Tabled by Mr Speaker
on 16 August 2018.

NSW GOVERNMENT | Justice

Statutory Review

Surrogacy Act 2010

July 2018
www.justice.nsw.gov.au

Justice Strategy and Policy
NSW Department of Justice
Email: www.lawlink.nsw.gov.au
Phone: 02 8346 1281
Fax: 02 8061 9370
Level 3, Henry Deane Building, 20 Lee St, SYDNEY 2000
GPO Box 31 SYDNEY 2001

Translating and interpreter service

If you need an interpreter ring 131 450 and ask the operator to ph: 02 8224 5330.
For alternative formats (audio tape, electronic or Braille versions) of this brochure, contact Justice Strategy and Policy on ph: 02 8346 1281 or Diversity Services
Email: diversityservices@agd.nsw.gov.au
Phone: 02 8688 7507
Fax: 02 8688 9626
TTY: 02 8688 7733 for people who have a speech or hearing impairment.

ISBN: 978-1-922254-07-81

Table of contents

Executive Summary

0.1 The *Surrogacy Act 2010* (**Act**) enables the Supreme Court of New South Wales to grant a parentage order in respect of a child born through an altruistic surrogacy arrangement if the order is in the child's best interests and other preconditions are met.

0.2 A parentage order transfers the legal parentage of the child from the birth mother (and her partner, if any) to the person(s) who intend to become parents under the surrogacy arrangement.

0.3 The Act also makes commercial surrogacy an offence, and extends this offence to people normally resident in NSW who enter into a commercial surrogacy arrangement outside the State.

0.4 The Department of Justice has reviewed the Act and the Surrogacy Regulation 2016 (**Regulation**) on behalf of the Attorney General. The Review considered whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

0.5 There are three policy objectives of the Act:

- Protecting the interests of children born as a result of surrogacy arrangements;
- Providing legal certainty to parties to surrogacy arrangements; and
- Preventing commercial surrogacy arrangements.

0.6 Submissions to the Review, case law, media reports and academic literature make clear that surrogacy is a fraught and emotionally charged area of public policy, which provokes a range of strongly held and divergent views. At one end of the spectrum are those who advocate for prohibiting all forms of surrogacy, including altruistic surrogacy. At the other end are those who advocate for liberalising surrogacy law, and in particular, legalising commercial surrogacy. We do not seek to reconcile these views.

0.7 After considering all submissions and evidence, we conclude that the policy objectives of the Act remain valid. Overwhelmingly, the debate focused on the validity of the objective of preventing commercial surrogacy. We acknowledge the differences of opinion on this issue but ultimately endorse the current objectives of the Act.

0.8 We also conclude that the terms of the Act remain appropriate for securing those objectives. We recommend two changes to improve the operation of the Act and better secure its policy objectives. The changes address advertising of surrogacy arrangements and counsellor qualifications.

Recommendations

Recommendation 1:

Amend the Act so that:

a) a person must not publish any advertisement, statement, notice or other material that seeks to introduce people for a fee or other reward with the intention that those people might enter into a surrogacy arrangement (whether altruistic or commercial); and

b) section 10(2)(b) is repealed, permitting the payment of fees for an advertisement, statement, notice or other material if it is clear that any advertised arrangement is not a commercial surrogacy arrangement and any advertisement does not seek or offer rewards or other inducements; and

c) except for sub recommendation 1(a), the penalty provisions in section 10 only apply to commercial surrogacy arrangements.

Recommendation 2:

Amend the Regulation so that all references to a 'qualified counsellor' in the Act (including sub-sections 35(1) and 35(2)) are defined as a person who:

a) holds a qualification conferred by a university (whether within or outside NSW) after at least four years full time study or an equivalent amount of part time study; and

b) is a qualified psychologist, qualified psychiatrist or qualified social worker; and

c) has specialised knowledge, based on the person's training, study or experience, of the issues surrounding surrogacy.

1. Introduction

Background to the Act

1.1 The Surrogacy Bill 2010 (**the Bill**) passed in both Houses of Parliament in November 2010 and the Act commenced on 1 March 2011.

1.2 The Act reflects the principles for Australian surrogacy laws endorsed in 2009 by the former Standing Committee of the Attorneys-General (**SCAG**) and Health and Disability Services Ministers (**Appendix 1**). SCAG agreed to the following key features of surrogacy laws, which are reflected in the Act:

- Commercial surrogacy is illegal
- Non-commercial surrogacy arrangements are lawful but agreements are unenforceable
- It is essential to have the informed consent of all parties
- There is mandatory specialist counselling
- Court orders are available to recognise the intended parents as the legal parents if the surrogacy arrangement meets legal requirements and is in the best interests of the child.

1.3 The Act also implements recommendation 8 of the NSW Legislative Council Standing Committee on Law and Justice (**NSW Parliamentary Committee**) in its 2009 report, 'Legislation on Altruistic Surrogacy in New South Wales'. The recommendation provided that:

- The NSW Government establish a transferral of parentage mechanism for surrogacy arrangements that preserves the presumption of legal parentage of the child in favour of the birth mother.
- At least six weeks after the birth of the child intended parents may apply to the Supreme Court for full legal parentage to be transferred to them.
- The fundamental requirement for a parentage order is that the order is in the child's best interests.

Recommendation 8 also listed factors that the Court should consider when determining applications for transfers of legal parentage in a surrogacy arrangement.

Overview and operation of the Act

1.4 The guiding principle of the Act is that the best interests of the child in a surrogacy arrangement are paramount.

1.5 The principal purposes of the Act are to provide the rules governing surrogacy arrangements and to provide for the making of parentage orders.

Surrogacy arrangements

1.6 A surrogacy arrangement is defined as an arrangement under which:

- a woman agrees to become or attempts to become pregnant with a child, and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons; or
- a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons.

1.7 The Act prohibits commercial surrogacy in NSW. The Act also makes it an offence for a NSW resident to enter into a commercial surrogacy arrangement in another jurisdiction. A commercial surrogacy arrangement is an arrangement that involves the provision of a fee, reward or other material benefit or advantage to a person if the person or another is involved in certain activities related to the surrogacy arrangement. However, a surrogacy arrangement is not commercial if the only fee, reward or other material benefit or advantage provided for is the reimbursement of a birth mother's surrogacy costs.

1.8 The 'birth mother' is the woman who agrees to become pregnant, tries to become pregnant or is pregnant with a child under a surrogacy arrangement. The 'intended parent' is the person who will become the parent of the child under a parentage order.

1.9 Surrogacy arrangements are not enforceable under the Act. Intended parents have no cause of action against a birth mother if she decides to keep the child or terminate a pregnancy. Conversely, a birth mother is not able to take legal action against intended parents to enforce the surrogacy arrangement.

Parentage orders

1.10 The legal parents of a child born in NSW are the birth mother and her spouse or de facto partner, if any.[1]

1.11 If the parties to the surrogacy arrangement agree to continue with the arrangement after the birth of the child, the intended parent(s) can apply to the Supreme Court for a parentage order which will transfer the legal parentage of the child from the birth mother and her partner (if any) to the intended parent(s) under the surrogacy arrangement.

1.12 The application must be made within a period of not less than 30 days and not more than six months after the birth of a child of a surrogacy arrangement. However, the Court may hear and determine an application made after the time limit if it is satisfied that it is justified by exceptional circumstances.

1.13 The Court may only make a parentage order if the Court is satisfied that the making of the order is in the best interests of the child and certain other preconditions are met. Certain preconditions, including the following, are mandatory and may not be waived by the Court:

- the surrogacy arrangement must not be a commercial surrogacy arrangement and;

1. *Status of Children Act 1996*, sections 9 and 10. Irrebuttable presumptions arising out of the use of fertilisation procedures also apply under s 14.

- the surrogacy arrangement must have been made before conception.

