

7 May 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001Via online submission: <https://www.alrc.gov.au/content/family-law-system-ip48-submission>**Re: Submission to ALRC's Review of the Family Law System IP48**

Dear Executive Director,

I am writing to make a submission to the Review of the Family Law System based on my doctoral research on how legal parentage works for disputed paternity children. My study examined the statutory framework surrounding legal parentage in Australia and analysed 75 disputed paternity judgments in the Family Court, Federal Magistrates Court, Federal Circuit Court and State Supreme Courts.¹ In each case, a child's paternity had been misattributed or was in doubt in the context of a dispute regarding parenting orders, child support or the child's legal parentage. This study offers some important insights for the Family Law Review in terms of identifying a subset of children who are poorly served by the current approach within the family law system to legal parentage, and describing key problems with legal parentage as currently understood within the family law system.

Question 1: What should be the role and objectives of the modern family law system?

This submission is limited to the role and objectives of the modern family law system as it operates in relation to children. Regarding children, the family law system's role is to help families resolve disputes about the parentage of children and about who cares and makes decisions for, and spends time with children. In doing so, its objective should be to support the development and survival of family relationships which support children's safety, health and development (physical, mental and cultural), and which respect children as legal persons

¹ *Status of Children Act 1974 (Vic)*, *Children (Equality of Status) 1976 (NSW)*, *Status of Children Act 1978 (Qld)*, *Status of Children Act 1974 (Tas)*, *Family Relationships Act 1975 (SA)*, *Status of Children Act 1978 (NT)*, *Parentage Act 2004 (ACT)*.

who deserve a say in any decisions affecting them. Therefore, any intervention which the family law system makes into children's lives should be centred on children's needs and should support children in expressing whether they want to be part of decision-making, and if so, in expressing their views.

Question 2: What principles should guide any redevelopment of the family law system?

From my research with disputed paternity cases, I would regard the key principles relevant to any redevelopment of the family law system as follows:

- A child-centred approach to legal parentage would adapt legal mechanisms in order to meet children's needs and to hear their voices on matters which concern them.
- Children have distinct interests in:
 1. accessing information about their own origins and having a say in how that information is disclosed to others;
 2. legal protection of their relationships with the people they regard and rely on as parents, the other children they regard as siblings and their kinship identity;
 3. having an adult/adults provide good quality care and decision-making for them; and
 4. adequate economic support.
- From a child-centred perspective, the parent-child relationships which matter most to children are created, not just by adults bringing a child into the world and caring for them, but also and equally by children who participate in parenting relationships, and come to rely on and regard certain adults as their parents. Children are therefore experts on which relationships are significant to them as parent-child relationships.
- Parents can offer better care to their child when they feel secure in their legal relationship with the child and when they can make an unconditional commitment to the child.

- Neither being parented by biogenetic progenitors, nor any one particular family structure can guarantee children's wellbeing – rather, children's wellbeing is better predicted by examining family processes (eg warmth, communication, conflict).²

Question 14: What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children

Question 16: What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

Currently, the family law system works from the assumption that every child has two parents who are the child's biogenetic progenitors, and that the child's relationships with these progenitors are necessarily significant so that it should define the child's legal kinship identity, and that these biogenetic progenitors (or non-biogenetic parents deemed to stand in their place) should appear on the child's birth certificate, be granted automatic shared parental responsibility and should be liable to support the child economically. The current model of legal parentage therefore locks together (presumed) genetic origins information, default parental responsibility, economic responsibility and legal kinship identity to define the same two people as legal parents for all functions. Children of disputed paternity are left in a precarious state by current parentage law, because a finding as to their genetic paternity can retrospectively unravel their parentage for the other three functions – impacting on parenting order decisions, the child's legal identity and kinship, and the economic support available for the child. This model is insufficiently flexible to respond to the diversity of Australian families, to children's perspectives and relational family realities.

