**Submission from Surrogacy Australia on Australian laws, safeguards and data**

**Identity, origins and parentage**

* **Describe safeguards protecting identity rights that are currently being implemented in your State.**

**General Requirements for Surrogacy Arrangements**

Altruistic surrogacy agreement permitted subject to meeting specified requirements

Meet eligibility criteria (stipulated in state/territory laws)

All parties have counselling (separate, joint, and/or multiple sessions in some states)

[Some states (or clinics) require all parties to undergo separate psychological assessment]

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Medical assessment of surrogate mother; gamete providers  
(eg. for communicable disease) may depend on whether clinical ART or traditional

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Intended parent(s) and the surrogate mother (and her partner if any) must obtain independent legal advice

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Paperwork: Some states require agreement in writing and/or certificates and reports from above counsellors, psychologist, and/or legal advisors

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Pre-approval: Some states require the surrogacy arrangement be approved by the clinic or a designated committee or panel, before conception

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Conception, Pregnancy, and Birth

Post Birth: Apply to Courts for Transfer of Parentage (Parentage Order)

The Prohibition of Human Cloning for Reproduction Act 2002 prohibits commercial trading in human eggs, human sperm or human embryos, which carry a maximum penalty of 15 years imprisonment (s 21). The respective states and territories have legislation that mirror this provision to ensure the law extends to persons and entities over which the Commonwealth laws do not cover (for example, sole traders, state agencies, and individuals).

* **Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements.**

Clinics providing ART services are also required, via their registration and accreditation process, to adhere to the National Health and Medical Research Council Ethical guidelines on the use of assisted reproductive technology in clinical practice and research, which include provisions relevant to surrogacy. The NHMRC Ethical Guidelines provide that commercial surrogacy is ethically unacceptable ‘due to it raising concern about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement

In relation to ‘altruistic’ arrangements the guidelines provide that clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal. The guidelines recognise reimbursement of verifiable out-of-pocket expenses, which may include expenses directly associated with the procedure or pregnancy such as medical and counselling costs, before, during, and after the pregnancy or birth; travel and accommodation costs within Australia; loss of earnings; insurance; child care costs when needed to allow for attendance at appointments and procedures related to the surrogacy arrangement; legal advice – subject to state or territory legislation that regulates what out-of-pocket expenses can be reimbursed.172 The guidelines also provide that clinics must ensure that the potential surrogate in an altruistic arrangement is medically and psychologically suitable to undertake the requested ART activity and perform only a single embryo transfer. 173 Clinics must also ensure the giving of information and counselling to,174 and valid consent by, the relevant party(ies) for each specific treatment or procedure.175 In addition, the NHMRC Ethical Guidelines recognise that persons born via a surrogacy arrangement are entitled to details of their birth and to have the opportunity to determine the significance of their gestational connection with the surrogate.176

* **Describe safeguards protecting the access to origins (whether and how such apply in surrogacy arrangements)**

In some states (eg Victoria)

Biological Parent Information on Birth Certificate

Where a child is conceived using sperm or ovum donated by the intending parent(s), this information will be held in the Birth Register provided the donor consents by signing the Birth Registration Statement. There is therefore a potential situation that birth certificate(s) will need to state: the child’s birth parent, intending parent(s) and donor(s).

* **Describe safeguards protecting the family environment (whether and how such apply in surrogacy arrangements) how the best interests of the child are factored in.**

Victoria requires screening by way of criminal record and child protection order checks of all applicants for ART and surrogacy and their partners, if any. There are legal presumptions against treatment when 1) a criminal record check specifies that charges have been proven against a woman or her partner for a sexual offence or violent offence; or 2) there has been a child protection order made removing a child from the custody or guardianship of the woman or her partner. Refusal of treatment may also occur if a registered ART provider or doctor reasonably believes that a child that may be born would be at risk of abuse or neglect.

If there is ‘presumption against treatment’, or refusal of treatment because of a reasonable belief concerning risk of abuse or neglect, an application for review may be made to the Victorian Patient Review Panel (PRP)

Regarding what ‘identifiable and established risk factors’ may be considered,

*1. physical violence by a person or couple applying for treatment  
2. sexual violence by a person or couple applying for treatment  
3. risk of emotional abuse or neglect  
4. physical or psychiatric illness of a person or couple applying for treatment 5. any intellectual disability of a person or couple applying for treatment*

*6. ‘some other problem’ that raises a doctor’s concern about a person or couple’s capacity to care for their child*

*7. previous child neglect by a person or couple necessitating the removal of a child(ren) from his or her care*

*8. domestic violence between the parents*

In South Australia, a lawful surrogacy agreement requires the surrogate mother and her husband or partner (if any) and the intending parents to be issued with a certificate by a counselling service, which states that in the opinion of the Accredited Independent Counsellor:

*The proposed recognised surrogacy agreement would not jeopardise the welfare of any child born as a result of the pregnancy that forms the subject of the agreement.*

There is no guidance or mechanism for how this should be assessed.