1.14 Other non-mandatory preconditions may be waived in exceptional circumstances. The preconditions are intended to protect the birth mother from exploitation or undue pressure and to ensure all parties are aware of their legal rights, including the ability to change their minds about continuing with the arrangement after the birth. They include the following:

- the birth mother must have been at least 25 years old when she entered into the surrogacy arrangement. Where this is waived by the Court, she must not have been under 18 years of age;
- all parties must consent to the making of the parentage order;
- the child must be living with the applicant(s) in NSW;
- each of the parties must have received counselling from a qualified counsellor about the social and psychological implications of the surrogacy arrangement before entering into the arrangement;
- the birth mother and her partner (if any) must have received further counselling after the birth of the child and before consenting to the parentage order;
- each of the parties must have received legal advice from an Australian legal practitioner about the surrogacy arrangement;
- the legal advice provided to the birth mother and her partner (if any) must have been provided independently from the advice provided to the intended parent(s); and
- the birth of the child must have been legally registered in accordance with the requirements of the *Births Deaths and Marriages Registration Act 1995* (**BDMR Act**) or a corresponding interstate law.

1.15 The NSW Registry of Births, Deaths and Marriages (**BDM**) registers parentage orders under Part 4A of the BDMR Act. Following the registration of a parentage order, BDM can issue an amended birth certificate with the intended parents as the child's legal parents. The amended certificate does not include any information that indicates that the child was born of a surrogacy arrangement. The Act allows a person aged over 18 who was the child of a surrogacy arrangement to receive his or her original birth certificate and full birth record.

1.16 Since 2012, BDM has registered 107 births from parentage orders arising from surrogacy arrangements.

Review of the Act

1.17 Section 60 of the Act provides that the Act is to be reviewed to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. More details about the conduct of the Review are available at **Appendix 2.** This Report outlines the findings and conclusions of the Review and makes two recommendations that aim to improve the operation of the Act.

Commonwealth House of Representatives Report

1.18 In April 2016 the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs (**Commonwealth Parliamentary Committee**) released a report titled *Surrogacy Matters*. It reports on an inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements.

1.19 The first recommendation of that report is that the practice of commercial surrogacy remains illegal in Australia.

1.20 Another key recommendation is that the Commonwealth Government, in conjunction with the Council of Australian Governments (**COAG**), considers the development of a model national law that facilitates altruistic surrogacy in Australia. The Committee also recommends that the Commonwealth Attorney-General request the 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. Within six months of the proposed report of the ALRC, the Attorney-General should request that COAG commit to consulting with all States and Territories to develop national uniform legislation on altruistic surrogacy.

1.21 The NSW Government made a submission to the Commonwealth Parliamentary Committee inquiry. The submission identified key pressures in the interaction between NSW and Commonwealth laws and procedures, particularly as they relate to international commercial surrogacy arrangements. The NSW submission acknowledged that surrogacy raises complex legal and social issues. It supported a coordinated response from all levels of government to improve protections for children and other parties to surrogacy arrangements, particularly for those involved in international commercial surrogacy arrangements.

1.22 At the time this Report was finalised, the Commonwealth had not responded to the recommendations of the Commonwealth Parliamentary Committee. NSW will continue to monitor any developments arising from the recommendations.

2. Do the policy objectives of the Act remain valid?

2.2 There are three policy objectives of the Act:

1. Protecting the interests of children born of surrogacy arrangements
2. Providing legal certainty
3. Preventing commercial surrogacy arrangements.

2.3 The objectives are expressed in provisions of the Act, the Second Reading Speech for the Bill, and/or are reflected in the principles agreed to by the former SCAG.

2.4 Two submissions suggested that the Act should include an additional objective to protect and support the diversity of family forms, structures or relationships.[1] In the Second Reading Speech it was observed that there 'are many diverse forms of family and it is necessary, and in the best interests of children in particular, to deal with this reality'. We acknowledge that the Act takes a non-discriminatory approach to the making of parentage orders, which recognises a variety of family forms and that since the commencement of the Act same sex couples have been granted parentage orders.[2] However, this is an object of the Act and it does not need to be express in the Act.

Objective 1: Protecting the interests of children born of surrogacy arrangements

2.5 The first policy objective comes from section 3 of the Act. It states that the Act is to be administered by reference to the principle that, in relation to any surrogacy arrangement, the best interests of the child of a surrogacy arrangement are paramount. Section 22 of the Act also provides that the Court must be satisfied that the making of a parentage order is in the best interests of the child.

2.6 Protecting the best interests of children is consistent with Article 3 of the United Nations Convention on the Rights of the Child, which provides that in all actions concerning children, 'the best interests of the child shall be a primary consideration'.

2.7 All submissions that addressed this policy objective expressed support for it and its retention in the Act.[3] The Commonwealth Parliamentary Committee also concluded that the best interests of the child should be a key principle in guiding the development of any national model law.

2.8 Protecting the interests of children born through surrogacy arrangements remains a central and critical policy objective of the Act.

1. See submissions from the NSW Gay and Lesbian Rights Lobby and Mr Alastair Lawrie.
2. *MJC and CSC re EMC* [2012] NSWSC 1626; *MM & KF re FM* [2012] NSWSC 445.
3. For example, see submissions from Mr Alastair Lawrie, Ms Monica Doumit, Women's Legal Service NSW, the NSW Department of Family and Community Services, the NSW Commission for Children and Young People and the Family Issues Committee of the Law Society of NSW.

Objective 2: Providing legal certainty

2.9 The second policy objective is not express in the Act, but is in the Second Reading Speech.

2.10 Many stakeholders expressed support for this policy objective and for its retention in the Act.[4] Additionally, the Commonwealth Parliamentary Committee concluded that any development of a model national law should have regard to the principle that there is legal clarity about the parent-child relationships that result from the arrangement.

2.11 Providing legal certainty for parties to surrogacy arrangements remains a valid and important policy objective of the Act.

Objective 3: Preventing commercial surrogacy arrangements

2.12 The third policy objective is at section 8 of the Act, which makes commercial surrogacy a criminal offence. The offence also extends to NSW residents entering into commercial surrogacy arrangements in jurisdictions where commercial surrogacy is legal.

2.13 The Second Reading Speech outlines the purpose of this objective that 'commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones'.

2.14 The validity of this objective, and the criminalisation of commercial surrogacy, was a contentious issue in the Review. Submissions largely focused on whether this policy objective was valid, and whether we should retain the prohibition on commercial surrogacy.

Arguments in support of objective 3

2.15 Support for this objective comes from various legal, ethical and moral grounds. Many stakeholders expressed concern that commercialising conception, pregnancy and childbirth commodifies and undermines the dignity of women and children and reduces them to an object of a commercial contract.[5]

2.16 The first recommendation of the Commonwealth Parliamentary Committee is that the practice of commercial surrogacy remains illegal in Australia. Currently, all Australian states[6], the ACT and many overseas jurisdictions also ban commercial surrogacy.

2.17 The so-called 'Baby Gammy case',[7] highlighted the issues that can arise from commercial surrogacy. In this case, twins born in an international commercial surrogacy arrangement, Pipah and Gammy, were separated after birth. Gammy

4. For example, see submissions from Mr Alastair Lawrie, Ms Monica Doumit, Women's Legal Services NSW and the NSW Department of Family and Community Services.
5. For example, see submissions from Ms Monica Doumit, the Australian Family Association, the Family Issues Committee of the NSW Law Society, the NSW Department of Family and Community Services, Professor Mary Keyes, Dr Sonia Allen and Professor John Tobin and Mr Elliot Luke.
6. While there is no Northern Territory legislation governing surrogacy, Assisted Reproduction clinics in the Northern Territory must adhere to the National Health and Medical Research Council Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research (2007), which prohibit clinics undertaking or facilitating commercial surrogacy.
7. *Farnell & Anor and Chanbua* [2016] FCWA 17.

remained with his surrogate mother in Thailand while Pipah was brought to Australia to live with her intended parents. Chief Justice Thackray of the Family Court of Western Australia noted that the separation of the twins was an 'appalling' outcome and that 'this case should also draw attention to the fact that surrogate mothers are not baby growing machines or "gestational carriers". They are flesh and blood women who can develop bonds with their unborn children'.[8]

2.18 Some submissions raised concerns that commercial surrogacy risks the exploitation of women, in particular those who are financially disadvantaged, and lack the education and capacity to negotiate and give informed consent to surrogacy arrangements.[9] In support, some noted evidence that surrogate mothers in developing countries may not be fully informed about their rights and obligations under surrogacy contracts. This issue arose in the Baby Gammy case where the Chief Justice stated that 'the facts also demonstrate the conflicts of interest that arise when middlemen rush to profit from the demand of a market in which the comparatively rich benefit from the preparedness of the poor to provide a service that the rich neither cannot or will not perform'.[10]

2.19 Submissions also cited various articles that documented a lack of regulation of surrogacy in foreign countries and the detrimental impact that surrogacy might have on the physical and emotional health of birth mothers in these countries.[11]

2.20 Some submissions expressed concern over the potential harms that flow to children if there is financial compensation involved in their conception and birth. For instance, the Australian Family Association commented that '[a]dding a commercial inducement may lead to identity problems for the child'. Professor Tobin and Mr Luke from the University of Melbourne also commented that a 'market for the creation of children arguably creates the risk that certain attributes, such as gender, race, complexion, intellectual and athletic ability, will be preferred by intending parents'.

