Surrogacy Bill 2009

Explanatory Notes

Objectives of the Bill

The objectives of the *Surrogacy Bill 2009* (the Bill) are to:

- decriminalise altruistic surrogacy and provide a legal mechanism for the transfer of parentage of a child born as a result of an altruistic surrogacy arrangement from the birth mother to the intended parent/s;
- repeal the *Surrogate Parenthood Act 1988* and make related amendments to the *Adoption Act 2009,* the *Births, Deaths and Marriages Registration Act 2003,* the *Births, Deaths and Marriages Registration Regulation 2003,* the *Domicile Act 1981,* the *Evidence Act 1977,* the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* following amendments to the surrogacy law;
- amend the *Status of Children Act 1978* -
  - — to extend the parentage presumption to the female de facto partner of a birth mother when the birth mother has undergone a fertilisation procedure to conceive the child with the consent of her female de facto partner; and
  - — to expand the definition of 'fertilisation procedure' to include in the definition the procedure where fertilisation occurs inside the woman's body; and
- make related amendments to the *Births, Deaths and Marriages Registration Act 2003* following amendments to the *Status of Children Act 1978* for parentage presumptions; and
- make minor amendments of various Acts as set out in Schedule 1 to the Bill.

Reasons for the Bill

A. Surrogacy

On 14 February 2008, the Legislative Assembly resolved to appoint the Investigation into Altruistic Surrogacy Committee (the Committee) to investigate and report on:

- whether altruistic surrogacy should be decriminalised and, if so, what the role of Government should be;
- the criteria, if any, for persons to meet before entering into an altruistic surrogacy arrangement;
- the legal rights and responsibilities to be placed on parties; whether there should be a genetic relationship between the child and parties to the arrangement; and
- the right of a child to have access to information about his or her genetic parentage.

On 8 October 2008, the Committee tabled in the Legislative Assembly its report, Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland (the Report). The Report can be accessed at:

www.parliament.qld.gov.au/view/historical/documents/committees/SURROGACY/Report.pdf

The key recommendations in the Report include that:

- altruistic surrogacy be decriminalised in Queensland subject to a regulatory framework;
- the Government's role should include implementing legislative reform including a mechanism to transfer legal parentage;
- altruistic surrogacy arrangements should be unenforceable under State law;
- a genetic connection between the intended parent/s and the child should not be a prescribed requirement; and
- births are re-registered after the transfer of legal parentage for a child and children have access to their original birth certificate when they turn 18 years of age.

The Queensland Government Response to the Report (the Response) was tabled into the Legislative Assembly on 23 April 2009. The Queensland Government Response can be accessed at:

www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/2009/5309T119.pdf

In the Response, the Queensland Government supported the main recommendations in the Report by committing to making altruistic surrogacy legal and developing a mechanism for the transfer of legal parentage from the birth mother to the intended parent/s. The Queensland Government also announced it would release for public comment a Queensland Model for Surrogacy (the Queensland Model) that would provide the framework for legislation to implement the surrogacy reforms.

The Queensland Model was tabled and publicly released on 18 August 2009. The Queensland Model can be accessed at: http://www.justice.qld.gov.au/509.htm

The Queensland Model sets out the Queensland Government's legislative framework for the regulation of surrogacy in Queensland. The public was invited to provide comments on the Queensland Model.

An exposure draft of the *Surrogacy Bill 2009* that implemented the main features of the Queensland Model was tabled and publicly released on 29 October 2009. The public was invited to provide comments on the exposure draft of the Surrogacy Bill 2009.

B. Same-sex Parenting Presumptions in the *Status of Children Act 1978*

The Report by the Committee into altruistic surrogacy noted that the issue of same-sex parents has wider implications for parents than surrogacy alone and it relates to the legal status of children being cared for by same-sex parents. Recommendation 20 of the Report states:

"The committee notes the broader issue of recognition of same-sex parents and recommends to the Queensland Government that it conduct a review of the legal status for children being cared for by same-sex parents with particular reference to the operation of the Status of Children Act 1978."

The Department of Justice and Attorney-General conducted a review of the parenting presumptions in the *Status of Children Act 1978* as they relate to same-sex de facto couples. The *Review on the legal status of children being cared for by same-sex Parents* (the same-sex parenting review) was tabled and made publicly available on 18 August 2009. The same sex parenting review can be accessed at:

http://www.justice.qld.gov.au/509.htm

The same-sex parenting review confirmed that amendments would be made to the *Status of Children Act 1978* to extend the parenting presumption to a lesbian partner of a birth mother when the birth mother has undergone a fertilisation procedure to conceive the child with the consent of her lesbian partner. The public was invited to provide comments on the same-sex parenting review.

Achievement of the Objectives

A. Surrogacy

Currently, surrogacy in Queensland is regulated by the *Surrogate Parenthood Act 1988* (SPA), which prohibits all forms of surrogacy and makes it an offence for a Queensland resident to enter into a surrogacy arrangement in Queensland or elsewhere. Offences in the SPA provide for a maximum penalty of three years imprisonment or 100 penalty units.

No other jurisdiction in Australia criminalises altruistic surrogacy. Western Australia, Victoria and Australian Capital Territory (and more recently South Australia) currently provide for the legal transfer of parentage of a child born as a result of a surrogacy arrangement to the intended parents.

Recommendation 3 of the Committee's Report provided that altruistic surrogacy should be decriminalised (with an appropriate legislative and regulatory framework). This recommendation did not include any qualifications or limitations on the types of altruistic surrogacy arrangements that would be decriminalised.

The Queensland Government Response supported the main recommendation of the Committee's Report to decriminalise altruistic surrogacy. This is achieved in the Bill by the repeal of the SPA and enacting a new *Surrogacy Act 2009* that allows parties to enter into altruistic surrogacy arrangements, while maintaining prohibitions against commercial surrogacy arrangements, advertising for surrogacy and receipt or giving of brokerage fees.

The Committee in their Report supported the notion of 'pre-conception' arrangements as this would reduce the risk of coercion of the birth mother and also allow time for parties to give due consideration before entering into a surrogacy arrangement. The Bill provides that the key components of a surrogacy arrangement are that it must be made prior to conception of the child, and there is the clear intention that the birth mother will permanently relinquish her parental responsibilities for the child's custody and

guardianship to the intended parent/s, and the intended parent/s agree to be permanently responsible for the custody and guardianship of the child.

Guiding Principles

The Committee's Report recommended that legislation to regulate surrogacy should include principles to guide the way the Act is administered and decisions are made under the Act. The Bill is underpinned by the main principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life, are paramount.

Subject to this main principle, the Bill provides that the Act is to be administered under further principles. These further principles include that each child born as a result of a surrogacy arrangement enjoys the same status, protection and support irrespective of the circumstances of the child's birth or the status of the persons who become the child's parents as a result of a transfer of parentage.

Another principle guiding the administration of the Act is that a child should be cared for in a way that promotes openness and honesty about the child's birth parentage. The Bill also includes principles that the autonomy of consenting adults in their private lives should be respected and that the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted.

The Enforceability of the Agreement

Subject to the recovery of the birth mother's reasonable surrogacy costs in certain circumstances (discussed in further detail below) the Bill provides that a surrogacy arrangement will not be legally enforceable.

The Committee recommended that a surrogacy arrangement will not be legally enforceable. In discussing this approach, the Committee identified that the *"unenforceability of arrangements reflects the concern about the prospect of forced relinquishment and commoditisation of women and children"*. (page 71) This policy position is consistent with the policy of minimal intrusion into the private lives of individuals. Individuals entering a surrogacy arrangement must be prepared to accept the responsibility for all the risks involved, one of which is that there will not be any remedy if the birth mother does not relinquish the child.

Birth Mother's Reasonable Surrogacy Costs

The Bill provides that under a surrogacy arrangement the birth mother will be entitled to be paid her reasonable surrogacy costs associated with the

surrogacy, unless the birth mother does not relinquish the custody and guardianship of the child or does not give her consent to the making of a parentage order. The Bill sets out what matters are regarded as the birth mother's surrogacy costs. The agreement about which, if any, of the particular matters regarded by the legislation as reasonable surrogacy costs are to be paid to the birth mother, and the preconditions for payment, will be a matter for the parties to agree to when making the surrogacy arrangement. This is consistent with the policy that there should be minimal intrusion into individuals' private lives.

However, as noted above, in the event of the birth mother deciding not to relinquish the child to the intended parent/s or failing to give consent to the making of the parentage order, the birth mother's surrogacy costs are not enforceable. Otherwise, the birth mother's costs are enforceable against the intended parent/s. Whether the birth mother may be able to recover her reasonable surrogacy costs will depend upon the terms of the surrogacy arrangement and the principles of contract law.

It is appropriate for the agreement about payment of the birth mother's surrogacy costs to be enforced. Whilst the birth mother will not receive any payment or reward for entering into the surrogacy arrangement, she should not be out of pocket for expenses related to the surrogacy if she has complied with the surrogacy arrangement and relinquished the child to the intended parent/s and consented to the making of the parenting order.

Victoria and Western Australia both allow for arrangements about the birth mother's reasonable surrogacy costs to be enforced, even though the surrogacy arrangement itself is unenforceable.

Restrictions on Who May Enter Into a Surrogacy Arrangement

The Bill does not restrict who can enter into a surrogacy arrangement. This means that a couple, either married or de facto (same-sex or heterosexual) or a single person (male or female) may be the intended parent/s in a surrogacy arrangement and then subsequently apply for a parentage order.

The decriminalisation of altruistic surrogacy will allow persons who are in various types of relationships or no relationship to enter into surrogacy arrangements and to become a parent of a child. To exclude a couple on the basis of their relationship status or a person because the person is single is discriminatory and fails to recognise the many types of family groups that exist today.

Surrogacy arrangements are regarded as private arrangements made between adults. The autonomy of these parties in decision making about starting a family should be respected. It is inconsistent with the principle that the welfare and best interests of the child are paramount to exclude the intended parent/s from applying for a parentage order because of their relationship status. All children are entitled to the same legal protections and certainty regardless of the nature of the relationship of their parents or the circumstances that resulted in their conception and birth.

The Committee noted at page 6 of its Report that there is greater social recognition of the diversity of family types raising children, including extended, nuclear and blended families and families headed by single parents and same-sex couples. The Committee did not make any recommendations that there should be any restrictions upon who may enter into a surrogacy arrangement based on the relationship status of the intended parent/s.

In relation to same-sex couples, the Committee, in their report, appears to envisage that the surrogacy reforms would apply to same-sex couples, where at page 79 of the Report it states, "*The committee recognises that broader changes are required in relation to parenting presumptions in the Status of Children Act 1978 for same-sex couples to be in a position to take up the proposed provision for transfer of legal parentage for altruistic surrogacy.*"

The Committee at pages 40 to 41 of the Report set out in detail the Committee's proposed policy principles and outcomes sought to guide the regulation of altruistic surrogacy. Principle 3 provides '*Every child enjoys the same status and legal protection, irrespective of the circumstances of their birth or the status of their parents.*' In principle 4, the committee provides that to achieve parity with other families "*Access to altruistic surrogacy is an option irrespective of marital status, sexuality, race or religion*'.

The Committee at pages 77 to 79 of the Report discuss the impact for same-sex couples and their children (in relation to surrogacy and for matters outside surrogacy). The Committee at page 78 said, '*The Committee believes concerns for the outcomes for children of same-sex parents are not supported by the available research. It also believes that it is in the best interests of children to ensure parenting arrangements and legal parentage are clarified. The Committee believes the Government should be guided by principle 3 in Chapter 3*."

There is an abundance of contemporary research that has found, *"it is the family processes (such as the quality of parenting and relationships within the family) that contribute to determining children's wellbeing and 'outcomes' rather than family structures, per se, such as number, gender, sexuality and co-habitation status of parents. The research indicates that parenting practices and children's outcomes in families parented by lesbian and gay parents are likely to be at least as favourable as those in families of heterosexual parents, despite the reality that considerable legal discrimination and inequity remain significant challenges for these families."* (*Lesbian, Gay, Bisexual and Transgender Parented Families: A Literature Review* prepared by The Australian Psychological Society, August 2007).

