



FAMILY  
• LAW •  
COUNCIL

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REPORT ON PARENTAGE AND  
THE FAMILY LAW ACT

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• December 2013 •

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# FAMILY LAW COUNCIL

## REPORT ON PARENTAGE AND THE *FAMILY LAW ACT*

### December 2013

#### **Family Law Council Terms of Reference**

June 2012—updated September 2012 to include consideration v.

I request that the Family Law Council consider and advise me by December 2013 on the following issues in relation to who is considered to be a parent of a child under the *Family Law Act 1975* (Cth):

- i. Whether the provisions in Part VII of the *Family Law Act* that deal with the parentage of children lead to outcomes that are appropriate, non-discriminatory and consistent for children.
- ii. Whether there are any amendments that could be made to the *Family Law Act* that will clarify the operation, interaction and effect of the relevant provisions.
- iii. Whether there are any amendments that should be made to make the *Family Law Act* more consistent with State and Territory legislation that provides for the legal parentage of children.
- iv. Are there any amendments that would assist the family courts to determine the parentage of children born as a result of assisted reproductive technology, including surrogacy, where the State and Territory Acts do not apply?
- v. Are there any amendments to the *Family Law Act* that could be made to assist other Commonwealth agencies, such as those responsible for immigration, citizenship and passports, to identify who the parents of a child are for the purposes of Commonwealth laws?

The Family Law Council should have regard to the legal parentage of children as determined by State and Territory laws.

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# Executive Summary

This report provides a response to the request from the former Attorney-General, Nicola Roxon, for the Family Law Council to consider a range of issues in relation to who is considered to be a parent of a child under the *Family Law Act 1975* (Cth) (*Family Law Act*). The reference responds to the increasing diversity of families in Australia and the rapidly changing nature of reproductive technology and community attitudes to family formation. It also reflects a concern to ensure that as far as possible children are not disadvantaged by the nature of their family or the way in which it was formed.

In its work, Council has considered the complex interaction of the legal and social aspects of families with a focus on the outcomes for children. Council has also considered Australia's international human rights obligations as well as Australian, state and territory laws.

Council conducted a number of consultations with community organisations, representatives of the Courts and the legal profession, government departments and academics. Council also made a public call for written submissions from interested members of the public. Council conducted its own research through searches of the relevant case law and academic literature. The cases were analysed with the aim of identifying who is a legal parent and whether the current provisions of Part VII of the *Family Law Act* lead to outcomes for children that are appropriate, consistent and non-discriminatory. In addition, Council identified a range of issues where there was uncertainty in the law and inconsistencies at both the state/territory and federal levels and between different Commonwealth agencies. Council also reviewed the data on the diversity of family forms and structures in Australia, which show that many children are living in families that are not based on the traditional form of a married couple and children who are biologically related to both parents.

Council has taken all of this information into consideration in formulating its response and recommendations. The complete set of recommendations is provided at the end of this Summary.

Council is making a general recommendation that the Australian Government introduce a federal Status of Children Act which would provide a clear statement of parentage laws for the purposes of all the laws of the Commonwealth. The rationale for this recommendation has developed out of Council's consideration of all the issues raised by the terms of reference. Council's work on this reference has reinforced its view that the appropriate focus of concern for Part VII of the *Family Law Act* is resolving disputes about post-separation care and parenting arrangements for children. In decision making in this area, the courts have consistently been guided by the principles of the best interests of the child (as they have developed) and not by the legal status of the adults who

care for those children. In other words, the fact of parentage (or legal parenthood), although obviously important, is not the determinative question in disputes arising under Part VII. In contrast, a range of different considerations may apply to the determination of parentage for the purposes of other Commonwealth laws, including those relating to citizenship and migration, which raise issues that are different from the concerns pertinent to post-separation parenting matters.

**1<sup>st</sup> Term of Reference—Whether the provisions in Part VII of the *Family Law Act* that deal with the parentage of children lead to outcomes that are appropriate, non-discriminatory and consistent for children.**

The main purpose of Part VII *Family Law Act* is to provide a decision making framework for cases involving disputes about the care arrangements for children. These disputes may involve decisions about where a child is to live, how much time children will spend with parents and other people of significance, and who has legal responsibility for children. In considering this term of reference, Council examined whether the current Part VII framework is being consistently for all children across different kinds of families. Council also considered the definition of parent for the purposes of this framework and whether changes need to be made to the relevant provisions of Part VII to more appropriately reflect children’s perspectives of family and the empirical evidence of the diversity of families in Australia.

*The cases*

Council reviewed a selection of cases from the family courts that involved ‘non-traditional’ families and compared the process of decision making that was applied with that in cases involving ‘traditional’ families. The surveyed cases revealed a number of inconsistencies in the operation of the current provisions in Part VII, and suggest the need for Part VII to be amended to better support decision making and settlement of disputes in cases where a child’s family does not conform to the ‘traditional’ model.

*Submissions*

Council received submissions that highlighted the lack of an appropriate definition of a parent for the purposes of Part VII. The submissions also reflected concern about the impact of the limitation of a number of provisions in Part VII to ‘parents’. The submissions suggest that for many in the community and legal sectors of the family law system, the legislative distinction between social parents and legal parents does not reflect their day-to-day work with children and families and is not relevant to their consideration of what is in the child’s best interests.

On the other hand, some submissions raised concerns about the effects on children and their families if the position of legal parents is not adequately recognised and supported in the legislation. Some noted that children in families with same sex parents may be adversely affected by a failure to recognise the legal status of both mothers as parents. Similar concerns were raised about the interests of children in circumstances where an extended family member, or step-parent, has assumed caring responsibility for the child.

### *Council's views and recommendations*

In Council's view, the provisions of Part VII that govern decision making about children's best interests should recognise the diversity of families in Australia and children's understandings of their families. Council recommends a number of changes to the *Family Law Act* to ensure that children are not disadvantaged by the nature or form of their family. These include changes to the objects and the principles underpinning Part VII to better reflect the reality of children's lives. Council also believes that a more inclusive definition of parent is needed in the *Family Law Act*.

### **2<sup>nd</sup> Term of Reference—Whether there are any amendments that could be made to the *Family Law Act* that will clarify the operation, interaction and effect of the relevant provisions.**

The parentage provisions of the *Family Law Act* are spread over a number of different divisions. In addition to the definition of a parent in s 4 of the *Family Law Act*, Part VII contains a number of rebuttable 'presumptions of parentage', a number of provisions that 'deem' a child to be a child of particular people in certain circumstances (such as when an assisted reproductive technology is used) and a power to make declarations of parentage. There is a lack of certainty about the operation and effect of a number of these provisions. In particular, there is a lack of certainty about the application of the provisions dealing with children born from assisted reproductive technologies (s 60H) and surrogacy arrangements (s 60HB). This includes uncertainty about the parental status of known donors of genetic material and the parental status of intending parents in surrogacy arrangements where state and territory Acts do not apply.

The interaction between the general presumptions of parentage and the 'deeming' provisions in the *Family Law Act*, (s 60H for example), have also caused some problems. For instance, although being registered as a parent under a law of the Commonwealth, or a state or territory law raises a presumption of parentage (s 69R), this presumption may conflict with the provisions in s 60H *Family Law Act*, as happened in the domestic surrogacy case of *Re Michael: Surrogacy Arrangements* [2009] FamCA 691. The *Family Law Act* is not clear about whether the presumptions of parentage in Part VII can be rebutted by other provisions in the *Family Law Act*.

The application of the provisions relating to declarations of parentage and parentage testing procedures are also unclear in some cases. A declaration of parentage (s 69VA) is 'conclusive evidence of parentage for the purposes of all laws of the Commonwealth'. However the current provision appears to be limited by a number of factors. Firstly, it is not a stand-alone power, but requires 'parentage' of a child to be in issue in proceedings in respect of another matter. Secondly, the power is limited by the fact that the court can only make a declaration if it finds that a person is a parent.

### *The cases*

The cases relating to the parentage provisions and assisted reproductive technologies have considered whether s 60H *Family Law Act* provides an 'exhaustive' definition of who is a parent (the 'restrictive' approach), or whether it merely 'enlarges' the range of parents, without necessarily excluding other people from being considered a parent (the 'expansive' approach). This question arises where a single woman has a child as a result of an assisted reproductive technology, because s 60H *Family Law Act* does not explicitly exclude a donor of genetic material from being found to be a

parent in this circumstance. This is an area where inconsistencies between the *Family Law Act* and state and territory laws arise.

In addition, the 'expansive' approach has, on occasion, been applied in surrogacy cases in order to find that an intending father is a parent. However, as in the case above, this is only possible where the woman who gives birth does not have a partner. In both cases, the inconsistent application of the provision raises issues of discrimination.

#### *Submissions*

There was broad agreement in the submissions about the need for several amendments to clarify the operation of various provisions. The inconsistent interpretative approaches to s 60H *Family Law Act* were the subject of criticism in a number of submissions. This included concerns that the 'expansive' approach discriminates against single women by treating them differently to women with partners, and concerns that its application would mean that a sperm donor will automatically be considered a legal parent where a woman does not have a partner.

Council also received a number of submissions suggesting that the provision dealing with parentage of children born from assisted reproductive treatments (s 60H *Family Law Act*) should be amended to make it clear that it does not apply to children born from surrogacy arrangements. There was widespread agreement on this point.

#### *Council's views and recommendations*

Council agrees there is a need to clarify the operation of s 60H *Family Law Act*. Council's views on this issue are expanded on in its discussion of the third term of reference, as this issue also raises an inconsistency with state and territory laws. Council has also made a number of other recommendations to clarify the operation of the power to make declarations of parentage.

### **3<sup>rd</sup> Term of Reference—Whether there are any amendments that should be made to make the *Family Law Act* more consistent with State and Territory legislation that provides for the legal parentage of children.**

Council identified two specific areas of inconsistency between the *Family Law Act* and state and territory laws dealing with parentage. The first issue is the inconsistency between the definition of parents in the *Family Law Act* and the more inclusive definition of parents in state and territory statutes that define parents to include people recognised as parents according to Aboriginal and Torres Strait Islander tradition or custom. The second area is the inconsistency in approach to the parental status of known donors of genetic material where single women have children as a result of assisted reproductive technologies. In addition, the overall lack of consistency between the states, territories and Commonwealth laws dealing with parentage was a common theme in many submissions.

#### *The cases*

A recent case, *Groth & Banks* [2013] FamCA 4031 has highlighted the continuing inconsistency that arises under the provisions relating to assisted reproductive technology. In this case Cronin J found that there was a direct inconsistency between the *Family Law Act* provision which covers the situation where a single woman has a child using assisted reproductive technology (s 60H(3) *Family Law Act*)

and the provision in the Victorian *Status of Children Act 1975*, that covers the same situation (s 15). Cronin J applied the ‘expansive’ approach to s 60H *Family Law Act*, discussed above, to make a finding that a known sperm donor was a parent for the purposes of the *Family Law Act* and that the Victorian provisions were inoperative as a result of a direct inconsistency.

### *Submissions*

Council received a number of submissions that were in favour of uniform parentage laws as a general principle. There was a range of submissions in relation to how the *Family Law Act* should apply to known donors of genetic materials. Some recommended that the *Family Law Act* should be amended to make it clear that donors of genetic material are not legal parents, regardless of the relationship status of the woman who gives birth following assisted reproductive technology. This would be consistent with the majority of state and territory laws. This could be done by either prescribing state and territory laws for all of s 60H *Family Law Act* (and not just where women have partners), or by including provisions in the *Family Law Act* that mirror those that exist in the state and territory laws.

### *Council's views and recommendations*

Council agrees that the *Family Law Act* should be as consistent with state and territory laws as possible and recommends that s 60H *Family Law Act* be amended to reflect that position. This would mean that the same parenting presumptions would apply to intending parents using assisted reproductive technology or entering surrogacy arrangements under state or territory laws and the *Family Law Act*.

In terms of ‘uniformity’ across all jurisdictions, it is beyond the scope of the *Family Law Act* to achieve this goal. Council agrees with the recommendations that suggested the need for further work on harmonisation of parentage laws to be referred to the Standing Council on Law and Justice. However, Council believes that there are a number of legislative changes the Australian Government could introduce that would assist in this area. Principally, Council recommends that the Australian Government enact a separate Status of Children Act for the purposes of all Commonwealth laws. In addition, Council is making a further recommendation (in Chapter 5) that the Australian Government introduce separate legislation to enable the Family Court of Australia to transfer parental status to Torres Strait Islander receiving parents.

### **4<sup>th</sup> Term of Reference—Are there any amendments that would assist the family courts to determine the parentage of children born as a result of assisted reproductive technology, including surrogacy, where the State and Territory Acts do not apply?**

Over the past several years, the family courts have received a number of applications for parenting orders relating to children born from surrogacy in circumstances where the surrogacy arrangement used by the parties did not meet the requirements for a transfer of parentage under the relevant state or territory law. In most of these cases the intended parents had used a commercial surrogacy arrangement and the child/ren had been born outside Australia. Commercial surrogacy arrangements are prohibited by state and territory Acts (the Northern Territory has no legislation). Despite this prohibition, many hundreds of children have been born to Australian couples as a result of overseas surrogacy arrangements, and the numbers are growing each year.

The provision in the *Family Law Act* that was intended to govern the recognition of parental status arising from surrogacy arrangements (s 60HB) does not apply to these cases. Consequently, the children born as a result of these arrangements are at risk of having no secure legal relationship to the people who are raising them. Council was asked to consider possible amendments to the *Family Law Act* to assist decision making by the family courts in these cases.

### *The cases*

The decisions in these cases have highlighted that as a result of the preparedness of intending parents to commission surrogacy arrangements that do not meet the requirements of the state or territory law, the child/ren born of these arrangements face the prospect of being unable to secure appropriate and non-discriminatory legal status. The cases in this area also reveal the potential for inconsistent outcomes for children, for example, as between children born of surrogacy arrangements within Australia that do not meet the requirements of state and territory laws and children born of overseas commercial surrogacy arrangements.

Further, the cases demonstrate a lack of certainty about the application of the other parentage provisions—such as s 60H *Family Law Act*, which deals with children born as a result of an artificial conception process—to surrogacy cases that fall outside s 60HB *Family Law Act*. They also raise questions, as they have for the court in England, about the relevance of public policy considerations (such as the illegality of the surrogacy arrangement) to decision making in commercial surrogacy cases. In considering this term of reference, Council had regard to relevant cases and legislation in other jurisdictions, such as the UK, New Zealand and Canada.

### *Submissions*

Council received submissions expressing a broad range of views as to whether, and if so how, the *Family Law Act* should be amended in relation to the determination of parentage in surrogacy cases. Some submissions recommended that the current *Family Law Act* provision (s 60HB), which recognises parentage transfers made under state and territory laws, is appropriate and that no amendments are needed. Other submissions proposed wide reaching changes to enable the courts to give automatic effect to overseas birth certificates, court orders, or the surrogacy agreement itself. A third group of submissions suggested the need for a parentage transfer process for overseas surrogacy cases that is subject to judicial oversight, in order to safeguard the rights of the child and the surrogate in these cases and ensure the children are not disadvantaged by the status of their family.

### *Council's views and recommendations*

Council has had regard to the strongly held views in relation to this term of reference. Council has considered the research literature on overseas surrogacy arrangements and notes the limited empirical information about the practices in emerging surrogacy market countries and the long-term outcomes for children born from overseas surrogacy arrangements. Council is conscious that the number of children conceived as a result of overseas commercial surrogacy arrangements has increased dramatically in the past several years, despite the existence of Australian laws prohibiting such arrangements. Council believes this issue requires a coordinated international regulatory response of the kind embodied in the Hague Adoption Convention.

