



**Legislative Assembly for the  
Australian Capital Territory**

Standing Committee on Justice and  
Community Safety

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

Legislative Assembly for the Australian Capital Territory  
Standing Committee on Justice and Community Safety

---

Approved for publication

---

Report 24  
10th Assembly  
March 2024



# About the committee

## Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety on 2 December 2020.

The Committee is responsible for the following areas:

- ACT Electoral Commission
- ACT Integrity Commission
- Gaming
- Minister of State (JACS reporting areas)
- Emergency Management and the
- Emergency Services Agency
- Policing and ACT Policing
- ACT Ombudsman
- Corrective Services
- Attorney-General
- Consumer Affairs
- Human Rights
- Victims of Crime
- Access to Justice and Restorative Practice
- Public Trustee and Guardian

You can read the full establishing resolution [on our website](#).

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Sophie Milne, Committee Secretary

Alicia Coupland, Assistant Secretary

Erin Dinneen, Assistant Secretary

Satyen Sharma, Administrative Officer

## Contact us

**Mail** Standing Committee on Justice and Community Safety  
Legislative Assembly for the Australian Capital Territory  
GPO Box 1020  
CANBERRA ACT 2601

**Phone** (02) 6207 0524

**Email** [LACommitteeJCS@parliament.act.gov.au](mailto:LACommitteeJCS@parliament.act.gov.au)

**Website** [parliament.act.gov.au/parliamentary-business/in-committees](http://parliament.act.gov.au/parliamentary-business/in-committees)



## About this inquiry

The Parentage (Surrogacy) Amendment Bill 2023 was presented in the Assembly on 31 October 2023. It was then referred to the Standing Committee on Justice and Community Safety (the Committee) as required by clause 5 of the establishing resolution in effect at the time. This clause allowed committees to inquire into and report on bills within three months of their presentation.

The Committee decided to inquire into the Bill on 8 November 2023. An extension was sought to the required reporting date of 26 January 2024 by motion in the Assembly on 28 November 2023. The extension was granted, and the reporting date extended to 14 March 2024.

# Contents

<b>About the committee</b>	<b>1</b>
Establishing resolution	1
Committee members	1
Secretariat	1
Contact us	1
<b>About this inquiry</b>	<b>3</b>
<b>Acronyms &amp; abbreviations</b>	<b>6</b>
<b>Glossary of terms</b>	<b>6</b>
<b>Recommendations</b>	<b>8</b>
<b>1. Introduction</b>	<b>9</b>
Conduct of the inquiry	9
Background to the Bill	9
Removing barriers to altruistic surrogacy	9
Strengthening the regulatory framework for surrogacy arrangements	10
Guidance on reasonable expenses	10
Applying for a parentage order	10
Other provisions	11
Legislative Scrutiny	12
Current ACT legislation on surrogacy	13
Surrogacy legislation across Australia	15
<b>2. Issues raised in evidence</b>	<b>17</b>
Support for the Bill	17
Parentage orders for commercial surrogacy arrangements	17
Extraterritorial commercial surrogacy	19
Time limits to make parentage orders	21
Reasonable expenses	22
Counselling	23
Conception	25
Reason for surrogacy	27
Age limit of surrogate	27
<b>3. Conclusion</b>	<b>29</b>
<b>Appendix A: Submissions</b>	<b>30</b>

<b>Appendix B: Witnesses</b>	<b>31</b>
Wednesday, 21 February 2024	31
<b>Appendix C: Questions Taken on Notice</b>	<b>32</b>
Questions Taken on Notice	32
<b>Appendix D: Gender distribution of witnesses</b>	<b>33</b>

## Acronyms & abbreviations

Acronym or Abbreviation	Long form
ACT	Australian Capital Territory
ANZICA	The Australia and New Zealand Infertility Counsellors Association
Assembly	ACT Legislative Assembly
the Committee	the Standing Committee on Justice and Community Safety
The Court	The Supreme Court of the ACT
HRA	<i>Human Rights Act 2004</i>
LGBTIQ+	Lesbian, gay, bisexual, transgender, intersex, queer and others
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
TAS	Tasmania
VIC	Victoria
WA	Western Australia

## Glossary of terms

Term	Definition
Altruistic surrogacy	a surrogacy arrangement in which the surrogate does not receive payment or reward, other than reasonable expenses
Birth parent	the person who gave birth to or intends to give birth to the child
Commercial surrogacy	a surrogacy arrangement under which a person agrees to make or give to the birth parent a payment or reward, other than for reasonable expenses incurred in relation to the arrangement
Intended parent	a person who will be taken to be the parent of a child born under a surrogacy arrangement
Presumed parent(s)	the birth parent and the birth parent's partner
Surrogacy arrangement	a contract, agreement, arrangement or understanding under which a birth parent and an intended parent or two intended parents agree that the birth parent will become, or attempt to become, pregnant; and 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.
Traditional surrogacy	Surrogacy arrangement in which the surrogate provides their own eggs to be fertilised, thereby having a genetic connection to the child they carry for the intended parents





# 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.

## 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.

## Recommendation 3

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

## 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.

## 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.

## 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.

## 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.

## 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.

## 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 2.5.2 as appropriate to avoid any doubt of the Bill's intentions.

# 1. Introduction

## Conduct of the inquiry

- 1.1. On 10 November 2023, the Committee issued a media release calling for public submissions by 29 November 2023.<sup>1</sup> Invitations to make submissions were also emailed directly to stakeholders.
- 1.2. The Committee received 10 submissions. These are listed in Appendix A.
- 1.3. On 14 February 2024, the Committee resolved to hold a public hearing and issued a media release on 19 February 2024 with further information.<sup>2</sup> The public hearing was held on 21 February 2024. Witnesses who appeared at the hearing are listed in Appendix B.
- 1.4. One question was taken on notice (QTON) during the public hearing on 21 February 2024. This is listed in Appendix C.
- 1.5. A breakdown of witnesses at the public hearing by gender identity is given in Appendix D.

## Background to the Bill

- 1.6. The Parentage (Surrogacy) Amendment Bill 2023 (the Bill) would, if passed, make changes to the *Parentage Act 2004* to remove barriers to altruistic surrogacy in the ACT, strengthen the regulatory framework for surrogacy arrangements, and provide guidance on reasonable expenses and the making of parentage orders. It also aims to modernise the language in the *Parentage Act 2004* to align with other Australian jurisdictions.<sup>3</sup>
- 1.7. The following sections outline the main changes that would be introduced by the Bill, according to the explanatory statement.

