

# Explanatory Memorandum

## *Surrogacy Bill 2007*

### INTRODUCTION

This Bill provides for the regulation of surrogacy arrangements and for the parentage of children born as a result of those arrangements.

The issue of the regulation of surrogacy has been considered by two Parliamentary Select Committees. In 1988 recommendations were made to develop legislation that discouraged the practice of surrogacy, but provided for the welfare of children born as a result of the process. Legislation was not introduced.

In 1999 the Select Committee on the *Human Reproductive Technology Act 1991* (the HRT Act) released its report including recommendations supporting the development of legislation regulating the practice of surrogacy. The Bill with some exceptions reflects the recommendations of the 1999 Select Committee.

The Bill does not deal specifically with approval of surrogacy arrangements or the provision of reproductive technology services in connection with a surrogacy arrangement. Directions issued under the HRT Act will provide for a detailed assessment and preparation process that must be undertaken before reproductive technology treatment can be provided in connection with a surrogacy arrangement.

### ***Long Title***

The long title sets out the purpose of the Bill, which is to make arrangements for surrogate births and children born under those arrangements and to make consequential amendments to various Acts.

### **Part 1 – Preliminary**

This part contains the title of the Act, the relevant commencement provisions and definitions of the terms used within the Bill.

#### ***Clause 1 Short Title***

This clause provides the short title of the Act.

#### ***Clause 2 Commencement***

This clause provides for the Act to come into operation on a day fixed by proclamation.

#### ***Clause 3 Terms used in this Act***

This clause provides a definition of surrogacy arrangement. A surrogacy arrangement means an arrangement where a woman (the birth mother) agrees to carry a child for another person or a couple (the arranged parent(s)) with the intention that the child will be raised by those

arranged parents. A surrogacy arrangement can only be made prior to the birth mother becoming pregnant.

## **Part 2 – Surrogacy arrangements**

### **Division 1 – General**

#### ***Clause 4      What this Part is about***

Part 2 is about the status of surrogacy arrangements and provides for offences in connection with surrogacy arrangements.

#### ***Clause 5      Term used in this Part***

This clause provides a pointer to the definition of the term “surrogacy arrangement that is for reward” in clause 6.

#### ***Clause 6      Meaning of “surrogacy arrangement that is for reward”***

A surrogacy arrangement that is for reward is a surrogacy arrangement that provides for payment or other benefit to any person in connection with the surrogacy arrangement. Reasonable expenses associated with the pregnancy (including expenses in connection with attempts to achieve a pregnancy) or costs associated with assessment or expert advice in connection with the arrangement are permitted.

The intention is that the birth mother should not receive a material benefit or advantage because of her involvement in the surrogacy arrangement, but that she should not be out of pocket for expenses reasonably incurred by her because of the arrangement. Reasonable expenses associated with the pregnancy could include such things as the payment for medical expenses including private health insurance cover, payment of travel or childcare expenses or lost earnings incurred in connection with receiving treatment or because of the pregnancy or birth, purchase of pregnancy clothing and payment for life insurance coverage during the pregnancy.

#### ***Clause 7      Surrogacy arrangement not binding***

A surrogacy arrangement is not enforceable. This means that a birth mother would not be forced to give a child to the arranged parents solely because this was agreed as part of a surrogacy arrangement.

### **Division 2      Offences**

#### ***Clause 8      Making surrogacy arrangement that is for reward***

It is an offence for a person to enter into a surrogacy arrangement that is for reward. The offence is not limited to the intended birth mother and the arranged parent or parents.

A penalty of a fine of \$24,000 or imprisonment for 2 years is provided.

**Clause 9**      ***Reward for introducing parties for surrogacy arrangement***

It is an offence for a person to seek or receive payment or benefit for introducing parties to a surrogacy arrangement, whether or not the surrogacy arrangement is for reward. This offence is directed at a person who is paid or seeks payment to act as a broker or agent in connection with introducing potential parties to a surrogacy arrangement.

A penalty of a fine of \$12,000 or imprisonment for 1 year is provided.

**Clause 10**      ***Publishing willingness to make surrogacy arrangement that is for reward***

This clause makes it an offence to advertise for a person to enter into a surrogacy arrangement that is for reward or to advertise a willingness to enter into such an arrangement. It is not an offence to advertise or publish an article or story seeking a person to enter into, or offering to enter into, a surrogacy arrangement that does not involve payment or valuable consideration other than reasonable expenses.

A penalty of a fine of \$6,000 is provided.

**Clause 11**      ***Services connected with surrogacy arrangement that is for reward***

It is an offence to provide a service knowing that the service is to facilitate a surrogacy arrangement that is for reward. This provision is intended to cover services such as reproductive technology services in an attempt to achieve a pregnancy, or legal services to prepare documentation in connection with a surrogacy arrangement that is for reward. It is not intended to cover the provision of advice about the legality of a surrogacy arrangement.

If a woman becomes pregnant in connection with a surrogacy arrangement that is for reward it is not an offence to provide health services in connection with the surrogacy. This is to ensure that the woman receives appropriate medical treatment in connection with the pregnancy and the birth of a child.

