

Review of the Surrogacy Act 2010 and the Status of Children Act 1996

Submission from the NSW Anti-slavery
Commissioner

2 August 2024

Acknowledgement of Country

As New South Wales Anti-slavery Commissioner, I acknowledge that Aboriginal and Torres Strait Islander peoples are the first peoples and traditional custodians of Australia and the oldest continuing culture in human history.

I acknowledge that First Nations communities in New South Wales have survived practices that today we call modern slavery. The legacies of that treatment continue to affect Aboriginal and Torres Strait Islander people today, and through them affect the New South Wales community and economy.

My Office and I pay our respects to elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to country and acknowledge their continuing custodianship of the land, seas and sky. We acknowledge their ongoing stewardship and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families and communities, towards improved economic, social and cultural outcomes, self-determination and for real freedom.

Review of the Surrogacy Act 2010 and the Status of Children Act 1996

Published by the Office of the NSW Anti-slavery Commissioner

<https://dcj.nsw.gov.au/legal-and-justice/our-commissioners/anti-slavery-commissioner.html>

Not legal advice

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1 Background

1.1 Focus of this submission

1. In its Review of the *Surrogacy Act 2010* and the *Status of Children Act 1996* ('Review'), the Department of Communities and Justice ('the Department') has requested feedback on 28 questions covering a range of matters related to surrogacy arrangements in NSW and establishing parentage of children born through surrogacy.
2. This submission focuses on the Department's questions regarding commercial surrogacy (particularly international commercial surrogacy arrangements) and proposed amendments to remove the prohibition on international commercial surrogacy arrangements for intended parents in NSW.
3. My submission responds broadly to the following questions raised by the Department regarding commercial surrogacy arrangements:
 7. *Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?*
 8. *Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?*
 9. *Do the offences and penalties for commercial surrogacy in the Surrogacy Act meet the policy objectives?*
 10. *What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?*

1.2 Role of the NSW Anti-slavery Commissioner

4. I have served as New South Wales' independent Anti-slavery Commissioner ('Commissioner') since 1 August 2022. The role is an independent statutory office established by the Modern Slavery Act 2018 (NSW) ('MS Act').
5. The MS Act gives the role of Commissioner various functions, including:
 - Advocating for and promoting action to combat modern slavery.
 - Making recommendations and providing information and advice about action to prevent modern slavery.
 - Monitoring the effectiveness of legislation in combating modern slavery.¹
6. Additionally, the MS Act positively requires me to encourage good practice in prevention of modern slavery (section 9(2)(a)).
7. This submission is made in exercise of all these functions.

1.3 Acknowledgments

8. Proposals to amend the Surrogacy Act to remove prohibitions on international commercial surrogacy, including the Equality Legislation Amendment (LGBTIQA+) Bill 2023 ('Equality Bill 2023'), seek to take important steps to remove discrimination and barriers to well-being and

¹ Sections 9(1)(a), (c) and (f).

enjoyment of human rights for the LGBTIQ+ community in NSW. I strongly support steps taken to advance equality for LGBTIQ+ people and their full enjoyment of human rights.

9. I acknowledge that existing legal arrangements in NSW, which prohibit anyone domiciled in the State engaging in commercial surrogacy, create barriers to parenting for some people, notably those in the LGBTIQ+ community, and that this may have impacts on well-being.
10. I further acknowledge that the regulation of surrogacy is a complex and difficult matter, and that excessive reliance on criminal law as a regulatory tool may have counter-productive effects, driving intending parents to operate outside the law.² This is good for no one.
11. I also acknowledge that the amendments proposed in Schedule 19 of the Equality Bill 2023 seek to protect children born through commercial surrogacy, regardless of the legality of that arrangement. This objective is welcome, given Australia's commitment to the UN Convention on the Rights of the Child, which stipulates in Article 3(1) that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

2 Concerns regarding proposed amendments of the *Surrogacy Act 2010* and the *Status of Children Act 1996*

2.1 Poorly regulated commercial surrogacy arrangements may produce modern slavery in some circumstances

12. Surrogacy, whether commercial or altruistic, can in theory be organised in a manner that ensures that it is free of coercion and consistent with the rights of all parties. Commercial surrogacy is not inherently or unavoidably exploitative. However, when poorly regulated, commercial surrogacy may in some circumstances create several different risks relating to modern slavery.