Consistent with this view, the Victorian Law Reform Commission (VLRC) at page 174 of their report, Assisted Reproductive Technology and Adoption, March 2007 stated, *"The commission does not believe it is justified to require people who are commissioning a surrogacy arrangement to be married or in a heterosexual de facto relationship. This reflects the commission's conclusion that a person's marital status or sexuality are not factors that are considered by child welfare authorities or experts to be predictors of harm to children."*

Conception Method / Genetic Material Used

Consistent with the Committee's recommendations, the Bill allows the parties entering into the surrogacy arrangement to utilise any of the various methods for conception, such as, in vitro fertilisation, assisted insemination, gamete intra-fallopian transfer, intracytoplasmic sperm injection (which are all forms of Assisted Reproductive Technology (ART)); self insemination or natural conception.

In Recommendation 10 of the Report, the Committee acknowledged that it is desirable that the birth mother's gametes not be used and at least one intended parent contributes their gametes where possible. However, the Committee acknowledged that people have different capacities and views in relation to genetic connection and recommended that the legislation avoid a prescriptive approach on genetic connection.

Following this recommendation, the Bill does not include any restrictions upon who can apply to the court based on how the birth mother conceived the child or whether or not there is any genetic relationship between the child and the birth mother or intended parent/s.

The Committee's view is supported by the VLRC who, at page 177 of their report, Assisted Reproductive Technology and Adoption, March 2007, when discussing surrogacy, concluded that *'Outcomes for children are not necessarily dependent on whether they are genetically related to the people who parent them.'*

The Bill requires the court to be satisfied before making an order transferring legal parentage that, prior to entering into the surrogacy arrangement, the parties received legal advice and counselling about its legal, social and psychological implications. It is expected that the counselling would canvass the issues and consequences around the use of genetic material in appropriate cases. The legal advice and counselling requirements are discussed later.

Also, parties entering into a surrogacy arrangement will be entitled to use the services of fertility clinics. In Queensland, fertility clinics must be accredited with the Fertility Society of Australia's *Reproductive Technology Accreditation Committee (RTAC)*. RTAC requires compliance with the RTAC Code of Conduct and the National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (the NHMRC Ethical Guidelines). These guidelines include further guidelines for surrogacy.

People who wish to access ART services at a fertility clinic for a surrogacy arrangement will be subject to the same requirements as any other person who accesses a fertility clinic for an ART service. Fertility clinics in Queensland currently provide services to single women and female same-sex couples.

The NHMRC Ethical Guidelines specify that clinics must not facilitate surrogacy arrangements unless every effort has been made to ensure the participants: have a clear understanding of the ethical, social and legal implications of the arrangement; and have undertaken counselling to consider the social and psychological significance for the person born as a result of the arrangement and themselves. The NHMRC Ethical Guidelines also require ART clinics to run ongoing training programs for clinicians and their staff involved in the ART procedures used, and also undertake regular quality assurance activities.

Although the Bill does not impose any restrictions upon the genetic material to be used for conception of the child, it is important to note that the Bill does not encourage, promote or foster the creation of '*designer babies'*. Preimplantation Genetic Diagnosis (PGD) allows a person to

detect serious genetic conditions, improve ART outcomes and in rare circumstances to select an embryo with compatible tissue for a sibling. The NHMRC Ethical Guidelines specifically recognise that PGD has profound ethical significance and does not allow PGD to be used for: prevention of conditions that do not seriously harm the person to be born; selection of the sex of an embryo except to reduce the risk of transmission of a serious genetic condition; or selection in favour of a genetic defect or disability in the person to be born. (Chapter 12 of the NHMRC Ethical Guidelines)

Court Order for the Transfer of Parentage of the Child

The Committee's Report recommended that there should be a legal mechanism for the transfer of the parentage of the child. The Bill provides for a court (the Childrens Court constituted by a District Court Judge) to make a parentage order that will transfer the parentage of the child from the birth mother to the intended parent/s.

Formal transfer of parentage is desirable because it will ensure that the child born as a result of the surrogacy arrangement has the same legal rights and status as other children. A mechanism to allow the transfer of parentage following a surrogacy will comply with the paramount principle of the welfare and best interests of the child.

The effect of a parentage order is similar to an adoption order – once the order is made, the intended parent/s will be the child's only parents to the exclusion of the birth parents.

If the parent-child relationship is not legally recognised, the child will have reduced rights or entitlements than other children within the community. These include reduced rights under succession law, both under intestacy and if contesting a will of the intended parent under the family maintenance provisions in the *Succession Act 1981*. Also, if the parentage of the child is not transferred to the intended parent/s, the child may have a claim against the estate of the birth parents in certain circumstances. This creates uncertainty for the birth parents, particularly in relation to the distribution of their estate to other children they may have.

The Committee at page 73 of their report were of the view that *"a specific mechanism (to transfer the parentage) could provide certainty to children in relation to inheritance in case of death without a will and the protection of child support obligations in case of relationship breakdown."* The Committee further stated, *"… a specific provision for legal transfer is in*

the best interests of the child and promotes the wellbeing and protects the liberty of the parties."

The VLRC was also of the same view and said at page 188 of their report, *"The law's failure to recognise the parental relationship between the commissioning parent(s) and the child has serious consequences for children."*

There are two less than satisfactory alternatives to a formal transfer of the parentage of the child: a parenting order under the *Family Law Act 1975 (Cth)* (FLA) or, no transfer of parentage order relating to the child. Although a parenting order made under the FLA may create similar legal entitlements in some areas, a parenting order is not final and therefore, can be varied at any time, expires when the child is 18 years and is subject to its specified terms. Also a parenting order will not overcome the problems associated with the child's entitlements under succession law. No order to allow for the transfer of parentage fails to address the above problems.

Consistent with the Committee's recommendations, the Bill also includes certain safeguards in the court process to ensure that the court will only make an order to transfer the parentage of the child if it is for the wellbeing and in the best interests of the child. These safeguards are discussed in more detail later.

Registration of Parentage Order at the Registry of Births, Deaths and Marriages

The Bill allows the parentage order to be registered with the Births, Deaths and Marriages Registry so that the birth certificate will show the intended parent/s as parents of the child. Recording details of the intended parent/s on the child's entry on the birth register will confirm the legal status of the child and avoid any social disadvantage to the child. Without the registration of the intended parent/s as the parents of the child, the birth mother will, for the purposes of matters relating to the Births, Death and Marriages Registry, still have rights in relation to the child, such as changing the child's name.

There could be social disadvantage if the child's birth certificate does not show the intended parent/s as the child's parents. This could occur in situations when the child is to be registered for school or with a sporting club that requires lodgement of the child's birth certificate. Further, this may affect the ability of the intended parent/s to engage with service providers, health professionals or others involved with the child because they are not recognised as the child's legal guardians.

The Committee at page 87 of the Report recommended that there be a legal mechanism to allow for the re-registration of births after the court makes the order transferring the parentage of the child. Consistent with the Committee's recommendation, the Bill will also allow the child, once the child is 18 years, to access information about the child's birth parentage.

Safeguards included in the Bill

The Bill includes safeguards to protect the rights, wellbeing and best interests of a child born as a result of a surrogacy arrangement and also to ensure that the parties understand the implications of entering into the surrogacy arrangement and the making of the parentage order. The safeguards are built into the court process and require the court to be satisfied of certain matters before a parentage order is made, including:

- the parentage order is for the wellbeing, and in the best interests of the child;
- that the parties to the surrogacy arrangement received independent legal advice before entering into the surrogacy arrangement. The lawyer who gives legal advice to the intended parent/s can not be the same lawyer who gives the legal advice to the birth mother and her spouse (if any);
- that the parties to the surrogacy arrangement received counselling before entering into the arrangement;
- that there was a medical or social need for the surrogacy;
- the receipt by the court of a surrogacy guidance report by an independent and appropriately qualified counsellor, prepared following the child's birth;
- that the parties to the surrogacy arrangement are of a certain age; and
- that the intended parent/s are Queensland residents.

Legal Advice

The Bill requires that the court be satisfied that all parties each obtained independent legal advice prior to entering into the surrogacy arrangement. If there are two intended parents they can both receive the legal advice from the one lawyer at the same time. Similarly, if the birth mother has a spouse, then the birth mother and her spouse can both receive the legal advice from the one lawyer at the same time. However, the lawyer who gives the legal advice to the intended parent/s can not be the same lawyer who gives the legal advice to the birth mother and her spouse (if any). It is

important that parties to a surrogacy arrangement have an opportunity to have these legal implications explained to them in a way that is specific to their role in the arrangement. The provision of this information in an impartial manner ensures that agreement to the arrangement is more fully informed.

Counselling

In addition to the legal implications, surrogacy arrangements potentially have profound and long lasting psychological and social implications for the parties involved and the child born as a result of the arrangement. A requirement for each party to participate in counselling prior to the making of the surrogacy arrangement ensures that they have an opportunity to explore the issues arising from the surrogacy and can provide free and voluntary agreement to the surrogacy arrangement.

The counsellor is required to be one of the following:

- a member of the Australian and New Zealand Infertility Counsellors Association;
- a psychiatrist who is a member of the Royal Australian and New Zealand College of Psychiatrists;
- a psychologist who is a member of the Australian Psychological Society; or
- a social worker who is a member of the Australian Association of Social Workers; and

has the appropriate experience, skills or knowledge to give the counselling. Counselling will also enable the parties to discuss with the counsellor complex issues such as the method of conception and genetic material to be used.

Residency

The Bill requires the intended parent/s to be resident in Queensland. This is consistent with legislation in other jurisdictions. Victoria, Western Australian, South Australia and the Australian Capital Territory all include a residency requirement in their respective surrogacy legislation. A residency requirement will ensure that intended parent/s do not forum shop in order to avail themselves of the most suitable forum in which to apply to a court for a parentage order.

Age Requirements

The Bill requires the birth mother (and her partner, if any) and the intended parent/s to be at least 25 years at the time the surrogacy arrangement is made.

Entering into a surrogacy arrangement involves complex emotional issues as well as complicated legal implications, particularly where one of the parties decides not to follow through with the arrangement. If parties are aged 25 when they enter into a surrogacy arrangement they are more likely to understand and manage the social, emotional and legal implications that flow from entering into a surrogacy arrangement and are better able to make informed choices about whether to enter into such an arrangement or not.

The surrogacy model in Western Australia provides for an age restriction for the birth mother and at least one of the intended parents to be at least 25 years. The surrogacy model in Victoria also requires the birth mother to be at least 25 years.

Medical or Social Need

The Committee were of the view that surrogacy is to be seen as a limited option and recommended that the intended parent/s must establish that there is a need for the surrogacy such as medical infertility, inability to carry a pregnancy or health risks, before proceeding with a surrogacy. The Committee noted in their report (page 65) that this criterion was an area of debate amongst members, with some members preferring to limit surrogacy to heterosexual parents. However, the Report did not recommend that there be any restrictions on who may be an intended parent/s based upon the relationship status of the intended parent/s. Therefore, under the Bill, a need for surrogacy, includes a social need, such as the intended parent/s are a male de facto couple or single male.

The Bill provides that a medical or social need will occur if: the intended parents are a man and an eligible woman; or the intended parents are both men or both eligible women; or the sole intended parent is a man or an eligible woman.

An eligible woman is a woman who is unable to become pregnant or is unable to carry a pregnancy or give birth. It also includes the situation where, if the woman did conceive a child: the child would be affected by a genetic condition or disorder or the child's health or life would be at risk by the pregnancy or birth. Eligible woman also covers the situation where, the

woman, if she did conceive a child, is unlikely to survive the pregnancy or birth or her health would be significantly affected.

This definition would exclude a heterosexual couple in the circumstances where the male partner is the carrier of the genetic condition or disorder and the female partner is fertile and able to carry a child and give birth. This is because the female partner is able to conceive a child not affected by a genetic condition or disorder with the use of donor sperm through an ART procedure.

Existing Surrogacy Arrangements and Children born in Queensland as a result of a surrogacy arrangement prior to decriminalisation

The Committee found that there were already some children who were born as a result of a surrogacy arrangement in Queensland. A child born under such an arrangement does not enjoy the same legal certainty and status as other children and for these reasons, the Bill allows an intended parent/s of a child who is born before the Bill commences, or born pursuant to a surrogacy arrangement entered into before the Bill commences, to apply to the court for a parentage order. However, the intended parent/s must apply within two years from the commencement of the Bill.

