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Dear Colleague

REPEAL SOUGHT OF PART 3 OF THE *FAMILY LAW AMENDMENT (2026 MEASURES NO. 1) REGULATIONS 2026***ACTION SOUGHT**

I seek that matters in essence be put back to where they were on 2 September, 2026, with the repeal of Part 3 of the *Family Law Amendment (2026 Measures No. 1) Regulations 2026* until a clear and measured pathway forward concerning the recognition of children born overseas through surrogacy is undertaken in response to the ALRC surrogacy report.

OVERVIEW

The proposed repeal of regulation 10(3) of the *Family Law Regulations 2024*, due to take effect on 9 December 2026, would effectively remove statutory presumptions that help establish the legal parentage of children born overseas through surrogacy, restoring legal uncertainty about parentage, and likely resulting in costly and unnecessary litigation for affected families. These changes were made without consultation or a satisfactory explanation of the need for them. They risk undermining children's rights to identity, family relationships and right to non-discrimination.

INTRODUCTION

On 3 September 2026, the Governor-General made the above regulations.

Part 3 of the *Regulations* provides in item 6 that subsection 10(3) of the *Family Law Regulations 2024* (Cth) be repealed. It then provides that this repeal will commence from 9 December 2026. Before that date, if there are any proceedings on foot, then presumptions referred to in s.10(3) will remain, but not for any new proceedings after that date. Instead of wide application, as s.10(3) provides, part 3 allows for the presumptions to apply only to international maintenance cases, which are by their nature, extremely rare.

To illustrate that last point, I was admitted as a solicitor in 1987, and was a full time articled law clerk starting in 1985. I have practised in family law since 1985, and have specialised in family law in

1988, becoming an accredited specialist in 1996. In that time, over 40 years, I have handled all types of family law matters, but only one international maintenance case.

WHY REPEAL OF PART 3 IS SOUGHT

The 2026 Regulations were made:

1. Immediately before or at the time of the receipt by the Attorney-General of the Australian Law Reform Commission surrogacy review report. The action in repealing s.10(3) has pre-empted a thorough and considered review by the Commonwealth and the States and Territories of that report. That report was due to be delivered to the Attorney-General, the Hon. Michelle Rowland MP, by 11 September 2026. It is yet to be tabled by her in Parliament.
2. Without any consultation with key stakeholders, including the children and the parents affected by this change. There was no consultation with Equality Australia, Rainbow Families Australia, Surrogacy Australia or the Fertility Society of Australia and New Zealand¹. I became aware of the Regulations on Monday. That was the first that others became aware- when I told them. The chair of the Family Law Section of the Law Council of Australia, Mr Jason Walker, has made plain that the Section was not consulted either: *“Thank you for bringing this to my attention. We had our last meeting with AGD in September. This was not raised and has come complete surprise to me.”* How can it be that the Department met with the Section in September and did not mention a change of this magnitude?
3. Under a veil of secrecy. With a change of this magnitude, one would expect that there would be a Departmental media release, or one by the Attorney-General, or possibly one by the Federal Circuit and Family Court of Australia. There appear to have been none.
4. Critically, without any consideration of the impact on the affected children, their parents and their families from a whiplash inducing acceptance of parentage on 1 April 2025, to a removal of that acceptance on 9 December 2026. The removal of the presumptions of parentage for the affected children appears to perpetuate the judicial criticism of discrimination of children born through surrogacy, by the ongoing failure to recognise the functional parents of these children as their lawful parents.
5. Without apparent consideration of Australia’s international obligations under the UN *Convention on the Rights of the Child*, and the *International Covenant on Civil and Political Rights*. The Government can, of course, choose to do so- but if it does so, then it ought to explain to the public and the affected parties why it has chosen to do so. Put bluntly, the Government has not put forward that argument. Indeed, there has no explanation *to anyone* why it has taken this action.
6. Without any obvious urgency justifying the repeal in such circumstances.

The proposed repeal of Part 3 would enable a calm, considered and methodical approach, with input from affected individuals and stakeholders, and after due reflection of the ALRC surrogacy report,

If there are concerns by the Commonwealth about possible abuse of the parentage presumptions for children born overseas, that they be addressed at that time, with the ability by affected individuals and stakeholders to provide information and make submissions.

THE PREVIOUS RECOMMENDATIONS FOR REFORM

¹ Of which I am Secretary.

Following the Family Law Council report on the status of children (2013), which recommended that there be a review of surrogacy issues, the House of Representatives held an inquiry into surrogacy (2016). It has been a decade since that inquiry recommended that there be national, non-discriminatory surrogacy laws. Those laws have not been achieved. There are no national surrogacy laws.

Discrimination still exists, as to the location of the parties, under the *Surrogacy Act 2012* (Tas). Everyone to the surrogacy arrangement must reside in Tasmania².

Discrimination concerning sexuality only ended in May 2026 in Western Australia, following the Western Australia Court of Appeal finding that s.19 of the *Surrogacy Act 2008* (WA), which prevented a gay couple, the Dunns, from accessing surrogacy there, was in breach of s.22 of the *Sex Discrimination Act 1984* (Cth)³, and was therefore invalid.

