



Surrogacy: A legislative framework

Fact Sheet 8 – Surrogacy Regulation and the Law in Australia

Surrogacy and the Law in Australia

The law governing surrogacy in Australia is complicated. There is no single consistent law.

The Commonwealth has only limited constitutional jurisdiction in the area of surrogacy but certain laws and practices of the Commonwealth are still significant in surrogacy. For example, the Family and Federal Circuit Courts are Commonwealth Courts empowered to deal with children and the issue of a passport to a surrogate child born overseas of Australian commissioning parents is part of the Commonwealths jurisdiction.

State and Territory Parliaments have the main legal power and responsibility to regulate surrogacy arrangements in Australia. All States and Territories have laws on surrogacy except for the Northern Territory. Commercial surrogacy is illegal in all States and Territories with relevant laws. It is an offence in all jurisdictions, except the Northern Territory, to engage in commercial surrogacy. There are also offences in Queensland, New South Wales and the Australian Capital Territory that make it a crime for residents of those jurisdictions to engage in commercial arrangements outside (this includes overseas) of the relevant jurisdiction. No one has ever seemingly been prosecuted under these laws even though residents of Queensland, New South Wales and the Australian Capital Territory have taken part in international commercial surrogacy arrangements.

Altruistic surrogacy is permitted in all Australian jurisdictions, with different regulatory requirements about:

1. who can access surrogacy;
2. who can be a surrogate mother;
3. the types of reasonable costs a surrogate mother can lawfully recover; and
4. the process for granting parentage orders.

In 2016, the joint Commonwealth House of Representatives and Senate Inquiry recommended that a nationally consistent legal approach to regulating surrogacy agreements be adopted, based around the principle that the best interests of the child are paramount.¹ In addition to clarifying and codifying the guiding principles to regulating surrogacy across Australia, a nationally consistent approach would also help prevent potential parties to surrogacy agreements from 'forum shopping' or travelling across jurisdictions to access the legal regime that best suits their particular interests. Though a consistent national model has benefits, there are practical and political difficulties in obtaining a national consistent approach across Australia. Achieving a nationally uniform or even consistent approach would require reform and changes to the laws in a number of jurisdictions, including South Australia.

The different approaches to surrogacy regulation in Australian States and Territories are set out in Table B below:

¹ 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) 7-18.

Table B: Regulatory approaches to surrogacy in Australian jurisdictions

Legislation	Altruistic surrogacy permitted	Altruistic surrogate compensated for reasonable costs *	Commercial surrogacy prohibited	Criminal offences in relation to commercial surrogacy	Criminal offences with extra territorial effect	Recognition of International Commercial Surrogacy Arrangements
<u>Australia Capital Territory</u> Parentage Act 2004 (ACT)	Yes	Yes s 40 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✗ The value of the surrogate mother's lost earnings ✗ Insurance premiums ✓ Counselling or medical services ✗ Reasonable costs of child born ✗ Cost of being party to parentage order ✗ Legal services/ advice ✗ Travel or accommodation costs ✗ Reasonable out of pocket expenses	Yes s 41	Yes • Entering into s 41 • Procuring s 42 • Advertising s 43 • Facilitating s 44	Yes s 45	No
<u>New South Wales</u> Surrogacy Act 2010 (NSW)	Yes	Yes s 7 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes ss 8, 23	Yes • Entering into s 8 • Advertising s 10	Yes s 11(2)	No
<u>Queensland</u> Surrogacy Act 2010 (Qld)	Yes	Yes s 11 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes s 56	Yes • Advertising s 56 • Giving or receiving consideration s 57 • Providing technical, professional or medical services s 58	Yes s 54(b)	No

<u>South Australia</u> Family Relationships Act 1975 (SA) (Post 2015 Amendments) CURRENT LAW	Yes	Yes s 10HA ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✗ The value of the surrogate mother's lost earnings ✗ Insurance premiums ✓ Counselling or medical services ✗ Reasonable costs of child born ✗ Cost of being party to parentage order ✓ Legal services/ advice ✗ Travel or accommodation costs ✓ Reasonable out of pocket expenses (in respect of the agreement)	Yes • A surrogacy contract (apart from a recognised surrogacy arrangement) is illegal and void s 10G • Recognised surrogacy arrangements must be for no valuable consideration other than for reasonable expenses s 10HA(2a)(i)	Yes • Except as authorised by the Act or the <i>State Framework</i> negotiates, arranges or obtains the benefit of a surrogacy contract for valuable consideration s 10H(1) • For valuable consideration induces another to enter a surrogacy contract s 10H(2)	No	Yes s 10F • 'international surrogacy arrangements' can be prescribed for the purposes of the Act if approved by the Attorney General or declared by the Regulations • Prescribed international surrogacy arrangements are 'recognised surrogacy arrangements' under the Act, allowing for parenting orders to be made under s 10HB
<u>South Australia</u> Family Relationships Act 1975 (SA) (Proposed 2017 Amendments)	Yes	Yes s 10L ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✗ Insurance premiums ✓ Counselling or medical services ✗ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs (likely covered by reasonable costs provision s 10L(1)(f)) ✓ Reasonable out of pocket expenses (in respect of the agreement)	Yes s 10T	Yes • Entering or offering to enter a commercial surrogacy arrangement s 10T(1) (inserted 2017) • Entering or offering to enter a surrogacy arrangement s 10T(2) (inserted 2017) • Negotiating, arranging or obtaining the benefit s 10U(1) • Inducing another s 10U(2)	No	No
<u>Tasmania</u> Surrogacy Act 2012 (Tas)	Yes	Yes s 9 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✓ Reasonable costs of child born ✓ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes s 40	Yes • Commercial brokerage or advertising s 41	No	No

Victoria Assisted Reproductive Treatment Act 2008 (Vic)	Yes	Yes s 44(2) ✕ Pregnancy and any attempt to become pregnant (only prescribed costs) ✕ The birth and care of the child ✕ The value of the surrogate mother's lost earnings ✕ Insurance premiums ✓ Counselling or medical services (those not recoverable by Medicare) ✕ Reasonable costs of child born ✕ Cost of being party to parentage order ✓ Legal services/ advice ✓ Travel or accommodation costs ✕ Reasonable out of pocket expenses	Yes s 44	Yes • Entering into s 44	No	No
Western Australia Surrogacy Act 2008 (WA)	Yes	Yes s 6 ✓ Pregnancy and any attempt to become pregnant ✓ The birth and care of the child ✓ The value of the surrogate mother's lost earnings ✓ Insurance premiums ✓ Counselling or medical services ✕ Reasonable costs of child born (could be covered by s 6(1)(a)) ✓ Cost of being party to parentage order ✓ Legal services/ advice ✕ Travel or accommodation costs ✓ Reasonable out of pocket expenses	Yes	Yes • Entering into s 8 • Introducing parties s 9 • Publishing willingness s 10 • Facilitating s 11	No	No

* The Northern Territory law is silent on the issue of surrogacy

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