Intended parent/s of children born as a result of surrogacy arrangements entered into prior to decriminalisation will need to comply with the other requirements set out in the Bill unless the court dispenses with the need to satisfy a particular requirement because of the unique circumstances of an individual situation. The court is however unable to dispense with the requirements that the surrogacy arrangement must have been entered into prior to the child's conception; all parties consented to entering into the surrogacy arrangement and that the arrangement must not have been a commercial surrogacy arrangement. The retrospective application of the Bill is important to ensure that all children experience the same status and legal certainty regardless of the circumstances that resulted in their birth.

The surrogacy legislation recently passed in Victoria, South Australia and Western Australia have similarly allowed intended parent/s from prior surrogacy arrangements to apply to a court for the making of a parentage order in certain circumstances. The provisions in the Bill that allow an intended parent/s of a child who is born before the Bill commences, or born pursuant to a surrogacy arrangement entered into before the Bill commences, to apply to the court for a parentage order are largely consistent with these jurisdictions.

When the Bill is passed to decriminalise altruistic surrogacy, section 11 of the *Criminal Code* will have the effect that, in circumstances where a person has not been charged with an offence under the SPA, that person cannot be subsequently charged after the time when the law changed to decriminalise the offence. Therefore, once the Bill commences, those parties who entered into an altruistic surrogacy arrangement and who have not been charged with an offence under SPA prior to the commencement of the Bill, will not be liable for a criminal prosecution for entering into an altruistic surrogacy arrangement prior to the commencement of the Bill.

Related Amendments

The Bill contains other related amendments that are necessary to ensure that the welfare and best interests of children are maintained, following the passage of the Bill to regulate surrogacy.

The Bill amends the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* to include as a 'special personal matter' the act of entering into or agreeing to enter into a surrogacy arrangement, or consenting to the making of a parentage order or a discharge order. This will prevent a person who has the formal authority to make decisions for a person with impaired capacity, from entering into a surrogacy arrangement on behalf of the person with impaired capacity. Therefore, a guardian or personal attorney for a woman who has impaired capacity cannot agree on behalf of the woman for the woman to be a birth mother in a surrogacy arrangement.

The Bill amends the *Criminal Code* to clarify the types of relationships that are included in the provisions relating to sexual offences where relationships are relevant. For example, a relationship between a birth mother and a child will be relevant in an offence of incest even after a transfer of parentage order has been made. Section 363 (Child Stealing) of the *Criminal Code* is also amended to clarify that a birth parent is not able to raise as a defence to a charge of child stealing that the birth parent is a parent of the child, once a parentage order has been made in favour of the intended parent/s.

The Bill amends section 8 (Domicile of Certain Children) of the *Domicile Act 1981* to provide for the domicile of the child who is born as a result of a surrogacy arrangement after a parentage order has been made or then subsequently discharged.

The Bill also amends Section 21AC (Definitions) of the *Evidence Act 1977* to include within the definition of 'prescribed relationship' the relationships that are created by the making of a parentage order. This

definition is used in relation to the 'affected child witness' provisions in the *Evidence Act 1977* and will ensure that where the child is the subject of a parentage order, the 'affected child witness' provisions apply to that child.

The *Births, Deaths and Marriages Registration Act 2003* (and Regulation under that Act) are also amended to enable the Registrar of Births, Deaths and Marriages to register a parentage order in the 'parentage order register'. This will ensure that a birth certificate issued for the child will show the intended parent/s as the parents of the child.

The Bill includes a consequential amendment to the criteria listed in the *Adoption Act 2009*, which determines if a couple who are interested in adopting a child are eligible to lodge an expression of interest to commence the adoption process. One of these criteria is that neither of the couple is currently participating in fertility treatment or has participated in fertility treatment for the previous six months. The definition of fertility treatment in the *Adoption Act 2009* does not currently include participation in a surrogacy arrangement. The amendment in the Bill makes a person ineligible to lodge an expression of interest in adoption if he or she is an intended parent under a surrogacy arrangement.

B. Same-Sex Parenting Presumptions in the *Status of Children Act 1978*

In recommendation 20 of the Report, the Committee recommended a review of the legal status of children being cared for by same-sex parents as provided for in the *Status of Children Act 1978* (SCA). This refers to a situation where a woman in a female de facto relationship has, with the consent of her partner, used a fertilisation procedure, including self-insemination, to conceive a child and has given birth to that child and the birth mother's partner is not recognised as the legal co-parent of that child. The consequences are that the child does not have the same social and legal rights as other children who have both parents recognised as the child's parents.

The review, conducted by the Department of Justice and Attorney-General, concluded that the SCA should be amended to allow for the non-biological co-parent in a female de facto relationship to be recognised as the child's parent where both the birth mother and her partner have consented to the procedure being carried out. Although the operation of this amendment is retrospective, it does not affect the vesting in possession or in interest of any property that occurred before the commencement of the amendments. This protects any previous disposition of property under a will or

devolution of property on intestacy. The amendment has the effect that all children born before the commencement of this amendment will have the same legal rights and protection as other children. This is consistent with the principle that the rights and interest of children are paramount.

The review also concluded that the *Births, Deaths and Marriages Registration Act 2003* (BDM Act) be amended to enable the birth mother's partner in these situations to be recorded as a parent of the child. The Bill also includes an amendment to the BDM Act to allow the birth mother and the birth mother's female de facto partner to apply to the Births, Deaths and Marriages Registry to include the birth mother's female de facto partner as a parent of the child.

These amendments are consistent with amendments already made to the similar legislation in New South Wales, Victoria, Western Australia, Australian Capital Territory, Tasmania and the Northern Territory. Also, under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, the Commonwealth Government amended the *Family Law Act 1975* to recognise female same-sex de facto couples as the parents of a child born where the couple consent to the artificial conception procedure and one of them is the birth mother.

C. Definition of 'Fertilisation Procedure' in the *Status of Children Act 1978*

Part 2, Division 2 of SCA provides for certain parentage presumptions to determine a child's legal parentage following the use of fertilisation procedures. The current definition of 'fertilisation procedure' does not include the procedure where fertilisation of the egg occurs inside the woman's body, such as gamete intra-fallopian transfer (GIFT).

The gap in the definition means the parenting presumptions in SCA do not apply to the parent or parents who have conceived a child using a procedure where fertilisation of the egg occurred inside the woman's body. Further, the donor of the ovum or semen may be regarded as the parent of the child and liable to child support or other rights or liabilities. This is not the intention of the parties who either underwent the procedure or who provided donor ovum or semen.

The Bill amends SCA to include as a fertilisation procedure the procedures where fertilisation occurs inside the woman's body. This amendment will apply retrospectively so that those parents whose child or children were conceived using a fertilisation procedure that is currently not included in the current definition, will be legally presumed to be the parents of the

child. It is also retrospective to ensure donors of gametes for these procedures do not have any rights or liabilities towards the child.

Although the operation of this amendment is retrospective, it does not affect the vesting in possession or in interest of any property that occurred before the commencement of the amendments. This protects the prior disposition of property under a will or devolution of property on intestacy.

D. Amendments in Schedule 1 of the Bill

Schedule 1 of the Bill includes minor unrelated amendments to various Acts of a technical nature, such as correcting out of date references and punctuation.

Estimated Cost for Government Implementation

The costs associated with the implementation of this Bill will be met within existing resources.

Consistency with Fundamental Legislative Principles

The following aspects of the Bill may represent a breach of fundamental legislative principles which are justified in the circumstances.

Requirement for the court to be satisfied that the intended parent/s and birth parents to be at least 25 years at the time of the surrogacy arrangement is made

Section 4(2) of the Legislative Standards Act 1992 provides that legislation must have sufficient regards to the right and liberties of individuals.

The Bill provides that a court must not make an order to transfer the parentage of the child unless all the parties to the surrogacy arrangement were at least 25 years of age at the time of the arrangement. This may preclude a couple or a person from becoming parents under a surrogacy arrangement or a woman from becoming a birth mother under a surrogacy arrangement because they are considered 'too young'. Although age is not necessarily a determinant of whether a person is an appropriate parent or not, or whether a woman is appropriate to be a birth mother or not, the serious implications of entering into a surrogacy arrangement require age limits being imposed in the Bill.

The implications of entering into a surrogacy arrangement are complex and involve emotional, social, economical and legal consequences to the parties. Imposing an age limit of 25 for parties to enter into a surrogacy arrangement

ensures that the parties have gained suitable life experience and are appropriately mature to understand and manage the social, emotional, economical and legal implications that result from entering into a surrogacy arrangement. Parties are better able to consider the likely effect upon them and make informed choices about whether to enter into such an arrangement or not.

Offences

Section 4(2) of the Legislative Standards Act 1992 provides that legislation must have sufficient regards to the rights and liberties of individuals.

The Bill includes offences relating to: entering into a commercial surrogacy arrangement; advertising for surrogacy; and receiving or giving brokerage fees for surrogacy. These matters are existing offences in SPA and have been included in this Bill. The offences carry the same penalties that are imposed in SPA. The Committee in the Report recommended that these matters be retained as offences when new legislation is enacted for the regulation of surrogacy in Queensland.

Two new offences have been included in this Bill that are not offences in the SPA. The Bill provides that it is an offence for a person to knowingly provide a medical, technical or professional service to a person to facilitate a pregnancy under a commercial surrogacy arrangement. This offence will only apply if the person providing the service to facilitate the pregnancy is aware at the time the service is provided that the surrogacy arrangement is commercial in nature. However, if a service is provided after the pregnancy, the offence provision does not apply. The penalty imposed is the same as that which applies to parties who enter into commercial surrogacy arrangements. The Committee was clear in the Report that commercial surrogacy arrangements should not be fostered. This offence will ensure that all those associated with the arrangement or facilitation of commercial surrogacy can be prosecuted.

The Bill also provides that it is an offence for a person to publish identifying material about a court proceeding for the making, or discharge of, a parentage order, without obtaining the requisite consent from the parties. This offence imposes a maximum penalty of 100 penalty units or 2 years imprisonment for an individual, and 1000 penalty units for a corporation. The publication of sensitive and personal information about the private affairs of a family and a child born as a result of a surrogacy arrangement may have significant effect upon the family or child's health and well being. Therefore, the inclusion of this offence to prohibit such

publications is warranted. The *Guardianship and Administration Act 2000* and the *Childrens Services Tribunal Act 2000* also create offences for a person to publish identifying information from a tribunal hearing in certain circumstances. The recently passed *Adoption Act 2009* contains a similar offence with the same penalty imposed.

Retrospective Operation of Provisions

Section 4(3)(g) of the Legislative Standards Act 1992 provides that legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

The SCA amendment to create the presumption that the female de facto partner of a child's birth mother is a parent of the child, when the birth mother has undergone a fertilisation procedure, including self-insemination, to conceive the child with the consent of her female de facto partner, will apply retrospectively. The purpose of the retrospective provision in the Bill is to allow this parenting presumption to apply when the child is born prior to the commencement of the Bill. This will ensure that those children are no worse off than other children and have the same legal rights and status as other children regardless of when they were born or the relationship status of their parents. The effect of this amendment is the child will have two parents recognised at law.

The Bill also provides that the amendment to correct the definition of 'fertilisation procedure' in SCA will apply retrospectively. The purpose of the retrospective operation is so that those women and their partners who conceived a child using a fertilisation procedure that involved fertilisation of the egg inside the woman's body will be presumed the parents of their child and the donor of the gametes will have no rights or liabilities in relation to the child. This is consistent with the intention of the parties involved in the birth of the child, namely the birth mother and her partner who would be regarded as the parents of the child; and also the donors of gametes who donated their gametes on the understanding they would not have any rights or liabilities towards the child.

For both of these amendments to SCA, the retrospective operation of the amendments does not affect the vesting in possession or in interest of any property that occurred before the commencement of the amendments. This protects the previous disposition of property under a will or devolution of property on intestacy.

The Bill also allows intended parent/s under a surrogacy arrangement that was made prior to the Bill's commencement to apply to the court for the

transfer of parentage of the child. Such applications must be made within two years of the Bill's commencement and comply with the Bill's requirements. The Committee found that children had been born in Queensland as a result of surrogacy arrangements. Allowing the intended parent/s of these children to obtain a transfer of parentage will ensure that these children have the same rights and status as other children irrespective of when they were born.

