

South Australia

Family Relationships (Surrogacy) Amendment Bill 2017

A BILL FOR

An Act to amend the *Family Relationships Act 1975*, and to make related amendments to the *Assisted Reproductive Treatment Act 1988* and the *Births, Deaths and Marriages Registration Act 1996*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Family Relationships Act 1975*

- 4 Substitution of Part 2B

Part 2B—Surrogacy

Division 1—Preliminary

- 10F Interpretation
- 10G Interaction with other Acts
- 10H Rights of surrogate mother to manage pregnancy and birth

Division 2—Lawful surrogacy agreements

- 10I Lawful surrogacy agreements
- 10J Assessment and counselling
- 10K Use of commissioning parent's human reproductive material not necessary in certain circumstances
- 10L Payment or reimbursement of certain costs permitted

Division 3—Court proceedings relating to recognised surrogacy arrangements

- 10M Interpretation
- 10N Extent to which recognised surrogacy arrangements can be enforced
- 10O Parentage orders
- 10P Court may dispense with certain requirements under section 100(3)
- 10Q Court may discharge parentage order
- 10R Court to notify Registrar of Births, Deaths and Marriages
- 10S Access to Court records

Division 4—Offences relating to unlawful surrogacy arrangements

- 10T Commercial and other unlawful surrogacy arrangements prohibited
- 10U Related offences

- 5 Amendment of section 15—Regulations

Schedule 1—Related amendments and transitional provisions

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

- 1 Amendment of section 3—Interpretation

Part 2—Amendment of *Births, Deaths and Marriages Registration Act 1996*

- 2 Amendment of section 4—Interpretation
- 3 Substitution of Part 3 Division 6

Division 6—Surrogacy

- 22A Parentage orders

Part 3—Transitional provisions

- 4 Continuation of recognised surrogacy agreements
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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 2017*.

2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

3—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*

4—Substitution of Part 2B

Part 2B—delete the Part and substitute:

Part 2B—Surrogacy

Division 1—Preliminary

10F—Interpretation

15 (1) In this Part—

commercial surrogacy arrangement—see subsection (2);

commissioning parent, in relation to a lawful surrogacy agreement—see section 10I(1);

20 *Court* means the *Youth Court of South Australia* constituted of the Judge of the Court or a magistrate;

fertilisation procedure has the same meaning as in Part 2A;

human reproductive material means—

(a) human semen; or

(b) a human ovum;

25 *lawful surrogacy agreement* means a lawful surrogacy agreement under section 10I, as in force from time to time;

lawyer means a legal practitioner within the meaning of the *Legal Practitioners Act 1981*;

parentage order means a parentage order under section 100;

prescribed reason, for entering a lawful surrogacy agreement, means 1 or more of the following reasons:

- (a) it is unlikely that a commissioning parent can or would become pregnant (whether because of infertility or other medical reasons, or by reason of the sex or gender identity of the commissioning parent);
- (b) it is unlikely on medical grounds that a commissioning parent would be reasonably able to carry a pregnancy to term or give birth;
- (c) there appears to be a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to a commissioning parent;
- (d) there appears to be a risk that becoming pregnant or giving birth to a child would result in physical harm to a commissioning parent (being harm of a kind, or of a severity, unlikely to be suffered in the course of a pregnancy or birth generally);

qualifying relationship—2 persons will be taken to be in a qualifying relationship on a particular day if, on that day, they—

- (a) are legally married; or
- (b) are in a registered relationship; or
- (c) have lived together continuously in a marriage-like relationship—
 - (i) for the period of 3 years immediately preceding that day; or
 - (ii) for periods aggregating not less than 3 years during the period of 4 years immediately preceding that day;

recognised surrogacy arrangement means—

- (a) a lawful surrogacy agreement; or
- (b) a surrogacy arrangement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth, or of another State or Territory; or
- (c) a surrogacy arrangement of a kind declared by the regulations to be a recognised surrogacy arrangement;

registered relationship means a relationship that is registered under the *Relationships Register Act 2016*, and includes a corresponding law registered relationship under that Act;

surrogate mother, in relation to a lawful surrogacy agreement—see section 10I(1).

