



# Surrogacy: A legislative framework

## Fact Sheet 3 – Surrogacy and the Law in South Australia

### Surrogacy and the Law in South Australia

In South Australia, surrogacy is regulated by Part 2B of the *Family Relationships Act 1975* (SA). This law *prohibits commercial surrogacy*,<sup>1</sup> and sets out strict conditions for when **altruistic surrogacy agreements** will be lawful and legally recognised in South Australia.<sup>2</sup> In accordance with this approach, the present law presumes that the woman who gives birth to a child is the child's legal mother.<sup>3</sup>

The present law also sets out a range of offences for those involved in negotiating or being party to a commercial surrogacy contract. This reflects a broadly held policy position across Australia that children should not be able to be 'bought and sold', which is balanced with the practical need to set out a legal framework to provide for the **legal parentage** of a child born to **commissioning parents** with the help of an altruistic surrogate, who does not charge any fee to carry and give birth to their child (though medical and/or other expenses may be paid).<sup>4</sup>

The present law seeks to *encourage* lawful surrogacy in South Australia but *discourage* unlawful surrogacy in Australia or overseas, especially commercial international surrogacy agreements.

### Recognised Surrogacy Agreements

The present law means that surrogacy is only lawful in South Australia if it occurs under a '**recognised surrogacy agreement**'. To be lawfully recognised, a surrogacy agreement must be one that meets all of the following conditions:

- The surrogate mother agrees to become pregnant, or try to become pregnant, and surrender the custody and rights in relation to a child born as a result of the pregnancy to the commissioning parents who are party to the agreement;
- The commissioning parents must both live in South Australia, be married, or in a registered relationship, or lived together continuously in a marriage like relationship for at least three years (whether a heterosexual or a homosexual couple);<sup>5</sup>

<sup>1</sup> See *Family Relationships Act 1975* (SA) s 10H offences.

<sup>2</sup> *Family Relationships Act 1975* (SA) Part 2B. SALRI notes that, although a parenting order in South Australia requires a recognised surrogacy agreement, it is not illegal for a couple to enter into a non-commercial surrogacy agreement in South Australia that fails to meet the requirements of the *Family Relationships Act*. However, this will not result in the transfer of parentage. An example is a gay couple who engage a surrogate to self-inseminate without the use of ART.

<sup>3</sup> *Family Relationships Act 1975* (SA) ss 8 and 10C.

<sup>4</sup> *Statutes Amendment (Surrogacy) Act 2009* (SA), inserting s 10HA into *Family Relationships Act 1975* (SA).

<sup>5</sup> As part of the range of 2016 LGBTIQ law reforms, the law was changed to allow non-heterosexual couples to take part in surrogacy arrangements. Prior to 2016, South Australians in non-heterosexual relationships had to travel outside South Australia to access surrogacy. Surrogacy in South Australia remains unavailable to a commissioning parent who is single.

- The commissioning parents must be unlikely to be able to become pregnant or carry a pregnancy or give birth<sup>6</sup> or face a risk of a serious genetic defect, or serious illness to the child or commissioning parent by becoming pregnant, or carrying a pregnancy or giving birth;
- The surrogate mother must have been assessed and approved as a surrogate by a specialist counselling service;
- No money changes hands, other than for specific valid expenses set out in s 10HA (2a)(i) including those associated with becoming pregnant through the use of IVF and medical expenses associated with the birth. (Further information about these expenses is set out in Fact Sheet 6);
- The parties agree that, once the child is born, the commissioning parents will apply for an order from the Youth Court of South Australia to confirm that they (and not the surrogate mother) will be the legal parents of the child; and
- The parties have obtained a lawyer's certificate to confirm that the surrogate mother (and, if relevant, her partner) has received independent legal advice, separate from the commissioning parents.

## Declaration of Parentage

Once a recognised surrogacy agreement is in place, the legal avenue in South Australia is clear for the commissioning parents to apply to the Youth Court under s 10HB of the Act for an order to transfer the legal parentage of the child. This is called an order as to the parents of a child born under a recognised surrogacy arrangement. The application may only be made when the child is between the ages of four weeks and six months. In the event that the application is not made the Youth Court loses its ability to make an order and the presumptions of the *Family Law Act 1975* (Cth) which is enforced by the Federal courts (being the Family Law Court and the Federal Circuit Court) will remain in force. This means the surrogate (and her partner if she has one) is considered to be the parent/s of the child. The Federal courts currently do not have the power to amend or declare the parentage of a surrogate child.

The welfare of the child is the paramount consideration for the Youth Court to grant an order recognising the commissioning parents as the child's legal parents.<sup>7</sup> The Court must also be satisfied that the child's surrogate mother freely and fully understands the effect of making the order,<sup>8</sup> the commissioning parents are regarded as 'fit and proper persons' to be parents, and any other consideration the court deems relevant.<sup>9</sup> The effect of the Youth Court's order under s 10HB is that the commissioning parents are treated as the legal parents and the birth parent is no longer a legal parent.<sup>10</sup> The Court will also notify the Birth, Deaths and Marriages Registrar of the order.<sup>11</sup>

## Changes in 2015: The State Framework for Altruistic Surrogacy, Surrogate Register and Prescribed International Surrogacy Agreements

In 2015, changes were made to the law in relation to surrogacy in South Australia in the *Family Relationships (Surrogacy) Amendment Act 2015* moved by the Hon John Dawkins MLC. These changes sought to amend 'the current law in South Australia to secure the welfare of children born through surrogacy, to try to make accessibility of surrogacy arrangements in this jurisdiction wider, to limit overseas use of the commercial surrogacy process, and to ensure that commercial surrogacy

<sup>6</sup> Whether because of infertility, other medical reasons, risk to an unborn child or for some other reason, see *Family Relationships Act 1975* (SA) s10HA.

