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

Submission Number: 009

Date Authorised for Publication: 13 December 2023

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Submission to ACT Inquiry into the Parentage (Surrogacy) Amendment Bill 2023

Prepared by Donor Conceived Australia

08 December 2023

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1 Introduction

Donor Conceived Australia (DCA) thanks the Standing Committee on Justice and Community Safety for the opportunity to provide feedback regarding the Parentage (Surrogacy) Amendment Bill 2023 (the Amendment Bill*) and* associated changes to the *Births, Deaths and Marriages Registration Act 1997*. We are hopeful that the Amendment Bill will bring about positive changes to the lives of surrogacy born and donor-conceived people, surrogates, and intended/recipient parents from the Australian Capital Territory and encourage further discussion in this area of legislative reform in the ACT.

1.1 History and purpose of Donor Conceived Australia

For over two decades, individuals and small groups throughout Australia have been working to bring about reform on matters relating to donor conception. In November 2021, a group of donor-conceived people came together with the goal of unifying these individuals and groups. Donor Conceived Australia is the peak body for donor-conceived people in Australia. We are a national, not-for-profit charitable organisation led by donor-conceived people offering support, information, and advocacy on behalf of people conceived via Assisted Reproductive Treatments (ART) - including sperm, egg and embryo donation throughout Australia, and those affected by donor conception. With over 600 members across every state and territory of Australia, including many in the ACT, we represent donor-conceived individuals at all ages and stages of discovery of their origins. This includes many surrogacy born people.

Donor Conceived Australia advocates for consistent legislation in the area of donor conception, whether that be through state-based or commonwealth laws. Donor Conceived Australia is guided by the United Nations Convention on the Rights of the Child (the CRC) and the Geneva Principles on Donor Conception and Surrogacy which were provided to the UN Committee on the Rights of the Child by donor-conceived and surrogacy born people (including many Australians), on the 30th anniversary of the CRC, (Allan et al, 2019) - see **Appendix I**. Donor Conceived Australia advocates for a regulatory framework in which the rights of the child created are of paramount importance in all policy and practice relating to ART. This includes the right to identifying information about their origins, including donor, surrogate and sibling linking services, regardless of when or where they were conceived.

1.2 Position on donor conception, surrogacy and ART

It is Donor Conceived Australia's position that:

1. The rights of the child created via donor conception and surrogacy are paramount in all policy, legislation, and decision-making related to donor conception practices;
2. All children have the right to grow up knowing and having the opportunity of forming a relationship with their biological parents, surrogate, siblings, and extended family members;
3. Donor-conceived individuals should have the option of contacting their biological donor parent when and if they choose to do so, and be supported to do so;
4. Each state and territory have a centralised register and that there is a mechanism by which data from these registers can be linked, in the absence of a national register;
5. Donor-conceived individuals must be able to share information with siblings and that contact be facilitated and supported;
6. Consideration be given to the moral and ethical issues surrounding appropriate family limits for each donor;
7. Any legislation or access to information via a register be retrospective;
8. Counselling be available for free for those affected by donor conception and surrogacy, particularly donor-conceived people, and that this be provided by a qualified and experienced professional;
9. Donor-conceived status be shared by the government with appropriate support, including the amendment of birth certificates;
10. The importation of and use of international gametes in Australia be much more heavily regulated, and if not possible, made illegal.

1.3 Background comments on the Parentage (Surrogacy) Amendment Bill 2023

Donor Conceived Australia considers the Amendment Bill a positive step towards the reform of surrogacy practices in ACT. We agree that the *Parentage Act 2004* requires updating to bring it in-line with best-practice legislation in the field. The current *Parentage Act 2004* is insufficient to regulate surrogacy practices holistically and does not appropriately cater to the rights of the person created. Subsequently, the rights of surrogacy born people have not been sufficiently protected nor fostered to-date.

