International Surrogacy Arrangements

Submission to the Family Law Council of Australia

Consideration of determining who is a parent in cases involving surrogacy arrangements

June 2013
Background

International surrogacy arrangements are becoming increasingly common, with cases presenting in both the citizenship and migration programs. The caseload has increased consistently since 2008, when the Department was only aware of occasional cases. We estimate that there are now well over 100 cases per year.

Source countries for surrogacy cases
The United States was previously the main country where Australians entered into surrogacy arrangements. In recent years, most cases presented to the Department have come from India, the United States and Thailand, with a few from Malaysia, Ukraine and China.

Drivers
We observe that there is a complex set of drivers for overseas surrogacy which encompass social, legal, economic and technological elements. These include:

- social changes resulting in family formation later in life, leading to fertility difficulties for would-be parents;
- changing social norms regarding surrogacy;
- recent changes in legal recognition of children of same-sex relationships under Australian law;
- improvements in success rates and increased availability of cheap reproductive technology, especially in emerging economies;
- the limitations of domestic surrogacy options (costs of reproductive technology, illegality of commercial arrangements and possible scarcity of willing surrogate mothers);
- the limited availability of children for adoption domestically and the complexities of the international adoptions framework.

Caseload
The Department must accommodate two types of caseloads involving children born through surrogacy arrangements; newborn babies whose intended parents are Australian citizens or permanent residents and children in “established families”.

Newborn babies – with intended parent being an Australian citizen or permanent resident
Most surrogacy cases present as newborn babies whose (intended / commissioning) parents are Australian citizens or permanent residents. Typically, the Australian parent(s) enter into an arrangement with a surrogate mother overseas and often only travel to the baby’s country to collect the child. They will then apply for either Australian citizenship by descent or a Child (subclass 101) visa for the child.

Children in “established families”
The Department has received applications from family units that include children born overseas under surrogacy arrangements. These family units may include older children who have been with the commissioning parents since birth. These cases would typically be non-Australians or ex-patriate Australian parents who have lawfully and legitimately formed their family on the basis of the law of their country of residence.
**Entry into Australia**
To enter Australia, a child born overseas must apply (and be eligible) for either Australian citizenship (by descent) or a visa for Australia.

Approval of these applications relies upon recognition of the parent-child relationship between the child and the intended parent.

The Department is in a difficult position because it must make an assessment based on the recognition of a parent-child relationship between the intended parent(s) and the child, but there is no Commonwealth or international legal framework to guide recognition of parent-child relationships in cases where surrogacy arrangements are commissioned overseas.

**Overview of Departmental legislation and current approach to surrogacy caseload**

**Applications for Australian citizenship by descent**
A child born overseas will be eligible for Australian citizenship by descent if they have at least one parent who is an Australian citizen. Under policy, the consent of at least one ‘responsible parent’ to the application is required if the applicant is under 16 years of age. However, the absence of such consent would not prevent the approval of citizenship by descent if the child meets the legislative criteria. There is no requirement to have the consent of both parents for an application for Australian citizenship.

**Parent under citizenship legislation**
The term ‘parent’ is not defined in the Australian Citizenship Act 2007 (the Citizenship Act). Section 8 of the Citizenship Act prescribes who is taken to be a child’s parent when a child is a child of a person under section 60H (children born as a result of artificial conception procedures) or 60HB (children born through surrogacy arrangements) of the Family Law Act 1975.

Until 2010, it was the Department’s position that, except where section 8 applies, ‘parent’ meant a biological parent. On 15 September 2010, the Full Federal Court found that ‘parent’ for the purposes of the Australian Citizenship Act 2007 (the Citizenship Act) cannot be restricted to biological parents and is a question of fact, with regard to all the circumstances, including biological, social and legal. This ruling increased the vulnerability of the citizenship program to child trafficking and/or abduction cases. Cases where there is no biological link with an Australian intended parent, including those involving international surrogacy, are dealt with on a case by case basis, with close scrutiny of the evidence.

