

South Australia

# Surrogacy Act 2019

An Act to recognise and regulate certain forms of surrogacy in South Australia, to ensure commercial surrogacy remains unlawful in South Australia, and for other purposes.

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## Legislative history

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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 *Surrogacy Act 2019*.

#### 3—Simplified outline of Act

- (1) This Act provides a scheme allowing for certain forms of surrogacy in South Australia. However, all other forms of surrogacy remain unlawful, and the Act provides for a number of offences relating to surrogacy.
- (2) In this Act—
  - Part 2 sets out principles that are to be applied in relation to the operation of the Act and to lawful surrogacy agreements;
  - Part 3 sets out the scheme for surrogacy agreements that are lawful and legally recognised;
  - Part 4 sets out the role of the Court in relation to lawful surrogacy agreements (and, in particular, the making of parentage orders for children born as a result of such agreements);
  - Part 5 provides that all other surrogacy agreements are unlawful in this State, and creates offences relating to surrogacy;

- Part 6 contains miscellaneous provisions relating to surrogacy and the operation of the Act, including provisions protecting the privacy of children born as a result of a surrogacy agreement and a power to make regulations under the Act.

#### 4—Interpretation

- (1) In this Act, unless the contrary intention appears—

**accredited counsellor** means a counsellor who is accredited in accordance with the regulations for the purposes of this Act;

**birth mother**, of a child, means the woman who gave birth to the child;

**birth sibling**, of a child, means any other child who is born as a result of the same pregnancy as the child;

**counsellor's certificate** means a statement in a lawful surrogacy agreement signed by an accredited counsellor certifying that the accredited counsellor provided the counselling required under section 14 to a specified person or persons;

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

**domestic partner** means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975* whether declared as such under that Act or not;

**human reproductive material** means—

- a human embryo; or
- human semen; or
- a human ovum;

**intended parent**—see section 10(2)(b);

**lawful surrogacy agreement** means—

- a surrogacy agreement recognised as a lawful surrogacy agreement under section 10; or
- a surrogacy agreement (however described) entered into in accordance with a prescribed corresponding law of the Commonwealth or another State or Territory;

**lawyer's certificate** means a statement in a lawful surrogacy agreement signed by a legal practitioner certifying that—

- the legal practitioner explained the legal implications of the agreement to a specified person or specified persons; and
- the legal practitioner gave the prescribed information in respect of the lawful surrogacy agreement to a specified person or persons;

**legal practitioner** means a legal practitioner or interstate legal practitioner (both within the meaning of the *Legal Practitioners Act 1981*);

**payment** means money or any other consideration;

**reasonable surrogacy costs**—see section 11;

**spouse**—a person is the spouse of another if they are legally married;

*surrogate mother*—see section 10(2)(a);

*surrogacy agreement* means an agreement (whether a lawful surrogacy agreement or otherwise) under which—

- (a) a woman agrees to—
    - (i) become pregnant or attempt to become pregnant; and
    - (ii) surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy to another person or persons; or
  - (b) a pregnant woman agrees to surrender parentage or custody of, or rights in relation to, a child born as a result of the pregnancy.
- (2) For the purposes of this Act, a reference to a lawful surrogacy agreement includes, unless the context requires otherwise, a reference to a proposed lawful surrogacy agreement.
- (3) For the purposes of this Act, a reference to a surrogate mother under a lawful surrogacy agreement includes, unless the context requires otherwise, a reference to a person who is to be the surrogate mother pursuant to the lawful surrogacy agreement.
- (4) For the purposes of this Act, a person will be taken to have ***impaired decision-making capacity*** in respect of a particular decision if the person is not capable of—
- (a) understanding any information that may be relevant to the decision (including information relating to the consequences of making a particular decision); or
  - (b) retaining such information; or
  - (c) using such information in the course of making the decision; or
  - (d) communicating their decision in any manner,

however—

- (e) a person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a technical or trivial nature;
- (f) a person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time;
- (g) a person may fluctuate between having impaired decision-making capacity and full decision-making capacity;
- (h) a person's decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

## 5—Interaction with other Acts

Except where the contrary intention appears, nothing in this Act limits the operation of any law relating to the guardianship, custody, protection or adoption of children.

