



The Australian Surrogacy Handbook

Helping you navigate surrogacy laws in Australia

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WELCOME

Chances are you are reading this because you are considering surrogacy as an option to grow your family, or considering becoming a surrogate to help someone else. Welcome!

You probably have a bunch of questions, and perhaps you are feeling a bit overwhelmed. Don't worry, you are in the right place. Think of this as a Beginner's Handbook, to get you started.

This book focuses on surrogacy in Australia and is not intended to replace individual advice from a lawyer or a clinician.



ABOUT ME

My name is Sarah Jefford and I am a family and surrogacy lawyer living in Melbourne.

I live with my partner and we have two young children.

My partner and I experienced infertility and IVF to have our first child. Since then, I've been an egg donor, and in 2018 I gave birth as a traditional surrogate.

I am passionate about making surrogacy information accessible to intended parents and surrogates and their families.

If you have questions that are not covered in this book, please feel free to contact me:

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Disclaimer: The information contained in this book does not constitute legal advice. Whilst every effort is made to ensure the information is correct, you should obtain legal advice before proceeding.

Photo credit: Bree Downes (Page 6-7, 17, 22)

Surrogacy in Australia – a quick overview

Surrogacy in Australia is regulated in each State, which means there are no uniform laws that cover surrogacy across the country. Surrogacy laws in all States follow the same basic principles:

- The Intended Parents must not be able to either conceive or carry a baby themselves. You should check the laws in your State to see who can access surrogacy.
- The surrogacy arrangement is not enforceable. This means that if the surrogate does not relinquish the baby, or the intended parents do not accept the baby, neither party can enforce the agreement. However, the surrogate can enforce the agreement to recover prescribed costs.
- The surrogacy arrangement must be altruistic. Commercial surrogacy is illegal in all States in Australia. This means the surrogate and her partner cannot be paid for carrying a baby for someone else.
- Whilst surrogacy is altruistic, the intended parents must cover the surrogate's expenses in relation to surrogacy, pregnancy and birth.
- When the baby is born, the birth is registered in the State where the baby is born, with the surrogate and her partner listed as the baby's parents on the Birth Certificate. After the birth, the Intended Parents can apply to the Court for a Parentage Order in the State where they live. The Order transfers parentage from the birth parents (the surrogate and her partner) to the intended parents. The Birth Certificate is then re-issued with the new parents listed, instead of the surrogate and her partner.



Definitions

There are many terms in the surrogacy world that you'll quickly become familiar with. Below are some definitions to get you started.

Intended Parent (IP): Also referred to as "Commissioning Parents," these are people who need the help of a surrogate and possibly a donor or two, to become parents. Intended Parents can be heterosexual or homosexual couples or singles. In Australia, to qualify for a surrogacy, the Intended Parents must have a medical or social reason for being unable to carry their own child. You may also see the terms "Intended Mother" (IM) and "Intended Father" (IF) used.

Gestational Surrogate (GS): A gestational surrogate is a woman who carries a baby for another person or couple, using an egg provided by the Intended Mother, or an egg donor. A gestational surrogate does not use her own genetic material in the surrogacy.

Traditional Surrogate (TS): A traditional surrogate is a woman who carries a baby for

another person or couple, using her own eggs. Most, but not all traditional surrogates become pregnant through home insemination, with sperm from an Intended Father or donor.

Altruistic Surrogacy: Altruistic surrogacy is the only form of surrogacy that is legal in Australia. It is where the surrogate receives no payment for carrying a baby for someone else, but she can receive reimbursement for prescribed expenses.

Commercial Surrogacy: Commercial surrogacy is the practice of Intended Parents paying a woman to carry a baby for them. Commercial surrogacy is illegal in Australia; there are various commercial surrogacy practices overseas.



Finding a Surrogate, and Finding Intended Parents

This is probably the biggest question on your mind! Many Australian States prohibit you from advertising for a surrogate, or from advertising that you would like to be a surrogate. In other countries, there are agencies that provide services that match surrogates and intended parents, but this is not currently an option in Australia.

