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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

PARENTAGE (SURROGACY) AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Tara Cheyne MLA**

PARENTAGE (SURROGACY) AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Parentage (Surrogacy) Amendment Bill 2023 will remove unnecessary barriers to altruistic surrogacy in the ACT while strengthening the regulatory framework for surrogacy arrangements and making of parentage orders. It will also modernise the language in the *Parentage Act 2004* to better align with other Australian jurisdictions.

Removing barriers

The Bill removes discriminatory barriers that prevent people from accessing altruistic surrogacy. It will allow single people to be intended parents, removing restrictions that required two intended parents to enter into a surrogacy agreement.

It will also remove a requirement in the Act that one intended parent must have a genetic connection with the child, which discriminates against couples based on fertility. It will allow traditional surrogacy, where a surrogate is a genetic parent, to provide additional flexibility recognising the diverse situations where people may choose to enter into altruistic surrogacy arrangements.

The Bill also removes the requirement in the Act that the child needs to be conceived as a result of a procedure carried out in the ACT. Removing this requirement will enable parties to a surrogacy arrangement to have flexibility about how and where conception occurs and to use 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.

Finally, the Bill removes criminal offences relating to the advertising or procurement of altruistic surrogacy, while retaining offences in respect of commercial surrogacy.

This will reduce barriers for both surrogates and intended parents wishing to identify opportunities to enter into a legal altruistic surrogacy arrangement.

Framework for surrogacy agreements

The Bill creates new requirements for a surrogacy agreement. Requirements include that the agreement be made in writing, before conception, and that all parties must receive independent legal advice and counselling before the agreement is entered into. Age requirements are clarified for intended parents and surrogates.

These requirements for surrogacy arrangements are largely consistent with other Australian jurisdictions, but 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.

By creating a structured framework for surrogacy arrangements, the Bill provides clarity and appropriate minimum safeguards 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.

Additionally, the Bill confirms that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person. This recognises the autonomy of surrogates to make informed decisions about their own medical care and bodies during pregnancy.

Guidance on reasonable expenses

The Bill also provides greater guidance as to the reasonable expenses that may be reimbursed under an altruistic surrogacy arrangement. Reasonable expenses in relation to a surrogacy arrangement includes the reasonable costs associated with becoming or trying to become pregnant; a pregnancy or birth; an 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 legislation. It also include some matters from Victoria's model (Assisted Reproductive Treatment Regulations 2019 (Vic)). Reasonable expenses include reimbursement of loss of earnings in certain circumstances where the surrogate is required to take unpaid leave as a result of relating to the pregnancy or birth and a partner's loss of earnings as a direct result of taking unpaid leave to take care for the surrogate parent or child as a result of the surrogacy arrangement. This is to ensure the surrogate and any partner are not financially disadvantaged by participating in an altruistic arrangement. 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.

Applying for a parentage order

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 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.

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.

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.

In very limited circumstances, the Supreme Court will also be able to make a parentage order recognising intended parents where a child has been born through a commercial surrogacy arrangement. A parentage order may only be made where 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. 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 to recognise the rights of the child, and that a child living in the ACT should not be subject to real disadvantage because of circumstances of their birth.

Retrospective application and transitional provisions

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

Other provisions

The Bill 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.

The Bill will also update the language from 'substitute parents' to 'intended parents' and 'substitute parent agreement' to 'surrogacy arrangement' to provide a clearer representation of the parties involved and the nature of the arrangement.

CONSULTATION ON THE PROPOSED APPROACH

The ACT was a member of the Working Group on Surrogacy established by the Standing Council of Attorney-Generals (SCAG) in November 2019.

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.

The Justice and Community Safety Directorate (JACS) undertook a targeted stakeholder consultation process to inform reforms to the ACT's surrogacy frameworks.

Stakeholders who represent specific groups within the community that have an interest in surrogacy and would be most impacted in the proposed reforms were consulted, including community organisations, fertility and sexual health clinics and organisations, legal organisations and ministerial councils.

The ACT Human Rights Commission was also consulted in relation to the reforms.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

Broadly, the Bill engages and supports the following rights under the *Human Rights Act 2004* (HRA):

- Section 8 – Recognition and equality before the law (*promoted and limited*)
- Section 11 – Protection of the family and children (*promoted and limited*)
- Section 12 – Right to privacy (*promoted and limited*)

Rights Promoted

Section 11 - Protection of the family and children

The rights of children, including those born through surrogacy, are enshrined in the HRA and further described in the *Convention on the Rights of the Child* (CRC), which Australia is a signatory to. A human rights approach requires that the best interests of the child must be a primary consideration in any decision that affects a child. It also requires that children be protected and not discriminated against based on the circumstances of their birth. The Bill promotes the rights of children by putting in place minimum safeguards for surrogacy arrangements and requiring the Court to consider the best interests of the child when determining whether to grant a parentage order.