It is also our policy that the provisions relating to s60H of the Family Law Act (about artificial conception procedures) do not apply to international surrogacy cases because the birth mother is not an intended parent, allowing us to recognise the biological intended parent as a parent for the purposes of the Citizenship Act.

Because the term ‘parent’ is not defined in the Citizenship Act, it is possible that in some circumstances a person is found to have more than two parents for the purposes of that Act.

**Applications for a visa**
The entitlement to a visa relies on the recognition of the parent-child relationship between the intended parent and the child. This applies whether the child is applying for a Child (subclass 101) visa, or as a dependent family member in their parent’s visa application.
It is also a requirement for the grant of a visa that the public interest criteria relating to parental responsibility be met (these are specifically Public Interest Criteria 4015 and 4017 in Schedule 4 of the Migration Regulations 1994).

**Parent under Migration legislation**

Although ‘parent’ and ‘child’ are defined in the Migration Act 1958 and Regulations, these definitions are inclusive, rather than conclusive - together, they ensure that for migration purposes, we recognise parent-child relationships covered under the Family Law Act, and also recognise both formally and customarily adopted children, as well as step-children.

The Department’s current position is that, for the purposes of the Migration Act, in the absence of specific provisions such as those at s60H or s60HB of the Family Law Act, or those relating to adoption, a parent must be the biological parent of the child. For international surrogacy cases, we therefore generally require that there be a biological link between the intended parent and the child in order for the parent-child relationship to be recognised.

The public interest criteria relating to parental responsibility requires there to be either court or other legal consent allowing the grant of the visa to the child, or the consent of each person who can lawfully determine where the child is to live. This requires us to consider not only the relationship between the intended parent and the child, but also the parental rights of other parties, such as the surrogate mother and her partner as well as donors. In making these determinations, the Department currently considers Australia’s migration legislation as well as local laws.

Applications for both citizenship and visas from children born under surrogacy arrangements are given considerable scrutiny. Consideration is given to the lawfulness of the process in the home country, as well as to the contract and the consent of the surrogate mother (and her partner, if she has one) relinquishing parental rights to the child and giving the intended parent(s) parental responsibility. However, in the absence of any Australian law guiding this process, it can be difficult to require applicants to provide various information (such as DNA), and the Department is concerned that any decision is open to challenge in a court.

**Key Issues arising for the Department in the surrogacy caseload**

Of particular concern is the growing number of cases presenting from countries where there is no or limited legal framework surrounding surrogacy, such as India, Thailand and Malaysia. The lack of a legal framework in these countries, coupled with the poverty of many of the population, increases the potential for exploitation of the surrogate mother as well as the risks of child trafficking.

Specific risks to the Department include:

- The lack of legal framework creates uncertainties in the Department’s decision-making;
- The lack of a legal framework or clear guidelines governing international surrogacy arrangements requires the Department to adopt specific approaches to each country. This inevitably leads to inconsistent requirements, and creates a risk of inconsistent decisions across the caseload;
• The caseload presents a range of integrity concerns, particularly where there is no genetic link between the intended parents and the child;
• The risk of unauthorised or incomplete adoptions being passed off as surrogacy arrangements to avoid the particular immigration requirements in relation to adoptions;
• The risk of possible child trafficking being disguised as surrogacy;
• Concerns over the implication of Australia recognising parent-child relationships through surrogacy arrangements that may;
  o be exploitative;
  o involve a minor acting as a surrogate mother;
  o be illegal or not recognised in the home country;
  o be commercial in nature and illegal for the residents of some Australian jurisdictions;
• Even if the Department and the Department of Foreign Affairs and Trade recognise a parent-child relationship to enable entry into Australia, once here, this relationship is often not able to be recognised under other Australian laws, leaving the child vulnerable and in legal limbo;
• In addition to being able to recognise an intended parent as a parent of the child, the Department needs to be able to determine conclusively who is not a parent of a child so as to ensure surrogacy arrangements do not result in chain migration applications from the surrogate mother and her family. This approach is similar to existing provisions at section 60H and 60HB in the Family Law Act which limit the number of parents to two.