2.1.1 Risks for the child

13. In accordance with its international commitments, Australia has a duty to protect the human rights of children born through surrogacy and to ensure that national legal and regulatory frameworks protect and promote their rights.³
14. In a 2018 report, the United Nations Special Rapporteur on the Sale and Sexual Exploitation of Children flagged concerns around abusive practices in some international commercial surrogacy arrangements.⁴ The Special Rapporteur observed that in some cases these practices may amount to the sale of children and made several recommendations, including the introduction of safeguards to prevent the sale of children in the context of commercial surrogacy.⁵

² Compare Anita Stuhmcke, "The regulation of commercial surrogacy: The wrong answers to the wrong questions" [2015] UTSLRS 16 (1 January 2015); (2015) 22 *Journal of Law and Medicine* 333.

³ United Nations Convention on the Rights of the Child, Art. 2.

⁴ United Nations Human Rights Office of the High Commissioner, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, 15 January 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement>.

⁵ Ibid.

15. In a 2016 submission to the Australian House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements, the Australian Human Rights Commission considered the questions of whether commercial surrogacy amounts to the sale of children at some length.⁶ The submission notes that the UN Committee on the Rights of the Child “does not consider that all commercial surrogacy arrangements amount to the sale of children. Rather, there is the potential for arrangements to amount to sale of children if they are unregulated.”⁷

2.1.2 Risks for the birth mother

16. Modern slavery risks are not, however, limited to the sale of the child. There may also be a risk that poorly regulated commercial surrogacy produces forced labour or even servitude of the birth mother.

17. The central question in any given arrangement is whether the birth mother has given free and informed consent to the agreement and whether she is at risk of exploitation, including risk of trafficking.⁸ As the University of Chicago Law School Global Human Rights Clinic has noted, as:

“a surrogate provides a service that requires dedication for a period of time and compromises her physical state through pregnancy, concerns of forced or compelled labor are arguably heightened and should be addressed by protective mechanisms to ensure a surrogate has the ability to make choices freely and engage in the process with proper consent.”⁹

18. This is not an abstract or hypothetical concern.

19. In September 2023, authorities in Greece raided the Mediterranean Fertility Institute, and charged all its staff members with participation in human trafficking, after an investigation uncovered use of brokers, fraud and record falsification to traffic at least 98 women from Ukraine, Moldova, Romania, Albania and Georgia, many of whom became birth mothers at the clinic. The operation targeted financially vulnerable women. In some cases it appears birth mothers were falsely told the embryo they were carrying was from another woman, when it was in fact their own – a ruse apparently intended to dupe them into participating in the arrangement and giving up their child to the intending parents.

20. Shockingly, around half of all the clientele for the Mediterranean Fertility Institute were, reportedly, Australian.¹⁰ Between 60 and 150 Australian families are thought to have been impacted.¹¹ Many lost tens of thousands of dollars, embryos and expectations of parenthood.

⁶ Australian Human Rights Commission, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements, pp. 29-35. Available at https://humanrights.gov.au/sites/default/files/20160217_AHRC_SurrogacySubmission.pdf.

⁷ Ibid., p. 31.

⁸ Hague Conference on Private International Law, A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements (2014), at [194]-[197].

⁹ University of Chicago Law School Global Human Rights Clinic, “Human Rights Implications of Global Surrogacy” (2019). *Global Human Rights Clinic*. 10, p. 19. Available at: <https://chicagounbound.uchicago.edu/ihrcl/10>.

