



issues backgrounder

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NSW Parliamentary Library

The Surrogacy Bill 2010

Introduction

In May 2010 the NSW Government announced that it would move to implement surrogacy laws. According to the [Attorney General](#), this followed discussion of national model provisions in the [Standing Committee of Attorneys-General \(SCAG\) meeting](#) of 7 May 2010, where it was agreed to refer the draft model provisions to Health and Services Ministers for their consideration. Mr Hatzistergos said the Government had foreshadowed these moves in January 2010 when it released its response to a report by the [Legislative Council Standing Committee on Law and Justice](#) into altruistic surrogacy in NSW. **Altruistic surrogacy** involves an arrangement where the birth mother received no financial gain for being the surrogate. However, the surrogate may be reimbursed by the commissioning parents for any reasonable costs incurred during the pregnancy.

As summarised in the Attorney General's [Media Release](#) of 8 May 2010, the Committee report recommended that:

- the ban on commercial surrogacy be strengthened by clarifying the reasonable expenses that the birth mother may be reimbursed in an altruistic surrogacy arrangement; and
- Courts be given the power to grant a parentage order to commissioning parents if it is satisfied that: (a) it is in the best interests of the child; (b) the child is living with the intended parents at the time of the application; and (c) the surrogacy arrangement was agreed upon prior to conception and that all parties have received legal advice, counselling and have given their informed consent.

The introduction of such laws would mirror recent legislative reforms in the ACT, Queensland and Victoria, legalising altruistic surrogacy and providing parentage rights to commissioning parents. Surrogacy legislation is also due to come into effect in South Australia in November this year.

The Bill

The [Surrogacy Bill 2010](#) was introduced in the NSW Legislative Council on 21 October 2010. In the [Second Reading speech](#) the Attorney General confirmed that

the proposed legislation is based in part on the report by the Legislative Council Standing Committee on Law and Justice and that it:

also draws on the work of the Standing Committee of Attorneys-General, which in March 2008 agreed to develop a national model for the legal recognition of parentage achieved by surrogacy arrangements. In November 2009 the Standing Committee of Attorneys-General adopted 15 principles as the basis for drafting model provisions to regulate surrogacy, and the committee then discussed draft provisions at its meeting in May.

The [Second Reading speech](#) further explained that:

This bill introduces, amongst other things, a comprehensive scheme for new parentage orders, which may be granted by the Supreme Court to transfer parentage in surrogacy situations, provided certain safeguards are observed. The bill is subject to a guiding principle—that the best interests of children born as a result of surrogacy arrangements are paramount.

The objects of this Bill are set out in the [Explanatory Note](#).

Note that a Government amendment to the Surrogacy Bill was passed providing for a "geographical nexus for offences". New s 11 provides in full:

(1) This section applies for the purposes of, and without limiting, Part 1A of the *Crimes Act 1900*.

(2) The necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in the State.

Note. Section 10C of the *Crimes Act 1900* also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State.

The effect of the amendment is to extend the Act's application to prohibit a NSW resident from entering into a commercial surrogacy agreement outside of NSW. For a commentary on the amendment see - [Surrogate jail threat for couples](#), 22 November 2010, Daily Telegraph.

Current laws in NSW

Part 4 of the [Assisted Reproductive Technology Act 2007](#), which is headed 'Surrogacy', came into effect on 1 January 2010. By s 42, a **surrogacy agreement** is defined in the *Assisted Reproductive Technology Act 2007* as:

an agreement, whether formal or informal, under which:

(a) a woman agrees (whether or not for fee or reward) to become, or try to become, pregnant, with the intention:

(i) that a child born as a result of the pregnancy is to be treated as the child of another person (whether by adoption, agreement or otherwise), or

(ii) of transferring custody of, or parental responsibility for, a child born as a result of the pregnancy to another person, or

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- (iii) that the right to care for a child born as a result of the pregnancy be permanently surrendered to another person, or
- (b) a pregnant woman agrees (whether or not for fee or reward):
- (i) that a child born as a result of the pregnancy is to be treated as the child of another person (whether by adoption, agreement or otherwise), or
- (ii) that custody of, or parental responsibility for, a child born as a result of the pregnancy is to be transferred to another person, or
- (iii) that the right to care for a child born as a result of the pregnancy is to be permanently surrendered to another person.