An additional issue is that the Department generally relies on clients to inform us that a child is born under a surrogacy arrangement. It is not uncommon for clients to conceal this from the Department, and our ability to detect surrogacy arrangements is limited. Key indicators are:
• same-sex male couples with children where both men are listed on a birth certificate
• a woman over the age of 45 listed as the mother of a child
• records of travel to another country shortly before the birth of the child.

Given these risks, the Department pays particular attention to any cases involving surrogacy.

These issues specifically impact the immigration and citizenship portfolio and we acknowledge that there is a range of other issues that will be included in your consideration of international surrogacy arrangements which may be outside the scope of our portfolio. However, given the extent of our exposure to cases involving international surrogacy arrangements to date, we are very happy to be engaged in further discussions of these broader issues.
Possible solutions – what the terms of reference mean to DIAC

Clarification on who is and who is not a parent
Ultimately, the Department would like an amendment to the Family Law Act that would allow for the consistent determination of who is, and also who is NOT a parent in cases involving international surrogacy.

Because there are a range of entitlements that flow from parent-child relationships, it is equally important to the Department to be able to determine conclusively who is not a parent of a child.

How this may be achieved
The Department recognises that developing the policy settings to put this goal into effect is incredibly complex. A primary concern for the Department is that the end goal must be easy to implement, consistent and enforceable. Decisions made on visa and citizenship applications are often made at the APS4 or APS5 level. It is important therefore, that these officers are able to interpret and apply any guidelines.

Although it is ultimately a matter for Government to decide the policy settings which reflect social norms and expectations, the Department is concerned that if the policy settings are too restrictive, clients will simply develop more sophisticated ways of concealing surrogacy arrangements from us. An example of this would be if commercial surrogacy arrangements were not recognised under a new regime. Conversely, we accept there may be a range of requirements that are more restrictive than current overseas practices but which are necessary, such as minimum age limits for surrogate mothers, and age limits (both upper and lower) on intended parents.

The Department has given some consideration on how any amendments may be achieved, and would propose the following alternatives as possible models:

Option A: Specific provisions in the Family Law Act
This may be similar to existing state and territory legislation, whereby the Family Law Act contains a set of requirements that must be met. This may include, for example:

- minimum and maximum age for parties involved;
- requirement for a biological link;
- the arrangement is lawful in the child’s home country;

If this model is adopted, it is important to consider the implementation of the amendments. This means the requirements must be simple, consistent and be able to be assessed objectively.

For example, a common requirement in Australian law is that all parties to a surrogacy arrangement obtain counselling prior to entering into the agreement. Unless it is also a requirement in the country in which the surrogacy arrangement occurs, requiring pre-agreement counselling for migration and citizenship purposes may lead some intending parents to obtain such counselling but may also result in the provision to decision-makers of fraudulent evidence of counselling. Further, decision-makers would not be in a position to consider the quality of the counselling.
Option B: Jurisdictions prescribed under the Family Law Act
This would be similar to existing provisions in the Family Law Act, whereby a surrogacy arrangement is recognised if it occurs under the law of a specific jurisdiction. This may mean, for example, that the Attorney-General’s Department (or another body) is responsible for developing a set of criteria through which the surrogacy arrangements that occur in specific jurisdictions are recognised under the Family Law Act.

Option C: Access to Family Law Court or other body to determine parent-child relationship
Another model would be to provide a streamlined avenue for intended parents to seek parentage orders through the Family Court. This would allow a suitable person to make assessments based on the individual facts of the case, and bearing in mind the best interests of the child.

