LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into Parentage (Surrogacy) Amendment Bill 2023

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Dear Committee Members

Parentage (Surrogacy) Amendment Bill 2023

Introduction

It is a privilege to be asked to make a submission to you about the Bill. I welcome the Bill. I would hope that the Bill is the first step of change in this area. If so, its terms are largely welcome. However, if the Bill is intended as the only substantive change for some considerable time, then it is a missed opportunity.

I ***enclose***:

1. My colour chart of comparison of surrogacy costs between the *Parentage Act 2004*, the Bill, and the *Surrogacy Act 2010* (NSW);

2. My submissions dated 18 July 2023 to the Government, ahead of the Bill's preparation; and

3. My curriculum vitae.

POSITIVES ABOUT THE BILL

The ACT was the first to legislate for surrogacy, back in 2004. It did so after being lobbied by the then Canberra Fertility Clinic, based on the United Kingdom model, taking into account the practices that were proposed by that clinic. While the model in the 2004 Act was innovative then, the Act has long needed to be updated to remove anomalies.

Many of the changes proposed are common sense ones, bringing the ACT up to speed with other Australian jurisdictions, as seen in **Table 1**.

Table 1 – major changes proposed in the Bill

Current requirement	Section in Act	Proposed change	Clause/proposed section in Bill	Is the change a good idea?
Surrogacy arrangement can be written or oral.	N/A	Surrogacy arrangement must be written.	s.25	Yes. Being in writing gives certainty.
No legislated requirement for independent legal advice	N/A	Legislated requirement for independent legal advice	s.27	Yes. Although this occurs in practice, it is better that it be legislated.
Counselling required from an independent service.	26(3)(e)	Legislated requirement for counselling.	s.28	In part. Discussed below.
No legislated requirement for the age of the substitute parents, though 18+ seen as minimum.	26(3)(b)	Intended parents must be 18+.	s.28A	Yes. The Government has put a lower threshold than most other jurisdictions of 25.
No legislated requirement for the age of the surrogate and partner.	N/A	25+, unless a counsellor is satisfied that birth parent is of sufficient maturity	s.28B	Yes
Only a couple can access surrogacy.	24	Either surrogates or singles can access surrogacy.	cl. 8	Yes
The surrogate must be a member of a couple.	24	The surrogate can be a member of a couple or single.	cl. 8	Yes.
Only gestational surrogacy is permitted.	24	Both traditional and gestational surrogacy is permitted.	cl. 8	Yes. A ban on traditional surrogacy is ineffective. Parliament cannot legislate what occurs in bedrooms by consent.[1] Parties should have autonomy in family formation.
The embryo transfer has to occur in the ACT.	24	Fertilisation can occur anywhere.	cl. 8	Yes. Parties should have autonomy in family formation and the choice of doctor and clinic.

[1] As acknowledged by the New Zealand Law Commission: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/Law%20Commission%20-%20Review%20of%20Surrogacy%20-%20Issues%20Paper%2047.pdf at [1.15].

Current requirement	**Section in Act**	**Proposed change**	**Clause/proposed section in Bill**	**Is the change a good idea?**
There must be a genetic link between one of the substitute parents and child.	24	No genetic link required.	cl. 8	Yes. Intended parents always seek a genetic link where possible.
The surrogate has bodily autonomy under the common law.	N/A	The surrogate has legislated bodily autonomy.	s.28D	Yes. I have advocated for this in changes in Tas, Vic, SA and NT.
Substitute parents obtain a Parentage Order.	25, 26	The intended parents obtain a Parentage Order.	s. 28F, 28G	Yes. I have advocated for this in changes in Vic, SA and NT. The current language is insulting and demeaning. The new language is consistent with its purpose, nationally and internationally.
Surrogate can only be paid reasonable expenses.	24, 26, 40, 41	Surrogate can only be paid or reimbursed reasonable expenses.	s. 24, 28C, 40, 41, reg. 4 of the *Regulations*	Partly.
Substitute parents could choose the name of the child.	N/A	Supreme Court decides name of child.	s.28K	Unnecessary. Intended parents invariably choose the name of the child. A court will decline to make the Order if it considers that it is not in the child's best interests.
Offence of procuring substitute parent agreement	42	Offence of procuring *commercial* surrogacy arrangement	cl.19	Yes
Offence of advertising substitute parent agreement	43	Offence of procuring *commercial* surrogacy arrangement	cl.22	Yes