Despite that report being delivered a decade ago, there remain inconsistencies between the States about how surrogacy is regulated. Victoria, for example, refuses to recognise interstate parentage orders unless a registration order has been made there, despite s.118 of the *Constitution*, s.185 of the *Evidence Act 1995* (Cth) and s.60HB of the *Family Law Act 1975* (Cth), which apply otherwise. When a South Australian woman enters into a surrogacy arrangement with interstate intended parents, that agreement is deemed unlawful⁴.

Any substantive response to the ALRC report ought, if possible, be undertaken by all nine Australian Governments, so that this time there can be lasting, equitable, systemic and effective reform.

DISCUSSION

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Art. 23.1, *International Covenant on Civil and Political Rights*

Parliament has said, as recently as 2024, that the objects of Part VII of the *Family Law Act 1975*, the Part that was entitled Parenting, but is now more appropriately entitled Children, are to ensure that the best interests of children are met, including by ensuring their safety and to give effect to the United Nations *Convention on the Rights of the Child* (“UNCRC”)⁵. S.10(3) of the *Family Law Regulations 2024* relates back to Division 12 of Part VII of the Act, and critically to parentage presumptions in sections 69P to 69T.

UNCRC

Relevant provisions of the *Convention* include:

- **Art.2**, that the child not be discriminated against. This is to the same effect as art. 2 of the *International Covenant on Civil and Political Rights*.
- **Art. 3**, that in all actions concerning children, the best interests of the child shall be a primary consideration, including the state taking up all appropriate legislative and administrative measures.

² S.16(2)(g).

³ *Dunn v WA Reproductive Technology Council* [2026] WASCA 65.

⁴ *Surrogacy Act 2019* (SA), ss. 4 lawful surrogacy agreement, 9 and 10.

⁵ S.60B.

- **Art. 5**, whereby the State shall respect the responsibilities, rights and duties of parents.
- **Art. 7**, that the child shall be registered immediately after birth and have the right to know and be cared for by his or her parents. This is consistent with art. 23.1 of the *ICCPR* that: “*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*”
- **Art. 8**, whereby States undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
- **Art. 16**, whereby no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. This article is to the same effect as art.17 of the *ICCPR*.

Art. 16 is similar in terms to art. 8 of the *European Convention on Human Rights*. Most notably in *Mennesson v France* ECtHR Application no 65192/11 (2014), the European Court of Human Rights held that the lack of recognition under French law of the legal parent-child relationship between the intended parents and the children born through surrogacy in the United States “*necessarily affects their family life*”⁶.

Further⁷:

“As the Court has observed, respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. As domestic law currently stands, the third and fourth applicants [the children] are in a position of legal uncertainty. While it is true that a legal parent-child relationship with the first and second applicants [the intended parents] is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children’s identity within French society.” (emphasis added)

PARENTAGE PRESUMPTIONS

Part VII of the *Family Law Act 1975* contains various parentage presumptions:

“Spread across different divisions in Part VII there are a number of provisions that deal with parentage, presumptions and declarations of parentage. Those in Division 1 subdivision D operate to irrebuttably deem a child for the purposes of the Act, in the circumstances there identified, the child of designated people. Those in Division 12 subdivision D create rebuttable presumptions for the purpose of the Act. Notably by s 69U it is acknowledged that two or more presumptions under that subdivision may apply, in which case (excluding s 69S(1)) it is for the Court to determine which presumption should prevail. Then in Division 12 subdivision E, the Court is empowered to issue a declaration of parentage that is conclusive for the purposes of all laws of the Commonwealth. In essence there is a scheme which operates so that, for the

⁶ [87].

⁷ [96].

purpose of the Act or federal law, children may variously be deemed, presumed or declared the child of a person.”⁸

Parentage presumptions “operate in the interests of children”⁹. The “finding that a particular man is the child’s father might well be of the greatest significance to the child in establishing his or her lifetime identity”¹⁰. They give certainty, without the need for a judicial determination, about who is, and who is not, a parent.

This statutory approach gives some certainty in application. This contrasts with the broader, more uncertain test that where Parliament has not specified who is a parent, who is a parent is a factual one. Application of that factual test varies from case to case, and therefore brings with it uncertainty.

DIVISION 1, SUBDIVISION D PRESUMPTIONS

There are two presumptions:

- **S.60H**, children born from an artificial conception procedure. This presumes a married couple, de facto partners or the woman who gave birth to be the parents of the child, irrespective of any genetic link. The section does not apply to children born via surrogacy¹¹.
- **S.60HB**, children born via surrogacy, who are the subject of a State or Territory parentage order. This provision replicates the effect of the full faith and credit clause of the *Constitution*, s.118, in turn taken up by the *Evidence Act 1995*, s.185.

Both ss.60H and 60HB have limited scope:

*“However, neither s 60H nor s 60HB apply unless the circumstances of the child’s birth fall within the terms of the respective section.”*¹²

Therefore:

1. where a man and a woman who after 15 years of trying to conceive a child, again agree that she will undergo IVF, but they are no longer in a de facto relationship together, then s.60H will not apply to him to presume him to be the father of the child that is born¹³. Nor will s.60H apply to a man when the man and the woman had been in a relationship, but not a de facto relationship, and only form their de facto relationship after the child has been conceived¹⁴.
2. a birth of a child overseas via surrogacy falls neither within the scope of s.60H nor s.60HB.

