

Family (Surrogacy) Bill 2009

Clause and Explanatory Notes

Introduction

Short title of the Bill

The short title of the Bill is the *Family (Surrogacy) Bill 2009*

Objectives of the Bill

The objectives of the *Family (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 *eligible parents*;
- 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;

Reasons for the Bill

On 14 February 2008, the parliament 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 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 parents 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 report made no specific recommendation to legalise altruistic surrogacy for single people or same sex couples and as a result this Bill does not seek to do so.

This Bill achieves its objectives by implementing a regime for altruistic surrogacy and does not seek to combine together other issues of single and same sex parenting, nor does it seek to deal with matters that were not covered in detail during the extensive Parliamentary inquiry on the issue.

This Bill utilises key elements and provisions of the Draft Exposure Bill proposed by the Government in its 'all encompassing' Bill that had sought to pool issues of same sex and single persons seeking altruistic surrogacy. As a consequence of the Government's insistence on proceeding with what was considered an unworkable Bill, this Bill has sought to untangle the gambit of moral issues the Government is trying to add on to the original intent of the altruistic surrogacy inquiry.

It was never the policy intent when the LNP agreed to the joint parliamentary inquiry into altruistic surrogacy to have all of these other matters included and that is why this Bill has been put forward as a consequence of the findings of that inquiry utilising the findings of the report and appropriate elements put forward in the Draft Exposure Bill.

Achievement of the Bill

Guiding Principles

It is acknowledged the Investigation into Altruistic Surrogacy 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. This 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 by further principles. These further principles include that each child born as a result of an eligible surrogacy arrangement enjoys the same status, protection and support irrespective of the circumstances of the child's birth or and 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, 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)

Eligible couples 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.

In the event of the birth mother deciding not to relinquish the child to the intended parents 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 eligible parents.

It was agreed to by the Committee that consideration should be given to the agreement about payment of the birth mother's surrogacy costs that is different from commercial surrogacy arrangements. 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 parents and consented to the making of the parenting order.

Restrictions on Who May Enter Into a Surrogacy Arrangement

The Bill restricts the use of altruistic surrogacy to married or de facto (heterosexual) couples, eligible couples, where the eligible woman in the couple, is unable to conceive for defined medical reasons.

The decriminalisation of altruistic surrogacy will allow eligible couples to enter into surrogacy arrangements and to become a parent of a child.

Surrogacy arrangements should be regarded as private arrangements made between adults. The autonomy of these parties in decision making about starting a family should be respected. Children

conceived through altruistic surrogacy arrangements are entitled to the same legal protections and certainty regardless of the circumstances that resulted in their conception and birth.

Fundamental Legislative Principles

The following aspects of the Bill raise fundamental legislative principles issues.

Exemption from operation of Anti-Discrimination Act 1991

Clause 6 of the Bill exempts the Family (Surrogacy) Act 2009 from the operation of the *Anti-Discrimination Act 1991*, the effect being that discrimination on the basis of the attributes in that Act will be lawful, particularly in relation to who is an eligible couple for inclusion in the altruistic surrogacy process.

Overriding the *Anti-Discrimination Act 1991* in this way clearly breaches fundamental legislative principles. However, the breach is justified because the imposition of discriminatory processes, particularly in relation to the paramount principles of the best interests of the child must be maintained above the rights of any person wishing participate in the altruistic surrogacy process, including any rights they may otherwise have under the *Anti-Discrimination Act 1991* not to experience discrimination.

Clauses Explained-

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

Clause 2 provides that the Act commences on 1 April 2010

Clause 3 states that the dictionary in schedule 1 defines particular words used in the Act.

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 stipulates the State, the Commonwealth or another State is not 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) establishes court sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement as a result of a child born through surrogacy arrangements in those particular circumstances; and

c) 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

The Clause also 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.

Clause 6 provides that acts or decisions made under this Act are exempt from the operation of the Anti-Discrimination Act which must be overridden to enable many of the requirements of these laws to be correctly fulfilled and administered in a way that gives precedence to the wellbeing and best interests of the child.

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 an eligible surrogacy arrangement is an arrangement where the intended parents are an eligible couple as defined in clause 9.

Subsection (3) states that who may be involved in the surrogacy arrangement and this may include the birth mothers spouse.

Subsection (4) also states that certain matters may be dealt with in an eligible surrogacy arrangement. 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 entering into the surrogacy arrangement and agreeing to have the child) 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.

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 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 the intended parents and eligible couple.

Subsection 1 states the intended parents are those eligible couples under an eligible surrogacy arrangement.

Subsection 2 defines who is an eligible couple. Under this section only a married couple or a de facto couple comprising of a male and female de facto who, when an eligible surrogacy arrangement was made have lived together for at least 2 years. This clause is in line with existing definitions under the Adoption Act 2009.

