

South Australia

Family Relationships (Surrogacy) Amendment Act 2015

An Act to amend the *Family Relationships Act 1975* and to make a related amendment to the *Assisted Reproductive Treatment Act 1988*.

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Part 1—Amendment of *Assisted Reproductive Treatment Act 1988*

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Family Relationships (Surrogacy) Amendment Act 2015*.

2—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Family Relationships Act 1975*

3—Amendment of section 10F—Interpretation

- (1) Section 10F—before the definition of *procurator contract* insert:

commissioning parents, in respect of a recognised surrogacy agreement, means the 2 persons to whom custody of any child to whom the agreement relates is, or is to be, surrendered;

prescribed international surrogacy agreement means—

- (a) a surrogacy agreement (however described) under a law of another country that is declared by the regulations to be a prescribed international surrogacy agreement; or
- (b) a surrogacy agreement (however described) relating to surrogacy arrangements between commissioning parents resident in this State and a person resident in another country and approved by the Minister for the purposes of this paragraph;

- (2) Section 10F, definition of *procurator contract*—delete the definition

- (3) Section 10F, definition of *recognised surrogacy agreement*—delete the definition and substitute:

recognised surrogacy agreement means a recognised surrogacy agreement under section 10HA(2) and includes, for the purposes of Division 3—

- (a) a surrogacy agreement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth, or of another State or Territory; and
- (b) a prescribed international surrogacy agreement;

- (4) Section 10F—after the definition of *recognised surrogacy agreement* insert:

State Framework for Altruistic Surrogacy or *Framework* means the *State Framework for Altruistic Surrogacy* prepared under section 10FA, as in force from time to time;

- (5) Section 10F, definition of *surrogacy contract*—after paragraph (b) insert:

but does not include a contract that forms part of, or relates to, a recognised surrogacy agreement or proposed recognised surrogacy agreement;

- (6) Section 10F—after the definition of *surrogacy contract* insert:

surrogate mother, in respect of a recognised surrogacy agreement, means the woman who will, or will seek to, become pregnant for the purposes of the agreement;

4—Insertion of Part 2B Division 1A

After section 10F insert:

Division 1A—State Framework for Altruistic Surrogacy and Surrogate Register

10FA—State Framework for Altruistic Surrogacy

- (1) There is to be a *State Framework for Altruistic Surrogacy*.
- (2) The Framework is to be prepared by the Minister in accordance with this section.
- (3) The Framework must contain the following information:
 - (a) information setting out the effect of this Part generally and, in particular, the effect of section 10HA(2);
 - (b) information setting out the circumstances in which a person can lawfully arrange, or contribute to arranging, a recognised surrogacy agreement on behalf of another;
 - (c) information relating to conditions that must be satisfied before the Minister will approve a prescribed international surrogacy agreement for the purposes of this Part;
 - (d) information setting out the circumstances in which a person can advertise for the services of a surrogate mother;
 - (e) the information required under section 10FB(2);
 - (f) the information required under section 10HA(2)(b)(xi);
 - (g) information explaining the relationship between this Part and the *Assisted Reproductive Treatment Act 1988* and, in particular, how in vitro fertilisation procedures under that Act are, or are not, able to be provided in respect of altruistic surrogacy;
 - (h) any other information required by the regulations,and may contain such other information as the Minister thinks fit.
- (4) The Minister must, in preparing the Framework—
 - (a) consult with—
 - (i) the Australian Medical Association Limited; and
 - (ii) the Law Society of South Australia; and
 - (iii) medical practitioners of a class determined by the Minister to whom the administration of the *Health Care Act 2008* is committed for the purposes of this paragraph; and
 - (iv) any other person or body prescribed by the regulations,

- and may consult with any other person or body that the Minister thinks appropriate; and
- (b) ensure an appropriate focus on the needs of any children born as a consequence of recognised surrogacy agreements; and
 - (c) call for public submissions in accordance with the scheme set out in the regulations; and
 - (d) comply with any requirements set out in the regulations relating to the preparation of the Framework.
- (5) The Minister may, from time to time, vary or substitute the Framework.
 - (6) The Framework, and any variation or substitution of the Framework, has effect from the time it is published in the Gazette by the Minister.
 - (7) The Minister must—
 - (a) cause the Framework, as in force from time to time, to be published on a website determined by the Minister; and
 - (b) ensure that copies of the Framework are reasonably available for inspection (without charge) and purchase by the public at a place or places determined by the Minister.
 - (8) The Minister must, at least once in every 3 year period, review the Framework to ensure it remains consistent with community standards.

