

**NACLC National Conference 2013**  
**Surrogacy, Parenting Arrangements and Family Law**  
**A Legal Update**

**Women’s Legal Services Australia (WLSA)**

**Friday 26 July 11am**

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Women’s Legal Services Australia  
 PO Box 179, Sydney NSW 1585  
 Tel: 02 9552 0544 | www.wlsa.org.au



## Surrogacy – Useful Definitions

**Intending Parent/s:** the person or persons who agree to become permanently responsible for the custody and guardianship of a child born as a result of the pregnancy (taken from QLD legislation). This phrase is used in other legislation, and particularly internationally. Also called arranged, commissioning or substitute parent/s.

**Gestational Surrogacy:** Where the surrogate is genetically unrelated to the child. A previously created embryo is transferred to the surrogate in a clinical setting.

**Traditional Surrogacy:** Where the surrogate is the child's genetic mother. The child may be conceived at home via artificial insemination using fresh or frozen sperm or impregnated via intrauterine insemination (IUI) or intracervical insemination (ICI) at a health clinic.

**Commercial Surrogacy:** Where there is a surrogacy arrangement whereby the birth mother receives a fee, reward or other material benefit or advantage that is over and above the reimbursement of her surrogacy costs. The legislation provides definitions for commercial surrogacy as well as for what are considered surrogacy or reasonable costs that may be reimbursed.

## NORTHERN TERRITORY - Note

The Northern Territory is the only state and territory not to have any legislation governing surrogacy. According to one lawyer, Stephen Page:<sup>1</sup>

On face value this means that both traditional and gestational surrogacy is possible as is commercial and altruistic surrogacy. It is perfectly legal to engage in any of these in the Northern Territory. Unfortunately because there are no laws enabling parentage orders to be made, it is not possible to obtain a parentage order in the Northern Territory...One ART clinic operates in the Northern Territory. It is bound by the National Health and Medical Research Council ethical guidelines which prohibit the clinic from engaging in commercial surrogacy. The effect of that prohibition is that, bizarrely, commercial surrogacy can take place in the Northern Territory if it is a traditional surrogacy, but not if it is gestational surrogacy.

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<sup>1</sup>*An Overview of Surrogacy Legal Dramas*, Stephen Page (Harrington Family Lawyers) a paper presented at 'Surrogacy Australia National Conference', 27 May 2012.  
<<http://surrogacyandadoption.blogspot.com.au/2012/05/overview-of-surrogacy-legal-dramas.html>>





	Key Legislation	Is altruistic surrogacy legal?	Who may access surrogacy?	How is the surrogacy arrangement formalised?	Other Key Requirements	How do intended parents get their name on the birth certificate?
Australian Capital Territory	Parentage Act 2004	Yes	Couples only (sexuality irrelevant)	Via a 'Substitute Parent Agreement'	Neither birth parent can be a genetic parent.  At least one substitute parent must be genetically related to the child.	Apply to the Supreme Court when child is 6 weeks to 6 mths (Division 2.5 Parentage Act).  Criteria: Best interests of Child and birth parents' informed consent, list of issues and 'anything else' the court considers 'relevant'.
New South Wales	Surrogacy Act 2010: No 102	Yes	Singles and couples (sexuality irrelevant)  Must be a medical or social need for surrogacy	Via a 'Surrogacy Arrangement'	Surrogate must be at least 25. Intended parents must be at least 25, or of 'sufficient maturity and have undergone counselling'	Apply to Supreme Court when child is 1-6 months.  Criteria: Best interests of child paramount + consent of birth parents (Part 3). Parties also require independent counsellor's report and independent legal advice for both parties. Child must be living with applicants.
Victoria	Assisted Reproductive Treatment Act 2008 – part 4  Status of Children Act 1974 Part IV	Yes	Singles and couples (sexuality irrelevant)  Commissioning parent must be 'unlikely to become pregnant, be able to carry a pregnancy or give birth'	Via a 'Surrogacy Arrangement' that must be approved by the Patient Review Panel	Surrogate must be at least 25 and have given birth before. Must not be her egg.  All parties must have received counselling and legal advice.  All parties to have undergone criminal records and child protection checks.	Apply to the County Court or Supreme Court for a substitute parentage order when child 1-6 months.  Criteria: Best of interests of child + surrogacy arrangement approved by Patient Review Panel + commissioned with the assistance of a registered ART provide + consent of parties + child living with commissioning parents.