Historically, donor-conceived people (DCP) and people born from surrogacy arrangements, the people most affected by the process, have not been consulted about it. We thank the ACT Government for their consultative approach to understanding the many points of view on the sector and, as a human-rights jurisdiction, understanding the important role to be played in understanding and centring the rights of the child.

As a National Peak Body for DCP, we are invested in ensuring equitable representation from ACT DCP in response to the current amendments being considered. While the proposed amendments are an important step forward and a good start, this submission makes recommendations that identify inadequate elements of the current regulations and proposed amendments; centralise child welfare paramountcy; and provide a platform for further consultation.

2 Response to the Parentage (Surrogacy) Amendment Bill 2023

2.1 Reasonable Expenses

DCA understands that the birth parent/surrogate and their partner/family require reimbursement of costs involved so that they are not unduly disadvantaged by participating in the surrogacy arrangement. The availability of these financial reimbursements across the three stages identified at Section 24 is appropriate, as is the list of reasonable expenses outlined in more detail in Section 4 of the Parentage Regulation 2023. However, we are concerned with the lack of clarity about who determines the extent of a reasonable expense. This omission leaves the intention of the Amendment Bill and future Act, to facilitate altruistic donations, open to abuse. Any loophole or unintended ability for the reasonable expenses component of the Amendment Bill to facilitate such generous use of the reimbursement clause that the birth parent/surrogate could emerge financially better off would, as a result of the agreement, constitute commercial surrogacy which is not legal in Australia, and a commodification of human life that impinges on the human rights of the resulting child.

DCA recommends that the Amendment Bill and Parentage Regulation 2023 make clear how a "reasonable expense" is classified and how this is determined and monitored.

2.2 Counselling

DCA commends the ACT Government for including strong requirements around independent counselling for all parties to the surrogacy agreement. Of utmost importance is:

- The ability to access specialised, qualified professionals; and,
- The independence of those professionals from any other party to the surrogacy agreement, most particularly independence from the clinic/any other commercial operator within the ART industry.

More clarity is needed in the proposed changes to the *Act* that defines:

- How the appropriate qualifications of a counsellor shall be determined (Section 28.4)
- The definition of the word 'connection' in Section 28.5 - DCA believes that clear guidelines ensuring counsellors are truly independent need be outlined such as:
  - "Has not been in the employ of, or received payment for services from",
  - "Has not received material, reputational or other demonstrable benefit from, any of the parties/entities listed at Section 28.5a-c."

DCA recommends that Section 28 relating to counselling be clarified to ensure that all parties to the surrogacy agreement receive counselling from appropriately qualified professionals who are truly independent from individuals or entities who financially benefit from the surrogacy arrangement.

2.3 Age of Birth Parent

DCA is not supportive of the allowance for under 25-year-olds to become birth parents within a surrogacy arrangement. Early adulthood is considered young to make decisions around parenthood in mainstream Australian society at this time, and there is a risk for undue influence or inability to understand the financial, mental, physical, and life-long impacts childbearing may have on the surrogate.

While we acknowledge this allowance is within a regulated environment with counsellor sign-off being required, we believe there is too much chance for misuse of this clause and harm for the surrogate and resulting child compared to potential benefit to the intended parents.

DCA recommends that surrogates be required to be at least 25 years old when they enter into a surrogacy arrangement.

2.4 Parentage Orders

The focus on prioritising the best interests of the child and ensuring the circumstances of their birth do not disadvantage them in any way is supported by DCA. DCA supports the inclusion of the paragraph immediately following Part 4 heading of the Amendment Bill that clearly outlines that,

> "The making of a parentage order about a child born under a commercial surrogacy arrangement does not affect a person's criminal responsibility under part 4 in relation to the commercial surrogacy arrangement."

There needs to be clear ramifications for people who engage in international surrogacy that does not comply with the ACT's regulation to provide sufficient deterrents without further disadvantaging the child born through the arrangement. However, DCA notes that no enforcement of existing restrictions on intended parents who use an overseas, commercial surrogacy arrangement has ever taken place in the jurisdiction. This is unlikely to be because none of these arrangements have been used by ACT-based intended parents. It is our concern that a problematic loophole is in existence and will continue to gain traction whereby intended parents unable to secure their preferred type of surrogacy arrangement in Australia will take advantage of this process.