¹⁰ Hester Underhill, “The Cretan baby scandal”, *The New European*, 28 October 2023, available at <https://www.theneweuropean.co.uk/the-cretan-baby-scandal-hester-underhill/>.

¹¹ Ibid. See also Rob Stott, “Australian woman fears Greek surrogacy scandal jeopardises her dream of motherhood”, ABC News, 9 September 2023. Available at <https://www.abc.net.au/news/2023-09-09/greek-surrogacy-scandal-australian-intended-parent/102819796>. And see Neos Kosmos, “Surrogacy scandals: Allegations of human trafficking, and illegal adoptions leave Australian families devastated”, 25 August 2023, available at <https://neoskosmos.com/en/2023/08/25/news/australia/surrogacy-scandal-human-trafficking-illegal-adoptions-and-heartbroken-aussie-families/>.

Some were temporarily separated from babies at the clinic due to doubts over parentage and citizenship.

21. As this tragic case demonstrates, the imbalance of power between some women involved in surrogacy arrangements and the clinics and their clients can create conditions ripe for manipulation and exploitation, with tragic consequences on all sides.
22. Earlier studies of commercial surrogacy in India – prior to the prohibition of commercial surrogacy through the adoption of the *Surrogacy (Regulation) Act 2021* (India), which prohibits any payment to surrogates except to cover their medical expenses and insurance¹² - identified that many birth mothers reported that they had felt ‘emotionally pressurized’ by their husbands to undergo surrogacy for financial reasons. Around half of these mothers were illiterate, making it difficult for them to understand the arrangement being put to them.¹³
23. Further, surrogacy arrangements in places where poverty drives birth mothers’ participation may tend to externalise risks onto those mothers: for example, in India, prior to the 2021 Act, commercial surrogacy arrangements were reportedly often not confirmed until the second trimester. This left birth mothers to carry the associated medical risks to that point, unprotected. (In contrast, under the *Surrogacy Act 2010* (NSW), the arrangement must be agreed prior to conception.) In some cases, where the pregnancy was not ultimately successful, mothers appear to have received no payment.¹⁴
24. Other cases have also arisen in jurisdictions proximate to Australia that point to considerable trafficking risks for birth mothers, notably in Thailand.¹⁵ One case involved a number of Vietnamese women trafficked to Thailand and exploited as commercial surrogates by a company called ‘Baby 101’. The owners of Baby 101, Taiwanese nationals, were convicted of trafficking in persons for exploitation.¹⁶ Such commercial surrogacy arrangements are now banned in Thailand.

2.2 Permitting unfettered participation in international commercial surrogacy arrangements risks contributing to modern slavery

25. Proposals to permit commercial surrogacy outside New South Wales, where the NSW government’s ability to ensure effective regulation is weakest, while continuing the ban on commercial surrogacy within New South Wales, where its ability to ensure effective regulation is strongest, could have unintended and perverse effects. This approach could, for example, *increase* the overall systemic risk of modern slavery occurring – because it will increase demand for commercial surrogacy without requiring safeguards to be in place to prevent that surrogacy producing modern slavery.

¹² See further <https://reproductiverights.org/assisted-reproduction-and-surrogacy-in-india/>

¹³ Centre for Social Research (India), *Surrogate Motherhood: Ethical or Commercial?* At <http://www.csrindia.org/surrogate-motherhood>.

¹⁴ Ibid.

¹⁵ See Yuri Hibino, “Non-commercial Surrogacy in Thailand: Ethical, Legal, and Social Implications in Local and Global Contexts”, *Asian Bioeth Rev.* 2020 May 29;12(2):135-147.

¹⁶ See “Choen Pai Wan and Others”, Thailand, in UNODC Sherloc, Case Law Database, available at https://sherloc.unodc.org/cld//case-law-doc/traffickingpersonscrimetype/tha/2012/choen_pai_wan_and_others.html?lng=en&tmpl=sherloc. See also UNODC Issue Paper (‘The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol’) 2015 https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf, p 72.

