

# LEGAL PROCESSES IN SURROGACY FOR AUSTRALIANS



**Surry Hills Office:** Upper Ground, 55 Brisbane Street, Surry Hills, NSW 2010.

**t** [+612 8218 2116](tel:+61282182116) **f** [+612 8588 1203](tel:+61285881203) **e** [surryhills@sbfamilylawyers.com.au](mailto:surryhills@sbfamilylawyers.com.au)

**Parramatta Office:** Suite 7, 5 Macquarie Street, Parramatta, NSW 2150.

**t** [+612 9633 1088](tel:+61296331088) **f** [+612 9633 4244](tel:+61296334244) **e** [parramatta@sbfamilylawyers.com.au](mailto:parramatta@sbfamilylawyers.com.au)

**Crows Nest:** Also available, by appointment, at 133 Alexander Street, Crows Nest, NSW 2065.

# SURROGACY LAWS IN AUSTRALIA



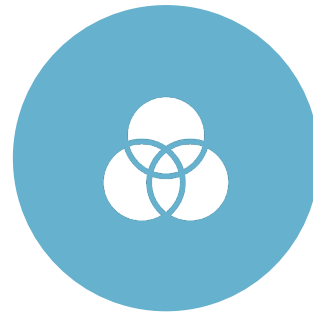
Each State and Territory (except the Northern Territory) has its own legislation.



All allow for altruistic surrogacy only.



NSW, ACT and QLD make it a criminal offence to engage in commercial surrogacy, including internationally.



The legislation in all states is fairly uniform, with small, but important differences, eg age of surrogate.

## BASIC TERMS IN SURROGACY

- Altruistic surrogacy = NO financial benefit for the surrogate.
  - Payment of expenses (“surrogacy costs”) is permitted
- Commercial surrogacy = financial gain for the surrogate.



## COMMONALITY BETWEEN STATES AND TERRITORIES

- Must be altruistic.
- Intended Parents (IPs) must be residents of that state/ territory.
- All states and territories place an emphasis on the mental and legal autonomy of both the IPs and the surrogate.
- Most states and territories place fundamental obligations on ART (assisted reproductive technology) providers to ensure that the IPs, surrogate, and eventually the child have provided express consent, and that their privacy is respected.
- Surrogacy arrangements are not enforceable, however the agreement to pay for the surrogate's medical expenses may be.

# DIFFERENCES BETWEEN STATES AND TERRITORIES

## **Age of surrogate:**

- At least 25 years old in NSW s27, VIC – ART Act s40(1)(b), WA s17(A)(1), QLD s22(2)(f), TAS s16(2)(c) & ACT s23.
- At least 18 years old in SA s10HA(2a)(b).

## **Time to make an application for transfer/substitution of parentage after the child's birth:**

- After 28 days in VIC s20(2)(a), QLD s21(1), SA s10HB(5).
- After 30 days in NSW s16, WA (s 20(2)-(3)), TAS s1(a).
- After 6 weeks in ACT s25(3).
- All are up to 6 months, but applications can be made later with leave.

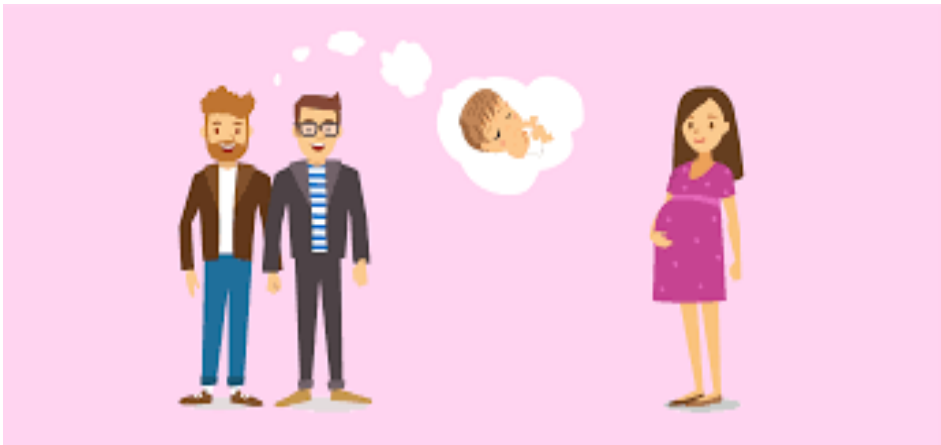
## **Location and nature of conception:**

- Required to have taken place in the relevant state - VIC s20(1), ACT s24(a), SA s10HA(h)(i).
- Silent as to location of conception – NSW, QLD, TAS, WA.
- Must be gestational – ACT s24(b),
- Must be gestational if using ART provider – VIC ART Act s40(1)(ab)

## **Previous birth requirement for surrogate:**

- Previously given birth to a live child VIC - ART Act s40(1)(ac), TAS s16(2)(d), WA s17(a)(ii)

# MEET BILL, GEORGE & CHLOE



Bill and George have been a couple for 7 years, and they want a child. They are both 35.

Their friend Chloe has agreed to be their surrogate and will not be paid.

They have agreed gestational surrogacy.

Chloe is:

- 26 years old; and
- A single mother.

Sarah Bevan Family Lawyers will be representing Bill and George. Chloe will have her own independent legal representation. They are all obtaining counselling as well.

They all live in Victoria.

## MEETING THE JURISDICTIONAL REQUIREMENTS

- Pursuant to the *Assisted Reproductive Treatment Act 2008 (Vic)*, Bill and George as IPs meet the jurisdictional requirements.
- They both:
  - Live in Victoria and intend to remain there;
  - Intend for the child to be conceived as a result of a treatment procedure in Victoria; and
  - Have found a surrogate who is at least 25 years of age.