In Council's view, the most appropriate course to assist the family courts in the meantime is one aimed at addressing the concerns that underpin current state and territory surrogacy laws (such as concerns about exploitation of surrogates and to protect children's identity rights) whilst also recognising the need to ensure that children born of illegal surrogacy arrangements are not disadvantaged by a lack of legal status.

Council's view is that the best way to achieve this outcome is by providing the family courts with a power to effect a post-birth transfer of parentage from the surrogate (and her partner) to the intended parents where certain 'safeguard' criteria have been met. Council believes that a process of judicial oversight (rather than a contract-based presumption, or prescribing overseas jurisdictions) is necessary given the current, largely unregulated, circumstances of some overseas surrogacy markets. These unregulated markets give rise to concerns about the arrangements, including issues of full, informed consent of surrogate mothers and the (identity) rights of the child.

As noted above, Council recommends that the Government introduce a new federal Status of Children Act, which would include specific provisions dealing with the parentage of children born as a result of assisted reproductive technologies and surrogacy arrangements where the state and territory Acts do not apply. Council has recommended a set of minimum requirements that the courts should have regard to in determining whether to transfer parentage. These minimum requirements are based on the types of matters that the courts (in Australia and other jurisdictions) have considered in these kinds of cases to date, and include similar requirements as currently exist in state and territory laws.

**5<sup>th</sup> Term of Reference—Are there any amendments to the *Family Law Act* that could be made to assist other Commonwealth agencies, such as those responsible for immigration, citizenship and passports, to identify who the parents of a child are for the purposes of Commonwealth laws?**

A number of inconsistencies have arisen in different areas of Commonwealth laws, particularly how various Commonwealth agencies determine who the parent of a child is. This is despite the fact that many pieces of Commonwealth legislation explicitly refer to the parentage provisions in Part VII *Family Law Act*.

In addition to the lack of certainty about legal parentage, overseas surrogacy arrangements also raise uncertainty about citizenship. When a child is born overseas as a result of a surrogacy arrangement, Australian intending parents need to obtain either citizenship (including a passport) or a visa, in order to bring the child back to Australia. In all cases, eligibility is largely determined by a finding that there is a parent child relationship as defined by the various pieces of legislation and related policy manuals.

One route to citizenship has been for intending parents to apply for citizenship by descent. The eligibility requirement for applying for citizenship by descent has raised the problem of the status of the intending parents at the time of birth of the child overseas. The policy of the former Department of Immigration and Citizenship (now the Department of Immigration and Border Protection) has been to grant citizenship by descent where at least one intending parent can demonstrate a biological connection with the child. However, the grant of citizenship does not mean that the intending parents are legal parents for the purposes of any other Commonwealth, state or territory laws, including the *Family Law Act*.

Similar difficulties arise in the case of passport applications for children born overseas as a result of surrogacy arrangements and in visa applications for children under the *Migration Act 1958* (Cth).

### *Submissions*

Council received submissions that expressed the view that the *Family Law Act* should recognise legal parentage of intending parents based on the former Department of Immigration and Citizenship's application of the *Australian Citizenship Act 2007* (Cth).

On the other hand, some submissions were heavily critical of the practice of granting citizenship by descent in international surrogacy cases on the basis that this effectively bypasses all state and territory legislation that provide a mechanism for a transfer of parentage and which prohibit commercial surrogacy arrangements.

### *Council's views and recommendations*

Council's view is that the *Family Law Act* is not the appropriate vehicle for providing a definition of parents for the purposes of other Commonwealth laws. The grant of citizenship by descent does not mean the intending parents are considered legal parents in Australian law and this means these children are vulnerable if there is no legally recognised parent in Australia. Many intending parents do not seek parenting orders when they return to Australia. There have been only 19 reported cases dealing with overseas surrogacy arrangements in the family courts, while there have been many hundreds of children born to Australian couples through overseas surrogacy arrangements. This means that the great majority of children born as a result of surrogacy arrangements overseas do not have the legal protection of having a legally recognised parent in Australia.

Council is of the view that it is in the best interests of children born from international surrogacy arrangements that a child has at least one parent in Australia who is legally recognised as a parent. As noted above, Council believes that a process of parentage transfer, subject to judicial oversight, is the preferred option pending an international regulatory response to the issue of overseas surrogacy arrangements.

### **Other matters**

In addition to the above, in the course of Council's reference, a number of related issues were brought to the attention of Council. In particular, the recognition of 'receiving parents' under Torres Strait Islander customary adoption was also considered under the first and third terms of reference. Council recommends that the Australian Government enact a separate piece of legislation to provide for legal recognition of Torres Strait Islander customary adoption.

Council also notes that questions of legal parentage also raise issues about birth certificates. Council recommends that this is an area where further harmonisation and integration between states and territories and the Commonwealth would be beneficial.

A complete list of Council's recommendations is provided in the following section.

A list of references is provided at the conclusion of the report. The reference list includes all works cited in the report as well as other material that informed Council's report.

A list of Commonwealth, state and territory laws regarding parentage is listed at **Appendix A**.

The Objects and Principles of Part VII *Family Law Act* are reproduced at **Appendix B**.

A list of cases is provided in **Appendix C**.

A table of other significant Commonwealth laws that define parent child relationships is provided at **Appendix D**.

A comparative table of state and territory surrogacy legislation (QLD, NSW, VIC) is provided in **Appendix E**.

A comparative table of state and territory surrogacy legislation (WA, SA, ACT, TAS) is provided in **Appendix F**.

A list of consultations is provided in **Appendix G**.

A list of written submissions received by Council is provided in **Appendix H**.

The function and membership of the Family Law Council is provided in **Appendix I**.

## Recommendations

### Recommendation 1

The Australian Government should conduct a comprehensive review and revision of the decision making provisions of Part VII of the *Family Law Act* to ensure that it provides a consistent approach to decision making for all children regardless of their family form.

### Recommendation 2

Given the evidence of family diversity and children's views about who is a parent, the reference to 'both' of the child's parents should be removed from s 60B(1) of the *Family Law Act* and s 60CC(2)(a) of the *Family Law Act*.

In addition, where the word 'parent' appears in the decision making framework for parenting orders in Part VII of the *Family Law Act*, it should be amended to include a reference to 'other significant adults' or 'other people of significance to the child' where appropriate.

### Recommendation 3

The definition of parent in s 4 of the *Family Law Act* should be amended to make it clear that for the purposes of determining parenting orders in accordance with Part VII of the *Family Law Act*, the term parent is inclusive and not limited to parents recognised under the law.

The definition should reflect the empirical evidence of family diversity and children's perspectives of family.

The definition should include a provision that recognises that a parent ‘may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.’

#### **Recommendation 4**

In determining the best interests of an Aboriginal child, s 60CC(3)(h) of the *Family Law Act* should be amended to include ‘the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the benefit to that child to enjoy that culture with other people who have the responsibility to pass on that culture).’

#### **Recommendation 5**

Part VII of the *Family Law Act* should make specific provision for the making of orders in favour of one person or more than two persons where that supports the child’s best interests.

#### **Recommendation 6**

The Australian Government should introduce a federal Status of Children Act that includes power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws.

Council recommends that s 60H of the *Family Law Act*, together with all the other provisions relating to parentage that are currently in Part VII of the *Family Law Act*, should be consolidated in this separate federal Status of Children Act.

#### **Recommendation 7**

Council recommends that the Attorney-General ask the Standing Council on Law and Justice consider further state, territory and Commonwealth cooperation on harmonising parentage laws nationally.

#### **Recommendation 8**

Council recommends that s 60H of the *Family Law Act* be re-drafted to be consistent in its approach to single and couple parents and to be consistent with state and territory laws in this area that make provision about the parental status of donors of genetic material.

#### **Recommendation 9**

Council recommends that s 69U of the *Family Law Act* be amended to make it clear that the presumptions in Division 12 can be rebutted by other provisions in Part VII *Family Law Act*.

#### **Recommendation 10**

The Australian Government should seek a referral of power from South Australia consistent with the referrals from New South Wales, Queensland, Tasmania and Victoria which provide that the family courts may make a determination of parentage ‘whether or not the determination of the child’s parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth’.

Upon receiving the referral of power from South Australia, the Australian Government should amend s 69VA of the *Family Law Act* to reflect those referrals.

### **Recommendation 11**

To remove any doubt, the Australian Government should consider amending s 69W of the *Family Law Act* to make it clear that the court may consider the best interests of the child when deciding whether to make a parentage testing order.

### **Recommendation 12**

The new federal Status of Children Act (see Recommendation 7) should contain provisions specifically dealing with applications for transfer of parentage in surrogacy cases where state and territory Acts do not apply. This should be based on a transfer of parentage process and not a presumption of parentage.

### **Recommendation 13**

The provisions in the new federal Status of Children Act dealing with the transfer of parentage in surrogacy cases where state and territory Acts do not apply should contain a set of minimum requirements based on the proposals considered by Ryan J in *Ellison and Anor & Karnchanit* [2012] FamCA 602 with the aim to ensure compliance with Australia's international human rights obligations, including the following:

- That any order is subject to the best interests of the child;
- Provision is made for when the parties change their minds;
- Evidence of the surrogate mother's full and prior informed consent;
- Evidence of the surrogacy agreement, including any sums paid;
- Consideration should be given to whether the intending parents have acted in good faith in relation to the surrogate mother;
- Evidence of the intending parent/s actions in relation to ensuring the child will have access to information concerning the child's genetic, gestational and cultural origins;
- Provision is made that where a surrogacy arrangement involves multiple births, orders must be made in relation to all children born;
- The legality of the surrogacy arrangement should be a relevant consideration for the court when determining parentage.

### **Recommendation 14**

Council recommends that s 60H of the *Family Law Act* should be amended so that it is clear it does not apply to surrogacy arrangements. This amendment should be effected irrespective of whether the Australian Government introduces a new Status of Children Act.

### **Recommendation 15**

Council recommends that s 60HB of the *Family Law Act* should be retained (in some form) to recognise state and territory orders that transfer parentage in domestic surrogacy arrangements. This recommendation should apply irrespective of whether the Australian Government introduces a new Status of Children Act.

### **Recommendation 16**

Council recommends that the Australian Government should pass amendments to:

- Clarify whether the court has power to authorise the taking of a sample from a child without the consent of a parent.
- Amend s 69ZC of the *Family Law Act* to make it clear that a non-compliant report may be admitted into evidence if the court is satisfied it should be.

This should be effected irrespective of whether the Australian Government introduces a new Status of Children Act.

### **Recommendation 17**

Council recommends that the Attorney-General ask the Australian Law Reform Commission to conduct an inquiry into the full range of issues raised by international surrogacy and its impact on Commonwealth laws.

### **Recommendation 18**

Council recommends that the Australian Government should pass separate legislation to enable the family courts to transfer parental status to Torres Strait Islander receiving parents.

### **Recommendation 19**

In line with Recommendation 8, Council further recommends that the related matter of birth registration be reviewed at the same time and that consideration be given to harmonisation of records so that one search can track births (deaths and marriages) in all states and territories.

# Preface

This report provides a response to the request from the former Attorney-General, Nicola Roxon, which asked the Family Law Council to examine a number of issues in relation to who is considered to be a parent of a child under the *Family Law Act*. The reference arises from the increasing diversity of families in Australia and the rapidly changing nature of reproductive technology and community attitudes to family formation. It also reflects a concern to ensure that as far as possible children are not disadvantaged by the nature of their family or the way in which it was formed.

A number of the terms of reference raise issues about the legal parentage of children born of assisted conception procedures and surrogacy arrangements and these issues are discussed in various chapters of this report. In order to minimise repetition throughout the report, this preface provides an overview of assisted reproductive technology processes and the relevant legislative provisions in the *Family Law Act*. An explanation of the terminology used throughout the report is also provided.

## **Assisted reproduction**

According to the Fertility Society of Australia website 'one in six Australian couples suffer infertility.'<sup>1</sup> 'Assisted reproduction' refers to procedures that are used to assist a person to conceive a child other than through intercourse. Some people may provide their own sperm and eggs for an assisted reproductive procedure, whereas other people may need to use sperm and/or eggs (gametes) obtained from a donor. The donor may be someone that the recipient knows, or may be a person previously unknown to the recipient. Donated gametes are often used when partners have had difficulties conceiving, or when a person carries a hereditary disease or genetic abnormality, or when women without male partners wish to have children.<sup>2</sup>

Australia and New Zealand wide the statistics for the number of births following assisted reproductive technology in 2010 included:

- 11,618 births from in vitro fertilisation cycles
- 382 births involving donor eggs or donor embryos

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1 The Fertility Society of Australia, <[www.fertilitysociety.com.au/](http://www.fertilitysociety.com.au/)>.

2 Victoria Law Reform Committee, *Inquiry into Access by Donor-Conceived People to Information about Donors*, Final Report (2012), pp 2-3 (references omitted).

- 16 births from gestational surrogacies (domestic)
- 259 births from donor sperm insemination cycles.<sup>3</sup>

Assisted reproduction may also occur informally through private arrangements where a man provides sperm to a woman or couple for self-insemination.

Couples wishing to become parents may also use a surrogacy arrangement. A simple definition of surrogacy is ‘an understanding or agreement by which a woman—the surrogate mother—agrees to bear a child for another person or couple.’<sup>4</sup> Surrogacy arrangements may take a variety of forms, and a child born from a surrogacy arrangement may be genetically related to both, one, or neither of the intending parent/s. The forms and use of surrogacy arrangements by Australians is discussed in more detail in Chapter 3 (see Chapter 3.2).

### ***The regulation of parentage in Australia***

The legal definition of who is a parent varies historically, culturally and jurisdictionally. The legal determination of a parent/child relationship is a significant matter given that parents have obligations and responsibilities to children that flow from that relationship. Legal parents automatically have parental responsibility for their child/ren unless a court orders otherwise: ‘Each of the parents of a child who is not 18 has parental responsibility for the child.’<sup>5</sup> Parental responsibility is not affected by the change in the relationship of the parents.<sup>6</sup> Importantly, the legal status of being a parent is permanent (unless there is a court ordered transfer—as in adoption and surrogacy), and is not limited by a child turning 18 years old.

Parental responsibility under the *Family Law Act* means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.’<sup>7</sup> These duties and responsibilities are derived from common law and legislation and include the day-to-day care of, and decision making for children in a number of areas. In addition to having parental responsibility, legal parental status is relevant in many other areas of Commonwealth, state and territory law. Principally, these areas include, child support, citizenship, migration, and a range of benefits under Commonwealth laws (see Chapter 5 and Appendix D). At state and territory level, rights under inheritance laws, birth registration, and statutory compensation schemes (to name a few) may also depend on the legal recognition of a parent/child relationship.<sup>8</sup> A brief overview of the development of parentage laws is provided below.

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3 Macaldowie, Alan et al, *Assisted reproductive technology in Australia and New Zealand 2010* (Australian Institute of Health and Welfare, 2012), p47.

4 Morgan, Derek, ‘Surrogacy: An Introductory Essay’ in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics and the Beginnings of Life* (Routledge, 1989) 55, p. 56.

5 *Family Law Act*, s 61C.

6 *Family Law Act*, s 61C(2).

7 *Family Law Act*, s 61B.

8 For a discussion of the potential range of legal entitlements, responsibilities and duties see, eg: Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report*, (2007), pp113-114. In relation to Commonwealth laws see the Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements. National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007).

The English common law of parentage was, in effect, a presumption of legitimacy tied to marriage. Children who were born 'outside' of marriage (sometimes referred to as 'ex-nuptial' children, were legally viewed as 'filius nullius' (literally 'son of nobody'). In other words, fathers had no legal responsibilities in relation to these children and the child could not inherit from the father. Legitimacy was more a matter of inheritance (protection of property interests) and preserving the family lineage, than it was about children's interests.