Each of the above mentioned amendments, which apply retrospectively, do not impose any obligations upon parties or affect the rights and liberties of individuals. The provisions are beneficial in purpose and ensure that the child born in the respective circumstances is afforded the same rights and protections as other children.

Consultation

Community

On 6 May 2008, the Committee released an Issues Paper to inform consideration of the issues regarding altruistic surrogacy in Queensland. The Committee invited interested groups and individuals to make public submissions to the investigation based on the questions posed, the terms of reference of the Committee and any matters considered relevant. The Committee received 130 submissions in response to the Issues Paper. The Committee also held public hearings on 7 and 8 July 2008 and held interviews and meetings with key informants and stakeholders. The Report by the Committee includes further details of the consultation undertaken.

The Committee gave consideration to all written and oral submissions when writing the Report and formulating its recommendations to Parliament.

The Queensland Model and same-sex parenting review were both publicly released for comment on 18 August 2009 with submissions closing on 18 September 2009, but later extended to 30 September 2009.

A total of 640 responses to the Queensland Model and same-sex parenting review were received, comprising 621 submissions from individuals and 19 submissions from organisations. Of these 639 submissions, 540 addressed surrogacy and 622 addressed the same-sex parenting review.

An exposure draft of the *Surrogacy Bill 2009* was publicly released for comment on 29 October 2009. A total of 19 submissions were received

with 16 addressing surrogacy amendments and 12 addressing the same-sex parenting presumption amendments.

Government

Consultation on the Bill has been undertaken with all relevant Government departments including the Department of Premier and Cabinet, the Department of Communities (Child Safety Services), the Department of Communities (Office for Women), Queensland Health and Queensland Treasury.

Is the Bill substantially uniform or complementary with Commonwealth or another State's legislation?

The Australian Capital Territory, Victoria, South Australia and Western Australia all have legislation allowing for the transfer of parentage following an altruistic surrogacy arrangement. The Bill, although not uniform or complementary with this interstate legislation, has been developed having regard to aspects of these interstate provisions.

The *Births, Deaths and Marriages Registration Act 2003* is based upon a model law that has been adopted in all Australian jurisdictions, but with modifications in each of the jurisdictions to suit local conditions. In Western Australia, Victoria, South Australia and the Australian Capital Territory, amendments have been made to their respective Births, Deaths and Marriages legislation to allow for registration of the court's order transferring parentage and the issue of a birth certificate showing the intended parent/s as the child's parents.

The *Status of Children Act 1978* and similar legislation in other States and Territories was introduced in the 1970's to remove discrimination against children based on the marital status of their parents and to provide legal certainty about the parentage of children.

With the development of assisted reproductive technologies, amendments were made to the legislation containing the parenting presumptions in most States and Territories in the 1990's to clarify the status of parents, children and donors. This occurred in 1988 in Queensland following the passage of the *Status of Children Act Amendment Act 1988*.

Since this time, all States and Territories have passed amendments to legislation providing for the status of children conceived using donor material. All States and Territories, apart from Queensland and South Australia have already passed amendments to extend the parentage

presumption to the female de facto partner of a birth mother, when the birth mother has undergone a fertilisation procedure to conceive the child with the consent of her female de facto partner.

The definition of 'fertilisation procedure' in the respective Status of Children legislation of New South Wales, South Australia and Western Australia, includes a procedure where fertilisation occurs inside the woman's body. The proposed amendment in this Bill relating to the definition of a 'fertilisation procedure' in the *Status of Children Act 1978* is consistent with these other jurisdictions' legislation.

Notes on Provisions

Chapter 1 Preliminary

Part 1 Introduction

Clause 1 establishes the short title of the Act as the *Surrogacy Act 2009*.

Clause 2 provides that the Act commences on a day to be fixed by proclamation.

Clause 3 states that the dictionary in schedule 2 defines particular words used in the Act.

Part 2 Application, objects and guiding principles

Clause 4 specifies that the Act binds all persons including the State and, as far as the legislative power of the Parliament permits, the Commonwealth and all the other States. This section does not make the State, the Commonwealth or another State liable for an offence.

Clause 5 sets out the main objects of the Act, which are: -

a) to regulate particular matters in relation to surrogacy arrangements, including by prohibiting commercial surrogacy arrangements and providing, in particular circumstances, for the court sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement; and

b) in the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result –

   i. to establish procedures to ensure parties to the arrangement understand its nature and implications; and

   ii. to safeguard the child's wellbeing and best interests

Clause 6 provides that the Act is to be administered under the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount. Therefore, this principle underpins the way in which every other provision in the Act must be read and administered.

The clause then sets out a range of further, more detailed principles that apply to the administration of the Act, but are subject to the paramount principle mentioned above. These principles reflect:

- The way that a child born as a result of a surrogacy arrangement should be cared for so the child has a safe, stable and nurturing home life and the child's development of its emotional, mental, physical and social wellbeing is promoted. Also, openness and honesty about the child's birth parentage is to be promoted.
- That the child born as a result of a surrogacy arrangement should have available the same status, protection and support regardless of: how the child was conceived; the genetic relationship between the child and any of the parties; and the relationship status of the person or

persons who become the child's parents as a result of the transfer of parentage.

- That the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted.
- That the autonomy of consenting adults in their private lives should be respected.

Part 3 Core Concepts

Clause 7 defines what a 'surrogacy arrangement' is for the purposes of this Act. By virtue of subsection (1), a surrogacy arrangement means an arrangement, agreement or understanding between a woman and another person or persons under which the woman agrees to become or try to become pregnant with the intention that the child born as a result of the surrogacy arrangement is not to be treated as a child of the woman but a child of the other person or persons. Further, the woman agrees to relinquish custody and guardianship of the child to the other person or persons and the other person or persons agree to become permanently responsible for the custody and guardianship of the child.

Subsection (2) states that there may other people who are parties to the surrogacy arrangement, such as the woman's spouse.

Subsection (3) states that the surrogacy arrangement may also deal with other matters. Other matters that may be dealt with in the surrogacy arrangement may include what reasonable expenses or costs of the woman (as a result of her agreeing to enter into the surrogacy arrangement and consenting to the making of a parentage order) will be reimbursed to the woman or paid by the other person or persons. Clause 11 provides what can be included as the birth mother's surrogacy costs.

This clause provides the minimum requirements for a surrogacy arrangement. If it is the intention of the parties to the surrogacy arrangement that an application will be made to the court for an order that transfers the parentage of the child from the woman who gave birth to the child to the person or persons who intend to be permanently responsible for the custody and guardianship of the child, then there are many additional requirements about which the court must be satisfied of when deciding

whether or not to make an order to transfer the parentage under chapter 3. Some of these additional requirements include that each party to the surrogacy arrangement must obtain counselling and independent legal advice prior to entering into the surrogacy arrangement. Chapter 3 sets out what these additional requirements are.

Clause 8 defines who is a 'birth mother', 'birth mother's spouse' and 'birth parent' for the purposes of this Act. Subsection (1) defines the birth mother as the woman who is mentioned in section 7(1)(a) under a surrogacy arrangement. This is the woman who agrees to become pregnant under the surrogacy arrangement and to relinquish the custody and guardianship of the child to the other person or persons.

Subsection (2) defines the 'birth mother's spouse' as the spouse of the birth mother, if any, at the time when the birth mother entered into the surrogacy arrangement. 'Spouse' is defined in the *Acts Interpretation Act 1954* as including a de facto partner.

Subsection (3) defines a 'birth parent' of a child to be the person (other than an intended parent – see definition in clause 9) who is recognised at law as being a parent of the child at the time when the child is born. The *Status of Children Act 1978* provides for various presumptions as to who a parent of a child is in certain circumstances. This could be the birth mother's spouse or a person with whom the birth mother has formed a relationship subsequent to the surrogacy arrangement. Whether either of these people is a birth parent will depend upon the application of the presumptions in the *Status of Children Act 1978* to the particular factual situation.

Clause 9 defines who are an 'intended parent' and 'couple' for the purposes of this Act. Subsection (1) defines intended parent as the person who agrees to the matters set out in section 7(1)(b). This is the person who agrees under the surrogacy arrangement to treat the child as his or her child and to be permanently responsible for the custody and guardianship of the child. The parentage of the child may only be transferred to one intended parent or two intended parents who are a couple.

Subsection (2) provides that a 'couple' is a person and the person's spouse.

Clause 10 defines what a 'commercial surrogacy arrangement' is for the purposes of this Act. A commercial surrogacy arrangement is when a person receives a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother's surrogacy costs) for the person or another person for:

a) agreeing to enter into or entering into the surrogacy arrangement; or

b) permanently relinquishing to one or more intended parents the custody and guardianship of the child born as a result of the surrogacy arrangement; or

c) consenting to the making of the parentage order for a child born as a result of the surrogacy arrangement.

Clause 11 defines 'birth mother's surrogacy costs'. Subsection (1) provides that the 'birth mother's surrogacy costs' include the reasonable costs associated with the birth mother becoming or trying to become pregnant or her pregnancy or birth. The birth mother's surrogacy costs also include any reasonable costs associated with the birth mother or the birth mother's spouse (if any) being a party to the surrogacy arrangement or proceedings in relation to a parentage order.

Subsection (2) sets out further details of what costs are considered reasonable within the matters that are mentioned in subsection (1) and include a reasonable medical cost for the birth mother; a reasonable cost, including medical cost for the child; certain health, disability or life insurance premiums; certain counselling and counsellor's report costs; legal costs; actual lost earnings of the birth mother in certain circumstances; and other reasonable costs associated with the surrogacy arrangement or the making of the order transferring parentage.

Clause 12 defines a 'parentage order' and 'discharge order' for the purposes of this Act. Subsection (1) defines a parentage order to be an order made by the court under chapter 3 for the transfer of the parentage of a child born as a result of a surrogacy arrangement. Subsection (2) defines a discharge order as an order made by the court under chapter 3 discharging a parentage order.

Clause 13 provides that the term 'court' used in the Act is the Childrens Court constituted by a Childrens Court Judge.

Clause 14 provides a definition for the concept of a 'medical or social need' for the purposes of this Act. Under the requirements in chapter 3 for the making of a parentage order, the intended parent/s must establish he, she or they have a medical or social need for the surrogacy.

Subsection (1) provides the circumstances in which there is a medical or social need and this occurs where: if there is one intended parent under the surrogacy arrangement, the intended parent is a man or an eligible woman; and if there is two intended parents under the surrogacy arrangement, the

intended parents are a man and an eligible woman, or are both men, or both eligible women.

Subsection (2) defines who is an 'eligible woman' and includes when the woman is unable to conceive a child. Also, an eligible woman is a woman who is able to conceive a child but: she is likely to be unable on medical grounds to either carry a pregnancy or give birth; or she is unlikely to survive a pregnancy or birth; or her health is likely to be significantly affected by a pregnancy or birth. Also the definition of eligible woman includes when the woman is likely to conceive a child but: the child is likely to be affected by a genetic condition or disorder, the cause of which is attributable to the woman; or the child is unlikely to survive a pregnancy or birth; or the child's health is likely to be significantly affected by a pregnancy or birth.

This definition would exclude a heterosexual couple in the circumstances where the cause of the genetic condition or disorder in the child is attributable to the male partner and the female partner is fertile and able to carry a child and give birth. This is because the female partner is able to conceive a child not affected by a genetic condition or disorder with the use of donor sperm through an ART procedure.

This definition would include a single male intended parent or a same-sex male couple who are intended parents under the surrogacy arrangement. If a same-sex female de facto couple were to be intended parents under a surrogacy arrangement, both women would need to be an eligible woman.

Chapter 2 Surrogacy Arrangements

Clause 15 provides in subsection (1) that a surrogacy arrangement is not enforceable.

Subsection (2) provides that an obligation under a surrogacy arrangement to pay or reimburse the birth mother's surrogacy costs is enforceable unless a child is born under a surrogacy arrangement and the birth mother: does not relinquish the custody and guardianship of the child to the intended parent; or does not give her consent to the making of the parentage order on an application (if any) to the court for a parentage order.

The effect of this clause is that where the birth mother decides to keep the child and does not relinquish the child to the intended parent/s or consent to the making of the parentage order, the intended parent/s can not force the birth mother to relinquish the child to them. However, in these circumstances, the birth mother can not force the reimbursement to her by the intending parents of her surrogacy costs.