## Removing barriers to altruistic surrogacy

- 1.8. The Bill would remove restrictions requiring there be two intended parents to enter into a surrogacy agreement, allowing single people to be sole intended parents. It would also remove the requirement that at least one of the intended parents must have a genetic connection to the child.<sup>4</sup>
- 1.9. The Bill would also remove the requirement that conception of the child be carried out in the ACT, meaning it could occur in other jurisdictions. However, intended parents would need to be living in the ACT when they applied for a parentage order.<sup>5</sup>

---

<sup>1</sup> Standing Committee on Justice and Community Safety, *Media Release: Inquiry into the Parentage (Surrogacy) Amendment Bill 2023* 10 November 2023.

<sup>2</sup> Standing Committee on Justice and Community Safety, *Media Release: Public hearing for Inquiry into Parentage (Surrogacy) Amendment Bill 2023*, 19 February 2024.

<sup>3</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

<sup>4</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

<sup>5</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

- 1.10. Advertising for or procurement of altruistic surrogacy would no longer be considered criminal offences. It would still be a criminal offence to advertise for a commercial surrogacy arrangement.<sup>6</sup>

## Strengthening the regulatory framework for surrogacy arrangements

- 1.11. The Bill states that a surrogacy agreement must be made in writing and all parties must receive independent legal advice and counselling before the agreement is entered into.<sup>7</sup>
- 1.12. A surrogate would need to be no younger than 18 years old. A person under 25 (but over 18) could only be a surrogate if the Supreme Court of the ACT (the Court) were satisfied, on the basis of a counsellor's opinion, that they had sufficient maturity and understanding of the implications. Intended parents would have to be at least 18 years old.<sup>8</sup>
- 1.13. The Bill confirms that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person.<sup>9</sup>

## Guidance on reasonable expenses

- 1.14. The Bill provides further guidance on the reasonable expenses that may be reimbursed under an altruistic surrogacy arrangement.<sup>10</sup>
- 1.15. Expenses related to surrogacy are divided into three categories: trying to become pregnant; a pregnancy or birth; and entering or giving effect to a surrogacy arrangement. Additional detail about the types of expenses that are reasonable under these categories is provided in a new regulation.<sup>11</sup> For example, a reasonable expense included in the new regulation is 'any reasonable travel or accommodation costs incurred by a presumed parent' in relation to becoming or trying to become pregnant and a pregnancy or a birth.<sup>12</sup>

## Applying for a parentage order

- 1.16. Under the Bill, an application for a parentage order about a child could be made by the intended parents when the child was between 4 weeks and 6 months old.<sup>13</sup>
- 1.17. If the Court was satisfied that the requirements for the surrogacy arrangement were met, that all parties freely agreed (including intended parents and the surrogate and their partner, who would otherwise be presumed to be the parents), and such an order was deemed to be in the best interest of the child, then it could make a parentage order about the child.<sup>14</sup>

---

<sup>6</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

<sup>7</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

<sup>8</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, pp 1–2.

<sup>9</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 2.

<sup>10</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 2.

<sup>11</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 2.

<sup>12</sup> Parentage (Surrogacy) Amendment Bill 2023, Schedule 2, New Parentage Regulation, s 4.

<sup>13</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 2.

<sup>14</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, pp 2–3.

- 1.18. The Court would have the discretion to waive specific requirements of a surrogacy arrangement if, despite non-compliance with some criteria, issuing a parentage order is deemed to be in the child's best interests.<sup>15</sup>
- 1.19. In very limited circumstances, the Bill provides for a parentage order to be made to recognise intended parents where a child has been born through a commercial surrogacy arrangement. The Court must be satisfied that the child would otherwise face a pressing disadvantage that would be alleviated by making a parentage order. This provision was included in the Bill to recognise the rights of the child, and to ensure that such a child living in the ACT would not be subject to real disadvantage because of the circumstances of their birth.<sup>16</sup>

## Other provisions

- 1.20. The Bill includes transitional arrangements for parentage orders made in relation to a child born before the commencement of the Bill.<sup>17</sup>
- 1.21. The Bill would update the language of the *Parentage Act 2004* to reflect modern understandings of surrogacy, with 'substitute parents' updated to 'intended parents' and 'substitute parent agreement' to 'surrogacy arrangement'. This would provide a clearer representation of the parties involved and the nature of the arrangement.<sup>18</sup>

---

<sup>15</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 3.

<sup>16</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 3.

<sup>17</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 3.

<sup>18</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 3.

## Legislative Scrutiny

- 1.23. The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (the Scrutiny Committee) considered the Bill in its *Scrutiny Report 37* of 21 November 2023.
- 1.24. The Parentage (Surrogacy) Amendment Bill 2023 is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HRA).<sup>19</sup>
- 1.25. The Scrutiny Committee observed that requiring additional criteria to be satisfied for people under 25 to act as surrogates may limit the right to equality before the law.<sup>20</sup>
- 1.26. The Bill allows a parentage order to be made for a child born of commercial surrogacy if it is deemed in the best interests of the child, each presumed parent consents, and other requirements applied by the Bill to a surrogacy agreement are met. Additionally, the child must be facing a pressing disadvantage and it be deemed reasonable to make the order. The Scrutiny Committee highlighted that further limiting when a parentage order can be made that would otherwise be in the best interests of the child could limit the rights of the child to protection under section 11 of the Human Rights Act.<sup>21</sup>
- 1.27. The Scrutiny Committee also noted that the Bill would apply various provisions of the *Adoption Act 1993* to parentage orders made by intended parents and suggested that this could limit the protection of privacy under Section 12 of the *Human Rights Act 2004*. The Scrutiny Committee recommended that the Bill's *Explanatory Statement and Human Rights Compatibility Statement* give further justification for why this limitation on the protection of privacy was considered reasonable.<sup>22</sup>
- 1.28. Where surrogacy arrangements were already in place, the Scrutiny Committee found that the transitional arrangements in the Bill for making parentage orders were beneficial.<sup>23</sup>
- 1.29. For such parentage orders, some requirements can be dispensed with if this is in the best interests of the child. However, the requirement that surrogates under 25 years old must receive counselling and be deemed sufficiently mature cannot be dispensed with under the Bill. The Scrutiny Committee raised a concern that in the case where a child was born to a surrogate under the age of 25 who had not received counselling, a parentage order could not be granted. The Committee noted that it may still be in the best interest of the child for a parentage order to be granted in this circumstance..<sup>24</sup>
- 1.30. The Scrutiny Committee requested further information from the Minister for Human Rights about this absence of discretion. At the time of this report, a response by the Minister has not yet been received.

