

# Discussion paper

## Review of the *Surrogacy Act 2010* and the *Status of Children Act 1996*

June 2024

# Table of Contents

Summary.....	2
Purpose of this consultation .....	2
Introduction.....	4
Background to the Surrogacy Act.....	4
Principles and objectives .....	5
Surrogacy arrangements.....	6
Commercial surrogacy arrangements .....	7
Advertising for altruistic surrogacy arrangements.....	11
Parentage orders.....	12
Jurisdictional comparison .....	16
Principles and objectives .....	17
Establishing Parentage.....	18
Making an application for a declaration of parentage.....	21
Consultation questions .....	23
Appendix 1: Principles to form the basis of surrogacy laws in Australia (2009).....	25
Appendix 2: Jurisdictional comparison – surrogacy legislation.....	27

---

## Summary

The NSW Government committed to review the *Surrogacy Act 2010* (the **Surrogacy Act**) and the *Status of Children Act 1996* (the **Status of Children Act**), and to consult with LGBTIQ+ family organisations and advocacy groups to best understand the complexities of co-parenting arrangements and the challenges faced by families created through surrogacy.

The NSW Government has initiated this review to consider whether legislative amendments are required to sufficiently protect the rights of children and meet the needs of various family structures, including LGBTIQ+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements.

---

## Purpose of this consultation

The purpose of this review is to canvass a broad range of community views to assist the Government in determining whether existing legislation is up-to-date and fit-for-purpose. This Discussion Paper sets out the policy objectives of the Surrogacy Act and the Status of Children Act, and summarises how both pieces of legislation currently operate. It asks whether the objectives remain valid and whether the legislation remains appropriate for securing those objectives.

This Paper asks, amongst other questions:

- Does the Surrogacy Act ensure that the best interests of the child are paramount in every case?
- Does the Surrogacy Act offer sufficient protections for birth mothers?
- Does the Status of Children Act ensure the equal status of children regardless of family structure?
- Does the Status of Children Act adequately establish parentage?
- Does the legislation adequately meet the needs of various family structures, including LGBTIQ+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements?

The full list of consultation questions to help guide submissions is on page 15 of this discussion paper.

## Submissions

The NSW Government welcomes views on the 'Have Your Say' website until **5 pm on 2 August 2024**.

Please send your responses to the discussion questions

- by email to: [policy@dcj.nsw.gov.au](mailto:policy@dcj.nsw.gov.au) or

- by mail to:

Director, Civil Justice, Vulnerable Communities and Inclusion

Policy, Reform and Legislation Branch

Department of Communities and Justice

Locked Bag 5000

Parramatta, NSW, 2124

Following the consultation period, the submissions will be considered by the NSW Government. Further targeted consultation may also occur.

Submissions may be published on the Department of Communities and Justice webpage, unless you ask us not to publish your submission.

Questions about this consultation can be directed to [policy@dcj.nsw.gov.au](mailto:policy@dcj.nsw.gov.au) or 02 8688 9998.

# Part 1: Surrogacy Act 2010

---

## Introduction

Surrogacy is an arrangement under which a woman (the birth mother) who is, or will try to become, pregnant agrees that, following the birth of the child, another person or couple (the intended parent or parents) will be the legal parents of the child. Surrogacy in NSW is regulated by the Surrogacy Act.

There are a variety of social and medical reasons that an intended parent or parents may enter into a surrogacy arrangement, for example, an intended parent may be unable to conceive or unable to safely carry a child to term, an intended parent may be a single person or the intended parents may be two men.

Due to advances in reproductive technology, it is possible that a child born through a surrogacy arrangement may be genetically related to one or both of the intended parents, the birth mother or a third-party donor or donors.

Surrogacy arrangements may be 'altruistic' (where the surrogate mother receives no payment or only reimbursement of reasonable expenses associated with the pregnancy) or 'commercial' (where the surrogate is paid a fee for conceiving or carrying the child). Only altruistic surrogacy is permitted in Australia. Commercial surrogacy is permitted in some other countries.

Surrogacy raises complex legal, ethical and policy questions. In the best cases, it can result in the creation of a new family, with all parties feeling satisfied by their role in the process and the best interests of the child are protected. However, surrogacy also presents opportunities for exploitation with poor outcomes for children, birth mothers and intended parents.

Surrogacy can also be a highly emotive topic, particularly for people who have been parties to surrogacy agreements or people who may have limited options to become a parent other than through a surrogacy arrangement.

---

## Background to the Surrogacy Act

The Surrogacy Act commenced on 1 March 2011.

The Surrogacy Act reflects the 15 principles to form the basis of surrogacy laws ('the Surrogacy Principles'), endorsed by the Standing Committee of Attorneys-General and Health, Community and Disability Services Ministers in 2009. The Surrogacy Principles are included at **Appendix 1**.

The Surrogacy Act also implements recommendation 8 of the 2009 report of the NSW Legislative Council Standing Committee on Law and Justice 'Legislation on Altruistic Surrogacy in New South Wales', to introduce legislation establishing a transfer of parentage specifically for surrogacy arrangements.

All Australian States and Territories have introduced laws to regulate surrogacy. The uniform aim of surrogacy laws in Australia has been to prevent the exploitation of vulnerable adults, to avoid the

commercialisation of reproduction and to protect the best interests of children. Uniformity in the regulation of surrogacy by States and Territories is desirable to reduce inequity between Australians engaging in surrogacy arrangements and to make regulation effective within Australia.<sup>1</sup>

Surrogacy law in NSW and Australia more broadly has been subject to reviews and inquiries, most relevantly for this paper:

- the 2018 Statutory Review of the Surrogacy Act;<sup>2</sup> and
- the 2016 report of the Australian Parliament’s House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements ‘Surrogacy Matters’.<sup>3</sup>

These reviews affirmed the continuing relevance of the Surrogacy Principles.<sup>4</sup>

---

## Principles and objectives

The guiding principle of the Surrogacy Act is that the best interests of the child in a surrogacy arrangement are paramount.<sup>5</sup>

The main objectives of the Surrogacy Act are:

- to protect the interests of children born of surrogacy arrangements,
- to provide certainty for parties to surrogacy arrangements, and
- to prohibit commercial surrogacy arrangements.