<sup>7</sup> *Family Relationships Act 1975* (SA) s 10HB(6).

<sup>8</sup> *Family Relationships Act 1975* (SA) s 10HB(7).

<sup>9</sup> *Family Relationships Act 1975* (SA) s 10HB(10)-(11).

<sup>10</sup> *Family Relationships Act 1975* (SA) s 10HB(13).

<sup>11</sup> *Family Relationships Act 1975* (SA) s 10HD.

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remains banned in South Australia.<sup>12</sup> The 2015 changes introduced three new avenues designed to improve access to domestic, altruistic surrogacy and to allow the relevant Minister to recognise international surrogacy agreements (including international commercial agreements) if certain strict conditions were met.<sup>13</sup> These new avenues are:

➤ **The State Framework for Altruistic Surrogacy (s 10FA)**

The 2015 changes allow the State Attorney-General, as the relevant Minister, to set up a Framework containing information about a range of matters relevant to recognised surrogacy agreements including: details about the type of counselling parties to a surrogacy agreement should have, the circumstances in which a person can advertise the services of a surrogate mother and the conditions the Attorney-General must be satisfied of to approve a prescribed international arrangement.<sup>14</sup>

➤ **Prescribed International Surrogacy Arrangements (s 10F)**

The 2015 changes set out a process for international surrogacy arrangements – such as those involving South Australian commissioning parents and an overseas surrogate – to be recognised as lawful under South Australian law. Under these changes, the Attorney-General has the power to recognise an international surrogacy arrangement if certain conditions are met. Once recognised under this process, international surrogacy arrangements can then provide a legal avenue for parenting orders to be made under s 10HB.

The 2015 changes raise some issues. One concern is whether the State Attorney-General is the most suitable person to approve international surrogacy agreements and, if not, who is the best placed person, body or court to approve such agreements? What should be the criteria to have regard to in deciding if to approve such agreements? Should such agreements even be able to be approved?

➤ **The Surrogate Register (s 10FB)**

The 2015 changes require the Attorney-General to establish a Register of South Australian women over the age of 18 who are willing to act as a surrogate in a lawful surrogacy agreement. The Register would not be available to the public, but could be accessed by approved groups of people, such as medical service providers or prospective commissioning parents.

The powers provided to the Attorney-General by the 2015 changes to date have not been used and no Framework or Register has been established.

## **Proposed 2017 Changes: A New Approach to Parentage Orders for Interstate and International Surrogacy Arrangements and New 'Reasonable Costs' Regime**

In 2017, further changes were proposed to the surrogacy laws in South Australia that, if passed, would provide an alternative approach to the changes introduced in 2015.<sup>15</sup> The proposed 2017 changes – which have not yet become law – would remove the State Framework for Altruistic Surrogacy, the Surrogate Register and the process for prescribing international surrogacy agreements introduced in 2015.<sup>16</sup>

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<sup>12</sup> South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2014, 1597-1598 (Hon John Dawkins).

<sup>13</sup> *Family Relationships (Surrogacy) Amendment Act 2015* (SA).

<sup>14</sup> *Family Relationships Act 1975* (SA) s 10FA (3).

<sup>15</sup> In October 2017, the *Family Relationships (Surrogacy) Amendment Bill* (SA) (2017) was introduced to State Parliament. The Bill failed to pass before Parliament and was prorogued in December 2017 before the 2018 State election.

<sup>16</sup> The 2017 Bill also proposed changes to the offences in the Act, including the offence of 'entering, or offering to enter, a commercial surrogacy arrangement' and the offence of 'entering, or offering to enter, a surrogacy arrangement'. See *Family Relationships (Surrogacy) Amendment Bill* (SA) (2017) s 10T(1).

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The proposed changes would also introduce a new process for the Youth Court to make an order as to the parents of a child born under a recognised surrogacy arrangement made by South Australian parents in other jurisdictions in Australia or overseas, provided any such arrangements were not commercial surrogacy arrangements and other conditions were satisfied.<sup>17</sup>

The 2017 changes also suggested a new way for dealing with the expenses or costs that can be recovered by a surrogate mother under a lawful surrogacy agreement. In particular, the changes would provide that in addition to recovering medical, legal and counselling expenses associated with the surrogacy agreement, the surrogate mother could also recover '**reasonable costs**', associated with:

- loss of earnings because of leave taken just before and after the birth;<sup>18</sup>
- legal services incurred after the birth of a child, such as those associated with the registration of birth and the parentage order
- reasonable out of pocket expenses incurred by the surrogate mother; and
- any other matter prescribed by the Regulations.<sup>19</sup>

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| <p><b>Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service or the South Australian Legal Services Commission's <a href="#">Legal Advice Helpline</a> on 1300 366 424.</b></p> |
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<sup>17</sup> South Australia, *Parliamentary Debates*, Legislative Council, 18 October 2017, 7962 (John Dawkins).

<sup>18</sup> This is defined to include the value of the surrogate mother's actual **lost earnings** because of leave taken for a period of not more than two months during which a birth happened or was expected to happen; or for any other period during the pregnancy when the surrogate mother was unable to work on medical grounds. Similar provisions exist in New South Wales, Queensland, Tasmania and Western Australia.

<sup>19</sup> The proposed changes in 2017 were to maintain that surrogacy arrangements are not enforceable in South Australia. If ever passed, the 2017 Bill would make changes so the payment of reasonable surrogacy costs incurred by the surrogate mother would be enforceable against the commissioning parents, unless the surrogate mother refuses or fails to relinquish custody or does not consent to a parentage order.