



THE LAW SOCIETY  
OF NEW SOUTH WALES

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28 August 2025

The Director  
Select Committee on Fertility Support and Assisted Reproductive Treatment  
Parliament House  
Macquarie Street, Sydney NSW 2000

By email: [fertilitysupport@parliament.nsw.gov.au](mailto:fertilitysupport@parliament.nsw.gov.au)

Dear Director,

### **SELECT COMMITTEE ON FERTILITY SUPPORT AND ASSISTED REPRODUCTIVE TREATMENT IN NSW**

Thank you for the opportunity to contribute to the Select Committee's inquiry into fertility support and reproductive treatment in NSW. The Law Society's Family Law, Children's Legal Issues and Human Rights Committees contributed to this submission.

This submission addresses (i) and (j) of the Select Committee's Terms of Reference, namely:

- Changes to government policies and surrogacy laws to protect families and surrogates.
- Relevant national and international laws that impact on surrogacy arrangements in New South Wales, including consideration of a model national legal framework for surrogacy arrangements.

In our view, and as previously advocated for by the Law Society,<sup>1</sup> the ban on commercial surrogacy should be removed and a national regulatory framework for compensatory surrogacy should be established that foregrounds the best interests of the child, is sufficiently robust and ensures adequate rights protections for children born through surrogacy, surrogates and the intended parent(s).

#### **Replacing NSW's ban on commercial surrogacy with a national compensatory framework**

At present, surrogacy is currently regulated by the States and Territories, as the Commonwealth does not have the power to legislate with respect to surrogacy arrangements. In NSW and every other Australian jurisdiction 'commercial' surrogacy is prohibited.<sup>2</sup> Entering into, or offering to enter into, a commercial surrogacy arrangement is also a criminal offence in NSW, punishable by a maximum imprisonment for two years or a fine.<sup>3</sup> Further, obligations under a surrogacy agreement are not enforceable, other than the obligation to pay or reimburse the birth mother's surrogacy costs.<sup>4</sup>

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<sup>1</sup> Law Society of NSW, 'Review of Surrogacy Laws – Issues Paper' (10 July 2025), <[Letter to LCA - Review of Surrogacy Laws - Issues Paper - 10 July 2025.pdf](#)>.

<sup>2</sup> Surrogacy Act 2010 (NSW) ('*Surrogacy Act*') s 8; Parentage Act 2004 (ACT) s 41; Surrogacy Act 2022 (NT) s 48; Surrogacy Act 2010 (Qld) s 56; Surrogacy Act 2019 (SA) s 23(1); Surrogacy Act 2012 (Tas) s 40; Assisted Reproductive Treatment Act 2008 (Vic) s 44; Surrogacy Act 2008 (WA) s 8.

<sup>3</sup> Surrogacy Act s 8.

<sup>4</sup> Ibid s 6.

In our view, this binary classification of ‘commercial’ and ‘altruistic’ surrogacy oversimplifies the often complex motivations of both surrogates and intended parents. Indeed, many surrogacy arrangements fall between these two classifications, demonstrating the need for a more nuanced regulatory approach.

Moreover, the current prohibition creates a two-tiered reality where wealthy intended parents can access commercial surrogacy overseas while others cannot, raising significant equity concerns. Further, it augments the risks of human rights violations for all parties to the surrogacy arrangement, particularly the rights of the child. As noted in the 2019 report of the Special Rapporteur on the sale and sexual exploitation of children:<sup>5</sup>

The Special Rapporteur has observed that the prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child.

For these reasons, and given the unique legal and ethical issues raised by surrogacy arrangements, we consider that it would be appropriate to abolish the ban on commercial surrogacy and establish a uniform regulatory approach across all Australian jurisdictions that is sufficiently robust to ensure adequate rights protections for children born through surrogacy, surrogates and the intended parent(s). In our view, any regulatory framework governing surrogacy arrangements should take account of children’s rights, surrogates’ rights and intended parents’ rights. If relevant, it would also be appropriate to consider the rights of any donor. Such an approach acknowledges the core tenet of the universality and interdependence of human rights.

#### Proposed national regulatory model

We suggest that an onshore, compensatory framework would reduce many of the risks to surrogates arising in international jurisdictions, including human trafficking, inadequate healthcare and financial exploitation by for-profit surrogacy clinics or brokers, which may be unregulated. A regulated onshore framework would mean that there would be greater oversight over matters such as informed consent, supported decision-making and access to legal representation and advice, which would help reduce risk.

