THE LAW SOCIETY
OF NEW SOUTH WALES

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Director, Civil Justice, Vulnerable Communities and Inclusion
Policy, Reform and Legislation Branch
Department of Communities and Justice
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By email: policy@justice.nsw.gov.au

Dear Director,

**Discussion paper – Review of the *Surrogacy Act 2010* and the *Status of Children Act 1996***

Thank you for the opportunity to provide feedback on the Review of the *Surrogacy Act 2010* (NSW) (**Surrogacy Act**) and the *Status of Children Act 1996* (NSW) (**SOC Act**). The Law Society's Family Law, Children's Legal Issues and Human Rights Committees contributed to this submission.

The issue of surrogacy, both altruistic and commercial, is contentious and multifaceted, often giving rise to passionate and diverse positions relating to the rights of those involved.

Our members have expressed the view that the current approach of prohibiting commercialised surrogacy in NSW, while well-intentioned, may not be achieving its desired outcomes. It has proven to be an inflexible regulatory tool which has been difficult to enforce, and has effectively driven aspiring parents into surrogacy arrangements offshore, in less regulated marketplaces.

We suggest that a more nuanced regulatory framework would be more effective in achieving the policy objectives of appropriately balancing the best interests of children with the interests of birth mothers and other parents.

Our suggested approach is to reframe the objectives and principles of the *Surrogacy Act* to directly address and support key policy aims, without any reliance on a commercial surrogacy ban. This would permit and encourage development, over time, of a scheme for compensatory surrogacy, with clearly defined categories of permissible compensation.

Our responses to consultation questions, as relevant, are set out below.

**Question 1 - What do you think of the guiding principle and policy objectives of the Surrogacy Act? Do you think they are still valid?**

Yes, they are still valid. However, we suggest a focus on the following policy objectives:

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

1. Protecting the best interests of children born through surrogacy arrangements.
2. Safeguarding surrogates against exploitation.
3. Ensuring non-discriminatory access to surrogacy services/arrangements.
4. Providing clarity and certainty regarding parentage and legal status of children born through surrogacy.
5. Balancing the interests of surrogates and would-be parents.

In our view, a regulatory approach based on the above principles may encourage greater compliance from stakeholders, protect participants from consequences of engaging in illegal behaviour, allow for more sensitive balancing of interests among surrogates, intended parents, and the broader community, and provide a contemporary regulatory framework that could evolve over time.

**Question 2 - Does the Surrogacy Act ensure that the best interests of the child are paramount in every case?**

No. The rigidity of the present approach means that the best interests of children born under surrogacy arrangements are not always served. For example, there still exists legal uncertainties around parentage, and a lack of clarity in relation to the status children that are born in unregulated overseas markets.

Another known risk to children in foreign surrogacy arrangements is abandonment, particularly in developing countries, for example in instances where the baby has a disability, or there is an unexpected multiple pregnancy. This was highlighted in the well published case of Baby Gammy, where a baby born with Down Syndrome in Thailand was at the centre of an international surrogacy dispute in 2014.

There can also be a breakdown of a relationship between the intended parents and the surrogate. This can result in children becoming stateless, particularly in countries where the status of the surrogate mother may not be recognised.

**Question 4 - Does the legislation adequately meet the needs of various family structures, including LGBTIQA+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements?**

In our view, the current legislation does not adequately recognise, nor support, the legitimate needs and interests of intended parents under a surrogacy arrangement, including LGBTIQA+ intended parents. This is potentially discriminatory, and it is especially problematic for same-sex male couples who biologically require surrogacy to have genetically related children.

While the SOC Act has been amended to include same-sex female couples in parentage presumptions for children born through assisted reproductive technology (Section 14), it does not provide equivalent presumptions for male same-sex couples using surrogacy. There is a lack of automatic recognition at birth for both intended parents in a male same-sex couple using surrogacy. This creates a void of uncertain parentage in the period between the birth of the child and the granting of a parentage order. This lack of immediate recognition can cause issues in emergency situations or for legal decisions that need to be made immediately after birth.

The Act also does not explicitly address parentage for transgender or non-binary parents using surrogacy, potentially leaving gaps in legal recognition.

The legislation generally assumes genetic connection for at least one intended parent, which may not reflect the circumstances of all LGBTIQA+ couples using surrogacy. For example,

Section 30 of the Surrogacy Act implicitly assumes a genetic connection for at least one intended parent by focusing on the medical inability to conceive or carry a pregnancy. It does not explicitly address situations where neither intended parent has a genetic connection to the child, which could be the case for some LGBTIQA+ couples who might use both donor eggs and donor sperm.