The sunset provisions to enable Parentage Orders to be made when intended parents have previously undertaken traditional surrogacy, or overseas commercial surrogacy, are common sense, and in the best interests of the child, and therefore are supported by me. Parentage Orders would only be made in a commercial surrogacy case if there was a *pressing disadvantage*

facing the child. As seen in the explanatory statement, this ability to make a Parentage Order has been included to *"recognise the rights of the child, and that a child living in the ACT should not be subject to real disadvantage because of circumstances of their birth."*

That phrase is unclear. It is unclear whether a child born overseas through commercial surrogacy who has in reality two parents, but only one of them who is recognised as a parent, has a *real disadvantage*. While I may argue that a child in those circumstances would have a real disadvantage, a Supreme Court judge might view it otherwise. In numerous cases seen in the European Court of Human Rights concerning surrogacy, for example, that Court has looked at the practicalities for the child. If the child is able to live in the jurisdiction, because it obtained citizenship from one of its parents, is able to go to school and have the other benefits in life, then that Court has held that the child's rights may not have been interfered with sufficiently to require that court to intervene.[2]

What is also not clear from the drafting (and therefore would not be clear to the Supreme Court) is whether the process of obtaining a Parentage Order should be preferred (as it should be) to obtaining parentage by a step-parent adoption, available under the *Adoption Act 1993* (ACT).

I say, *as it should be*, for two reasons. First, the process of establishing at law, what is already occurring in reality, as to who is a parent by the making of a Parentage Order should be a more straightforward, cheaper and less stressful process than a step-parent adoption. Second, it is fundamentally offensive to be required to adopt your own child.

If the Government's position is that a child has real disadvantage by only having one of its parents recognised on the birth certificate, rather than two, then it should say so. It should put that on the public record, to assist the Court and possible litigants.

Intended parents have undertaken surrogacy in the following jurisdictions where only one of them has been recognised, as seen in **Table 2**.

Table 2: Countries where only one parent has been recognised through surrogacy

Country	Issue
India	Heterosexual couples would be on the birth certificate. Gay couples could not access surrogacy. However, single men could. Their partner would not be recognised, as occurred in *Blake* [2013] FCWA 1.
Thailand	Genetic father and surrogate would be on the birth certificate, as occurred in *Ellison & Karnchanit* [2012] FamCA 602.
Malaysia	Genetic father and surrogate would be on the birth certificate.
Mexico	Genetic father and surrogate would be on the birth certificate. Sometimes, both intended parents are registered as the parents.

In most recent years, the most popular overseas surrogacy destinations have been the United States and Ukraine. In both countries, both intended parents are recognised on the birth certificate as the parents. In 2017, I had the honour of acting for a couple who had lived in the ACT, who had been posted to the United States, where they underwent surrogacy.[3] What they

[2] For example, *Mennesson v France* (2014), *Paradiso and Campanelli v Italy* (2015), *D v France* (2020), *Fjolnnisdottir v Iceland* (2021), *KK v Denmark* (2023).
[3] *Re Grosvenor* [2017] FamCA 366.

did was lawful. If they had done so from the ACT, they would have committed an offence under the Act.

ISSUES OF CONCERN WITH THE BILL

I have four issues of concern about the Bill:

- Applying to the Supreme Court for a Parentage Order concerning commercial surrogacy;
- The counselling requirements;
- The definition of surrogacy costs; and
- No safeguards about why surrogacy can be undertaken.

1. APPLYING TO THE SUPREME COURT FOR A PARENTAGE ORDER CONCERNING COMMERCIAL SURROGACY

As I said above, the test to be able to obtain a Parentage Order when there has been commercial surrogacy is unclear.

It is important that the parentage of children is properly recognised. Giving the ability to the Supreme Court to make a Parentage Order seeks to give that recognition. The child has a right to its identity, under Art. 8 of the *UN Convention on the Rights of the Child*.