These objectives are expressed in provisions of the Surrogacy Act and the Second Reading Speech for the Bill from its introduction in 2010. All other Australian States and Territories have adopted laws to regulate surrogacy that have the same guiding principle and objectives, which are reflective of the Surrogacy Principles.<sup>6</sup>

---

<sup>1</sup> See Commonwealth Parliament House of Representatives, Standing Committee on Social Policy and Legal Affairs, ‘Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements’, April 2016, paras 1.12-1.13.

<sup>2</sup> NSW Department of Justice, *Statutory Review of the Surrogacy Act 2010*, July 2018.

<sup>3</sup> Parliament of the Commonwealth of Australia, House of Representatives, Standing Committee on Social Policy and Legal Affairs, ‘Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements’, April 2016 (Surrogacy Matters).

<sup>4</sup> See Surrogacy Review, para 1.2 and Surrogacy Matters, para 1.23.

<sup>5</sup> Surrogacy Act, section 3.

<sup>6</sup> Statutory Review, paras 2.2-2.4. See also Appendix 1 to this Discussion Paper.

**QUESTION: PRINCIPLES AND OBJECTIVES; GENERAL QUESTIONS**

1. What do you think of the guiding principle and policy objectives of the Surrogacy Act? Do you think they are still valid?
2. Does the Surrogacy Act ensure that the best interests of the child are paramount in every case?
3. Does the Surrogacy Act offer sufficient protections for birth mothers?
4. Does the Surrogacy Act adequately meet the needs of various family structures, including LGBTIQ+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements?

---

## Surrogacy arrangements

A surrogacy arrangement is defined as an arrangement under which:

- a woman agrees to become or try to become pregnant with a child, and the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons (a pre-conception surrogacy arrangement); or
- a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons (a post-conception surrogacy arrangement).<sup>7</sup>

The ‘birth mother’ is the woman who agrees to become pregnant, tries to become pregnant or is pregnant with a child under a surrogacy arrangement.<sup>8</sup> The ‘intended parent’ is the person who will become the parent of the child under a parentage order.<sup>9</sup>

### Surrogacy arrangements are not enforceable, except to reimburse birth mothers’ costs

Surrogacy arrangements are not enforceable under the Surrogacy Act, other than an arrangement to pay or reimburse the birth mother’s surrogacy costs.<sup>10</sup> Either the birth mother or the intended parents may change their mind about the arrangement at any time before or after the birth, before the Court makes a parentage order.

This means that intended parents have no cause of action against a birth mother if she decides to keep the child or terminate a pregnancy, and a birth mother is not able to take legal action against intended parents if they decide not to proceed with the transfer of parentage.

---

<sup>7</sup> Surrogacy Act, section 5.

<sup>8</sup> Surrogacy Act, section 5(5).

<sup>9</sup> Surrogacy Act, section 5(6).

<sup>10</sup> Surrogacy Act, section 6.

To enforce a surrogacy arrangement would undermine the legal requirement that all parties freely and voluntarily give consent to the transfer of legal parentage from the surrogate to the intended parent or parents.<sup>11</sup> In particular, enforcing a surrogacy arrangement against a surrogate may subject vulnerable birth mothers to exploitation and/or coercion, and the transfer of parentage to non-consenting intended parents would be inconsistent with the best interests of the child.

However, a birth mother may enforce an arrangement to pay or reimburse surrogacy costs. These costs include reasonable medical, travel or accommodation costs associated with:

- becoming or trying to become pregnant,
- a pregnancy or a birth, and
- entering into and giving effect to a surrogacy arrangement (for example, costs associated with receiving counselling and legal advice).<sup>12</sup>

#### QUESTION: SURROGACY ARRANGEMENTS

5. Do you have any comments about the definition of surrogacy arrangements?
6. Do you have any comments about the extent to which surrogacy arrangements can be enforced?

---

## Commercial surrogacy arrangements

A commercial surrogacy arrangement is an arrangement that involves the provision of a fee, reward or other material benefit or advantage to a person if the person is involved in certain activities related to surrogacy arrangements.<sup>13</sup>

A surrogacy arrangement is not a commercial surrogacy arrangement if the only fee, reward or other material benefit provided is the reimbursement of a birth mother's surrogacy costs (as defined above).<sup>14</sup>

The Surrogacy Act prohibits commercial surrogacy in NSW and prohibits NSW residents from entering into commercial surrogacy arrangements outside of NSW.

The maximum penalty for the entering into a commercial surrogacy arrangement for an individual is \$110,000 or two-years imprisonment (or both).<sup>15</sup> However, there are no known cases in NSW where these penalties have been imposed.

---

<sup>11</sup> Surrogacy Act, section 31.

<sup>12</sup> Surrogacy Act, section 7.

<sup>13</sup> Surrogacy Act, section 9(1).

<sup>14</sup> Surrogacy Act, section 9(2).

<sup>15</sup> Surrogacy Act, section 8.



Preventing commercial surrogacy is one of the policy objectives of the Surrogacy Act. The Act makes commercial surrogacy a criminal offence in an aim to prevent the commercialisation of human reproduction. The Second Reading speech notes that “*commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones*”.

Commercial surrogacy is prohibited in all Australian States and Territories.

### International commercial surrogacy arrangements

Although commercial surrogacy is illegal in all states and territories, approaches vary across jurisdictions as to whether international commercial surrogacy is expressly a criminal offence.

