentage order is sought, at which point the safeguards have been rendered meaningless.

12.45 To address this, the ALRC is recommending the introduction of an approval process (**Recommendation 9**), in which a surrogacy arrangement must meet all the required legislative safeguards before it can be approved. This will help ensure that parties have engaged with comprehensive safeguards (**Chapters 5**–**7**) which are designed to support free and informed decision-making, protect the rights and interests of all parties, minimise the risk of harm, and reduce the likelihood of problems arising during a surrogacy arrangement.

12.46 The recommended responsible and supportive surrogacy regime includes incentives for engaging in an approved arrangement, including support throughout the arrangement from an SSO (**Recommendation 8**) and access to the administrative pathway to parentage for approved arrangements (**Recommendation 28**). These incentives are necessary to encourage parties to a surrogacy arrangement to comply with the legislative safeguards, as this will enhance the effectiveness of the proposed domestic regime.

12.47 A further way to incentivise compliance with the responsible and supportive surrogacy regime, and to ensure that domestic surrogacy only proceeds by way of approved arrangements, is to restrict access to ART (for the purposes of facilitating a pregnancy) to approved surrogacy arrangements. As discussed in **Chapter 1**, gestational surrogacy arrangements are the predominant form of surrogacy in Australia, accounting for upwards of 85% of arrangements.[74] Some traditional surrogacy arrangements also require access to ART. This means that most surrogacy arrangements require access to ART in order to facilitate a pregnancy. **Recommendation 34** would establish the required incentive by prohibiting ART service providers from transferring an embryo, or otherwise attempting to facilitate a pregnancy for the purposes of a surrogacy arrangement, unless the ART service provider is satisfied that the surrogacy arrangement has been approved. This would likely result in most domestic surrogacy arrangements being compliant with the proposed legislative safeguards. The ALRC considers this measure to be pivotal to ensuring high levels of compliance with the safeguards in the responsible and supportive surrogacy regime, as most arrangements would need to comply in order to proceed. Therefore, to ensure the effectiveness of this important measure, ART service providers ought to be required to comply and non-compliance should be deterred. For the reasons outlined above the ALRC is of the view that civil penalties are sufficient to achieve deterrence, more likely to be enforced, and therefore more likely to be effective at achieving compliance.

How the prohibition would work

12.48 The prohibition in **Recommendation 34** would apply to all ART service providers who seek to facilitate a pregnancy for the purposes of a surrogacy arrangement. ART service providers would need to be satisfied that an arrangement has been approved. It would be expected that the ART service provider would make appropriate enquiries and require confirmation of approval from the SSO directly, or through documentary confirmation from the SSO, rather than relying on any confirmation provided solely by the parties to the arrangement.

12.49 In recognition of the reality that access to ART is frequently time-sensitive, the prohibition in **Recommendation 34** is limited to embryo transfer or facilitation of pregnancy. This is to ensure that parties to surrogacy arrangements could still access other forms of ART, such as egg retrieval or embryo creation. Access to

74 See **Chapter 1**, which arrives at this approximate figure. See also Sarah Jefford, *More Than Just a Baby: A Guide to Surrogacy for Intended Parents and Surrogates* (2020) 6–7.

these services — which fall short of embryo transfer or facilitation of pregnancy — should not be contingent upon there being an approved surrogacy arrangement.[75]

12.50 **Recommendation 34** would not apply to surrogacy arrangements that do not require the use of ART to achieve a pregnancy. This is likely to be a minority of arrangements and confined to traditional surrogacy. For traditional surrogacy arrangements which do not require ART, parties would still be incentivised to seek SSO approval of the arrangement in order to access the administrative pathway to parentage.

Prohibiting coercion in surrogacy arrangements

Recommendation 35

1. Legislation should provide that individuals and organisations, including Surrogacy Support Organisations (**Recommendation 8**), are prohibited from coercing, or attempting to coerce (by pressure, force, or deception), the involvement of a person in a domestic surrogacy arrangement.
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty or a criminal sanction.

The current prohibitions on 'coercion' and 'inducement' in surrogacy

12.51 South Australia has made it an offence to 'induce' someone to participate in a surrogacy arrangement, either 'by threat of harm, or by dishonesty or undue influence'; it also includes inducement 'for valuable consideration'.[76] While there is no discussion in parliamentary debates of the rationale for this specific provision, it was introduced as part of a standalone Surrogacy Act, recommended in the 2018 South Australian Law Reform Institute Report.[77] The review emphasised the risk of coercion or inducement in 'commercial' arrangements (particularly where brokers are involved),[78] but also included examples of familial pressure.[79] It emphasised the need for an age limit of 25 for surrogates given the risk of coercion;[80] the importance of parties receiving legal advice and having a proper surrogacy agreement, to promote

75 See ANZSREI, *Submission 366*.

76 *Surrogacy Act 2019* (SA) s 25. Sanctions range from two years' imprisonment (valuable consideration) to five years' imprisonment (harm, dishonesty, undue influence). Some jurisdictions have also addressed 'inducement' in the context of advertising. See, eg, *Parentage Act 2004* (ACT) s 43.

77 South Australian Law Reform Institute (n 40) rec 15.

78 Ibid 8.

79 One Australian fertility specialist, Denise Rice, quoted in ibid 43 [3.2.8], observed that '[e]veryone gets their knickers so much in a twist about commercial surrogacy, but … One of the things that we are starting to see is some really unpleasant pressure being put on close friends and relatives to act as surrogates because commercial surrogacy is banned.'

80 Ibid 144 [14.4.13].

'equality and parity' between the parties and reduce 'the scope for exploitation or coercion'.[81]

12.52 Western Australia has recently made it an offence to 'coerce' someone (which includes by threat or intimidation) to participate in a surrogacy arrangement.[82] Parliamentary debates emphasised that surrogacy is to take place under a regulated framework of informed consent, the need to protect the welfare of surrogates, and that this provision is designed to protect potentially vulnerable people from being coerced into any arrangement.[83] Like the 2018 South Australian Law Reform Institute Report, the 2019 Allan Review Report noted the importance of counselling to the prevention of coercion.[84]

Why it is necessary to prohibit coercion

12.53 South Australia and Western Australia are the only jurisdictions which have specifically addressed, with a standalone provision, the risk of people being 'coerced' or 'induced' into engaging in surrogacy. This gap in regulation is of significant concern, as free and informed consent is essential to ensuring a surrogacy arrangement is not exploitative and does not cause harm.

12.54 Consent to enter into the arrangement and participate in any of its requirements must be given freely. That means that a person's engagement in surrogacy should be an expression of their will, arrived at on an informed basis.

12.55 Coercion is the antithesis of free and informed consent; it is the overbearing of the will of another and involves negating choice.[85] Although existing legislation and the new regime proposed by the ALRC deploy a range of mechanisms to facilitate free and informed consent, the prohibition of coercion is also necessary to protect a person from being involved in a surrogacy arrangement against their will.

12.56 The ALRC is not aware of how common it is for people to be coerced into a domestic surrogacy arrangement, or pressured to continue with an arrangement against their will. However, as was raised in consultations, it is clear that there is

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81 Ibid 245 [21.2.5].

82 The penalty is a fine of $50,000 and two years' imprisonment: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) s 153.

83 Western Australia, *Parliamentary Debates*, Legislative Council, 21 October 2025, 3674–6 (Matthew Swinbourn).

84 Allan (n 27) 70–1.

85 See, eg, *Esso Australia Pty Ltd v Australian Workers' Union (FCA)* (2016) 245 FCR 39 [102]–[194]; *National Tertiary Education Industry Union v Commonwealth* (2002) 117 FCR 114 [103]; *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 [61]; *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378 [41]; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16 [20]. See also the definition of coercion for the purpose of slavery and slavery-like offences, which includes force, duress, detention, psychological oppression, abuse of power, and taking advantage of a person's vulnerability: *Criminal Code Act 1995* (Cth) s 270.1A.

a risk that surrogates and intended parents may be coerced into arrangements, including by friends or family members.[86]

12.57 Free and informed consent is at the heart of a responsible surrogacy regime. That is particularly so because respect for autonomy demands that parties who participate in a surrogacy arrangement must do so fully informed, with a clear understanding of the medical, psychological, social, and legal risks and responsibilities involved.[87]

12.58 **Recommendation 35** prohibits anyone from coercing, or attempting to coerce, someone into engaging in domestic surrogacy. It reduces the risk of coercion by addressing the current regulatory 'gap' in relation to such conduct and by ensuring there is a nationally consistent approach.

12.59 The overbearing of a person's will or the negation of choice can be achieved by a range of means. **Recommendation 35** specifies, in broad terms, the common means available: force, pressure, and deception. Conduct effectuated by the means specified will only constitute coercion where the conduct actually overbears the will of the person coerced. An *attempt* to coerce will only be established where the objective of the means used was to coerce.

12.60 Coercion is conduct that clearly justifies a civil penalty. But the means employed to coerce a person (for example, the use of force or threat of violence) may justify the imposition of a criminal sanction. Such conduct contravenes fundamental values and is harmful to society, such that it warrants deterrence, denunciation, and punishment.[88] For this reason, **Recommendation 35** provides that non-compliance with the prohibition on coercion will result in liability to a civil penalty or a criminal sanction.

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86 For example, the ALRC received a submission from a surrogate who states that she was pressured by the intended parents not to disclose her relationship breakdown with her husband to the IVF clinic which was facilitating the pregnancy, to ensure the arrangement proceeded: 'I decided to go ahead with [the surrogacy arrangement], for all the wrong reasons. My mindset at the time was that if I didn't go through with the surrogacy, the intending parents would take my ex-husband's side in the divorce, however, if I went ahead with the surrogacy, they would take my side. I was a single mother with 3 young children at the time (aged 12, 7, and 4) on the single parents pension, and I needed the support of my closest friends. To have their support and for them to take my side, I felt that I had no choice but to continue to be their surrogate': Name withheld, *Submission 12*. However, others suggest coercion is rare: Virtus Health, *Submission 397*.

87 See South Australian Law Reform Institute (n 40) 91; Maja von Bolton, 'Surrogacy: A Question of Women's Right to Self-Determination or Exploitation of Women's Bodies?' in Jocelynne A Scutt (ed), *Women, Power and Autonomy: Rights, Respect and Representation in Law and Society* (Palgrave Macmillan, 2025) 256; Rafal Zadykowicz, Katie Watson and Aris Antsaklis, 'FIGO Position Statement on Surrogacy: Ethical Considerations' (2025) 171(2) *International Journal of Gynaecology and Obstetrics* 588, 589.

88 See Attorney-General's Department (Cth) (n 10) 17.

12.61 Consideration will need to be given to whether the proposed National Regulator should have standing to prosecute coercion as a criminal offence. Where the same conduct gives rise to liability to both civil penalties and criminal sanctions, consideration must be given to the need to avoid double punishment for the same conduct. Those considerations will be best addressed when the proposed regime is being considered for implementation and the national uniform legislation which is to be adopted is determined.

13. Responsible Overseas Surrogacy

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Introduction

13.1 Most Australian intended parents would prefer to engage in surrogacy in Australia.[1] Despite this, approximately 80% of Australian children born through surrogacy are born through overseas surrogacy arrangements.[2] While a range of factors may influence a decision to go overseas (see **Chapter 1**), intended parents are going overseas generally because they are either unable to access surrogacy domestically, or because domestic arrangements lack support and certainty.[3] All are motivated by a strong desire to form a family. As one submission from an intended parent noted:

> [m]any Australians turn to international surrogacy out of necessity — not preference. The domestic options are few and the process is slow, restrictive,

1 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, 1453.

2 **Chapter 1** explains that, on the data available, overseas surrogacy appears to account for about 80% of children born through surrogacy to Australian intended parents. The number of children born is not insignificant. Over 1,300 children born through overseas surrogacy were granted Australian citizenship by descent in the last 5 financial years: Department of Foreign Affairs and Trade, *Submission 434*.

3 Kneebone et al (n 1) 1448–9. See, eg, Name withheld, *Submission 60*; Not published, *Submission 123*; Name withheld, *Submission 135*; L Tripodi, *Submission 168*; Name withheld, *Submission 173*; Name withheld, *Submission 177*; Not published, *Submission 178*; Name withheld, *Submission 185*; Not published, *Submission 204*; Name withheld, *Submission 304*; Name Withheld, Submission 327.

> and uncertain. Criminal penalties only add to the stress, fear, and stigma faced by loving would-be parents who are simply trying to build a family.[4]

13.2 The ALRC recognises that it is preferable for Australians to engage in well-regulated surrogacy domestically (**Chapter 1**). This is because overseas surrogacy arrangements raise heightened risks to human rights (see **Chapter 14**), particularly in jurisdictions that are unregulated or poorly regulated, or marked by significant social and economic inequality.[5] However, the ALRC also recognises that there is currently limited access to surrogacy in Australia (see **Chapter 1**), intended parents are likely to continue to engage in overseas arrangements,[6] and that not all overseas surrogacy arrangements put human rights at risk.[7]

13.3 The Terms of Reference for this Inquiry require the ALRC to consider how Australian law should address overseas surrogacy, including information available to, and legal parentage for, children born through overseas surrogacy; and how to align citizenship, visa, and passport requirements. The recommendations in this Report seek to address the Terms of Reference in two ways:

- First, by introducing a more accessible, responsible, and supportive domestic surrogacy regime (**Chapters 2**–**12**), which would likely reduce the need for overseas surrogacy.[8]
- Second, by replacing the current passive approach to regulating overseas surrogacy with a proactive 'responsible overseas surrogacy framework.' This includes measures which would better safeguard the identity, nationality, and

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4 Name withheld, *Submission 88*.

5 See, eg, concerns expressed by the CEDAW Committee about the risk of exploitation associated with surrogacy practices in lower income countries that are popular destinations for overseas surrogacy: Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Ukraine*, 83rd sess, UN Doc CEDAW/C/UKR/CO/9 (1 November 2022) 16 [45]–[46]; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of the Lao People's Democratic Republic*, 71st sess, UN Doc CEDAW/C/LAO/CO/8-9 (14 November 2018) 8–9 [27]–[28]. See also 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 [1.95], 28 [1.99], 31 [1.114]; Michael Gorton, *Helping Victorians Create Families with Assisted Reproductive Treatment: Final Report of the Independent Review of Assisted Reproductive Treatment* (2019) 138–9; Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 489 [16.10]. See also ; Attorney-General's Department (Cth), *Submission 153;* Department of Home Affairs (Cth), *Submission 248*.

6 As noted in **Chapters 1** and **14**, there is growing use of cross-border surrogacy arrangements by intended parents across Australia and globally. This is unlikely to change: see Kirsty Horsey, 'The Future of Surrogacy: A Review of Current Global Trends and National Landscapes' (2024) 48(5) *Reproductive BioMedicine Online* 1, 11.

7 See, eg, 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* (Routledge, 2015) 65, 78–9.

8 There is support for the view that improving access and regulation domestically will reduce the likelihood of intended parents pursuing overseas arrangements: see generally Horsey (n 6).

family rights of children born through overseas surrogacy. This framework is the focus of this chapter.

13.4 In this chapter, the ALRC first considers the inadequacy of Australia's current passive approach to regulating overseas surrogacy. It concludes that neither a blanket prohibition, nor an absence of regulation, is sufficient to address the risks posed by overseas surrogacy, and that a new, proactive approach is required. That new approach — the responsible overseas surrogacy framework — is set out in **Recommendations 36**–**45**. These recommendations remove the existing criminal framework that exists in some Australian jurisdictions, and replace it with a proactive national system of registration and guidance, which would empower intended parents to be aware of the risks of overseas surrogacy and how to avoid them, and be better protected from misinformation. The framework then imposes positive due diligence legal obligations on intended parents, to reasonably avoid engaging in overseas surrogacy arrangements that involve a significant risk of exploitation of the surrogate, the sale of the child, or the denial of the rights of the child to identity or nationality. Finally, the new framework requires intended parents to apply in Australia, where a child is born through overseas surrogacy, for legal parentage and to ensure the details of the child's birth are recorded with the National Surrogacy Register (**Recommendation 31**).[9]

13.5 Unlike the current approach, the recommended responsible overseas surrogacy framework would target conduct that can be effectively investigated, and enable non-compliance to be effectively addressed. Intended parents who do not comply with the requirements of the new framework would be liable to a civil penalty, with compliance to be enforced by the National Regulator (**Recommendation 6**). For the reasons outlined in detail in **Chapter 12**, this is also likely to be more effective than criminal sanctions in deterring intended parents from engaging in harmful or exploitative overseas surrogacy arrangements.

13.6 Together, **Recommendations 36**–**45** would ensure a consistent national approach to the regulation of overseas surrogacy in Australia and greater oversight. It would also likely reduce any incentive for Australians to enter overseas arrangements in order to avoid complying with domestic safeguards, as both the domestic regime and overseas framework require intended parents to act responsibly. Engagement in domestic arrangements over overseas arrangements will also be incentivised through access to the administrative pathway (**Recommendation 28**).

13.7 The ALRC recognises that these measures will not prevent all overseas surrogacy arrangements which raise heightened risks to human rights. As will be discussed below, without international cooperation, it is not possible to fully address these risks. However, this pragmatic, proactive approach — which recognises that overseas surrogacy is likely to continue to occur, and which imposes an obligation on intended parents to act responsibly when engaging in overseas surrogacy — is likely to be more effective in changing behaviour than the current passive approach.

9 Recommendations are also made to improve applications for Australian citizenship, passport, and visa applications, for children born through surrogacy: see **Recommendations 46** and **47**.

The risks of overseas surrogacy arrangements

13.8 The ALRC recognises that it is preferable for Australians to engage in well-regulated surrogacy domestically, where possible (**Chapter 1**).[10] This is because, as previous reports and inquiries have found, overseas surrogacy arrangements can carry greater risks, particularly in jurisdictions that are unregulated or poorly regulated, or marked by significant social and economic inequality.[11] Specifically, such arrangements may result in significant harm to surrogates and children born through overseas surrogacy.

13.9 The risks of exploitation of surrogates in overseas surrogacy arrangements are well documented. For example, there have been instances where surrogates have been unable to give informed consent before entering an arrangement or in relation to medical procedures, due to language barriers, limited education, or socio-economic factors.[12] There are also instances where surrogates have been inadequately reimbursed, or subjected to coercion, slavery-like conditions, human trafficking, restrictions on their freedom of movement,[13] or infringements upon their autonomy through forced medical procedures or lack of control over the pregnancy.[14] This is inconsistent with respect for the surrogate's dignity and the surrogate's right to be free from discrimination, including exploitation (see **Chapter 14**).

13.10 Depending on the nature of the overseas surrogacy arrangement, there is also a risk that it may violate the prohibition on the sale of a child.[15] Most overseas arrangements are for profit and reward.[16] While not all such arrangements violate the prohibition, the risk is increased in arrangements that are for profit or reward. This

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10 See **Recommendations 1**–**35**, which seek to establish a responsible and supportive domestic surrogacy regime.

11 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 27 [1.95], 28 [1.99]; Gorton (n 5) 138–9; Department of Home Affairs (Cth), *Submission 248*. See also Law Commission of England and Wales and Scottish Law Commission (n 5) 489 [16.10].

12 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 27–8 [1.98]; Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, 'Surrogacy Overseas' <www.surrogacy.gov.au/surrogacy-overseas>.

13 See Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, *Surrogacy Overseas* (n 12). See, eg, 'Surrogacy Scandals: Allegations of Human Trafficking, and Illegal Adoptions Leave Australian Families Devastated', *Neos Kosmos* (online, 25 August 2023) <www.neoskosmos.com/en/2023/08/25/news/australia/surrogacy-scandal-human-trafficking-illegal-adoptions-and-heartbroken-aussie-families/>; Lindsay Murdoch, 'Philippine Police Arrest Surrogate Mothers-to-Be in Human Trafficking Crackdown', *The Sydney Morning Herald* (online, 4 January 2017) <www.smh.com.au/world/philippine-police-arrest-surrogate-motherstobe-in-human-trafficking-crackdown-20170104-gtli45>.

14 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 28 [1.98]; Gorton (n 5) 135; Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, *Surrogacy Overseas* (n 12).

15 *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) arts 1–3.

16 Australian Government, *Surrogacy Overseas* (n 12).

is because, depending on the purpose and timing of the payment, it may constitute consideration for the transfer of the child (see **Chapter 14**). There is also a risk attempts may be made to disguise the purpose of such payments.[17] These risks are likely to be heightened in unregulated or poorly regulated jurisdictions that do not have safeguards against such practices.

13.11 Overseas surrogacy arrangements may also compromise the rights of children born through surrogacy to identity, nationality, and to be cared for by their parents.[18] For example, overseas arrangements may lack transparency. There have been examples of inaccurate records of donor and surrogate identity, and the use of anonymous gametes is not uncommon.[19] This is inconsistent with the child's right to know their genetic and gestational origins. Depending on the laws in the child's country of birth, there may also be a lack of clarity around the child's parentage or citizenship. For example, there have been instances where problems with paperwork or changes in laws impact on the ability to obtain identity documents for the child or to have the intended parents recognised as the child's legal parents.[20] Inadequate documentation may have flow on effects on applications for citizenship or passports, potentially leaving children in legal uncertainty.[21]

13.12 These risks are significant and should not be understated. However, the ALRC also recognises that not all overseas surrogacy arrangements that are for profit or reward constitute the sale of a child.[22] Nor do all such arrangements carry

17 See discussion in **Chapter 14**. See also International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021) principle 14.

18 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7–8.

19 See House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 27 [1.97]; Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, *Surrogacy Overseas* (n 12); Kneebone et al (n 1) 1452. See, eg, *Ellison & Karnchanit* [2012] FamCA 602, in which an egg was obtained from an unknown donor.

20 See, eg, Winsome Denyer and Lisa McGregor, 'Perth Couple Jonathan and Amy Carr-Knox Locked in International Surrogacy Battle to Bring Home Daughter', *ABC News* (online, 19 February 2026) <www.abc.net.au/news/2026-02-19/battle-bring-home-sophie-after-surrogacy-red-tape-argentina/106126626>; Henrietta Cook, 'Jamie's Daughter Was Born in Argentina 11 Months Ago. He Still Can't Bring Her Home', *The Age* (online, 18 January 2026) <www.theage.com.au/healthcare/jamie-s-daughter-was-born-in-argentina-11-months-ago-he-still-can-t-bring-her-home-20251210-p5nmub.html>; K Cox, *Submission 105*. See also Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, *Surrogacy Overseas* (n 12).

21 See Department of Home Affairs (Cth), *Submission 248*. The Department cites issues with supporting documentation for applications, including lack of clarity around citizenship and 'unclear' legal statuses of surrogates. See also Law Council of Australia, *Submission 342*.

22 See discussion in **Chapter 14**.

exploitation risks.[23] Respectful arrangements, based on free and informed consent, can occur. For example, as one submission from parents through overseas surrogacy noted:

> [w]e didn't just match with a surrogate — we formed a genuine connection with an incredible woman and her family, a connection we maintain today. [Our child] will grow up knowing exactly who she is, what role she played in his life, and how deeply she is respected and valued by all of us. She is, and always will be, part of his story.[24]

13.13 The degree of risk depends on the level of regulation, and the social and economic conditions in the overseas jurisdiction. As was noted in the 2016 Surrogacy Matters Report, it is

> clear that some overseas jurisdictions pose a more serious risk of exploitation and human rights violation than others when it comes to surrogacy arrangements. In lightly regulated or less developed countries the risk of exploitation of [surrogates] is much higher.[25]

13.14 It is clear that risks are reduced in jurisdictions where surrogacy is lawful, the practice is well-regulated, and the socio-economic conditions are less conducive to exploitation or other forms of harm.

13.15 In addition to the risks that such arrangements pose to surrogates and children born through overseas surrogacy, they also pose risks to intended parents who seek to engage in such arrangements, particularly in jurisdictions which are poorly regulated.[26] First, intended parents are likely to be in a position of vulnerability, particularly if they have exhausted domestic surrogacy options. They are at risk of exploitation by agencies and intermediaries who may seek to profit from their predicament. Second, intended parents may face unexpected delays and expense.[27] For example, where necessary paperwork has not been completed properly, birth documentation which recognises their connection to the child cannot be obtained, or

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23 See, eg, Stuhmcke (n 7) 78–9: 'For example, California has a well-regulated practice of commercial surrogacy and an equivalent country background yet … was not mentioned in any of the parliamentary justifications for extraterritorial laws in Australian jurisdictions. The exploitation justification is therefore flawed with respect to commercial surrogacy as there is the possibility of non-exploitative legal regulation of its practice'. See also Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 167, in which it was noted that: 'some jurisdictions were considered by those in the surrogacy industry and/or intended parents as better than others, and there were stories of successful transactions and relationships'. However, the review also found 'reports of exploitation and at times, trafficking including in those jurisdictions that are put forward as destinations of choice'. See also Law Commission of England and Wales, and Scottish Law Commission (n 5) 489 [16.10].

24 Name withheld, *Submission 301*.

25 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 31 [1.114].

26 See ibid 28 [1.99]; Gorton (n 5) 138–9; Department of Home Affairs (Cth), *Submission 248*.

27 Gorton (n 5) 138–9.

there are changes in the law which impact upon the legality of the arrangement. This may leave them stranded overseas and unable to return to Australia with their child.[28]

13.16 Despite these risks, increasing numbers of Australians are engaging in overseas surrogacy, and most surrogacy arrangements entered into by Australians take place overseas.[29] This is despite the fact that most intended parents prefer to engage in domestic arrangements. As one submission from an intended parent noted:

> Australia's strict prohibition on commercial surrogacy meant we faced even more legal and logistical obstacles .... After five years and nearly $300,000 spent, we are still without a child. We feel emotionally drained and financially exhausted. It should not be this hard to start a family — especially not in a progressive country like Australia. The current laws have not only forced us overseas, but also into seeking help from developing nations simply because those are the only options left.[30]

13.17 A range of factors can account for intended parents engaging in overseas surrogacy despite these risks, including a lack of support, inability to find a surrogate, lack of certainty around legal parentage,[31] and affordability in some jurisdictions relative to domestic arrangements.[32] Intended parents may also choose to engage in surrogacy overseas because there is a family member willing to be a surrogate, they have family support,[33] or for cultural reasons.[34]

13.18 Unfortunately, a 'high proportion' of surrogacy arrangements entered into by Australians take place in destinations where surrogacy is unlawful, or where 'laws

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28 See, eg, Winsome Denyer and Lisa McGregor (n 20); Cook (n 20); K Cox, *Submission 105*. See also Department of Home Affairs (Cth), *Submission 248*, citing Australian Government, *Surrogacy Overseas* (n 12).

29 See **Chapter 1**.

30 Name withheld, *Submission 304*.

31 See generally Kneebone et al (n 1). See also Horsey (n 6) 11; Claire Fenton-Glynn, *International Surrogacy Arrangements: A Survey* (Cambridge Family Law Centre, Foreign, Commonwealth and Development Office (UK), 2022) 8–11.

32 See, eg, Allan (n 23) 131. See also Sam G Everingham and Andrea Whittaker, 'Trends in Engagement in Surrogacy by Nationality 2018–2020: A Survey of Surrogacy Agencies' (2023) 8(1) *Global Reproductive Health* 1; Horsey (n 6) 11.

33 See, eg, Name withheld, *Submission 87*. See also Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 281 [9.48]–[9.49]; Law Commission of England and Wales and Scottish Law Commission (n 5) 532 [16.229].

34 Stephen Page, 'Surrogacy in Australia: The "Failed Experiment"?' (2023) 174 *Precedent* 22, 24: 'intended parents who have migrated [to Australia] are familiar with the culture and legal landscape of their homeland and seek to undertake surrogacy in that country and return with their child to Australia'. See also Not published, *Submission 393*.

are inadequate to regulate surrogacy'.[35] This increases the risks of exploitation and other forms of harm.

13.19 While there are global efforts underway to develop human rights-based principles for surrogacy[36] (in recognition of the fact that a coordinated international response is required)[37] there is currently no binding international convention which specifically governs surrogacy arrangements.[38]

13.20 As discussed in **Chapter 14**, whether Australia has obligations under existing international law to regulate extraterritorially the conduct of Australians and permanent residents engaging in overseas surrogacy depends on whether a restrictive or expansive approach to extraterritoriality is correct. Irrespective of which approach is correct, the ALRC has proceeded on the basis that, as a matter of good policy (rather than strict legal obligation), the expansive view should be accepted. Australia should do what it practicably can to protect the human rights of people living within its territory, and beyond. As will be discussed below, currently Australia does not have a 'comprehensive framework' to manage the risks posed by overseas surrogacy.[39]

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35 Department of Home Affairs (Cth), *Submission 248*. The most common surrogacy destinations between 2023 and 2024 (based on applications for citizenship by descent for children born through surrogacy) were the United States of America, Georgia, Canada, Colombia, and Ukraine. These jurisdictions have different degrees of regulation, with significant concerns raised in respect of some jurisdictions: see, eg, concerns raised about arrangements in Georgia and Ukraine: Allan (n 23) 160, 167; Law Commission of England and Wales, and Scottish Law Commission (n 5) 490 [16.14].

36 See, eg, the International Social Service (n 17); Hague Conference on Private International Law Parentage/Surrogacy Experts' Group, *The Feasibility of One or More Private International Law Instruments on Legal Parentage* (Final Report, 2022). There have also been efforts at the regional level in Europe: see Michael McGrath, European Parliament, *Answer given by Mr McGrath on behalf of the European Commission* Doc No E-002599/2024, (26 March 2025); *Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 Amending Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims* [2024] OL J 2024/1712.

37 Jakub Valc, 'Towards an International Consensus on Cross-Border Surrogacy: The Role of the European Court of Human Rights?' (2025) 33(3) *Medical Law Review* 1, 4; Horsey (n 6) 12. See also International Social Service, *Legal Trends in Surrogacy: Towards a Greater Protection for the Rights of Children Born Through Surrogacy?* (2025) 37. This is in part because changes to one state's surrogacy laws can have a significant impact on demand for surrogacy in other states: see Claire Fenton-Glynn and Jens M Scherpe, 'Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia Studies in Comparative Family Law, 2019) 515, 562, 581–2. See also Commonwealth, *Parliamentary Debates*, House of Representatives Standing Committee on Social Policy and Legal Affairs, 25 February 2016, 5 (Jenni Millbank), quoted in Ronli Sifris, 'Surrogacy' in Ben White et al (eds), *Health Law in Australia* (Thomson Reuters, 4th ed, 2023) 533, 547.

38 Professor Horsey has opined that international regulation is unlikely, and emphasised the need for adequate domestic regulation: Horsey (n 6) 1, 12.

39 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 29 [1.105].

Australia's current regulatory approach is inadequate and requires reform

13.21 Australia does not have a uniform national approach to regulating overseas surrogacy. Jurisdictions are currently split on whether overseas surrogacy arrangements that are for profit or reward should be permitted or prohibited:

- The Australian Capital Territory, New South Wales, Queensland, and most recently Western Australia, have introduced extraterritorial criminal prohibitions, making it illegal for a person usually resident in that jurisdiction to engage in surrogacy which is 'commercial' or 'for reward' overseas.[40] It does not appear that introduction of these extraterritorial provisions into legislation was the subject of significant parliamentary debate or justification.[41] However, where reasons are cited, they include 'significant human rights concerns'.[42]
- The Northern Territory, South Australia, Tasmania, and Victoria do not have restrictions in place.

13.22 This approach is inadequate for several reasons. First, there is no comprehensive approach which applies to all Australians. Each state and territory has approached the issue separately and the extent of disparity in approach between those jurisdictions that prohibit and those that do not is stark and unjustified. Currently we have a two-tiered approach to reproductive freedom in Australia,[43] with uneven regulatory impact; while some Australians can legally access overseas surrogacy as a form of family formation, others cannot and risk liability to criminal prosecution if they do so.