## MEETING THE PRE-PROCEDURAL REQUIREMENTS

- *Assisted Reproductive Treatment Regulations 2019* (Victoria)
  - Chloe is to:
    - Provide written consent in the prescribed form stipulating that she will undergo the treatment procedure (Schedule 1 – Regulation 6).
  - Bill and George must:
    - Provide written consent before donating gametes to be used in the treatment procedure (Schedule 2 – Regulation 8).

---

## IN THE EVENT CHLOE WITHDRAWS CONSENT AND INTERSTATE SURROGACY

- Let us assume that Chloe does not wish to continue with being the surrogate. Bill and George then find another surrogate who is over the age of 25 in Western Australia and the child is born in Victoria. The surrogate in Western Australia has also given birth before.
- Do Bill and George meet the jurisdictional requirements in Victoria?



## IN THE EVENT CHLOE WITHDRAWS CONSENT AND INTERSTATE SURROGACY

- The surrogate is over the age of 25 (40(1)(b)) and has taken place in Victoria (s20(1)).
- The surrogate has also previously given birth to a live child (s40(1)(ac)).



## AFTER PROVING JURISDICTION

Once IPs have found a surrogate, the process is:

1. Surrogacy agreement preparation, pre-conception.

2. Signing surrogacy agreement contemporaneously with pre-conception counselling. The IP's and the surrogate both do this, but separately.

After conception there is no legal action required until after birth.

3. After birth, surrogate and IP's get a counsellor's report, and complete Application and Affidavits for the Parentage Order. Application must be made within the relevant state's time frame, although exception exists for exceptional circumstances, e.g. NSW s16(3).



## STAGE I - THE CONTENT OF THE SURROGACY AGREEMENT

- The drafted surrogacy agreement:
  - Promotes trust between Bill and George as IPs and Chloe as the surrogate;
  - Address what expenses Chloe is to be compensated for, and how;
  - Confirms the parties have received independent legal advice and counselling;
  - Confirms the nature of the agreement as altruistic and pre-conception;
  - The roles of the IPs during the pregnancy and the post-relationship the surrogate will have the child;
  - Addresses the 'what if's' such as birth defects and deaths of one of the IPs.
  - The surrogacy agreement takes 2-4 weeks for us to draft. At this stage, pre-commissioning of counselling for the IP's will also commence.
  - The surrogacy agreement can either be gestational (egg and sperm given by donors) or a traditional (surrogate's egg is used).

## STAGE 2 - SIGNING AND COUNSELLING

- Prior to implantation of the embryo via IVF into Chloe, the surrogacy agreement must be signed contemporaneously to individual counselling. IVF clinics have ethics committees which ensure that each party to the surrogacy must have independent legal representation and must engage in individual counselling.
- There are specific timeframes that apply.



## STAGE 3 – PARENTAGE ORDERS



**Birth Certificate**  
This Certifies That

(Name)  
was born to  
(Mother) and (Father)  
at  
(Date) (Time)  
length  
(Weight) (Length)  
(Location)  
(City) (State)  
(Signed) (Signed)

- Steps here are procedural, and the responsibility is on the IP's lawyer to ensure all appropriate documentation is collated and prepared.
- Initial drafting of documents prior to due date.
- Advise/remind of counselling.
- Once all documents finalised, file at Court within time frames.
- Most Courts do not require appearance (except often Qld).
- Most Courts only have a list once a month, if that.
- Once Parentage Order is made, then apply for the new Birth Certificate. IPs will be listed as the parents.
- Expect that this process will take approximately 10 weeks.

## PARENTAGE ORDERS IN VICTORIA

For Bill and George to be granted a Parentage Order in Victoria, they need to satisfy the Patient Review Panel in order for a surrogacy arrangement to be accepted, and then apply under the *Status of the Children Act 1974 (VIC)* for a Substituted Parentage Order.

The substantive requirements are similar and are as follows:

- The surrogate is not receiving financial benefit.
- The surrogate is at least 25 years old.
- The surrogate has previously given birth to a live child.

*Assisted Reproductive Treatment Act 2008 (VIC)*



# EGG DONORS

In Victoria, ART Providers must:

- Be registered.
- Follow health and infection regulations.
- Make counselling available to patients.
- Ensure donors consent to the use of their gametes.
- Protect the privacy of any surrogates, donors and offspring.
- Donors must have undergone counselling.
- Donors must be over the age of 18.
- Donors must not have provided gametes to 10 or more procedures.



*Assisted Reproductive Treatment Act 2008 (VIC).*

# THE IMPORTANCE OF DONOR AGREEMENTS

- An egg donation agreement outlines:
  - The intentions of the IPs and the donor, as well as their legal rights and responsibilities.
  - The current circumstances of the parties.
  - The parameters of the relationship between the donor and the IPs pre-conception, at conception and post-conception- this includes the extent to which the donor is excluded from having parental responsibility of the child.
- It is always encouraged that the donor receive independent legal advice prior to signing the agreement so their understanding of the agreement is assured, which reduces the probability of dispute in the future.

## THE OUTCOME OF THE PARTIES



- Bill and George with Chloe are likely to meet the jurisdictional requirements.
- In the event Chloe withdraws consent, Bill and George are able to find a surrogate from another state and have an interstate surrogacy agreement drawn up.
- It is likely that a Parentage Order will be granted.

# QUESTIONS/COMMENTS?



SARAH BEVAN, Accredited Specialist in Family Law

e [sarah.bevan@sbfamilylawyers.com.au](mailto:sarah.bevan@sbfamilylawyers.com.au)

w [sbfamilylawyers.com.au](http://sbfamilylawyers.com.au)