	Key Legislation	Is altruistic surrogacy legal?	Who may access surrogacy?	How is the surrogacy arrangement formalised?	Other Key Requirements	How do intended parents get their name on the birth certificate?
<b>Tasmania</b>	<p>Surrogacy Act No 34</p> <p>Surrogacy (Consequential Amendments) Act No 31</p> <p>Surrogacy Contracts Act 1993 No 4</p>	Yes	<p>Singles and couples (sexuality irrelevant)</p> <p>Must be a social or medical need for surrogacy.</p>	Via a 'Surrogacy Arrangement'	<p>Surrogate must be at least 25 and have given birth before.</p> <p>Intended parent/s must be 21 or over when entering arrangement.</p>	<p>Apply to Magistrate's Court (Children's Division) when child 1-6 months.</p> <p>Criteria: Best Interests of Child, surrogate must consent, the child must be living with the intended parent/s, all parties must have received legal advice before entering arrangement, must have been counselling prior to arrangement AND after birth of child 'about the arrangement and its social and psychological implications'. The court may have regard to 'any other matter it considers relevant'.</p>
<b>Queensland</b>	Surrogacy Act 2010 No 2	Yes	<p>Singles and couples (sexuality irrelevant)</p> <p>Must be a medical or social need for surrogacy.</p>	Via a 'Surrogacy Arrangement'	<p>Surrogate must be at least 25.</p> <p>Affidavit stating the intended parents will be honest with the child about the child's parentage.</p>	<p>Application to Children's Court when child is 1-6 months.</p> <p>Criteria: Best Interests of Child, time living with intended parents and other issues.</p> <p>Also require:</p> <ul style="list-style-type: none"> <li>• a 'surrogacy guidance report' from a counsellor; and</li> <li>• the original surrogacy arrangement must have been in writing, after counselling and legal advice.</li> </ul>



	Key Legislation	Is altruistic surrogacy legal?	Who may access surrogacy?	How is the surrogacy arrangement formalised?	Other Key Requirements	How do intended parents get their name on the birth certificate?
South Australia	<i>Family Relationships Act 1975 Part 2B</i>	Yes	Heterosexual married or de facto couples only  Must be medical need for surrogacy	Via a 'Recognised Surrogacy Agreement'	Must use genetic material of at least 1 commissioning parent, unless extenuating circumstances.  All parties to have undergone counselling.	Application to the Youth Court of South Australia when child is 1-6 months.  Criteria: Welfare of Child is paramount consideration, consent of the surrogate, commissioning parents must be 'fit and proper persons'.
Western Australia	<i>Surrogacy Act 2008</i>  <i>Family Court (Surrogacy) Rules 2009</i>  <i>Surrogacy Regulations 2009</i>	Yes	Heterosexual married or de facto couples or single women  Must be a 'medical reason' for surrogacy (age is specifically excluded as an appropriate medical reason)	Via a 'Surrogacy Arrangement' approved by the WA Reproductive Technology Council	Surrogate must be at least 25 and have given birth to a child previously.  At least one 'arranged parent' must be 25.  All parties must be assessed to be 'psychologically suitable' and 'medically suitable' prior to agreement being made, and have undergone counselling and received independent legal advice.	Application to Family Court of WA when child 1-6 months.  Criteria: Best Interests paramount – with presumption that it's in child's best interests to be with the 'arranged parents'.  All parties must consent.  Parties must have received counselling and legal advice about the effect of the proposed order.  Parties must have agreed to an 'approved plan' about time to be spent, or communication with, the child's birth parents.
Northern Territory	No legislation	Unclear	Unclear	Unclear	Unclear	Unclear

