



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

By email to: LACommitteeJCS@parliament.act.gov.au

5 December 2023

Dear Committee Secretary

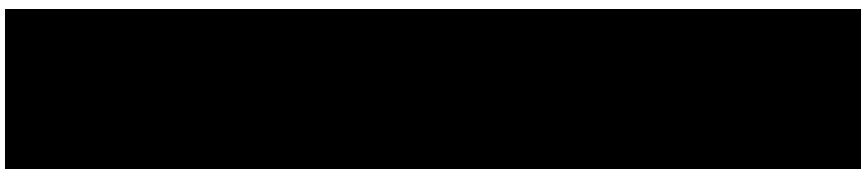
Inquiry into the Parentage (Surrogacy) Amendment Bill 2023

The ACT Human Rights Commission welcomes the opportunity to make a submission to this Inquiry into the *Parentage (Surrogacy) Amendment Bill 2023*.

This submission is made on behalf of the President and Human Rights Commissioner, Dr Penelope Mathew, the Public Advocate and Children and Young People Commissioner, Jodie Griffiths-Cook and the Discrimination, Disability, Health and Community Services Commissioner, Karen Toohey.

We do not object to the publication of this submission. The contact in our office in relation to this submission is Naomi Reiner Gould who may be reached via email or on 6205 2222.

Yours sincerely



Dr Penelope Mathew
President and Human
Rights Commissioner

Jodie Griffiths-Cook
Public Advocate and
Children and Young
People Commissioner

Karen Toohey
Discrimination, Health
Services, and Disability
and Community Services
Commissioner

The ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005 (HRC Act)*. Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:

- the President and Human Rights Commissioner,
- the Discrimination, Health Services, Disability and Community Services Commissioner,
- the Public Advocate and Children and Young People Commissioner and
- the Victims of Crime Commissioner.

As independent statutory office holders with key oversight responsibilities for promotion of human rights and the welfare of people in the ACT, the Commission is engaged in ongoing law reform work, particularly in areas such as the subject matter of this inquiry which require a delicate balancing of human rights protected by the *Human Rights Act 2004 (HR Act)*. The balance to be considered in this instance includes the human rights of those wishing to access surrogacy arrangements (the intended parents), the human rights of the surrogate birth parent, and the protection of the best interests of any children born as a result of a surrogacy process.

The Commission supports most of the proposed amendments to the *Parentage Act 2004*. We see the amendments as progress toward a framework which more appropriately protects and balances competing human rights in an area fraught with controversy. Although we are of the view that certain additional reforms may be needed in the future in addition to those proposed by the Bill, we recognise the difficulty in progressing many such reforms without a national approach.

The current framework for regulating surrogacy arrangements

The Commission supports the reforms proposed by the *Parentage (Surrogacy) Amendment Bill 2023 (the Bill)*, which are a step in the right direction to better align the ACT's regulation of surrogacy arrangements with human rights standards. The current framework for surrogacy arrangements in the ACT unacceptably limits human rights protected under the HR Act including the right to equality before the law at section 8, protection of the family and the child at section 11, and the right to privacy and family at section 12. We agree with the key concerns identified in the Explanatory Statement regarding the need to remove discriminatory barriers for intended parents to access surrogacy arrangements and the implementation of protective arrangements for the birth parent to ensure fully informed consent.

Current concerns that engage human rights include:

- Single parents being unable to access surrogacy arrangements, which engages with section 8 of the HR Act and in particular the right to enjoy equal and effective protection from discrimination based on relationship status,
- Limiting access to surrogacy to circumstances where one of the intended parents is a 'genetic parent' which also engages section 8 of the HR as it is discriminatory to limit access to surrogacy arrangements on fertility grounds,
- The current settings regarding what is considered to be the reasonable expenses involved in altruistic surrogacy,

- The proscription against advertising for altruistic surrogates and the difficulty parents have accessing lawful domestic surrogacy arrangements, increasing the likelihood of people accessing commercial arrangements internationally, and
- Certain children living in the ACT may not have their family arrangements appropriately recognised by the law because of the current blanket prohibition on certain parents seeking parentage orders based on the methods of conception of the child, without ensuring appropriate consideration to the interests of the child involved. The current settings discriminate against certain children based on the circumstances of their birth. Section 11 of the HR Act requires protection of the family and the child which requires recognition of the lived reality of the child including recognition of the child’s family.¹

The proposed amendments

The reforms contained in the Bill involve the balancing of potentially competing human rights of the various individuals involved in a surrogacy arrangement, whether or not those arrangements are altruistic or commercial. This includes the rights of the birth parent, the intended parents and any resulting child or children born of the arrangement.

