

**Submission  
No 43**

## **EQUALITY LEGISLATION AMENDMENT (LGBTIQA+) BILL 2023**

**Organisation:** Surrogacy Australia

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## Inquiry into the Equality Legislation Amendment (LGBTIQA+) Bill 2023: Submissions on behalf of Surrogacy Australia

Surrogacy Australia is an incorporated, registered charity which supports Australians who are planning on, or already involved in a surrogacy journey, including both the surrogate and the intended parent(s).

### Introduction

1. The purpose of these submissions is to address the Equality Legislation Amendment (LGBTIQA+) Bill 2023 ('the Bill') insofar as it relates to the *Surrogacy Act 2010* (NSW) ('the Act'). This is within the scope of terms of reference 1 and 3 of the inquiry, being: the provisions of the Bill and additional ways of improving the safety and wellbeing of the LGBTIQA+ community. The relevant proposed amendments are contained within Schedule 19[1]-[5] of the Bill.
2. It is noted that the direct nexus between some of the proposed amendments and advancing reference term 3, being amendments that directly promote improving the safety and wellbeing of the LGBTIQA+ community, is unclear. However, Surrogacy Australia welcomes the opportunity to appropriately address potential amendments to the Act.
3. In these submissions, we have used the term "surrogate" which has the same meaning as "birth mother" in the Act.
4. Surrogacy is used as a method for people to have a child or to have more children. Intended parents are varied but many of them are same sex male couples, or single men, who are unable to carry a child due to biology. Their other options to become parents are extremely limited.

### Schedule 19[1]: The addition of s 6A

5. The proposed new section reads:

#### **6A Rights of birth mother to manage pregnancy and birth**

(1) This section applies to a surrogacy arrangement despite anything the parties to the arrangement may have agreed, whether or not in writing.

(2) A birth mother has the same rights to manage her pregnancy and birth as any other pregnant woman.

6. Surrogacy Australia supports the addition of this new section, even though it is not necessary from a legal perspective.
7. Section 6 provides that a surrogacy arrangement is not enforceable, except in relation to payment of the surrogate's expenses. The surrogate already has, at law, the rights referred to at subsection (2) and if there was an attempt between the parties to limit those rights, the current section 6 makes that unenforceable.
8. Despite this position at law, Surrogacy Australia submits that there is a benefit to adding this new section as follows:
  - a. It makes clear, to the surrogacy team of the surrogate and the intended parent(s) what the surrogate's rights are. This can assist with unity in the process.
  - b. The legal position of the surrogate is clear to third parties. While surrogacy remains a rare occurrence in society, there can often be understandable confusion on the part of third parties, in particular health care providers about the rights of the surrogate. This clear drafting will assist surrogates to establish their rights in a straightforward manner.

**Schedule 19[2]: Abolishment of s 11**

9. This amendment removes the following section:

**11 Geographical nexus for offences**

(1) This section applies for the purposes of, and without limiting, Part 1A of the *Crimes Act 1900*.

(2) The necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in the State

**Note**— Section 10C of the *Crimes Act 1900* also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State.

10. Surrogacy Australia welcomes this amendment absolutely, and considers it long overdue.

11. The availability of surrogacy domestically is limited and challenging. This results in many intended parents turning to international options. Most of those options are commercial.
12. The omission of section 11 will eliminate the fear of criminal prosecution for intended parents who go overseas for a commercial arrangement.
13. This removes the organisational discrimination against all people who are unable to bear children, with a large proportion of whom are LGBTIQ+ people.
14. Surrogacy Australia acknowledges that all surrogacy, including commercial surrogacy, should be properly regulated. This aim is not advanced by a looming threat of prosecution held over intended parents who engage in properly regulated commercial surrogacy internationally.
15. Surrogacy Australia does not consider there is any benefit to retaining section 11.

**Schedule 19[3]: Replacement of s 18(2)(b)**

16. The current s 18(2) reads:
  - (2) However, the Court may make a parentage order, despite not being satisfied that a precondition to the making of the order has been met, if:
    - (a) the precondition is not a mandatory precondition to the making of a parentage order, and
    - (b) the Court is satisfied that exceptional circumstances justify the making of the parentage order, despite the precondition not having been met.
17. The proposed new s18(2)(b) is:
  - (b) the Court is satisfied, having regard to the circumstances of the birth parent or parents, the intended parent or parents and the surrogacy arrangement, that it is in the best interests of the child to make the parentage order.
18. Surrogacy Australia supports this amendment.
19. The current wording referencing 'exceptional circumstances' is, at law, a high bar. This wording has been subject of discussion by His Honour Robb J in *BB v DD; Re AA and the Surrogacy Act 2010 (NSW)* [2015] NSWSC 1095 at [36]-[40] and *BB v DD; Re AA and the Surrogacy Act 2010 (NSW)* (No 2) [2015] NSWSC 1825 at [41]-[47].