Art. 7.1 provides that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Art. 3.1 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

It is recognised under the common law that there is a right or freedom to be able to reproduce.[4]

Human rights are implicated by surrogacy arrangements, including:

- Right to equality and non-discrimination (e.g. UDHR art. 2; ICCPR art. 26; ICESCR art. 2; CEDAW art. 2, CRPD arts. 5 and 6);
- Right to health (e.g. UDHR art. 25, ICESCR art. 12, CEDAW art. 12);
- Right to privacy (e.g. UDHR art. 12; ICCPR art. 17);
- Bodily autonomy (e.g. ICCPR arts. 7 and 17, CEDAW art. 12 and GR 24);
- Reproductive autonomy (e.g. CESCR GC 22, CEDAW art. 12 and GR 24);
- Right to decide number and spacing of children (CEDAW art. 16);
- Right to found a family (e.g. UDHR art. 16; CRPD art. 23);
- Right to information (e.g. UDHR art. 19; ICCPR art. 19);

[4] For example, *F and F* [1989] FamCA 41.

- Right to benefit from scientific progress (e.g. UDHR, art. 27, ICESCR, art. 15 (b));
- Rights of persons with disabilities (e.g. CRPD arts. 5, 6, 7, 12, 17, 23); and
- Rights of SOGIE people to form families (Yogyakarta Principle 24).

While proposed s.28E and 28G enables a Parentage Order to be made concerning a child born through commercial surrogacy, and there are transitional provisions under proposed s.31B and s.57 to the same effect, proposed s.31D makes plain that criminal responsibility remains.

The ACT,[5] along with Queensland and NSW criminalises overseas commercial surrogacy. Unlike Queensland[6] and NSW[7] where there is a time limit for prosecution, there is no time limit for prosecution of this offence in the ACT: *Parentage Act 2004* (ACT), s.41, *Legislation Act 2001* (ACT), ss. 190, 192.

Therefore, any intended parent who may have otherwise considered making an application to the Court to regularise the parentage of the child will be chilled by the possibility of being referred by the Court to authorities for consideration of prosecution, as has occurred several times.[8]

Intended parents would run similar risks by making a step-parent application.

The Court can, under the *Evidence Act 2011* (ACT), s.128, issue a certificate against self-incrimination. However, the ability to do so only arise if the witness is testifying, and the point is taken. The certificate does not issue for an affidavit. Presumably the application to the Court would be by way of affidavit, at which point the applicants would say that they had undertaken surrogacy overseas, potentially putting themselves in peril.

2. THE COUNSELLING REQUIREMENTS

Proposed section 28 sets out the requirements for counselling. As with the current Act, the person providing counselling must be independent of the IVF clinic.

There is no definition of who is a counsellor. *Anyone* can set themselves up and be a counsellor for this Act. Any of you, or me, or anyone reading this submission might decide to call themselves a counsellor for these purposes- and be entitled to do so.

There is no requirement, unlike in most States, that the counsellor be an ANZICA member or eligible to join ANZICA.[9]

It is important that those who are undertaking surrogacy have the assistance of a counsellor who is properly qualified. Few things are more important in life than becoming parents. The quality of the counsellor should reflect the importance of the journey. The Act should set out some appropriate qualifications.

There could be a broader approach, as seen in Queensland, where the counsellor can be an ANZICA member, a social worker, psychiatrist or psychologist,[10] or a narrower approach

[5] *Parentage Act 2004* (ACT), ss. 41, 45.
[6] *Surrogacy Act 2010* (Qld), ss. 54, 56, 57, *Criminal Code 1899* (Qld), s. 3, *Justices Act 1886* (Qld), s.52.
[7] *Surrogacy Act 2010* (NSW), ss. 9, 11, *Criminal Procedure Act 1986* (NSW), ss.3, 5, 6, 7, 179, Schedule 1.
[8] *Dudley & Chedi* [2011] FamCA 502 and *Findlay & Punyawong* [2011] FamCA 503- which concerned two Queensland couples who had undertaken surrogacy in Thailand, and *Seto & Poon* [2021] FamCA 288 which concerned a NSW couple who had undertaken commercial surrogacy in South-East Asia/NSW with friends.
[9] Australia and New Zealand Infertility Counsellors Association.
[10] *Surrogacy Act 2010* (Qld), s.19.

where the counsellor needs to be an ANZICA member or eligible to join, as seen in Western Australia,[11] for example. Either works. The benefit of having an ANZICA member undertake the counselling is that they know what they are doing, and must comply with the ANZICA Surrogacy Guidelines. Those who are unqualified can choose whatever guidelines they want.