By s 45, all **surrogacy agreements**, including those made before the commencement of the *Assisted Reproductive Technology Act 2007*, are void in NSW. Prohibited by s 43 of the Act are **commercial surrogacy agreements**, which are defined by s 42 as 'a surrogacy agreement involving a fee or reward to the woman who gives birth, or intends to give birth, to the child that is the subject of the agreement'. By s 44, commercial surrogacy soliciting is also prohibited. The same penalties apply in both cases: up to 2,500 penalty units in the case of a corporation, or 1,000 penalty units or imprisonment for 2 years, or both, in any other case.

Provided for by s 14(1)-(3) of the [Status of Children Act 1996](#) are **presumptions of parentage** arising out of the use of fertilisation procedures. These cannot be rebutted and operate in favour of the birth mother.

Of further relevance is the [Adoption Act 2000 \(NSW\)](#). As stated in the [Legislative Council Standing Committee on Law and Justice](#) report into altruistic surrogacy in NSW, 'The only option for intending parents in NSW seeking full legal parentage of a child born through surrogacy arrangements is to apply to adopt the child under State legislation, namely the *Adoption Act 2000* (NSW)'.

Parliamentary material - New South Wales

[Assisted Reproductive Technology Act 2007](#) - Legislative Assembly [Minister's "Agreed to in Principle" Speech](#), 11 July 2007; Legislative Council [Second Reading Speech](#), 27 November 2007.

New South Wales Legislative Council Standing Committee on Law and Justice, [Legislation on altruistic surrogacy in NSW](#), May 2009.

[Debate on the report, "Legislation on altruistic surrogacy in NSW"](#), Hansard, Legislative Council, 11 November 2009. Speakers – Hon Christine Robertson; Hon David Clarke; Hon Amanda Fazio; Hon John Ajaka; and, Ms Sylvia Hale.

[Adjournment, Altruistic Surrogacy](#), Speaker: Hon Greg Donnelly, Hansard, Legislative Council, 26 November 2009

R Simpson, [Assisted Reproductive Technology](#), NSW Parliamentary Library Research Service, Background Paper 6/1998.

Governmental publications – New South Wales

Hon John Hatzistergos, Attorney General, Minister for Citizenship, Minister for Regulatory Reform, ['New South Wales considering surrogacy laws'](#), 8 May 2010

NSW Department of Health, [Review of the Human Tissue Act 1983 - Discussion Paper: Assisted Reproductive Technologies](#) (1998), Chapter IX

NSW Law Reform Commission, Report 60: [Artificial Conception: Surrogate Motherhood](#), December 1988

Governmental publications - SCAG

[Standing Committee of Attorneys-General Communiqué](#), 7 May 2010

Standing Committee of Attorneys-General (SCAG) and Ministerial Councils for Community Services and Health, [A proposal for a national model to harmonise regulation of surrogacy](#), January 2009

Legislation in other Australian jurisdictions

Australian Capital Territory: Altruistic Surrogacy is legal and governed by the [Parentage Act 2004 \(ACT\)](#). For an outline of the legislation in the ACT see [Legislation on altruistic surrogacy in NSW](#), p10.

Northern Territory: No direct legislation on surrogacy currently exists. Medical practitioners performing IVF procedures in the Northern Territory are required to comply with South Australian legislation.

Queensland: Altruistic surrogacy is permitted and governed by the [Surrogacy Act 2010 \(QLD\)](#). Among other things, the Act prohibits commercial surrogacy and provides, in particular circumstances, for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement (s 5).

South Australia: The [Family Relationships Act \(SA\)](#) will be amended on 26 November 2010 by the [Statutes Amendment \(Surrogacy\) Act 2009 \(SA\)](#). The new legislation will legalise altruistic surrogacy arrangements between heterosexual couples who are 'legally married' or have been in a de facto relationship as 'husband and wife' for at least three years (s 10HA(2)(iii)). The Act will also make amendments to the [Birth, Deaths and Marriages Registration Act 1996 \(SA\)](#) to allow for the commissioning parents to be listed on the child's birth certificate.

Tasmania: all surrogacy contracts are void and unenforceable under the [Surrogacy Contracts Act 1993 \(TAS\)](#). For an outline of the legislation in the Tasmania see [Legislation on altruistic surrogacy in NSW](#), p14-15.