At common law, a child was presumed legitimate, either if born during a marriage, whether or not conception occurred after marriage, or if conceived during a marriage, whether or not born during the marriage.<sup>9</sup> The status of illegitimacy discriminated against children based on the marital status of their parents. The concept of illegitimacy also operated alongside ideas about children as being like a form of property. Due to changed social attitudes (around marriage, the position of women in society and the position of children in society) such legal discrimination was gradually removed throughout the 1970s in the various state and territory Status of Children Acts.<sup>10</sup> These Acts are the main legal sources that determine parentage in Australia. A table of the relevant laws is listed in Appendix A. These laws contain a number of statutory presumptions of parentage that are generally rebuttable on the balance of probabilities, including:

- A presumption arising from marriage. A child born to a married woman is presumed to be the child of the woman and her husband.
- A presumption arising from cohabitation. There is a presumption of paternity where a woman gives birth to a child while cohabiting with a man during certain time periods (these vary according to the *Family Law Act*).
- Presumptions arising from registration of birth.
- Presumptions arising from judicial declarations/court orders.
- Presumptions arising from an instrument acknowledging paternity.

In addition to these 'traditional' presumptions, with the advent of reproductive technologies further provisions relating to the legal definition of parents were introduced.<sup>11</sup> These are discussed in Chapter 2 (see Chapter 2.2).

The *Family Law Act* also contains a number of provisions dealing with parentage. Most of these are found in Part VII. The family courts may find that someone is a parent under the general presumptions in Division 12 subdivision D *Family Law Act*. A person may be deemed to be a parent under s 60H *Family Law Act* (where a child is born as a result of an artificial conception procedure) or s 60HB *Family Law Act* (where a child is born from a surrogacy arrangement), or the court may

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9 *J and P* (1985) 10 Fam LR 490 and see *Cocks v Juncken* (1947) 74 CLR 277.

10 The (current) relevant Acts are as follows: *Parentage Act 2004* (ACT); *Status of Children Act 1978* (NT); *Status of Children Act 1996* (NSW); *Status of Children Act 1978* (QLD); *Family Relationships Act 1975* (SA); *Status of Children Act 1974* (Tas); *Status of Children Act 1974* (Vic). In Western Australia the statutory presumptions of parentage are in the *Family Court Act 1997* (WA).

11 See the *Infertility (Medical Procedures) Act 1984* (Vic). The Victorian legislation was one of the first of its kind in the world.

declare that a person is a parent for the purposes of Commonwealth laws under s 69VA *Family Law Act*.<sup>12</sup>

The general presumptions of parentage were first inserted into the *Family Law Act* in 1987,<sup>13</sup> to assist the Family Court in determining parentage or paternity for the purpose of making a declaration or finding of parentage under Part VII *Family Law Act*.<sup>14</sup> The relevant presumptions are as follows:

## Subdivision D—Presumptions of parentage

### 69P Presumptions of parentage arising from marriage

(1) If a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.

(2) If:

(a) at a particular time:

(i) a marriage to which a woman is a party is ended by death; or

(ii) a purported marriage to which a woman is a party is annulled; and

(b) a child is born to the woman within 44 weeks after that time;

the child is presumed to be a child of the woman and the husband or purported husband.

(3) If:

(a) the parties to a marriage separated at any time; and

(b) after the separation, they resumed cohabitation on one occasion; and

(c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and

(d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the divorce of the parties;

the child is presumed to be a child of the woman and the husband.

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12 For a summary description of the scheme of parentage provisions in Part VII, see *Ellison and Anor & Karnchanit* [2012] FamCA 602 at para 34.

13 House of Representatives, Second Reading of the Family Law (Amendment) Bill 1987, 29 October 1987, at 1716.

14 Prior to this time, the Family Court had power to make a declaration of paternity under s 92 of the *Marriage Act 1961* (Cth) but there were no presumptions in the *Family Law Act* to guide these decisions. Instead the presumptions in the state and territory Status of Children Acts applied to Family Court proceedings by virtue of s 79 of the Commonwealth *Judiciary Act 1903* (Cth).

### **69Q Presumption of paternity arising from cohabitation**

If:

- (a) a child is born to a woman; and
- (b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married;

the child is presumed to be a child of the man.

### **69R Presumption of parentage arising from registration of birth**

If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.

### **69S Presumptions of parentage arising from findings of courts**

(1) If:

- (a) during the lifetime of a particular person, a prescribed court (other than a court of a prescribed overseas jurisdiction) has:
  - (i) found expressly that the person is a parent of a particular child; or
  - (ii) made a finding that it could not have made unless the person was a parent of a particular child; and
- (b) the finding has not been altered, set aside or reversed;

the person is conclusively presumed to be a parent of the child.

(1A) If:

- (a) during the lifetime of a particular person, a court of a reciprocating jurisdiction within the meaning of section 110 or a jurisdiction mentioned in Schedule 4 or 4A to the regulations has:
  - (i) found expressly that the person is a parent of a particular child; or
  - (ii) made a finding that it could not have made unless the person was a parent of a particular child; and
- (b) the finding has not been altered, set aside or reversed;

the person is presumed to be a parent of the child.

(2) If:

- (a) after the death of a particular person, a prescribed court has:
  - (i) found expressly that the person was a parent of a particular child; or
  - (ii) made a finding that it could not have made unless the person was a parent of a particular child; and

- (b) the finding has not been altered, set aside or reversed;
- the person is presumed to have been a parent of the child.
- (3) In this section:

**prescribed court** means a federal court, a court of a State or Territory or a court of a prescribed overseas jurisdiction.

### **69T Presumption of paternity arising from acknowledgments**

If:

- (a) under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and
  - (b) the instrument has not been annulled or otherwise set aside;
- the man is presumed to be the father of the child.

### **69U Rebuttal of presumptions etc.**

- (1) A presumption arising under this Subdivision is rebuttable by proof on a balance of probabilities.
- (2) Where:
- (a) 2 or more presumptions arising under this Subdivision are relevant in any proceedings; and
  - (b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings;
- the presumption that appears to the court to be the more or most likely to be correct prevails.
- (3) This section does not apply to a presumption arising under subsection 69S(1).

Apart from the presumption in s 69S(1) *Family Law Act*, which is conclusive, these presumptions are rebuttable by proof on a balance of probabilities: s 69U *Family Law Act*.

Section 60H *Family Law Act* deals with the determination of parentage where an assisted reproductive treatment has been used. This provision sets out specific and non-rebuttable presumptions of parentage in relation to children born as a result of an 'artificial conception procedure', which is defined in s 4 *Family Law Act*.<sup>15</sup> The *Family Law Act* has contained a provision relating to children

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15 Defined in s 4 as including (a) artificial insemination and (b) the implantation of an embryo in the body of a woman.

born from assisted reproductive technology since 1983.<sup>16</sup> The section has undergone numerous amendments since then. Subsections (2) and (3) of s 60H *Family Law Act* were enacted in 1995.<sup>17</sup> Section 60H(1) *Family Law Act* was amended in 2008 to recognise same sex partners.<sup>18</sup>

The present version of s 60H *Family Law Act* is as follows:

### **60H Children born as a result of artificial conception procedures**

(1) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and
- (b) either:
  - (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
  - (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

- (c) the child is the child of the woman and of the other intended parent; and
- (d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

(2) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

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16 The *Family Law Amendment Act 1983* (Cth) inserted s 5A into the *Family Law Act* which extended the definition of a child of a marriage to child born to a woman while married following a medical procedure. The *Family Law Amendment Act 1987* (Cth) repealed s 5A and inserted an amended and extended provision in the then new s 60B of Part VII *Family Law Act*.

17 Prior to the enactment of the *Family Law Reform Act 1995* (Cth), s 60H(1) *Family Law Act* was found in identical terms in s 60B *Family Law Act*.

18 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

(3) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

**this Act** includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Circuit Court Rules.

Section 60HB *Family Law Act* was enacted in 2008.<sup>19</sup> It deals specifically with the issue of parentage in relation to domestic surrogacy arrangements. Section 60HB of the *Family Law Act* states:

### **60HB Children born under surrogacy arrangements**

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

- (a) a child is the child of one or more persons; or
- (b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

**this Act** includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Circuit Court Rules.

### **A note on terminology used in this report**

The word 'parent' has a broad range of meanings in common usage. There are ethical as well as technical reasons as to why it is necessary to specify at the outset how these words will be used in this report. Recent inquiries into past adoption practices<sup>20</sup> have highlighted the importance of

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<sup>19</sup> *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

<sup>20</sup> Kenny, Pauline et al, *Past Adoption Experiences: National Research Study on the Service Response to past Adoption Practices. Executive Summary* (Australian Institute for Family Studies, 2012).

language use and how language impacts those who are affected by it. Due to the differences between legal parents and other parents it is important that Council uses clear and consistent language when discussing the different legal and social arrangements that exist within families. By differences here, we mean the potential legal consequences that flow from a legal relationship of parent and child.

In addition, reproductive technologies have enabled the separation of genetic, gestational and social aspects of reproduction and child rearing. In this report Council uses 'legal parents' to refer to parents who currently have the legal status of parent in relation to a child. A legal parent could be an adoptive parent, a genetic parent, a social parent, a gestational mother. We use the term 'parent' to refer to other people who do not have the legal status of parent but who, for a variety of reasons, are also parents. We do not use the term birth mother.

Council notes at the outset that from a child's perspective, the question 'who is a parent?' might well be answered differently from the response provided by adults and the law.

Council also acknowledges the potentially harmful effects of certain terms for people affected by reproductive policies. As one submission to Council noted:

Terms such as gestational mother, birth mother, natural mother or relinquishing mother do not recognise that in the majority of cases, the mother that carries the child will maintain a psychological relationship to the child even if they nurtured the child in utero with the knowledge that they would be relinquishing the child for adoption or for others to raise.<sup>21</sup>

In drafting this report Council was conscious of this issue, and of the need for clarity. These issues informed Council's choice of terminology. The following terms used in this report are explained below:

### **Adoptive Parents**

Adoptive parents are legal parents who have been formally granted status through legislation and/or court orders.

### **Biological Parents**

Like the term 'natural parents', this term has generally been replaced by 'Genetic Parents'. This is because the term is now considered too broad: there are different kinds of biological parents—genetic and gestational. Not all biological parents are legal parents.

### **Genetic Parents**

Genetic parents are the parents whose eggs or sperm are used in the creation of a child. This may be through sexual intercourse, through self-insemination (as in private arrangements between a woman or a lesbian couple with a known sperm donor), or through the use of a form of reproductive technology. Not all genetic parents are legal parents. The situation with sperm and egg donors is a complex one that is discussed later.

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21 Dr Susan Green Submission, p. 2.

## **Intended/Intending Parent(s)**

This term is sometimes used in relation to all people using reproductive technologies as a means of family formation. In relation to surrogacy arrangements 'intending parents' refers to those who 'arrange for the surrogate mother to gestate and give birth to a child for them to raise from birth.'<sup>22</sup>

## **Psychological Parents**

The term psychological parent is used to designate the person whom a child forms an 'emotional attachment' with as their parent.<sup>23</sup> A classical formulation of this is given by Goldstein, Freud and Solnit:

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."<sup>24</sup>

## **Social Parents**

Parents who are not biologically related to their children but who do the loving and caring of children are sometimes referred to as social parents. As can be seen from the above definition, they may also be a child's 'psychological parent'. These parents may be step-parents or partners of biological parents, other relatives (grandmothers or aunts) or other people who take on the role of parent. In other words, these parents may form relationships after a child is conceived/born.

## **Surrogate mother**

A surrogate mother is a woman who enters an agreement with intending parent/s to become pregnant and give birth to a child with the intention that the intending parents will be the child's parents and the surrogate mother will relinquish all rights to the child. Surrogacy is discussed in a separate section in this report.

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22 Law Commission /Te Aka Matua O Te Ture, *New Issues in Legal Parenthood* (2005), p. x.

23 Goldstein, Joseph, Anna Freud and Albert J Solnit, *Beyond the Best Interests of the Child. New Edition with Epilogue* (The Free Press, 1973).

24 Ibid, p. 17.

# CHAPTER 1: Is Part VII of the *Family Law Act* working well for children?

## 1.1 Introduction

This chapter addresses the first question of the terms of reference, which asked Council to report on 'whether the provisions in Part VII of the *Family Law Act* that deal with the parentage of children lead to outcomes that are appropriate, non-discriminatory and consistent for children'. This question is central to each of the other terms of reference and is discussed further in particular in Chapter 2 (regarding inconsistencies between state and territory parentage laws and the *Family Law Act*) and Chapter 3 (regarding children born as a result of surrogacy arrangements).

The discussion in this chapter is confined to the issue of the application of Part VII to children in parenting matters and explores whether the provisions of Part VII apply consistently to all children irrespective of the structure of their family. More particularly, the chapter is concerned with the definition of parent for the purposes of parenting disputes under Part VII and the operation of the provisions of Part VII when one or more of the people who has primary or substantial care and responsibility for the child is not a parent within the meaning of this definition. The chapter considers whether amendments to Part VII are needed to better reflect the diversity of families in Australia and ensure that children are not disadvantaged by their family form.

The chapter begins with an examination of the social context in which the law is applied. This discussion has two aspects: the first concerns the growing diversity of family forms in Australia, the second relates to the research evidence on how children conceptualise family.

## 1.2 Family diversity in Australia

The nature of family life in Australia has changed significantly since the *Family Law Act* came into operation in 1976, and families with children now reflect a great diversity of family forms. As David de Vaus has noted,

Families are often talked about as if there was only one ideal template from which they are and should be shaped. But even a fleeting familiarity with family history, family demography and other family research makes it clear that families come in many shapes and sizes—they

always have and always will. Not only does the nature of families change over historical time, any person's family changes over their life course.<sup>25</sup>

Among the major changes since the passage of the *Family Law Act* have been significant increases in cohabiting and one-parent families.<sup>26</sup> The number of one-parent families in Australia doubled between 1966 and 1986,<sup>27</sup> while the proportion of couple families with dependent children fell from 48.4% (in 1976) to 35.7% (in 2011).<sup>28</sup>

Couple families with dependent children also encompass a number of different family types, including intact families, step-families, blended families, and same sex families<sup>29</sup> and, increasingly, formal and informal kinship care arrangements.<sup>30</sup> In 2011, 27% of all families with children were structured in 'non-traditional' ways.<sup>31</sup> The Australian Bureau of Statistics first counted same sex couples living together in 1996. In 2011, 33,714 same sex couples were counted,<sup>32</sup> representing 0.7% of all couple families.<sup>33</sup> Of these families, 14% included children currently living with them (this included adult children). For lesbian families, 22% had children while only 3% of gay male couple families had children.

There have also been significant changes in methods of family formation. As outlined in the Preface to this report, this includes the increasing use of assisted reproductive technologies and, more recently, surrogacy arrangements, to become parents. Recent reports indicate, in particular, that there has been a substantial rise in the number of single women using *in vitro fertilisation* and donor sperm to become parents,<sup>34</sup> a development that may see growing numbers of children with one

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25 de Vaus, David, *Diversity and Change in Australian Families* (Australian Institute of Family Studies, 2004), xv.

26 Qu, Lixia and Ruth Weston, 'Parental Marital Status and Children's Wellbeing' (Australian Institute of Family Studies, 2012).

27 Australian Bureau of Statistics, *Census 86—Australia's One Parent Families*, December 1991, Cat No. 2511.0, at 1.

28 Australian Institute of Family Studies, *Family Facts and Figures: Australian Families*. Available online at: <[www.aifs.gov.au/institute/info/charts/familystructure/index.html#ftype2011](http://www.aifs.gov.au/institute/info/charts/familystructure/index.html#ftype2011)>.

29 Australian Institute of Family Studies, *Family Facts and Figures: Glossary*. Available online at: <[www.aifs.gov.au/institute/info/charts/glossary.html#intact](http://www.aifs.gov.au/institute/info/charts/glossary.html#intact)>.