(2) For the purposes of this Part, a **commercial surrogacy arrangement** means a surrogacy arrangement under which a person offers or receives payment, reward or other material benefit or advantage for the person, or another person—

- 5 (a) agreeing to enter, or entering, the surrogacy arrangement; or
- (b) relinquishing custody and guardianship of a child born as a result of a pregnancy relating to the surrogacy agreement to 1 or more other persons; or
- 10 (c) consenting to the making of an order under Division 3 in relation to a child born as a result of a pregnancy relating to the surrogacy agreement.

(3) For the purposes of this Part, it is irrelevant whether the commissioning parents in respect of a particular recognised surrogacy arrangement are of the same or a different sex or gender identity.

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(4) For the purposes of this Part, a reference to the **partner** of a surrogate mother will be taken to be a reference to—

- (a) if the surrogate mother is legally married—her husband; or
- 20 (b) if the surrogate mother is in a registered relationship—the other person in the registered relationship; or
- (c) if the surrogate mother is in a qualifying relationship—the other person in the qualifying relationship,

but, to avoid doubt, to no other person or relationship.

10G—Interaction with other Acts

- 25 (1) This Part does not affect the operation of any law relating to the guardianship, custody or adoption of children.
- (2) For the purposes of the *Consent to Medical Treatment and Palliative Care Act 1995*, the *Mental Health Act 2009* or the *Guardianship and Administration Act 1993*, or 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 arrangement relates (including, to avoid doubt, a question relating to who can consent to such treatment, whether or not it relates to the pregnancy) is to be determined as if the recognised surrogacy arrangement did not exist.
- 30
- (3) Nothing in this Part limits the operation of an advance care directive under the *Advance Care Directives Act 2013*.
- 35

10H—Rights of surrogate mother to manage pregnancy and birth

- 40 (1) A surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.
- (2) This section applies despite any agreement of the parties to a recognised surrogacy arrangement to the contrary.

Division 2—Lawful surrogacy agreements

10I—Lawful surrogacy agreements

- 5 (1) A *lawful surrogacy agreement* is an agreement (however described) between a woman (the *surrogate mother*) and 2 other persons (the *commissioning parents*) that complies with the requirements under this section and under which—
- 10 (a) the surrogate mother agrees to become, or try to become, pregnant; and
 - (b) it is agreed that a child born as a result of the pregnancy is to be treated as the child of the commissioning parents and not of the surrogate mother; and
 - (c) the surrogate mother will relinquish custody and guardianship of the child to the commissioning parents; and
 - 15 (d) the commissioning parents agree to become permanently responsible for the custody and guardianship of the child.
- (2) A lawful surrogacy agreement must comply with the following provisions:
- 20 (a) only the surrogate mother and the commissioning parents can be parties to the agreement;
 - (b) the surrogate mother and each of the commissioning parents must be at least 18 years old;
 - (c) both of the commissioning parents must, on the day the agreement is entered, be domiciled in this State;
 - 25 (d) the commissioning parents must, on the day the agreement is entered, be in a qualifying relationship;
 - (e) there must be a prescribed reason for the lawful surrogacy agreement;
 - (f) the lawful surrogacy agreement must be entered before the pregnancy is achieved;
 - 30 (g) the surrogate mother has been assessed and approved under section 10J(1)(a);
 - (h) the surrogate mother and her partner (if any) have received counselling in accordance with section 10J(1)(b) or 10J(2) (as the case requires);
 - 35 (i) the commissioning parents have each—
 - (i) been assessed and approved under section 10J(3)(a); and
 - (ii) received counselling in accordance with section 10J(3)(b);
 - 40 (j) the pregnancy is to be achieved by the use of a fertilisation procedure carried out in this State;