The Department considers this is an important avenue for intended parents where there is a dispute that cannot be resolved in the country in which the surrogacy arrangement occurs. However, this structure does not offer the consistency or predictability that the two previous options offer, and would possibly lead to clients seeking to conceal the surrogacy arrangement to enable more rapid decisions on their applications. We note there may also be issues of jurisdiction and access, particularly by non-Australian citizens or residents.

Different provisions for Australians residents and other nationals and expatriate Australians
As mentioned previously, the international surrogacy caseload includes both Australians who enter into surrogacy arrangement overseas as well as family units which may include older children who were born under surrogacy arrangements that are lawful in the parent’s country of residence.

The Department would like any amendment to the Family Law Act to allow for the recognition of family units where this has been done lawfully in the client’s home country or country of usual residence before the migration process.

Migration legislation already contains provisions, in relation to adopted children, that allows for the recognition of adoptions that are lawful in other countries for non-Australian residents, or for expatriate Australians who adopt a child in the course of living abroad.

It is proposed that a similar approach could be adopted to cater for surrogacy cases that would not otherwise be recognised under Australian law, but where the family unit is already legitimately formed on the basis of foreign law.
Below are some case studies that illustrate the issues faced when trying to determine parent-child relationships for the purposes of assessing applications for a visa to Australia or for Australian citizenship. The issues addressed in these case studies are based on actual cases, but characteristics of different cases may have been blended, or changed in order to ensure the identity of real applicants is protected.

**Case Studies**

*Mr and Mrs S – only one twin wanted*
Mr S advised the Australian High Commission in New Delhi that he had come to India to meet his twin biological children, born through international surrogacy arrangements in India. Mr and Mrs S had decided that they wanted to take only one twin back to Australia with them as they could not afford to support both children. Mr S intends to transfer parental responsibility for his son to friends, who are Indian citizens, reside in India and are unable to have a child themselves.

Mr S lodged a citizenship by descent application for his only daughter. DNA testing confirmed his parentage of both children.

**Issues:**
- At this stage it is uncertain as to whether the proposed transfer of parental responsibility for the other twin to the unrelated Indian couple is possible under Indian law, or whether this twin will be able to obtain Indian citizenship.
- It is possible the child will be stateless.
- However, even if adopted the child would remain eligible for Australian citizenship by descent.
- The Australian Federal Police representative in India was consulted but did not identify any child welfare/trafficking ground for police action against Mr or Mrs S.

*Mr and Mrs P – no biological tie*
Mr P, an Australian citizen of Indian background, commissioned twin girls who he claims were intended to have been his biological children using donor eggs. DNA test results showed no biological tie with Mr P as the commissioning father. Investigations by the clinic where the embryos were created were unable to determine how the error occurred or who the actual biological parent of the children might be.

The Australian High Commission (AHC) was unable to determine whether it was in fact a genuine error on the part of the clinic or the children were conceived with donor sperm intentionally and Mr P has concealed this from the AHC.

**Issues:**
- Considering H-McMullen (FFC 2010) the decision maker found that, for the purposes of citizenship by descent application, the Mr P was a parent for citizenship purposes and the children have now acquired citizenship by descent.
- The failure of the clinic to have procedures in place to prevent such an error occurring or detect donor substitution highlights concerns with some international surrogacy markets.
Mr C and Mr B – determining who is the biological parent
Mr C and Mr B are a de facto couple. Mr C is an Australian citizen and Mr B is a US citizen. Their children, Baby J and Baby S were conceived through the use of sperm that was provided by both men and “mixed” together prior to fertilisation of the donor eggs.

The couple presented a Californian court order confirming their parental rights and severing those of the surrogate mother, her husband and the egg donor. The court order confirms that both men provided sperm to the procedure.