A penalty of a fine of \$12,000 or imprisonment for 1 year is provided.

**Part 3 – Order giving parental status to arranged parents**

**Division 1**      **Preliminary**

**Clause 12**      ***What this part is about***

Part 3 deals with the transfer of parentage of a child born under a surrogacy arrangement in certain circumstances.

**Clause 13**      ***Child’s best interests paramount***

In making any decision about a parentage order, the court must regard the best interests of the child as paramount.

#### ***Clause 14 Terms used in this Part***

This clause defines the terms that are used in Part 3.

An approved plan is a plan that that has been approved by the court in connection with a parentage order that sets out matters agreed between the parties about matters to do with the child such as communication between the child and the birth family and information sharing.

The arranged parents are the persons who are intending to parent a child born under a surrogacy arrangement.

The birth parents are the parents who are recognised by the law as being the parents of a child at the time of the child's birth. The *Artificial Conception Act 1985* provides that the woman who gives birth to a child following an artificial fertilisation procedure is the mother of the child and the mother's consenting husband or de-facto partner is a parent of the child.

The definition of child is included to clarify that the term is used in connection with the relationship of parent and child and not the age of the person.

The definition of "court" means that only the Family Court of Western Australia can make parentage orders under this Part.

A parentage order is an order made under this Part that transfers the legal parentage of a child from the birth parents to the arranged parents.

#### **Division 2 Transfer of child's parentage**

##### ***Clause 15 Circumstances for seeking parentage order***

In order to apply for a parentage order the arranged parents must reside in Western Australia and at least one of them must have met the requirements to be eligible for an IVF procedure under the HRT Act. This means that parentage orders will be available where surrogacy has been undertaken because of medical problems.

Directions under the HRT Act will provide for a detailed assessment and preparation process that must be undertaken prior to use of reproductive technology in connection with a surrogacy arrangement.

##### ***Clause 16 Applying for a parentage order***

An application for a parentage order cannot be made until the child is at least 28 days old. This gives the birth parents time to consider the decision of consenting to the making of the order following the birth of the child.

An order for a parentage order should be made before the child is 1 year old. It is considered to be generally in the interests of the child that the legal status of the parents is established early. A discretion is given to the court to extend this time as there may be exceptional circumstances where an application was not made within a year of the child's birth but where the best interests would be met by the making of an order. This would allow the court to

make a parentage order in respect of a child born more than a year before the commencement of the Act if other requirements are met.

A certified copy of the child's birth certificate is to be lodged with the court.

***Clause 17 Court may make parentage order***

This clause sets out the matters about which the court must be satisfied before making a parentage order. Apart from meeting the criteria in clause 15, the court must be satisfied that the arranged parents and the birth parents have had appropriate counselling and independent legal advice about the effect of the order, that the birth parents have freely consented to the making of the order and that the child is in the day to day care of the arranged parents. An order can only be made if the court considers that it would be in the best interests of the child and if an appropriate plan (an approved plan) has been agreed between the parties.

The court is given the capacity to dispense with requirements in relation to a birth parent if the person is deceased, incapacitated or unable to be contacted.

***Clause 18 Contents of approved plan***

This clause provides guidance about the things that may be included in an approved plan and about whether the plan is appropriate.

An appropriate plan may deal with any matter relating to the child, including communication between the child and any other person or information to be provided by any of the parties. The plan must promote the long term welfare of the child and balance the rights and responsibilities of the parties to the plan.

***Clause 19 Ancillary orders***

This clause provides that the court may make any other necessary orders at the time of making the parentage orders.

***Clause 20 Multiple births***

Where a surrogacy arrangement results in a multiple birth a parentage order can only be made if a parentage order is made about each living birth sibling. As a multiple birth will relate to a surrogacy arrangement entered into before a pregnancy the effect of this requirement is that all the children born following a pregnancy that results in a multiple birth will have the same legal parentage.

***Clause 21 Name of child***

The court order changing the child's parentage order is to include a declaration of the name by which the child is to be known.

***Clause 22 Effect of parentage order***

The effect of a parentage order is that for all purposes of the law, the relationship between the child and the arranged parents is that of parent and child and the relationship between the

birth parents and the child is no longer that of parent and child. All other relationships between the child and the family of the arranged parents and the birth parent are determined accordingly.

***Clause 23 Discharge of parentage order***

This clause provides for the discharge of a parentage order in limited circumstances. An application for discharge can only be made by the Attorney General, the Director General of the Department of Health or the Department of Community Development, or by a child who has reached the age of 18. The order may only be discharged if fraud, duress or improper means were involved or in exceptional circumstances.

If the court discharges a parentage order the clause provides for consequential matters to be dealt with at the same time.

***Clause 24 Relationships for laws relating to sexual offences***

For the purposes of laws relating to sexual offences where the relationship between the persons is relevant, the relationships established through both the birth and arranged parents are recognised as existing.

***Clause 25 Finality of parentage order***

A parentage order cannot be appealed against, reviewed or called into question other than through a discharge of the order under clause 23 or on appeal to the Court of Appeal.