Subsection 3 allows for the special circumstances where one of the eligible couple dies after the surrogacy arrangement has been entered into and before a parentage order can be made.

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 the 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 reasonable medical cost for the birth mother or

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 or 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 outlines 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 parents must establish they have a medical or social need for the surrogacy.

Subsection (1) provides the circumstances in which there would be a medical or social need and these include where: the intended parents are a man and an eligible woman;

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 can conceive a child but: she is likely to be unable on medical grounds to 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 the pregnancy or birth.

Clause 14 states that this section does not apply to eligible surrogacy arrangements. It does state that all other surrogacy arrangements are void and states that all other surrogacy arrangements are void.

For a void surrogacy arrangement this clause states that a proceeding may not be started or decided in a court of Queensland—

- (a) for the enforcement of a surrogacy arrangement; or
- (b) for the recovery of any amount or other thing paid or given in connection with a surrogacy arrangement.

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

However, 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 parents; 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 parents or consent to the making of the parentage order, the

intended parents can not force the birth mother to relinquish the child to them. However, in these circumstances, the birth mother can not require the reimbursement to her by the intending parents of her surrogacy costs.

Also, where the intended parents 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 parents, depending upon the terms of the surrogacy arrangement and contract principles.

Clause 16 outlines the provision 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 states 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 an eligible surrogacy arrangement, the birth mother will be presumed to be the mother of the child. The father of the child will be the person who, under the *Status of Children Act 1978*, is presumed to be the father.

Clause 18 makes it clear that upon the birth of a child under a surrogacy arrangement, the birth parents 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.

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 or medical practitioner has the qualifications, experience, skills or knowledge appropriate to prepare the report. This definition also includes examples of who may be considered an appropriately qualified counsellor.

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 has not previously provided counselling to any of: the birth mother, the birth mother's spouse (if any) or the intended parents, about the surrogacy arrangement. Further the counsellor must not be directly connected with the medical practitioner who carried out a procedure that resulted in the birth of the child.

Clause 20 explains that this chapter allows for 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 outlines that the intended parents may apply to the court for a parentage order in relation to the child. If the intended parents are a couple, both intended parents must apply. To the extent as practical, the documents mentioned in section 25 must also be filed with the application to the court.

This clause also provides that the application must be made not less than 28 days and not more than 6 months after the child's birth. However, the court may, if satisfied of exceptional circumstances, grant leave to extend the time to make the application after the 6 month period, but 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.

Clause 22 states in subsection (1) that the court may make a parentage order to the person or couple named in the application as the intended parents.

Subsection 2 states 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 intended parents for at least 28 consecutive days before the application was made, was residing with the intended parents when the application was made and is residing with the intended parents at the time of the hearing.

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

However, in subsection (2), the court may dispense with a requirement in section 22(2) (other than a requirement mentioned in section 22(2)(a) or section 22(2)(e)(iii), (iv) or (vi), only if the court 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 consent; or the applicant can not locate the person after making reasonable enquires.

Clause 24 deals with multiple births and 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 favour of the same intended parents. '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 outlines for the list of documents and information that must be produced to the court with the application for a parentage order.

Clause 26 outlines what information must be addressed in the affidavit that is sworn by the intended parents in support of their application for a parentage order. These matters include those matters that are relevant to them in section 22(2) as well as: the current and proposed care arrangements for the child; their understanding of the social, psychological and legal implications of the surrogacy arrangement and making of the parentage order; their understanding in relation to openness and honesty about the child's birth parentage being in the child's best interests; the proposed name for the child; and their date of birth and occupation at the date of the child's birth.

Clause 27 outlines what information must be addressed in the affidavit that is sworn by the birth mother. These matters include those matters that are relevant to the birth mother in section 22(2) as well as: 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 in the child's best interests; that the birth mother has not received any payment, reward or other material benefit or advantage for the matters mentioned in sections 10(a), (b) and (c).

Clause 28 outlines what information must be addressed in the affidavit that is sworn by the birth mother's spouse. The matters to be addressed are similar to those matters the birth mother must address under clause 27.

Clause 29 outlines what information must be addressed in the affidavit that is sworn by the other birth parent. The matters to be addressed are similar to those matters the birth mother must address under clause 27.

Clause 30 outlines what information must be addressed in the affidavit that is sworn by the lawyer who gave legal advice under sections 22(2)(e)(i). The lawyer must verify that the advice was independent and that in the lawyer's belief the person(s) understood the legal advice given. The lawyer who gives the legal advice to the intended parent(s) 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).

Clause 31 outlines 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 must verify a report prepared by the counsellor addressing the matters mentioned in section 22(2)(e)(ii) and certain other matters.

Clause 32 outlines 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 33 outlines 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 intended parents, 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 establishes the requirements for the form of the parentage order including the matters that must be stated in the parentage order.

