

Surrogacy Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to make all surrogacy arrangements unenforceable, except to the extent that they provide for the payment of a birth mother's costs,
- (b) to prohibit commercial surrogacy arrangements,
- (c) to prohibit the advertising of surrogacy arrangements,
- (d) to provide for the recognition of surrogacy arrangements, in certain circumstances, by allowing the parentage of a child of a surrogacy arrangement to be transferred to another person,
- (e) to protect the privacy of surrogacy arrangements,
- (f) to enable a person whose parentage is transferred as a result of a surrogacy arrangement, and other affected parties, to access birth information in relation to the person, similar to the arrangements for access to information that apply when a person is adopted.

The Bill amends the *Assisted Reproductive Technology Act 2007*:

- (a) to ensure that assisted reproductive technology treatment is not provided in connection with a surrogacy arrangement unless an independent counsellor's report has been obtained and considered, and
- (b) to require the central register kept under that Act to be used for the collection of information concerning surrogacy arrangements, and
- (c) to give a person whose parentage is transferred as a result of a surrogacy arrangement, and any other affected parties, access to information held on the register, and
- (d) to extend enforcement powers under that Act so that they can be used for the purposes of ensuring compliance with the proposed Act by providers of assisted reproductive treatment or in connection with such treatment.

This Bill also amends the *Births, Deaths and Marriages Registration Act 1995* to make provision for the registration of parentage orders, and the issue of an amended birth certificate or full birth record to any person whose parentage is transferred as a result of a surrogacy arrangement and to other affected parties.

Other Acts are also amended consequentially.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 provides that the proposed Act is to be administered by reference to the principle that, in relation to any surrogacy arrangement, the best interests of a child of the surrogacy arrangement are paramount.

Clause 4 defines certain words and expressions used in the proposed Act.

Clause 5 defines **surrogacy arrangement** and other key expressions. A surrogacy arrangement is:

- (a) an arrangement under which a woman agrees to become or to try to become pregnant with a child, and that the parentage of the child born as a result of the pregnancy is to be transferred to another person or persons (a **pre-conception surrogacy arrangement**), or
- (b) an arrangement under which a pregnant woman agrees that the parentage of a child born as a result of the pregnancy is to be transferred to another person or persons (a **post-conception surrogacy arrangement**).

A parentage order under the proposed Act can only be obtained in respect of a pre-conception surrogacy arrangement. In the proposed Act, **birth mother** means a woman who agrees to become pregnant or to try to become pregnant with a child, or who is pregnant with a child, under a surrogacy arrangement and **intended parent** means a person to whom it is agreed the parentage of a child is to be transferred under a surrogacy arrangement.

Part 2 Surrogacy arrangements

Division 1 Enforcement of surrogacy arrangements

Clause 6 provides that a surrogacy arrangement is not enforceable. However, an obligation to pay or reimburse a birth mother's surrogacy costs is enforceable.

Clause 7 defines what is meant by a **birth mother's surrogacy costs**. The provision limits the costs that are recoverable by a birth mother under a surrogacy arrangement to the birth mother's reasonable costs associated with the following matters:

- (a) becoming or trying to become pregnant,
- (b) pregnancy or birth,
- (c) entering into and giving effect to a surrogacy arrangement.

The provision also lists the type of costs that are recoverable in each category mentioned above.

A cost is reasonable only if the cost is actually incurred and the amount of the cost can be verified by receipts or other documentation.

Division 2 Offences in relation to surrogacy arrangements

Clause 8 makes it an offence to enter into, or to offer to enter into, a commercial surrogacy arrangement (maximum penalty: 2,500 penalty units for a corporation and 1,000 penalty units or 2 years imprisonment (or both) in any other case).