The Commission shares the apprehension that any proposed reforms do not inadvertently encourage international commercial surrogacy arrangements. There are compelling human rights concerns with international commercial surrogacy arrangements, particularly those that occur in jurisdictions without adequate oversight and protection for the women and children involved and the associated and severe forms of exploitation that may result². The Commission therefore supports continued measures to discourage potential intended parents living in the ACT from accessing unregulated commercial surrogacy arrangements internationally. The view of the Commission is that more needs to be done at both the national and international levels to prevent the well documented and publicised human rights concerns associated with cross-border international surrogacy arrangements³. One of the difficulties is that, in Australia, surrogacy arrangements are currently regulated at a state and territory level with differing regulatory approaches, including to extraterritorial prohibition of commercial surrogacy arrangements. A uniform national approach is ideally required⁴.

From the perspective of regulating surrogacy arrangements within the ACT under current settings that prohibit both international and domestic commercial surrogacy, the most important human

¹ The question of domestic legal recognition of a parent-child relationship where the child has been conceived through unrecognised cross border commercial surrogacy arrangement has been considered by the European Court of Human Rights in several cases including in *Menesson v France* no. 65192/11, ECHR. The Court recognised as a legitimate objective the deterrence of individuals accessing commercial surrogacy arrangements but found a violation of the children’s rights under the equivalent of section 12 of the HR Act (the right to privacy) due to the failure of the state to recognise the parent/child relationship. Another example is *Foulon and Bouvet v France* No’s 9063/14 and 10410/14 (21 July 2016).

² See for example *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/74/50, submitted to the UN General Assembly in accordance with Assembly resolution 73/155, 15 July 2019.

³ For an example resulting from the war in Ukraine see Gill, F., “Women’s Bodies, International Relations, and Surrogacy: Private Lives Made Public” in *Australian Institute of International Affairs*, 9 March 2023

⁴ Key recommendations of the April 2016 Report by the House of Representatives Standing Committee on Social Policy and Legal Affairs following its *Inquiry into regulatory and legislative aspects of international and domestic surrogacy arrangements* included the development of a national model law including that Australian Law Reform Commission be tasked to conduct a year-long inquiry with a view to developing such a model and with follow up action to be taken by the Council of Australian Governments. This does not appear to have occurred.

rights consideration is the implementation of a framework that protects and prioritises the rights of all children living in the ACT, no matter where or in what circumstances they were conceived or born. In addition, the human rights of altruistic surrogate birth parents must be protected to safeguard against exploitation even with the absence of commercial arrangements, for example due to intense family pressures or other vulnerabilities.

We see the proposed reforms as adequately considering and balancing the rights of those involved. We do not go into each of the amendment reforms in detail as we are generally supportive of the reforms including in relation to requirements for legal advice and counselling; flexibility regarding the age of a birth parent so long as maturity has been assessed; the broadening of the ability for the court to make parentage orders for children born as a result of commercial surrogacy arrangements where there is a pressing need; regulations regarding compensation of reasonable expenses; and clarity that a birth parent retains autonomy over her own body through the course of a pregnancy.

Time limit to apply for parentage orders for altruistic surrogacy arrangements

The one residual concern from the Commission's perspective pertains to the time limit to apply for parentage orders for altruistic surrogacy arrangements. Section 28F(3)(a) limits the time for making an application for a parentage order for a child born as a result of an altruistic surrogacy arrangement to between 4 weeks and 6 months. While we support the intent of this provision, the interests of the child should be given primacy even where the intended parents have failed to bring an application before the child is 6 months old, and assuming that all other requirements have been met. It is our view that, where it serves the best interest of a child, the court should retain a discretion to make parentage orders beyond the 6-month limitation.

Section 11 of the HR Act requires protections needed by a child because of being a child. Legal recognition of a child's parents is one such protection.⁵ In certain scenarios the strict timeframe may also be considered arbitrary under section 12 of the HR Act. To protect human rights of the family and the child, we foresee that in some circumstances it may be necessary to enable the Court to make orders to reflect the lived reality of children whose intended parents may have failed to bring an application within the requisite 6-month timeframe.

It is impossible to foresee all relevant circumstances but, given the difficulties of early child rearing for some parents, and given applications to the Supreme Court may be complex and costly, we consider the Court should be given a discretion to enable applications after 6 months, even if in only very limited circumstances. The limit also leads to the incongruous circumstance that where a parent applies for a parentage order for a child who is over 6 months it is possible to do so for a child born from a commercial arrangement but not one born through an altruistic arrangement, which we realise is not the policy intent.

The Commission otherwise considers that the draft Bill appropriately considers the human rights engaged and has provided adequate justification pursuant to section 28 of the HR Act in relation to the inevitable limitations on human rights necessary in such a delicate balancing exercise.

⁵ See comments of the Special Rapporteur (*ibid.*) who emphasises the need for "post-birth" evaluations of a child's best interests but also notes that "it will be rarely in the child's best interests to refuse to recognize or grant parenthood that reflects the child's lived reality." para [56]