To balance the interests of all parties involved, including the surrogate, the child, and the intended parents, the legislation should be amended to explicitly recognise diverse family structures and provide clear pathways for intended parents, including LGBTIQA+ families, to legally engage in surrogacy arrangements.

A regulated model for compensated surrogacy presents an opportunity to better recognise the needs of all intended parents, including LGBTIQA+ individuals and couples. Additional provisions could include:

- Specific provisions recognising LGBTIQA+ intended parents in surrogacy arrangements, such as:
  - Defining and providing for various LGBTIQA+ family configurations, including same-sex couples, transgender parents and non-binary individuals, and incorporating language that moves beyond the traditional binary concepts of 'mother' and 'father' to be more inclusive of all gender identities.
  - Streamlined processes for parentage recognition that provide for recognition of both intended parents at birth for all same-sex couples, similar to the presumptions that exist for heterosexual couples.
  - For lesbian couples using sperm from a known donor to conceive, clear rules providing for arrangements for the involvement of known sperm donors in children's lives without compromising the legal parentage of the intended parents.
  - Providing a legal framework for situations where neither intended parent may have a genetic connection to the child, for example, when using both donor egg and donor sperm.
  - Addressing the unique needs of transgender individuals in surrogacy, including recognition of their identified gender in legal documents and processes.

- Clear rules for legal recognition of parentage that are inclusive of diverse family structures, such as:
  - Provisions allowing for legal recognition of more than two parents in appropriate circumstances. This could be relevant for some LGBTIQA+ families, such as when a same-sex couple co-parents with a known donor.
  - Provisions for recognising parentage established in other jurisdictions, which is particularly important for LGBTIQA+ families who may have formed their families in more permissive legal environments.

By incorporating these elements into a compensated surrogacy scheme, discussed further below, the legislation could better support and protect the rights of LGBTIQA+ families, while maintaining ethical standards and balancing the interests of all parties involved in surrogacy arrangements.

**Question 7 - Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?**

The current prohibition on commercial surrogacy in NSW appears to be ineffective. Despite the ban, NSW residents continue to engage in commercial surrogacy arrangements both domestically and overseas, creating a disconnect between law and practice. The rarely enforced, and difficult to enforce, prohibition undermines the credibility of the legislation, and

leads many participants into making potentially illegal surrogacy arrangements which they may not understand.

At the base of the problem is the binary classification of 'commercial' and 'altruistic' surrogacy, which oversimplifies the complex motivations involved. Many surrogacy arrangements fall between these categories, demonstrating the need for a more nuanced approach.

In our view, a regulated system of compensated surrogacy would be more appropriate to contemporary conditions, acknowledging surrogates' significant commitment, while avoiding the pitfalls of a market-driven system. The model could adapt to evolving community views and societal needs over time. The criminalisation of commercial surrogacy in NSW does not appear to have discouraged the surrogacy industry. This has resulted in unforeseen and undesirable consequences, such as children born through overseas commercial surrogacy arrangements being deprived of the security and certainty of legal parentage. We therefore support shifting from a position of prohibition for surrogacy in NSW to a regulated regime.

In our view, adopting a model of compensated surrogacy would provide better protection for all parties involved, through regulated oversight. The framework for a compensated surrogacy model could include:

- Allowing advertising and matching services to operate to bring parties together.
- Surrogates and intended parents being required to attend counselling and receive independent legal advice.
- The payment of set forms of compensation to surrogates. Surrogates could, for example, be paid a monthly capped fee for the duration of the pregnancy and for a defined period to recover after the birth, for example to cover medical expenses.

A compensated surrogacy model could also keep more surrogacy arrangements within NSW, ensuring better local control and support. Further, it could remove the concerns about discrimination against LGBTIQ+ families, while not derogating from protection for the surrogate mother, or the primacy of the principle of the best interests of the child.

**Question 10 - What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?**

Children born through commercial surrogacy arrangements may be in limbo while parenting orders are being made. This presumably leaves parents unable to make decisions for their short-term care, and the intended parents are unable to become a family, being one of the overarching intentions for the introduction of the Surrogacy Act. There may also be issues with children being able to receive Australian citizenship and obtain passports.

**Question 11 - Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising related to altruistic surrogacy arrangements?**

As altruistic surrogacy arrangements are the only lawful pathway to surrogacy in NSW, it is our view that individuals should be able to pay for advertising related to these arrangements. Continuing the blanket prohibition on advertising for an altruistic surrogacy arrangement in NSW is a contributing factor for individuals to rely on undesirable overseas surrogacy arrangements. We note that South Australia and the Northern Territory already permit such advertising.