A key obstacle to a child-centred model of legal parentage which I observed in my research was the tendency within both the legislation and judicial discourse to conflate the fact of biogenetic parentage with parentage as a legal kinship status. The emphasis on

² Timothy Biblarz and Judith Stacey, 'How does the gender of parents matter?' (2010) 72 *Journal of Marriage and Family* 3; Susan Golombok and Fiona Tasker, 'Socioemotional Development in Changing Families' (2015) 3 *Handbook of Child Psychology and Developmental Science*; Michael Lamb, 'Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment' (2012) 16 *Applied Developmental Science* 98.

parentage as a ‘medical and not a legal issue’ and genetic paternity testing as an ‘inexpensive, prompt and virtually certain procedure to decide this question’³ meant that there was no space for judges to consider whether a change to a child’s legal parentage was in the child’s best interests, or to hear children’s own understandings of their family, and kinship identity. Currently, these two legal processes (making a finding regarding the child’s biogenetic parentage, and deciding the child’s legal parentage) are rolled into one, causing confusion, and making it impossible for judges to consider each on its merits.

For example, in *Masson & Parsons*, a case concerning children who lived with their lesbian mothers and spent regular time with their two gay dads, one of the main issues for dispute was whether Mr Masson was a legal parent, yet Cleary J held that section 69VA (which allows for judges to make a ‘declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth’⁴) had:

no relevance here because the trigger for the operation of the section is not present. There is no issue in question over the parentage of either child. The biological relationships are not in dispute.⁵

Cleary J treated legal parentage as a simple story of the ‘biological relationships’, in the process, dismissing the relevance of the children’s perspectives in deciding their parentage:

...the subject children define their family by feelings, not by law. The adults however are seeking, as they are entitled to do, legal definition.⁶

In a significant number of the disputed paternity cases, courts drew on evidence of genetic paternity (or inferences drawn from the refusal of parties to consent to genetic paternity testing) in order to retrospectively change a child’s legal parentage to align with their perceived genetic parentage.⁷ Some of these cases concerned adolescents who had

³ *G & H* [1993] FamCA 39 (Fogarty, Straus and Wilczek JJ) at [79,942].

⁴ S69VA *Family Law Act 1975*.

⁵ *Masson & Parsons* [2017] FamCA 789 (3 October 2017) [53].

⁶ *Ibid* [49].

⁷ See, for example, *Re C and D* [1998] FamCA 98; *C & G & M* [2001] FMCAfam 83; *B & B & Deputy Child Support Registrar* [2001] FamCA 1371; *Y & Y* [2001] FMCAfam 258; *V & V* [2002] FMCAfam 408; *Tryon & Clutterbuck*

been raised all their lives by their presumed father, yet the conflation of genetic origins and legal parentage meant that their lived identity and understanding of their kinship relationships were not ‘relevant’ to deciding their legal parentage.⁸ One of the limitations of the study was the absence of children’s voices in the judgments, and further research is needed to find out how children experience a sudden retrospective loss of legal kinship with a parent and his side of the family. Nonetheless, from the evidence of the adults involved, it was clear that many of the children were distressed by the process of disclosure and loss of a relationship with a presumed father.⁹ In *Levine & Levine*, Scarlett FM remarked:

From the child’s point of view, his father (as he thought) has rejected him, for no apparent reason. The Applicant’s desire to find out the truth about the child’s paternity will result in a financial benefit to him, at the expense of “collateral damage” to the child.¹⁰

The current model of legal parentage appears to be a simple one based on biogenetic parentage, yet the complexity and diversity of modern families means that it operates in complex ways and produces uncertain outcomes for families who do not fit the biogenetic heteronuclear family structure. Exceptions for families formed via ART and adoption work to secure legal recognition for the lived parent-child relationships in those families, yet they are nonetheless marginalised by the biogenetic norm, and as a result, some parents in

(No. 2) [2009] FamCAFC 176; *B & M* [2003] FMCAfam 113; *G & T* [2002] FamCA 1517; *Ames & Ames* [2009] FamCA 825 (4 September 2009); *Levine & Levine* [2011] FMCAfam 821

⁸ For example, *G & N* [2002] FMCAfam 281; *Ames & Ames* [2009] FamCA 825 (4 September 2009); *Levine & Levine* [2011] FMCAfam 821. In *Brianna*, then Chief Justice Bryant remarked that evidence from the child’s psychologist about the impact on the child of genetic parentage testing and loss of a legal kinship relationship with the father and his family did ‘not appear to be of relevance to the issues to be determined’ *Brianna v Brianna* [2010] [2010] FamCAFC 97 (Bryant CJ, Finn and Thackray JJ, 28 May 2010) [121] [56].

