THE LAW SOCIETY
OF NEW SOUTH WALES

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24 January 2018

Mr Paul McKnight
Executive Director Strategy and Policy
Department of Justice
GPO Box 31 SYDNEY 2001

By email: paul.mcknight@justice.nsw.gov.au

Dear Mr McKnight,

Proposed Consequential Amendments to the *Status of Children Act 1996* and *Births, Deaths and Marriages Registration Act 1995* Following Changes to the *Marriage Act 1961*

Thank you for your note of 21 December 2017 on the aforementioned proposed amendments. Please find below the Law Society of NSW ("Law Society") comments in relation to the proposed amendments.

Status of Children Act 1996

We note that the majority of consequential amendments proposed are of a technical nature, and support the substance and intent of the changes suggested in your note. In consultation with practitioners however we believe that as a general proposition the opportunity might be taken to draft the changes in such a way as to remove presumptions on the basis of gender or marital status more generally, given the policy intent behind amendments to the *Marriage Act 1961*.

For example, it may be opportune to adjust the wording of the presumptions in the *Status of Children Act 1996* ("*SoC Act*") to remove any inadvertent discrimination against parents who may be two fathers, or for intersex parents, or who may become parents through the use of surrogates. Specifically, we query whether there should be a hierarchy of presumptions where a married couple is treated differently to a de facto couple; we think it is appropriate that s 9 should also apply to a de facto couple to avoid any actual or perceived discrimination on the basis of marital status.

With regards to s 14 we consider that one provision that merges subsections (1) and (1A) would provide for the same outcome without a separate presumption.

Births, Deaths and Marriages Registration Act 1995

We again support the broad substance and intent of your changes, and whilst the majority of consequential amendments proposed are of a technical nature, we believe that the amendments may usefully be extended, as suggested below.

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In examining these amendments we note that a related unresolved issue from previous amendments may usefully be addressed.

In 2008 the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* extended legal status to a female de facto partner. Prior to this, when a woman gave birth to a child conceived through a fertilisation procedure, parental status was only conferred on the woman's de facto partner if they were a man. If the woman was in a same-sex de facto relationship, the child had only one legal parent.

The amendments applied retrospectively, legally recognising both parents of all NSW children born to same-sex couples, including those born before the 2008 changes.

To enable those changes to be reflected on the child's birth records, the *BDMR Act* was further amended to allow two women to be named on a child's birth certificate. Transitional provisions were enacted to facilitate the amendments in sch 3, pt 4, cl 17.

These provisions also provide for the removal of a man who has been recorded as the 'father' of the child on the birth records in circumstances where he is not the child's parent. We note that sperm and egg donors are not legal parents, whether they are known or anonymous donors, which means that removal from the birth records does not result in any change to the person's legal status. We note also that correcting the birth records does not remove the donor's status as a person concerned with the child's welfare, and accordingly the donor could apply for orders to spend time with a child in the family law courts.

Currently, a woman who is legally the child's parent pursuant to the *SOC Act* can be named on a child's birth certificate with the consent of both the birth mother and, if applicable, the person named as 'father' by simply lodging a form with the Registry. If the 'father' does not consent, his name can be removed by way of a court order pursuant to s 19 and sch 3, cl 17. The Courts in *AA v Registrar of Births Deaths and Marriages and BB*[1] and *LU v Registrar of Births Deaths and Marriages (No 2)*[2] have considered this issue.

From those judgments it is unclear whether the Court has the power to order the addition of the unnamed parent where the birth mother does not consent.

In *LU*, a case in which a sperm donor was recorded as the 'father' on the child's birth certificate, Taylor DCJ doubted the Court's power to order the Registrar of Births Deaths and Marriages to amend the birth records. His Honour was of the view that the Court only had the power to authorise the Registrar to remove the donor's name, not to order the Registrar to do so. Therefore, the birth mother's consent was required pursuant to cl 17(4)(a).[3]

Arguably, in circumstances where there is no person named as 'father' on a child's birth records, the name of the second female parent could be added pursuant to s 19 as it is 'registrable information about a birth or a child's parents'. However, there is uncertainty about the Court's power in these circumstances. While there have been no reported decisions to date, it might be argued that cl 17 requires the birth mother's consent in all cases where the addition of a second female parent occurs as a consequence of the retrospective amendments enacted by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008*.

The Women's Legal Service (NSW) is aware of families where children do not have both legal parents named on their birth certificate, but the unnamed parent is wary of litigation

[1] [2011] NSWDC 100.
[2] [2013] NSWDC 123.
[3] *LU*, [21]-[22] and [35]-[36].

because of the present uncertainty in the law. We are also aware of at least one case, subject to suppression orders, where litigation was withdrawn due to this uncertainty, with costs orders made against the unnamed parent.

This issue could be resolved by judicial determination at some date in the future. In the interim however there is a risk that children are being disadvantaged by not having both parents named on a birth certificate, which can cause problems when evidence of the parent-child relationship is required, e.g., by hospitals and schools.

It is arguable that s 18 of the *BDMR Act* may address any potential issues of that nature. However, in our view the provision is not an entirely adequate solution. Section 18 does not assist where the birth mother does not consent due to the interaction with cl 17, which is expressed to be despite s 18. This is particularly the case following the reasoning in *LU*.

We consider that a minor amendment to the *BDMR Act* would clarify the Court's powers and provide certainty to affected families, and suggest that the options below may be considered.

1. **Add a subsection to s 19**. Insert wording into s 19 to give the Court explicit power to correct, amend or remove information contained on the Register that is incorrect.

2. **Amend cl 17 of sch 3.** Insert wording into cl 17 to allow the Court to order:

    a. the removal of person named as 'father'; and

    b. the addition of a second parent (without specifying gender) without the requirement of consent of birth mother (where a finding as to parentage has been made).

3. **Insert a clearer process in the *BDMR Act.*** An alternative to using the transitional provisions in the Schedule would be to include a provision within the body of the Act at s 20. The benefit of doing this would be to provide a clear pathway for all parents, including those for whom the transitional provisions are not or may not be applicable, e.g., a child born after 2008, or where the mother's de facto partner is male.

Thank you for the opportunity to comment. Should you have any questions or require further information, please contact Steven Patrick, Policy Lawyer on (02) 9926 0212 or email steven.patrick@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President