RECOGNISING ALL OF OUR FAMILIES, EQUALLY

Equality Australia's submission in response to the consultation paper on ACT surrogacy laws

21 July 2023

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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We acknowledge that our offices are on the lands of the Eora Nation and the lands of the Kulin Nation and we pay our respects to their traditional owners.

INTRODUCTION

Equality Australia is grateful for the opportunity to provide a submission to the ACT's consultation paper on *ACT surrogacy laws.*

Children deserve the emotional and financial security that comes with the legal recognition of their families. Currently, children may be denied rights and entitlements because their parents are not legally recognised. This particularly affects children born via surrogacy arrangements and co-parenting arrangements[1]. In this submission, we suggest reforms to the *Parentage Act 2004* (ACT) and *Births, Deaths and Marriages Registration Act 1997* (ACT) to better recognise the diversity of families in the ACT, ensuring all children have the benefit of the legal recognition of their parents.

KEY POLICY PRINCIPLES

Our position is underpinned by several key policy propositions. These are:

- All children deserve the emotional and financial security that comes with the legal recognition of their families. No child should be discriminated against or disadvantaged because of the circumstances of their conception. Currently, some children may be denied rights and entitlements because their parents are not legally recognised. This particularly affects children born via surrogacy arrangements and children in co-parented families.
- The denial of legal parentage[2] is not an appropriate way of regulating who may or may not enter a surrogacy arrangement. Denying legal parentage does not serve the best interests of children because it denies them the protection of having their parents automatically responsible for their care, wellbeing and development. It may also leave both the intended parent(s) and surrogate in a legal position that does not reflect the reality and mutual understandings of their roles.
- The overly restrictive regulatory approach to surrogacy in Australia has not worked well.[3] In particular:
    - The availability of more accessible surrogacy frameworks overseas means the protections in Australia are not always engaged, leaving children in a legal limbo when their intended parents seek more accessible fertility options overseas. Yet the costs involved in entering surrogacy arrangements prevents people with

[1] In this submission, when we refer to 'co-parenting arrangements' we mean arrangements between two or more persons to conceive a child where those people agree to play a parental role of a significant or equal degree, and where all the people involved are not in a couple relationship with each other. Examples of these arrangements include a lesbian couple who agree to co-parent with a donor-dad or a single woman who agrees to co-parent with another man who is not her partner. Under the *Parentage Act 2004* (ACT), not all these co-parents are legally recognised as parents and may in fact be conclusively presumed *not* to be parents on the basis that they are sperm or ovum donors: ss 11(3)-(4). In this context, we use the term 'donor-dad' to refer to those fathers who are not recognised as legal parents (notwithstanding a co-parenting arrangement is in place) because the law recognises them as a donor.

[2] Legal parentage is the recognition of a person as a legal parent to a child. Legal parentage instils a person with parental responsibility for a child unless that parental responsibility is otherwise revoked or limited by law.

[3] See e.g. Jenni Millbank (2011) 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?', 35 *Melbourne University Law Review* 165; Jenni Milbank (2015) 'Rethinking "Commercial" Surrogacy in Australia', 12 *Journal of Bioethical Inquiry* 477.

more limited financial means in realising their dream of starting a family, so there is also an equity issue that arises from overly restrictive domestic regulation.

- People who agree to become pregnant as surrogates are no better protected by a system that leaves most of their rights and entitlements under-protected or which encourages more people to go overseas. Criminalisation has also driven practices underground or overseas.

Making surrogacy more accessible domestically ensures that the protections in place for children, surrogates and intended parents are actually engaged as more people undergo surrogacy at home.

- Children deserve a mechanism for the recognition of their parents which addresses historical gaps in our laws, ensuring that reforms capture children who are already born and living in families formed by surrogacy or which involve co-parenting arrangements.

PARENTAGE REFORM – THE FOCUS OF OUR SUBMISSION

The annexure to our submission briefly responds to each of the questions in the consultation paper. However, our submission's focus is on reforms to provide children with the legal recognition of their families, so they can benefit from the emotional and financial security which comes with that recognition. Accordingly, our submission principally responds to questions 8-13 of the consultation paper.

Given the ACT is considering reforms to the *Parentage Act 2004* (ACT) in the context of surrogacy, this is also an important opportunity to offer recognition to families created through co-parenting arrangements. These arrangements are the flip-side of a surrogacy arrangement; namely, they are arrangements in which the person who gives birth to the child intends to remain as a parent of the child but involves another person (who is not their partner and may only be recognised by law as a donor) in the mutually agreed co-parenting of the child. These families may involve two, three or four parents equally or significantly responsible for the child together.

The consequences of failing to legally recognise the parents of a child mean that a child may miss out on rights and obligations which would otherwise be owed to them if the relationships with their parents were legally recognised. Without legal parentage, the non-recognised parent(s) may be forced to instead rely on ad hoc definitions in federal and territory laws that extend rights and entitlements to people who are functionally in the position of a parent.[4] This may have consequences for situations such as the child's right to inherit or receive property or superannuation without adverse tax implications.[5]

Historically children born outside wedlock had different rights and entitlements from children born into a marriage. This unequal status has been rectified in every state and territory, including in the

[4] See e.g. *Health Insurance Act 1973* (Cth), s 10AA(1), 10AA(7); *National Health Act 1953* (Cth), s 84B(1), 84B(4).

[5] See e.g. *Family Provision Act 1969* (ACT), s 7(1)(c)-(f) (also see definition of 'parent' in *Legislation Act 2001* (ACT), Dictionary, Part 1); *Administration and Probate Act 1929* (ACT), s 49B, Sch 6; *Duties Act 1999* (ACT), ss 232D(1)(d), 232G(1), s232H(1) and 232I(1) ; *Income Tax Assessment Act 1997* (Cth), ss 302.195(1)(b)-(d) (definition of 'dependant'), 302.60-302.75; *Superannuation Industry (Supervision) Act 1993* (Cth), ss 10(1) (definition of 'dependant' and 'child') and 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth), r 6.17A.