---

<sup>19</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 2.

<sup>20</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, p 5.

<sup>21</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, p 5.

<sup>22</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, p 6.

<sup>23</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, p 5.

<sup>24</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, pp 5–6.

## Committee comment

- 1.31. The Committee shares the concerns of the Scrutiny Committee and suggests that the transitional arrangements would benefit from further revision to ensure their appropriateness and that the courts have the discretion to make rulings in the best interests of the child wherever possible.

### 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.

## Current ACT legislation on surrogacy

- 1.32. Commercial surrogacy arrangements are prohibited in all Australian states and territories, including in the ACT, where it is a criminal offence under Section 41 of the *Parentage Act 2004*.<sup>25</sup> The Bill does not seek to amend this.
- 1.33. Section 24 of the *Parentage Act* currently stipulates that a parentage order can only be applied following a surrogacy arrangement (currently referred to as a substitute parent agreement) if the following applies:
- (a) the child was conceived as a result of a procedure carried out in the ACT; and
  - (b) neither birth parent of the child is a genetic parent of the child; and
  - (c) there is a substitute parent agreement, other than a commercial substitute parent agreement, under which 2 people (the substitute parents) have indicated their intention to apply for a parentage order about the child; and
  - (d) at least 1 of the substitute parents is a genetic parent of the child; and
  - (e) the substitute parents live in the ACT.<sup>26</sup>
- 1.34. The Bill seeks to amend the above requirements so that:
- a) conception may occur as a result of a procedure carried out outside of the ACT, for example in other Australian jurisdictions or overseas;
  - b) the surrogate parent may have a genetic connection to the child (known as traditional surrogacy, whereby the surrogate provides their own egg to be fertilised);
  - c) there may be one intended parent, making surrogacy available for single people;

---

<sup>25</sup> *Parentage Act 2004*, s 41.

<sup>26</sup> *Parentage Act 2004*, s 24.

- d) the intended parent or parents do not need to have a genetic connection to the child. The child may be conceived with both a donor egg and donor sperm.<sup>27</sup>
- 1.35. Section 43 of the Parentage Act currently makes it a criminal offence to advertise for a surrogate, altruistic or otherwise, stating that a person commits an offence if the person:
- (a) publishes an advertisement, notice or anything else with the intention of inducing someone to enter into a substitute parent agreement; or
  - (b) publishes an advertisement, notice or anything else that—
    - (i) is likely to induce someone to enter into a substitute parent agreement; or
    - (ii) seeks or purports to seek someone who is willing to enter into a substitute parent agreement; or
    - (iii) states or implies that someone is willing to enter into a substitute parent agreement.<sup>28</sup>
- 1.36. The Bill seeks to remove the offences in relation to advertising or procuring an altruistic surrogate, while retaining offences in relation to procuring commercial surrogacy arrangements.<sup>29</sup>

---

<sup>27</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

<sup>28</sup> *Parentage Act 2004*, s 43.

<sup>29</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.



## Surrogacy legislation across Australia

- 1.37. Surrogacy arrangements are legislated for across Australia, with varying rules and requirements. These are summarised below, and in the table on the following page.
- 1.38. Intended parents must be at least 25 years old in most jurisdictions, except the ACT where currently they must be 18<sup>30</sup> and Tasmania where they must be 21.<sup>31</sup>
- 1.39. In all jurisdictions, the minimum age for a surrogate is 25 years old,<sup>32</sup> except for the ACT where this requirement is not currently stipulated.
- 1.40. In Tasmania<sup>33</sup> and Western Australia,<sup>34</sup> the surrogate must have already had a child of their own. Similarly, in Victoria the surrogate must have already had a child of their own if receiving treatment from a registered fertility clinic.<sup>35</sup>
- 1.41. In Western Australia, only heterosexual couples or single women can be intended parents.<sup>36</sup> All other jurisdictions allow couples of any gender to be intended parents. The ACT currently does not allow single people to be intended parents.<sup>37</sup>
- 1.42. All jurisdictions, except for the ACT, allow for traditional surrogacy, whereby the surrogate has a genetic connection to the child. However, in Victoria, fertility clinics cannot assist with traditional surrogacy, meaning conception would have to take place via home insemination only.<sup>38</sup>
- 1.43. Only Western Australia and the ACT require one of the intended parents to have a genetic connection to the child.<sup>39</sup>
- 1.44. In the Northern Territory, South Australia, and Western Australia advertising that you are willing to be a surrogate or seeking a surrogate is allowed for altruistic surrogacy arrangements.<sup>40</sup> In New South Wales advertising is also allowed for non-commercial surrogacy arrangements, but only if no fee has been paid for the advertisement.<sup>41</sup> In all other jurisdictions advertising is not permitted.<sup>42</sup>
- 1.45. All jurisdictions allow for surrogacy arrangements where there is a medical need. New South Wales, Northern Territories, Tasmania, Queensland, and Victoria also allow

---

<sup>30</sup> *Parentage Act 2004*, s 26(3)(b).

<sup>31</sup> *Surrogacy Act 2012* (TAS), s 16(2)(b).

<sup>32</sup> *Surrogacy Act 2010* (NSW), s 27(1); *Surrogacy Act 2010* (Qld), s 22(2)(f); *Assisted Reproductive Treatment Act 2008* (Vic), s 40(1)(b); *Surrogacy Act 2008* (WA), s 17(a)(i); *Surrogacy Act 2022* (NT), s 17(a); *Surrogacy Act 2019* (SA), s 10(3)(a); *Surrogacy Act 2012* (TAS), s 16(2)(c).

<sup>33</sup> *Surrogacy Act 2012* (TAS), s 16(2)(d).

<sup>34</sup> *Surrogacy Act 2008* (SA), s 17(a)(ii).

<sup>35</sup> *Assisted Reproductive Treatment Act 2008* (Vic), s 40(1)(ac).

<sup>36</sup> *Surrogacy Act 2008* (WA), s 19(2).

<sup>37</sup> *Parentage Act 2004*, s 24(c).

<sup>38</sup> Victorian Assisted Reproductive Treatment Authority, *Surrogacy explained*, <https://www.varta.org.au/surrogacy/surrogacy-explained>, (accessed 11 December 2023).

<sup>39</sup> *Parentage Act 2004*, s 24(d); *Surrogacy Act 2008* (WA) s 21(4)(b).