Furthermore, we hope that the parentage orders proposed in the new Bill at 28G 2(b)

> "*there is a pressing disadvantage facing the child that would be alleviated by making a parentage order about the child;"*

will need to be careful monitored to ensure it is not taken advantage of. DCA has concerns that some legal groups may see this as an opportunity to legalise international commercial surrogacy with a loophole, and once they find the right words to use in their application, will coach their clients to use the correct words so that everyone can be under a certain 'pressing disadvantage" and achieve the end goal to ensure you have legitimised commercial surrogacy, even though it is technically illegal in ACT. DCA strongly encourages the ACT Government to keep a close eye on applications in this area.

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. Moreover, the act of accessing these services in unregulated countries make oversight and record keeping impossible and ensure the resulting child will face extreme financial and other barriers to accessing their genetic and identity-based cultural information that is unsupportable. The knowledge of the impact of removing children from their home country and culture is clear following decades of international adoption which subsequently resulted in an international tightening of laws to ensure children are not removed from their home country wherever possible. The same principle applies to children born of both traditional surrogacy (using surrogate's gametes) and those gestational surrogacy.

To be a sufficient deterrent that protects surrogacy-born people's right to access connection, statehood and information, the regulation as proposed must be enforced despite the complexity of doing so.

DCA recommends that it be made clear that Part 4, Sections 28G2(b) and 40-42 will be enforced in order to make the deterrent to prospective international surrogacy users real and current, and ensure the Acts intention to provide protections for surrogates and surrogacy-born people can be upheld.

2.5 Penalty for engaging in commercial surrogacy arrangements

It is DCA's understanding that as of November 2023, the penalty unit in the ACT for engaging in a commercial surrogacy arrangement is $150 *(Parentage Act 2004* (ACT), p. 27). As such, the maximum 100 penalty units ($15,000) leveraged alongside imprisonment or not, is insufficient to dissuade intended parents from partaking in a commercial arrangement. These arrangements are already expensive and only available to those with access to strong financial reserves or means.

DCA acknowledges the difficulty in applying a penalty where any likely impact will flow onto the surrogate-born person (i.e. their parents jailed or financially impacted). As such, it seems unlikely imprisonment will be an option for most courts. Balancing the need to effectively dissuade often desperate, ill-informed intended parents from engaging in commercial (international) surrogacy, which can include holidays for both intended parents and surrogates to sought after tourism destinations, is central to protecting the rights of children born from these arrangements. Not further disadvantaging children for whom this is already a reality through no fault of their own is also crucial. However, any penalty needs to be significant enough that it acts as a true deterrent, rather than a bothersome and unfortunate additional cost for the intended parents to achieve their life-long dream of parentage. Ten years ago these agreements usually cost between $60,000 and up to $150,000 (Everingham et. al, 2014), and it is highly likely that cost has increased in the intervening years. The fine must be proportionate to ensure it makes illegal commercial surrogacy arrangements financially infeasible for the majority.

DCA recommends that penalties for engaging in a commercial surrogacy arrangement be increased to act as a meaningful deterrent.

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3 Discussion

Donor Conceived Australia thanks the ACT Government for providing the opportunity to provide comment on the Parentage (Surrogacy) Amendment Bill 2023 (ACT), and the related changes in Schedule 1 of the *Births, Deaths and Marriages Registration Act 1997.* It is vitally important that the legislation is constructed to prioritise the welfare of the people who are most affected by this legislation, for the duration of their lives – people born from surrogacy who often are also donor-conceived and who, without proper protections, will face significant disadvantage accessing health information and connection to important genetic and gestational contributors who have cultural and emotional roles in helping them shape their identity and sense-of-self.