DIVISION 12, SUBDIVISION D

This contains five rebuttable presumptions of parentage. As they are in Division 12, then s.10(3) of the *Regulations* applies. The presumptions are:

- **S.69P** presumptions of parentage arising from marriage
- **S.69Q** presumption of paternity arising from cohabitation

⁸ *Ellison & Karnchanit* [2012] FamCA 602, [34].

⁹ *G v H* [1994] HCA 48; (1994) 181 CLR 387, 400 per Deane, Dawson and Gaudron JJ.

¹⁰ *G v H*, 391 per Brennan and McHugh JJ.

¹¹ *Bernieres & Dhopal* [2017] FamCAFC 180, [58].

¹² *Ophoven & Berzina* [2025] FedCFamC1A 97, [24].

¹³ *Mizushima & Crocetti (No 3)* [2024] FedCFamC1F 542.

¹⁴ *Ophoven & Berzina*.

- **S.69R** presumption of parentage arising from registration of birth
- **S.69S** presumptions of parentage arising from findings of courts
- **S.69T** presumption of paternity arising from acknowledgments

These presumptions are significant.

For example, as to s.69R:

*“Where both parties register the birth of a child and include their names on the registration of birth such that the birth certificate issues, naming them as the legal parents of the child, this creates a rebuttable presumption. It is a public declaration by those persons of the identity of the persons who are to be regarded as the child’s legal parents.”*¹⁵

This presumption has proven important in determining who is a parent when there was no biological connection between father and child, for a child born through IVF¹⁶. The presumption of parentage arising from birth registration also been taken into account in determining parentage for the purposes of citizenship¹⁷.

These rebuttable parentage presumptions are replicated in State and Territory *Status of Children Acts*. However, there can be subtle differences. For example, a court order in the United States in which a finding is made that the person is the child’s parent is apparently taken up by s.26(1)(a) of the *Status of Children Act 1978* (Qld), although it is not taken up by its equivalent provision in s.69S(1A) of the *Family Law Act 1975*, because the United States is a schedule 2 jurisdiction and not a schedule 4 jurisdiction under the *Family Law Regulations*, s.69(1A) making a distinction.

It is a mistake to assume that the relevance of these presumptions is only as to some arcane point of family law. Who is a child’s parent impacts a child in a whole host of ways, including¹⁸:

- Who has parental responsibility for medical treatment for the child
- Registering with Medicare and health funds
- Applications for passports, childcare, sporting clubs and school that require a birth certificate specifying the child’s parents
- Inheritance rights, including to intestacy and superannuation
- The ability of a child to be referred to as a “child” in a will
- Recognition of entitlements to child support and child maintenance, and rights to entitlements on injury or death of a parent in schemes of workers compensation.

I acted in a number of cases in the Family Court of Australia concerning the registration of an overseas child order made in the United States with that court. The underlying motivation of several of my

¹⁵ *Ophoven*, [68]. See also the application of this principle in *H v Minister for Immigration and Citizenship* [2010] FCAFC 119, concerning the case of *NWH*.

¹⁶ *Ophoven*, *Mizushima*.

¹⁷ *Minister for Immigration, Citizenship and Multicultural Affairs v Lieu*, by her Litigation Representative *Nguyen* [2023] FCAFC 57.

¹⁸ *Dudley & Chedi* [2011] FamCA 502, [22]. See also *BLH v SJW* [2010] QChC 1.

clients in bringing those applications was to ensure that their children were not excluded from inheritance.

Until 31 March 2025, these presumptions only applied to children born in Australia, not overseas. This is despite Australia being a land of migrants, with 32% of us having been born overseas¹⁹.

HISTORICAL ISSUES

Since at least 2008, Australian intended parents have undertaken overseas surrogacy journeys.

In broad terms, for every child born through surrogacy in Australia, many more have been born overseas. Policymakers have seen that the norm is that children are born via surrogacy in Australia, and the exception is that children are born via surrogacy overseas. The reality however is the opposite. The norm is that children are born via surrogacy overseas, and the exception is that children are born via surrogacy in Australia.

The most recent figures show that for every child born in Australia via surrogacy, approximately five are born overseas, and that more Australian children are born via surrogacy in the United States alone, than in Australia, as seen in **Table 1**.

Table 1: Australian children born via surrogacy

Year	Australian gestational surrogacy births, year ended 31 December ²⁰	Australian surrogacy births overseas, year ended 30 June ²¹	Australian surrogacy births in the United States, year ended 30 June ²²
2021	82	223	76
2022	114	213	99
2023	84	236	68
2024	83	376	121
2025		377	137
2026		416	125

Until the *Family Law Regulations 2024* commenced, recognition of parentage of children born overseas through surrogacy was uncertain and messy. While this had some impact on the parents, the more adverse impact was on those who did not choose to be conceived and born, were the most vulnerable, and deserved protection: the children.

The Family Court of Australia and the Federal Circuit and Family Court of Australia have had until last year (and may still have) differing approaches to the recognition of parentage of children born overseas through surrogacy. The Court has had one of three approaches:

¹⁹ <https://www.abs.gov.au/statistics/people/population/australias-population-country-birth/latest-release>.

