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

**TENTH ASSEMBLY**

**PARENTAGE (SURROGACY) AMENDMENT BILL 2023**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**Presented by  
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# PARENTAGE (SURROGACY) AMENDMENT BILL 2023

This explanatory statement relates to the Parentage (Surrogacy) Amendment Bill 2023 (**the Bill**) – Government amendments as presented to the ACT Legislative Assembly.

## BACKGROUND

The Parentage (Surrogacy) Amendment Bill 2023 was introduced to the Legislative Assembly on 31 October 2023. The Bill 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.

The Standing Committee on Justice and Community Safety (the Committee) conducted an inquiry into the Bill and reported on 13 March 2024, making nine recommendations.

These amendments, introduced by the Government, respond to four of the recommendations.

## OVERVIEW OF GOVERNMENT AMENDMENTS

### Court discretion to make a parentage order

The proposed amendment to section 28F of the Bill will give the Court discretion to consider and grant parentage orders for children born in an altruistic surrogacy arrangement if the Court is satisfied that there are exceptional circumstances that would justify making a parentage order.

This provision will provide the Court with more flexibility to make an order where there is a reason that parties have not complied with the legislative timeframe for making an application. It is intended to operate beneficially and in the best interests of the child.

While there is an important policy basis to require that parenting arrangements are finalised in a reasonable period to provide certainty for children, this discretion will ensure that a parentage order can be made where there are reasons for the delay that justify the making of the order.

### Reasonable expenses

The amendments to the Bill and Regulation relating to reasonable expenses are intended to address concerns raised by stakeholders during the course of the inquiry about the framing of the relevant provisions in the Bill. The Government's intention, both in introducing the original provisions in the Bill and the amending provisions, is to provide greater guidance as to the reasonable expenses that may be reimbursed

under an altruistic surrogacy arrangement, largely aligning with the allowable reasonable expenses in NSW and including some matters from Victoria.

The amendment to section 24 (meaning of reasonable expense) states that a regulation may prescribe a reasonable expense. Any matters prescribed by regulation would be non-exhaustive and not limit section 24 (1) (b) which states that reasonable expenses are those reasonably necessary and reasonably incidental to any of the following: becoming or trying to become pregnant, a pregnancy or birth, and entering into and giving effect to a surrogacy arrangement.

The requirement that reasonable expenses must be an expense paid or owing that is verified by a receipt or other document is retained.

### Counselling requirements

Proposed new section 24A will require that any counselling a person receives in relation to surrogacy under the *Parentage Act* must be provided by a person prescribed by regulation. These requirements will ensure that counsellors are appropriately qualified and are included in a Regulation to allow them to be updated over time, as required in response to any changes to regulation of relevant professionals.

The Regulation prescribes the registration and qualification requirements for counsellors.

There is also an amendment to the requirement in s 28 (2) of the Bill to require that the intended parent/s must receive counselling from a counsellor that is different to the counsellor for which the birth parent and their partner, if any, receive their counselling. The Bill originally required that parties access a different counselling service, however in response to stakeholder feedback conveyed during the inquiry and the Committee's recommendation, this amendment will provide parties with greater flexibility while avoiding any risks of conflicts of interest that may arise from both parties accessing counselling from the same counsellor.

## **CONSULTATION ON THE PROPOSED APPROACH**

The Committee received 10 submissions from individuals and organisations during its inquiry into the Bill.

## **CLIMATE IMPACT**

Nil.

## CONSISTENCY WITH HUMAN RIGHTS

### Rights engaged

The amendments engage:

- the right of the child to the protection they require (s 11(2), *Human Rights Act 2004*) and
- the right to work (s 27B, *Human Rights Act 2004*)

### ***Rights Promoted***

#### Right of the child to protection (s11 (2))

The amendment to s 28F to provide discretion for a parentage order to be made outside a six-month period where exceptional circumstances exist will have a positive impact on the rights of children to the protection they need.

Section 11 (2) of the *Human Rights Act* provides that: “Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.”

Currently under the *Parentage Act*, the Supreme Court is not able to make a parentage order for a child born through surrogacy unless the application is made within 6 months of the child’s birth. This timeframe has been retained by the provisions introduced by the Parentage (Surrogacy) Amendment Bill 2023.

While this time limit is intended to provide certainty for children about their parentage by requiring orders to be applied for within a reasonable period, there may be situations where the order has not been sought due to circumstances outside the control of one or all of the parties or where there is other justification for the delay, but it is still in the best interests of the child to make the order. This amendment will promote the rights of the child by allowing the Court to make a parentage order where parties have not complied with the legislative time frame due to exceptional circumstances.

It is intended that this discretion be interpreted beneficially and in the best interests of the child.

#### Right to work (s27B)

The right to work may be promoted by the amendments to s 28 (2) of the Bill which remove restrictions to allow for different counsellors within the same counselling service to be engaged by birth parents and intended parents.

Section s 27B (1) of the *Human Rights Act* provides that “Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

The proposed amendment ensures that the regulation of the persons who may provide counselling services to parties in relation to a surrogacy arrangement is more targeted by removing a restriction on different counsellors within the same service being engaged by different parties, but ensuring that the same counsellor cannot provide a service to birth parents and intended parents to avoid an actual or perceived conflict of interest.

### ***Rights Limited***

#### **Right to work (s27B)**

##### ***Nature of the right and limitation (s28(a) and (c))***

Section s 27B (1) of the *Human Rights Act* provides that “Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

The right to work may be limited by amendment to the Bill to prescribe qualifications for people providing counselling to parties in relation to a surrogacy arrangement.

