**Australia’s Response: Questionnaire from the Special Rapporteur on the Sale and Exploitation of Children**

*Introduction*

Australia is a federation. In Australia, state and territory governments regulate birth registration, records and certification, child welfare and protection, and surrogacy. This response therefore covers the situation at the national, state and territory levels.

All states and territories, except the Northern Territory, have legislation that allows altruistic surrogacy, prohibits commercial surrogacy within Australia, and regulates surrogacy‑related matters including providing a legal mechanism for the transfer of the parentage of the child from the birth parent(s) to the intended parents\*. In the states of New South Wales (NSW) and Queensland, and in the Australian Capital Territory (ACT) it is also an offence to enter into a commercial surrogacy arrangement outside Australia.

At the national level, the *Family Law Act 1975* (Commonwealth, Family Law Act) provides for matters arising from the dissolution of married and de facto relationships. The family law courts may make parenting orders for the care of children in all states and territories of Australia (except in relation to ex-nuptial children in the state of Western Australia, for which Western Australia has its own legislation), and may make determinations of legal parentage where the determination of the child’s parentage is incidental to the family law proceedings.

The answers to the questions below include consideration of the laws at the federal level (including the Family Law Act), and the laws of most of Australia’s states and territories (including New South Wales, Queensland, Victoria, Western Australia, South Australia and Tasmania) relating to birth, parentage and surrogacy.

**\*** Intended parents, or arranged parents (depending on state and territory legislation), generally refer to a person, other than the birth mother, who under a surrogacy arrangement the child is to be treated as a child of, and who it is agreed will raise the child.

**Identity, origins and parentage**

* 1. **Describe safeguards protecting identity rights (CRC art. 7 and 8) that are currently being implemented in your State. Safeguards include laws, judicial and administrative procedures, enforcement actions, and other practices intended to prevent or remedy violations of human rights norms. Note whether and how such general safeguards protecting identity rights apply in the context of surrogacy arrangements.**

*National*

The Family Law Act provides safeguards to recognise and protect identity rights of children, in accordance with articles 7 and 8 of the *Convention on the Rights of the Child* (CRC). The objects and principles of Part VII – Children of the Family Law Act are to ensure that the best interests of children are met, and provide that children have a right to know and be cared for by both parents and have a right to enjoy their culture (section 60B). In making a parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration (section 60CA). The primary considerations in determining what is in a child’s best interests are the benefit to the child of having a meaningful relationship with both of the child’s parents; and the need to protect the child from harm (section 60CC). These provisions apply to all children irrespective of the method of the child’s conception or their parents’ relationship status.

Individual states and territories reflect these international obligations in state and territory legislation and surrogacy frameworks.

*Australian Capital Territory*

All births occurring in the Australian Capital Territory must be registered, as set out in the *Births, Deaths and Marriages Registration Act 1997* (ACT). This requirement applies equally to births due to surrogacy arrangements. See also Question 6.

*New South Wales*

The *Births, Deaths and Marriages Registration Act 1995* (NSW) (BDMR Act) provides that when a child is born in NSW, notice of the birth must be given to the Registrar in a form and manner required by the Registrar within 7 days after a live birth, or 48 hours after a stillbirth. Parents are required to register the birth, including a name, before the baby turns 8 weeks old. The BDMR Act provides that a child’s name may only be changed by the parents of a child via an application to the Registrar. The child’s birth must be registered in NSW or the child must have been resident in NSW for at least 3 consecutive years prior to the date of application.

The *Surrogacy Act 2010* (NSW) enables the Supreme Court of New South Wales to grant a parentage order in respect of a child born through an altruistic surrogacy arrangement if the order is in the child's best interests and certain other preconditions are met. See also Questions 3 and 6.

Where a parentage order is made, the NSW Registry of Birth, Deaths and Marriages will register the particulars provided by the Court, including the name of the child. The *Births, Deaths and Marriages Registration Act 1995* (NSW) provides that a child’s name may only be changed via an application to the Registrar.

*Queensland*

The Registry of Births, Deaths and Marriage (RBDM) is responsible for the registration of life events in Queensland, including the birth of a child, under the *Births, Deaths and Marriages Act 2003* (Qld)(BDMR Act). Under sections 6 and 9 of the BDMR Act, the birth of a child born in Queensland is to be registered within 60 days (eight weeks) after the birth. Under section 7 of the BDMR Act, the birth of a child outside of Queensland may also be registered with RBDM in certain circumstances. Under section 12 of the BDMR Act, the birth registration application must state the child’s name.

The *Surrogacy Act 2010* (Qld) (Surrogacy Act) provides a legal mechanism for the parentage of a child born as a result of a surrogacy arrangement to be transferred from the birth mother to the intended parents. This legal mechanism ensures that a child born as a result of a surrogacy arrangement has the same legal rights and status as other children. See also Question 6.

Section 41D of the BDMR Act allows for a parentage order to be registered with RBDM. In practice, the child’s birth entry is closed off and the transfer of parentage is registered in a new entry for the child, meaning that a birth certificate for the child will show the intended parents as the legal parents of the child. This process confirms the legal status of the child’s intended parents, and severs the legal parentage of the birth parents.

Section 6(1) of the Surrogacy Act outlines that the main principle underpinning Queensland’s surrogacy law is that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, are paramount (the paramount principle). The Surrogacy Act is administered under further principles, including principles that a child born as a result of a surrogacy arrangement should be cared for in a way that: ensures a safe, stable and nurturing family and home life; promotes openness and honesty about the child’s birth parentage; and promotes the development of the child’s emotional, mental, physical and social wellbeing (section 6(2)(a), Surrogacy Act).

*South Australia*

All births occurring in South Australia must be registered and the registration must include comprehensive identity information as set out in the *Births, Deaths and Marriages Registration Act 1996* (SA) and *Births, Deaths and Marriages Registration Regulations 2011* (SA). These requirements apply equally to births due to surrogacy arrangements.

*Tasmania*

All births occurring in Tasmania must be registered, as set out in the *Birth, Deaths and Marriages Registration Act 1999* (Tas). This requirement applies equally to births due to surrogacy arrangements.

The *Surrogacy Act 2012 (*Tas*)* is underpinned by the main principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life, are paramount. Section 3 of the *Surrogacy Act 2012* provides that the Act is to be administered according to the following principles:

(a) a child born as a result of a surrogacy arrangement should be cared for in a way that –

(i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;

(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of –

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the intended parents of the child;

(c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;

(d) the autonomy of consenting adults in their private lives should be respected.

The intended parent or parents apply to the Court for a parentage order, which will name the intended parent or parents as the legal parents. Section 31 of the *Surrogacy Act 2012* (‘Duty of parents not abrogated by Act’) confirms that the parents of a child before a parentage order is made for the child (i.e., the birth mother) still register the birth of the child in accordance with the *Births, Deaths and Marriages Registration Act 1999* (Tas). The Registrar re-registers the birth of a child who has had a parentage order made in relation to them (section 34 *Surrogacy Act 2012*). An entry is made in the surrogacy record showing the information that was held in the register before the parentage order was made.

