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Justice and Community Safety Directorate
ACT Government
By emailto civilconsultation@act.gov.au

Dear Minister,

ACT Legal Framework for Surrogacy

My name is Sarah Jefford and I wish to make a submission in response to the Consultation Paper about ACT surrogacy laws.

About the author

I am a family creation lawyer, practising in surrogacy and donor conception law across Australia from my home in Victoria. I was an IVF mum, and later became an egg donor and a surrogate, delivering a baby for two dads in 2018. I am the only lawyer practising exclusively in surrogacy and donor conception in Australia.

I have published a book, *More Than Just a Baby*, a guide to surrogacy for intended parents and surrogates, and I produced the *Australian Surrogacy Podcast*, sharing stories from intended parents and surrogates around Australia.

Each year, I provide advice to intended parents and surrogates pursuing surrogacy within Australia, and to intended parents considering options for international surrogacy arrangements. I provide advice to over 350 clients each year, across all states and territories, including over 140 domestic surrogacy arrangements per year. 36% of my clients are residents of ACT and New South Wales.

I was awarded the Medal of the Order of Australia in 2023 for services to the law, particularly in relation to my advocacy and work with the surrogacy and donor conception communities.

Surrogacy laws in Australia

Surrogacy in Australia is governed at the state and territory level, with some cross-over with the Commonwealth *Family Law Act*. The pre-surrogacy requirements and the post-birth parentage order frameworks are determined in each state or territory, with many inconsistencies between them.

There are an estimated 105-110 surrogacy births in Australia each year. The majority (about 75%) of arrangements involve existing relationships (sisters, extended family and friends) and the remaining 25% involve 'new' relationships, being friendships formed after meeting in designated surrogacy social media forums such as Facebook.

Surrogacy in Australia, despite inconsistencies between the laws, generally include the following elements and processes:

1. The surrogacy arrangement is altruistic. Commercial surrogacy is prohibited.

2. A surrogate's associated and prescribed expenses can and must be covered by the intended parents.

3. There must be a medical or social reason for surrogacy, whereby the intended parents cannot carry a pregnancy or to do so is risky for them or the child.

4. The parties must complete pre-surrogacy counselling with a qualified fertility counsellor.

5. The parties must obtain independent legal advice prior to entering the arrangement.

6. Upon the birth of the baby, the birth parents are registered as the child's parents and the birth certificate issued with their names

7. The intended parent must apply for a parentage order in their home state to transfer parentage from the birth parents to the intended parents.

Consultation Paper submission

Language in the Parentage Act

1. Change references in the Act to 'intended parents' rather than 'substitute parents.'

The writer agrees with this proposal noting that other jurisdictions refer to 'intended parents.'

2. Change references in the Act to refer to a surrogacy arrangement' rather than a 'substitute parent arrangement.

The writer agrees with this proposal noting that this is consistent with other jurisdictions.

Access to surrogacy arrangements

3. Allow single people in the ACT to access altruistic surrogacy arrangements.

It is discriminatory to deny access on the basis of relationship or marital status. ACT and Western Australia are the only jurisdictions to limit access to surrogacy. The writer agrees that single people should be able to enter a surrogacy arrangement.

4. Allow 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.

15% of all surrogacy arrangements in Australia involve traditional surrogacy. Recent research conducted by Narelle Dickinson at Lotus Health in Queensland confirms that there are no significant differences in outcomes between gestational and traditional surrogacy arrangements. The writer (who was a traditional surrogate) agrees that traditional surrogacy should be legalised in ACT.

Genetics do not make a parent. The ACT is the only jurisdiction to deny a parentage order if there is no genetic link between one or both intended parents and the child. There is no evidentiary basis to include this prohibition. The writer agrees that it should be removed.

5. Allow advertising for legally compliant domestic altruistic surrogacy.

It is very difficult to find a surrogate in Australia. With only 110 surrogacy births each year, many intended parents travel overseas for surrogacy due to limitations in Australia. Prohibitions on advertising only serve to stigmatise surrogacy and limit the options in Australia.

The writer agrees with removing the prohibition on advertising for legally compliant surrogacy arrangements.

6. Confirm, in ACT law, that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person.

It is a fundamental principle of any surrogacy arrangement that a surrogate should maintain their bodily autonomy throughout the pregnancy and birth. As an autonomous adult it is imperative that a surrogate be free to make decisions affecting their body.

7. What reasonable expenses related to an altruistic surrogacy arrangement should be permissible under the Parentage Act (for example, medical, counselling and/or legal expenses).

The writer commends legislative provisions in other jurisdictions including Regulations 11 and 11A of the *Assisted Reproductive Treatment Regulations (Victoria)* which provide broad entitlements for the intended parents to cover the birth parents' reasonable out of pocket expenses.

Surrogate's partners often incur expenses associated with the surrogacy arrangement and this should be covered within the Act. As a party to the arrangement, the surrogate's partner should not be out of pocket for expenses incurred.

Other legislation also provides for the surrogate's lost income for a period of 2 months during which time a birth occurred, plus any extra time for medical reasons. This should be reflected in the Act.

Requirements for surrogacy arrangements

8. Whether a surrogacy arrangement must be in writing and prior to conception

The writer considers that surrogacy arrangements should be entered prior to conception, and after the parties have completed counselling and obtained legal advice and signed a surrogacy agreement. This reflects the intention of the parties to enter a surrogacy arrangement and differentiates the arrangement from an informal adoption.

9. A requirement for parties to a surrogacy arrangement to seek legal advice.

Surrogacy is a complex legal arrangement about the parentage of a child. It is imperative that all parties obtain independent legal advice prior to entering the arrangement.