2.21 Several submissions argued that commercial surrogacy amounts to the sale of children, which is prohibited under international human rights law.[12] Professor Tobin and Mr Luke stated that the current prohibition on commercial surrogacy in NSW conforms to Australia's international obligations to the extent that the Government takes steps to ensure that the law is enforced.

Arguments against objective 3

2.22 A number of submissions stated that this policy objective was not valid. Access Australia noted that the commercialisation of surrogacy does not necessarily equate to exploitation. Instead, they argued that not allowing payment in a surrogacy arrangement is a form of exploitation of surrogate mothers and submitted that legalising and regulating the practice would better protect those involved.

8. *Farnell & Anor and Chanbua* [2016] FCWA 17 at paragraph 757.
9. For example, see submissions from Women's Legal Services NSW, the Hon Greg Donnelly MLC, the Australian Family Association and the Life, Marriage and Family Centre and the Catholic Archdiocese of Sydney.
10. *Farnell & Anor and Chanbua* [2016] FCWA 17 at paragraph 756.
11. For example, see Priya Shetty, 'India's unregulated surrogacy industry', The Lancet, 10 November 2012; Patrick Abboud, 'SBS journalist Patrick Abboud investigates the dark side of commercial surrogacy in Thailand', 28 October 2013; Anu, P Kumar, D Inder, N Sharma, 'Surrogacy and women's right to health in India: issues and perspective', Indian J Public Health (2013) 57(2),p. 65-70; Family Law Council, Parentage and the Family Law Act, December 2013.
12. For example, see submissions from Professor John Tobin and Mr Elliot Luke, Dr Sonia Allen and FamilyVoice Australia.

2.23 Some, including Surrogacy Australia, proposed that the objective should be replaced with an objective to prevent the exploitation of people for the purposes of human reproduction and that the key policy concern should be to prevent exploitation.[13] Some pointed out that commercial surrogacy is the only realistic means by which they or their friends could become parents. These submissions emphasised the pain and suffering of infertility and rejected any claim that intended parents, or parents through surrogacy, had exploitative intentions.

2.24 Others argued that international commercial surrogacy should be allowed. They framed commercial surrogacy as an inevitable practice that the law must recognise and accommodate and noted that rates of international commercial surrogacy are increasing. Surrogacy Australia stated that criminalising commercial surrogacy 'only serves to drive the issues underground, stigmatising children and families created through overseas surrogacy, and does not do justice to this complex method of family formation that is growing worldwide'. The focus, according to these submissions, should be on harm-minimisation through better regulation of commercial surrogacy, rather than prohibition of the practice.

2.25 Some further argued that commercial surrogacy should be legalised in NSW to ensure such arrangements could occur within Australia rather than in developing countries.[14] These stakeholders saw better prospects of minimising exploitation, and maximising a child's knowledge of their gestational and genetic history.

Conclusion

2.26 The policy objective of preventing commercial surrogacy remains valid and we do not recommend amending this objective.

2.27 This policy objective aims to prevent exploitation, preserve the dignity of children and women and prevent the commodification of women and children. Such concerns would not be protected by a narrower objective.

2.28 Dr Sonia Allen's submission stated, 'there is no evidence that there is a shared value, ethic or moral position that reflects broad societal support for [commercial surrogacy]'. The Family Law Council has commented that any move to legalise commercial surrogacy domestically would have to be preceded by 'broad community consultation and public debate'. Such consultation and debate has not occurred and there is no evidence that a broad cross-section of NSW supports the introduction of commercial surrogacy. Further, the continued prohibition of commercial surrogacy is consistent with the first recommendation of the Commonwealth Parliamentary Committee and the existing regulatory frameworks in all Australian States and Territories.

13. For example, see submissions from Mr Alastair Lawrie, Surrogacy Australia, Ms Michaela Stockey-Bridge and Mr Richard Dugi.
14. For example, see submissions from Dr Damien Riggs and Dr Clemence Due and Mr Alastair Lawrie.

3. Do the terms of the Act remain appropriate for securing its objectives?

Objective 1: Protecting the interests of children born of surrogacy arrangements

3.2 Several submissions expressed that overall, the provisions of the Act work well to protect the interests of children born to surrogacy arrangements. Some submissions suggested that the terms of the Act could better protect the interests of children, as outlined below.

Commercial surrogacy

3.3 Some submissions proposed that the Act would better protect the interests of children if the prohibition on commercial surrogacy were to be removed and the transfer of parentage in commercial surrogacy arrangements were to be allowed.[1]

3.4 Surrogacy Australia submitted that by criminalising commercial surrogacy and denying parentage orders in commercial arrangements, the Act stigmatises children and families involved in these arrangements. It also leaves children born through commercial arrangements with fewer legal protections than children born through altruistic arrangements.

3.5 Some argued that the interests of children would be better met if commercial surrogacy were legalised domestically, as this would avoid NSW residents entering into commercial surrogacy arrangements overseas.[2] Others advocated for a national commercial surrogacy framework that supports overseas commercial surrogacy where it meets particular regulations and standards.

3.6 The provisions prohibiting commercial surrogacy should remain. The Review does not consider that lifting the ban on commercial surrogacy is in the best interests of children. While some countries have taken steps to eliminate commercial surrogacy, international commercial surrogacy is particularly problematic as it often takes place in developing countries with limited regulation, and may involve women who lack education, money and bargaining power. There are no assurances that a child born through an international commercial surrogacy arrangement could make contact with their birth mother and/or donors should they wish to do so.

3.7 Legalising commercial surrogacy within NSW may not eliminate international commercial surrogacy. As Professor Mary Keyes commented 'most intended parents appear to be price-sensitive... even if there are women in NSW who are willing to undertake a commercial surrogacy, the cost would be significantly higher than in developing countries'.

1. For example, see submission from Senator David Leyonhjelm, the Surrogacy Australia form submission and Mr Alastair Lawrie.
2. For example, see submission from Dr Damien Riggs and Dr Clemence Due.

Altruistic surrogacy

3.8 Some submissions indicated that the Act does not protect the interests of children because no form of surrogacy, including altruistic surrogacy, is in the best interests of the child.[3] FamilyVoice Australia commented that surrogacy arrangements satisfy the interests or desires and adults, not children. It was stated that surrogacy leads to identity problems for children, and weakens the integrity and functionality of families.

3.9 We acknowledge these concerns but do not consider that the Act fails to protect the interests of children born of surrogacy arrangements. The best interests of the child is the paramount objective of the Act.

3.10 Children's interests may not be protected by the repeal of the Act or a prohibition on all forms of surrogacy. Children conceived through altruistic surrogacy arrangements in NSW have the right to access identifying information about their birth mother and any gamete donors once they reach adulthood so that they have access to their genetic and gestational origins. A parentage order can only be made if the court is satisfied that it is in the best interests of the child.