ACT.[6] The premise of these reforms was that all children be treated equally, and no child be disadvantaged or discriminated against based on the circumstances of their conception. Children born through surrogacy arrangements or under co-parenting arrangements deserve the same equality of treatment. Our submission provides options on ensuring that occurs.

A NOTE ABOUT CRIMINALISATION

While our submission focusses on legal parentage and supports regulation of surrogacy arrangements to promote the best interests of children and protect the surrogate and intended parents, we have reservations about whether the criminalisation of commercial surrogacy[7] and the criminalisation of the facilitation of any surrogacy arrangement[8] – including the extended geographical nexus for such offences[9] – has been effective in achieving their intended public policy objectives. We appreciate that commercial surrogacy arrangements are outside the scope of this paper, and we do not advocate for a completely unregulated approach. However, it is worth considering a different regulatory model is that promotes greater transparency, certainty, protection and more equitable access to surrogacy as a fertility journey for some people who want and need it.

Given these criminal prohibitions have clearly not worked to limit the number of children born through surrogacy overseas where commercial surrogacy is more common, a regulated domestic approach could offer greater benefits to children, surrogates and intended parent(s), including by:

- ensuring minimum safeguards in surrogacy arrangements that protect the child, surrogate and intended parents;
- ensuring the collection and recording of information about a child's biological heritage, so that the child is able to access this information when they are older;
- ensuring the person who is pregnant with the child has her or their rights to manage the pregnancy and birth of the child recognised and respected;
- minimising the risks of unnecessary travel and distance, including access to healthcare in more than one jurisdiction, conflicts of laws and immigration and citizenship difficulties; and
- ensuring the costs and processes involved in surrogacy are not prohibitive for intended parents who would otherwise consider the option if they could afford to.

For our part, we would at least remove the extraterritorial extension in s 45(1) of the *Parentage Act 2004* (ACT) as part of these reforms so that the issue of legal parentage in cases of children born overseas are not determined by a court under the shadow of potential criminalisation.

We would be happy to provide further information or input as requested.

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[6] *Parentage Act 2004* (ACT), ss 38-39.

[7] *Parentage Act 2004* (ACT), s 41.

[8] *Parentage Act 2004* (ACT), s 42.

[9] *Parentage Act 2004* (ACT), s 45.

REFORMS TO PARENTAGE LAWS IN THE ACT

In this section, we set out our recommended parentage reforms to ensure children have the benefit of the legal recognition of their parents when they are born as a result of a surrogacy arrangement or co-parenting arrangement.

PARENTAGE RECOGNITION FOLLOWING SURROGACY (QUESTIONS 8-12)

In response to questions 8-12 of the consultation paper, we believe that there is a benefit to the more flexible approach in how parentage orders are currently made under the *Parentage Act 2004* (ACT) when compared with other states and territories.

Broadly speaking, the ACT Supreme Court must make a parentage order when two conditions are satisfied, being that the order:

- is in the best interests of the child, and
- has been consented to by the surrogate and their partner (if any).[10]

The ACT Supreme Court must consider certain matters (which are not mandatory grounds for refusing a parentage order),[11] and is limited to making orders in particular ways in certain cases.[12] If an ACT parentage order is made, it is recognised throughout federal law.[13] However, the ACT parentage regime is ultimately limited by prescriptive and mandatory geographic, biological, commercial and temporal eligibility requirements which cannot be waived.[14] These prescriptive and mandatory requirements do not always serve the best interests of children.

Accordingly, while we recommend some changes to the current ACT approach as set out below, we generally do not support adding compulsory requirements that prevent children from having legal recognition of their families as a regulatory mechanism to encourage legal compliance. This approach, which has been adopted in other states and territories, has not worked well and it is ultimately the children who are denied the legal recognition of their families (and the rights, entitlements and protections which follow from legal recognition). While promoting written pre-conception agreements, independent legal advice, counselling and ensuring the maturity of surrogates are highly desirable policy objectives, children should not be punished when these requirements are not met or met fully. Conflating the rules around *when* surrogacy is permitted with *whom* is ultimately granted legal parentage is not a child-centred approach.

There is ample evidence that the current surrogacy parentage regimes in other states and territories have not worked well and should not be copied without careful consideration. For example, every jurisdiction in Australia prohibits commercial surrogacy and legal parentage is denied to intended

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[10] *Parentage Act 2004* (ACT), s 26(1). But subject to exceptions: s 26(2).

[11] *Parentage Act 2004* (ACT), ss 26(3)-(5).

[12] *Parentage Act 2004* (ACT), ss 26(6) (order in favour of one or both intended parents), 27 (multiple births), and 28 (name of child).

[13] *Family Law Act 1975* (Cth), s 60HB. Many federal laws define a 'parent' by reference to the *Family Law Act 1975* (Cth): see e.g. *Child Support (Assessment) Act 1989* (Cth), s 5 (definition of 'parent'); *Social Security Act 1991* (Cth), s 5(1) (definition of 'child); *Superannuation Industry (Supervision) Act 1993* (Cth), s 10(1) (definition of 'child').

[14] *Parentage Act 2004* (ACT), ss 24, 25(3).

parents who commission such arrangements.[15] Notwithstanding these prohibitions, we know that children have been born through commercial surrogacy arrangements overseas.[16] At least one case before the Family Court involved the intended parents being referred to the Queensland Director of Public Prosecutions.[17] More recently, the federal family courts have approached these legal prohibitions and restrictions cognisant that the court should take children as it finds them and ensure that the best interests of the child are the paramount consideration when making parenting orders, no matter the circumstances of the child's conception.[18] The result has been that the federal family courts have sought to recognise intended parents as parents for the purposes of the *Family Law Act 1975* (Cth) in ad hoc and undesirable ways that leave some intended parents without recognition, and which do not adequately protect the surrogate should the surrogacy agreement have contained objectionable provisions.