- 5
- (k) except as may be authorised under section 10K, human reproductive material required to achieve the pregnancy will be provided by at least 1 of the commissioning parents;
- (l) except as may be permitted under section 10L, no valuable consideration is payable under, or in respect of, the agreement;
- 10 (m) the commissioning parents must, in accordance with any requirement set out in the regulations, undertake to take reasonable steps to ensure that the surrogate mother and her partner (if any) are offered counselling (at no cost to the surrogate mother or partner) after the birth of a child to which the agreement relates (including, to avoid doubt, a stillbirth).
- 15 (3) A lawful surrogacy agreement must—
- (a) be a written instrument; and
- (b) be signed by each party to the agreement (and the signature of each party must attested by a lawyer's certificate).
- 20 (4) The regulations may make further provisions in relation to lawful surrogacy agreements (including, without limiting the generality of this subsection, by requiring or limiting the inclusion of provisions of a specified kind in lawful surrogacy agreements).
- (5) Subject to this Part and to any other Act or law, the parties to a lawful surrogacy agreement may include such other provisions in the agreement as the parties think fit.
- 25 (6) In this section—
- lawyer's certificate* means a certificate signed by a lawyer, and endorsed on the relevant lawful surrogacy agreement, certifying that—
- 30 (a) the lawyer explained the legal implications of the lawful surrogacy agreement to a party to the agreement named in the certificate; and
- (b) the party appeared to understand the advice given under paragraph (a); and
- 35 (c) the party signed the lawful surrogacy agreement in the lawyer's presence.

10J—Assessment and counselling

- 40 (1) For the purposes of section 10I(2)(h), the surrogate mother—
- (a) must be assessed and approved as a surrogate by an accredited counselling service in accordance with any requirements set out in the regulations; and

(b) must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the regulations.

5 (2) For the purposes of section 10I(2)(h), the partner of the surrogate mother must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the regulations.

10 (3) For the purposes of section 10I(2)(i), each of the commissioning parents—

(a) must be assessed by and approved as a commissioning parent by an accredited counselling service in accordance with any requirements set out in the regulations; and

15 (b) must receive counselling in respect of the proposed surrogacy arrangements from an accredited counselling service in accordance with any requirements set out in the regulations.

20 (4) On a person receiving counselling under this section, the accredited counselling service must issue to the person a certificate that complies with the requirements set out in the regulations.

(5) Except where it is not reasonably practicable to do so, counselling required under this section should be provided to each party to a lawful surrogacy agreement by the same counsellor.

25 (6) In this section—

accredited counselling service means a person or body accredited for the purposes of this section in accordance with the regulations.

10K—Use of commissioning parent's human reproductive material not necessary in certain circumstances

30 For the purposes of section 10I(2)(k), a pregnancy the subject of a lawful surrogacy agreement may be achieved without the use of human reproductive material from either of the commissioning parents if a medical practitioner is satisfied that—

(a) both of the commissioning parents appear to be infertile; or

35 (b) there is a medical reason why it would be preferable not to use such human reproductive material to achieve the pregnancy.

10L—Payment or reimbursement of certain costs permitted

40 (1) Payment of the reasonable surrogacy costs of a surrogate mother, or the reimbursement of a surrogate mother for payment of reasonable surrogacy costs, in respect of a lawful surrogacy agreement is permitted (and such payments or reimbursements may be provided for in a lawful surrogacy agreement accordingly).

(2) A surrogate mother's *reasonable surrogacy costs* are the reasonable costs associated with any of the following matters (being matters related to the agreement):

- 5
- (a) pregnancy (including any attempt to become pregnant) that is the subject of the agreement;
 - (b) birth or care of a child born as a result of the pregnancy;
 - (c) the value of the surrogate mother's actual lost earnings because of leave taken—

- 10
- (i) for a period of not more than 2 months during which a birth happened or was expected to happen; or
 - (ii) for any other period during the pregnancy when the surrogate mother was unable to work on medical grounds;

- 15
- (d) counselling or medical services (including after the birth of a child);
 - (e) legal services (including after the birth of a child);
 - (f) reasonable out of pocket expenses incurred by the surrogate mother;
 - (g) any other matter prescribed by the regulations.
- 20

(3) For the purposes of this section, a reference to *legal services* includes a reference to—

- 25
- (a) legal costs (including fees for obtaining legal advice and legal representation); and
 - (b) court fees, registry fees associated with registration of a birth and transfer of parentage.

(4) For the purposes of this section, a reference to costs for *medical services* does not include such costs to the extent that they are recoverable under Medicare or any health insurance or other scheme.

