LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Parentage (Surrogacy) Amendment Bill 2023

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Standing Committee on Justice and Community Safety
ACT Legislative Assembly Review
GPO Box 1020
Canberra ACT 2601

Dear Committee

Re: Parentage (Surrogacy) Amendment Bill 2023

Thank you for the opportunity to provide a submission in response to the inquiry into the Parentage (Surrogacy) Amendment Bill 2023 (ACT) (**the Bill**).

As a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people, Equality Australia broadly welcomes the steps taken by this Bill towards recognising the families of children born through surrogacy. We also support the measures to remove discrimination against prospective intended parents while protecting the rights of a surrogate parent to manage their own pregnancy and birth and putting in place some reasonable requirements for legal advice and counselling (which, importantly, can be dispensed with when considering a parentage order if it is in the best interests of the child[1]).

Our comments below are limited to addressing the issues we see with the operation of proposed subsection 28G(2), which is designed to ensure children born through commercial surrogacy arrangements have an opportunity to have their parents legally recognised in the ACT in the same way as a child born through a non-commercial surrogacy arrangement.

KEY POLICY OBSERVATIONS

Our comments below regarding subsection 28G(2) are informed by the following key policy observations.

All children deserve the emotional and financial security that comes with having their intended parents legally recognised. Denying legal parentage to a child does not serve their best interests as it denies them the protection of having their intended parents legally responsible for their care, wellbeing and development. Our principal concern with the way that subsection 28G(2) is currently framed is that, in effect, it puts the best interests of a child secondary to the policy of

[1] Parentage (Surrogacy) Amendment Bill 2023 (ACT) cl 8 (proposed sections 28G(3)(b)).

denying recognition to parents who have not complied with the regime's requirements. In our view, and consistent with Australia's international human rights obligations, the child's best interests must be the paramount consideration in any decision affecting a child.[2]

Secondly, the denial of legal parentage is not an appropriate or effective way of regulating surrogacy, including commercial surrogacy. This is apparent from the fact that, notwithstanding prohibitions on commercial surrogacy and current barriers to intended parents obtaining legal parentage, children have been born through surrogacy arrangements overseas.[3] The current approach of denying legal parentage to families created through surrogacy as a means of seeking to prevent their creation simply has not worked, and the ultimate cost is currently borne by the child whose legal parentage may never reflect the reality of their familial life.

Thirdly, and perhaps most importantly, whatever the arguments for or against commercial surrogacy, no child should be discriminated against or disadvantaged because of the circumstances in which they were conceived. This is particularly so where they were conceived under a surrogacy arrangement that is lawful overseas and in circumstances where the surrogate parent has consented in a fully informed and non-coerced way to the arrangement and the relinquishing of the child to the intended parents.

Accordingly, in our view, a regulatory approach that irrefutably ties the legal recognition of parentage with the circumstances of the surrogacy arrangement in which children have been conceived seems to both potentially discriminate against children based on the circumstances of their birth and provides no safeguards to protect the rights of surrogate birth parents, their partners and the intended parents who are involved in surrogacy, particularly overseas. While we support reasonable requirements which ensure that the wellbeing and interests of the surrogate, intended parents and the child are properly protected in the lead up to, during and after the surrogacy has been arranged, the issue of legal parentage should be centred on the best interests of the child.

These principles have been mostly realised through subsection 27G(3), which allows a court to dispense with technical requirements that have not been met with when it is in the best interests of the child to make a parentage order. However, as discussed below, we think that amendments to subsection 28G(2), or alternatively, to subsection 28G(3), are necessary to fully implement this principle.

SUGGESTED AMENDMENTS TO SUBSECTION 28G(2)

We welcome proposed subsection 28G(2) of the Bill because it reflects the principle that a child should never be discriminated against because of the circumstances of their conception and that denying a child the legal recognition of their true parents for the rest of their life is not a child-centred approach to regulating surrogacy.

While we endorse the direction that subsection 28G(2) has taken, we suggest that the requirements in subsections 28G(2)(b) and (2)(e) be removed, or alternatively, be reframed as

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[2] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1.

[3] See e.g. *Seto & Poon* [2021] FamCA 288 at [45]; *Whytham & Teng* [2019] FamCA 705; *Overton & Dyson* [2019] FamCA 20. See also Jenni Millbank (2013) 'Resolving the dilemma of legal parentage for Australians engaged in international surrogacy', *Australian Journal of Family Law*, 27(2).

considerations which can be taken into account but that do not otherwise override the paramount consideration of ensuring the best interests of the child.

We therefore make the following suggestion for reframing subsection 28G(2) (with consequential changes to the numbering in subsection 28G(3) made accordingly):

> *(2) The Supreme Court may make a parentage order about a child mentioned in section 28E(2) if satisfied that—*
>
> > *(a) <u>having regard to the circumstances of the presumed parent or parents, intended parent or parents and the surrogacy arrangement,</u> the making of the order is in the best interests of the child; and*
> >
> > *(<u>b</u>) each presumed parent freely, and with a full understanding of what is involved, agrees to the making of the order; and*
> >
> > *(<u>c</u>) the requirements of subdivision 2.5.2, other than the requirement in section 28C (reasonable expenses incurred), are met as if the commercial surrogacy arrangement mentioned in section 28E(2)(a) were a surrogacy arrangement mentioned in section 28E(1)(a).*
>
> Note: The making of a parentage order about a child born under a commercial surrogacy arrangement does not affect a person's criminal responsibility under pt 4—see s 31 (effect of surrogacy arrangements).