The Bill establishes a framework outlining requirements for surrogacy arrangements including that surrogacy agreements must be made in writing before conception and all parties to a surrogacy arrangement to seek independent legal advice and undertake counselling prior to agreement. These safeguards are intended to ensure that all parties are aware and understand their rights and responsibilities as well as the implications of entering into a surrogacy arrangement.

These safeguards will assist in protecting the rights of children born by surrogacy by ensuring all parties properly understand the arrangement and that there will be clarity around the parentage of the child once a parentage order is made.

Section 28G of the Bill requires that 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 and other requirements are met.

Section 28G (3)(b) will enable the Supreme Court to dispense with certain requirements of a surrogacy agreement where it is satisfied that doing so is in the best interests of the child. This promotes the rights of the child by ensuring that the Supreme Court is able to make the order even if a requirement has not been complied with, but this outcome would be best for the child.

As discussed below, the Bill also goes further to protect the interests of children by allowing a parentage order to be made in limited circumstances where a child has been born through a commercial surrogacy arrangement, including overseas commercial surrogacy. An order may be made where the Court is satisfied that the child is facing a pressing disadvantage that would be alleviated by a parentage order, it is in the best interests of the child, and it is reasonable in the circumstances.

Section 8 - Recognition and equality before the law

Under section 8 of the HRA, everyone is entitled to enjoy their rights without discrimination of any kind, everyone is equal before the law and is entitled to the equal protection of the law without discrimination. The Bill promotes the right to recognition and equality before the law by removing discriminatory barriers to accessing altruistic surrogacy.

The Bill will remove legislative barriers to single people having access to altruistic surrogacy arrangements, which will ensure that people are not discriminated against on the basis of their relationship status.

It will permit traditional surrogacy, and remove the requirement that one intended parent must be a genetic parent of the child. This is important in ensuring that the law does not discriminate against intended parents who are not able to provide viable gametes.

Improving access to altruistic surrogacy arrangements, irrespective of relationship and marital status and fertility, will promote the right to recognition and equality before the law. The Bill will improve consistency with other Australian jurisdictions and anti-discrimination legislation.

The Bill also promotes the right of the child to equality before the law, by allowing the making of a parentage order in circumstances where the child would otherwise face pressing disadvantage due to the circumstances of their birth.

Section 12 – Right to privacy

Under section 12 of the HRA, everyone has the right not to have their privacy interfered with unlawfully or arbitrarily. The right to privacy includes physical, psychological and bodily integrity including the protection of individuals against non-consensual contact, forced medical treatment, or invasive procedures.

The Bill promotes the right to privacy as it clarifies that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person. This recognises the autonomy, bodily integrity and reproductive self-determination of surrogates to make informed decisions about their own medical care and bodies during pregnancy.

The Bill also promotes the right to privacy by removing the requirement that to be eligible for a parentage order, the child need to be conceived as a result of a procedure carried out in the ACT. This allows intended parents the freedom of choice in their autonomous reproductive journey to engage with fertility and health services and clinics outside of the ACT and to choose how and where conception occurs.

Rights Limited

Right to equality

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 8 of the HRA outlines the right to equality and non-discrimination where everyone is entitled to enjoy their rights without discrimination of any kind, and that everyone is equal before the law and entitled to the equal protection of the law without discrimination.

The Bill introduces a minimum age requirement for a surrogate to be at least 18 when they enter a surrogacy arrangement in the ACT, and further provides that a surrogate must not enter an agreement if under 25, unless a counsellor is satisfied that the surrogate has sufficient maturity and understanding of the legal and psychological implications of the decision. This limits the right to recognition and equality before the law for young adults between the ages of 18 and 24 who may wish to become a surrogate.

2. Legitimate purpose (s 28(2)(b))

The purpose of this limitation is to provide a robust safeguard that protects young adults from entering into an agreement to become an altruistic surrogate where they do not have the maturity to fully appreciate the consequences, and may be more vulnerable to influence or exploitation.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

Making a choice to become an altruistic surrogate and to conceive, bear and give birth to a child for another person or couple is a significant decision with long term physical, psychological and legal implications. Understanding these consequences requires a level of maturity and emotional development.

The introduction of a minimum age for surrogates of 25 years of age aligns the ACT with all other Australian states and territories. This age limit recognises that at the age of 25, a surrogate is more likely to have sufficient maturity to understand the physical, legal and psychological consequences of entering a surrogacy arrangement than a young adult of 18.

Neuroscience has established that significant changes in brain anatomy and activity are still taking place during young adulthood, especially in prefrontal regions that are important for planning ahead, anticipating the future consequences of decisions, controlling impulses, and comparing risk and reward. It is well established that this 'rewiring' process is not completed until approximately 25 years of age.¹ The UN General Assembly also recognises that young people under 24 years have particular needs and vulnerabilities and makes particular provision for this group.

Introducing a general minimum age requirement for surrogates will help to ensure that a surrogate has a sufficient level of maturity and emotional development to fully understand the consequences of that choice. The limitation on the right to equality is considered reasonable and necessary to protect young adults from the risk of influence and exploitation.