**Question 12 - Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?**

It is our view that removing the prohibition on altruistic advertising is a more effective solution to the problem of intended parents not being able to connect with willing surrogates.

Further, the South Australian Law Reform Institute 2018 review of South Australia's *Family Relationships (Surrogacy) Amendment Act 2015,* noted that a centralised register, especially when the register is operated by the state, raises numerous issues that are better resolved by parties managing their own relationships with potential surrogates and intended parents.[1]

**Question 16 - Do you think the parentage order process meets the policy objectives of the Act, including providing legal certainty and promoting the best interests of the child?**

The process does not provide legal certainty for children who are born as a result of a surrogacy arrangement when a parentage order cannot be made under the Surrogacy Act.

Further, it is also important to recognise the relationship between state and federal laws, because disputes around the parenting arrangements for a child will ultimately be resolved under the *Family Law Act 1975* (Cth) (**Family Law Act**).

Section 60HB of the Family Law Act provides for the recognition of court orders declaring that certain persons are the parents of a child under state or territory surrogacy legislation. The prescribed legislation is listed in Reg 12CAA of the *Family Law Regulations* 1984 (Cth) and includes s 12 of the Surrogacy Act.

The operation of s 60HB was considered by the Full Court of the Family Court of Australia in *Bernieres and Dhopal* [2017] FamCAFC 180. *Bernieres* concerned an international commercial surrogacy arrangement, where it was accepted that, because the surrogacy was a commercial surrogacy, an order could not be made transferring parentage to the appellants under the relevant Victorian legislation. The Full Court held that in those circumstances, s 60HB of the Family Law Act had no operation.

The Full Court went further and held that a declaration of parentage could not be made under s 69VA, and s 60H (concerning children born as a result of artificial conception procedures) did not apply if the artificial conception procedure was performed pursuant to a surrogacy agreement. It also held that the welfare power in s 67ZC could not be used to resolve an issue of parentage. In *Bernieres*, the Full Court concluded that the parentage of the child was in doubt.

Following *Bernieres,* there have been a number of matters involving commercial surrogacy where the parties did not seek parentage orders, and instead sought parenting orders in the Family Court (including orders allocating them parental responsibility), for example, *Batkin & Bagri* [2019] FamCA 979 and *Pappas & Ugapathai* [2017] Fam CA 1090.

There is an issue however, regarding whether the decision in *Bernieres* is affected by the High Court's decision in *Masson v Parsons* [2019] HCA 21, which considered the meaning of 'parent' for the purposes of the Family Law Act.

In *Masson v Parsons* [2019] HCA 21, the High Court held that a biological child conceived by way of artificial insemination was a 'child' within the meaning of the Family Law Act. This was

[1] South Australian Law Reform Institute, *Review of South Australia's Family Relationships (Surrogacy) Amendment Act 2015*, 2018.

so because the relevant state law, the SOC Act, was not picked up by s 79 of the *Judiciary Act 1903* (Cth) and instead, the Family Law Act comprised a complete body of law on who should be regarded as a parent.

The plurality held that the word 'parent' in the Family Law Act refers to a parent within the ordinary meaning of the word, except when, and if, an applicable provision of the Family Law Act provides otherwise. In *Masson*, the Court referred to three matters in support of a conclusion that Mr. Masson was the child's parent: that he had provided sperm on an express understanding that he would be the child's parent, that he would be registered on the child's birth certificate (which he was), and that he would provide support and care for the child as her parent (which he did).

In surrogacy cases where parentage is not determined by an order under the state or territory parentage law, 'parent' has its ordinary meaning in proceedings under the Family Law Act. Whether someone is a parent will be a question of fact and degree, and may include issues of biology, intention and action. Unlike the state legislation, the Federal Circuit and Family Court of Australia (FCFCOA) may consider what has occurred after a child's birth, and not just the circumstances before the child's birth, when deciding whether someone is a parent.

In a subsequent case, *Tickner & Rodda* [2021] FedcFamC1F 279, a judge of the FCFCOA (Div 1) declared that a biological father (who was an intended parent in a surrogacy arrangement, but could not obtain a parentage order under the Surrogacy Act) was a parent of the child under the Family Law Act.