Proposed section 28(2) requires that the intended parents, the surrogate and partner, see separate counsellors. This is a mistake. Under this proposal, there is not one person who can reconcile differing views, to enable the parties to be paddling in the same canoe, in the same direction. Surrogacy is a collaborative process. It is essential that they see the same counsellor. Counselling has two purposes:

- To screen each party, to ensure that they are suitable to undertake surrogacy; and
- To inform each party of the journey ahead.

The approach used by ANZICA counsellors is that each of the parties are seen separately, then couples together, then all together.

In 2014, I commenced acting for a surrogate and her husband in South Australia. By the time I was retained, the surrogate had already given birth and handed the child over. Orders had not been made. The intended parents and the surrogate and her husband had fallen out. Looking at why, as I did, I was struck by the then requirements of the South Australian legislation. The law had required that each side see their own counsellor. South Australian law required that there be *three* counsellors- one to assess the surrogate as suitable, and one each for the surrogate and partner, and the intended parents.

It is no surprise to learn that the three counsellors had not spoken to each other- as they were not required to do so. Each carried out their job- separately. There was no unanimity of vision of what the surrogacy journey would entail. The expectations of the intended parents, and that of the surrogate and her husband respectively, were different. It was no surprise to learn that the parties had fallen out, when there was not one person who had seen all of the parties together.

Following representations made by me, in 2015, South Australia's Parliament amended the laws to ensure that the parties saw one counsellor together. The ACT should not repeat the mistake. The counselling under the Act should be provided by only one counsellor.

3. THE DEFINITION OF SURROGACY COSTS

The Bill has sought to define the surrogacy costs, which are restricted by proposed section 28C and 24 to those that are reasonable, related to the journey, and limited by those allowable in the Regulation. The explanatory statement says, *"The Regulation is largely aligned with the definition of reasonable expenses set out in the NSW legislation. It also include (sic) some matters from Victoria's model (Assisted Reproductive Treatment Regulations 2019 (Vic))."*

I accept that the Regulation adds the ability for each of the surrogate and partner to be reimbursed for unpaid leave, which is not possible currently.

However, to state that the Regulation is "largely aligned" is not accurate. The Regulation is also a step backwards in not allowing certain expenses that are permissible now, and confusingly allowing some types of expenses- such as parking when going to see the doctor, but not parking when going to see the counsellor. If the latter is reimbursed, then the surrogacy

[11] *Surrogacy Regulations 2009* (WA), reg. 3.

arrangement is a commercial one, and therefore may be criminal, or might prevent a Parentage Order being made, except if there is a real disadvantage.

NSW allows any expense to be reimbursed, provided that it is not commercial, that it is reasonable, that it is verified, and that is associated with becoming or trying to become pregnant, a pregnancy or a birth, or entering into and giving effect to a surrogacy arrangement.[12] NSW then gives examples of what is allowable. By contrast the Regulation tightly prescribes what is allowable.

Colour chart

The colour chart compares what is permissible now, what is proposed in the Bill and regulations, and what is permissible in NSW. The chart moves through the surrogacy process in stages. It sets out what is not permissible in red, what is unsure in yellow, and what is permissible in green. Any payment that is made in red could render the surrogacy arrangement a commercial one.

In step 2, the Regulation will not allow the payment of the following, shown in **Table 3**.

Table 3: Impermissible expenses in the Bill and Regulation in step 2, before signing

Category	Section, regulation	Why
Legal fees for the surrogate's divorce	s.24(b)(ii), reg. 4(2)(b)	If a married, separated surrogate is not divorced, the spouse must be a party to the surrogacy arrangement and consent to the Order- as the spouse will be a parent at birth.
New wills for the surrogate and partner	s. 24(b)(iii), reg 4(2)(a) and (b)	If the surrogate or partner die before the Parentage Order is made, the child can inherit- which prejudices financial safety of the survivor and their children.
Travel, parking, accommodation to see lawyer, counsellor	s. 24(b)(iii), regs 4(1)(b) and (2)	
Childcare, unpaid time off work to attend appointments	s.24(3)(b), reg. 4(2)	
Other reasonable related costs	s.24, reg. 4(2)	Only if they are reasonably necessary for or incidental to counselling or legal advice

As seen in step 3, becoming or trying to become pregnant, parking, childcare and time off work are generally allowed to see the doctor, but not to see the counsellor.