Reforms to the surrogacy eligibility and parentage order regime in the ACT should learn from the problems which have become apparent from laws in other states and territories. While we support some mandatory considerations forming the basis for a parentage order, we do not support highly technical requirements becoming part of the basis for denying legal parentage, at least without an overriding discretion for a court to make an appropriate order where the circumstances of the child's best interests demand it. Given this position, we suggest the following legal options for regulating eligibility and improving legal parentage following a surrogacy arrangement as follows.

OPTIONS FOR LEGAL PARENTAGE FOLLOWING SURROGACY

OPTION 1: LIBERALISING THE POST-BIRTH PARENTAGE ORDER REGIME

Children should not be denied legal recognition of their families as a method of securing compliance from intended parents and surrogates to surrogacy eligibility requirements. Accordingly, we suggest reforms to Division 2.5 of the *Parentage Act 2004* (ACT) to ensure that the Supreme Court has a discretion to make a parentage order when it is in the best interests of the child and it would be appropriate to do so (having regard to the circumstances of the birth parents and the intended parent(s), and the surrogacy arrangement), notwithstanding that one or more of the technical requirements of the scheme have not been met or met fully. This would still allow the Court to consider whether a surrogacy arrangement was one which should not be given the imprimatur of the Court but otherwise ensure that the child's best interests are the paramount consideration.

As to the mandatory requirements for this scheme, we suggest these principal requirements:

- a child[19] has been born with a relevant ACT geographical nexus, namely either:

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[15] *Surrogacy Act 2010* (NSW), ss 8, 23; *Assisted Reproductive Treatment Act 2008* (Vic), s 44(1); *Status of Children Act 1974* (Vic), s 22(1)(d); *Surrogacy Act 2010* (Qld), ss 11 (2)(e)(vi), 56; *Surrogacy Act 2008* (WA), s 8; *Surrogacy Act 2019* (SA), ss 23(1); *Surrogacy Act 2012* (Tas), ss 16(2)(a)(ii), 40; *Parentage Act 2004* (ACT), ss 24(c), 41; Surrogacy Act 2022 (NT), ss 34(1)(a), 48.

[16] See e.g. *Seto & Poon* [2021] FamCA 288 at [45]; *Whytham & Teng* [2019] FamCA 705; *Overton & Dyson* [2019] FamCA 20. See also Jenni Millbank (2013) 'Resolving the dilemma of legal parentage for Australians engaged in international surrogacy', *Australian Journal of Family Law, 27*(2).

[17] *Dudley & Chedi* [2011] FamCA 502.

[18] *Ellison & Karnchanit* [2012] FamCA 602.

[19] Including an adult child.

    - any of the intended parent(s) or surrogate and their partner (if any) live in the ACT; or
    - the child is born in the ACT;
- there was a pre-conception surrogacy arrangement in place which has not been revoked (however it does not need to be in writing and it can be varied post-conception);
- all the affected parties consent to the parentage order (where that consent must be freely and voluntarily given by a person with capacity to give consent), except in those limited circumstances set out in s 26(2) of the *Parentage Act 2004* (ACT);
- the intended parent(s) and the surrogate and their partner (if any) are at least 18 years old at the time of the surrogacy arrangement;
- that the wishes of the child are considered when making the order, if the child is of sufficient maturity to express their wishes;
- having regard to the circumstances of the intended parent(s) and the surrogate and their partner (if any), and the surrogacy arrangement, it would be appropriate to make the order; and
- the order is in the best interests of the child.

We suggest this option be open to children born before the commencement of these provisions to ensure the recognition of children who are already born, including overseas or interstate.

As to non-mandatory but relevant considerations, we would include a range of considerations that would guide the Court's discretion as to the appropriateness of the order and the child's best interests. This could include:

- whether the surrogacy agreement was in writing;
- whether the parties sought independent legal advice prior to agreeing the arrangement;
- whether the parties undertook counselling prior to agreeing the arrangement;
- the age and maturity of the surrogate and the intended parent(s);
- the terms of any surrogacy arrangement, including whether payment or reward (other than for expenses reasonably incurred) was offered, given or received;
- whether the child lives with the intended parent(s), and where all relevant affected parties reside;
- whether the child's birth has been registered;
- whether relevant details of the child's genetic information has been registered or recorded in a manner which would allow the child to access this information when they are older;
- whether the surrogate enjoyed the right to manage their pregnancy and birth;

- whether it would be more appropriate for another court to make the order given any relevant nexus to another jurisdiction;
- whether the order would be inconsistent with an order or the laws of another jurisdiction.

These non-mandatory but relevant considerations would set in place clear policy objectives that would make it *easier* to obtain a parentage order when intended parents and surrogates have met the expectations of the regulatory regime. However, they stop short of punishing a child for the circumstances of their conception.

Finally, while we suggest that a child must be born before an application can be made, we do not recommend limiting the period by which an application can be made without allowing a degree of discretion. This would allow applications to be made as soon as a child is born but could also allow an application to be made after 6 months if it is appropriate for the order to be made. To ensure certainty for the intended parent(s), the surrogate and the child, it is appropriate to put in place a reasonable period within which people are expected to apply for a parentage order unless they show that there is a good reason for their delay. An exception to this may be children born before the commencement of the reforms, whereby a period of time is given after the reforms commence for applications to be made regardless of the age of the child.

OPTION 2: A PRE-BIRTH INTERIM PARENTAGE ORDER

The birth of a child can be a joyous yet stressful time and intended parents and surrogates may prefer the certainty of having a parentage order in place prior to birth of the child which comes into effect upon the birth of the child should the surrogate and their partner (if any) relinquish the child.