*Victoria*

All births occurring in Victoria must be registered, as set out in the *Birth, Deaths and Marriages Registration Act 1996* (Vic). This requirement also applies to births due to surrogacy arrangements.

In Victoria, the *Assisted Reproductive Treatment Act 2008* (Vic) (the ART Act) provides the regulatory framework for gestational surrogacy arrangements. The *Status of Children Act 1974* (Vic) (SOC Act) provides the rules which govern when a Court can make a substitute parentage order which declares the commissioning parents to be the legal parents of a child.

Both the ART and SOC Acts aim to create a regulatory framework which safeguards the rights and wellbeing of surrogate mothers and their partners, commissioning parents, and children born as a result of surrogacy arrangements. The ART Act requires all gestational surrogacy arrangements to be approved by the Patient Review Panel before an assisted reproductive treatment provider may carry out a treatment procedure. The Panel must have regard to the welfare and interests of persons born or to be born as a result of assisted reproductive treatment including the health and wellbeing of persons seeking treatment.

In addition to making a substitute parentage order the Court may make any consequential or ancillary order it thinks fit in the interest of justice or for the welfare and in the best interests of the child, including any matter affecting the child in relation to the duties, powers, responsibilities and authority which parents have in relation to children, or the domicile of the child.

See also Question 3.

*Western Australia*

All births occurring in Western Australia must be registered, as set out in the *Births, Deaths and Marriages Registration Act 1998* (WA). This requirement applies equally to births due to surrogacy arrangements.

The Western Australian *Surrogacy Act 2008* provides for the regulation of altruistic surrogacy arrangements and for the transfer of parentage of children born as a result of those arrangements. The legislation specifically prohibits surrogacy for reward (financial or material).

In the context of an approved altruistic surrogacy arrangement in Western Australia the identity of the child is safeguarded as in Article 7 and 8 of the *Convention on the Rights of the Child* (CRC). The birth mother (surrogate) and her partner, if any, are considered to be the legal parents of the child until transfer of parentage by the Family Court.

* The *Surrogacy Act 2008* (WA) provides for transfer of parentage to the arranged parents, where certain conditions have been met.
* The child to whose parentage the order relates to has a right of access to the original registration of the birth on reaching 16 years of age.
* Where donated reproductive material has been involved, the child on reaching 16 years of age has the right to apply to the Department of Health Donor Register, for identifying information about their donor/s (if any).
1. **Describe safeguards protecting the access to origins (CRC art. 7 and 8) that are currently being implemented in your State. Note whether and how such general safeguards protecting the access to origins apply in the context of surrogacy arrangements.**

*National*

Access to records of origin, such as birth records, is a matter for the states and territories. In relation to a child having a right to know and be cared for by both parents, please see Question 1.

*New South Wales*

The *Surrogacy Act 2010* (NSW) provides for a child’s right to registered birth information. Section 55(1) provides that a person, aged over 18, who is the child of a surrogacy arrangement and in respect of whom a parentage order is made, is entitled to receive their original birth certificate and full birth record.

Where a person is under 18 years, they must have the consent of the person/s with parental responsibility. Other affected persons are also entitled to receive the original birth certificate of the child of the surrogacy arrangement and the full birth record.

An application for the supply of an original birth certificate or full birth record must be made in writing to the Registrar of Births, Deaths and Marriages.

*Queensland*

The *Births, Deaths and Marriages Act 2003* (Qld)allows the child born as a result of a surrogacy arrangement to access information about the child’s birth parentage once the child is 18 years old.

See also Question 1.

*South Australia*

Children in South Australia are entitled to access their origin information. Known gamete donors must be listed on the original birth registration form pursuant to the *Births, Deaths and Marriages Registration Act 1996* (SA) section 13(2). Children are entitled to access this information once they reach 18 years of age. If unknown gamete donors are used through a fertility clinic, the clinic must operate in accordance with the National Health and Medical Research Council Guidelines on Assisted Reproductive Technology. These guidelines entitle children conceived using anonymous donors to access details about their genetic origins. These rules about both known and unknown donors apply to children born due to a surrogacy arrangement.

*Tasmania*

Section 39 of the *Surrogacy Act 2012 (*Tas)provides for access to surrogacy records. A child born as a result of surrogacy can access their original birth information, subject to certain conditions. If the child does not know the name of the birth parents, the child must provide evidence from an approved counsellor stating they have received appropriate counselling about accessing their birth information.

See also Question 1.

*Victoria*

See Questions 1 and 3.

*Western Australia*

Under the *Surrogacy Act 2008* (WA)the birth is registered, the parents care for their child, and the genetic identity of the child and the identity of the birth parents is registered. The identity of the child is preserved, including nationality, name, and family relations and may be accessed by the child at 16 years of age (or earlier if an approved plan provides for this).

The principles of CRC articles 7 and 8 are upheld as these measures recognise the child’s right to know their birth, genetic and arranged parents.

The *Surrogacy Act 2008* (WA) has in place specific safeguards that protect access to origins. In the making of a parentage order, the registrar of the court is required to give the Register of Births, Deaths and Marriages, certain identity information to protect access to origins.

1. **Describe how the right to access origins is balanced with the right to privacy of parents and gamete donors. Indicate specifically how the best interests of the child are factored in.**

*New South Wales*

The *Assisted Reproductive Technology Act 2007* (NSW) establishes a Central Register to support information about donor conceived people, donors of gametes, parents and siblings of children who are donor conceived and those born through surrogacy arrangements, and to give donors and donor offspring greater opportunity to access information about each other.

Section 37 of the [*Surrogacy Act 2010*](http://www.legislation.nsw.gov.au/maintop/view/inforce/act%2B102%2B2010%2Bcd%2B0%2BN) (NSW) requires that information about surrogacy arrangements must be recorded in the Central Register before a parentage order can be granted by the Supreme Court.

Where donated gametes or a donated embryo have been used in a surrogacy arrangement, all relevant donor details must be provided to the Central Register by the Assisted Reproductive Technology Provider involved in the treatment. This mandatory information is able to be released to donor conceived children once they turn 18 years of age.

*Queensland*

The publication of sensitive and personal information about the private affairs of a family and a child born as a result of a surrogacy arrangement may have significant effect upon the family or child’s health and well-being. As such, it is an offence under section 53 of the *Surrogacy Act 2010* (Qld) for a person to publish identifying material about a surrogacy court proceeding without obtaining the requisite consent from the parties.

Section 44(13) of the *Births, Deaths and Marriages Act 2003* limits access to information in the child’s original birth record to the intended parents, birth parents and the child (if at least 18 years old). Law enforcement, the Attorney-General and certain other persons (such as a guardian appointed under the *Guardianship and Administration Act 2000* (Qld)) may also have access to the closed entry. Sections 44(16) and 44(17) of the *Births, Deaths and Marriages Act 2003* allow for the release of information to children under 18 years old if the birth parents and the intended parent/s give their consent (which is not required if the person has died or cannot be located).