²⁰ Source: Annual Reports of Australian and New Zealand Assisted Reproductive Database, and ECART reports (NZ).

²¹ Source: Department of Home Affairs, *Applications for Australian citizenship by descent for children born overseas through surrogacy*.

²² Ibid.

- The intended parents were the parents.
- The intended parents were not the parents.
- Uncertainty about whether or not the parents were the parents.

Two cases illustrate the evident problem, that of Mr and Mrs Dennis/Dudley and that of Mr and Mr Mason.

A Queensland couple, called by pseudonym either **Mr and Mrs Dennis** or **Mr and Mrs Dudley**, had two parallel surrogacy journeys in Thailand. They then brought two separate applications to the Family Court of Australia for parental responsibility for the children. In the first case, Mr Dennis/Dudley was found to be the father. One of the reasons for this finding was because he was named as the father on the birth certificate.²³ Although the Thai surrogate was a gestational surrogate, the assumption in both cases was that she was the mother. She was the mother under Thai law²⁴, but there was no apparent consideration in the first case of whether she or Mrs Dennis/Dudley (or both of them) was a parent under Australian law.

At all times, Mrs Dennis/Dudley was a legal stranger to both children.

In the second case, Mr Dennis/Dudley was not recognised as the parents of the twins²⁵, but both Mr and Mrs Dennis/Dudley were referred for prosecution, for engaging in commercial surrogacy overseas.

A NSW gay couple, **Mr and Mr Mason**, originally from the UK, underwent surrogacy in India. The biological father was found²⁶ not to be a parent under the *Family Law Act*, a reversal of position that the judge concerned had taken with a similar case (from Thailand) the previous year²⁷. Instead, they returned to the United Kingdom, where a parental order was made in their favour²⁸. There was no apparent ability for Australian courts to recognise their parentage.

In 2017, the Full Court of the Family Court of Australia held²⁹ that a Melbourne couple who had undergone surrogacy and egg donation in India were not the parents of the child. The child had acquired Australian citizenship by descent, which meant that a Delegate of the Minister was satisfied that at the time of birth the child had an Australian citizen parent. The Court did not:

- Take into account the provisions of the *UNCRC*, even though it was relevant under s.60B of the Act;
- Say who, therefore, was the parent or parents of the child. As a US court has said³⁰, there is a public policy that a child has a parent or parents. The obvious conclusion is that the child either had no parents or that the parents were the Indian surrogate and her husband, people who under the law of India, as per the contract, were not the parents, were not named on the child's birth certificates as the parents, were not the genetic parents, had never parented the child (and nor did they ever have any intention to do so), and were not the functional parents of the child.

²³ *Dennis & Pradchapet* [2011] FamCA 123, [18].

²⁴ [20].

²⁵ *Dudley & Chedi* [2011] FamCA 502, [32].

²⁶ *Mason & Mason* [2013] FamCA 424.

²⁷ *Ellison & Karnchanit* [2012] FamCA 602.

²⁸ *AB v CD (Surrogacy: Time Limit and Consent)* [2015] EWFC 12.

²⁹ *Bernieres & Dhopal* [2018] FamCAFC 180.

³⁰ *In re Marriage of Buzzanca* 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280 (1998).

There were a small number of cases where parentage of children born overseas through surrogacy was recognised either automatically, or by court order:

1. Automatically when the overseas method of regulation of surrogacy was by adoption, as for example in some cases in Florida, due to the definitions of *adopted*, *child* and *parent* in s.4 of the Act which recognise the parentage of children adopted overseas.
2. In one case, the general parentage presumptions under the Act did not apply to children born in South Africa via surrogacy to a man who was resident there, a comity approach being adopted³¹.
3. When parentage orders were made in 48 out of 51 United States jurisdictions, those orders could be registered with the Family Court of Australia³². However, registration was refused by one judge when the Court could not exclude that the parties had engaged in commercial surrogacy³³. In five of the reported six cases, the parents through surrogacy were living overseas. In all of the cases, the children had already acquired Australian citizenship by descent.

The Court has been clear that even if a person is recognised overseas as a parent, that is not the test in Australia. The test in Australia is whether or not a person is recognised *here* as a parent, which process will involve consideration of relevant parentage presumptions³⁴.

In 2019, the High Court held in the co-parenting case of *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554 that, absent Parliament saying so, who was a parent under the *Family Law Act* was a question of fact.

While the application of the test in *Masson* has been a significant improvement on the previous approach, each case is confined to its own facts, and has led to inconsistent outcomes since *Masson*:

1. The genetic intended father through surrogacy is a parent under the Act³⁵.
2. The genetic intended father through surrogacy is not a parent under the Act³⁶.
3. It is unclear if the surrogate or the non-genetic intended parent is a parent under the Act³⁷.
4. A non-genetic parent through IVF is a parent under the Act³⁸, although the dissenting judge held that to be a parent under the Act, there needed to be a genetic connection between parent and child.

Although *Masson* has provided some guidance, application of its principles remains a lottery for children (and their parents) about whether or not their intended parents are recognised as their parents under the Act. Statutory parentage presumptions bring more certainty as to the outcome.