**Table 3: Overview of Parenting and Adoption Laws in Australia by Jurisdiction**

	Parentage Legislation	Do parenting presumptions apply to a woman's partner regardless of the partner's sex?	Can there be two mums or two dads on a birth certificate?	Adoption Legislation	Does Adoption Law Discrimination on the basis of Sexual Orientation or Relationship Status?
<b>Australian Capital Territory</b>	<i>Parentage Act 2004</i>	Yes	Yes	<i>Adoption Act 1993</i>	No Discrimination s14
<b>New South Wales</b>	<i>Status of Children Act 1988</i>	Yes	Yes	<i>Adoption Act 2000</i>	No Discrimination s28
<b>Victoria</b>	<i>Status of Children Act 1974</i>	Yes	Yes	<i>Adoption Act 1984</i>	Same-sex couples cannot jointly adopt s11(1) A Same-sex de facto partner can apply to adopt their partner's child s5.
<b>Tasmania</b>	<i>Status of Children Act 1974</i>	Yes	Yes	<i>Adoption Act 1988</i>	No Discrimination s20
<b>Queensland</b>	<i>Status of Children Act 1978</i>	Yes	Yes	<i>Adoption Act 2009</i>	Same-sex couples cannot jointly adopt OR adopt as step-parents. See Dictionary: 'couple' defined as person and spouse.
<b>Northern Territory</b>	<i>Status of Children Act 1979</i>	Yes	Yes	<i>Adoption of Children Act 1994</i>	Same-sex couples cannot jointly adopt s13.
<b>South Australia</b>	<i>Family Relationships Act 1975</i>	Yes	Yes	<i>Adoption Act 1988</i>	Same-sex couples cannot jointly adopt.
<b>Western Australia</b>	<i>Artificial Conception Act 1985 (WA)</i>	Yes	Yes	<i>Adoption Act 1994</i>	No Discrimination s38 (2)





## DIAC Fact Sheet 36a – International Surrogacy Arrangements

Available at: [http://www.immi.gov.au/media/fact-sheets/36a\\_surrogacy.htm](http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm)

**Caution:** This fact sheet reflects Australian law, as at the date of publication, which may impact upon Australian citizens or residents who are considering entering into an international surrogacy arrangement. Surrogacy is poorly regulated in many countries, which gives rise to a range of concerns for the welfare of the parties involved. Concerns include both the potential exploitation of women and differing approaches among countries to the legal rights of children who are born as a result. Both Australian and other countries' laws concerning overseas surrogacy may change, and people should check the current legal position before undertaking an international surrogacy arrangement.

This fact sheet outlines some of the key issues for Australians considering entering into a surrogacy arrangement with someone outside Australia.

If you are considering international surrogacy you should seek independent legal advice before beginning the process. You should also contact the Australian immigration office responsible for the country in which you plan to enter into a surrogacy agreement to determine if there are any Australian citizenship or visa processing requirements specific to that country.

Contact information for immigration offices outside Australia is available on the department's website.

See: [Immigration offices outside Australia](#)

A printable version of this information is also available.

See: [Fact Sheet 36a – International Surrogacy Arrangements](#) (194KB PDF file)

### What is international surrogacy?

International surrogacy is a surrogacy arrangement involving a surrogate mother who lives in an overseas country. This includes surrogacy involving either an altruistic or commercial arrangement.

Altruistic surrogacy is where the surrogate mother does not make a profit. She might, however, be reimbursed by the commissioning parents for the cost of reasonable medical and legal expenses. Altruistic surrogacy is legal in most Australian states and territories.

Commercial surrogacy is where payment is made to the surrogate mother that is beyond the recovery of medical costs—where the surrogate mother makes a profit from the arrangement. Commercial surrogacy arrangements are illegal within most Australian states and territories.



## Children born through surrogacy arrangements in Australia

The legal transfer of parentage following surrogacy arrangements is the responsibility of state and territory governments. Most states and territories in Australia have legislated to regulate surrogacy arrangements in Australia and have provided for transfer of the legal parentage of children where the surrogacy arrangement meets the requirements set out in legislation.