26. It may even create a race to the bottom. It may be easier and cheaper for NSW residents to become parents by organising a commercial surrogacy in a developing country, where there is less red tape and lower costs, than engaging in altruistic surrogacy in NSW – or engaging in commercial surrogacy arrangements in jurisdictions where there are more effective safeguards (and higher cost structures) in place. So, some part of the demand for surrogacy services may move off-shore.
27. The unintended result may be to encourage competition amongst commercial surrogacy providers, for clients from New South Wales, purely on price. The popularity of the Greek surrogacy clinic mentioned earlier, the Mediterranean Fertility Institute, appears to have derived at least in part from the fact that it cost around half, or less, the cost of equivalent services in the US.¹⁷
28. There is plenty of evidence from other supply-chains that, in the context of cross-border commercial transactions, heavy competition on price frequently leads suppliers to use coercion to force down costs of supply. The introduction of coercion into the employment relationship can, when combined with other factors such as discrimination, abuse, or poor working conditions, lead to forced labour violations.
29. This may, in turn, have the perverse and unintended effect of increasing the risk that NSW residents are *connected* to that modern slavery. Permitting unfettered participation in international commercial surrogacy will not induce NSW residents to differentiate commercial surrogacy providers or jurisdictions according to the actions they take to prevent modern slavery. It offers NSW residents little by way of ‘consumer protections’, placing them at risk of being drawn into financing modern slavery by unscrupulous surrogacy service providers. Distance, language barriers and cost are all likely to make it unfeasible for NSW residents to themselves conduct effective due diligence on offshore providers, leaving them significantly exposed to potential involvement in modern slavery.

2.3 NSW residents may end up being exposed to criminal liability for violation of certain Commonwealth and NSW offences identified in Schedule 2 of the MS Act, or violation of modern slavery laws overseas

30. It appears, consequently, foreseeable that in certain circumstances participation in offshore commercial surrogacy arrangements could give rise to criminal liability in NSW for modern slavery offences as identified in the MS Act, notwithstanding the removal of the prohibition under the *Surrogacy Act 2010* (NSW). I note that the Australian Government has expressly recognised that the Commonwealth Criminal Code offences of slavery, slavery-like practices, servitude and forced labour “could apply to international commercial surrogacy arrangements that involve the exploitation of the surrogate mother or the child”.¹⁸ Writing as recently as 2022, the Australian Attorney-General’s Department noted “Surrogacy, including forced surrogacy, can in specific circumstances constitute trafficking in persons, slavery or a slavery-like practice.”¹⁹

¹⁷ Underhill, *op. cit.*

¹⁸ See Australian Government, “Australian Government response to the Standing Committee on Social Policy and Legal Affairs report: Surrogacy Matters”, November 2018, p. 3.

¹⁹ Australian Government Attorney-General’s Department, “Targeted Review of Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth), Discussion Paper, 2022. Available at https://consultations.ag.gov.au/crime/modern-slavery-offences/user_uploads/targeted-review-of-divisions-270-and-271-of-the-criminal-code.pdf.