In our view, adopting a model of compensated surrogacy would provide better protection for all parties involved, through regulated oversight. A compensated surrogacy model could also keep more surrogacy arrangements within Australia, ensuring better local control and support. Further, it could remove the concerns about discrimination against LGBTIQ+ families, while not derogating from protection for the surrogate mother, or the primacy of the principle of the best interests of the child.

We recommend implementing a future-focused scheme for compensated surrogacy, to be introduced with a transitional plan that allows for the forms of compensation available to surrogates within the scheme to be adjusted over time. Such a scheme could begin with modest, clearly defined compensation categories and evolve as community acceptance and regulatory confidence develop. This approach would permit a relatively

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<sup>5</sup> Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children Inputs on safeguards for the protection of the rights of children born from surrogacy arrangements*, UN Doc A/74/162 (15 July 2019).

non-challenging commencement point for the initiative, supporting the concerns of jurisdictions and citizens apprehensive about abolishing the commercialisation ban.

We support establishing a streamlined regulatory function, preferably at the Commonwealth level, to support compliance and oversight including: registration processes governing eligibility, compliance, practical harmonisation across jurisdictions, production of education and guidance materials; and facilitating access to specialised dispute resolution processes.

Additionally, the framework for a compensated surrogacy model could incorporate the following:

- Permitting regulated advertising and matching services to operate to bring parties together.
- The requirement of counselling and independent legal advice for both surrogates and intended parents.

If legislative reform in the manner described above is not proposed, we suggest that the Commonwealth and States/Territories work collaboratively to ensure, as far as possible, a consistent approach to surrogacy matters. There needs to be, at minimum, a framework for addressing the needs of children born as a result of commercial surrogacy arrangements who cannot be subject to a State/Territory parentage order.

We also suggest that the Commonwealth and States/Territories produce centralised guidance so that persons contemplating assisted reproduction, including surrogacy, can inform themselves about the legal framework which will apply to them, as well as have a clear understanding of some of legal issues known to arise in this area of the law. In the experience of our members, intended parents often seek information and guidance from social media groups as a way of understanding surrogacy options, particularly in overseas jurisdictions, which can lead to confusion and misinformation.

### **Addressing the gap in current legal parentage laws**

Another aspect of the current legal framework regulating surrogacy in NSW which is of particular concern is the laws conferring legal parentage from the surrogate to the intended parent(s), which do not address the reality of surrogacy arrangements in many cases. In our view, the current laws do not adequately protect children born via commercial and/or overseas surrogacy arrangement, and or children whose surrogate and intended parents do not otherwise meet the stringent preconditions for obtaining a parentage order.

There is significant legal uncertainty in NSW about obtaining legal parentage of a child born via surrogacy, particularly in relation to surrogacy arrangements that occur outside Australia or via commercial surrogacy arrangement. This appears to be the case not just in NSW, but across Australian jurisdictions, although the inconsistencies across jurisdictions may incentivise “forum shopping”. The absence of legal parentage can profoundly affect the child, whose rights and interests are the paramount consideration in any discourse around surrogacy. The absence of legal parentage can adversely affect a child, in terms of the public validation of their family structure, but also in terms of ‘inter-generational relationships and entitlements’, noting the way in which the law of succession, rights on intestacy and family provision rest on proof of kinship.<sup>6</sup>

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<sup>6</sup> Adiva Sifris, ‘Overseas Compensated Surrogacy Arrangements and the Family Court of Australia: What About the Children?’ [2020] 14 *Court of Conscience* 44, 44–47.



Accordingly, we suggest that the laws which confer legal parentage on intended parents be reformed to address this gap consistently either through uniform State and Territory legislation or federal law.

#### Parentage orders under the *Surrogacy Act 2010* (NSW)

Each State and Territory has distinct processes for obtaining parentage for a child born through surrogacy, although in all cases, a court order is required for the transfer of parentage from the birth parent to the intended parents to be effected (**parentage order**).