## Part 2—Guiding principles for purposes of Act

### 6—Best interests of child paramount

- (1) The best interests of any child born as a result of a lawful surrogacy agreement is to be the paramount consideration in respect of the administration and operation of this Act.
- (2) To avoid doubt, the requirement under this section applies to the Court.

### 7—Surrogacy principles

- (1) The following principles (the *surrogacy principles*) apply in relation to the lawful practice of surrogacy in South Australia:
  - (a) the human rights of all parties to a lawful surrogacy agreement, including any child born as a result of the agreement, must be respected;
  - (b) the surrogate mother under a lawful surrogacy agreement should not be financially disadvantaged as a result of her involvement in the lawful surrogacy agreement.
- (2) The Minister, the Court, and each person or body engaged in the administration of this Act must exercise their powers and perform their functions so as to give effect to the surrogacy principles.
- (3) However, the surrogacy principles do not displace, and cannot be used to justify the displacement of, section 6.

### 8—Presumptions under *Family Relationships Act 1975* to apply until parentage order made

The presumptions and other rules as to the parentage of a child under the *Family Relationships Act 1975* continue to apply to a child born as a result of a surrogacy arrangement until such time as the Court makes an order or orders as to parentage of the child under Part 4.

## Part 3—Lawful surrogacy agreements

### Division 1—Lawful surrogacy agreements

#### 9—Surrogacy agreements not in accordance with Act void and of no effect

Except as may be provided for in this Act, a surrogacy agreement (however described) is void and of no effect.

#### 10—Certain surrogacy agreements lawful in South Australia

- (1) Subject to this Act, a surrogacy agreement that complies with the requirements under this section, and any regulations made for the purposes of this section, will be taken to be a *lawful surrogacy agreement*.
- (2) Subject to this Act, the following persons may be parties to a lawful surrogacy agreement:
  - (a) a woman (the *surrogate mother*) who is to have a child or children for the purposes of the lawful surrogacy agreement;

- (b) a person, or both persons, (an *intended parent*) on whom parentage of the child or children born as a result of the lawful surrogacy agreement will be conferred in accordance with this Act.
- (3) Subject to this Act, each of the following provisions must be satisfied by, or in respect of, the surrogate mother under a lawful surrogacy agreement:
- (a) the surrogate mother must be 25 years of age or older at the time the lawful surrogacy agreement is entered;
  - (b) the surrogate mother must not have impaired decision-making capacity in respect of the decision to enter a lawful surrogacy agreement;
  - (c) the surrogate mother must be an Australian citizen or a permanent resident of Australia;
  - (d) the surrogate mother must not be pregnant at the time the lawful surrogacy agreement is entered;
  - (e) the surrogate mother must, before entering the lawful surrogacy agreement, undergo counselling of a kind required by section 14;
  - (f) the surrogate mother must provide to each intended parent a criminal history report in respect of the surrogate mother provided by South Australia Police, or the Australian Crime Commission or an Australian Crime Commission accredited agency or broker, within the 12 months prior to entering a lawful surrogacy agreement;
  - (g) the surrogate mother must comply with any other requirements set out in the regulations.
- (4) Subject to this Act, each of the following provisions must be satisfied by, or in respect of, the intended parents under a lawful surrogacy agreement:
- (a) each intended parent must be 25 years of age or older at the time the lawful surrogacy agreement is entered;
  - (b) an intended parent must not have impaired decision making capacity in respect of the decision to enter a lawful surrogacy agreement;
  - (c) each intended parent must be an Australian citizen or a permanent resident of Australia;
  - (d) at least 1 intended parent must be domiciled in South Australia at the time the lawful surrogacy agreement is entered;
  - (e) each intended parent must, before entering the lawful surrogacy agreement, undergo counselling of a kind required by section 14;
  - (f) at least 1 of the following circumstances must exist in relation to the intended parent or parents:
    - (i) at least 1 of the intended parents is a female person who is unlikely to become pregnant, or to be able to carry a pregnancy or give birth (whether because of medical reasons or otherwise); or
    - (ii) there is a risk that a serious genetic defect, serious disease or serious illness would be transmitted to a child born to an intended parent; or

