



# LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

## Submission Cover Sheet

Inquiry into Parentage (Surrogacy) Amendment Bill 2023

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Standing Committee on Justice and Community Safety,  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

[REDACTED]  
[REDACTED]  
[REDACTED]  
29 November 2023

Dear Committee

### **Re- Inquiry into the Parentage (Surrogacy) Amendment Bill 2023**

The charity Surrogacy Australia has provided below a submission providing our feedback on the ACT's draft Parentage (Surrogacy) Amendment Bill 2023.

This feedback is based on over 12 years experience in working with Australian surrogates, egg donors, intended parents, their family members and the professionals who support them. It is also grounded in the academic research published in Australia over the last decade which provides essential insights into Australians engagement in the surrogacy landscape<sup>1,2,3,4</sup>

Surrogacy Australia promotes and provides education and support in regard to domestic surrogacy arrangements.

The re-redrafted legislation should address existing gaps, better align the ACT's surrogacy laws with other Australian jurisdictions and ensure children born via surrogacy are not discriminated against.

Surrogacy Australia supports many aspects of the Amendment Bill such as

- replacing the term “substitute parent” with “intended parent” in line with the agreed terminology across Australia
- establishing age criteria for surrogates, while respecting their pregnancy and birth rights.
- protecting a surrogate's right to autonomy and bodily integrity (28D) - essential from a feminist and human rights perspective.

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<sup>1</sup> Ezra Kneebone, Karin Hammarberg, Sam Everingham & Kiri Beilby (2023) Australian intended parents' decision-making and characteristics and outcomes of surrogacy arrangements completed in Australia and overseas, Human Fertility, DOI: [10.1080/14647273.2023.2270157](https://doi.org/10.1080/14647273.2023.2270157)

<sup>2</sup> Everingham S, Stafford-Bell M, Hammarberg K Australians (2014) Use of Surrogacy Med Jour Australia; 201: 1-4

<sup>3</sup> Everingham S & Hale K. (2021) Demographics, Personality Traits & Satisfaction amongst altruistic surrogates who carry for strangers Australian Counselling Research Journal,

<sup>4</sup> Stafford-Bell M, Everingham S, Hammarberg K Outcomes of surrogacy undertaken by Australians overseas MJA 2014; 201: 1-4 doi: [10.5694/mja14.01086](https://doi.org/10.5694/mja14.01086)

- removing the prohibition on single people becoming parents. Many children grow up in single-parent homes. The eradication of such discrimination is a welcome development.
- removing the requirement for at least one intended parent to be biologically related to any child born through surrogacy. Given many twenty-first century families are not biologically related (eg adoptive children, step-children, double-donor-conceived children), this requirement is outdated.
- allowing the surrogate to use her own eggs, a practice which the research shows leads to no difference in psychological outcomes for surrogates or the child(ren) that result<sup>5</sup>

Surrogacy Australia has concerns regarding the following aspects of the draft bill

1. There is no definition of counsellor in the Bill. Given the very specialised nature of counselling required for surrogacy arrangements, it is essential that counselling be carried out by one who is a member of ANZICA to ensure that they are suitably qualified.
2. The current draft bill does not require intended parents to demonstrate a medical or social need for surrogacy. Given the dire shortage of surrogates in Australia, the risks involved and the huge amount of preparation and commitment required of altruistic surrogates, it is vital that access be restricted to those who can demonstrate a medical or social need for surrogacy, including the absence of a uterus.
3. Mandating legal advice, counselling, and a written agreement before conception. While we believe independent legal advice should be provided to all parties prior to entering a surrogacy arrangement, the absence of prior legal advice should not of itself, preclude recognition of the intended parent(s) as the legal parent(s) of the child. To do so would unfairly disadvantage vulnerable children, whose intending parents may have proceeded without understanding the processes fully. This is a particular risk in cases of traditional surrogacy, where an IVF clinic may not be involved in the process.
4. Lack of Definition of Conception  
The Bill's Explanatory Statement refers to '*requirements for surrogacy arrangements including that surrogacy agreements must be made in writing before conception....*'. However nowhere in the Draft Bill is there mention of 'conception' introducing an element of uncertainty. In addition, there is no definition of this term which carries diverse interpretations<sup>[1]</sup>.

