

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

**SUBSTITUTE PARENT AGREEMENTS BILL 1994**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of  
Terry Connolly, MLA  
Attorney General**

**AUSTRALIAN CAPITAL TERRITORY****SUBSTITUTE PARENT AGREEMENTS BILL 1994****OUTLINE**

This Bill makes substitute parent agreements (otherwise known as surrogacy agreements) void and unenforceable. It also prohibits the making of commercial substitute parent arrangements, as well as actions which facilitate the making of substitute parent agreements.

The current law in the ACT indirectly raises impediments to the realisation of substitute parent agreements. The purpose of this Bill is to clarify and strengthen the law relating to such agreements. The Bill declares that substitute parent agreements are void and unenforceable at law. This means that while entering a non-commercial agreement is not an offence, such an agreement is totally ineffective at law, and the birth mother is the legal mother as if no agreement had been made. Parenthood of a child is established by other legislation, for example the *Birth (Equality of Status) Act 1988*, the *Artificial Conception Act 1985*, the *Family Law Act 1975 (C'th)* and the *Adoption Act 1993*.

The Bill creates offences in relation to substitute parent agreements. Entering a commercial agreement for profit, for example, is declared an offence, and there are some offences relating to agreements whether they are commercial or non-commercial. These include advertising in relation to an agreement, procuring a person to make an agreement with a third person, or providing professional or technical service to facilitate a woman's pregnancy for the purposes of agreement.

The Bill also provides that the child's interests are paramount in any legal action which involves a substitute parent agreement.

**Financial Considerations:** Any additional demand on the courts involved will be absorbed within the current budget allocation.

## PART 1 - PRELIMINARY

**Clauses 1 and 2** are formal requirements. They refer to the short title of the Bill, and commencement of the Bill, which is to be on a day fixed by the Minister by notice in the Gazette, or in six months, whichever occurs first.

### Interpretation - clause 3

The term "substitute parent agreement" involves either:

- (a) an agreement by a woman to become, or to attempt to become, pregnant, with the intention that the child is to be taken as the child of another, whether by adoption or otherwise; or
- (b) an agreement by a woman who is already pregnant that the child she bears is to be taken as the child of another person, whether by adoption or otherwise.

In a substitute parent agreement, the woman who is to carry the child agrees that on birth she will give the child to the 'commissioning parent' or parents. To be covered by the Bill, the agreement must involve the birth mother at that point formally divesting herself of the status of motherhood in relation to that child. This is not the same as, for example agreeing to have grandparents raise the child and pretend that the child is theirs. To establish whether an agreement is covered by the legislation, a court would consider the intention of the parties rather than what they hold out to society to be the case. Thus, for example, moves to establish names on the birth certificate or adoption of the child would indicate an intention to divest the birth mother of her status as parent.

If the parties involved want the child to be adopted by the other person, the agreement expressed by (b) would be a prohibited action under the *Adoption Act 1993* unless the requirements of the Act are fulfilled and relatives as defined in the Act are involved. This clause reinforces the policy enshrined in the *Adoption Act 1993* that private agreements for the parenthood of children are unacceptable.

The Bill goes further, however, by targeting agreements which may involve arrangements to relinquish motherhood by the birth mother without adoption.

The term "commercial substitute parent agreement" is defined in the Bill as a substitute parent agreement involving payment or reward, other than payment for medical or other expenses incurred by the birth mother.

The legislation draws a distinction between 'commercial substitute parent agreements' and 'non-commercial substitute parent agreements'. All substitute parent agreements will be void and unenforceable in the eyes of the law, however provisions relating to those involved in non-commercial substitute parent agreements (sometimes called 'altruistic surrogacy agreements') are different from those relating to commercial substitute parent agreements.

## Offences

### Application of offence provisions - clause 4

Because substitute parent agreements can be made across different jurisdictions the prohibitions in the Bill apply to

- *acts done in the ACT no matter where the people involved are actually located at the time the act is committed; and*
- *people who are ordinarily resident in the ACT who commit a prohibited act, no matter where the act is committed.*

This means, for example, that the procuring of, or advertising for, someone to act as a birth mother in the ACT by a person who is in another State or country would be an offence. It would also prevent, say, an ACT resident procuring the services of a person for the purposes of a substitute parent agreement, or advertising for a birth mother in another State or country.

