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Your Ref: Natalie Marsic

Executive Officer
Secretariat of the Standing Committee of Attorneys-General
NSW Attorney General's Department
GPO Box 6
Sydney NSW 2001

17 April 2009

Dear Ms Marsic,

Re: A Proposal for a National Model to Harmonise Regulation of Surrogacy

Thank you for the invitation to comment on the proposed regulation of Surrogacy and for the extension of time within which to respond.

The Family Issues Committee of the Law Society of New South Wales ("The Committee") is grateful for the opportunity to make submissions and has attempted to provide responses to each question posed in the Discussion Paper. The Committee however wishes to make some initial comments which would not necessarily arise within those responses. These are as follows:

1. All of the comments are based on the position that the paramount consideration is the welfare of the child. In saying that the Committee does not imply that anyone suggests otherwise. Indeed that statement or ones similar are often repeated and are sincerely promoted. This proposal has been a central tenet of the *Family Law Act* for almost 35 years and has been part of the law for longer. The Committee does however feel it necessary to repeat the Paramountcy Principle because, in some ways, the notion of surrogacy and the surrounding debate overlaps with and intersects with the rights and interests of adults.

The desire to have a child is a powerful force and for some it is all-consuming, which leads many people to seek out and access means to achieve that end. If an adult is infertile, either biologically or socially, then Artificial Reproductive Technology (ART) and Surrogacy are just some of those means. Notwithstanding the genuine and sincere motivation many adults have in seeking to parent a child, it is conceivable that the best interests of the child may not always be congruent with the adult's desire.

We therefore approach the responses contained in this submission not from the rights or interests of the adult but from the position of the best interests of the child.

2. Further, it is the position of the Committee that a broad and inclusive approach should be taken in relation to the issue of surrogacy. In this respect, it is noted that commissioning/intending parents and a surrogate mother may utilise either the ART process or a private arrangement. It is of concern that the primary focus of the proposal/discussion paper is on those parties who utilise ART processes in registered clinics such that there may be a disenfranchisement and marginalisation of children born of a private arrangement. This may occur in circumstances where the commissioning/intending parents and surrogate mother were unaware of the requirements that may be necessary, or were unable to obtain access to them, prior to seeking parentage orders. If this is the case, then they may not be entitled to apply for parentage orders at all and whilst it is recognised that these parties would be able to apply to the Court for parenting orders, children born of such arrangements should be in a position to have the same rights as those born of ART processes. This would go some way to ensuring that the best interests of all children are met.

3. It is not clear what is meant by 'Surrogacy'. Is it:
   a) where a birth mother conceives and gives birth to a child using the sperm of a donor being one of the commissioning parents?
   b) where a birth mother conceives and gives birth to a child using the sperm of a donor <u>not</u> being one of the commissioning parents (whether an anonymous donor or not)?
   c) where a birth mother carries and gives birth to a child of the egg from a female donor being one of the commissioning parents fertilised by the sperm of a donor being one of the commissioning parents?
   d) where a birth mother carries and gives birth to a child of the egg from a female donor being one of the commissioning parents fertilised by the sperm of a donor <u>not</u> being one of the intended 'parents'? or
   e) all of the above, or
   f) some other model?

   The Committee supports a Surrogacy arrangement only in the event that such an arrangement is entered into prior to conception.

   The Committee also recognises that care should be taken to ensure any 'model' of surrogacy does not create problems for current and future generations, such as in avoiding the conception of children by genetic parents who come within particular degrees of consanguinity.

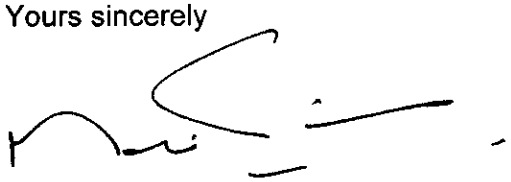
4. It is not clear why the Federal model under the *Family Law Act* might not be drawn upon. A Court exercising jurisdiction under that *Act* is capable of making Parentage Orders and Parenting Orders.