Also, where the intended parent/s decide not to be permanently responsible for the custody and guardianship of the child or do not give consent to the making of the parentage order, the birth mother may be able to enforce all of her surrogacy costs against the intended parent/s, depending upon the terms of the surrogacy arrangement and contract principles.

Clause 16 provides for the rights of the birth mother to manage her own pregnancy just as any other pregnant woman, irrespective of what may have been agreed to by the parties to the surrogacy arrangement and whether or not in writing.

Clause 17 provides that the parentage presumptions in the *Status of Children Act 1978* apply to the child upon birth of the child and up until a parentage order is made under Chapter 3. Therefore, when the child is born as a result of a surrogacy arrangement, the birth mother will be presumed to be the mother of the child. The father (or other parent) of the child will be the person who, under the *Status of Children Act 1978,* is presumed to be the father (or other parent).

Clause 18 makes it clear that upon the birth of a child under a surrogacy arrangement, the birth parent/s are under the same legal obligations as other parents under the *Births, Deaths and Marriages Registration Act 2003* to register the birth of the child.

Chapter 3 Parentage Orders

Part 1 Introduction

Clause 19 contains various definitions that are used in chapter 3.

The term 'appropriately qualified' is used in this chapter to refer to a counsellor or a medical practitioner who is required to prepare a report for particular purposes.

An 'appropriately qualified' counsellor is a counsellor who is one of the following:

- a member of the Australian and New Zealand Infertility Counsellors Association;
- a psychiatrist who is a member of the Royal Australian and New Zealand College of Psychiatrists;
- a psychologist who is a member of the Australian Psychological Society; or
- a social worker who is a member of the Australian Association of Social workers; and

also has the experience, skills or knowledge appropriate to prepare the report.

An 'appropriately qualified' medical practitioner is a medical practitioner who has the qualifications, experience, skills or knowledge appropriate to prepare the report.

The term 'child' used in this chapter (except in part 4) is defined as a child born as a result of a surrogacy arrangement.

The term 'consent' means consent that is freely and voluntarily given by a person with capacity, within the meaning of the *Guardianship and Administration Act 2000,* to give consent.

The term 'independent' is used in this chapter to describe the counsellor who is to prepare a surrogacy guidance report. Independent, for this counsellor, means that the counsellor did not give counselling about the surrogacy arrangement to any of: the birth mother, the birth mother's spouse (if any) or an intended parent/s. Further the counsellor is not, and has not been, directly connected with the medical practitioner who carried out a procedure that resulted in the birth of the child.

Part 2 Making a Parentage Order

Clause 20 explains that this part facilitates the transfer, in particular circumstances, of the parentage of a child born as a result of a surrogacy arrangement that satisfies particular requirements.

Clause 21 provides that an application for a parentage order in relation to a child may be made not less than 28 days and not more than 6 months after the child's birth. However, the court may, if exceptional circumstances justify the making of a late application, grant leave to extend the time to make the application after the six month period. In granting the leave, the court is to be satisfied that it is for the wellbeing, and in the best interests of the child to grant the leave for the late application.

If there are two intended parents under the surrogacy arrangement and the two intended parents are a couple when the surrogacy arrangement was made, then the application for the parentage order may only be made by the two intended parents jointly. However, one of the two intended parents may apply for a parentage order in relation to a child if the two intended parents are no longer a couple or one of them has died.

If there is one intended parent under the surrogacy arrangement and the intended parent did not have a spouse when the surrogacy arrangement was made, the intended parent may apply for a parentage order.

To the extent practicable, the documents mentioned in section 25 must also be filed with the application.

Clause 22 provides in subsection (1) that the court may make a parentage order to the applicant, or joint applicants. The applicant or joint applicants will be the intended parent or intended parents.

Subsection (2) provides that the court may make the parentage order only if satisfied of all of the matters that are set out in the subparagraphs to subsection (2). The court is to be satisfied that the parentage order is for the wellbeing and in the best interests of the child. This is the paramount consideration for the court.

The child must have resided with the applicant, or joint applicants, for at least 28 consecutive days before the application was made; was residing with the applicant, or joint applicants, when the application was made; and is residing with the applicant, or joint applicants, at the time of the hearing.

The applicant, or joint applicants, must be a couple or a single person and must establish to the court that there is evidence of a medical or social need for the surrogacy arrangement. The applicant, or each of the joint applicants, must be at least 25 years of age at the time of making the surrogacy arrangement and must also be resident in Queensland.

The surrogacy arrangement must have been made prior to conception of the child, is in writing and signed by each of the parties (that is, the birth mother, the birth mother's spouse (if any), and the applicant or joint applicants). The surrogacy arrangement must not be a commercial surrogacy arrangement. Also, the surrogacy arrangement must be made with the consent of the birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants.

The birth mother, the birth mother's spouse (if any) and the applicant, or joint applicants, must have obtained counselling from an appropriately qualified counsellor about the surrogacy arrangement and its social and psychological implications before entering into the surrogacy arrangement. The birth mother, the birth mother's spouse (if any) and the applicant or joint applicants may see the same counsellor or separate counsellors, provided the counsellors are appropriately qualified.

The birth mother, the birth mother's spouse (if any) and the applicant or joint applicants must also obtain legal advice about the surrogacy arrangement and its implications prior to the making of the surrogacy arrangement. If there are joint applicants they can both receive legal advice from the one lawyer at the same time. Similarly, if the birth mother has a spouse then the birth mother and her spouse can both receive the legal advice from the one lawyer at the same time. However, the lawyer who gives the legal advice to the applicant or joint applicants can not be the same lawyer who gives the legal advice to the birth mother and her spouse (if any). A lawyer is an Australian legal practitioner under the *Legal Profession Act 2007*.

The court must also be satisfied that the birth mother and the birth mother's spouse were both at least 25 years at the time the surrogacy arrangement was made.

The birth mother, the birth mother's partner (if any), another birth parent (if any), the applicant or joint applicants must also consent to the making of the parentage order at the time of the hearing.

The court must also be satisfied that the surrogacy guidance report prepared under section 32 by an independent and appropriately qualified counsellor supports the making of the proposed order.

Clause 23 provides in subsection (1) that the court may not dispense with requirements mentioned in section 22(2)(a) or (e)(iii), (iv) or (vi).

However, clause 23(2) provides that the court may dispense with a requirement in section 22(2)(b) to (d), (e)(i), (ii) or (v), or (f) to (i) only if it is satisfied there are exceptional circumstances for giving the dispensation and the dispensation will be for the wellbeing, and in the best interests of the child.

In subsection (3), the requirement in section 22(2)(h) for a person to consent to the making of the parentage order by the court may only be dispensed with if the exceptional circumstances for giving the dispensation are either: the person has died or is not a person with capacity to give the consent; or the applicant can not locate the person after making all reasonable enquires.

Clause 24 provides that if the child has a living birth sibling then the court can only make a parentage order about the child if it also makes a parentage order about each living birth sibling in the applicant's or joint applicants' favour. 'Birth sibling' is defined to mean a brother or sister of the child who is born as a result of the same pregnancy as the child.

Clause 25 provides for the list of documents and information that must be produced to the court with the application for a parentage order.

Clause 26 provides what information must be addressed in the affidavit that is sworn by the applicant or joint applicants in support of the application for a parentage order. These matters include those requirements that are relevant to the applicant or joint applicants in section 22(2) including by stating: the current and proposed care arrangements for the child; the applicant or joint applicants' understanding of the social, psychological and legal implications of the surrogacy arrangement and making of the parentage order; the applicant or joint applicants' understanding in relation to openness and honesty about the child's birth parentage being for the wellbeing, and in the best interests of the child; the proposed name for the child; and for each applicant – the applicant's date of birth and occupation as at the date of the child's birth.

Clause 27 provides what information must be addressed in the affidavit that is sworn by the birth mother. The requirements in section 22(2)(a), (e), (f)

and (h) that are relevant to the birth mother and sections 22(e)(iv) and (vi) must be addressed, including by stating: her understanding of the social, psychological and legal implications of the surrogacy arrangement and making of the parentage order; her understanding in relation to openness and honesty about the child's birth parentage being for the wellbeing, and in the best interests of the child; that the birth mother has not received any payment, reward or other material benefit or advantage for a matter mentioned in sections 10(a), (b) and (c); and her date of birth.

Clause 28 provides what information must be addressed in the affidavit that is sworn by the birth mother's spouse. The requirements in section 22(2)(a), (e), (f) and (h) that are relevant to the birth mother's spouse and sections 22(e)(iv) and (vi) must be addressed, including by stating: his or her understanding of the social, psychological and legal implications of the surrogacy arrangement and making of the parentage order; his or her understanding in relation to openness and honesty about the child's birth parentage being for the wellbeing, and in the best interests of the child; he or she has not received any payment, reward or other material benefit or advantage for a matter mentioned in sections 10(a), (b) and (c); and his or her date of birth.

Clause 29 provides what information must be addressed in the affidavit that is sworn by the other birth parent. The requirements in section 22(2)(a) and (h) that are relevant to the other birth parent and section 22(e)(vi) must be addressed, including by stating: his or her understanding of the social, psychological and legal implications of the surrogacy arrangement and making of the parentage order; his or her understanding in relation to openness and honesty about the child's birth parentage being for the wellbeing, and in the best interests of the child; he or she has not received any payment, reward or other material benefit or advantage for a matter mentioned in sections 10(a), (b) and (c); and his or her date of birth

Clause 30 provides in subsection (1) what information must be addressed in the affidavit that is sworn by the lawyer who gave legal advice under section 22(2)(e)(i). The lawyer must verify that the advice was independent and that in the lawyer's belief the person(s) appeared to understand the legal advice given. The lawyer who gives the legal advice to the applicant (or joint applicants jointly or separately) can not be the same lawyer, and has to be independent of, the lawyer who gives the legal advice to the birth mother and her spouse (if any).

Subsection (2) confirms that this Act does not affect the law relating to legal professional privilege.

Clause 31 provides that the affidavit sworn by the appropriately qualified counsellor who gave counselling before the surrogacy arrangement was entered into, to the birth mother, the birth mother's spouse (if any) and the intended parents (the relevant persons) must verify a report prepared by the counsellor addressing the matters mentioned in section 22(2)(e)(ii), including by stating: the reasons the counsellor is an appropriately qualified counsellor and that the counselling about the surrogacy arrangement and its social and psychological implications was given to the relevant persons before the surrogacy arrangement was made.

Clause 32 provides for the list of matters that the independent and appropriately qualified counsellor must address in the surrogacy guidance report. Of importance to the court is the requirement that the independent and appropriately qualified counsellor must offer an opinion on whether the making of the parentage order would be for the wellbeing, and in the best interests of the child. Clause 25(1)(i) provides that the independent and appropriately qualified counsellor is to swear an affidavit that verifies the surrogacy guidance report. Clause 19 defines 'appropriately qualified' and 'independent' for a counsellor under this section.

Clause 33 provides that the court may, for the purposes of deciding whether the proposed order will promote the child's wellbeing and best interests, require the attendance of the birth mother, the birth mother's spouse (if any), the other birth parent (if any), the applicant or joint applicants, or another person who has sworn an affidavit for the application, to give evidence in relation to the application or to produce a stated document or thing.

Clause 34 sets out the requirements for the form of the parentage order including the matters that must be stated in the parentage order.

Clause 35 provides that the child's names are those names that the court approves for the child in the parentage order. The name must not be a name that is a prohibited name under the *Births, Deaths and Marriages Registration Act 2003*. In approving a name, the court must have regard to the child's wellbeing and best interests. This clause further provides that the making of the parentage order does not prevent a name of the child being changed later under a law of the State or the Commonwealth.

Clause 36 allows the court to make any other order it considers appropriate in the interests of justice or to ensure that the child's wellbeing and best interests.

Clause 37 provides the circumstances when the court may make an order naming a deceased intended parent as the parent of the child in a parentage order.

Clause 38 provides for the circumstances when the court may notify the chief executive under the *Child Protection Act 1999* that the court considers the child is in need of protection within the meaning of that Act.

