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Australian Law Reform Commission
By email: surrogacy@alrc.gov.au

Dear Australian Law Reform Commission

Legal Aid NSW submission to the Australian Law Reform Commission's Review of Surrogacy Laws

Thank you for the opportunity to make a submission to the Australian Law Reform Commission's **(ALRC)** review of surrogacy laws in Australia.

Legal Aid NSW provides legal services across NSW in civil, criminal and family law, with an emphasis on assisting socially and economically marginalised people. Our Family Law Division is the largest family law practice in Australia. It provides legal information, advice and minor assistance, extended legal assistance, early resolution assistance, duty services, dispute resolution, case representation, and allied professional social support. Our specialist teams include the Child Support Service, and further information about the service is set out below.

This submission considers questions 18 and 19 of the Issues Paper as well as other issues not identified in the issues paper as per question 27. In summary, we believe current Australian legislation and case law relating to legal parentage could lead to unintended and unexpected consequences about who can be liable for child support for a child born of surrogacy. The impact of these problems on the financial support of children after separation will also be outlined in our submission. Legal Aid NSW would be pleased to discuss any of the issues raised in this paper further with the ALRC.

Legal Aid NSW's Child Support Service

Legal Aid NSW has a specialist Child Support Service within the Family Law Division. Our solicitors assist clients to resolve legal problems related to the Australian Child Support Scheme, administered by Services Australia, which operates under two principal Commonwealth enactments: the *Child Support (Registration and Collection) Act 1989* (Cth) (**CSRCA**) and the *Child Support (Assessment) Act 1989* (Cth) (**CSAA**).

Legal Aid NSW's Child Support Service has extensive experience assisting clients in proceedings to obtain proof of parentage in order to qualify for an administrative assessment of child support under the CSAA, or alternatively, to "disprove" parentage when a person considers that they should not be liable to pay child support. From time to time, we also provide advice and assistance to people about the possibility of obtaining child maintenance orders under the *Family Law Act 1975* (**FLA**), or registration under the CSRCA of overseas orders for maintenance of a child or step-child. Against the background of that experience, we make the following observations regarding the lack of certainty about the legal parentage of children born through surrogacy and the consequences of that within the Australian Child Support Scheme. Our observations relate to the availability of child support and/or financial support for a child in the event of a breakdown in the relationship of the intended parents of a child born as the result of a surrogacy arrangement.

Child support for children born through surrogacy

The Issues Paper describes the Australian law regarding the parentage of a child born through surrogacy. That is, for a child born in Australia, the surrogate who bears the child is that child's legal parent (and their partner if any), and the intended parent/s[1] may only acquire legal parentage through a judicial process. If the child is born in another country, their parentage is determined by the law of that country, but sometimes the legal parentage of a surrogate parent or parents under the law of the child's country of birth is not recognised in Australia.

However, at a practical level, in the absence of dispute, the person or persons named on a child's birth certificate as the parents will be treated as that child's parent for most practical and legal purposes, even if the birth certificate is inconsistent with legal parentage. Thus, we consider that the Australian cases about the parents of children born through surrogacy may not accurately reflect the practical experience of Australian families formed through surrogacy.

If both intended parents of a child born through surrogacy voluntarily assume the legal obligations of parentage, regardless of their actual legal status, and, in the event of separation, agree to financial support arrangements for the child, there is no reason for their parentage to be questioned. The parties would be free to make whatever arrangements suited them. However, if they could not reach an agreement about financial support for the child and attempt to access the Australian Child Support Scheme, they may be faced with a range of confusing and unanticipated legal barriers, because:

- one or both of the intended parent/s might not be considered a legal parent of the child, and/or

[1] The term "intended parent/s" will be used to refer to the person/s who sought out the surrogacy and intend to become the full-time carers of the child.

- the surrogate mother may still be considered a legal parent of the child.

Those factors may preclude the availability of an administrative assessment for child support under the CSAA, or alternatively, a child maintenance order under the FLA.

Application of the CSAA for a child born through surrogacy

The Australian child support scheme[2] is a legislative scheme set up with the object of ensuring children receive financial support from their parents and that financial support should be able to be readily determined without the need for court proceedings.[3] The CSAA provides that the parents of a child have the primary duty to support that child.[4]

The factual question of whether a person is a legal parent will determine:

- Whether they have a duty to maintain the child (s 3 of the CSAA) and thus may be assessed in respect of the costs of the child in an administrative assessment under Part 5 of the CSAA.
- Whether they can apply for an administrative assessment of child support for the child, as a parent (s 25 of the CSAA) or as a non-parent carer (s 25A of the CSAA, in which case the non-parent carer's income is ignored and the administrative assessment is worked out using the incomes of both the child's parents.
- Whether they can enter into a child support agreement as a liable parent (s 93 of the CSAA).

