



Australian Government

Australian Government response to the
Standing Committee on Social Policy and Legal Affairs
report:

Surrogacy Matters

NOVEMBER 2018

AUSTRALIAN GOVERNMENT RESPONSE TO THE RECOMMENDATIONS OF THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS SURROGACY MATTERS REPORT

Introduction

In Australia, surrogacy is regulated by state and territory governments. All jurisdictions (except the Northern Territory) have legislation dealing with surrogacy.

The Commonwealth's role in relation to surrogacy is primarily concerned with matters arising from children born via international surrogacy arrangements, such as applications for visas, citizenship and passports.

The Department of Home Affairs determines visa applications and Australian citizenship by descent applications made for children born through surrogacy arrangements.

The Department of Foreign Affairs and Trade is responsible for issuing Australian passports.

The Attorney-General's Department has administrative responsibility for federal family law. The *Family Law Act 1975* includes provisions that provide that state and territory laws determine the parentage of children born via surrogacy arrangements, and that family courts may make parenting orders, which can be sought by intending parents of children born via surrogacy.

The Department of Social Services has responsibility for a range of payments and programs to support families.

On 2 December 2015, then Attorney-General, the Honourable George Brandis QC, asked the House of Representatives Standing Committee on Social Policy and Legal Affairs to inquire into and report on the regulatory and legislative aspects of international and domestic surrogacy arrangements. The Committee released its final report, *Surrogacy Matters*, on 4 May 2016. The report makes ten recommendations. These recommendations and the Australian Government's response are addressed below.

The Government supports greater national consistency in the approach to surrogacy arrangements at the state and territory level and, where relevant, the Commonwealth level. The Government would welcome the opportunity to work with state and territory governments to ensure that the best interests of the child are paramount in any regulatory response to surrogacy, to minimise the risk of exploitation of children and surrogate mothers in surrogacy arrangements, and to improve the availability of information for all parties.

The Government thanks the Standing Committee on Social Policy and Legal Affairs for its consideration of the regulatory and legislative aspects of international and domestic surrogacy arrangements and apologises for the delay in responding.

Recommendation 1:

The Committee recommends that the practice of commercial surrogacy remain illegal in Australia.

Response: Agree in principle

In Australia, surrogacy is regulated by the states and territories. The Government notes that domestic commercial surrogacy is prohibited in all Australian jurisdictions that have legislated on surrogacy.

While recognising that the substantive regulation of surrogacy arrangements is the responsibility of the states and territories, the Government agrees in principle with the Committee's recommendation that commercial surrogacy should remain illegal in Australia. Acknowledging the exploitation risks to the child and surrogate mother, as evidenced in some international commercial surrogacy arrangements, the Government agrees with the principle of commercial surrogacy remaining illegal under domestic law.

The Government recognises the serious risks of exploitation and human rights violation in some overseas jurisdictions conducting commercial surrogacy. The Australian Capital Territory, New South Wales and Queensland have extraterritorial provisions prohibiting Australian residents engaging in international commercial surrogacy.

At the Commonwealth level, Australia has comprehensively criminalised human trafficking, slavery and slavery-like practices, including servitude and forced labour. These offences have extended geographical jurisdiction and could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child.

Recommendation 2:

The Committee recommends that the Australian Government, in conjunction with the Council of Australian Governments, consider the development of a model national law that facilitates altruistic surrogacy in Australia. The model law should have regard to the following four guiding principles:

- that the best interests of the child should be protected (including the child's safety and well-being and the child's right to know about their origins)
- that the surrogate mother is able to make a free and informed decision about whether to act as a surrogate
- that sufficient regulatory protections are in place to protect the surrogate mother from exploitation, and
- that there is legal clarity about the parent-child relationships that result from the arrangement.

Response: Agree in principle

The Government agrees that state and territory laws should, to the greatest extent possible, be consistent in their approach to the regulation of domestic altruistic surrogacy arrangements.

States and territories currently have legislative frameworks that are broadly consistent with the surrogacy principles developed in 2009 by the then Standing Committee of Attorneys-General, although there are some inconsistencies.

The Government agrees that the Committee's four guiding principles should inform the domestic regulation of surrogacy arrangements. The Government will seek agreement from the states and territories to list the issues raised in the Committee's report for consideration by the Council of Attorneys-General (CAG). Through this forum, the Government will seek the views of the states and territories about opportunities to progress consistency in the regulation of domestic altruistic surrogacy arrangements. The Government considers that CAG is the most appropriate forum for jurisdictions to discuss the legislative frameworks and other arrangements that regulate domestic altruistic surrogacy.