In NSW, the intended parent(s) can apply to the Supreme Court for a parentage order under the *Surrogacy Act 2010* (NSW) (**Surrogacy Act**).<sup>7</sup>

The Court may make a parentage order only if it is satisfied that preconditions set out in Division 4 of the *Surrogacy Act* are met, including the following mandatory preconditions:<sup>8</sup>

- The making of the parentage order is in the best interests of the child;<sup>9</sup>
- If the surrogacy arrangement was entered into in Australia, it was not a commercial surrogacy arrangement;<sup>10</sup>
- The surrogacy arrangement is a pre-conception arrangement;<sup>11</sup>
- There are either two intended parents who are a couple, or there is only one intended parent;<sup>12</sup>
- The child is under 18 years of age and, if the child is of sufficient maturity to express his or her wishes and the Court considers it appropriate, the Court must have regard to the child's wishes;<sup>13</sup>
- The birth mother must be at least 25 years old when she entered into the surrogacy arrangement;<sup>14</sup>
- The intended parents are at least 18 years old when they entered into the surrogacy arrangement.<sup>15</sup> If an intended parent was under 25 years of age when they entered into the surrogacy arrangement, the Court must be satisfied that they are of sufficient maturity to understand the social and psychological implications of the making of the order.<sup>16</sup> An intended parents who was under 25 when the arrangement was entered into must also provide evidence to the satisfaction of the Court that they received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the arrangement, and the counsellor was satisfied that they were of sufficient maturity at that time.<sup>17</sup>

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<sup>7</sup> *Surrogacy Act 2010* (NSW) s 12.

<sup>8</sup> *Surrogacy Act* s 18. See also ss 21-29 of the *Surrogacy Act*, which specifies in their subsections that these preconditions are mandatory to making a parentage order.

<sup>9</sup> *Ibid* s 22.

<sup>10</sup> *Ibid* s 23.

<sup>11</sup> *Ibid* s 24.

<sup>12</sup> *Ibid* s 25.

<sup>13</sup> *Ibid* s 26.

<sup>14</sup> *Ibid* s 27.

<sup>15</sup> *Ibid* s 28.

<sup>16</sup> *Ibid* s 29(1).

<sup>17</sup> *Ibid* s 29(2).

A number of other preconditions which are not mandatory are set out at ss 30–38 of the Surrogacy Act.<sup>18</sup>

We note amendments to the Surrogacy Act introduced by the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW), which commenced on 1 July 2025. Notably, under these new amendments, the Court can make a parentage order if a non-mandatory precondition is not met in the following circumstances:

- For a surrogacy arrangement that is not a commercial surrogacy arrangement – the Court is satisfied that exceptional circumstances justify the making of the parentage order, despite the precondition not being met;<sup>19</sup>
- For a commercial surrogacy arrangement has been entered into outside Australia for a child born on or before 30 June 2025 – the Court is satisfied, having regard to the circumstances of the birth parent(s), the intended parent(s) and the surrogacy arrangement, that it is in the best interests of the child to make the parentage order, despite the precondition not being met;<sup>20</sup>
- For a commercial surrogacy arrangement entered into outside Australia for a child born on or after 1 July 2025:
  - If the precondition is that the surrogacy arrangement is not a commercial surrogacy arrangement – the Court is satisfied, having regard to the circumstances of the birth parent or parents, the intended parent or parents and the surrogacy arrangement, that it is in the best interests of the child to make the parentage order, despite the precondition not being met.<sup>21</sup>
  - If the precondition is any other precondition that is not a mandatory precondition to the making of a parentage order—the Court is satisfied exceptional circumstances justify the making of the parentage order, despite the precondition not being met.<sup>22</sup>

We are of the view that these developments are positive in that there is now an avenue for legal parentage for children born via surrogacy arrangement that is commercial and/or outside Australia. However, the bar that intended parents must meet to obtain a parentage order, ‘exceptional circumstances’, is a high one and does not necessarily reduce the legal uncertainty for parties in these circumstances. Additionally, commercial surrogacy remains a criminal offence under the Surrogacy Act,<sup>23</sup> leaving parties to an agreement open to prosecution.<sup>24</sup>

Significantly, there have been recent examples in NSW where the Court has refused a parentage order in circumstances where intended parents have failed to meet the statutory requirements for the making of such an order.<sup>25</sup>

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<sup>18</sup> In ss 22-29, there is a subsection that states "this precondition is a mandatory precondition to the making of a parentage order." It is my understanding that this is what distinguishes these preconditions as "mandatory preconditions". Sections 30-38 do not have a subsection which states they are mandatory preconditions.