MORE THAN TWO PARENTS

³¹ *Carlton & Bissett* [2013] FamCA.

³² *Re Halvard* [2016] FamCA 1045; *Re Grosvenor* [2017] FamCA 366 ; *Sigley & Sigley* [2018] FamCA 3. I acted for the applicants in *Grosvenor* and *Sigley*.

³³ *Rose* [2018] FamCA 366; *Allan & Peters* [2018] FamCA 978. I acted for the applicants in both cases.

³⁴ *Ellison & Karnchanit* [2012] FamCA 602; *Farnell & Chanbua* [2016] FCWA 17.

³⁵ *Seto & Poon* [2021] FamCA 288; *Tickner & Rodda* [2021] FedCFamC1F 279; *Gallo & Ruiz* [2024] FedCFamC1F 893.

³⁶ *Lloyd & Compton* [2025] FedCFamC1F 28; *Noake & Chetwyn* [2025] FedCFamC1F 332,

³⁷ *Seto & Poon*; *Tickner & Rodda*.

³⁸ *Mizushima & Crocetti (No 3)*; *Ophoven & Berzina*.

Some children have more than two parents³⁹. There is now the ability for more than two parents to be recognised under the *Family Law Act* as the parents⁴⁰. It is essential, therefore, for those children that there is some certainty as to who are their lawful parents. This is best achieved by the use of rebuttable parentage presumptions. As children are often born overseas, it would be exclusionary and discriminatory for those parentage presumptions to apply only to children born in Australia, and not children born overseas also.

HOW DOES S.10(3) FIT IN?

The commencement of the *Family Law Regulations 2024*, which replaced the *Family Law Regulations 1984*, made two changes in this area:

1. Under s.72(1)(b)(ii), it is no longer possible to register an overseas surrogacy order with the court. They have been specifically excluded. The only apparent justification for doing so was if by other means the parentage of the child was otherwise recognised.
2. Under s.10(3), for the first time overseas countries were named for the purposes of the parenting presumptions. Therefore, the inability to register overseas surrogacy order was cured by the recognition of the parentage of the intended parents.

Section 10 concerns *prescribed overseas jurisdictions*. Section 10 provides:

“Meaning of prescribed overseas jurisdiction

- (1) *For the purposes of the definition of **prescribed overseas jurisdiction** in subsection 4(1) of the Act, this section declares countries, or parts of a country, outside Australia to be a prescribed overseas jurisdiction for the purposes of provisions.*

Provisions relating to State, Territory and overseas child orders

- (2) *Each country, or part of a country, specified in an item of the table in Schedule 1 is declared to be a prescribed overseas jurisdiction for the purposes of:*
 - (a) *the definition of **overseas child order** in subsection 4(1) of the Act; and*
 - (b) *each provision of Division 13 of Part VII of the Act.*

Note: This meaning applies in provisions of this instrument that use that defined term or that are made for the purposes of those provisions: see subsection 13(1) of the Legislation Act 2003. For example, this meaning applies in sections 72 and 73 of this instrument.

Provisions relating to presumptions of parentage and proof of birth, parentage, death or marriage

- (3) *Each country, or part of a country, specified in an item of the table in Schedule 2 as a reciprocating jurisdiction, and each jurisdiction prescribed in an item of the table in Schedule 4, is declared to be a prescribed overseas jurisdiction for the purposes of:*
 - (a) *each provision of Division 12 of Part VII of the Act; and*
 - (b) *section 102 of the Act.*

³⁹ For example, *Packer & Irwin* [2013] FCCA 658. I acted for the successful respondent.

⁴⁰ *Masson v Parsons* at [26]; *Ophoven & Berzina* at [63].

Note: This meaning applies in provisions of this instrument that are made for the purposes of those provisions: see subsection 13(1) of the Legislation Act 2003 .

Provisions relating to overseas maintenance agreements and financial agreements

(4) *Each country, or part of a country, specified in an item of the table in Schedule 2 as a reciprocating jurisdiction is declared to be a prescribed overseas jurisdiction for the purposes of:*

*(a) the definition of **overseas maintenance agreement** in subsection 4(1) of the Act; and*

(b) each provision of Part VIII of the Act; and

(c) section 110B of the Act.

Note: This meaning applies in provisions of this instrument that use that defined term or that are made for the purposes of those provisions: see subsection 13(1) of the Legislation Act 2003 . For example, this meaning applies in section 146 of this instrument.”

There was the apparent clear intent in section 10(3) on the part of the Government to recognise the parentage of children born overseas, if the places where the children were born were places where the Government was confident in the processes of the courts as to parentage (for schedule 4, as to the application of s.69S(1A)) or as to the issue of birth certificates (schedules 2 or 4).

WHAT IS THE EFFECT OF S.10(3)?

S.10(3) provides certainty, via statutory presumption, to many children born overseas that their functional parents are their parents.