3.11 We do not recommend any amendment to prohibit altruistic surrogacy.

Single people and same-sex and de facto couples

3.12 Parentage orders are available to single people, same-sex and de facto couples. The Second Reading Speech for the Surrogacy Bill outlines two key reasons for this. Firstly, it upholds the principle of minimal State intervention. Secondly, children born into surrogacy arrangements involving same-sex, single and unmarried parents deserve the benefits that will flow from a parentage order as much as any other child.

3.13 Submissions were divided on this aspect of the Act. Some submitted that parentage orders should be limited to married, heterosexual couples.[4] Some suggested that it is in the best interests of children to have a mother and father who are married.[5]

3.14 In December 2017, the Commonwealth Government amended the definition of marriage to allow for same sex marriages.[6] NSW laws should reflect the new definition of marriage and ensure that same sex married couples are recognised as equal under NSW law. For this reason parentage orders should not be limited to heterosexual married couples.

3.15 Similarly, parentage orders should not be limited to married couples. As indicated by the NSW Parliamentary Committee, counsellors, clinicians and the Courts are best placed to determine (based on all of the facts of an individual case) whether it is in the best interests of a child to make a parentage order in favour of a particular person or couple.

---

3. For example, see submissions from Ms Monica Doumit, FamilyVoice Australia, Australian Family Association, Life Marriage and Family Centre, Catholic Archdiocese of Sydney, Mr Gerard Calihanna and Mr Greg Donnelly MLC.
4. For example, see submissions from FamilyVoice Australia, Australian Christian Lobby and Australian Family Association.
5. For example, see Loren Marks, 'Same-sex parenting and children's outcomes: A closer examination of the American psychological association's brief on lesbian and gay parenting', (2012) Social Science Research 41 p.735-751; Mark Regnerus, 'How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structure Study', (2012) Social Science Research 41 p.766.
6 *Marriage Amendment (Definitions and Religious Freedoms) Act 2017.*

Time limits for making an application for a parentage order

3.16 Under section 16 of the Act an application for a parentage order may be made not less than 30 days and not more than six months after the child's birth. For a surrogacy arrangement made prior to the commencement of the Act, the application must be made not more than two years after the commencement of the Act. However, the Court may hear and determine an application after the time limit if the Court is satisfied that 'exceptional circumstances' justify that action. The Act does not define 'exceptional circumstances'.

3.17 The Family Issues Committee of the Law Society of NSW submitted that, although the time periods for the making of an application are important to provide certainty, the two-year time limit for pre-commencement surrogacy arrangements is arbitrary, is unnecessary and does not go to the paramount policy objective to protect the interests of children.

3.18 The Second Reading Speech for the Bill does not directly explain the rationale for the two-year time limit for pre-commencement surrogacy arrangements. However, the then Attorney General did observe that the six month time limit for post-commencement surrogacy arrangements was intended to 'provide certainty to the parties, and to encourage a secure and stable living environment for children'. These considerations are also applicable to pre-commencement surrogacy arrangements.

3.19 While the requirement for 'exceptional circumstances' sets a high threshold, there is no evidence that out-of-time applications for parentage orders are being denied by the court. In the two reported cases involving such applications, both involving pre-commencement surrogacy arrangements, the court found exceptional circumstances and made the parentage order sought.

3.20 In *AB and CD v EF*,[7] while noting that '[i]t is not entirely clear why s 16 imposes a limitation period of two years in respect of pre-commencement surrogacy arrangements"[8], Justice Ball went on to say that 'the purpose of the provision is to provide what is essentially an arbitrary cut-off point so that the persons involved in the arrangement know with certainty their responsibilities in relation to a child who is conceived as part of a surrogacy arrangement'.[9]

3.21 In this case, an application for a parentage order in respect of a pre-commencement surrogacy arrangement was made two months after the two-year time limit. In finding that exceptional circumstances existed to determine the application, Ball J stated that 'the failure of the court to determine the application would only create uncertainty concerning the status of the children and those who are responsible for them. That would not be in the best interests of the children.'[10]

3.22 Justice Robb came to a similar view in *BB v DD; Re AA and the Surrogacy Act 2010 (NSW) (No 2)*,[11] which also concerned a parentage order application in respect of a pre-commencement surrogacy arrangement. In this case, the application was made almost two years out of time.

7. *AB and CD v EF* [2013] NSWSC 866.
8 *AB and CD v EF* [2013] NSWSC 866 at [9].
9 *AB and CD v EF* [2013] NSWSC 866 at [11].
10. *AB and CD v EF* [2013] NSWSC 866 at [12].
11 *BB v DD; Re AA and the Surrogacy Act 2010 (NSW) (No 2)* [2015] NSWSC 1825.

3.23 While noting that the applicants had not expressly adverted to the exceptional circumstances required under section 16(3) in their evidence, Robb J 'decided that there is no point in requiring the applicants to put on further supplementary evidence on this issue. To do so would unnecessarily subject the applicants to further delay, cost and anxiety'.[12] Justice Robb concluded that the circumstances, namely that the applicants did not obtain legal advice and were unaware of the requirement in section 16(2), were sufficiently exceptional and made the parentage order sought.

3.24 The concern that the requirement for 'exceptional circumstances' may set too high a bar is not borne out by the available case law, as the court is aware of the need to formalise parentage arrangements. As Robb J stated:

> *It is hard to imagine a more unsatisfactory outcome than if the court is obliged to refuse to make a parentage order. The result would be that the child is left in limbo, subject to the inclinations of the birth mother, whose objective has probably always been to give custody and parental responsibility of the child to the applicants, or involve the intervention of the Secretary of the Department of Family and Community Services.*[13]

3.25 Accordingly, an amendment to this aspect of the legislation is not recommended at this time.

Access to birth information

3.26 Part 5 of the Act regulates access to birth information for children and affected parties of surrogacy arrangements. Subsection 55(1) states that a person who is the child of a surrogacy arrangement, is 18 years or older, and in respect of whom a parentage order is made is entitled to receive:

- the person's original birth certificate; and
- the person's full birth record.

3.27 This is complemented by section 25D of the BDMR Act, which provides that when a birth certificate is issued to a person who was the child of a surrogacy arrangement and who is at least 18 years of age, the Registrar of BDM must attach an addendum indicating that further information is available. The person can then request their original birth certificate and full birth record.

3.28 Under subsection 55(2) of the Act if a person is under 18 years of age, they are not entitled to receive their original birth certificate or full birth record except with the consent of the person(s) who have parental responsibility for the person.

3.29 Part 3 of the *Assisted Reproductive Technology Act 2007* (**ART Act**) gives a person, once over 18 years of age, born through a surrogacy arrangement access to information about the surrogacy arrangement. Part 3A of the ART Act similarly allows a person over 18 years born through assisted reproductive treatment (**ART**) to access non-identifying information about the gamete donor.

3.30 The Australian Family Association argued that section 55(2) of the Act prevents children from accessing truthful records about their birth and conception, and such records are essential to identity. The former Commission for Children and Young

12 *BB v DD; Re AA and the Surrogacy Act 2010 (NSW) (No 2)* [2015] NSWSC 1825 at [48].

13 *BB v DD; Re AA and the Surrogacy Act 2010 (NSW) (No 2)* [2015] NSWSC 1825 at [9].

People expressed support for the child's right to registered birth information and commented that it is 'important for children to be able to access information regarding their genetic parentage as they have a right to preserve and define their identity'.

3.31 The Family Issues Committee of the Law Society of NSW observed that 'there is no perfect solution to knowledge about a child's surrogacy history including parentage and genetic history, where the child is unable to access this information until he or she attains the age of 18 years'. The Committee stated that the Act is consistent with the model of open adoption. The Hon Greg Donnelly MLC queried whether we should review the provisions and whether the age of access should be lowered to 16 years.

3.32 Any changes to the access to birth information provisions in the Act should only occur in concert with similar changes to the ART Act. In the 2013-14 Statutory Review of the ART Act, there were no submissions recommending changes to the provisions of the Act governing access to surrogacy information. The Review does not recommend any change to section 55 of the Act at this time.