Accordingly, in addition to Option 1, we suggest providing a mechanism by which the ACT Supreme Court could make an *interim* parentage order which becomes a final parentage order after the birth of the child, where certain conditions are met. This option would allow the intended parent(s) to effectively assume parental responsibility for a child from birth. The purpose of this proposal is to give certainty for both the surrogate and their partner (if any) and the intended parent(s) as to the legal parentage of a child born through surrogacy.

Here is how we propose this mechanism would work:

- An application for an interim parentage order would be allowed from the point that the surrogate falls pregnant.
- The ACT Supreme Court could make an interim parentage order which becomes effective only upon the birth of the child / children (even if stillborn). This preserves the rights of a surrogate to manage their pregnancy and birth.
- The effect of an interim parentage order would be to transfer legal parentage to the intended parent(s) from the surrogate and their partner (if any) from birth on the relinquishment of the child.

- To make an interim parentage order, the court must be satisfied of the same requirements for a final parentage order, save for those that assume that a child has already been born.
- The interim parentage order becomes a final parentage order 60 days after birth of the child provided that affected parties fill out a form that includes a standard statutory declaration and lodge it with the Supreme Court Registry confirming prescribed matters relevant to the birth of the child (such as registration of the child's birth, registration of genetic information etc.) and that the surrogate and their partner (if any) do not dispute the parentage order becoming final.
- If the form is duly completed, the Court must make a parentage order without a further hearing (or otherwise the matter can be listed for hearing if there is a dispute).
- If there is a dispute, the court should have the power to:
  - make a parentage order if the statutory conditions are met (as discussed in Option 1);
  - revoke the interim parentage order and reinstate the rights of the surrogate and their partner (if any);
  - if the child is born in the ACT, order the amendment of details on the births register (and reissuing of birth certificate with corrected details);
  - make such other orders as it sees fit.
- If an interim parentage order is revoked, there should be a statutory provision that states the revocation does not affect any actions taken by third parties on the authority of the intended parents relying on the interim parentage order while it was in place. For example, a doctor who performs a medical procedure on the child with the consent of the intended parents when the interim parentage order was in place does not then become liable for assault by having failed to get consent to the procedure from the surrogate and their partner (if any).

To ensure that this scheme achieves the same legal effect under federal law as a parentage order under section 26 of the *Parentage Act 2004* (ACT), the ACT should either introduce the scheme under section 26 or ask the Commonwealth to amend reg 12CAA of the *Family Law Regulations 1984* (Cth) to prescribe the new sections of the *Parentage Act 2004* (Cth) for the purposes of s 60HB of the *Family Law Act 1975* (Cth).

OPTION 3: A PRESCRIBED SURROGACY AGREEMENT THAT HAS SOME LEGAL FORCE

Some jurisdictions have gone further to provide automatic parental recognition to intended parent(s) provided a surrogacy arrangement is in place. This approach offers some benefits, given it reduces costs and time involved in seeking court orders in surrogacy arrangements which are not

disputed. In the ACT (and in Australia generally), surrogacy agreements are not enforceable, however.[20]

If the ACT were minded to consider an automatic recognition of parentage scheme, one option could be to consider a statutorily-prescribed standard surrogacy agreement which, if entered into by the intended parent(s) and the surrogate and their partner (if any) with independent legal advice, could automatically confer parentage on the intended parent(s) from birth provided that the surrogate and their partner (if any) have voluntarily and freely consented to the agreement without any fraud, undue pressure or influence. The standard surrogacy agreement could set in place minimum standards and guarantees to protect all parties, including the child born under such an agreement. Appropriate clauses in a standard surrogacy agreement (such as those that deal with reasonable expenses to be reimbursed) could be made enforceable as an exception to s 31 of the *Parentage Act 2004* (ACT). The laws could also prohibit any additional terms that are inconsistent with the standard terms, meaning that surrogacy agreements are better regulated to avoid terms that are oppressive or contrary to public policy.

The chief question to be considered in this approach is to what extent, if any, the surrogate and their partner (if any) should maintain the right to revoke the agreement up to a period of time following birth, and thereby invalidate or revoke the transfer of parentage. The ACT may also consider whether, in the best interests of the child, the agreement could still be set aside in exceptional circumstances. An additional consideration is the interaction of this model of regulation with federal law, given s 60HB of the *Family Law Act 1975* (Cth) only takes effect where there is a court order – not merely an agreement. Accordingly, such a scheme might still require a court order to be made giving effect to the agreement, unless the Commonwealth were convinced to reform s 60HB (or another provision) to provide automatic recognition to such agreements.

A statutorily prescribed standard agreement designed to achieve public policy objectives is not a novel idea. Classes of relationship marked by potential power imbalances or vulnerabilities are commonly regulated through statute in a way which provides certainty and protection for all parties through minimum standards and guarantees, and a requirement that voluntarily agreed terms are not inconsistent with those standards and guarantees. Examples of this model of regulation include agreements between tenant and landlord in residential tenancy agreements[21] or between employer and employee in employment agreements.[22]

Establishing such a scheme would not require all the standards terms to be set out ahead of legislation. Instead, the principal legislation could put in place a power to prescribe regulations that set out minimum terms and conditions. Those prescribed terms and conditions could include:

- obligations regarding the reimbursement of reasonable expenses;
- the surrogate's right to manage their pregnancy and birth;

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[20] *Parentage Act 2004* (ACT), s 31.

[21] *Residential Tenancies Act 1997* (ACT), ss 8-10 and Sch 1.

[22] *Fair Work Act 2009* (Cth), ss 43, 44, 55(1) and Part 2.2.

- cooling off periods;
- arrangements for ensuring the genetic heritage of the child are recorded and biological information is available to the child.

This option might offer people considering surrogacy a scaffold for an agreement that protects everyone's rights and provides certainty. It would also ensure transparency for the terms that were contained in a surrogacy agreement, providing a greater level of oversight into the agreements being reached to ensure everyone is protected. It should also reduce the legal costs associated with the surrogacy process given the statutory agreement provides the starting point.