30 Boetto, Heather, 'Kinship Care: A Review of Issues' (2010) 85 *Family Matters* 60, p. 60. Formal kinship care refers to 'children and young people who have been placed with relatives, friends or local community members by child protection agencies' whereas informal kinship care arrangements are 'voluntary arrangements made between family members.'

31 Hunter, Cathryn and Rhys Price-Robertson, *Family Structure and Child Maltreatment: Do some family types place children at greater risk?* (Child Family Community Australia, Paper No 10, 2012), p. 3.

32 Australian Bureau of Statistics, 'Same-Sex Couple Families' *Reflecting a Nation: Stories from the 2011 Census, 2012-2013* (ABS Document 2071.0). Available online at: <[www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013)>.

33 It can be noted that this was 32% higher in 2011 compared with the 2006 census data. It is suggested that this may reflect increased awareness and preparedness of same sex couples to identify as such for the census data: Australian Bureau of Statistics, 'Same-Sex Couple Families' *Reflecting a Nation: Stories from the 2011 Census, 2012-2013* (ABS Document 2071.0). Available online at: <[www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013)>.

34 See Medow, J, 'Dreams fulfilled as donor use soars', *The Age*, 3 November 2013; Victorian Assisted Reproductive Treatment Authority, *Annual Report 2013*, <[www.varta.org.au/annual-reports/](http://www.varta.org.au/annual-reports/)>.

parent. On the other hand, the use of reproductive technologies and surrogacy to create families has also increased the number of potential parents that a child may have, including a mix of genetic, gestational, social and intending parents.

A further issue related to family diversity stems from the fact that Australia is home to a wide range of different cultural practices about child care and parentage. Council's 2012 report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, described the considerable range and variation in Aboriginal and Torres Strait Islander child rearing practices.<sup>35</sup> An examination of these practices shows 'there is no one Aboriginal child rearing practice ...within each clan, there is a wide variation of child rearing practices';<sup>36</sup> and that these practices are constantly in 'a state of transition'.<sup>37</sup> The literature on Aboriginal and Torres Strait Islander child rearing practices also highlight approaches to family structure that are distinct from those of non-Indigenous families, although familial terms such as 'mother', 'grandmother' and 'uncle' may be used.

Importantly, responsibility for children in Aboriginal families may be broader than biological parents, with multiple caregivers drawn from family or community members.<sup>38</sup> For example, a review by the Warrki Jarrinjaku ACRS Project Team that was noted in Council's report in 2012 on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* indicates that:

[A]mongst the Central Australian Aboriginal language groups, the biological mother's sisters are also referred to as the child's mothers. The mother's sisters have an obligation to support her to carry out her daily roles and responsibilities. This may extend to breastfeeding if required and possible. If the biological mother is absent for a period, it is the duty of her sisters or mother to take over the responsibility for the children. For example ...a child taken from the Pitjantjatjara next to Uluru at about 7 years of age remembers that he had several mothers, and knowing who was his biological mother was never made clear to him or considered important.<sup>39</sup>

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35 See also, Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, Out of the Maze* (2004).

36 Yeo, Soo See, 'Bonding and attachment of Australian Aboriginal Children', (2003) 12(5) *Child Abuse Review*, 292, p. 297, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011), p. 120.

37 Howard, Sue, 'Fathering and Indigenous Families—a North Queensland Community Partnership', paper presented at the *Helping Families Change Conference*, Melbourne, 23 -24 February 2001, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011), p. 123.

38 Yeo, Soo See, 'Bonding and attachment of Australian Aboriginal Children', (2003) 12(5) *Child Abuse Review*, 292, p. 299 as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011), p. 32.

39 Warrki Jarrinjaku ACRS Project Team, 2002, Warrki Jarrinjaku Jintangkamanu Purananjaku 'Working Together Everyone and Listening', Aboriginal Child Rearing & Associated Research: A Review of the Literature, Department of Family and Community Services, Canberra, p. 58 as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011), p. 24. See Council's report on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012), p.19.

In contrast to Aboriginal child care practices is the customary adoption practice of Torres Strait Islanders, known as *kupai omasker*. Customary adoption is a widespread practice within Torres Strait Islander communities.<sup>40</sup> It is used to maintain inheritance of traditional land, to ensure that family members who cannot have children due to infertility are able to raise a child, and to strengthen alliances between families.<sup>41</sup> In contrast to Western legal notions of adoption, these customary adoptions take place between relatives and close friends where bonds of trust have already been established. A key characteristic of this practice is the principle that children 'are never lost to the family of origin', as they have usually been placed with relatives somewhere in the family network.<sup>42</sup>

As noted in Council's 2012 report, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, Australia also has one of the most ethnically diverse populations in the world, a result of a long tradition of nation-building through immigration.<sup>43</sup> Australians come from over 200 different countries of birth, speak up to 400 different languages and follow more than 100 religious faiths,<sup>44</sup> and around 27 per cent of our resident population was born overseas (approximately 6 million people).<sup>45</sup> The population includes a growing number of humanitarian entrants and refugees from Africa and the Middle East.<sup>46</sup> As was outlined in Council's report in 2012 on *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*, a number of submissions to that reference described the propensity among many of these new and emerging communities in Australia to take a 'collective rather than individualist approach' to family and child rearing, and noted the lack of recognition of this approach in the *Family Law Act*.<sup>47</sup>

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40 Ban, Paul, 'The rights of Torres Strait Islander children to be raised within the customs and traditions of their Society' (Submission to Queensland Government Joint Select Committee on Surrogacy 2008).

41 Ibid.

42 Ibid.

43 See Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012), Chapter 1. See also Department of Immigration and Citizenship, 'Immigration history 2006 to today', *Annual Report 2009-2010*, <[www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf](http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf)>; Australian Bureau of Statistics, *Australian Standard Classification of Cultural and Ethnic Groups* [Cat No 1249.0] (2005), p. 2.

44 See Department of Immigration and Citizenship, *Living in Australia: A National Action Plan to Build on Social Cohesion, Harmony and Security*, <[www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/nap.htm#e](http://www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/nap.htm#e)>, and Dimopoulos, Maria, 'Implementing legal empowerment strategies to prevent domestic violence in new and emerging communities (Australian Domestic and Family Violence Clearinghouse, Issues Paper 20, 2010).

45 Australian Bureau of Statistics, 'Australia's Diverse Population', *Migration Australia 2009-10* [Cat No 3412.0] (2011).

46 Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012), Chapter 1.

47 Australian Immigrant and Refugee Women's Alliance Submission, Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (2012), Chapter 2.2.11.

### 1.3 Children's understanding of family

One of the other significant developments since the introduction of the *Family Law Act* has been the rise in recognition of children's rights and perspectives.<sup>48</sup> This is particularly relevant to the consideration of the issue of 'who is a parent', which is the subject of Council's reference.

As Jan Pryor and Bryan Rodgers have noted,

Children's views about their parents and the relationships they have with them differ in significant ways from the assumptions made by many adults.<sup>49</sup>

Many of the concepts of parenthood that are embodied in the law have been developed from adult perspectives. Adult ideas about biology, genetics, intention and legal status may be viewed differently by children. Also, the relative importance of such factors or concepts may change over time as children develop beyond infancy, enter adolescence and then transition into adulthood. Pryor and Rodgers' review of research findings indicates that among the general population, traditional concepts of family (married parents and children living in the same household) are prevalent among young children. A wider conceptualisation is evident among children in middle childhood, with acceptance of extended family members and lone-mother households as 'family'. Adolescents maintain a still wider construct, inclusive of lone-father households and gay parents. Biological relationships receive more emphasis among children in middle childhood and in adolescence, whereas love and affection are definitive features of family across all age groups.<sup>50</sup>

Pryor and Rodgers further note that children's own experiences of their family influence their conceptions of family form, but that variation is evident in the extent to which some children accept reconstituted families as 'family'.

Children living in different household structures see families in slightly different ways. Lone-parent households are more likely to be seen as real families by children whose parents have divorced...[another study] found that nonresidential parents were less likely to be endorsed as part of their families by young people in lone-parent and stepparent households than were the residential parents of those in original families.<sup>51</sup>

Pryor and Rodgers also highlight the diversity in the extent to which children's conceptions of family are constrained by biological links:

We do not know why some children extend their concept of family to encompass non-kin and stepfamily members while others include only biological kin as family members. What is important to note is the variety of ways in which children construct their sense of family; we

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48 Cleaver, Hedy, Ira Unell and Jane Aldgate, *Children's Needs - Parenting Capacity* (TSO, 2nd ed, 2011); Bainham, Andrew et al (eds), *Children and Their Families* (Hart Publishing, 2003); James, Allison, 'Parents: A Children's Perspective' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 181; Wallbank, Julie, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge, 2010).

49 Pryor, Jan and Bryan Rodgers, *Children in changing families: life after parental separation* (Blackwell, 2001), p. 128.

50 Ibid.

51 Ibid, p. 127 (references omitted).

cannot make assumptions about who belongs to an individual child's family in his or her eyes.<sup>52</sup>

Children also grow up and participate in their families as active members. Allison James, for instance, has pointed out that rather than being 'about' children, research should examine what children themselves think rather than focusing on parents' views of parenting.<sup>53</sup> Children's own observations about families and caring for parents suggest that they view their families as involving 'interdependent relationship' rather than a one way relationship.<sup>54</sup> James also notes that children rarely refer to 'parent' but to mums, dads, step dads etc., and that 'family' is not necessarily confined to those who live together.<sup>55</sup> The key findings from Morrow's study of 183 children in the United Kingdom (ages 8–14), which asked children 'who is important to me', 'what is a family' and 'what are families for', found that:

From children's point of view, love, care and mutual respect and support were the key characteristics of 'family'. This was the case regardless of gender, ethnic background, and location. Overall, children appeared to have an accepting, inclusive view of what counts as family and their definitions did not centre around biological relatedness or the 'nuclear' norm.<sup>56</sup>

James suggests that the 'literature on children living in exceptional circumstances is instructive for our understanding of a more general children's perspective on parents'.<sup>57</sup> By 'exceptional circumstances' James is referring in particular to a study of children's experiences of family separation<sup>58</sup> which

...draws a clear distinction between the concept of "parent" and the actions of "parenting". A 'proper' parent is a person with whom one has a good relationship such that the experience of being parented involves "a profound sense of being loved and valued" even if that parent is not in contact regularly.<sup>59</sup>

A recent study based on the data from the first national longitudinal study of children in Ireland, *Growing up in Ireland* (GUI) has collected information from the interviews with 9 year old children.<sup>60</sup> The GUI has two national cohorts of 8568 children (9 years old and up) and 11,100 children (infants from 9 months). As part of the overall research design the GUI included a Children's Advisory Forum

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52 Ibid, p. 130.

53 James (1999) above n 48, p. 182.

54 Ibid, p. 189.

55 Ibid, p. 190, referring to the study by Virginia Morrow, *Understanding Families: Children's Perspectives* (National Children's Bureau & the Joseph Rowntree Foundation, 1998).

56 *Findings: Children's Perspectives on Families*, Joseph Rowntree Foundation, <[www.jrf.org.uk/sites/files/jrf/spr798.pdf](http://www.jrf.org.uk/sites/files/jrf/spr798.pdf)>.

57 James (1999) above n 48, p. 191.

58 Neale, Bren, Amanda Wade and Carol Smart, 'I just get on with it: Children's experiences of family life following parental separation and divorce' (Leeds University, Centre for Research on Family Kinship and Childhood, 1998).

59 James (1999) above n 48, p. 191 citing Neale et al (1998) above n 58.

60 McAuley, Colette, Caroline McKeown and Brian Merriman, 'Spending Time with Family and Friends: Children's Views on Relationships and Shared Activities' [2012] 5 *Child Indicators Research* 449.

comprised of 84 children from 12 different schools who had input into the design of the study.<sup>61</sup> The qualitative data involved 120 families who were randomly selected from the larger quantitative study. Overall the authors note that one in three children do not live in a 'traditional' family. In their review of the interview material on 'child relationships' and 'family and parenting' they found that:

When they [the children] were asked about who they saw as part of their family, most listed their parents (whether resident or not) and siblings as might be expected. However, what was interesting was that their conceptualisations also included members of their extended family (grandparents, aunts, uncles, and cousins), pets (living or dead) and deceased members of the family.<sup>62</sup>

## 1.4 Parents and parenting orders under Part VII of the *Family Law Act*

The primary function of Part VII *Family Law Act* is to regulate post-separation parenting decisions by setting out the objects, principles and specific legal provisions that are to be applied by courts and taken into account in matters resolved by negotiation and agreement. The Chief Justice of the Family Court notes in her submission to Council that the purpose of Part VII is to provide a 'broad framework in which decisions are made in cases involving disputes about where children should live, how much time they should spend with each parent or other significant adults, and the allocation of parental responsibility.'<sup>63</sup> A question that is raised by the evidence of family diversity and children's perspectives of family referred to in the preceding section is whether these developments and understandings are reflected in Part VII. That is, has the 'broad framework' for decision making about children's care post-separation in Part VII to which the Chief Justice refers kept pace with these social changes, and does it operate consistently for all children regardless of their family type?

These questions are clearly important for decision makers who are required to use the framework in Part VII to decide what care arrangements are in the best interests of the child in the matter before them.<sup>64</sup> The Federal Circuit Court of Australia (previously the Federal Magistrates Court), the Family Court of Australia and the Family Court of Western Australia (the family courts) are generally the courts that exercise jurisdiction in relation to parenting cases. Parenting matters form a substantial part of their decision making workload.

However, the relevance of the framework in Part VII reaches well beyond the family courts. The law is also important to the work of both legal and non-legal advisers within the family law system. Disputes about children's care form the bulk of the family law work of the family relationships support and family dispute resolution sector. Whilst professionals working in this sector are not required to give legal advice, they are frequently faced with parents whose understanding of the law has been informed by their solicitor's advice, or by the advice and

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61 Ibid.

62 Ibid, p. 453.

63 Chief Justice of the Family Court of Australia, Diana Bryant, Submission p. 3 ('Chief Justice Bryant Submission').

64 *Goode & Goode* [2006] FamCA 1346.

experiences of friends and family who have been involved in family law disputes.<sup>65</sup> Further, advisers (including family dispute resolution practitioners and counsellors) are obligated under s 60D *Family Law Act* to provide guidance to parents along the lines specified in the legislation, namely that parenting arrangements should be in children's best interests and should prioritise protection from harm, among other things. Thus, although the great majority of disputes about the care of children do not end up in the family courts, Part VII plays an important role in informing people's expectations about appropriate parenting arrangements for children.<sup>66</sup>

The present decision making framework in Part VII was introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the *Shared Parental Responsibility Act*), with further amendments enacted in 2012.<sup>67</sup> The Explanatory Memorandum to the *Shared Parental Responsibility Act* states:

The amendments promote the object of ensuring that children have a right to have a meaningful relationship with both their parents and that parents continue to share responsibility for their children after they separate. The amendments also reinforce the primary importance of the object of ensuring that children live in an environment where they are safe from violence or abuse.<sup>68</sup>

Amendments dealing with family violence were made to the *Family Law Act* by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), which came into effect in 2012. Those amendments included changes to the definitions of abuse and family violence. The amendments also clarified that the interaction of the primary considerations to make it clear that 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' (s 60CC(2)(b)) is to be given greater weight than 'the benefit to the child of having a meaningful relationship with both' parents (s 60CC(2)(a)). In addition, the Objects of Part VII were amended to 'give effect to the Convention on the Rights of the Child done at New York on 20 November 1989'.<sup>69</sup>

Subdivision B of Part VII *Family Law Act* sets out the Objects (s 60B(1)) and Principles (s 60B(2)) that are to inform the application of the specific legislative provisions in Part VII in achieving a decision in the best interests of the child, which is the paramount consideration (s 60CA). These provisions are

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65 Note that the recent legal needs survey conducted by the Law and Justice Foundation of New South Wales found that most people with a legal problem resolve their problem outside the formal justice system: Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (August 2012), Executive Summary, xiii-xxiv.