- (iii) there is a risk that becoming pregnant or giving birth to a child would result in physical harm to an intended parent (being harm of a kind, or of a severity, unlikely to be suffered by women who become pregnant or give birth generally); or
    - (iv) it appears to be unlikely in all of the circumstances of the intended parent or parents that an intended parent would become pregnant, or be able to carry a pregnancy or give birth (whether because of gender identity, sexuality or any other reason);
  - (g) each intended parent must provide to the surrogate mother a criminal history report in respect of the intended parent provided by South Australia Police, or the Australian Crime Commission or an Australian Crime Commission accredited agency or broker, within the 12 months prior to entering a lawful surrogacy agreement;
  - (h) the intended parents must comply with any other requirements set out in the regulations.
- (5) Subject to this Act, a lawful surrogacy agreement must comply with each of the following provisions:
  - (a) the lawful surrogacy agreement must be in writing in a form that complies with any requirements set out in the regulations;
  - (b) the lawful surrogacy agreement must contain a lawyer's certificate in respect of the surrogate mother and each intended parent;
  - (c) the lawful surrogacy agreement must contain a counsellor's certificate in respect of the surrogate mother and each intended parent;
  - (d) the lawful surrogacy agreement must contain provisions setting out the arrangements for the payment of reasonable surrogacy costs;
  - (e) the lawful surrogacy agreement must contain provisions setting out the Court orders under Part 4 that the intended parents will be likely to seek following the birth of a child under the lawful surrogacy agreement (however, nothing in this paragraph prevents the intended parents from seeking orders that differ from those set out in the agreement);
  - (f) the lawful surrogacy agreement must comply with any other requirements set out in the regulations.
- (6) Without limiting this section, a lawful surrogacy agreement may contain such other lawful provisions as the parties to the lawful surrogacy agreement think fit.

## 11—Extent to which surrogacy costs are payable

- (1) Despite any other Act or law, no payment of any form may be made (whether to a surrogate mother, an intended parent or any other person or body) in relation to a lawful surrogacy agreement except payment of the following kinds (the *reasonable surrogacy costs*)—
  - (a) such reasonable costs as may be incurred, or likely to be incurred, in respect of the lawful surrogacy agreement, being—
    - (i) costs relating to the pregnancy (including any attempt to become pregnant) that is the subject of the lawful surrogacy agreement; and

- (ii) costs relating to the birth of a child born as a result of the lawful surrogacy agreement; and
  - (iii) costs relating to the postnatal care of a child born as a result of the lawful surrogacy agreement; and
  - (iv) medical, counselling or legal services provided in relation to the lawful surrogacy agreement; and
  - (v) reasonable out of pocket expenses incurred by the surrogate mother in relation to the lawful surrogacy agreement; and
  - (vi) any other costs, or costs of a kind, prescribed by the regulations for the purposes of this paragraph; or
- (b) payments representing loss of income of a kind set out in the regulations; or
  - (c) any other payment of a kind relating to the lawful surrogacy agreement of a kind prescribed by the regulations.
- (2) A provision of a lawful surrogacy agreement that is inconsistent with subsection (1) is void and of no effect.
- (3) Nothing in this section authorises regulations to be made that allow for commercial surrogacy (however described).

## **12—Variation of lawful surrogacy agreement**

The parties to a lawful surrogacy agreement may, by instrument in writing signed by each party, vary a lawful surrogacy agreement.

## **13—Extent to which lawful surrogacy agreement can be enforced**

- (1) Except as is provided for in this section, a lawful surrogacy agreement, or a provision of a lawful surrogacy agreement, is not enforceable.
- (2) A provision of a lawful surrogacy arrangement relating to the payment or reimbursement of reasonable surrogacy costs (being costs that have, in fact, been incurred) is enforceable in a court of competent jurisdiction.
- (3) However, subsection (2) does not apply where the surrogate mother—
- (a) refuses or fails to relinquish the custody or rights in relation to a child born as a result of the lawful surrogacy arrangement to the intended parents; or
  - (b) does not consent to the making of an order under section 18.

