



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into Parentage (Surrogacy) Amendment Bill 2023

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ACT
Government

ACT Government Submission

Standing Committee on Justice and
Community Safety Inquiry into
Parentage (Surrogacy) Amendment
Bill 2023

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Contents

ACT Government Submission	1
1. Introduction.....	3
2. Context for reforms	3
3. Parentage (Surrogacy) Amendment Bill 2023	4
A. Access to surrogacy arrangements.....	4
B. Framework for surrogacy arrangements.....	5
C. Parentage order applications	6
D. Commercial surrogacy	7
E. Other changes.....	7
4. Conclusion	8

1. Introduction

The ACT Government welcomes the opportunity to provide a submission to the Standing Committee on Justice and Community Safety's (the Committee) inquiry into the Parentage (Surrogacy) Amendment Bill 2023 (the Bill). The Bill amends the *Parentage Act 2004* and aims to:

- better align ACT's surrogacy laws with other Australian jurisdictions,
- improve access to altruistic surrogacy in the ACT,
- strengthen the requirements for altruistic surrogacy arrangements in the ACT, and
- establish a structured framework to provide more certainty for parties entering surrogacy arrangements.

This submission seeks to assist the Committee by providing information regarding surrogacy laws in the ACT and how the Bill will make a positive impact on the Canberra community. The submission is intended to supplement information presented in the Explanatory Statement to the Bill and the presentation speech of the Minister for Human Rights, Tara Cheyne MLA.

2. Context for reforms

In Australia, state and territory governments regulate surrogacy. In the ACT, surrogacy is regulated by the *Parentage Act 2004* which sets out the requirements for parentage orders and offences relating to substitute parent agreements. The Parentage Act allows for altruistic surrogacy but prohibits commercial surrogacy.

The ACT was a member of the Working Group on Surrogacy established by the Standing Council of Attorney-Generals (SCAG) in November 2019.¹ The Working Group on Surrogacy was established to advise SCAG on opportunities for attaining greater national consistency in legal and policy frameworks regulating surrogacy in Australia and to reduce barriers to altruistic surrogacy. Through engagement with the Working Group, the ACT Government identified opportunities to achieve greater alignment with other states and territories, and ensure that the rights of children, intended parents and surrogates are more adequately protected.

In 2019, the ACT Government commissioned Equality Australia to undertake a comprehensive and independent legal audit of ACT legislations, which can be updated to better protect LGBTIQ+ people's human rights and remove discriminatory provisions to be more inclusive of the diversity of LGBTIQ+ people living in the ACT. The audit included some recommendations on proposed changes to the Parentage Act.² The Government also made a commitment in the Second Action Plan (2022-2023) of the Capital of Equality Strategy that we will work with other jurisdictions to consider harmonisation and updates to existing surrogacy laws.³

¹ See Council of Attorneys-General communiqué – November 2019, available at:

<https://webarchive.nla.gov.au/awa/20220325033126/https://www.ag.gov.au/about-us/publications/council-attorneys-general-communique-november-2019>

² See ACT LGTBTIQ+ Legal Audit report by Equality Australia, available at:

https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0006/1663611/EQAU-ACT-legal-report-2019.pdf.

³ See Second Action Plan (2022-2023) of the Capital of Equality Strategy, available at:

https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0006/1975218/Second-Action-Plan-April-2022.pdf.

To inform the Bill, the Justice and Community Safety Directorate consulted with a targeted group of stakeholders who represent specific groups within the community that have an interest in surrogacy and would be most impacted. This includes community organisations including those working with LGBTIQ+ community members and women, fertility and sexual health clinics and organisations, legal organisations, donor conceived people and ministerial councils. Many stakeholders were supportive of these proposed reforms, recognising the need for the Parentage Act to be updated to reflect developments that have occurred in the past 20 years and to better align with surrogacy laws in other states and territories.

3. Parentage (Surrogacy) Amendment Bill 2023

The Bill will modernise surrogacy laws in the ACT by removing discriminatory barriers, providing clearer structure for arrangements which better protects human rights for all parties involved, better considers the rights of a child, and results in greater consistency with states and territories.

The Bill updates the language used in the Act from ‘substitute parents’ to ‘intended parents’ and ‘substitute parent agreement’ to ‘surrogacy arrangement’ to better reflect a more inclusive and contemporary understanding of these arrangements. This will better align with other Australian jurisdictions and language used in the community.