**Information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. (how the best interests of the child are factored in)**

**Commonwealth**

s 10HB (6) of the 1975 Commonwealth Act presently provides that in deciding an application under s 10HB to transfer legal parentage of a child born as a result of surrogacy, the ‘welfare of the child’ must be regarded by the Youth Court ‘as the paramount consideration’.

**State**

Section 22 of the *Surrogacy Act 2010* (NSW)

Best interests of child are paramount

(1)  The Court must be satisfied that the making of the parentage order is in the best interests of the child.

(2)  This precondition is a mandatory precondition to the making of a parentage order.

* **how the establishment of parentage occurs & how the best interests of the child are factored in**

Domestic Surrogacy

Where the Youth Court makes an order under s 10HD of the 1975 Act transferring the parentage of a child from birth mother to intending parents, the particulars of the order made by the Youth Court must be registered by the Registrar of Births, Deaths and Marriages in relation to the registration of the child's birth and the child's name.822 For example, the Registrar must make changes to the child's birth certificate to replace the child's birth mother and her partner/spouse with the names of the intending parents, and change the child's surname to reflect that of the intending parents.

Where the Youth Court makes an order under s 10HD of the *Family Relationships Act 1975* (SA), the Office of Births, Deaths and Marriages registers the particulars of the order by making a new entry in the Birth Register. The new birth certificate must only disclose and certify up-to-date particulars contained in an entry (eg only disclose the intending parents and not the birth mother); and must not provide any information disclosing a change in a parent or parents of the relevant child, or a change in the name of the child (including by disclosing the name of, or information about, any birth parent who is no longer considered as a parent of the child).823

The original entry is then ‘locked down’, with the details of the entry remaining as per the original registration by the birth parent(s). Access to a certificate certifying all relevant entries in the Register is available to the relevant child once they attain the age of 18 years or to a parent who is a party to the surrogacy agreement. The parents may apply at any time.824

In general terms, the Registrar decides who can access information on the Register, based on the following criteria: the nature of the applicant's interest, the sensitivity of the information, the use to be made of the information and any other relevant factors. The privacy of the persons to whom the entries in the Register relate is also a key consideration. The Births, Deaths and Marriages Registry is also required to have an access policy that can be made available to interested parties.

When it comes to accessing information about surrogacy arrangements, the Registrar must restrict access to the Register to maintain the confidentiality of any information that would disclose the making, or discharge, of a surrogacy order. However, relevant information will be made available to a party to the surrogacy arrangement, and to the child born as a result of a surrogacy arrangement once they attain 18 years.

International Surrogacy

In all states and territories of Australia issuance of citizenship by descent or a passport does not confer on the intending parent(s) legal parentage of the child born as a result of an international commercial surrogacy arrangement in Australia.

A recent international surrogacy case ***Bernieres and Another & Dhopal and Another*** [FamCAFC 180 (1 September 2017) ruled that the parents who had custody of the child since birth were not recognised as the parents as the arrangement was commercial not altruistic and thus could not be granted parentage under s 60HB

The Court acknowledged that this left many Australian children born via international surrogacy with their parentage seriously in doubt