In NSW, the Surrogacy Act makes it an offence for a person who lives in NSW to enter into, or offer to enter into, a commercial surrogacy arrangement in NSW or any other jurisdiction.<sup>16</sup> This means that a NSW resident is prohibited from entering into an international commercial surrogacy arrangement, even if commercial surrogacy is permitted in an international jurisdiction. Queensland and the ACT have similar prohibitions. Victoria, WA, SA, Tasmania and the NT do not expressly extend commercial surrogacy offences to conduct engaged in overseas.

There is evidence to show that a large proportion of the Australians who have a child through surrogacy do so by entering into international commercial surrogacy arrangements, regardless of laws that make this an offence in some jurisdictions.<sup>17</sup> Figures published by the Department of Home Affairs show 213 applications for Australian citizenship by descent were made for children born through international surrogacy in the 2021/22 financial year.<sup>18</sup> The figures do not show whether these were commercial surrogacy agreements or altruistic agreements.

People may pursue international surrogacy arrangements for a number of reasons, such as:

- difficulties in finding a birth mother in Australia, due the laws on commercial surrogacy and the prohibition of advertising;
- lack of legal certainty in Australia, due to surrogacy arrangements not being binding and needing to rely on the consent of the surrogate (some other countries have legally enforceable surrogacy arrangements); and
- uncertainty arising from inconsistencies between different Australian State and Territory laws.

There are a number of concerns relating to international commercial surrogacy, especially when arrangements take place in jurisdictions with less regulated surrogacy industries. The legal, economic and social conditions in these jurisdictions greatly increase the risk that the rights of the child, and of the birth mother, may be infringed.

There have been several high profile cases involving Australian parents entering into international surrogacy arrangements that highlight the potential risks involved in engaging in these arrangements. The ‘Baby Gammy case’<sup>19</sup> in 2016 involved two twins born through an international commercial surrogacy arrangement who were separated after birth, with one twin remaining with his surrogate mother in Thailand while the other was brought to Australia to live with her intended parents in Western Australia.

---

<sup>16</sup> Surrogacy Act, sections 8 and 11.

<sup>17</sup> Surrogacy Matters, para 170.

<sup>18</sup> <https://www.homeaffairs.gov.au/foi/files/2022/fa-220800210-document-released.PDF>

<sup>19</sup> *Farnell & Anor and Chanbua* [2016] FCWA 17.

Chief Justice Thackray of the Family Court of Western Australia noted that the separation of the twins was an ‘appalling’ outcome, and that ‘this case should draw attention to the fact that surrogate mothers are not baby growing machines or “gestational carriers”. They are flesh and blood women who can develop bonds with their unborn children.’<sup>20</sup>

In 2023, several Australian intended parents engaging in international commercial surrogacy arrangements were left without access to embryos and other genetic material when a fertility clinic in Greece was shut down amid charges of human trafficking, falsifying records and mistreating surrogate mothers.<sup>21</sup> This was despite no warning signs to industry professionals in Australia that there was anything amiss.

Children born through an international commercial surrogacy arrangement will require an Australian passport or valid visa to enter Australia. If a child born through surrogacy meets all relevant citizenship requirements, they may be eligible for Australian citizenship. The Australian Passport Office imposes certain requirements for obtaining an Australian passport for a child born through surrogacy.<sup>22</sup>

### Consideration of commercial surrogacy arrangements in Australia and internationally

The 2016 Surrogacy Matters Report, published by the Commonwealth Parliament’s Standing Committee on Social Policy and Legal Affairs, noted:

*‘First and foremost, the Committee recommends that the practice of commercial surrogacy remain illegal in Australia. This recommendation was informed by the view that, even with the best of regulatory intentions, there is still significant potential for the exploitation of surrogates and children to occur.’<sup>23</sup>*

The 2018 NSW Statutory Review of the Surrogacy Act stated that the policy objective of preventing commercial surrogacy aims to ‘prevent exploitation, preserve the dignity of children and women and prevent the commodification of women and children.’<sup>24</sup> The Review concluded that the objective of the Surrogacy Act to prevent commercial surrogacy remained valid.<sup>25</sup>

This issue has also been considered internationally. In 2018 and 2019, the United Nations Special Rapporteur on the sale and sexual exploitation of children reported to the UN General Assembly on safeguards for the protection of the rights of children born from surrogacy arrangements. The Special Rapporteur’s website notes:

*‘There is growing unease that the practice of engaging surrogate mothers in [United Nation Member] States with emerging economies to bear children for more wealthy intending parents from other States entails power imbalances and thus risks for both the children and surrogate mothers.’*

*The report presented by the Special Rapporteur on the sale and sexual exploitation of children to the Human Rights Council noted the presence of abusive practices in both unregulated and*

<sup>20</sup> Farnell & Anor and Chanbua [2016] FCWA 17 at paragraph 757.

<sup>21</sup> <https://www.abc.net.au/news/2023-09-09/greek-surrogacy-scandal-australian-intended-parent/102819796>

<sup>22</sup> <https://www.passports.gov.au/getting-passport-how-it-works/how-get-child-passport/surrogacy>

<sup>23</sup> Surrogacy Matters, foreword.

<sup>24</sup> Statutory Review of the Surrogacy Act, July 2018, para 2.13.

<sup>25</sup> Statutory Review, para 2.26.

*regulated contexts and provided analysis and recommendations on implementing the prohibition of the sale of children as it relates to surrogacy.*<sup>26</sup>

Commercial, or ‘for-profit’ surrogacy, is banned in many countries, including Canada, Denmark, New Zealand, Brazil, the United Kingdom and Australia.

Several countries that were previously popular destinations for Australians seeking commercial surrogacy arrangements have now banned the practice entirely, or banned the practice for non-residents, including Cambodia, India, Nepal, and Thailand.

Some countries prohibit all forms of surrogacy, including France, Germany, Taiwan and Spain.

Some countries permit commercial surrogacy including some states of the United States, Russia, Mexico, Ukraine, Iran and Georgia. Some countries have laws restricting access to commercial surrogacy for same sex couples and single parents. Russia and Georgia have recently prohibited commercial surrogacy for foreign couples.

