THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple,

REVIEW OF SURROGACY LAWS – ISSUES PAPER

Thank you for the opportunity to contribute to the Law Council submission to the Australian Law Reform Commission (**ALRC**) regarding its Issues Paper on the Review of Surrogacy Laws. The Law Society's Family Law and Human Rights Committees contributed to this submission.

At present, there is significant legal uncertainty in Australia around surrogacy, particularly in relation to surrogacy arrangements that occur outside Australia. This arises from the complex interaction between State and Territory and Commonwealth laws, as well as the distinct legal systems of the jurisdiction in which a birth via surrogacy takes place. The legal complexities in this area are compounded by inconsistencies across State and Territory laws governing surrogacy arrangements.

We note that the Law Society made a submission in 2024 to the NSW Department of Communities and Justice's Review of the *Surrogacy Act 2010* (NSW) and the *Status of Children Act 1996* (NSW). In that submission, we suggested that a regulatory framework that would allow for a scheme for compensatory surrogacy be established.

Given the unique legal and ethical issues raised by surrogacy arrangements, we consider that it would be appropriate to establish a uniform regulatory approach across all Australian jurisdictions that is sufficiently robust to ensure adequate rights protections for children born through surrogacy, surrogates and the intended parent/s.

Key human rights issues raised by domestic and/or international surrogacy arrangements

In our view, any regulatory framework governing surrogacy arrangements should take account children's rights, surrogates' rights and intended parents' rights. If relevant, it would also be appropriate to consider the rights of any donor. Such an approach acknowledges the core tenet of the universality and interdependence of human rights.

In terms of children's rights, we agree with the list of rights set out in the Issues Paper, noting that the rights of the child are paramount in any discussion around the regulation of surrogacy. In addition, we also suggest that the right to a nationality should be emphasised in the context of the rights of the child, particularly given that statelessness can occur in the context of international surrogacy arrangements.[1]

In terms of the surrogates' and intended parents' rights, we also suggest that additional rights found in international instruments to which Australia is a party should inform the discussion on surrogacy arrangements, including rights to health,[2] privacy,[3] bodily autonomy,[4] reproductive autonomy,[5] information,[6] benefit from scientific progress[7] and the rights of persons with disabilities.[8]

Requirements and processes for obtaining legal parentage for a child born through domestic and/or international surrogacy

It is our view that the current processes for obtaining legal parentage are unsatisfactory and require uniform reform at a federal level, for the following reasons.

First, the inconsistency in processes and requirements across Australian jurisdictions creates uncertainty for intended parents, as well as the possibility of "forum shopping". Surrogacy is currently regulated by the States and Territories, as the Commonwealth does not have the power to legislate with respect to surrogacy arrangements. Each State and Territory has distinct processes for obtaining parentage for a child born through surrogacy, although in all cases, a court order is required for the transfer of parentage from the birth parent to the intended parents to be effected. In NSW, the intended parent/s can apply to the Supreme Court for a parentage order under the *Surrogacy Act 2010* (NSW).[9] As set out in the Issues Paper at [58], there have been recent examples in NSW where the Court has refused a parentage order in circumstances where intended parents have failed to meet the statutory requirements for the making of such an order.[10]

Additionally, there is legal uncertainty for children born as a result of a surrogacy arrangement that does not meet the relevant requirements under the applicable State or Territory legislation.

Where intended parents are not eligible to obtain legal parentage orders in their State or Territory, there does not appear to be an avenue for obtaining legal parentage under the *Family Law Act 1975* (Cth) (**FLA**). Section

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[1] *United Nations Convention of the Rights of the Child* (**CRC**), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 7.
[2] *Universal Declaration of Human Rights* (**UDHR**), GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 25, *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 12, *Convention on the Elimination of All Forms of Discrimination Against Women* (**CEDAW**), opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), art. 12
[3] UDHR art 12; *International Covenant on Civil and Political Rights* (**ICCPR**), opened for signature 16 December 1966, 999 UTS 171 (entered into force 23 March 1976) art 17.
[4] ICCPR arts 7 and 17, CEDAW art 12.
[5] CESCR GC 22, CEDAW art 12.
[6] UDHR art 19; ICCPR art 19.
[7] UDHR, art 27, ICESCR, art 15(b).
[8] Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[9] Section 12, *Surrogacy Act 2010* (NSW).
[10] *Re N* [2025] NSWSC 409.

