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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TENTH ASSEMBLY

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY – REPORT 24 -
INQUIRY INTO THE PARENTAGE (SURROGACY) AMENDMENT BILL 2023**

GOVERNMENT RESPONSE

**Presented by
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Minister for Human Rights
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Introduction

The ACT Government welcomes the report by the Standing Committee on Justice and Community Safety (the Committee) on its inquiry into the Parentage (Surrogacy) Amendment Bill 2023 (the Bill).

The Bill was introduced to the Legislative Assembly on 31 October 2023 and aims to reduce barriers to accessing altruistic surrogacy in the ACT. It will also establish a structured framework for surrogacy arrangements to provide greater certainty and better protect the rights of surrogates and children born through these arrangements.

The Committee received a total of 10 submissions, which largely welcome the measures put forward in the Bill, and also raised some issues for further consideration. The Government thanks individuals and organisations who made submissions to the inquiry.

The Committee published its report on 13 March 2024 and made 9 recommendations.

This Government response commits to progressing amendments to the Bill on four matters raised by stakeholders and recommended by the Committee.

ACT Government response to recommendations

Recommendation 1: The Committee recommends that the ACT Government amend the Bill to give the Court discretion, when making a parentage order as per the transitional arrangements, to dispense with the requirement that a birth parent under 25 but over 18 has received counselling prior to the surrogacy arrangement being made.

Government Response: Existing Government policy.

Under the transitional provisions in the Bill, the new minimum age requirement for surrogates does not apply to arrangements made prior to the commencement of the Act.

Clause 26 of the Bill adds a new Part 7 to the *Parentage Act*, which sets out transitional arrangements. New section 54 provides that where there is a substitute parent agreement entered into before commencement and no parentage order made before the commencement date of the Bill, division 2.5 (as in force immediately before the commencement day) applies to the child under the substitute parent agreement. This transitional provision preserves the application of the previous law for people who had already entered into a substitute parent agreement on the basis of that previous law, and met the requirements of that law, to allow them to apply for a parentage order in accordance with those provisions.

New section 56 provides for the granting of a parentage order where an arrangement, other than a commercial arrangement, was entered into, a child was not born before commencement day, and the intended parent/s live in the ACT when the application is made. The intended parent/s may apply to the Supreme Court under s 28F for a parentage order as if it was a surrogacy arrangement

and the person or people were the intended parent/s under the surrogacy arrangement. This transitional provision ensures that people can benefit retrospectively from changes introduced under the Bill to remove barriers to altruistic surrogacy, including allowing single people to be intended parents.

When making a parentage order under these transitional provisions, the Supreme Court need not be satisfied under s 28G (1) (c) that the requirements of subdivision 2.5.2 are met (which includes the new minimum age for surrogates).

Recommendation 2: The Committee recommends that the ACT Government explore amendments to the Bill to remove the requirement that a child is facing a ‘pressing disadvantage’ in order for a parentage order to be made for a child born of a commercial surrogacy arrangement.

Government Response: Not agreed.

The pressing disadvantage test has been included in the Bill to seek to preserve the policy intent to discourage commercial surrogacy, which gives rise to a range of human rights concerns, while better protecting the rights of children born through such arrangements. For this reason, Government will not be amending the Bill to remove the requirement that a child is facing a ‘pressing disadvantage’ in order for a parentage order to be made for a child born of a commercial surrogacy arrangement.

The provision will allow a parentage order to be made where a commercial surrogacy arrangement has been entered into and a child born through this arrangement would otherwise face a real and substantive disadvantage. The ACT will be the first jurisdiction in Australia to provide a pathway for parentage orders to be granted in these circumstances, and the Government will monitor the operation of the provision as it is subject to judicial consideration over the coming years.

Recommendation 3: The Committee recommends that the ACT Government further examine whether the criminalisation of extraterritorial commercial surrogacy is appropriate.

Government Response: Noted.

The ACT Government is not intending to re-consider the prohibition on extraterritorial commercial surrogacy at this time. While the Government acknowledges that overseas commercial surrogacy may be seen as an accessible pathway for couples and individuals seeking to have a child, there are significant human rights concerns associated with commercial surrogacy, particularly in countries where there may be less protection for the rights of surrogates and children born through these arrangements. Instead, the focus of the Bill is to reduce barriers for altruistic surrogacy, to make this a more accessible option for people in the ACT.