## **Proposed amendments to international commercial surrogacy legislation**

### Greenwich Equality Bill

On 24 August 2023, Mr Alex Greenwich MP introduced the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (**Equality Bill**). The Equality Bill is a private members bill that seeks to amend 20 different Acts or instruments to ‘modernise laws and advance equality for LGBTIQA+ people and communities in NSW’. The Equality Bill has yet to be debated in Parliament.

The Equality Bill proposes substantial amendments to the Surrogacy Act in relation to commercial surrogacy, including limiting the application of the offence of entering into a commercial surrogacy arrangement to arrangements in NSW only. This would remove the prohibition on international commercial surrogacy arrangements for intended parents in NSW.

The Equality Bill has been referred to the Legislative Assembly’s Committee on Community Services for review. The Committee is due to report to Parliament on the provisions of the Equality Bill by 3 June 2024.

---

<sup>26</sup> United Nations Special Rapporteur on the sale and sexual exploitation of children: <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>

**QUESTION: COMMERCIAL SURROGACY ARRANGEMENTS**

7. Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?
8. Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?
9. Do the offences and penalties for commercial surrogacy in the Surrogacy Act meet the policy objectives?
10. What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?

---

## Advertising for altruistic surrogacy arrangements

There have been reports of people having difficulty finding a woman to act as a surrogate birth mother in Australia.<sup>27</sup>

A person looking for a surrogate birth mother, or a woman seeking to become a surrogate birth mother, may publish an advertisement for an altruistic surrogacy arrangement as long as no fee has been paid for the publishing of, or access to, the information.<sup>28</sup> Paid advertising relating to altruistic surrogacy arrangements is not permitted, and penalties may be imposed where a fee has been paid.<sup>29</sup> No advertising is permitted for commercial surrogacy arrangements.<sup>30</sup> There is a concern that allowing advertising may encourage the offer of rewards for services and could increase the risk of commercial surrogacy arrangements.

The 2018 Statutory Review of the Surrogacy Act noted that there were grounds for allowing paid advertising for altruistic surrogacy arrangements. The Review Report recommended that the Surrogacy Act be amended to allow for paid advertisements for surrogacy arrangements if the advertisement made clear that the arrangement would not be commercial, and the advertisement did not offer any reward. The Review Report noted that this reform could make altruistic surrogacy more accessible in NSW. This recommendation was not implemented.

There is no central register in NSW or in any other Australian jurisdiction that holds information relating to, or details of, women willing to be surrogates or intended parents. The Ministry of Health Central Register, established under the *Assisted Reproductive Technology Act 2007*, records certain information about children who are born through surrogacy arrangements, affected parties in relation to surrogacy arrangements, and details of any individual who has provided sperm or egg for use in a related reproductive procedure.

---

<sup>27</sup> Surrogacy Matters, para 1.74.

<sup>28</sup> Surrogacy Act, section 10

<sup>29</sup> Surrogacy Act, section 10(1) penalty (b).

<sup>30</sup> Surrogacy Act, section 10.

NSW Health provides some basic information about assisted reproductive technology procedures, including surrogacy, at [www.health.nsw.gov.au](http://www.health.nsw.gov.au).

#### QUESTION: ADVERTISING SURROGACY ARRANGEMENTS

11. Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising related to altruistic surrogacy arrangements?
12. Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?

---

## Parentage orders

At birth, the legal parents of a child born through a surrogacy arrangement in NSW are the birth mother and her spouse or de facto partner, if any.

The intended parent(s) can apply to the Supreme Court for a parentage order which will transfer the legal parentage of the child from the birth mother and partner to the intended parent(s) under the surrogacy arrangement.<sup>31</sup>

All Australian jurisdictions have a court process for the transfer of legal parentage. Many international jurisdictions also require a court process. However, in some jurisdictions, such as the Canadian provinces of Ontario and British Columbia, an administrative process allows for parentage to be transferred without the intervention of a court.<sup>32</sup>

Once a parentage order has been made in relation to a child:

- the child becomes a child of the intended parent or parents named in the order and they become the parents of the child, and
- the child stops being a child of a birth parent and a birth parent stops being a parent of the child.<sup>33</sup>

Accordingly,

- the child of the surrogacy arrangement has the same rights in relation to the intended parents as a child born to the intended parents, and
- the intended parents named in the order have the same parental responsibility as the birth parent had before the making of the order.<sup>34</sup>

---

<sup>31</sup> Surrogacy Act, sections 14 and 12.

<sup>32</sup> Children's Law Reform Act 2016 (Ontario).

<sup>33</sup> Surrogacy Act, section 39(1).

<sup>34</sup> Surrogacy Act, section 39(2).

## Making an application for a parentage order

An application for a parentage order must be made between 30 days and six months after the birth of a child of a surrogacy arrangement.<sup>35</sup> This timeframe was introduced to provide a “cooling-off period” for the birth mother to carefully consider consenting to the parentage order after the birth of the child.

The Court may hear and determine an application made after the time limit if it is satisfied that it is justified by exceptional circumstances.<sup>36</sup>

The Court may only make a parentage order if the Court is satisfied that the making of the order is in the best interests of the child and certain other preconditions are met.<sup>37</sup> Several preconditions are mandatory and may not be waived by the Court. Mandatory preconditions include:

- the birth parent must consent to the making of the parentage order (unless the birth parent has died or lost capacity to consent, or cannot be located)
- the surrogacy arrangement must not be a commercial surrogacy arrangement; and
- the surrogacy arrangement must have been made before conception.<sup>38</sup>

This means that the Court **cannot** make a parentage order in respect to a child born under a commercial surrogacy arrangement. If there is a dispute or ambiguity regarding parental responsibility for a child born through commercial surrogacy, an application for a parenting order may be made by the intended parents to the Family Court of Australia. Parenting orders made by the Family Court do not transfer legal parentage (the child’s birth certificate is not changed, for example) but do determine broader matters including who the child will live with and the allocation of parental responsibility. Parenting orders expire once a child turns 18.