<sup>19</sup> Ibid s 18(2)(a).

<sup>20</sup> Ibid s 18(2)(b).

<sup>21</sup> Ibid s 18(2)(c)(i).

<sup>22</sup> Ibid s 18(2)(c)(ii)

<sup>23</sup> Ibid s 8.

<sup>24</sup> See, eg, *Lloyd & Compton* [2025] FedCFamC1F 28, where the Court referred the matter to the Queensland Director of Public Prosecutions to consider whether criminal charges against the parties should be pursued in relation to the commercial surrogacy.

<sup>25</sup> *Re N* [2025] NSWSC 409.

### Parenting orders under the *Family Law Act 1975* (Cth)

Where intended parents are not eligible to obtain legal parentage orders in their State or Territory, there does not appear to be an avenue for obtaining legal parentage under the *Family Law Act 1975* (Cth) (FLA),<sup>26</sup> although they may be able to obtain ‘parenting orders’ pursuant to s 65C, FLA. Parenting orders, which end when the child reaches the age of 18, deal with specific aspects of parenting the relevant child, such as who they will live with, how much time the child will spend with each parent and who is responsible for making decisions for the child.<sup>27</sup> We suggest that it is unsatisfactory that there is no avenue for legal parentage for intended parents who do not meet strict State or Territory requirements for parentage orders. There are matters, at a state, territory and federal level where a parent’s or a child’s rights and entitlements are determined by legal parentage. For example, child support obligations only fall on legal parents.<sup>28</sup> Additionally, under the FLA, there are a number of provisions that treat legal parents differently to non-parents.<sup>29</sup> This means that if the intended parents separate at any time, children can be left vulnerable. Uncertainty about legal parentage under the FLA and *Child Support (Assessment) Act 1989* (Cth) means that obtaining financial support and other orders for children may involve complex and expensive legal proceedings or indeed may not be possible under current laws.

In our view, to ensure consistency and clarity for all parties involved, there should be harmonisation of laws across Australian jurisdictions related to legal parentage for children born via a surrogacy arrangement. This could be achieved either by way of enactment of uniform legislation at a State and Territory level, or by referral of power by the States allowing the Commonwealth to legislate amendments to the FLA which provide a single avenue for obtaining legal parentage in surrogacy arrangements. Any legislative amendment should create an avenue for vesting legal parentage on intended parents for international and/or commercial surrogacy arrangements.

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<sup>26</sup> Section 60HB of the FLA provides that where a court of a state or territory provides that where a court of a State or Territory has made an order creating a parent-child relationship under ‘prescribed’ state or territory provisions, that order is to be considered effective for the purposes of the FLA. In *Bernieres v Dhopal* (2014) 53 Fam LR 547; [2015] FamCA 736. Berman J held that s 60HB “covers the field” with respect to surrogacy arrangements under the FLA. This was confirmed by the Full Court of the Federal Circuit and Family Court on appeal. In that case, the child for whom the intended parents were seeking a declaration of legal parentage was born via compensated surrogacy arrangements overseas. The Court held that a declaration of legal parentage under the FLA was not available, but did make a parenting order in favour of the applicant under s 65C, FLA. It is unclear whether *Bernieres* is affected by the High Court decision of *Masson v Parsons* (2019) 266 CLR 544, where the plurality held that the word ‘parent’ under the FLA should take on its ordinary meaning unless there is an applicable provision of the FLA that provides otherwise. Citing *Masson v Parsons*, Aldridge J in the case of *Tickner v Rodda* [2021] FedcFamC1F 279 made a declaration of legal parentage under s 69VA in favour of an intended parent of a child born as a result of an altruistic surrogacy agreement. This was despite the fact that the intended parent could not obtain a parentage order under the *Surrogacy Act 2010* (NSW).

<sup>27</sup> *Family Law Act 1975* (Cth) s 64B.

<sup>28</sup> See s 5, *Child Support Assessment Act 1989* (Cth).

<sup>29</sup> For example, under s 60CC(2), the parent-child relationship is a consideration in determining what is in a child’s best interests.



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Thank you for the opportunity to comment. Questions at first instance may be directed to Ursula Paetzholt, Policy Lawyer, at (02) 9926 0130 or [Ursula.Paetzholt@lawsociety.com.au](mailto:Ursula.Paetzholt@lawsociety.com.au).

Yours sincerely,

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