*South Australia*

Known gamete donors must sign the birth registration form indicating their consent for release of the identifying information. If they do not sign the form, they will not be listed on the birth certificate as a biological parent. (However known gamete donors must be listed on the original birth registration form pursuant to the *Births, Deaths and Marriages Registration Act 1996* (SA) section 13(2)). Anonymous donor programs at fertility clinics must operate in accordance with the National Health and Medical Research Council Guidelines on Assisted Reproductive Technology. These guidelines prohibit use of donated gametes unless the donor has consented to release of information to any children born as a result of the donation. A donor can consider whether they wish to provide such consent before making their donation.

*Tasmania*

See Question 2.

*Victoria*

In 2016, Victoria passed *Right to Know* laws giving all donor-conceived people in Victoria access to information about their donors. If donated gametes or embryos are used in a treatment procedure connected to a gestational surrogacy arrangement their information will be included on the donor conception register.

The Right to Know laws established a range of measures to support donor-conceived people and donors, including through provision of counselling and contact preferences. Contact preferences allow donors to manage the release of their information including through a no contact preference, limited contact, or specifying certain preferences for contact.

Under the *Assisted Reproductive Treatment Act 2008* (Vic), the Victorian Assisted Reproductive Treatment Authority was given responsibility for managing the donor conception registers, donor-linking and providing information support and counselling to donors and donor-conceived people wishing to access information from the registers in a sensitive and appropriate manner.

*Western Australia*

Gamete donation is regulated under the Western Australian *Human Reproductive Technology Act 1991*. The legislation specifically requires that the prospective welfare of any child to be born consequent upon a procedure to which the Act related is properly taken into consideration. Specifically Direction to the *Human Reproductive Technology Act 1991* (WA) (4.2) requires:

The licensee must ensure that prior to consent being given for the donation or use of donor human reproductive material in an artificial fertilisation procedure, all donors and recipients are given oral explanations supported by written information about –

* The effect of the *Artificial Conception Act 1985* (WA) (which provides that the donor is not the parent of the child born from their donation);
* Information that is included on Department of Health registers in relation to its use and the biological parentage of any child born as a result of the use;
* Rights of donors, participants and children born as a result of the donation to access identifying and non-identifying information in accordance with the *Human Reproductive Technology Act 1991* (WA);
* The medical and social implications in relation to donation and for children born as a result of the donation.

The donor (and partner if any) must undergo counselling so there is a full understanding that identifying donor information will be recorded on a donor register and the donor-conceived person has a legal right to access this information when they reach 16 years of age.

Arranged parents are required to undergo counselling to ensure the prospective welfare of the child is properly taken into consideration through openness and honesty about the nature of a child’s birth and genetic origin.

1. **Describe safeguards protecting the family environment (CRC art. 7, 8, 9, 10, 20) that are currently being implemented in your State. Note whether and how such general safeguards protecting the family environment apply in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.**

*National*

The Family Law Act provides that a court must regard the best interests of the child as the paramount consideration when making orders about parenting arrangements (sections 60B and 60CA). A key principle is that children have a right to spend time on a regular basis with both parents and other people significant to their care, welfare and development (section 60B). The primary considerations in determining a child’s best interests are the benefit of a child having a meaningful relationship with both parents, and the need to protect the child from harm including violence, neglect and abuse (section 60CC(2)). In applying these two primary considerations, the court must give greater weight to the need to protect the child from harm (section 60CC(2A)).

Orders for parental responsibility can be made in favour of people who are concerned with the care, welfare or development of the child. This includes those who may not otherwise be considered the legal parents of the child, and can include grandparents and other family members. Parental responsibility in relation to a child means all the duties, powers, responsibilities and authority that parents have in relation to children (section 61B). These provisions apply to all children irrespective of the method of the child’s conception or their parents’ relationship status. The Family Law Act also stipulates that a child has the right to enjoy their culture (section 60B(2)(e)), and for Aboriginal and Torres Strait Islander children this includes a right to maintain connection with that culture.

In determining what is in a child’s best interests, the court must consider any views expressed by the child, and may take advice from professionals including independent children’s lawyers and family consultants.

*Australian Capital Territory*

The *Human Rights Act 2004* (ACT) recognises that ‘every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind’; and that the family is the natural and basic group unit of society and is entitled to be protected by society (s 11). The Act also protects the right to recognition and equality before the law (s 8).

Rights protected in the Human Rights Act are enforced in a range of ways, including an obligation imposed on public authorities to take relevant human rights into account in decision-making and to act consistently with human rights (s 40B). The Act also requires other legislation, such as the *Parentage Act 2004* (ACT) which regulates surrogacy, to be interpreted consistently with human rights as far as is possible, consistently with the purpose of the legislation.

*New South Wales*

Under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the Secretary can exercise emergency protection powers to ensure the protection of a child or young person, or seek appropriate orders from the Children’s Court of NSW. Removal of the child from his or her usual caregiver may occur only where it is necessary to protect the child from risk of serious harm. Decisions made by the Secretary are reviewable.

See also Questions 3 and 6.

*Queensland*

The *Human Rights Act 2019* (the HR Act) (the substantive elements of which are expected to commence 1 January 2020) protects 23 fundamental human rights, including the right to privacy (section 25, HR Act) and protection of families and children (section 26, HR Act). The right to protection of families and children specifically includes the right for every person born in Queensland to a name and birth registration.

Subject to the paramount principle (the wellbeing and best interests of the child), a guiding principle of the *Surrogacy Act 2010* (Qld) is that the autonomy of consenting adults in their private lives should be respected. Surrogacy arrangements in Queensland are regarded as private arrangements made between adults. The Surrogacy Act respects the autonomy of the parties in decision making about starting a family and the surrogacy arrangements they wish to put in place.

The Surrogacy Act does not impose restrictions based on marital status, gender, sexual orientation or methods of conception, as to do so is inconsistent with the principle that the welfare and best interests of the child are paramount. The Surrogacy Act recognises that all children are entitled to the same legal protections and certainty regardless of the nature of the relationship of their parents or the circumstances that resulted in their conception and birth.

However, as noted above, the Surrogacy Act includes safeguards to ensure that the wellbeing and best interests of the child are protected, and that individuals understand the implications of entering into a surrogacy arrangement.

A court considering an application for a parentage order (or a discharge order) under the Surrogacy Act may notify the Department of Child Safety, Youth and Women (the department responsible for the administration of the *Child Protection Act 1999*), if the court considers the child is in need of protection (section 38, Surrogacy Act).

*Tasmania*

To ensure that the wellbeing and best interests of the child are protected and that parties to a surrogacy arrangement understand all the implications of the surrogacy arrangement, various safeguards are included. These safeguards are built into the requirements to be met before the pregnancy occurs, after the birth and during court processes dealing with an application to transfer the parentage of the child to the intended parents. See also answer to Question 6.