10FB—Surrogate Register

- (1) The Minister must establish a register (the *Surrogate Register*) of women who are willing to act as a surrogate mother within the meaning of section 10HA.
- (2) The Surrogate Register must be kept and maintained in accordance with the *State Framework for Altruistic Surrogacy*.
- (3) A woman cannot apply for registration on the Surrogate Register unless—
 - (a) she is 18 years of age or older; and
 - (b) she is resident and domiciled in the State; and
 - (c) she is a permanent resident of Australia; and
 - (d) she satisfies any other requirement set out in the regulations for the purposes of this subsection.
- (4) The Surrogate Register is not available for public inspection.
- (5) The regulations may make further provisions in relation to the Surrogate Register (including, to avoid doubt, provisions relating to inspection of the Surrogate Register by specified persons, or persons of a specified class).

5—Amendment of section 10G—Illegality of surrogacy contracts

Section 10G(2), (3) and (4)—delete subsections (2), (3) and (4)

6—Substitution of section 10H

Section 10H—delete the section and substitute:

10H—Offences

- (1) Except as authorised by or under this Act or the *State Framework for Altruistic Surrogacy*, a person who, for valuable consideration, negotiates, arranges or obtains the benefit of a surrogacy contract on behalf of another is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

- (2) A person who, for valuable consideration, induces another to enter into a surrogacy contract is guilty of an offence.

Maximum penalty: Imprisonment for 12 months.

- (3) For the purposes of subsections (1) and (2), the prosecution need not prove that—

- (a) a surrogacy contract was, in fact, entered; or
(b) a woman became pregnant, or a child born, pursuant to a surrogacy contract.

7—Amendment of section 10HA—Recognised surrogacy agreements

- (1) Section 10HA(1), definition of *prescribed relative*—delete the definition
- (2) Section 10HA(2)(a)—delete "a woman (the *surrogate mother*)" and substitute:
a surrogate mother
- (3) Section 10HA(2)(a)(ii)—delete "2 other persons (the *commissioning parents*)" and substitute:
the commissioning parents
- (4) Section 10HA(2)(b)(vii)—delete subparagraph (vii) and substitute:
(vii) the surrogate mother, her husband or domestic partner (if any) and both commissioning parents each have a certificate issued by a counselling service that complies with the requirements of subsection (3);
- (5) Section 10HA(2)(b)(ix)—after "connected with" insert:
or consisting of
- (6) Section 10HA(2)(b)(ix)—after subparagraph (D) insert:
(DA) any reasonable out of pocket expenses incurred by the surrogate mother in respect of the agreement; or

(7) Section 10HA(2)(b)—after subparagraph (x) insert:

- (xi) the agreement states that the commissioning parents will, in accordance with any requirements in the State Framework for Altruistic Surrogacy, take reasonable steps to ensure that the surrogate mother and her husband or domestic partner (if any) are offered counselling (at no cost to the surrogate mother or her husband or domestic partner) after the birth of a child to which the agreement relates (including, to avoid doubt, a still-birth).

(8) Section 10HA(3)—after paragraph (a) insert:

- (ab) the counselling provided to each person referred to in that subparagraph must, unless it is not reasonably practicable to do so, be provided by the same counsellor;

Note—

Examples where it might not be reasonably practicable to do so would include where the counsellor has a conflict of interest with one of the parties, or is unavailable due to illness.

- (ac) except as contemplated by paragraph (ab), the counselling must be consistent with—
 - (i) any guidelines related to such counselling published by the Australian and New Zealand Infertility Counsellors Association; and
 - (ii) any relevant guidelines published by the National Health and Medical Research Council;

(9) Section 10HA(3)(b)(i)—delete subparagraph (i) and substitute:

- (i) that the person to whom it relates has received counselling about personal and psychological issues that may arise in connection with a surrogacy arrangement; and

(10) Section 10HA(4)—delete subsection (4)

8—Insertion of section 10HAB

After section 10HA insert:

10HAB—Medical decisions affecting surrogate mother or child

- (1) For the purposes of this Act, the *Consent to Medical Treatment and Palliative Care Act 1995* and any other Act or law, a question relating to any medical treatment to be provided to a surrogate mother or an unborn child to which a recognised surrogacy agreement relates (including, to avoid doubt, a question relating who can consent to such treatment, whether or not it relates to the pregnancy) is to be determined as if the recognised surrogacy agreement did not exist.
- (2) Nothing in this section limits the operation of an advance care directive under the *Advance Care Directives Act 2013*.

9—Amendment of section 10HB—Orders as to parents of child born under recognised surrogacy arrangements

- (1) Section 10HB(1), definition of *commissioning parents*—delete the definition
- (2) Section 10HB(2)(c)—delete paragraph (c)
- (3) Section 10HB(9)(c)—delete "for expenses of the kind allowed" and substitute:
as is authorised

Schedule 1—Related amendments and transitional provisions

Part 1—Amendment of *Assisted Reproductive Treatment Act 1988*

1—Amendment of section 3—Interpretation

Section 3, definition of *recognised surrogacy agreement*—delete "section 10HA" and substitute:

Part 2B