### Commercial substitute parent agreements prohibited- clause 5

The Bill prohibits entering into a commercial substitute parent agreement. The penalty for this offence is \$10,000 or imprisonment for 12 months, or both.

### Procurement of substitute parent agreements - clause 6

This provision prohibits the procuring of another person to enter into a substitute parent agreement with a third person unless the person procuring intends to be a party to the agreement. 'Procure' is intended to have its ordinary common law meaning, which in one case has been described as including 'effort, care, management or contrivance towards the obtaining of a desired end', involving some element of 'persuasion or inducement or influencing.' (*R v Castiglione* [1963] NSWLR 1 at p. 6 per Sugarman J.) The penalty is \$10,000 or imprisonment for 12 months, or both.

### Advertising in relation to substitute parent agreements - clause 7

This clause relates to all types of advertising through all forms of media in relation to a substitute parent agreement. The penalty for the advertiser is \$5,000 with the provision for imprisonment for 6 months as an alternative or additional penalty where the advertising relates to a commercial agreement.

### Provision of professional and technical services - clause 8

This clause prohibits the provision of professional or technical services to a woman to facilitate her becoming pregnant for the purposes of a substitute parent agreement. The penalty is \$10,000 or imprisonment for 12 months or both. This provision is not intended prohibit professionals such as lawyers and doctors giving general legal information and advice on substitute parent agreements,

such as information on this or other legislation, or medical implications of agreements.

*Aiding and abetting commercial substitutes parent agreements*

Section 345 of the *Crimes Act 1900* provides that a person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of an offence under a law of the Territory shall be deemed to have committed that offence and shall be punishable, on conviction, accordingly. Sections 346 - 349 of that Act prohibit being an accessory after the fact, and attempts, incitement and conspiracy to commit an offence. These sections would apply to complicity in the offences established by clauses 5, 6, 7 and 8. Assisting non-commercial agreements other than by procuring, advertising or facilitating pregnancy would not be an offence.

**Summary: Offences and Penalties under the *Substitute Parent Agreements Bill***

Non-commercial Agreements	Commercial Agreements	Penalty	Clause
	Enter agreement	\$10,000 or 12 months imprisonment or both.	5
	Aid and abet, be an accessory after the fact, or attempt, incite or conspire to commit an offence under clause 5,6,7 or 8.	Penalties differ under relevant sections.	<i>Crimes Act 1900</i> ss. 345-349
Procure a person to enter an agreement with a third person unless the person procuring is a party to the agreement	Procure a person to enter an agreement with a third person unless the person procuring is a party to the agreement	\$10,000 or 12 months imprisonment or both.	6
Advertise	Advertise	<b>Non-commercial agreement:</b> \$5,000. <b>Commercial Agreement:</b> \$5,000 or 6 months imprisonment or both.	7
Facilitate pregnancy	Facilitate pregnancy	\$10,000 or 12 months imprisonment or both.	8

### Other Provisions

#### **Substitute parent agreement agreements void - clause 9.**

This clause makes all substitute parent agreements void. The word 'void' is a legal term which means that so far as the law is concerned the agreement never happened.

Making substitute parent agreements void differs from the prohibition of such agreements. Prohibition normally means that legal sanctions are imposed on those involved. It is not the intention of the Bill to make the birth mother or commissioning parents in non-commercial substitute parent agreements subject to the criminal law. This clause is a signal that those entering a substitute parent agreement are undertaking the risk that if the agreement is not honoured, there is no remedy - the State will not intervene and enforce the agreement or order compensation when it is broken.

#### **Welfare and interests of child paramount - clause 10**

This clause states the principle that underlies the Government's approach to children. It provides that, notwithstanding that substitute parent agreements are void, in any action or proceeding in connection with such an agreement, the welfare and interests of a child born as a result of a pregnancy that was the subject of the agreement is to be regarded as the paramount consideration. It is consistent with other legislation relating to children such as the *Family Law Act (C'lt)* 1975, the *Adoption Act (ACT)* 1993. It is also consistent with section 5 of the *Children's Services Act 1986*, and is not intended to displace the additional requirements of section 5 of that Act.