13.23 Second, the risks posed by overseas surrogacy are a national problem. To address a problem which is extraterritorial to Australia, a federal response is required, enforced by Commonwealth mechanisms. However, currently, there is an absence of Commonwealth regulation. Rather, engagement by Australians in overseas surrogacy is being regulated at the state and territory level, addressed by state and territory laws and enforcement mechanisms which are not well suited to addressing the conduct of Australians overseas.

13.24 Third, it is not appropriate to impose a blanket prohibition on Australians engaging in overseas surrogacy arrangements which are for profit or reward. The prohibitions do not distinguish between jurisdictions in which surrogacy is lawful

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40 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b). The *Surrogacy Act 2008* (WA) (which currently remains in force) does not contain such a provision. However, Western Australia has recently passed new legislation, which commences mid-2027, which extraterritorially prohibits surrogacy 'for reward': *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151.

41 Stuhmcke (n 7) 74–6.

42 ACT Government, *Act Government Response to Standing Committee on Justice and Community Safety (Act) Inquiry into Parentage (Surrogacy) Amendment Bill 2023* (2024) 3. See also Explanatory Statement, Parentage (Surrogacy) Amendment Bill 2023 (ACT) 8, which included concerns about trafficking and sale of children, and child abandonment.

43 Stuhmcke (n 7) 72.

and well-regulated and those in which it is not. As noted above, not all overseas surrogacy arrangements which are for profit or reward are exploitative. Imposing a blanket prohibition in these circumstances is a blunt response to a nuanced problem.

13.25 Fourth, the prohibition on Australians engaging in surrogacy overseas for profit or reward is targeted at conduct which occurs overseas and, because it occurs beyond Australia's shores, is more difficult to effectively regulate. For instance, it would generally be difficult for Australian enforcement bodies to establish a contravention of the current prohibition. That would require such bodies to obtain, and then produce to an Australian court, evidence of conduct that occurred overseas. This could include evidence such as financial records (which may be necessary to prove that the arrangement was for profit or reward) which are not in Australia, and are in the possession of people who are not subject to Australian laws that could compel the production of such evidence. Furthermore, unless the conduct was unlawful in the overseas jurisdiction, overseas authorities are unlikely to assist Australian authorities to investigate the conduct or collect the evidence necessary for a prosecution. A regulatory response by Australia would be more effective if it could focus on conduct which Australia can more effectively regulate.

13.26 The current approach is not effective in addressing the risks of harm and exploitation posed by overseas surrogacy arrangements entered into by Australians. A new, proactive national approach, targeted at conduct that can be more effectively regulated, is required.

13.27 To facilitate this, as will be discussed in detail below, the ALRC recommends:

- the repeal of extraterritorial criminal prohibitions (**Recommendation 36**), which are inappropriate and not sufficiently effective. This is also necessary to enable a national approach to regulating overseas surrogacy;
- the introduction of a national framework for regulating overseas surrogacy (**Recommendations 37–44**) — the responsible overseas surrogacy framework — which takes a more proactive approach targeted at conduct which Australian authorities would be better able to effectively enforce; and
- specific measures to uphold the rights of children born through overseas surrogacy arrangements to identity, nationality, and to be cared for by their parents (**Recommendations 45–47**).

Extraterritorial criminal offences should be repealed

Recommendation 36

The Australian Capital Territory, New South Wales, Queensland, and Western Australia should repeal criminal offences which prohibit 'commercial surrogacy' or 'surrogacy for reward' overseas.

13.28 As discussed above, it is not appropriate to adopt a blanket prohibition on Australians engaging in 'commercial surrogacy' or 'surrogacy for reward' overseas. Further, the use of criminal sanctions — to give effect to the prohibition — is neither appropriate nor sufficiently effective.

13.29 As discussed in detail in **Chapter 1**, use of the criminal law to regulate surrogacy stems from a time when surrogacy was considered unethical. Societal norms have since changed. Surrogacy which is not for profit or reward is now lawful in every jurisdiction. This reflects the fact that it is now recognised as a valid form of family formation in every jurisdiction.

13.30 As discussed in detail in **Chapter 12**, the continued use of criminal sanctions for unlawful surrogacy causes harm by stigmatising surrogacy,[44] and may push arrangements underground due to fear of liability.[45] As one submission noted:

> [t]he idea that loving, responsible parents could be prosecuted or imprisoned for accessing reproductive assistance abroad is not only absurd — it is out of step with Australian values and would not withstand scrutiny in the court of public opinion. These laws serve no practical or ethical purpose. Instead, they compound the stress of becoming a parent through surrogacy, adding a layer of criminal stigma to an already complex process.[46]

13.31 Further, as also discussed in **Chapter 12**, extraterritorial criminal prohibitions have not proven to be a sufficiently effective deterrent. It appears likely that while some people from Australian jurisdictions with extraterritorial prohibitions are deterred, others ignore the prohibition or try to evade it.[47] The prohibitions are also

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44 See ibid 71–2. See also 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. See also Name withheld, *Submission 10*; Name withheld, *Submission 69*; K Cox, *Submission 105*; A Whittaker, C Volks, A Molas (et al), *Submission 201*; Equality Australia, *Submission 253*; Name withheld, *Submission 259*; E Kneebone, *Submission 321*; Rainbow Families, *Submission 429*.

45 Stuhmcke (n 7) 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>; Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Law Review* 59, 74; Name withheld, *Submission 44*; Name withheld, *Submission 88*; K Cox, *Submission 105*; K Horsey, *Submission 418*.

46 Name withheld, *Submission 259*.

47 See Allan (n 23) 176; Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, 'Australians' Use of Surrogacy' (2014) 201(5) *Medical Journal of Australia* 1.

not enforced.[48] Lack of enforcement raises questions about the effectiveness of the system.[49] As one submission from an intended parent noted:

> [c]riminalisation of certain forms of surrogacy, particularly international arrangements, has not prevented families from seeking those paths. It has merely created risk, stigma, and vulnerability. Rather than criminalising families who pursue ethical arrangements overseas, the law should regulate, register, and support those arrangements. The criminal law should focus exclusively on exploitation, coercion, trafficking, and lack of consent, not on the pursuit of parenthood.[50]

13.32 In addition to being inappropriate and not sufficiently effective, it is also rare for a country to criminalise conduct extraterritorially. The Australian Capital Territory, New South Wales, Queensland, and Western Australia, are outliers internationally.[51] While many countries prohibit domestic 'commercial' surrogacy,[52] few countries have prohibited their citizens from engaging in it overseas, and those that do have faced criticism. For example, Italy's recent declaration that surrogacy is a 'universal crime' has been criticised as a 'legally and ethically disproportionate response' which, rather than deterring intended parents, may 'indirectly undermine the legal position of children born abroad'.[53]

13.33 Extraterritorial criminal prohibitions are usually reserved for heinous conduct which is universally accepted to be devoid of social utility or acceptability, such as war crimes, slavery, and child sexual offences.[54] By contrast, there is no 'moral'

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48 See Allan (n 23) 173–4, which acknowledged 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. See also South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 126 [12.3.1]. This reticence for prosecution is seen in comparable jurisdictions overseas, such as the United Kingdom, 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.

49 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 31 [1.113]. See also P Parkinson, *Submission 13*. However, it must be acknowledged that the absence of prosecution does not, on its own, prove that criminal sanctions are ineffective, as it does not indicate how many people — who may otherwise have engaged in commercial surrogacy — have been deterred from doing so: see Allan (n 23) 175–6.

50 Name withheld, *Submission 69*. See also Name withheld, *Submission 301*.

51 Stuhmcke (n 7) 66. Italy recently prohibited surrogacy extraterritorially: Dafni Lima, 'Italy's Ban on International Surrogacy Is Part of a Drive towards an Ultra-conservative Idea of Family', *The Conversation* (online, 20 November 2024) <www.theconversation.com/italys-ban-on-international-surrogacy-is-part-of-a-drive-towards-an-ultra-conservative-idea-of-family-243069>.

52 Including Canada, New Zealand, and the United Kingdon: Keyes (n 48) 393.

53 As intended parents will avoid registering their children for fear of criminal prosecution: Susanna Marinelli et al, 'The Newly Enacted Italian Surrogacy Law: Effects on Reproductive Tourism' (2025) 42(8) *Journal of Assisted Reproduction and Genetics* 2515, 2520.

54 See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, Lawbook Company, 4th ed, 2017) 1040 [15.30]. See also Stuhmcke (n 7) 65–66. See generally Wannes Van Hoof and Guido Pennings, 'Extraterritoriality for Cross-Border Reproductive Care: Should States Act against Citizens Travelling Abroad for Illegal Infertility Treatment?' (2011) 23(5) *Reproductive BioMedicine Online* 546.

consensus in respect of surrogacy that warrants a blanket extraterritorial criminal prohibition.[55] For this reason, international cooperation — which would be necessary for Australian law enforcers to successfully prosecute any offence — is unlikely, particularly where the conduct is lawful in the destination country.[56] However, where overseas surrogacy arrangements involve conduct which amounts to human trafficking or slavery-like practices, there are other Commonwealth offences that can be enforced.[57]

13.34 Few inquiries have squarely addressed the question of extraterritorial prohibition of surrogacy for profit or reward. Of those that have, the views expressed have been mixed. One supported the introduction of such provisions,[58] and one cited the benefit of a nationally consistent approach,[59] while others have queried their effectiveness,[60] or suggested existing prohibitions be reconsidered.[61]

13.35 While some submissions to this Inquiry expressed support for retaining and expanding extraterritorial criminal prohibitions nationally,[62] others have called for them to be repealed, variously emphasising stigma, distress, and vulnerability.[63] Some have emphasised ineffectiveness,[64] and the need for Australia to focus on improving access to domestic surrogacy and preventing predatory practices by facilitators.[65] Several emphasised the need for better regulation, rather than criminalisation, to ensure ethical arrangements.[66]

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55 Stuhmcke (n 7) 67. See also Van Hoof and Pennings (n 54) 550.

56 See Marinelli et al (n 53) 2520.

57 *Criminal Code Act 1995* (Cth) divs 270, 271. These provisions have high evidentiary thresholds and are not specifically designed to capture exploitative surrogacy arrangements. However, they may apply where the arrangement involves an element of exploitation which amounts to human trafficking or slavery: see Australian Government, *National Action Plan to Combat Human Trafficking and Slavery 2015–19* (2014) 11–12. See also Australian Government, *Australian Government Response to the Standing Committee on Social Policy and Legal Affairs Report: Surrogacy Matters* (2018) 3; Attorney-General's Department (Cth), *Submission 153*.

58 Allan (n 23) 175–6, rec 44. As noted above, Western Australia has since implemented this recommendation: *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) ss 112, 151. This Act will commence in mid-2027.

59 Gorton (n 5) 139.

60 South Australian Law Reform Institute (n 48) 126–7 [12.3.1]–[12.3.4].

61 In 2024 the Australian Capital Territory Standing Committee on Justice and Community Safety recommended that the Government consider whether its extraterritorial provision ought to be retained, but the Government declined citing 'significant human rights concerns': ACT Government (n 42) 3.

62 See, eg, M Quinlan, *Submission 381*; Abolish Surrogacy Australia, *Submission 402*; FINRRAGE, *Submission 410*; ADF International, *Submission 413*; Australian Christian Lobby, *Submission 419*. See also D Adams, *Submission 382*; Feminist Legal Clinic Inc., *Submission 409*.

63 See, eg, Name withheld, *Submission 88*; Name withheld, *Submission 259*; Name withheld, *Submission 302*; Name Withheld, Submission 327.

64 See, eg, A Whittaker, C Volks, A Molas (et al), *Submission 201*; K Cox, *Submission 389*; Rainbow Families, *Submission 429*; Equality Australia, *Submission 435*.

65 See, eg, S Jefford, *Submission 128*. See also Relationships Australia, *Submission 404*, which expresses support for criminal sanctions for facilitators.

66 See, eg, Name withheld, *Submission 44*; Not published, *Submission 72*; Name withheld, *Submission 88*; Not published, *Submission 123*; L Tripodi, *Submission 168*; Name withheld, *Submission 302*.

13.36 For the reasons outlined above, and in greater detail in **Chapter 12**, the ALRC considers that it is not appropriate or sufficiently effective to use criminal sanctions to deter intended parents from engaging in unlawful surrogacy, including harmful or exploitative overseas surrogacy arrangements. Criminal sanctions have not achieved their aim of preventing exploitation and harm, or upholding human rights in the context of overseas surrogacy. In light of this reality, the ALRC recommends that extraterritorial criminal offences in the Australian Capital Territory, New South Wales, Queensland, and Western Australia should be repealed (**Recommendation 36**). That repeal would facilitate a consistent national approach at the federal level.

A responsible and more effective approach to overseas surrogacy

13.37 For the reasons outlined above, the ALRC considers that a new, proactive, and better targeted approach to regulating overseas surrogacy is required. An approach that will empower intended parents to act responsibly and impose positive obligations upon them to do so which, when not complied with, can be effectively enforced.

13.38 The ALRC recommends a proactive approach that focuses on regulating the conduct of intended parents in Australia (rather than their conduct overseas), and empowers them with a lawful and responsible way to engage in overseas surrogacy. This approach — the responsible overseas surrogacy framework — is pragmatic. It recognises that Australians will continue to engage in overseas surrogacy if they cannot access an arrangement domestically and that it is necessary to steer intended parents into responsible ways to engage in surrogacy overseas. The approach is proactive because, rather than just punishing intended parents for engaging in irresponsible surrogacy, it seeks to empower intended parents to engage responsibly. Further, by regulating conduct in Australia rather than conduct that occurs overseas, the investigation and enforcement of any breach of the legal obligations requiring intended parents to engage in responsible surrogacy will be more feasible. In turn, this would provide for more effective deterrence of irresponsible conduct and more responsible engagement by Australians with overseas surrogacy.

13.39 The regime we now recommend differs from that proposed by the ALRC in our Discussion Paper. We had proposed that intended parents be prohibited from engaging in surrogacy overseas unless the arrangement was in a permitted destination or the intended parents could demonstrate that the arrangement was non-exploitative, and the arrangement was approved by the National Regulator or other federal agency.[67] While there was support for the principle behind this

67 Australian Law Reform Commission, *Review of Surrogacy Laws* (Discussion Paper 89, 2025) proposal 37.

proposal,[68] the ALRC received significant feedback that the proposed regime would not be feasible and would be unlikely to be implemented. While a range of concerns were raised, the primary concern was that it is not possible to develop a prescriptive list of approved surrogacy destinations where surrogacy is well-regulated. This is because surrogacy laws and practices can change quickly, creating an unpredictable landscape, and it would require significant government resources to administer an approval system.[69]

13.40 In light of this feedback, and following further research and consultation, the ALRC now recommends the responsible overseas surrogacy framework contained in **Recommendations 37**–**45**. The recommended regime would likely achieve the same reform objectives and would likely be more feasible to implement.

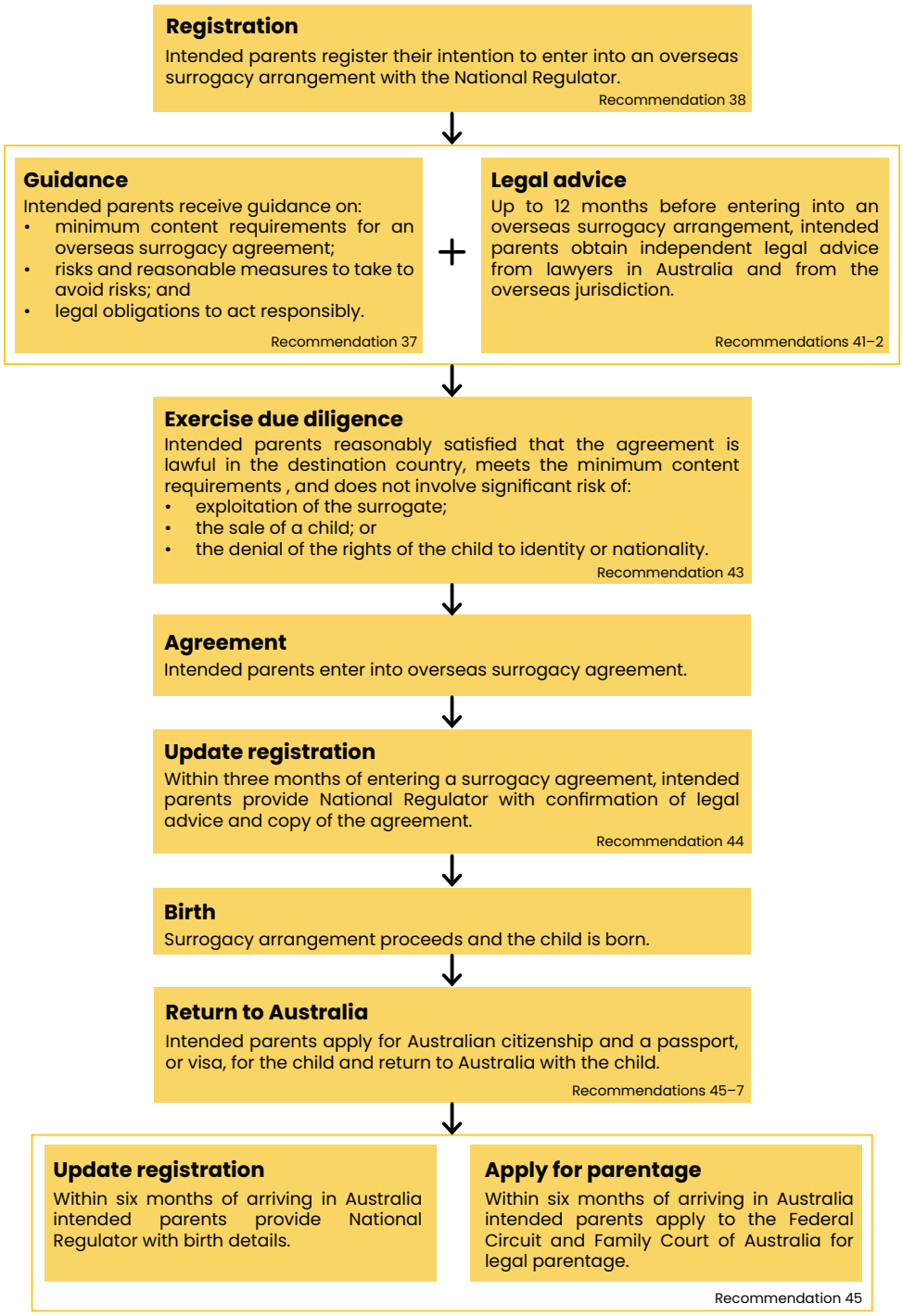
Responsible overseas surrogacy framework

13.41 **Figure 13.1** provides an overview of the recommended responsible overseas surrogacy framework:

68 See, eg, B Tobin, *Submission 367*; K Cox, *Submission 389*; E Kneebone, *Submission 415*; Name withheld, *Submission 422*; Rainbow Families, *Submission 429*; Equality Australia, *Submission 435*. Others raised concerns that a system of registration and approval for overseas surrogacy arrangements was inconsistent with Australia's domestic prohibition on surrogacy for profit or reward: see, eg, ADF International, *Submission 413*; Women's Forum Australia, *Submission 416*.

69 See, eg, Fertility & Family, *Submission 427*; Department of Foreign Affairs and Trade, *Submission 434*; Equality Australia, *Submission 435*.

Figure 13.1: Responsible overseas surrogacy framework



13.42 In essence, under the responsible overseas surrogacy framework, intended parents would be legally obliged to obtain advice, receive guidance, and make reasonable enquiries, in order to reasonably avoid their engagement in a surrogacy arrangement which:

- is unlawful in the overseas jurisdiction;
- fails to meet minimum content requirements specified by Australian law; or
- involves significant risk of either the exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity or nationality.

13.43 Specifically, they would be required to:

- register, with the National Regulator, their intention to engage in overseas surrogacy (**Recommendation 38**);
- obtain guidance from the National Regulator ('Responsible Overseas Surrogacy Guidelines' or 'Guidelines') about the general risks involved to the surrogate, the child, and themselves, and what steps they are legally required to take to responsibly engage in overseas surrogacy (**Recommendation 37**);
- obtain legal advice from an independent lawyer in Australia and in the overseas destination, to ensure the arrangement is lawful and they understand their legal obligations (**Recommendations 41** and **42**);
- take reasonable steps to act responsibly in choosing to engage in an overseas surrogacy arrangement (**Recommendation 43**), including by following the guidance in the Responsible Overseas Surrogacy Guidelines, the legal advice obtained, and the information obtained after further reasonable enquiries, so as to avoid engaging in an overseas surrogacy arrangement which:
    - is unlawful in the overseas jurisdiction;
    - fails to meet minimum content requirements specified by Australian law; or
    - involves significant risk of either the exploitation of the surrogate, the sale of a child or the denial of the rights of the child to identity or nationality; and
- update registration to confirm that legal advice was obtained and to provide a copy of the surrogacy agreement (**Recommendation 44**).

13.44 To help ensure the guidance provided in the Responsible Overseas Surrogacy Guidelines is not undermined by misinformation, and to protect the intended parents from exploitation and other forms of harm, those who seek to facilitate or arrange overseas arrangements would be prohibited from intentionally or recklessly providing intended parents with incorrect or misleading information or advice (**Recommendation 45**).

13.45 In the ALRC's view, this approach, which combines risk education and guidance, registration, and positive obligations upon intended parents to reasonably exercise due diligence to avoid specified harms, is more likely to result in the avoidance of those harms than a blanket prohibition on Australians engaging in

overseas surrogacy for profit or reward. Over time, increased risk awareness may result in positive behavioural and cultural change, in terms of how people think about overseas surrogacy and their obligations.[70] The recommended regime is likely to be more effective than the current regime. This is because it empowers intended parents with reliable information. It also imposes positive obligations on intended parents to reasonably avoid harm, and these obligations can be effectively enforced. By contrast, the current regime relies on trying to deter inadequately informed intended parents from engaging in harmful conduct which could have been proactively avoided, through a prohibition which is difficult to enforce. In this context, the familiar proverb that 'prevention is better than cure' has particular force.

Establishing a system of registration and guidance

13.46 This section discusses **Recommendations 37**–**39**. The purpose of these recommendations is to establish a system in which intended parents must:

- register, with the National Regulator, their intention to engage in overseas surrogacy before entering an arrangement; and
- receive education and guidance on how to act responsibly and comply with their obligations under Australian law.

70 The relationship between risk-perception and behaviour is complicated by a range of factors, including cognitive and emotional factors, and who is providing the information on risk and the perceived trustworthiness of that information: see generally Hye-Jin Paek and Thomas Hove, 'Risk Perceptions and Risk Characteristics' in Matthew Powers (ed), *Oxford Research Encyclopedia of Communication* (Oxford University Press, 2017). There is empirical evidence to suggest that increased risk perception can lead to risk-reducing behaviours, for example, in the public health context: see, eg, Susanne Gaube, Eva Lermer and Peter Fischer, 'The Concept of Risk Perception in Health-Related Behavior Theory and Behavior Change' in Martina Raue, Bernhard Streicher and Eva Lermer (eds), *Perceived Safety* (Springer International Publishing, 2019) 101, 113–15.

Recommendation 37

1. Legislation should require the National Regulator (**Recommendation 6**) to:
   a. establish and manage a registration system for all overseas surrogacy arrangements;
   b. compile and maintain the Responsible Overseas Surrogacy Guidelines; and
   c. make reasonable efforts to ensure that information about the requirement to register (**Recommendation 38**) and the Responsible Overseas Surrogacy Guidelines are publicly and readily available to intended parents.
2. The Responsible Overseas Surrogacy Guidelines in paragraph 1(b) should:
   a. specify the minimum content requirements for an overseas surrogacy agreement in order to reduce the risk that a surrogacy arrangement will involve significant risk of:
      i. exploitation of the surrogate;
      ii. the sale of a child; or
      iii. the denial of the rights of the child to identity or nationality;
   b. provide guidance (either generally or in relation to specific jurisdictions) about the nature and extent of the risks specified in paragraph 2(a), including the warning signs that indicate risks and the reasonable measures that should be taken to avoid those risks;
   c. include information about the processes and evidentiary requirements for applications which are necessary for children born through overseas surrogacy to return to Australia, including applications for Australian citizenship, an Australian passport, or an Australian visa; and
   d. include information about the limitations on the Australian Government's ability to provide assistance when difficulties arise overseas, including that the Australian Government cannot intervene in the legal processes of other countries.

Recommendation 38

1. Legislation should provide that:
   a. intended parents are prohibited from engaging in overseas surrogacy without first registering their intention with the National Regulator (**Recommendation 6**);
   b. registration must occur prior to (and within 12 months of) entry into an overseas surrogacy arrangement; and
   c. registration lapses after 12 months if no overseas surrogacy arrangement has been entered into and will need to be renewed if intended parents seek to engage in overseas surrogacy after this period.
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

Recommendation 39

Legislation should require the National Regulator (**Recommendation 6**) to:

a. advise intended parents, upon registering their intention (**Recommendation 38**), that they must comply with the legal requirements set out in **Recommendations 41**–**45**, and that failure to comply with any of those requirements will result in liability to a civil penalty; and
b. provide intended parents, upon registering their intention, with the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**).

A proactive and responsible approach to mitigating risk is required

13.47 As discussed above, currently there is no effective oversight of Australian citizens and permanent residents who seek to engage in overseas surrogacy arrangements. There is no positive legal requirement for intended parents to consider the risks involved in overseas surrogacy, get legal advice, or take any steps to ensure that the overseas surrogacy arrangement they propose to enter will not infringe upon the rights of anyone involved.

13.48 There is also limited reliable information available to guide people who are considering engaging in surrogacy overseas. The Australian Government maintains a website that sets out some of the risks involved in overseas surrogacy.[71] However,

71 Australian Government, *Surrogacy Overseas* (n 12).

the website is lacking in general information about how to reduce the risks of engaging in overseas surrogacy, including in poorly regulated destinations, beyond a general encouragement to obtain legal advice before engaging in surrogacy. It is also lacking in specific information about known risks to surrogates, children, and intended parents, even in common surrogacy destinations. Some of this information is detailed on the Smartraveller website, which is managed by the Commonwealth Department of Foreign Affairs and Trade,[72] however, the level and specificity of information is generally low. The website links to external websites containing information about visas and citizenship,[73] passports,[74] and travel advice,[75] but does not set out surrogacy-specific information in relation to those topics.

13.49 The ALRC has heard that many intended parents often do not seek legal advice before entering an overseas arrangement.[76] It is often not until something goes wrong with the arrangement,[77] or the intended parents experience difficulty seeking to return to Australia with the child,[78] that they seek legal advice. Intended parents are particularly vulnerable to exploitation by individuals or organisations which stand to profit from overseas arrangements. When issues do occur overseas, there are limitations on the ability of the Australian Government to assist, particularly as it cannot intervene in legal proceedings in another country.[79]

13.50 This lack of reliable information increases the risk of exploitation and other forms of harm to everyone involved as intended parents may be less able to identify and avoid such arrangements. As one submission noted:

> [e]ntering into … an arrangement transnationally did require us as intended parents to be very well educated and informed about various matters, so that we could make appropriate choices in the surrogates, egg donors, children,

72 Department of Foreign Affairs and Trade (Cth), 'Going Overseas for International Surrogacy', *Smartraveller* <www.smartraveller.gov.au/before-you-go/activities/surrogacy>.

73 Department of Home Affairs (Cth), 'International Surrogacy Arrangements', *Immigration and Citizenship* <https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>.

74 Australian Passport Office, Department of Foreign Affairs and Trade (Cth), 'International Surrogacy' <www.passports.gov.au/help/international-surrogacy>.

75 Department of Foreign Affairs and Trade (Cth) (n 72).

76 Anecdotally, many Australians do not seek legal advice before engaging in overseas surrogacy: see, eg, S Jefford, *Submission 359*; S Page, *Submission 365*. See also Kneebone et al (n 1) 1451; Karin Hammarberg, Martyn Stafford-Bell and Sam Everingham, 'Intended Parents' Motivations and Information and Support Needs When Seeking Extraterritorial Compensated Surrogacy' (2015) 31 *Reproductive BioMedicine Online* 689, 692, Figure 2.

77 See, eg, the situation which unfolded in Greece in 2023: Rob Stott, 'Australian Woman Fears Greek Surrogacy Scandal Jeopardises Her Dream of Motherhood', *ABC News* (online, 9 September 2023) <www.abc.net.au/news/2023-09-09/greek-surogacy-scandal-australian-intended-parent/102819796>.

78 Winsome Denyer and Lisa McGregor (n 20).

79 Department of Foreign Affairs and Trade, *Submission 434*.

> and our own best interests. Clear guidelines and laws to facilitate this would be preferable.[80]

13.51 As discussed in more detail below (under **Recommendation 40**), the risk of exploitation due to lack of access to reliable information is compounded by the risk of intended parents being exploited by intermediaries who may intentionally or recklessly give incorrect information and advice. They may deceive intended parents into engaging in unsuitable surrogacy arrangements in poorly regulated destinations, where this would be advantageous to the intermediaries.

13.52 To address these problems — of a lack of information and misinformation — a proactive approach is required, which focuses on guidance and oversight. This is addressed by **Recommendations 37**–**40**.

13.53 **Recommendation 37** would require the National Regulator to:

- establish a system of registration. This is to facilitate nationally consistent oversight and support better compliance by intended parents with the requirements and obligations imposed upon them. The National Regulator is the most appropriate body to conduct these functions; and
- develop and maintain the Responsible Overseas Surrogacy Guidelines. These Guidelines are discussed in detail below. Their purpose is to help ensure intended parents understand the risks of overseas surrogacy, the steps they can take to address those risks, and the minimum content requirements a surrogacy agreement must comply with. This is complemented by **Recommendation 40** which aims to prevent intended parents receiving misinformation about surrogacy which may undermine the potential effectiveness of the Guidelines.

13.54 **Recommendation 38** would prohibit intended parents from engaging in surrogacy overseas without first registering their intention with the National Regulator. This is necessary to make the registration system effective. It requires intended parents to register — prior to and within 12 months of — entering any arrangement. This is to ensure intended parents receive current guidance and advice, where practicable, before they engage in an arrangement overseas. To encourage compliance with this requirement, as will be discussed at the end of this chapter, non-compliance will result in liability to a civil penalty.

13.55 **Recommendation 39** would require the National Regulator to ensure intended parents are aware of their obligations under Australian law. Specifically, the National Regulator must advise intended parents of the need to comply with **Recommendation 38**, and ensure they are armed with information about overseas

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80 Name withheld, *Submission 5*. See also K Cox, *Submission 105*: 'Without adequate safeguards and regulatory guidance, intended parents may unknowingly enter into exploitative or legally precarious arrangements. They may face issues with inaccurate or non-consensual use of genetic material, fraudulent intermediaries, or the inability to obtain timely legal recognition of parentage. In extreme cases, they have been stranded overseas, unable to bring their child home due to legal uncertainty, geopolitical instability, or failures in diplomatic coordination.'

surrogacy. This information would be provided through the Responsible Overseas Surrogacy Guidelines discussed below.

Responsible Overseas Surrogacy Guidelines

13.56 Central to the effectiveness of the responsible overseas surrogacy framework are the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**). The information required to be included in the Guidelines is set out in **Recommendation 37**. Apart from empowering intended parents to be better aware of the general risks involved in overseas surrogacy, the purpose of the Guidelines is to assist intended parents with complying with the obligation in **Recommendation 43**.

13.57 **Recommendation 37** would work in conjunction with **Recommendation 43**, which effectively requires intended parents to exercise due diligence, consistent with the Guidelines, in order to avoid entering into an overseas surrogacy arrangement that involves a significant risk of exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity and nationality.