Ultimately, we think there is merit in exploring further this option of regulation, but we think further consultation is required on the detail of any statutorily prescribed standard surrogacy agreement and the legal effect of such an agreement generally as well as on the transfer of parentage (including how and when such an agreement can be revoked, invalidated or set aside).

OPTION 4: RECOGNITION OF PRESCRIBED OVERSEAS SURROGACY PARENTAGE SCHEMES

The ACT currently does not automatically recognise overseas court orders which recognise the parentage of children born through surrogacy arrangements. Section 10 of the *Parentage Act 2004* (ACT) only recognises the findings of a court of the Commonwealth or another state or territory in the Commonwealth of Australia.

This could be addressed by amending section 10 of the *Parentage Act 2004* (ACT) to allow the recognition of prescribed overseas surrogacy court orders for the purposes of section 10 of the *Parentage Act 2004* (ACT). If option 3 is considered, the ACT may also consider prescribing overseas surrogacy agreement schemes for automatic recognition provided certain conditions are met. This provision would be similar to that in section 27 of the *Civil Union Act 2012* (ACT) which provides recognises relationships formalised under corresponding laws prescribed by regulation.

This reform would ensure that parents who have been recognised as the legal parents of a child under a robust surrogacy scheme overseas are also recognised as legal parents in the ACT, should they move to or live in the ACT. The obvious candidates for such an approach are overseas schemes that allow a surrogate and their partner (if any) to consensually relinquish their parental status to the intended parent(s) via a comparable court order mechanism. This would include schemes such as those in the UK, US, Canada and New Zealand, among others.

Otherwise, ACT law currently appears to irrebuttably deem the surrogate and their partner (if any) as the legal parents of the child under section 11 of the *Parentage Act 2004* (ACT), regardless of whether an overseas court has – with the consent of the surrogate and their partner (if any) – relinquished their parental status to the intended parents. This is because section 11(7), which is an irrebutable presumption under section 13(3) of the *Parentage Act 2004* (ACT), continues to apply to any child conceived other than through sexual intercourse, including where the procedure occurred outside the ACT and the child was born outside the ACT.

COMBINATION OF OPTIONS AND IMPLEMENTATION

Each of the four options discussed above achieve different purposes. In our view, there is utility in considering *all* options, leaving intended parents and surrogates to determine which pathway would work best for them and their circumstances. Option 1 provides less certainty but would provide a fall-back option if a surrogacy agreement under Option 3 was non-compliant, Option 4 did not apply or Option 3 was not pursued as a regulatory option. Option 2 would ensure that the intended parents are recognised as legal parents from the birth of the child subject to an interim parentage order that could be made final. Option 3 would provide a new way of transferring parentage to the intended parents which could also allow the ACT to set minimum standards that protect all parties while avoiding the cost and effort involved in separately drawn agreements and the need for legal proceedings where relationships are harmonious. Finally, Option 4 would avoid the need for duplicate legal processes where overseas laws have ordered a transfer of legal parentage in circumstances that the ACT considers are appropriate to recognise.

Specifically in response to question 12 of the consultation paper, depending on the nature of the reforms proposed, the transitional period for the reforms required may differ.

- Option 4 can be implemented immediately and retrospectively. Most parents and surrogates would be surprised to know that the ACT does not appear to recognise their overseas court orders granting the intended parents legal parentage. The ability to prescribe jurisdictions before orders from those jurisdictions are recognised means due diligence can be done after the reforms are passed and before any specific jurisdiction is prescribed.
- Option 3 should be implemented prospectively, given existing agreements in place that might otherwise be disturbed. Parties should also be allowed to amend existing agreements without falling foul of the new laws, or to opt in to the new framework by consent.
- Option 2 can be implemented immediately, as it provides people with greater choice from a range of existing options.
- Option 1 may need to be phased in after a period of education, given it changes how parentage orders can be made. Unless there are compelling reasons, it should apply to children born before the commencement of the provision but implementation of the changes need to be communicated to the community and legal professionals to ensure they have time to adjust their agreements and advice as to the method and requirements for obtaining parentage orders.

RECOGNISING CO-PARENTED FAMILIES (QUESTION 13)

Co-parenting arrangements between two, three or four parents are one way in which families are formed using assisted conception procedures, particularly within LGBTIQ+ communities. These arrangements are the flip-side to surrogacy arrangements, in that a person (with or without their partner) may conceive and give birth to a child alongside other intended co-parents who are not in a couple relationship with the pregnant person.

ACT law recognises that a child can have up to two legal parents,[23] and a sperm or egg donor who is not in a couple relationship with the pregnant person is not a legal parent.[24] This model of parentage does not allow recognition for co-parented families with more than two parents, or parents who are not in a couple at the time of conception using an assisted conception procedure. As stated above, the consequences of non-recognition are that the child may miss out on legal rights and obligations which would otherwise be owed to them if all parent-child relationships were legally recognised.

As highlighted in the consultation conducted by the NSW Gay & Lesbian Rights Lobby with rainbow families, there is a community need and desire to recognise families with more than two parents.[25] This is particularly so for families with co-parenting arrangements involving three or four parents (such as a lesbian couple who are co-parenting with a donor-dad). However, it is important to recognise that the role of donor-dads in rainbow families significantly differs among families. That is, in some families, the donor is not intended to be a parent, but is known to the child and has some contact. However, in other families, the donor is intended to have a significant or equal parenting role.[26]

Some states in Canada and the United States now allow more than two parents to be listed and recognised on a child's birth certificate.[27]

A PARENTAGE REGISTRATION SCHEME

We suggest amendments to the *Parentage Act 2004* (ACT) and the *Births, Deaths and Marriages Registration Act 1997* (ACT) to provide for the recognition of co-parented families through a new parentage registration scheme allowing up to 4 consenting parents to be recognised as the legal parents of a child. This scheme is intended to recognise families where all parents are intended to be co-parents to an equal or significant degree.