Issues:
- If this arrangement had been undertaken in Australia (and an appropriate court order was issued under a State or Territory Law to satisfy s60HB of the FLA), both men would be recognised as the legal parents of each child, regardless of which was the genetic father of each child.
- A similar case in another country arose where we conduct DNA testing as a matter of course. The intended father was the biological father of both twins, but the intended mother was the biological mother of only one. She claimed not to know donor eggs had also been used in the procedure. Because the father was not an Australian citizen, but the mother was, only the twin with a biological link to the mother was approved citizenship by descent. The other needed to apply for a visa as a dependent applicant on the father’s Partner visa application.

Mr and Mrs L – failure to keep to the terms of a surrogacy arrangement
An Australian couple in an overseas country entered into a surrogacy arrangement with a local woman and her partner for her to act as a surrogate mother. There was no formal contract and there are no surrogacy laws in that country. The Australian male was the biological father of the child.

During the pregnancy, the monetary demands by the surrogate mother and her partner grew and the relationship between the two couples broke down. The surrogate mother and her partner refused to provide the child to the Australian couple.

Issues:
- This case highlights the issues when people pursue surrogacy arrangements that are not regulated in the home country. In some countries, it is possible that, despite the biological link between the Australian man and the child, the surrogate mother and her husband may be found to be the parents of the child.
- The case also raises interesting questions about the protection of all parties involved, including the intended parents and the child.
- In this case, the Australians ultimately located the child and the Australian male was given care, custody and control of the child by the Court for Children. The biological relationship between him and the child was evidenced by a DNA test. Citizenship by descent was approved.
Mr K and Ms B- possible fraudulent surrogacy arrangement
A male in Australia on a temporary visa (Mr K), and Australian citizen (Ms B), claim to have had a baby under a surrogacy arrangement in India.

Ms B is sponsoring Mr K for a Partner visa. There are doubts about whether their relationship is a genuine partner relationship. The (claimed) surrogate mother is Mr K’s ex-wife.

**Issues:**

- There is nothing in the Citizenship Act that would allow us to defer consideration of the application until such time as an assessment had been made on the partner visa application, notwithstanding the fact that there is a potential integrity issue with that visa application.
- Regardless of whether a migration decision maker were to find that Mr K and Ms B are not in a genuine relationship, H-McMullen (FFC 2010) means that, for the purposes of citizenship by descent application, we would still have to address whether Ms B was a parent when the child was born.
- If Mr K was refused a partner visa but Baby K was granted Australian citizenship, Baby K could then sponsor Mr K (and any dependent family members) for a parent visa.
- Reverting to a requirement that the Australian citizen parent is a biological parent would mean the child would not be eligible for citizenship by descent, but may be eligible for a Partner visa (as a dependant on Mr K’s application) or later sponsored for a Child visa by Mr K or Ms B if and only if the relationship between Mr K and Ms B is found to be genuine.
- This case also raises issues around Indian surrogacy arrangements, and the lack of any scrutiny of such arrangements. It should, for example, not be acceptable for Mr K’s ex-wife to act as a surrogate mother for his child. We also would have no reliable evidence that the conception of Baby K involved any artificial conception process.
- While this is speculation, it is possible that this case represents a “baby for a visa” deal, and that once Mr K is a permanent resident, he would then reconcile with his first wife and seek to sponsor her and their child for migration. In return, Ms B may keep Baby K.
Mr Y and Mr D – established family units
Mr Y and Mr D are a de facto male couple from Israel. Mr Y applied for a Business – Long Stay (subclass 457) visa with Mr D and their two children, Master B (aged 8) and Miss L (aged 6) as dependants.

An Israeli birth certificate lists Mr Y and Mr D as the parents of each child.

Issues:
- This is an example of an “existing” family unit. Whatever the circumstances behind the surrogacy arrangement, the family may have been lawfully living as a family unit in their home country for several years.
- Current Migration legislation allows for the recognition of children who are adopted in accordance with the laws of a person’s home country to be recognised providing the person is not an Australian permanent resident or citizen – except in cases where they have been residing as expatriates in that country for over 12 months before applying for a visa and the residence was not contrived to circumvent Australian adoption provisions (see Schedule 2 Regulations for Adoption (subclass 102) visa).
- Where the couple is a same-sex male couple, we will be alerted to the fact there must have been a surrogacy arrangement. This allows us to ask for appropriate documents (such as court documents, or other evidence of a biological link). We are conscious that this may lead to the perception that we are targeting same-sex couples on the basis of their sexuality.