Contact with birth parents

3.33 The Act does not allow the Court to approve a plan setting out intended access and contact arrangements between surrogate parents and the child born of the surrogacy arrangement. However, an independent counsellor's report must be submitted with an application for a parentage order to ensure that parties and the Court have considered any contact arrangements proposed in relation to the child and his or her birth parent(s) or biological parent(s).

3.34 The Commonwealth Parliamentary Committee recommended that the ALRC consider a potential requirement for all parties to a surrogacy arrangement to enter into a written agreement about shared expectations and the manner of dispute resolution. It is not clear that this would further the interests of the child. The Review does not recommend such changes at this time.

Criminal record checks

3.35 No submissions to the Review raised the issue of criminal record checks. However, some Family Court judges have suggested that criminal record checks should form part of the surrogacy process. Media reporting also expressed this view following the 'Baby Gammy case', where it was found to be in the best interests of the child to remain with her intended parents, notwithstanding that her intended father was a convicted sex offender.[14] The judge noted that 'while it is a matter of grave concern to leave any child in the home of a convicted sex offender… it must be stressed that there were only two options. I have chosen the one least unsatisfactory for Pipah, whose best interests are the paramount consideration'.[15]

3.36 The only Australian jurisdiction to require criminal record and child protection checks in surrogacy is Victoria. However, this requirement applies to all ART, not just surrogacy involving ART. The requirements in Victoria have been controversial, and

14. For example, see "Gammy case demands surrogacy background checks", *Sydney Morning Herald* (7 August 2014) at https://www.smh.com.au/national/nsw/gammy-case-demands-surrogacy-background-checks-20140807-101c2v.html

15. *Farnell & Anor and Chanbua* [2016] FCWA 17 at paragraph 67-68.

criticised as discriminatory and insulting.[16] Introducing similar requirements into the ART Act would ultimately be a matter for the Minister for Health. No submissions to the 2014 Review of the ART Act advocated for the introduction of criminal record checks or otherwise raised the issue.

3.37 The NSW Parliamentary Committee canvassed the issue of criminal record checks in its inquiry into altruistic surrogacy in 2009. The Committee concluded that it did not receive sufficient information to make further comment on the issue.

3.38 The Review does not recommend implementing criminal record checks for prospective surrogate parents at this time. The Act provides a mechanism for transferring legal parentage in respect of altruistic surrogacy arrangements. These arrangements often occur between family members or close friends and there is little evidence to suggest that such arrangements are not in good faith. The requirement may merely cause unwarranted inconvenience, expense and distress for those seeking to use altruistic surrogacy for genuine purposes.

3.39 Additionally, the 'Baby Gammy case' involved an international commercial surrogacy arrangement, which is illegal for NSW residents. Therefore, implementing a requirement for criminal record checks in domestic arrangements would not necessarily prevent similar situations occurring in the future.

Objective 2: Providing legal certainty

3.40 Some submissions commented that overall, the legal framework of the Act achieves the policy objective of providing legal certainty. Others raised issues regarding the extent to which the Act meets the objective of legal certainty, as outlined below.

National inconsistency

3.41 Some submissions noted the inconsistency between surrogacy laws in Australian States and Territories.[17] Women's Legal Services NSW stated that 'having complex sets of rules for parentage transfer that are also different in each state and territory has lead [sic] to confusion, jurisdiction-shopping and in some instances, uncertainty'. These stakeholders advocated for national harmonisation of surrogacy laws. However, they cautioned against any amendments to the Act that would mirror discriminatory or bureaucratic restrictions contained in the surrogacy laws of other Australian jurisdictions.

3.42 There have been attempts to achieve national uniformity in surrogacy laws. In 2009 SCAG developed 15 principles to form the basis of Australian surrogacy laws that were endorsed by a range of Ministers (**Appendix 1**) and that now form the basis of the NSW Act. A key recommendation of the Commonwealth Parliamentary Committee Report is that the Commonwealth Government and COAG consider developing a model national law that facilitates altruistic surrogacy in Australia. It also recommends that COAG commit to consulting with all States and Territories in developing national uniform legislation on altruistic surrogacy. The NSW submission

16. For example, see Emily Bourke, 'IVF Patients Enraged over Police Checks', ABC Radio PM (3 September 2009); Geraldine Mitchell, 'Doctors slam Victorian push for IVF criminal checks', Herald Sun (28 October 2008).
17. For example, see submissions from Women's Legal Services NSW and Stephen Page of Harrington Family Lawyers.

to the Commonwealth Parliamentary Committee inquiry supported a coordinated response from all levels of government to improve surrogacy arrangements.

3.43 We also note that section 25B of the BDMR Act allows for the registration of parentage orders issued under corresponding laws in other States and Territories, where they are made in respect of a child whose birth is registered in NSW. Conversely, if the Supreme Court makes a parentage order in respect of a child whose birth is registered under a law of another State or Territory, the Court and BDM must notify the relevant registry in that other jurisdiction.[18] While these provisions do not achieve national uniformity, they do contribute to a national system for the recognition of legal parentage through surrogacy across Australia.

Costs of parentage orders

3.44 Surrogacy Australia submitted that obtaining a parentage order is costly. We note there has also been media reporting regarding surrogacy arrangements, including the associated costs, in Australia.

3.45 Although the fees charged by legal practitioners are outside the scope of this review, we accept that the process of seeking a parentage order, including the commencement of an application in the Supreme Court, and the requirements that each of the affected parties must have received counselling and legal advice, does incur costs to the parties engaging in surrogacy arrangements.

3.46 We note that the Supreme Court has inherent *parens patriae* jurisdiction for the protection of children. The Court determines applications for parentage orders in the best interests of the child, in keeping with this jurisdiction. This acknowledges the significant legal consequences attached to parentage orders and the importance of the birth certificate as the child's primary identity document.

3.47 Further, given the serious and life-altering nature of surrogacy arrangements, it is appropriate that each of the affected parties receive counselling and legal advice before entering into the surrogacy arrangement, and that the Supreme Court determine that these preconditions have been complied with.

3.48 As discussed at paragraph 1.14 above, the purposes of requiring the parties to obtain counselling and legal advice is to ensure that all parties are aware of the potential social and psychological implications of surrogacy arrangements, and their legal rights, including the ability to change their minds about continuing with the arrangement after the birth.

3.49 These requirements provide important safeguards to protect the birth mother from exploitation and from undue pressure, including to continue with the arrangement after the birth. The review therefore concludes that these requirements remain appropriate despite the costs that they may incur.

Commercial surrogacy

3.50 Some submissions, including the submission of Surrogacy Australia, argued that the Act does not provide legal certainty to people who enter into commercial surrogacy arrangements as intended parents cannot obtain parentage orders. However, intended parents occasionally apply to the Family Court for declarations of parentage

18. *Surrogacy Act 2010*, section 50; *Births, Deaths and Marriages Registration Act*, section 25C.

or parenting orders under the *Family Law Act 1975* (Cth). These applications have led to inconsistent and varied outcomes.[19]

3.51 The Act seeks to provide legal certainty to parties who enter into altruistic surrogacy arrangements. The Act prohibits commercial surrogacy arrangements and so does not seek to provide legal certainty to those who enter into such arrangements.

Objective 3: Preventing commercial surrogacy

3.52 A number of submissions suggested that the Act has not been effective at preventing commercial surrogacy as there is evidence that NSW residents have breached the prohibition on commercial surrogacy (at least in regard to international commercial surrogacy arrangements), and these breaches have not been prosecuted.[20]

3.53 The Review recognises that Australians, including NSW residents, have entered into commercial surrogacy arrangements overseas since the Act commenced. This practice was documented in submissions, media reports[21] and cases before the family law courts,[22] and was outlined in the Family Law Council's 2013 Report on *Parentage and the Family Law Act 1975*. The Review also acknowledges that, to date, there have been no criminal prosecutions for commercial surrogacy under the Act.