A. Access to surrogacy arrangements

The Bill includes the following reforms to remove barriers to altruistic surrogacy in the ACT:

- **Allowing single people in the ACT to access altruistic surrogacy arrangements** – The Bill removes the current requirement for there to be two intended parents to enter into an arrangement. Most other Australian jurisdictions allow single people to access surrogacy arrangements.
- **Allowing traditional surrogacy** (that is, where the surrogate is permitted to use their own egg to conceive the child) and **remove the requirement for intended parents to have a genetic connection with the child** – The Parentage Act currently only permits gestational surrogacy, that is where a surrogate agrees to carry and give birth to a child that they do not have a genetic link to. Most other Australian jurisdictions also permit traditional surrogacy, that is, where the surrogate is permitted to use their own egg to conceive the child. Additionally, the ACT is currently the only Australian jurisdiction that requires that at least one intended parent be a genetic parent of the child, which discriminates against couples based on fertility.
- **Removing the requirement that a child will need to be conceived as a result of a procedure carried out in the ACT** – By removing this requirement, the Bill will enable flexibility about how and where conception occurs and will enable intended parents to use assisted reproductive technology services of their choice. Although conception need not occur in the ACT, intended parents will be required to be living in the ACT when they apply for a parentage order.
- **Allowing advertising and procurement for legally compliant altruistic surrogacy** – Sections 42 and 43 of the Parentage Act set out offences for procurement and advertising in relation to any surrogacy arrangements. The bill will remove offences relating to advertising or procuring altruistic surrogacy, which will further assist in facilitating access to altruistic surrogacy in the ACT.

Improving access to altruistic surrogacy in the ACT offers people more options to have a child. This is particularly important for those who, for many reasons, are unable to conceive and carry a child themselves.

B. Framework for surrogacy arrangements

Other Australian jurisdictions have more detailed frameworks for surrogacy arrangements in place with the aim of protecting all parties entering arrangements and for children born by such arrangements.

The Bill introduces a robust framework for altruistic surrogacy arrangements that is consistent with other Australian jurisdictions by aligning minimum safeguards in the ACT and providing clarity to all parties entering into surrogacy arrangements. The Bill includes the following requirements:

- **Surrogacy arrangements to be agreed in writing prior to conception of the child** – This will align the ACT with most other Australian jurisdictions. The Parentage Act is currently silent on when and how a surrogacy arrangement needs to be made.
- **Legal advice** – In the ACT, there is currently no requirement for parties to seek legal advice. Most jurisdictions require parties to seek legal advice prior to entering the surrogacy arrangement and the conception of the child. This requirement has been included because it provides an appropriate minimum safeguard for all parties involved to have a clear understanding of their rights, responsibilities and implications associated with entering a surrogacy arrangement and with the conception of the child.
- **Counselling** – While the Parentage Act requires the Supreme Court to consider whether both birth parents and both substitute parents have received appropriate counselling and assessment from an independent counselling service, it does not currently require that counselling be undertaken and there is no guidance about when in the process parties should access counselling.

The Bill introduces a requirement for each party to a surrogacy arrangement to receive counselling before entering the arrangement. The intended parent/s must receive counselling that is independent to the counselling service for which the birth parent and their partner, if any, receive their counselling. Further, if the birth parent is to undergo a procedure with the intention of becoming pregnant, the counselling each party receives must be from a counselling service that is not connected with the doctor who will carry out the procedure, the institution where the procedure will be carried out or another entity involved in carrying out the procedure, to avoid a potential conflict of interest.

- **Age requirements for intended parents and surrogates** – The Bill clarifies that each intended parent must be at least 18 years old and sets a default minimum age of 25 years for surrogates. However, the Bill provides that a person under 25 (but over 18) may become a surrogate if the Court is satisfied, on the basis of the counsellor's opinion, that they have sufficient maturity and understanding of the implications. This differs from the approach in other jurisdictions, with the exception of Northern Territory, who do not provide this flexibility for under 25 year olds to become surrogates.

The Parentage Act allows for the payment of reasonable expenses connected with an altruistic surrogacy arrangement, however 'reasonable expenses' is currently not defined. Other jurisdictions provide more specific guidance about what reasonable expenses can be paid for or reimbursed to the surrogate. The Bill amends the Act to provide greater guidance as to the reasonable expenses that may be reimbursed under an altruistic surrogacy arrangement. Reasonable expenses in relation to a surrogacy arrangement will include the reasonable costs associated with becoming or trying to become pregnant; a pregnancy or birth; and entering and giving effect to a surrogacy arrangement. Further detail about the types of expenses that are reasonable under each of these three categories is provided in a new regulation. The regulation is largely aligned with the definition of reasonable expenses set out in the NSW legislation⁴ and includes some matters from the Victorian model.⁵ These matters are included in the regulation rather than the primary legislation to allow greater flexibility for these provisions to be updated if further guidance is required.

The Parentage Act does not currently include any provisions relating to the management of a pregnancy subject to a surrogacy arrangement. The Bill confirms that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person, which is consistent with other Australian jurisdictions. This recognises the autonomy of surrogates to make informed decisions about their own medical care and bodies during pregnancy.