4. Proportionality (s 28(2)(e))

To ensure that the limitation is proportionate to achieving the intended aim and noting that individual development and maturity can differ significantly, the Bill allows an adult under 25 to enter into a surrogacy agreement where a counsellor agrees that the person has sufficient maturity and understanding of the consequences of becoming a surrogate.

These provisions provide an appropriate balance in ensuring greater protection for this age group but not arbitrarily excluding them from becoming a surrogate where they have sufficient maturity and understanding.

Right to protection of the family and children

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 11 of the HRA outlines the protection of the family and children. The family is entitled to be protected by society and every child has the right to the protection needed as a child without distinction or discrimination of any kind.

¹ See eg Mariam Arainet al (2013) Maturation of the adolescent brain, *Neuropsychiatric Disease and Treatment*, 449-461.

Article 2(2) of the CRC is relevant to the interpretation of the right and provides that State Parties shall take all appropriate measures to ensure that children are protected against all forms of discrimination on the basis of the status of their parents, legal guardians or family members. Article 8 of the CRC also recognises the right of the child to preserve their identity, including nationality, name and family relations as recognised by law without lawful interference. Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

A 2018 thematic report on surrogacy presented to the UN Human Rights Council by the Special Rapporteur on the sale and sexual exploitation of children 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.

The Bill potentially limits the rights of the child to protection in circumstances where a child is born via commercial surrogacy, as it provides that a parentage order may only be made in limited circumstances, where the child is facing a pressing disadvantage, it is in the best interests of the child and it is reasonable for the Court to make the order.

The inability to obtain legal parental recognition as a general rule where a child has been born through commercial surrogacy affects the legal recognition of a child's intended parents, and discriminates against the child based on the circumstances of the child's birth.

2. *Legitimate purpose (s 28(2)(b))*

The purpose of this limitation is to maintain the consistent position of all Australian jurisdictions in prohibiting commercial surrogacy arrangements where a payment or reward is made for the surrogacy service.

No other Australian jurisdiction allows a parentage order to be made where a child has been born through a commercial surrogacy arrangement.

There are significant human rights concerns and risks for children born through these arrangements, particularly in overseas jurisdictions where surrogacy is less regulated such as potential for trafficking and sale of children, and children born with disabilities or through multiple pregnancies being abandoned by intended parents.

There are also real concerns for the safety and health of surrogates including trafficking of surrogates, lack of informed consent and unsafe practices in relation to artificial reproductive technology procedures.

Australia is a party to the Optional Protocol to the Convention of the Rights of the Child on Child Prostitution and Child Pornography. 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.

It is the intention of the Bill to make altruistic surrogacy more accessible and feasible by reducing a range of barriers and providing a more structured framework, to reduce demand for overseas commercial surrogacy arrangements.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

Allowing parentage orders to be granted as a general rule where a child has been born through commercial surrogacy would provide encouragement to intended parents considering travelling overseas to enter into a commercial surrogacy agreement, rather than exploring options for altruistic surrogacy.

A more limited approach retains a disincentive for intended parents to enter into commercial surrogacy arrangements while not unreasonably limiting the rights of the child.

4. *Proportionality (s 28(2)(e))*

The approach taken in the Bill of allowing parentage orders to be granted where a child has been born through commercial surrogacy arrangements in limited circumstances seeks to balance the strong policy objective of discouraging commercial surrogacy with protecting rights of the child, recognising that a child should not be punished for the actions of their parents or circumstances of their birth.

To strike this balance, the Bill retains the criminal offence in relation to entering into a commercial surrogacy arrangement in the ACT or overseas. However, it provides that where a child has been born through commercial surrogacy and the intended parents are now living in the ACT, the Court may grant a parentage order if satisfied that the child would face a pressing disadvantage that would be alleviated by a parentage order, that the order would be in the best interests of the child, and it is reasonable in all the circumstances.

The concept of pressing disadvantage is intended to recognise that making a parentage order may be justified, despite the strong policy concerns, where the lack of a parentage order creates a real and substantial difficulty for the child, beyond simply not having their parentage formally recognised by an Australian Court.

This approach acknowledges the reality that in many cases where a child is born through overseas commercial surrogacy they are able to be recognised as an Australian citizen by descent (where one intended parent is a genetic parent) and

granted an Australian passport.² The child will have an overseas birth certificate which may recognise one or both intended parents that can be used in Australia for most purposes although not legally recognised. In these situations there may be no immediate need or disadvantage facing the child that would justify making a parentage order.

However, in other cases there may be real difficulties that directly affect the child, for example if the intended parent recognised on the child's passport dies or is incapacitated and the other parent does not have any formal documentation or recognition of their role as parent. There may be particular challenges where intended parents are a same sex couple and this relationship cannot be recognised on an overseas birth certificate.