Other issues raised by cases
- The above are a range of issues we have encountered in cases that relate to the general lack of safeguards in place for all parties. They particularly highlight the differences between the strict adoption requirements and what people achieve through surrogacy arrangements.
- Commissioning parents with significant criminal history and/or convictions for child sex offences.
- Multiple babies - a couple commissioned two surrogate mothers simultaneously, resulting in 3 babies.
- People of advanced (or young age) commissioning babies.
- Surrogacy arrangements occurring in countries where it is illegal – a Chinese case presented with a provincial court certificate declaring intended parents as parents.
- Some countries (eg. Ukraine) have surrogacy regulated in their Family Law and issue birth certificates according to local law. No court oversight is provided.
Relevant legislation for citizenship

The Australian Citizenship Act 2007

The term “parent” is not defined in the Citizenship Act. However, section 8 allows for recognition of parent-child relationships recognised under s60H (about artificial conception procedures) and s60HB (about surrogacy arrangements) of the Family Law Act 1975.

Section 8 - Children born as a result of artificial conception procedures or surrogacy arrangements

(1) This section applies if a child is:
   (a) a child of a person under section 60H or 60HB of the Family Law Act 1975; and
   (b) either:
       (i) a child of the person’s spouse or de facto partner under that section; or
       (ii) a biological child of the person’s spouse or de facto partner.

(2) The child is taken for the purposes of this Act:
   (a) to be the child of the person and the spouse or de facto partner; and
   (b) not to be the child of anyone else.

Section 6 – Responsible parent

(1) For the purposes of this Act, a person is a responsible parent in relation to a child if and only if:
   (a) the person is a parent of the child except where, because of orders made under the Family Law Act 1975, the person no longer has any parental responsibility for the child; or
   (b) under a parenting order the child is to live with the person (whether or not the person is a parent of the child); or
   (c) under a parenting order the person has parental responsibility for the child’s long-term or day-to-day care, welfare and development (whether or not the person is a parent of the child); or
   (d) the person (whether or not a parent of the child) has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.

(1A) In paragraph (1)(a):
parental responsibility has the same meaning as in Part VII of the Family Law Act 1975.

(2) Expressions used in paragraphs (1)(b) and (c) have the same meaning as in the Family Law Act 1975.
Relevant legislation for migration

The Migration Act 1958

Section 5 Interpretation

parent: without limiting who is a parent of a person for the purposes of this Act, someone is the parent of a person if the person is his or her child because of the definition of child in section 5CA.

Section 5CA Child of a person

1. Without limiting who is a child of a person for the purposes of this Act, each of the following is the child of a person:
   a. someone who is a child of the person within the meaning of the Family Law Act 1975 (other than someone who is an adopted child of the person within the meaning of that Act);
   b. someone who is an adopted child of the person within the meaning of this Act.

2. The regulations may provide that, for the purposes of this Act, a person specified by the regulations is not a child of another person specified by the regulations in circumstances in which the person would, apart from this subsection, be the child of more than 2 persons for the purposes of this Act.

3. Subsection (2), and regulations made for the purposes of that subsection, have effect whether the person specified as not being a child of another person would, apart from that subsection and those regulations, be the child of the other person because of subsection (1) or otherwise.

The Migration Regulations 1994

Reg 1.14A Parent and child

1. A reference in these Regulations to a parent includes a step-parent.

2. For subsection 5CA(2) of the Act, if a child has been adopted under formal adoption arrangements mentioned in paragraph 1.04(1)(a) or (b) by a person or persons (the adoptive parent or parents):
   a. the child is taken to be the child of the adoptive parent or parents; and
   b. the child is taken not to be the child of any other person (including a person who had been the child’s parent or adoptive parent before the adoption).