As seen in step 4, pregnancy, the surrogate cannot:

- be reimbursed for maternity clothing;

[12] *Surrogacy Act 2010* (NSW), s.7.

- engage a cleaner or gardener if needed;
- employ a locum if the surrogate is self-employed;
- have massages or acupuncture,

unless she pays for these out of her own pocket. Each of these expenses is permissible in NSW and currently in the ACT.

If the surrogate wants to buy her own breast pump and bottles, in order to provide breastmilk for the baby, she will be unable to be reimbursed- though she can be currently in the ACT or in NSW. Experience has taught me that surrogates want to choose their own breast pump, and not have one chosen for them.

After the birth, it is a lottery for the surrogate as to whether or not she can claim parking. She can claim parking to see the doctor: reg. 4(1)(a) and (b). The surrogate can at that stage claim parking for going to see her lawyer (but not earlier in the process) if it related to the application to Court, but not about advice. The reasonable costs of going to Court include travel and accommodation in reg. 4(2)(c). In reg. 4(2)(a), concerning counselling, and 4(2)(b), legal advice in relation to the surrogacy arrangement, there is no mention of travel and accommodation. The clear intent, in context, when reading reg. 4(2) as a whole and reg. 4 as a whole, is that travel and accommodation can be reimbursed when associated with an Application for a Parentage Order- but not otherwise when attending the counsellor or lawyer.

If the same broad-brush approach had been taken as the *Surrogacy Act 2010* (NSW), then rather than the surrogate wondering whether she can claim parking or not, and wondering whether she can buy maternity clothes or a breast pump, all the reasonable expenses of the surrogate are able to be reimbursed, other than time off work for the partner (which has been set out for the first time in the Victorian regulations).

It is absurd that a surrogate living in Queanbeyan can claim various costs, such as maternity clothing, in accordance with the *Surrogacy Act 2010* (NSW), but if the Regulations are adopted, and these are paid by the intended parents, who might be living just over ten minutes away in Narrabundah, they commit a criminal offence, and might prejudice their obtaining a Parentage Order.

Whatever impact there might be on the intended parents, the inability to have its parentage properly recognised is a much worse outcome visited upon the child, and would be a failure to meet the child's human rights.

The allowable costs should be the same as that in the *Surrogacy Act 2010* (NSW), albeit to allow for unpaid leave for the surrogate's partner. The costs, as currently allowed under the *Parentage Act 2004* (ACT) are the same as that in NSW (save for not requiring verification of receipts or other documentation, and not enabling the surrogate to be reimbursed for unpaid time off work).

4. NO SAFEGUARDS ABOUT WHY SURROGACY IS UNDERTAKEN

Unlike other Australian surrogacy laws, there is no requirement in the Bill for there to be a medical or social need for surrogacy. There was not historically such a need, because the Act reflected the clinical practices of Canberra Fertility Clinic. These in turn required that there be a medical need.

Of the three IVF clinics in the ACT: IVF Australia (previously the Canberra Fertility Clinic), Genea Fertility and Compass Fertility, the first two undertake surrogacy.

However, consistent with the autonomy of the intended parents, the Bill allows assisted reproductive treatment to occur anywhere.

No woman should be put unnecessarily at risk by being a surrogate. By not having that safeguard, it is permissible for a clinic to undertake surrogacy so that the intended mother does not lose her looks. It is confronting to hear, as I have done, the Indian surrogacy promoter talking of her clinic helping Bollywood stars who did not want to carry, as they were worried about losing their looks- and as a result other women had to take the risk of being pregnant and giving birth.

It should be a clear requirement of the Bill that there is a medical or social need for surrogacy.

FIRST STEP OR MISSED OPPORTUNITY?

It is unclear whether the incremental reforms in the Bill are merely a first step or a missed opportunity. As seen in South Australia, between 2009 and 2019, there were continued changes to the surrogacy laws in 2009, 2010, 2011, 2012, 2015, 2016, 2017, and finally with the enactment of the *Surrogacy Act 2019*. However, as seen in Queensland (2010), New South Wales (2010) and Tasmania (2012), once the change is made, no substantive changes occur after that point.

What is unclear to me is whether the Bill is that first step or that missed opportunity. If the Government is committed to keep changing surrogacy laws so that they reflect the needs of the people of the Territory, I welcome the changes. However, if this is the extent of what the Government proposes, then these changes, while largely welcome in themselves, are very much a missed opportunity.