Matters will need to be considered on an individual basis and will also require consideration of other factors required in a surrogacy arrangement such as an agreement made before conception and requirements relating to the age of the surrogate, legal advice and counselling.

This approach is considered to be a reasonable limitation on the rights of the child, by ensuring that the Court can grant an order where the child would otherwise face real disadvantage, without signalling encouragement of commercial surrogacy.

² The approach of the Australian Government in these cases is reflected in a range of publicly available materials <https://www.smartraveller.gov.au/before-you-go/activities/surrogacy>

Parentage (Surrogacy) Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Parentage (Surrogacy) Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Parentage (Surrogacy) Amendment Act 2023*.

Clause 2 Commencement

This clause provides for the Act to commence on the day after its notification day.

Clause 3 Legislation amended

This clause identifies that the Act will amend the *Parentage Act 2004*.

This Act also amends the *Births, Deaths and Marriages Registration Act 1997* (see sch 1).

Clause 4 New Parentage Regulation - sch 2

This clause says that the provisions set out in schedule 2 are taken to be a regulation made under the *Parentage Act 2004*, section 50.

The regulation is taken to be notified under the Legislation Act on the date this Act is notified and commences on the commencement of schedule 2. The regulation may be amended or repealed as if it had been made under the *Parentage Act 2004*, section 50.

Clause 5 Dictionary

Section 3, note 1

This clause replaces note 1 which provides an example of a signpost definition with “the signpost definition of *‘birth parent*, of a child, for Division 2.5 (Surrogacy) - see section 23.’ means that the term birth parent is defined in that section.”

Clause 6 Presumptions arising from procedure

Section 11 (9), definition of *procedure*, paragraph (b)

This clause omits ‘the procedure of transferring’ and substitutes ‘a clinical process to transfer’.

Clause 7 Division 2.5 heading

This clause substitutes the Division 2.5 heading and subdivision 2.5.1 heading.

Clause 8 Sections 23 to 28

This clause substitutes sections 23 to 28, which make amendments to the definitions for Division 2.5, introduce a framework for surrogacy arrangements, and contain technical amendments to division 2.5 about parentage orders.

Section 23 Definitions for div 2.5

This section provides new definitions for div 2.5. It provides definitions of birth parent, birth sibling, intended parent, partner, presumed parent and procedure.

The section includes updated language, reflecting contemporary understandings of the diverse ways in which families are formed.

Section 24 Meaning of *reasonable expense*

This section introduces the definition of a reasonable expense. A reasonable expense, in relation to a presumed parent under a surrogacy arrangement, means a financial amount paid or owing that is verified by receipt of any other documentation and is reasonably necessary for, or incidental to, costs in relation to any of the following: becoming or trying to become pregnant, a pregnancy or birth, and entering and giving effect to a surrogacy arrangement.

Subdivision 2.5.2 Surrogacy arrangements

This subdivision deals with the requirements for surrogacy arrangements.

Section 25 Surrogacy arrangement must in writing

This section introduces a requirement that a surrogacy arrangement must in writing.

Section 26 Parties to surrogacy arrangement

This section provides that the parties to a surrogacy arrangement are the birth parent, the birth parent's partner, if any, and each intended parent.

Section 27 Legal advice

This section provides that each party to a surrogacy arrangement must obtain legal advice before entering the arrangement. The purpose of this section is to provide a safeguard for all parties to have a clear understanding of their rights, responsibilities and the legal implications of entering a surrogacy arrangement and conception of the child.

The intended parent or parents must obtain legal advice that is independent to the legal advice obtained by the birth parent and their partner, if any.

If there are two intended parents to the surrogacy arrangement, they may obtain the legal advice jointly or separately.

If the birth parent's partner is a party to the surrogacy agreement, the birth parent and their partner may obtain the advice jointly or separately.

Section 28 Counselling

This section provides that each party to a surrogacy arrangement must receive counselling from a counselling service about the effect of the surrogacy arrangement before entering the arrangement. The purpose of counselling is to provide a minimum safeguard for all parties to have a clear

understanding of the psychological implications associated with the surrogacy arrangement and conception of the child.

The intended parent or parents must receive counselling from a counselling service that is different to the counselling service for which the birth parent and their partner, if any, receive their counselling. If there are two intended parents to the surrogacy arrangement, they may receive counselling jointly or separately.

If the birth parent's partner is a party to the surrogacy agreement, the birth parent and their partner may receive counselling jointly or separately.

If the birth parent is to undergo a procedure, with the intention of becoming pregnant as a result of the procedure, 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.

Section 28A Age of intended parent

This section provides that each intended parent must be at least 18 years old when they enter into a surrogacy arrangement.

Section 28B Age of birth parent

This section provides that a birth parent must be at least 18 years old when they enter a surrogacy arrangement.

However, a birth parent who is not yet 25 years old must not enter into a surrogacy arrangement unless they have received counselling from a counselling service about the surrogacy arrangement and its social and psychological implications and the counsellor was satisfied the person was of sufficient maturity to understand the surrogacy arrangement and its effect.