5. The Committee supports a minimalist but broad based approach to the regulation of surrogacy which utilises one legal system and one Court system. This in effect answers the question in the discussion paper as to whether a national system of regulation is to be preferred to a uniform system between the States and Territories. The ideal approach is to achieve a single regulatory framework across Australia. The option of a Federal law is to be preferred because it is consistent with the broader public policy goal of having all matters in relation to children and families being dealt with in one federal specialist Court system.

6. Finally, the comments within this submission have been the subject of considered and intensive debate by the Committee. It is perhaps self-evident that the subject matter is difficult and not without controversy. In that sense, the Committee did not always have a unanimous view in response to each question and in some respects merit was seen in a variety of approaches. Where possible the Committee has attempted to explore the issues and highlight the differing perspectives.

Should any further information be required in regard to this submission, please contact Maryanne Plastiras, Legal Officer, Family Issues Committee, on 9926 0212.

Yours sincerely



Joseph Catanzariti
President

Submission by the Law Society of New South Wales Family Issues Committee regarding A Proposal for a National Model to Harmonise Regulation of Surrogacy

The following comments are submitted for your consideration as per the numbering of the Discussion Paper:

3. Scope

3.1 Should parentage Orders be available regardless of the method of conception? That is, should a parentage order be available regardless of whether conception is achieved naturally, through self-insemination or with the assistance of Assisted Reproductive Technology? Or should Orders be available only where the child has been conceived through Assisted Reproductive Technology?

3.1.1 The method of conception is not the primary philosophical fulcrum. The issue is a series of other factors and processes which go to ensuring the interests of the child are protected. It is a fact however that the method of ART has some of those processes inbuilt (such as counselling).

3.1.2 Important factors which may be influential in determining whether Parentage Orders, that is, an Order (or Declaration) by a Court as to who is the child's 'parent' should be available are:

3.1.2.1 where one of the prospective parties is in fact a biological parent;

3.1.2.2 whether the surrogacy 'arrangement' was made before the child was conceived.

3.1.2.3 whether all relevant persons (including commissioning parents and the birth mother and, in certain circumstances the donor of genetic material) received information/counselling and gave informed consent prior to the time of conception as to:

3.1.2.3.1 the undergoing of any relevant medical procedure

3.1.2.3.2 the ramifications of a Parentage Order.

3.1.2.4 whether a fee was paid in relation to the surrogacy arrangement. The primary concern is a 'profit' or 'fee for service'. A more difficult issue is reimbursement of costs. This in itself leads to potential manipulation such as:

3.1.2.4.1 fees may be 'dressed up' or 'built in' to expenses.

3.1.2.4.2 fees may or may not include lost wages.

3.1.2.4.3 such may lead to a tacit competition between potential surrogates as to who might provide lower expenses. It is submitted that it is contrary to the best interests of the child that a competitive market economy develop. One alternative may be to set a regulated amount of expenses (akin to a prescribed scale of expenses) which might be reimbursed however that too may lead to the evolution of a market (as some may offer below-scale services).

3.1.2.5 if the birth mother withdraws her consent at any time up to the making of a Parentage Order.

3.1.3 There are also concerns as to whether Parentage Orders should be available to persons where the child in question was conceived before the commencement of the legislation; i.e. retrospectively. It would be difficult if not impossible to establish the relevant parties could have given an informed consent to a non-existent law (at the time).

3.2 Should parentage Orders be available regardless of the source of the genetic material? Should surrogacy be available regardless of the source of the genetic material? Should surrogacy be allowed where the surrogate mother has a genetic connection to the child who is conceived?

3.2.1 Yes to each question.

4. Surrogacy arrangements

4.1 Should the surrogate mother be able to enforce an agreement for the reimbursement of reasonable expenses necessarily incurred?

4.1.1 The issue of reasonable expenses may be regulated by a statutory process as is the case with ss67B-67G *Family Law Act 1975.* This is as opposed to a contractual regime. Please refer to the concerns and considerations as outlined in (¶3.1.2.4) above.