Whilst the law might prohibit advertising in your State, it does not prohibit you from discussing it with your friends and family. You are more likely to find someone within your friends and family than connecting with someone outside your circle.

The number of intended parents far outweighs the number of women considering surrogacy, so familial connections are a good place to start.

For the most part, surrogates and intended parents do not need to live near each other, or even in the same State.

There are a number of Facebook groups and web-based forums established to support intended parents and surrogates. **See Page 18** for a helpful list of information sources.

For information about international options, go to Families Through Surrogacy (FTS) www.familiesthrusurrogacy.com

FTS holds regular information seminars in major cities, and also hosts a surrogacy conference in June each year.





Traditional Surrogacy

Traditional surrogacy is where a surrogate uses her own eggs to conceive, with sperm from an Intended Father or from a donor.

Traditional surrogacy is not as common as gestational surrogacy, although that is changing.

Most clinics do not assist with traditional surrogacy arrangements. Traditional surrogacy is usually arranged entirely by the intended parents and the surrogate and her partner.

There is a common belief that traditional surrogacy is illegal, when in fact the opposite is true. In Australia, traditional surrogacy is legal in every State except the ACT (and is not legislated for in the NT). As most fertility clinics will not assist with traditional surrogacy arrangements, this leaves home insemination as the only option.

To enter into a traditional surrogacy arrangement, the parties will need to obtain legal advice and participate in counselling, prior to attempting to fall pregnant.

For more information about traditional surrogacy, you should speak to a lawyer experienced in surrogacy law, and a counsellor who has experience with surrogacy arrangements. Other Intended Parents and surrogates are very knowledgeable and are usually willing to answer questions as well.

The Surrogacy Process

For surrogacy arrangements accessing clinic services, the process usually involves the following steps. Note that the steps vary in each State.

- 1 QUALIFY FOR SURROGACY**
The Intended Parents need to meet the criteria for surrogacy in their State. Generally, this begins with a fertility specialist recommending surrogacy.
- 2 MEDICAL ASSESSMENT**
The Surrogate attends for a medical assessment by an Obstetrician.
- 3 COUNSELLING**
All parties involved have counselling about the surrogacy arrangement.
- 4 LEGAL ADVICE**
The Intended Parents and the Surrogate and her partner obtain legal advice from two different lawyers.
- 5 PSYCHOLOGICAL ASSESSMENT**
Some Clinics and States require the parties to be psychologically assessed.
- 6 APPROVAL**
Surrogacy arrangement is approved by the Clinic or external Committee before any embryo transfer can occur.

The Laws of Surrogacy

Surrogacy in Australia is regulated by each State. The applicable laws are those in the State where the Intended Parents live.



Surrogacy arrangements in Australia are regulated by State legislation. If you have a child born through international surrogacy arrangements, the Commonwealth Family Law Act applies to all States other than Western Australia.

The Chart on the next page provides information about the relevant legislation in each State.

The intended parents and the surrogate and her partner must obtain independent legal advice from separate lawyers. If a written agreement is required, parties might draft their own agreement, but it is not valid unless a lawyer has provided advice and all parties have signed the Agreement.

All State jurisdictions require everyone to obtain legal advice before attempting to become pregnant. This applies to both gestational and traditional surrogacy arrangements.

If you are considering international surrogacy, you should consult a lawyer in your destination country.

If you are you looking for a surrogacy lawyer, you should research your options and compare lawyer fees and fee structures. Sarah can provide advice over Skype and telephone, and provide a fixed-fee quote.