If the birth parent is to undergo a procedure, with the intention of becoming pregnant as a result of the procedure, the counselling they must receive 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.

Section 28C Reasonable expenses incurred

This section provides that a surrogacy arrangement may provide for the payment or reimbursement of the reasonable expenses incurred by the birth parent or their partner, if any, in relation to the surrogacy arrangement.

Reasonable expense is defined in section 24 with reasonable costs prescribed under the regulation.

Section 28D Rights of birth parent

This section clarifies that a birth parent has the same rights to manage their pregnancy and birth as any other pregnant person.

Subdivision 2.5.3 Parentage orders

This subdivision outlines the application of subdivision 2.5.3, application for parentage order, making of parentage order, relevant considerations for making of parentage order, content of parentage order, multiple births and name of child.

Section 28E Application of subdiv 2.5.3

This section sets out the application of subdivision 2.5.3 regarding parentage orders. Subdivision 2.5.3 applies to a child if there is a surrogacy arrangement, other than a commercial surrogacy arrangement, under which the intended parent or intended parents have indicated their intention to apply for a parentage order about the child; and the intended parent or intended parents of the child live in the ACT.

The subdivision also applies to a child if there is a commercial surrogacy arrangement of a kind described in section 40 (1) (a) under which the intended parent or parents of the child have indicated their intention to become the parent or parents of the child and the intended parent or parents of the child live in the ACT.

Section 28F Application for parentage order

This section sets out how applications can be made to the Supreme Court for a parentage order about a child conceived through a surrogacy arrangement.

The intended parent or intended parents of a child mentioned in section 28E may make an application to the Supreme Court for a parentage order about the child. If there are two intended parents to a surrogacy arrangement mentioned in section 28E, the application must be made jointly by both intended parents, unless the Supreme Court grants leave to only 1 intended parent to make the application.

The application may be made for a child mentioned in section 28E (1) when the child is between the ages of 4 weeks and 6 months old or for a child mentioned in section 28E (2) any time after a child is 4 weeks old. The open-ended time frame for a child mentioned in section 28E (2) is intended to recognise that a pressing disadvantage that could justify the making of a parentage order may arise after the child is 6 months of age.

Section 28G Making of parentage order

This section provides that the Supreme Court may make a parentage order about a child mentioned in section 28E (1) if satisfied that the making of the order is in the best interests of the child, each presumed parent freely, and with a full understanding of what is involved, agrees to the making of the order and the requirements of subdivision 2.5.2 are met.

This section also provides that the Supreme Court may make a parentage order about a child mentioned in section 28E (2) if satisfied that the making of the order is in the best interest of the child, there is a pressing disadvantage facing the child that would be alleviated by making a parentage order about the child, each presumed parent freely, and with a full understanding of what is involved, agrees to the making of the order, and the requirements of subdivision 2.5.2, other than

the requirements in section 28C (reasonable expenses incurred), are met as if the commercial surrogacy arrangement in section 28E (2) (a) were a surrogacy arrangement in section 28E (1) (a).

The concept of pressing disadvantage is intended to recognise that making a parentage order may be justified where the lack of a parentage order creates a real and substantial difficulty for the child, beyond simply not having their parentage formally recognised by an Australian court.

This test seeks to balance the policy objective of not encouraging participation in commercial surrogacy arrangements, while not unreasonably limiting the human rights of children born through such arrangements, who should not be punished because of the circumstances of their birth.

In particular cases there may be real difficulties that directly affect the child, for example if the intended parent recognised on the child's passport dies or is incapacitated and the other parent does not have any formal documentation or recognition of their role as parent. There may be particular challenges where intended parents are a same sex couple and this relationship cannot be recognised on an overseas birth certificate. These matters will need to be considered on an individual basis.

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 - see section 31 (Effect of surrogacy arrangements).

In making an order under subsection (1) or (2), the Supreme Court may dispense with the requirement under subsection (1) (b) or (2) (c) in relation to a presumed parent if satisfied that the presumed parent is dead or incapacitated or cannot be contacted despite reasonable steps being taken. The Supreme Court may also dispense with following requirements of subdivision 2.5.2 if satisfied that doing so is in the best interests of the child: section 25 (surrogacy arrangement must be in writing), section 27 (legal advice) and section 28 (counselling).

Section 28H Relevant considerations for making of parentage order

This section provides that the Supreme Court may take the following matters into consideration, if relevant, in deciding whether to make a parentage order:

- whether the child's home is, and was at the time of the application with the intended parent or intended parents;
- if there are 2 intended parents to a surrogacy arrangement but only 1 intended parent has applied for the order and the other intended parent is alive at the time of the application, whether the other intended parent freely and with a full understanding of what is involved agrees to the making of the order in favour of the applicant intended parent or the applicant intended parent, despite taking reasonable steps, cannot contact the other intended parent to obtain their agreement;
- if a presumed parent is dead or incapacitated or cannot be contacted, any evidence before the court that the parent no longer agreed or agrees that the intended parent or intended parents obtain a parentage about the child;
- if the birth parent was not yet 25 years old, but was at least 18 years old, when they entered into the arrangement – any evidence before the court of compliance with section 28B (2).