13.58 To achieve this, the Guidelines would need to be comprehensive and cover the following information and advice.

The risks of engaging in overseas surrogacy and how to identify them

13.59 As discussed above, overseas arrangements can carry significant risks. The Guidelines would therefore need to include general information about the risks of engaging in overseas surrogacy,[81] and that these risks are increased in jurisdictions where surrogacy is unlawful, poorly regulated, or social and economic conditions increase the risks of exploitation and other forms of harm. The Guidelines would also need to include country-specific information, where available, about known risks in common surrogacy destinations. This would help intended parents make responsible decisions and divert them from considering surrogacy arrangements in those destinations. Examples may include whether, in a particular jurisdiction:

- surrogacy is lawful, and if so, whether it is poorly regulated;[82]
- there are human rights concerns (as discussed below) with the way surrogacy is regulated or practiced;
- there are concerns about lack of transparency. For example, anonymous gametes, embryos, or surrogates;[83] or around what the surrogate will receive in terms of advice, healthcare, and recovery of any costs or losses incurred under the arrangement; and

81 See, eg, Australian Government, *Surrogacy Overseas* (n 12). While not a comprehensive list, it provides an example of the sorts of risks which the Guidelines should cover in more detail.

82 As discussed above, risks of exploitation and other forms of harm are increased where surrogacy is unlawful or poorly regulated.

83 See **Chapter 11**, which discusses how Australia has moved away from permitting anonymous gamete donation, which was originally the status quo, in favour of compulsory identification, consistent with the rights of people born through donor conception to know their genetic origins.

- there are risks of fraud or unscrupulous intermediaries,[84] which may obscure an exploitative arrangement or unlawful activity, and cast doubt on the accuracy of what intended parents are told or documentation they are provided.

13.60 The guidance about human rights concerns (see **Chapter 14**), which may usefully include examples of 'red flags' or other warnings, should specifically cover the following:

- **Indicators of exploitation of the surrogate** — For example, lack of free and informed consent, the use of coercion or duress, restrictions on bodily autonomy, or inadequate compensation of the surrogate. Red flags may include intended parents being prevented from making reasonable enquiries (including about the possibility of exploitation) to the surrogate directly or without the agency being present; the surrogate not being provided with an interpreter or an agreement in the surrogate's language; or terms in the surrogacy agreement or other mechanisms which restrict the surrogate's freedom of movement.
- **Indicators of the sale of a child** — For example, arrangements where payment is predicated upon the birth or transfer of a child (further discussed below). Red flags may include the intended parents not being provided with details of how and when money will be distributed, or the existence of mechanisms which seek to disguise the true purpose of a required payment.
- **Indicators of the denial of the rights of the child to identity and nationality** — For example, lack of transparency around the surrogate's identity, gametes, or lack of clarity as to the child's nationality upon birth. Red flags may include the agency being unable to provide contact details for the surrogate or gamete donors.

The minimum content requirements for an overseas surrogacy agreement

13.61 As is discussed in **Chapter 7**, surrogacy agreements can play an important role in ensuring informed consent, and in promoting clarity, transparency, and mutual understanding between the parties.

13.62 The ALRC recommends that the Guidelines specify the minimum content requirements for an agreement in order to help guard against the risk of exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity or nationality. This includes provisions that go to free and informed consent, and transparency.

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84 There are many examples where overseas agencies have been alleged to have acted unethically: see, eg, Shanti Das, Simon Bowers, and Malia Politzer, 'Global Surrogacy Agency Accused of Putting Women at Risk with "Unethical" Medical Procedures', *The Guardian* (online, 18 December 2022) <www.theguardian.com/society/2022/dec/18/global-surrogacy-agency-accused-of-putting-women-at-risk-with-unethical-medical-procedures>; Name withheld, *Submission 177*. See also Name withheld, *Submission 89*; K Cox, *Submission 105*; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 26–7 [1.93]–[1.95].

13.63 The formulation of minimum content standards for agreements will require careful study and more extensive consultation than the ALRC has had the opportunity to undertake. It is proposed that the National Regulator undertake that task. To assist, the following non-exhaustive list of potential content requirements, largely drawn from the Verona Principles, is provided. Requirements may include that the agreement:

- be in writing, in both English and in the language of the surrogate.[85] This is to ensure there is a record of the agreement and the surrogate can read it, or have it explained in their own language. This is necessary for informed consent;
- includes the name and contact details of the surrogate.[86] This is to uphold the child's rights to know their gestational origins, and to reduce the risk of exploitation of the surrogate, by ensuring they are known and contactable;
- includes the surrogate as a party and that it be signed by the surrogate and be accompanied by a declaration (possibly from a party independent of the intermediary or agency) that it has been explained to and understood by the surrogate.[87] This may be necessary to determine informed consent;
- includes confirmation (including from the intended parents) that the intended parents and the surrogate have had direct contact prior to entering the agreement.[88] This is to reduce the risk of exploitation of the surrogate, by: facilitating the capacity of the intended parents to make reasonable enquiries in order to be reasonably satisfied that there is no significant risk of exploitation; and, helping ensure the surrogate is known to the intended parents and the parties have a shared understanding about what the arrangement will involve;
- includes confirmation that the agreement has been entered into pre-conception.[89] This is to ensure there is informed consent before there is a pregnancy, that the pregnancy is based on the intentions of the parties, and to reduce the risk of the sale of child;

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85 See International Social Service (n 17) principle 7.3. See also Sifris (n 37) 548; Family Law Council, *Report on Parentage and the Family Law Act* (2013) 101: 'the current, largely unregulated, circumstances of some overseas surrogacy markets, means that it cannot be assumed from the surrogate's signature (which is sometimes evidenced by a thumbprint) on the contract (which is often not written in the surrogate mother's first language) that her consent to the process has been freely given'. For an example of where the surrogate signed with a thumb print, see *Mason & Mason* [2013] FamCA 424. For an account from a surrogate overseas, see Suruchi Thapar-Björkert, Anindita Majumdar and Johanna Gondouin, '"There Are Two Sides to Everything": Re (Locating) Vulnerability in the Surrogacy Industry in India' (2023) 33(3) *Feminism & Psychology* 335, 349: '[w]hile making the agreement, they write the conditions in small letters. That is not visible, and they ask us to sign. And when they turn over the paper quickly, we do not have the time to check how much money we will be paid… And at that time, if we request to check the agreement (which is in English) once, they make a face and ask us how we can possibly suspect them of cheating us'.

86 See International Social Service (n 17) principle 11.3.

87 See ibid principle 7.3.

88 See ibid principle 7.5.

89 See South Australian Law Reform Institute (n 48) 133–4 [14.2], which considers the rationale for such a requirement, in the context of domestic surrogacy arrangements.

- includes confirmation that the surrogate is an adult, who has previously given birth, and has the cognitive capacity to enter into an arrangement.[90] This is necessary for free and informed consent;
- includes a statement confirming the surrogate's right to autonomy, including in relation to medical procedures, and a prohibition on any interference with that right;[91]
- specifies the origin of the gametes involved, including the name and contact details of any donor.[92] This is to uphold the child's right to know their genetic origins; and
- specifies the details and timing of any payment to be made under the agreement. Specifically, the agreement must require all payments to be made prior to the birth of the child and be wholly divorced from transfer of the child,[93] and that any payments be clearly and transparently documented.[94] This is to guard against the sale of a child (see **Chapter 14**).

13.64 Minimum content requirements would be helpful but the ALRC recognises that they are not foolproof mechanisms. That is why they need to be accompanied by other due diligence obligations (see **Recommendation 43**), which would reinforce the scrutiny that is reasonably required for the intended parents to reasonably avoid engaging in overseas surrogacy arrangements that involve a significant risk of exploitation of the surrogate, the sale of a child or the denial of the rights of the child to identity or nationality.

13.65 Under **Recommendation 44**, the intended parents would be required to provide the National Regulator with a copy of the agreement, upon entering into it. This would facilitate oversight by the National Regulator including to address non-compliance.

Guidance on measures that should be taken to avoid risks

13.66 As discussed above, there is currently insufficient reliable information to assist intended parents to help determine whether it would be responsible for them to engage in overseas surrogacy in particular destinations. Information about the steps they should take, including the reasonable enquiries they should make, would be useful to help empower intended parents to act responsibly and in accordance with the positive obligations the recommended regime will impose on them (see **Recommendation 43**). The Guidelines should assist and help to identify the steps intended parents should take in order to satisfy themselves that the agreement meets the minimum content requirements, and the arrangement does not involve significant risk of exploitation of the surrogate, the sale of a child, or the denial of the rights of the child to identity and nationality. This would include ensuring intended parents have read and understood the most recent Guidelines,

90 See International Social Service (n 17) principle 7.2.
91 See ibid principle 7.4.
92 See ibid principles 11.1, 11.2, 11.4.
93 See ibid principle 14.7.
94 See ibid principle 15.

obtained legal advice specific to their situation in Australia and in the country of destination (**Recommendations 41** and **42**), and made any necessary further reasonable inquiries. For example, where the proposed surrogacy agreement is complex, intended parents may be encouraged to obtain legal advice on whether the terms of the agreement comply with the minimum content requirements.

Applications for the child to enter Australia

13.67 The purpose of this requirement is to ensure the intended parents understand which applications are required — and what is necessary to satisfy the evidentiary requirements of those applications — for a child born through overseas surrogacy to enter Australia. This may include applications for citizenship, a passport, or a visa. The Guidelines should explain that applications can be complicated by processes in overseas destinations, which can cause delays. Under **Recommendation 41**, intended parents would also be required to obtain independent legal advice in respect of these applications. Greater awareness of the legal requirements and potential delays may encourage intended parents to proactively gather necessary documents, and require certain standards in overseas arrangements, which would reduce the risk of evidentiary requirements not being met.

Limits on the Australian Government's ability to provide assistance

13.68 The purpose of this requirement is to help intended parents understand the limitations on the Australian Government's ability to provide assistance when difficulties arise overseas, noting that the Australian Government cannot intervene in the legal processes of other countries.[95] This should encourage intended parents to reconsider high-risk arrangements.

Why a 'responsible' approach is likely to be more effective

13.69 **Recommendations 37–39** establish the entry point to the responsible overseas surrogacy framework, to ensure that there is a clear and effective point of engagement before an arrangement is entered into and a structure that then supports the prevention of harm and exploitation, and enforcement in the event of non-compliance.

13.70 Collectively, these recommendations would also likely make it easier to establish liability and enforce non-compliance. This is because the legal obligations imposed on intended parents require steps to be taken in Australia, prior to entering an overseas arrangement. This will facilitate easier investigation of non-compliance, as it will not require an assessment of conduct undertaken overseas. Further, as intended parents would be provided with the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**), they would be unable to deny knowledge of the risks involved or their legal obligations. The Guidelines would also provide a clear benchmark against which their conduct could be assessed.

95 See Department of Foreign Affairs and Trade, *Submission 434*.

13.71 Some submissions raised concerns about imposing a registration requirement on intended parents. For example, some were concerned that this could have unfair consequences, noting that most intended parents do not seek legal advice until after a child is born, either out of ignorance or naivety,[96] or because reliable information is scarce.[97] The ALRC recognises that in the initial stages of implementation, there may be some intended parents who fail to register due to lack of awareness. However, the National Regulator would be responsible for public education, and for ensuring that the surrogacy community are aware of the legal requirements. Information is also likely to be communicated within the surrogacy community, by organisations and professionals who work in the field and by word of mouth. Over time, this would reduce the number of intended parents who are unaware of these requirements, and encourage a shift in behaviour, from being reactive to proactive.

13.72 Others were concerned that a registration requirement may push arrangements underground. People might avoid the registration process (if they think the arrangement will fail to meet the requirements) and return with the child without declaring the surrogacy, knowing that doing so would expose them to civil penalties.[98] The ALRC recognises that some intended parents may deliberately seek to evade registration. However, evasion would be difficult. The participation of Australian intended parents in overseas surrogacy arrangements would be identified in the course of applications by intended parents to register the child's citizenship or obtain a passport, or for legal parentage. To avoid evasion, it would be important to ensure there is adequate information sharing between the National Regulator, the Commonwealth Department of Foreign Affairs and Trade, the Department of Home Affairs, the Australian Federal Police, and other relevant agencies. Information sharing would assist the National Regulator to investigate non-compliance and bring enforcement proceedings. In turn, consistent enforcement, and growing awareness of consequences, would deter non-compliance.

13.73 Other submissions cited benefits of requiring intended parents to register in advance, including that it would:

- provide intended parents with more clarity about what was required of them and better risk awareness;[99]
- help reduce the risk of statelessness, in that it would aid citizenship application processing and reduce the risk of abandonment by intended parents;[100] and
- promote consistency, oversight, and transparency.[101]

13.74 The ALRC recognises that there is a current culture of non-compliance, which has been enabled due to lack of reliable information, and become normalised due

96 See, eg, S Jefford, *Submission 359*; S Page, *Submission 365*; Not published, *Submission 393;* Relationships Australia, *Submission 404*.
97 J Attawet, *Submission 360*.
98 Department of Foreign Affairs and Trade, *Submission 434*.
99 S Jefford, *Submission 359*.
100 Peter McMullin Centre on Statelessness, *Submission 376*. See also Name withheld, *Submission 96*.
101 K Cox, *Submission 389*.

to lack of enforcement. However, the ALRC considers that if intended parents were better informed, about both the risks and their obligations, they may be less likely to engage in arrangements which risk harm. This is demonstrated by submissions to this Inquiry, in which intended parents emphasised their desire for a positive, respectful arrangement and to avoid exploitation or harm.[102] Through public education (**Recommendation 7**) and nationally consistent legal obligations, there would be a growing social expectation that people act responsibly. As will be discussed at the end of this chapter, those who disregard known risks will face civil penalties for non-compliance, and may also face social censure. This proactive approach, backed by effective enforcement where there is non-compliance, is likely to be more effective than the current approach, which is reactive and ultimately passive because compliance is not enforced.

Implementation considerations

13.75 The National Regulator would need to be adequately resourced to develop and maintain the Guidelines, to ensure they are as accurate as possible. In developing the Guidelines, the National Regulator may wish to consider jurisprudence from England and Wales,[103] which sets out a non-exhaustive list of factors that intended parents should consider before engaging in surrogacy overseas. In England and Wales, these factors go to whether parentage can be granted, rather than an assessment of whether the intended parents have acted responsibly. However, they raise important considerations.

13.76 The ALRC recognises that drafting and maintaining the Guidelines will be a difficult task, and that it will not be possible for the National Regulator to comprehensively address every risk in every potential surrogacy destination, both because of the volatility of the overseas surrogacy landscape and because of the significant resources this would require.[104] A potentially analogous task is faced by the Commonwealth Department of Foreign Affairs and Trade in respect of Country Information Reports. These reports provide factual overviews of the circumstances in a particular country, to assist decision-makers to determine whether an application by a person seeking asylum for protection status should be granted.[105] The preparation of the Guidelines may benefit from an understanding of how Country Information Reports are prepared. Preparing the Guidelines and keeping them up to date could also involve research, consideration of reports from United Nations human rights

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102 See, eg, Name withheld, *Submission 15*; Name withheld, *Submission 16*; Name withheld, *Submission 63*; P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 86*; Not published, *Submission 103*; L Tripodi, *Submission 168*.

103 *Re Z (Foreign Surrogacy)* [2024] EWFC 304 [4]. The judgment also notes the importance of 'a clear and chronological account of events and relevant documents', not only for the purposes of the parentage order, but also as this 'retains key information regarding the child's background and identity': ibid. See also *K v Z* [2025] EWHC 927 (fam) [35]; *B & C v D & H (Anonymous Surrogacy)* [2025] EWFC 366 [8]–[9], [43].

104 See Department of Foreign Affairs and Trade, *Submission 434*. See also Fertility & Family, *Submission 427*; Equality Australia, *Submission 435*.

105 Department of Foreign Affairs and Trade (Cth), 'Country Information Reports' <www.dfat.gov.au/about-us/publications/country-information-reports>.

treaty bodies, non-government human rights organisations, and engagement with relevant government departments such as the Commonwealth Department of Home Affairs.

13.77 Upon registering, intended parents should be provided with the most recent version of the Guidelines, and be updated by the National Regulator if the Guidelines change. This is because the Guidelines would form a basis for assessing whether intended parents have complied with their obligations to exercise due diligence (**Recommendation 43**).

Protecting intended parents from misleading information and advice

Recommendation 40

1. Legislation should prohibit any person involved in promoting or facilitating an overseas surrogacy arrangement from intentionally or recklessly providing misleading or deceptive information or advice in relation to the arrangement.
2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

13.78 For the responsible overseas surrogacy framework to be effective, it is essential that intended parents receive accurate information about overseas surrogacy from trusted channels. Few legal professionals are qualified to give reliable advice and, as discussed above, there is limited, publicly-available and reliable advice. This is one of the reasons that **Recommendation 37** requires the National Regulator to provide intended parents with guidance upon registering, and to also make the information publicly available.

13.79 In parallel to ensuring reliable information is readily available, there is a need to reduce the risk of misinformation. Currently there is a lack of adequate regulation of people and organisations involved in promoting or facilitating overseas surrogacy arrangements, and the information and advice they provide. As Sarah Jefford, a lawyer practising in surrogacy and donor conception across Australia, noted:

> [w]here there is a lack of reliable and unbiased information provided by government or regulated not-for-profit organisations, intended parents will seek and find information from trade shows, intermediaries, and international service providers. That information may not be independently verifiable, and consumers may not be discerning enough to ensure the stability of the legal framework in

> the destination jurisdiction, or safeguards for themselves, the surrogate, or their future child.[106]

13.80 The ALRC is not aware of how common it is for intended parents to be misled into engaging in surrogacy arrangements overseas. However, unless well regulated, there is a risk that intended parents may be misled about what the process involves, particularly by those who stand to benefit from the arrangement.

13.81 In response to our Discussion Paper, we received feedback that our proposal directed at regulating the facilitation of prohibited arrangements (see **Recommendation 2**) did not fully address the risk that unregulated actors, who seek to promote or facilitate overseas arrangements, may mislead intended parents into engaging in overseas surrogacy.[107] Unlike Surrogacy Support Organisations (**Recommendation 8**) — which would need to be licensed (**Recommendation 6**) and whose conduct is covered by **Recommendation 2** — there are no such safeguards in place to regulate others who may provide surrogacy-related information and advice. Without some form of regulation, these intermediaries and facilitators could encourage people to engage in overseas arrangements that are exploitative or in high-risk destinations, without consequences, particularly if they could profit from doing so.

13.82 While the ALRC recognises this concern, we consider that it would be impractical to require everyone who seeks to promote or facilitate an overseas arrangement to be licensed in the way Surrogacy Support Organisations would be. Rather, it is preferable to focus on ensuring reliable information about overseas surrogacy is available (as discussed above) and that there are consequences where someone deliberately or recklessly provides misleading or deceptive information or advice. For this reason, **Recommendation 40** prohibits any person who is involved in promoting or facilitating an overseas surrogacy arrangement from intentionally or recklessly providing misleading or deceptive information or advice in relation to the arrangement. As will be discussed at the end of this chapter, non-compliance would result in liability to a civil penalty. The conduct may also be captured by other laws, for example, where the person is a practising lawyer with professional obligations.

13.83 The ALRC recognises that while this approach may not capture all instances of misinformation, it would capture the most serious instances. Combined with **Recommendations 37** and **39**, this would increase the likelihood that intended parents and surrogates only receive information from trusted channels.

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106 S Jefford, *Submission 128*. See also Sarah Jefford, 'Surrogacy in Australia: A Journey of Love, Law and Reform', *LSJ Online* <www.lsj.com.au/articles/surrogacy-in-australia-a-journey-of-love-law-and-reform/>. For a discussion on the broad range of expertise (or lack of expertise) of those facilitating overseas arrangements, and largely self-regulating nature of the industry: see generally Jenni Millbank, 'The Role of Professional Facilitators in Cross-Border Assisted Reproduction' (2018) 6 *Reproductive Biomedicine & Society Online* 60, 70.

107 See, eg, S Jefford, *Submission 359*; S Page, *Submission 365*; Name withheld, *Submission 422*.

Requiring intended parents to act responsibly

13.84 This section discusses **Recommendations 41–44**. The purpose of these recommendations is to ensure intended parents obtain legal advice and exercise due diligence, before engaging in overseas surrogacy.

Independent legal advice

Recommendation 41

1. Legislation should provide that prior to (and within 12 months of) entry into an overseas surrogacy arrangement, intended parents must obtain legal advice from an Australian lawyer about:
   a. their obligations under Australian law in relation to engaging in overseas surrogacy; and
   b. the legal requirements for applications that are necessary for children born through overseas surrogacy to return to Australia, including applications for Australian citizenship, an Australian passport, or an Australian visa.
2. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

Recommendation 42

1. Legislation should provide that prior to (and within 12 months of) entry into an overseas surrogacy arrangement, intended parents must obtain legal advice from a lawyer in the overseas jurisdiction where the arrangement is proposed to occur about:
   a. the legality of the proposed arrangement in the overseas jurisdiction;
   b. the legal status of the intended parent(s), in relation to parentage of or parental responsibility for the child, in the overseas jurisdiction, including whether they will be recognised as the child's legal parent(s) by operation of law upon the child's birth, and if not, what steps would be required to be recognised as the child's parents;
   c. the legal status of the surrogate and the surrogate's partner (if any) in relation to parentage of, or parental responsibility for, the child; and
   d. the child's legal status, in relation to nationality (including as to any risk that the child will be stateless), and the processes and mechanisms available to support the child's right to identity.

2. Legislation should provide that to satisfy the obligation in paragraph 1, intended parents must make reasonable enquiries and be reasonably satisfied that the lawyer providing the advice is independent of any other party or person interested (such as an intermediary or agency) in the proposed surrogacy arrangement.
3. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

13.85 Legal advice is key to intended parents understanding their own rights and obligations, and those of others involved in the arrangement.[108]

13.86 As discussed above, currently many intended parents do not obtain legal advice before they enter an overseas surrogacy arrangement.[109] This is concerning, as a lack of understanding about the legal consequences of entering an arrangement can put the rights and interests of everyone involved in the arrangement, and any child born through the arrangement, at risk.[110]

13.87 It is essential that intended parents obtain legal advice before any arrangement is entered into. This is to ensure that intended parents understand (under both Australian law and the laws of the destination country):

- whether the proposed arrangement is legal;
- what their rights and obligations are;
- the child's nationality at birth; and
- their legal relationship to the child upon birth, and the legal relationship of the surrogate (and their partner, if any) to the child upon birth, including what applications or documentation are required to ensure they are recognised as the child's legal parents and can exit the birth country and enter Australia with the child.

13.88 Obtaining such legal advice would likely reduce the risk of exploitation and other forms of harm for everyone involved in the arrangement, and better ensure the child's rights — to nationality, identity, and to know and be cared for by their parents — are upheld. Legal advice could help identify risks in the destination and specific risks with the proposed agreement. For example, advice may inform intended parents that only certain types of surrogacy are lawful in the particular destination, and the proposed agreement would not meet those requirements, or the lawyer may identify terms in the surrogacy agreement that would not meet the minimum content

108 See **Chapter 14**. See also K Cox, *Submission 105*; S Jefford, *Submission 128*, which discuss the importance of legal advice for informed consent (in the domestic context).
109 One Australian study found that while all respondents who completed surrogacy in Australia obtained legal advice from an Australian lawyer, only 65% did so in overseas surrogacy: Kneebone et al (n 1) 1451. See also S Jefford, *Submission 359*; S Page, *Submission 365*.
110 See, eg, Winsome Denyer and Lisa McGregor (n 20).

requirements and would put the surrogate at risk of harm, or constitute the sale of a child. This advice would then assist intended parents to make a responsible decision about whether to proceed with the arrangement.

13.89 To this end, **Recommendations 41** and **42** provide, respectively, that intended parents must get advice from a lawyer in Australia and in the overseas surrogacy destination. They provide the minimum requirements of what the advice must cover, to help ensure consistency and adequacy of the advice provided. They also require that the advice is obtained no more than 12 months before the arrangement is entered into, to reduce the risk of the advice being out of date.

13.90 Requiring intended parents to provide confirmation to the National Regulator that they have received legal advice (including providing contact details for the lawyers), combined with liability to a civil penalty for failing to obtain advice or provide confirmation (**Recommendation 44**), would deter intended parents from engaging in overseas surrogacy without first receiving advice specific to their situation.

13.91 The ALRC considers it important that intended parents obtain legal advice from lawyers. Professional obligations on Australian lawyers should ensure that the lawyer is not conflicted.[111] However, in relation to overseas lawyers it would be better to impose a practical obligation on intended parents to help ensure that the lawyer is independent. **Recommendation 42** includes such an obligation.

The due diligence obligation to act reasonably

Recommendation 43

1. Legislation should provide that intended parents are prohibited from engaging in an overseas surrogacy arrangement unless a reasonable person, having taken into account the nature and extent of the risks specified and the guidance for avoiding those risks provided by the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**), and having otherwise made reasonable enquiries, would be satisfied that:

    a. the surrogacy arrangement will not contravene the laws of any jurisdiction in which any aspect of the surrogacy arrangement will take place;

    b. the surrogacy agreement complies with the minimum content requirements set out in the Responsible Overseas Surrogacy Guidelines; and

111 Some submissions emphasise the importance of independent legal advice in the domestic context: see, eg, Australian Christian Lobby, *Submission 104*; K Cox, *Submission 105*.

c. the surrogacy arrangement will not involve a significant risk of:

i. exploitation of the surrogate;

ii. the sale of a child; or

iii. the denial of the rights of the child to identity or nationality.

2. Legislation should provide that non-compliance with the prohibition in paragraph 1 will result in liability to a civil penalty.

3. Legislation should provide that in respect of any court proceeding in which a contravention of the prohibition in paragraph 1 is alleged and, for the purpose of determining whether a reasonable person having made reasonable enquiries would not have been satisfied of the matters specified in paragraph 1, relevant information in the Responsible Overseas Surrogacy Guidelines as at the time that the surrogacy arrangement was entered into is admissible as evidence of any fact asserted in the Responsible Overseas Surrogacy Guidelines, unless rebutted.

13.92 The ALRC considers that if intended parents wish to engage in overseas surrogacy, it is incumbent on them to ensure — before entering an arrangement — that minimum standards have been met.[112] Central to the responsible overseas surrogacy framework, is the expectation that intended parents — properly informed through the Responsible Overseas Surrogacy Guidelines (**Recommendation 37**) and legal advice (**Recommendations 41** and **42**) — act responsibly. This would reduce the incidence of harmful or exploitative arrangements.

13.93 **Recommendation 43** requires intended parents to exercise due diligence before they engage in an overseas arrangement. Intended parents will need to be reasonably satisfied that the arrangement is lawful in the destination country, that it meets the minimum content requirements set out in the Responsible Overseas Surrogacy Guidelines, and that there is no significant risk of the exploitation of the surrogate, the sale of a child or the denial of the rights of the child to identity or nationality. The standard of satisfaction which is required is objective and not subjective. The standard to be applied when assessing whether intended parents are 'satisfied' is that of a 'reasonable person' who has considered the guidance in the Responsible Overseas Surrogacy Guidelines, and made any other 'reasonable' enquiries necessary to satisfy themselves of the matters listed in **Recommendation 43**. As will be discussed at the end of this chapter, non-compliance

112 See An Comhchoiste Um Máthairionadaíocht Idirnáisiúnta/Joint Committee on International Surrogacy, Tithe an Oireachtais/House of the Oireachtas, *An Tuarascáil Deiridh Ón gComhchoiste Um Máthairionadaíocht Idirnáisiúnta/Final Report of the Joint Committee on International Surrogacy* (2022) 29, 41, rec 18, in which a similar view was expressed in support of a proactive pre-registration system for overseas surrogacy.

with these requirements would leave intended parents liable to a civil penalty. This is to ensure (as discussed above) that intended parents are deterred from engaging in arrangements where the due diligence required by **Recommendation 43** has not occurred.

13.94 The 'reasonable person test' is often applied by negligence law, and is a cornerstone of civil liability.[113] It sets an objective standard against which the actions of the intended parents ought to be assessed, which increases fairness and consistency in expectations, and removes subjectivity. In essence, it asks what assessment a hypothetical reasonable person — in the same circumstances as the intended parents, with the same information — would make. For example, if the Responsible Overseas Surrogacy Guidelines indicated that surrogacy was unlawful in a particular destination, or that there was a 'do not travel' warning for a particular destination, which would put the safety of anyone involved in the arrangement at risk, it would not be reasonable for an intended parent to proceed with an arrangement in that destination. Another example may be where a surrogacy agreement is particularly complex, and it is difficult for the intended parents to understand whether it meets the minimum content requirements. In these circumstances, a reasonable person in their position would be expected to get legal advice before proceeding with the arrangement.

13.95 The National Regulator would need to be empowered to investigate non-compliance with this requirement, and initiate civil proceedings in a court of appropriate jurisdiction, such as the Federal Circuit and Family Court of Australia. In such proceedings, the National Regulator would need to establish that the intended parents had engaged in a prohibited surrogacy arrangement; that is, an arrangement in relation to which a reasonable person would not have been satisfied that the requirements listed in **Recommendation 43** were met. The evidentiary task imposed on the National Regulator would be assisted by the reliance made by **Recommendation 43** on the Responsible Overseas Surrogacy Guidelines (**Recommendations 37**). What is intended is that relevant information in the Responsible Overseas Surrogacy Guidelines would provide a permissible basis upon which a court could determine that a reasonable person could not have been satisfied of the matters listed in **Recommendation 43**. Where the Guidelines provide such a basis, to avoid a finding of a contravention, the intended parents would likely be required to present evidence sufficient to persuade the court that reliable information was available to satisfy the reasonable person of the matters listed in **Recommendation 43**. This might include evidence of:

- the legal advice they received (**Recommendations 41** and **42**);
- any reliable information provided to them by the surrogacy agent or agency responsible for organising the arrangement; and

113 The objective 'reasonable person' standard stems from the decision in *Vaughan v Menlove* (1837) 3 Bing (NC) 468, 475; 132 ER 490, 493 (Tindal CJ), and it has been 'generally recognized ever since' that negligence is to be established against this objective standard: *McHale v Watson* (1964) 111 CLR 384, 396 (Windeyer J). This principle has since been incorporated in legislation: see, eg, *Civil Liability Act 2002* (NSW) s 5B; *Wrongs Act 1958* (Vic) s 48.

- any other reliable information obtained by inquiries made by the intended parents.

13.96 The ALRC fully appreciates that lack of information and inherent uncertainties will often make it difficult for intended parents to avoid engaging in inappropriate overseas surrogacy arrangements. However, intended parents are not required to avoid such arrangements. Rather, **Recommendation 43** requires them to make a reasonable assessment, based on the information that is available to them after reasonable enquiries have been made, that a particular surrogacy arrangement should be avoided. It is reasonable to require intended parents to act reasonably. We consider that this approach is likely to be more effective than the existing punitive prohibitions or absence of regulation. It will likely better avoid the risk of harm to both surrogates and children born through overseas surrogacy (who will be Australian citizens or residents) for two primary reasons. First, it would empower intended parents to act reasonably, and thus responsibly, to avoid harm. Second, because the contravention of the due diligence obligations imposed can be effectively enforced, it would deter intended parents from behaving unreasonably or irresponsibly.

Updating registration

Recommendation 44

1. Legislation should provide that intended parents must update their registration (**Recommendation 38**), within three months of entering into an overseas surrogacy arrangement, by providing:
   a. confirmation that they have received the legal advice required under **Recommendations 41** and **42**, with such confirmation specifying the name and contact details of the lawyers; and
   b. a copy of the written surrogacy agreement (**Recommendation 37**).
2. Legislation should provide that non-compliance with the requirements in paragraph 1 will result in liability to a civil penalty.

13.97 **Recommendation 44** would require intended parents to advise the National Regulator when they have entered into an overseas surrogacy arrangement. They must provide the National Regulator with confirmation that they have obtained legal advice (**Recommendations 41** and **42**)[114] and a copy of the surrogacy agreement (**Recommendation 37**). As will be discussed at the end of this chapter, non-compliance would result in liability to a civil penalty.