Section 60HB of the *Family Law Act 1975* recognises orders of state and territory courts that transfer the legal parentage of children who are born as a result of surrogacy arrangements for the purposes of legal proceedings under the Family Law Act.

## Children born through surrogacy arrangements outside Australia

As a party to the United Nations Convention on the Rights of the Child, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, and certain other treaties, Australia is committed to protecting the fundamental rights of children. These conventions include obligations to prevent the abduction, sale or trafficking of children.

Extreme caution is exercised by the Department of Immigration and Citizenship in cases involving surrogacy arrangements that are entered into overseas, so as to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.

## Legal issues affecting Australians undertaking surrogacy arrangements overseas

Surrogacy arrangements that are undertaken outside Australia may not fulfil the variety of requirements for a transfer of legal parentage under state and territory law. This may be because the arrangement entered into is commercial in nature and/or the parties may not have received counselling or independent legal advice. As a result, the transfer of legal parentage to the intended parents may not be available under Australian law. This result can have a range of effects for children born through an international surrogacy arrangement. You should seek independent legal advice about the possible consequences of not being recognised as a legal parent of a child who is born through an international surrogacy arrangement.

The following Australian states and territories have legislation making it an offence for their residents to enter into overseas commercial surrogacy arrangements.

State/territory	Legislation	Penalty
NSW	<i>Surrogacy Act 2010</i>	Maximum penalty: 2500 penalty units, in the case of a corporation, or 1000 penalty units or imprisonment for two years (or both) in any other case.

ACT	<i>Parentage Act 2004</i>	Maximum penalty: 100 penalty units, imprisonment for one year or both.
Qld	<i>Surrogacy Act 2010</i>	Maximum penalty: 100 penalty units or three years imprisonment.

## **Bringing the child to Australia**

To bring a child to Australia to live, the intended parents of the child will need to apply for either Australian citizenship by descent or a permanent visa for the child. Where a child becomes an Australian citizen by descent, the intended parents will also need to apply for an Australian passport for the child.

### **Australian citizenship by descent**

A person born overseas to an Australian citizen does not obtain Australian citizenship by automatic operation of law. However, the person may apply for Australian citizenship by descent. Applications for Australian citizenship by descent are assessed according to requirements set out in the Australian Citizenship Act 2007 and the policy guidelines set out in the Australian Citizenship Instructions.

#### **Eligibility requirements for Australian citizenship by descent**

A child born outside Australia as a result of a surrogacy arrangement is eligible for Australian citizenship by descent if, at the time of their birth, they had a parent who was an Australian citizen.

If the child's Australian citizen parent became an Australian citizen either by descent or because they were adopted outside Australia in accordance with the Hague Convention on Intercountry Adoption, then that parent must have been present in Australia (except as an unlawful non-citizen) for a total period of at least two years before they submitted the application. There is an exception for people who are not a national or citizen of any country at the time of their application and they have never been such a national or citizen.

Under the department's citizenship policy, an application for citizenship by descent by a person under the age of 16 must be signed by a responsible parent.

## Bars on approval for citizenship by descent

Citizenship by descent cannot be approved by the department if:

- the decision-maker is not satisfied of the identity of the person
- the applicant is aged 18 years or older and the decision-maker is not satisfied that the person is of good character
- the person does not meet national security requirements.

## Determining parent-child relationships

A parent-child relationship is a question of fact to be determined by the department with regard to all the relevant circumstances.

In the majority of surrogacy arrangements, at least one of the intended parents is also a biological parent of the child. Normally, the biological parentage can be readily determined through medical records and/or DNA testing. Provided that DNA testing is carried out to approved standards the result of DNA testing is given substantial weight when determining if a person is a parent of another person.

**See: Fact Sheet 23 – DNA Testing**

Where there is no biological connection between an Australian citizen who is the intended parent and the child born through an international surrogacy arrangement, or where such a biological connection has not been satisfactorily established, it is necessary for an Australian citizen to provide other evidence to demonstrate that the Australian citizen was in fact the parent of the child at the time of the child's birth. The type of evidence that would support such a claim is likely to require greater scrutiny and verification than DNA evidence. Consequently, an application based on such evidence may take significantly longer to decide.