The Supreme Court may take into consideration anything else it considers relevant.

Section 28I Content of parentage order

This section sets out the content of a parentage order.

For an application made jointly by 2 intended parents to a surrogacy arrangement, a parentage order is made in favour of both intended parents.

For an application made by only 1 of 2 intended parents to a surrogacy arrangement – if the application was made by the applicant intended parent because the other intended parent is dead or incapacitated, the order is made in favour of both intended parents, or if the court is satisfied, that at the time of the other intended parent’s death or incapacitation, the deceased or incapacitated intended parent no longer intended or intends to apply for a parentage order about the child, the order is in favour of the applicant. In any other case, the order is made in favour of the applicant intended parent.

For an application made by 1 intended parent who is the only intended parent to a surrogacy arrangement, the order is in favour of the intended parent.

Section 28J Multiple births

This section applies if a child about whom an application for a parentage order has been made has a living birth sibling from a multiple birth.

The Supreme Court may make a parentage order about the child only if it also makes a parentage order about each living birth sibling of the child.

Section 28K Name of child

This section sets out how a child’s name is determined in making of a parentage order.

Where a child has only one intended parent, the child will have that parent’s surname. Where the child has two intended parents with the same surname, the child will have their surname. In any other case the Supreme Court will approve a surname based on the application of the intended parent or parents.

In relation to given names, the child will have as their given name (or names), the name (or names) that the Supreme Court approves in the parentage order based on the application of the intended parent or parents.

Despite this, if the child has been generally known by a particular given name (or names), the Supreme Court may order that the child will have that as their given name (or names).

This section does not prevent the child’s name being later changed in accordance with Territory law.

Clause 9 Effect of parentage order and access to information

Section 29 (2) (a)

This clause omits 'substitute parent or substitute parents' and replaces this with the term 'intended parent or intended parents'.

Clause 10 Section 29 (3)

This clause omits from section 29 (3) 'division 5.3 (Identifying information) other than section 77, section 78 and section 79' and inserts 'division 5.3 (Identifying information) other than sections 70, 71, 77, 78 and 79'.

Clause 11 Medical information

Section 30 (3), definition *relevant person*, paragraph (b)

This clause omits from section 30 (3), definition of *relevant person*, paragraph (b) 'birth parent' and substitutes 'presumed parent'.

Clause 12 Section 31

This clause substitutes section 31 regarding effect of surrogacy arrangements.

This provision states that the legal effect of a surrogacy arrangement is limited only to this division.

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

Clause 13 New subdivision 2.5.4

Subdivision 2.5.4 Parentage orders – particular arrangements entered into before Parentage (Surrogacy) Amendment Act 2023

This clause inserts new subdivision 2.5.4 which deals with particular arrangements made before the commencement of these amendments.

New section 31A sets out definitions for subdivision 2.5.4.

New section 31B applies in particular circumstances where: a commercial arrangement was made and child was born before the commencement day; there is no parentage order in force in relation to the child; the person or people who intend to be the parents live in the ACT; and subdivision 2.5.3 would have applied to the child if the arrangement had been an arrangement under section 28E (2) (a) and the arrangement been entered into on or after the commencement day.

The person or people may apply to the Supreme Court under section 28F for a parentage order if the arrangement was a commercial surrogacy arrangement of a kind described in section 40 (1) (a) and the person or people were the intended parent/s of the child under the commercial surrogacy arrangement.

The Supreme Court may make a parentage order about the under section 28G (2) as if the child were a child mentioned in section 28E (2).

In making a parentage order about the child, the Supreme Court need not be satisfied under section 28G (2)(d) that the requirements of subdivision 2.5.2 are met.

New section 31C sets out the effect of a parentage order mentioned in section 31B. The provisions of the *Adoption Act 1993* in subsection (4) apply in relation to the parentage order as if the parentage order were made under the Act for the adoption of the child and the child were an adopted child.

New section 31D provides that the making of a parentage order about a child born under a commercial substitute parent agreement does not affect a person's criminal responsibility under part 4, as in force immediately before the commencement date.

Clause 14 Part 4 heading

This clause substitutes the heading of Part 4 to be 'offences relating to surrogacy arrangements' and adds a note 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 this part – see s 31 (Effect of a surrogacy arrangement)'.

Clause 15 Section 40

This clause substitutes a new section 40 setting out the definition of a commercial surrogacy arrangement.

Under section 40 (1), a commercial surrogacy arrangement means either:

- a surrogacy arrangement under which a person agrees to make or give to someone else a payment or reward, other than for reasonable expenses incurred in relation to the arrangement (s40(1)(a)); or
- a contract, agreement, arrangement or understanding under which a person who is already pregnant agrees that a child born as a result of the pregnancy will be taken to be the child of someone else, and a person agrees to make or to give to someone else a payment or reward other than for reasonable expenses incurred in relation to the contract, agreement, arrangement or understanding as if this was a surrogacy arrangement (s40(1)(b)).