4.2 Should legislation or regulations prescribe what expenses are reasonable?

4.2.1 In addition to the considerations in (¶3.1.2.4) the Committee is concerned that whilst this may dampen, but not eliminate the development of a 'black market', it will nonetheless lead to the evolution of an economic market.

4.3 Should it be a pre-requisite for a parentage Order that the parties demonstrate that they underwent the required counselling before the child was conceived?

4.3.1 The Committee refers to the above comments in (¶3.1.2.3) as to the concerns and considerations.

4.3.2 The matters set out in the Discussion Paper at (b) on page 6 regarding counselling as to "Risks of a surrogacy arrangement" are appropriate. It is suggested however that there are other matters which should be included in 'information' available to and provided to all persons involved. For example:

4.3.2.1 whether, should the commissioning parents separate, child support is payable and/or receivable

4.3.2.2 the impact on rights pursuant to deceased estates.

4.3.3 The availability of pre-conception counselling, legal advice and/or information is very important. It is a separate consideration however whether the making of a parentage order should rise or fall on any or all having in fact been accessed. It might be better seen as a factor taken into account by a Court when the making of such an order is applied for.

4.4 Should it be a pre-requisite for a parentage order that the parties demonstrate that they underwent separate counselling after the birth of the child, about the effects of the proposed order on all parties, before an application can be made for parentage orders.

4.4.1 There is some merit in this given the paramount consideration is the child's best interests. There is a risk however that this will simply become a 'hoop' to be jumped through.

4.5 Is it appropriate for there to be no requirement for a surrogacy agreement to be made in writing, given the unenforceable nature of the agreement.

4.5.1 No.

4.5.1.1 An agreement is a primary record of what people understood (or did not understand) at the relevant time. It can also prompt and promote understanding by focussing the parties on the issues canvassed in the document.

4.5.1.2 An agreement will serve as a protection against later fabrications.

4.5.1.3 An agreement is a convenient 'vehicle' for the giving of advice. That is, the agreement can set out the relevant factors and the parties understanding forming a backdrop for advice/counselling etc.

4.5.1.4 There may be no particular 'magic' in referring to the document as an 'Agreement' and such may intone too legal a context. Any number of alternative descriptions may be used such as 'Surrogacy Plan', 'Surrogacy Understanding' or 'Surrogacy Memorandum'.

4.6 Should there be a requirement that all parties obtain independent legal advice?

4.6.1 Yes. Certainly at the pre-conception stage and possibly the making of a parentage Order.

5. Parentage Orders

5.1 What are the appropriate preconditions that must be met before a Court can make a parentage order, conferring legal parentage on the intended parents?

5.1.1 Suggested pre-conditions include:

5.1.1.1 the application is made at least 42 days, but not more than 6 months, after the birth and an Order is made within a further 6 months (subject to a discretion to extend time in exceptional circumstances). The period of 42 days is suggested to align with the timeframe for registering a birth with the Registrar of Births, Deaths and Marriages (in NSW).

5.1.1.2 before the child was conceived all relevant persons had received the required counselling.

5.1.1.3 before the child was conceived all relevant persons had received the required information and legal advice so that they might give a fully informed consent.

5.1.1.4 the birth mother (and her partner if the partner is a genetic parent of the child) freely, and with a full understanding of what is involved, agree to the making of the order (or consent is dispensed with because it cannot be obtained).

5.1.1.5 the order is in all the circumstances in the best interests of the child.

5.2 Are these the only circumstances in which the Court should have a discretion to waive strict compliance with the preconditions?

5.2.1 As the paramount consideration is the best interests of the child, the Court should retain a discretion. There should however be a weighting or balancing/mitigating against exercising such discretion other than in compelling circumstances

5.3 How should the best interest's criterion be applied? Should there be a presumption that it is, generally, in the interests of the child born through surrogacy to become legally the child of the intended parents, where all parties consent?