In all of DCA's discussion above, the welfare of the person created through surrogacy has been central to all positions and arguments. It is our understanding that the ACT jurisdiction is currently preparing further legislation to regulate ART in the Territory, that will align with other world-leading legislation in other Australian states that will centre the rights of the child as paramount to the decision-makers consideration. The legislation handling surrogacy agreements must therefore align with these principles. We note that these Acts, along with the *Family Court Act 1975*, must give effect to Australia's obligations under the United Nations Convention on the Rights of the Child. This includes rights to a name, a nationality, registration immediately after birth and to know and be cared for by their parents. The reality is that in ART and Surrogacy arrangements, the child has multiple parents who they have rights not to be separated from, and who all play an important role in facilitating the connection to genetic, cultural and individual heritage of surrogacy and donor-conceived people. We call for all changes to the relevant legislation to reflect the child welfare paramountcy principle, rather than the interests of other parties who may also be involved, whether they be recipient parents, surrogates, donors, or ART clinics.

The Geneva Principles, as presented to the United Nations on the 30th Anniversary of the Convention on the Rights of the Child, support the positions taken in this document and are the guiding principles that this submission is founded on. DCA has also drawn on its extensive experience in the Australian donor-conceived and surrogacy-born community. Subsequently, DCA is best placed to provide feedback on the proposed amendments of the legislation because it is us who are both directly affected and the subject of the child welfare paramountcy principle. We therefore trust that the ACT Government will listen to the suggestions and concerns put forth by Donor Conceived Australia.

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5 Appendix

International Principles for Donor Conception and Surrogacy

Purpose:

The International Principles for Donor Conception and Surrogacy (the Principles) have been drafted to provide minimum standards for laws and practice in Nation States where surrogacy and/or donor conception are already permitted or tolerated. The Principles require strict regulation of such practices to uphold the human rights and best interests of people born as a result, in accordance with the principles universally agreed to by Member States as per the United Nations Convention on the Rights of the Child (UNCRC), the most successful human rights treaty in history.

Background:

Donor conception is the commonly used term for the practice of intending parents using third party gametes (such as third party sperm, egg or embryos) to create their own child(ren).

Donor conception also applies to people who are born via surrogacy arrangements, where one or more gametes do not come from the intending parents. These surrogacy-born people are also donor-conceived. The birth mother in surrogacy may or may not be related to the child she carries and births, but she is always also important to the person born as a result.

The Principles are based on the recognition that regardless of the type of assisted reproduction used, all donor-conceived people and people born of surrogacy have a fundamental human right to their full and true identity, a right to preserve relations with their families, and a right not to be bought or sold as enshrined in the UNCRC and other international instruments.

The Principles originally arose out of a presentation by the drafters at the Conference on the 30th anniversary of the UNCRC, at the Palais des Nations, Geneva, November 19, 2019. They are informed by the lived experience of the drafters as donor-conceived. They respond to practices past and present that have impacted and/or continue to impact their lives. Many feel that they are the products of an international industry in human eggs, sperm, embryos and wombs which profits from human life – their lives. Yet as of this writing there is no jurisdiction in the world that fully protects the human rights of donor-conceived or surrogacy-born people despite all UN Member States having signed, and all but one having ratified, the UNCRC.

The Principles are also informed by extensive engagement by the drafters in advocacy on behalf of their community at local, national and international levels, and examination of laws and policy that directly impact them and their genetic, social and gestational families. In addition, the drafters draw upon their professional legal, communications, policy, social services, scientific and other qualifications and experience to inform their work.

In drafting the Principles, it is recognised that many countries maintain prohibitions on assisted reproduction including surrogacy and/or donor conception, as contrary to their values and the human rights of men, women and children. The Principles are not intended to be used to condone, widen or to encourage such practices. Rather, they are intended to set minimum standards that should be adhered to by nations that already permit such practices, and to require strict regulation where such practices occur. They are relevant to all donor-conceived people, including those born of surrogacy – past, present, and future.