This clause also provides the definition of 'payment or reward'.

Clause 16 Section 41, heading

This clause substitutes the heading of section 41 to be 'commercial surrogacy arrangements prohibited'.

Clause 17 Section 41

This clause omits 'substitute parent agreement' and substitutes 'surrogacy arrangement' in section 41.

Clause 18 Section 42, heading

This clause substitutes the heading of section 42 to be ‘procuring commercial surrogacy arrangements’.

Clause 19 Section 42 (1)

This clause omits ‘substitute parent agreement’ and substitutes ‘commercial surrogacy arrangement’ in section 42 (1).

Clause 20 Section 42 (2)

This clause omits section 42 (2).

Clause 21 Section 43 heading

This clause substitutes the heading of section 43 to be ‘advertising in relation to commercial surrogacy arrangements.’

Clause 22 Section 43

This clause omits ‘a substitute parent agreement’ and replaces it with ‘a commercial surrogacy arrangement’ in section 43.

Clause 23 Section 43 (1), penalty

This clause substitutes the maximum penalty of 50 penalty units, imprisonment for 6 months or both.

Clause 24 Facilitating pregnancy

Section 44 (b)

This clause omits ‘substitute parent agreement’ and replaces it with ‘surrogacy arrangement’ in section 44 (b).

Clause 25 Section 44 (c)

This clause omits ‘agreement’ and substitutes ‘arrangement’ in section 44 (c).

Clause 26 New Part 7

Part 7 Transitional – Parentage (Surrogacy) Amendment Act 2023

This clause inserts a new Part which outlines transitional provisions for the Parentage (Surrogacy) Amendment Act 2023.

New section 53 sets out definitions for part 7.

New section 54 provides that where there is a substitute parent agreement entered into before commencement and no parentage order made before commencement date of this Bill, division 2.5,

as in force immediately before the commencement day, applies to the child under the substitute parent arrangement. This transitional provision preserves the application of the previous law for people who had already entered into a substitute parent agreement on the basis of that previous law, and met the requirements of that law, to allow them to apply for a parentage order in accordance with those provisions.

New section 55 makes provision for situations where there was an arrangement in the nature of a surrogacy arrangement, other than a commercial arrangement, and a child was born before the commencement day, but the arrangement did not meet the requirements of the previous law (for example because there was only one intended parent, or the child does not have a genetic connection to an intended parent), and a parentage order could not be made. This provision extends the benefit of the removal of discriminatory barriers in the new division 2.5 to families in these circumstances for a five-year period beginning on the commencement day to allow parentage orders to be sought during that period. It requires that the intended parents live in the ACT when an application is made.

New section 55(5) provides that in making the order about the child the Court need not be satisfied that the requirements of subdivision 2.5.2 are met, which recognises that these formal requirements such as an agreement in writing, legal advice and counselling, were not in place at the time that the arrangement was made.

New section 56 similarly provides for situations where an arrangement made prior to commencement did not meet the requirements of previous law, but covers situations where the child was born after commencement. It applies where an arrangement, other than a commercial arrangement, was entered into and a child was not born before commencement day and the intended parent or parents under the arrangement live in the ACT when an application is made. The intended parent or parents may apply to the Supreme Court under section 28F for a parentage order as if it was a surrogacy arrangement and the person or people were the intended parent or parents under the surrogacy arrangement.

The Supreme Court may make a parentage order about the child under section 28G (1) as if the child were a child mentioned in section 28E (1). The Supreme Court need not be satisfied under section 28G (1) (c) that the requirements of subdivision 2.5.2 are met.

New section 57 provides where there was a commercial arrangement made, which was in the nature of a surrogacy arrangement, but involved the payment or reward other than reasonable expenses, and the child was born after commencement, intended parents may make an application for a parentage order under section 28F as if the commercial arrangement was a commercial surrogacy arrangement described in section 40 (1) (a). An application of this kind may be made at any time on or after the commencement day.

This provision enables a parentage order to be granted by the Supreme Court in limited circumstances, where the child is facing a pressing disadvantage and the Court is satisfied of the matters in section 28G(2). This section allows orders to be made in relation to children born after the commencement of the Bill. It is not subject to a time period, in recognition that a pressing disadvantage that might justify the making of a parentage order may arise later in a child's life.

Section 57(4) provides that in making the order about the child the Court need not be satisfied that the requirements of subdivision 2.5.2 are met, as these requirements were not in place at the time that the arrangement was made. However, these factors may still be relevant in determining whether it is reasonable to make an order.

New section 58 makes provision for effect of parentage order mentioned in section 55 (4) or 56 (4) in relation to access to information. A parentage order made about a child has the same effect in many ways as an adoption order. Provisions of the *Adoption Act 1993* are applied to the parentage order as if the parentage order were an order for the adoption of the child and the child were an adopted child.