Our recommended amendment to subsection 28G(2)(a) is intended to deal with the two key concerns we have with the current formulation, as set out below.

The best interests of the child are not currently the paramount consideration

The requirement that the making of a parentage order be in the best interests of the child must be a paramount consideration, if it is to align with Australia's international human rights obligations.[4] Consistently with the *Family Law Act 1975* (Cth), it is possible to suggest to a court the considerations that should be taken into account when determining the best interests of the child.[5] However, ultimately the court must have a child's best interests as the paramount consideration in arriving at its decision as to whether a parentage order should be made or refused.

We think this principle can be implemented by framing the requirement to consider whether it is reasonable in the circumstances to make the parentage order (s 28G(2)(e)) as a consideration made along the decision-making journey, where the final decision must ultimately be in the best interests of the child. Our suggested amendment provides the court with guidance on what matters should be reasonably considered in arriving at the decision. It also reflects the amendments to the NSW *Surrogacy Act* proposed by Alex Greenwich MP in his private members' bill before the NSW parliament.[6]

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[4] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 3.1.

[5] *Family Law Act 1975* (Cth) ss 60CC, 65AA.

[6] Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) Schedule 19, [3].

This balances the countervailing interest in not giving the Court's imprimatur to a surrogacy arrangement which is abusive, coercive or otherwise contrary to public policy, while ensuring that the child is not disadvantaged because of the circumstances of their conception or birth.

The requirement to prove 'pressing disadvantage' facing the child is too strict

The requirement in subsection 28G(2)(b) for a child to demonstrate *'pressing disadvantage'*, defined in the explanatory memorandum as comprising *'real and substantial difficulty beyond simply not having their parentage recognised'*,[7] is unnecessarily burdensome and should be removed.

All children are innately disadvantaged when the law fails to recognise their true parents. The disadvantage may include:

- the child's parents may not have legal authority to make decisions about their education or medical care, and may potentially be under a duty to give notice to or even consult with a surrogate birth parent in decisions involving the child;
- legal uncertainty regarding whether a child is entitled to inherit property and superannuation upon the death of a parent;
- legal issues with citizenship and travel; and
- the need for multiple proceedings in different jurisdictions to establish parental responsibility or parentage on particular issues.

These are not all things that a parenting order under the *Family Law Act 1975* (Cth) can fix, given these orders expire once a child turns 18 years and a parenting order can only confer parental responsibility (and not legal parentage).[8]

Requiring 'pressing disadvantage' before the discretion in subsection 28(2) can be engaged will likely leave families and children having to seek parentage orders during periods of significant stress, such as when the parent-child relationship is questioned. Having to wait until and if there is a 'pressing disadvantage' negates the benefit of ensuring every child has the economic and emotional security that comes with the legal recognition of their family.

OTHER MATTERS

In the short time available for submissions, we have not canvassed the range of other matters we previously submitted to the Department's review of the *Parentage Act 2004* (ACT). We would be happy to provide this committee with a copy of our submissions which go to other parentage and regulatory reforms we consider necessary to ensure all children have the economic and emotional security which comes with the legal recognition of their families, and which address our view that the current regulatory approach to surrogacy needs to be further considered as to whether it is meeting its policy objectives.

The matters which need further consideration include:

- a scheme to recognise multi-parent families; and

[7] Explanatory Memorandum, Parentage (Surrogacy) Amendment Bill 2023.

[8] *Family Law Act 1975* (Cth) ss 61B-61D, 64B, 65H.

- a mechanism allowing the automatic recognition of surrogacy parentage orders made overseas in appropriate circumstances (and thereby negating the need for further orders to be applied for in the ACT).

We also have not had the opportunity to analyse in detail the transitional provisions of the Bill but welcome the retrospective provisions that allow children who have already been born to have their families recognised by the new provisions.

Finally, we are aware that Surrogacy Australia and Mr Stephen Page have expressed concerns about the current drafting of the Parentage Regulation 2023, insofar as it limits reasonable allowable expenses in a manner that may be inconsistent with the current NSW position. It is desirable to ensure that reasonable expenses related to the pregnancy, surrogacy arrangement and parentage order proceedings be compensable without falling foul of the prohibition on commercial surrogacy, and that these regulations are as consistent as possible with the NSW position. We agree with the general proposition that the legislation should set out broad principles on what reasonable expenses can be claimed, with a regulation providing some certainty as to the detail, without necessarily attempting to be exhaustive. It is the attempt to be exhaustive that appears to have resulted in some anomalies (such as parking allowable for certain appointments but not others).

We would be happy to provide the Committee with further assistance, including by testifying if required.

Kind Regards,

Ghassan Kassisieh
Legal Director
Equality Australia