Note 1 A child cannot have more than 2 parents (other than step-parents) unless the child has been adopted under arrangements mentioned in paragraph 1.04(1)(c).

Note 2 Parent is defined in subsection 5(1) of the Act, and child is defined in section 5CA of the Act.
Public Interest Criterion 4017 (a requirement for most visas to Australia)

The Minister is satisfied of 1 of the following:
(a) the law of the applicant’s home country permits the removal of the applicant;
(b) each person who can lawfully determine where the applicant is to live consents to the grant of the visa;
(c) the grant of the visa would be consistent with any Australian child order in force in relation to the applicant.

Provisions relating to adoption:

Adoption visa (subclass 102) – Schedule 2 of the Migration Regulations 1994

Key provisions to be met regarding the adoption allow for expatriate adoptions (subclause 2), 102.211
(1) The applicant meets the requirements of subclause (2), (3), (4) or (5).

(2) An applicant meets the requirements of this subclause if:
(a) the applicant has not turned 18; and
(b) the applicant was adopted overseas by a person who:
   (i) was, at the time of the adoption, an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen; and
   (ii) had been residing overseas for more than 12 months at the time of the application; and
(c) the Minister is satisfied that the residence overseas by the adoptive parent was not contrived to circumvent the requirements for entry to Australia of children for adoption; and
(d) the adoptive parent has lawfully acquired full and permanent parental rights by the adoption

[§5 of the Migration Act defines enter, enter Australia, entered, and entry, leave Australia and remain in Australia - see also s4 (object of the Act) and s6 (effect of limited meaning of certain expressions) - LEGEND note]

(3) An applicant meets the requirements of this subclause if:
(a) the applicant has not turned 18; and
(b) the applicant is resident in an overseas country; and
(c) either:
   (i) a person who is not in a married relationship or de facto relationship, and who is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen has undertaken in writing to adopt the applicant; or
   (ii) spouses or de facto partners, at least one of whom is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, have undertaken in writing to adopt the applicant; and
(d) a competent authority in Australia:
   (i) has approved the prospective adoptive parent as a suitable adoptive parent for the applicant; or
   (ii) has approved the prospective adoptive parent and the spouse or de facto partner of the prospective adoptive parent as suitable adoptive parents for the applicant.
An applicant meets the requirements of this subclause if:
(a) the applicant has not turned 18; and
(b) the applicant is resident in an overseas country; and
(c) a competent authority in the overseas country has allocated the applicant for prospective adoption by a person who is an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen, or such a person and that person's spouse or de facto partner; and
(d) either:
   (i) arrangements for the adoption are in accordance with the Adoption Convention; or
   (ii) the adoption is of a kind that may be accorded recognition by regulation 5 of the Family Law (Bilateral Arrangements - Intercountry Adoption) Regulations 1998; and
(e) a competent authority in Australia:
   (i) has approved the prospective adoptive parent as a suitable adoptive parent for the applicant; or
   (ii) has approved the prospective adoptive parent and the spouse or de facto partner of the prospective adoptive parent as suitable adoptive parents for the applicant.

An applicant meets the requirements of this subclause if:
(a) the applicant has not turned 18; and
(b) the applicant was adopted in accordance with the Adoption Convention, in an Adoption Convention country, by a person who was an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen when the adoption took place, or by such a person and that person's spouse or de facto partner.

The applicant is sponsored by a person who is:
(a) an Australian citizen, a holder of a permanent visa or an eligible New Zealand citizen; and
(b) in the case of an applicant who is a child for adoption — a prospective adoptive parent of the child; and
(c) in the case of an applicant who is an adopted child — an adoptive parent of the child.

The laws relating to adoption of the country in which the child is normally resident have been complied with.