



Australian Government

**Department of Immigration
and Border Protection**

Inquiry into Surrogacy

Standing Committee on Social Policy and Legal
Affairs

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Introduction

The involvement of the Department of Immigration and Border Protection in international commercial surrogacy arrangements (international surrogacy) is limited to determining Australian citizenship by descent applications and less commonly, visa applications, made by persons born through surrogacy arrangements.

Australian citizenship laws apply universally to the children of an Australian parent no matter how the child came to be conceived. The overall intent of the requirements for Australian citizenship by descent is deliberately simple, that is, the child must have had a parent who is an Australian citizen at the time of the child's birth and the citizenship decision-maker must be satisfied of the child's identity. However, assessing these requirements in practice, particularly in an international surrogacy context, can be complicated.

An overview of Departmental legislation and current approach to surrogacy is at [Attachment A](#).

Key issues arising for the Department from international surrogacy

1. Meaning of 'parent' and 'parental responsibility'

For the purposes of the Citizenship Act 'parent' has its ordinary meaning, which can depend on various factors, including social, legal and biological, and 'parental responsibility' includes a person who is a parent of a child and a person who has guardianship or custody of a child, jointly or otherwise, under a foreign law. This means people other than the commissioning parents may have parental responsibility for a child born through an international surrogacy. Consequently, applications for both citizenship and visas from children born under surrogacy arrangements are given considerable scrutiny. Currently, only one person who has parental responsibility for a child needs to sign the Australian citizenship by descent application form. Citizenship decision-makers give consideration to the extent that local laws impact on parental rights, the contract and the consent of the surrogate mother (and her partner, if she has one) to relinquish their parental rights and giving the intended parent(s) parental responsibility. The Department finds scrutinising overseas laws surrounding surrogacy and parental responsibility to be complex. For example, in the United States of America there are tight legal requirements around surrogacy which vary significantly from state to state. The Department must make an assessment of a parent-child relationship in the absence of Commonwealth or international legal framework to guide recognition of such relationships where surrogacy arrangements are commissioned overseas.

2. Biological link to a parent

The Full Federal Court [H v Minister for Immigration and Citizenship (2010) FCAFC 119; (2010) 188 FCR 393 (15 September 2010)] found that a child could be an Australian citizen by descent through a person who was not a biological parent but acted in a parental capacity. The expansion of the meaning of 'parent' beyond biological has meant that citizenship decision-makers are required to deal with applications where there is no biological link with an Australian intended parent on a case-by-case basis, with close scrutiny of the evidence.

The Department has seen several cases where Australian parents have claimed their child was born to the claimed mother but the circumstances strongly suggest the child was born through a commercial surrogacy arrangement, that is, the arrangement was not declared on the citizenship application form. These cases can be difficult to detect because in many countries a birth certificate may be issued without any reference to the natural parents or birth mother. In such cases the parental rights of the birth mother and her partner, if any, may not have been extinguished, raising concerns as to whether they agree to the citizenship application and removal of the child from their birth country.

3. Differing citizenship requirements compared with adoption processes

Australian citizenship laws apply universally to the children of an Australian parent. The law does not differentiate how a child came to be conceived. The intent of the requirements for Australian citizenship by descent is relatively straightforward, that is, the child has to be the child of an Australian citizen and the citizenship decision-maker must be satisfied of the child's identity.

In contrast, children who have been adopted and need a visa, must meet a range of legal requirements that are not generally given consideration under citizenship provisions. This includes, for example, police clearances for the adoptive parents, a biological link with the commissioning parent (or a court order), best interest of the child consideration and compliance with domestic and international adoption laws, such as, adoption from the particular country is lawful and the laws of the child's country allow the child to be removed.

4. Legal status of commercial surrogacy in Australia

The Department has no involvement when international surrogacy arrangements are negotiated between commissioning parents and surrogacy service providers. All States and Territories (except the Northern Territory) have legislation dealing with surrogacy. Altruistic surrogacy is lawful in each of these jurisdictions. Each jurisdiction also provides a mechanism to transfer parentage to the intended parents of a child, where that child has been born as a result of domestic altruistic surrogacy arrangements. The specific requirements for persons entering into altruistic surrogacy arrangements vary across states and territories.

All jurisdictions (except the Northern Territory) have prohibited commercial surrogacy.