10. A requirement for parties to a surrogacy arrangement to undertake counselling.

Other jurisdictions provide that the parties must obtain counselling with an experienced surrogacy counsellor, registered with ANZICA. This is consistent with ensuring the parties understand the consequences of entering a surrogacy arrangement. It also provides some measures to ensure the welfare and wellbeing of the surrogate and the best interests of the child.

11. A minimum age for surrogates. Currently all jurisdictions except the ACT stipulate that the surrogate must be at least 25 years old.

It is appropriate that people who choose to enter a surrogacy arrangement are of sufficient maturity to understand the complex legal and psychological implications of doing so. All parties

– the birth parents and the intended parents – should be over the age of 25 at the time of entering the arrangement.

12. The optimal length of transition period

Other jurisdictions have allowed a 10-month transition, noting that pregnancy can be 38-44 weeks in length. Other arrangements may fall outside that timeframe, and provision should be made for pre-commencement arrangements to obtain a parentage order in exceptional circumstances. Including pre-commencement arrangements would protect the interest of children born and a generous discretionary period should be allowed.

Other matters

Treatment provisions

Section 24(a) of the *Parentage Act* provides that a parentage order can be made if the child was conceived as a result of a procedure carried out in the ACT. There is no discretion afforded to the court to make a parentage order in cases where treatment occurred outside the jurisdiction.

The requirement for the procedure to occur within the jurisdiction is not required in other jurisdictions except Victoria and Western Australia. In a jurisdiction with limited options for accessing fertility treatment, it is not unusual for ACT residents to seek treatment in New South Wales. Removing this requirement allows patients to seek treatment with their preferred provider without risking the parentage order. In many cases where a donor may be involved, it is more convenient for intended parents to undergo treatment in another jurisdiction, close to where their donor, or surrogate lives.

The writer recommends repealing Sections 24(a), (b) and (d) and reforming (c) to allow for single intended parents to access surrogacy in ACT.

Decriminalising commercial surrogacy

Pursuant to Section 45 of the *Parentage Act,* it is illegal for residents to enter a commercial surrogacy arrangement overseas. The 'geographical nexus' provision means that intended parents are breaking a law in their home state by engaging in commercial surrogacy overseas. I am not aware of any prosecutions of such cases. The purpose of the geographical nexus provisions maybe to deter intended parents from engaging in commercial surrogacy, but with 200-300 babies born overseas each year to Aussie intended parents, they do not serve the purpose.

If we are focused on the best interests of the children born, then criminalising their parents for engaging in something that is legal in the country of destination does not serve that purpose.

To promote the best interests of the children born, we should be considering ways to support and encourage surrogacy within Australia, including with provision for compensated surrogacy, better access to reproductive healthcare, more robust systems within Medicare and Centrelink for parents, surrogates and newborns. Consistent, uniform surrogacy laws that allow for advertising for a surrogate and remove discrimination between the states would provide a better framework for surrogacy within Australia.

Replace Parentage Orders with a registration process

At birth, the birth parents are the legal parents of the child born. The intended parents must apply for a parentage order to transfer parentage from the birth parents to the intended parents before being legally recognised as the parents of the child.

This process is inefficient and costly. Current parentage order application filing fees at the ACT Supreme Court are $1,975 – the most expensive in Australia. Other jurisdictions charge a filing fee of between zero and $1,250. Legal fees are additional, often amounting to between $4,000 and $10,000.

While the process of applying for a parentage order is underway or pending, the birth parents are the legal parents of the child. Matters of succession, estate planning and legal parentage leave all parties and the child in a precarious position until the parentage order is made. This is not in the child's best interests and risks the estate of the birth parents. Intended parents often cannot access Medicare and Centrelink benefits or apply for a passport for the child, until the parentage order is made.

A less invasive, smoother and more administrative process would be for the birth to be registered, listing the intended parents as the child's parents, immediately form birth. This could be done with the birth parents' consent within 90 days of the birth and would be an entirely administrative process managed by the Registry of Births Deaths and Marriages. Matters where the birth parents are not consenting could involve court proceedings if necessary. Such a process benefits the parties and more importantly promotes the best interests of the child.

The most inconsistencies in surrogacy legislation exists in respect of the parentage order process, including:

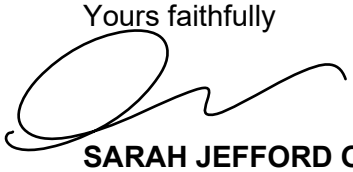
1. Court hearings are not required in New South Wales, Victoria, Western Australia or Tasmania.
2. Court hearings are required in Queensland, ACT, South Australia and Northern Territory. ACT is the only jurisdiction which requires two court hearings.
3. The surrogate's consent is required in all jurisdictions except Western Australia (for gestational surrogacy arrangements).
4. Post-birth counselling is required in New South Wales, Queensland and the Northern Territory but not in other jurisdictions.

Making the post-birth parentage recognition process more accessible and less costly serves to promote the best interests of the child and protects the interests of the parties.

Reforming the ACT surrogacy legislation provides an opportunity to bring the ACT into line with other jurisdictions. Removing prohibitions and limitations that restrict Territory residents from accessing surrogacy in their home, the ACT government offers residents an opportunity to engage in surrogacy within Australia. Doing so promotes the best interests of the child and reduces the likelihood of intended parents engaging in international surrogacy.

Thank you for the opportunity to make a submission. Please contact the writer should you have any questions or wish to discuss further.

Yours faithfully



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