Victoria: Altruistic Surrogacy is legal and governed by the [Assisted Reproductive Treatment Act 2008 \(VIC\)](#). For an outline of the legislation in Victoria see [Legislation on altruistic surrogacy in NSW](#), pp12-13.

Western Australia: Altruistic surrogacy is legal and governed by the [Surrogacy Act 2008 \(WA\)](#). For an outline of the legislation in Western Australia see [Legislation on altruistic surrogacy in NSW](#), pp15-16.

Commonwealth: The [Family Law Act 1975 \(Cth\)](#) recognises the commissioning parent/s as the legal parent/s of a child born under surrogacy arrangements if a court has made an order under a prescribed law of a State or Territory to that effect: s60HB.

Parliamentary and governmental material – other Australian jurisdictions

Queensland Parliament, ['Investigation into Altruistic Surrogacy' Committee Report](#), October 2008

Parliament of Tasmania, [Legislative Council Select Committee Report on Surrogacy](#), July 2008

Western Australian Legislative Council, Standing Committee on Legislation, [Report in Relation to the Surrogacy Bill 2007](#), May 2008

South Australian Legislative Council, Social Development Committee, [Inquiry into Gestational Surrogacy](#), Report 26, November 2007

Victoria Law Reform Commission, [Assisted Reproductive Technology & Adoption: Final Report](#), June 2007

The National Health and Medical Research Centre, [Ethical Guidelines on the use of assisted reproductive technology in clinical practice and research](#), 2007

News articles

Below are some selected Australian media articles on the issue.

[Surrogate jail threat for couples](#), 22 November 2010, Daily Telegraph

[Two mums, one dad and a baby](#), 28 October 2010, Sydney Morning Herald

[Surrogacy bill gives parents more rights](#), 22 October 2010, Sydney Morning Herald

[NSW surrogacy bill 'to bring equality'](#), 22 October 2010, Daily Telegraph

[Surrogacy bill proposed](#), 22 September 2010, Sydney Star Observer

[Conscience vote called on surrogacy](#), 8 September 2010, Daily Telegraph

[Surrogate baby laws](#), 8 September 2010, Daily Telegraph

[Birth of a booming baby industry](#), 26 June 2010, The Australian

[India to tighten surrogacy protocol](#), 9 May 2010, Sun-Herald

[Complex surrogacy laws to be untangled](#), 8 May 2010, Sydney Morning Herald

[A government out of step](#), 28 February 2010, Sun-Herald

[Couple battle to adopt own son](#), 11 August 2009, The Australian

[Surrogates told to pay support](#), 25 January 2009, Sydney Morning Herald

[Biological mother and father in legal wait for rights](#), 6 November 2008, Sydney Morning Herald

[Senator wins paternity battle](#), 3 December 2007, The Age

[And baby makes five - the senator, his wife and the surrogate mothers](#), 7 November 2007, Sydney Morning Herald

Journal articles

Johnson, Tammy, "[Queensland's proposed surrogacy legislation: An opportunity for national reform](#)", *Journal of Law and Medicine*, 17(4) February 2010: 617

Millbank, Jenni, "[De facto relationships, same-sex and surrogate parents: exploring the scope and effects of the 2008 federal relationship reforms](#)", *Australian Journal of Family Law*, 23 (3) November 2009: 160-193

Gaffney, Peter "[Why the 'widespread agreement' is wrong: contesting the non-harm arguments for the prohibition of full commercial surrogacy](#)", *Journal of Law and Medicine*, 17 (2) October 2009: 280-296

Simmonds, Kathleen, "[Reforming the surrogacy laws of Australia: some thoughts, considerations and alternatives](#)", *Flinders Journal of Law Reform*, 11 (1) June 2009: 97-122

Brown, Catherine, "[The Queensland investigation into the decriminalisation of altruistic surrogacy](#)", *Queensland Lawyer*, 29 (2) October 2008: 78-83

Teman, Elly, "[The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood](#)", *Social Science & Medicine*, 67(7) October 2008: 1104-1112

Bishop, Liz, "[A world of surrogacy options](#)", *Law Institute Journal*, 82 (6) June 2008: 92 – LIB HC

Brown, Catherine, Willmott, Lindy and White, Ben, "[Surrogacy in Queensland: Should Altruism be a Crime?](#)", (2008) *Bond Law Review*, 20 (1) June 2008: 1-29