New section 59 provides that the making of a parentage order about a child born under a commercial substitute parent agreement does not affect a person's criminal responsibility under part 4, as in force immediately before the commencement day, in relation to the commercial substitute parent agreement.

New section 60 provides this part expires 5 years after the commencement date. The Note recognises that a transitional provision is repealed on expiry, but continues to have effect after its repeal (see Legislation Act, s88).

Clause 27 Dictionary, definitions of *birth parent* and *birth sibling*

This clause substitutes the definitions of birth parent and birth sibling for division 2.5. The new definitions are '*birth parent*, of a child, for division 2.5 (Parentage orders)- see section 23' and '*birth sibling*, of a child, for division 2.5 (Surrogacy)-see section 23'.

Clause 28 Dictionary, new definition of *commercial substitute parent agreement*

This clause omits the definition of commercial substitute parent agreement.

Clause 29 Dictionary, new definitions

This clause inserts new definitions including *commencement day*, *commercial arrangement*, *commercial surrogacy arrangement* and *intended parent*.

The definitions of *commencement day* and *commercial arrangement* for subdivision 2.5.4 (Parentage orders – particular arrangements entered into before Parentage (Surrogacy) Amendment Act 2023) refers to section 31A.

The definition of *commercial surrogacy arrangement* refers to section 40.

The definition of *intended parent* of a child for division 2.5 (Surrogacy) refers to section 23.

Clause 30 Dictionary, definition of *parentage order*

This clause substitutes *parentage order* as an order under section 28G.

Clause 31 Dictionary, new definitions

This clause inserts new definitions of *partner*, *payment or reward* and *presumed parent*. Those definitions are: *partner*, of a birth parent, for division 2.5 (Surrogacy) – see section 23, *payment or reward*, for subdivision 2.5.4 (Parentage orders – particular arrangements entered into before Parentage (Surrogacy) Amendment Act 2023) see section 40(2), and *presumed parent*, or a child, for division 2.5 (Surrogacy) – see section 23.

Clause 32 Dictionary, definition of *procedure*

This clause substitutes definition of procedure. The definition of *procedure* for division 2.5 (Surrogacy) refers to section 23.

Clause 33 Dictionary, new definitions of *reasonable expense*

This clause inserts definition of reasonable expense to the dictionary. The definition of *reasonable expense*, in relation to a presumed parent under a surrogacy arrangement – see section 24.

Clause 34 Dictionary, definitions of *substitute parent* and *substitute parent agreement*

This clause omits the definitions of substitute parent and substitute parent agreement from the dictionary.

Clause 35 Dictionary, new definition of *surrogacy arrangement*

This clause inserts new definition of surrogacy arrangement to the dictionary.

A surrogacy arrangement is a contract, agreement, arrangement or understanding under which a birth parent and an intended parent or 2 intended parents agree that the birth parent will become, or attempt to become pregnant, and that the child born as a result of the pregnancy will be taken to be (whether by adoption, agreement or otherwise) the child of the intended parent or intended parents.

Schedule 1 Births, Deaths and Marriages Registration Act 1997 – Consequential amendments

[1.1] Division 2.4 heading

This clause substitutes the division 2.4 heading of Intended parent information.

[1.2] Section 16A (1)

This clause omits the reference to section 26 and substitutes section 28G.

[1.3] Section 16B (1) (a) (iii)

This clause omits ‘substitute’ and inserts ‘intended’.

[1.4] Section 70 (4), definition of *relevant children*

This clause omits the reference to section 26 and substitutes section 28G.

Schedule 2 New Parentage Regulation

The new regulation is the *Parentage Regulation 2023*.

The regulation sets out what constitutes reasonable costs associated with becoming or trying to become pregnant, a pregnancy or a birth and entering and giving effect to a surrogacy arrangement.

The Regulation is largely aligned with the definition of reasonable expenses set out in the NSW *Surrogacy Act 2010*. It also includes some matters from Victoria's model (*Assisted Reproductive Treatment Regulations 2019* (Vic)).

1 Name of regulation

This provision provides that the regulation is the *Parentage Regulation 2023*.

2 Dictionary

This provision provides that the dictionary at the end of this regulation is part of this regulation.

3 Notes

The provision provides that a note included in this regulation is explanatory and not part of this regulation.

4 Reasonable expenses – Act, s 24, def *reasonable expense*, par (b)

This provision sets out the costs which are prescribed in relation to becoming or trying to become pregnant and a pregnancy or a birth (both antenatal and postnatal), and costs prescribed in relation to entering into and giving effect to a surrogacy arrangement.

The provision includes definitions for 'medical costs' and 'obtains insurance.'

Dictionary

The Dictionary includes three notes setting out that the Legislative Act contains definitions relevant to this regulation and that terms used in this regulation have the same meaning that they have in the *Parentage Act 2004*.