Clause 9 defines **commercial surrogacy arrangement**. A surrogacy arrangement is a commercial surrogacy arrangement if the arrangement involves the provision of a fee, reward or other material benefit or advantage (other than the reimbursement of the birth mother's surrogacy costs) for the person or another person:

- (a) agreeing to enter into or entering into the surrogacy arrangement, or
- (b) giving up a child of the surrogacy arrangement to be raised by the intended parent or parents, or
- (c) consenting to the making of a parentage order in relation to a child of a surrogacy arrangement.

Clause 10 prohibits a person from publishing any advertisement, statement, notice or other material that:

- (a) states or implies that a person is willing to enter into, or arrange, a surrogacy arrangement, or
- (b) seeks a person willing to act as a birth mother under a surrogacy arrangement, or
- (c) states or implies that a person is willing to act as a birth mother under a surrogacy arrangement, or
- (d) is intended, or is likely, to induce a person to act as a birth mother under a surrogacy arrangement.

Part 3 Parentage orders

Division 1 Parentage orders

Clause 11 confers power on the Supreme Court (the **Court**) to make a parentage order in relation to the child of a surrogacy arrangement. The purpose of a parentage order is to transfer parentage of a child of a surrogacy arrangement.

Clause 12 confirms that a reference in the proposed Part to a child is a reference to a child of a surrogacy arrangement.

Division 2 Application for parentage order

Clause 13 allows an application for a parentage order to be made by one intended parent or 2 intended parents jointly. Generally if there are 2 intended parents under the surrogacy arrangement, both intended parents must be a party to the application. However, in some cases an intended parent can make a sole application (such as when 2 intended parents have separated).

Clause 14 permits an application for a parentage order to be made in relation to a surrogacy arrangement entered into before or after the commencement of the proposed Act.

Clause 15 requires an application for a parentage order to be made not less than 30 days and not more than 6 months after the child of the surrogacy arrangement is born. For a surrogacy arrangement entered into before the commencement of the proposed Act (a ***pre-commencement surrogacy arrangement***) an application must be made not more than 2 years after the commencement of the relevant section. The Court can hear an application that is made out of time in exceptional circumstances.

Clause 16 requires an application for a parentage order to be supported by a report about the application prepared by an independent counsellor.

Division 3 Making of parentage order

Clause 17 permits the Court to make a parentage order only if the preconditions to the making of a parentage order have been met. The Court may make a parentage order, despite not being satisfied that a precondition to the making of the order has been met, if the precondition is not a mandatory precondition to the making of a parentage order and the Court is satisfied that exceptional circumstances justify the making of the parentage order, despite the precondition not having been met.

Clause 18 confers power on the Court to make ancillary orders in connection with a parentage order.

Clause 19 requires the Court to keep birth siblings together in the same family when making parentage orders, unless the Court considers it in the best interests of the child to make the order, despite the fact that the birth siblings will not be kept together.

Division 4 Preconditions to making of parentage order

Clause 20 explains that the Division sets out the preconditions to the making of a parentage order.

Clause 21 makes it a mandatory precondition to the making of a parentage order that the Court is satisfied that the order is in the best interests of the child of the surrogacy arrangement.

Clause 22 makes it a mandatory precondition to the making of a parentage order that the surrogacy arrangement is not a commercial surrogacy arrangement.

Clause 23 makes it a mandatory precondition to the making of a parentage order that the surrogacy arrangement is a pre-conception surrogacy arrangement.

Clause 24 makes it a mandatory precondition to the making of a surrogacy arrangement that the intended parent is single or, if there are 2 intended parents, that the intended parents were a couple at the time of entering into the surrogacy arrangement.

Clause 25 makes it a mandatory precondition to the making of a parentage order that the child is under the age of 18 years and that his or her wishes have been considered (if the child is old enough to express them). This precondition will generally be of relevance only to pre-commencement surrogacy arrangements, which may have been entered into some years before the commencement of the proposed Act.