Willmott, Lindy, "[Surrogacy: ART's forgotten child](#)", *University of New South Wales Law Journal*, 29(2) 2006: 227-232

Hand, Jacqueline, "[Surrogacy in Israel: A Model of Comprehensive Regulation of New Technologies](#)", (2005) 7 *UTS Law Review* 111

Advocacy groups

[Fertility Society of Australia](#)

[Gay and Lesbian Rights Lobby](#)

[Sydney IVF](#)

[NSW Right to Life](#)

Selected overseas jurisdictions

For a comprehensive outline of the regulation of surrogacy in overseas jurisdictions please refer to [Legislation on altruistic surrogacy in NSW](#), pp 16-22.

New Zealand

Surrogacy is governed by the [Human Assisted Reproductive Technology Act 2004](#). Under the Act, altruistic surrogacy is permitted but surrogacy arrangements are unenforceable. A presumption of parentage exists in favour of the birth mother. The transfer of parentage to the commissioning parent/s is only available through adoption.

United Kingdom

Under the [Surrogacy Arrangements Act 1985](#) altruistic surrogacy is permitted, but surrogacy arrangements are unenforceable. Courts can issue parental orders recognising the commissioning parents as the legal parents, as long as the application is made within six months of the child's birth: [Human Fertilisation and Embryology Act 1990](#).

Canada

Only altruistic surrogacy is permitted under the [Assisted Human Reproduction Act 2004](#). The Act requires that the surrogate is 21 years of age or older. The enforceability of a surrogacy agreement is determined by provincial and territorial legislation.

United States

Varying State laws apply. For example:

- **California:** Commercial surrogacy is not prohibited and surrogacy generally is governed by case law.
- **Florida:** Altruistic surrogacy is permitted by the Florida Code - [742.16 'Expedited affirmation of parental status for gestational surrogacy'](#).
- **New York:** Surrogate parenting contracts are declared to be against public policy and surrogacy agreements are unenforceable: *Domestic Relations Law* § 116, [Article 8 'Surrogate Parenting Contracts'](#). However, only commercial surrogacy is declared to be against the law (Article 8 (123)).

India

Both altruistic and commercial surrogacy is legal in India. According to an article in [the Guardian](#), commercial surrogacy is a major industry generating \$2.4 billion annually. Currently no legislation exists regarding surrogacy.

In 2008, a Japanese couple commissioned an Indian woman as a surrogate. Prior to the child's birth, the couple separated and the commissioning mother abandoned the unborn child. Indian law forbids adoption by single men and the father had to pursue action in the Supreme Court of India. The situation was resolved in the high-profile case [Baby Manji Yamada v Union of India \[2008\] INSC 1656](#).

United Nations instruments

[Convention on the Rights of the Child](#)

[Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally](#)

International media articles

[Astoria woman arrested in alleged surrogacy scam](#), 18 October 2010, Daily Astorian

[Military Wives Turn to Surrogacy: Labor of Love or Financial Boost?](#), 15 October 2010, ABC Good Morning America

[Cancer survivor's dream of having a baby lies with finding a surrogate](#), 13 October 2010, Halifax News Net

[Vital debate needed on surrogacy and other IVF issues](#), 10 October 2010, Calgary Herald

[Row as couple who discovered their unborn child had Down's want to abort... but the surrogate carrying the foetus says 'No'](#), 10 October 2010, Mail Online

[Justice comes for surrogate-seeker](#), 9 October 2010, Global Times

[Regulation for reproduction](#), 9 October 2010, Khaleej Times Online

[IVF opens box of issues](#), 5 October 2010, Arab Times Online

[Valencia judge annuls registration of twins](#), 22 September 2010, Euro Weekly

[Donating a Womb](#), 13 September 2007, India Today

[India Surrogate Mothers Face New rules to Restrict 'Pot of Gold'](#), 30 July 2010, The Guardian

[Building a Baby, With Few Ground Rules](#), 12 December 2009, The New York Times

[Business of Babies](#), 14 December 2008, The Sunday Tribune

[Japan gate-pass for baby Manji](#), 18 October 2008, The Telegraph Calcutta

[Surrogate relishes unique role](#), 22 January 2007, USA Today

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