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Division 3—Court proceedings relating to recognised surrogacy arrangements

10M—Interpretation

In this Division—

birth parent, of a child, means—

- 35
- (a) the woman who gave birth to the child; or
 - (b) a man (if any) who is the father of the child under another Part of this Act (the *birth father*);

birth sibling, of a child, means a brother or sister of the child who is born as a result of the same pregnancy as the child.

10N—Extent to which recognised surrogacy arrangements can be enforced

- 5
- (1) Except as is provided for in subsection (2), a recognised surrogacy arrangement, or purported recognised surrogacy arrangement, is not enforceable.
- (2) An obligation under a recognised surrogacy arrangement to pay or reimburse the reasonable surrogacy costs (within the meaning of section 10L(2)) of the surrogate mother is enforceable in a court of competent jurisdiction unless a child is born as a result of the surrogacy arrangement and the surrogate mother—
- 10
- (a) refuses or fails to relinquish the custody and guardianship of the child to the commissioning parents; or
- (b) does not consent to the making of a parentage order.

10O—Parentage orders

- 15
- (1) An application may be made by 1 or both of the commissioning parents (being a commissioning parent domiciled in this State) in respect of a recognised surrogacy arrangement to the Court for a parentage order in relation to a child to whom the recognised surrogacy arrangement relates.
- 20
- (2) An application for a parentage order may only be made when the child is between the ages of 4 weeks and 6 months.
- (3) Subject to section 10P, the Court must not make a parentage order unless satisfied that—
- 25
- (a) the making of the parentage order is in the best interests of the child; and
- (b) the child is currently residing with the commissioning parents, and has done so for at least 28 consecutive days before the application for the parentage order was made; and
- (c) either—
- 30
- (i) in the case of a lawful surrogacy agreement—the requirements under Division 2 have been complied with in respect of the agreement; or
- (ii) in the case of any other recognised surrogacy arrangement—the requirements of the law of the jurisdiction under which the arrangement was entered have been complied with in respect of the arrangement; and
- 35
- (d) the surrogate mother freely, and with a full understanding of what is involved, agrees to the making of the parentage order; and
- 40
- (e) if only 1 of the commissioning parents has applied for the parentage order, and the other commissioning parent is alive at the time of the application—

- 5
- (i) the other commissioning parent consents to the making of a parentage order in favour of the applicant commissioning parent; or
 - (ii) the applicant commissioning parent cannot, after making reasonable inquiries, contact the other commissioning parent to obtain consent under subparagraph (i); and
- (f) the recognised surrogacy arrangement is not a commercial surrogacy arrangement.
- 10 (4) In deciding whether to make a parentage order, the Court must take into account any submission made to the Court by, or on behalf of, the birth father, and may take into account anything else the Court considers relevant.
- 15 (5) The Court may, before deciding whether to make a parentage order, require any party to the proceedings to provide an assessment from a specified counselling service (obtained at the expense of the commissioning parents) in relation to the matter.
- (6) If the Court makes a parentage order, the effect of the order is as follows:
- 20 (a) the relationship between the child and the commissioning parent or each commissioning parent (as specified under the terms of the parentage order) is to be treated as being that of child and parent;
- 25 (b) the relationship between the child and any birth parent is to be treated as not being that of child and parent; and
- (c) any existing appointment of a person as guardian of the child will cease to have effect; and
- 30 (d) the relationships of all other persons to the child are to be determined according to the operation and effect of paragraphs (a) and (b).
- (7) The name of a child to whom a parentage order relates will be taken the name approved by the Court on the application of 1 or both of the commissioning parents (however, nothing in this subsection prevents the name of the child being later changed in accordance with another law of the State).
- 35 (8) If a child in relation to whom an application for a parentage order has been made has a living birth sibling—
- 40 (a) the application will be taken to relate to the child and the birth sibling; and
- (b) the Court may only make a parentage order in relation to the child if it makes a comparable order (in all respects apart from any given name or names) in relation to the birth sibling; and

- (c) this section will apply to the birth sibling in the same way as it applies to the child.