When making a parentage order, if it is in the best interests of the child to do so the court has a discretion which will enable it to waive some preconditions.

1. **Provide information on existing laws, regulations or practices for the establishment, recognition and contestation of legal parentage. Indicate specifically how the best interests of the child are factored in.**

*National*

Generally, the establishment, recognition and contestation of legal parentage is a matter for states and territories. At the national level, family courts may determine parentage of a child where parentage is incidental to the determination of other proceedings under the Family Law Act.\* Family courts may also make a declaration of parentage where the parentage of a child is a question in issue in proceedings (section 69VA). The court may order the carrying out of parentage testing procedures (section 69W).

The Family Law Act contains presumptions of parentage that arise from factual circumstances, including cohabitation, registration of birth, and findings of courts, among others. These presumptions, with the exception of findings of courts, are rebuttable. The Family Law Act also sets out the framework for parentage at the national level for children born as a result of artificial conception procedures (section 60H) and recognises state and territory laws and court orders as establishing parentage in surrogacy cases (section 60HB).

\*Please see ‘Introduction’ for the limitations of federal jurisdiction in relation to parentage.

*States and Territories*

Each state and territory has separate legislation providing for the recognition and contestation of parentage. Such legislation provides for parentage presumptions and parentage testing procedures. Further, the legislation provides that certain persons may make an application to the relevant Supreme Court for a declaration of parentage where this issue is disputed.

1. **Specify how the establishment of parentage occurs in the context of surrogacy arrangements. Indicate specifically how the best interests of the child are factored in.**

*National*

In Australia, surrogacy is regulated by the States and territories. The Commonwealth Family Law Act provides that family courts can only recognise parentage arising from surrogacy arrangements when a court order has been made under a prescribed law of a state or territory to that effect (section 60HB). However, under the Family Law Act, the court can make orders for parental responsibility and must regard the best interests of the child as the paramount consideration (see Question 4).

In terms of determining the parentage for a citizenship by descent application, when the Australian Government is informed of, or detects a citizenship by descent application involving a child born through surrogacy arrangements, medical procedure records and surrogacy agreement documents are required to support the application. Additional DNA testing and/or other evidence may also be required to support the claimed relationship between the Australian citizen parent and the child. The surrogate mother may be required to attend an interview to determine that she was the person who gave birth and to establish her informed consent to the citizenship application.

In all states and territories with surrogacy frameworks, surrogacy legislation provides that the birth mother (and usually their partner) is/are the legal parent(s) of the child, until a court order is sought and made transferring parentage to the intended parents. In making an order transferring legal parentage to the intended parents, the court has regard to the best interests of the child and the views of the intended parents and the birth mother.

*Australian Capital Territory*

The *Parentage Act 2004* (ACT) allows for altruistic surrogacy arrangements subject to a range of strict conditions, including that the child is conceived as the result of a procedure carried out in the ACT; that neither birth parent is a genetic parent of the child; at least one of the substitute parents is a genetic parent of the child; and that there is a substitute parent agreement (other than a commercial substitute parent agreement) under which the substitute parents have indicated their intention to apply for a parentage order about the child (section 24).

To have legal effect, a substitute parent must make an application to the Supreme Court for a parentage order under section 25 of the *Parentage Act 2004* (ACT). The application must be made when the child is between 6 weeks and 6 months old.

The Supreme Court must make a parentage order about the child if satisfied that the making of the order is in the best interests of the child; and both birth parents freely, and with full understanding of what is involved, agree to the making of the order.

In deciding an application the Court must consider whether both birth parents and substitute parents have received appropriate counselling and assessment from an independent counselling service.

*New South Wales*

In NSW, the *Surrogacy Act 2010* (NSW) enables the Supreme Court of NSW to grant a parentage order in respect of a child born through an altruistic surrogacy arrangement if the order is in the child's best interests and other preconditions are met. An application for a parentage order must be made not less than 30 days and not more than 6 months after the child’s birth. The Court may consider an application made outside this timeframe only if the Court is satisfied that exceptional circumstances justify that action.

The best interests of the child are paramount (section 22). Other mandatory pre-conditions include that: the arrangement must be a pre-conception surrogacy arrangement; there must only be one or two intended parents; the court must have regard to the wishes of the child if the child is of sufficient maturity to express his or her wishes; the birth mother must be at least 18 years old when entering into the arrangement; the intended parent/s must be at least 18 years old when entering into the surrogacy arrangement.

A parentage order transfers the legal parentage of the child from the birth mother (and her partner, if any) to the person(s) who intend to become parents under the surrogacy arrangement. Parentage orders that are made by the Supreme Court are registered by the Registry of Births, Deaths and Marriages under Part 4A of the *Births, Deaths and Marriages Registration Act 1995* (NSW).

*Queensland*

Under section 22 of the *Surrogacy Act 2010* (Qld), a court (the Childrens Court constituted by a District Court Judge) can make a parentage order to transfer the parentage of the child from the birth mother to the intended parents.

The *Surrogacy Act 2010* (Qld) sets out the effect of the making of a parentage order that transfers parentage of the child to the intended parent/s. The child becomes a child of the intended parents, and is no longer a child of the birth parents (section 39, *Surrogacy Act 2010* (Qld)).

To ensure that the wellbeing and best interests of the child are protected and that parties (the birth mother, the birth mother’s spouse or partner and the intended parents) to a surrogacy arrangement understand the implications of the arrangement, the *Surrogacy Act 2010* (Qld) contains safeguards that have been built into the court process for an application to transfer the parentage of the child. For example, when seeking a parentage order, the intended parents must state in their sworn affidavit their understanding in relation to openness and honesty about the child’s birth parentage being for the wellbeing and best interests of the child (section 26(c), *Surrogacy Act 2010* (Qld)). Under section 22(2)(a) of the *Surrogacy Act 2010* (Qld), the Childrens Court may only make a parentage order if satisfied of certain matters, including:

* the parentage order is for the wellbeing and in the best interests of the child;
* that the parties to the surrogacy arrangement received independent legal advice before entering into the surrogacy arrangement;
* that the surrogacy arrangement was made before the child was conceived and is not a commercial surrogacy arrangement;
* that the parties to the surrogacy arrangement received counselling before entering into the arrangement;
* that there was a medical or social need for the surrogacy;
* the receipt by the court of a surrogacy guidance report by an independent and appropriately qualified counsellor, prepared following the child’s birth;
* that the parties to the surrogacy arrangement are of a certain age; and
* that the intended parent/s are Queensland residents.

Under section 23 of the *Surrogacy Act 2010* (Qld), the court may dispense with some of the requirements under section 22(2) if it is satisfied there are exceptional circumstances for giving the dispensation and it will be for the wellbeing and in the best interests of the child. However the court cannotdispense with the requirement to be satisfied that the order will be for the wellbeing and in the best interests of the child, that the surrogacy arrangement was made with consent before the child was conceived, and that is not a commercial surrogacy arrangement.