60HB of the FLA provides that where a court of a State or Territory has made an order creating a parent-child relationship under 'prescribed' state or territory provisions, that order is to be considered effective for the purposes of the FLA. In *Bernieres v Dhopal,*[11] Berman J held that s 60HB "covers the field" with respect to surrogacy arrangements under the FLA.[12] This was confirmed by the Full Court of the Federal Circuit and Family Court on appeal.[13] In that case, the child for whom the intended parents were seeking a declaration of legal parentage was born via compensated surrogacy arrangements overseas. The Court held that a declaration of legal parentage under the FLA was not available, but did make a parenting order in favour of the applicant under s 65C, FLA. Parenting orders, which end when the child reaches the age of 18, are to be distinguished from legal parentage. It is unclear whether *Bernieres* is affected by the High Court decision of *Masson v Parsons* [2019] HCA 21, where the plurality held that the word 'parent' under the FLA should take on its ordinary meaning unless there is an applicable provision of the FLA that provides otherwise. Citing *Masson v Parsons,* Aldridge J in the case of *Tickner v Rodda* [2021] FedcFamC1F 279 made a declaration of legal parentage under s 69VA in favour of an intended parent of a child born as a result of an altruistic surrogacy agreement. This was despite the fact that the intended parent could not obtain a parentage order under the *Surrogacy Act 2010* (NSW). This lack of certainty in the case law as to the availability of parentage orders under the FLA compounds a need for legislative clarification.

Associate Professor Adiva Sifris has suggested the absence of legal parentage in such cases is unsatisfactory, not only for the child in terms of the public validation of their family structure, but also due to the impacts on 'inter-generational relationships and entitlements', noting the way in which the law of succession, rights on intestacy and family provision rest on proof of kinship.[14] We agree it is unsatisfactory that there is no avenue for legal parentage for intended parents who do not meet strict State or Territory requirements for parentage orders. There are matters, both at a State/Territory and federal level where a parent's or a child's rights and entitlements are determined by legal parentage. For example, child support obligations only fall on legal parents.[15] Additionally, under the FLA, there are a number of provisions that treat legal parents differently to non-parents.[16] This means that if the intended parents separate at any time, children can be left vulnerable. Uncertainty about legal parentage under the FLA and *Child Support (Assessment) Act 1989* (Cth) means that obtaining financial support and other orders for children may involve complex and expensive legal proceedings or indeed may not be possible under current laws. We support the introduction of uniform parentage laws that ensure the care and financial support of children born via surrogacy arrangements.

In our view, to ensure consistency and clarity, and to obviate the need for "forum shopping", there should be harmonisation of laws related to legal parentage for children born via surrogacy arrangement across Australian jurisdictions. This could be achieved either by way of enactment of uniform legislation at a State

[11] *Bernieres v Dhopal* (2014) 53 Fam LR 547; [2015] FamCA 736.
[12] Ibid.
[13] *Bernieres and Anor & Dhopal and Anor* [2017] FamCAFC 180.
[14] Adiva Sifris, 'Overseas Compensated Surrogacy Arrangements and the Family Court of Australia: What About the Children?' [2020] 14 *Court of Conscience* 44, 44–47.
[15] See s 5, *Child Support Assessment Act 1989* (Cth).
[16] For example, under s 60CC(2), the parent-child relationship is a consideration in determining what is in a child's best interests.

and Territory level, or by referral of power by the States allowing the Commonwealth to legislate amendments to the FLA which provide a single avenue for obtaining legal parentage in surrogacy arrangements.[17] Any legislative amendment should create an avenue for vesting legal parentage in intended parents for international and/or commercial surrogacy arrangements.

Interaction between migration law and international surrogacy arrangements

Children born overseas require either a visa or citizenship to enter Australia.

Citizenship

Children born overseas may be eligible for Australian citizenship in the following ways:

1. Adoption outside Australia by an Australian citizen (i.e. at least one parent must be an Australian citizen) in accordance with the Hague Convention on Intercountry Adoption or a bilateral agreement.[18] In the experience of our members, this is a less common pathway to citizenship.

2. Citizenship by descent pursuant to s 16(2), *Australian Citizenship Act* (2007). To be eligible, amongst other requirements, the person must have a parent who was an Australian citizen (not a permanent resident), at the time of birth. This is the more common pathway to citizenship.

In *H v Minister* [2010] FCAFC 119, the Full Court of the Federal Court held that a non-biological parent could be a 'parent', depending on the circumstances, with consideration to be given to social, legal and biological factors. Relevantly, at [130], the Court stated the following:

> In deciding whether a person can be properly described as the applicant's parent, the Tribunal is obliged to consider the evidence before it, including evidence as to the supposed parent's conduct before and at the time of birth and evidence as to the conduct of any other person who may be supposed to have had some relevant knowledge. Evidence as to conduct after the birth may be relevant as confirming that parentage at the time of birth. For example, evidence that a person acknowledged the applicant as his own before and at the time of birth and, thereafter, treated the applicant as his own, may justify a finding that that person was a parent of the applicant within the ordinary meaning of the word "parent" at the time of the birth.