Part 3 Effect of a Parentage Order

Clause 39 explains the effect of the making of a parentage order that transfers parentage of the child to the intended parent/s. The child becomes a child of the intended parent/s and the intended parent/s become the parents of the child. The child stops being a child of a birth parent and a birth parent stops being a parent of the child. Other relationships are determined in accordance with the abovementioned effects. Therefore, after a parentage order is made, a parent of an applicant or joint applicants is a grandparent of the child, while the parent of the birth parent will no longer be a grandparent of the child.

However, subsection (4) provides that for the purposes of applying a law that relates to a sexual offence where a familial relationship is relevant (for example section 222 of the *Criminal Code*, Incest), the child is taken to have both familial relationships that existed before the making of the parentage order and after the making of the parentage order. Therefore, in circumstances where a parentage order is made, a birth parent will still be liable to prosecution under section 222 of the *Criminal Code* where it is alleged that a sexual relationship occurred with the child.

Clause 40 provides in subsection (1) that sections 39(2) and (3) has effect in relation to: dispositions of property whether by will or otherwise; and devolutions of property in relation to which a person dies intestate. However, subsection (2) states that sections 39(2) and (3) do not affect the operation of a will or other instrument that distinguishes between children who were born as a result of a surrogacy arrangement and children who were born other than as a result of a surrogacy arrangement.

Clause 41 provides for the circumstances where a testator under a will made after the commencement of this section makes a disposition of property to a person who is described firstly as being a child of the testator

or of another person and secondly as having had his or her parentage transferred to another person or persons as a result of the making of a parentage order; and the personal representative of the testator is unable to find out the name and address of the child.

Subsection (2) provides that the personal representative must give the public trustee a copy of the will and a notice stating that the personal representative is unable to find out the name and address of the child.

Subsections (3), (4) and (5) provide that the public trustee must take steps to find out the name and address of the child and if the child has died, the date of death of the child. The public trustee may obtain information from the records held by registrar under the *Births, Deaths and Marriages Registration Act 2003* and the registrar of the court about the child.

Subsection (6) requires the public trustee to provide a notice to the personal representative stating: whether the name and address of the child has been found out; or if it has been found out that the child has died.

Clause 42 provides for the circumstances following the public trustee's involvement to locate a child under clause 41.

Subsection (2) provides that the public trustee is a trustee for the child on trusts stated in, or arising under, the will.

Subsection (3) provides that if the personal representative transfers property to the public trustee for the child, the personal representative is taken to have transferred the property to the child.

Subsection (4) provides that where the child has died before the testator or, for another reason, is not entitled to an interest under the will, then subsections (2) and (3) do not apply.

Subsection (5) provides that where the public trustee gives the personal representative a notice that the child has disclaimed property to which the child was entitled under the will, the notice is, for the purpose of administering the estate, sufficient evidence that the child has disclaimed the property.

Clause 43 allows the public trustee to charge fees for taking steps under sections 41(3) or (6) or as acting as trustee under section 42. The personal representative must pay the public trustee any fees charged by the public trustee out of the testator's estate

Clause 44 provides in subsection (1) that subject to this section, a trustee may transfer or distribute property to a person who appears entitled to it

without finding out whether or not the parentage order has been made because of which a person is or is not entitled to an interest in property.

Subsection (2) provides that a trustee who transfers or distributes property under subsection (1) is not liable to a person claiming directly or indirectly because of the parentage order unless the trustee has notice of the claim before the transfer or distribution.

Subsection (3) states that this section does not affect a person's right to follow property into the hands of a person, other than a purchaser for value, who has received it.

Part 4 Discharge of a Parentage Order

Clause 45 defines particular words that are used in this part, including 'child' and 'interested person'.

Clause 46 provides the grounds upon when an application may be made by an interested person to the court for a discharge order, how the application is to be made and who it is to be served upon.

Subsection (1) states that the grounds for making an application are that:

a) the parentage order was obtained by fraud, duress or other improper means; or

b) a consent required for the making of the parentage order was, in fact, not given or was given for payment, reward or other material benefit or advantage (other than the birth mother's surrogacy costs); or

c) there is an exceptional reason why the parentage order should be discharged.

Subsection (2) provides that the grounds on which the application is made must be stated in the application. Subsection (3) requires the applicant to serve a copy of the application on each other interested person as soon as practicable after filing the application, other than the Attorney-General. Although the Attorney-General is included in the definition of 'interested person', so is able to apply for the discharge of a parentage order, it is not necessary for the Attorney-General to be served with a copy of the application.

Subsection (4) requires an application to be served upon a child who is under 18 years if the court considers it appropriate having regard to the child's age.

Subsection (5) requires the application to include details of where and when the application is to be heard.

Under subsection (6), the court may dispense with the requirement for the application to be served upon an interested person, when the applicant can not locate that person after making all reasonable enquiries or the person has died.

Clause 47 provides that upon an application made under this part, a court may make a discharge order discharging a parentage order. Subsection (2) sets out the matters that the court must be satisfied of before making a discharge order. In general, the court must be satisfied: that there has been proper service and notice to interested persons of the application; and that a ground for the discharge (as set out in clauses 46(1)(a), (b) and (c)) has been satisfied.

When making the discharge order, the court is also to declare the first name and surname of the child and subsections (3), (4) and (5) provides the court with guidance on the name of the child to be declared.

Subsection (6) provides that a declaration of the child's name does not prevent a subsequent change of name under a law of the State or the Commonwealth.

Subsection (7) allows the court to make any other order it considers appropriate in the interests of justice or to ensure the child's wellbeing and best interests, including an order relating to: the ownership or possession of property; any matter affecting the child in relation to the duties, powers, responsibilities and authority which, by law, parents have in relation to children; or where the child is to live.

Clause 48 explains the effect of the making of a discharge order. Subsection (1) provides that upon the making of a discharge order the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the parentage order that is being discharged had not been made.

However, subsection (2) provides that the making of the discharge order does not affect: anything that was lawfully done or the consequences of anything lawfully done while the parentage order was in effect. So if any decisions or actions have been taken while the parentage order was in force

and this was done lawfully, then the discharge order does not affect the lawfulness or otherwise of the decision or action. Further, a right, privilege or liability acquired, accrued or incurred while a parentage order was in force is also not affected by the making of the discharge order.

Subsection (3) provides that for a law relating to a sexual offence where a familial relationship is relevant, the child is taken, after the discharge order is made, to have both the familial relationships that resulted from the making of the parentage order as well as the familial relationships that result from the making of the discharge order. Therefore, in circumstances where the parentage order has been discharged, an intended parent will still be liable to prosecuted under section 222 of the *Criminal Code* (Incest) where it is alleged that a sexual relationship occurred with the child.

Part 5 Appeals

Clause 49 provides in subsection (1) that any of the birth parents or intended parents may appeal to the Court of Appeal against a decision refusing an application by an intended parent or intended parents, for a parentage order.

Subsection (2) provides that an appeal to the Court of Appeal against a decision granting or refusing an application for a discharge order can be made by: the child if the child is 18 years or more; or the child, if under section 46(4) the court considered the child should be served with the application; the birth parents; the intended parent or intended parents; or the Attorney-General where the Attorney-General was the applicant.

Clause 50 provides that the appeal to the Court of Appeal is an appeal by way of rehearing.

Part 6 Privacy

Clause 51 provides for when hearings are not to be in public. Subsection (1) provides that this section applies to a hearing in the Childrens Court or the Court of Appeal, of a proceeding under this Act relating to a child.

Subsection (2) provides that a hearing of a proceeding is not open to the public.

Subsection (3) provides that despite section 20 of the *Childrens Court Act 1992*, the court must exclude from the room in which the court is sitting a person who is not: the child, an applicant or an appellant; a respondent; a birth parent; an intended parent; a lawyer of a party to the proceedings or of a child, applicant, appellant, respondent, birth parent or intended parent; or a witness giving evidence.

However, subsection (4) allows the court to permit a person to be present during the hearing if the court is satisfied it is in the interests of justice to do so.

Clause 52 provides for when certain persons may have access to a particular record of proceedings in relation to a proceeding under this Act. This section applies to proceedings in the Childrens Court and also the Court of Appeal. The record of proceedings that this section applies to includes: a written transcript of the proceedings, the documents in the court file for the proceedings and an appeal book in relation to the proceedings.

Subsection (1) provides that a person may not have access to a particular record of proceedings unless the court has, on application by the person, given approval to the access. This section does not prevent the public trustee from accessing information from the court under section 41(3).

Subsection (2) provides for who may apply to the court for access to a record of proceedings. Subsection (3) provides that the court may give access to all or part of the record of proceedings.

Subsection (4) states that without limiting the reasons for which a court may refuse to give a person access on an application under this section, the court may refuse to give access if the person has not produced to the registrar or another appropriate officer of the court, proof of the person's identity. Also the court may refuse to give access if the person has not complied with a requirement of the court under any law or rule of practice relating to inspection of and release of information generally from its record of proceedings.

Clause 53 provides for a prohibition against the publication of certain identifying material in relation to surrogacy arrangements in certain circumstances.

Subsection (1) sets out the material (identifying material) that this section applies to. Identifying material is material that identifies, or is likely to lead to the identification of, a person as: -

a) a child born as a result of a surrogacy arrangement or a child to whom a court proceeding under this Act relates; or

b) a party to a surrogacy arrangement; or

c) a party to a court proceeding under this Act; or

d) a person whose consent to a surrogacy arrangement, or the making of a parentage order, is or was required.

Subsection (2) provides that a person must not publish identifying material unless written consent to the publication has been given, for each identifying person, by –

a) for an identified person who is an adult, then that person; or

b) if the identified person is the child and under 18 then –

   i. if the child is residing with the birth mother – the birth mother; or

   ii. otherwise, the intended parent or intended parents.

Publish means publish to the public by television, radio, the internet, newspaper, periodical, notice, circular or other form of communication. Publish does not mean private communications.

Subsection (2) provides that the maximum penalty for the unlawful publication of identifying material is: for an individual 100 penalty units or 2 years imprisonment; or for a corporation is 1000 penalty units.

Chapter 4 Miscellaneous

Part 1 Offences

Clause 54 provides that the offences in this chapter apply in relation to:

a) acts done in Queensland regardless of the whereabouts of the offender at the time the act is done; or

b) acts done outside Queensland if the offender is ordinarily resident in Queensland at the time the act is done.

Clause 55 establishes an offence for a person to publish an advertisement, statement, notice or other material that –

a) is intended or likely to induce a person to agree to act as a birth mother; or

b) seeks or purports to seek a person willing to act as a birth mother; or

c) states or implies that a person is willing to agree to act as a birth mother; or

d) states or implies that a person is willing to enter into a surrogacy arrangement.

Publish means publish to the public by television, radio, the internet, newspaper, periodical, notice, circular or other form of communication. Publish does not mean the private communications between proposed parties to a surrogacy arrangement.

The maximum penalty imposed for this offence is 100 penalty units or 3 years imprisonment.

Clause 56 establishes an offence for a person to enter into or offer to enter into a commercial surrogacy arrangement. The maximum penalty imposed for this offence is 100 penalty units or 3 years imprisonment.

Clause 57 establishes in subsection (1) an offence for a person to give a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother's surrogacy costs) for another person:

a) agreeing to enter into or entering into a surrogacy arrangement; or

b) giving the intended parent or intended parents under a surrogacy arrangement the permanent custody and guardianship of a child born as a result of the surrogacy arrangement; or

c) consenting to the making of the parentage order for a child born as a result of a surrogacy arrangement.

In subsection (2) an offence is created for a person to receive a payment, reward or other material benefit or advantage (other than the

reimbursement of the birth mother's surrogacy costs) for the person or another person:

a) agreeing to enter into or entering into a surrogacy arrangement; or

b) giving the intended parent or intended parents under a surrogacy arrangement the permanent custody and guardianship of a child born as a result of the surrogacy arrangement; or

c) consenting to the making of the parentage order for a child born as a result of a surrogacy arrangement.

The maximum penalty imposed for these offences is 100 penalty units or 3 years imprisonment

Clause 58 establishes an offence under subsection (1) for a person to intentionally provide a technical, professional or medical service to another person when the person knows the other person is, or intends to be a party to a commercial surrogacy arrangement and the provision of the service is with the intention of assisting the other person to become pregnant for the purpose of the commercial surrogacy arrangement.

However, a person does not commit an offence under this section if the person provides a technical, professional or medical service to a woman after she becomes pregnant.