13.98 The purpose of this recommendation is to facilitate oversight including the enforcement of non-compliance. While this requirement may be evaded, it is unlikely

114 Requiring confirmation that legal advice was provided would not require disclosure of any information covered by legal privilege.

it would be easily evaded for the same reasons as discussed above in relation to the registration requirement made by **Recommendation 38**.

Upholding the rights of children born through overseas surrogacy

13.99 Central to the responsible overseas surrogacy framework is the need to uphold the rights and interests of children born through overseas surrogacy — children who will likely become Australian citizens or residents shortly after they are born.

13.100 This section will discuss **Recommendations 45**–**47**. The purpose of these recommendations — in conjunction with other recommendations in this Report which address legal parentage (**Recommendation 29**) and the identity rights of children born through surrogacy (**Recommendations 30**–**32**) — is to ensure the rights of children born through surrogacy to identity and nationality are upheld.

Rights to identity and to know and be cared for by their parents

Recommendation 45

1. Legislation should provide that, within six months of a child born through overseas surrogacy entering Australia, parents through overseas surrogacy must provide to the National Regulator (**Recommendation 6**), for inclusion on the National Surrogacy Register (**Recommendation 31**), the following information (where known):
    a. Country where the child was born.
    b. Identifying information about the surrogate, including:
        i. full name;
        ii. month, year, and place of birth; and
        iii. contact details.
    c. Identifying information about genetic origins.
    d. Whether the surrogacy was a traditional or gestational surrogacy.
    e. Details of the relevant surrogacy agency, assisted reproductive technology service provider, and doctor (if any).
    f. A personal statement from the surrogate, if the surrogate wishes to provide one.

2. Legislation should provide that, within six months of a child born through overseas surrogacy entering Australia, the intended parent(s) must apply to the Federal Circuit and Family Court of Australia for legal parentage through the judicial pathway (**Recommendation 29**).
3. Legislation should provide that intentional or reckless failure to comply with the requirements in paragraphs 1 or 2 will result in liability to a civil penalty.
4. Legislation should empower the Federal Circuit and Family Court of Australia to order intended parents to comply with the requirements in paragraphs 1 and 2. Non-compliance will result in liability to proceedings for contempt of court.
5. Legislation should provide that if a parentage order is made in relation to a child born through overseas surrogacy, the Federal Circuit and Family Court of Australia must provide a sealed copy of the order to the National Regulator for inclusion on the National Surrogacy Register.
6. Legislation should provide that:
   a. the provision of the information listed in paragraph 1 is mandatory for overseas surrogacy arrangements occurring after the relevant provision commences; and
   b. parties to overseas surrogacy arrangements that occurred before commencement of the provision may provide the information listed in paragraph 1 to the National Regulator for inclusion on the National Surrogacy Register.

13.101 The Terms of Reference ask the ALRC, in order to meet Australia's obligations under the United Nations Convention on the Rights of the Child ('CRC'), to:

- consider the information that should be available to children born through surrogacy, including on the child's birth certificate; and
- ensure appropriate recognition of legal parentage in Australia for children born through surrogacy overseas.

13.102 People born through surrogacy have the right to preserve their identity and to know and be cared for by their parents. As discussed in more detail in **Chapters 10**, **11**, and **14**, under the CRC:

- art 8 enshrines a child's right to preserve their identity, including nationality.[115] A generally accepted component of the right to identity is that children must

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

know who has 'played a role in contributing to [their] creation and care'.[116] The Committee on the Rights of the Child has categorically stated that States must provide children born through surrogacy with access to information about their gestational origins;[117] and

- art 7 enshrines a child's right to know and be cared for by their parents.[118] Closely connected are the right to be free from discrimination[119] and the right to privacy, family, and home.[120]

13.103 We have made several recommendations in this Report to help realise these rights for children born through domestic surrogacy:

- In **Chapter 11**, we recommend a National Surrogacy Register (**Recommendation 31**), which would ensure children born through domestic surrogacy arrangements have timely and appropriate access to information about their gestational origins. We also make recommendations as to which details should be collected and how this information should be reflected on the child's birth certificate (**Recommendations 30** and **32**).
- In **Chapter 10**, we recommend a judicial pathway to parentage (**Recommendation 29**) for unapproved surrogacy arrangements. Pursuant to the judicial pathway, the Federal Circuit and Family Court of Australia would be empowered to determine parentage in the best interests of the child, for any child born through surrogacy. This applies to all domestic arrangements which do not comply with legislative requirements, and all overseas surrogacy arrangements entered into by Australian citizens and permanent residents.

13.104 Currently, there is no requirement, where children are born through an overseas surrogacy arrangement, for details of the child's birth — including both gestational and genetic origins — to be recorded and made accessible to them in Australia. This is inconsistent with the child's rights to identity (see **Chapters 11** and **14**). We agree with the Australian Human Rights Commission that surrogacy reforms should ensure that children born through overseas surrogacy can access

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116 John Tobin and Florence Seow, 'Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 237, 260. See also Alexandra Harland, 'Surrogacy, Identity, Parentage and Children's Rights: Through the Eyes of a Child' (2021) 59(1) *Family Court Review* 121, 123; Law Commission of England and Wales and Scottish Law Commission (n 5) 397 [13.4.367]; Elaine O'Callaghan, 'Surrogacy Reform and Its Impact on the Child's Right to Birth Registration' (2021) 13 *Reproductive BioMedicine and Society Online* 46, 48.

117 Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Georgia*, 74th sess, 2193rd mtg, UN Doc CRC/C/GEO/CO/4 (9 March 2017) 6 [19(b)]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, 71st sess, 2104th mtg, UN Doc CRC/C/IRL/CO/3-4 (1 March 2016) 7–8 [34(a)]; Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) 9 [34].

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

119 Ibid art 2; International Social Service (n 17) principle 3.

120 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.

information about their genetic and gestational origins in the same way as children born in Australia.[121]

13.105 There is also no requirement for intended parents to obtain confirmation of their legal relationship to the child. There is a risk that intended parents — who have returned to Australia with the child, and who may have an overseas birth certificate (which records them as the child's legal parents) — may never seek formal legal recognition of parentage for the child in Australia.[122] In many circumstances, the law actually precludes intended parents being recognised as the child's legal parents, even where it is in the child's best interests. As discussed in **Chapter 10**, recognition of legal parentage is important for a child's sense of identity, and is the source from which many rights and obligations are derived.

13.106 Through **Recommendation 45**, we seek to ensure that children born through overseas surrogacy arrangements are not discriminated against, in terms of identity or parentage, due to the circumstances of their birth.

13.107 To uphold the child's right to identity, we recommend that the intended parents and the Federal Circuit and Family Court of Australia must ensure the National Surrogacy Register is provided with necessary information about the circumstances of the child's birth (**Recommendation 45(1)**). The ALRC recognises that there is added complexity in overseas surrogacy arrangements, as some overseas arrangements involve anonymous surrogates and the use of anonymous gametes.[123] For this reason, the information required under **Recommendation 46(1)** may not be available. However, other recommendations in this chapter seek to guard against intended parents engaging in arrangements that lack transparency in the first place (**Recommendations 37**–**43**).

13.108 To uphold the child's right to know and be cared for by their parents, we recommend that intended parents must be required to apply, through the judicial pathway, for legal recognition of their relationship with their child (**Recommendation 45(2)**). This would also ensure oversight of the arrangement and allow the Federal Circuit and Family Court of Australia to consider the child's best interests. The ALRC has recommended a timeframe of six months within which the intended parents must apply, to ensure timely judicial oversight and certainty of legal parentage in the best interests of the child, with discretion for the Court to extend that timeframe where necessary (see **Recommendation 29**).

13.109 Intentional or reckless failure to comply with the requirements in **Recommendation 45(1)** and **45(2)** would result in liability to a civil penalty. This

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121 Australian Human Rights Commission, *Submission 433*. See also International Social Service (n 17) principles 11.7, 11.8.

122 The 2019 Allen Review found that the 'vast majority' of intended parents (from Western Australia) who return with children born through overseas surrogacy arrangements do not apply for legal parentage: Allan (n 23) 183.

123 For example, anonymous gametes are used in certain states in the United States of America: House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 5) 25 [1.84].

is to deter intended parents from failing to ensure that the rights of the child are upheld, and to ensure the National Regulator and Federal Circuit and Family Court of Australia (or other court of appropriate jurisdiction) have oversight of overseas surrogacy arrangements. Where there is continued non-compliance with either requirement, the Federal Circuit and Family Court of Australia would be empowered to compel compliance, disregard of which would result in liability to proceedings for contempt of court. As a matter of practice, the National Regulator should follow up with intended parents, within six months of returning to Australia, to see if there has been compliance with these requirements. This may require information sharing with the Commonwealth Department of Foreign Affairs and Trade, for example, to determine whether the child has entered Australia.

Right to nationality — Australian citizenship, passports, visas

13.110 Under international law, all children have 'the right to acquire a nationality', and Australia has an obligation to ensure this right is realised, in 'particular where the child would otherwise be stateless' (see **Chapter 14**).[124]

13.111 Where overseas surrogacy arrangements occur, the Australian Government is 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 and an Australian passport, or a visa may be required.[125] These applications can be complex, and further complicated by exit processes in the birth country.

13.112 The Terms of Reference ask the ALRC to consider how citizenship, visa and passport requirements for children born through overseas surrogacy may be aligned.

Current law on citizenship, passports, and visas

Citizenship

13.113 Children born in Australia, to an Australian citizen parent, are automatically recognised as Australian citizens.[126] However, for children born overseas to an Australian citizen, while they are entitled to Australian citizenship, it is not automatically recognised. Rather, they need to apply for citizenship by descent.[127] Responsibility for processing citizenship applications rests with the Commonwealth Department of Home Affairs and is governed by *Australian Citizenship Act 2007* (Cth). The Minister

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124 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7, 8.

125 *Australian Citizenship Act 2007* (Cth) pt 2 div 2 subdiv A; *Australian Passports Act 2005* (Cth) s 11; *Australian Passports Determination 2015* (Cth) s 10. See also Department of Home Affairs (Cth), 'International Surrogacy Arrangements' <https://immi.homeaffairs.gov.au/help-support/glossary/international-surrogacy>; Department of Home Affairs (Cth), *Submission 248*.

126 *Australian Citizenship Act 2007* (Cth) s 12(1).

127 Ibid pt 2 div 2 subdiv A. Adoption by an Australian citizen (in accordance with the Hague Convention on Intercountry Adoption, or a bilateral agreement) is also a pathway to citizenship: ibid s 19C. See also Law Council of Australia, *Submission 342*.

must be satisfied as to the child's identity and that the child does not raise any security concerns.[128] The main requirements are that a parent is an Australian citizen and was the child's 'parent' at the 'time of birth'.[129] The connection between the child and the parent does not need to be biological. Rather, the determination is made based on a holistic assessment of 'social, legal and biological' factors.[130] Once it is established that the child is a child of an Australian citizen, the law affords no discretion to refuse a child's application for citizenship.[131] It appears that applications for citizenship are often granted.[132]

Passports

13.114 If a child is granted Australian citizenship they are legally entitled to an Australian passport.[133] However, for a passport to be issued (or renewed), consent is required from everyone with parental responsibility for the child, which under Australian law, includes the surrogate.[134] A passport can also be issued, without the consent of everyone with parental responsibility, where there is an Australian court order.[135] This requirement can however be waived by the Minister (for example, where there has been no contact between the child and the surrogate for a substantial period).[136]

Visas

13.115 If a child is unable to obtain Australian citizenship,[137] or seeks to enter Australia on a passport from the country of birth,[138] the only way the child can enter Australia is with a valid visa. Mandatory criteria include the birth country permitting the child to leave (otherwise other criteria apply).[139] A genetic connection between

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128 *Australian Citizenship Act 2007* (Cth) s 17.

129 Ibid s 16(2)(a). This timing requirement can present an evidentiary burden: see, eg, *Minister for Immigration, Citizenship and Multicultural Affairs v Su* (2024) 303 FCR 342 [21]. See generally *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Koka* [2020] FCA 1471.

130 *H v Minister for Immigration and Citizenship* (2010) 118 FCR 393 [129].

131 *Department of Immigration and Border Protection (Cth),* Submission 45 to 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, 3–4.

132 Over 1,300 children born through overseas surrogacy have been granted Australian citizenship by descent in the last five financial years: Department of Foreign Affairs and Trade, *Submission 434*.

133 Provided they meet the identity, and consent requirements: see *Department of Immigration and Border Protection (Cth),* Submission 45 to 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 (n 131) 3.

134 *Australian Passports Act 2005* (Cth) s 11(1)(a); Australian Passport Office, Department of Foreign Affairs and Trade (Cth), 'Parental Consent' <www.passports.gov.au/help/parental-consent>.

135 *Australian Passports Act 2005* (Cth) s 11(1)(b).

136 Ibid s 11(2). See also Allan (n 23) 171; Department of Foreign Affairs and Trade, *Submission 434*.

137 For example, where one or both of the intended parents is a permanent resident but neither is an Australian citizen.

138 Where the child acquires citizenship in the country of birth, they may obtain a passport from the country of birth and travel to Australia: Department of Home Affairs (Cth) (n 125).

139 *Migration Regulations 1994* (Cth) sch 4. See also Law Council of Australia, *Submission 342*.

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.[140] Unless the child can obtain a temporary visa to enter Australia,[141] the child must apply and wait offshore, sometimes for long periods, until a permanent visa is granted.[142] For the child to remain in Australia, the visa must be permanent.[143]

Improving application processes

Recommendation 46

Commonwealth legislation and administrative processes that govern applications for Australian citizenship, an Australian passport, or an Australian visa for children born through surrogacy should be reviewed and reformed in order to:

a. improve data-sharing mechanisms between the Department of Home Affairs and the Department of Foreign Affairs and Trade;

b. align documentary requirements, to the extent practicable, across citizenship, passport, and visa application processes;

c. allow documents to be provided to the Australian Government once, rather than requiring separate provision for each type of application specified in paragraph b; and

d. provide clear instructions and guidelines, including by way of examples, of the documentation required for each application.

140 In these circumstances, an adoption visa would be required: see Department of Home Affairs (Cth), *Submission 248*.

141 See, eg, *Gallo & Ruiz* [2024] FedCFamC1F 893, in which the intended parent (biological father) obtained tourist visas for his children (who were born through surrogacy overseas) to enter Australia. The children were then granted bridging visas, pending the outcome of applications for permanent visas.

142 The Department of Home Affairs, Immigration and Citizenship provides that currently, for a Child (subclass 101) visa, 50% of applications are processed within 20 months and 90% are processed within 30 months: Department of Home Affairs, Immigration and Citizenship (Cth), *Visa Processing Times* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>.

143 A visa grant is subject to public interest criteria: *Migration Regulations 1994* (Cth) sch 4.

13.116 Intended parents can face practical hurdles when seeking to return to Australia with children born through overseas surrogacy.[144] As discussed above, citizenship, passport, and visa applications have evidentiary requirements, which differ depending on the application and may be complicated to satisfy.[145] This can lead to families being unable to return to Australia for long periods of time,[146] and can put time pressure on the departments responsible for processing these applications, for example where there are exceptional or compelling circumstances requiring urgent processing.[147] If evidentiary requirements for these applications cannot be satisfied, this puts the child's right to nationality at risk. For example, if the child is unable to secure Australian citizenship, they may be at risk of statelessness.[148]

13.117 In the Discussion Paper, we proposed that registered arrangements should be able to access a more streamlined application process, which would allow them to commence applications prior to the birth of the child. The reform aim behind this proposal was to reduce the risk of delays or of an application being denied, by allowing sufficient time, before the child is born, for evidentiary requirements to be met. However, the Commonwealth Department of Foreign Affairs and Trade raised concerns that this was not feasible, as such applications cannot be commenced before a child is born,[149] and that such a process would unfairly prioritise children born through surrogacy over other children born to Australians overseas.[150] The ALRC was also advised that applications for citizenship are generally already expedited for children born through overseas surrogacy, particularly where exceptional

144 This includes complexities obtaining appropriate documentation in the birth country, and navigating processes and applications which are necessary to enter Australia: Not published, *Submission 2*; Name withheld, *Submission 161*; Name withheld, *Submission 173*; Not published, *Submission 209*; Not published, *Submission 220*; Name withheld, *Submission 278*; Not published, *Submission 292*; Name withheld, *Submission 301*; Not published, *Submission 309*; Law Council of Australia, *Submission 342*; Not published, *Submission 345*.

145 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 (Cth), *Submission 248*; Law Council of Australia, *Submission 342*. See also Peter McMullin Centre on Statelessness, *Submission 174*, which describes the citizenship application process as 'arduous and complex'.

146 Law Council of Australia, *Submission 342*. Others raise concerns that delays are caused where the surrogate's consent is required despite documentation confirming the intended parents are the legal parents, or due to automatic allocation to the complex cases team: see S Jefford, *Submission 128*; S Everingham, *Submission 129*. See also S Page, *Submission 365*, who notes the increasing scrutiny of applications, which could add to delay. One submission indicates that, anecdotally, the usual processing time for a citizenship application is about one month, though emergency passports can be issued within weeks: S Page, *Submission 130*.

147 Department of Home Affairs (Cth), *Submission 248*.

148 Peter McMullin Centre on Statelessness, *Submission 174*.

149 Department of Foreign Affairs and Trade, *Submission 434*; *Australian Citizenship Act 2007* (Cth) pt 2 div 2 subdiv A.

150 Department of Foreign Affairs and Trade, *Submission 434*.

circumstances are raised,[151] and that delays are generally due to legal processes within the birth country,[152] rather than departmental processes in Australia.

13.118 The Commonwealth Department of Foreign Affairs and Trade was supportive of better data sharing between key agencies and allowing intended parents to present key documents to the Australian Government once (including birth certificates, surrogacy contracts, DNA test results where required, and court orders),[153] noting such reforms could benefit all children born to Australians overseas. Suggestions from other stakeholders included:

- aligning documentary requirements and digitising processes;[154]
- a single portal where applications could be made, to reduce duplication;[155]
- better instructions about what was required, including sample or template affidavits and other similar documents, along with translated instructions and relevant templates in languages commonly used in Australia;[156] and
- training of citizenship and passport staff.[157]

13.119 **Recommendation 46** seeks to improve processes for applications for Australian citizenship, passports, and visas, by reducing complexity and duplication where possible. These reforms were either supported by the Commonwealth Department of Foreign Affairs and Trade — which would be central to the implementation of any streamlined process — or reflect promising approaches suggested by other stakeholders. Through this recommendation, the ALRC seeks to reduce the likelihood that applications will be delayed, without eroding necessary evidentiary safeguards against the risk of human trafficking.

13.120 **Recommendation 46** is complemented by **Recommendations 37**, **39**, **41**, and **42**, which would help ensure intended parents receive accurate information about the processes and evidentiary requirements for applications which are necessary for children born through overseas surrogacy to return to Australia, and legal advice specific to their overseas arrangement from both an Australian lawyer and a lawyer in the birth country. Collectively, these recommendations support the rights of children born through surrogacy to nationality.

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151 The Department of Home Affairs indicated 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 (Cth), *Submission 248*. Cf Peter McMullin Centre on Statelessness, *Submission 376*, which raises concerns about the complexity of Australian citizenship applications, which are described as 'onerous' and placing 'high administrative burdens' on intended parents.

152 Department of Foreign Affairs and Trade, *Submission 434*.

153 However, the Department noted this would require careful consideration against relevant privacy laws, and that intended parents may need to consent before data could be shared between agencies: ibid 13.

154 Rainbow Families, *Submission 429*.

155 Not published, *Submission 393*.

156 Law Council of Australia, *Submission 431*.

157 S Jefford, *Submission 128*; Rainbow Families, *Submission 429*.

Simplifying passport renewals

Recommendation 47

Commonwealth legislation and administrative processes should be amended, where necessary, to provide that where an intended parent is recognised as a legal parent of a child born through surrogacy, either through the administrative pathway (**Recommendation 28**) or through the judicial pathway (**Recommendation 29**), the surrogate and the surrogate's partner (if any) are not considered to be parents of, or to have parental responsibility for, the child for the purposes of a passport application or passport renewal application, unless the Federal Circuit and Family Court of Australia expressly orders otherwise.

13.121 As discussed above, unless the requirement is displaced by a court order or waived, or there is an Australian court order permitting travel,[158] the issuance or renewal of an Australian passport for a child requires the consent of everyone with parental responsibility.

13.122 The ALRC has heard that the requirement to obtain the surrogate's consent for an initial passport, and for a passport renewal,[159] was a source of frustration.[160] However, the ALRC recognises that these issues are not necessarily unique to surrogacy, as this requirement would apply wherever there are multiple people with parental responsibility for a child.[161]

13.123 The ALRC also recognises, in the context of overseas surrogacy, the need to obtain the consent of everyone with parental responsibility before a child's initial application for a passport can be granted. This is an important safeguard against human trafficking and child abduction,[162] as it prevents one person with parental responsibility from travelling with a child without the others' consent. The surrogate's consent may be necessary, even where there is a court order in the birth country confirming that the intended parents are the child's legal parents and the surrogate (and their partner, if any) has no parental responsibility for the child. This is because it

158 *Australian Passports Act 2005* (Cth) ss 11(1)(b), 11(2), in conjunction with *Australian Passports Determination 2015* (Cth) s 10(3)(h).

159 The passport must be renewed every five years for children aged 0–15; children aged 16 or 17 may be issued with a passport that is valid for up to ten years: see Australian Passport Office, Department of Foreign Affairs and Trade (Cth), 'Child Passport' <www.passports.gov.au/child-passport>:

160 See, eg, Name withheld, *Submission 5*; P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 99*; S Everingham, *Submission 129*; Name withheld, *Submission 177*; Name withheld, *Submission 231*; Name withheld, *Submission 234*; Name withheld, *Submission 235*; Name withheld, *Submission 236*; Not published, *Submission 246*; Name withheld, *Submission 259*; Name withheld, *Submission 288*; Not published, *Submission 292*. See also Name withheld, *Submission 330*; Name withheld, *Submission 343*; Not published, *Submission 345*; Rainbow Families, *Submission 429*.

161 Department of Foreign Affairs and Trade, *Submission 434*.

162 Ibid.

is not necessarily possible for the Commonwealth Department of Foreign Affairs and Trade to know if those orders are accurate or current. Where the surrogate's consent cannot be obtained, this may be a sign that arrangement was not consensual.

13.124 The ALRC recognises that, at times, it may not be possible to obtain the surrogate's consent. Where this is because the identity of the surrogate is unknown, this may raise concerns of exploitation or an absence of consent on the part of the surrogate. However, where the surrogate's details are provided, but the surrogate cannot be contacted, this could be for a range of reasons. This could delay and frustrate an application unless a waiver can be obtained.

13.125 Ultimately, the ALRC considers that where an initial application is made for a child born through overseas surrogacy, prior to the intended parents being recognised as the child's legal parents through the judicial pathway (**Recommendation 29**), the surrogate's consent should be required (subject to the existing waivers discussed above). This is because there has yet to be a determination, under Australian law, as to legal parentage of the child.

13.126 However, the ALRC considers that where the intended parents have been recognised as the legal parents of a child born through surrogacy — either through the judicial pathway (**Recommendation 29**) or the administrative pathway (**Recommendation 28**) — the surrogate's consent should not be required for either an initial passport application or a passport renewal application. Unless the Federal Circuit and Family Court of Australia expressly orders that the surrogate (and their partner, if any) have retained parental responsibility for the child, the presumption should be that they have not.

13.127 **Recommendation 47** requires Commonwealth legislation and administrative processes to be amended, where necessary, to give effect to this approach. In doing so, it upholds the child's rights to nationality by ensuring children — who are born through surrogacy and are entitled to an Australian passport — will be able to access one without unnecessary delay. It achieves this without increasing the risks of child trafficking, by ensuring the surrogate's consent (and that of their partner, if any) is required where legal parentage has not been determined either by operation of law (**Recommendation 28**) or court order (**Recommendation 29**).

Risk of statelessness

13.128 As discussed above, there is a risk of statelessness if the child is unable to secure either Australian citizenship (through the intended parents) or citizenship in the place of birth (either through the surrogate, or by operation of law at birth). The Peter McMullin Centre on Statelessness submitted that while there is limited evidence, in the Australian context, of statelessness having arisen through overseas surrogacy arrangements, the risk remains.[163]

163 Peter McMullin Centre on Statelessness, *Submission 174*.

13.129 In the Discussion Paper, we asked whether there should 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. There was good support for this idea,[164] as being consistent with the best interests of the child and their right to a nationality.[165] However, views differed on the best way to address this issue. For example:

- the Peter McMullin Centre on Statelessness recommended a simplified nationality verification process; and[166]
- the Law Council of Australia suggested the introduction of a specific avenue for citizenship for stateless children born through surrogacy to an Australian or permanent resident.[167]

13.130 Ultimately, as the ALRC considers that as there is limited evidence of statelessness having arisen through overseas surrogacy arrangements entered into by Australians, and the risk of statelessness for children born overseas to Australians is not unique to children born through surrogacy arrangements, we will not make a specific recommendation. However, the Australian Government should consider, when implementing the other recommendations in this chapter, how this risk should be addressed.

Enforcing compliance with the responsible overseas surrogacy framework

13.131 To ensure that the responsible overseas surrogacy framework is effective, there needs to be enforceable consequences for non-compliance.

13.132 As discussed above, the ALRC considers that in the context of surrogacy, the criminal law should only be used to deal with the most egregious conduct. As discussed in **Chapter 12**, there are principled and practical reasons for this. Additionally, the ALRC considers a civil penalty scheme would be more likely to be effective in deterring non-compliance with prohibitions in surrogacy regulations. This is because (as is discussed in detail in **Chapter 12**):

- the primary purpose of civil penalties is deterrence as opposed to punishment, which is more appropriate in the context of surrogacy;
- civil penalties can be tailored to neutralise the benefits of non-compliance;

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164 See, eg, J Attawet, *Submission 360*; Australian Nursing and Midwifery Federation, *Submission 375*; Peter McMullin Centre on Statelessness, *Submission 376*; S Everingham, *Submission 378*; Not published, *Submission 393*. See also Australian Christian Lobby, *Submission 419*, who supported the idea, but considered that children should become wards of the state, so as not to encourage intended parents.

165 See **Chapter 14**.

166 This would be consistent with *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 32, which directs states to facilitate and expedite the assimilation and naturalisation of stateless persons.

167 Through the introduction of a new, surrogacy-specific provision (with retrospective effect) into the *Australian Citizenship Act 2007* (Cth): Law Council of Australia, *Submission 431*.

- civil contraventions are easier to prove, due to a lower standard of proof and less strict rules of evidence and procedure, resulting in more simplified investigation and enforcement processes; and
- civil penalties are more likely to be enforced, where enforced by a regulator that is invested in maintaining the integrity of the regulatory scheme it administers.[168]

13.133 Additional reasons why the criminal law is likely to be ineffective to deal with overseas surrogacy are discussed above under the justification for **Recommendation 36**.

13.134 For these reasons, the ALRC recommends that non-compliance with any of the requirements (in **Recommendations 38** and **40**–**45**, which are discussed in detail above) should result in liability to a civil penalty, to be enforced by the National Regulator (**Recommendation 6**). As is recommended in relation to domestic surrogacy (see **Chapter 12**), the National Regulator would be empowered to investigate matters and have standing to bring proceedings in a court of appropriate jurisdiction, such as the Federal Circuit and Family Court of Australia.

13.135 As discussed above, many submissions supported the use of criminal sanctions to punish non-compliance with prohibitions in the context of overseas surrogacy. Two submissions, while recognising that civil penalties were preferable to criminal sanctions, suggested that civil penalties could still stigmatise children,[169] and may add unnecessary complexity.[170] Another suggested they may be treated as the 'cost' of doing surrogacy overseas, noting that the process already involves considerable expense.[171] Ultimately, for the reasons outlined above and in detail in **Chapter 12**, the ALRC considers that consequences for non-compliance are necessary to better ensure the reforms are an effective deterrent and the rights of everyone involved are upheld. Civil penalties do not carry the same stigma as criminal sanctions. They are a proportionate response to non-compliance in the context of overseas surrogacy, which can be tailored to achieve deterrence.

168 See **Chapter 12**.
169 S Jefford, *Submission 359*.
170 K Cox, *Submission 389*.
171 E Kneebone, *Submission 415*.

14. Compliance with International Human Rights Obligations

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Introduction

14.1 This chapter examines the human rights engaged by surrogacy arrangements. It assesses whether the recommendations in this Report are compatible with those rights and therefore consistent with Australia's international law obligations. This is responsive to the ALRC's enabling legislation[1] and the Terms of Reference, which ask the ALRC to:

- have regard to 'the human rights of children born of surrogacy, [surrogates], and intended parents';
- identify legal and policy reforms that are consistent with Australia's obligations under international law and conventions, and protect and promote the human rights of children born through surrogacy, surrogates and intended parents, noting that the best interests of children are paramount; and
- consider Australia's human rights obligations.[2]

1 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b), which requires the ALRC to ensure that the recommendations it makes 'are, as far as practicable, consistent with Australia's international obligations that are relevant to the matter'.

2 Australian Law Reform Commission, 'Terms of Reference', *Review of Surrogacy Laws* (6 December 2024) <www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/>.

14.2 Surrogacy is not explicitly the subject of any treaty.[3] Nevertheless, the issues considered in this Inquiry engage human rights obligations under several international treaties to which Australia is a party, most relevantly, the:

- United Nations Convention on the Rights of the Child ('CRC'), a multilateral treaty ratified by 196 states (including Australia in 1990);[4]
- International Covenant on Civil and Political Rights ('ICCPR'), a multilateral treaty ratified by 175 states (including Australia in 1980);[5]
- International Covenant on Economic Social and Cultural Rights ('ICESCR'), a multilateral treaty ratified by 173 states (including Australia in 1975);[6] and
- Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), a multilateral treaty ratified by 189 states (including Australia in 1983).[7]

14.3 Pursuant to art 26 of the Vienna Convention on the Law of Treaties, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.[8] Australia is therefore obliged under international law to comply with the articles of the treaties to which it is a state party.

3 Attorney-General's Department (Cth), *Submission 153*.

4 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); United Nations Human Rights Office of the High Commissioner, 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org/>.

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); United Nations Human Rights Office of the High Commissioner (n 4).

6 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); United Nations Human Rights Office of the High Commissioner (n 4).

7 *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); United Nations Human Rights Office of the High Commissioner (n 4).

8 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980) art 26.

In focus: Understanding human rights treaty obligations

The Vienna Convention provides the basic rules for treaty interpretation. However, the general terms of human rights treaties may be open to differing interpretations, especially where rights intersect and as societies change.

Each human rights treaty has a Committee, which consists of several independent experts appointed by the Human Rights Council, who have the task of monitoring the treaty's implementation. The Committees undertake at least three tasks that contribute to an understanding of the obligations of states under human rights treaties. First, they issue general statements regarding their interpretation of the relevant treaty (often known as 'General Comments' or 'General Recommendations'). Second, they issue views on individual communications or complaints. Third, they issue concluding observations as part of the periodic reporting process, with recommendations for states as to what states should do to fulfil their obligations under a treaty. These contributions by the Committees are not enforceable and determinative. However, they are given significant weight in understanding the scope, applicability, and content of these treaties.[9] For example, the views issued by a Committee in response to an individual complaint 'exhibit some of the principal characteristics of a judicial decision' and 'represent an authoritative determination' by the body charged with interpreting the relevant treaty.[10]

Reports published by UN Special Procedures (also known as Special Rapporteurs and Independent Experts), who are appointed by the UN Human Rights Council as experts on issues, also offer guidance on interpreting treaty provisions and identifying human rights issues that intersect with multiple rights.[11]

9 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary objections) [1996] ICJ Rep 595, 654 (Separate Opinion of Weeramantry J). With respect to the Human Rights Committee, see *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 [22]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits, Judgment) [2010] ICJ Rep 639 [66]. As to the status of General Comments as evidence of the state of international law, see Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 65, 71–2, 81.