⁹ See, eg, *Ames & Ames* [2009] FamCA 825 (Dawe J) [20]; *Henning and Henning* [2012] FMCAfam 1119;

¹⁰ *Levine & Levine* [2011] FMCAfam 821 at [78] per Scarlett FM.

heterosexual families formed via donor conception still find it difficult to disclose this important information to their child for fear of isolation and stigma.¹¹

The result is a dual-track system, where the legal parentage of heterosexually conceived children is assumed to reflect their genetic parentage (and vice versa) while the legal parentage of ART-conceived children depends on a series of technical exceptions transcribing donors and surrogates out of and non-biogenetic parents into the position of biogenetic parents. Research has tended to focus on the difficulties of the more curly track for ART-conceived children. Yet the judgments examined in my study indicate that there is also a significant group of heterosexually-conceived children who are poorly served by the current model of legal parentage.

Rather than tacking on more exceptions, it is time to re-visit the norm that 'parent' is a biogenetic category and instead treat legal parentage as a legal status which aims to protect lived parent-child relationships and the child's legal kinship identity. Lived parent-child relationships are important to the wellbeing of both parent and child because of their relational nature – characterised by a child's reliance on the care and commitment of an adult and the sense of belonging which is created by that reliance, care and commitment.

A crucial first step in moving towards a child-centred model of legal parentage would be to unbundle origins information from the other functions within legal parentage. As Melanie Jacobs suggests in the context of donor conception,

Disaggregating biological parentage from legal parentage would enable children to have access to information about their background while providing assurances to legal parents that their ability to raise their child as they see fit is not compromised.¹²

Such measures have already been implemented for donor conceived and adopted children in all Australian States and Territories – therefore, extending this approach to all children regardless of the method of their conception would in itself provide greater

¹¹ Natacha Salomé Lima, 'Narrative Identity in Third Party Reproduction: Normative Aspects and Ethical Challenges' (2018) 15 *Bioethical Inquiry* 57, 65.

¹² Melanie B Jacobs, 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 *Journal of Law & Family Studies* 309.

consistency of treatment across different family structures. This might mean changes to the wording of birth certificates to clarify that their purpose is to certify legal parentage (alongside date and place of birth, and any older siblings), not to record genetic origins, for example by way of a warning similar to that suggested by Andrew Bainham for UK birth certificates:

This certificate records legal parentage and is not to be relied upon as a guarantee of biological parentage.¹³

Information about the child's origins could then be kept on a separate 'Origins Register' – collating any available information about who provided the gametes, who gave birth and any changes to the child's legal parentage – for example by way of adoption or a re-assessment. For adopted people and people conceived via assisted reproductive treatment, separate registers already exist. Having a single Origins Register would bring that information together in the one place and acknowledge that there are many other children whose legal parentage may not align completely with their origins information. It would create a space where new information about a person's biogenetic origins could be acknowledged, and could make use of and expand existing support services which help parents and children navigate testing and disclosure of origins information and contact with biogenetic kin.¹⁴

A person's extract from the Origins Register would be their private information rather than a public identity document – acknowledging that the significance which people attach to genetic parentage very individual. For some, genetic parentage information is important in terms of being part of their personal health information, while for other people, it has significance for their narrative identity, or may be the basis to develop kinship relationships.¹⁵

If genetic testing revealed new information about a person's genetic origins – for example, that a social father was not a genetic progenitor – then the Origins Certificate could be updated, and the child could be informed in a sensitive way without the news

¹³ Andrew Bainham, 'What is the point of birth registration?' (2008) *Child and Family Law Quarterly* 449.

