FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

(Division 1) and (Division 2)

[redacted]

CHAMBERS OF THE CHIEF JUSTICE

16 January 2026

The Honourable Justice Mordecai Bromberg
President
Australian Law Reform Commission

By email: surrogacy@alrc.gov.au

Dear Justice Bromberg

Australian Law Reform Commission Review of Surrogacy Laws

The Federal Circuit and Family Court of Australia (Division 1) and (Division 2) (collectively **FCFCOA/the Courts**) are grateful for the invitation to provide a submission addressing some of the proposals and questions in the Australian Law Reform Commission's (**ALRC**) Discussion Paper on the Review of Surrogacy Laws.

This submission was prepared in consultation with the Joint Legal Committee, which comprises judicial representatives of both Courts. However, whilst informed by the views of a number of Judges, this submission does not necessarily reflect the views of all Judges.

Administrative pathway to legal parenthood for approved surrogacy agreements

The Courts support the ALRC's proposal at 30(1)(a) in the Discussion Paper. Amending the *Family Law Act 1975* (Cth) (**FLA**) to provide that the intended parents are the legal parents from the child's birth would give effect to the administrative pathway to legal parentage. If the ALRC's proposals for regulation of surrogacy arrangements are accepted, then surrogacy arrangements in Australia will be properly regulated with appropriate safeguards in place. Intended parents may be more likely to engage in surrogacy in Australia rather than overseas, where there are clear requirements for the surrogacy arrangement to be approved including counselling and receiving independent legal advice. One important incentive is an administrative pathway for legal parentage for registered approved surrogacy agreements.

The proposed administrative pathway would provide the intended parents, surrogates and their partners legal certainty upon the child's birth which reflects the parties' intentions. It will avoid the difficulties that intended parents currently experience after the birth of a child, where they do not have the authority to make decisions about the child's welfare given the surrogate, and her partner if applicable, would be considered the legal parent(s) under current law.

Australia is not the first jurisdiction to consider having an administrative pathway for legal parentage arising out of domestic surrogacy agreements. The Law Commission of England and Wales and the Scottish Law Reform Commission released its final report *Building Families Through Surrogacy* in March 2023.[1] That report also recommended an administrative pathway for parentage and domestic surrogacy arrangements that complied with the legislative requirements. They have had established surrogacy agencies for many years and judges have discretion to retrospectively approve payments made to surrogates and grant parentage orders.

Proposal 30(1)(b) and questions N – Should the surrogate be able to bring an application to the court?

The inclusion/ability of the surrogate to apply to the Courts for a declaration of parentage within three months of the child being born is also an important safeguard as without this it could amount to the sale of a child. Although rare, there may be circumstances where the surrogate changes her mind.[2]

Proposal 30(2) and 31(2) Specialist List

The Courts support the creation of a specialist list, which is already under consideration. Given the likely volume and distribution of matters, the specialist list would be national, with hearings generally conducted online. The specialist list should also apply to cases involving artificial conception procedures which do not involve surrogacy, as similar legal issues and challenges with respect to declarations of parentage arise in these matters. The parties in *Masson v Parsons* [2019] HCA 21 and *Ophoven & Berzina* [2025] FedCFamC1A 97 each had a child through artificial conception.

A specialist list would aim to produce greater certainty and consistency of outcomes. This area is a complex and specialist area of law, and these cases are not always well articulated by lawyers. The cases that have been referred to above illustrate some of these complexities.

The case of *Mizushima & Crocetti* [2024] FedCFamC1F 113 also demonstrates the need for a specialist list. This was not a surrogacy case but involved artificial conception where donor ovum and donor sperm were used so neither party had a biological connection the child. The presiding judge said at [4]:

> *While characterisation as a "parent" will influence the way in which factors under s 60CC of the Act are applied to the evidence at trial, the applicant was declared in February 2021 to be a person concerned with the children's care, welfare and development so as to give him standing in the proceedings (s 65C(c)) and the Act does not import any presumption in favour of parents over non-parents in the determination of proper parenting orders for children (Maldera v Orbel (2014) FLC 93-602 at [79]–[81]; Valentine & Lacerra (2013) FLC 93-539 at [42]–[43]; Aldridge & Keaton (2009) FLC 93-421 at [59]–[61], [75]–[81] and [83]). For that reason, the parties' fierce contest over the applicant's status as a "parent" is liable to be hollow.*

Both this case and *Ophoven & Berzina* are illustrative of how hard fought and complex these cases can be when they involve issues of legal parentage and parenting orders after the relationship has broken down.