The Australian Capital Territory (ACT), New South Wales (NSW) and Queensland (QLD) have prohibited residents of those jurisdictions from entering into commercial surrogacy arrangements in foreign jurisdictions. While these Australian laws make it illegal to enter into international surrogacy arrangements, the offence of entering into a commercial surrogacy does not prevent the relationship between the commissioning parents and the child being recognised for the purpose of the Citizenship Act. Whether or not there is unlawful activity relating to a surrogacy arrangement is not a consideration a citizenship decision-maker may take into account.

There has been at least one case where a couple from an Australian jurisdiction where international surrogacy is illegal was convinced by a surrogacy clinic in a foreign country that the surrogacy was 'altruistic' as opposed to 'commercial'. In altruistic surrogacy, the surrogate is paid only for expenses incurred or is not paid at all. In commercial surrogacy, the surrogate is paid a fee plus any expenses incurred in her pregnancy.

5. Emerging international locations

Babies born through surrogacy last year made up around 1.4% of the total citizenship by descent caseload. The total caseload was 17,357.

Internationally, surrogacy has become contentious for many 'traditional' market countries. Following cases of concern, some of which have included Australian citizens commissioning children, India and Thailand have banned access to surrogacy by foreign nationals. Recent actions by the Nepalese Government and Courts suggest that Nepal is similarly closing its doors to the practice. Cases are now being seen in newer markets, such as in Mexico and Ukraine. The challenges for the Department with this moveable market include commissioned babies born with unclear entitlements to citizenship in the countries of their birth, unclear legal statuses of the birth mothers and their rights which limit the documentation that can be provided in support of citizenship applications, and ultimately Australian parents who request assistance from the Department to attempt to resolve many of these complexities for them.

6. Information available to interested parties

A concerted multi-departmental Government approach has been taken to inform Australians considering international surrogacy. Australians are strongly advised to familiarise themselves with the legal implications of overseas commercial surrogacy and seek independent legal advice.

The Department publishes on its website Fact Sheet 36a *International Surrogacy Arrangements* which includes a caution regarding issues that may be faced by commissioning parents.
http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm.

Attachment A: Overview of Departmental legislation and current approach to surrogacy

Citizenship by descent involving international surrogacy

The *Australian Citizenship Act 2007* (the Citizenship Act), for the purpose of an Australian citizenship by descent application, does not differentiate how a child came to be born. Rather, if a person is born outside Australia, and a parent of the person was an Australian citizen at the time of the person's birth, the person may be eligible for Australian citizenship.

The term 'parent' is not defined in the Citizenship Act. However there is common law guidance on the interpretation of this term. The Department's current position is a biological connection is not necessary in order for a person to be a parent for the purposes of the Citizenship Act. It is sufficient that, at the time of birth, an Australian citizen is a 'parent' as that word is understood in ordinary usage which includes consideration of social, legal and biological factors. A range of evidence of the parent-child relationship is generally requested. When supporting evidence is insufficient the parent is offered the opportunity to provide DNA test results. Where an international surrogacy is declared or detected, it is policy that surrogacy medical records and surrogacy agreement documents be provided in support of the application.

The Citizenship Act requires that the identity of a child must be substantiated. This is done by a combination of evidence, such as a birth certificate/hospital records, DNA and information from the surrogacy contract. The identity of the commissioning parents and the gestational mother must be established.

All citizenship applications lodged for applicants aged under 16 years must be signed by a responsible parent of the child. A 'responsible parent' for the purposes of the Citizenship Act includes a parent of the child (except where, because of orders made under the *Family Law Act 1975* (the Family Law Act), the person no longer has any parental responsibility for the child). Each country has its own rules about who will be recognised as the parents of a child born overseas. In some overseas jurisdictions, only the birth mother and her partner, if she has one, are recognised as the child's parents and must sign the application form on the child's behalf.

Under policy, a citizenship by descent application requires additional scrutiny if one or more of the following circumstances apply:

- the person stated to be the child's mother travelled by air in what would have been a very advanced state of pregnancy (most airlines will not carry a passenger after the 28th week of pregnancy)
- the person stated to be the child's mother is of mature age and the birth certificate shows the child to be her first born
- the person stated to be the child's mother claims to have had no pre-natal attention from a doctor in Australia
- a person stated to be a parent is not contactable
- the person stated to be the child's mother claims she had no ante-natal care
- an application is lodged by a responsible parent in Australia and the child is outside Australia
- the birth certificate was issued/re-issued many years after the birth
- the travel movements of the persons stated to be the parents indicate that they could not have been together at the time the child would have been conceived
- a child notionally eligible for citizenship applied for a visa before seeking citizenship or evidence of citizenship.