¹⁴ See, for example, the support services provided to families formed via ART by the Victorian Assisted Reproductive Treatment Authority: Louise Johnson, Kate Bourne and Karin Hammarberg, 'Donor conception legislation in Victoria, Australia: the "Time to Tell" campaign, donor-linking and implications for clinical practice' (2012) 19 *Journal of Law and Medicine* 803. Katrina Hargreaves and Ken Daniels, 'Parents Dilemmas in Sharing Donor Insemination Conception Stories with their Children' (2007) 21 *Children & Society* 420.

¹⁵ Gabriele Griffin, 'Identity matters: donor offspring's narratives of self and their implications for epigenetic debates' (2015) 29 *Textual Practice* 453.

automatically undermining the child's legal parentage. If the child or one of the parties wished to change a child's legal parentage to align with the biogenetic testing result, a court order would be required, and would require consultation with the child and consideration of how the child's lived family relationships and legal kinship identity could be affected by a change to legal parentage.

This untangling of legal parentage from biogenetic origins is being considered by the government of the Netherlands, with a 2017 Government Committee recommending a change in terminology from 'recognition' of parentage to 'acceptance' as wording which 'better displays the character of the legal institution, namely a legal act and not an act of truthfulness'.¹⁶ The same report recommends the creation of an 'Origins Story Register' to register 'as much information regarding parentage as possible' as a resource for the children concerned to address their rights to know their origins under Articles 7 and 8 of the UN Convention on the Rights of the child and Article 8 of the European Convention on Human Rights.¹⁷ The report suggests that

... legal parentage can offer protection to social parentage and can, therefore, contribute to the continuity of the parent-child relationship and the improvement of both the factual position, as well as the legal position of the child.¹⁸

The report also lays out recommendations for up to four legal parents where necessary to 'reflect the social reality', either by way of agreement before the child is born, or after the child is born, but to add on people who have become significant to the child as parents.¹⁹ Allowing for more than two legal parents has been implemented (to some degree) in a number of other jurisdictions.²⁰ Other jurisdictions are actively considering and

¹⁶ Government Committee on the Reassessment of Parenthood (Staatscommissie Herijking Ouderschap), *Child and Parents in the 21st Century*, Government of the Netherlands (2017), 43.

¹⁷ *Ibid* 21,22.

¹⁸ *Ibid* 63.

¹⁹ *Ibid*, 62-69.

²⁰ For example, British Columbia: Fiona Kelly, 'Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting' (2014) 47 *UBC Law Review* 565; California: California Family Code, section 7612(c), discussed in Tricia Kazinetz, 'You Can't Have One without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals' (2018) 24 *Widener Law Review* 179 See also case law in Louisiana, Oregon, Washington, Massachusetts, and Alaska, which recognise third-parent adoptions in individual cases. See *ibid* 181.

implementing what may have previously been thought of as radical approaches which are shifting the focus of legal parentage from biogenetic parentage to the child's lived family.

Professor Susan Golombok was recently asked to comment on these proposed changes to legal parentage in the Netherlands and remarked that 'the greater emphasis on family relationships than on family structure appears to be a radical and highly innovative departure from existing law, and reflects contemporary understanding of the processes that are most influential in children's psychological wellbeing'.²¹

Separating out origins information from legal parentage would require greater clarity on the rules allocating legal parentage at birth. An approach which treats children as legal subjects (rather than merely as consequences) should define legal parentage in terms of the relational significance of the relationship to the child and adults involved. At birth, the best guess we can make as to which relationships are significant to the child is likely to start, as the current presumptions of parentage do, with the woman giving birth and any other person(s) with whom she plans to co-parent. Signing the birth certificate as the child's parents might then operate as a relational commitment to the child – to meet the child's needs in a way which builds a significant parent-child relationship over time.