10 Human Rights Committee, *General Comment No 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 94th sess, UN Doc CCPR/C/GC/33 (25 June 2009) 2–3 [11], [13].

11 Chinkin (n 9) 80.

Further, decisions of international and regional courts also help to 'elucidate and develop international law' in this area.[12] Cases decided by regional human rights courts under their own treaties (such as the European Convention on Human Rights and African Convention on Human and Peoples' Rights) may provide important insights into the interpretation of similarly worded rights under international treaties. Differences in text and context, however, may mean that these interpretations cannot be automatically transposed.

Decisions of domestic courts applying international law 'may also be influential in developing international human rights law', feeding into and informing the development of international law.[13]

Other 'soft law',[14] including nonbinding resolutions of international institutions such as the UN General Assembly and UN Human Rights Council, can also provide evidence of states' understanding of the law, 'aspirations and goals', and accepted interpretations of particular treaties.[15] Over time, the accumulation of soft law on a particular issue can also contribute to the development of international norms.[16]

12 Ibid 77.
13 Ibid 78.
14 'Soft law' refers to the spectrum of non-binding instruments that guide the creation and implementation of international law: see Alan Boyle, 'Soft Law in International Law-Making' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 118, 118–20. See also Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39(2) *Adelaide Law Review* 303, 303–4; Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 1, 2–7.
15 Chinkin (n 9) 82.
16 See further ibid 82–4.

In focus: Understanding how human rights can be limited and managing the intersection of rights

As the Vienna Convention acknowledges, all human rights 'are universal, indivisible and interdependent and interrelated'.[17] In this sense, human rights can be conceptualised as coexisting, reinforcing, and mutually enriching.[18] This means that no one right can be used to extinguish or 'destroy'[19] another right.

Only a small number of human rights are absolute. This includes the prohibition against torture. Most rights can be limited provided a limitation is legal, pursues a legitimate objective, and the measures to achieve that objective are necessary and proportionate. Depending on the right, legitimate objectives might include the protection of public health, public order, or to protect the rights and freedoms of others.

The criteria governing the permissible limitation of rights are set out in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ('Siracusa Principles').[20] A limitation on a right must:

- be provided for by law;
- pursue a legitimate goal, as set out in the relevant article;
- be necessary — that is, respond to a pressing social need; and
- be proportionate to the specific need it is aimed at addressing.[21]

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17 *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993 by the World Conference on Human Rights) [5].

18 See Dominic McGoldrick, 'Thought, Expression, Association, and Assembly' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 209, 232.

19 Ahmed Shaheed, Special Rapporteur on Freedom of Religion or Belief, *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, 43rd Sess, UN Doc A/HRC/43/48 (24 August 2020) [60].

20 See Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984); Attorney-General's Department (Cth), 'Permissible Limitations'<www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/permissible-limitations>; Australian Human Rights Commission, *Lawful Limits on Fundamental Freedoms* (Human Rights Brief No 4, 2006) 4; Parliamentary Joint Committee on Human Rights (Cth), *Drafting Statements of Compatibility* (Guidance Note 1, December 2014). The Ruddock Religious Freedom Inquiry recommended that Commonwealth, state, and territory governments should have regard to the Siracusa Principles when drafting laws that would limit the right to freedom of religion: Expert Panel into Religious Freedom, *Religious Freedom Review: Report of the Expert Panel* (Report, 2018) rec 2.

21 See Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, 1247th mtg, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993, adopted 30 July 1993) [8].

In relation to assessing proportionality, the types of factors that are often considered include:

- whether there are other less restrictive ways to achieve the same aim;
- whether effective safeguards, including monitoring and review mechanisms, are in place;
- the extent of any interference with human rights;
- whether affected groups are particularly vulnerable; and
- whether the measure provides sufficient flexibility to account for different circumstances, rather than imposing a blanket policy.[22]

Applying limitation criteria is more complicated when rights intersect and where potential limitations must be considered in relation to each of the intersecting rights. The aim in managing intersecting rights is to identify and preserve the substance of each human right in apparent tension, so that the substance of each right is preserved to the maximum degree possible.[23]

This mechanism has often been conceptualised as involving the need to balance one human right against the other. However, the metaphor of 'balancing' has been criticised. Instead, the aim of the exercise is to provide practical concordance of the human rights claims involved and thus 'to coordinate and maximise the competing human-rights based concerns in a manner that comes as closely as possible to a full implementation' of all rights in apparent tension.[24] Accordingly, the exercise is better described as maximising the realisation of human rights.[25]

14.4 This chapter is divided into three parts and structured around the groups whose rights are engaged by surrogacy arrangements. Consistent with the obligation to give primary consideration to the best interests of the child,[26] this chapter first considers children's rights, before turning to the rights of surrogates and then the rights of intended parents. In each part, we analyse our recommendations against the rights most directly engaged, consider the interpretive guidance most relevant to the surrogacy context and, where rights intersect, assess whether the recommendations accommodate those rights in a way that maximises their realisation.[27]

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22 Parliamentary Joint Committee on Human Rights (Cth), *Drafting Statements of Compatibility* (Guidance Note 1, December 2014) 2–3.

23 See Heiner Bielefeldt and Michael Wiener, *Religious Freedom Under Scrutiny* (University of Pennsylvania Press, 2020) 57–8, 99.

24 Ibid 99.

25 As the ALRC did in its recent report: Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, 2023) 34.

26 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

27 For a discussion on why this approach is adopted, see Bielefeldt and Wiener (n 23) 34, 99.

14.5 Many submissions to this Inquiry addressed the human rights dimensions of the topic.[28] Those submissions have been considered, but with caution where they engaged selectively with human rights by emphasising certain rights whilst ignoring others. That was done because we have adopted a 'substantive rights-based approach' which requires the relevant issues to be conceptualised by reference to all rights engaged, the content of those rights and corresponding obligations to be examined, and an accepted rights-based methodology to be applied where rights appear to compete.[29]

Children's rights

14.6 The CRC is the primary treaty governing the rights of children under international law.[30] The CRC is supplemented by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ('Optional Protocol').[31] The CRC, together with the Optional Protocol, establishes a framework with legally binding obligations for Australia.[32] The CRC Committee, as the body established to monitor implementation of the CRC, is the primary body responsible for interpreting the Convention. Its General Comments and decisions therefore carry considerable weight.[33]

14.7 Neither the CRC nor the Optional Protocol mention surrogacy, and the CRC Committee has not considered any individual communications related to surrogacy. In that context, we have given consideration to influential observations that provide

28 See, eg, 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 arguing 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*; M Quinlan, *Submission 381*; Stop Surrogacy Now UK & Surrogacy Concern, *Submission 384*; Abolish Surrogacy Australia, *Submission 402*; Australian Catholic Bishops Conference, *Submission 403*; ARMS (Vic), *Submission 408*; World Youth Alliance, *Submission 411*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

29 John Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International and Comparative Law Quarterly* 317, 322–3.

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

31 *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). Ratified by Australia in 2007.

32 Philip Alston and Frédéric Mégret, 'Introduction: Appraising the United Nations Human Rights Regime' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 2020) 19; Christine Evans, 'The Committee on the Rights of the Child' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 2nd ed, 2020) 682, 698.

33 See Evans (n 32) 696–8.

interpretive guidance for how CRC rights should be applied in the context of surrogacy. These include the:

- 2019 UN Special Rapporteur on the Sale and Sexual Exploitation of Children Report and 2018 UN Special Rapporteur on the Sale and Sexual Exploitation of Children Report;[34]
- 2021 Principles for the Protection of the Rights of the Child Born through Surrogacy (commonly referred to as the 'Verona Principles'), authored by 15 members of the CRC Committee and released by the International Social Service;[35] and
- 2022 Briefing Note relating to surrogacy published by UNICEF and Child Identity Protection.[36]

14.8 This part discusses the articles of the CRC and the Optional Protocol that are most relevant to the surrogacy context and explains, with reference to the interpretive guidance, how our recommendations align with the rights enshrined in those articles.

Right to be free from discrimination

14.9 The right to be free from discrimination is enshrined in art 2 of the CRC, which specifies 'birth or other status' as one of the prohibited grounds for discrimination.[37] According to the former Special Rapporteur on the sale and exploitation of children, this

> overarching principle of non-discrimination signifies that none of the rights of the child should be impacted by the method of his or her birth, including through a surrogacy arrangement.[38]

14.10 When the law refuses to recognise the families of children born through surrogacy, it discriminates against them by treating them differently from children born through other means. This is contrary to art 2 of the CRC.[39] As noted by the CRC Committee in its 2022 concluding observations on Cambodia, 'the criminalization

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34 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018); Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019).

35 International Social Service, *Principles for the Protection of the Rights of the Child Born through Surrogacy (Verona Principles)* (2021).

36 Child Identity Protection and UNICEF, *Key Considerations: Children's Rights & Surrogacy* (Briefing Note, 2022).

37 *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 35) principle 3.

38 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [23].

39 See discussion below about the right to form a family.

and stigmatization of surrogacy puts children born through surrogacy at risk of discrimination'.[40]

14.11 The right to be free from discrimination is also closely connected to the best interests of the child in art 3 of the CRC (discussed below). In General Comment No 14 on the best interests of the child the CRC Committee noted that the

> right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.[41]

14.12 The recommendations in this Report would allow for legal recognition of all families formed through surrogacy (**Recommendations 28** and **29**) and replace criminal sanctions with civil penalties to reduce the stigma that attaches to prohibited surrogacy arrangements (**Recommendations 1** and **36**). This would reduce differential treatment arising from a child's method of birth and uphold the right of children in such families to be free from discrimination.[42]

14.13 The recommendations in this Report are also aimed at ensuring that proactive measures are implemented so that children born through surrogacy can enjoy all rights under the Convention in the same way as children not born through surrogacy. This includes measures to ensure access to identity information (**Recommendations 30**–**32**, **45**) and to reduce practical difficulties in obtaining Australian citizenship, passports or visas (**Recommendation 46**–**47**).

Best interests of the child

14.14 Article 3(1) of the CRC states that in

> all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[43]

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40 Committee on the Rights of the Child, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Cambodia*, 90th sess, 2630th mtg, UN Doc CRC/C/KHM/CO/4-6 (27 June 2022) [20].

41 Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [41].

42 Several submissions supported the move away from the criminal law: see, eg, Not published, *Submission 116*; Name withheld, *Submission 231*; K Cox, *Submission 389*; Equality Australia, *Submission 435* and others expressed a contrary position: see, eg, Australian Catholic Bishops Conference, *Submission 187*.

43 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1). It should be noted that art 6 of the CRC further recognises the rights of children to survival and development (extending to their physical, psychological, social and emotional development).

14.15 In 2013, the CRC Committee issued a General Comment on art 3(1),[44] outlining that the child's best interests is a threefold concept: a substantive right; a fundamental, interpretive legal principle; and a rule of procedure.[45]

14.16 The recommendations in this Report accord primary consideration to the best interests of the child from each of these three perspectives, with a particular focus on the substantive right: the right of the child to have their best interests assessed and taken into account as a primary consideration when different interests are being considered.[46] This is especially evident in, for example:

- **Recommendation 16**, which would require intended parents to undergo a Nationally Coordinated Criminal History Check as a precondition for approval of the surrogacy arrangement. This would give effect to the child's best interests by requiring risks to the child's safety to be taken into account.
- **Recommendations 28** and **29**, which would enable children born through surrogacy to have their families legally recognised (discussed further below), ensuring that legal parentage decisions are directed to the outcome that best protects the child's best interests.
- **Recommendations 30**–**32**, which would protect the identity rights of children born through surrogacy (discussed further below), which are integral to the child's best interests.[47]

14.17 It is with a focus on the rights of the child that the ALRC has developed the recommendations for reforming the law on legal parentage (**Recommendations 28** and **29**). The rights and best interests of children born through surrogacy are best served by a process that front-ends appropriate protections and provides clarity and certainty regarding legal parentage once certain legislative safeguards have been met. This is a key reason why this Report recommends that safeguards (such as eligibility requirements, counselling, and independent legal advice) be implemented at the start of any arrangement, before the surrogate is pregnant (**Recommendations 11**–**20**). That said, the ALRC recognises that there may

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44 Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013).

45 Ibid [6].

46 Ibid.

47 In concluding observations on New Zealand, the CRC Committee recommended that the state party 'ensure that children born through assisted reproduction technologies, in particular with the involvement of surrogate mothers, have their best interests taken as a primary consideration in facilitating their access to the relevant register, court file or other records of information about their biological origins': Committee on the Rights of the Child, *Concluding Observations on the Sixth Periodic Report of New Zealand*, 92nd sess, 2698th mtg, UN Doc CRC/C/NZL/CO/6 (28 February 2023) [20]. In concluding observations on Ukraine the Committee recommended that the state party ensure that children born through surrogacy 'have their best interests taken as a primary consideration and have access to information about their origins': Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ukraine*, 91st sess, 2668th mtg, UN Doc CRC/C/UKR/CO/5-6 (27 October 2022) [21]. See also Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Malaysia*, 100th sess, 1936th mtg, UN Doc CRC/C/MYS/CO/2-4 (26 February 2026) [37].

be some circumstances where it would not be in the child's best interests for the intended parents to be their legal parents. Therefore, under both the recommended administrative and judicial pathways to legal parentage, a court would be able to determine parentage taking into account all relevant considerations, but giving paramount consideration to the best interests of the child (**Recommendations 28**–**29**) thus embedding the best interests of the child as a fundamental, interpretative legal principle.[48] As a matter for procedure, these recommendations also give the court discretion to waive application timeframes where necessary, ensuring that procedural requirements do not operate as a barrier to the court considering and giving effect to the child's best interests. The combination of these elements would better ensure that the best interests of the child have been taken into account as the primary consideration throughout the proposed parentage framework.

14.18 There has been some debate about the appropriateness of what is often referred to as parentage by operation of law upon the birth of a child through surrogacy, referred to in this report as the administrative pathway to legal parentage (**Recommendation 28**). The former Special Rapporteur on the sale and sexual exploitation of children, for example, has advocated for a 'post-birth best interests of the child determination'.[49] However, she also acknowledges the importance of certainty of parentage to give effect to the child's best interests[50] and recognises that post-birth assessments may be made more complex by the fact that the child may be living with the intended parent(s).[51]

48 It should be noted that whereas art 3 of the CRC states that 'the best interests of the child shall be a *primary* consideration', the *Family Law Act 1975* (Cth) states that that child's best interests shall be the '*paramount* consideration': see, eg, *Family Law Act 1975* (Cth) ss 60CA, 60CB, 65AA, 67L, 67V (emphasis added). But see International Social Service (n 35) [6.1].

49 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [77]–[78].

50 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [19]. The CRC Committee has also emphasised the importance of certainty of parentage, see for example: Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland*, 86th sess, 1983rd mtg, UN Doc CRC/C/CHE/CO/2-4 (26 February 2015) [46]–[47].

51 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [57].

14.19 In contrast to these concerns, there has been significant support for the administrative pathway, as being grounded in the best interests of the child. As recognised by her Honour Judge Harland, speaking extra-curially:

> [r]ecognition of the intended parents as the child's legal parents at birth promotes the best interests of the child, particularly in a context where significant safeguards have been met upfront.[52]

14.20 In a similar vein, UNICEF and Child Identity Protection expressed the view that a post-birth best interests determination is only necessary in circumstances where

> pre-surrogacy evaluations lack sufficient rigor, the surrogate mother and/or intending parent(s) dispute legal parentage, the transfer of legal parentage is considered, or unforeseen developments arise.[53]

14.21 The ALRC considers that the best interests of the child are best protected through a framework that effects safeguards before a surrogacy arrangement commences, while preserving access to a post-birth best interests determination where it is needed.

14.22 Beyond our parentage recommendations, our focus on the best interests of the child is also apparent in **Recommendation 31**, which states that a child born through surrogacy who is under the age of 16 may access information on the National Surrogacy Register if such access would be in their best interests. In fact, certainty of identity more broadly is viewed as important to ensuring the best interests of the child and is discussed in greater detail below and in **Chapter 11**. This would be achieved via **Recommendations 30**–**32**, which address what information is available through birth certificates and access to information through the National Surrogacy Register, as well as **Recommendation 45**, which would ensure information about overseas surrogacy arrangements is included in the Register. These recommendations align with the view of the CRC Committee that

> in the regulation of assisted reproduction technologies, particularly with the involvement of surrogate mothers, the State party ensure respect for the rights of children to have their best interests taken as a primary consideration and to have access to information about their origins.[54]

14.23 The importance of considering the best interests of the child has also been emphasised as a basis for critiquing blanket prohibitions on overseas surrogacy.[55]

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52 Extra-curial conversation between the ALRC and her Honour Judge Harland of the Federal Circuit and Family Court of Australia, dated 6 May 2026.

53 Child Identity Protection and UNICEF (n 36) 3.

54 Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) [34].

55 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [91].

The ALRC's recommendations adopt a more nuanced approach than a blanket prohibition (see **Chapter 13**), recognising that the child's best interests are not served by leaving their legal status or family relationships uncertain because of the legality of decisions made by adults. The recommendations ensure that children born through surrogacy can have their families legally recognised, irrespective of the legality of the surrogacy arrangement (**Recommendation 29**). This approach is supported by the former Special Rapporteur on the sale and exploitation of children, who also supports the move away from a criminal law approach to the regulation of surrogacy.[56]

Birth registration, nationality, and the parent-child relationship

14.24 Article 7 of the CRC is of particular relevance in the surrogacy context. It states that the child

> shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and as far as possible, the right to know and be cared for by his or her parents.[57]

14.25 The relevant rights contemplated by this article are the right to birth registration, the right to nationality, and the right to know and be cared for by the child's parents. These will be dealt with in turn.

The right to birth registration

14.26 The right to birth registration is important as birth registration is a precondition to the exercise of many other rights. In its 2013 report on Birth Registration and Birth Certificates, the Victorian Law Reform Commission observed that birth certificates 'are fundamental to our effective functioning as citizens' and may be necessary to take full advantage of citizenship rights.[58] Gerber and Lindner similarly describe birth registration as a 'gateway to certain rights for children', and birth certificates as the key to that gateway'.[59] Birth certificates, or equivalent documents, therefore play an important role in enabling individuals to prove their identity, citizenship, and parentage, and have social and symbolic value.[60]

14.27 **Recommendation 30** seeks to include children born through surrogacy in current systems of birth registration. By requiring that birth registration statements and any other documents used to register a child's birth in Australia

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56 Ibid [79]. See discussion in **Chapter 12**. See also **Recommendation 36**.

57 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1).

58 Victorian Law Reform Commission, *Birth Registration and Birth Certificates* (Final Report, August 2013) 2 [1.2].

59 Paula Gerber and Phoebe Irving Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18 *Legislation and Public Policy* 225, 235. See also Committee on the Rights of the Child, *General Comment No 10 (2007): Children's Rights in Juvenile Justice*, 44th sess, CRC/C/GC/10 (25 April 2007) [39].

60 See generally Malinda L Seymore, 'Obituary for the Birth Certificate' (2025) 78(3) *SMU Law Review* 639. See also Gerber and Lindner (n 59) 235–6.

include a dedicated section to collect information relating to surrogacy-related births, our recommendation supports compliance with art 7 of the CRC. Similarly, **Recommendation 45** supports the right to birth registration by ensuring that children born through overseas surrogacy are brought into Australian systems of registration and parentage by requiring their birth circumstances, gestational and genetic origins, and legal parentage be recorded.

The right to nationality

14.28 The right to nationality is relevant in the context of overseas surrogacy, where a risk of child statelessness may arise. According to the Peter McMullin Centre on Statelessness,

> risks of statelessness arising in the context of international surrogacy arrangements are well documented globally, these risks arise where neither the country of a child's birth nor the country of the parent's nationality recognise the child as a citizen.[61]

14.29 In its 2019 concluding observations on Australia, the CRC Committee stressed the importance of ensuring

> that children born through international surrogacy arrangements can obtain Australian nationality through a clear process and rules applied uniformly throughout the country.[62]

14.30 Child statelessness may prevent the intended parents from traveling home with the child, thereby affecting their ability to care for the child and act in the child's best interests. In fact, it may affect the ability of the child to be cared for more broadly as the child will not belong to any State. As observed by Te Aka Matua o te Ture | Law Commission (NZ), children born through surrogacy should enjoy the same rights as children not born through surrogacy, including the right to nationality.[63] This same sentiment is expressed in the Verona Principles, which state that

> [i]rrespective of the circumstances of their birth, all children have a right to a nationality. The right to acquire a nationality requires States to prevent statelessness of children.[64]

14.31 These concerns are addressed by the ALRC's overseas surrogacy recommendations, which seek to protect the right to nationality and reduce the risk of statelessness of children born through overseas surrogacy. The recommendations do not predicate recognition of the child's Australian citizenship

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61 Peter McMullin Centre on Statelessness, *Submission 174*.

62 Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, 2430th mtg, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [23(c)]. See also Committee on the Rights of the Child, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Namibia*, 96th sess, 2816th mtg, UN Doc CRC/C/NAM/CO/4-6 (26 June 2024) [21].

63 Te Aka Matua o te Ture | Law Commission (NZ), *Te Kōpū Whāngai: He Arotake Review of Surrogacy* (Pūrongo | Report No 146, 2022) 81–2 [3.50]–[3.52].

64 International Social Service (n 35) principle 13.1 (citations omitted).

on the nature of the overseas surrogacy arrangement (**Recommendations 36**–**47**). **Recommendation 39** would require the National Regulator to provide intended parents with information about the requirements for applications which are necessary for children born through overseas surrogacy to return to Australia. In addition, **Recommendations 46** and **47** would improve processes around Australian citizenship, passport, and visa applications, including by making it easier to renew the Australian passports of children born through overseas surrogacy.

The right to know and be cared for by parents

14.32 Article 7 of the CRC protects children's right, 'as far as possible', to 'know and be cared for' by their parents.[65] The right has two limbs: Australian law must ensure, as far as possible, that children know the identity of their parents, and that children are cared for by their parents.

14.33 To ensure that Australian law is consistent with this right, it is important to consider who is a 'parent' for the purposes of art 7. International law does not offer a clear definition of 'parent'. The CRC Committee has not defined 'parent' in any of its general comments, concluding observations, or other jurisprudence. However, it has acknowledged that international law recognises and protects diverse family formations.[66] Applying orthodox rules of construction to take into account the object and purpose of art 7, and that art 7 is a beneficial provision and ought to be given a broad construction, these two limbs may refer to different people in the surrogacy context.

14.34 The 'right to know' one's parents appears to be a right to know one's genetic or biological origins. It is linked to the child's right to identity (discussed below). The *travaux préparatoires* for the CRC indicate that the right 'to know' one's parents was introduced to ensure 'the psychological stability of the child', which was considered to be 'of equal importance to [the child's] physical and mental growth and helped to form [their] personality'.[67]

14.35 The CRC Committee has referred to the right to know one's parents in the context of laws that prevented adoptive children from knowing their biological parents,[68] prevented DNA tests to establish paternity,[69] and limited the ability of

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65 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1).

66 Committee on the Rights of the Child, *Role of the Family in the Promotion of the Rights of the Child*, 7th sess, UN Doc CRC/C/24 (8 October 1994) [2.1]. See also Human Rights Committee, *General Comment No 19: Article 23 (The Family)*, 39th Sess, UN Doc HRI/GEN/1/Rev.8 (vol 1) (compiled 8 May 2006, adopted 27 July 1990) [2].

67 Economic and Social Council, *Report of the Working Group on a Draft Convention on the Rights of the Child*, 45th sess, Agenda Item 13, UN Doc E/CN.4/1989/48 (2 March 1989) [94].

68 See, eg, Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Czechia*, 88th sess, 2562nd mtg, UN Doc CRC/C/CZE/CO/5-6 (22 October 2021) [32(a)].

69 See, eg, Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Morocco*, 67th sess, 1929th mtg, UN Doc CRC/C/MAR/CO/3-4 (14 October 2014) [32]–[33].

children born through ART to know their genetic origins.[70] In each case, the CRC Committee called on the states parties to adopt measures that would enable the child to identify their 'biological parent' or 'biological origin'.

14.36 In the context of surrogacy, the child's interest in knowing their origins may extend beyond knowing their genetic or biological origins, to their gestational origins. As discussed below, and in **Chapter 11**, the recommendations in this Report ensure children born through surrogacy can access information about their gestational origins, including the identity of their parents. The recommendations in this Report also complement existing legislation relating to donated gametes, which protects the right of the child to know their biological or genetic identity.

14.37 By contrast, the 'right to be cared for' by one's parents should be understood in the broader context of the CRC, which recognises the rights, duties, and responsibilities of parents in relation to a child.[71] So understood, the responsibilities of parents are the concomitant obligations to the right of the child to be cared for by the child's parents. It is therefore evident that this limb of the right is not concerned with establishing a genetic or biological link between the 'parent' and child, it is about ensuring that the child is able to be cared for by the person who has the responsibility and obligation to provide that care. To comply with this limb, the law must ensure that the person with 'parental responsibility' for the child is not impeded from providing care for the child, which would require ensuring that there is always a person or body who is recognised as having parental responsibility for the child. In this section, we use the term 'parental responsibility' in accordance with its ordinary meaning, and not the particular meaning that term has in Australian family law, or other areas of the law.[72] Further, in the surrogacy context, the ALRC considers that the word 'parent' should be construed widely to accommodate ART and modern family formation.[73] The UNICEF Implementation Handbook for the Convention on the Rights of the Child similarly states that the term 'parents' should include genetic parents, birth parents, and psychological parents. Psychological parents include 'those who cared for the child for significant periods during infancy and childhood'.[74] Parents through surrogacy would fall within this definition and will often also be the child's genetic parents.

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70 See, eg, Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland*, 86th sess, 1983rd mtg, UN Doc CRC/C/CHE/CO/2-4 (26 February 2015) [32]–[33].

71 See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 5, 18, 27.

72 See discussion in **Chapter 10** about the distinction between legal parentage and parental responsibility under Australian family law. In that chapter, the ALRC argues that the best interests of the child requires the child's parents to be legally recognised as such, rather than just being granted parental responsibility.

73 See John Tobin and Florence Seow, 'Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 237, 241. The view has also been expressed that international law allows for recognition of more than two parents: Tobin (n 29) 327.

74 UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 106.

14.38 While some may view the surrogate as the child's parent (and this represents the starting point of the current law in Australia), as discussed in **Chapter 10** of this Report, surrogates do not generally view themselves as the child's parent and generally have no desire to care for the child. Rather, it is the intended parents who view themselves (and are viewed by the child) as the parents and who care for and look after the day-to-day needs of the child.

14.39 In the ALRC's view, in the context of surrogacy, the child's right to be cared for by their parents requires a legal framework capable of recognising, as legal parents, the person or people who are willing to assume and have parental responsibility for the child. Further, the legal framework should not impede the capacity for care to be provided to the child by the person or people with parental responsibility. Our recommendations provide for this. Both the administrative and judicial pathways to parentage ensure that the duties and responsibilities associated with parenting are assumed either by intended parents or, where it is in the child's best interests and the surrogate wishes to do so, by the surrogate. Accordingly, our recommendations are compliant with both limbs that constitute the elements of the right of the child to know and be cared for by the child's parents.

Right to identity[75]

14.40 Article 8 of the CRC stipulates that 'States Parties undertake to respect the right of the child to preserve his or her identity'.[76] In addition to meriting its own article in the Convention, the right to identity is also relevant to considerations of a child's best interests under art 3 of the CRC (discussed above).[77] In relation to surrogacy, it has been interpreted as including the child's right to access information about their genetic, gestational, and social origins.[78] In this context, the child's right to identity has been the right most frequently emphasised by the CRC Committee, which has called on states parties to adopt legislation that respects this right, to prevent possible violations of this right, and to guarantee access to appropriate information.[79] The CRC Committee has stated categorically that states must provide

75 For a more detailed discussion of the right to identity see **Chapter 11** of this Report.

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

77 See Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [55]–[57].

78 See, eg, Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Georgia*, 74th sess, 2193rd mtg, UN Doc CRC/C/GEO/CO/4 (9 March 2017) [19(b)]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, 71st sess, 2104th mtg, UN Doc CRC/C/IRL/CO/3-4 (1 March 2016) [34(a)]; Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) [34]; International Social Service (n 35) principle 11.1.

79 International Social Service, *Legal Trends in Surrogacy: Towards a Greater Protection for the Rights of Children Born Through Surrogacy?* (2025) 21. See, eg, Committee on the Rights of the Child, *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Namibia*, 96th sess, 2816th mtg, UN Doc CRC/C/NAM/CO/4-6 (26 June 2024) [21].

children born through surrogacy with access to identity related information about their gestational origins.[80] Access to such information is critical to the realisation of identity rights. More broadly, protection of the rights of the child to identity also supports the enjoyment of other rights, including the rights to health and culture.[81] Numerous submissions, including those that were broadly opposed to surrogacy, recognised the child's right to know their origins and supported measures designed to protect the identity rights of people born through surrogacy.[82]

14.41 Reflecting those rights, the ALRC recommends an addendum to the child's birth certificates, which would notify them that further information about their birth is available (**Recommendation 30**), and a National Surrogacy Register that would contain an entry with information about the surrogate and surrogacy arrangement for every person born through surrogacy (**Recommendation 31**).[83] Providing information as an addendum attached to the birth certificate (rather than by notation on the actual certificate) would ensure that people born through surrogacy can access information about their gestational origins, while protecting their right to privacy under art 16 of the CRC.[84] This would preserve their choice about whether and when to reveal the circumstances of their birth.

14.42 Overseas surrogacy can present heightened risks to a child's right to identity because it may be more difficult to ensure that accurate information about the child's genetic and gestational origins is collected, preserved, and made available to the child over time. This is for four main reasons. First, Australia's capacity to regulate conduct overseas is limited (see below discussion on extraterritoriality). Second, some overseas jurisdictions permit anonymous gamete donation or anonymous surrogates. Third, record-keeping standards may be inadequate. Fourth, it may

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80 Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Georgia*, 74th sess, 2193rd mtg, UN Doc CRC/C/GEO/CO/4 (9 March 2017) [19(b)]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland*, 71st sess, 2104th mtg, UN Doc CRC/C/IRL/CO/3-4 (1 March 2016) [34(a)]; Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-Third Session*, 63rd sess, 1815th mtg, UN Doc CRC/C/ISR/CO/2-4 (4 July 2013) [34].

81 See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 24, 30–1.

82 See, eg, Name withheld, *Submission 12*; Name withheld, *Submission 19*; Australian Christian Lobby, *Submission 104*; Not published, *Submission 116*; Jigsaw Queensland Inc., *Submission 163*; Not published, *Submission 172*; Name withheld, *Submission 173*; Not published, *Submission 206*; Not published, *Submission 220*; Name withheld, *Submission 225*; Name withheld, *Submission 238*; Anglican Church Diocese of Sydney, *Submission 247*; Active Watchful Waiting Inc., *Submission 250*; Equality Australia, *Submission 253*; Rainbow Families, *Submission 260*; Feminist Legal Clinic Inc., *Submission 271*; Not published, *Submission 274*; ANZICA, *Submission 277*; Name withheld, *Submission 334*; M Quinlan, *Submission 381*; ARMS (Vic), *Submission 408*.

83 See, eg, Donor Conceived Families Australia, *Submission 311*, which supports the creation of a federal register to store and facilitate release of information on gamete donors and surrogates.

84 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16. The importance of protecting the privacy of people born through surrogacy by avoiding notations on the face of the birth certificate was expressed in several submissions: see, eg, Donor Conceived Families Australia, *Submission 311*.

be practically difficult for a person born through overseas surrogacy to locate their surrogate over time. Our overseas surrogacy recommendations are aimed at addressing these risks.