Under section 41D of the *Births, Deaths and Marriages Act 2003* (Qld), once a parentage order has been made, an application can be made to register the order with Registry of Births, Deaths and Marriage so that the child’s original birth entry is closed and a new entry is made for the child. The presumption of parentage arising from the registration of birth will apply so that the intended parents are presumed to be the child’s parents.

Section 46 of the *Surrogacy Act 2010* (Qld) sets out a process to seek a court order discharging a parentage order. The court may make a discharge order if the court is satisfied reasonable efforts have been made to serve the application on relevant parties, and the child (if the child is under 18 years and if the court considers it appropriate having regard to the child’s age) and on one of the following grounds:

* the parentage order was obtained by fraud, duress or other improper means;
* a consent required for the making of the parentage order was, in fact, not given or was given for payment, reward or other material benefit or advantage (other than the birth mother’s surrogacy costs); or
* there is an exceptional reason why the parentage order should be discharged.

Section 48 of the *Surrogacy Act 2010* (Qld) states that upon the making of a discharge order the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the parentage order had not been made. A decision refusing an application for a parentage order and a decision granting or refusing an application for a discharge order may be appealed in certain circumstances (section 49, Surrogacy Act).

*South Australia*

At birth a baby born of a surrogacy arrangement is legally the child of the surrogate mother. Parentage is not transferred to the intending parents unless the Youth Court of South Australia makes an order to that effect, taking into account the best interests of the child and the views of the intending parents and surrogate mother. Prior to parentage transfer the child generally lives with the intending parents, with the consent of the surrogate mother.

*Tasmania*

A parentage order under the *Surrogacy Act 2012* (Tas)is necessary to transfer the parentage and rights in relation to the child to the intended parents and to extinguish any rights (as a parent) the birth mother and her partner may have. The *Surrogacy Act 2012* (Tas)is administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

The intended parent or parents in a surrogacy arrangement apply to the Court for a parentage order, which will name the intended parent or parents as the legal parents. This application must be made not less than 30 days and not more than 6 months after the birth of the child (section 15 of the *Surrogacy Act 2012* (Tas)*)* or at a later date with leave from the Court, subject to certain conditions (section 15 of the *Surrogacy Act 2012* (Tas)).

Under section 16 of the *Surrogacy Act 2012* (Tas)the Court may make a parentage order in favour of the intended parent or parents only if it is satisfied as to all of the following matters:

1. the parties sought legal advice and entered into a written, altruistic agreement;
2. the intended parents are over 21 and the birth mother over 25 years old;
3. the birth mother has previously given birth to a live child;
4. all relevant parties sought counselling from an accredited counsellor;
5. the parties have shown a medical or social need for the arrangement;
6. all necessary parties have been served with the parentage order;
7. the child is living with the intended parents;
8. the intended parents are Tasmanian residents;
9. all parties to the parentage order consent to the transfer of parentage; and,
10. the transfer is in the best interests of the child.

To conclude the surrogacy, a child must be born and the Court must order the child’s parentage to be transferred from the birth parent or parents, to the intended parent or parents.

*Victoria*

As above, the *Status of Children Act 1974* (Vic) (SOC Act) provides the rules around substitute parentage orders. It contains rules governing both surrogacy arrangements involving an artificial reproductive technology (ART) provider and those that do not. In relation to gestational surrogacy an application for a substitute parentage order under the SOC Act can only be made if:

* the child was conceived as the result of an ART procedure carried out in Victoria;
* the commissioning parents live in Victoria at the time of making the application; and
* at least 28 days and not more than 6 months have passed since the birth of the child (unless the Court gives leave for applications at other times).

A Court may only make a substitute parentage order if it is satisfied that:

* making the order is in the best interest of the child;
* the Patient Review Panel (where an ART provider is involved) approved the surrogacy arrangement before the arrangement was entered into;
* the child was living with the commissioning parents at the time the application was made;
* the surrogate mother (and her partner if they are a party to the arrangement) have not received any material benefit or advantage from the surrogacy arrangement; and
* the surrogate mother freely consents to the making of the order.

These requirements also apply to traditional surrogacy arrangements, in addition to several other requirements. The Attorney-General, the Secretary of the Department of Justice, or the child whose parentage was transferred by the substitute parentage order (and who is over 18) can apply to have a substitute parentage order discharged. A Court must not discharge a substitute parentage order unless it is satisfied that this would be in the best interest of the child and reasonable efforts have been made to give notice to the surrogate mother, her partner (if they were party to the surrogacy arrangement), the commissioning parents, and the child (where this is appropriate given the child’s age).

*Western Australia*

The *Surrogacy Act 2008* (WA) Part 3, Division 1, section (13)(1) provides that: In deciding whether to make a particular decision concerning a parentage order or proposed parentage order about a child, the court must regard the best interest of the child as the paramount consideration. Section 13(2) states: For the purposes of this Act it is presumed to be in the best interests of the child for the arranged parents to be the parents of the child, unless there is evidence to the contrary.

Under the *Surrogacy Act 2008* (WA), surrogacy arrangements are not enforceable, except in relation to the recovery of reasonable expenses. However, what this means in practice is that the court would be required to consider the best interest of the child.

Additionally the court may only make an order to transfer parentage when the child’s birth parents freely consent to the making of the order. Exceptions to this consent requirement may apply in circumstances where the court is satisfied that:

* a birth parent is deceased or incapacitated, or;
* the arranged parents have been unable to contact a birth parent despite reasonable efforts to do so, or;
* when the birth mother is not the child’s genetic parent and at least one arranged parent is the child’s genetic parent.

The *Surrogacy Act 2008* (WA) presupposes that formal preparation and assessment will provide some degree of protection for parties seeking access to surrogacy and is in the best interest of the child.

The surrogacy arrangement must have been approved in writing by the Reproductive Technology Council (Council). In order for Council to approve a surrogacy arrangement the following conditions must be met, as part of section 17 of the *Surrogacy Act 2008* (WA):

1. the birth mother

(i) has reached 25 years of age and:

(ii) unless the Council is satisfied that there are exceptional circumstances because of which it should be dispensed with this requirement, has given birth to a live child; and

1. the arrangement is set out in a written agreement signed by –

(i) each of the arranged parents’ and

(ii) the birth mother and her husband or de facto partner, if any; and

(iii) any other person (a donor) whose egg or sperm is to be used for the conception of the child or who is the spouse or de facto partner of a donor;

and

1. the Council is satisfied that, at least 3 months before the approval is given, each of the persons required by paragraph (b) to sign the agreement has –
2. undertaken any counselling about the implications of the surrogacy arrangement that regulations under this Act require; and
3. been assessed by a clinical psychologist and confirmed, in a written report provided to the Council , to be psychologically suitable to be involved in the surrogacy arrangement; and
4. received independent legal advice about the effect of the surrogacy arrangement;

and

1. the Council is satisfied that, as least 3 months before the approval is given, each of the arranged parents, the birth mother and any donor has been assessed by a medical practitioner and confirmed, in a written report provided to the Council, to be medically suitable to be involved in the surrogacy arrangement; and
2. the intended birth mother has not yet become pregnant under the arrangement.