The introduction of a structured framework for surrogacy arrangements in the ACT will increase safeguards and strengthen the protection of human rights for all parties entering surrogacy arrangements, ensuring there is a clear understanding of their rights and responsibilities as well as legal and psychological implications associated with the surrogacy arrangement and conception of the child.

C. Parentage order applications

The Bill sets out the requirements for applications for parentage orders relating to a surrogacy agreement, and the basis on which the Supreme Court may grant parentage. This is based on the existing requirements in the Parentage Act, with some changes made to achieve the aims of improving access and ensuring the appropriate minimum safeguards as in place for all parties.

The intended parent/s of a child may make an application to the Supreme Court for a parentage order about the child when the child is between the ages of 4 weeks and 6 months. Reducing the earliest time that an application can be made for a parentage order from when the child is 6 weeks old to 4 weeks old reflects the common timeframe across the states and territories for applying for a parentage order following the birth of a child from a surrogacy arrangement and allows families and surrogates to confirm these arrangements with the court more promptly while still allowing an appropriate period for a surrogate to freely decide whether to proceed with the arrangement.

The Supreme Court may make a parentage order about the child if satisfied that the making of the order is in the best interests of the child; each intended parent, surrogate and any partner (who would otherwise be the presumed parent of the child) freely agree to the making of the order; and the requirements for surrogacy arrangements are met.

⁴ See *Surrogacy Act 2010* (NSW), available at: <https://legislation.nsw.gov.au/view/html/inforce/current/act-2010-102>.

⁵ See *Assisted Reproductive Treatment Regulations 2019* (Vic), available at: <https://www.legislation.vic.gov.au/in-force/statutory-rules/assisted-reproductive-treatment-regulations-2019/003>.

While the mandatory requirements for a surrogacy arrangement are specified in the Bill, and are expected to be complied with, discretion is provided to the Supreme Court to dispense with certain formal requirements of a surrogacy arrangement where, despite this non-compliance, making the parentage order is in the best interests of the child. This is intended to ensure that the Court has sufficient flexibility to ensure an appropriate outcome based on the Court's assessment of the child's best interests.

D. Commercial surrogacy

Commercial surrogacy arrangements are prohibited in the ACT. The Bill introduces changes to the Parentage Act so that in very limited circumstances, the Supreme Court will be able to make a parentage order recognising intended parents where a child has been born through a commercial surrogacy arrangement. No other Australian jurisdiction allows a parentage order to be made where a child has been born through a commercial surrogacy arrangement. While entering into a commercial surrogacy agreement in the ACT or overseas is not condoned and remains a criminal offence, this provision has been included in the Bill to recognise the rights of the child,⁶ and that a child living in the ACT should not be subject to real disadvantage simply because of the circumstances of their birth.

Australia is also a party to the Optional Protocol to the Convention of the Rights of the Child on Child Prostitution and Child Pornography.⁷ In guidelines for the implementation of the Optional Protocol, the Committee on the Rights of the Child encouraged State parties to take all necessary measures to avoid the sale of children under surrogacy arrangements. The Special Rapporteur on the sale and sexual exploitation of children presented a 2018 thematic report on surrogacy to the UN Human Rights Council which recommended that States protect the right of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness.⁸

In these limited cases, a parentage order may only be made where the Court is satisfied that the child is facing a pressing disadvantage that would be alleviated by making a parentage order, that it is in the best interests of the child, and it is reasonable in the circumstances. This follows a human rights approach where the best interests of the child must be a primary consideration in any decision that affects a child where children are protected and not discriminated against based on the circumstances of their birth.

E. Other changes

The Bill provides for the making of parentage orders for children who were born before the commencement of these new provisions to allow the beneficial application of provisions introduced by the Bill to remove barriers to altruistic surrogacy and allowing discretion for the Court to make a parentage

⁶ The rights of children, including those born through surrogacy, are enshrined in the *Human Rights Act 2004* (ACT), and further described in the Convention on the Rights of the Child (CRC), which Australia is a signatory to.

⁷ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child>.

⁸ See 2018 Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (A/HRC/37/60), available at: <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>, see 2019 follow up Report of the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (A/74/162), available at: <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy>.

order in a broader range of circumstances. The Bill provides transitional arrangements for surrogacy arrangements on foot when the Bill commences.

The Bill also provides for transitional arrangements in relation to the effect of a parentage order made in relation to a child born before the commencement of the amendments to avoid unintended consequences in relation to the disposition of property.

4. Conclusion

The Parentage (Surrogacy) Amendment Bill 2023 is a significant reform which modernises surrogacy law in the ACT by removing discriminatory barriers, providing clearer structure for arrangements which better protects human rights for all parties involved, better considers the rights of a child, and results in greater consistency with states and territories.