## **Division 2—Counselling**

### **14—Counselling requirements prior to entering lawful surrogacy agreement**

- (1) A surrogate mother must, before entering a lawful surrogacy agreement, undergo counselling regarding the implications of the agreement that complies with the following provisions:
- (a) the counselling must be provided by an accredited counsellor;
  - (b) 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;
  - (c) the counselling must comply with any requirements set out in the regulations for the purposes of this paragraph.
- (2) Each intended parent must, before entering a lawful surrogacy agreement, undergo counselling regarding the implications of the agreement that complies with the following provisions:
- (a) the counselling must be provided by an accredited counsellor;
  - (b) at least 1 session of the counselling must be provided to each intended parent in the absence of the other;
  - (c) 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;
  - (d) the counselling must comply with any requirements set out in the regulations for the purposes of this paragraph.
- (3) The costs of counselling under this section (including the costs of counselling the surrogate mother) are to be met by the intended parents.
- (4) The reasonable costs of counselling under this section (including the costs of counselling the surrogate mother) may be recovered against the intended parents as a debt in a court of competent jurisdiction.

### **15—Intended parents to ensure counselling available to surrogate mother during pregnancy and after birth**

- (1) The intended parents under a lawful surrogacy agreement must take reasonable steps to ensure that—
- (a) the surrogate mother and the spouse or domestic partner of the surrogate mother (if any) is, in accordance with any requirements in the regulations, offered counselling by an accredited counsellor—
    - (i) during any period in which a surrogate mother is attempting to become pregnant for the purpose of a lawful surrogacy agreement; and
    - (ii) during any pregnancy to which a lawful surrogacy agreement relates; and
    - (iii) during the period of 6 months after the birth of the child; and
  - (b) if the surrogate mother, spouse or domestic partner of the surrogate mother undergoes such counselling—the reasonable costs associated with the counselling are paid by the intended parents.

- (2) If the intended parents under a lawful surrogacy agreement refuse or fail to comply with subsection (1), each intended parent is guilty of an offence.

Maximum penalty: \$5 000.

- (3) The reasonable costs of any counselling under this section may be recovered against the intended parents as a debt in a court of competent jurisdiction.

### **Division 3—Preservation of certain rights of surrogate mother**

#### **16—Rights of surrogate mother to manage pregnancy and birth**

- (1) A surrogate mother has the same rights to manage her pregnancy and birth as any other pregnant woman.
- (2) A provision of a lawful surrogacy agreement that is inconsistent with subsection (1), or that purports to require the consent of the intended parents in relation to the management of the surrogate mother's pregnancy, the health of the unborn child to which the lawful surrogacy agreement relates, or the birth of a child to which the lawful surrogacy agreement relates, is void and of no effect.
- (3) This section applies despite any provision of a lawful surrogacy agreement to the contrary.

#### **17—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 to an unborn child to which a lawful surrogacy agreement relates, is to be determined as if the lawful surrogacy agreement did not exist.
- (2) Nothing in this Act limits the operation of an advance care directive under the *Advance Care Directives Act 2013*.

### **Part 4—Court orders relating to lawful surrogacy agreements**

#### **18—Court may make orders as to parentage of child born as a result of lawful surrogacy agreement**

- (1) Subject to this section, the Court may, on an application by 1 or both of the intended parents under a lawful surrogacy agreement, make 1 or more of the following orders in relation to a child born as a result of the lawful surrogacy agreement:
  - (a) an order declaring—
    - (i) that the relationship between the child and the intended parent or parents is as specified in the order; and
    - (ia) in a case where subsection (1a) applies—that the relationship between the child and the deceased person is as specified in the order; and
    - (ii) that the relationship between the child and the surrogate mother is as specified in the order; and
    - (iii) that the relationships of all other persons to the child are to be determined according to the operation and effect of the preceding subparagraphs;
  - (b) an order declaring that the name of the child will be as specified in the order;