A view that acknowledges the dignity of children as legal persons and relational beings might recognise that before a child is born and while it is an infant, the intentions and agreements of the adults involved are probably the best way to predict the parent-child-relationships which will form. Making it possible for more than two people to sign on as legal parents would mean that legal parentage could better reflect the child's lived family in those families where two or more adults have committed to parenting the child. Separating out origins information from legal parentage also means that a biogenetic parent who does not want to commit to being a legal parent (whether in the context of gamete donation or heterosex) can be identified in the child's origins information without becoming a legal parent.²²

²¹ Letter from Susan Golombok to Ms Helsing-Puts, Clerk, Standing Committee on Security and Justice, House of Representatives of the States General, The Netherlands, 16 January 2017
<<https://www.tweedekamer.nl/kamerstukken/detail?id=2017D01023&did=2017D01023>>.

²² Where a biogenetic father had helped conceive a child via heterosex but did not want to 'sign on' as a legal parent there might be a shorter period of child support liability.

If a child's parentage is disputed further down the track – when the child has had an opportunity to form relationships with family and to rely on them to meet their needs – there is a stronger argument that any change to a child's legal parentage should involve a relational analysis to hear who the child relates to and relies on as parents. For example, where a stepfather has signed the child's birth certificate as an informal way of adopting the child, but then after separating from the mother, seeks to challenge parentage in order to end his child support liabilities,²³ a relational analysis would allow the court to hear whether the child regarded and relied on him as a parent and what significance the legal parentage relationship held for the child in terms of their legal kinship identity.

A child-centred concept of legal parentage could therefore allow for orders (whether contested or by consent) to secure legal parentage for a step-parent, misattributed parents, extended family or kinship carers, and receiving parents in customary adoption practices such as *kupai omasker* where the child regarded and relied on the person *as a parent*. This would represent a step beyond an order for parental responsibility, and need not result in the erasure of another parent in the way that step-parent adoption currently does.

Question 8: How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

The biogenetic emphasis within legal parentage has also functioned to stigmatise families formed by LGBTIQ people, and to offer inadequate protection for children's relationships with non-biogenetic parents. While the 2008 reforms improved the situation for lesbian-led families by making it possible for co-mothers to be legal parents, there still appear to be barriers to recognising the significance of co-mothers in their children's lives.²⁴

The reforms suggested above, in terms of unbundling origins information from legal parentage, and refocusing legal parentage as a mechanism to protect children's relationships

²³ See for example, *Brianna v Brianna* [2010] [2010] FamCAFC 97 (Bryant CJ, Finn and Thackray JJ, 28 May 2010) and *B & B & DCSR* [2001] FCA 1371 (Unreported) [2001].

²⁴ Fiona Kelly, Hannah Robert and Jennifer Power, 'Is there still no room for two mothers? Revisiting lesbian mother litigation in post-reform Australian family law' (2017) 31 *Australian Journal of Family Law* 1.

with the people they regard as and rely on as parents, would be likely to help better protect children's legal kinship identity within LGBTIQ-parented families.

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

Question 37: How can children be supported to participate in family dispute resolution processes?

Decisions about a child's legal parentage affect the child's legal kinship identity. Excluding children from such decisions may be harmful not just to their autonomy, but to their dignity as legal subjects who co-create their identity in relation to others.²⁵ Like being misgendered, for a child to be stripped of their legal kinship identity may be 'psychologically disruptive' in terms of affecting their sense of belonging, and their ability to build a coherent sense of identity.²⁶

For children's views to be heard and to matter in family law proceedings and dispute resolutions which affect them, my study of the disputed paternity cases would suggest there is an urgent need to broaden the scope of orders which are considered 'parenting orders' (and therefore in which the court is obliged to hear children's views) to include orders regarding genetic parentage testing and declarations of legal parentage. This would involve

²⁵ Kim Atkins, 'Re Alex: Narrative Identity and the Case of Gender Dysphoria' (2005) 14 *Griffith Law Review* 1.

²⁶ Kevin A McLemore, 'Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals' (2015) 14 *Self and Identity* 51, 51.

reversing the 2012 amendments to the Family Law Act which excluded parentage declarations and related orders from the category of 'parenting orders'.²⁷

Thank you for considering my submission. If you have any further questions, please do not hesitate to contact me on the contact details above, [REDACTED]

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Yours sincerely,

[REDACTED]

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²⁷ s64B(1) 'However, a declaration or order under Subdivision E of Division 12 is not a parenting order .' *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), s17.