Clause 35 expresses 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 ensures 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 Commonwealth.

Clause 36 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.

Clause 37 outlines 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 outlines the circumstances when the court may notify the chief executive under the *Child Protection Act 1999* about whether a child is in need of protection.

Clause 39 explains the effect of the making of a parentage order that transfers parentage of the child to the intended parents. The child becomes a child of the intended parents and the intended parents are 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 this abovementioned effects. Therefore, after a parentage order is made, a parent of an intended parent 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) details the extent 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 makes clear that in subsection (1) 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 another person and secondly as having had his or her parentage transferred to another person under a parentage order; and the personal representative 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 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 outlines the circumstances following the public trustee's involvement to locate a child under clause 41.

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

Subsection (3) states 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) also states 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) allows for 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 states that subject to this section, a trustee may transfer or distribute property to persons who appear 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.

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

Clause 46 sets out the grounds upon when an application can be made by an interested person, to the court for a discharge order and 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:

- the parentage order was obtained by fraud, duress or other improper means; or
- 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
- 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 interested person as soon as practicable after filing the application, except for 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 reasonable enquiries or the person has died.

Clause 47 states when an application is 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 name of the child and subsections (3), (4) and (5) provides the court with guidance on the name of the child to be approved.

Subsection (6) makes certain 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) states 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) states 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) states 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 be prosecuted under section 222 of the Criminal Code (Incest) where it is alleged that a sexual relationship occurred with the child.

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 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 birth parents; intended parents; 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 Attorney-General can also appeal against a refusal to grant a discharge order, in circumstances 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.

Clause 51 provides in subsection (1) that this section applies to a hearing in the 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 appellant, a respondent; a birth parent; an intended parent, a lawyer of a child, birth parent, intended parent, applicant, appellant or respondent; or a witness required by the court to give 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 allows for when certain persons may have access to particular court records in relation to a proceeding under this Act. This section applies to proceedings in the Children's Court and also the Court of Appeal. The court records that this section applies to include: the 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 the particular court records 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 42(3).

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

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 registry 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 outlines the prohibition of the publishing of identifying material.

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

a party to a surrogacy arrangement; or

a party to a court proceeding under this Act; or

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—

- for an identified person who is and adult, then that person; or
- if the identified person is the child and under 18 then –
- if the child is residing with the birth mother – the birth mother; or
- otherwise, the intended parents.

Subsection (2) also 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.

Clause 54 provides that the offences in this chapter apply in relation to acts done in Queensland regardless of the whereabouts of the offender at the time the act is done; or 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 –

- is intended or likely to induce a person to agree to act as a birth mother; or
- seeks or purports to seek a person to agree to act as a birth mother; or
- states or implies that a person is willing to agree to act as a birth mother; or
- states or implies that a person is willing to enter into a surrogacy arrangement.

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

Clause 56 provides for an offence for a person enter in a surrogacy arrangement that is not an eligible surrogacy arrangement.

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

Clause 57 establishes the offence provision for those persons who enter into a commercial surrogacy arrangement for agreeing to enter into or entering into a surrogacy arrangement; or giving the intended parents under a surrogacy arrangement the permanent custody and guardianship of a child born as a result of the surrogacy arrangement; or 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 provision for persons giving or receiving consideration. The clause makes the provision punishable by a maximum penalty imposed for these offences as being 100 penalty units or 3 years imprisonment.

Clause 59 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.

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

Chapter 60 repeals the *Surrogate Parenthood Act 1988*, No.65.

Chapter 61 defines certain words that are used in this part, including 'commencement', 'pre-commencement birth mother', 'pre-commencement intended parents' and 'pre-commencement surrogacy arrangement'.

Clause 62 provides the circumstances where intended parents under a surrogacy arrangement may apply to the court for a parentage order when the child was born prior to the commencement of this section.

Subsection 1 establishes when the section applies and includes requirements that the pre-commencement birth mother and 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.

Subsection (2) requires the application to the court by the 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 and any parentage order that is made on an application under this section is a parentage order under chapter 3.

Subsection (4) further states that in addition to the courts 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 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 makes clear that the requirement for the parties to consent to the making of the parentage order can not be dispensed with except if the person has died or does not have capacity to give the consent, or the applicant can not locate the person after making reasonable inquiries.

Clause 63 provides that this part amends this Act.

Clause 64 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.

Clause 65 states that this part amends the Adoption Act 2009

Clause 66 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. This amendment seeks to include that definition and the amendment made by clause 63 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 before.

Clause 67 states that this part and schedule 1 amend the *Births, Deaths and Marriages Registration Act 2003*.

Clause 68 amends section 3 (Objects) to insert a new object of the Act to be 'changes of parentage under the *Family (Surrogacy) Act 2009*'.