The provisions of the scheme should include that:

- With the registration of the birth of a new child and up to 6 months from birth, a person may also apply to the Births, Deaths and Marriages Registrar to register as an additional parent of the child if:
  - all persons who would otherwise be recognised as a parent to the child under common law or the *Parentage Act 2004* (ACT) consent to the registration;
  - no orders exist granting parental responsibility to another person.
- No more than 4 parents can be recognised as the legal parents of a child.

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[23] *Parentage Act 2004* (ACT), s 14. Whether that assumption is correct for the purposes of the *Family Law Act 1975* (Cth), and thereby under most Commonwealth law, is not clear: see *Masson v Parsons* [2019] HCA 21 at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[24] *Parentage Act 2004* (ACT), ss 11(3)-(4).

[25] Jenni Millbank (2003) *And Then… The Brides Changes Nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, NSW Gay & Lesbian Rights Lobby: Sydney, recommendations 4, 7.

[26] See Jenni Millbank (2003) *And Then… The Brides Changes Nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, NSW Gay & Lesbian Rights Lobby: Sydney, at 5-6.

[27] Courtney Joslin and Douglas NeJaime (2022) 'The next normal: States will recognize multiparent families', *The Washington Post*, 28 January; Verity Stevenson (2018) 'Quebec families with more than 2 parents fight for recognition', *CBC News*, 12 May.

- Upon registration under this scheme:
  - the child is recognised as the child of the registered person for the purposes of ACT law alongside the other parents; and
  - the child is provided a birth certificate with all their parents named as 'mother', 'father' or 'parent' (at their parents' choice).
- For children born before this scheme commences, or if after 6 months from birth, a person should be able to apply to the ACAT or Supreme Court to allow the Registrar to register the person as an additional parent of a child (including an adult child) if:
  - all persons who would otherwise be recognised as a parent to the child under common law or under the *Parentage Act 2004* (ACT) consent to the registration;
  - the child consents (to the extent that they have sufficient maturity to do so); and
  - in respect of a minor child, it would be in the best interests of the child to recognise the person as a parent.
- The registration of a person as a parent under this scheme should be subject to any law or order granting parental responsibility to another person.

Consequential amendments to the *Parentage Act 2004* (ACT) should also be made, so that:

- sections 11(3)-(4) – the presumptions that a donor is not a legal parent – do not apply to a person registered as a parent under this scheme;
- a person registered as a parent under this scheme is presumed a parent and that presumption is an irrebuttable presumption;
- section 14 (the limitation to having more than two parents) does not apply to children with parents recognised under this scheme.

Consequential amendments to the Dictionary in the *Legislation Act 2001* (ACT) should also be made, so that the definition of a 'parent' is updated to recognise a person registered as a parent under this scheme.

The scheme could also include provisions similar to those in section 44 of the *Surrogacy Act 2010* (NSW) allowing the Supreme Court to discharge the registration of a parent under this scheme where consent to the registration was obtained by fraud, duress or other improper means. It is notable that the *Parentage Act 2004* (ACT) does not have a similar provision to unwind a parentage order obtained by fraud or duress, which might also be considered as part of surrogacy reforms.

Legal effect of the parentage registration scheme under ACT law

Unlike adoption, the parentage registration scheme proposed above should not extinguish the rights of any legal parent. That is, it may add a third or fourth parent, but does not remove the rights of existing parents. In most cases, the existing parents will be the two people who conceived the child through sexual intercourse or, in the case of assisted conception, the birth parent and their domestic

partner (for example, two mums in a domestic relationship who intend to have a child together and conceive through donor insemination or IVF).[28]

Legal effect of the parentage registration scheme under federal law

While this scheme cannot alter the various definitions of a child or parent under federal law, the registration of a parent under this scheme may provide proof of the parent-child relationship sufficient to meet Commonwealth parent-child definitions that are non-exhaustive.[29] The creation of a new registration of parentage scheme in the ACT would also allow for advocacy of further reforms at the Commonwealth level and the inclusion of a provision similar to section 60HB of the *Family Law Act 1975* (Cth) covering people recognised as parents under such schemes.

However, this parentage scheme would not alter the child support obligations under the *Child Support (Assessment) Act 1989* (Cth), given the definition of a 'parent' under that Act is likely exhaustive.[30] This would mean that further federal reforms would be necessary to adjust the federal child support scheme to recognise child support obligations shared among more than two parents. In the meantime, if more than two parents may be recognised under the *Family Law Act 1975* (Cth) as parents,[31] the federal family courts may be able to make child maintenance orders in respect of the child.[32] Alternatively, there may be an argument that an agreement to conceive and co-parent a child may be enforceable in respect of the financial aspects of the agreement under common law or equity.

Families likely to benefit from the scheme

This scheme draws upon but builds on the proposal suggested by Professor Jenni Millbank for the NSW Gay & Lesbian Rights Lobby in 2003. By narrowing the registration of an additional parent to the time of birth or shortly thereafter, this proposal allows an administrative scheme to operate without the need for court proceedings for most families where there is agreement on the role of the donor-dad (and their partner, if any).

This scheme would benefit a family such as that of:

- a lesbian couple with a donor-dad (and his partner) who intend to raise a child together;
- a single woman with a donor-dad who intend to raise a child together, but not as a couple.

Families who could not rely on this scheme may still be able to obtain parenting orders from the federal family courts.[33] These grant more limited rights and responsibilities in respect of a child aged

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[28] *ND v BM* (2003) 31 Fam LR 22; *Parentage Act 2004* (ACT), s 11.

[29] See e.g. *H v Minister for Immigration and Citizenship* [2010] FCAFC 119. In *Masson v Parsons* [2019] HCA 21, the majority of the High Court also left open the question as to whether the *Family Law Act 1975* (Cth) (which does not exhaustively define the meaning of a 'parent') allowed the recognition of more than two people as parents: at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[30] *Child Support (Assessment) Act 1989* (Cth), s 5(1) (definition of 'parent'). See *Masson v Parsons* [2019] HCA 21 at [28] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[31] See *Masson v Parsons* [2019] HCA 21 at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[32] *Family Law Act 1975* (Cth), ss 66F and 66G.