66 Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009, pp 11-12; John Dewar refers to the 'expressive function' of family law in terms of being 'designed to influence behaviour in a general rather than detailed way': Dewar, John, 'The Normal Chaos of Family Law' (1998) 61(4) *The Modern Law Review* 467, p. 483.

67 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

68 Revised Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth) p. 1.

69 *Family Law Act*, s 60B(4).

set out in full in Appendix B. In addition to recognising Australia's obligations as a signatory to the Convention on the Rights of the Child,<sup>70</sup> the key values reflected in the Objects are the need to ensure:

- Children have the benefit of both **parents** having meaningful involvement in their lives to the maximum extent consistent with their best interests (s 60B(1)(a));
- Children are to be protected from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence (s 60B(1)(b));
- Children receive adequate and proper parenting to support optimum development (s 60B(1)(c));
- **Parents** fulfil their responsibilities and duties concerning the care, welfare and development of their children (s 60B(1)(d)).

In relation to the Principles underlying the Objects of Part VII, the key values, subject to the caveat that they must be consistent with a child's best interests, are:

- Children have the right to know and be cared for by both **parents**, regardless of their relationship status (s 60B(2)(a));
- Children have the right to spend time and communicate with both **parents** and others significant to their care welfare and development, such as grandparents and other relatives (s 60B(2)(b));
- **Parents** should share duties and responsibilities in relation to their children (s 60B(2)(c));
- **Parents** should agree about the future parenting of their children (s 60B(2)(d));
- Children have a right to enjoy their culture, including with others who enjoy that culture (s 60B(2)(e)).

The Principles give further recognition to specific aspects of the right of Aboriginal and Torres Strait Islander children to enjoy their culture (s 60B(3)). The application of these provisions in parenting cases involving Aboriginal and Torres Strait Islander children is discussed further in the following section (1.5).

In broad terms, these Objects and Principles inform the application of the more specific provisions in Part VII that guide the determination of parenting matters. Section 60CC *Family Law Act* sets out the 'considerations' (enlivened by and applied to questions of fact) that assist judges in determining what arrangements might be in a child's best interests. The considerations include:

- Two 'primary considerations' relating to the benefit to the child of having a meaningful relationship with each **parent** (s 60CC(2)(a)) and the need to protect the child from physical or psychological harm (s 60CC(2)(b)). Since the 2012 amendments, protection from harm is to be given greater weight where these considerations are in conflict: s 60CC2A *Family Law Act*, as noted above.

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

- There are 12 further specific ‘additional’ considerations relating, variously to: the child, the parents and their parenting history and capacity, the wider circumstances of the family and any history of family violence that may be relevant (s 60CC(3)(a)–(k)).
- Two further additional considerations allow the court to
  - consider a course of action that would minimise the likelihood of further proceedings in relation to the child (s60CC(3)(l));
  - consider ‘any other fact or circumstance the courts thinks is relevant (s60CC(3)(l)).
- s 61DA *Family Law Act* incorporates a presumption in favour of equal shared **parental** responsibility which is not applicable where there are concerns about family violence or child abuse (s 61DA(2)(a) and (b)) and is rebuttable on the basis of evidence that its application would not be in a child’s best interests (s61DA(4));
- s 65DAA *Family Law Act* provides that where a court makes orders for equal shared parental responsibility pursuant to the presumption in s 61DA *Family Law Act*, it is also required to consider whether orders for a child to spend equal or substantial and significant time with each **parent** is reasonably practicable and in the child’s best interests.

Even if parties present consent orders, the court may consider the primary and/or additional considerations.<sup>71</sup>

As this overview of the main elements of the Part VII framework indicates, ‘parents’ are referred to in several of the main provisions including: the Objects and Principles, the ‘meaningful relationship’ provision in s 60CC(2)(a) *Family Law Act*, several of the ‘additional considerations’ in s 60CC(3) *Family Law Act*, the equal shared parental responsibility presumption in s 61DA *Family Law Act* and the equal or substantial and significant time provisions in s 65DAA *Family Law Act*. The implications of this in the context of the diversity of family forms in Australia as outlined in 1.2 is now considered.

## 1.5 Parenting cases and non-parents

The question of who is considered a parent for the purposes of applying Part VII has significant implications for the issues raised by Council’s first term of reference. The *Family Law Act* contains no general definition of a ‘parent’. The definition of ‘parent’ in s 4 of the *Family Law Act* relates only to adopted children. It provides as follows:

**parent**, when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child.

However, the meaning of the word ‘parent’ for the purposes of Part VII has been the subject of guidance by the Full Court of the Family Court. In *Tobin v Tobin*,<sup>72</sup> the Full Court said:

<sup>71</sup> *Family Law Act*, s 60CC(5).

<sup>72</sup> [1999] FamCA 446; (1999) FLC 92-848.

... in respect of the *Family Law Act*, in our view, the natural meaning of the word “parent” is the first definition given in both the Oxford and Macquarie dictionaries, and the definition “a person who has begotten or borne a child.”<sup>73</sup>

Whilst the term may be capable of being used in different contexts to include broader categories than those of “father” or “mother”, in our view, the natural meaning of the word in the context in Part VII, Division 7 of a child is the biological mother or father of the child and not a person who stands in *locus parentis*.<sup>74</sup>

This approach contrasts with children’s understandings and conceptions of family (discussed in 1.3) and is not reflective of the diversity of families with children described (discussed at 1.2). This divergence raises a question about the operation of Part VII in contested cases involving parents or carers who do not conform to the interpretation in *Tobin v Tobin*. It also raises questions about the flow-on impact of judicially decided cases on advisory practices within the wider family law system, and the messages about the law that are conveyed to families who do not approach the formal justice system for assistance.

In order to explore the question of how Part VII is operating in judicially determined matters, Council examined a sample of reported cases of the family courts, using the AustLII database to identify judgments where one or both of the parties was not a legal parent.<sup>75</sup> A table of the cases is in Appendix C. The aim of this examination was to identify how the courts are applying the provisions of Part VII to achieve outcomes that are in the best interests of children, and whether there is a need for legislative change to ensure consistent treatment for children, and better support decision making by the courts.

Council’s review demonstrates that courts are not infrequently faced with making decisions in matters where one party is not a legal parent of a child but has nonetheless assumed, or wishes to assume, the responsibility of parenting a child. Standing to bring proceedings in such matters arises from s 65(c) *Family Law Act*, which provides that people in the following categories may apply for a parenting order:

- Either or both of the child’s parents (s 65(c)(a));
- The child (s 65(c)(b));
- A grandparent (s 65(c)(ba));
- Any other person concerned with the care, welfare or development of the child (s 65(c)).

Council’s analysis of the cases highlighted a variety of circumstances that may give rise to applications for parenting orders by parties who are not parents within the meaning articulated in *Tobin v Tobin* (hereafter referred to as ‘non-legal parents’). In these situations, the application of the legislation raises some complex issues. The following discussion illustrates this point by reference

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73 *Tobin v Tobin* [1999] FamCA 446; (1999) FLC 92-848, para 42 (references omitted).

74 *Tobin v Tobin* [1999] FamCA 446; (1999) FLC 92-848, para 45.

75 This included decisions of the Family Court of Australia and the Federal Circuit Court of Australia (previously the Federal Magistrates Court).

to cases involving three different kinds of broad circumstances: (1) cases where an ex-partner or extended family member is applying for parenting orders, (2) cases involving Aboriginal and/or Torres Strait Islander children, and (3) cases involving donor conceived children.

### ***Children and non-biological parents***

The cases within this broadly defined category reflect a range of scenarios where parties other than legal parents apply for parenting orders for a child. These include circumstances in which a parent's former partner wishes to maintain parenting responsibility for a child that they had previously assumed while the parties were together. There are also situations where an extended family member, such as a grandparent, sibling, or an aunt, has assumed a parenting role. The dilemma facing courts in such circumstances are manifold. Two core issues are how a framework that repeatedly refers to parents should be applied to non-legal parents in light of the interpretation of 'parent' established in *Tobin v Tobin*, and what legislative principles are available to guide 'best interests' decision making in such cases.

The analysis of cases in this section suggests that there has not been a consistent approach to these questions. Some decisions demonstrate the adoption of a pragmatic approach in which the legislation is applied in the same way to parents and non-parent carers alike, despite the technical limitation of certain provisions to 'parents'. In other cases, judicial officers have decided that the provisions that explicitly refer to 'parents' (such as s 60CC(2)(a), which requires the court to have regard to the benefit to the child of having a meaningful relationship with both parents), cannot be applied to non-legal parents. A question that has attracted significant debate is whether the framework is intended to privilege legal parents over other relationships of significance to the child.

In *Mulvany & Lane*,<sup>76</sup> the Full Court was critical of an approach that involved making distinctions between the child's carers on the basis of their legal status. The case concerned a situation where, as a result of a paternity test, the child's father had discovered that he was not the child's biological parent during post separation proceedings. Federal Magistrate Howard (as he then was) found on this basis that the father was not a 'parent' for the purposes of Part VII. As a consequence, his Honour decided that the presumption of equal shared parental responsibility in s 61DA did not apply in this case, even though the mother, father and child had lived together as a family for the 6 years of the child's life. He also decided that the first primary consideration in the 'best interests' list, which requires the court to consider the benefit to the child of having a meaningful relationship with both of the child's parents, had no application to the father, as he was not a 'parent'.<sup>77</sup> On the other hand, the Federal Magistrate considered the significant nature of the relationship between the father and the child for the purposes of some of the additional considerations in the 'best interests' list, including some that contained references to 'parents'.

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76 [2008] FMCAfam 473.

77 See also *Potts & Bims* [2007] FamCA 394.

On appeal, the Full Court of the Family Court held that the Federal Magistrate had erred in adopting this inconsistent approach. The discussion by members of the Court illustrates the problems that can arise when the Part VII framework is applied to parties who are not legal parents, and highlights the Act's differential treatment of children's best interests depending on the nature of their family. May and Thackray JJ stated that:

In our view, his Honour was quite right to consider and make findings in relation to all of the relevant "additional considerations" in s 60CC(3), even though he acknowledged some had no application to the father because they relate only to a "parent". However, for the sake of consistency it seems to us his Honour should have adopted the same approach when discussing s 60CC(2)(a). What occurred instead is that the father was treated as a "parent" for some purposes but not others.

If the father had adopted S [the child], his Honour would have been obliged to consider the benefit to S of having a meaningful relationship with him. If the father had been the biological father, but never lived with S, his Honour would still have been obliged to consider the benefit to S of having a meaningful relationship with him. Why should a different approach be taken because it was discovered that the boy was the product of an extramarital liaison?<sup>78</sup>

Finn J also highlighted problems with the limited application of Part VII to children who are raised by non-legal parents, noting that:

As the legislation currently stands, and assuming that it is correct that "parent" means only a natural or adoptive parent, it would seem that in a case such as this, the court can only reach its determination in parenting proceedings on an application of s 60CC(2)(b) (protection from harm) and of the additional matters in s 60CC(3) so far as they expressly or impliedly refer to a person other than a parent.<sup>79</sup>

In contrast to the Full Court's views in this case, some judicial decision makers continue to see the first primary consideration (concerning the benefit to the child of a meaningful relationship with both parents) as being only applicable in cases where the two parties in dispute are the child's legal parents. In *Maxwell & Finney*<sup>80</sup> a father who had been absent for 6 years from the time the child was a few months old, applied for orders that the boy live with him. The child had grown up with his mother and grandmother, and when his mother died in 2009 (when the boy was 7 years of age) his grandmother became his sole carer. The Family Report noted that the grandmother was 'the only adult with whom [the child] has to date had an experience of permanent care', and that it was a relationship that could 'be relied upon to be permanent, safe and supportive'.<sup>81</sup>

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78 *Mulvany & Lane* [2009] FamCAFC 76, paras 78-79. See for an analysis of this case, Chisholm, Richard, 'When a "Father" Turns out Not to Be, Does the Act Give Priority to the (Biological) Mother?' *Mulvany v Lane* [2010] 24 *Australian Journal of Family Law* 128.

79 *Mulvany & Lane* [2009] FamCAFC 76, Finn J, paras 155-16.

80 [2013] FMCAfam 131.

81 *Maxwell & Finney* [2013] FMCAfam 131, para 50.

In this case, Federal Magistrate Kelly (as she then was) commented that 'while the language within Part VII of the *Family Law Act 1975* does not specifically relate to a situation such as this, where [the child's] primary caregiver is not one of his parents, it nonetheless provides a useful checklist of relevant considerations.'<sup>82</sup> Her Honour then considered the various best interests considerations within this context. Significantly, however, as far as the first primary consideration was concerned, the judgment only refers to the benefit to the child of developing a meaningful relationship with his father, his legal parent.<sup>83</sup> That is, Federal Magistrate Kelly appeared to adopt the same approach that was the subject of criticism by the Full Court in *Mulvany & Lane*.

On the other hand, some judicial officers have adopted an approach that seeks to recognise the reality of the child's family situation when applying the relevant sections of Part VII. This approach was adopted by Federal Magistrate Laphorn (as he then was) in *Vaughan & Vaughan & Scott*.<sup>84</sup> In a case where three parties had applied for parenting orders in relation to two siblings, His Honour proceeded along the lines suggested by the Full Court of the Family Court in *Mulvany & Lane* by considering both the primary and additional considerations as they applied to all three parties. His Honour did this by relying on the catch all provision of s 60CC(3)(m) *Family Law Act* (ie. any other relevant factor) in the list of 'additional' best interests considerations.

*Vaughan's* case concerned parenting arrangements for two children Z and Y aged around 9 and 11 respectively. The mother, Ms Vaughan, had three children—orders were not sought in relation to the oldest child. Mr Vaughan and Ms Vaughan had been in a relationship since 1998 and married in 2000. They separated in 2007. Mr Vaughan was the biological father of the youngest child, Z. Although he was not Y's biological father, he had been his step-father for much of Y's life. Since the parties' separation, Z (the 9 year old) had remained living with Mr Vaughan, while Y (the 11 year old) had been living interstate with his mother. The proceedings were initiated by Mr Vaughan after Y had run away from his mother's home and asked to live with his step-father. There was evidence that the mother suffered from depression and that Y felt unsafe in her care.

Federal Magistrate Laphorn found that Mr Vaughan 'was the primary care giver to all of the children for the last 5 years of the [parties'] relationship'.<sup>85</sup> The Family Consultant concluded that 'Y views Mr Vaughan as his psychological father'.<sup>86</sup> However, given that the definition of 'parent' for the purposes of Part VII does not include step-parents, a question arose about the applicability to Mr Vaughan of the best interests considerations that refer exclusively to parents. On this point, is Honour cited the following extract from *Potts & Bims*,<sup>87</sup> another case involving a parent and non-parent:

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82 *Maxwell & Finney* [2013] FMCAfam 131, para 38.

83 *Maxwell & Finney* [2013] FMCAfam 131, para 40.

84 [2010] FMCAfam 863.

85 *Vaughan & Vaughan & Scott* [2010] FMCAfam 863, para 38.

86 *Vaughan & Vaughan & Scott* [2010] FMCAfam 863, para 56.

87 [2007] FamCA 394.