31. There appears to me to be an arguable case that in certain circumstances NSW residents involved in commercial surrogacy offshore could potentially be exposed to liability for or relating to the following offences identified as modern slavery offences in Schedule 2 of the MS Act:
- servitude offences under section 270.5 of the Commonwealth Criminal Code
 - servitude under section 93AB of the *Crimes Act 1900* (NSW)
 - trading in tissue prohibited under section 32 of the *Human Tissue Act 1983* (NSW)
 - forced labour offences under section 270.6A of the Commonwealth Criminal Code
 - trafficking in persons under section 271.2 of the Commonwealth Criminal Code
32. Nor is it unthinkable that this could give rise to prosecution. In June 2011, Watts J in the Family Court of Australia referred two cases involving intended parents from Queensland who had engaged in commercial surrogacy arrangements in Thailand to the Director of Public Prosecutions to consider prosecution under the previous offences provisions in the *Surrogate Parenthood Act 1988* (Qld). The DPP declined in that case to proceed with prosecutions, but the shadow of prosecution may subsequently have reduced applications to the court for parentage orders.²⁰
33. In Australia, investigation and prosecution of modern slavery offences are usually referred to and led by federal agencies. Accordingly, the critical question in this case would be the willingness of these agencies to pursue a prosecution, notwithstanding NSW's legalisation of participation in offshore commercial surrogacy. I can only speculate on this question, but direct engagement with the relevant Commonwealth agencies might help to ensure that the passage of Schedule 19 would not unintentionally expose NSW residents to criminal liability under federal law.
34. Finally, participation in poorly regulated offshore commercial surrogacy arrangements could also expose NSW residents and other Australian citizens to liability under laws of other jurisdictions restricting or criminalising commercial surrogacy. I note, for example, the 2017 conviction of an Australian citizen in Cambodia for falsifying documents and acting as an intermediary between a commercial surrogate and foreign adoptive parents.²¹

3 The need for safeguards and consultation with federal authorities

35. Whether or not to permit commercial surrogacy, in NSW or outside the jurisdiction, is properly a policy matter for the Parliament. That decision goes beyond the four corners of my mandate under the *Modern Slavery Act 2018* (NSW). Nonetheless, this submission has served to highlight that commercial surrogacy necessarily involves certain modern slavery risks. Any move to permit NSW residents to participate in commercial surrogacy should be accompanied by proportionate safeguards to ensure those NSW residents neither contribute to increased modern slavery risk, nor suffer criminal liability for conduct permissible under NSW law.
36. These safeguards should also aim to ensure the protection of human rights, notably the rights of birth mothers, and of children. Government has a critical role to play in protecting these human rights through effective regulation of commercial surrogacy, even where it occurs largely offshore. This may mean that commercial surrogacy should only be permitted where government actors, after appropriate research and consultation with relevant experts, definitively assess that

²⁰ Australian Human Rights Commission, *op. cit.*

²¹ Holly Robertson, "Tammy Davis-Charles: Australian nurse found guilty in Cambodia surrogacy trial", *ABC News*, 3 August 2017, <https://www.abc.net.au/news/2017-08-03/tammy-davis-charles-jailed-in-cambodia-over-surrogacy-business/8770418>.

commercial surrogacy arrangements in a jurisdiction conform with Australia's anti-slavery commitments – or, indeed, their broader potential impacts on human rights.

37. While altruistic surrogacy is subject to a carefully designed legislative framework (in the *Surrogacy Act 2010* (NSW)), it is unclear how this would apply to commercial surrogacy offshore. Many of the provisions stipulated in the Act to safeguard all parties, such as the requirement that the affected parties, including the birth mother, receive advice from an Australian legal practitioner (section 36), seem difficult to implement in the context of offshore commercial surrogacy.
38. An alternative approach could involve a mandated, perhaps periodic, expert review of specific jurisdictions' regulatory and enforcement arrangements for commercial surrogacy, to assure they meet a defined regulatory standard that protects human rights, conforms with Australia's international anti-slavery commitments, and offers safeguards for NSW residents to protect them against unwitting exposure to criminal liability for modern slavery offences. This assessment could be undertaken by a panel of suitably qualified surrogacy, medical, and anti-slavery experts.
39. This approach seems to conform with the general approach suggested by the Australian Human Rights Commission in its 2016 submission to the House of Representatives Committee Inquiry mentioned earlier.²²
40. However, such an approach may raise complex issues relating to:
- consistency between Commonwealth criminal law, including as it relates to modern slavery, and NSW law,
 - consistency between federal and state policy on commercial surrogacy,
 - impacts on Australia's bilateral relations with countries evaluated for inclusion in the approved jurisdictions list.

These issues would require careful consideration and consultation with relevant federal authorities.

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²² Australian Human Rights Commission, op. cit.

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