The ACT has, since 2004, criminalised those ordinarily resident from undertaking commercial surrogacy overseas. Not one person has been convicted. The then Chief Justice of the Family Court of Australia and Chief Judge of the Federal Circuit Court of Australia in 2014 called for the repeal of these extraterritorial laws, because they do not work, are not enforced, and make a mockery of the law. New Zealand researchers called them a "failed experiment",[13] and on the evidence, they are right.

For every child born through surrogacy in Australia, three are born overseas- despite these laws. Unless she has a personal connection with the intended parents, or a personal philosophy of wanting to be a surrogate, no woman facing the risk of maternal death that arises from any pregnancy or childbirth would volunteer to do so- unless she was being paid to do so. Until we face that unpalatable fact, there will always be a shortage of surrogates in Australia, no matter how much tinkering at the edges with incremental changes like this occurs.

[13] Cited by the New Zealand Law Commission, Review of Surrogacy Issue Papers 47: Debra Wilson and Julia Carrington "Commercialising Reproduction: In Search of a Logical Distinction between Commercial, Compensated, and Paid Surrogacy Arrangements" (2015) 21 NZBLQ 178 at 186. See also South Australian Law Reform Institute Surrogacy: A Legislative Framework – A Review of Part 2B of the Family Relationships Act 1975 (SA) (Report 12, 2018) at [12.3.1]; and House of Representatives Standing Committee on Social Policy and Legal Affairs Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements (Parliament of the Commonwealth of Australia, April 2016) at [1.70]–[1.71] and [1.112]–[1.113].

Between 2009 and 2023, 2,779 Australian children have been born overseas through surrogacy.[14] Between 2009 and 2021, 537 Australian children have been born through gestational surrogacy in Australian IVF clinics.[15] The ACT has about 2% of the Australian population. On a per capita basis, the number of children are 55 born overseas, and 10 born domestically.

In the year ended 30 June 2023, 236 children born via surrogacy were born overseas. In the year ending 31 December 2021, the most recent year, 82 children were born via gestational surrogacy through Australian IVF clinics.

The New Zealand Law Commission has recommended making surrogacy easier over there, including auto-recognition of the intended parents upon birth. The Law Commissions of England and Wales, and Scotland have made the same recommendation.[16] The UK Commissions undertook research which showed that surrogates did not consider themselves to be the parents- but that the intended parents were.

What is proposed in New Zealand and the UK is what already occurs in British Columbia, Manitoba and Ontario, where auto-recognition is the norm. Canada is an altruistic surrogacy regime like Australia. Alberta has a post-birth order regime to transfer parentage. Typically those Orders are made by Alberta judges two to three business days after the birth.

The UK Commissions set out various problems with the UK laws, including these:

> *"The current law governing surrogacy does not work in the best interests of any of the people involved: the children born though surrogacy, women who become surrogates, or intended parents:*
>
> - *Under the current law the surrogate and her spouse or civil partner are the legal parents of the child unless and until a parental order is obtained by the intended parents. This does not reflect the best interests of the child. The surrogate, who does not intend to raise the child, is legally responsible for the child until the parental order is granted. In the vast majority of cases, where the child is cared for by the intended parents from birth, the law means that those raising the child have no legally recognised relationship with the child until the grant of the parental order.*
>
> - *Because the intended parents are not recognised as the legal parents of the child until a parental order is granted, the intended parents cannot (unless they have been granted parental responsibility or PRRs) make any decisions in respect of the child, such as decisions in respect of medical treatment. These decisions must be made by the surrogate and her spouse or civil partner, who are not caring for and raising the child."*

These words aptly describe the legal landscape in the ACT, save that the Act also criminalises residents for undertaking surrogacy overseas.

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[14] Department of Home Affairs, Applications for Australian citizenship by descent born overseas through surrogacy, 2009-2023, obtained under Freedom of Information.
[15] Australia and New Zealand Assisted Reproductive Database, University of New South Wales, annual reports, including those prepared for the New Zealand ACART.
[16] But not Northern Ireland. https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/03/LC_Surrogacy_Summary_of_Report_2023.pdf

I raised that issue in my lengthy submission to the Government before the Bill was drafted, a copy of which is ***enclosed***.