5.3.1 There should be no presumption that *"... it is, generally, in the interests of the child born through surrogacy to become legally the child of the intended parents, where all parties consent."*

5.3.2 Courts exercising jurisdiction under the *Family Law Act*, 1975 have been dealing with, and applying, the criterion of a child's best interests for over three decades. The present provisions can be found in s.60CC (formerly s.68F) which have received much deliberation over the years and are a good, if not obvious, starting point. See also s.67ZC.

5.4 Should the new birth certificate resemble an ordinary birth certificate, recording only the names of the legal parents?

5.4.1 The Committee submits that birth certificates should be open and truthful documents. If Orders are subsequently made to alter the definition of who may exercise parental responsibility for a child (whether through surrogacy or adoption or Court order) then this information could be added to the certificate rather than replacing information already present.

5.5 Who should be able to access a copy of the birth certificate?

5.5.1 Persons with any Parental Responsibility for a child and the child.

6. Consent

6.1 If the surrogate has willingly placed the child with the intended parents and does not wish to seek to raise the child herself, but does not consent to the parentage application, should the Court be able to make a parentage order in favour of the intended parents, if satisfied that to do so would be in the child's best interests?

6.1.1 Yes, subject to the qualification of the Court being satisfied that to do so would be in the child's best interests

6.2 How is the Court to be satisfied that the consent is informed and voluntary? Is the evidence of counselling before conception and after birth sufficient? Should the parties be required to sign a form or a declaration in relation to their consent?

6.2.1 Issues include

6.2.1.1 What is the consent to? Is it to undergoing a medical procedure (e.g. ART) or becoming a parent or indeed to relinquishing parentage &/or involvement with the child?

6.2.1.2 If it is a consent to becoming a parent, there is a question as to what is sufficient information.

6.2.1.3 Unlike many medical procedures (where only the patient's consent, or their guardian, is required) this is a consent by more than one person. It may be at least 2 persons and may be up to 4 (e.g. 2 intending parents, the birth mother and her partner). Hence the consents may be different.

6.2.1.4 Evidence of counselling may not be sufficient. In many areas of the law it is a requirement, or considered an appropriate safeguard, for adults to receive legal advice as to how their rights, responsibilities and obligations are affected, for example entering into a Financial Agreement in relation to a marriage or de facto relationship or providing a guarantee in relation to borrowings. Yet these are only in relation to financial arrangements. It might be considered that they pale in significance to the issues surrounding the welfare of a child and an adult's associated rights, responsibilities and obligations (actual and potential).

6.2.2 A form or declaration should be included in the process. It should be remembered however that such is only evidence of consent but not the consent itself.

6.2.3 Many protocols in relation to 'consents' (such as the NHMRC) state that a fundamental aspect of a consent is the right to withdraw the consent. Hence consideration should be given to:

6.2.3.1 ensuring that is part of the 'information' given

6.2.3.2 ensuring all participants are aware of the right of any participant to withdraw consent

6.2.3.3 whether the withdrawal of a consent by 1 or more participants would affect the rights of any other participant to apply for an Order in relation to a child born of such an arrangement.

6.3 *What say, if any, should the surrogate's partner have if he or she is not genetically related to the child? Is it appropriate that the consent of the surrogate mother's partner not be an essential pre-condition, but that his or her non-consent is a matter that the Court takes into account?*

6.3.1 It might be considered that this is more appropriately an issue for consideration between the surrogate mother and her partner.

6.3.2 That said, pursuant to s.65C of the *Family Law Act* a person *not* genetically related may still be a person interested in the care, welfare and development of a child. Further, such a person may be allocated Parental Responsibility by the Court.

6.3.3 Further, if there were a contested dispute between the intending parents and a surrogate mother for parenting orders (including where the child should live) then any existing partner of the surrogate mother would no doubt be a central witness. They could of course be a party seeking Orders.