<sup>40</sup> *Surrogacy Act 2022* (NT), s 50; *Surrogacy Act 2019* (SA), s 26; *Surrogacy Act 2008*, (WA), s 10.

<sup>41</sup> *Surrogacy Act 2010* (NSW), s 10(2)(b).

<sup>42</sup> *Assisted Reproductive Technologies Act 2008* (VIC), s 45; *Surrogacy Act 2010* (Qld), s 55(1); *Parentage Act 2004*, s 43; *Surrogacy Act 2012* (TAS), s 41.

surrogacy for social reasons, such as being in a same sex relationship.<sup>43</sup> Neither current ACT legislation nor the Bill require a demonstration of need, whether medical or social.

- 1.46. Aside from Victoria and the ACT, all jurisdictions require a surrogacy agreement to be in written form.<sup>44</sup>

Table 1: Summary of legislative requirements across Australian jurisdictions

Jurisdiction	Applicable Legislation	Minimum age of surrogate	Surrogate must have a child of their own already	Intended parents can be single	Traditional surrogacy allowed	Advertising allowed
ACT	<i>Parentage Act 2004</i>	18	No	No	No	No
NSW	<i>Surrogacy Act 2010</i>	25	No	Yes	Yes	Yes
NT	<i>Surrogacy Act 2022</i>	25	No	Yes	Yes	Yes
QLD	<i>Surrogacy Act 2010</i>	25	No	Yes	Yes	No
SA	<i>Surrogacy Act 2019</i>	25	No	Yes	Yes	Yes
TAS	<i>Surrogacy Act 2012</i>	25	Yes	Yes	Yes	No
VIC	<i>Assisted Reproductive Treatment Act 2008</i>	25	Yes	Yes	Yes	No
WA	<i>Surrogacy Act 2008</i>	25	Yes	Yes (women only)	Yes	Yes

<sup>43</sup> *Surrogacy Act 2010* (NSW), s 30(1); *Surrogacy Act 2022* (NT), s 19(2); *Surrogacy Act 2012* (TAS), s 16(h); *Surrogacy Act 2010* (Qld), s 22(d); *Assisted Reproductive Treatment Act 2008*, s 40(a)(i).

<sup>44</sup> *Surrogacy Act 2010* (NSW), s 34(1); *Surrogacy Act 2022* (NT), s 14(1); *Surrogacy Act 2010* (Qld), s 22(e)(v); *Surrogacy Act 2019* (SA), s 5(a); *Surrogacy Act 2012* (TAS), s 16(e); *Surrogacy Act 2008* (WA), s 16(1).

## 2. Issues raised in evidence

### Support for the Bill

- 2.1. The majority of submissions demonstrated overall support for the Bill, most notably in relation to:
- a) removing barriers to single people being intended parents;<sup>45</sup>
  - b) updating language to be consistent with other jurisdictions;<sup>46</sup>
  - c) protecting the right of the surrogate to manage their own pregnancy;<sup>47</sup> and
  - d) requiring legal advice and counselling for all parties.<sup>48</sup>
- 2.2. The Committee received one submission in strong opposition to the Bill from the Catholic Archdiocese of Canberra and Goulburn. They raised concerns about the commodification of surrogates and children, and potential psychological risks to surrogates and children born of surrogacy. Their position was that all forms of surrogacy should be prohibited.<sup>49</sup>

### Parentage orders for commercial surrogacy arrangements

- 2.3. Several submitters made comments regarding proposed section 28G(2)(b) which allows a parentage order to be made for a child born of a commercial surrogacy arrangement if the Supreme Court of the ACT (the Court) is satisfied that the child is facing a pressing disadvantage.<sup>50</sup>
- 2.4. This provision would make the ACT the first jurisdiction to allow parentage orders to be made in relation to a commercial surrogacy arrangement.<sup>51</sup>
- 2.5. The ACT Human Rights Commission indicated support for allowing the Court to make parentage orders for children born as a result of commercial surrogacy arrangements where there is a pressing need.<sup>52</sup>
- 2.6. The peak body for donor-conceived people in Australia, Donor Conceived Australia, stated they supported prioritising the best interests of the child, but cautioned that this provision could be used as a loophole to effectively legitimise commercial surrogacy, and that

---

<sup>45</sup> See, for example: Ronli Sifris, *Submission 001*, p 5; Surrogacy Australia, *Submission 002*, p 3; ACT Law Society, *Submission 007*, p 2; Page Provan, *Submission 010*, p 3.

<sup>46</sup> See, for example: Ronli Sifris, *Submission 001*, p 5; Surrogacy Australia, *Submission 002*, p 3; ACT Law Society, *Submission 007*, p 2.

<sup>47</sup> See, for example: Surrogacy Australia, *Submission 002*, p 2; Equality Australia, *Submission 004*, p 2; ACT Law Society, *Submission 007*, p 2; ACT Human Rights Commission, *Submission 008*, p 5; Page Provan, *Submission 010*, p 3.

<sup>48</sup> See, for example: Equality Australia, *Submission 004*, p 2; ACT Law Society, *Submission 007*, pp 2–3; ACT Human Rights Commission, *Submission 008*, p 5; Donor Conceived Australia, *Submission 009*, p 6; Page Provan, *Submission 010*, p 3.

<sup>49</sup> Catholic Archdiocese of Canberra and Goulburn, *Submission 003*, pp 2–7.

<sup>50</sup> See, for example: Ronli Sifris, *Submission 001*, p7; Surrogacy Australia, *Submission 002*, p4; Equality Australia, *Submission 004*, p 5; Donor Conceived Australia, *Submission 009*, p 6; Page Provan, *Submission 010*, pp 4–5.

<sup>51</sup> ACT Government, *Submission 005*, p 8.