The provisions about children's arrangements are to be found in Part VII of the *Family Law Act 1975*. The concept of best interests of the child is at the heart of it and that is designated to be the paramount consideration in making any parenting order. Some Part VII provisions refer to '*parent/s*' which, given the word's ordinary meaning and in the absence of an expanded definition or some other descriptor such as '*party*', means a number of sections do not apply when assessing '*best interests*' in proceedings that are not between parents but between a parent and a non-parent [eg. relative]. Section 60B(1) and (2) set out the objects of Part VII and the principles underlying them. However, a number are expressed to apply to '*parent/s*' and so are excluded in proceedings of the latter kind. For example, paragraphs 60B(1)(a), (c), and (d) fall away and what remains is paragraph (b); namely, the object of protecting children from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence. Similarly, paragraphs 60B(2) (a), (c) and (d) fall away as underlying principles and there remains paragraph (b); namely, [*except when it would be contrary to a child's best interests*] '*children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)*'. With objects and underlying principles as a guide, the determination of what is in a child's best interests requires the court to consider both '*primary considerations*' and '*additional considerations*' set out in s 60CC. But again the use by the legislature of the word '*parent/s*' in a number of those considerations operates to exclude those factors in proceedings between a parent and non-parent. Falling within that group is the *primary consideration* in paragraph 60CC(2)(a) and the *additional considerations* at paragraph (c), (e), and (i). However, that does not mean those considerations are to be ignored if the facts of the case raise them as issues because they can be addressed under other considerations such as paragraph (f) [capacity to provide for needs] or, if nowhere else, under paragraph (m) [any other fact or circumstance relevant]. On that same analysis, the presumption of equal shared parental responsibility imposed by s 61DA and, if it applies and the order is to provide for equal shared parental responsibility, consideration of the child/ren spending equal time or substantial and significant time, as set out more particularly in s 65DAA, are not prescribed pathways in the reasoning process towards a best interests conclusion in proceedings between a parent and non-parent. Nonetheless, the particular applications may make it necessary to address those outcomes in any event.<sup>88</sup>

In his reasons for judgment, Federal Magistrate Laphorn explained his approach:

In this particular case I am satisfied it is appropriate to consider all of the factors set out in s 60CC(2) and (3) as if they are applicable to all three parties, but in doing so I will be relying on s 60CC(3)(m) where the relevant consideration would seemingly exclude non-parents. I have arrived at this decision because I am satisfied that [Y] identifies Mr Vaughan as his psychological father and Mr Vaughan has been the father figure in his life ever since he was a small baby. To exclude Mr Vaughan from those considerations that specifically relate to

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88 *Potts & Bims* [2007] FamCA 394, para 8.

parents would in the circumstances be artificial and may have the potential to distort the decision making process leading to a decision that may not be in the child's best interests.<sup>89</sup>

More recently, in *Knightley & Brandon*,<sup>90</sup> Federal Magistrate Harman (as he then was) considered the issue of the narrow definition of 'parent' for the purposes of the *Family Law Act* in a case involving a dispute between the biological father and the maternal aunt of two Aboriginal children.

The aunt had been raising the children following the death of the children's mother. Federal Magistrate Harman noted in relation to the presumption of 'equal shared parental responsibility' in s 61DA *Family Law Act* that:

...if one were to adopt a limited definition of "parent", so as to confine that term to a "biological parent", then clearly the presumption cannot apply in this circumstance as the presumption could then operate only between the biological parents. On that basis and by operation of the Act it might be suggested that, were Mr Brandon participating in these proceedings, that he would have the benefit, as the surviving biological parent, of a presumption of parental responsibility in his favour. However, the presumption applies "between" parents and requires a plurality of parents. It does not create any specific right in favour of a surviving parent (however that term is defined). I am not satisfied, however, that a limited interpretation of the term "parent" is required nor is such a definition reflective of the spirit of section 61DA.<sup>91</sup>

His Honour decided that the presumption does not arise to favour 'parents' over others, but only operates as between parents. He noted further that,

...the term "family" is not defined in the *Family Law Act* (although reference is made to "members of the child's family"). To the extent a "family" remains defined as a "nuclear family" (comprising parent/s and children), this would appear a particularly outdated and unnecessarily constrictive, heteronormative and white Anglo Saxon perspective which fails to recognise diverse views of family arising for and within families of difference.

This is particularly clear and pronounced when considering LGBTQ [lesbian, gay, bisexual, trans and queer] families but also relates to diverse cultural perspectives including, as arises in this case, broader kinship connections and culturally appropriate familial and cultural assistance in parenting children. The configuration of "families", and thus the definition of both that term and "parents", has changed significantly since the *Family Law Act* was drafted and commenced operation in 1975. Each definition will, no doubt, continue to change and evolve.<sup>92</sup>

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89 *Vaughan & Vaughan & Scott* [2010] FMCAfam 863, para 139.

90 [2013] FMCAfam 148.

91 *Knightley & Brandon* [2013] FMCAfam 148, paras 36-38.

92 *Knightley & Brandon* [2013] FMCAfam 148, paras 45-46 (references omitted).

## **Aboriginal children**

Cases involving Aboriginal and Torres Strait Islander children may raise the questions that are dealt with in the preceding section, as such cases often involve non-parents seeking parenting orders. They also raise additional questions relating to the weight that should be attached to cultural considerations. As noted earlier, s 60CC(3) recognises a child's right to enjoy their culture, with s 60CC(6) specifying that in relation to Aboriginal and Torres Strait Islander children this involves the right to:

- Maintain a connection with that culture; and
- To have the support, opportunity and encouragement necessary:
  - To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
  - To develop a positive appreciation of the culture.

Also of significance is a provision introduced with the Shared Parental Responsibility Act amendments, namely s 61F *Family Law Act*, which requires the Court to have regard to 'any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.'<sup>93</sup> Again, Council's analysis of the cases indicates that there continues to be difficulty with the application of Part VII *Family Law Act* to Aboriginal families despite the introduction of this section,<sup>94</sup> as illustrated by *Donnell & Dovey*<sup>95</sup>.

*Donnell & Dovey* was a case involving an 8 year old boy (born in 2001) who had a Torres Strait Islander father and an Aboriginal mother. The boy's parents had separated when the boy was 7 months old. The boy had thereafter lived with his mother in Brisbane and his father returned to live in the Torres Strait. After his mother's death, the boy's older sister raised him, in accordance with Aboriginal Wakka Wakka custom. The sister was a married woman living in Brisbane. The hearing involved a dispute between the sister and the child's father.

The trial Judge treated the case as one involving a legal parent (the father) and a non-parent (the boy's older sister), and made orders in favour of the father. On appeal, the Full Court found that both the Family Report writer and the trial Judge had placed undue emphasis on the significance of the father's parental status and had failed to adequately consider the child's Aboriginal Wakka Wakka heritage and the associated customary parental obligations of the older sister.<sup>96</sup> The Full Court also observed that the trial Judge appeared to be unaware that parental responsibility could be ordered in favour of a non-parent, and noted that no consideration had been given to s 61F *Family Law Act*.

Nevertheless, in light of the definition of 'parent' for the purposes of the *Family Law Act*, the Full Court proceeded on the basis that the dispute was one between a parent and a non-parent:

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93 *Donnell & Dovey* [2010] FamCAFC 15, para 178.

94 See the discussion of this case in the earlier report of the Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander* (Family Law Council, 2012), pp. 73-75.

95 [2010] FamCAFC 15.

96 See *Donnell & Dovey* [2010] FamCAFC 15, paras 280-292.

Importantly, for present purposes, we accept that the word “parent”, when used in relation to a child, does not include a person who may be treated as a parent of that child by the customs of people of Aboriginal or Torres Strait Islander background. Whether this assumption can withstand critical analysis is a matter best left to an occasion when the Court has the benefit of argument on the possible application of s 61F.<sup>97</sup>

There have now been a number of cases which have come before the Full Court involving a parent and a non-parent in which it has been asserted that the trial Judge or Magistrate erred because of an inconsistent approach taken in addressing the relevant factors. This has especially been so where although one of the parties is not a “parent” within the meaning of the Act, they have been regarded within the family as if they were a “parent”. The difficulty has also arisen in other cases where one of the parties has been the primary carer to the child and hence largely stood in the place of a “parent.”<sup>98</sup>

The Full Court expressed the view that best interests of children in cases involving non-parents (including cases involving Aboriginal children) should be considered by using the catch-all ‘any other matter’ factor in s 60CC(3)(m) *Family Law Act*, in order to avoid inconsistency or the appearance of inconsistency:

In our view, there can be no doubt that s 60CC(2)(a) has no application to a person who is not a “parent.” This is so because the paragraph refers only to “parents,” and there is no extended definition of that word—save for the one incorporating adoptive parents (and query the potential application of s 60H). However, that fact does not give rise to any difficulty in ensuring all relevant matters are taken into account. In a particular case, the maintenance of a meaningful relationship with a non-parent may be equally important or more important than the maintenance (or establishment) of such a relationship with a parent. As with the additional considerations, it is not necessary to classify a non-parent as a “parent” to ensure that clearly relevant matters are given appropriate weight.<sup>99</sup>

The effect of the Full Court’s ruling appears to be that courts cannot treat someone in the position of the child’s sister in *Donnell & Dovey*, a person who is regarded as a parent under Aboriginal custom, as a parent for the purposes of s 60CC(2)(a). However, a more expansive interpretation of this section was articulated by Federal Magistrate Harman (as he then was) in *Knightley & Brandon*,<sup>100</sup> a case that was discussed above. In *Knightley*, Federal Magistrate Harman noted that he would have been prepared to find that the maternal aunt was a parent for the purposes of the *Family Law Act* if evidence of cultural practice had been presented.

Judicial concern for Aboriginal children’s family relationships stemming from the narrow definition of parent in the *Family Law Act* has also been aired in a number of cases. In *Nineth & Nineth (No 2)*<sup>101</sup> Murphy J referred to the extract in *Donnell v Dovey* from the *Bringing Them Home Report* of

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97 *Donnell & Dovey* [2010] FamCAFC 15, para 93.

98 *Donnell & Dovey* [2010] FamCAFC 15, paras 95-96.

99 *Donnell & Dovey* [2010] FamCAFC 15, para 101.

100 [2013] FMCAfam 148.

101 [2010] FamCA 1144 .

the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), which noted:

It was a seminal document in informing many areas of public policy relevant to indigenous children. The Report was critical of the way some cases involving indigenous children had been dealt with in the Family Court. The Report (at page 486) contained the following observations and gave an illustration to explain why at least two indigenous groups prefer children to be raised by persons other than their biological parents:

The Family Court clearly has preferred the biological parent over a disputant extended family member in making custody (now residence) orders, although there is no presumption that that should be the case. Nevertheless, the Court, at least in reported cases, has yet to prefer an Indigenous child's grandmother, for example, over the child's natural, non-Indigenous father or mother. Moreover, section 61C recognises only the parental responsibility of each of the biological parents and fails to recognise the childrearing obligations of others.

By privileging parents and relegating the rights of other family members, the Australian family law system conflicts with Aboriginal childrearing values. In Aboriginal societies childrearing responsibilities are shared.<sup>102</sup>

These cases suggest the need to consider the rationale for confining the interpretation of parent in Part VII to legal parents, and whether it should be construed more broadly to include people who are regarded as parents under Aboriginal and Torres Strait Islander custom or tradition. They also raise a question of inconsistency with state and territory laws on this point, an issue discussed in Chapter 2.

### ***Kupai families***

The family courts have been asked on a number of occasions to make parenting orders in favour of parents who are raising children in accordance with the practice of Torres Strait Islander traditional adoption, known as *kupai omasker*. The practice was discussed in Council's 2012 report on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. In the 2003 case of *Lara & Marley*,<sup>103</sup> Chief Justice Nicholson noted that *kupai omasker* involves 'the giving of a child by his/her biological parents to another couple', and reproduced expert testimony about the customary practice, including evidence that it:

- 'runs deep in Torres Strait Islander culture';
- that 'the handing over by a biological parent is a permanent arrangement'; and
- that 'when the child is "given" pursuant to a traditional adoption, it is usually to members of the extended family of the givers' so as to enable 'the maintenance of blood connections'.<sup>104</sup>

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102 *Donnell & Dovey* [2010] FamCAFC 15, para 325.

103 *Simon Lara and Irma Lara & Tom Marley and Elizabeth Sharp* [2003] FamCA 1393

104 *Simon Lara and Irma Lara & Tom Marley and Elizabeth Sharp* [2003] FamCA 1393, paras 37, 49-51.

Under the leadership of the former Chief Justice, the Court instituted a practice of making consent parenting orders conferring sole parental responsibility on the receiving parents,<sup>105</sup> a practice that has continued. However, as receiving parents are not recognised as legal parents under the *Family Law Act*, applicants must seek orders as persons concerned with the care, welfare and development of the child.<sup>106</sup> In *Beck and Anor & Whitby and Another*,<sup>107</sup> a case involving an application for consent parenting orders by the receiving parents of a child under a Torres Strait Islander traditional adoption, Justice Watts noted the lack of recognition of receiving parents in the *Family Law Act*, and the practical consequences of this for *kupai* children. Like Justice Murphy in *Nineth v Nineth (No 2)*, Watts J referred to the succession of reports on the need for recognition of Aboriginal and Torres Strait Islander child rearing practices, and the limitations of the *Family Law Act's* understanding of parents:

The problem has been discussed for more than 25 years in various significant Government reports. The Federal Government has power to amend the *Family Law Act* to enable a court to declare persons in the positions of the Applicants in this case as parents. Alternatively the states have power to amend state legislation to allow full recognition of traditional Torres Strait Islander child rearing practices. Maybe one day the law will change.<sup>108</sup>

The cases involving parentage arising from the practice of *kupai omasker* also raise a question of inconsistency with state laws. This is discussed in Chapter 2 (see Chapter 2.9).

### ***Children born from an assisted conception procedure***

The question of how non-parents are dealt with under the Part VII framework also raises particular questions for people who have conceived children through assisted conception processes. In this section, the focus of the discussion is the position of partners of women who have children through assisted conception procedures but cannot establish that they were married or in a de facto relationship with the child's mother at the time of conception. Again, the cases show variations in the way the law is applied.

The definitional provision that is applied in this situation is s 60H(1) *Family Law Act* which provides as follows:

If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and

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105 See *Simon Lara and Irma Lara & Tom Marley and Elizabeth Sharp* [2003] FamCA 1393, para 39.

106 See for example *Beck and Anor & Whitby and Anor* [2012] FamCA 129, para 3.

107 [2012] FamCA 129.

108 *Beck and Anor & Whitby and Anor* [2012] FamCA 129, para 75.

- (b) either:
  - (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
  - (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

- (c) the child is the child of the woman and of the other intended parent; and
- (d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.

The effect of sub-section (a) is that where the mother's partner has been parenting the child but cannot show that he or she was married to or in a de facto relationship with the mother at the time of the child's conception, he or she is deemed not to be a parent for the purposes of the *Family Law Act*. This can have significant implications for that person's ongoing relationship with the child if the person's relationship with the child's mother breaks down. In particular, a person in this situation is vulnerable to being excluded from the child's life by the mother.<sup>109</sup> The cases concerning step-parents and kinship carers, discussed above, also highlight the potential consequences of this circumstance when it comes to post-separation disputes about care arrangements for a donor conceived child.

Where a party to parenting proceedings is able to show that they are a 'parent', he or she will be presumed to have 'equal shared parental responsibility' for the child's care with the child's mother.<sup>110</sup> However, if they cannot show that they were the mother's married or 'de facto partner' at the time of the child's conception (or are otherwise a parent under a prescribed law), they will need to seek standing as a person concerned with 'the care, welfare or development' of the child to apply for parenting orders,<sup>111</sup> and ask the court to make orders giving them parental responsibility and time with the child.

Two cases illustrate the different outcomes for children that can arise as a result of s 60H(1) *Family Law Act*. The first, *Baker & Landon*,<sup>112</sup> was a decision of Federal Magistrate Riethmuller (as he then was) in 2010. The question for the court in this matter was whether the parties, whose relationship deteriorated during the pregnancy, were in a de facto relationship at the time the IVF procedure was carried out. Section 4AA(2) *Family Law Act* sets out a list of factors to be taken into account in determining whether the parties were de facto partners. These include the 'nature and extent of their common residence', the 'degree of financial dependence or interdependence' and the 'degree of commitment to a shared life'. The agreed evidence in this case was that the applicant and

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109 See on this point, *Re G (Children) (Residence: Same-sex partner)* [2006] UKHL 43.