Australian Surrogacy Laws: State by State

Where are the Intended Parents?	Applicable Legislation	Minimum age of the surrogate	Allows gay couples	Allows single women	Written Agreement required	Traditional Surrogacy	Can I advertise?
ACT	<i>Parentage Act 2004</i>	18yo	Yes	No	No	No	No
NSW	<i>Surrogacy Act 2010</i>	25yo	Yes	Yes	Yes	Yes	Unpaid only
NT	No relevant law	–	–	–	–	–	–
QLD	<i>Surrogacy Act 2010</i>	25yo	Yes	Yes	Yes	Yes	No
SA	<i>Family Relationships Act 1975</i>	18yo	Yes	No	Yes	Yes	Yes
TAS	<i>Surrogacy Act 2012</i>	25yo	Yes	Yes	Yes	Yes	No
VIC	<i>Assisted Reproductive Treatment Act 2008</i>	25yo	Yes	Yes	No	Yes	No
WA	<i>Surrogacy Act 2008</i>	25yo	No (This is currently under review)	Yes	Yes	Yes	Yes

The Big Money Question – how much does it cost?

Intended parents are always keen to know how much surrogacy will cost them. There are so many variables depending on individual circumstances, so it can be hard to give an exact answer to that question. You can expect that surrogacy in Australia will cost anywhere from \$15,000 to over \$100,000. The major variable is the cost fertility treatment, which will depend on what sort of treatment you require, and the success of any treatment and when the surrogate falls pregnant.

You can expect surrogacy costs to include:

Fertility treatment– this will depend on how many cycles are required, whether donor eggs or sperm are required, and the success of the treatment. Medicare rebates are not available for surrogacy arrangements and this will have a variable impact.

Legal Advice – Lawyer fees vary considerably and depend on a number of factors, including whether you need a written agreement. You should compare quotes beforehand, and seek out lawyers who specialise in surrogacy law. Intended parents need to cover the cost of their own legal advice as well as that of their surrogate and her partner.

Counselling and Psychological Assessments – some fertility clinics provide counselling as part of their service. For the most part, however, counselling and psychological assessments are provided by independent counsellors specialising in surrogacy.

Pregnancy and Birth – Surrogates are eligible for Medicare and public healthcare, just as if they were having their own baby. Medical costs that are not covered by Medicare need to be covered by the intended parents. This includes private health insurance, private healthcare and hospital fees as appropriate. It also includes medication and treatments that might be required during the pregnancy and birth.

Parentage Order – After the baby is born, the intended parents need to apply to Court for a Parentage Order to recognise them as the legal parents and to change the Birth Certificate. This can involve lawyers, and further counselling.

Other costs that might be payable, depending on the State legislation and individual circumstances, include:

- travel costs (fuel, parking fees, train tickets) for the surrogate and her partner to attend for treatment, or for pregnancy appointments;
- life insurance for the surrogate;
- loss of income for the surrogate and her partner for days they need to take off for appointments related to surrogacy, pregnancy and birth;
- non-medical treatment such as massage, naturopathy and acupuncture for the surrogate.

Giving gifts to your Surrogate

Altruistic surrogacy means that the surrogate cannot receive any fee, payment, material benefit, compensation or inducement to be a surrogate.

One of the first questions asked by intended parents is whether they can give gifts to their surrogate or her family members, without compromising the surrogacy agreement or the Parentage Order application. And what sort of gifts might be ok, and what might be considered a reward or inducement? The answer is complex!

The legislation can be interpreted very broadly, such that even the gift of a massage voucher or a bunch of flowers could be seen as a material benefit or reward for the surrogate. So how do intended parents look after their surrogate, support her through any treatment and pregnancy, and show their appreciation without crossing over into illegal territory?

A good rule of thumb is to act as you would if you were to give a gift to any other friend. Gifts that are not cash, such as massage vouchers, flowers, ready-cooked meals, movie tickets and dinner vouchers are unlikely to be considered by any reasonable person as an inducement or reward for surrogacy.

So what about bigger gifts? The legislation is clear that surrogates should not receive material benefits or reward for being a surrogate. But is a gift of love and appreciation a reward, or inducement, or material benefit of surrogacy? You should exercise both caution and common sense. And if in doubt, get legal advice.