In relation to the requirement that a parent is an Australian citizen at 'the time of birth' may also create some difficulty. In *Minister v Su* [2024] FCAFC 68, the Full Court stated the following:

> The determination of "time of the birth", as that term is ordinarily understood, does not require an evaluative exercise of the kind required to be undertaken in determining whether the relationship of one individual to another is to be characterised as that of parent to child. It requires the identification of the time at which the child is born. The reference to "the time" in this context refers to a point in time at which an event, namely birth, might be said to occur. It does not refer to an entire day.

[17] See, for example: *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth); *Commonwealth Powers (De Facto Relationships) Act 2003* (NSW); *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld); *Commonwealth Powers (De Facto Relationships) Act 2003* (SA); *Commonwealth Powers (De Facto Relationships) Act 2003* (Tas); *Commonwealth Powers (De Facto Relationships) Act 2003* (Vic).
[18] Section 19C, *Australian Citizenship Act 2007* (Cth).

> …
>
> The time of birth of a child is not a period of indefinite duration. In its ordinary meaning the phrase denotes the point in time from which a baby exists or starts life outside of his or her birth mother's body. It is not necessary for the purposes of this case to define the precise moment a child is born as a matter of fact, whether that be, for example, the moment the baby completely exits the birth mother's body, takes his or her first breath, or is finally separated by the cutting of the umbilical cord. The precise moment of birth as a matter of fact may vary depending on the particular circumstances in a given case. However, irrespective of the identification of the precise moment at which a baby might be said to have been born, the phrase "the time of the birth" denotes a narrow window of time. It does not extend to a period of hours after any one or all of the events we have identified has occurred.[19]

This decision, which was consistent with the earlier decision of *Minister v Koka* [2020] FCA 1471, creates an evidentiary burden which may be difficult to overcome.

Again, neither option is available unless at least one parent is an Australian citizen (permanent residency does not suffice).

Visas

If a child born overseas is not eligible for Australian citizenship, the only way they can enter Australia is by applying for a visa. For the child to be able to remain in Australia, that visa must be a permanent visa. The following permanent visas are available:

1. An adoption visa, which allows an Australian citizen or permanent visa holder to sponsor a child adopted overseas. Obtaining an adoption visa is generally a complicated process, with the two most common ways being that a sponsor was already living overseas for 12 months, or that the child is to be adopted in accordance with the Adoption Convention in an Adoption Convention country; or

2. A child visa, which allows an Australian citizen or permanent visa holder to sponsor their child or step-child. Section 5CA of the *Migration Act 1958* (Cth) provides that a child of a person that has the same meaning as that under the *Family Law Act 1975* (Cth). However, the Department's policy states that only a child with a biological link to a parent can be sponsored for a child visa (usually demonstrated through DNA), unless a court order is in place. The grant of the child visa is subject to Public Interest Criteria 4017.[20] In the event that a child visa is an available avenue, Public Interest Criteria 4017 requires that the Minister be satisfied that either:

    a. The law of the applicant's home country permits their removal;

    b. Each person who can lawfully determine where the applicant is to live consents to the grant of the visa; and

    c. The grant of the visa would be consistent with an Australia child order in force.

[19] *Minister v Su* [2024] FCAFC 68 at [21] and [23]
[20] *Migration Regulations 1994* (Cth), sch 4.

> Public Interest Criteria 4017 does not apply to a child applying for an adoption visa (but does apply to an additional family member being included in the application).
>
> There is complexity in identifying (b), where a child can live, although this can be overcome if the law of the country permits their removal and therefore does not usually present a significant hurdle.

Two other notable criteria apply to both child and adoption visas. These criteria are applicable to all children applying for child and adoption visas. First, both visas are subject to a health criterion, Public Interest Criteria 4007.[21] This is a discretionary criterion that allows the Minister to refuse a visa on the basis that it will likely result in a significant cost to the Australian community in the areas of health care and community services, or prejudice the access of an Australian citizen or permanent resident to health care or community services. The second is a discretion to request an Assurance of Support (**AOS**) and refuse the visa if one cannot/is not provided. An AOS is a promise to financially support the child and make repayments if the child receives government financial support. The issue lies in the fact that to provide an AOS, a person(s) needs to have a specific income (this varies depending on the number of people giving the assurance and how many dependents they have).