By prescribing overseas jurisdictions for the purposes of the parentage presumptions in ss 69P to 69T, s 10(3) has:

- Caused a presumption of parentage to arise when a court in a schedule 4 country has found expressly that the person is a parent of a particular child: **s.69S(1A)**. In the context of surrogacy, this has meant that when a court in the United Kingdom has found that a person is a parent arising from the making of a parental order, or from when a court in Mexico has made an amparo⁴¹ order that a person is a parent, then that person is presumed, under s.69S(1A) to be a parent of the child.
- Presumed a man who has executed an instrument in a prescribed overseas jurisdiction acknowledging that he is the father of the child is the father of the child: **s.69T**. Therefore, if a man has executed an affidavit⁴², in support of a petition in California concerning a child to be born there through surrogacy, that he is the father of the child, then he is presumed, under s.69T, to be the father.
- When the intended parents through surrogacy are recognised in the *prescribed overseas jurisdiction* as the child’s parents on the birth certificate, then they are presumed to be the parents: **s.69R**.

⁴¹ Constitutional protection.

⁴² *AI & JN* [2006] FMCAfam 566.

In *Allbring & Barsotti* [2026] FedCFamC2F 602, a gay couple from NSW underwent surrogacy in the United States. A child was born. A court order issued recognising them as the parents. A birth certificate issued in the United States. Judge Harland applied s.10(3) of the *Regulations* and s.69R of the *Act* to find that the couple were presumed to be the parents of the child. Her Honour then issued a declaration to that effect.

Judge Harland could also have arrived at that point by application of s.69T (at least in respect of one of the men), but she did not follow that path.

Her Honour said:

“ [5] Like many families who have had trouble finding a surrogate in Australia the parties looked overseas for a solution....

[7] Many children born of surrogacy arrangements are discriminated against due to not having both functional parents recognised as their legal parents. Having legal parents gives the child a series of other rights including inheritance rights. Parental responsibility is much more limited. The ALRC addresses the importance of children born of surrogacy having their functional parents recognised as their legal parents.

[8] The United Nations Convention on the Rights of the Child (“UNCRC”) recognises the importance of a child’s right to identity. It is referred to as a gateway right to many other rights which is an important gateway to a series of other human rights including the right to be cared for by their parents. Many children born from surrogacy arrangements are discriminated against where one or more of their functional parents are not recognised as their legal parent....

[16] Previous versions of the family law regulations did not contain any prescribed jurisdictions for the purposes of the parentage provisions. The explanatory statement to the Family Law Regulations 2024 (“the regulations”) refers to the United Nations Convention on the Rights of the Child and articles 7 and 8 particularly, which refers to children’s rights to be registered immediately after birth, to acquire a nationality and to know and be cared for by their parents and have their identity preserved and family relations recognised. With respect to regulation 10 the Explanatory Statement refers to ensuring that necessary and appropriate prescribed overseas jurisdictions are prescribed ensuring that presumptions of parentage in other jurisdictions are given effect to and provides processes to relating to registrations of birth in overseas jurisdictions. The Supplementary Explanatory Statement to the regulations adds specific reference to article 2 of the UNCRC which refers to the right of the child to be free from discrimination. This is particularly relevant to children born of surrogacy arrangements who are discriminated against when their parents do not have legal status.

[17] Regulation 10(3) of the regulations refers to prescribed overseas jurisdictions for the provisions dealing with presumptions of parentage (found in Division 12 of Part VII of the FLA) and proof of birth, parentage, death or marriage (section 102 of the FLA). The definition found at section 4(1) of the FLA includes a schedule of prescribed overseas jurisdictions. It refers to both reciprocating jurisdictions set out in Schedule 2 and jurisdictions set out in Schedule 4. Jurisdictions set out in schedules 2 and 4 of the regulations are defined as prescribed overseas jurisdictions for the purposes of Division 12 of Part VII of the FLA and section 102 of the FLA. The United States of America is listed in schedule 2.

[18] I am satisfied that section 69R of the FLA and schedule 2 of the regulations apply to permit me to recognise the applicants as X’s legal parents based on the US birth certificate naming

both of them as X's parents. I will make parentage declarations under s69VA of the FLA in favour of each of the applicants."

Example: Britney goes to British Columbia for surrogacy

Britney is a single Australian woman, resident in Queensland. Britney was married to Rob, but they have been separated for 8 years. They have not divorced.

Due to medical issues, Britney cannot reproduce without the assistance of an egg donor, a sperm donor and a surrogate. Her attempts at IVF in Australia have failed. Britney undertakes a surrogacy journey in British Columbia. A child, Jason, is born. A court order is made, declaring her to be the parent. A birth certificate issues in British Columbia naming Britney as the mother.

Jason acquires Australian citizenship by descent and an Australian passport.

Under s.10(3), as British Columbia is a schedule 2 jurisdiction, Britney is presumed under s.69R to be the mother of Jason. The same presumption, arising from s.10(3) also applies under the *Status of Children Act 1978* (Qld), s 25 (as to the presumption) and s 4 (the definition of *prescribed overseas jurisdiction* is that under the *Family Law Act*, s 4, which in turn leads to s 10(3)).

Further, under s.26(1) of the *Status of Children Act 1978* (Qld) because the British Columbia court has found Britney to be the parent, she is also presumed to be the parent. This provision only has application because of s.10(3) (even though s.69S(1A) would not apply, because British Columbia is a schedule 2 jurisdiction, not a schedule 4 jurisdiction, the latter being needed for the presumption under s.69S(1A) to apply).