**Surrogacy Laws in Australia**

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| **Legislation** | | **Altruistic surrogacy permitted** | | **Altruistic surrogate compensated for reasonable costs \*** | **Commercial surrogacy prohibited** | **Criminal offences in relation to commercial surrogacy** | **Criminal offences with extra territorial effect** | **Recognition of International Commercial Surrogacy Arrangements** | |
| **Australia Capital Territory Parentage Act 2004 (ACT)** | | Yes | | Yes s 40  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  🗶 The value of the surrogate mother’s lost  earnings  🗶 Insurance premiums  ✓Counselling or medical services  🗶 Reasonable costs of child born  🗶 Cost of being party to parentage order  🗶 Legal services/ advice  🗶 Travel or accommodation costs  🗶 Reasonable out of pocket expenses | Yes | Yes  •  Entering into s 41  •  Procuring s 42  •  Advertising s 43  •  Facilitating s 44 | Yes s 45 | No | |
| **New South Wales Surrogacy Act 2010 (NSW)** | | Yes | | Yes s 7  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  ✓ The value of the surrogate mother’s lost  earnings  ✓ Insurance premiums  ✓ Counselling or medical services  ✓ Reasonable costs of child born  ✓ Cost of being party to parentage order  ✓ Legal services/ advice  ✓ Travel or accommodation costs  ✓ Reasonable out of pocket expenses | Yes ss 8, 23 | page32image9074800  Yes  •  Entering into s 8  •  Advertising s 10 | Yes s 11(2) | No | |
| **Queensland Surrogacy Act 2010 (Qld)** | | Yes | | Yes s 11  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  ✓ The value of the surrogate mother’s lost  earnings  ✓ Insurance premiums  ✓ Counselling or medical services  ✓ Reasonable costs of child born  ✓ Cost of being party to parentage order  ✓ Legal services/ advice  ✓ Travel or accommodation costs  ✓ Reasonable out of pocket expenses | | Yes | Yes  •  Advertising s 56  •  Giving or receiving consideration s 57  •  Providing technical, professional or medical services s 58 | Yes s 54(b) | No |
| **South Australia Family Relationships Act 1975 (SA) (Post 2015 Amendments)**  **CURRENT LAW** | | Yes | | Yes s 10HA  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  🗶 The value of the surrogate mother’s lost  earnings  🗶 Insurance premiums  ✓Counselling or medical services  🗶 Reasonable costs of child born  🗶 Cost of being party to parentage order  ✓Legal services/ advice 🗶Travel or accommodation costs ✓Reasonable out of pocket expenses (in respect  of the agreement) | | Yes  •  A surrogacy contract  (apart from a recognised surrogacy arrangement) is illegal and void s 10G  •  Recognised surrogacy  arrangements must be for no valuable consideration other than for reasonable expenses s 10HA(2a)(i)  page32image23857024 | Yes   * Except as authorised by the Act or the *State*   *Framework* negotiates, arranges or obtains the benefit of a surrogacy contract for valuable consideration s 10H(1)   * •  For valuable consideration induces another to enter a surrogacy contract s 10H(2) | No | Yes s 10F  •  ‘international surrogacy  arrangements’ can be prescribed for the purposes of the Act if approved by the Attorney-General or declared by the Regulations  Prescribed international surrogacy arrangements are ‘recognised surrogacy arrangements’ under the Act, allowing for parenting orders to be made under s 10HB |
| **South Australia Family Relationships Act 1975 (SA) ( Proposed 2017 Amendments)** | | Yes | | Yes s 10L  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  ✓ The value of the surrogate mother’s lost  earnings  🗶Insurance premiums ✓Counselling or medical services 🗶Reasonable costs of child born  ✓ Cost of being party to parentage order  ✓ Legal services/ advice  ✓ Travel or accommodation costs (likely  covered by reasonable costs provision s  10L(1))(f)  ✓ Reasonable out of pocket expenses (in respect  of the agreement) | Yes s 10T | Yes  •  Entering or offering to  enter a commercial surrogacy arrangement s 10T(1) (inserted 2017)  •  Entering or offering to enter a surrogacy arrangement s 10T(2) (inserted 2017)  •  Negotiating, arranging or obtaining the benefit)  •  Inducing another | No | No | |
| **Tasmania Surrogacy Act 2012 (Tas)** | | Yes | | Yes s 9 ✓Pregnancy and any attempt to become  pregnant ✓The birth and care of the child | Yes s 40 | Yes  • Commercial brokerage or advertising s 41 | No | No | |

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|  |  | ✓ The value of the surrogate mother’s lost earnings  ✓ Insurance premiums  ✓ Counselling or medical services  ✓ Reasonable costs of child born  ✓ Cost of being party to parentage order  ✓ Legal services/ advice  ✓ Travel or accommodation costs  ✓ Reasonable out of pocket expenses |  |  |  |  |
| **Victoria Assisted Reproductive Treatment Act 2008 (Vic)** | Yes | Yes s 44(2)  🗶 Pregnancy and any attempt to become  pregnant (only prescribed costs)  🗶 The birth and care of the child  🗶 The value of the surrogate mother’s lost  earnings  🗶 Insurance premiums  ✓Counselling or medical services (those not  recoverable by Medicare)  🗶 Reasonable costs of child born  🗶 Cost of being party to parentage order  ✓ Legal services/ advice  ✓ Travel or accommodation costs  🗶Reasonable out of pocket expenses | Yes s 44 | Yes • Entering into s 44 | No  page33image24019520page33image24022976 | No  page33image24023168 |
| **Western Australia Surrogacy Act 2008 (WA)** | Yes | Yes s6  ✓ Pregnancy and any attempt to become  pregnant  ✓ The birth and care of the child  ✓ The value of the surrogate mother’s lost  earnings  ✓ Insurance premiums   * ✓ Counselling or medical services   🗶Reasonable costs of child born (could be  covered by s 6(1)(a)   * ✓ Cost of being party to parentage order * ✓ Legal services/ advice   🗶Travel or accommodation costs ✓Reasonable out of pocket expenses | Yes | Yes   * •  Entering into s 8 * •  Introducing parties s 9 * •  Publishing willingness s   10   * •  Facilitating s 11 | No | No |