These requirements provide safeguards that ensure that the applicants are suitable to enter a surrogacy arrangement. Participants of sufficient maturity can understand the complexity and significance of entering into a surrogacy arrangement, and can be prepared to deal with it in a way that is in the best interest of a child that might be born.

Mitigation of the risks of disputes upholds the dignity of the child to be born, an uncontested transfer of parentage, and the opportunity for the birth parents to have an on-going relationship with the family.

**Sale of children**

1. **Provide information on the laws prohibiting the sale and trafficking of children as well as corresponding implementation measures. Note whether and how such general safeguards against the sale and trafficking of children apply in the context of surrogacy arrangements.**

*National*

Australia has a comprehensive legal framework under the *Criminal Code Act 1995* (Commonwealth) (Criminal Code), which criminalises all forms of human trafficking, including trafficking in children. This legal framework fulfils Australia’s obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Under Division 271 of the Criminal Code, the offences of trafficking in children, including for sexual services, has a penalty of 25 years’ imprisonment.

*New South Wales*

In the *Crimes Act 1900 (NSW):*

* Section 80D of the *Crimes Act 1900* (NSW) criminalises the causing of sexual servitude. Section 80C(a) of the *Crimes Act 1900* (NSW) provides that the offence is aggravated where the alleged victim is under the age of 18.
* Section 80E of the *Crimes Act 1900* (NSW) provides that it is an offence to conduct a business involving sexual servitude.
* Section 91D of the Crimes Act 1900 (NSW) criminalises child prostitution (child is defined as anyone under 18 years).
* Section 91G of the *Crimes Act 1900* (NSW) makes it an offence to use, cause or procure a child to be used, or consent to the use of a child, for the production of child abuse material.
* Section 93AB of the *Crimes Act 1900* (NSW), which is expected to commence on 1 July 2019, makes it an offence to hold another person (whether a child or an adult) in slavery or servitude; or require a child to perform forced or compulsory labour.
* Section 93AB of the *Crimes Act 1900* (NSW), which is expected to commence on 1 July 2019, makes it an offence to cause a child to enter into a forced marriage, or to enter into a forced marriage with a child.

Section 32 of the *Human Tissues Act 1983* (NSW) prohibits the trading of tissue. The provision makes it an offence to enter into or offer to enter into an agreement for the sale of human tissue. This general prohibition encompasses the trading of gametes and embryos.

*Queensland*

There are no offences in the Queensland Criminal Code that apply specifically to surrogacy arrangements. However, there are some general offences which may have some application to surrogacy arrangements. These include offences such as kidnapping (section 354), kidnapping for ransom (section 354A), deprivation of liberty (section 355), child-stealing (section 363), abduction of child under 12 (section 363A) and extortion (section 415) of the Queensland Criminal Code. Whether and how such offences apply to the sale and trafficking of children in the context of surrogacy arrangements will depend on the particular circumstances.

The offence of Child-stealing (section 363, Queensland Criminal Code) may be particularly relevant, as it applies to the actions of a person who removes a child from a parent, guardian, or other person with lawful care of the child. ‘Parent’ is defined to include a person who is a parent of a child by way of a parentage order under the *Surrogacy Act 2010* (Qld) .

1. **Describe any safeguards against the sale of children and child trafficking specifically created for surrogacy arrangements.**

*National*

The *National Action Plan to Combat Human Trafficking and Slavery 2015–19* provides the strategic framework for Australia’s whole-of-government response to combating human trafficking and slavery from 2015 to 2019. Key initiatives include:

* A dedicated range of support services for suspected trafficking victims through the Government’s Support for Trafficked People Program. The Support Program meets clients’ basic needs for safety, food, accommodation, mental and physical health and well‑being. Children on the Support Program under the age of 18 are automatically entitled to a minimum of 90 days of unconditional support.
* A comprehensive visa framework that enables people who are suspected victims of trafficking to remain lawfully in Australia if they do not already hold a valid visa. The visa framework allows suspected victims to stay in Australia for a period to recover, and if they choose to, to assist with a criminal investigation.
* Regular training for law enforcement and frontline officials on identifying and responding to cases of human trafficking.
* Leadership in international and regional initiatives to combat human trafficking including through Alliance 8.7 and the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime.*
* Regional capacity building initiatives with partner countries to combat human trafficking. Since 2008, the Australian Government has provided over $5.8million to specialist anti-trafficking organisations working to combat human trafficking and slavery.

*Australian Capital Territory*

Under the *Parentage Act 2004* (ACT) it is an offence to intentionally enter into a commercial surrogacy arrangement (s.41), or to procure a person to enter into such an arrangement with a third person (s42). It is a criminal offence to arrange for payment or reward in return for a pregnancy or birth as a result of the pregnancy (other than payments to cover expenses connected with a pregnancy in an altruistic surrogacy arrangement). It is also an offence to publish an advertisement or notice with the intent of inducing someone to enter into a surrogacy agreement (including an altruistic surrogacy agreement) (s 43).

These offences apply to conduct of a person ordinarily resident in the ACT even if the conduct occurs outside the ACT, including if the conduct occurs outside Australia (section 45).

The *Adoption Act 1993* (ACT) provides that it is an offence to negotiate or make unauthorised arrangements for adoption. It is an offence to make, give or receive any payment in consideration of an adoption (s 94)

The *Crimes Act 1900* (ACT) includes a range of criminal offences relating to abduction of a child and sexual servitude.

*New South Wales*

Section 8 of the *Surrogacy Act 2010 (NSW)* prohibits commercial surrogacy, including if the conduct occurs overseas (section 11). A surrogacy arrangement will be commercial, if, for fee, reward or other benefit, a person agrees to enter into or enters into a surrogacy arrangement, or gives up a child of the surrogacy arrangement to be raised by the intended parent or intended parents, or consents to the making of a parentage order in relation to a child of the surrogacy arrangement.

*Queensland*

Commercial surrogacy is prohibited in Queensland. Under sections 55 to 58 of the *Surrogacy Act 2010* (Qld), a person cannot enter into a commercial arrangement, advertise for any surrogacy arrangement or receive any fees for arranging a surrogacy (each offence carries a maximum penalty of 100 penalty units or three years imprisonment). This prohibition extends to a person who is ordinarily resident in Queensland entering into or arranging a commercial surrogacy arrangement outside of Queensland (including overseas) (section 54, *Surrogacy Act 2010* (Qld)). A “commercial surrogacy arrangement” means a person receives a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother’s surrogacy costs) in exchange for agreeing to enter, or entering into a surrogacy arrangement, or arranging a surrogacy arrangement (section 10, *Surrogacy Act 2010* (Qld)).