Inconsistency between Commonwealth and State laws

3.54 Breaches of the prohibition on international commercial surrogacy may be due to the inconsistency between State and Commonwealth laws. Under the Act, international and domestic commercial surrogacy is illegal. However, the Commonwealth Government may grant visas and/or citizenship to children born overseas through commercial surrogacy arrangements if surrogate parents are Australian residents or citizens. The Department of Home Affairs and Australian embassies and High Commissions also provide information to Australians about commercial surrogacy arrangements. It may be that NSW residents would be less likely to enter into commercial surrogacy arrangements overseas if they did not receive support and assistance from Commonwealth authorities.

3.55 In his judgement of the 'Baby Gammy case', Chief Justice Thackray noted the problems that arise from inconsistencies in Australian laws and expressed support for the harmonisation of Commonwealth and state laws:

> The arrangement leading to the births of Pipah and Gammy would never have been put in place had it not been for the fact that a department of the Australian Government provided assurances that the children would receive citizenship and automatic entry to this country. Such assurances could not be provided if the

19. For example, see submission from Women's Legal Services NSW, citing *Dennis & Pradchaphet* [2011] FamCA 123; *Dudley & Chedi* [2011] FamCA 502; *Ellison and Anor & Karnchanit* [2012] FamCA 602; *Gough and Gough & Kaur* [2012] FamCA 79; *Hubert and Anor & Juntasa* [2011] FamCA 504.
20. See submissions from Dr Damien Riggs and Dr Clemence Due; Mr Alastair Lawrie; Professor John Tobin and Mr Elliott Luke; Professor Mary Keyes; Stephen Page, Harrington Family Lawyers; and Surrogacy Australia.
21. For example, see Zoe Daniel, 'The Baby Makers', ABC Foreign Correspondent (15 April 2014); Barbara Miller, 'Surrogacy Secrets', ABC Radio National (27 December 2012).
22. *Mason & Mason and Anor* [2013] Fam CA 424.

> citizenship laws were harmonised with all the other laws of this country. Effective law reform therefore does not have to involve the legalisation of commercial surrogacy to encourage would-be parents to buy locally-grown children. Equally, it could involve amendment of the citizenship laws to align them even more clearly with existing state laws. A fundamental policy decision is required.[23]

3.56 In recommendation 9 of its 2016 Report, the Commonwealth Parliamentary Committee recommended that the Commonwealth Government introduce legislation to amend the *Migration Act 1958* (Cth). It recommended that Australian residents seeking a passport for a young child to return to Australia be subject to screening by the Department of Home Affairs to determine whether they have breached Australian or international surrogacy laws while outside Australia. The Commonwealth Parliamentary Committee further recommended that where the Department is satisfied that breaches have occurred, the Minister for Immigration and Border Protection should have authority to make determinations in the best interests of the child, including in relation to the custody of the child.

3.57 The NSW submission to the Commonwealth Parliamentary Committee acknowledged that without Commonwealth Government support in the form of visas and/or citizenship, children born of surrogacy arrangements may be left stateless or at risk of abandonment if intended parents were unable to bring them into Australia. This support from the Commonwealth is therefore necessary, but in practice helps to facilitate commercial surrogacy arrangements. NSW supports national cooperation on this complex issue.

Breaches unprosecuted

3.58 Breaching the prohibition on international commercial surrogacy can be attributed to the desire of some people to become parents, and the remote risk of prosecution. There are difficulties associated with the enforcement of the extra-territorial application of the commercial surrogacy offence in the Act. In particular, there are evidentiary challenges associated with proving beyond reasonable doubt that a surrogacy arrangement entered into overseas was commercial. We also acknowledge that prosecution, conviction and potential imprisonment of parents may negatively impact the child born as a result of the surrogacy arrangement.

3.59 The Commonwealth Parliamentary Committee, in recommendation 7, suggested that the Commonwealth Government establish an interdepartmental taskforce to report on ways to address the situation of Australians who choose to enter international surrogacy arrangements. That report should have regard, amongst other things, to ensuring that Australians who enter into offshore surrogacy arrangements meet their responsibility to act in the best interest of all of their children and consider whether it should be unlawful to engage in offshore surrogacy in any overseas jurisdiction where commercial surrogacy is prohibited. Professor Tobin and Mr Luke, in their submission to the Review, suggested that awareness-raising as to the status of international commercial surrogacy under international law could be a solution to reducing such arrangements.

Family Court orders

3.60 Another reason for breach may be that the Family Court has made parenting orders in favour of intended parents who are caring for a child or children through

23. *Farnell & Anor and Chanbua* [2016] FCWA 17 at paragraph 759.

commercial surrogacy arrangements entered into overseas. In line with the *Family Law Act 1975* (Cth) these orders concern parental responsibility, with whom a child may live, and arrangements for a child to spend time with his or her parents as well as other people interested in the child's welfare. These orders are made on the basis that they are in the best interest of the child or children concerned. In some cases the Family Court has questioned the appropriateness of making parenting orders in favour of applicants who appear to have broken the law.[24] The Family Court is placed in a difficult position of being forced to reconcile the prohibition on commercial surrogacy with the welfare of children born as a result of these arrangements. National cooperation on this issue is required.

Other matters

Advertising of surrogacy arrangements

3.61 Section 10 of the Act prohibits publishing any advertisement, statement, notice or other material representing that a person is seeking or willing to enter a surrogacy arrangement. Subsection 10(2) ensures the prohibition does not apply if:

- the surrogacy arrangement is not a commercial surrogacy arrangement, and
- no fee has been paid for the advertisement, statement, notice or material.[25]

3.62 The Second Reading Speech provides that the rationale for the ban is that advertising may increase the risk of commercial surrogacy arrangements. The ban reflects a preference for arrangements between families and close friends where there is an opportunity for ongoing contact between the child and the birth mother.

3.63 The ban is consistent with all Australian jurisdictions except Western Australia and South Australia. Western Australia allows the advertising of altruistic surrogacy arrangements but prohibits any fee for brokering such arrangements.[26] South Australia has repealed its previous offences relating to advertising and replaced them with offences relating to brokering surrogacy contracts or inducing someone to enter a surrogacy contract for valuable consideration.[27] The amendment also allows for the creation of a register containing the names of women willing to be surrogates.

3.64 The Commonwealth Parliamentary Committee commended the South Australian Government on this amendment. It also recommended that in developing a national model law, the ALRC must consider whether a government body should implement a closed register of surrogates and intended parents, access to which may be granted following background checks, and medical and psychological screening.

3.65 The Law Society suggested that NSW Health maintain a non-exclusive online advertising platform for altruistic surrogacy arrangements (with accompanying access to public education). The Review does not adopt this recommendation given that NSW Health has a limited role in administering the Act.

24. For example, see *Farnell & Anor and Chanbua* [2016] FCWA 17; *Dudley & Chedi* [2011] FamCA 502.
25. *Surrogacy Act 2010*, section 10(2)(a)-(b).
26. *Surrogacy Act 2008* (WA), division 2.
27. *Family Relationships Act 1975*, section 10H.

3.66 There are grounds for relaxing the current restrictions on paid advertising for altruistic surrogacy arrangements. Altruistic surrogacy arrangements are legal, as is unpaid advertising by persons willing to act as or seeking an altruistic surrogate. If no rewards or other inducements are sought or offered and any advertisement makes clear that the arrangement would be a non-commercial one, we do not consider that the advertisement itself must be unpaid. This reform may make altruistic surrogacy more accessible in NSW.

3.67 We also consider that any 'brokerage' or introductory service between intended parents and surrogates should not involve payment of a reward. The reason for this is to prevent assisted reproduction clinics or other organisations profiting from assisting to arrange altruistic surrogacy arrangements, and thus transforming an altruistic arrangement into a commercial surrogacy arrangement.

Recommendation 1

Amend the Act so that:

a) a person must not publish any advertisement, statement, notice or other material that seeks to introduce people for a reward or other inducement with the intention that those people might enter into a surrogacy arrangement (whether altruistic or commercial); and

b) section 10(2)(b) be repealed, so that it is permissible to pay a fee for an advertisement, statement, notice or other material if it is clear that any advertised arrangement is not a commercial surrogacy arrangement and any advertisement does not seek or offer rewards or other inducements; and

c) except for sub recommendation 1(a), the penalty provisions in section 10 only apply to commercial surrogacy arrangements.