In Western Australia, under the *Surrogacy Act 2008* (WA) judges of the court may make parentage orders and other related orders to transfer the parentage of a child from his or her surrogate birth parent/s to the child’s arranged parents. However, for such an order to be made, any person wishing to enter into a surrogacy arrangement must comply with all the requirements of the Act (and Regulations and Directions).

Persons bringing a child into Western Australia that was born as a result of an international commercial surrogacy arrangement abroad (or indeed any commercial surrogacy arrangement) are unable to apply for an order for a legal parentage order under the *Surrogacy Act 2008* (WA) as such arrangements do not meet the legal pre-conditions for an order for legal parentage to be made.542 Further, such people are not considered a legal parent of the child pursuant to provisions in the *Artificial Conception Act 1985*

**Sale of children**

* Number of cases where safeguards against the sale of children have been used in criminal cases in surrogacy arrangements.   ZERO

**Data**

* **Altruistic surrogacy arrangements are legal in Australia**
* Births per year via clinic-approved gestational surrogacy: 2014:n= 32: 2015:n=52 2016: n=45
* **number of cases of refusal to transfer the child**. NIL
* **Intermediaries facilitating surrogacy arrangements do not need to be registered and in some states are illegal**

**Overseas Surrogacy Cases**

* **number of cases, annually, where nationals have returned to Australia with the surrogate-born child.**

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| **Number of children born through surrogacy arrangements who have acquired Australian citizenship by descent, by country of birth and financial year (1 July 2014 to 30 April 2019)** | | | | | |
| **Country of Birth** | **2014-15** | **2015-16** | **2016-17** | **2017-18** | **2018-19 (to 30 Apr)** |
| Cambodia | 0 | <5 | 11 | <5 | 0 |
| Canada | <5 | 5 | 15 | 26 | 11 |
| Georgia | 0 | <5 | 8 | 7 | 17 |
| Greece | 0 | 0 | <5 | <5 | 0 |
| India | 85 | 58 | 11 | 6 | <5 |
| Kenya | 0 | 0 | 0 | <5 | 5 |
| Malaysia | <5 | 0 | 0 | <5 | <5 |
| Mexico | <5 | 10 | 7 | 0 | <5 |
| Nepal | <5 | 55 | <5 | 0 | 0 |
| Russian Federation | 0 | 0 | <5 | 0 | <5 |
| Thailand | 95 | 20 | 12 | 9 | 8 |
| Ukraine | <5 | <5 | 9 | 26 | 61 |
| United States of America | 48 | 52 | 56 | 80 | 75 |
| Other countries | 7 | 8 | 6 | 12 | 9 |
| **Total** | **243** | **214** | **139** | **175** | **193** |
|  | | | | | |

* **under which circumstances authorities have allowed their nationals to bring the child born from a surrogacy arrangement into their country of origin and which ones (e.g. judgements, best interests of the child determinations, etc.), and how often they have been used.**
* At a Commonwealth level, people who have engaged in surrogacy arrangements abroad are able to apply for citizenship by descent for the child(ren) who have been born as a result, provided there is either
  1. genetic relationship with one of the intending parent(s)
  2. A court order from an overseas jurisdiction which has awarded a transfer of parentage (and recognised in Australia). These are only available in some US states, Canadian provinces and Greece
* The granting of citizenship by descent involves the determination of applications pursuant to the *Australian Citizenship Act 2007* (Cth). Australian citizenship laws apply universally to the children of an Australian parent and the current law does not give discretion to refuse a child’s application for citizenship once it has been established that one of its parents is Australian.

Australian Passports Act 2005

Australian passport laws apply universally to child passport applications, no matter how the child came to be conceived. If a child is granted Australian citizenship and meets the requirements of the *Passports Act 2005* (Cth) (that is, they meet citizenship, identity and consent requirements) they have a legal entitlement to an Australian passport. Until the child is 18, consent of the surrogate will be required unless there is a recognised order from an Australian court (such as an order for legal parentage, parental responsibility, adoption, registering a foreign order); or having the passports office dispense with the requirement for consent (which may occur when there ‘has been no contact between the child and the surrogate)

* **how many cases have led to the non-recognition of parentage orders established in the State where the surrogacy arrangement occurred.**