[33] See e.g. *Wilson v Roberts* [2010] FamCA 734.

under 18 years (and who is not married or in a de facto relationship),[34] and may work alongside other ad hoc definitions of parent-child relationships found in ACT and federal laws. This would also be an option for co-parented families who do not have consensus on the parental role of each of the persons involved.

SYMBOLIC RECOGNITION FOR PEOPLE WHO ARE NOT PARENTS

As part of the ACT donor registry reforms, the ACT may also wish to consider providing families the option to name on a child's birth certificate (in a place other than that reserved for the parents) the names of significant people involved in the child's conception, where all affected parties consent. This option would be suitable for people who want to symbolically recognise a significant person such as a surrogate or donor but stop short of recognising them as a legal parent. This symbolic recognition would be meaningful to some families formed through surrogacy or donor conception.

This option would give a child a document that recognises their genetic heritage and the people who contributed to their life. This certificate could be issued alongside a standard birth certificate that only names the legal parents, so that the family and the child have the right to disclose the circumstances of the child's conception only to those who they wish to know. This option should raise no presumptions under s 9 of the *Parentage Act 2004* (ACT).

SUMMARY OF RECOMMENDATIONS

1. Recognise the intended parent(s) of children born through surrogacy arrangements by:

- Giving the ACT Supreme Court more discretion to make parentage orders where it is in the best interests of the child, it is appropriate to do so, and all relevant parties consent (see Option 1);
- Giving the ACT Supreme Court power to make interim parentage orders prior to birth that take effect from the birth of a child and which become final once certain conditions are met (see Option 2);
- Implementing a statutorily prescribed standard surrogacy agreement with minimum standards and guarantees protective of everyone's rights, and which confers legal parentage in certain circumstances either with court authorisation or automatically subject to consent (see Option 3);
- Automatically recognising parents recognised under prescribed overseas surrogacy parentage orders and schemes under the *Parentage Act 2004* (ACT) (see Option 4).

2. Recognise the intended parent(s) of children born under co-parenting agreements by providing a simple administrative scheme allowing up to 4 consenting parents to be recognised as the legal parents of a child.

3. Allow significant people who are not parents, such as surrogates and donors, to be recognised symbolically on a child's birth certificate with the consent of all affected parties and in a form which

[34] *Family Law Act 1975* (Cth), s 65H(1).

is distinct from the recognition of their parents, with the child also being given access to a second birth certificate that does not contain this information.

4. Repeal s 45 of the *Parentage Act 2004* (ACT).

ANNEXURE: SHORT ANSWERS TO CONSULTATION QUESTIONS

SUGGESTED PROPOSALS	RESPONSE
1. Change references in the *Parentage Act* to refer to 'intended parents' are parties of surrogacy arrangements rather than 'substitute parents'.	We support this proposal as it would use language which is more consistent with that used by intended parents and surrogates to describe their roles.
2. Change references in the *Parentage Act* to refer to a 'surrogacy arrangement' rather than 'substitute parent agreement'.	We support this proposal as it would use language which is more consistent with that used by intended parents and surrogates to describe their roles. We support the use of the term 'arrangement' rather than 'agreement', as it avoids invoking formal notions of contract law.
3. Allow single people in the ACT to access altruistic surrogacy arrangements.	We support this proposal. It is family processes rather than structure that is a better predictor of a child's current or future wellbeing. While there is evidence that sole parent families may face some challenges compared to two-parent families (particularly in financial means), the diversity of sole parent families in Australia shows that merely being single does not determine parental capacity any more than being in a couple relationship defines whether a person would make a good parent.[35] Given the outcomes for children cannot be determined by the martial status of their parents, removing discrimination against single people is consistent with the principle of non-discrimination, including obligations under the *Sex Discrimination Act 1984* (Cth) not to discriminate in the provision of services on the basis of marital status.[36] This proposal is also consistent with laws in all other states and territories.[37]
4. Allow traditional surrogacy (that is, where the surrogate is permitted to use their own egg to conceive the child) and remove the requirement for intended parents to have a genetic connection with the child.	We support this proposal for the reasons stated in the consultation paper (p. 3) and on the basis that the ACT is developing a registry that will enable a child to discover their genetic heritage. This proposal is also consistent with laws in all states and territories, except in Victoria where traditional surrogacy can only occur through home insemination rather than through a registered ART provider.[38]
5. Allow advertising for legally compliant domestic altruistic surrogacy.	We support this proposal because there are benefits to children, intended parents and surrogates in encouraging surrogacy to take place in Australia rather than overseas. These include: • ensuring children can access information on their genetic heritage through laws that require the registration of donor information;

[35] See: Australian Bureau of Statistics (2022) *Labor Force Status of Families*, 18 October; Elly Robinson (2009) 'Sole-parent families: Different needs or a need for different perceptions', *Family Matters* 82: 47-51; Australian Psychological Society (2018) *Child Wellbeing After Parental Separation: An APS Position Statement*.

[36] *Sex Discrimination Act 1984* (Cth), s 22; *McBain v Victoria* [200] FCA 1009; *EHT18 v Melbourne IVF* [2018] FCA 1421.

[37] *Surrogacy Act 2010* (NSW), s 25(1)(b); *Assisted Reproductive Treatment Act 2008* (Vic), s 3 definition of 'surrogacy arrangement'; *Surrogacy Act 2010* (Qld), ss 7(1), 21(6); *Surrogacy Act 2008* (WA), s 3 definition of 'surrogacy arrangement'; *Surrogacy Act 2019* (SA), s 10(2); *Surrogacy Act 2012* (Tas), s 5(1)(b); *Surrogacy Act 2022* (NT), s 16(c).

[38] *Status of Children Act 1974* (Vic), s 23(1).