Intended parents worry that giving any gifts to their surrogate could compromise the surrogacy arrangement and that the Court might refuse to make the Parentage Order.

The laws provide that the Courts can refuse to make a Parentage Order if the arrangement looks to be a commercial transaction. And parties can be prosecuted if they have broken the law and made or received payment for surrogacy. Some things to consider:

- The Court is most concerned whether making the Parentage Order would be in the baby's best interests. If all the criteria are met, the Courts are unlikely to refuse to make the Parentage Order simply because the surrogate received a gift from the intended parents.
- There have been no prosecutions that we are aware of, where the intended parents have given gifts to their surrogate.

If in doubt, you should contact your lawyer. Our advice: be kind, exercise common sense, and remember: if it looks like a commercial arrangement it probably is. If it looks like a gift of love and friendship, it probably is.

Written Agreements

Surrogacy arrangements can be written into formal Agreements between the surrogate and her partner, and the intended parents. Some States require surrogacy arrangements to have a written agreement, whilst other States do not require it but the parties might be inclined to have one anyway.

A written agreement is not enforceable, other than where a surrogate might need to claim costs and reimbursement for expenses incurred during the surrogacy.

A written agreement can help ensure everyone is on the same page and there is less likely to be conflict or misunderstandings.

Written agreements should include details such as counselling and legal advice.

They can also cover agreements about other matters, such as:

- Pregnancy and birth care options;
- What costs the intended parents have committed to cover;
- How the intended parents will reimburse their surrogate for costs;
- How the intended parents will support their surrogate and her family in times of need;
- How the parties will communicate with each other;
- How the parties might resolve issues and conflict as it arises.

Remember that even if an agreement is in writing, it is generally unenforceable other than how it relates to reimbursing the surrogate for prescribed costs.



Parenting Orders and Parentage Orders

You will need to speak to a surrogacy lawyer to get advice about your options and the laws in your State. Below is some information about the different Orders pertaining to children.

In Australian domestic surrogacy arrangements, the appropriate Orders are Parentage Orders, which are sought in the State Courts.

Information about international surrogacy arrangements are provided on the following page.

Type of Order	Parentage Order (or Substitute Parentage Order)	Parenting Order
Legislation	Various State legislation	Family Law Act 1975 (Cth) Family Court Act 1997 (WA)
Court	State Court	Federal Circuit Court or Family Court
Aim	To recognise the intended parents as the real parents of the child	Often applied in parenting disputes about children's arrangements for separated parents.
Application	Applies only to <i>Australian</i> surrogacy arrangements that meet legislative requirements	Might be useful after <i>overseas</i> surrogacy arrangements upon return to Australia
Birth Certificate	Changes the Birth Certificate to list the intended parents instead of the surrogate and her partner	Does not change the Birth Certificate
Outcome	Transfers parentage from surrogate to intended parents	Grants parental responsibility to intended parents where they are not named on the birth certificate

Overseas surrogacy: Do I need an Australian lawyer?

The short answer is, probably not. You can engage a lawyer in your destination country, who will guide you through the Surrogacy and Donor Agreements. You may like to ask an Australian lawyer to review the Agreements as well, but remember that Australian lawyers are not experts in overseas surrogacy laws, and they're also not insured to practice in overseas jurisdictions.

After the baby is born, the agency and lawyer in your destination country should facilitate the process to have the birth registered. Most countries now allow the intended parents to be listed on the Birth Certificate, even where there is no genetic connection between the parents and the baby. An Australian lawyer is not required for this process.

To bring the baby to Australia, you will need to apply for either Australian citizenship by descent, or a permanent visa for the baby. Again, you do not need an Australian lawyer to facilitate this process. Many intended parents have completed the process on their own, often online, and with assistance from Australian embassy and immigration officials. For more information, visit the Australian Department of Home Affairs www.homeaffairs.gov.au.

You may be required to complete DNA testing, and you can expect to provide copies of the Surrogacy Agreement as part of the application.