Clause 26 makes it a precondition to the making of a parentage order that the birth mother was at least 25 years of age when she entered into the surrogacy arrangement. For pre-commencement surrogacy arrangements, the birth mother must have been at least 18 years of age. In all cases it is a mandatory precondition that the birth mother was at least 18 years of age when she entered into the surrogacy arrangement.

Clause 27 makes it a mandatory precondition to the making of a parentage order that each of the intended parents was at least 18 years of age when the surrogacy arrangement was entered into.

Clause 28 makes it a precondition to the making of a parentage order that the Court is satisfied that there is a medical or social need for the surrogacy arrangement. Medical or social need relates to the inability of the intended parent or parents to conceive or give birth to a child, or to a healthy child, or to do so in a manner that is safe for the mother.

Clause 29 makes it a precondition to the making of a parentage order that the affected parties all consent to the making of the order. The consent of the birth parent to the making of the order is a mandatory precondition, except in limited circumstances (such as death or incapacity).

Clause 30 makes it a precondition to the making of a parentage order that the applicant or applicants are resident in NSW.

Clause 31 makes it a precondition to the making of a parentage order that the child of the surrogacy arrangement is living with the intended parent or parents.

Clause 32 makes it a precondition to the making of a parentage order that the surrogacy arrangement is in writing. This is not required for a pre-commencement surrogacy arrangement.

Clause 33 makes it a precondition to the making of a parentage order that the affected parties have obtained counselling. This is not required for a pre-commencement surrogacy arrangement.

Clause 34 makes it a precondition to the making of a parentage order that the affected parties have received legal advice about the arrangement before entering into the arrangement. This is not required for pre-commencement surrogacy arrangements.

Clause 35 makes it a precondition to the making of a parentage order that all registrable information concerning the surrogacy arrangement has been provided to the Director-General of the Department of Health for entry in the central register. The amendments to the *Assisted Reproductive Technology Act 2007* make further provision for the collection and use of this information.

Clause 36 makes it a precondition to the making of a parentage order that the birth of the child has been registered.

Division 5 Effect of parentage order

Clause 37 provides for the general effect of a parentage order. The general effect of a parentage order is that:

- (a) the child to whom the order relates becomes a child of the intended parent or parents named in the order and the intended parent or parents become the parents of the child, and
- (b) the child stops being a child of the birth parent and a birth parent stops being a parent of the child.

Other relationships are determined accordingly.

Clause 38 makes it clear that a parentage order does not operate to deprive a child of any vested or contingent property right acquired by the child before the making of the parentage order.

Clause 39 provides a protection from liability for trustees and legal personal representatives who transfer property without notice of a parentage order.

Clause 40 requires the Court to approve a name for the child on making a parentage order.

Division 6 Discharge of parentage order

Clause 41 permits an application for the discharge of a parentage order to be made by:

- (a) a child whose parentage was transferred and who has reached 18 years of age, or
- (b) a birth parent or intended parent of the child, or
- (c) the Attorney General.

Clause 42 confers power on the Court to make an order discharging a parentage order. The Court may make such an order only if satisfied:

- (a) the parentage order was obtained by fraud, duress or other improper means, or
- (b) a consent the Court making the parentage order considered had been given to the making of the parentage order was, in fact, not given or was given for payment, reward or other material benefit or advantage (other than the birth mother's surrogacy costs), or
- (c) there is an exceptional reason why the parentage order should be discharged.

Clause 43 provides for the effect of the discharge of a parentage order, which is generally to restore all the parties to the position that they were in before the making of a parentage order.

Clause 44 confers power on the Court to make ancillary orders in connection with a discharge order.

Division 7 Other provisions relating to parentage order

Clause 45 requires proceedings in respect of a parentage order, or a discharge of a parentage order, to be heard in closed court unless the Court otherwise orders.

Clause 46 provides for appeals against a decision to refuse an application for a parentage order or a decision to grant or refuse an application for the discharge of a parentage order.