	• ensuring intended parents and surrogates have access to robust healthcare and legal systems that support their fertility journey and protect their rights; • improving accessibility, by reducing costs, and avoiding risks involved in cross-jurisdictional disputes; • facilitating better communication between the intended parents and surrogate throughout and after pregnancy when they are more likely to reside in the same place. To encourage surrogacy to take place at home rather than overseas, we must meaningfully address barriers to access in Australia. Advertising bans, particularly in respect of altruistic surrogacy, are one such barrier. This proposal is also consistent with laws in South Australia, Western Australia and the Northern Territory, and moves in the same direction as laws in New South Wales and Tasmania which allow advertisements in respect of altruistic surrogacy arrangements other than for fee or payment.[39]
6. Confirm, in ACT law, that a surrogate has the same rights to manage their pregnancy and birth as any other pregnant person.	We support this proposal which reflects the express law in Queensland, Victoria, Tasmania, South Australia and the Northern Territory.[40]
7. What reasonable expenses related to an altruistic surrogacy arrangement should be permissible under the Parentage Act (for example, medical, counselling and/or legal expenses).	We support making ACT laws consistent with NSW laws in this regard.[41] We also suggest considering a statutorily prescribed standard surrogacy agreement which may be enforceable in some respects, such as in respect of reasonable expenses. For a detailed discussion of this proposal, see our proposed reforms to parentage laws in the ACT above and the discussion of Option 3 in particular.
8. Require surrogacy arrangements to be agreed in writing between parties prior to conception.	We support the proposal to require surrogacy arrangements to be agreed prior to conception provided that variations can be agreed post-conception. While having a written surrogacy arrangement is desirable, we do not support the requirement for a written agreement to be a mandatory precondition to a parentage order. Victoria and the ACT currently do not require agreements to be in writing, and New South Wales, Queensland and Tasmania each have provisions that allow the requirements for writing to be dispensed with when making a parentage order.[42] For a detailed response to this question, see our proposed reforms to parentage laws in the ACT above and our discussion of Options 1, 2, 3 and 4 in particular.

[39] *Surrogacy Act 2019* (SA), s 26(1); *Surrogacy Act 2008* (WA), s 10; *Surrogacy Act 2022* (NT), s 50; *Surrogacy Act 2010* (NSW), ss 10(1)-(2); *Surrogacy Act 2012* (Tas), s 41(2).

[40] *Surrogacy Act 2010* (Qld), s 16; *Assisted Reproductive Treatment Act 2008* (Vic), s 44A; *Surrogacy Act 2012* (Tas), s 11; *Surrogacy Act 2019* (SA), s 16(1); *Surrogacy Act 2022* (NT), s 10.

[41] *Surrogacy Act 2010* (NSW), ss 7(1)-(5), 9(2).

[42] *Assisted Reproductive Treatment Act 2008* (Vic), s 3 definition of 'surrogacy agreement'; *Parentage Act 2004* (ACT), s 23 definition of 'substitute parent agreement'; *Surrogacy Act 2010* (NSW), ss 18(2), 34; *Surrogacy Act 2010* (Qld), ss 22(2), 23(2)(a)-(b); *Surrogacy Act 2012* (Tas), ss 16(2)(e), 16(3)(a).

9. Require parties to a surrogacy arrangement to seek legal advice prior to agreeing to an arrangement. 10. Require parties to a surrogacy arrangement to undertake counselling prior to agreeing to an arrangement.	While encouraging legal advice and counselling prior to agreeing to an arrangement is desirable, we do not support these requirements becoming mandatory preconditions to a parentage order. The ACT, New South Wales, Victoria and Tasmania currently retain some residual discretion for courts to waive these requirements when making a parentage order.[43] For a detailed response to this question, see our proposed reforms to parentage laws in the ACT above and our discussion of Options 1, 2, 3 and 4 in particular.
11. Set 25 years as the minimum age for surrogate entering into substitute parent agreements.	We support setting 18 years as the minimum age requirement for all parties entering into a surrogacy arrangement. While it is desirable to ensure all parties entering into a surrogacy arrangement are sufficiently mature, we do not support requiring the surrogate to be at least 25 years old as a mandatory precondition for a parentage order. Only Western Australia and South Australia currently require the surrogate to be at least 25 years as a mandatory pre-condition to making a parentage order, with Victoria only imposing this requirement for traditional surrogacy.[44] In every other case, courts retain residual discretion to waive this requirement in an appropriate case when making a parentage order. For a detailed response to this question, see our proposed reforms to parentage laws in the ACT above and our discussion of Options 1, 2, 3 and 4 in particular.
12. The optimal length of any transition period to any new framework for surrogacy arrangements, noting the need to safeguard children, surrogates and intended parents who have arrangements in place under the current legislation.	For a detailed response to this question, see our proposed reforms to parentage laws in the ACT above and our discussion on the implementation of Options 1, 2, 3 and 4.
13. Any other matters relating to the regulation of altruistic surrogacy arrangements in the Parentage Act.	We suggest further reforms to: • legally and consensually recognise parents of children born under co-parenting agreements, and • symbolically and consensually recognise significant people in a child's life, such as their surrogate or donor(s), on a secondary birth certificate and in a place which is distinct from the recognition of their legal parents. For a detailed response to this question, see our proposed reforms to recognise co-parented families and the symbolic recognition of people who are not parents in our main submission.

[43] *Parentage Act 2004* (ACT), s 26(3)(e); *Surrogacy Act 2010* (NSW), ss 18(2), 35(1); *Assisted Reproductive Treatment Act 2008* (Vic), ss 40(1), 41; *Surrogacy Act 2012* (Tas), ss 16(2)(f), 16(3)(a).

[44] *Surrogacy Act 2008* (WA), s 17(a)(i); *Surrogacy Act 2019* (SA), s 10(3)(a); *Status of Children Act 1974* (Vic), s 23(2)(a).