- (c) such consequential or ancillary orders as the Court considers appropriate.
- (1a) If, in proceedings under subsection (1) brought by an intended parent, the Court is satisfied that human reproductive material used in relation to the relevant lawful surrogacy agreement came from a person—
- (a) who has died; and
  - (b) who, before their death—
    - (i) was a party to the lawful surrogacy agreement; or
    - (ii) consented to the human reproductive material being used in relation to the lawful surrogacy agreement,
- the Court may make an order under subsection (1)(a)(ia) declaring the relationship between the child and the deceased person.
- (2) An application under this section must be made—
- (a) not less than 30 days but not more than 12 months after a child is born as a result of the lawful surrogacy agreement; or
  - (b) if the Court considers it is in the best interests of the child or that exceptional circumstances exist—at such later time as the Court may allow.
- (3) An applicant for an order under this section must provide to the Court (whether in an application or in proceedings under this section) such of the following information as is known to the applicant:
- (a) the identity of the donor of any human reproductive material used in relation to the lawful surrogacy agreement and resulting in the birth of a child (being a donor who is not the surrogate mother or an intended parent);
  - (b) any other information prescribed by the regulations.
- (4) In the case where a child born as a result of the lawful surrogacy agreement has 1 or more birth siblings—
- (a) the application will be taken to relate to the child and each birth sibling; and
  - (b) the Court may only make an order under subsection (1)(a) in relation to the child if it makes a comparable order in relation to each birth sibling, unless the Court considers it is not in the best interests of the child to do so.
- (5) The Court may not make an order under subsection (1) unless satisfied that—
- (a) making the order is in the best interests of the child; and
  - (b) the intended parent or parents (if alive at the time of the order) are fit and proper to assume the role of parent of the child; and
  - (c) subject to this section, the surrogate mother under the lawful surrogacy agreement consents to the making of the order; and
  - (d) subject to this section, each intended parent under the lawful surrogacy agreement (if alive at the time of the order) consents to the making of the order.
- (6) However, the Court may dispense with the requirement under subsection (5)(c)—
- (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.
- (7) The Court may excuse a failure to comply with a particular requirement under Part 3 (other than a prescribed requirement) if satisfied that, in the circumstances of the particular case, it is appropriate for the Court to make orders under this section despite the failure and, in such a case, may order that, subject to such conditions as may be stipulated by the Court, the requirement be dispensed with.
- (8) An order under subsection (7) may be conditional or unconditional.
- (9) The Court may, in the case where only 1 intended parent has applied for the order, and the other intended parent is alive at the time of the application, make an order under subsection (1) in favour of the applicant intended parent only—
  - (a) if the other intended parent consents to the making of an order in favour of the applicant intended parent; or
  - (b) if the applicant intended parent cannot, after making reasonable inquiries, contact the other intended parent to obtain their consent to the making of an order in favour of the applicant intended parent; or
  - (c) in any other circumstances prescribed by the regulations.
- (10) The Court may, before deciding whether to make an order under this section, require any party to the proceedings to provide an assessment of a specified kind from an accredited counsellor (obtained at the expense of the intended parents) in relation to the matter.
- (11) On the making of an order under subsection (1)(a)—
  - (a) the appointment of a person or persons as guardian of the child in force immediately before the order is made will be taken to be revoked; and
  - (b) any order of the Court under a child protection law placing the child in the custody of a person or persons in force immediately before the order is made will be taken to be revoked; and
  - (c) any presumptions or other rules as to parentage of the child under the *Family Relationships Act 1975* will be taken not to apply in relation to the child.
- (12) To avoid doubt, the Court, in proceedings under this section—
  - (a) is not bound by the rules of evidence but may inform itself as it thinks fit; and
  - (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and
  - (c) may take into account anything it considers relevant.
- (13) Nothing in this section prevents the name of a child being later changed in accordance with another law of the State.