Former and current initiatives to formulate policy and/or principles on donor conception and surrogacy by government agencies and not-for-profits are unacceptable. They have failed to adequately consult with donor-conceived and surrogacy-born people. They often choose to ignore the voices of donor-conceived and surrogacy-born people who do not support certain practices in favour of the interests of the fertility industry and intending parents. All policy-making, both national and international, henceforth must include meaningful consultation with a broad representation of donor-conceived and surrogacy-born persons in recognition that the people created by reproductive technology are overwhelmingly those most affected by it. These voices need to be heard, listened to, and acted upon.

We call upon all governments, agencies, and lawmakers to hear directly from this constituency, to recognise the rights of donor-conceived and surrogacy-born people and to enact laws that uphold and implement the following principles.

The Principles:

Best Interests and Human Rights of the Child Paramount

1. The best interests and human rights of the child who will be or has been born as a result of donor conception and/or a surrogacy arrangement must be the paramount consideration in all relevant laws, policies and practices and in any judicial and administrative decisions relating to donor conception and surrogacy.

Pre-Conception Screening and Post-Birth Review

2. Pre-conception assessments and screening of donors, intended parents and potential surrogate mothers and post-birth review of the best interests and human rights of the child born as a result must occur in every case of surrogacy and donor conception.

The Right to Identity and to Preserve Relations

3. All donor-conceived and surrogacy-born people have an inalienable right to identifying information about all of their biological parents, regardless of when or where they were conceived or born.

4. All donor-conceived and surrogacy-born people have an inalienable right to identifying information about all of their biological siblings, be they half or full siblings, regardless of when or where they were conceived or born.

5. All surrogacy-born people have an inalienable right to identifying information about their surrogate mother, regardless of when or where they were conceived or born.

6. All donor-conceived and surrogacy-born people have the right to preserve relations with biological, social and gestational families, regardless of when or where they were conceived or born. Such relations should be able to be maintained if mutually agreeable.

7. Anonymous donation of gametes and embryos, and anonymous surrogacy must be prohibited.

Record Keeping, Birth Records, and Access to Information

8. Comprehensive and complete records of the identity and familial medical history of all parties involved in the conception and birth of donor-conceived and surrogacy-born people must be kept. Such records must be held by each Nation State in which the conception and birth is commissioned and/or occurs, in perpetuity and for future generations. Verification of the identity of donors, surrogate mothers, and intending parents must occur.

9. All children's births should be notified to and registered with the appropriate competent authority in the Nation State of birth. Truth in registration, noting the child is donor-conceived and/or surrogacy-born, must occur. Birth records must be maintained in perpetuity and for future generations that recognise biological, social, and birth parents.

10. All donor-conceived and surrogacy-born people have the right to be notified of their status and to access records pertaining to their identity, familial medical history, and birth registration.

11. Parents should be encouraged and supported to tell their children of their donor-conceived or surrogacy-born status as early as possible, and preferably from birth. This should be coupled with efforts to reduce stigma related to infertility.

Prohibitions on commercialisation of eggs, sperm, embryos, children and surrogacy

12. All forms of commercialisation of eggs, sperm, embryos, children, and surrogacy must be prohibited. This includes, but is not limited to any kind of consideration (payment or other consideration) for a) the recruitment of potential donors and/or surrogate mothers; b) gametes or embryos; c) 'services', time, effort, 'pain and suffering' related to the conception, pregnancy and/or birth of a child, or termination of pregnancy.

13. The sale and trafficking in persons and/or of gametes in the context of assisted reproduction and surrogacy must be prohibited.

14. The participation of paid intermediaries or agents in arranging surrogacy and/or recruiting or procuring women or donors of gametes for the purposes of surrogacy or gamete donation for profit, should be prohibited on the basis that their participation increases the risks of the sale and/or trafficking of women and children.