A first substantive reform would be to have an auto recognition model in place. The human rights of the child demand that there is certainty at all times as to the child's parentage- and that the parents are able to take responsibility for the child. It is absurd, but also a failure of protection of the human rights of the child, that there must be a transfer of parentage that occurs not less than a month after the child is born, during which time parental responsibility for the child is left subject to the legal fiction that the surrogate is the parent.

DATA PLEASE

It would be helpful, if by administrative processes in their annual reports:

- The Supreme Court reports the number of Parentage Orders made; and
- The Registrar of Births, Deaths and Marriages reports the number of surrogacy births.

While it is easy to collate data as to the number of children born overseas through surrogacy, it is difficult to collate that data in Australia. Sources of data in Australia about surrogacy births are set out in **Table 4**. No Registrar of Births, Deaths and Marriages collates data as to the number of surrogacy births, although they could easily do so, when they alter the birth register to recognise parentage following the making of a Parentage Order. Counterparts of the Supreme Court in Queensland and Victoria collate the number of Parentage Orders made each year and publish them in their annual reports.

Table 4: Data sources of Australian surrogacy births

Source	Comment
ANZARD[17]	ANZARD does not give a break down between surrogacy births through IVF clinics in Australia and New Zealand. However, ANZARD provides the NZ data, from which the Australian births can be calculated. The data does not reflect traditional surrogacy births through IVF clinics. It is typically two years behind, the most recent year being 2021.
ACT	No data. The Supreme Court does not report the number of Parentage Orders.
NSW	No data. The Supreme Court does not report the number of Parentage Orders.
NT	No data. The *Surrogacy Act 2022* (NT) only commenced in December 2022.
Qld	Annual reports of the Childrens Court publish the number of Parentage Orders made.
SA	The number of Parentage Orders made was published by the Courts Administration until 2016, but then stopped.
Tas	No data. The Magistrates Court does not report the number of Parentage Orders.
Vic	Annual reports of the County Court of Victoria publish the number of Parentage Orders made. Annual reports of the Victorian Assisted Reproductive Treatment Authority publish the number of children born.

[17] Australia and New Zealand Assisted Reproductive Database, published by UNSW.

Source	Comment
WA	Annual reports of the Reproductive Treatment Council publish the number of children born.

Reporting the data will give a true picture of the state of surrogacy in the ACT, including whether or not legislative settings are working, and will help contribute to the national picture.

NEXT STEPS

I am happy to assist the Committee in any way I can, including to testify if requested.

ABOUT ME

I am a dad, with my husband, through surrogacy and egg donation in Brisbane. I have also suffered infertility. In 1987, I was admitted as a solicitor in Queensland, and as a solicitor and barrister in South Australia in 2013. Since 1996, I have been a Queensland Law Society accredited family law specialist. I have received a number of awards, including the inaugural Pride in Law Award (2020) and the most recent being the 2023 Queensland Law Society President's Medal.

Since 1988, I have advised in over 1,900 surrogacy journeys for clients throughout Australia (including the ACT) and 37 countries overseas.

I am a Fellow of the International Academy of Family Lawyers. I am a member of the Academy's Forced Marriage; Parentage; and Gender and Sexuality Committees.

I am a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys. I am the only Fellow in Australia. I was the first Fellow outside the US and Canada. I am a member of its ART Resources Committee.

Since 2012, I have been an international representative on the ART Committee of the American Bar Association. In that role, I was the principal advocate for, and co-author of a policy requested by the State Department as to a proposed Hague surrogacy convention. I have been described by the former chair of that committee, Mr Steve Snyder from Minneapolis, as the leading international ART lawyer in the world.

I am a board member of the Fertility Society of Australia and New Zealand. I am the only lawyer to have served in that role.

Between 2017 and 2022 I taught Ethics and the Law in Reproductive Medicine at the University of New South Wales, for which I received a teaching award (2019).

I am a member of the LGBTI Committee of Australian Lawyers for Human Rights.

I was a member of the Northern Territory Government's joint surrogacy working group, and continued to assist that Government as requested, until the day that the Bill was enacted.

I am the author of *When Not If: Surrogacy for Australians*, as well as numerous presentations and articles.

I have assisted in the All Kids Are Equal Campaign.

In my spare time, I am currently writing a book for the American Bar Association on international ART.

The views in this letter are mine alone.

Yours faithfully
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2023 Qld Law Society President's Medal recipient