The administrative pathway would recognise the child's functional parents (the intended parents) as their legal parents from birth without the need for a court application. Currently the surrogate (and her partner if any) are recorded as the legal parent in domestic surrogacy arrangements and the intended parents must lodge a court application for legal parentage which can be expensive and time consuming.

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[1] Law Commission of England and Wales and the Scottish Law Reform Commission *Building Families Through Surrogacy: a new law, Law Commission, March 2023* Surrogacy – Law Commission

[2] See *Farnell & Anor and Chanbua* [2016] FCWA 17.

This delay in transferring legal parentage causes several practical problems for the intended parents including being unable to make legal decisions including about medical treatment. Granting the intended parents, legal parentage at birth gives them certainty and is also consistent with the intentions of the parents and the surrogate. This will be a powerful incentive for parents to engage in domestic surrogacy as it provides greater certainty and reduced costs.

Proposal 30(c) and question O – specific factors the court must consider

Where there is an unapproved domestic surrogacy arrangement or an overseas surrogacy arrangement, under this proposal, the parties will need to apply to the Courts for a parentage declaration. Until that declaration is made the surrogate and her partner are the legal parents.

A question asked is if there should be specific factors the Courts must consider when determining a parentage application by a surrogate or with respect to unapproved surrogate arrangements. There should be specific reference to the best interests of the child being paramount having regard to the child's right to identity.[3] The same factors should apply if the application for a parentage application is by intended parents or a surrogate.

The definition of parent in section 4 of the FLA simply refers to adoption. The definition should clarify that biology is not a necessary factor. It should also refer to intention if a biological factor is not present. An expansive definition of parent beyond biology is necessary to avoid arguments about what the ordinary meaning of parent is.

Rule 1.10 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* sets out a list of matters the parties must give evidence about in parentage matters involving surrogacy. That list is useful to direct the parties to the types of matters they must address in their evidence.

Unapproved and overseas surrogacy arrangements

The ALRC proposes a simpler application process for legal parentage where intended parents have engaged in a registered overseas surrogacy arrangement and where the parties have been recognised as legal parents in an overseas jurisdiction. The ALRC proposes this on the basis that these arrangements will have been subjected to some regulation. Such was also considered by the England and Wales Law Commission and the Scottish Law Commission in its final report *Building Families Through Surrogacy*. There is likely to be resistance to there being an administrative approach for this as there may be concerns about the level of oversight in other jurisdictions and what checks and balances have been in place. Listing approved countries in a register could also be problematic as the conditions under which surrogacy arrangements take place can change rapidly.

Retrospective application

Retrospective application of these provisions is important as there are many children who do not have the benefit of both parents being legal parents and the reality of their family circumstances being acknowledged. The legislation should be amended to specifically allow adult children and/or their functional parents to be able to apply for a retrospective parentage order.

This is important as there are numerous examples of cases both historically and currently where it has not been possible to grant both parents legal parentage.

Section 69R and prescribed overseas jurisdictions

The *Family Law Regulations 1984* did not have any prescribed overseas jurisdictions for the purpose of section 69R of the FLA. Section 10 was inserted in the *Family Law Regulations 2024.* This regulation

[3] See Article 7, Convention of the Rights of the Child, 20 November 1989.

addresses the meaning of prescribed overseas jurisdictions. Relevantly the prescribed overseas jurisdictions apply to each provision of Division 12 of Part VII of the FLA (the parentage provisions) and section 102 of the FLA (proof of birth, parentage, death or marriage).

The *Family Law Regulations 2024* commenced on 1 April 2025. In the Explanatory Memorandum (**EM**) there are a few references to surrogacy and artificial conception procedures and Articles 7 and 8 of the Convention on the Rights of the Child with respect to their rights to identity and family. The EM refers to the Regulations ensuring that people who have entered into non-commercial surrogacy arrangements are recognised. The EM primarily refers to surrogacy and artificial conception in the context of recognising parentage orders by prescribed states and territories. It is not clear whether the legislators turned their minds to the effect of having overseas prescribed jurisdictions tied to section 69R. Whilst recognising overseas parentage orders from some jurisdictions is unlikely to raise concerns, there may be concerns about the circumstances behind the parentage order being made in places where there is little or no regulation of surrogacy and concerns about human rights abuses and exploitation.

The Courts are not currently aware of any cases engaging surrogacy arrangements, section 69R and prescribed overseas jurisdictions.

If the Commission has further queries with respect to the Courts' submission, please contact my Chambers by return email. The Courts are grateful for the opportunity to engage with the ALRC on this important issue.

Yours sincerely

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The Honourable Chief Justice William Alstergren AO
Chief Justice – Federal Circuit and Family Court of Australia (Division 1)
Chief Judge – Federal Circuit and Family Court of Australia (Division 2)