Recommendation 3:

The Committee recommends that the Attorney-General request the Australian Law Reform Commission (ALRC) to conduct a 12-month inquiry into the surrogacy laws of Australian States and Territories, with a view to developing a model national law on altruistic surrogacy. The Attorney-General should request that the ALRC consider:

- first and foremost, the best interests of the child
- previous reviews of Australian surrogacy laws, including the 2009 report of the Standing Committee on Attorneys-General and the 2013 Family Law Council report on Parentage and the Family Law Act 1975
- the need for State and Territory laws to be non-discriminatory
- the need for mandatory, independent and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment
- the need for background checks, medical and psychological screening, and independent legal advice for all parties entering into a surrogacy arrangement
- the need for parties to enter into a non-binding surrogacy agreement which sets out shared expectations of all parties, including dispute resolution processes, and which ensures that parties respect the birth mother's right to make decisions about her own health and that of the child
- the processes by which parental responsibility is transferred from the birth mother to intended parents, and when this transfer should take place
- the need for adequate reimbursement for the birth mother for legal, medical and other expenses incurred as a consequence of the surrogacy
- the need for a closed register of surrogates and intended parents, to be administered by a Government body, access to which may be granted following background checks, and medical and psychological screening, and
- whether States and Territories should keep standardised statistical information on families formed through surrogacy to enable long-term studies of surrogacy's effect on families.

Recommendation 4:

The Committee recommends that the Attorney-General request that the Australian Law Reform Commission consider the issue of birth certificates as part of its inquiry as set out in Recommendation 3. In particular, the ALRC should consider whether a child's birth certificate should contain information on all gestational, genetic and intended parents, including a record that the child was born as a result of a surrogacy arrangement.

Recommendation 5:

The Committee recommends that, within six months of the proposed report of the Australian Law Reform Commission being presented to the Attorney-General, the Attorney-General should request that the Council of Australian Governments (COAG) commit to the following actions:

- consultation with all Australian States and Territories in relation to the proposed model, and
- the development of national uniform legislation on altruistic surrogacy to be implemented in all Australian States and Territories.

The Committee considers that the deliberations by COAG should not exceed 12 months.

Response: Noted

The Government notes recommendations 3–5, which recommend that the Australian Law Reform Commission (ALRC) conduct a 12-month inquiry into the surrogacy laws of Australian states and territories, with a view to developing a model national law on altruistic surrogacy.

In September 2017, the Government commissioned the ALRC to undertake a comprehensive review of the family law system. As part of this review, the ALRC is looking at whether changes should be made to the existing policy and legislative frameworks relating to children and parentage. The ALRC is considering how to apply frameworks consistently to all children including those from diverse family structures, including children born via surrogacy arrangements. The ALRC will report to the Commonwealth Attorney-General on 31 March 2019. The Government will consider the ALRC's report and recommendations, including any that relate to the intersection between family law and surrogacy arrangements.

As identified in the response to recommendation 2 above, the Government considers that CAG is the appropriate forum to consider how to achieve consistency in the legislative and regulatory frameworks governing domestic surrogacy arrangements. The Government will consult with the states and territories with a view to listing surrogacy matters for discussion at CAG.

The Government would raise the considerations identified in recommendation 3, and the specific issue of information recorded on birth certificates identified in recommendation 4, as part of its engagement with states and territories through CAG.

Recommendation 6:

The Committee recommends that the Australian Government develop a website that provides advice and information for Australians considering domestic altruistic surrogacy. The website should include:

- clear advice on the role of Australian Government support and service provision for intended parents, surrogates and children including Medicare, social security & welfare payments, child support, paid parental leave,
- clear advice on surrogacy legislation in each Australian State and Territory, and
- clear advice on the support and services funded and provided for by each Australian State and Territory including relevant health, counselling and legal services available.

Response: Noted

The Government supports there being a strong information framework for Australians considering domestic altruistic surrogacy. In consultation with states and territories through CAG, the Government will consider the best approach to providing up-to-date information on domestic altruistic surrogacy.

To ensure that information is regularly updated and current, the Government supports the effective linking of relevant state, territory and Commonwealth sources of information.

Recommendation 7:

The Committee recommends that the Australian Government establish an interdepartmental taskforce (which should include eminent jurists with relevant expertise) to report in 12 months on ways to address the situation of Australians who choose enter into offshore surrogacy arrangements, with respect to:

- protecting the rights of the child, particularly their rights to be free from exploitation, to know their genetic heritage, to know the circumstances of their birth, and to have an ongoing relationship with their birth mother and any siblings or genetic donor/s
- ensuring birth mothers give their free and informed consent and reducing the likelihood that they face exploitation
- ensuring that Australians who enter into offshore surrogacy arrangements meet their responsibility to act in the best interest of all of their children, and
- considering whether it should be unlawful to engage in offshore surrogacy in any overseas jurisdiction where commercial surrogacy is prohibited.

While not condoning Australians' use of offshore surrogacy, the aim of the taskforce should be to ensure that where the regulatory, economic or social conditions in a particular jurisdiction give rise to an increased risk of exploitation or rights violations, Australians entering into or facilitating surrogacy arrangements in that jurisdiction are made aware of those risks, and are subject to a more stringent investigative process to ensure that the rights of the birth mother and the child have not been infringed.

Response: Noted

The Government agrees that in matters of surrogacy, the best interests of the child are paramount and surrogate mothers should be protected from exploitation. These principles should apply in both the domestic and international setting. As states and territories are responsible for regulating surrogacy in Australia, they are also responsible for enforcing breaches of Australian surrogacy laws (see recommendation 9 below). As identified in the response to recommendation 2 above, the Government will engage with states and territories through CAG on the appropriate regulatory arrangements for surrogacy and children born of surrogacy arrangements.