Non-mandatory pre-conditions may be waived in exceptional circumstances.<sup>39</sup> The preconditions are intended to protect the birth mother from exploitation or undue pressure and to ensure all parties are aware of their legal rights, including the ability to change their minds about continuing with the arrangement after the birth. These include:

- the birth mother must have been at least 25 years old when she entered into the surrogacy arrangement. Where this is waived by the Court, she must not have been under 18 years;
- all affected parties must consent to the making of the parentage order;
- there must be a medical or social need for the surrogacy arrangement (i.e. one or both intended parent must be unable or unlikely to conceive or give birth to a healthy child);
- the child must be living with the applicant(s) in NSW;

---

<sup>35</sup> Surrogacy Act, section 16(1).

<sup>36</sup> Surrogacy Act, section 16(3).

<sup>37</sup> Surrogacy Act, sections 18 and 22.

<sup>38</sup> Surrogacy Act, sections 23 and 24. See also sections 25 to 26, 28(2), 29 and 31(2).

<sup>39</sup> Surrogacy Act, section 18(2)(b).

- each of the parties must have received counselling from a qualified counsellor about the social and psychological implications of the surrogacy arrangement before entering into the arrangement;
- the birth mother and her partner (if any) must have received further counselling after the birth of the child and before consenting to the parentage order;
- each of the parties must have received legal advice from an Australian legal practitioner about the surrogacy arrangement;
- the legal advice provided to the birth mother and her partner (if any) must have been provided independently from the advice provided to the intended parent(s); and
- the birth of the child must have been legally registered in accordance with the requirements of the *Births Deaths and Marriages Registration Act 1995 (BDMR Act)* or a corresponding interstate law.<sup>40</sup>

These preconditions and timeframe requirements are consistent with requirements in other Australian jurisdictions.

### Registration of parentage orders

The NSW Registry of Births, Deaths and Marriages (**BDM**) registers parentage orders under Part 4A of the *Births, Deaths and Marriages Registration Act 1995*.<sup>41</sup> Following the registration of a parentage order, BDM can issue an amended birth certificate with the intended parents as the child's legal parents. The amended certificate does not include any information that indicates that the child was born of a surrogacy arrangement.<sup>42</sup> The Act allows a person aged over 18 who was the child of a surrogacy arrangement to receive his or her original birth certificate and full birth record.

Since 2019, BDM has registered 139 parentage orders arising from surrogacy arrangements.

### Legal certainty

The comprehensive parentage orders framework was established by the Surrogacy Act to provide certainty for those seeking to become parents under surrogacy arrangements.

The time frames for seeking orders, including the upper time limit of six months, aims to both protect birth mothers and provide certainty to parties to surrogacy arrangements, and encourage a secure and stable living environment for children.

Parentage orders give the intended parents the full legal capacity to make decisions in the child's interests, which also supports the principle objective of the Surrogacy Act, to promote the best interests of children.

---

<sup>40</sup> Surrogacy Act, sections 27, 30, 31(2), 33, 35, 36 and 38.

<sup>41</sup> Births Deaths and Marriages Registration Act 1995, section 25B.

<sup>42</sup> Births, Deaths and Marriages Registration Act 1995, section 25D.

## Proposed amendments to parentage order legislation in relation to commercial surrogacy Greenwich Equality Bill

In addition to limiting the geographical application of commercial surrogacy offences, the Equality Bill also proposes amendments to the parentage order preconditions under the Surrogacy Act. The Equality Bill would allow the Supreme Court to make parentage orders with respect to children conceived through commercial surrogacy arrangements, if doing so would be in the best interests of the child. A court could also grant a parentage order if other non-mandatory preconditions had not been complied with, if doing so would be in the best interests of the child.

### ACT Bill – Parentage (Surrogacy) Amendment Bill 2023

The Parentage (Surrogacy) Amendment Bill 2023 was introduced to ACT Parliament in October 2023. The Bill will amend the *Parentage Act 2004* (ACT) to allow the Supreme Court to make parentage orders for children born through commercial surrogacy arrangements if the child is facing a ‘pressing disadvantage’ that would be reduced by making a parentage order. The Bill has not yet been passed by the ACT Parliament.

#### QUESTION: PARENTAGE ORDERS

13. Do you have any comments about the process for obtaining parentage orders in NSW?
14. Do you have any comments about the preconditions to obtaining parentage orders?
15. Do you think the process for obtaining parentage orders adequately protects birth mothers and other parties to a surrogacy arrangement?
16. Do you think the parentage order process meets the policy objectives of the Act, including providing legal certainty and promoting the best interests of the child?
17. Do you have any other comments about the provisions of the Surrogacy Act?



## Jurisdictional comparison

Surrogacy laws in Australia are regulated by individual States and Territories. All States and Territories have adopted laws that are reflective of the Surrogacy Principles.<sup>43</sup> There are consistent themes throughout all jurisdictions, such as:

- Commercial surrogacy is prohibited.
- Altruistic (non-commercial) surrogacy is permitted.
- Surrogacy arrangements are not enforceable.
- The intended parent(s) can apply for parentage orders to transfer legal parentage of the child from the birth mother and partner to the intended parent(s) after the birth of the child.

Other surrogacy provisions and requirements vary throughout different Australian States and Territories, such as who may enter into surrogacy arrangements, what level of legal advice or counselling is required, and the process for obtaining parentage orders.

There have been several recommendations to work towards national uniformity in surrogacy laws, including in the 2016 Surrogacy Matters Report. Developing a model national law is outside the scope of this review, however the NSW Government will consult with the Commonwealth and other States and Territories if any reform is recommended as a result of the review.

A detailed jurisdictional comparison is attached to this paper (**Appendix 2**).