The maximum penalty imposed for this offence is 100 penalty units or 3 years imprisonment.

Part 2 Court matters

Clause 59 provides that the *Uniform Civil Procedure Rules 1999* apply in relation to proceedings under this Act as if the proceedings were proceedings in the District Court. However, the *Uniform Civil Procedure Rules 1999* do not apply for a matter in relation to a proceeding in the Childrens Court that is provided for under the *Childrens Court Rules 1997*.

Clause 60 provides that the *Uniform Civil Procedure (Fees) Regulation 2009* applies in relation to proceedings in the Childrens Court under this Act as if the proceedings were proceedings in the District Court.

Chapter 5 Repeal and Transitional Provisions

Part 1 Repeal

Clause 61 repeals the *Surrogate Parenthood Act 1988*, No.65.

Part 2 Transitional Provisions for Surrogacy Act 2009

Clause 62 defines certain words that are used in this part, including 'commencement', 'pre-commencement birth mother', 'pre-commencement intended parent' and 'pre-commencement surrogacy arrangement'.

Clause 63 provides the circumstances in which the pre-commencement intended parent or pre-commencement intended parents under a surrogacy arrangement (that was made prior to commencement) may apply to the court for a parentage order for the child born as a result of the pre-commencement surrogacy arrangement.

Subsection 1 establishes when the section applies and includes requirements that the pre-commencement birth mother and pre-commencement intended parent or pre-commencement intended parents were parties under a pre-commencement surrogacy arrangement and that the pre-commencement surrogacy arrangement is not a commercial surrogacy arrangement and was made before the child was conceived. Further, the child must be born as a result of the pre-commencement surrogacy arrangement.

Subsection (2) requires the application to the court to be made by the pre-commencement intended parent or pre-commencement intended parents within 2 years after commencement of this section.

Subsection (3) confirms that chapter 3 applies in relation to applications made under this section. Further, any parentage order that is made on an application under this section is a parentage order under chapter 3.

Subsection (4) provides that in addition to the court's power under section 23, the court may dispense with a requirement under chapter 3 if the court considers it is for the wellbeing, and in the best interests of the child, or it is otherwise impractical for the pre-commencement intended parent or pre-commencement intended parents to comply with the requirement. However, the requirement that the parties consented to entering into pre-commencement surrogacy arrangement can not be dispensed with.

Subsection (5) also provides that the requirement for the birth mother, the birth mother's spouse (if any) and the applicant or joint applicants to consent to the making of the parentage order can not be dispensed with except if the person to whom the requirement applies has died or does not have capacity to give the consent, or the applicant can not locate the person after making all reasonable inquires.

Chapter 6 Amendments

Part 1 Amendment of this Act

Clause 64 provides that this part amends this Act.

Clause 65 provides that the Long Title to the Act is to be amended so that when the Act commences and is reprinted, the Long Title will not include the references to the related and unrelated amendments to other Acts but will refer to the remaining provisions about surrogacy arrangements and parentage orders. This is because when the Act commences, the other Acts amended in chapter 6 will be so amended and when this Act is reprinted, chapter 6 will not be included in the Reprint.

Part 2 Amendment of Adoption Act 2009

Clause 66 provides that this part amends the *Adoption Act 2009*.

Clause 67 makes a consequential amendment to the criteria listed in section 76 of the *Adoption Act 2009* which determines if a couple who are interested in adopting a child are eligible to lodge an expression of interest to commence the adoption process.

One of these criteria is that neither of the couple is currently participating in fertility treatment or has participated in fertility treatment for the previous six months. The definition of 'fertility treatment' in the *Adoption Act 2009* does not currently include participation in a surrogacy arrangement. The amendment made by this clause inserts a new criterion into the *Adoption Act 2009* which makes a person ineligible to lodge an expression of interest in adoption if: he or she is an intended parent under a surrogacy arrangement within the meaning of the *Surrogacy Act 2009;* or if the person had been an intended parent under a surrogacy arrangement (within the meaning of the *Surrogacy Act 2009)* and the surrogacy arrangement ended not less than 6 months earlier.

Part 3 Amendment of Births, Deaths and Marriages Registration Act 2003

Clause 68 provides that this part and schedule 1 amend the *Births, Deaths and Marriages Registration Act 2003*.

Clause 69 amends section 3 (Objects) to insert a new object of the Act to be 'changes of parentage under the *Surrogacy Act 2009'*.

Clause 70 inserts a new section 10A (Limitation on registration of parentage details) that provides for the registration of parentage details in relation to the registration of a relevant event for a child. A relevant event for a child includes: the child's birth; the child's adoption; or the child's change of parentage under a parentage order or discharge order.

In relation to the registration of a relevent event for a child: the child's parents, or one of the child's parents, must be registered as the child's mother or as the child's father; and not more than one person may be registered as the child's mother or as the child's father; and not more than two people in total may be registered as the child's parents however described.

Clause 71 amends section 13 (Application to change child's first name within a year of birth) to include the parentage order register as a register that will require changing in the circumstances when the child's parents apply to change the child's name and the parentage of the child has been changed under a parentage order. This is required because when a parentage order is lodged with the Registry of Births, Deaths and Marriages under the new section 41D (inserted by clause 78) the child's entry will be recorded in the parentage order register and not the birth register.

Clause 72 amends section 14 (Reregistering a birth or adoption) to include the parentage order register as a register in which an entry may need to be reregistered for the reasons that are set out in section 14(3). An entry for a person that is to be reregistered may be recorded in the parentage order register because when a parentage order is lodged with the Registry of Births, Deaths and Marriages, the new section 41D (inserted by clause 78) requires the child's birth entry to be recorded in the parentage order register and not the birth register. Subsection (1) of section 14 is also amended to ensure that this section applies when the child's parentage has changed under a parentage order.

Clause 73 amends section 15 (Change of name by registration) by inserting a new subsection (5), which confirms that changes to a person's name that are made under a parentage order or discharge order are not dealt with under this part but under section 41D or 41E.

Clause 74 amends section 17 (Application to register change of child's name) in subsection (3) to include the parentage order register as a register that records details of the child's parents. A child's details (including the child's parents) may be recorded in the parentage order register because when a parentage order is lodged with the Registry of Births, Deaths and Marriages under the new section 41D (inserted by clause 78) the child's birth entry will be recorded in the parentage order register and not the birth register.

Clause 75 amends section 19 (Registration of change of name) to include the parentage order register as a register that will require changing in the circumstances when the person applies to register a change of the person's name (and the parentage of the person has been changed under a parentage order) . This is required because when a parentage order is lodged with the Registry of Births, Deaths and Marriages under the new section 41D (inserted by clause 78) the person's birth entry will be recorded in the parentage order register and not the birth register.

Clause 76 amends section 20 (Notation of change of name other than by registration) to include the parentage order register as a register that will require changing in the circumstances when the person applies to note a change of the person's name (and the parentage of the person has been changed under a parentage order). This is required because when a parentage order is lodged with the Registry of Births, Deaths and Marriages under the new section 41D (inserted by clause 78), the person's birth entry will be recorded in the parentage order register and not the birth register.

Clause 77 amends section 41 (Registering events other than adoptions in register) to provide that section 41 does not apply to registering changes in the parentage of the child pursuant to a parentage order. This is because a new section 41D (parentage order) and 41E (discharge of parentage order) will provide how these events are registered (see clause 78).

Clause 78 inserts two new provisions after section 41C that are: section 41D (Registering change of parentage under parentage order) and 41E (Reregistering birth if discharge order).

Section 41D sets out the procedure for the Births, Deaths and Marriages Registry for the registration of a parentage order to transfer the parentage of the child from the birth parents to the intended parents. The intended parents may make an application to register the parentage order with an original copy of the parentage order. The application is to contain the prescribed information under a regulation. The effect of the registration is that the birth entry for the child will be closed and a new entry for the child will be made in the parentage order register. The information to be recorded in the parentage order register is that contained in the application to register and parentage order.

Section 41E sets out the procedure for the Births, Deaths and Marriages Registry for the registration of a discharge of a parentage order. The discharge order may be lodged at the Births, Deaths and Marriages Registry with an application to register the discharge order. The effect of the registration of the discharge order is that the entry in the parentage order register is to be closed and new entry for the child in the birth register is to be made. The information to be recorded in the birth register is the name of the child as declared in the discharge order and all the information that was in the previously closed entry following the making of the parentage order.

The Births, Deaths and Marriages Registry will also be able to register a parentage order or discharge order that has been made in another Australian jurisdiction, where the birth of the child is registered in Queensland. The definition of parentage order and discharge order contained in Schedule 2, includes similar orders made in other Australian jurisdictions.

Clause 79 amends section 44 (obtaining information from the register) to provide that information in a closed entry for a child relating to a parentage order or a discharge order is not to be accessed by any persons except those listed in the new subsection (13). Subsections (14) and (15) provide how applications requesting information in a closed entry are to be made by certain persons.

Subsections (16) and (17) make provision for release of the information to the child when the child is less than 18 years in certain circumstances. Subsection (18) provides that when releasing a certificate from a closed entry the registrar must stamp the certificate in a way that shows that the certificate is not for official use.

Clause 80 inserts a new section 44A (Addendum to birth certificate) which outlines the process by which a child who is over the age of 18 years applies to obtain a birth certificate and is provided with an addendum to the birth certificate to inform the child that there is additional information about the child's birth. The child is then able to be informed about the child's birth history by making an application to the registry requesting that additional information. The addendum referred to in this section is separate to the birth certificate. The addendum referred to in this clause, is to be released only to the adult child the subject of the parentage order.

Clause 81 inserts a new division 5 in part 9 for the transitional provisions for the *Surrogacy Act 2009*: **Division 4 Transitional provisions for Surrogacy Act 2009.**

There are two new provisions inserted into this new division, section 63 (Application to alter or add parentage details as result of amendments to the *Status of Children Act 1978*) and section 64 (Amendment of regulation by *Surrogacy Act 2009* does not affect powers of Governor in Council).

The new section 63 (Application to alter or add parentage details as result of amendments to the *Status of Children Act 1978*) provides the circumstances in which the registrar must amend the register of births with additional information provided by a birth mother and the birth mother's female de facto partner to record the birth mother's female de facto partner

as parent of the child. This provision applies for those children whose birth occurred prior to the commencement of this section and where the birth mother and the birth mother's female de facto partner comply with the requirements set out in section 63.

This amendment is required because of the amendments in the *Status of Children Act 1978*, which are in clause 107 below. Clause 107 provides for a parentage presumption to the female de facto partner of a birth mother in certain circumstances.

The new section 64 (Amendment of regulation by *Surrogacy Act 2009* does not affect powers of Governor in Council) provides that the amendment of the *Births, Deaths and Marriages Registration Regulation 2003* by the *Surrogacy Act 2009* does not affect the power of the Governor in Council to further amend the regulation or to repeal it.

Clause 82 amends schedule 2 (Dictionary) to insert the definition of various terms used in the Act.

Part 4 Amendment of the Births, Deaths and Marriages Registration Regulation 2003

Clause 83 provides that this Part amends the *Births, Deaths and Marriages Registration Regulation 2003*.

Clause 84 amends section 13 (Information and documents for registering events in register – Act, s41) to provide that the information that is prescribed in an application to register a parentage order or discharge order under sections 41D and 41E are included in schedule 1, part 1 of the Regulation.

Clause 85 amends section 15 (Information that may be obtained from register – Act, s44) as a result of the amendments made in clauses 70, 87 and 88 of the Bill. Section 15 provides for the information that can be obtained from the register. Section 15(5) prescribes the information for the purposes of section 44(6)(c) of the Act that is not to be included in a certificate of birth of a child. Section 15(5) is amended to clarify the information that can not be released when the child's parent is registered as

parent and to ensure the terminology used is consistent with the terminology used in clause 70.

Clause 86 amends section 16 (Information for commemorative birth certificate) as a result of the amendments made in clauses 70, 87 and 88 of the Bill. Section 16 provides for the information that is prescribed for inclusion in a commemorative birth certificate. Section 16 is amended to clarify the information that is to be included in the commemorative birth certificate when the child's parent is registered as parent and to ensure the terminology used is consistent with the terminology used in clause 70.

Clause 87 amends schedule 1, part 1, which provides the information to be recorded about the birth of the child in the register, to include the information that is required for a 'parent'. This additional category is required because the amendments in clause 70 will allow same-sex parents to be recorded as either mother/parent or father/parent.