Australian Government agencies, including the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, Department of Home Affairs, Department of Health, Department of Social Services and the Attorney-General's Department, consider appropriate responses to international surrogacy issues as required.

The Government will engage, as appropriate, on international developments on surrogacy through relevant forums including the Experts' Group on Parentage/Surrogacy at the Permanent Bureau of the Hague Conference on Private International Law (see response to recommendation 10 below).

Recommendation 8:

The Committee recommends that the interdepartmental taskforce should undertake a systematic audit of surrogacy destination countries to assess the extent to which surrogacy practices in these countries meet the requirements laid out in recommendation 3. The Committee considers that this audit will assist in informing the Australian Government's response to the Australians who choose to enter into offshore surrogacy arrangements.

Response: Not agreed

The Department of Foreign Affairs and Trade provide the public with information on international surrogacy through the Smartraveller website, including the International Surrogacy Bulletin. The Department of Foreign Affairs and Trade's overseas posts may also include country specific surrogacy information on their post websites.

While the Government recognises that information on the legal frameworks in place in surrogacy destination countries may be useful in informing state and territory regulation of international surrogacy arrangements in which Australians may be engaged, there are likely to be difficulties in undertaking a 'systematic audit' as envisaged in this recommendation. The mobility of the international surrogacy industry means that businesses rapidly relocate to new jurisdictions when regulatory frameworks tighten, with destination countries for surrogacy continually changing. The level of regulation, and the level of information available about legal frameworks and the requirements set out in recommendation 3, is likely to vary markedly from country to country. Obtaining timely and up-to-date information from destination countries is likely to present challenges and require significant resources.

The Government will continue to work closely with states and territories and with countries in which Australians engage in surrogacy arrangements to establish appropriate regulatory frameworks in response to Australians entering into international surrogacy.

Recommendation 9:

The Committee recommends that the Australian Government introduce legislation to amend the *Migration Act 1958* such that Australian residents seeking a passport for a young child to return to Australia are subject to screening by Department of Immigration and Border Protection officials to determine whether they have breached Australian or international surrogacy laws while outside Australia, and that, where the Department is satisfied that breaches have occurred, the Minister for Immigration is given the authority to make determinations in the best interests of the child, including in relation to the custody of the child.

Response: Not agreed

The Government does not support the Committee's proposed legislative amendments.

The Government shares the Committee's concern that some Australians are breaching Australian laws, or the laws of overseas jurisdictions, by engaging in international surrogacy arrangements. The Government also recognises the complexities involved in determining what is in the best interests of a child where an international commercial surrogacy agreement has already been executed.

As surrogacy is regulated by the states and territories, the Committee's concerns about breaches of Australian laws are a matter for state and territories. It is therefore the responsibility of state and territory law enforcement agencies to investigate potential breaches of those laws, and the responsibility of state and territory prosecution offices to bring alleged

breaches before the courts for a judicial determination of whether breaches have occurred. Legal questions about the best interests of a child are generally matters for the courts.

The Government will work with states and territories as appropriate, to the extent that any state and territory law enforcement issues touch upon matters that come within the Commonwealth's responsibility. Australians who are overseas are subject to the local laws and penalties of the relevant jurisdiction.

The Government clarifies that it is through the *Australian Citizenship Act 2007* (Cth) that citizenship by descent provisions apply, and that only Australian citizens are eligible to seek a passport under the *Australian Passports Act 2005* (Cth). Extreme caution is exercised by the Australian Government in cases involving international surrogacy arrangements, to ensure that Australia's citizenship provisions are not used to circumvent either adoption laws or other child welfare laws.

Recommendation 10:

The Committee recommends that the Australian Government, in its representations to the Experts' Group on Parentage/Surrogacy at the Permanent Bureau of the Hague Conference on Private International Law should prioritise:

- the rights of the child, particularly their right to know their genetic heritage, to know the circumstances of their birth, and to have ongoing relationships with their birth mother and any siblings or genetic donor/s,
- the rights of surrogate mothers to be free from exploitation, and to only engage in surrogacy arrangements to which they give their free and free informed consent, and
- the development of an international convention dealing with the regulation of parentage and surrogacy.

Response: Agree in principle

The Australian Government agrees that the rights of the child, the rights of surrogate mothers and the development of an international convention should be priorities for the Permanent Bureau of the Hague Conference on Private International Law's Experts' Group on Parentage/Surrogacy (Experts' Group).

The Experts' Group is currently examining the private international law issues being encountered in relation to international surrogacy arrangements. Chief Justice John Pascoe AC CVO of the Family Court of Australia has represented Australia in his personal capacity at the Experts' Group since November 2015. The Government will consider representations to the Experts' Group in accordance with this recommendation as opportunities arise.

The Government welcomes the ongoing work of the Experts' Group, but does not want to pre-empt the outcome of this work.