Clause 47 requires the registrar of the Court to notify the Registrar of Births, Deaths and Marriages of the making of a parentage order or the discharge of a parentage order. This requirement is relevant to the functions of the Registrar of Births, Deaths and Marriages with respect to the registration of parentage orders. Those functions are dealt with by amendments to the *Births, Deaths and Marriages Registration Act 1995*.

Clause 48 requires the registrar of the Court to notify the registering authority of another State or a Territory of a parentage order, or a discharge of a parentage order, made by the Court in relation to a child whose birth the registrar has reasons to believe is registered in that State or Territory.

Clause 49 requires the registrar of the Court to notify the Director-General of the Department of Health of the making of a parentage order or the discharge of a parentage order. This requirement is relevant to the functions of the Director-General with respect to the registration of information about surrogacy arrangements. These functions are dealt with by amendments to the *Assisted Reproductive Technology Act 2007*.

Part 4 Protection of privacy of surrogacy arrangements

Clause 50 makes it an offence to publish any material that identifies, or is reasonably likely to identify, a person as a person affected by a surrogacy arrangement. The provision does not prevent publication where the person identified or reasonably likely to be identified consents to be identified and the material published does not identify any person affected by the surrogacy arrangement who does not consent to being so identified.

Clause 51 provides that a person is not entitled to access court records relating to proceedings in respect of a parentage order, except with leave of the Court.

Part 5 Access to birth information

Clause 52 defines the expressions used in the Part. An **original birth certificate** means a certificate certifying the particulars of a person's birth registered under the *Births, Deaths and Marriages Registration Act 1995*. A **full birth record** means a single certificate that records both a child's original birth details and particulars relating to a parentage order or discharge of a parentage order.

Clause 53 gives a person who is the child of a surrogacy arrangement and whose parentage has been transferred by a parentage order a right to receive the person's original birth certificate and full birth record, if the person has reached the age of 18 years. This right also applies where a parentage order is made under a law of another State or a Territory.

Clause 54 gives an affected party in relation to a surrogacy arrangement in respect of which a parentage order has been made a right to receive the original birth certificate and full birth record of the child whose parentage is transferred by the parentage order. This right also applies where a parentage order is made under a law of another State or a Territory.

Clause 55 makes provision for an application for the supply of birth information.

Part 6 Miscellaneous

Clause 56 enables proceedings for offences under the Act to be dealt with summarily by the Local Court.

Clause 57 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 58 provides for the review of the proposed Act in 3 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 makes provision for the making of savings and transitional regulations as a consequence of the enactment of the proposed Act. It also contains specific savings and transitional provisions relating to the proposed Act.

Schedule 2 Amendment of Acts

Assisted Reproductive Technology Act 2007 No 69 Assessment reports

Schedule 2.1 [4] makes it an offence for an assisted reproductive technology (**ART**) treatment provider (an **ART provider**) to provide a woman with ART treatment in connection with a surrogacy arrangement unless the provider has received an assessment report in relation to the surrogacy arrangement. An assessment report is a report by an independent counsellor that is based on interviews with the parties to the surrogacy arrangement. In addition, a registered medical practitioner who undertakes or supervises the provision of ART services by an ART provider must ensure that ART treatment is only provided if the medical practitioner is satisfied it is appropriate to do so, having regard to the assessment report. Non-compliance with this requirement is not an offence but may constitute improper conduct by the medical practitioner for the purposes of the *Health Practitioner Regulation National Law (NSW)*.

Central register

Schedule 2.1 [6] requires the Director-General of the Department of Health (the **Director-General**) to establish a central register, which will include information about ART treatment (currently held on the central ART donor register) as well as information about surrogacy arrangements. The regulations will prescribe the information the Director-General is required to be entered in the register. The objective of the central register is to ensure that an adult whose parentage has been transferred as a result of a parentage order, and affected parties in relation to a surrogacy arrangement, have access to certain information about the surrogacy arrangement. **Schedule 2.1 [1], [3], [5] and [7]–[13]** are consequential amendments.