## 19—Court may revoke order under section 18

- (1) Subject to this section, the Court may, on an application by the birth mother of a child, make an order revoking an order under section 18 (the *original order*) relating to a child, and any comparable order under that section relating to the birth siblings of the child.
- (2) The Court must not make an order under subsection (1) unless satisfied that—
  - (a) making the order is in the best interest of the child; and
  - (b) 1 or more of the following circumstances applies in relation to the original order:
    - (i) the original order was obtained by fraud, duress or other improper means;
    - (ii) a consent relied on for the making of the original order was not an effective consent because it was obtained by fraud, duress or inducement;
    - (iii) there are exceptional reasons why the original order should be discharged; and
  - (c) reasonable efforts have been made to give notice of the application to—
    - (i) each intended parent under the relevant lawful surrogacy agreement; and
    - (ii) if the Court considers it appropriate having regard to the child's age, the child.
- (3) If the Court makes an order under subsection (1), the Court must also make the following ancillary orders:
  - (a) an order declaring—
    - (i) that the relationship between the child and the birth mother is as specified in the order; and
    - (ii) that the relationship between the child and the intended parents is as specified in the order; and
    - (iia) that the relationship between the child and a deceased person in relation to whom an order had been made under section 18(1)(a)(ia) is as specified in the order; and
    - (iii) that the relationships of all other persons to the child are to be determined according to the operation and effect of the preceding subparagraphs;
  - (b) an order declaring that the name of the child will be as specified in the order (having regard to the principle that the child's first name should not be changed by the order except in exceptional circumstances),  
and may make such other consequential or ancillary orders as the Court considers appropriate.
- (4) Any person may apply for leave to intervene in an application under this section and the Court may make an order permitting the person to intervene in the application.

- (5) Except where the Court orders otherwise, a person who is permitted to intervene in an application under this section will be taken to be a party to the application.
- (6) Subject to any orders made under subsection (3), if an original order is revoked under this section, any rights, duties and relationships under the law of the State (including, to avoid doubt, parentage relationships determined under the *Family Relationships Act 1975*) are to be determined as if the original order had not been made.
- (7) Subject to any order made under this section, nothing in this section affects anything lawfully done, or any proprietary right or interest created in a person, while the original order was in force.
- (8) Nothing in this section prevents the name of a child being later changed in accordance with another law of the State.

## **20—Court may require separate representation of child**

- (1) In proceedings before the Court under this Act relating to a child born as a result of a lawful surrogacy agreement, the Court may, if it thinks it appropriate to do so—
  - (a) order that the child is to be separately represented in the proceedings; and
  - (b) make any other orders the Court considers necessary or appropriate to secure that separate representation.
- (2) A legal practitioner representing a child in proceedings under this Act must act in the best interests of the child, having regard to any evidence reasonably available to the legal practitioner.

## **21—Court to notify Registrar of Births, Deaths and Marriages**

The Registrar of the Court must, as soon as is reasonably practicable after the Court makes an order under section 18 or 19 relating to a child, give to the Registrar of Births, Deaths and Marriages written notice of the following matters:

- (a) the date of the order;
- (b) the full name, address and occupation of the birth mother of the child;
- (c) the full name, address and occupation of the intended parent or parents of the child under the relevant lawful surrogacy agreement;
- (ca) the full name and any other prescribed particulars of any deceased person in relation to whom an order is made under section 18(1)(a)(ia) or section 19(3)(a)(ia);
- (d) the name by which the child is known before, and is to be known after, the order becomes effective;
- (e) details of the date and place of birth of the child;
- (f) the terms of any relevant consequential or ancillary orders made;
- (g) if known, the identity of the donor of any human reproductive material used in relation to the relevant lawful surrogacy agreement and resulting in the birth of a child (being a donor who is not the birth mother, an intended parent or a deceased person the subject of an order under section 18(1)(a)(ia));

- (h) if known, such other information as may be reasonably required by the Registrar of Births, Deaths and Marriages for the purposes of registration of the birth of the child to whom the order relates.

## 22—Access to Court records

Except as may be authorised by the Court, the records of proceedings relating to an order under section 18 or 19 will not be open to inspection.

## Part 5—Offences relating to surrogacy agreements

### 23—Offence relating to commercial surrogacy agreements

- (1) A person who enters, or purports to enter, a commercial surrogacy agreement is guilty of an offence.  
Maximum penalty: Imprisonment for 12 months.
- (2) In proceedings for an offence against this section, the prosecution need not prove that a woman became pregnant, or a child was or is to be born, pursuant to the commercial surrogacy agreement.
- (3) For the purposes of this section, a reference to a payment will be taken not to include a reference to a payment of reasonable surrogacy costs.
- (4) In this section—

*commercial surrogacy agreement* means a surrogacy agreement that provides for, or purports to provide for, a person to receive payment for any of the following:

- (a) entering, or agreeing to enter, the surrogacy agreement; or
- (b) giving up a child, or any rights in respect of a child, born as a result of the surrogacy agreement; or
- (c) consenting to the making of an order under this Act relating to a child born as a result of the surrogacy arrangement.