Evidence that the parent-child relationship existed at the time of the child's birth may include, but is not limited to:

- a formal surrogacy agreement entered into before the child was conceived
- lawful transfer of parental rights in the country in which the surrogacy was carried out to the Australian citizen before or at time of the child's birth
- evidence that the Australian citizen's inclusion as a parent on the birth certificate was done with that parent's prior consent
- evidence that the Australian citizen was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support and making arrangements for the birth and prenatal and postnatal care
- evidence that the child was acknowledged socially from or before birth as the Australian citizen's child, for example, where the child was presented within the Australian citizen's family and social groups as being the Australian citizen's child.

Evidence that the Australian citizen treated the child as his or her own from some point in time after birth would not by itself be evidence that the Australian citizen was the child's parent at time of birth, but it would lend weight to evidence of the types previously listed

## Responsible parents

If an applicant for Australian citizenship by descent is under 16 years old, their application must be signed by a responsible parent. A person is a responsible parent if they meet one of the following requirements:

- The person is a parent of the child except where, because of orders made under the *Family Law Act 1975*, the person no longer has any responsibility for the child.
- Under a parenting order, the child is to live with the person.
- Under a parenting order, the person has responsibility for the child's long-term or day-to-day care, welfare and development.
- The person has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.

While only one responsible parent is required to consent to and sign the application, the department encourages all responsible parents to reach an agreement as to whether or not to lodge an Australian citizenship application on behalf of the child.

See: [Citizenship by descent](#)

## Requirements for a visa to Australia

If the child is not eligible for Australian citizenship by descent, or the parent chooses not to apply on the child's behalf for Australian citizenship, the parent will need to apply for a visa for the child to enable the child to enter and remain permanently in Australia.

In international surrogacy cases where the intended parent is a biological parent, and is also an Australian citizen, permanent resident or eligible New Zealand citizen, a Child (subclass 101) visa is the relevant visa for the child. Eligibility requirements for this visa are available on the department's website. In most cases a DNA test will be requested as evidence of a biological link between the child and the sponsoring parent.

See: [Child \(subclass 101\) visa](#)

In international surrogacy cases where the intended parent is not a biological parent, an Adoption (subclass 102) visa is the relevant visa for the child. The intended parent would need to formally adopt the child in accordance with the law of the child's country of usual residence and must meet additional residency requirements outside Australia before applying for the visa. It is rare for a child born of an international surrogacy arrangement to be able to meet the immigration requirements for an expatriate adoption and the subsequent grant of an Adoption visa. Detailed information on adopting a child outside Australia and obtaining a permanent visa for that child is available on the department's website.

See: [Fact Sheet 36 – Adopting a Child from Overseas](#)

There are no other permanent visa options on grounds of a parent-child relationship available to a child born of a surrogacy arrangement if the child is not able to meet the legal requirements for the grant of either a Child or an Adoption visa.

## **Sponsorship limitation and best interests of the child**

The sponsorship of a child who is younger than 18 years of age cannot be approved where the sponsor or the sponsor's spouse or de facto partner has a conviction or an outstanding charge for an offence against a child, except in very limited circumstances. There must also be no compelling reason to believe that the grant of the visa would not be in the best interests of the child.

**See:**

[Sponsor eligibility](#)

[Measures for the protection of children](#)

## **Country-specific information**

For further information on surrogacy arrangements for specific countries:

**See:**

[Australian High Commission India](#)

[Australian Embassy Thailand](#)

[Embassy of Australia United States of America](#)

## **Applying for a passport**

For more information on how to apply for an Australian passport for a child, visit the Australian Passport Office website or contact your nearest Australian Embassy, High Commission or Consulate.

**See:** [Australian Passport Office](#)

Further information is available on the department's website.

**See:** [www.immi.gov.au](http://www.immi.gov.au)

The department also operates a national general enquiries line.

**Telephone:** 131 881

**Hours of operation:** Monday to Friday from 8.30 am to 4.30 pm. Recorded information is available outside these hours.

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