20. That *obiter dicta* of exceptional circumstances was adopted by Meek J in *Re Ashley [2023]* NSWSC 1295 at [114] where a positive finding of exceptional circumstances was made.
21. Those referenced cases contained arguably circular arguments that returned to the consideration of the child's best interest in the finding of exceptional circumstances. Section 22 of the Act provides that it is a mandatory precondition that the Court must be satisfied making a parentage order is in the best interests of the child. This proposed amendment brings the granting of judicial discretion for non-mandatory preconditions in line with the paramountcy principle of s22.
22. There exists a substantial body of case law in relation to the child's best interests under the Act and other Acts, in particular the Family Law Act 1975 (Cth). There can therefore not be a legitimate concern that the lowering of the bar from exceptional circumstances to best interests of the child will open the floodgates in any way.
23. Surrogacy is a complex area which operates within the sphere of human emotions and fallibility. It is inevitable that on occasions, intended parents or surrogates or both, will fall short of the legislative requirements. Where those requirements are non-mandatory, it is potentially discriminatory to the child in particular, as well as her or his parent(s), many of whom are LGBTIQ+, to not enjoy the same legal recognition as children born in the traditional way to a heterosexual couple. Granting of judicial discretion to be tied to the child's best interests, significantly reduces the potential for such discriminatory outcomes.

**Schedule 19[4]: Abolishment of s 23(2)**

24. The current s23 reads:
  - (1) The surrogacy arrangement must not be a commercial surrogacy arrangement.
  - (2) This precondition is a mandatory precondition to the making of a parentage order.
25. The omission of subsection (2) means that the altruistic nature of the surrogacy arrangement is a non-mandatory precondition to the making of a parentage order. This would then mean that a parentage order can still be made if the Court finds exceptional circumstances (currently) or it is in the best interests of the child (proposed) to make that order.
26. Surrogacy Australia supports this amendment.

27. This proposed amendment does not affect the criminality of commercial surrogacy, as provided for in section 8 of the Act. This proposed amendment however would potentially allow children born as a result of a commercial surrogacy arrangement, to have the benefit of the same legal position as children born in the traditional manner and children born as a result of an altruistic surrogacy arrangement.
28. There are many reasons a surrogacy arrangement may be commercial. It can be that it is by design and all parties are clearly in breach of section 8 of the Act. It also can be that the parties have not closely monitored all expenses and the intended parent(s) have ended up 'overpaying' the surrogate.
29. The omission of this subsection would assist with positive relationships in the surrogacy team consisting of the surrogate (and any partner) and the intended parent(s). It may alleviate the constant anxiety by the parties that unless they carefully scrutinise and monitor every dollar being reimbursed, they will fall foul of the Act and the child will not then be fully recognised as the child of the intended parent(s). Money is a difficult subject in many human relationships. This is even more of a possibility in relationships where emotions run high, and pregnancy falls into that category.
30. There is no legitimate argument that the omission of subsection (2) would lead to widespread commercial arrangements. Criminal penalties for domestic commercial surrogacy remain, and this continues to be a deterrent.
31. Surrogacy Australia considers that while this proposed amendment is a step in the right direction, there should be full consideration given to how commercial surrogacy could be properly regulated to be a future possibility in NSW. This would likely remove further barriers to members of the LGBTIQ+ becoming parents.

**Schedule 19[5]: Amendment of s 26(3)**

32. This proposed amendment would make the requirement that a child is under 18 years old at the time of an application for a parentage order a non-mandatory precondition.

33. This proposal would likely only apply to pre-commencement applications and as such its use and/or relevance is extremely limited.
34. Surrogacy Australia supports this amendment, despite its likely limited application, on the basis that providing for judicial discretion to make an order for a child over 18 is appropriate. This may result in years of unequal legal status for a child being addressed.

**Additional points for consideration**

35. Surrogacy Australia takes this opportunity to address two other suggested amendments and to raise a further issue.
36. The Act uses the term 'birth mother' to refer to the surrogate throughout the Act. The denotation of the surrogate as 'mother' is problematic. A surrogate enters into a surrogacy arrangement with the express provision that she will not be a mother. In NSW she does not already have to be a mother and she may be opposed to the idea of ever becoming a mother, and certainly not to the child she is agreeing to carry. It is then offensive to the surrogate for her to have to be referred to as 'mother' in the documents she needs to sign to meet the requirements of the Act. Further, the surrogate has to be biologically female in order to carry a pregnancy. However the surrogate may not identify as a woman. Surrogacy Australia therefore strongly recommends changing all references to 'birth mother' to 'birth person'.
37. Surrogacy Australia recommends consideration is given to amending s31(2) to add another circumstance where the Court can make a parentage order where it is satisfied that the surrogate has consented to the making of a parentage order. This would then cover circumstances which arise on occasion where the surrogate chooses not to fully participate in the parentage proceedings. Examples that have arisen in practice include where the surrogate has clearly indicated consent to the post birth relinquishment counsellor and/or the independent report writer, or she has made verbal confirmations of her consent to the intended parents and/or other people (who are available to give evidence of this). Such an amendment would enable the Court to act in the child's best interest by making a parentage order despite the final step by the surrogate not being properly performed.
38. Surrogacy Australia is concerned about the lack of awareness surrounding the availability of domestic surrogacy as an option for eligible people to become parents. Putting effort into increasing awareness may result in an increase in people offering to become a surrogate, which



would then increase the numbers of intended parents who are able to match with a local surrogate. The flow on from this would be a decrease in intended parents who are forced to source international surrogacy. For people who are unable to become parents, many of whom are from the LGBTIQ+ community, the financial and emotional burden of surrogacy can be enormous. Decreasing this burden is therefore essential to promote the wellbeing of the LGBTIQ+ community.

39. If so requested, a number of members of the Surrogacy Australia board are willing to appear before the inquiry, including a specialist surrogacy lawyer and parents through surrogacy.