---

<sup>43</sup> See Appendix 1 to this Discussion Paper.

# Part 2: *Status of Children Act 1996*

---

## Principles and objectives

The main objectives of the Status of Children Act are:

- To ensure that children born outside a marriage and children born within a marriage are treated the same under NSW law,
- To promote consistency between State and Commonwealth parentage laws,
- To ensure that the parentage assumptions which apply to children born as a result of artificial conception procedures are up to date with modern technology.

These objectives are expressed in the provisions of the Status of Children Act and in the Second Reading Speech for the Bill.

The Status of Children Act is partly based on model provisions agreed by the Standing Committee of Attorneys General. Each State and Territory has passed similar status of children legislation.<sup>44</sup>

The Status of Children of Act sought to improve and update the system for determining parentage that had existed under the *Children (Equality of Status) Act 1976* (NSW) and the *Artificial Conception Act 1984* (NSW). As well as providing that all children were to be treated equally irrespective of whether they were born within a marriage, the Status of Children Act updated presumptions about parentage to take account of advances in reproductive technology used in artificial conception procedures. In addition, it aligned the NSW law on parentage presumptions and parentage testing procedures with those contained in the *Commonwealth Family Law Act 1975* to ensure the same presumptions and procedures were applied in NSW and Commonwealth legal proceedings.

---

<sup>44</sup> See Status of Children Act 1978 in Queensland; Status of Children Act 1974 in Victoria; Status of Children Act 1974 in Tasmania; Status of Children Act in the Northern Territory; Family Relationships Act 1975 in South Australia; Parentage Act 2004 in the Australian Capital Territory; Status of Children Act 2012 in Norfolk Island. In Western Australia the Wills Act 1970 provides that a child's entitlements are to be determined regardless of whether their parents were married to each other, and the Family Court Act 1997 makes provision for parentage presumptions.

**QUESTION: POLICY OBJECTIVES; GENERAL QUESTIONS**

18. What do you think of the policy objectives of the Status of Children Act? Do you think they are still valid?
19. Does the Status of Children Act ensure the equal status of children regardless of family structure?
20. Does the Status of Children Act adequately establish parentage?

**Equal status of children**

The Act establishes the general rule that children born outside a marriage and children born within a marriage are to be treated equally under NSW laws.<sup>45</sup> For example, when a parent or relative disposes of property through a will, any references to a 'child' include children born inside and outside of marriage. If a person dies without a will, any child of that person has the same entitlements to the deceased's property regardless of whether they were born inside or outside of marriage.<sup>46</sup>

**QUESTION: EQUAL STATUS OF CHILDREN**

21. Do you have any comments about the general rule regarding the equal status of children in NSW?

---

**Establishing Parentage**

In some circumstances, it may be necessary to establish who a person's legal parents are to assist courts to make orders in relation to that person. For example, when a court makes an order for the care and protection of a child or when a last will and testament is being interpreted.

To help establish a person's parentage, Part 3 of the Status of Children Act allows courts to make certain presumptions about the identity of a parent, unless there is evidence that proves otherwise. However, certain presumptions cannot be removed by evidence that proves otherwise, as detailed below.

There are six circumstances in which a court can make a presumption about who a child's parents are, or are not:

- marriage;
- cohabitation;
- registration of birth;

---

<sup>45</sup> Status of Children Act, section 5.

<sup>46</sup> Status of Children Act, sections 6 and 8.

- previous decisions of courts;
- acknowledgments; and
- use of fertilisation procedures.

## Marriage

Where a child is born to a woman during her marriage, the child is presumed to be the child of the woman and her spouse.<sup>47</sup> This parentage will be presumed for any child born within 44 weeks of the death of the spouse or born within 44 weeks of the marriage being annulled.<sup>48</sup>

The presumption may also be made if the woman and her spouse have separated and divorced if the couple have resumed living together on one occasion for less than three months before separating again. In this case, if the child is born after the couple divorced but within 44 weeks of the woman and her husband ceasing to live together, the child is presumed to be the child of the woman and her former spouse.<sup>49</sup>

## Cohabitation

A man is presumed to be the father of a child if he and the woman who gave birth to the child were unmarried but lived together for a period of time between 44 weeks and 20 weeks prior to the birth.<sup>50</sup>

## The registration of birth

A person is presumed to be the parent of a child if their name is entered as the child's parent in the Births, Deaths and Marriages Register or equivalent register recognised under NSW law.<sup>51</sup>

## Findings of courts

A person is presumed to be a child's parent if a court has said that the person is the child's parent, or the court has made a finding that it could not have made unless the person was the child's parent, and the finding has not been altered.<sup>52</sup> This presumption **cannot** be overturned by evidence that the person is not a child's parent if the finding was made while the person is alive.<sup>53</sup>

## Acknowledgments

A man is presumed to be a child's father if he has formally acknowledged that he is the child's father by executing a document under the Status of Children Act or similar law of a recognised jurisdiction.<sup>54</sup>

---

<sup>47</sup> Status of Children Act, section 9(1).

<sup>48</sup> Status of Children Act, sections 9(2) and 9(3).

<sup>49</sup> Status of Children Act, section 9(4).

<sup>50</sup> Status of Children Act, section 10.

<sup>51</sup> Status of Children Act, section 11.

<sup>52</sup> Status of Children Act, section 12(1).

<sup>53</sup> Status of Children Act, section 12(2).

<sup>54</sup> Status of Children Act, section 13.