14.43 **Recommendation 37** would require the National Regulator to compile Responsible Overseas Surrogacy Guidelines, which would specify minimum content requirements that an overseas surrogacy agreement must comply with, including that an overseas surrogacy agreement must not involve any significant risk to, amongst other things, a child's right to identity. **Recommendation 43** provides that, in summary, intended parents are prohibited from entering into a surrogacy arrangement unless it complies with the minimum content requirements set out in the Responsible Overseas Surrogacy Guidelines. In addition, and consistent with the Verona Principles,[85] **Recommendation 45** would require parents to provide the National Regulator with sufficient identity-related information for inclusion on the National Surrogacy Register. This includes information about the surrogate; genetic origins; the country of birth; and details of the relevant surrogacy agency, fertility clinic and doctor. Inclusion of these details aims to protect the child's right to identity and information about their origins. Failure to comply with the requirements in **Recommendations 37**, **43**, and **45** would expose parents to liability to a civil penalty. These recommendations, to the extent practicable, regulate overseas surrogacy arrangements entered into by Australian citizens and permanent residents, and seek to ensure that the identity of children born through those arrangements are upheld.

14.44 The domestic surrogacy regime proposed is compliant with the requirements of art 8. The ALRC considers that in so far as it is practicable to do so, the regime which we have proposed for overseas surrogacy is also compliant.[86]

Sale of a child

14.45 Article 35 of the CRC states that

> States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.[87]

14.46 The relevant question for the purpose of this Report is whether surrogacy constitutes the sale of a child, in violation of art 35 of the CRC and its

85 International Social Service (n 35) [11.2]–[11.4].

86 See *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b), which requires the ALRC to ensure that its recommendations are consistent with the ICCPR 'as far as practicable'.

87 *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, art 1 of which states that 'States Parties shall prohibit the sale of children'.[88] Importantly, the Optional Protocol defines the sale of children as

> any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.[89]

Domestic surrogacy

14.47 Applying the definition provided by the Optional Protocol, the domestic surrogacy recommendations in this Report are carefully tailored to ensure surrogacy does not amount to the sale of children.[90]

14.48 **Recommendation 1** prohibits domestic surrogacy for profit or reward and, in doing so, prevents a surrogate from receiving remuneration or any other consideration. As outlined in **Chapter 2**, that prohibition defines the parameters for lawful domestic surrogacy under our proposed domestic regime. Those parameters preclude receiving remuneration or any other consideration for the child. **Recommendations 23** and **24** allow payments to be made to the surrogate, but those payments are for costs incurred and losses suffered by the surrogate.[91] They are not 'remuneration or any other consideration'. Additionally, those recommendations include mechanisms to protect against the recovery of loss being used to make a disguised remunerative payment. Accordingly, surrogacy

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88 Ibid; *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. There is general consensus that child trafficking is a heinous crime. It is captured by its own offence within the Commonwealth Criminal Code: *Criminal Code 1995* (Cth) s 271.4. Where surrogacy constitutes child trafficking it is rightly captured by this offence. The view was expressed in some submissions that surrogacy constitutes child trafficking: see, eg, J McHitchinson, *Submission 245*.

89 *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 2.

90 Some scholars and organisations, as well as some submissions to this Inquiry, consider that surrogacy arrangements that permit payment to the surrogate, beyond reimbursement of reasonable expenses, involve the sale of a child. See, eg, Tobin (n 29) 335–8; FINRRAGE (Australia), *Submission 180*; Australian Catholic Bishops Conference, *Submission 187*. Others have argued that there is no sale of a child in such an arrangement, as the exchange of money is compensation for the surrogate's reproductive labour rather than for the child: see generally Jason KM Hanna, 'Revisiting Child-Based Objections to Commercial Surrogacy' (2010) 24(7) *Bioethics* 341. See also Paula Gerber and Katie O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Ashgate Publishing, 2015) 81, 96–9. The former Special Rapporteur on the sale and sexual exploitation of children has observed that 'a truly "altruistic" surrogacy does not constitute sale of children', noting that some surrogacy arrangements that are called 'altruistic' are not properly so-called, given the broad interpretation that is often given to reimbursement of expenses: Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [69].

91 **Chapter 8** discusses the concepts of 'costs incurred' and 'losses suffered', and explains how the recommended cost and loss recovery system would operate.

conducted in accordance with our proposed domestic surrogacy framework would not constitute a sale of a child within the meaning of the Optional Protocol.

14.49 Further, in relation to a second necessary element of the sale of a child under the Optional Protocol, that the remuneration or other consideration be 'for' the transfer of the child, there is no aspect of the domestic regime proposed that would make the transfer of a child contingent upon the payment of any money or the provision of any consideration to the surrogate. That is so because transfer of the child occurs by reason of the conferral of legal parentage. Legal parentage is not contingent on any payment or any consideration being provided to the surrogate. It is either conferred by operation of law in respect of the administrative pathway to legal parentage (**Recommendation 28**), or by a judicial order based on the best interests of the child (**Recommendation 29**). The surrogate's entitlement to be reimbursed for costs and losses connected to the surrogacy arrangement is not contingent on the transfer of a child. That entitlement subsists in the event of a still birth and also in the event that legal parentage is conferred by judicial order on the surrogate and not the intended parents.

14.50 Accordingly, the proposed domestic regime is compliant with the prohibition on the sale of children.

Overseas surrogacy

14.51 Overseas surrogacy arrangements raise heightened human rights risks, including in relation to the prohibition on the sale of a child. In practice, overseas surrogacy arrangements commonly involve intended parents from jurisdictions where surrogacy for profit or reward is prohibited engaging, via an intermediary, in arrangements in jurisdictions where surrogacy for profit or reward is permitted, or where surrogacy is poorly regulated (**Chapter 13**).

14.52 To assess whether the ALRC's recommendations concerning overseas surrogacy are consistent with Australia's international law obligations, two questions must be considered: first, whether Australia's obligations extend extraterritorially;[92] and, second, whether and in what circumstances surrogacy for profit or reward constitutes the sale of a child within the meaning of the Optional Protocol. These questions will be dealt with in turn.

14.53 The first issue that requires consideration is whether Australia has extraterritorial obligations to prohibit the sale of a child in surrogacy arrangements which involve the birth of a child overseas. The Optional Protocol explicitly requires extraterritorial application with respect to the particularly exploitative acts listed in art 3(1). These include the sale of children for sexual exploitation, organ transfer for

92 Extraterritoriality refers to a State making, applying, and enforcing 'rules of conduct in respect of persons, property or events beyond its territory': M Kamminga, 'Extraterritoriality' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2020) [1].

profit or forced labour, improper inducement of consent to adoption, child prostitution, and child pornography.[93]

14.54 The Guidelines regarding the implementation of the Optional Protocol were adopted by the Committee on the Rights of the Child in 2019 and provide the principal interpretive guidance on implementation of the Optional Protocol. They state that, 'as a minimum, State parties must establish criminal jurisdiction over all offences mentioned in art 3(1) of the Optional Protocol'.[94] In relation to art 3(1) offences, the guidance goes on to state that

> each State party should also establish its jurisdiction over offences covered by the Optional Protocol that are committed outside its territory (extraterritorial jurisdiction) when the alleged offender is a national of that State or a person whose habitual residence is in its territory, or when the child victim is a national of that State.[95]

14.55 Read together, the Optional Protocol and the Committee's interpretive guidance suggest that Australia's extraterritorial obligations are confined to the specific offences listed in art 3(1), which concern serious forms of harm and exploitation, unless Australia determines to take on additional obligations. This accords with statements from the CRC Committee that 'extraterritorial jurisdiction should be interpreted restrictively', and limited to exceptional circumstances.[96] This also aligns with the Attorney-General's Department's submission to the House of

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93 *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 4. See also Joint Standing Committee on Treaties, Parliament of Australia, *Treaties Tabled on 13 September and 11 October 2005* (2005) 11–17.

94 Committee on the Rights of the Child, *Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 81st sess, UN Doc CRC/C/156 (10 September 2019) [80].

95 Ibid [82].

96 The CRC Committee has reiterated that states parties' extraterritorial obligations under the CRC should be interpreted narrowly, and that the extraterritorial scope of the CRC should be confined to exceptional circumstances: Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 106/2019*, 88th sess, UN Doc CRC/C/88/D/106/2019 (22 September 2021) (*'Sacchi v Argentina'*) [10.3]; Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 107/2019*, 88th sess, UN Doc CRC/C/88/D/107/2019 (22 September 2021) (*'Sacchi v Argentina'*) [9.3]. See John Tobin, 'Article 4: A State's General Obligation of Implementation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 108, 147–57. See also *Al-Skeini v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011) [131]–[142]; *Catan v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application Nos 43370/04, 8252/05 and 18454/06, 19 October 2012) [105]; *State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights (Advisory Opinion)* (Inter-American Court of Human Rights, OC-23/17, 15 November 2017) [81].

Representatives Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements, that

> Australia's international human rights obligations only apply to people within its territory and subject to its jurisdiction … Consistent with the principle of State sovereignty, the relevant international human rights obligations in respect of individuals involved in surrogacy will generally be those of the State in which the relevant practice occurs.[97]

14.56 There are, however, more expansive interpretations of states parties' extraterritorial obligations.[98] Under an expansive approach, states parties are understood to have implied obligations to engage in international cooperation and assistance and, where they are in a position to do so, must take reasonable steps to respect, protect, and fulfil human rights beyond their territory. This expansive interpretation is supported by the non-binding, expert-drafted Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights ('Maastricht Principles'), which declare that all states

> have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extra territorially.[99]

14.57 Relevant to the discussion of regulating Australians' engagement in overseas surrogacy, the Commentary to the Maastricht Principles notes that the

> duty of the state to protect human rights by regulating the conduct of private actors extends to situations where such conduct may lead to violations of human rights in the territory of another state.[100]

14.58 Taking this approach, Australia would be required to take reasonable steps to prevent Australians from participating in overseas surrogacy arrangements that pose human rights risks to people in another jurisdiction.

14.59 For the purposes of assessing the ALRC's recommendations against Australia's international obligations, it is not necessary for us to determine whether the restrictive or expansive approach to extraterritoriality is correct. Rather, we have proceeded on the basis that as a matter of good policy (rather than strict legal obligation), the expansive view should be accepted. Australia should do

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97 Attorney-General's Department (Cth), Submission No 46 to 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* (10 February 2016) 4.

98 See Tobin (n 96) 147–57. See generally Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law* 295.

99 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2012) [3].

100 Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34(3) *Human Rights Quarterly* 1084, 1135.

what it practicably can to protect the human rights of people living within its territory, and beyond. Specifically, and as is evident from our overseas surrogacy recommendations (**Chapter 13**), we consider that Australians entering into overseas surrogacy arrangements should, as far as practicable, be subject to extraterritorial obligations directed at protecting relevant human rights.

14.60 For example, and as outlined above, **Recommendation 37** requires the National Regulator to compile Responsible Overseas Surrogacy Guidelines, which would specify the minimum content requirements that an overseas surrogacy arrangement must comply with to guard against significant risks, including in relation to the prohibition on the sale of children. **Recommendation 41** ensures intended parents obtain legal advice in relation to their obligations prior to entering into overseas surrogacy arrangements. **Recommendation 43** stipulates due diligence obligations to the effect that intended parents are prohibited from entering into a surrogacy arrangement unless a reasonable person would be satisfied that the arrangement complies with the minimum content requirements and will not involve a significant risk of the sale of a child. Failure to comply would expose parents to liability to a civil penalty. It is intended that the Responsible Overseas Surrogacy Guidelines and minimum content requirements are informed by the definition of a sale of a child in the Optional Protocol and the interpretative guidance to which we now turn.

14.61 Some human rights experts have expressed the view that 'commercial surrogacy' inherently involves the sale of children, and that the CRC and Optional Protocol's silence on the question should not be indicative of tacit approval of commercial surrogacy.[101] However, several influential documents have adopted a more nuanced position which, in our view, is more appropriately grounded in the definition of the sale of a child expressly provided by the Optional Protocol.[102]

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101 See, eg, Reem Alsalem, 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) [42]. See generally Adeline A Allen, 'Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human' (2018) 41(3) *Harvard Journal of Law and Public Policy* 753; David M Smolin, 'Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children' (2016) 43 *Pepperdine Law Review* 265.

102 See, eg, Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [72]–[79]; Committee on the Rights of the Child, *Concluding Observations on the Report Submitted by Georgia under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 82nd sess, 2430th mtg, UN Doc CRC/C/OPSC/GEO/CO/1 (30 October 2019) [22]; Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 75th sess, 2221st mtg, UN Doc CRC/C/OPSC/USA/CO/3-4 (12 July 2017) [24].

14.62 Although the Committee on the Rights of the Child has not had the opportunity to consider the issue in individual communications, in its concluding observations it has drawn a distinction between regulated and unregulated 'commercial surrogacy',[103] and members of the Committee have indicated that whether a sale occurs is to be assessed by reference to whether any payment provided to the surrogate is wholly divorced from the transfer of the child.[104] On this point, the Committee's most recent concluding observations on the United States of America's compliance with the Optional Protocol are instructive, given the observations were in relation to a jurisdiction where regulated 'commercial surrogacy' is well established. The Committee noted that while surrogacy

> is a complex area … the Committee is nevertheless concerned that widespread commercial use of surrogacy in the State party may lead, under certain circumstances, to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage.[105]

14.63 To similar effect, the former United Nations Special Rapporteur on the sale and sexual exploitation of children in her 2018 report, having observed that 'commercial surrogacy as currently practised usually constitutes sale of children, as defined under international human rights law', nevertheless concluded that commercial surrogacy

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103 For example, in its 2018 concluding observations on the Lao People's Democratic Republic, the CRC Committee noted that it was 'seriously concerned' by the insufficient measures taken to address '*unregulated* commercial surrogacy which may amount to the sale of children': Committee on the Rights of the Child, *Concluding Observations on the Combined Third to Sixth Periodic Reports of the Lao People's Democratic Republic*, 79th sess, 2340th mtg, UN Doc CRC/C/LAO/CO/3-6 (1 November 2018) [44] (emphasis added). See also Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the United States of America Submitted under Article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography*, 62nd sess, 1748th mtg, UN Doc CRC/C/OPSC/USA/CO/2 (2 July 2013) [24]–[25]. In its 2014 concluding observations on India, the CRC Committee observed that 'commercial surrogacy' that is not properly regulated leads to the sale of children, and called on the state to take action to prevent the 'misuse of surrogacy': Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Reports of India*, 66th sess, 1901st mtg, UN Doc CRC/C/IND/CO/3-4 (7 July 2014) [57(d)], [58(d)]. Similarly, in its 2019 concluding observations on Georgia, the Committee raised concern 'that surrogate motherhood, *if not properly monitored and regulated*, may lead to the sale of children': Committee on the Rights of the Child, *Concluding Observations on the Report Submitted by Georgia under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 82nd sess, 2430th mtg, UN Doc CRC/C/OPSC/GEO/CO/1 (30 October 2019) [22] (emphasis added).

104 See International Social Service (n 35) principle 14.7. The Verona Principles were supported by 15 members of the Committee on the Rights of the Child: see ibid 3.

105 Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 75th sess, 2221st mtg, UN Doc CRC/C/OPSC/USA/CO/3-4 (12 July 2017) [24]. See further discussion in **Chapter 13**.

> could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child.[106]

14.64 The former Special Rapporteur, in her supplementary 2019 report, went on to outline conditions, which must be satisfied to ensure commercial surrogacy does not amount to sale of children.[107] These conditions are reiterated and expanded upon in the Verona Principles, which provide specific guidance on how regulated 'commercial surrogacy' arrangements can avoid breaching the prohibition. In summary, the Verona Principles provide that regulation should ensure:

- the surrogate retains the right at birth to consent or not to the transfer of parentage;
- all remuneration provided to the surrogate be in advance of any post-birth transfer of parentage, and be non-refundable;
- all remuneration is reported and properly regulated by law; and
- intermediaries are properly regulated by law.[108]

14.65 Overall, while the authorities discussed above consistently warn of the risk that 'commercial surrogacy' may amount to the sale of children, the general conclusion is that compliance with the prohibition turns not on the mere existence of the commercial arrangement, but on the conditions attached to payment. Specifically, payments must precede any transfer of parentage and must not be conditional upon it.

14.66 The ALRC agrees that not all surrogacy for profit or reward equates to the sale of a child. Our overseas surrogacy recommendations therefore guard against arrangements which would infringe the prohibition on the sale of a child. Although, as discussed above, international law does not strictly require Australia to address, with extraterritorial effect, all overseas surrogacy arrangements that may amount to the sale of a child, the ALRC's recommendations adopt a protective approach and would nevertheless do so.

14.67 The Responsible Overseas Surrogacy Guidelines put forward in **Recommendation 37** would inform intended parents about the prohibition and set out the minimum requirements overseas surrogacy arrangements must meet to avoid being in breach. Specifically, it is intended that the minimum content requirements would prohibit any contractual provision which linked any payment to be made by intended parents to the transfer of the child. Additionally, they would require the

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106 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [72].

107 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, *Thematic Study on Safeguards for the Protection of the Rights of Children Born from Surrogacy Arrangements*, 74th sess, UN Doc A/74/162 (15 July 2019) [73]–[79].

108 See International Social Service (n 35) principles 14.6–14.7.

inclusion of the details and timing of any payment to be made under the agreement, that all payments are made before the birth of the child and not be contingent on the child's birth, and that all payments are clearly and transparently documented. As discussed above, failure to comply with due diligence obligations, including in relation to minimum content requirements, would expose intended parents to civil penalty liability (**Recommendation 42**–**43**). Taken together, our overseas surrogacy recommendations are directed at reducing the risk of Australians entering harmful or exploitative overseas surrogacy arrangements including those involving the sale of a child. The recommendations go beyond what is required of Australia under international law. If it were the case that Australia has extraterritorial obligations to prohibit the sale of a child, the recommendations would, as far as is practicable,[109] comply with those obligations.

Surrogates' rights

14.68 The key treaties governing the rights of surrogates at the international level are:

- ICCPR;[110]
- ICESCR;[111] and
- CEDAW.[112]

14.69 The ICCPR is a general treaty containing a range of civil and political rights, some of which are relevant in the surrogacy context. These include, for example, the right to be free from discrimination,[113] the right to privacy,[114] and the right to be free from torture or other cruel, inhuman, or degrading treatment.[115] ICESCR is also a general treaty, containing a range of economic, social, and cultural rights, some of which are relevant in the surrogacy context. These include, for example, the right to health[116] and the right to work.[117] Finally, CEDAW is a key treaty that is relevant to any consideration of the rights of the surrogate, as it is the only treaty dedicated specifically to protecting women's rights. This section discusses the rights in the ICCPR, ICESCR, and CEDAW that are most relevant in the surrogacy context and explains how our recommendations align with those rights.

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109 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

110 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (n 3).

111 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); United Nations Human Rights Office of the High Commissioner (n 4).

112 *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); United Nations Human Rights Office of the High Commissioner (n 4).

113 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 26.

114 Ibid art 17.

115 Ibid art 7.

116 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1).

117 Ibid art 6.

Right to autonomy and reproductive freedom

14.70 Central to a discussion on the human rights of the surrogate is the right to autonomy. The right to autonomy, closely connected to rights to privacy and bodily integrity, is reflected in art 17 of the ICCPR, which provides in part that

> [n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.[118]

14.71 Although art 17 does not expressly refer to 'autonomy', the right to privacy protected by this article has been interpreted broadly by the United Nations Human Rights Committee as protecting a sphere of individual autonomy and personal decision making.[119]

14.72 The right to personal autonomy and reproductive freedom is also found within the general 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' contained in art 12 of ICESCR.[120] The Committee responsible for interpreting ICESCR explains the content of this right further in General Comment No 14, noting that the right to health

> contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.[121]

14.73 Surrogacy is often framed as an exercise of the surrogate's autonomy, with feminist support for surrogacy frequently emphasising that a central issue in surrogacy is the scope of women's freedom, including their freedom to control their bodies, lives, and reproductive capacity, and to decide how to use this reproductive capacity.[122]

14.74 In this context, the right to autonomy and reproductive freedom requires that people are free to make choices about their own bodies, including by making an informed decision about whether to act as a surrogate, without being coerced or

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

119 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994, adopted 31 March 1994) ('*Toonen v Australia*'); Attorney-General's Department (Cth), 'Privacy and Reputation: Public Sector Guidance Sheet' <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/privacy-and-reputation>.

120 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

121 Committee on Economic, Social, and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) [8].

122 Christine T Sistare, 'Reproductive Freedom and Women's Freedom: Surrogacy and Autonomy' in Alison M Jaggar (ed), *Living With Contradictions: Controversies in Feminist Social Ethics* (Routledge, 1994) 395, 395–6.

inappropriately induced, and to receive any medical treatment only with informed consent.[123] Several submissions to this Inquiry emphasise the right to autonomy.[124]

14.75 However, surrogacy does not always operate as an exercise of autonomy. In the absence of effective regulation, surrogacy can infringe on the surrogate's right to autonomy if informed consent is absent, including if there is coercion or financial inducement. This may occur, for example, where economic inequality places pressure on a person to become a surrogate, or where they enter an agreement without completely understanding its terms. A surrogate's autonomy may also be compromised if the arrangement involves pressure to be subject to particular medical procedures or a lack of control over the pregnancy (**Chapter 12**). In these circumstances, surrogacy may be inconsistent with, rather than an exercise of, the right to autonomy.

14.76 In developing our recommendations, we have sought to embed myriad safeguards that promote and, as far as possible, secure the surrogate's free and informed consent, thereby protecting the right to autonomy. These safeguards are more fully discussed and explained in the other chapters of this Report. For example:

- **Recommendation 12** would require that the surrogate be at least 25 years old, to ensure sufficient maturity to make the decision to enter a surrogacy arrangement. Evidence suggests that setting the minimum age for surrogates at 25, rather than 18, better ensures sufficient maturity to give free and informed consent and reduces the risk of harm and exploitation.[125] An accredited counsellor may waive this requirement if the surrogate is sufficiently mature to provide their informed consent.[126]
- **Recommendation 14** would help ensure that surrogacy proceeds only where the risks are understood by requiring that the surrogate must have previously carried a pregnancy and given birth to a live child. This requirement may be dispensed with if the surrogacy can proceed without undue risk to the surrogate's health and if the parties understand the potential risks associated with the surrogacy arrangement and are making a free and informed decision to continue with the arrangement.

123 Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23 *Journal of Law and Medicine* 275, 289. It should be noted that several submissions to this Inquiry questioned whether it is possible to give true informed consent prior to the birth of the child: see, eg, ARMS (Vic), *Submission 275*; M Quinlan, *Submission 381*; World Youth Alliance, *Submission 411*.

124 See, eg, Name withheld, *Submission 126*; Name withheld, *Submission 185*; Name withheld, *Submission 205*; Name withheld, *Submission 259*; Not published, *Submission 274*; Name withheld, *Submission 335*; Name withheld, *Submission 339*.

125 See Mariam Arain et al, 'Maturation of the Adolescent Brain' (2013) 9 *Neuropsychiatric Disease and Treatment* 449, 451; Grace Icenogle et al, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample' (2019) 43(1) *Law and Human Behavior* 69, 86 fig 2. See also Not published, *Submission 172*; M Montrone, *Submission 263*; ANZICA, *Submission 277*; L Ransome, *Submission 380*.

126 The National Regulator may also dispense with the requirement in cases of a minor procedural irregularity or exceptional circumstances (see **Recommendation 9**).

- **Recommendation 15** would require a medical assessment which would help ensure the surrogate receives the information needed to understand the health risks of the proposed arrangement before deciding whether to proceed.
- **Recommendations 17** and **18** would require all parties to receive independent legal advice and counselling about significant issues raised by the arrangement. This would help ensure that each party understands the nature and implications of the arrangement.
- **Recommendation 17** would require legal advice to cover the surrogate's bodily integrity, autonomy, and the legal requirement for informed consent in relation to medical treatment or procedures that directly affect them. Further, surrogacy agreements would not be able to include any provision that inhibits this right and must expressly confirm these rights, with an unenforceable carveout for reasonable medical advice (**Recommendations 20** and **21**).
- **Recommendation 20** would promote informed decision making by requiring the parties to enter into a signed, compliant surrogacy agreement. This reduces the scope for misunderstanding or pressure, and helps ensure the arrangement proceeds on a shared understanding of each party's rights and obligations.
- **Recommendations 8** and **9** would establish a role for Surrogacy Support Organisations, overseen by a National Regulator (**Recommendation 6**). They would be a core part of the newly established infrastructure, ensuring compliance with key safeguards aimed at facilitating informed consent.
- **Recommendation 35** would prohibit individuals and organisations from coercing or attempting to coerce a person's involvement in a domestic surrogacy arrangement. Coercion is the antithesis of informed consent (**Chapter 12**). A prohibition on coercion therefore protects a person from being involved in a surrogacy arrangement against their will, which supports informed consent.

14.77 The ALRC recognises that many of these safeguards may, strictly speaking, limit the surrogate's right to autonomy as they regulate the circumstances in which a surrogate may decide to enter into a surrogacy arrangement. For example, the minimum age requirement, the requirement that the surrogate has previously given birth to a live child, and the requirements for a health assessment, legal advice, and counselling all impose conditions on a surrogate's ability to make decisions about their own body. Some may argue these limitations are paternalistic and risk treating surrogates as individuals in need of protection, rather than as rights-bearing decision makers.

14.78 However, it is our conclusion that the limitations are justified as the safeguards are directed at the legitimate purpose of ensuring the surrogate understands the full spectrum of implications of the arrangement, and is able to give their free and informed consent. Together with the prohibition on surrogacy for profit or reward, these safeguards reduce the risk of coercion, inducement, or lack of information sufficient to make a free and informed decision. It is also our view that these safeguards are proportionate to the risks, and sufficiently flexible to

address the unique circumstances of each surrogacy arrangement. The two most onerous requirements — that the surrogate must be 25 years old and have carried a pregnancy and given birth to a live child — can both be dispensed with under certain circumstances. Properly understood, these requirements seek to maximise the surrogate's right to autonomy, while embedding flexible safeguards to ensure the right is exercised in a free and informed manner.

14.79 The ALRC also recognises that prohibiting surrogacy for profit or reward — as we have recommended — may limit the surrogate's autonomy and reproductive freedom by restricting the circumstances under which a surrogate may use their reproductive capacity, including by preventing them from receiving remuneration. This issue is discussed fully in **Chapter 2** where we conclude that the prohibition on any remuneration to the surrogate is compliant with Australia's international law obligations, but we note that there is a risk of non-compliance in the future.

14.80 In relation to overseas surrogacy, in line with the discussion above relating to an expansive view of extraterritoriality, the recommendations relating to overseas surrogacy are in part aimed at ensuring that overseas surrogacy arrangements are protective of the surrogate's right to autonomy. The ALRC has taken this approach as a matter of good policy rather than strict international law obligation. The recommendations require the Responsible Overseas Surrogacy Guidelines to specify the minimum content requirements of an overseas surrogacy agreement so that the agreement does not involve any significant risk of exploitation of the surrogate (**Recommendation 37**). That requirement will likely involve the inclusion of a provision in a surrogacy agreement that protects the surrogate's autonomy (see **Chapter 13**). Accordingly, even if it were the case that Australia had extraterritorial obligations to protect the overseas surrogate's right to autonomy, the proposed recommendations dealing with overseas surrogacy are, as far as practicable,[127] compliant.

Right to be free from discrimination

14.81 The right to be free from discrimination is enshrined in art 2 of CEDAW, which states that

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.[128]

14.82 Article 1 adopts a broad conception of discrimination against women that encompasses any distinction, exclusion, or restriction based on sex that either intends to impair, or in practice impairs, women's equal enjoyment of human rights and fundamental freedoms. The CEDAW Committee has issued a General Recommendation on art 2, which establishes it as foundational to all other CEDAW

127 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

128 See also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.

articles, makes clear that the prohibition on discrimination against women covers direct, indirect, and intersectional discrimination, and requires states parties to take all appropriate measures to implement its obligations.[129] The CEDAW Committee's understanding of discrimination is considerably broader than differential treatment or treatment resulting in inequality, and includes gender-based violence,[130] gender stereotypes,[131] exploitation,[132] and trafficking.[133]

14.83 The ALRC considers that exploitative treatment of a surrogate would constitute discrimination under CEDAW.[134] Exploitative surrogacy may arise where a surrogate is treated unfairly for another's gain, including where there is an absence of free and informed consent, bodily or reproductive autonomy, or adequate reimbursement for costs or losses (as briefly indicated below). Australia therefore has a positive duty to prevent such conduct. Our recommendations are designed to protect against surrogate exploitation by ensuring their free and informed consent (discussed above), ensuring they are not financially disadvantaged (**Recommendations 23**–**24**) or coerced (**Recommendation 35**), and requiring that risks to their health (**Recommendations 14**–**15**) are identified before any approval of the arrangement.

129 Taking 'all appropriate measures' in implementation focuses on measures that will enable the practical realisation of formal and substantive equality for women and men, and may include matters such as establishing comprehensive action plans, mechanisms for monitoring implementation, education, complaints mechanisms, ensuring access to effective remedies, government accountability, and providing adequate financial and administrative support: Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [24], [36].

130 Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence Against Women*, 11th sess, UN Doc A/47/38 (1992); *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, UN Doc A/59/38 (18 March 2004) annex I.

131 *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 5.

132 The right to be free from exploitation is not a single, standalone right but is derived from rights such as the right to be free from trafficking enshrined in art 6 of CEDAW, the right to be free from discrimination, as well as ICCPR rights such as the art 7 right to be free from cruel, inhuman, or degrading treatment or the art 8 right to be free from slavery and forced labour.

133 Committee on the Elimination of Discrimination against Women, *General Recommendation No 38: Trafficking in Women and Girls in the Context of Global Migration*, UN Doc CEDAW/C/GC/38 (20 November 2020) [20].

134 This is in addition to the right to be free from exploitation being included in art 6 of CEDAW, the right to be free from discrimination, as well as ICCPR rights such as the art 7 right to be free from cruel, inhuman, or degrading treatment or the art 8 right to be free from slavery and forced labour.

14.84 Article 5 of CEDAW, which requires states parties to eliminate gender stereotypes and structural discrimination, is also relevant to the surrogacy context. The CEDAW Committee, in its applicable General Recommendation, notes that the obligation in art 5

> is central to the transformative conception of equality in the Convention, requiring all branches of government to adopt appropriate measures to eliminate patterns, prejudices, and practices based on gender stereotypes.[135]

14.85 Gender stereotypes derive from patriarchal ideas, attitudes, and beliefs about women and their societal role. The CEDAW Committee expressly views all gender stereotypes as contributing to discrimination and thereby constituting a violation of CEDAW rights.[136] In the context of surrogacy, the relevant gender stereotype that risks being perpetuated is that women are valued principally for their reproductive capacity and are reduced to 'reproductive instruments rather than full human beings and members of society'.[137] This is the same stereotype that risks arising in all spheres of life where maternity presents: in work, family, public, and political life. The CEDAW Committee notes that

> women's capacity to reproduce and bear children has been consistently linked in many societies to a social obligation to be the primary care and support for their families, and in particular, the raising of children and the performance of household chores and responsibilities. The prevalence of such stereotypes has limited women's autonomy in choosing their life paths and in participating in the political and public life of their countries and communities. Gender stereotypes concerning women and their supposed inferior physical and intellectual capacities, and emotions, along with their reproductive capacity, have sustained the patriarchal perception that there is a need for male domination, power, control, and subordination of women, perpetuating gender-based violence.[138]

14.86 The relevant question for this Inquiry is whether surrogacy in and of itself will always and inevitably perpetuate this stereotype. It is acknowledged there is a range of views on this issue within feminist scholarship. Those who view surrogacy as a form of discrimination against women argue that it is a product of, and reinforces, patriarchal views that reduce women's value and role in society to their reproductive capacity.[139] A related reason why some feminists oppose surrogacy is reflected in the view that it commodifies the surrogate by reducing them to their reproductive

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135 Committee on the Elimination of Discrimination against Women, *Draft General Recommendation No 41 on Dismantling Gender Stereotypes and the Unequal Power Relations that Sustain Them*, UN Doc CEDAW/C/GC/41 (4 March 2026) [2].

