

CLAUSE NOTES

SURROGACY BILL 2010

- Clause 1:** **Short title**
sets out the name of the proposed Act –
Surrogacy Act 2010
- Clause 2:** **Commencement**
provides that the bill will commence on a day
or days to be proclaimed.
- Clause 3:** **Interpretation**
defines certain words and expressions used in
the proposed Act eg
“**consent**” means informed consent freely
and voluntarily given by a person with capacity
to give consent.
“**relevant party**” includes birth mother, birth
mothers spouse (at time of agreement and
time of birth) and intended parents.
“**spouse**” includes husband and wife and
parties to a significant relationship.
- Clause 4:** **Meaning of “surrogacy arrangement”,
“birth mother” and “intended parent”**
defines the terms “surrogacy arrangement”,
“birth mother” and “intended parents”
- Clause 5:** **Meaning of “birth mother’s spouse” and
“birth parent”**
defines the terms “birth mother’s spouse” and
“birth parent”
- Clause 6:** **Meaning of “commercial surrogacy
arrangement”**

outlines what constitutes a “commercial surrogacy arrangement” (which is unenforceable).

Clause 7: Meaning of “birth mother’s surrogacy costs”

defines the term “birth mother’s surrogacy costs”

Clause 8: Enforcement

provides that a surrogacy arrangement itself is not enforceable (e.g a birth mother can never be forced to give up the child she gives birth to), but an obligation that the intended parent/s pay the birth mother’s surrogacy costs is enforceable in a number of circumstances. Broadly, a costs arrangement may be enforced where a birth mother has tried to become pregnant and fails, the birth mother becomes pregnant but the pregnancy fails, a child is born and parentage is transferred to the intended parents or a child is born and the intended parents then refuse to take it.

Clause 9: Right of birth mother to manage pregnancy

provides that the birth mother has the same rights to manage her pregnancy as any other woman does.

Clause 10: Application of Division

provides that clauses 12 to 16 inclusive only apply in relation to surrogacy arrangements made on or after the commencement of clause 11.

- Clause 11: Applications for parentage orders**
provides that the intended parent or parents may apply to the court for a parentage order and explains how this is to be done
- Clause 12: Persons who may apply for parentage orders**
provides more detail on who may apply for parentage orders. If there is one intended parent, then that person must not have had a spouse at the time the surrogacy arrangement was entered into. If a person is part of a couple, then each person must be a party to the surrogacy arrangement. It is in the best interests of the child if this is the case as both parties will be involved in the child's upbringing. If there are two intended parents who are spouses, they must apply together for the parentage order. If the parties have separated since the surrogacy arrangement was entered into, this clause provides the mechanisms for applying to the court and possibly making an order in favour of one of the intended parents. Subsection 5 has the effect of providing that if there are two intended parents, they must be in a spousal relationship with one another, they cannot simply be two people who are not connected by a spousal arrangement, such as two friends.
- Clause 13: When applications for parentage orders may be made**
unless there are exceptional circumstances, an application for a parentage order is to be made not less than 30 days and not more than 6 months after the birth of the child.

Clause 14: Making parentage orders

outlines the conditions which the court must be satisfied of before a parentage order can be made.

These include legal advice, counselling, the age of the birth mother, consent of all relevant parties and most importantly that the order would be in the best interests of the child.

There is provision made for the court to waive conditions in relation to counselling, legal advice and residence if it is in the best interests of the child that the parentage order be made despite the fact that these conditions have not been met.

All parties must consent to the making of the parentage order but the court may waive this in certain circumstances where it is in the best interests of the child. These include that only one of the intended parents consents to the making of the parentage order (this will cover situations where the intended parents have separated since the surrogacy arrangement was entered into and are now contesting custody). Consent of the birth mother or the birth mother's spouse may also be waived where the court is satisfied that they do not have the mental capacity to give consent, they have died or they are uncontactable.

The clause also provides that where the birth parents have not contributed either egg or sperm for the conception of the surrogate child, and at least one of the intended parents has contributed either an egg or sperm to enable the conception of the surrogate child, the court may make a parentage order in favour of the intended parents even though

the birth parents have not consented to the making of the order and even though the surrogate child is not living with the intended parents.

Clause 15: Additional requirements if multiple births

outlines what orders the court is to make if there is a multiple birth – generally an order would not be made that would separate the twins/triplets.

Clause 16: Application of this Division

provides that clauses 18 to 21 apply to surrogacy arrangements that were entered into prior to the commencement of this Act (pre-existing surrogacy arrangements).

Clause 17: Applications for parentage orders

outlines how an application is made in relation to a pre-existing surrogacy agreement.

Clause 18: Persons who may apply for parentage orders

outlines who may apply for a parentage order in relation to a pre-existing surrogacy arrangement. It essentially mirrors the requirements of clause 12.

Clause 19: Making of parentage orders

outlines the matters a court must be satisfied of before it can make a parentage order in relation to a pre-existing surrogacy arrangement. The clause also allows the court to waive certain pre-conditions where it is in the best interest of the child to do so. This clause is similar to clause 14 and will not

enable orders where the arrangement was a commercial surrogacy arrangement but recognises the fact that the child is likely to have been with the proposed parents for an extended period and may be old enough to express his or her own views on the intended order. In any event, subject to s 20, the best interests of the child are still paramount.

