THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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Law Council of Australia
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By email: janina.richert@lawcouncil.au

Dear Dr Popple,

AUSTRALIAN LAW REFORM COMMISSION REVIEW OF SURROGACY LAW DISCUSSION PAPER

The Law Society is grateful to provide input to inform a Law Council of Australia submission to the Australian Law Reform Commission in response to its Discussion Paper as part of its review of surrogacy laws. This submission will address specific Proposals and Questions from the Discussion Paper in turn. The Law Society's Children's Legal Issues, Human Rights and Family Law Committees contributed to this submission.

Proposal 1

We support regulation of surrogacy through Commonwealth legislation, implemented by way of referral of the power to regulate surrogacy (Option 1.1.). We are of the view that this is preferable to the option of enacting mirror legislation in each State and Territory, given the potential difficulties associated with coordinating consistent amendments across such legislation in the future. We would also prefer this approach as it would ensure that all surrogacy matters are dealt with by the same court, the Federal Circuit and Family Court of Australia (**FCFCOA**), in order to develop a body of nationally consistent practice, procedure and case law. Commonwealth legislation would ensure consistency and clarity in legislation and case law, streamline the process for any future review and amendments, and eliminate the potential for parties involved in surrogacy to be involved in proceedings in both State and Federal Courts.

Proposal 2

We support the establishment of a National Regulator to oversee the national surrogacy regime. We would support the National Regulator being given the power to perform the four functions set out in Proposal 2, namely, standard setting, compliance, oversight of surrogacy agreements, and community awareness and information provision.

Relatedly, we support Proposal 7, requiring the National Regulator to publish and promote information which addresses common misconceptions in the community about surrogacy; inform intended parents about surrogacy and Australian surrogacy laws, as well as overseas surrogacy laws, policies, and practices

overseas, associated risks; and the need to register overseas surrogacy arrangements. The National Regulator should also publish relevant educational material and provide training for professionals who provide services related to surrogacy arrangements.

Proposal 30(1)(b): Question N

We support providing a surrogate with a right to seek a declaration of parentage within three months of the birth (or stillbirth) of the child, as set out at Proposal 30(1)(b). The Discussion Paper sets out a range of safeguards to ensure that a surrogate has provided informed consent and is aware of their rights and the rights of other people involved in the arrangement. However, we are still of the view that it is necessary to provide an avenue for a surrogate to seek a declaration of parentage in the event that these safeguards are not adhered to in any given case, intentionally or unintentionally, casting doubt on whether the surrogate has provided informed consent to the arrangement. This option will also provide flexibility to account for any developments may occur during the pregnancy which mean that it is no longer in the best interests of the child for the intended parents to have parentage over the child conceived via surrogacy. This is particularly so given that the Discussion Paper contemplates the parties entering a surrogacy agreement and having it approved by a Surrogacy Support Service prior to conception of the pregnancy, and therefore some time before the birth of the child, leaving scope for developments which may affect what is in the best interests of the child. The proposed regime reflects a very significant change in current practice and there may be factors or circumstances which have not been provided for which may also affect whether a surrogate should be able to obtain a declaration of parentage.

For these reasons, we support there being an avenue under the proposed regime for a surrogate to seek a declaration of parentage. Any declaration should be in the best interests of the child. We support there being a temporal limit of three months for the surrogate to make an application for a declaration of parentage.

Question O

We are of the view that the legislation should not specify the factors that the Court is required to consider when determining legal parentage applications.

At present, legally, there is no authoritative pronouncement on the definition of a 'parent'. In the High Court decision of *Masson v Parsons*,[1] the High Court held that the definition of 'parent' under the *Family Law Act 1975* (Cth)(FLA) is 'ambulatory' and should be determined by reference to the 'ordinary' meaning of the word, unless a specific provision of the FLA provides otherwise.[2] The 'ordinary' meaning of 'parent' 'is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of parent and the relevant circumstances of the case at hand'.[3] Under the FLA, parent is defined to include adoptive parents in respect of Part VII of the Act,[4] and in relation to artificial conception,[5] and surrogacy.[6] None of the

[1] (2019) 266 CLR 554 ('*Masson*').
[2] Ibid [44].
[3] Ibid [44].
[4] *Family Law Act 1975* (Cth) s 4.
[5] Ibid s 60H.
[6] Ibid s 60HB.

FLA definitions of parentage attempt to articulate or provide a substantive definition of parentage. For example, in relation to surrogacy, s 60HB provides that, 'if a court has made an order under a prescribed law of a State or Territory to the effect that a child is the child of one or more persons, or one or more persons is a parent of a child, then for the purposes of the FLA, the child is a child of those persons'.