Clause 88 amends schedule 2, part 1, which provides the information to be included in the birth certificate or death certificate for a person is amended to include the information that is required for a 'parent'. This additional category is required because the amendments in clause 70 will allow same-sex parents to be recorded as either mother/parent or father/parent.

Part 5 Amendment of Criminal Code

Clause 89 provides that this part and schedule 1 amend the *Criminal Code*.

Clause 90 amends section 222 (Incest). Section 222 describes relationships between the child and others that are relevant for this offence. The amendment clarifies that the relevant relationships for this offence include those that are created by the making of the parentage order as well as the relevant relationships that cease to have effect because of the making of the parentage order. Likewise, where the parentage order has been discharged, the relationships created by the discharge of the parentage order are relevant for this offence as well as the relationships that cease to exist by the discharge of the parentage order.

Clause 91 amends section 363 (Child-stealing) to provide that a birth parent is not able to raise as a defence to a charge of child stealing that the

birth parent is a parent of the child, once a parentage order has been made in favour of the intended parent or parents.

Part 6 Amendment of Domicile Act 1981

Clause 92 provides that this part amends the *Domicile Act 1981*.

Clause 93 amends section 8 (Domicile of certain children to provide for the domicile of the child who is born as a result of a surrogacy arrangement after a parentage order has been made and also after the discharge of a parentage order.

Part 7 Amendment of Evidence Act 1977

Clause 94 provides that this part amends the *Evidence Act 1977*.

Clause 95 amends section 21AC (Definitions for div 4A) to include a new definition of 'parentage order relationship' that will be used in the definition of 'prescribed relationship'. 'Prescribed relationship' is used in relation to the 'affected child witness' provisions in the *Evidence Act 1977* and will ensure that where the child is the subject of a parentage order, the 'affected child witness' provisions apply to that child.

Part 8 Amendment of Guardianship and Administration Act 2000

Clause 96 provides that this part and schedule 1 amends the *Guardianship and Administration Act 2000.*

Clause 97 amends schedule 2, part 2, section 3 to include as a 'special personal matter' the act of entering into or agreeing to enter into a surrogacy arrangement. This will prevent a guardian who has the formal authority to

make personal decisions for a person with impaired capacity, from entering into a surrogacy arrangement on behalf of the person with impaired capacity. Therefore, a guardian for a woman who has impaired capacity cannot agree on behalf of the woman for the woman to be a birth mother in a surrogacy arrangement.

Part 9 Amendment of Powers of Attorney Act 1998

Clause 98 provides that this part amends the Powers of Attorney Act 1998.

Clause 99 amends schedule 2, part 2, section 3 to include as a 'special personal matter' the act of entering into or agreeing to enter into a surrogacy arrangement. This will prevent an attorney who has the formal authority to make personal decisions for a person with impaired capacity, from entering into a surrogacy arrangement on behalf of the person with impaired capacity. Therefore, a personal attorney for a woman who has impaired capacity cannot agree on behalf of the woman for the woman to be a birth mother in a surrogacy arrangement.

Part 10 Amendment of Status of Children Act 1978

Clause 100 provides that this part and schedule 1 amend the *Status of Children Act 1978*.

Clause 101 amends section 4 (definitions) to insert three new definitions.

'Artificial insemination' is defined to mean the insertion of semen into a woman's reproductive tract by means other than sexual intercourse and regardless of whether the insertion is done by the woman or another person. This definition will include self insemination by the woman as well as assisted insemination through health professionals or other persons.

'Semen' is defined to include semen and sperm.

'Womb', is defined to include fallopian tubes.

Clause 102 amends section 8 (Recognition of paternity) to substitute the word 'paternity' with the word 'parentage'. This is required because the amendment in clause 104 below that provides for gender neutral wording in section 10 of the Act.

Clause 103 amends section 9 (Filing of certain instruments with registrar-general) to substitute the word 'paternity' with the word 'parentage'. This is required because the amendment in clause 104 below that provides for gender neutral wording in section 10 of the Act.

Clause 104 amends section 10 (Declaration of paternity) to substitute the words 'paternity' and 'father' with the words 'parentage' and 'parent'. This is required because the amendments in clause 107 that allow a parentage presumption to the female de facto partner of a birth mother in certain circumstances, will make it possible for the child to have two female parents. Therefore, the wording in section 10 should be gender neutral to allow a female to seek a declaration of parentage.

Clause 105 amends section 18 (Implantation procedure – Presumption as to status where donor semen used) to include within the definition of a fertilisation procedure the procedure where fertilisation occurs inside the woman's body.

Clause 106 amends section 19 (Implantation procedure – Presumption as to status where donor ovum used) to include within the definition of a fertilisation procedure the procedure where fertilisation occurs inside the woman's body.

Clause 107 inserts a new subdivision 2A for part 3, division 2. Subdivision 2A (Fertilisation procedures – women with female de facto partner's consent) includes 7 new sections.

The new section 19A (Interpretation) provides that the term 'fertilisation procedure in this subdivision refers to a procedure mentioned in sections 19C to 19E.

The new section 19B (Application of sdiv 2A) provides that this subdivision applies if a woman has a female de facto partner and undergoes a fertilisation procedure with the consent of her female de facto partner.

The new section 19C (Artificial insemination – Presumption as to status) provides for a parentage presumption that applies in the circumstances where a woman who has a female de facto partner uses artificial insemination to conceive a child. The effect of this section is that the man who produced the semen has no rights or liabilities relating to any child

born as a result of the pregnancy. Further, the woman's female de facto partner is presumed to be a parent of any child born as a result of the pregnancy.

The new section 19D (Implantation procedure – Presumption as to status where donor semen used) provides for a parentage presumption that applies in circumstances where a woman with a female de facto partner uses a fertilisation procedure described in this section with donor semen. The effect of this section is that the man who produced the semen has no rights or liabilities relating to any child born as a result of the pregnancy. Further, the woman's female de facto partner is presumed to be a parent of any child born as a result of the pregnancy.

The new section 19E (Implantation procedure – Presumption as to status where donor ovum used) provides for parentage presumptions that apply where a woman with a female de facto partner uses a fertilisation procedure described in this section with donor ovum and semen. The effect of this section is that the woman who donated the ovum is not the mother of, and has no rights or liabilities relating to any child born as a result of the pregnancy. The birth mother is presumed to become pregnant as a result of the fertilisation of an ovum produced by her and to be the mother of any child born as a result of the pregnancy. The birth mother's female de facto partner is presumed to be a parent of any child born as a result of the pregnancy. Also, the man who produced the semen has no rights or liabilities relating to any child born as a result of the pregnancy.

The new section 19F (Irrebuttable presumptions) provides that the presumptions declared to exist under section 19C to 19E are irrebuttable.

The new section 19G (Presumption without consent) provides that in any proceedings in relation to the operation of this division, a female de facto partner's consent mentioned in 19B must be presumed unless the contrary is proved and that the presumption is rebuttable.

Clause 108 amends section 20 by omitting section 20 and inserting a new section 20. Section 20 provides who subdivision 3 applies to and this includes when: a married woman undergoes a fertilisation procedure other than with her husband's consent; a woman who is not married and does not have a de facto partner undergoes a fertilisation procedure; or a woman who has a de facto partner undergoes a fertilisation procedure other than with her partner's consent.

Clause 109 section 22 (Implantation procedure – Presumption as to status where donor semen used) to include within the definition of a fertilisation

procedure the procedure where fertilisation occurs inside the woman's body.

Clause 110 amends section 23 (Implantation procedure – Presumption as to status where donor ovum used) to include within the definition of a fertilisation procedure the procedure where fertilisation occurs inside the woman's body.

Clause 111 inserts a new Division 3 in part 5, Transitional provisions for *Surrogacy Act 2009*. This clause inserts two new sections into Division 3.

The new section 36 (Parentage presumption of children conceived by particular fertilisation procedures occurring before commencement) provides that the extension of the definition of fertilisation procedure in sections 18, 19, 22 and 23 will apply retrospectively to a child born as a result of the fertilisation procedure prior to the commencement of the *Surrogacy Act 2009*. However, these presumptions don't apply so as to affect the vesting in possession or in interest of any property before the commencement of the section.

The purpose of the retrospective operation is so that those women and their partners who conceived a child using a fertilisation procedure that involved fertilisation of the egg inside the woman's body, will be presumed the parents of their child and the donor of the gametes will have no rights or liabilities in relation to the child. This is consistent with the intention of the parties who underwent the fertilisation procedure and also the donors of gametes, when they agreed to participate in the fertilisation process.

The new section 37 (Parentage presumption of children conceived by particular fertilisation procedures occurring before commencement for women with female de facto partner) will provide that the parentage presumptions created in the new subdivision 2A (that is for fertilisation procedures to a woman with a female de facto partner) will apply to those children born prior to the commencement of clause 107. However, these presumptions don't apply so as to affect the vesting in possession or in interest of any property before the commencement of the section.

The purpose of the retrospective application of these presumptions is to allow the parentage presumptions created by the new subdivision 2A for part 3, division 2 to apply to those children born prior to the commencement of clause 107, so that the female de facto partner of the birth mother, who agreed with the birth mother for the child to be born, can be recognised as the child's parent along with the birth mother. The child will therefore be

presumed to have two parents who will both have the same rights and liabilities at law or otherwise, that attach to being a parent of a child.

The purpose of the retrospective application of these presumptions is to ensure that those children born prior to the commencement of clause 107 are no worse off than other children and that these children have the same legal rights and status as other children, regardless of when they were born and the relationship status of their parents. The child will be presumed to have those two parents from when the child is born and the child's birth record can be amended accordingly.

Chapter 7 Amendment of Acts

Clause 112 Provides that schedule 1 amends the Acts that it mentions.

Schedule 1 Minor Amendments to Acts

The *Births, Deaths and Marriages Act 2003* is amended as follows:

Item 1 amends section 10(2) and (4) by correcting the reference to section 18C with the correct reference to section 26. This incorrect reference is a result of the renumbering of the Act.

Item 2 amends section 48A(3)(a)(vii) by inserting after ';' the word 'and'.

Item 3 amends section 50(2)(b) to omit the words 'if the person' as these words are not necessary in this subsection.

The *Criminal Code* is amended as follows:

Item 1 amends section 1 to include new definitions that are relevant for various sections in the *Criminal Code* and will assist with interpretation of those sections.

Item 2 amends section 15 to omit the words 'Land and Marine Defence Force' as this is obsolete and substituting the words 'Australian Defence Force'.

Item 3 amends sections 54A(1)(a) to (c), 213(6)(a), 219(6)(a) by inserting after (;) the word 'or'.

Item 4 amends section 98 by omitting the definitions of 'municipal election' and 'polling booth'.

Item 5 amends section 228E(5)(a) by omitting the words 'or X' as this classification no longer exists.

Item 6 amends sections 568(10)(a) and (b), 694(a) and (b) by omitting the word 'or'.

Item 7 amends section 694 by omitting the word 'either' and substituting this with the word 'any'.

Item 8 amends section 719(3) by omitting the words 'section 642(2)' with the words 'section 641(2) to correct an incorrect internal section reference.

The *Guardianship and Administration Act 2000* is amended as follows:

Item 1 amends sections 5(e), 6(a) and (b), 7(d), 9(2)(a) to change in the editor's note the word 'decision making' to 'decision-making'.

Item 2 changes the 'Editor's note' to be a 'Note' in sections: 8(1)(a), 9(2)(a) and (b)(iv) and (v), 10, 11(1), 14(3) and (5), 56(4) definition know, 65(4), 66(3), 66A(1), 67(1), 68(2), 69(2), 72(1) and (3)(a), 79(1) and (2), 80A, 92(1), 160(1), 177(1) and (4)(b), 182(4), 183(1), 201(1), 215(1), 232(1), 262D(2).

Item 3 amends Schedule 2, sections 2(h), 3, 6, 7(a), 18C by changing the 'Editors Note' to be a 'Note'.

The *Status of Children Act 1978* is amended as follows:

Item 1 amends section 12(8) to change the incorrect internal section reference of 'subsection (6)' to the correct internal section reference of 'subsection (7)'.

Schedule 2 Dictionary

The schedule 2 dictionary defines certain terms used throughout the Bill.