110 *Family Law Act*, s 61DA.

111 *Family Law Act*, s 65C(c).

112 [2010] FMCAfam 280.

the mother had presented at the IVF clinic as a couple. However, the mother argued that they were not in a de facto relationship at the time of conception, pointing to the fact that she was receiving a pension at the time on the basis that she was not in a de facto relationship and that they did not live together for most of her pregnancy.

The Federal Magistrate found that the parties' relationship was 'not always a happy one' and that they 'had various levels of commitment from time to time', but he noted that under s 60H *Family Law Act*, the 'parties need only be de facto partners on the day of the procedure'.<sup>113</sup> He found that on the balance of probabilities, taking into account the factors in s 4AA *Family Law Act* (including evidence from the psychologist who provided the parties with their compulsory pre-IVF counselling), that the parties were de facto partners on the day the child was conceived and that, therefore, the applicant was a parent of the child for the purposes of the *Family Law Act*. As a result, the applicant was presumed to have equal shared parental responsibility for the child, despite the fact that he had, up to that point in time, had little involvement in the child's upbringing.

In contrast is a similar application in *Aldridge & Keaton*.<sup>114</sup> In this case the applicant was a woman. The parties had moved in together while the mother was pregnant. Although the Chief Federal Magistrate (as he then was) found that the non-biological parent had 'played a major role in the child's life' and 'was actively involved in caring for' her since her birth,<sup>115</sup> he concluded that the parties had not been in a de facto relationship at the time of conception.<sup>116</sup> The applicant was therefore not a parent and did not have equal shared parental responsibility for the child with the biological mother. The applicant's application for an order for shared parental responsibility was not successful.<sup>117</sup> The Chief Federal Magistrate made orders that the mother have sole parental responsibility and that the child spend gradually increasing time with the applicant.

Like the cases discussed above, the different outcomes of these cases underline the importance of legal parenthood to disputes about children's care arrangements. Whilst a non-legal parent who has raised the child may be able to apply for parenting orders as a person concerned with the child's 'care, welfare or development',<sup>118</sup> the existence of a prior relationship with the child's mother does not guarantee this standing.<sup>119</sup>

## 1.6 Concerns and guidance in the reported cases

The review of cases in the previous section indicates that the present decision making framework in Part VII has presented the courts and families with a number of difficulties when one of the parties to the dispute is not a legal parent. As noted, these difficulties have been the subject of commentary by judicial officers in some cases. For example, in *Mulvany & Lane*, Justice Finn referred to the

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113 *Baker & Landon* [2010] FMCAfam 280, para 10.

114 [2009] FamCAFC 229.

115 *Aldridge & Keaton* [2009] FamCAFC 229, paras 37 and 41.

116 See *Family Law Act*, s 60H.

117 See also *Yanders & Jacklin* [2011] FMCAfam 57.

118 *Family Law Act*, s 65C(c).

119 See for example, *Harris & Calvert* [2013] FCCA 995.

constraints that the *Family Law Act* places on decision makers in cases involving non-biological parents, noting that, strictly speaking

...the court can only reach its determination ...on an application of s 60CC(2)(b) (protection from harm) and of the additional matters in s 60CC(3) so far as they expressly or impliedly refer to a person other than a parent.<sup>120</sup>

In *Vaughan's* case, Federal Magistrate Laphorn commented on the implications of this limitation for the best interests of children raised by people like the applicant step-father in that case, who had 'been the father figure in [the child's] life ever since he was a small baby'. His Honour noted that,

To exclude Mr Vaughan from those considerations that specifically relate to parents would in the circumstances be artificial and may have the potential to distort the decision making process leading to a decision that may not be in the child's best interests.<sup>121</sup>

In *Knightley & Brandon*, Federal Magistrate Harman expressed concern about the present definition of parent in the *Family Law Act*, characterising it as embodying

...a particularly outdated and unnecessarily constrictive, heteronormative and white Anglo Saxon perspective which fails to recognise diverse views of family arising for and within families of difference.<sup>122</sup>

The different decision making pathways that Part VII provides for differently situated children have also been the subject of argument before the courts. The case of *Simpson & Brockman*<sup>123</sup> provides an example. This case involved a dispute between two women, each of whom had a biological child that had been born during the parties' relationship. The reported judgment is of the appeal against orders of Federal Magistrate Jarrett (as he was then) that each woman was not a legal parent of the other woman's biological child. The trial in this case took place prior to the amendments to s 60H(1) *Family Law Act* in 2008 (described in the Preface) and therefore the parties could not rely on that section to obtain a declaration of parentage in relation to the other woman's biological child. Instead, they had to seek parenting orders as a person concerned with the care, welfare and development of the relevant child, rather than as a parent. This meant that certain provisions in the Part VII framework for deciding parenting orders were not relevant to them, namely those sections that refer explicitly to a 'parent'.

Counsel for the appellant argued that, in this respect, Part VII *Family Law Act* was discriminatory, as it provides a different legislative pathway for children 'whose two parents are apparent (either because of biological connection or the operation of some presumption as to parenthood) compared with a child for whom the identity of only one parent is apparent (either because of biological connection or the operation of some presumption as to parenthood).'<sup>124</sup> The Full Court rejected this argument. Referring to its earlier ruling in *Donnell & Dovey*,<sup>125</sup> it held that the court has a wide best interests

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120 *Mulvany & Lane* [2009] FamCAFC 76, Finn J, paras 155-16.

121 *Vaughan & Vaughan & Scott* [2010] FMCAfam 863, para 139.

122 *Knightley & Brandon* [2013] FMCAfam 148.

123 *Simpson & Brockman* [2010] FamCAFC 37.

124 *Simpson & Brockman* [2010] FamCAFC 37, para 45.

125 [2010] FamCAFC 15.

discretion under Part VII and that although some of its parenting order provisions are only referable to a 'parent', their substance can still be considered by judicial officers in addressing s 60CC(3)(m), which refers to 'any other fact or circumstance that the court thinks relevant'.<sup>126</sup>

In some cases judges have called for clearer guidance about the weight to be given to the child's relationship with a non-legal parent. For example, Justice Finn in *Mulvany & Lane* commented that:

It is indeed unfortunate that ...the legislation does not give some clearer indication of the weight to be attached to the child's relationship with a person other than his or her parent, compared with the child's relationship with the natural parent in the determination of proceedings between a parent and a person other than a parent.<sup>127</sup>

Some attempts have been made by judges in the United Kingdom to provide this kind of guidance. The former Justice Hedley, for example, developed the concept of 'principal and secondary parents' to delineate legal parents (in this case lesbian mothers) and sperm donors who wish to play a parenting role. However, the Court of Appeal in *A v B & Anor*<sup>128</sup> rejected Justice Hedley's approach, noting the difficulties of relying on intention to predict the development of a relationship between a sperm donor and child. Thorpe LJ in that case said that the relationship between a child and his or her donor is an organic one, and that its nature can only be identified on a case by case basis and 'by stages in light of accumulating evidence' as the child grows and the relationship develops.<sup>129</sup> Black LJ commented similarly that trying to provide general guidance about this kind of relationship is 'fraught with risk' and that ultimately whether or not a sperm donor should have parental responsibility for the child is a matter of the child's best interests. Her Honour went on to say that sometimes this will result in recognition that the child's family is constituted by the child and the two mothers, and at other times it will mean the child has 'three parents and two homes'.<sup>130</sup>

As in the United Kingdom, the issue has played out in the Australian family courts in cases where a sperm donor has sought orders for parental responsibility in relation to a biologically related child who is being raised by his or her lesbian parents. In these cases, arguments about the intention of the parties at the time of conception have been considered, but the resulting decision has been based on the best interests of the child.<sup>131</sup>

*Wilson and Anor & Roberts and Anor (No. 2)*<sup>132</sup> illustrates this dynamic. This was a contested application for parenting orders by a known sperm donor and his partner. The two men wanted orders giving them equal shared parental responsibility for the child with the child's mothers, his legal parents. Much of the hearing focused on identifying the intention of the parties prior to conception and the nature of the understanding and agreement between them leading up to the conception of the child, referred to as 'E' in the judgment. In the end, Dessau J found that there was 'ample evidence

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126 *Simpson & Brockman* [2010] FamCAFC 37, para 47 citing *Donnell & Dovey* [2010] FamCAFC 15, para 99.

127 *Mulvany & Lane* [2009] FamCAFC 76, Finn J, paras 155-16.

128 [2012] EWCA Civ 285 (Court of Appeal).

129 *A v B & Anor* [2012] EWCA Civ 285 (Court of Appeal), para 32.

130 *A v B & Anor* [2012] EWCA Civ 285 (Court of Appeal), para 45-46.

131 See *Re Patrick* [2002] FamCA 193; *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734.

132 [2010] FamCA 734.

to support the men's version of a shared intention of integral involvement as a "family", raising E together'.<sup>133</sup> However, she found that the reality of shared parenting was very different to that intention, and that the relationship between the two couples had quickly deteriorated once the child was born. Dessau J concluded that it was 'clear that E cannot be successfully parented in an equal division of parenting roles between the four adults'.<sup>134</sup> Noting that 'fairness to the adults' was not a relevant consideration for the court, she concluded that:

Equality is simply untenable. It is frequently difficult enough between two adults. It certainly has not worked across the four adults in any practical manner. I am satisfied that the efforts to create that equality, the fact that it did not work, and the enormous angst generated by all the on-going endeavours to work, has ironically brought it undone. As the initial shared ideal of a form of "equality" in parenting has thus far failed, it strikes me as contrary to E's best interests to pursue it now.<sup>135</sup>

Dessau J decided that the mothers should have sole parental responsibility for the child,<sup>136</sup> and made orders for gradually increasing contact with the applicants. This case reinforces the concerns noted by the English Court of Appeal in *A v B & Anor* about the dangers of making predictions about the child's relationship with a sperm donor based on the intention of the adults involved. This position also accords with relevant rulings of the Full Court of the Family Court of Australia. As the Full Court stated in *Rice v Miller*:

[T]he fact of parenthood is to be regarded as an important and significant factor in considering which of the proposals best advances the welfare of the child. We would reiterate, however, that the fact of parenthood does not establish a presumption in favour of the natural parent nor generate a preferential position in favour of that parent from which the Court commences its decision making process. Each case must be determined according to its own facts, the paramount consideration always being the welfare of the child whose custody is in question.<sup>137</sup>

Most recently, the Full Court affirmed this general principle in *Yamada & Cain*,<sup>138</sup> a 2013 case involving a dispute between the child's mother and a paternal great aunt. In that case the Court held that *parenting*, rather than parental status, is central to the child's best interests:

The broad inquiry as to best interests contemplated by s60CC (in the context of the other provisions of Part VII) recognises that it is not *parenthood* which is crucial to the best interests of the child, but *parenting*—and the quality of that parenting and the circumstances in which it is given or offered by those who contend for parenting orders.<sup>139</sup>

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133 *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734, para 98.

134 *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734, para 334.

135 *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734, para 334.

136 *Wilson and Anor & Roberts and Anor (No. 2)* [2010] FamCA 734, para 335.

137 *Rice v Miller* (1993) 16 Fam LR 970, p. 977.

138 [2013] FamCAFC 64.

139 *Yamada & Cain* [2013] FamCAFC 64, para 27, emphasis in the original.

## 1.7 Submissions and consultations

### *The definition of 'parent' in the Family Law Act*

A number of submissions referred to the problems with the present definition of parent in the *Family Law Act*, and suggested the need for a more inclusive definition of parent to be inserted into s 4 *Family Law Act* to reflect the broader changes in family structure and community understandings of what it means to be a parent, including acknowledgment of both biological and non-biological parents.<sup>140</sup>

In her personal submission to Council, the Chief Justice of the Family Court of Australia stated:

There should be a definition of parent. In my view, the current definition of parent in s 4 of the Act should be repealed and a new definition substituted that serves a more constructive purpose. Ideally, a new and more inclusive definition of parent should be as consistent as possible with State laws. I do not however believe that the word "parent" should be changed where it presently occurs in Part VII.<sup>141</sup>

In a similar vein, the Australian Human Rights Commission submitted:

It would be useful for the *Family Law Act* to contain a general definition of what it means to be a parent. In the commission's view, this should be consistent with current community understandings of what it means to be a parent, including de facto partners and non-biological parents.<sup>142</sup>

In particular, the submissions referred to the need for the law to reflect current community understandings that 'parent' has a broad range of meanings, and is not limited to biological parents.<sup>143</sup> For instance, The National Children's and Youth Law Centre recommended:

[a]n adaptive and inclusive meaning that should not be limited to traditional notions of parentage through biology or adoption.<sup>144</sup>

Some submissions suggested reforms that would include specific definitions based on the intentions of the parties (eg. in surrogacy arrangements),<sup>145</sup> while others emphasised the difficulties in attempting to define in advance who is a parent of a child given the 'organic and evolving' nature of

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140 Eg, Australian Human Rights Commission Submission, para 17; Paul Boers Submission p. 12; National Children's and Youth Law Centre Submission, p. 4; Women's Legal Centre (ACT and Region) Submission, p. 3; Women's Legal Service Victoria Submission p. 6; Women's Legal Service NSW Submission, p. 3; Dr Olivia Rundle Submission, p. 9.

141 Chief Justice Bryant Submission, p. 4.

142 Australian Human Rights Commission Submission, para 17.

143 Eg. Australian Human Rights Commission Submission, para 17; National Children's and Youth Law Centre Submission, p. 4; Surrogacy Australia Submission, p. 3; Women's Legal Service Victoria Submission, p. 6; Women's Legal Service NSW Submission, p. 3; Dr Olivia Rundle Submission, p. 9; Family Law Section, Law Council of Australia, Submission, para 32.

144 National Children's and Youth Law Centre Submission, p. 4.

145 See Surrogacy Australia Submission, pp. 7-8 and Stephen Page Submission, p. 5.

family relationships.<sup>146</sup> Dr Giuliana Fuscaldo, who has worked as a clinical scientist and researcher in reproductive technology and health ethics, noted that the advent of reproductive technologies has meant that parentage is no longer a simple 'fact'.<sup>147</sup>

### ***The decision making framework in Part VII and the limitation of key best interests factors to parents***

Many of the submissions raised concerns for children in relation to the limitation of important provisions in Part VII to 'parents'.<sup>148</sup> For example, Family & Relationship Services Australia (FRSA) submitted that Part VII 'has not kept pace with changing family types, changing methods of family formation, diverse cultural practice or community attitudes to family and parenthood'. FRSA noted that the approach to deciding the child's best interests in the legislation was out of step with the approach taken by practitioners within its services when working with families:

The experiences of FRSA member organisations, who work on a daily basis with families and children across Australia, support the premise that families are increasingly diverse. Children may have a range of adults, which may or may not include their biological parents, who are significantly involved in their nurture and development.<sup>149</sup>

Deborah Fry and Karen Barker, Family Consultants in the Sydney Registry of the Family Court, noted similarly that while the legal status of the people raising children may be noted by Family Consultants, it is not one of the main factors that would be considered in their assessment of family relationships.<sup>150</sup>

The Family Law Section of the Law Council of Australia (the Family Law Section) commented on the assumption in some sections that children will have two parents, noting:

Part VII of the *Family Law Act* suggests that it is possible for a child to have no more than two parents. Commonwealth and State laws have tended to lag behind both changes in reproductive technology and the different constellations of families, and community attitudes to who is a parent of a child. Whilst Cronin J in *Groth & Banks* found that '*the fact that a child has two parents who are her or his biological progenitors permeates the language of the Act*,' the primacy of biology in the determination of who is a child's parents has been displaced for many years by virtue of State and Commonwealth laws responding to the challenges of artificial reproductive technology "ART". The widening of availability of ART to, for instance, single women, lesbian couples and gay male couples, has led to changes in the law that presume parentage in some situations regardless of biological connection. FLS submits that the language of Part VII insufficiently recognises the realities of some modern families.<sup>151</sup>

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146 Family & Relationship Services Australia Submission, p. 1.