6.3.4 It is perhaps more appropriate that the consent of the surrogate mother's partner be a factor 'taken into account' by the Court. That said, is that to work in all respects? That is the existence of such a consent would presumably be a factor in support of parenting orders made in favour of

the intending parents? It is not clear however how the Court might interpret the absence of such a consent. Does it for example mitigate against parenting orders made in favour of the intending parents?

7. Eligibility for a parentage order - same-sex couples

7.1 Should there be any restrictions on which adults may apply for parentage orders?

7.1.1 Section 65C of the *Family Law Act* is a good model with established jurisprudence.

7.2 Is this an issue of which jurisdictions participating in a uniform national regime for the regulation of surrogacy should be free to differ, given the presently divergent laws in relation to the rights of same-sex parents to become parents?

7.2.1 Wherever possible there should be a uniform federal approach.

7.2.2 There are divergent laws at present in relation to the rights of same-sex parents to become parents however matters are far more uniform today than in recent years. That said, the regime of laws in place today (in this context) are in relation to children born of what for the sake of convenience might be called 'natural' means and children born through ART. The issue becomes more sensitive with Surrogacy because of the debate regarding commercial arrangements and the potential for reimbursement of disbursements. Differing laws therefore may lead to 'forum shopping' and the creation of different 'markets'.

8. Residency

8.1 What residency requirements should be imposed on the parties? Is it appropriate and sufficient that there be a requirement that the intended parents can apply for parentage orders only in the jurisdiction in which they normally reside?

8.1.1 The surrogate mother should reside within the Australian jurisdiction. This is primarily to place a barrier against the exploitation of women in third-world countries. It is submitted that the counselling requirement, together with the rule against commercial surrogacy, will not necessarily preclude exploitative arrangements with third-world surrogates. This is because pursuant to s.65C of the *Family Law Act*, any person interested in the care, welfare and development of a child will have standing to seek Orders for Parental Responsibility.

9. Eligibility for ART – infertility treatment

9.1 Should it be a pre-requisite for a parentage order that a surrogacy arrangement has been facilitated through ART?

9.1.1 No but neither should the fact the surrogacy arrangement was facilitated through ART be a guarantee of a parentage order being made. It should be a factor taken into account by a Court when the making of such an order is applied for.

9.2 If not, should intending parents who wish to use assisted reproductive technology to conceive a child by surrogacy have to meet the usual eligibility requirements for ART applying in their jurisdiction? Or should surrogacy by assisted reproductive technology be available to all enquires (subject to medical approval)?

9.2.1 Parents who wish to use ART to conceive a child by surrogacy should have to meet the usual eligibility requirements for ART applying in their jurisdiction

9.2.2 If infertility is adopted as a prerequisite, it should be of the intending parents.

10. Eligibility - age and previous pregnancies

10.1 Should there be further pre-conditions imposed on applicants for parentage orders relating to the age or experience of the surrogate mother or intended parents?

10.1.1 There should be a minimum age of 25 years. Whilst the Committee has no expertise on the appropriate age, if the age of 25 has been accepted by most jurisdictions then it should be adopted generally to maintain uniformity.

10.1.2 An important consideration however is whether a child born to a surrogate mother under the age of 25 should be denied the availability of a parentage order.

10.1.3 Consideration might be given to establishing pre-conditions, the absence of which would lead to a rebuttable presumption that a parentage order is not available. That is, and for example, if the surrogate mother were under the age of 25 then the Court would start from the premise that a parentage order would not be made unless there were evidence supporting the making of the order and thereby rebutting the presumption.

11. Approval process

11.1 Should it be a legal requirement that an ART clinic may not provide assisted reproductive technology services for the purpose of surrogacy unless the case has been considered by an expert committee?

11.1.1 Yes. Presumably this should be considered in the same manner as ethical protocols where human participants are involved.

11.2 If so, what should be the role of the committee in examining a particular case?

11.1.2 It is expected that the committee will exercise its supervisory function which will include looking at relevant medical/social/psychological/familial and any other important issues involved. There are existing ART mechanisms which can form the basis of appropriate expert review.