Much has been written about Australian family laws and recognising parentage of children born through overseas surrogacy. At the time of writing, it is unlikely that an Australian family court will grant a Parentage Order in those circumstances. Parents through overseas surrogacy are often anxious that the lack of recognition places them in precarious position when it comes to accessing services and being recognised as the parents of the child. In practice, there is usually nothing to be concerned about.

Parents of children through overseas surrogacy can apply for a passport, Centrelink benefits, Medicare benefits and enroll their child in childcare and school, without needing a Parentage Order. The legal process to apply for the Order is expensive and very often, no Order is granted. My short advice is: don't fix it if it's not broken. Spend your money on your new baby, not more lawyers.

Applying for a Parentage Order



When the baby is born, the surrogate and her partner register the baby's birth in the State where the baby is born. They can register the baby with a name chosen by the intended parents.

The surrogate and her partner are listed as the baby's parents on the birth certificate. Where the surrogate is single, she may not list a father on the Birth Certificate, but you should seek legal advice about your options.

Once the birth certificate is issued, the intended parents must apply for a Parentage Order (also called a Substitute Parentage Order). They apply to a Court in the State where they live. The purpose of a Parentage Order is to transfer parentage from the surrogate and her partner, to the intended parents. This has the effect of providing an Order that recognises the surrogacy arrangement, and who the true parents are.

The Order also tells the Registry of Births Deaths and Marriages (in the State where the child was born) to re-issue the birth certificate with the parents listed, instead of the surrogate and her partner.

For the Court to grant a Parentage Order, the intended parents need to provide evidence of the surrogacy arrangement, and that the surrogate and her partner have relinquished care of the baby to the parents. This is usually provided by way of Affidavits from each of the intended parents and the surrogate and her partner.

The Court will need to see evidence that the parties received legal advice and counselling prior to the pregnancy. In some States, post-surrogacy counselling is also a requirement of the Parentage Order.

You should refer to the legislation in the State where the intended parents live to understand the requirements that apply to you.

Where to go for more information

I hope that this Handbook has answered some of your initial questions about surrogacy in Australia. Remember, you will need to speak to your clinic and lawyer to find out more about how the surrogacy laws apply to your situation.

If you have any questions or feedback, please email me at sarah@sarahjefford.com

Below are links to sites that you might find useful. I cannot verify the information contained on those sites.

Australian Surrogacy Community on Facebook

www.facebook.com/groups/ftsaust/

This community supports Australian residents who are intended parents or surrogates, or parents who have created families through surrogacy.

EDA: Egg Donation Australia

www.eggdonationaustralia.com.au

EDA provides a supportive forum for people seeking egg donors or looking to donate their eggs. Egg donation in Australia is altruistic; we recommend you explore local options before considering overseas donation.

Families through Surrogacy

www.familiesthrusurrogacy.com

Families Through Surrogacy is a consumer-based non-profit organisation focused on bringing together surrogates, intended parents and families through surrogacy to network share their stories and stay informed about best practice in surrogacy arrangements.

Fertility Connections

www.fertilityconnections.com.au

Fertility Connection is an online community for Intended Parents, Surrogates and Donors.

RTC: The Reproductive Technology Council in Western Australia

www.rtc.org.au

The RTC regulates surrogacy arrangements in WA and is a useful resource for surrogates, intended parents, donors, legal and health professionals.

Surrogacy Australia

www.surrogacyaustralia.org

Surrogacy Australia promotes social inclusion and best practice in relation to all stakeholders in surrogacy arrangements, including parents, surrogates, children and service providers.

VARTA: The Victorian Assisted Reproductive Treatment Authority

www.varta.org.au

VARTA provides independent information and support for individuals, couples and health professionals on fertility and issues related to assisted reproductive treatment, including egg and sperm donation, infertility treatment and surrogacy in Victoria.

This Handbook is intended as informative only. It does not replace legal or medical advice. You should consult your medical specialist, fertility clinic and your lawyer for individual advice.





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