<sup>52</sup> ACT Human Rights Commission, *Submission 008*, p 5.

parentage orders made under proposed section 28G(2)(b) would need to be carefully monitored.<sup>53</sup>

- 2.7. Conversely, several submissions argued strongly that the requirement to show a pressing disadvantage should be removed from proposed section 28G(2), stating that all children face disadvantage when the law fails to recognise their functional family as their legal family.<sup>54</sup>
- 2.8. Equality Australia, a national LGBTIQ+ organisation, identified the following difficulties that children might face:
- a) difficulties for parents to make medical or educational decisions for their child;
  - b) legal uncertainty regarding inheritance; and
  - c) challenges when travelling overseas.<sup>55</sup>
- 2.9. Family and fertility lawyers, Page Provan, suggested that the phrase ‘pressing disadvantage’ was unclear, both for the Courts and potential litigants.<sup>56</sup>
- 2.10. Associate Professor Ronli Sifris of Monash University Faculty of Law asserted that children should not be discriminated against due to the circumstances of their birth, and that this proposed section could contravene Article 3 of the United Nations Convention on the Rights of the Child.<sup>57</sup>
- 2.11. In their submission, the ACT Government verified that Australia is a signatory to both the United Nations Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child. The Optional Protocol prohibits the sale of children, child prostitution and child pornography and encourages signatories to take all necessary measure to avoid the sale of children under surrogacy arrangements.<sup>58</sup>
- 2.12. The ACT Government explained that proposed section 28(G) was included to recognise the rights of the child and to ensure that no child living in the ACT would be disadvantaged due to the circumstances of their birth.<sup>59</sup>
- 2.13. During the public hearing on 21 February 2024, Ms Tara Cheyne MLA, Minister for Human Rights, told the Committee that:

... the intent is not to undermine our policy concerns about commercial surrogacy but to identify the circumstances where not having a parentage order is creating a real difficulty for the child and something that is quite substantial. It is not just about being recognised in a parentage order. For example, if a parentage order is not granted then there may be difficulties in getting a passport. That is the intent

---

<sup>53</sup> Donor Conceived Australia, *Submission 009*, p 9.

<sup>54</sup> See for example, Ronli Sifris, *Submission 001*, p7; Surrogacy Australia, *Submission 002*, p4; Equality Australia, *Submission 004*, p 5.

<sup>55</sup> Equality Australia, *Submission 004*, p 5.

<sup>56</sup> Page Provan, *Submission 010*, p 5.

<sup>57</sup> Ronli Sifris, *Submission 001*, p7; *United Nations Convention on the Rights of the Child (1989)*, *United Nations Treaty Collection*, Article 3.

<sup>58</sup> ACT Government, *Submission 005*, p 7.

<sup>59</sup> ACT Government, *Submission 005*, p 7.

that we are looking at here. We will be watching closely to see how the Supreme Court will be interpreting this. But our intent, both in drafting and in the explanatory statement, is clear.<sup>60</sup>

- 2.14. The ACT Human Rights Commission also shared the apprehension that any reforms should not inadvertently encourage commercial surrogacy arrangements. Overall, they felt that the proposals made in the Bill were adequate in balancing the rights of all parties involved.<sup>61</sup>

## Committee comment

- 2.15. The Committee notes the importance of discouraging commercial surrogacy arrangements while also ensuring children living in the ACT are not subject to real disadvantage. The Committee is of the view that the ‘pressing disadvantage’ test may prevent the Courts from acting in the best interests of the child in cases where this threshold is not met.

### 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.

## Extraterritorial commercial surrogacy

- 2.16. The *Parentage Act 2004* makes it a criminal offence to engage in commercial surrogacy, both within the ACT and extraterritorially.<sup>62</sup> The Bill does not seek to change this.
- 2.17. New South Wales<sup>63</sup> and Queensland<sup>64</sup> are the only other two Australian jurisdictions that criminalise extraterritorial commercial surrogacy but, unlike the ACT, have time limits on prosecuting these offences.
- 2.18. Some submitters advocated for the Bill to decriminalise extraterritorial commercial surrogacy, saying that it was not an effective deterrent but prevented parents from seeking parentage orders, thus disadvantaging the child.<sup>65</sup>
- 2.19. Alternatively, one submission suggested to the Committee that a time limit for prosecution should be introduced, in line with the practice in New South Wales and Queensland.<sup>66</sup>

---

<sup>60</sup> Tara Cheyne MLA, Minister for Human Rights, *Proof Committee Hansard*, 21 February 2024, pp 3–4.

<sup>61</sup> ACT Human Rights Commission, *Submission 008*, p 2–5.

<sup>62</sup> *Parentage Act 2004*, ss 41 and 45.

<sup>63</sup> *Surrogacy Act 2010* (NSW), ss 9, 11; *Criminal Procedure Act 1986* (NSW), ss 3, 5, 6, 7, 179, Schedule 1.

<sup>64</sup> *Surrogacy Act 2010* (Qld), ss 54, 56, 57; *Criminal Code 1899* (Qld), s 3, *Justices Act 1886* (Qld), s 52.

<sup>65</sup> See, for example: Ronli Sifris, *Submission 001*, p 9; Surrogacy Australia, *Submission 002*, p 5.

<sup>66</sup> Ronli Sifris, *Submission 001*, pp 8–9.

2.20. Page Provan indicated in their submission that any parent who may consider applying for a parentage order under proposed section 28G(2) would ‘be chilled by the possibility of being referred by the Court to authorities for consideration of prosecution’.<sup>67</sup>

2.21. Conversely, Donor Conceived Australia stated in their submission that jurisdictions that prohibit commercial surrogacy ‘should include extraterritorial prohibitions in their laws’. They expressed the view that:

Commercial surrogacy commodifies the creation of human life in a way that impinges on the rights of all human-beings not to be bought and sold. Additionally, the use of international surrogates (and often international gametes to conceive the child as well) ensures the child is removed from important components of their cultural heritage and through it, important links to self-identity.<sup>68</sup>

2.22. The Catholic Archdiocese of Canberra and Goulburn shared a similar concern that ‘the human rights of all involved is compromised through the objectification and commodification of surrogate mothers and children’.<sup>69</sup>

2.23. At the public hearing, Mr Daniel Ng, Executive Branch Manager, Justice and Community Safety Directorate, provided the following information about the criminal offence landscape across Australia for commercial surrogacy arrangements:

The consistent policy position across the jurisdictions is that no parentage order can be made as a result of commercial surrogacy. That is a position that goes across all states and territories. The ACT, Queensland and New South Wales have extraterritorial offences for commercial surrogacy arrangements, but all jurisdictions have local offences for entering into commercial surrogacy arrangements.<sup>70</sup>

2.24. In answer to a Question Taken on Notice (QTON) at the public hearing, the Minister advised the Committee that:

There have been no prosecutions in the ACT for the following offences under the *Parentage Act 2004*: section 41 (entering into a commercial substitute parent agreement), section 42 (procurement of substitute parent agreement), section 43 (advertising in relation to substitute parent agreements) and section 44 (facilitating pregnancy in the context of a commercial substitute parent agreement).