136 Ibid [9].

137 Ibid [30].

138 Ibid [24].

139 See, eg, the seminal article: Margaret Jane Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1849, 1930. See also Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* (Spinifex Press, 2013) 180–1; Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Harper & Row Publishers, 1985) 220.

capacity.[140] This is closely connected to the argument that surrogacy perpetuates gender-based discrimination because that argument posits that commodification of women's reproductive capacity both reflects and reinforces structural gender inequality.

14.87 In her 2025 report focussing on surrogacy, Reem Alsalem, the United Nations Special Rapporteur on violence against women, its causes and consequences, expressed the view that surrogacy reinforces sexist stereotypes and called for the abolition of surrogacy on the basis that the practice of surrogacy

> is characterized by exploitation and violence against women and children, including girls. It reinforces patriarchal norms by commodifying and objectifying women's bodies and exposing surrogate mothers and children to serious human rights violations.[141]

14.88 Included in the human rights that the Special Rapporteur describes as being violated by the practice of surrogacy are the principle of human dignity,[142] the right to be free from torture and other cruel, inhuman, or degrading treatment,[143] and risks relating to human trafficking.[144]

14.89 The ALRC agrees that surrogacy raises acute human rights risks. However, we view the Special Rapporteur's reasoning as unpersuasive, for the following reasons:

- The Special Rapporteur almost exclusively focuses on the human rights risks associated with overseas surrogacy arrangements, particularly those involving significant socioeconomic disparities between the surrogate and intended

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140 See, eg, Rosalind Pollack Petchesky, 'The Body as Property: A Feminist Re-Vision' in Faye Ginsburg and Rayna Rapp (eds), *Conceiving the New World Order: The Global Politics of Reproduction* (University of California Press, 1995) 387, 395; Ekman (n 139) 157; Counsel for Amici Curiae, 15 Feminist Academics and Advocates, 'Motion for Leave to File Brief for *amici curiae* and Brief for 15 Feminist Academics and Advocates as *amici curiae* in Support of Petitioner', Motion for Leave to File Amicus Curiae Brief in *MC v CM*, No 17-129, 23 August 2017, 3–4. See generally Elizabeth S Anderson, 'Is Women's Labor a Commodity?' (1990) 19(1) *Philosophy and Public Affairs* 71.

141 Reem Alsalem, 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) [69].

142 Ibid [53].

143 Ibid [55].

144 Ibid [56]. Similar arguments have been presented in submissions to this Inquiry, with multiple submissions expressing the view that surrogacy amounts to violence, exploitation, and commodification, and generally violates the rights of surrogates: see, eg, Centre for Bioethics and Culture (US), *Submission 90*; Australian Christian Lobby, *Submission 104*; M Somerville, *Submission 106*; International Coalition for the Abolition of Surrogate Motherhood, *Submission 134*; Coalition of Australian Feminist Organisations, *Submission 155*; FINRRAGE (Australia), *Submission 180*; Casablanca Declaration Organisation, *Submission 199*; Active Watchful Waiting Inc., *Submission 250*; Not published, *Submission 261*; Name withheld, *Submission 269*; Feminist Legal Clinic Inc., *Submission 271*; Stop Surrogacy Now UK and Surrogacy Concern, *Submission 303*; Women's Bioethics Alliance, *Submission 349*; Stop Surrogacy Now UK & Surrogacy Concern, *Submission 384*; F Farmer, *Submission 405*; ARMS (Vic), *Submission 408*; Women's Forum Australia, *Submission 416*; Australian Christian Lobby, *Submission 419*.

parents. The report 'underrepresents the heterogeneity of experiences', including regulated domestic surrogacy and responsible overseas surrogacy arrangements.[145]

- The Special Rapporteur's analysis of informed consent is unconvincing. It is located within an argument that consent cannot justify extreme forms of exploitation, such as trafficking, slavery and torture, and cannot be free in circumstances of coercion. It is silent on consent in surrogacy arrangements that feature no exploitation or coercion. It fails to consider well-regulated, rights-respecting contexts like Australia, where informed consent is a legal requirement.[146] It presumes that women operating in regulated surrogacy contexts are unable to understand the implications of surrogacy, negotiate the terms of their participation, and make informed decisions about the use of their own bodies.
- The Special Rapporteur, in almost exclusively focusing on exploitative surrogacy arrangements, argues that all forms of surrogacy reinforce sexist stereotypes and the commodification of women. Her report does not accommodate or seek to address the alternative perspective that surrogacy can be viewed as a form of reproductive agency when consent is free and informed. Empirical research reveals that many surrogates feel empowered and valued as a result of the surrogacy experience.[147]
- The Special Rapporteur uses empirical research selectively in relation to the health outcomes for surrogates and children born through surrogacy. Legitimate criticism has been levelled at both the process undertaken in preparing,[148] and the substance of,[149] the Special Rapporteur's Report.

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145 Women Speak Tasmania, 'Analysis of the UN Report by Reem Alsalem Titled The Different Manifestations of Violence against Women and Girls in the Context of Surrogacy (A/80/158) — Women Speak Tasmania' <www.womenspeaktas.au/2025/07/24/analysis-of-the-un-report-by-reem-alsalem-titled-the-different-manifestations-of-violence-against-women-and-girls-in-the-context-of-surrogacy-a-80-158/>.

146 Informed consent has been recognised as a legal requirement in cases involving sterilisation procedures, and life-saving treatments: see, eg, *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* (1992) 175 CLR 218; *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88.

147 See generally Ezra Kneebone, Kiri Beilby and Karin Hammarberg, 'Experiences of Surrogates and Intended Parents of Surrogacy Arrangements: A Systematic Review' (2022) 45(4) *RBMO* 815.

148 In particular, concerns have been raised about potential bias on the part of Alsalem, including the framing of the report in a manner that appears to presuppose that surrogacy constitutes a form of gender-based violence, as well as its notable failure to engage with the substantial body of relevant doctrinal and empirical scholarship that could have added nuance to the analysis: Kirsty Horsey, 'UN Special Rapporteur's Surrogacy Report: Biased from the Outset', *PET* <www.progress.org.uk/the-un-special-rapporteurs-report-on-surrogacy-biased-from-the-outset/>.

149 Leading psychologist Professor Susan Golombok, for example, has referred to the report as 'advocacy masquerading as scholarship'. She has expressed the view that, in certain instances where credible empirical research is cited, research findings have been taken out of context and presented in a manner that is skewed and misleading. In addition, in Golombok's view, the report 'relied on a flawed argument about children's attachment' thereby lending 'scientific language to an ideological position': see Susan Golombok, 'Research or Belief: Surrogacy Families in the Political Crossfire', *PET* <www.progress.org.uk/when-research-challenges-belief-surrogacy-families-in-the-political-crossfire/>.

14.90 The ALRC does not agree that surrogacy is, in and of itself, discriminatory or inherently underpinned by a stereotype that reduces women to their reproductive capacity. That characterisation fails to distinguish between exploitative and rights-respecting surrogacy arrangements, and gives insufficient weight to the surrogate's right to autonomy and reproductive agency. Whether a surrogacy arrangement is discriminatory and inconsistent with CEDAW hinges on the presence or absence of free and informed consent, and whether the state has taken all appropriate measures to provide for such consent. Consent cannot be free and informed where there is exploitation, including coercion or financial inducement. In the ALRC's view, a properly regulated surrogacy framework that requires key safeguards to be met before an arrangement proceeds can adequately protect against breaches of CEDAW. The ALRC's domestic surrogacy recommendations are compliant with CEDAW because they take all appropriate measures to guard against discrimination. For example, the surrogate's free and informed consent is a precondition for accessing ART for the purposes of surrogacy and the administrative pathway to parentage (**Recommendations 12**, **14**, **17**–**20**), and penalties are imposed for exploitative conduct (**Recommendation 35**). Given that use of ART is essential in the context of gestational surrogacy, the most common form of surrogacy, these safeguards are likely, in practical terms, to make free and informed consent a precondition for most surrogacy arrangements, further supporting compliance with CEDAW.

14.91 This conclusion is supported by the approach taken by the CEDAW Committee. Although the Committee has not issued a general recommendation or individual communication dedicated to surrogacy, its relevant commentary has focused on risks of exploitation, economic vulnerability, coercion, and discrimination, rather than adopting a prohibitionist approach in relation to surrogacy. For example, in its General Recommendation No 39 on the Rights of Indigenous Women and Girls, the CEDAW Committee identified 'forced surrogacy' as a form of violence affecting Indigenous women and girls.[150] In its General Recommendation No 38 on the Trafficking in Women and Girls in the Context of Global Migration, the CEDAW Committee called on states parties to criminalise 'abusive surrogacy practices and the sale of children'.[151] Additionally, in its country specific concluding observations, the Committee has frequently called on states parties to adopt regulatory frameworks that would protect all parties to a surrogacy arrangement from exploitation, coercion, discrimination, and trafficking.[152] For example, in its 2025 concluding observations on Luxembourg, the Committee called on Luxembourg to adopt a regulatory framework

150 Committee on the Elimination of Discrimination against Women, *General Recommendation No 39: The Rights of Indigenous Women and Girls*, UN Doc CEDAW/C/GC/39 (31 October 2022) [37].

151 Committee on the Elimination of Discrimination against Women, *General Recommendation No 38: Trafficking in Women and Girls in the Context of Global Migration*, UN Doc CEDAW/C/GC/38 (20 November 2020) [112(c)].

152 See, eg, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth Periodic Report of Luxembourg*, 90th sess, UN Doc CEDAW/C/LUX/CO/8 (28 February 2025) [53(d)]; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of the Lao People's Democratic Republic*, 71st sess, UN Doc CEDAW/C/LAO/CO/8-9 (14 November 2018) [28(d)].

for surrogacy to protect surrogates, intended parents, and children born through surrogacy 'from exploitation, coercion, discrimination and trafficking'.[153]

Overseas surrogacy and the right to be free from discrimination

14.92 The CEDAW Committee has expressed concerns about the risk of exploitation associated with 'commercial surrogacy' practices, particularly in lower income countries that are popular destinations for overseas surrogacy.[154] The ALRC agrees with these concerns. As discussed in **Chapter 13**, the risks posed by overseas surrogacy depend on the level of regulation, and on legal, social, and economic conditions in the overseas jurisdiction. Those risks are greatest where surrogacy is unlawful or poorly regulated. The 2023 Law Commission of England and Wales, and Scottish Law Commission Report makes a similar argument, stating that the

> risks of exploitation will depend, for example, on the effectiveness of regulation provided by national laws in different countries, and the impact that the payment available to women to be a surrogate can have on the lives of the surrogate and her family. Concerns may be greatest where regulation is inadequate, the sums of money payable to women who act as surrogates are life-changing, and where women do not have equal access to employment, education or other opportunities. While we do not consider that all international arrangements will necessarily be exploitative, we consider that the risk of exploitation is considerably higher than in domestic agreements.[155]

14.93 To address the human rights risks posed by overseas surrogacy arrangements, the ALRC adopts a two-pronged approach (**Chapter 13**). The first is to introduce a more accessible, responsible, and supportive domestic framework which will drive down demand for overseas surrogacy. The recommendations seek to do this through measures to address the lack of available surrogates in Australia, strengthen support for surrogates and intended parents, and streamline recognition of legal parentage through the administrative pathway (**Chapter 1**). This approach reflects research and submissions indicating that intended parents would prefer to access surrogacy domestically.[156] Encouraging intended parents to pursue domestic surrogacy is

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153 Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth Periodic Report of Luxembourg*, 90th sess, UN Doc CEDAW/C/LUX/CO/8 (28 February 2025) [53(d)].

154 See, eg, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Ukraine*, 83rd sess, UN Doc CEDAW/C/UKR/CO/9 (1 November 2022) [45]–[46]; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of the Lao People's Democratic Republic*, 71st sess, UN Doc CEDAW/C/LAO/CO/8-9 (14 November 2018) [27]–[28].

155 Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law (Volume II: Full Report)* (Law Commission Report No 411, Scottish Law Commission Report No 262, 2023) 489 [16.10].

156 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, 1451. See, eg, P Hadfield-Jia, *Submission 71*; Name withheld, *Submission 76*; L Ransome, *Submission 144*; Not published, *Submission 221*; Department of Home Affairs (Cth), *Submission 248*; Name withheld, *Submission 278*; E Kneebone, *Submission 321*; Not published, *Submission 332*.

therefore one of the most effective ways to protect human rights, because domestic surrogacy can be directly regulated and supported by the safeguards recommended in this Report. The second is to deter harmful or exploitative overseas surrogacy by replacing the current passive approach to regulating overseas surrogacy with a proactive 'responsible overseas surrogacy framework' (as outlined in **Chapter 13**).

14.94 Whether our overseas surrogacy recommendations are compliant with Australia's obligations under CEDAW depends on whether, and to what extent, Australia has extraterritorial obligations. Australia currently criminalises, with extraterritorial effect, the most serious forms of exploitation that may arise in the context of surrogacy, including slavery and slavery-like offences,[157] forced labour, and trafficking offences.[158] Beyond those extreme forms of exploitation, recent general recommendations by the CEDAW Committee suggest that Australia's CEDAW obligations extend to extraterritorial conduct by persons or entities within Australia's effective control, even if not situated within Australia's territory.[159] This includes the actions of national corporations that operate overseas, and actions by state agents or institutions, particularly those operating within conflict and post-conflict contexts.[160]

14.95 The extent of states parties' extraterritorial obligations under CEDAW is not explicitly settled. Taking a broad interpretation, and one that is consistent with the expansive view of extraterritoriality discussed above, Australia would be obliged to take all appropriate measures to implement its obligations under

157 A crime against humanity under the Rome Statute that has been incorporated into domestic law.

158 *Criminal Code 1995* (Cth) divs 270, 271. The second reading speech to the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 notes that the Bill 'ensures Australia meets, and actually exceeds, its obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children': Commonwealth, *Parliamentary Debates*, Senate, 8 December 2004, 4 (Chris Ellison).

159 Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [36]; Committee on the Elimination of Discrimination against Women, *General Recommendation No 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc CEDAW/C/GC/30 (1 November 2013) [8], [12]; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35: Gender-Based Violence Against Women, Updating General Recommendation No 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) [22], [27].

160 Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [36]; Committee on the Elimination of Discrimination against Women, *General Recommendation No 30: Women in Conflict Prevention, Conflict and Post-Conflict Situations*, UN Doc CEDAW/C/GC/30 (1 November 2013) [8], [12]; Committee on the Elimination of Discrimination against Women, *General Recommendation No 35: Gender-Based Violence Against Women, Updating General Recommendation No 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) [22].

CEDAW.[161] The ALRC's recommendations do so by regulating Australian intended parents' engagement in overseas surrogacy through guidance and education on the risk of exploitation, prescribed minimum content requirements for an overseas surrogacy agreement, a legal obligation to take reasonable steps to reduce the risk of exploitation, and civil penalties for non-compliance. Our overseas surrogacy recommendations satisfy even the broadest plausible interpretation of CEDAW's extraterritorial obligations and are therefore compliant.

Intended parents' rights

14.96 Human rights analyses of surrogacy frequently focus on the rights of the child and the surrogate yet exclude discussion of the rights of the intended parents. While intended parents are often characterised as having more power and financial resources, they also have rights which must be promoted and protected. The ICCPR is the most relevant treaty in this context, with the rights to equality before the law (art 26), to found a family (art 23), and to privacy in family life (art 17) being of particular significance.[162]

Right to equality

14.97 For the majority of intended parents, surrogacy is the only way for them to become parents.[163] It is generally not a 'first choice', but rather the option of last resort for people who otherwise cannot form a family.[164] One of the primary ways in which the rights of intended parents may be infringed is through eligibility requirements governing access to surrogacy which may amount to discrimination.[165] Article 26 of the ICCPR states that

> [a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,

161 See Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28: Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 47th sess, UN Doc CEDAW/C/GC/28 (16 December 2010) [36].

162 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17, 23, 26.

163 See, eg, South Australian Law Reform Institute, *Surrogacy: A Legislative Framework* (Report No 12, 2018) 33 [2.1.1] n 55: 'Mrs F in consultation powerfully described how, after prolonged, costly and highly stressful and unsuccessful efforts at ART and both domestic and international adoption, her cousin had ultimately volunteered to act as a surrogate mother for her and her husband.' Millbank notes 'the marked and continual decline in availability of young children for both domestic and international adoption'. See also Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135, 135.

164 See South Australian Law Reform Institute (n 163) 68–9 [7.5.1].

165 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) arts 2, 26.

> religion, political or other opinion, national or social origin, property, birth or other status.[166]

14.98 Preventing categories of people from accessing surrogacy based on a protected attribute, such as sex or sexual orientation, would be discriminatory and in breach of the right to equality. Numerous submissions to this Inquiry emphasised the relevance of the right to equality and the corresponding importance of adopting an inclusive approach to the regulation of surrogacy.[167] Western Australia was the only remaining Australian jurisdiction to impose discriminatory eligibility requirements on the basis of sex and sexuality; with the amendment of Western Australia's legislation in 2025, discriminatory eligibility requirements have been eliminated nation-wide.[168] Our recommendations do not propose to reintroduce discriminatory eligibility criteria for accessing surrogacy arrangements and uphold intended parents' right to equality.

14.99 **Recommendation 11** provides that as a precondition for approval (**Recommendation 9**), intended parents must be unlikely to conceive, gestate, or give birth to a child for a medical, biological, or psychological reason. This means that surrogacy would be available only to intended parents who cannot conceive, gestate or give birth to a child themselves, and do not have a partner who is able to do so. **Recommendation 11** is intended to be broadly construed. It would include gay and single men, people with tokophobia, and transgender men for whom pregnancy may pose serious mental health concerns. It therefore supports non-discriminatory access to surrogacy, while still requiring participants to have a justifiable reason for accessing it.

14.100 Further, our recommendations would remove restrictive practices which may involve indirect discrimination. For example, currently Medicare rebates are not provided for ART services performed in connection with a surrogacy arrangement.[169] In light of the fact that surrogacy is the primary mechanism by which certain groups of

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166 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

167 See, eg, Name withheld, *Submission 5*; Name withheld, *Submission 28*; Name withheld, *Submission 60*; Name withheld, *Submission 62*; Name withheld, *Submission 68*; P Hadfield-Jia, *Submission 71*; Not published, *Submission 119*; Name withheld, *Submission 126*; Name withheld, *Submission 138*; Name withheld, *Submission 173*; Name withheld, *Submission 185*; Name withheld, *Submission 205*; Equality Australia, *Submission 253*; T Trevor, *Submission 258*; Not published, *Submission 274*; Name withheld, *Submission 278*; Name withheld, *Submission 330*.

168 In Western Australia parentage orders are currently limited to opposite sex couples and single women: *Surrogacy Act 2008* (WA) s 19. In 2019, the Independent Review of the Human Reproductive Technology and Surrogacy Acts found this was contrary to the *Sex Discrimination Act 1984* (Cth): Sonia Allan, *The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008* (Report: Part 2, 2019) 55 [3.3.2]. At that time, the ACT and South Australia had similar limitations. Both jurisdictions have since removed those limitations: see *Parentage Act 2004* (ACT) s 28G; *Surrogacy Act 2019* (SA) s 18. The *Assisted Reproductive Technology and Surrogacy Act 2025* (WA) (which will commence in mid-2027) will remove the limitation in Western Australia, meaning that no surrogacy laws in Australia discriminate against intended parents based on sex, sexual orientation, gender identity, intersex status, marital or relationship status. See also Castan Centre for Human Rights Law, *Submission 331*.

169 *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'.

people (such as gay and single men) may become parents, this could be considered to be discriminatory in effect. **Recommendations 26** and **27** would eliminate financial barriers associated with accessing surrogacy by allowing Medicare rebates for ART services and counselling to apply to treatment and counselling carried out for the purpose of surrogacy, so long as there is an approved surrogacy arrangement in place.

Right to found a family

14.101 The right to found a family is also relevant to a discussion of the rights of intended parents.[170] Article 23(2) of the ICCPR states that the 'right of men and women of marriageable age to marry and to found a family shall be recognized'.[171] In General Comment No 19 on art 23, the Human Rights Committee, responsible for interpreting the ICCPR, explained that the right to found a family 'implies, in principle, the possibility to procreate and live together'.[172] While it is clear that the right to found a family contains two aspects relevant to surrogacy — the right to marry and procreate — scholars have observed that there is a lack of clarity regarding the scope of the right.[173]

14.102 For example, there is a view based on the Human Rights Committee's 2002 decision in *Joslin v New Zealand*[174] that the right to marry is restricted to heterosexual couples.[175] Others argue that the right is not limited to heterosexual couples. For example, Professor Zanghellini has argued that more recent decisions of the Human Rights Committee relating to other articles of the convention reflect a growing intolerance for discrimination against same-sex couples and therefore suggest that art 23(2) would be interpreted differently today.[176] Similarly, some scholars argue that: the decision in *Joslin v New Zealand* is no longer good law; the Human Rights Committee's interpretive methodology was too narrow and semantic; and the right

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170 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23; *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, UN Doc A/810 (10 December 1948) art 16. Several submissions raised this right: see, eg, Name withheld, *Submission 11*; Name withheld, *Submission 28*; Name withheld, *Submission 54*; Name withheld, *Submission 68*; Name withheld, *Submission 87*; Name withheld, *Submission 138*; Name withheld, *Submission 173*; Name withheld, *Submission 205*; Name withheld, *Submission 307*; Name withheld, *Submission 334*. See also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10.

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

172 Human Rights Committee, *General Comment No 19: Article 23 (The Family)*, 39th Sess, UN Doc HRI/GEN/1/Rev.8 (vol 1) (compiled 8 May 2006, adopted 27 July 1990) [5].

173 Tobin (n 29) 324; Aleardo Zanghellini, 'To What Extent Does the *ICCPR* Support Procreation and Parenting by Lesbians and Gay Men?' (2008) 9 *Melbourne Journal of International Law* 1, 23.

174 Human Rights Committee, *Views: Communication No 902/1999*, 75th sess, UN Doc CCPR/C/75/D/902/1999 (30 July 2002, adopted 17 July 2002) ('*Joslin v New Zealand*').

175 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 691 [20.48].

176 Zanghellini (n 173) 22.

to marry should be interpreted to include same sex couples.[177] Interpreting the right consistently with the principles of equality and non-discrimination would align with Australia's domestic legal framework, which provides for equal access to marriage for same-sex couples. For the purposes of determining whether our recommendations are compliant with international law, it is not necessary to resolve whether the right is confined to heterosexual couples or is inclusive of same-sex couples because our recommendations would be compliant under either approach.

14.103 There is also debate about how far the procreation aspect of the right extends. Nowak interprets the right to found a family as guaranteeing protection against interference with natural procreation (for example, prohibitions or restrictions on having children, compulsory sterilisation, or obligations to use contraceptives) as well as artificial procreation.[178] Interference with artificial procreation would include general prohibitions on IVF, artificial insemination, surrogacy, or 'embryo donation'.[179] This is consistent with Professor Tobin's view that

> the meaning of 'family' is not confined under international law to the traditional nuclear family and would extend to the creation of the modern family formations now possible as a result of advancements in reproductive technology. As such, a surrogacy arrangement might be perceived as an exercise of the right to found a family.[180]

14.104 While it is relatively clear that the right encapsulates a protection from state interference with both natural and artificial procreation, there are different views on whether the right to found a family includes the right to a child, per se. In her 2018 report, the former United Nations Special Rapporteur on the sale and sexual exploitation of children opined that 'there is no "right to a child" under international law'.[181] The former Special Rapporteur explained that a child

> is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing a 'right to a child' would be a fundamental denial of the equal human rights of the child. The 'right to a

177 Paula Gerber, Kristine Tay and Adiva Sifris, 'Marriage: A Human Right for All?' (2014) 36 *Sydney Law Review* 643, 649–50.

178 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd rev ed, 2005) 533.

179 Ibid.

180 Tobin (n 29) 324.

181 Maud de Boer-Buquicchio, Special Rapporteur on the sale and sexual exploitation of children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [64]. This view was expressed in several submissions: see, eg, P Zagarelou-Mackieson, *Submission 48*; Centre for Bioethics and Culture (US), *Submission 90*; E Cervini, *Submission 93*; Attorney-General's Department (Cth), *Submission 153*; FINRRAGE (Australia), *Submission 180*; Australian Feminists for Women's Rights (AF4WR), *Submission 182*; Catholic Women's League Australia, *Submission 241*; J Sliwka, *Submission 242*; Anglican Church Diocese of Sydney, *Submission 247*; Name withheld, *Submission 269*; Stop Surrogacy Now UK and Surrogacy Concern, *Submission 303*; World Youth Alliance, *Submission 411*; Australian Christian Lobby, *Submission 419*.

> child' approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.[182]

14.105 The Te Aka Matua o te Ture | Law Commission (NZ) expressed a different view, stating

> there is no *unqualified* right to have a child by surrogacy. Rather, intended parents should have the freedom to do so provided the rights of others, in particular the rights of the child and the surrogate, are adequately protected.[183]

14.106 Whichever view is taken of the scope of the right, it is unclear what additional obligations would be imposed on the State under a more expansive view that included a right to a child, beyond ensuring non-discriminatory access to ART. As discussed above, all Australian jurisdictions will soon provide for equal access to surrogacy, and we do not recommend changing this position.

14.107 However, our recommendations do limit intended parents' right to form a family by restricting the types of surrogacy arrangements intended parents can access. Specifically, the right is limited by our prohibitions on surrogacy for profit and reward, the preconditions for accessing the administrative pathway to parentage, and the minimum content standards required in overseas surrogacy arrangements. We limit the right to form a family so far as it is necessary to achieve the legitimate goal of giving full effect to the relevant rights of the child and surrogate. We consider these limitations to be proportionate and justified as they are protective of the rights of the child, whose best interests must be a primary consideration, and the rights of the surrogate. Within this context of legitimate limitations, we have sought to maximise intended parents' right to form a family through our recommendations targeted at increasing the availability of surrogates, improving the support available to intended parents, and increasing certainty around parentage.

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182 Maud de Boer-Buquicchio, Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, 37th sess, UN Doc A/HRC/37/60 (15 January 2018) [64].

183 Te Aka Matua o te Ture | Law Commission (NZ) (n 63) 87 [3.69] (emphasis added). See also Zanghellini (n 173).

Appendix A
Consultations and Events

Consultees

The ALRC thanks all consultees for their engagement with the Inquiry, sharing their experiences, and providing feedback that helped to shape the recommendations contained in this Report. We acknowledge that, on occasion, officers or representatives of organisations consulted with the ALRC on the basis that their views did not necessarily represent the views of the organisations they represented. Note that individuals are listed with the affiliation and title held at the time of consultation.

	Name	Consultee location
1.	The Hon Judge Alexandra Harland, Federal Circuit and Family Court of Australia	Melbourne
2.	Professor Andrea Whittaker, Monash University	Melbourne
3.	Professor Stephan Millett, Western Australia Reproductive Technology Council	Perth
4.	Michael Gorton AM, Russell Kennedy	Melbourne
5.	Sam Everingham, Growing Families	New South Wales
6.	Department of Home Affairs (Cth)	Australia
7.	Department of Foreign Affairs and Trade (Cth)	Australia
8.	Anna Brown OAM, Equality Australia	Melbourne
9.	Heather Corkhill, Equality Australia	Brisbane
10.	Rachel Oakeley, Barrister	Perth
11.	Stephen Page, Page Provan	Brisbane
12.	Dr Jutharat Attawet, Swinburne University of Technology	Melbourne

	Name	Consultee location
13.	Dr Alison Gee, Australian and New Zealand Society of Reproductive Endocrinology and Infertility	Sydney
14.	Dr Melissa Cameron, Melbourne IVF	Melbourne
15.	Sarah Bevan, Surrogacy Australia	Sydney
16.	Anna McKie, Surrogacy Australia	South Australia
17.	Rebecca Kerner, Australia and New Zealand Infertility Counsellors	Adelaide
18.	Associate Professor Kiri Beilby, Fertility Society of Australia and New Zealand	Melbourne
19.	Professor Kirsty Horsey FAcSS, Loughborough University	Loughborough, United Kingdom
20.	Dr Owen Bradfield, Victorian Patient Review Panel	Melbourne
21.	Graeme Edgerton, Australian Human Rights Commission	Sydney
22.	Commissioner Lorraine Finlay, Australian Human Rights Commission	Canberra
23.	Dr Jaya Keaney, University of Melbourne	Melbourne
24.	Professor Roger Hart, University of Western Australia	Perth
25.	Professor Claire Fenton-Glynn, Monash University	Melbourne
26.	Professor Amrita Pande, University of Cape Town	Cape Town, South Africa
27.	Margaret Casey KC, Barrister	New Zealand
28.	Department of Health, Disability and Ageing (Cth)	Canberra
29.	Department of Social Services (Cth)	Canberra
30.	National Health and Medical Research Council	Canberra; Melbourne
31.	Professor Jens M Scherpe, Aalborg University	Aalborg, Denmark

	Name	Consultee location
32.	Richard Vaughn, Esq, International Fertility Law Group	Los Angeles, California, United States of America
33.	Tara Downes, Ireland Adoption Authority	Ireland
34.	Professor Catherine Waldby, Australian National University	Canberra
35.	Dr Stephen Whyte, Queensland University of Technology	Brisbane
36.	Natalie Gamble, NGA Law	United Kingdom
37.	Associate Professor Erin Nelson, University of Alberta	Alberta, Canada
38.	Cailin Jordan, Genea	Perth
39.	Antonia Clissa, Genea	Perth
40.	Narelle Dickinson, Lotus Health and Psychology	Brisbane
41.	Sarah-Jayne Duryea, Happy Minds Psychology	Melbourne
42.	Andy Leggat, Fertility Associates	Auckland, New Zealand
43.	Amanda Monteith, Monteith Psychology and Education	Adelaide
44.	Miranda Montrone, Counselling Place	Sydney
45.	Sarah Jefford OAM, Surrogacy & Donor Legal Services	Melbourne
46.	Simone Cureton, Equal Justice Lawyers	Adelaide
47.	Kirsty McLeod, Farrar Gesini Dunn	Canberra
48.	Sally Nicholes, Nicholes Family Lawyers	Melbourne
49.	The Hon Justice Gail Sutherland, Family Court of Western Australia	Perth
50.	Principal Registrar Leonie Forrest, Family Court of Western Australia	Perth
51.	The Hon Justice Guy Parker, Supreme Court of New South Wales	Sydney

	Name	Consultee location
52.	The Hon Judge Liberty Sanger OAM, County Court of Victoria	Melbourne
53.	Department of Health (NT)	Northern Territory
54.	Attorney-General's Department (NT)	Northern Territory
55.	Attorney-General's Department (SA)	South Australia
56.	Department of Communities and Justice (NSW)	New South Wales
57.	Department of Health (WA)	Western Australia
58.	Australian Capital Territory Government	Canberra
59.	Department of Justice (Tas)	Tasmania
60.	Department of Justice (Qld)	Queensland
61.	The Hon Judge Michelle Sutcliffe, Youth Court of South Australia	Adelaide
62.	The Hon Judge Deborah Richards, District Court of Queensland and Childrens Court of Queensland	Brisbane
63.	The Hon Justice Verity Alexandra McWilliam, Australian Capital Territory Supreme Court	Canberra
64.	Leia Dawson, Melbourne IVF	Melbourne
65.	Christina Pitter, Melbourne IVF	Melbourne
66.	Belinda Dimmock, Melbourne IVF	Melbourne
67.	Jenna Campbell, Melbourne IVF	Melbourne
68.	Julia Bragagnolo, Melbourne IVF	Melbourne
69.	Renee Economos, Melbourne IVF	Melbourne
70.	Dr Elizabeth (Liz) Butler, Life Fertility Clinic	Brisbane
71.	Associate Professor Kate Stern, Royal Women's Hospital	Melbourne
72.	Associate Professor Wan Tinn Teh, Royal Women's Hospital	Melbourne
73.	Roman Deauna, Far and Wide Migration	Sydney
74.	Donor-conceived person	Adelaide