Recommendation 4: The Committee recommends that the ACT Government amend the Bill to give the Court discretion to make a parentage order for a child older than six months if there are exceptional circumstances to justify the order being made.

Government Response: Agreed.

The Government will amend the Bill to provide a discretion for the Supreme Court to grant parentage orders where an application has been made outside the 6 month timeframe in exceptional circumstances. While it is the policy objective of this time limit to ensure that parenting arrangements are finalised in a reasonable period to provide certainty for children, this discretion would ensure that a parentage order can be made where there are reasons for the delay that justify the making of the order and making the order is in the best interests of the child.

Recommendation 5: The Committee recommends that the ACT Government review the *Parentage Regulation 2023* and consider further alignment with NSW, with a view to ensuring the expenses are appropriately and reasonably determined.

Government Response: Agreed.

The ACT Government will introduce government amendments to ensure that the drafting of the Bill and regulation achieves the Government's policy intent. The Government intends to provide greater guidance as to the reasonable expenses that may be reimbursed under an altruistic surrogacy arrangement, largely aligning with the allowable reasonable expenses in NSW and including some matters from Victoria relating to the surrogate's partner. The amendments will confirm that the reasonable expenses prescribed by regulation are not exhaustive, and other reasonable expenses may be covered if they fall within the categories set out in the Bill.

Recommendation 6: The Committee recommends that the ACT Government amend the Bill to require that counselling must be provided by a qualified counsellor and define the minimum standards that a qualified counsellor must meet.

Government Response: Agreed.

The ACT Government will amend the Bill to prescribe appropriate qualifications for counsellors providing counselling to parties to surrogacy arrangements.

Recommendation 7: The Committee recommends that the ACT Government amend the Bill to remove the requirement that the intended parents and birth parents must receive counselling from different counsellors.

Government Response: Agreed in principle.

The Government considers that it could create an actual or perceived conflict of interest for the same counsellor to provide counselling to intended parents and birth parents.

However, the Government will introduce an amendment to the Bill that would allow parties to receive counselling from the same counselling service, provided that they use different counsellors within that service. This will provide greater flexibility for parties to use a counselling service of their choice while avoiding actual or perceived conflict of interest.

Recommendation 8: The Committee recommends that the ACT Government amend the Bill to require each party to receive counselling after the birth of the child and prior to the parentage order being made.

Government Response: Not agreed.

The requirement to receive counselling prior to making the surrogacy arrangement is an important safeguard and provides an opportunity for parties to the arrangement to establish a relationship with a counsellor who could be voluntarily re-engaged at a later time.

It is open to parties to access further counselling following the birth of the child. The Government does not intend to amend the Bill to make this a mandatory requirement, as this could create an additional barrier to parties finalising a parentage order.

Recommendation 9: The Committee recommends that the ACT Government provide further clarity on whether a surrogacy arrangement must be made in writing before conception and amend proposed subdivision 2.5.3 as appropriate to avoid any doubt of the Bill's intentions.

Government Response: Existing Government policy.

The Bill defines a surrogacy arrangement as a “a contract, agreement, arrangement or understanding under which a birth parent and an intended parent or 2 intended parents agree –

- (a) That the birth parent **will become, or attempt to become, pregnant;** and
- (b) That the child born as a result of the pregnancy will be taken to be (whether by adoption, agreement or otherwise) the child of the intended parent or intended parents.”

In accordance with this definition, a surrogacy arrangement can only be made prior to the birth parent becoming pregnant.

The language of ‘conception’ is used in the Explanatory Statement but not specifically in the Bill itself, which refers to requirements that must occur “before entering into the arrangement”.

The Government acknowledges that, while the plain and common meaning of ‘conception’ involves pregnancy, there may be some confusion for community members with how these requirements have been communicated in the Explanatory Statement. The Government will ensure that public-facing materials developed to support implementation of the reforms use language that is easy to understand, so that all interested community members are clear about the requirements for surrogacy arrangements.