12. Screening

12.1 Should intending parents who seek to have a child through a surrogacy arrangement (and the surrogate mother?) have to pass a screening process? Or should this be addressed through counselling?

12.1.1 Yes. In particular the thresholds similar to the Victorian Act presumptive against ART where women seeking treatment or their partners have:

12.1.1.1 had charges proven against them for sexual offences

12.1.1.2 been convicted of a violent offence as defined in relevant legislation

12.1.1.3 had a child protection order removing the child from their care made in relation to one or more children in their care.

12.1.2 Once more, such provisions would not prevent such a person applying for Parenting Orders with S.65C of the *Family Law Act* as an entry point.

12.2 If a screening process is considered appropriate, what should be the mechanism?

12.2.1 A criminal records/history check.

12.2.2 working-with-children checks

12.3 If a screening process is considered appropriate, should it be a precondition to accessing ART, or a pre-condition to the making of a parentage or order, or both?

12.3.1 It should be a pre-condition for accessing ART.

12.3.2 It should be a factor taken into account by a Court when a parentage order is applied for.

13. Donor register

There should be a register.

14. Retrospectivity / Transitional

14.1 Should it be possible for parents who are now lawfully raising children conceived through surrogacy to apply for parentage orders under the new law?

14.1.1 The Committee does not have a single view.

14.1.2 Some Committee members saw merit in retrospectivity on the basis that it provides a uniform approach for children of all relationships and does not set up different 'classes' of children under different legal regimes.

14.1.3 Other Committee members see difficulties with retrospectivity for reasons including the following:

14.1.3.1. The adults raising a child conceived through surrogacy did so in a known legal environment at the time.

14.1.3.2 It is not possible to retrospectively ascribe 'informed consent'. Even if the relevant parties gave some form of consent, when given it could not satisfy a future standard.

14.1.3.3 Retrospective application creates significant challenges for persons who are separated and attempting to resolve 'parenting' disputes under one set of laws which applied at the time all the relevant events occurred.

14.1.3.4 There is nothing to suggest there is a need for retrospectivity. Again, there is nothing to prevent such a person applying for Parenting Orders with S.65C of the *Family Law Act* as an entry point. This would address the issue raised in the Consultation Paper in relation to passports.

14.1.4 One approach discussed by the Committee was not to apply the law retrospectively but to allow parties with children born prior to the commencement of the law to 'opt in'. That is, if in this circumstance an application was made for a parentage order then the Court should consider, as one of the factors to be taken into account, whether such an order should be made in the absence of the consent of all relevant parties. This would then serve to protect parties caught in the transition phase of any change in the law.

14.2 If so, should the child's consent be required if she or he is of an age to understand the proceedings?

14.2.1 The views of the child should be put before the Court if the child is of an appropriate age. It is difficult however to perceive an appropriate 'benchmark' of a child's understanding.

14.3 Should it be possible to make parentage orders in these cases even if the child is over 18?

14.3.1 No.

15. Advertising

15.1 Should there be any (and, if so, what) legal restrictions on advertising by intended parents, persons willing to be surrogates or clinics about surrogacy?

15.3.1 The proposition in the Consultation Paper is noted that "As for parties, it can be argued that, if the practice of surrogacy is to be lawful, then it should not be unlawful for an intending parent or a person willing to act as a surrogate to place advertisements to this effect"

15.3.2 The Committee notes in this context that there are a number of precedents for advertising restrictions on otherwise legal activities. For example:

15.3.2.1 federal restraints on tobacco advertising in television, cinemas and sporting venues.

15.3.2.2 restraints in NSW (at least) on advertising by lawyers related to personal injury practice and workers compensation.

16. Brokerage

16.1 Should non-commercial brokerage by licensed ART clinics be permitted?

16.1.1 No.

17. Mutual recognition

17.1.1 There should be mutual recognition amongst Australian States.

17.1.2 The issue is less relevant if the Orders are made under a federal regime.