### 24—Offence to arrange etc surrogacy agreement for another person

- (1) A person who, for valuable consideration—
- (a) negotiates, or arranges or obtains the benefit of, a surrogacy agreement on behalf of another; or
- (b) offers to negotiate, or arrange or obtain the benefit of a surrogacy agreement on behalf of another; or
- (c) arranges, or offers to arrange, introductions between people seeking to enter a surrogacy agreement,
- is guilty of an offence.  
Maximum penalty: Imprisonment for 12 months.
- (2) Subsection (1) does not apply to—
- (a) the negotiation, or arranging or obtaining the benefit of, a lawful surrogacy agreement by an intended parent on behalf of another intended parent under the lawful surrogacy agreement; or

- (b) any other act, or act of a kind, prescribed by the regulations.
- (3) In proceedings for an offence against this section, the prosecution need not prove that—
  - (a) a surrogacy agreement was, in fact, entered; or
  - (b) a woman became pregnant, or a child was or is to be born, pursuant to the surrogacy agreement.

## **25—Offence to induce person to enter surrogacy agreement**

- (1) A person who, by threat of harm, or by dishonesty or undue influence, induces another to enter a surrogacy agreement is guilty of an offence.  
Maximum penalty: Imprisonment for 5 years.
- (2) A person who, for valuable consideration, induces another to enter into a surrogacy agreement is guilty of an offence.  
Maximum penalty: Imprisonment for 2 years.
- (3) In proceedings for an offence against this section, the prosecution need not prove that a woman became pregnant, or a child was or is to be born, pursuant to the surrogacy agreement.

## **26—Offence to advertise certain services relating to surrogacy**

- (1) A person must not publish an advertisement, statement, notice or other material that—
  - (a) seeks, or purports to seek, the agreement of a person to act as a surrogate mother for valuable consideration; or
  - (b) states, or implies, that a person is willing to act as a surrogate mother for valuable consideration.

Maximum penalty: \$10 000.

- (2) In proceedings for an offence against this section, it is not necessary for the prosecution to prove that a person did, in fact, as a surrogate mother, or that a surrogacy agreement (whether a lawful surrogacy agreement or otherwise) was, in fact, entered.
- (3) In this section—

*publish* means to disseminate or provide access, by any means, to the public or a section of the public.

## **Part 6—Miscellaneous**

### **27—Provision of information etc for purposes of *Births, Deaths and Marriages Registration Act 1996***

Except as may be provided for in this Act, nothing in this Act affects the requirement of the parents of a child born as a result of a surrogacy agreement to have the child's birth registered under the *Births, Deaths and Marriages Registration Act 1996*.

## 28—Limitation of liability

Except as specifically provided in this Act, no civil or criminal liability attaches to the Crown, or a person exercising powers and functions under this Act in respect of an act or omission in good faith in the exercise or discharge, or purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act.

## 29—Confidentiality

A person must not, directly or indirectly, disclose information obtained in the course of the administration or operation of this Act except—

- (a) for the purposes of the administration or enforcement of this Act; or
- (b) for the purposes of referring the matter to a law enforcement agency; or
- (c) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or
- (d) to an agency or instrumentality of this State, the Commonwealth or another State or a Territory of the Commonwealth for the purposes of the proper performance of its functions; or
- (e) if the disclosure is reasonably necessary for the protection of the lawful interests of that person; or
- (f) as is otherwise required or authorised by or under this or any other Act.

Maximum penalty: \$10 000.

## 30—Service

Except where this Act requires otherwise, a notice or other document required or authorised to be given to or served on a person under this Act may—

- (a) be given to the person personally; or
- (b) be left for the person at the person's place of residence or business with someone apparently over the age of 16 years; or
- (c) be posted to the person at the person's last known place of residence or business; or
- (d) be transmitted by email to an email address provided by the person (in which case the notice or other document will be taken to have been given or served at the time of transmission); or
- (e) if the person is a company or registered body within the meaning of the *Corporations Act 2001* of the Commonwealth, be served in accordance with that Act.