The term "parent" is defined in section 5 of the CSAA, but only by way of exceptions, as follows:

(a) when used in relation to a child who has been adopted—means an adoptive parent of the child; and
(b) when used in relation to a child born because of the carrying out of an artificial conception procedure — means a person who is a parent of the child under section 60H of the *Family Law Act 1975*; and
(c) when used in relation to a child born because of a surrogacy arrangement—**includes** (our emphasis) a person who is a parent of the child under section 60HB of the *Family Law Act 1975*.

[2] Child support legislative scheme is comprised of the CSAA and CSRCA.
[3] Section 4(2) of the CSAA
[4] Section 3(1) of the CSAA.

Apart from those three exceptions, it is likely that the term “parent”– when used in the CSAA in relation to a particular child – has its ordinary natural meaning, that being the biological parents of the child in question.

We consider that the CSAA’s definition of a parent for a child born because of a surrogacy arrangement is not adequate to cover the complexities of surrogacy. It merely provides – via reference to s 60HB of the FLA - for the recognition of orders made under prescribed Australian state and territory laws that declare a person, or persons, to be a parent or parents of a child born through surrogacy arrangement. In the absence of such orders, and especially in those cases where the surrogacy arrangement was contracted and the child conceived and/or born outside of Australia, the inclusive definition of a “parent” in s 5 would mean that the child’s parentage would be determined by the laws of one or more non-Australian jurisdictions.

For the purposes of the CSAA, the question of who is a parent of a child conceived via a surrogacy arrangement would initially fall to be administratively determined by the Child Support Registrar (“the Registrar”), upon receipt of an application for administrative assessment of child support. Section 29(2) of the CSAA says that Registrar is to be satisfied that a person is a parent of a child only if the Registrar is satisfied that one of the factual situations (or “presumptions”) listed in that subsection apply. Section 29(3) provides that if more than one of the presumptions apply, the one that appears to the Registrar to be more or most likely to be correct is to prevail. Section 29(1) provides that the Registrar may act on the basis of the application and accompanying documents.

Relevant to the Issues Paper, we note that the list of “presumptions” in s 29(2) of the CSAA contains a variety of situations that could apply in respect of a child conceived because of surrogacy, but that may not in fact be reliable indicators of legal parentage. Relevant subsections of section 29(2) read:

> (2) The Registrar is to be satisfied that a person is a parent of a child only if the Registrar is satisfied:
>
> (a) that the person is or was a party to a marriage and the child was born to the person, or the other party to the marriage, during the marriage; or
> (b) that the person’s name is entered in a register of births or parentage information, kept under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, as a parent of the child; or
> (c) …
> (d) that, whether before or after the commencement of this Act, the person has, under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, executed an instrument

acknowledging that the person is a parent of the child, and the instrument has not been annulled or otherwise set aside.

Paragraphs (f),(g) and (h) which contain presumptions that a man who cohabited with, or was purportedly married to the child's mother at designated times, around the conception and birth of a child is that child's father, may also be relevant.

We strongly suggest that efforts need to be made to ensure the definition of "parent" is uniform across Commonwealth legislation and, if possible, all Australian jurisdictions. In addition, the definition of parent needs to be reconsidered to ensure that the intended parents of a child born because of a surrogacy arrangement are featured in the definition.

Case studies

The following (fictionalised) case study explores a typical Australian surrogacy scenario in which an Australian male couple use a surrogate in another to country to start a family. The case study illustrates some of the difficulties facing the Registrar in determining whether a person is the parent of a child when that child has been conceived through surrogacy. It also illustrates potential unintended consequences of the current law.

Facts

Bob and Joe are married and live in Australia. They enter into a surrogacy arrangement with a woman in Country U, named Mary, whereby she will carry a child conceived through artificial conception procedure using a donated ovum and Bob's sperm. Bob, Joe and Mary all agree that Mary is to have no financial obligation to support the child, and that the child will live with Bob and Joe in Australia.

When the child is born, Bob and Joe name her Audrey. Audrey's birth is registered in Country U, as the child of Bob and Mary. Neither Bob, Joe nor Mary have turned their minds to whether that is correct under the law of Country U. As far as they are concerned, the birth certificate simply reflects that Audrey was carried by Mary, and is genetically related to Bob. Bob applies for recognition of Audrey's status as an Australian citizen by descent, and she is issued an Australian passport. Bob, Joe and Audrey return to Australia together.

Bob and Joe separate when Audrey is 5 years old.