Prohibitions on transnational surrogacy and donor conception

15. It is not in the best interests of the child to be conceived or born in circumstances in which the 'intending parents' have circumvented or breached laws within their own country by engaging in cross-border assisted reproduction, including but not limited to donor-conception and/or surrogacy. States that prohibit such practices should include extraterritorial prohibitions in their laws. States that allow such practices should limit access to their own citizens. Extraterritorial prohibitions should be enforced.

16. It is not in the best interests of the child to be intentionally separated from their genetic families by geographical, linguistic or cultural barriers. As such, inter-country transfer of gametes should also be prohibited.

Family limits

17. To avoid the risk of consanguineous relationships, and the psychological impact of an unlimited number of potential siblings, the number of families that may be created using one donor's gametes should be limited to five.

Requirement for Counselling and Legal Advice

18. Independent counselling and legal advice must be a requirement prior to entering into donor conception and surrogacy arrangements. All parties to donor conception and/or surrogacy must be able to give their informed consent after receiving information about the processes involved, material risks, legal and financial implications and their rights and responsibilities. All information must be delivered in a language the person receiving the counselling and advice can understand. All decisions must be made autonomously and free from duress, coercion, and/or exploitation.

19. The provision of counselling and legal advice must always uphold and convey the best interests and human rights of the child(ren) born to be the paramount consideration.

Transfer of Legal Parentage (Surrogacy)

20. Upon the birth of a child conceived as a result of a surrogacy arrangement, the child should share the birth mother's nationality to avoid the situation that a surrogacy-born child is 'stateless', and records to this effect must be kept.

21. Transfer of legal parentage in cases of surrogacy from a surrogate mother to 'intending parent(s)' should never be automatic nor based solely on intention. Intending parent(s) do not have a right to exclusive legal parentage or parental responsibility of a child born through surrogacy, regardless of any expenses they may have incurred through the process. The surrogate mother must never be compelled to relinquish the child(ren) she has given birth to.

22. Where a surrogate mother has carried the full genetic child of another couple and does not wish to relinquish the child, legal parentage of the child should be determined by a Court dependent on the best interests of the child.

23. Enforcement of contractual terms that purport to transfer legal parentage is not consistent with the best interests or human rights of a child.

Posthumous Use of Gametes

24. Gametes or embryos which a) have been retrieved posthumously from a person, or b) are stored by a clinic on behalf of a person who has since died must never be used in donor conception or surrogacy arrangements, regardless of whether any consent had been given by the person from whom those gametes were obtained prior to their death.

Commentary:

The Principles express the common view of the members of the November 2019 UN presentation on The Rights of the Child in the Age of Biotechnology as part of the 30th anniversary conference on the UNCRC.

The Principles recognise that, pursuant to the UNCRC, donor-conceived people and people born of surrogacy have a fundamental human right to:

- as far as possible, know and be cared for by their parents (Article 7);
- preserve their identity, nationality and family relations, to not be deprived of any elements of their identity, and to seek State assistance to re-establish their identity (Article 8);
- maintain personal relations and direct contact with both parents on a regular basis (Article 9);
- express their views in all matters affecting them (Article 12); and
- seek, receive and impart information and ideas affecting them (Article 13).

Most importantly, ALL children have a fundamental human right not to be bought or sold.

Donor-conceived people and people born of surrogacy also have the right to:

- have their rights in the Convention respected by States Parties without discrimination of any kind, irrespective of the child's birth or other status (Article 2); and
- have the best interests of the child as the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3).

States Parties should undertake all appropriate legislative, administrative and other measures for the implementation of these human rights as recognised in the UNCRC (Article 4).

As noted in the background to this document, all policy-making, both national and international, must henceforth include meaningful consultation with a broad representation of donor-conceived and surrogacy-born persons, as they are the population overwhelmingly affected by the practice of third-party reproduction.

The full United Nations Presentation by Donor-Conceived and Surrogacy-born People for the 30th Anniversary of the Convention on the Rights of the Child can be viewed here: https://www.youtube.com/watch?v=GEP3ZGPFdeQ

The transcript of the presentation can be found here: https://www.donorkinderen.com/speeches-united-nations

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