In the absence of s.10(3), Britney has to be found as a matter of fact to be the mother of the child. No Australian court has found, following *Masson v Parsons*, absent the making of a domestic parentage order or the registration of an overseas child order, that a non-genetic parent through surrogacy is a parent of the child.

In several Canadian provinces, such as British Columbia, under its *Family Law Act*, SBC 2011, c 25, section 29, an intended parent under a compliant surrogacy arrangement is a parent by operation of law, without the need to obtain a court order. Some Australian intended parents achieve parentage by this means. If Britney had chosen this method to establish parentage, she would be presumed to be a parent under s.69R (and s 25 of the *Status of Children Act 1975* (Qld)), by virtue of the operation of s 10(3).

Britney dies intestate. She owned a home, subject to a mortgage, and was a member of a superannuation fund. Jason is aged 2.

The estate

Under schedule 2 of the *Succession Act 1981* (Qld), if the intestate is not survived by issue, then the spouse (in this case Rob) is entitled to the whole of the residuary estate. If the intestate had issue, then the estate is divided between the spouse and the issue, in this case between Rob and Jason. Who is a child of the intestate or issue is a person who is considered under Queensland law to be the child.

If there is no statutory presumption that Britney was the parent of Jason, then Jason will need to prove- as a matter of fact- that Britney was his parent for the purposes of Queensland law, in circumstances where:

- Britney was not the genetic parent, nor did she give birth.
- There is no specific statutory recognition of this parentage, given that the statutory recognition that existed with s.10(3) will be removed with the repeal of s.10(3), which may indicate on the part of the Government to the Court that the Government did not want that type of parentage to be recognised in Australia. In the absence of an explanation from the Government, what other message could the Court glean?
- Expert evidence would need to be obtained from Canada as to the recognition of Britney's parentage of Jason there.

To run such a case would be problematic, costly, and have a significant risk that Jason receives no inheritance.

The retention of the presumption by virtue of s.10(3) makes the running of the case for Jason much simpler and cheaper, and would likely mean that litigation would resolve at an earlier stage, with Britney's parentage of Jason recognised.

Superannuation claim

The definition of *child* under s. 10 of the *SIS Act* includes someone who is a child of the person within the meaning of the *Family Law Act 1975*⁴³. Superannuation trustees may decline to make payment to Jason if they are not satisfied as a matter of fact that Britney was Jason's parent. It would be much simpler, easier, quicker and cheaper, in making that application to the trustees, to rely on the statutory presumption under ss 69R and 25, based on s.10(3).

WHICH COUNTRIES ARE COVERED BY THE PRESUMPTION?

These are set out in **Table 2**. I have set out how many applicants born through surrogacy in each country has applied for Australian citizenship by descent.

Table 2: Overseas countries that are prescribed under s.10(3)

Country	Listed in schedule 2	Listed in schedule 4	How many Australian children were born there via surrogacy 2009-2026 ⁴⁴
Algeria		✓	0
Argentina		✓	51+
Austria	✓	✓	1+
Barbados		✓	0

⁴³ S.10.

⁴⁴ Department of Home Affairs. The Department allocated <10, and more recently <5 for numbers under those figures, for privacy reasons. Those have been counted as one. Therefore, the + symbol has been used to denote that the number of children born in each such country may be more.

Country	Listed in schedule 2	Listed in schedule 4	How many Australian children were born there via surrogacy 2009-2026 ⁴⁴
Belarus	✓	✓	1+
Belgium	✓	✓	1+
Bosnia and Herzegovina		✓	0
Brazil		✓	6+
Brunei Darussalam	✓		0
Burkina Faso		✓	0
Canada, other than Quebec	✓		254+
Cape Verde		✓	0
Central African Republic		✓	0
Chile		✓	0
Colombia	✓	✓	134
Cook Islands	✓		0
Croatia		✓	0
Cyprus	✓	✓	10+
Czech Republic	✓	✓	3+
Denmark	✓	✓	0
Ecuador		✓	0
Estonia	✓	✓	0
Fiji	✓		0
Finland		✓	0
France	✓	✓	0
Germany	✓	✓	0
Gibraltar	✓		0
Greece		✓	38+
Guatemala		✓	2+
Haiti		✓	0
Holy See		✓	0
Hong Kong	✓		2+
Hungary		✓	0
India	✓		682+
Israel		✓	1+
Italy	✓	✓	1+
Kazakhstan	✓	✓	4+

Country	Listed in schedule 2	Listed in schedule 4	How many Australian children were born there via surrogacy 2009-2026 ⁴⁴
Kenya	✓		21+
Kyrgyzstan		✓	1+
Liberia		✓	0
Lithuania	✓		0
Luxembourg	✓	✓	0
Malawi	✓		0
Malaysia	✓		5+
Malta	✓		0
Mexico		✓	136
Monaco		✓	0
Montenegro		✓	0
Morocco		✓	0
Nauru	✓		0
Netherlands	✓	✓	0
New Zealand	✓	✓	4+
Niger		✓	0
Niue	✓		0
North Macedonia		✓	0
Norway	✓	✓	0
Pakistan		✓	4+
Papua New Guinea	✓		2+
Philippines		✓	1+
Poland	✓		2+
Portugal	✓	✓	0
Republic of Ireland	✓	✓	0
Republic of Moldova		✓	0
Romania		✓	0
Samoa	✓		1+
Serbia		✓	0
Seychelles		✓	0
Sierra Leone	✓		0
Singapore	✓		0
Slovak Republic	✓	✓	0
Slovenia		✓	0