The *Surrogacy Act 2010* (Qld) contains safeguards to prevent forced relinquishment of children. Subject to the recovery of the birth mother’s reasonable surrogacy costs, a surrogacy arrangement is not legally enforceable in Queensland (section 15, *Surrogacy Act 2010* (Qld)). The rationale for this position is to protect the rights of the birth mother, prevent forced relinquishment and commoditisation of women and children. Individuals entering a surrogacy arrangement must be prepared to accept the responsibility for all the risks involved, one of which is that there will not be any remedy if the birth mother does not relinquish the child.

*South Australia*

Surrogacy in South Australia may not involve any payment as direct consideration for the provision of the child. The only acceptable remuneration is to reimburse the surrogate mother for her reasonable expenses related to the arrangement. Further, it is a criminal offence to negotiate, arrange, or obtain the benefit of a surrogacy contract for valuable consideration. Surrogacy agreements are not enforceable as contracts such that transfer of parentage cannot occur against the wishes of the surrogate mother or against the child’s best interests.

*Tasmania*

A surrogacy arrangement itself is not enforceable (e.g. a birth mother can never be forced to give up the child she gives birth to), but an obligation that the intended parent/s pay the birth mother’s surrogacy costs is enforceable in a number of circumstances.

*Victoria*

The ART Act creates an offence for a surrogate mother to receive a material benefit or advantage from a gestational surrogacy arrangement.

Under the ART Act, providers must be registered before providing assisted reproductive treatments, including treatments required as part of a gestational surrogacy arrangement. All women seeking treatment, whether as part of a gestational surrogacy arrangement or part of a regular treatment cycle, must provide their consent and receive counselling from a registered provider.

*Western Australia*

The *Surrogacy Act 2008* (WA) specifically prohibits surrogacy arrangements for reward (commercial surrogacy). The *Surrogacy Act 2008* (WA) refers to a surrogacy arrangement as being for reward if the arrangement provides for any person to receive any payment or valuable consideration other than for reasonable expenses associated with pregnancy or assessment or expert advice in connection with the arrangement.

The *Surrogacy Act 2008* (WA) restricts certain activities relating to facilitating surrogacy arrangements by persons or clinical facilities. Advertising in relation to commercial surrogacy is prohibited under section 10 of the *Surrogacy Act 2008* (WA). A person commits an offence if they publish or cause to be published anything:

* That is intended to, or likely to, induce a person to enter into a surrogacy arrangement that is for reward; or
* To the effect that a person who is willing to enter into a surrogacy arrangement that is for reward is sought; or
* To the effect that a person is or might be willing to enter into a surrogacy arrangement that is for reward.
1. **Comment on the adequacy of current safeguards against the sale of children and child trafficking in the context of surrogacy arrangements.**

The regulation of surrogacy in Australia is a matter for states and territories. All jurisdictions (except the Northern Territory) have legislation dealing with surrogacy. All jurisdictions with legislation on surrogacy have prohibited commercial domestic surrogacy. Overseas commercial surrogacy is also prohibited for residents of New South Wales, Queensland and the Australian Capital Territory. Australia’s human trafficking offences may apply in relation to overseas surrogacy arrangements in certain circumstances. In situations where a child has been procured through an international surrogacy arrangement specifically to be sexually abused, federal child sex offences could potentially apply. Australia’s *Criminal Code Act 1995* *(Commonwealth)* criminalises sex offences committed against children via a carriage service, via a postal service and by Australians while overseas. The *Criminal Code Act 1995* *(Commonwealth)* also includes offences restricting the overseas travel of Australian registered child sex offenders. Australia’s human trafficking offences have extended geographical jurisdiction and capture the conduct of Australian citizens, residents and bodies corporate overseas.

**5. Note the number and types of cases where safeguards against the sale of children have been used in criminal cases in the context of surrogacy arrangements.**

*New South Wales*

# Section 80D of the *Crimes Act 1900* (NSW) criminalises the causing of sexual servitude. 0 convictions were recorded between 2013 and September 2018.

* Section 80E of the *Crimes Act 1900* (NSW) provides that it is an offence to conduct a business involving sexual servitude. 0 convictions were recorded between 2013 and September 2018.
* Section 91G of the *Crimes Act 1900* (NSW) makes it an offence to use, cause or procure a child to be used, or consent to the use of a child, for the production of child abuse material. 197 convictions were recorded between 2013 and September 2018.

**Data**

1. **Indicate if surrogacy arrangements are legal in your State and if so how many occur every year.**

*Australian Capital Territory*

In the ACT commercial surrogacy is illegal. Altruistic surrogacy is permitted in limited circumstances.

There is only one reported decision regarding altruistic surrogacy (a substitute parent agreement) under the *Parentage Act 2004* in the ACT Supreme Court: *ON & Anor v BE &Anor* [2015]ACTSC 332. In that case Justice Mossop found that the criteria for granting a parentage order to the substitute parents were satisfied, and made the order. <https://courts.act.gov.au/supreme/judgments/on-anor-v-be>

*New South Wales*

* In 2014 there were 15 altruistic surrogacy registrations in NSW
* In 2015 there were 11 altruistic surrogacy registrations in NSW
* In 2016 there were 26 altruistic surrogacy registrations in NSW
* In 2017 there were 20 altruistic surrogacy registrations in NSW
* In 2018 there were 17 altruistic surrogacy registrations in NSW.

 *Queensland*

The Department of Justice and Attorney-General does not collect data on the number of surrogacy arrangements that are entered into every year. However, below is data on the number of applications under the *Surrogacy Act 2010* (Qld) for parentage orders made to the Childrens Court of Queensland, since commencement of the *Surrogacy Act 2010* (Qld) on 1 July 2010.

**Applications for parentage orders\*:**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| 2010–11 | 2011–12 | 2012–13 | 2013–14 | 2014–15 | 2015–16 | 2016–17 | 2017–18 |
| 2 | 6 | 10 | 5 | 9 | 14 | 14 | 12 |

\*These statistics were obtained from the Childrens Court of Queensland Annual Reports for 2011–12 and 2017 – 2018 and reflect a count of originating applications for parentage orders made per section 21 of the Surrogacy Act. The count is based upon the originating application document lodged at the Childrens Court of Queensland within the reporting period.

*South Australia*

Altruistic surrogacy arrangements are legal in South Australia. Data indicates that only one or two surrogacy-related parentage orders are made each year. However, orders transferring parentage of the child only occur after the child is born. It is therefore not possible to conclude how many surrogacy arrangements are made that do not result in a pregnancy or a live birth.

*Tasmania*

Commercial surrogacy is prohibited, however the *Surrogacy Act 2012* (Tas) enables altruistic surrogacy in Tasmania. Prior to the introduction of the *Surrogacy Act 2012* (Tas), surrogacy was not legal in Tasmania.