The clause also provides that where the birth parents have not contributed an egg or sperm to the surrogate child, and at least one of the intended parents has contributed either an egg or sperm to the surrogate child, the court may make a parentage order in favour of the intended parents even though the birth parents have not consented to the making of the order and even though the surrogate child is not living with the intended parents.

Clause 20: Presumption as to best interests of child creates a presumption that, unless there is evidence to the contrary, if all the parties to a surrogacy arrangement consent to the making of a parentage order, it is in the child's best interests to become the child of the intended parents.

It also creates the presumption that, unless there is evidence to the contrary, it is presumed to be in the best interests of the child that a parentage order is made in favour of the intended parents where the birth parents have not contributed an egg or sperm to the child and at least one of the intended parents have contributed an egg or sperm to the child.

Clause 21: Method of conception, &c, irrelevant to whether parentage order ought to be made

makes it clear that the method of conception of the surrogate child is not a matter which affects the making of an order.

Clause 22: Other orders

gives the court the power to make any other orders which it thinks are required as a result of the making of a parentage order.

Clause 23: Appeal against decision in relation to application for parentage order

provides a right of appeal to the Supreme Court.

Clause 24: Effect of parentage orders on legal relationships

outlines the effect a parentage order has on the legal relationship of the parties involved – the child becomes the child of the new parents for all purposes. There is a saving provision which deals with criminal offences such as incest where a familial relationship may be relevant.

Clause 25: Applications for discharge of parentage orders

outlines who may apply and how to apply for the discharge of a parentage order and on what grounds an application for discharge can be made. These grounds are essentially that the order was obtained by fraud or duress, consent that was given to the original order was, in fact, not given or was given for reward

or payment (except the birth mother's reasonable surrogacy costs), or there is an exceptional reason why the order should be discharged.

Clause 26: Orders for discharging parentage orders
allows the court to make an order discharging a parentage order.

Clause 27: Effect of discharge of parentage order
outlines the legal effect that a discharge of a parentage order will have. Essentially, the discharge of the order will mean that things revert to being as if the parentage order had not been made.

Clause 28: Appeal against decision granting or refusing discharge of parentage order
outlines how an appeal against a decision to discharge a parentage order is to be made and by whom.

Clause 29: Duty of birth mother not abrogated by Act
confirms that the birth mother must still register the birth of the child in accordance with the *Births, Deaths and Marriages Registration Act 1999*.

Clause 30: Surrogacy record
Provides that the Registrar of Births, Deaths and Marriages is to establish and maintain a surrogacy record and outlines how it is to be maintained.

Clause 31: Copy of parentage orders and orders discharging parentage orders to be sent to registrar

Requires the Registrar of the Court to send to the Registrar Births, Deaths and Marriages a copy of parentage orders made or discharged.

Clause 32: Record of parentage orders, &c., of child born in Tasmania to be made in birth register

outlines how the Registrar, Births, Deaths and Marriages creates a surrogacy record in relation to a child born in Tasmania. The Registrar re-registers the birth of a child who has had a parentage order made in relation to them. An entry is made in the surrogacy record showing the information that was held in the register before the parentage order was made.

Clause 33: Record of parentage orders of persons born outside Tasmania

if the Registrar, Births Deaths and Marriages, receives a memorandum of a parentage order in relation to a child whose birth is not registered in Tasmania, the Registrar must make an entry in the surrogacy record.

Clause 34: Alteration of records, &c., where parentage orders discharged

outlines what the Registrar, Births Deaths and Marriages, is to do when a parentage order is discharged. This section applies in relation to both children whose birth is registered in Tasmania and those whose birth is registered elsewhere.

Clause 35: Sending of memoranda, &c., of orders to other States, &c.

provides that if the Registrar, Births, Deaths and Marriages, receives a memorandum of a parentage order in relation to a child who the Registrar believes was born in another state or territory of Australia, the registrar must send information to the relevant person in another jurisdiction.

Clause 36: Registrar of Supreme Court may provide registrar with certain information

allows the Registrar of the Supreme Court to provide information to the Registrar, Births Deaths and Marriages, in relation to parentage orders made or discharged in the Supreme Court.

Clause 37: Copies of entries in register or surrogacy record

provides that the Registrar of Births, Deaths and Marriages is able to issue information in relation to the birth register of the surrogacy record in accordance with the provisions of the Births, Deaths and Marriages Act 1999.

Clause 38: Commercial surrogacy arrangements prohibited

makes it an offence to enter into, or offer to enter into, a commercial surrogacy agreement.

Clause 39: Commercial brokerage or advertising of surrogacy arrangements prohibited

makes commercial brokerage or advertising in relation to surrogacy an offence.

- Clause 40: Reporting of applications prohibited**
places limitations on the reporting of applications.
- Clause 41: Prosecutions and enforcement of certain surrogacy arrangements**
provides that prosecutions under the *Surrogacy Contracts Act 1997* are not to occur, unless the prosecution is for an offence which is also an offence under this Act.
- Clause 42: Hearings to be in private**
provides that hearings in relation to surrogacy arrangements are to be held in private
- Clause 43: Access to court records**
places limitations on who may access court records in relation to surrogacy proceedings.
- Clause 44: Accreditation of counsellors**
the Secretary, Department of Justice, may accredit appropriately qualified people as counsellors for the purpose of this Act.
- Clause 45: Regulations**
provides the Governor with regulation making powers.
- Clause 46: Administration of Act**
provides the administrative arrangements in relation to the Act.