Country	Listed in schedule 2	Listed in schedule 4	How many Australian children were born there via surrogacy 2009-2026 ⁴⁴
South Africa	✓		5+
Spain	✓	✓	0
Sri Lanka	✓	✓	4+
Suriname		✓	0
Sweden	✓	✓	0
Switzerland	✓	✓	0
Tanzania (excluding Zanzibar)	✓		0
Territory of Christmas Island	✓		0
Territory of Cocos (Keeling) Islands	✓		0
Trinidad and Tobago	✓		0
Tunisia		✓	0
Türkiye	✓	✓	1+
Ukraine		✓	334+
United Kingdom	✓	✓	26+
United States	✓		1,119+
Uruguay		✓	0
Zambia	✓		0
Zimbabwe	✓		0
Total			2,933

HOW MANY CHILDREN ARE AFFECTED BY THE REPEAL OF S.10(3)?

Approximately 3,000 of the approximately 4,000 children born overseas through surrogacy between 2009 and 2026 will be impacted by the repeal. Parentage presumptions do not end by operation of law upon the child turning 18. Parentage presumptions continue during the whole of the lifetime of the child (and may, in estate matters, continue beyond that).

According to the Department of Home Affairs⁴⁵, between 2009 and 2026, 3,762 children have applied for Australian citizenship by descent when they were born via surrogacy overseas. Using the Department's figures, and cross-checking as to where the children were born, at least 2,933 of those were born in countries that are schedule 2 or schedule 4 countries. I say, at least, because the Department measures small numbers of less than 5, and previously less than 10 as <5 or <10, for

⁴⁵ Applications for Australian citizenship by descent by children born overseas through surrogacy.

privacy reasons. Therefore, the calculation of the number of children by me in those instances has counted <5 or <10 as one child. Each may well be more.

ABOUT ME

I am a dad through domestic surrogacy and known egg donation. Since 1988, I have advised in over 2,170 surrogacy journeys.

I have not attached my curriculum vitae, which is very long. If requested, I will provide it.

I was admitted in 1987, and have been an accredited family law specialist for over 30 years. I am a Fellow of the International Academy of Family Lawyers, and co-chair its Sexual Orientation and Gender Identity Committee. I am a Fellow of the Academy of Adoption and Assisted Reproductive Attorneys, and am a member of its International and ART Resources Committees.

Since 2012, I have been an international representative on the ART Committee of the Family Law Section of the American Bar Association. In that role, I was the principal advocate for and co-author of a policy approved in 2016 by the 400,000+ member Association as to a Hague surrogacy convention, a policy sought of the Association by the State Department.

I am Secretary of the Fertility Society of Australia and New Zealand.

I have written and presented extensively about family law and surrogacy including:

- Since 2010, in over 330 presentations around Australia and around the world, including to the International Bar Association, the Family Law Section of the Law Council of Australia, the International Academy of Family Lawyers, the American Bar Association, the Academy of Adoption and Assisted Reproductive Attorneys, the Law Societies of Queensland and South Australia, and the Fertility Society of Australia and New Zealand.
- I have co-authored a chapter in *Surrogacy, Law and Human Rights*, and authored a chapter in *The Feminist Legislation Project*.
- I have written numerous legal articles.
- I wrote *When Not If: Surrogacy for Australians*, and *International Assisted Reproductive Technology*.
- I was the course convenor in *Ethics and the Law in Reproductive Medicine* at The University of New South Wales, for which I received a post-graduate teaching prize (2019).

I have appeared in numerous groundbreaking cases in surrogacy, including the first case in the world that determined that conception was the act of pregnancy not fertilisation⁴⁶, and applications for registration by the Family Court of US surrogacy orders⁴⁷.

In 2012 to 2013, I led Queenslanders for Equality, which successfully opposed the attempt by the then Queensland Attorney-General to criminalise intended parents through surrogacy (with the punishment to be up to 3 years imprisonment), if the intended parents were gay, lesbian or single.

⁴⁶ *LWV v LMH* [2012] QChC 26.

⁴⁷ *Re Grosvenor* [2017] FamCA 366 ; *Sigley & Sigley* [2018] FamCA 3; *Rose* [2018] FamCA 366; *Allan & Peters* [2018] FamCA 978

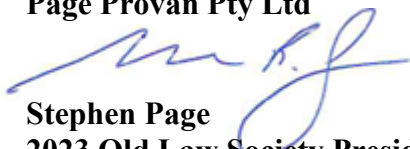
I was a member of the advisory committee to the ALRC surrogacy review, and made submissions to that review.

I received the inaugural Pride in Law Award (2020) and the Queensland Law Society President's Medal (2023).

If I can be of any further assistance, please let me know.

Yours sincerely

Page Provan Pty Ltd



Stephen Page

2023 Qld Law Society President's Medal recipient

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