### Use of fertilisation procedures

A fertilisation procedure, or assisted conception procedure, includes procedures such as artificial insemination and in vitro fertilisation (IVF).<sup>55</sup>

Parentage is presumed in four circumstances involving the use of fertilisation procedures. When a presumption is made in these circumstances, it **cannot** be overturned by evidence that the person is not a child's parent.<sup>56</sup>

These circumstances are:

1. Where a woman falls pregnant as a result of a fertilisation procedure, her husband or her de facto partner, will be presumed to be the father of any child born from the pregnancy, if the husband or de facto partner consented to the procedure. This will be the case even if the husband's sperm, or de facto partner's sperm, was not used in the procedure.<sup>57</sup>

The woman will be presumed to be the mother of the child of the pregnancy even if she did not provide the egg used in the procedure.<sup>58</sup>

2. Where a woman, who is married to or is in a de facto relationship with another woman, falls pregnant as a result of undergoing a fertilisation procedure, the other woman, if consenting, will be presumed to be a parent of any child born from the pregnancy.<sup>59</sup>

The woman who became pregnant with the child will be presumed to be the mother of the child even if she did not provide the egg used in the procedure.<sup>60</sup>

3. A man is presumed not to be the father of any child born as a result of a fertilisation procedure for which he has donated sperm if he is not married to, or in a de facto relationship with, the woman who fell pregnant as a result of the procedure.<sup>61</sup>

4. A woman is presumed not to be the mother of a child born as a result of a pregnancy using a fertilisation procedure in which she has donated an egg unless she is married to, or a de facto partner of, the woman who became pregnant as a result of the procedure.<sup>62</sup>

#### QUESTION: PRESUMPTIONS OF PARENTAGE

22. Do you have any comments about the parentage presumptions contained in the Status of Children Act?
23. Do you think there are any situations not covered by the current presumptions that should be included?

<sup>55</sup> Status of Children Act, section 3.

<sup>56</sup> Status of Children Act, section 14(4).

<sup>57</sup> Status of Children Act, sections 14(6) and 14(1)(a).

<sup>58</sup> Status of Children Act, section 14(1)(a).

<sup>59</sup> Status of Children Act, section 14(1A)(a).

<sup>60</sup> Status of Children Act, section 14(1A)(b).

<sup>61</sup> Status of Children Act, sections 14(6) and 14(2).

<sup>62</sup> Status of Children Act, sections 14(1A)(a) and 14(3).

---

## Making an application for a declaration of parentage

A number of persons can apply to the Supreme Court of New South Wales (the **Court**) for a declaration that a person is a child's parent. A declaration may be made before or after the birth of child and/or after the death of the parent and/or child.

People who may apply for a declaration include:

- A person who alleges that the relationship of parent and child exists between their child and another person.
- A person who alleges that they have a relationship of parent and child with another person.
- The Registrar of Births, Deaths and Marriages when seeking a decision that a relationship of parent and child exists between two people.
- The Secretary of the Department of Communities and Justice when seeking a decision that the relationship of parent and child exists between two people, for example in care and protection proceedings concerning a child.
- A person prescribed by the regulations to the Act who seeks a decision that a relationship of parent and child exists between two people. Currently the regulation prescribes the NSW Trustee and Guardian, an executor, trustee or administrator of an estate or a licensed trustee company.
- A person who might be affected by the result who seeks a decision that the relationship of parent and child exists between two people.<sup>63</sup>

If new facts or circumstances emerge, a declaration of parentage may be annulled by the Court.<sup>64</sup>

### Testing for Parentage

The Court has the power to order parentage testing procedures be carried out in proceedings where the parentage of a person is disputed.<sup>65</sup> However, this power does not allow the Court to order the removal of a DNA sample from a deceased person for the purpose of testing paternity.<sup>66</sup>

---

<sup>63</sup> Status of Children Act, section 21.

<sup>64</sup> Status of children Act, section 22.

<sup>65</sup> Status of Children Act, section 26(1).

<sup>66</sup> *AW v CW* (unreported) 17 April 2022, Supreme Court of NSW per Barrret J. unreported.

An application for this procedure may be made by a party to the proceedings, the Secretary of the Department of Communities and Justice or a person representing the child in the proceedings.<sup>67</sup>

**QUESTION: APPLYING FOR A DECLARATION OF PARENTAGE AND TESTING PROCEDURES**

24. Do you have any comments about the categories of persons who can apply to the Supreme Court for a declaration of parentage?
25. Do you have any comments about the pathway to obtaining a parentage declaration?
26. Do you have any comments about the categories of persons who can apply for a parental testing procedure?
27. Do you think the Court has sufficient powers to order parentage testing?
28. Do you have any other comments about the provisions of the Status of Children Act?

---

<sup>67</sup> Status of Children Act, section 26(2).

---

## Consultation questions

The NSW Government is seeking your views on whether legislative amendments are required to sufficiently protect the rights of children and meet the needs of various family structures.

The NSW Government welcomes submissions responding to the following questions, or any other comments on the Surrogacy Act and the Status of Children Act.

### Surrogacy Act

1. What do you think of the guiding principle and policy objectives of the Surrogacy Act? Do you think they are still valid?
2. Does the Surrogacy Act ensure that the best interests of the child are paramount in every case?
3. Does the Surrogacy Act provide sufficient protections for birth mothers?
4. Does the legislation adequately meet the needs of various family structures, including LGBTIQ+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements.?
5. Do you have any comments about the definition of surrogacy arrangements?
6. Do you have any comments about the extent to which surrogacy arrangements can be enforced?
7. Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?
8. Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?
9. Do the offences and penalties for commercial surrogacy in the Surrogacy Act meet the policy objectives?
10. What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?
11. Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising related to altruistic surrogacy arrangements?
12. Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?
13. Do you have any comments about the process for obtaining parentage orders in NSW?
14. Do you have comments about the preconditions to obtaining parentage orders?
15. Do you think the process for obtaining parentage orders adequately protects birth mothers and other parties to a surrogacy arrangement?
16. Do you think the parentage order process meets the policy objectives of the Act, including providing legal certainty and promoting the best interests of the child?
17. Do you have any other comments about the provisions of the Surrogacy Act?