These amendments will preclude some people who work as counsellors from providing this service, as counselling is a broad occupation that includes people with varying levels of qualifications and experience. There is no single professional registration or accreditation process for people providing counselling services and some people working as counsellors may have no formal qualifications.

##### ***Legitimate purpose (s28(b))***

The mandatory requirement for counselling for all parties to a surrogacy arrangement, and additional requirements for a counsellor to provide an opinion in relation to a birth parent under 25 years of age are intended to provide an important safeguard to ensure that parties entering into a surrogacy agreement have a full understanding of the likely impacts of this decision including emotional and psychosocial impacts before they enter into such a significant arrangement.

The purpose of the limitation is to ensure that people who provide this counselling to birth parents and intended parents for the purposes of a surrogacy arrangement have a sufficient level of skill and expertise to provide this service appropriately.

##### ***Rational connection (s28(d))***

Prescribing qualifications for counsellors will mean that persons providing counselling to parties to surrogacy arrangements in the ACT have undertaken significant tertiary education in relevant counselling professions and have been recognised by registration bodies or the Australian and New Zealand Infertility Counsellors Association (ANZICA). These qualifications equip counsellors to provide counselling in a way that will serve as a safeguard as intended.

##### ***Proportionality (s28 (e))***

The limitation is reasonable and justifiable as counselling is an important safeguard for the rights of parties entering into a surrogacy arrangement, and it is important that it is undertaken by counsellors with appropriate skills and expertise. Given the lack of consistent regulation of counselling as an occupation, prescription of qualifications will assist to ensure that the quality and efficacy of counselling as a safeguard is maintained.

ANZICA is recognised as the largest professional association for infertility counsellors in Australia and New Zealand and has rigorous requirements for full membership. ANZICA membership is prescribed as a requirement for surrogacy counselling in many Australian jurisdictions.

In addition to ANZICA members, the regulation will allow for counselling to be provided by registered psychologists, psychiatrists and social workers. This will allow flexibility for parties to seek services from a wider range of providers while ensuring that people providing counselling have appropriate tertiary qualifications and are subject to professional regulation and ethical requirements.

Prescribing these qualifications in a regulation will also allow these requirements to be updated more readily to reflect any relevant developments in relation to the regulation or accreditation of counsellors, to ensure that these requirements remain proportionate.

## CLAUSE NOTES

### **Clause 1      Clause 2**

This clause substitutes clause 2 of the Bill about commencement. The Act (other than section 4) commences on the day after its notification day. Section 4 commences on the Act's notification day.

### **Clause 2      Clause 2** **Proposed new section 24**

This clause substitutes section 24 which outlines the meaning of reasonable expenses.

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

A regulation may also prescribe an expense as reasonably necessary or reasonably incidental to becoming or trying to become pregnant, a pregnancy or birth, and entering and giving effect to a surrogacy arrangement.

### **Clause 3      Clause 8** **Proposed new section 24A**

This clause inserts a new section 24A, which requires that any counselling a person received under Division 2.5 of the *Parentage Act* must be provided by a person prescribed by regulation.

### **Clause 4      Clause 8** **Proposed new section 28 (1)**

This clause omits 'from a counselling service' from proposed new section 28 (1).

### **Clause 5      Clause 8** **Proposed new section 28 (2)**

This clause amends proposed new section 28 (2) to remove the requirement that parties receive counselling from a counselling service that is different to the counselling service used by the other party to the surrogacy arrangement. The clause requires that parties receive counselling from a person who is different to the person who the other party to the arrangement receives counselling from.

### **Clause 6      Clause 8** **Proposed new section 28 (5)**



This clause amends proposed new section 28 (5) to remove the reference to a counselling service and instead require that the counselling each party must receive (if the birth parent is to undergo a procedure with the intention of becoming pregnant as a result of the procedure) must be from a person who, or an entity providing counselling services that, is not connected with a doctor who will carry out the procedure, or the institution where the procedure will be carried out, or another entity involved in carrying out the procedure.

**Clause 7      Clause 8**  
**Proposed new section 28B (2A)**

This clause inserts a new section 28B (2A) which requires a birth parent must receive counselling from a person who is different to the person from whom the intended parent or parents to the surrogacy arrangement receive their counselling under section 28 (1).

**Clause 8      Clause 8**  
**Proposed new section 28B (3)**

This clause amends proposed new section 28B (3) to remove the reference to a counselling service and instead require that the counselling each party must receive (if the birth parent is to undergo a procedure with the intention of becoming pregnant as a result of the procedure) must be from a person who, or an entity providing counselling services that, is not connected with a doctor who will carry out the procedure, or the institution where the procedure will be carried out, or another entity involved in carrying out the procedure.

**Clause 9      Clause 8**  
**Proposed new section 28F (4)**

This clause inserts a new section 28F (4), which will permit a parentage order application for a child mentioned in section 28E (1) to be made after the end of the time limited specified in subsection (3) (a) if the Supreme Court is satisfied on reasonable grounds that exceptional circumstances justify the court deciding the application.

This provision will provide the Court with more flexibility to make an order where there is a reason that parties have not complied with the legislative time frame. It is intended to operate beneficially and in the best interests of the child.

**Clause 10    Schedule 2**  
**Proposed new section 4**

This clause substitutes proposed new section 4 of the Parentage Regulation.

The provision sets out expenses which are prescribed in relation to becoming or trying to become pregnant, a pregnancy or a birth (both antenatal and postnatal),

and expenses prescribed in relation to entering into and giving effect to a surrogacy arrangement. The expenses prescribed do not limit section 24 (1) (b) in the Bill.

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

**Clause 11    Schedule 2**  
**Proposed new section 5**

This clause prescribes people for the purposes of section 24A of the Bill, who can provide counselling under Division 2.5 of the *Parentage Act*.