Access to information

Schedule 2.1 [14] inserts provisions about access to information about surrogacy arrangements. The Director-General must, on application by an adult born as a result of a surrogacy arrangement, an affected party, or an adult biological sibling of a person born as a result of a surrogacy arrangement, provide to the person a copy of any information held on the central register about that person. The Director-General must also, on application by an adult born as a result of a surrogacy arrangement, provide to that person the name of the person's birth parent, or gamete provider under the surrogacy arrangement, and any other prescribed information about the parent or gamete provider held on the central register, as well as prescribed non-identifying information about the person's birth siblings or other information a birth sibling has consented to being disclosed. The Director-General must, on application by a person's birth parent or a gamete provider, provide non-identifying information about the person whose parentage has been transferred as a result of a parentage order, and other information that the person has consented to being disclosed, to the birth parent or gamete provider. The Director-General may only contact a person to seek the person's consent to disclose information about the person if the person is an adult and the Director-General is of the opinion that the contact is justified in order to promote the welfare and best interests of one or more persons concerned. The Director-General may on application by an affected party, or on the Director-General's own initiative, remove information from the central register if the surrogacy arrangement did not involve the provision of ART treatment and a parentage order has not been granted in relation to the surrogacy arrangement or has been discharged.

Other provisions

Schedule 2.1 [16] authorises an inspector under the *Assisted Reproductive Technology Act 2007* to exercise his or her functions under that Act relating to enforcement for the purpose of ascertaining whether or not a provision of the proposed Act or the regulations under the proposed Act have been contravened by an ART provider or in connection with the provision of ART services.

Schedule 2.1 [18] extends the grounds on which the Director-General may prohibit a person from carrying on a business that provides ART services to include if the person has contravened the proposed Act or regulations made under the proposed Act. **Schedule 2.1 [17]** is a consequential amendment.

Schedule 2.1 [2] inserts a definition of **surrogacy arrangement**. **Schedule 2.1 [15]** omits redundant provisions relating to surrogacy.

Schedule 2.1 [19] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act. **Schedule 2.1 [20]** inserts savings and transitional provisions.

Births, Deaths and Marriages Registration Act 1995 No 62

Schedule 2.2 [1] inserts proposed Part 4A into the *Births, Deaths and Marriages Registration Act 1995*. Under the proposed Part, the Registrar of Births, Deaths and Marriages will be required to register parentage orders and orders for the discharge of a parentage order made in New South Wales and may register corresponding orders from other States and Territories. The Registrar will be required to issue a birth certificate for a person showing the information contained in the parentage order in place of the information recorded in relation to the person's birth before the parentage order was made. The birth certificate must not include any information that indicates that the person was the child of a surrogacy arrangement. **Schedule 2.2 [3]** authorises the Registrar of Births, Deaths and Marriages, if requested to do so by an applicant, to issue a certificate in relation to a person in respect of whom a parentage order has been made and registered by the Registrar, which will show the particulars of the birth of the person and the particulars of the parentage order.

Schedule 2.2 [2] provides that a provision in the *Births, Deaths and Marriages Registration Act 1995* for exceptions to certain change of name restrictions does not limit or affect the operation of the proposed Act.

Schedule 2.2 [4] provides that the *Births, Deaths and Marriages Registration Act 1995* is subject to the proposed Act (as well as the *Adoption Act 2000*, as is currently the case). To the extent of any inconsistency with the proposed Act or the *Adoption Act 2000*, those Acts prevail.

Schedule 2.2 [5] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Status of Children Act 1996 No 76

Schedule 2.7 provides that the *Status of Children Act 1996* does not affect the operation of Part 3 of the proposed Act, which deals with parentage orders.

Amendments to other Acts

Schedule 2.3–2.6, 2.8 and 2.9 make consequential amendments to various Acts.