One of the objectives of the criminal offences in the *Parentage Act* is to deter specified behaviour. The number of prosecutions does not indicate the number of times that individuals in the community may have been influenced by the

---

<sup>67</sup> Page Provan, *Submission 010*, p 7.

<sup>68</sup> Donor Conceived Australia, *Submission 009*, p 17.

<sup>69</sup> Catholic Archdiocese of Canberra and Goulburn, *Submission 003*, p 2.

<sup>70</sup> Mr Daniel Ng, Executive Branch Manager, Justice and Community Safety Directorate, *Proof Committee Hansard*, 21 February 2024, p 14.

existence of the criminal offences, and then not engaged in the specified behaviour.<sup>71</sup>

- 2.25. The Committee notes the inconsistency across Australian jurisdictions regarding extraterritorial commercial surrogacy. Considering the concerns raised in evidence to this inquiry, the Committee believes further exploration on the value of extraterritorial prosecutions would be beneficial.

### Recommendation 3

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

## Time limits to make parentage orders

- 2.26. Proposed paragraph 28F(3)(a) of the Bill stipulates that an application for a parentage order for a child born of a surrogacy arrangement, other than a commercial surrogacy arrangement, can be made for a child between the ages of four weeks old and six months old.<sup>72</sup>
- 2.27. The ACT Law Society and the ACT Human Rights Commission both raised concerns in their submissions about this time limit to apply for a parentage order. They suggested it may be appropriate for the Court to have discretion to consider applications outside this time frame where the Court is satisfied there are exceptional circumstances to justify it.<sup>73</sup>
- 2.28. The Committee notes that this would align with other Australian jurisdictions.<sup>74</sup>
- 2.29. The ACT Human Rights Commission also noted that an unintended consequence of this time limit would be that a parentage order could be made for a child older than six months in the case of commercial surrogacy, but not altruistic surrogacy.<sup>75</sup>

### 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.

<sup>71</sup> Ms Tara Cheyne MLA, *Answer to QTON: commercial surrogacy prosecutions*, 21 February 2024 (received 1 March 2024), pp 1–2.

<sup>72</sup> Parentage (Surrogacy) Amendment Bill 2023, s 28F(3)(a).

<sup>73</sup> See, for example: ACT Law Society, *Submission 007*, p 3; ACT Human Rights Commission, *Submission 008*, p 5.

<sup>74</sup> See, for example: *Surrogacy Act 2010* (NSW), s 16(3); *Surrogacy Act 2012* (TAS), s 15(1)(c); *Surrogacy Act 2008* (WA), s 20(3); *Surrogacy Act 2010* (Qld), s 21(2); *Surrogacy Act 2022* (NT), s 26(2)(b); *Status of Children Act 1974* (Vic), s 20(1)(b).

<sup>75</sup> ACT Human Rights Commission, *Submission 008*, p 5.

## Reasonable expenses

- 2.30. The ACT Government indicated in their submission that the proposed regulations on reasonable expenses largely aligned with NSW and included some elements of the Victorian model. They advised that reasonable expenses were included in the regulations rather than the primary legislation to allow for further flexibility if necessary.<sup>76</sup>
- 2.31. Donor Conceived Australia cautioned that a lack of clarity in determining the extent of a reasonable expense could lead to overly generous altruistic donations, ultimately constituting commercial surrogacy. They called for further clarity on how a reasonable expense is determined and monitored.<sup>77</sup>
- 2.32. Conversely, Ronli Sifris expressed the view in their submission that surrogates deserved to be adequately compensated and was supportive of allowing a broad range of expenses to be covered to ensure the surrogate was not out of pocket.<sup>78</sup>
- 2.33. In their submission, Page Provan disagreed with the ACT Government's assertion that the regulation on reasonable expenses was 'largely aligned' with NSW, stating:
- 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.<sup>79</sup> NSW then gives examples of what is allowable. By contrast the Regulation tightly prescribes what is allowable.<sup>80</sup>
- 2.34. Page Provan highlighted a disparity in the regulations allowing parking and travel expenses to be reimbursed for a medical appointment, but not for a counselling or legal appointment.<sup>81</sup>
- 2.35. Equality Australia posited in their submission that regulations should set out broad principles without attempting to be prescriptive, saying that this is how anomalies such as the above could arise.<sup>82</sup>
- 2.36. Several submitters shared the view that the regulations may not cover all potential costs to the surrogate and suggested closer alignment with New South Wales may be needed.<sup>83</sup>
- 2.37. Many submitters also raised concern that the following expenses, which are currently permissible in the ACT and in NSW, would no longer be permissible with the passing of the Bill:
- maternity clothing;<sup>84</sup>

---

<sup>76</sup> ACT Government, *Submission 005*, p 7.

<sup>77</sup> Donor Conceived Australia, *Submission 009*, p 6.

<sup>78</sup> Ronli Sifris, *Submission 001*, p 9–10.

<sup>79</sup> *Surrogacy Act 2010* (NSW), s 7.

<sup>80</sup> Page Provan, *Submission 010*, p 9.

<sup>81</sup> Page Provan, *Submission 010*, pp 8–9.

<sup>82</sup> Equality Australia, *Submission 004*, p 6.

<sup>83</sup> Surrogacy Australia, *Submission 002*, p 4; Equality Australia, *Submission 004*, p 6; Page Provan, *Submission 010*, pp 8–10.

<sup>84</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; ANZICA, *Submission 006*, p 7; Page Provan, *Submission 010*, p 9.



- parking or travel expenses related to seeing a counsellor or lawyer;<sup>85</sup>
- massages or acupuncture due to pregnancy related back pain;<sup>86</sup>
- employing a locum if surrogate is self-employed;<sup>87</sup>
- cost of getting a will made;<sup>88</sup> and
- cost of a divorce for a separated surrogate (so their spouse is not a presumed parent).<sup>89</sup>

## Committee comment

- 2.38. The Committee considers that the wording used in the *Parentage Regulation 2023* to determine what is considered a reasonable expense may unfairly rule out some expenses that would be considered reasonable in New South Wales or under the current provisions in the *Parentage Act 2004*.

### 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.

## Counselling

- 2.39. Several submitters highlighted the need for counsellors to be appropriately qualified and have specialised knowledge of infertility and surrogacy. A concern was raised that the Bill does not specify any minimum requirements in this regard.<sup>90</sup>
- 2.40. The Australia and New Zealand Infertility Counsellors Association (ANZICA) and Surrogacy Australia both suggested in their submissions that counsellors should be required to hold qualifications that would permit them to become full members of ANZICA, as is required in several other Australian jurisdictions.<sup>91</sup>
- 2.41. ANZICA identifies their organisation as ‘the peak professional Australian and New Zealand counselling organisation dedicated to promoting the psychological and social wellbeing of individuals and couples undergoing fertility treatment’.<sup>92</sup>
- 2.42. Page Provan agreed that the ACT should set out appropriate qualifications, suggesting in their submission that:

<sup>85</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; ANZICA, *Submission 006*, p 7; Page Provan, *Submission 010*, p 9.