***Clause 26 Varying approved plan***

This clause provides for variation of approved plans where there has been a change in circumstances since the approved plan was agreed.

***Clause 27 Court's powers to do with breach of approved plan***

On an application by one of the parties to an approved plan, the court can order mediation or take enforcement action under the *Family Court Act 1997* in respect of a breach of a provision of the plan.

***Clause 28 Court to notify certain officers***

The court is to notify the Registrar of Births, Deaths and Marriages of the making of a parentage order and is to provide the information that is necessary for the registration of the birth of the child to include details of the changed parentage of the child.

**Division 3 Access to information**

***Clause 29 Terms used in this Division***

The terms descendant, grandparent and sibling are defined.

***Clause 30 Application of this Division or order under it***

The intention of this clause is to ensure that the access to information about the parentage order and birth registration is not limited if an approved plan provides greater access than provided for in this Division and that an approved plan cannot reduce the access to information that this Division provides.

***Clause 31 Right under this Division to be treated as adequate reason***

This clause provides that a right to access to information about a registration of birth is authority for the Registrar of Births, Deaths and Marriages to provide that information.

***Clause 32 Court order excluding access to information***

In circumstances where access to information under this Division would be likely to place a person or his or her immediate family at serious risk, the person can apply for an order excluding another person from having access to the information.

***Clause 33 Access to certain birth records***

A child, a birth parent, an arranged parent, another person who was a party to the proceedings for a parentage order or, in circumstances set out in clause 36 and 37, certain other persons can apply to the court for access to the record of the proceedings. Procedural requirements are to be met and the court has the discretion to allow access to all or part of the record of proceedings.

***Clause 34 Access to registration of birth***

A child, a birth parent, an arranged parent or, in circumstances set out in clauses 36 and 37, certain other persons have a right to access the registration of the birth of a person whose parentage has been transferred. Procedural requirements are to be met before the information is provided.

***Clause 35 Portion of registration of birth not referring to parentage order***

Following the receipt of a parentage order from the court, the birth register will contain details of both the original registration and the changed parentage details. This clause provides that an arranged parent of a child or the child, if he is she has reached the age of 18 years, can apply for a certified copy of the portion of the registration of birth that does not refer to the birth parents or the parentage order. The certified copy of the child's birth registration provided under this clause will be in the same form as the birth certificate of any other person.

***Clause 36 If certain person deceased***

This clause provides that if a child, a birth parent or arranged parent is deceased, a grandparent, descendant or sibling of the deceased may be able to access information about the parentage order or the registration of birth.

***Clause 37 If adult child cannot be contacted***

This clause provides that if a child about whom a parentage order has been made cannot be located or contacted, a grandparent, descendant or sibling of the person may be able to access information about the parentage order or the registration of birth.

**Division 4 Other matters**

***Clause 38 Application of Family Court Act 1997***

Various provisions of the *Family Court Act 1997* may be relevant to consideration of an application for a parentage order. Those provisions include the power to order parentage testing, to order a report to be prepared by a family consultant, to order that the child be independently represented and other procedural matters. This clause provides that those provisions may be used in connection with an application for a parentage order.

***Clause 39 Court proceedings to be private***

Applications for parentage orders are to be heard in chambers or in closed court.

***Clause 40 Regulations***

This clause provides for the making of Regulations as required for the purposes of the Act.

**Part 4– Other Acts amended**

***Clause 41 Births, Deaths and Marriages Registration Act 1998 amended***

Changes to the *Births, Deaths and Marriages Registration Act 1998* provide for the registration of information following a parentage order. The registration of information following a parentage order is modelled on the provisions that relate to the registration of information following an adoption order.

***Clause 42 Children and Community Services Act 2004 amended***

An amendment to the *Children and Community Services Act 2004* is made to allow arranged parents to have the day to day care of a child between the birth of the child and the making of a parentage order, without breaching section 104 of that Act.

***Clause 43 Family Court Act 1997 amended***

Amendments to the *Family Court Act 1997* provide that the court has jurisdiction to deal with applications under the Surrogacy Act and that a child whose parentage has been transferred under the Surrogacy Act is subject to the provisions of the Family Court Act in the event of the breakdown of the relationship of the child's parents.



**Clause 44      *Guardianship and Administration Act 1990 amended***

The *Guardianship and Administration Act 1990* is amended to provide that a plenary guardian of a person cannot consent to the making of a parentage order on behalf of the person.

**Clause 45      *Human Reproductive Technology Act 1991 amended***

The amendment to the *Human Reproductive Technology Act 1991* is intended to make it clear that in vitro fertilisation procedures can be provided to a woman who does not herself meet the eligibility requirements in section 23 of that Act if the treatment is provided in connection with a surrogacy arrangement where the arranged parents meet those eligibility criteria.

**Clause 46      *Interpretation Act 1984 amended***

The definition of “parent” in the *Interpretation Act 1984* is amended to include a reference to a person who is in the relation of parent and child arising because of a parentage order.