Clause 69 amends the definition of the register to 'relevant child register'

Clause 70 makes amendments to the re-registration of a birth or adoption to include a relevant event which under subsection 4 will now include change of parentage under a parentage order.

Clause 71 makes a consequential amendment to the change of name registration to include changes of name as a consequence of a parentage order or discharge order.

Clause 72 changes the definition of the register to a relevant child register.

Clause 73 allows for the inclusion of 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. This amendment is because of the parentage order being lodged with the Registry of Births, Deaths and Marriages and will be entered in the parentage order register and not the birth register.

Clause 74 allows for the inclusion of 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. This is required because when a parentage order is lodged with the Registry of Births, Deaths and Marriages and the person's entry will be recorded in the parentage order register and not the birth register.

Clause 75 allows for the registration to parentage arrangements by way of a parentage order or a discharge order which are recorded on the relevant register.

Clause 76 establishes 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 must make an application and lodge the parentage order with the application. 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. All relevant information is to be recorded in the parentage order register is that contained in the application to register and parentage order.

Section 41E defines the procedure for the Births, Deaths and Marriages Registry for the registration of a discharge of a parentage order. The discharge order must be lodged at the 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 that contained in the application to register and the discharge order.

Clause 77 amends section 44 (obtaining information from the register) to provide that information in a closed entry for the 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). The amendments also provide how applications requesting information in a closed entry are to be made by certain persons.

Provision is also made for release of the information to the child when the child is under 18 years in certain circumstances. 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 78 allows for a child to make an application for a birth certificate and is provided with an addendum informing the child there is additional information on the birth certificate.

The child may then be able to be informed about the child's birth history by application to the registry requesting that additional information. The addendum referred to in this section is separate to the birth certificate.

Clause 79 The new section 63 (Amendment of regulation by *Surrogacy Act 2009* does not affect powers of Governor in Council) states 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 80 amends schedule 2 (Dictionary) to insert the definition of various terms used in the Act.

Clause 81 states that this part amends the *Births, Deaths and Marriages Registration Regulation 2003*

Clause 82 amends section 13 to allow for information to be provided 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 83 states that this part amends the Criminal Code

Clause 84 establishes within the offence provision for the offence of incest that if a parentage order is made under the *Family (Surrogacy) Act 2009*, a reference in this section to an offspring or other lineal descendant, or a sibling or a parent includes a relationship of that type that—
(a) existed before the making of the order; or
(b) came into existence as a result of the making of the order regardless of whether the order has been discharged.'

This in effect makes birth parents applicable under this section.

Clause 85 establishes amendments to the child stealing provisions of the Code that state a *corresponding parentage order* means an order under a law of another State that provides for a parentage order similar to a parentage order under the *Family (Surrogacy) Act 2009*.

Parent includes—

- (a) for a child who has been legally adopted in Queensland or in another State—a person who has adopted the child; or
- (b) for a child whose parentage has been transferred by a parentage order under the *Family (Surrogacy) Act 2009* or a corresponding parentage order—a person who is a parent of the child under the order but does not include a natural parent of the child.'

Clause 86 states that this part amends the *Domicile Act 1981*

Clause 87 defines that the child's domicile will now include as a consequence of a parentage order-

- (a) if, on the making of the parentage order, the child has two parents—is, from the time of the making of the order, the domicile the child would have if the child were a child born in wedlock to those parents; and

Family (Surrogacy) Bill 2009

(b) if, on the making of the parentage order, the child has 1 parent only—is, from the time of the making of the order, the domicile of that parent or, if that parent has died, the domicile that parent had at the time of death.’.

Further this clause states that a child’s domicile is dealt with—

(a) the domicile stated in, or dealt with under, the discharge order; or

(b) if there is no provision in the discharge order dealing with the child’s domicile—the domicile the child would have if the transfer of parentage under the parentage order had not taken place.’.

Clause 88 states that this part amends the *Evidence Act 1977*

Clause 89 establishes a new parenting order relationship to be used in the application of a prescribed relationship that is relevant to affected child witness provisions of the *Evidence Act 1977*. This amendment ensures that children covered under parentage order relationships will be covered by the provisions.

Clause 90 states that this part amends the *Guardianship and Administration Act 2000*

Clause 91 makes consequential amendments to the Act to include in types of matters covered an eligible surrogacy arrangement or the making of discharge of a parentage order under the *Family (Surrogacy) Act 2009*.

Clause 92 states that this part amends the *Powers of Attorney Act 1988*

Clause 93 makes consequential amendments to the Act to include in types of matters covered an eligible surrogacy arrangement or the making of discharge of a parentage order under *the Family (Surrogacy) Act 2009*.

SCHEDULE – Dictionary establishes the dictionary for relevant terms used throughout the Act.