Scenario one

After the separation, Audrey lives mainly with Joe, who applies for a child support assessment against Bob. Joe says on the application that he is Audrey's father and her other parent is Bob. He provides a copy of Audrey's birth certificate as proof that Bob is Audrey's parent. Relying on the birth certificate, which is issued by a prescribed overseas jurisdiction, the Registrar tells Joe that he is a non-parent carer. He can apply for child support against both Audrey's parents, Bob and Mary (because Mary lives in country U, which is a reciprocating jurisdiction for the purposes of the CSAA).

The Registrar makes an administrative assessment of child support based on the incomes of Bob and Mary. As a non-parent carer, Joe's income is not used in the child support assessment. Joe decides not to collect the child support that Mary is assessed to pay him, because he doesn't think that would be fair when they all agreed that Mary would have no financial obligation for Audrey. But he asks the Registrar to collect the assessed child support from Bob.

Bob thinks it right that he should pay child support for Audrey, because he sees himself as her parent. But he is annoyed that Joe's income is ignored in the child support assessment. He and Joe had originally agreed that they would both be responsible for supporting Audrey. Bob is also annoyed when he discovers that that Mary is receiving correspondence from the Registrar with information about Bob's income and his separation from Joe.

Bob seeks legal advice about whether the child support assessment is correct, and whether Joe is also Audrey's parent. Bob's lawyer tells him that even though Bob is named on Audrey's birth certificate as her father, he is probably not her legal parent, and that Joe is definitely not considered her parent for the purposes of child support. The lawyer tells Bob he might be able to challenge the assessment on the basis that Joe is not Audrey's legal parent. If Bob is successful, Joe would then only be able to get child support from Mary.

Feeling frustrated, Bob decides that he will just accept current situation however his relationship with Joe has become strained as a result of this process and their previously cooperative co-parenting approach is adversely impacted.

Scenario two

After the separation, Audrey lives mainly with Bob, who applies for a child support assessment against Joe. Bob says on the application that he and Joe are Audrey's parents. He provides a copy of Audrey's birth certificate. Relying on the birth certificate, the Registrar tells Bob that he can only apply for child support against Mary.

Bob does not want to apply for child support against Mary. Bob's application against Joe is refused because the Registrar is not satisfied that Joe is Audrey's parent.

Bob seeks legal advice about applying to court under s 106A of the CSSA for a declaration that Joe is a parent of Audrey and he should be assessed to pay child support for her. His solicitor advises him that the law is unclear and he may not be successful. The solicitor tells Bob that he might be able to apply for Joe to pay him child maintenance for Audrey under s 66F(1)(c) of the FLA. Bob is frustrated that not even his lawyer seems to know what his options are and feels let down by the system.

In the months after the separation, Bob and Joe's relationship sours and, on the advice of his new partner, Joe refuses to pay Bob any child support for Audrey. Bob is forced to decide whether to pursue potentially costly legal action to recover child support – a path that his lawyer was unable to clearly describe with certainty - or attempt to support Audrey on his own.

Though fictionalised, these two case studies illustrate the potential, if unanticipated, outcomes of a system that has not adequately considered the impacts of surrogacy on the definition and obligations of intended parents. The Australian Child Support Scheme was created in recognition that separated parents have the primary duty to financially care for their child[5] and with a particular object that a person with ongoing daily care of a child should be able to have the level of financial support to be provided readily determined without the need to resort to court proceedings.[6] For families formed through surrogacy, there is a substantial risk that these principles will remain unfulfilled.

Can a child maintenance order be made against Bob or Joe?

In this section, we consider the potential scenarios outlined in the case studies above to explore the likely outcomes for Bob, Joe and Audrey. Without significant case law to rely upon, the below assessments are based on our analysis of the law and may or may not reflect the findings of a court were there to be a situation with the same or similar facts.

Section 66E of the FLA provides that a court may not make an order for child maintenance between parties who could be the subject of an administrative assessment under the CSAA. If the Registrar had refused Joe's application in **scenario one** above (having failed to be satisfied that Bob was Audrey's parent under the law of Country U, despite Bob being named on Audrey's birth certificate), Joe might consider applying for child maintenance under the FLA, because s 66E is not engaged.

[5] Section 3(1) of the CSAA.
[6] Section (2)(c) of the CSAA.

The court can only order Bob to pay child maintenance to Joe if Bob is Audrey's parent (s 66C of the FLA).

We think it is possible that the Court may find that Bob is Audrey's parent for the purposes of s 66C, according to the ordinary natural meaning of the word parent (applying *Masson v Parsons* [2019] HCA 21). Even if Bob is not Audrey's legal parent under the laws of Country U, he has a genetic connection to Audrey and there is a presumption arising from him being named on her birth certificate. It is also clear that he provided his genetic material for Audrey's conception with the intention of being her parent (with Joe being Audrey's other parent, rather than Mary). However, the likely cost of proceedings to determine this issue may deter someone in Joe's position from pursuing this course.