Given that neither the High Court, nor the FLA have defined 'parent' in a substantive way or attempted to articulate factors to consider when determining whether a person is a parent, it is our view that surrogacy legislation should not be the first to attempt to do so, even by way of articulating indicia or factors for the Court to consider. This is despite calls by some for legislative intervention to provide a clear definition of the meaning of 'parent'.[7] Further, as views and attitudes regarding the meaning of a 'parent' in the context of surrogacy are evolving and developing, we suggest that this would not be the appropriate circumstance in which to define the meaning of 'parent'.

If the legislation were to include factors for consideration by the Court when determining a parentage application, there would need to be a consideration of some broader and more complicated issues. This might include consideration or, for example, the relevant period of time that is being considered (before the approved surrogacy agreement, after the agreement but before the pregnancy, during the pregnancy, the period after birth); whether actions, intentions, agreements are relevant to the determination; and whether the law would recognise more than two legal parents. It is our view that it is preferable for a specialised court to determine the relevant factors as they arise in cases before the Court.

Question P

We support there being a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement and are recognised in the child's birth country as the legal parents for the child. This could be by way of recognition or registration similar to that set out in Part VII, Division 13, Subdivision C of the FLA for registration of overseas child orders. Alternatively, the provisions under Subdivision C could be explicitly extended to register the legal recognition of parentage in the relevant overseas jurisdiction[8]. If there were to be a simpler pathway to legal parentage in these circumstances, we suggest that the intended parents be required to provide evidence of legal parentage from the child's birth country. We support the inclusion of a pathway for the recognition and/or registration of parentage from an overseas surrogacy because it is likely to provide some certainty for parents and children and avoid issues arising in the future.

Proposal 39: Question T

We suggest that clear instructions with sample or template affidavits and other similar documents may reduce errors and delays which may stem from these errors. It would also be worthwhile to provide translated instructions and relevant templates in commonly used languages in Australia.

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[7] See Richard Chisholm, 'Who is a 'parent'? The need for review of Australian laws' (2021) 34 *Australian Journal of Family Law* 7.

[8] Other examples can be found in the way in which foreign adoptions are recognised under State adoptions laws, see for example s 116 and 117 of the *Adoption Act 2000* (NSW).

Proposal 39: Question U

Limiting access to streamlined registration processes or subjecting intended parents to complex or costly registration processes could encourage unsafe practices by intended parents that cannot be regulated or monitored. It may also reduce options for parents seeking surrogacy options from their chosen country and result in some discriminatory practices against groups unable to register due to overseas legal barriers.

Proposal 39: Question V

Extending citizenship by descent to these groups would align with family reunification principles, child welfare and would reduce reliance on visa pathways which are often lengthy processes for permanent options.

Notably, Question V appears to suggest that biological children who are born overseas to permanent residents of Australia are eligible for citizenship by descent, which is not correct.[9] However, we would support consideration of whether all children of permanent residents, both biological children and those born through surrogacy, should be able to obtain citizenship by descent.

Proposal 39: Question W

We suggest that the availability of a retrospective process for children who are stateless and born through overseas surrogacy to intended parents who are Australian citizens or permanent residents to obtain Australian citizenship should be implemented and would uphold the best interests of the child. This could be done through introduction of a provision under the *Citizenship Act 2007* (Cth) which provides an avenue for citizenship by descent if a child born overseas is stateless at birth and born via a surrogacy arrangement to at least one Australian citizen or permanent resident, even if the birth occurred before the law's commencement date. If this retrospective process were to be introduced, intended parents would need to provide evidence of intended parentage and the surrogacy agreement, along with evidence from the surrogate, the intended parents and the assisting organisation, in addition to the standard identity documents.

It is noted that the identity requirements under the *Citizenship Act 2007* (Cth) may need to be eased. It is noted that Australia's Humanitarian Program already allows certain concessions for documentary evidence, and this could be extended to stateless children born via overseas surrogacy.

Additionally, the Humanitarian Program is known for its lengthy processing delays. We suggest that an expedited pathway be created, which would provide expedited processing times subject to receiving all mandatory documents at time of lodgement of the application.

Proposal 39: Question X

We support introduction of an expedited temporary visa which would allow children born through surrogacy to travel to Australia. This may be of particular use if the fast-tracked avenue to citizenship or permanent residency for children born stateless through an overseas surrogacy arrangement set out in our answer to

[9] A person is only eligible to citizenship by descent if their parent was a citizen at the time of their birth; see *Citizenship Act 2007* (Cth) ss 15A–18.

Question W is not introduced; in such situations, such a visa would allow the child to travel to Australia and explore the possibility of onshore permanent residency or citizenship. This would ensure a reduced risk of prolonged separation from the intended parents.

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

Jennifer Ball
President