Development of a compensatory surrogacy framework

The Law Society supports further consideration of the way the rights of a child, as well as surrogates' and intended parents' rights, might be balanced within a highly regulated compensatory surrogacy framework in Australia.

At present, only altruistic surrogacy is permitted within Australia, and in some states such as NSW, Queensland and the ACT, residents are also prohibited from entering into commercial surrogacy arrangements .[22] This binary classification of 'commercial' and 'altruistic' surrogacy oversimplifies the often complex motivations involved. Indeed, many surrogacy arrangements fall between these two classifications, demonstrating the need for a more nuanced regulatory approach.

The current prohibition creates a two-tiered reality where wealthy intended parents can access overseas commercial surrogacy overseas while others cannot, raising significant equity concerns. Moreover, it augments the risks of human rights violations for all parties to the surrogacy arrangement, particularly the rights of the child. As noted in the 2019 report of the Special Rapporteur on the sale and sexual exploitation of children:

> The Special Rapporteur has observed that the prohibition of surrogacy arrangements carried out abroad is problematic as domestic laws prohibiting surrogacy will often be sidestepped. States will inevitably be confronted with surrogacy arrangements carried out abroad, leading to issues surrounding, inter alia, rights to identity, access to origins and the family environment for the child.[23]

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[21] *Migration Regulations 1994* (Cth), sch 4.
[22] Section 8, *Surrogacy Act 2010* (NSW); s 56, *Surrogacy Act 2010* (Qld); s 41, *Parentage Act 2004* (ACT).
[23] Maud de Boer-Buquicchio, *Report of the Special Rapporteur on the sale and sexual exploitation of children Inputs on safeguards for the protection of the rights of children born from surrogacy arrangements,* UN Doc A/74/162 (15 July 2019).

We suggest that an onshore, compensatory framework would also reduce many of the risks to surrogates arising in international jurisdictions, including human trafficking, inadequate healthcare and financial exploitation by for-profit surrogacy clinics or brokers, which may be unregulated. A regulated onshore framework would mean that there would be greater oversight over matters such as informed consent, supported decision-making and access to legal representation and advice, which would help reduce risk.[24] In our view, adopting a model of compensated surrogacy would provide better protection for all parties involved, through regulated oversight. A compensated surrogacy model could also keep more surrogacy arrangements within Australia, 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.

Proposed model

We recommend implementing a future-focused compensatory scheme, to be introduced with a transitional plan that allows for the forms of compensation available within the scheme to be adjusted over time. Such a scheme could begin with modest, clearly defined compensation categories and evolve as community acceptance and regulatory confidence develop. This approach would permit a relatively non-challenging commencement point for the initiative, supporting the concerns of jurisdictions and citizens apprehensive about abolition of the commercialisation ban.

We support establishing a streamlined regulatory function, preferably at the Commonwealth level, to support compliance and oversight including: registration processes governing eligibility, compliance, practical harmonisation across jurisdictions, production of education and guidance materials, and facilitating access to specialised dispute resolution processes.

Additionally, the framework for a compensated surrogacy model could incorporate the following:

- Permitting regulated advertising and matching services to operate to bring parties together.
- The requirement of counselling and independent legal advice for both surrogates and intended parents.

If legislative reform in the manner described above is not proposed, we suggest that the Commonwealth and States/Territories work collaboratively to ensure, as far as possible, a consistent approach to surrogacy matters. There needs to be, at minimum, a framework for addressing the needs of children born as a result of commercial surrogacy arrangements who cannot be subject to a State/Territory parentage order.[25]

[24] See Human Rights Watch, *Submission to the Special Rapporteur on the sale and sexual exploitation of children Inputs on safeguards for the protection of the rights of children born from surrogacy arrangements*, May 2019: https://www.hrw.org/news/2019/06/03/submission-special-rapporteur-sale-and-sexual-exploitation-children.
[25] See Australian Law Reform Commission, Family Law for the Future: An Inquiry into the Family Law System (Report No 135, 10 April 2019).

We also suggest that the Commonwealth and States/Territories produce centralised guidance so that persons contemplating assisted reproduction, including surrogacy, can inform themselves about the legal framework which will apply to them, as well as have a clear understanding of some of legal issues known to arise in this area of the law. In the experience of our members, intended parents often seek information and guidance from social media groups as a way of understanding surrogacy options, particularly in overseas jurisdictions, which can lead to confusion and misinformation.

Thank you for the opportunity to comment. Questions at first instance may be directed to Ursula Paetzholdt, Policy Lawyer, at (02) 9926 0130 or Ursula.Paetzholdt@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

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