Under the current conditions, a same-sex male couple seeking to create embryos may face restrictions on initiating the embryo creation process unless they have already secured a surrogate and completed all necessary counselling and legal prerequisites. This limitation arises from differing perspectives on the point of conception, with some holding that it occurs at the fertilisation of the egg by sperm. This ambiguity can complicate the surrogacy process, particularly concerning the commencement of legal obligations such as legal advice and entering into agreements.

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<sup>5</sup> Golombok, Readings, Blake, Casey, Mellish, Marks & Jadva (2011) Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7. *Developmental Psychology*, 47(6) 1579-1588.

<sup>[1]</sup> *LWV v LMH* (2012) QChC 26. <https://archive.sclqld.org.au/qjudgment/2012/QChC12-026.pdf>

To address this, we propose avoiding use of the term "conception". Instead, the bill's language should align with the practicalities of these arrangements, where often a donor is sources and embryos created prior to a surrogate being finalised. This adjustment would provide a more contextually relevant framework for the initiation of legal obligations, thereby minimising confusion, while maintaining its core objectives.

#### 5. Definition of Birth Parent

The bill inappropriately defines the person who is altruistically carrying the child for the intended parent(s) as the 'birth parent'. Given Australian and international research studies demonstrate that those carrying a child for other recipients do not see themselves as a 'parent' to that child, the more sensitive, correct term to use would be 'surrogate' and 'surrogate's partner.'

#### 6. Allowable expense re-imburements are specified in the associated Regulations but fail to allow for a number of commonly required expenses which the regulations in other Australian jurisdictions such as NSW allow. The way the regulations are currently framed makes it difficult for surrogates to understand what they can claim. Under Section 24, Regulation 4 should also be included re-imburements for

- travel, accommodation and parking to see a counsellor
- maternity clothing
- massages or acupuncture required to deal with back issues associated with pregnancy
- to employ a locum if the surrogate is self-employed
- the surrogate or her partner to get their wills done
- a separated surrogate to get a divorce (so her spouse is not presumed to be a parent)

All of these are currently allowed under the Parentage Act, if they are an expense connected with the pregnancy or any attempt to become pregnant, and the birth or care of a child born as a result of that pregnancy.

#### 7. Only allowing intended parents of children born through compensated surrogacy to be recognised as the legal parents if they can show the child will otherwise suffer a "pressing disadvantage."

All child have a right to have their parents recognised by law as their legal parents. We strongly support the ACT recognising this group in order to protect children's rights. It should not be necessary to prove a "pressing disadvantage". All children are disadvantaged when the law refuses to recognise their functional family as their legal family.

8. The offence of compensated surrogacy remains one of extra-territorial operation.

Research has shown that the ACT's prohibition on extraterritorial compensated surrogacy has been a 'failed experiment' given it has failed to deter ACT residents from engaging internationally<sup>6</sup>. However, statistics show that this prohibition means such families do not seek legal parentage for their children.

The ACT should remove the prohibition on compensated surrogacy outside Australia so parents of children born through compensated surrogacy arrangements don't abstain from seeking a parentage order for fear of prosecution.

A Surrogacy Australia representative is happy to appear before the committee if required to provide further information and context to the above. We are happy for our submission to appear on your website, in full, however with the name of [REDACTED] removed and replaced with the title 'Surrogacy Australia Board members'.

Yours faithfully

[REDACTED]

[REDACTED]

On behalf of Surrogacy Australia Board members

Dr Shadi Kashaba

Alex Tinsley

Kate Fitzpatrick

Sam Everingham

Michael Langtree

Courtney Smyth

Naomi Seddon

Adam Zuchetti

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<sup>6</sup> Millbank J (2013) Resolving the dilemma of legal parentage for Australians engaged in international Surrogacy. Australian Journal of Family Law, 27, 135-169