Hearing of surrogacy matters

3.68 Part 56A of the Uniform Civil Procedure Rules (**UCPR**) provides for the hearing of applications for parentage under the Act. This part of the UCPR also provides that unless the Supreme Court orders otherwise, an application for a parentage order is to be dealt with and determined by the Court in the absence of the public and without any attendance by, or on behalf of, the plaintiff. In practice, this means that applications for parentage orders can be determined on the papers in chambers. Only one submission from Mr Page of Harrington Family Lawyers took issue with this practice.

3.69 We consider that the rules for the determination of parentage applications are appropriate. Determining matters in chambers aims to minimise costs and delay for parties and ensures the privacy of all involved. We also note that Part 56A of the UCPR allows a plaintiff to apply for a preliminary hearing of the application if it is not appropriate for the matter to be dealt with without the attendance by and on behalf of the plaintiff.

Counselling

3.70 There are three provisions in the Act that refer to qualified counsellors: sections 17, 35(1) and 35(2). The Regulation defines 'qualified counsellor' separately for each of those sections. The table below sets out when a counsellor must be involved, and what qualifications that counsellor must hold as per the definitions in the Regulation.

Table of counselling requirements and counsellor qualifications

Counselling requirement as per the Act	Counsellor qualifications as defined in the Regulation
Each affected party must have received counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications **before entering into the surrogacy arrangement**.[28] This is a non-mandatory precondition to the making of a parentage order.	The person must: ▪ be a member of, or eligible for membership of, the Australian and New Zealand Infertility Counsellors Association (**ANZICA**), and ▪ be familiar with any guidelines issued by ANZICA and the National Health and Medical Research Council that are relevant to the exercise of those functions.[29]
The birth mother and her partner (if any) must have received further counselling from a qualified counsellor about the surrogacy arrangement and its social and psychological implications **after the birth of the child** and before consenting to the parentage order.[30] This is a precondition, but not a mandatory precondition, to the making of a parentage order.	The person must ▪ hold a university qualification conferred after at least 3 years full time study or an equivalent amount of part time study, and ▪ be a qualified psychologist, qualified psychiatrist or qualified social worker, and ▪ have specialised knowledge, based on the person's training, study or experience, of the social and psychological implications of relinquishing a child.[31]
An **application for a parentage order** must be supported by a report about the application prepared by an independent counsellor.[32] An independent counsellor is defined as a qualified counsellor who did not counsel the parties about the surrogacy arrangement, and is not connected with a medical practitioner who carried out a procedure that resulted in the conception or birth of the child.[33]	The person must ▪ hold a university qualification conferred after at least 3 years full time study or an equivalent amount of part time study, and ▪ be a qualified psychologist, qualified psychiatrist or qualified social worker, and ▪ have specialised knowledge, based on the person's training, study or experience, that enables the person to give opinion evidence as to the matters referred to in section 17 of the Act.[34]

28. *Surrogacy Act 2010*, sub-section 35(1).
29. Surrogacy Regulation 2016, clause 6.
30. *Surrogacy Act 2010*, sub-section 35(2).
31. Surrogacy Regulation 2016, sub-clause 7(2).
32. *Surrogacy Act 2010*, section 17.
33. *Surrogacy Act 2010*, section 17.
34. Surrogacy Regulation 2016, sub-clause 7(1).

3.71 In his submission, Mr Stephen Page of Harrington Family Lawyers raised issues about the requirements for counselling and counsellors' qualifications. He recommended that a broader definition of qualified counsellor be adopted, which does not depend on membership of ANZICA. He also observed that it is not clear whether two or three counsellors are required and noted that some counsellors who provide the initial counselling decline to provide relinquishment counselling given the unclear definition. He also commented that relinquishment counselling increases the cost of counselling and suggested that it should be encouraged, but not compulsory.

3.72 We agree that the three definitions of 'qualified counsellor' could imply that three different counsellors require involvement in the process of seeking a parentage order. While the independent counsellor should be a separate person, there is no reason why the same counsellor cannot counsel the parties before entering the surrogacy agreement and after the birth of the child. This could be beneficial at the relinquishment phase, given the counsellor would already have a professional relationship with the birth mother and her partner (if any) and understand the history of the arrangement. We recommend streamlining the definition of qualified counsellor so that there is one set of qualifications that applies to the pre-surrogacy arrangement and post-birth counsellor.

3.73 In consultation, two counsellors emphasised that surrogacy counselling is a specialised field, for which generalist counsellors, or inexperienced counsellors, are not equipped. These counsellors submitted that full membership of ANZICA is an appropriate requirement of counsellors who provide pre-surrogacy arrangement and relinquishment counselling under the Act. However, the Review does not support this recommendation as it would be overly prescriptive and may indicate a preference for professional associations. The Review considers that the requisite qualifications and experience is captured in the requirements that a person:

- hold a qualification conferred by a university (whether within or outside NSW) after at least 4 years full time study or an equivalent amount of part time study; and
- be a qualified psychologist, qualified psychiatrist or qualified social worker; and
- have specialised knowledge of infertility (including surrogacy), based on the person's professional experience counselling clients on these issues.

3.74 We recommend that these requirements serve as the definition of 'qualified counsellor' for the purposes of counselling prior to entry into the surrogacy agreement and after the birth of the child.

3.75 We do not recommend removing the requirement that the birth mother and her partner (if any) receive counselling after the birth of the child. Counselling before the birth mother and her partner relinquish the child is essential in order to give informed consent to the parentage order, which transfers legal parentage to the intended parent(s). Counselling is also essential in order to provide the birth mother and her partner with proper emotional and psychological support after the birth of the child.

3.76 The Law Society's Family Issues Committee suggested that NSW Health's functions be extended to include the maintenance (and possibly accreditation) of a list of qualified counsellors under the Regulation. However, NSW Health does not support this suggestion given that it does not administer this legislation.

Recommendation 2

Amend the Surrogacy Regulation so that all references to a 'qualified counsellor' in the Act, including sub-sections 35(1) and 35(2), are defined as a person who:

a) holds a qualification conferred by a university (whether within or outside NSW) after at least four years full time study or an equivalent amount of part time study; and

b) is a qualified psychologist, qualified psychiatrist or qualified social worker; and

c) has specialised knowledge, based on the person's training, study or experience, of the issues surrounding surrogacy.

Other preconditions for the surrogate mother

3.77 Division 4 of the Act states that in order to obtain a parentage order, the birth mother must be at least 25 years old and have received counselling and legal advice prior to entering the surrogacy agreement. However, in exceptional circumstances the Supreme Court can make a parentage order if the birth mother is under 25 years, provided that she is over 18 years of age.

3.78 The Law Society Family submitted that the following preconditions should be added to the Act to protect the well-being of the birth mother:

- the birth mother should be between 21 and 35 years of age;
- the birth mother must have already given birth to a child (or children); and
- the birth mother must have received a positive medical assessment in relation to the proposed pregnancy.

Age of the birth mother

3.79 The NSW Parliamentary Committee considered the age of the birth mother in 2009, and the majority of the Committee thought that a minimum age of 18 was appropriate. Some Committee members disagreed. The Committee did not recommend a maximum age for birth mothers.

3.80 We consider that the current provisions in the Act regarding the minimum age of the birth mother strike an appropriate balance. The age of 25 brings sufficient maturity to understand the nature and implications of the surrogacy agreement (though counselling and legal advice remain critical to the process of giving informed consent). However, given that 18 is the age of legal adulthood, in exceptional circumstances women between the ages of 18 and 24 should be able to act as surrogates.

3.81 We do not recommend an upper limit on the age of birth mothers. Many women choose to start their family later in life and have healthy pregnancies. Having an upper age limit would also limit further the already small pool of potential altruistic surrogate mothers.