The first surrogacy arrangement in Tasmania was successfully completed in early 2015. Only two surrogacy arrangements (parentage orders) have been registered in Tasmania since the introduction of the *Surrogacy Act 2012* (Tas).

*Western Australia*

Altruistic surrogacy arrangements are permitted in Western Australia. On average four applications a year are received for approval of a surrogacy arrangement.

Since 2009, a total of 16 surrogacy applications seeking parentage orders, for children who were born as a result of a surrogacy arrangement, have been filed with the Family Court of Western Australia.

1. **For countries where surrogacy is permitted, please indicate the number of cases, if any, of contract breaches or of refusal to transfer the child.**

*Australian Capital Territory*

Not applicable – In the ACT, a parentage order may not be made unless both birth parents (that is, the person who gave birth to the child, and their domestic partner (if any)), freely consent to the order.

*New South Wales*

Under Part 2 of the *Surrogacy Act 2010* (NSW), surrogacy arrangements are not enforceable.

An obligation under a surrogacy arrangement to pay or reimburse the birth mother’s surrogacy costs is enforceable, but only if the surrogacy arrangement is a pre-conception surrogacy arrangement.

We are unable to provide statistics regarding the number of cases relating to contractual breach in relation to surrogacy costs that come before the NSW Courts.

*South Australia*

South Australia is not able to provide data on contract breaches or refusal to transfer a child. No Government body is involved in the pre-conception formation of a surrogacy agreement. Therefore, if the arrangement never results in a Court application for parentage orders after the child is born, it will not create any data in South Australia’s systems.

*Tasmania*

Births, Deaths and Marriages, Department of Justice, do not hold any relevant data. Pursuant to section 10 of the *Surrogacy Act 2012* (Tas)*,* a surrogacy arrangement made pursuant to the *Surrogacy Act 2012* (Tas) is not enforceable. If the birth mother changes her mind, she cannot be forced to give up her child.

See also Question 5.

*Western Australia*

No disputes have been reported in relation to surrogacy arrangements approved under Western Australia law.

1. **Indicate if intermediaries facilitating surrogacy arrangements must be registered and, if so, how many are registered in your State.**

*New South Wales*

In NSW, intending parents must find their own surrogate. Accordingly, there is no requirement for registration of intermediaries.

*South Australia*

In South Australia it is illegal to negotiate, arrange, or obtain the benefit of a surrogacy contract for valuable consideration. Clinics providing the necessary fertility treatments for a surrogacy arrangement must be licensed, but they are not permitted to provide services negotiating a surrogacy arrangement.

*Tasmania*

Under the *Surrogacy Act 2012* (Tas)(section 32 ‘Surrogacy record’) the Registrar of Births, Deaths and Marriages is to establish and maintain a surrogacy record which is to contain the information the Registrar is required to enter in the record under this *Surrogacy Act 2012* (Tas). The record is to be maintained in the form the Registrar thinks fit.

The *Surrogacy Act 2012* (Tas)(section 16) requires all parties involved in surrogacy arrangements to have counselling from an accredited counsellor both before a child is conceived and after the birth of the child. The purpose of the counselling is to make parties aware of the social and psychological implications of a surrogacy arrangement.

The Tasmanian Department of Justice publically lists accredited surrogacy counsellors on its Births Deaths and Marriages website. There are currently nine accredited surrogacy counsellors in Tasmania.

*Victoria*

Under the *Assisted Reproductive Treatment Act* *2008* (Vic), providers must be registered before providing assisted reproductive treatments, including treatments required as part of an altruistic gestational surrogacy arrangement. All women seeking treatment, whether as part of a gestational surrogacy arrangement or part of a regular treatment cycle, must provide their consent and receive counselling from a registered provider.

In Victoria there are 9 registered providers across 19 locations. Between 2010 and 2016, the Patient Review Panel received 118 applications in relation to gestational surrogacy arrangements.

*Western Australia*

Under the *Surrogacy Act 2008* (WA) Division 2 section 9 (1) a person who receives, or seeks to receive, valuable consideration for introducing or agreeing to introduce persons with the intention that they might enter into a surrogacy arrangement commits an offence – Penalty fine of $12000 or imprisonment for one year. Subsection (1) applies whether or not it is intended that the surrogacy arrangement be one that is for reward.

1. **For countries where surrogacy is prohibited, please indicate the number of cases, on an annual basis, where nationals have made a surrogacy arrangement abroad and have returned to their country of origin with the surrogate-born child.**

The below indicative numbers are citizenship by descent cases (by program year) where surrogacy was declared or detected.  It is not restricted to countries where surrogacy may be prohibited.

A person may be eligible to become an Australian citizen by descent under the Australian Citizenship Act 2007 in two situations:

* They were born outside Australia on or after 26 January 1949 and a parent of theirs was an Australian citizen at the time of their birth; or
* They were born outside Australia or New Guinea before 26 January 1949 and a parent of theirs was an Australian citizen on 26 January 1949.

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 2008-09 | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 | 2017-18 |
| 10 | 6 | 30 | 266 | 244 | 263 | 243  | 214 | 139 | 175 |

1. **Following on the previous question, please indicate under which circumstances authorities have allowed their nationals to bring the child born from a surrogacy arrangement back into their country of origin and if so please indicate which ones (e.g. domestic parenting orders, judgements, best interests of the child determinations, etc.), and how often they have been used.**

A child born to Australian citizens overseas may be eligible for Australian citizenship by descent.

The principal requirement for Australian citizenship by descent is that, at the time the person was born outside Australia, the person had an Australian citizen parent. This includes children born overseas through surrogacy arrangements, as the *Australian Citizenship Act 2007* (Commonwealth) does not differentiate according to the circumstances of the child’s conception or birth.

When the Australian Government is informed of, or detects a citizenship by descent application involving a child born through surrogacy, medical procedure records and surrogacy agreement documents are required to support the application. Additional DNA testing and/or other evidence may also be required to support the claimed relationship between the Australian citizen parent and the child.

1. **Lastly, in the same context, please indicate how many cases have led to the non-recognition of parentage orders established in the State where the surrogacy arrangement occurred.**

All states and territories, except the Northern Territory, have laws prohibiting commercial surrogacy. In NSW, ACT, and Queensland overseas commercial surrogacy is also prohibited. Courts exercising jurisdiction under the federal Family Law Act can only recognise parentage of intended parents in surrogacy arrangements when there is an order from a state or territory to that effect. Therefore, in certain circumstances, intended parents who return to Australia with children born to overseas commercial surrogacy arrangements may not be recognised as legal parents under state or territory, or federal law. However, courts exercising jurisdiction under the federal Family Law Act can make parenting orders in relation to children, regardless of their means of conception and birth. Distinct from a parentage order (which determines the legal parentage of a child), a parenting order deals with the parenting arrangements for a child, including the allocation of parental responsibility and who the child will live with. When making a parenting order, a court must regard the best interests of the child as the paramount consideration (section 60CA).