## Status of Children Act

18. What do you think of the policy objectives of the Status of Children Act? Do you think they are still valid?
19. Does the Status of Children Act ensure the equal status of children regardless of family structure?
20. Does the Status of Children Act adequately establish parentage?
21. Do you have any comments about the general rule regarding the equal status of children in NSW?
22. Do you have any comments about the parentage presumptions contained in the Status of Children Act?
23. Do you think there are any situations not covered by the current presumptions that should be included?
24. Do you have any comments about the categories of persons who can apply to the Supreme Court for a declaration of parentage?
25. Do you have any comments about the pathway to obtaining a parentage declaration?
26. Do you have any comments about the categories of persons who can apply for a parental testing procedure?
27. Do you think the Court has sufficient powers to order parentage testing?
28. Do you have any other comments about the provisions of the Status of Children Act?

---

## Appendix 1: Principles to form the basis of surrogacy laws in Australia (2009)

Principles endorsed by the Standing Committee of Attorneys-General, Health, Community and Disability Services Ministers in the November 2009 Communique.

**A.1** A court may grant a parentage order where the court is satisfied a surrogacy arrangement was entered into by the surrogate mother, her partner (if any) and the intended parents prior to conception.

**A.2** A court may grant a parentage order where the court is satisfied all parties have undergone counselling with an accredited counsellor in relation to the surrogacy arrangement.

**A.3** A court may grant a parentage order where the court is satisfied all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement.

**A.4** A court may grant a parentage order where an application was made to the court at least 21 days, but not more than six months after the birth.

**A.5** The intended parents must reside in the jurisdiction in which the application is made.

**A.6** All parties to the surrogacy arrangement must give informed consent to the granting of a parentage order.

**A.7** The child must be living with the intended parents at the time the application is heard.

**A.8** A court may grant a parentage order where the court is satisfied granting the order is in the best interests of the child.

**A.9** A court may grant a parentage order where certain requirements set out in the model provisions are not met if the court is, despite this, satisfied granting the order is in the best interests of the child. The ability of the court to waive requirements is subject to mandatory requirements set out in legislation.

**A.10** A court may take into account any other matter it considers relevant when determining whether to grant a parentage order.

**A.11** A court may grant a parentage order to parents who are now lawfully raising children under the age of 18 years conceived through surrogacy if:

- the court is satisfied that a surrogacy arrangement was entered into prior to conception;
- the court is satisfied the surrogacy arrangement was not a commercial arrangement;
- all parties consent to the granting of the order; and
- it is in the best interests of the child. In determining such an application the court will be required to take into account the views of the child, where appropriate.

**A.12** After a parentage order is granted a new birth certificate can be applied for and will resemble an ordinary birth certificate recording only the names of the legal parents.

**A.13** The original birth record would still exist and the child would be able to obtain both records in defined circumstances.

**A.14** The jurisdiction where the original birth certificate was issued will provide for the mutual recognition of a parentage order granted in another jurisdiction by provision of a new birth certificate. Alternately, the jurisdiction where the original birth certificate was issued should cancel the birth certificate and the jurisdiction where the parentage order was granted should issue a new birth certificate.

**A.15** The surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.

## Appendix 2: Jurisdictional comparison – surrogacy legislation

	NSW	VIC	QLD	WA	SA	TAS	ACT <sup>68</sup>	NT
Is commercial surrogacy prohibited?	Yes – in NSW and overseas	Yes – in VIC	Yes – in QLD and overseas	Yes – in WA	Yes – in SA	Yes – in TAS	Yes – in ACT and overseas	Yes – in NT
Can a parentage order be made for a child born through commercial surrogacy?	No	No	No	No	No	No	No	No
Is advertising for surrogacy permitted?	Unpaid advertising only	No	No	No	Yes	No	No	Yes
Is the surrogacy arrangement enforceable?	No – except to reimburse birth mother’s costs	No – except to reimburse birth mother’s costs	No – except to reimburse birth mother’s costs	No – except to reimburse birth mother’s costs	No – except to reimburse birth mother’s costs	No – except to reimburse birth mother’s costs	No – birth mother costs not specified	No – except to reimburse birth mother’s costs
Are same sex couples eligible?	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Are single people eligible?	Yes	Yes	Yes	Single women only	Yes	Yes	Yes	Yes
Must there be a medical or social need for surrogacy arrangement?	Yes	Yes	Yes	Medical need only	Yes	Yes	Not specified	Yes
Is legal advice and counselling required?	Both	Both	Both	Both – and independent psychological assessment	Both	Both	Counselling only. Legal advice not mentioned	Both
Are there residency or location requirements?	Applicants for parentage order must be resident in NSW (can be waived in exceptional circumstances)	Embryo transfer must occur in VIC	None	Embryo transfer must occur in WA	All parties must be Australian citizens or permanent residents	All parties must be resident in TAS	Embryo transfer must occur in ACT	All parties must be Australian citizens or permanent residents

<sup>68</sup> A Bill to amend the ACT legislation is currently before Parliament and the existing requirements may change.

OFFICIAL

Can pre-conditions to obtaining a parentage order be waived?	Non-mandatory pre-conditions in exceptional circumstances	The Patient Review Panel, which approves surrogacy arrangements, may waive certain pre-conditions in exceptional circumstances	Certain pre-conditions can be waived in exceptional circumstances and if the dispensation is in the best interests of the child	Certain preconditions may be waived if exceptional circumstances exist and others may be waived if the birth parent is not the child's genetic parent and at least one intended parent is the child's genetic parent	An order may be made if certain pre-conditions haven't been met if it is appropriate for the court to make the orders	Certain pre-conditions may be waived if it is in the best interests of the child	Not expressly stated	Certain preconditions can be waived in exceptional circumstances
--	---	--	---	--	---	--	----------------------	--

OFFICIAL

Locked Bag 5000  
Paramatta NSW 2124

T: (02) 9377 6000  
E: [policy@dcj.nsw.gov.au](mailto:policy@dcj.nsw.gov.au)  
W: [www.dcj.nsw.gov.au](http://www.dcj.nsw.gov.au)

OFFICIAL