In that case, Mr. Tickner and Mr. B. Tickner (the applicants) consented to a surrogacy agreement with the birth mother (the respondent). The applicants and the respondent were strangers before they met online. According to the surrogacy arrangement, Mr. Tickner would provide sperm, an acquaintance of the applicants would provide the egg, and the respondent would carry the child. There was no genetic connection between the respondent and the child.

The respondent notified her counsellor that she had ended the surrogacy arrangement and terminated the pregnancy. She did not, however, terminate the pregnancy, and the child was born. This case brought to light the difficulties that arise when surrogacy arrangements break down and parentage orders cannot be made under state legislation.

The applicants sought declarations of parentage and parenting orders under the Family Law Act, in circumstances where the child was with the respondent. The court considered the child's best interests and determined that Mr. Tickner was the child's parent, as he had provided his sperm on the basis that he would be the child's parent. The court also found that Mr. B. Tickner was a person concerned with the child's welfare. The court further noted that the child would likely wish to know more about the person who gave birth to him as he becomes older. As a result, the applicants were granted equal shared parental responsibility for the child and the respondent was to spend time with the child as agreed between the parties.

**Question 19 - Does the Status of Children Act ensure the equal status of children regardless of family structure?**

It does not, due to the relationship between state and federal laws in Australia. For example, in *Masson*, Mr. Masson was not a parent for the purposes of NSW law. He was, however, a parent for the purposes of Commonwealth law. This is because Ms. Parsons was unpartnered at the time the child was conceived. In this way, the SOC Act does not ensure the equal status of children, regardless of family structure.

This has a flow on effect in terms of who has, and can exercise, parental responsibility for a child, including when the state can intervene in the child's life, and who can consent to a child's adoption.

The presumptions set out in the SOC Act also state that a child will have only two parents. It is arguable that, if the word 'parent' in the Family Law Act has an ambulatory meaning, a child could have more than two parents. We recommend that any review of the SOC Act consider this.

**Question 22 - Do you have any comments about the parentage presumptions contained in the Status of Children Act?**

The SOC Act establishes parentage presumptions based on six categories, as referred to on page 18 of the Discussion paper. These presumptions should be reviewed in comparison with those under the Family Law Act and the *Child Support (Assessment) Act 1989* (Cth).

While there are many similarities between the acts, this review should consider changes required to ensure harmonisation with the Family Law Act and the *Child Support (Assessment) Act 1989* (Cth). The High Court ruling in *Masson*, as discussed above, highlighted the complexities around the parental rights of sperm donors, showing how state and Commonwealth laws can sometimes conflict, leading to legal uncertainty. This case underscores the need for clear and consistent laws across jurisdictions, to avoid confusion and ensure equal status for all children.

Section 14 of the SOC Act addresses the presumption of parentage arising from consented fertilisation procedures and explicitly covers same-sex female couples, but not same-sex male couples. This differs from the Family Law Act, which includes broader provisions.

The SOC Act does not address parentage presumptions in surrogacy arrangements, unlike s 60HB of the Family Law Act, which provides explicit provisions for the recognition of court orders declaring that certain persons are the parents of a child under state or territory surrogacy legislation.

**Question 23 - Do you think there are any situations not covered by the current presumptions that should be included?**

To ensure that the SOC Act is inclusive, comprehensive, and reflective of the diverse modern family structures within our community, it is crucial to address existing gaps, particularly in artificial conception cases and surrogacy arrangements. This approach will help create amendments to the SOC Act that recognise and protect the rights and responsibilities of all parents, regardless of the method of conception or surrogacy arrangements.

The current presumptions under the SOC Act lack inclusivity for certain family situations, including:

1. **Recognition of All Same-Sex Couples:**

   We recommend broadening the provisions to explicitly include male same-sex couples and other same-sex parenting arrangements, ensuring comprehensive coverage for all family types.

2. **Surrogacy Arrangements:**

   We recommend including explicit presumptions of parentage for intended parents in lawful surrogacy arrangements, analogous to s 60HB of the Family Law Act.

3. **Gender Diverse and Non-Binary Parents:**

   We recommend updating the language of the SOC Act to explicitly recognise gender diverse and non-binary parents, ensuring they are included in the presumptions of parentage.

4. **Non-Monogamous and Religious Family Structures:**
   We recommend a consideration of amending the SOC Act to include provisions for non-monogamous and religious family structures. We note that care must be taken to ensure that these provisions do not conflict with other legal standards and societal norms.

We look forward to further involvement in this consultation. Any questions in relation to this letter should be directed to Ms. Nerida Harvey via nerida.harvey@lawsociety.com.au.

Yours sincerely,

Brett McGrath
**President**