10P—Court may dispense with certain requirements under section 10O(3)

- 5 (1) Subject to this section, the Court may dispense with a requirement under section 10O(3)(c)(i) (being a requirement to comply with a specified requirement under Division 2) if satisfied that there are exceptional reasons for doing so.
- 10 (2) However, the Court must not dispense with the following requirements under section 10O(3)(c) (being a requirement to comply with a specified requirement under Division 2 or a law of another jurisdiction):
- 15 (a) a requirement that the recognised surrogacy arrangement not be a commercial surrogacy arrangement;
- (b) a requirement that the commissioning parents be in a qualifying relationship;
- (c) a requirement that the surrogate mother and each of the commissioning parents be at least 18 years old;
- 20 (d) a requirement that the recognised surrogacy arrangement be entered before pregnancy is achieved.
- (3) Subject to this section, the Court may dispense with a requirement under section 10O(3)(d)—
- 25 (a) if satisfied that the surrogate mother is dead or incapacitated; or
- (b) if satisfied that the applicants cannot contact the surrogate mother after making reasonable inquiries; or
- (c) in any other circumstances prescribed by the regulations.
- 30 (4) In each case, the Court must not dispense with a requirement under section 10O(3) unless satisfied that it is in the best interests of the child to do so.

10Q—Court may discharge parentage order

- (1) The Court may, on an application by—
- 35 (a) the Attorney-General; or
- (b) the chief executive of an administrative unit of the Public Service responsible for assisting a Minister in the administration of the *Adoption Act 1988*,
- discharge a parentage order if the Court is satisfied that—
- (c) the parentage order was obtained by fraud, duress or other improper means; or

(d) a consent relied on for the making of the parentage order was not an effective consent because it was obtained by fraud, duress or material inducement; or

(e) there is an exceptional reason why the parentage order should be discharged,

and, in each case, the Court is satisfied that it is in the best interests of the child to whom the parentage order relates to do so.

(2) If the Court discharges a parentage order, the Court must make a declaration of the name by which a child to whom the parentage order relates is to be known (however, a child's first name should not be changed except in exceptional circumstances).

(3) Nothing in subsection (2) prevents the name of a child being later changed in accordance with another law of the State.

(4) The Court should not discharge a parentage order unless reasonable efforts have been made to give notice of the application to—

(a) each of the birth parents of the child; and

(b) each of the commissioning parents under the recognised surrogacy arrangement to which the parentage order relates; and

(c) if the Court considers it appropriate, the child.

(5) Any person may apply for leave to intervene in an application under this section and the Court may make an order entitling the person to intervene in the application.

(6) A person who is permitted under subsection (5) to intervene in an application under this section is to be treated as a party to the application with all the rights, duties and liabilities of a party, unless the Court orders otherwise.

(7) The Court may, on discharging a parentage order, make such other consequential or ancillary orders as the Court thinks fit, including an order relating to—

(a) the ownership or possession of property; or

(b) any matter affecting the child to whom the parentage order relates in relation to the duties, powers, responsibilities and authority which, by law, parents have in relation to children; or

(c) the domicile of the child.

(8) If a parentage order is discharged, the rights, duties and relationships under the law of the State are to be determined as if the parentage order had not been made.

(9) The discharge of a parentage order does not affect—

(a) anything lawfully done; or

(b) the consequences of anything lawfully done; or

- (c) any proprietary right or interest that became vested in any person,

while the parentage order was in force.

10R—Court to notify Registrar of Births, Deaths and Marriages

The Registrar of the Court must, if the Court makes or discharges a parentage order, give to the Registrar of Births, Deaths and Marriages notice setting out such information as may be required by the Registrar of Births, Deaths and Marriages.

10S—Access to Court records

Except as may be authorised by the Court, the records of proceedings under this Division will not be open to inspection.

Division 4—Offences relating to unlawful surrogacy arrangements

10T—Commercial and other unlawful surrogacy arrangements prohibited

- (1) A person who enters, or offers to enter, a commercial surrogacy arrangement is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.
- (2) A person who enters, or offers to enter, a surrogacy arrangement is guilty of an offence.
Maximum penalty: Imprisonment for 12 months.
- (3) This section does not apply in relation to a recognised surrogacy arrangement.