The Citizenship Act contains no provision for a character test for an Australian parent of a child applying for citizenship by descent. (Note: this is similar to Australians onshore who have children, that is, their character is not considered.) The Citizenship Act bestows no obligation on the Department to report surrogacy cases to child protection authorities, even where it is unlawful under Australian law. Presently, where concerns regarding the safety of children arise in the course of an application, departmental officers will contact the Australian Federal Police who have jurisdiction on the matter.

Parent under citizenship legislation

When determining who is a 'parent' for the purposes of the Citizenship Act all the circumstances, including biological, social and legal parentage claims, must be considered. The Full Federal Court [H v Minister for Immigration and Citizenship (2010) FCAFC 119; (2010) 188 FCR 393 (15 September 2010)] ruled that 'parent', when used in the Citizenship Act, takes its meaning from ordinary contemporary English usage. Whether a person is a parent of another person is a question of fact, having regard to the evidence.

Section 8 of the Citizenship Act provides that:

- if a person is a child of a person under s60H (children born as a result of artificial conception procedures) or s60HB (children born through surrogacy arrangements) of the *Family Law Act 1975* (FLA) and either
 - a child of that person's partner under s60H or s60HB or
 - a biological child of that person's partner,

the child is taken to be the child of that person and their partner and of no one else.

A child who is not a child of a person under s60H or s60HB of the FLA may however be a child of that person if the person is the child's 'parent' within the ordinary meaning of that word. It is also possible that in some circumstances a child born outside Australia through international surrogacy may be found to have more than two parents for the purposes of the Citizenship Act.

Applications for visa

While a person may be eligible to apply for Australian citizenship, there can be reasons why a visa pathway is favoured. The main reason would be where one parent is an Australian citizen and the parents do not want the child to lose the citizenship of the other parent as some countries do not allow nationals to hold dual citizenship.

In international surrogacy cases where the intended parent is a biological parent, and is also an Australian citizen, permanent resident of Australia or an eligible New Zealand citizen, a Child (subclass 101) visa is the relevant visa for the child. In most surrogacy-related cases a DNA test will be requested as evidence of a biological link between the child and the sponsoring parent.

To apply for a Child visa (subclass 101), the child must be outside Australia when the application is lodged and when the application is decided. The visa can only be granted if:

- the visa applicant is sponsored by a commissioning parent who is either the holder of an Australian permanent residence visa, an eligible New Zealand citizen, or an Australian citizen, and
- there is a biological link between a surrogate child born outside Australia and the commissioning parent, or a court has made an order under a law of a State or Territory of Australia that the child is the child of that person, and

- the Minister is satisfied that there is no compelling reason to believe the grant of the visa would not be in the best interests of the child, and
- the Minister is satisfied of one of the following:
 - the law of the country of origin allows the removal of the child from the jurisdiction or
 - each person who can lawfully determine where the child is to live consents to the grant of a visa
- the grant of the visa would be consistent with any Australian child order in force in relation to the applicant.

Sponsorship for a Child visa cannot be approved if the sponsor (or their partner) has been charged with a registrable offence. Indicative examples of registrable offences include murder of a child, sex offences involving a child, kidnapping of a child, grooming of a child, child prostitution or pornography made using children.

In international surrogacy cases where the intended parent is not a biological parent and Australian citizenship is not sought or approved, an Adoption (subclass 102) visa may be the appropriate 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 challenging 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.

There are no other permanent visa options on the 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.

Parent under Migration legislation

Although 'parent' and 'child' are defined in the *Migration Act 1958* (the Migration Act) and Regulations, these definitions are inclusive, rather than conclusive – together, they ensure that for migration purposes, the Department recognises parent-child relationships covered under the Family Law Act, and also recognise both formally and customarily adopted children, as well as step-children.

For international surrogacy cases, the Department generally requires that there be a biological link between the intended parent and child in order for the parent-child relationship to be recognised.

Before granting a Child visa or an Adoption visa the Department must consider not only the relationship between the intended parent and the child, but also the parental rights of other parties, such as the surrogate mother and her partner as well as donors. In making these determinations, the Department currently considers Australia's migration legislation as well as local laws.