Previous children

3.82 The NSW Parliamentary Committee considered whether a surrogate mother should have previously given birth. A majority of members did not recommend that the birth mother be required to have previously given birth or completed her own family. Some participants expressed concern over the inflexibility of a legislated criterion. Access Australia argued that 'legislation should not prevent a woman with no previous children acting as a surrogate for her sister if there was no-one else available'.

3.83 The NSW Parliamentary Committee referred to the principle of minimal government intervention and restated its belief that 'counsellors and clinicians with experience in surrogacy arrangements are best placed to determine on a case by case basis if the particular characteristics of the birth mother strengthen or undermine the particular surrogacy arrangement'. A majority of the Committee noted that the issue would be a factor considered during the pre-treatment counselling process by counsellors determining the suitability of the particular birth mother for the particular surrogacy arrangement.

3.84 Other Committee members believed that NSW should require the surrogate mother to have previously carried a pregnancy and given birth. They submitted that a birth mother who has already been pregnant and given birth may better understand the consequences of what she is agreeing to and therefore proceed on a more informed and prepared basis. Some thought the birth mother would be less likely to face difficulties relinquishing the child if she had children of her own.

3.85 The Review does not recommend prescribing such a requirement in legislation. Pre-surrogacy counselling addresses the birth mother's individual circumstances, including whether she has given birth or not. Professional counsellors are best place to consider emotional and physical risks that arise for each woman.

Positive medical assessment in relation to the proposed pregnancy

3.86 The intention of the proposal to ensure that birth mothers receive a positive medical assessment in relation to the proposed pregnancy is to ensure the welfare of the birth mother. However, we consider medical professionals are best placed to provide a medical assessment prior to conception, not by a court following the pregnancy. We also note that such a medical assessment will be undertaken as a matter of course in surrogacy arrangements involving ART by its nature as a medical service, even though this is not a statutory requirement. We do not recommend amendment to include provisions requiring birth mothers to receive a positive medical assessment.

4. Conclusion

4.1 The Review concludes that the policy objectives of the Act remain valid and that the terms of the Act remain appropriate to secure those objectives. The Review recommends two changes to improve the operation of the Act and better secure its policy objectives.

4.2 The Review notes that the Commonwealth Parliamentary Committee has made recommendations with a view to developing a national surrogacy law. At the time of writing, the Commonwealth Government has not provided a response to the committee's recommendations.

Appendix 1 – Principles to form the basis of surrogacy laws in Australia (2009)

Principles endorsed by SCAG and Health, Community and Disability Services Ministers in the November 2009 Communique.

A.1 A court may grant a parentage order where the court is satisfied a surrogacy arrangement was entered into by the surrogate mother, her partner (if any) and the intended parents prior to conception.

A.2 A court may grant a parentage order where the court is satisfied all parties have undergone counselling with an accredited counsellor in relation to the surrogacy arrangement.

A.3 A court may grant a parentage order where the court is satisfied all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement.

A.4 A court may grant a parentage order where an application was made to the court at least 21 days, but not more than six months after the birth.

A.5 The intended parents must reside in the jurisdiction in which the application is made.

A.6 All parties to the surrogacy arrangement must give informed consent to the granting of a parentage order.

A.7 The child must be living with the intended parents at the time the application is heard.

A.8 A court may grant a parentage order where the court is satisfied granting the order is in the best interests of the child.

A.9 A court may grant a parentage order where certain requirements set out in the model provisions are not met if the court is, despite this, satisfied granting the order is in the best interests of the child. The ability of the court to waive requirements is subject to mandatory requirements set out in legislation.

A.10 A court may take into account any other matter it considers relevant when determining whether to grant a parentage order.

A.11 A court may grant a parentage order to parents who are now lawfully raising children under the age of 18 years conceived through surrogacy if:

- the court is satisfied that a surrogacy arrangement was entered into prior to conception;
- the court is satisfied the surrogacy arrangement was not a commercial arrangement;
- all parties consent to the granting of the order; and
- it is in the bests interests of the child.

In determining such an application the court will be required to take into account the views of the child, where appropriate.

A.12 After a parentage order is granted a new birth certificate can be applied for and will resemble an ordinary birth certificate recording only the names of the legal parents.

A.13 The original birth record would still exist and the child would be able to obtain both records in defined circumstances.

A.14 The jurisdiction where the original birth certificate was issued will provide for the mutual recognition of a parentage order granted in another jurisdiction by provision of a new birth certificate. Alternately, the jurisdiction where the original birth certificate was issued should cancel the birth certificate and the jurisdiction where the parentage order was granted should issue a new birth certificate.

A.15 The surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.

Appendix 2 – Conduct of the Review

B.1 Section 60 of the Act provides that the Minister is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

B.2 The Act states that a review should be conducted as soon as possible, three years from the date of assent to the Act. Following this, a report on the outcome of the Review is to be tabled in each House of Parliament.

B.3 The Department of Justice reviewed the Act on the Attorney General's behalf. The Department advertised the Review of the Act and wrote to the Supreme Court, the Law Society, the Bar Association and key government agencies to invite submissions to the Review. In total, the Review received 70 submissions from a range of interested bodies and members of the public (see list at **Appendix 3**). The submissions expressed a range of divergent and strongly held views on the regulation of surrogacy in NSW.

B.4 Many submissions appeared to use a form or template submission prepared by Surrogacy Australia, which is a lobby and support group for parents of surrogacy arrangements or people who are planning to be parents through surrogacy.

B.5 BDM and NSW Health also provided statistics on the operation of the Act from its commencement to the end of the review period. The Department also considered case law, international human rights law, media reports and academic literature on the issue of surrogacy.

Appendix 3 – List of submissions to the Review

C.1 Access Australia

C.2 Alastair Lawrie

C.3 Alex Greenwich MP

C.4 Alison Lowe

C.5 Anne Byrne

C.6 Anthony Stralow

C.7 Ashley Scott

C.8 Australian Christian Lobby

C.9 Australian Family Association

C.10 Bernadette Madden

C.11 Christina Lam

C.12 Christopher Thurgood

C.13 Claire Field

C.14 Confidential submission #1

C.15 Confidential submission #2

C.16 Confidential submission #3

C.17 Danielle Montague

C.18 David Leyonhjelm

C.19 Deauvanne Athanasakis

C.20 Don and Karen Mills

C.21 Dr Damien Riggs & Dr Clemence Due

C.22 Dr Sonia Allen

C.23 Family Voice Australia

C.24 Felicity Lindsay

C.25 NSW Gay and Lesbian Rights Lobby

C.26 Gerard Calihanna

C.27 Helen Odlin

C.28 Hon Greg Donnelly MLC

C.29 J Campbell

C.30 James Brown

C.31 Jane Galloway

C.32 Jason Cragg

C.33 Kasia Becconsall

C.34 Kimm McTavish

C.35 Laura Bradley

C.36 Laura Day

C.37 Leanne Hall

C.38 Life, Marriage and Family Centre, Catholic Archdiocese of Sydney

C.39 Louise Shaw

C.40 Louise Spittles

C.41 Lynette Smith

C.42 M Attamini and B Watson

C.43 Martin Fitzgerald

C.44 Merindah Overhall

C.45 Michaela Stockey-Bridge

C.46 Monica Doumit

C.47 Nicholas Bone

C.48 Nick Corrigan

C.49 NSW Commission for Children and Young People

C.50 NSW Department of Family and Community Services

C.51 NSW Health (statistics only)

C.52 NSW Registry of Births, Deaths and Marriages (statistics only)

C.53 Professor John Tobin and Mr Elliot Luke

C.54 Professor Mary Keyes

C.55 Randall Yip

C.56 Richard Dugi

C.57 Roisin Kelly

C.58 Shae Baxman

C.59 Shaun Thompson

C.60 Simon Gooch

C.61 Stephen Page, Harrington Family Lawyers

C.62 Sue Hayman

C.63 Surrogacy Australia

C.64 Susie P.

C.65 Suzanne Thatcher

C.66 Suzy Ly

C.67 Tabatha Peterson

C.68 The Law Society of NSW Family Issues Committee

C.69 Tracy Jenner-Lawson

C.70 Women's Legal Services NSW