10U—Related offences

- (1) A person who, for payment or other consideration, negotiates, arranges or obtains the benefit of a surrogacy arrangement on behalf of another is guilty of an offence.
Maximum penalty: Imprisonment for 12 months.
- (2) A person who, for payment or other consideration, induces another to enter into a surrogacy arrangement is guilty of an offence.
Maximum penalty: Imprisonment for 12 months.
- (3) Subsections (1) and (2) apply to a surrogacy arrangement whether it is a recognised surrogacy arrangement or otherwise.
- (4) For the purposes of subsections (1) and (2), the prosecution need not prove that—
- (a) a surrogacy arrangement was, in fact, entered; or
 - (b) a woman became pregnant, or a child was born, pursuant to a surrogacy arrangement.

5—Amendment of section 15—Regulations

Section 15(2)—after paragraph (b) insert:

- (ba) make provisions of an evidentiary nature in relation to a matter or thing in respect of which regulations may be made;

5 Schedule 1—Related amendments and transitional provisions

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

1—Amendment of section 3—Interpretation

- (1) Section 3—after the definition of *in vitro fertilisation procedure* insert:

lawful surrogacy agreement means a lawful surrogacy agreement under Part 2B of the *Family Relationships Act 1975*;

- (2) Section 3, definition of *recognised surrogacy agreement*—delete the definition

Part 2—Amendment of *Births, Deaths and Marriages Registration Act 1996*

2—Amendment of section 4—Interpretation

- (1) Section 4—after the definition of *human remains* insert:

parentage order means an order under section 10O of the *Family Relationships Act 1975* or a corresponding previous section of that Act;

- (2) Section 4—after the definition of *prohibited name* insert:

recognised surrogacy arrangement has the same meaning as in Part 2B of the *Family Relationships Act 1975*;

- (3) Section 4, definition of *surrogacy order*—delete the definition

3—Substitution of Part 3 Division 6

Part 3 Division 6—delete Division 6 and substitute:

Division 6—Surrogacy

22A—Parentage orders

- (1) On receipt of a notice under section 10R of the *Family Relationships Act 1975* (or a corresponding previous section of that Act) in relation to the making or discharge of a parentage order about a child whose birth is registered in this State, the particulars provided in the notice must be registered by the Registrar in relation to the registration of the child's birth and the child's name.

- 5
- (2) Without limiting subsection (1), the Registrar must, in relation to the Register, make such entries and alterations as are necessary to give effect to the operation of section 10O(6) or 10Q(8) (as the case requires) of the *Family Relationships Act 1975* (or a corresponding previous section of that Act).
- (3) Subject to subsection (4), a certificate issued by the Registrar after the registration of the particulars provided in a notice under section 10R of the *Family Relationships Act 1975* (or a corresponding previous section of that Act)—
- 10
- (a) must only disclose and certify up-to-date particulars contained in an entry; and
- (b) must not provide any information disclosing a change in a parent or parents of the relevant child, or a change in the name of the child (including by disclosing the name of, or information about, any birth parent who is no longer considered as a parent of the child).
- 15
- (4) A person—
- (a) who is the subject of a parentage order and who has attained the age of 18 years; or
- 20
- (b) who is a party to the recognised surrogacy arrangement that gave rise to a parentage order,
- is entitled to a certificate certifying all relevant entries in the Register.
- (5) On the receipt of a notice under section 10R of the *Family Relationships Act 1975* (or a corresponding previous section of that Act) in relation to the making or discharge of a parentage order about a child whose birth is registered in another State, the Registrar must send a copy of the notice to the relevant registering authority.
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Part 3—Transitional provisions

4—Continuation of recognised surrogacy agreements

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- (1) A recognised surrogacy agreement under section 10HA of the *Family Relationships Act 1975* and in force immediately before the commencement of this clause will, subject to this clause, continue in accordance with its terms.
- (2) Any matter or dispute arising under or related to a recognised surrogacy agreement continued under this clause is, to the extent that the matter or dispute relates to the operation of the *Family Relationships Act 1975*, to be determined according to that Act, and any regulations or the State Framework for Altruistic Surrogacy under that Act, as in force immediately before the commencement of this clause.
- 35