In **scenario two** above, although Joe is clearly not Audrey's parent as per existing legislation, he may be considered her step-parent, and thus have a duty to maintain her under s66D of the FLA. Section 4 of the FLA defines "step-parent", in relation to a child, as a person who:

(a) is not a parent of the child; and
(b) is, or has been, married to or a de facto partner (within the meaning of section 60EA) of, a parent of the child; and
(c) treats, or at any time while married to, or a de facto partner of, the parent treated, the child as a member of the family formed with the parent.

The question of whether Joe is Audrey's step-parent is therefore inextricably linked to a finding of whether Bob is her parent. We also note that s 66D provides that a step-parent's duty to maintain the child is secondary to, and does not derogate from, the primary duty of the parents to maintain the child. The court is also likely to require expert evidence about the law in country U and whether Mary is also a parent of Audrey, and whether as a consequence she has a duty to support Audrey. Again, the likely cost of these proceedings may deter someone in Bob's position from pursuing this course.

Under the current Australian Child Support Scheme, intended parents are unable to enter into a surrogacy arrangement knowing what their child support obligations would be if their relationship subsequently breaks down. Nor is it clear whether the FLA will apply to enable a court to determine the financial contributions to be made by the intended parents after separation. Furthermore, it is possible that the surrogate may have a financial obligation under Australian law to support the child, contrary to the expectations of all the parties to the surrogacy agreement, and that obligation may have extra-territorial application. We consider it is questionable whether the status quo meets the standard of the best interests of the child as

defined by the Convention on the Rights of the Child[7] and featured as a paramount consideration in the FLA.

The significance of parentage on a birth certificate to child support

It is worth highlighting again the importance in the above case study of the presumptions arising from Mary and Bob being named as Audrey's parents on her birth certificate. A birth certificate is evidence of parentage, but if the person or persons named as parents are not in fact a parent under the law of the issuing jurisdiction, the birth certificate cannot make them so. In our experience, there are many cases where parentage is at issue in a dispute about child support, but the person named on the birth certificate is not in fact a legal parent of the child.

The current state of the law, as demonstrated by the case study gives rise to a number of difficult policy issues, for example:

- It appears possible under current Australian law that an intended parent (including one named on a birth certificate) can challenge a presumption of parentage and avoid liability to pay child support.
- It appears possible under current Australian law that a surrogate (who may be from a different legal jurisdiction) could potentially become financially liable for a child if the relationship between the intended parents breaks down, or even while the intended parents remain together.
- A possible consequence of findings under current law is that a child may not have another – or any – legal parent, and this could leave them without access to financial support from one or both intended parents.
- A possible consequence of the development of case law is that a child born to a surrogate may have more than two legal parents.[8] This is neither contemplated or workable under the current child legislation, which uses an administrative formula to calculate the costs of the child, based on the adjusted taxable incomes of a maximum of two parents, and ignores the income of any "non-parent carer".

[7] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 27.

[8] The majority in *Ophoven v Berzina* [2025] FedCFamC1A 97 held that a person may be deemed a parent even if they share no biological connection with the subject child. In the shadow of this decision, it is possible that a child may be found to have more than two legal parents; this is particularly the case for such factual circumstances as those which arose before the High Court in *Masson v Parsons* [2019] HCA 21.

These potentially anomalous outcomes need to be considered to ensure that the legislation is updated and unintended consequences are minimised where possible.

Conclusion

Separation can happen to all families. In Australia, parents have the primary duty to support their children after separation. Whilst there may be a public policy basis for laws intended to make it harder for hopeful parents to access surrogacy, it is unsatisfactory that the children born of those arrangements may not have ready access to financial support from both their intended parents following family breakdown. If predictable and reliable financial support of children conceived and born through surrogacy arrangements (and through artificial conception procedure) is considered a priority, we believe there should be uniform laws that deal with the support of children born and conceived by those methods, both in Australia and overseas. We consider law reform is necessary to clarify a consistent definition of parentage under family law and child support law. Reform should be guided by the best interests of children (regardless of the circumstances of their conception and birth) and their right to be financially supported consistent with international obligations.

It is important that the law around parentage and liability for financial support is definable and knowable by all parties to a surrogacy arrangement before it is entered into. However, as discussed, the policy considerations are complex and there is a significant risk that unintended consequences will result from law reform proposals. For those reasons we consider it premature to suggest a legislative framework for the definition of parentage and the process for obtaining it. Legal Aid NSW is keen to participate in any further discussion and consultation should this be considered a priority for reform.

Thank you again for the opportunity to provide a submission to your review of Australian surrogacy laws. If you have any questions or would like to discuss this matter further, please contact Prem Aleema, Solicitor in Charge, Child Support Service, at [redacted]

Yours sincerely

[redacted]

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