	Name	Consultee location
75.	The Hon Justice Norah Hartnett, Federal Circuit and Family Court of Australia	Melbourne
76.	The Hon Justice Mark Anderson, Federal Circuit and Family Court of Australia	Parramatta
77.	The Hon Justice Shane Gill, Federal Circuit and Family Court of Australia	Canberra
78.	Professor Elly Teman, Ruppin Academic Centre	Israel
79.	Eti Dekel, Surrogacy Committee, Ministry of Health (Israel)	Israel
80.	Professor Nahum Mushin AM, Monash University	Melbourne
81.	Registry of Births, Deaths and Marriages (Qld)	Queensland
82.	Registry of Births, Deaths and Marriages (SA)	South Australia
83.	Registry of Births, Deaths and Marriages (Tas)	Tasmania
84.	Registry of Births, Deaths and Marriages (Vic)	Victoria
85.	Health and Community Services Directorate, Australian Capital Territory Government	Canberra
86.	Ministry of Health (NSW)	New South Wales
87.	Donor Conception Information Register (Qld)	Queensland
88.	Department for Health and Wellbeing (SA)	South Australia
89.	Donor Conception Register (SA)	South Australia
90.	Donor Conception Information Service (WA)	Western Australia
91.	Dr David Molloy, Queensland Fertility Group	Brisbane
92.	Dr Raelia Lew, Melbourne IVF	Melbourne
93.	Associate Professor Robert Lahoud, IVF Australia	Sydney

	Name	Consultee location
94.	Australian Capital Territory Justice and Community Safety Directorate	Canberra
95.	NT Health	Northern Territory
96.	Amber Rossi, Affiliation of Australian Women's Advocacy Alliances	Perth
97.	Anna Kerr, Feminist Legal Clinic	Sydney
98.	Professor Emerita Bronwyn Winter, Australian Feminists for Women's Rights	Sydney
99.	Dr Catherine Lynch, Abolish Surrogacy Australia	Sydney
100.	Jo Fraser, ARMS (Vic)	Melbourne
101.	Lily Clifford, ARMS (Vic)	Melbourne
102.	Dr Susan Hawthorne, Coalition of Activist Lesbians	Sydney
103.	Dr Renate Klein, FINRRAGE (Australia)	Geelong
104.	Dr Elisabeth Taylor, Australian Christian Lobby	Canberra
105.	Michelle Pearse, Australian Christian Lobby	Canberra
106.	Bishop Tony Percy, Catholic Archdiocese of Sydney, Australian Catholic Bishops Conference	Sydney
107.	Monica Doumit, Catholic Archdiocese of Sydney, Australian Catholic Bishops Conference	Sydney
108.	Dr Deidre Little, Catholic Women's League Australia Inc	Queensland
109.	Ann Pereira, Catholic Women's League Australia Inc	New South Wales
110.	Dr Ben Saunders, Presbyterian Church of Australia	Victoria
111.	Reverend Dr Danielle Treweek, Anglican Diocese of Sydney	Sydney

	Name	Consultee location
112.	Reverend Dr Kamal Weerakoon, New South Wales Council of Churches	Melbourne
113.	Dr Guzyal Hill, HWLE Lawyers	Darwin
114.	Attorney-General's Department (Cth)	Canberra
115.	Kimberly Surratt, Surratt Law Practice	Nevada, United States of America
116.	Angela Richardson-Mook, Alcea Surrogacy	New York, United States of America
117.	Ella McNamara, Fertility & Family	Sydney
118.	Adrienne Black, Heart to Hands Surrogacy	Oregon, United States of America
119.	The Hon Judge Maria Tsikaris, County Court of Victoria	Melbourne
120.	Australian Federal Police	Australia
121.	Australian Centre to Counter Child Exploitation	Brisbane
122.	Commonwealth Director of Public Prosecutions	Australia
123.	Services Australia	New South Wales

Events

Date	Host Organisation	Event Name	Event Location
9–10 October 2025	Law Council of Australia, Family Law Section	Australia and New Zealand Fertility Law and Ethics Symposium	Melbourne
1 December 2025	Monash University, Faculty of Law	Presentation	Melbourne
7–9 December 2025	Australasian Association of Bioethics and Health Law	Australasian Association of Bioethics and Health Law Conference	Christchurch, New Zealand

Date	Host Organisation	Event Name	Event Location
19 February 2026	Rochedale State High School	Presentation	Melbourne
30 June 2026	Monash University, Faculty of Law	Presentation	Melbourne

Appendix B
Submissions

	Name
1	Name withheld
2	Not published
3	Name withheld
4	Name withheld
5	Name withheld
6	Name withheld
7	P Peace
8	Name withheld
9	Name withheld
10	Name withheld
11	Name withheld
12	Name withheld
13	P Parkinson
14	Name withheld
15	Name withheld
16	Name withheld
17	Name withheld (minor)
18	Name withheld (minor)
19	Name withheld
20	Not published
21	Name withheld
22	Name withheld
23	Name withheld
24	Name withheld

	Name
25	C Lynch
26	Name withheld (minor)
27	Not published (minor)
28	Name withheld
29	Name withheld
30	Name withheld (minor)
31	Not published
32	Name withheld (minor)
33	Name withheld (minor)
34	J Attawet
35	D Caruso
36	Name withheld (minor)
37	Name withheld
38	Name withheld
39	Name withheld
40	Not published
41	Name withheld
42	Name withheld (minor)
43	Name withheld
44	Name withheld
45	Name withheld
46	Name withheld
47	A Clarke
48	P Zagarelou-Mackieson
49	Name withheld
50	Name withheld
51	Name withheld
52	Name withheld

	Name
53	Name withheld
54	Name withheld
55	J Taylor
56	Name withheld
57	Name withheld
58	Not published
59	Name withheld
60	Name withheld
61	Name withheld
62	Name withheld
63	Name withheld
64	Name withheld
65	R Lukins
66	Name withheld
67	Name withheld
68	Name withheld
69	Name withheld
70	Name withheld
71	P Hadfield-Jia
72	Not published
73	Not published
74	Name withheld
75	Name withheld
76	Name withheld
77	Name withheld
78	Name withheld
79	S Nicholes
80	Not published

	Name
81	Name withheld
82	Not published
83	Name withheld (minor)
84	Name withheld (minor)
85	Name withheld
86	Name withheld
87	Name withheld
88	Name withheld
89	Name withheld
90	Centre for Bioethics and Culture (US)
91	K Smith
92	Name withheld
93	E Cervini
94	Name withheld
95	S Lambert
96	Name withheld
97	Name withheld
98	A Fouche
99	Name withheld
100	Name withheld
101	K Q Ho
102	Name withheld
103	Not published
104	Australian Christian Lobby
105	K Cox
106	M A. Somerville
107	Name withheld
108	Not published

	Name
109	Not published
110	Name withheld (minor)
111	Name withheld
112	Abolish Surrogacy Australia
113	Name withheld
114	Name withheld
115	Name withheld
116	Not published
117	Name withheld
118	Not published
119	Not published
120	H Drabsch
121	Not published
122	Presbyterian Church of Australia
123	Not published
124	Name withheld
125	Name withheld
126	Name withheld
127	Name withheld
128	S Jefford
129	S Everingham
130	S Page
131	Name withheld (minor)
132	Name withheld (minor)
133	Name withheld
134	International Coalition for the Abolition of Surrogate Motherhood
135	Name withheld
136	A Sanfillippo-Fernie

	Name
137	Name withheld
138	Name withheld
139	Name withheld
140	Name withheld
141	Name withheld
142	J Holder
143	Name withheld
144	L Ransome
145	Australian Nursing and Midwifery Federation
146	Name withheld
147	Name withheld
148	Name withheld
149	P Shearing
150	D Cody
151	D Kooyong
152	D McGregor
153	Attorney-General's Department (Cth)
154	Name withheld
155	Coalition of Australian Feminist Organisations
156	Name withheld
157	Not published
158	Name withheld
159	S Bryan
160	Name withheld
161	Name withheld
162	Name withheld
163	Jigsaw Queensland Inc.
164	Name withheld

	Name
165	N McLean
166	E Kendal
167	A-R Crispin
168	L Tripodi
169	Name withheld
170	Name withheld
171	Name withheld
172	Not published
173	Name withheld
174	Peter McMullin Centre on Statelessness
175	National Health and Medical Research Council
176	E Cummings
177	Name withheld
178	Not published
179	Not published
180	FINRRAGE (Australia)
181	H Drew
182	Australian Feminists for Women's Rights (AF4WR)
183	Health Law Group, Monash Law School
184	Not published
185	Name withheld
186	Name withheld
187	Australian Catholic Bishops Conference
188	Name withheld
189	Name withheld
190	NSW Council of Churches
191	Name withheld
192	You Gave Me a Voice

	Name
193	Name withheld
194	Name withheld
195	Name withheld
196	Name withheld
197	Name withheld
198	Name withheld
199	Casablanca Declaration Organisation
200	Not published
201	A Whittaker, C Volks, A Molas (et al)
202	Not published
203	Name withheld
204	Not published
205	Name withheld
206	Not published
207	Name withheld
208	Name withheld
209	Not published
210	Name withheld
211	Name withheld
212	Name withheld
213	Names withheld
214	Name withheld
215	Not published
216	Name withheld
217	Not published
218	Les Syndicate de la Famille
219	Name withheld
220	Not published

	Name
221	Not published
222	Name withheld
223	Name withheld
224	Children's Voices in Surrogacy Law Project
225	Name withheld
226	S Swanepoel
227	Name withheld
228	Name withheld
229	Name withheld
230	Not published
231	Name withheld
232	FamilyVoice Australia
233	P Lyons
234	Name withheld
235	Name withheld
236	Name withheld
237	Name withheld
238	Name withheld
239	Name withheld
240	Not published
241	Catholic Women's League Australia
242	J Sliwka
243	Name withheld
244	R Boneham
245	J McHitchinson
246	Not published
247	Anglican Church Diocese of Sydney
248	Department of Home Affairs (Cth)

	Name
249	Not published
250	Active Watchful Waiting Inc.
251	Name withheld
252	Coalition of Activist Lesbians
253	Equality Australia
254	Not published
255	Name withheld
256	Name withheld
257	R Rowland
258	T Trevor
259	Name withheld
260	Rainbow Families
261	Not published
262	Name withheld
263	M Montrone
264	A McKie
265	J McCloy
266	U Narawa
267	Single Mother Families Australia
268	Name withheld
269	Name withheld
270	Names withheld
271	Feminist Legal Clinic Inc.
272	Name withheld
273	VANISH
274	Not published
275	ARMS(Vic)
276	Name withheld

	Name
277	ANZICA
278	Name withheld
279	Name withheld
280	Not published
281	Name withheld
282	Name withheld
283	Name withheld
284	G Boneham
285	Switchboard Victoria
286	Name withheld
287	Name withheld
288	Name withheld
289	Name withheld
290	P Harper
291	Mothers Adoption Loss Alliance
292	Not published
293	Not published
294	H Driesen
295	Name withheld
296	Women's Declaration International (Australia)
297	Plunkett Centre for Ethics
298	Department of Health, Disability and Ageing (Cth)
299	Name withheld
300	Name withheld
301	Name withheld
302	Name withheld
303	Stop Surrogacy Now UK and Surrogacy Concern
304	Name withheld

	Name
305	Not published
306	Name withheld
307	Name withheld
308	Name withheld
309	Not published
310	Not published
311	Donor Conceived Families Australia
312	Name withheld
313	Name withheld
314	Not published
315	Name withheld
316	Not published
317	Name withheld
318	Name withheld
319	Name withheld
320	Name withheld
321	E Kneebone
322	Not published
323	Name withheld
324	Name withheld
325	Not published
326	Name withheld
327	Name withheld
328	Not published
329	Name withheld
330	Name withheld
331	Castan Centre for Human Rights Law
332	Not published

	Name
333	K Gribble
334	Name withheld
335	Name withheld
336	Legal Aid NSW
337	Not published
338	GeneEthics
339	Name withheld
340	Name withheld
341	Not published
342	Law Council of Australia
343	Name withheld
344	Adoptee Rights Australia
345	Not published
346	ANZSREI
347	Name withheld
348	Women's Forum Australia
349	Women's Bioethics Alliance
350	MRKH Australia
351	S Cureton
352	Victorian Women Lawyers
353	Name withheld
354	P Kerrison
355	A Banerjee
356	S Piercey
357	A Fouche
358	Not published
359	S Jefford
360	J Attawet

	Name
361	P Zagarelou-Mackieson
362	Name withheld
363	Not published
364	Not published
365	S Page
366	ANZSREI
367	B Tobin
368	ANZICA
369	Castan Centre for Human Rights Law
370	The National Catholic Bioethics Center
371	S Allen
372	Name withheld
373	Not published
374	M Montrone
375	Australian Nursing and Midwifery Federation
376	Peter McMullin Centre on Statelessness
377	K Hammarberg
378	S Everingham
379	Centre for Bioethics and Culture
380	L Ransome
381	M Quinlan
382	D Adams
383	Name withheld
384	Stop Surrogacy Now UK and Surrogacy Concern
385	Not published
386	Name withheld
387	Name withheld
388	Child Identity Protection

	Name
389	K Cox
390	Active Watching Waiting Inc.
391	LifeSiteNews
392	Name withheld
393	Not published
394	Not published
395	Not published
396	International Coalition for the Abolition of Surrogate Motherhood
397	Virtus Health
398	Anglican Church Diocese of Sydney
399	National Health and Medical Research Council
400	Coalition of Activist Lesbians
401	Centre for Health Law & Policy, University of WA Law School
402	Abolish Surrogacy Australia
403	Australian Catholic Bishops Conference
404	Relationships Australia
405	F Farmer
406	J Tritton
407	Mothers Adoption Loss Alliance
408	ARMS(Vic)
409	Feminist Legal Clinic Inc.
410	FINRRAGE (Australia)
411	World Youth Alliance
412	M Eason
413	ADF International
414	Z Mahmoud
415	E Kneebone
416	Women's Forum Australia

	Name
417	Surrogacy Australia
418	K Horsey
419	Australian Christian Lobby
420	Department of Health, Disability and Ageing (Cth)
421	Name withheld
422	Name withheld
423	AAWAA
424	Australian Feminists for Women's Rights (AF4WR)
425	GeneEthics
426	R West
427	Fertility & Family
428	Federal Circuit and Family Court of Australia
429	Rainbow Families
430	P Harper
431	Law Council of Australia
432	Name withheld
433	Australian Human Rights Commission
434	Department of Foreign Affairs and Trade (Cth)
435	Equality Australia
436	NSW Council of Churches
437	Not published
438	Adoptee Rights Australia
439	Not published
440	Not published
441	C Miller
442	D and R Cox
443	D Birtles
444	Name withheld

	Name
445	E Solymosi
446	G Cooper
447	J McRae
448	J McShane
449	J Neagle
450	J Spyker
451	L Arthur
452	Name withheld
453	M O'Reilly
454	M Pinn
455	P Debets
456	R Graham
457	S Mildenhall
458	Name withheld
459	Not published
460	C Elias
461	D Griffiths
462	I Murray
463	J Moss
464	J Shelley
465	M Crowley
466	M Rose
467	R Chong
468	R Roy

Appendix C
Primary Sources

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Commonwealth primary legislation

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Australian Constitution

Australian Law Reform Commission Act 1996 (Cth)

Australian Passports Act 2005 (Cth)

Criminal Code (Cth)

Fair Work Act 2009 (Cth)

Family Law Act 1975 (Cth)

Human Cloning for Reproduction Act 2002 (Cth)

Paid Parental Leave Act 2010 (Cth)

Privacy Act 1988 (Cth)

Regulatory Powers (Standard Provisions) Act 2014 (Cth)

Therapeutic Goods Act 1989 (Cth)

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Federal Circuit and Family Court of Australia (Family Law) Rules 2021 (Cth)

Health Insurance (General Medical Services Table) Regulations 2021 (Cth)

Migration Regulations 1994 (Cth)

Paid Parental Leave Rules 2021 (Cth)

State and territory primary legislation

Age of Majority Act 1973 (Tas)

Age of Majority Act 1974 (ACT)

Age of Majority Act 1974 (NT)

Age of Majority Act 1977 (Vic)

Annulled Convictions Act 2003 (Tas)

Artificial Conception Act 1985 (WA)

Assisted Reproductive Technology Act 2007 (NSW)

Assisted Reproductive Technology Act 2024 (ACT)

Assisted Reproductive Technology Act 2024 (Qld)

Assisted Reproductive Technology and Surrogacy Act 2025 (WA)

Assisted Reproductive Treatment Act 1988 (SA)

Assisted Reproductive Treatment Act 2008 (Vic)

Assisted Reproductive Treatment Amendment Act 2020 (Vic)

Births, Deaths and Marriages Registration Act 1995 (NSW)

Births, Deaths and Marriages Registration Act 1996 (NT)

Births, Deaths and Marriages Registration Act 1996 (SA)

Births, Deaths and Marriages Registration Act 1996 (Vic)

Births, Deaths and Marriages Registration Act 1997 (ACT)

Births, Deaths and Marriages Registration Act 1998 (WA)

Births, Deaths and Marriages Registration Act 1999 (Tas)

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Civil Liability Act 2002 (NSW)

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Commonwealth Powers (Family Law — Children) Act 1990 (Qld)

Commonwealth Powers (Family Law) Act 1986 (SA)

Commonwealth Powers (Family Law) Act 1987 (Tas)

Court Procedures (Fees) Determination 2018 (ACT)

Cremations Act 2003 (Qld)

Criminal Code Act Compilation Act 1913 (WA)

Criminal Records (Spent Convictions) Act 1992 (NT)

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Health Practitioner Regulation (National Uniform Legislation) Act 2010 (NT)

Health Practitioner Regulation National Law (WA)

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Sentencing Act 1991 (Vic)

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Spent Convictions Act 2000 (ACT)

Spent Convictions Act 2009 (SA)

Spent Convictions Act 2021 (Vic)

Status of Children Act 1974 (Tas)

Status of Children Act 1974 (Vic)

Status of Children Act 1978 (NT)

Status of Children Act 1978 (Qld)

Status of Children Act 1996 (NSW)

Surrogacy Act 2008 (WA)

Surrogacy Act 2010 (NSW)

Surrogacy Act 2010 (Qld)

Surrogacy Act 2012 (Tas)

Surrogacy Act 2019 (SA)

Surrogacy Act 2022 (NT)

Surrogate Parenthood Act 1988 (Qld)

Wrongs Act 1958 (Vic)

State and territory delegated legislation

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Assisted Reproductive Treatment Regulations 2024 (SA)

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Parentage Regulation 2024 (ACT)

Spent Convictions Regulations 2021 (Vic)

Surrogacy Regulations 2009 (WA)

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Surrogacy Regulations 2020 (SA)

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Admiralski v Stehbens [1960] Qd R 510

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Esso Australia Pty Ltd v Australian Workers' Union (2016) 245 FCR 39

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Re Bima [2014] FamCA 1170

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

Convention relating to the Status of Stateless Persons, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960)

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Committee on the Rights of the Child, *Concluding Observations on the Combined Third to Sixth Periodic Reports of the Lao People's Democratic Republic*, 79th sess, 2340th mtg, UN Doc CRC/C/LAO/CO/3-6 (1 November 2018)

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State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights (Advisory Opinion) (Inter-American Court of Human Rights, OC-23/17, 15 November 2017)

Appendix D
Data on Domestic and Overseas Surrogacy

This appendix supplements the description of domestic and overseas surrogacy data in **Chapter 1**.

Data on domestic surrogacy

Domestic figures are derived from Australian and New Zealand Assisted Reproduction Database ('ANZARD') and New Zealand Ethics Committee on Assisted Reproductive Technology ('ECART') reports on live births following surrogacy arrangements. Australian live birth figures have been derived by subtracting the New Zealand live birth figures reported by ECART from the combined Australia and New Zealand live birth figures reported by ANZARD for the relevant reporting period.

The domestic figures count live births following surrogacy arrangements and therefore do not capture surrogacy arrangements that were entered into but did not result in a live birth in the relevant period. They are unlikely to capture traditional surrogacy arrangements accurately. The figures are also not directly comparable, as they are drawn from different sources and use different reporting periods and methodologies. The resulting Australian figures should therefore be treated as approximate and indicative, rather than as precise annual counts.

The domestic surrogacy data was provided by surrogacy lawyer, Stephen Page, to the ALRC and independently verified by the ALRC.

Table A: Estimated live births following domestic surrogacy arrangements in Australia, 2014–2023

Year (calendar)	Australia and New Zealand live births	Year (financial)	New Zealand live births[1]	Australian live births
2014	36[2]	2013–14	9	27
2015	52[3]	2014–15	8	44

1 Ethics Committee on Assisted Reproductive Technology, *Annual Report 2022/2023* (2024) 15.
2 Katie Harris et al, *Assisted Reproductive Technology in Australia and New Zealand 2014* (2016) 4.
3 Oisín Fitzgerald et al, *Assisted Reproductive Technology in Australia and New Zealand 2015* (2017) 4.

Year (calendar)	Australia and New Zealand live births	Year (financial)	New Zealand live births[1]	Australian live births
2016	45[4]	2015–16	8	37
2017	62[5]	2016–17	6	56
2018	86[6]	2017–18	13	73
2019	73[7]	2018–19	18	55
2020	91[8]	2019–20	16	75
2021	100[9]	2020–21	18	82
2022	131[10]	2021–22	17	114
2023	104[11]	2022–23	20	84

Data on overseas surrogacy

Overseas surrogacy figures are derived from data provided by the Department of Home Affairs and are based on the number of Australian citizenship by descent applications involving surrogacy arrangements. This has been used as a proxy for children born through overseas surrogacy to Australian intended parents.[12] Citizenship by descent applications may not correspond precisely to the number of children born through overseas surrogacy in a particular year. For example, an application may be lodged after the year of birth, and the figures count applications rather than the number of children born through overseas surrogacy.

The domestic and overseas surrogacy figures are not directly comparable as they are drawn from different sources, measure different things, and use different

4 Oisín Fitzgerald et al, *Assisted Reproductive Technology in Australia and New Zealand 2016* (2018) 4.

5 Jade E Newman et al, *Assisted Reproductive Technology in Australia and New Zealand 2017* (2019) 4.

6 Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2018* (2020) 4.

7 Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2019* (2021) 4.

8 Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2020* (2022) 45.

9 Jade E Newman, Repon C Paul and Georgina M Chambers, *Assisted Reproductive Technology in Australia and New Zealand 2021* (2023) 45.

10 Jade E Newman et al, *Assisted Reproductive Technology in Australia and New Zealand 2022* (2024) 45.

11 Damian P Kotevski et al, *Assisted Reproductive Technology in Australia and New Zealand 2023* (2025) 45.

12 Email from the Department of Home Affairs (Cth) to the Australian Law Reform Commission dated 17 April 2025.

reporting periods and methodologies. The data should therefore be treated as approximate and indicative only.

Table B: Australian citizenship by descent applications involving overseas surrogacy arrangements, 2014–15 to 2023–24

Year (financial)	Number of Australian citizenship by descent applications involving surrogacy arrangements
2014–15	246
2015–16	207
2016–17	164
2017–18	170
2018–19	232
2019–20	275
2020–21	223
2021–22	213
2022–23	236
2023–24	375

Appendix E
Health Legal and Regulatory Frameworks in Australia

Gene technology[1]	
Regulatory framework in overview	**Scope of Regulator powers and functions**
The Commonwealth, state, and territory governments entered into the Gene Technology Agreement.[2] This establishes: • nationally consistent legislation where state and territory legislation corresponds to Commonwealth legislation; • a Ministerial Council consisting of a minister from each state and territory government. The Ministerial Council's role is to issue policy, guidelines, and codes of practice, oversee implementation of the framework, agree on future amendments, and initiate regular reviews of the gene technology laws; • a Commonwealth Gene Technology Regulator; and	The Ministerial Council has multiple powers and functions, including to: • issue policy principles, guidelines, and codes of practice; • approve regulations; • approve the appointment of the Regulator and chairperson of the Advisory Committee and Ethics and Consultative Committee; and • agree on proposed amendments.[3] The Gene Technology Regulator has multiple powers and functions, including to: • perform duties in relation to licensing; • develop policy principles, guidelines, and codes of practice at the direction of the Ministerial Council;

1 Gene technology legislation is an example of national uniform legislation that uses a hybrid structure of applied and mirror legislation: Australasian Parliamentary Counsel's Committee, *Australian National Uniform Law Schemes and Associated Legislation of Participating Jurisdictions* (2020) 19–20.

2 Intergovernmental Agreement between the Commonwealth, States and Territories, *Gene Technology Agreement* (2001).

3 Ibid cl 23; *Gene Technology Act 2000* (Cth) pt 2 div 4 subdiv B.

Gene technology[1]	
• an Advisory Committee and Ethics and Consultative Committee, which include skilled and experienced members in the gene technology field. Their role is to provide expert advice to the Ministerial Council and Regulator.	• give advice to the Ministerial Council; • give guidance and advice on gene technology to other agencies and the public; and • undertake and commission research in relation to gene technology risk assessments.[4]

Therapeutic goods[5]	
Regulatory framework in overview	**Scope of Regulator powers and functions**
• The Therapeutic Goods Administration ('TGA') is a risk-based regulator, which administers the *Therapeutic Goods Act 1989* (Cth).[6] • The TGA is part of the Department of Health (Cth). • Despite the *Therapeutic Goods Act 1989* (Cth) existing since the late 1980s, the states and territories did not implement the national uniform legislation until recently.	• The TGA regulates therapeutic goods, medicines, and medical devices to ensure these products are safe for use.[7] • The TGA has broad functions, including management of a national register (the Australian Register of Therapeutic Goods), licensing functions, and powers to enforce their functions including through criminal offences and civil penalties.[8]

4 *Gene Technology Act* 2000 (Cth) s 27.

5 The therapeutic goods scheme is an example of national uniform legislation that uses applied legislation: Australasian Parliamentary Counsel's Committee (n 1) 31.

6 Therapeutic Goods Administration, Department of Health, Disability and Ageing (Cth), 'Our Regulatory Framework' <www.tga.gov.au/products/regulations-all-products/regulation-essentials/regulation-basics/our-regulatory-framework>.

7 *Therapeutic Goods Act* 1989 (Cth) s 4.

8 Ibid chs 2, 3, 5A. See also Therapeutic Goods Administration, Department of Health, Disability and Ageing (Cth) (n 6).

Health practitioner regulation[9]	
Regulatory framework in overview	**Scope of Regulator powers and functions**
• Health practitioner regulation was established by Queensland in the *Health Practitioner Regulation National Law Act 2009* (Qld), Schedule. The other states and territories then implemented national uniform legislation. • This law established a Ministerial Council, the Australian Health Practitioner Regulation Agency ('AHPRA'), and National Boards.	• AHPRA and the National Boards operate together as a risk-based regulator to maintain a register of health practitioners who are trained, qualified, and safe to practice.[10] • AHPRA sets up agreements with the National Boards about their annual budgets and services provided by AHPRA, so that the National Boards can carry out their functions.[11] • The functions of the National Boards include creating and approving standards, codes, and guidelines,[12] taking action to suspend or impose conditions on a health practitioner's registration, interim prohibition orders, investigative powers, health and performance assessments, and referral of matters to the responsible tribunal for professional misconduct.[13]

9 Health practitioner regulation is an example of national uniform legislation that uses applied legislation: Australasian Parliamentary Counsel's Committee (n 1) 19.

10 *Health Practitioner Regulation National Law Act 2009* (Qld) sch 1, s 3; Australian Health Practitioner Regulation Agency, 'About AHPRA and the National Boards' <www.ahpra.gov.au/About-Ahpra.aspx>.

11 Australian Health Practitioner Regulation Agency, 'Health Profession Agreements' (2024) <www.ahpra.gov.au/Publications/Health-profession-agreements.aspx>.

12 *Health Practitioner Regulation National Law Act 2009* (Qld) sch 1 pt 5 div 3.

13 Ibid sch 1 pt 8.

Food regulation[14]	
Regulatory framework in overview	**Scope of Regulator powers and functions**
• The Commonwealth, state, and territory governments agreed under the Food Regulation Agreement to commit to nationally consistent food laws. The Agreement included a model law for each state and territory to adopt as complementary law.[15] • The state and territory Food Acts refer to the Food Standards Code, which is a legislative instrument developed by the Food Standards Australia New Zealand ('FSANZ'). The FSANZ was established by the *Food Standards Australia New Zealand Act 1991* (Cth).	• The functions of the FSANZ include developing codes of practice, standards, and guidelines, and co-ordinating with state and territory governments to harmonise procedures, food recalls, and food education for the public.[16] • FSANZ has no direct enforcement powers but can help co-ordinate with relevant jurisdictions for consistent enforcement. State and territory government agencies, the Department of Agriculture, Fisheries and Forestry (Cth), and local councils are responsible for enforcing the Food Acts and Food Standards Code.[17]

14 Food regulation is an example of national uniform legislation that uses a hybrid structure of applied and mirror legislation: Australasian Parliamentary Counsel's Committee (n 1) 17–18.

15 Intergovernmental Agreement between the Commonwealth, States and Territories, *Food Regulation Agreement* (6 July 2010) <www.foodregulation.gov.au/sites/default/files/2024-01/food-regulation-agreement-fra.pdf>.

16 *Food Standards Australia New Zealand Act 1991* (Cth) s 13.

17 For a list of state and territory enforcement agencies, see Food Standards Australia New Zealand, 'Food Regulatory Agencies' (2026) <https://www.foodstandards.gov.au/contact/food-regulatory-agencies>.

Research involving human embryos and human cloning[18]	
Regulatory framework in overview	**Scope of Regulator powers and functions**
• The Commonwealth, state, and territory governments entered into an intergovernmental agreement to ensure national consistency in the regulation of research involving human embryos and the prohibition of human cloning.[19] • This agreement established the National Health and Medical Research Council ('NHMRC') Licensing Committee.	• The NHMRC Licensing Committee has functions to monitor, issue, and renew licenses. It has investigative and monitoring powers to ensure compliance with the legislation.[20] There are also criminal offences for non-compliance.[21]

18 Australasian Parliamentary Counsel's Committee (n 1) 20–1.

19 Intergovernmental Agreement between the Commonwealth, States and Territories, Research Involving Human Embr*yos and Prohibition of Human Cloning Agreement* (31 March 2004) <www.federation.gov.au/about/agreements/research-involving-human-embryos-and-prohibition-human-cloning>.

20 *Research Involving Human Embryos Act 2002* (Cth) ss 14–15. See also National Health and Medical Research Council, *Annual Report 2023–2024* (2024) 67.

21 *Research Involving Human Embryos Act 2002* (Cth) pt 2 div 2.

Appendix F
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Scottish Law Commission

South Australian Law Reform Institute

Law Students

Monash University

Damien Chung

Ananya Goswami

Maxwell Gray

Lauren Hughes

Monica Ibrahim

Karina Kakafikas-Bek

Cecil Mete

Aiden Morton

Elli Murphy

Violet O'Connor

Bethany O'Kane

Ashlee Scott

Gabriella Kazenbroot-Phillips
Amy Li
Prudence Spencer
Vy Que Tran

University of Melbourne

Mara Antic
Charlotte Conroy
Amelia Joseph
Ali Lo Giudice
Michelle Luo
Susan Malikoff
Jaime Minogue
Tian Ai Pang
Victoria Tischenko
Sam Warner

Australian Law Reform Commission

www.alrc.gov.au
info@alrc.gov.au
PO Box 209
Flinders Lane VIC 8009



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