## 31—Review of Act

- (1) The Minister must cause a review of the operation of this Act to be conducted and a report on the review to be prepared and submitted to the Minister.
- (2) The review and the report must be completed after the fifth, but before the sixth, anniversary of the commencement of this Act.
- (3) The Minister must cause a copy of the report submitted under subsection (1) to be laid before both Houses of Parliament within 6 sitting days after receiving the report.

## 32—Regulations

- (1) The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.
- (2) Without limiting the generality of subsection (1), the regulations may provide for—
  - (a) fees in respect of any matter under this Act and their payment, recovery or waiver; and
  - (b) fines, not exceeding \$10 000, for offences against the regulations; and
  - (c) facilitation of proof of the commission of offences against the regulations.
- (3) The regulations may—
  - (a) be of general or limited application; and
  - (b) make different provision according to the matters or circumstances to which they are expressed to apply; and
  - (c) make provisions of a saving or transitional nature consequent on the enactment of this Act or on the commencement of specified provisions of this Act or on the making of regulations under this Act; and
  - (d) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Minister or any other specified person or body; and
  - (e) apply or incorporate, wholly or partially and with or without modification, a code, standard, policy or other document prepared or published by the Minister or another specified person or body.
- (4) If a code, standard or other document is referred to or incorporated in the regulations—
  - (a) a copy of the code, standard or other document must be kept available for public inspection, without charge and during ordinary office hours, at an office or offices specified in the regulations; and
  - (b) evidence of the contents of the code, standard or other document may be given in any legal proceedings by production of a document apparently certified by the Minister to be a true copy of the code, standard or other document.

## Schedule 1—Transitional provisions etc

### Part 5—Transitional and saving provisions etc

#### 11—Continuation of recognised surrogacy agreements under *Family Relationships Act 1975* as lawful surrogacy agreements

- (1) A recognised surrogacy agreement under Part 2B of the *Family Relationships Act 1975* that was in force immediately before the commencement of this clause—
  - (a) will, on the commencement of clause 10 of this Schedule, be taken to continue in force in accordance with its terms; and
  - (b) will be taken to be a lawful surrogacy agreement under this Act.

- (2) Any counselling, certificate or other matter done under the *Family Relationships Act 1975* in respect of a recognised surrogacy agreement continued under this clause will be taken to have effect as if it were counselling, a certificate or matter done under this Act.
- (3) A reference in any Act or law, or contract or other instrument, to a recognised surrogacy agreement (being a recognised surrogacy agreement continued under this clause) will be taken to be a reference to the agreement as so continued.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Legislation amended by principal Act

The *Surrogacy Act 2019* amended the following:

*Assisted Reproductive Treatment Act 1988*

*Births, Deaths and Marriages Registration Act 1996*

*Family Relationships Act 1975*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2019	31	<i>Surrogacy Act 2019</i>	7.11.2019	1.9.2020 ( <i>Gazette 18.6.2020 p3392</i> ) except Sch 1 (cl 4)—7.11.2021 (s 7(5) <i>Acts Interpretation Act 1915</i> )
<b>2024</b>	<b>8</b>	<b><i>Assisted Reproductive Treatment (Posthumous Use of Material and Donor Conception Register) Amendment Act 2024</i></b>	<b>28.3.2024</b>	<b>Sch 1 (cll 6 to 9)—26.2.2025 (<i>Gazette 28.11.2024 p4271</i>)</b>

### Provisions amended

New entries appear in bold.

Provision	How varied	Commencement
Pt 1		
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	26.2.2025
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	26.2.2025
s 4		
s 4(1)		
human reproductive material	inserted by 8/2024 Sch 1 cl 6	26.2.2025
Pt 4		
s 18		
s 18(1)	amended by 8/2024 Sch 1 cl 7(1)	26.2.2025
s 18(1a)	inserted by 8/2024 Sch 1 cl 7(2)	26.2.2025
s 18(5)	amended by 8/2024 Sch 1 cl 7(3), (4)	26.2.2025
s 19		

s 19(3)	amended by 8/2024 Sch 1 cl 8	26.2.2025
s 21	amended by 8/2024 Sch 1 cl 9(1), (2)	26.2.2025
Sch 1		
<i>Pts 1—4</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	26.2.2025