<sup>86</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; Page Provan, *Submission 010*, p 10.

<sup>87</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; Page Provan, *Submission 010*, p 10.

<sup>88</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; Page Provan, *Submission 010*, p 9.

<sup>89</sup> See, for example: Surrogacy Australia, *Submission 002*, p 4; Page Provan, *Submission 010*, p 9.

<sup>90</sup> See, for example: Surrogacy Australia, *Submission 002*, p 3; ANZICA, *Submission 006*, p 4; Donor Conceived Australia, *Submission 008*, p 7; Page Provan, *Submission 010*, p 7.

<sup>91</sup> See, for example: ANZICA, *Submission 006*, p 4; Surrogacy Australia, *Submission 002*, p 3.

<sup>92</sup> ANZICA, *Submission 006*, p 2.

There could be a broader approach, as seen in Queensland, where the counsellor can be an ANZICA member, a social worker, psychiatrist or psychologist, or a narrower approach where the counsellor needs to be an ANZICA member or eligible to join, as seen in Western Australia, for example. Either works.<sup>93</sup>

### Committee comment

- 2.43. The Committee notes that most other Australian jurisdictions require counsellors to be appropriately qualified.<sup>94</sup>

#### 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.

- 2.44. Additionally, ANZICA in their submission opposed proposed subsection 28(2) which requires that the intended parents must receive counselling from a different service than the surrogate and their partner, stating that this is contrary to best practice guidelines and misaligned with all other Australian jurisdictions. They drew attention to South Australia's arrangements, which previously made the same requirement but had since abandoned it due to its unworkability.<sup>95</sup>
- 2.45. In their submission, Page Provan also opposed this requirement, arguing that there should be one counsellor who could reconcile differing views. They likewise cautioned that the ACT should not 'repeat the mistake' of South Australia, noting that the State abolished this requirement from their legislation in 2015.<sup>96</sup>

### Committee comment

- 2.46. The Committee notes that the requirement in the Bill for each party to see a different counsellor would bring the ACT out of step with all other Australian jurisdictions and is not considered best practice.

#### 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.

---

<sup>93</sup> Page Provan, *Submission 010*, pp 7–8.

<sup>94</sup> See, for example: *Surrogacy Regulation 2016* (NSW), s 6(1); *Surrogacy Act 2022* (NT), s 25(1); *Surrogacy Act 2010* (Qld), s 19(a); *Surrogacy Act 2019* (SA), s 14(1); *Surrogacy Act 2012* (Tas) s 47; *Surrogacy Regulations 2009* (WA), s 3.

<sup>95</sup> ANZICA, *Submission 006*, p 4.

<sup>96</sup> Page Provan, *Submission 010*, p 8.

2.47. Additionally, ANZICA argued that there should be a requirement for post-birth counselling for all parties prior to a parentage order being made, as is the case in several other Australian jurisdictions.<sup>97</sup>

2.48. The submission from ANZICA states:

This period is extremely critical in terms of ongoing relationships and psychological wellbeing. The intended parent/s are understandably very preoccupied with caring for their much longed for child/ren, and the birth parent is physiologically and emotionally still impacted by the gestation and birth for the surrogacy.<sup>98</sup>

### Committee comment

2.49. The Committee notes these concerns and considers it beneficial to ensure all parties involved receive appropriate counselling after the birth of the child, prior to a parentage order being made.

#### 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.

2.50. In their submission, Donor Conceived Australia emphasised the need for counsellors to be independent from fertility clinics that provide assisted reproductive technologies. They suggested that the Bill clearly stipulate that the counsellor ‘has not received material, reputational or other demonstrable benefit’ from any fertility clinic or other party involved.<sup>99</sup>

### Committee comment

2.51. The Committee notes the provisions in proposed subclause 28(5) that counselling must be provided by a counselling service ‘that is not connected with’ the doctor, institution, or another entity, that is involved in carrying out the procedure.<sup>100</sup> The Committee considers this appropriately ensures the independence of the counselling service.

## Conception

2.52. The Explanatory Statement to the Bill states that ‘surrogacy agreements must be made in writing before conception and all parties to a surrogacy arrangement [are] to seek independent legal advice and undertake counselling prior to agreement.’<sup>101</sup>

---

<sup>97</sup> See, for example: ANZICA, *Submission 006*, p 5; Surrogacy Act 2022 (NSW), s 35(2); Surrogacy Act 2022 (NT), s 23.

<sup>98</sup> ANZICA, *Submission 006*, p 5

<sup>99</sup> Donor Conceived Australia, *Submission 009*, p 7.

<sup>100</sup> Parentage (Surrogacy) Amendment Bill 2023, s 28(5).

<sup>101</sup> Parentage (Surrogacy) Amendment Bill 2023, *Explanatory Statement and Human Rights Compatibility Statement*, p 1.

- 2.53. However, Surrogacy Australia noted in their submission that the term conception does not appear anywhere in the Bill, nor is it defined by the Bill. They cautioned that this could lead to ambiguity regarding each parties' legal obligations.<sup>102</sup>
- 2.54. They referred to a Queensland court case in which the court was required to interpret the definition of 'conceived' in order to determine whether a parentage order could be made about a child born of a surrogacy arrangement.<sup>103</sup>
- 2.55. Surrogacy Australia further highlighted that the requirement for legal advice, counselling, and a written agreement to take place before conception could adversely affect same-sex couples, in whose cases an embryo is often created prior to securing a surrogate, or in the case of traditional surrogacy where a fertility clinic is not always involved.<sup>104</sup>
- 2.56. Surrogacy Australia proposed that the term 'conception' be avoided altogether and suggested aligning the Bill with the practicalities of surrogacy, where an embryo is often created prior to surrogacy arrangements being finalised.<sup>105</sup>
- 2.57. During the public hearing, the Minister for Human Rights told the Committee that:

Because conception is not defined in the bill, the plain and ordinary meaning of the word applies. Dictionary definitions of "conception" and "conceive" involve pregnancy, so we are confident that elements that are required to occur prior to conception will not be enlivened prior to the creation of an embryo but instead prior pregnancy, as intended by the government when we created this bill.<sup>106</sup>

## Committee comment

- 2.58. The Committee notes that there is an inconsistency between the Explanatory Statement, which states a requirement for the surrogacy arrangement to be made in writing prior to conception, and the Bill itself, which makes no mention of such a requirement.

### 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 2.5.2 as appropriate to avoid any doubt of the Bill's intentions.

---

<sup>102</sup> Surrogacy Australia, *Submission 002*, p 3.

<sup>103</sup> Surrogacy Australia, *Submission 002*, p 3. See also: *LWV v LMH* (2012) QChC 26.

<sup>104</sup> Surrogacy Australia, *Submission 002*, p 3.

<sup>105</sup> Surrogacy Australia, *Submission 002*, p 4.

<sup>106</sup> Ms Tara Cheyne MLA, Minister for Human Rights, *Proof Committee Hansard*, 21 February 2024, p 9.

## Reason for surrogacy

- 2.59. Three submissions noted that the Bill does not require intended parents to have a medical or social need for surrogacy and suggested this be included as a requirement in the Bill.<sup>107</sup>
- 2.60. Reasons given to justify requiring intended parents to demonstrate a medical or social need included:
- a) surrogacy being chosen due to the inconvenience of pregnancy or to preserve the intended mothers' looks;<sup>108</sup>
  - b) a shortage of surrogates across Australia;<sup>109</sup> and
  - c) the risks involved to the surrogate.<sup>110</sup>
- 2.61. The Committee heard from Ms Gabrielle McKinnon, Senior Manager in Human Rights and Social Policy, Justice and Community Safety Directorate, that 'the level of altruistic surrogacy arrangements in Australia is quite low generally and often occurs with family members or friends'.<sup>111</sup>

## Committee comment

- 2.62. The Committee does not consider it necessary to legislate a requirement to demonstrate a medical or social need for altruistic surrogacy, as it largely takes place between family and friends.

## Age limit of surrogate

- 2.63. The Bill requires a surrogate to be at least 18 years old. In addition, a person under 25 (but over 18) may only act as surrogate if they have been assessed by a counsellor as having sufficient maturity and understanding of the implications of the surrogacy arrangement.<sup>112</sup>
- 2.64. In their submission, the ACT Government recognised that this differed from most other Australian jurisdictions, which require a surrogate to be a minimum of 25 years old.<sup>113</sup>
- 2.65. The Scrutiny Committee highlighted in its report that by making 'a distinction based on the age of a person the Bill may limit the right to equality before the law under section 8 of the HRA.'<sup>114</sup>
- 2.66. In their submission, Donor Conceived Australia opposed allowing a person under the age of 25 to be a surrogate, expressing concern that they could be at risk of undue influence. They

---

<sup>107</sup> See, for example: ANZICA, *Submission 006*, p 7; Surrogacy Australia, *Submission 002*, p 3; Page Provan, *Submission 010*, pp 10–11.

<sup>108</sup> Page Provan, *Submission 010*, p 11.

<sup>109</sup> Surrogacy Australia, *Submission 002*, p 3.

<sup>110</sup> See, for example: Surrogacy Australia *Submission 002*, p 3; Page Provan, *Submission 010*, p 11.

<sup>111</sup> Ms Gabrielle McKinnon, Senior Manager, Human Rights and Social Policy, Justice and Community Safety Directorate, *Proof Committee Hansard*, 21 February 2024, p 11.

<sup>112</sup> Parentage (Surrogacy) Amendment Bill 2023, s 28B.

<sup>113</sup> ACT Government, *Submission 005*, p 6.

<sup>114</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Report No 37*, p 5.

also cautioned that people under 25 years of age may not fully understand the ‘financial, mental, physical, and life-long impacts childbearing may have’.<sup>115</sup>

- 2.67. Submitters Ronli Sifris and the ACT Human Rights Commission, commended the flexibility that this provision allowed.<sup>116</sup>

### Committee comment

- 2.68. The Committee considers that, on balance, the provisions requiring an assessment by a counsellor to ensure a young person has sufficient maturity and understanding prior to acting as a surrogate are appropriate.

---

<sup>115</sup> Donor Conceived Australia, *Submission 009*, p 8.

<sup>116</sup> See, for example: Ronli Sifris, *Submission 001*, p 3; ACT Human Rights Commission, *Submission 008*, p 5.

### **3. Conclusion**

- 3.1. The Committee would like to thank all those who participated in this inquiry for the valuable contributions they made in assisting and informing the Committee's deliberations.
- 3.2. The Committee makes nine recommendations in relation to the Parentage (Surrogacy) Amendment Bill 2023.

Peter Cain MLA

Chair

March 2024

## Appendix A: Submissions

No.	Submission by	Received	Published
1	Ronli Sifris	28/11/2023	06/12/2023
2	Surrogacy Australia	29/11/2023	06/12/2023
3	Catholic Archdiocese of Canberra and Goulburn	29/11/2023	06/12/2023
4	Equality Australia	29/11/2023	06/12/2023
5	ACT Government	01/12/2023	06/12/2023
6	ANZICA	04/12/2023	06/12/2023
7	ACT Law Society	05/12/2023	06/12/2023
8	ACT Human Rights Commission	05/12/2023	06/12/2023
9	Donor Conceived Australia	08/12/2023	13/12/2023
10	Page Provan	09/02/2024	14/02/2024
10	Page Provan - Attachments	09/02/2024	14/02/2024



# Appendix B: Witnesses

Wednesday, 21 February 2024

## ACT Government

- **Ms Tara Cheyne MLA**, Minister for Human Rights
- **Mr Daniel Ng**, Executive Branch Manager, Legislation, Policy and Programs, Justice and Community Safety Directorate
- **Ms Gabrielle McKinnon**, Senior Manager, Legislation Policy and Programs, Justice and Community Safety Directorate

## Appendix C: Questions Taken on Notice

### Questions Taken on Notice

No.	Date	Asked of	Subject	Response received
1	21/02/24	Minister for Human Rights	Commercial surrogacy prosecutions	1/03/2024

## Appendix D: Gender distribution of witnesses

Beginning in April 2023, in response to an audit by the Commonwealth Parliamentary Association, Committees are collecting information on the gender of witnesses. The aim is to determine whether committee inquiries are meeting the needs, and allowing the participation of, a range of genders in the community. Participation is voluntary and there are no set responses.

Gender indication	Total
Female	2
Male	1