147 Dr Guiliana Fuscaldo Consultation, 9 October 2012.

148 National Children's and Youth Law Centre Submission, p. 6; Women's Legal Centre (ACT and Region) Submission, pp. 2-3; Women's Legal Service NSW Submission, p. 4.

149 Family & Relationship Services Australia Submission, p. 1.

150 Consultation with Deborah Fry and Karen Barker, 23 October 2012.

151 Family Law Section Submission, para 32 (references omitted).

The Family Law Section also noted a number of factors that flow from being recognised as a legal 'parent', including the fact that if an application for parenting orders is made then the parents must be parties to the case,<sup>152</sup> and that parents are entitled to make an application for parenting orders without meeting any other threshold test.<sup>153</sup>

The submission from the National Children and Youth Law Centre provided examples of the 'voices' of children on the issue of parentage. These demonstrated a desire for some form of legal recognition of their relationship with the people who cared for them and who they regarded as their parents, such as stepfathers and foster parents.

A number of other submissions supported the view that children can have more than two parents, and that this should be capable of recognition by the courts when it is in the child's best interests.<sup>154</sup> Rainbow Families Council noted:

The continued failure of many state/territory and federal laws to understand or appreciate the complexities of the same-sex (or lesbian, gay, bisexual, transgender or intersex) parented families systematically **discriminates** against both the grown-ups and the children living in the rainbow families. Where there is little or no legal certainty regarding parentage, there can be a profound and ongoing impact on the mental health and wellbeing of the family.<sup>155</sup>

### ***Children born from an assisted conception procedure***

Submissions from community legal services noted concerns about the degree of inconsistency they had seen in the outcomes of parenting matters involving children born as a result of assisted reproductive technologies. Women's Legal Services NSW stated:

WLS NSW has significant concerns about the high degree of inconsistency we are seeing in the outcomes of parenting matters involving children born as a result of artificial conception procedures. We believe that it is essential for there to be certainty for all children regarding who their parents are, regardless of the manner of their conception. Failure to ensure this certainty through clear, comprehensive provision in the *Family Law Act 1975 (Cth)* causes distress, instability in the lives of children and increases the potential for disputes and litigation.<sup>156</sup>

Other submissions raised concerns about the arbitrary recognition of known donors of genetic material as parents, and emphasised the need for this to be a process based on the child's best interests.<sup>157</sup> Reflecting the reasoning of the United Kingdom Court of Appeal (noted above at 1.6),

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152 *Family Law Rules 2004* (Cth), r 6.02(2)(a); Family Law Section Submission, p. 2.

153 *Family Law Act*, s 65C. Grandparents may also apply and any other person 'concerned with the care, welfare and development of a child'.

154 Family & Relationship Services Australia Submission, p. 2; ACT Law Society Submission, p. 2; Stephen Page Submission, p. 5; Rainbow Families Council Submission, p. 1; Dr Olivia Rundle Submission, p. 13.

155 Rainbow Families Council Submission, p. 2 (emphasis in original).

156 Women's Legal Services NSW Submission, p. 1.

157 See Dr Olivia Rundle Submission, p. 12 on the problem of 'blanket' inclusions or exclusions; ACT Law Society Submission, p. 2;

Women's Legal Service Victoria submitted that donors of genetic material should be regarded as persons concerned with the 'care, welfare or development' of the child who can seek parenting orders, rather than being recognised as parents:

The issue of whether it is in the best interests of the child to spend time with an individual is separate to the legal recognition of that person as a 'parent.'

### **Aboriginal and Torres Strait Islander children**

Particular concerns were raised in some submissions about Aboriginal and Torres Strait Islander children. The Indigenous Issues Committee of the Law Society of NSW expressed concern to ensure the development of culturally appropriate policies for Aboriginal children. The Indigenous Issues Committee also referred to its experience that 'there are many situations where children's identity can be dismissed or overlooked' in family law matters.<sup>158</sup>

Women's Legal Centre (ACT and Region) also emphasised the importance of the obligation of the Courts to consider Aboriginal and Torres Strait Islander kinship obligations and child rearing practices:

The provision [section 61F *Family Law Act*] is to ensure that the unique kinship obligations and child rearing practices of Aboriginal or Torres Strait Islander culture are recognised by the court when making decisions about the parenting of Aboriginal or Torres Strait Islander children.<sup>159</sup>

Professor Muriel Bamblett, the CEO of the Victorian Aboriginal Child Care Agency, raised systemic problems confronting Aboriginal children in state and territory child protection systems including the impact of permanent placements outside Aboriginal children's families and communities in terms of the loss of their culture and identity. At state level, the Aboriginal Child Placement Principle (ACPP) applies to all Aboriginal children where the involvement of child protection services may result in removing an Aboriginal child from their families. The purpose of the ACPP 'is to enhance and preserve Aboriginal children's sense of identity as an Aboriginal by ensuring that Aboriginal children and young people are maintained within their own biological family, extended family, local Aboriginal community, wider Aboriginal community and maintaining their connections to their Aboriginal culture.'<sup>160</sup> Professor Bamblett emphasised the importance of ensuring a child's Aboriginality is respected in all decision making about the child and that this requires cultural knowledge and consultation with Aboriginal communities. Professor Bamblett also raised the issue about family law cases where an Aboriginal child is to live with non-Aboriginal parents/carers and how the

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158 Indigenous Issues Committee of the Law Society of NSW Submission, p. 1. This has also been raised as an issue in parenting cases by the Aboriginal Family Violence Prevention and Legal Service Victoria, *Strengthening on-the-ground service provision for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault in Victoria, Policy Paper Series No 2*, June 2010, p. 28-29.

159 Women's Legal Centre (ACT and Region), Submission p. 3.

160 'Aboriginal Child Placement Principle' Victorian Aboriginal Child Care Agency website: <[www.vacca.org/about-us/aboriginal-child-placement-principle/](http://www.vacca.org/about-us/aboriginal-child-placement-principle/)>. The ACCP is incorporated into Victorian State legislation. See *Children, Youth and Families Act 2005* (Vic), s 13.

*Family Law Act's* best interests guidelines meet the cultural needs of Aboriginal children (like return to country).<sup>161</sup>

Council also heard from Ivy Trevallion from the Torres Strait, and the Honourable Alastair Nicholson, about the need for recognition of Torres Strait Islander customary adoption practices.<sup>162</sup>

Josephine Akee, an Indigenous Family Liaison Officer with the Family Court, also described the ongoing difficulties faced by Torres Strait Islander receiving parents in a range of dealings with government departments.<sup>163</sup>

In her submission, the Chief Justice of the Family Court of Australia suggested that legislation could be introduced to enable the family courts to recognise the parental status of Torres Strait Islander receiving parents.<sup>164</sup>

### ***The need for Part VII to be reviewed***

Although one submission called for legislative guidelines about the application of Part VII to non-parents who are concerned with the care, welfare and development of the child, to enable lawyers to provide advice about this,<sup>165</sup> other organisations expressed concerns about piecemeal changes to the *Family Law Act*. The latter submissions noted the already 'convoluted and complex drafting of the Act, and in particular of Part VII',<sup>166</sup> and called for a more comprehensive principle-based revision of Part VII.<sup>167</sup> Women's Legal Service NSW submitted that the guiding principles for such a revision should be that,

[a]ll decisions about children should be [based on] the best interests of the child [and] the law should aim to eliminate all forms of discrimination, including discrimination based on sexual orientation, family type and relationship status.<sup>168</sup>

The Family Law Section recommended the involvement of child development experts in any revision of Part VII, and highlighted the need for simplicity.<sup>169</sup>

## **1.8 Council's views**

Council notes the Chief Justice's submission that the purpose of Part VII is to provide a 'broad framework in which decisions are made in cases involving disputes about where children should live, how much time they should spend with each parent or other significant adults, and the allocation of parental responsibility.'<sup>170</sup> Council also notes that in addition to guiding decision making by the

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161 Professor Muriel Bamblett AM Consultation, 31 October 2013.

162 Ivy Trevallion and the Hon Alastair Nicholson Consultation, 21 February 2013.

163 Josephine Akee Consultation, 27 August 2013.

164 Chief Justice Bryant Submission, p.6. See further at 5.3.

165 ACT Law Society Submission, p. 2.

166 Women's Legal Services NSW Submission, p. 3.

167 Family Law Section Submission, para 36.

168 Women's Legal Services NSW Submission, p. 3.

169 Family Law Section Submission, paras 35-36 and 45.

170 Chief Justice of the Family Court of Australia, Diana Bryant, Submission p. 3 ('Chief Justice Bryant Submission').

courts, the framework in Part VII has an expressive or 'message sending' function that informs the expectations of people who do not use the family law service system.

Council agrees with the principle established in *Yamada & Cain*,<sup>171</sup> that 'it is not *parenthood* which is crucial to the best interests of the child, but *parenting*—and the quality of that parenting'.<sup>172</sup> Council is concerned that the current decision making framework in Part VII does not adequately support this position.

Council notes in particular that the present framework does not reflect the reality of parenting and family life for many children in Australia. Nor does it reflect an understanding of children's perspectives of who is a parent. Council notes in this regard the different outcomes in *Mulvany & Lane*<sup>173</sup> and *Baker & Landon*.<sup>174</sup> The father in *Mulvany's case* had raised the 6 year old child from birth, but was not regarded as the child's parent. In contrast, the applicant in *Baker & Landon* had had little involvement in the child's life. Nevertheless he was considered to be a parent because he was able to show that he had been in a de facto relationship with the child's mother at the time of the child's conception from IVF, and his parental status afforded him the benefit of the presumption of equal shared parental responsibility for the child with the child's mother.

Council notes that the disjunction between the present Part VII framework and the social reality of family life for many children has created problems for decision makers, and led to uncertainty about the application of certain provisions (such as s 60CC(2)(a)) to non-legal parents. More particularly, Council notes that the present framework in Part VII creates different pathways for deciding the best interests of the child depending on the nature of the child's family.

Council is concerned that this inconsistent treatment could disadvantage children who are raised by step-parents (such as the father in *Vaughan's case*), lesbian co-mothers (such as the applicant in *Aldridge & Keaton*) or members of their extended family (such as the aunt in *Knightley & Brandon* and the grandmother in *Maxwell & Finney*). Council is also concerned that the present law may be preventing step-parents and kinship carers from seeking orders to secure their relationship with the child/ren, and that the present focus on legal parents may facilitate the exclusion of significant adults from a child's life.

Council further notes that the present legal framework is out of step with the practices of Family Consultants and the family relationships services sector, whose work with families is underpinned by an understanding 'that families are increasingly diverse' and that 'children may have a range of adults, which may or may not include their biological parents, who are significantly involved in their nurture and development'.<sup>175</sup>

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171 [2013] FamCAFC 64.

172 *Yamada & Cain* [2013] FamCAFC 64, para 27, emphasis in the original.

173 [2008] FMCAfam 473.

174 [2010] FMCAfam 280.

175 Family & Relationship Services Australia Submission, p. 1.

Council notes in this regard that studies of children's development have suggested that it is parenting capacity rather than family structure that is important to children's wellbeing.<sup>176</sup> For instance, the research by Professor Susan Golombok and colleagues at the University of Cambridge has involved longitudinal and comparative studies of children in diverse family types (opposite sex and same sex, natural conception, donor conception, adoption and surrogacy).<sup>177</sup> The factors that have been identified as important in safeguarding and promoting development include the child's needs, parenting capacity, and other family and environmental factors.<sup>178</sup> Children's developmental needs encompass: health, education, emotional and behavioural development, identity, family and social relationships, social presentation and self-care skills. Parenting capacity includes: basic care, ensuring safety, emotional warmth, stimulation, guidance, boundaries and stability. Family and environmental factors include: family history and functioning, wider family, housing, employment, income, social integration and community resources.<sup>179</sup>

This understanding accords with the principle established by the Full Court of the Family Court in *Yamada & Cain*. However, as noted, Council believes that this principle is not adequately supported by the present decision making framework in Part VII, and that reform is needed to ensure a consistent approach to the best interests of all children, regardless of the nature of their family or the legal status of the people who are raising them. Council agrees with the view expressed in the submissions from the Family Law Section and Women's Legal Service NSW that this cannot be achieved by piecemeal changes to Part VII, and that there is a pressing need for a comprehensive review and revision of Part VII with a view to ensuring consistent treatment of all children.

Council's view is that any revision should include changes to the objects and principles underpinning Part VII to recognise the diversity of family forms in which children are raised. Council's work in this area has identified a number of general principles as important for ensuring that all children are given the opportunity for the 'full and harmonious development of their personality, and should grow up in a family environment in an atmosphere of happiness, love and understanding.'<sup>180</sup> The general principles are derived from a variety of sources. These include Australia's obligations to children under the *Convention on the Rights of the Child* and the research evidence in relation to children's development.

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176 See, eg. McNair, Ruth, 'Outcomes for Children Born of Art in a Diverse Range of Families' (Victorian Law Reform Commission Occasional Paper, 2004); Hunter, Cathryn and Rhys Price-Robertson, 'Family Structure and Child Maltreatment' (Child Family Community Australia, 2012).

177 See eg. Golombok, Susan et al, 'The European Study of Assisted Reproduction Families: Family Functioning and Child Development' (1996) 11(10) *Human Reproduction* 2324; Golombok, Susan et al, 'Families with Children Conceived by Donor Insemination: A Follow-up at Age Twelve' (2002) 73(3) *Child Development* 952; Golombok, Susan et al, 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' (2006) 21(7) *Human Reproduction* 1918.

178 Cleaver, Hedy, Ira Unell and Jane Aldgate, *Children's Needs - Parenting Capacity* (TSO, 2<sup>nd</sup> ed, 2011), p. 18.

179 *Ibid*, p. 18.

180 Preamble, *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Council's view is that consideration be given to the inclusion of the following principles and objectives:

**1. The courts must consider the best interests of the particular child in his or her particular circumstances.**

This principle is drawn from the *Care of Children Act 2004* (NZ).<sup>181</sup> This way of phrasing the paramountcy principle highlights the importance of considering the child within the context of his or her individual circumstances, including the nature of the child's family.

**2. The law should ensure that children are not disadvantaged by the status of their carers or the way in which their family is formed.**

This principle reflects Article 2 of the *Convention on the Rights of the Child*, which provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

This principle also reflects the research evidence that family structure is not itself predictive of parenting quality or child outcomes.<sup>182</sup>

Council recognises that a comprehensive review and revision of Part VII cannot be achieved overnight. However, Council believes that the need for reform to ensure consistent treatment for children is pressing. Therefore Council supports the view that, pending a comprehensive review of Part VII, the references to parents in the present Part VII framework should be amended to include a reference to 'other significant adults' or 'other people of significance to the child' where appropriate.

Council also agrees that the definition of parent in s 4 *Family Law Act* should be amended to make it clear that it is an inclusive concept and not limited to legal parents. Council's view is that the definition should also be amended to make it consistent with state and territory laws that recognise the customary child rearing practices of Aboriginal and Torres Strait Islander peoples (see 2.9).

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181 *Care of Children Act 2004* (NZ), s 4(2).

182 Pryor, Jan 'Parenting in Reconstituted and Surrogate Families', in M Hoghugh and N Long (eds), *Handbook of Parenting: Theory and Research for Practice* (SAGE Publications, London, 2004) at 110. See also Nicholson, The Hon Alastair, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 11 *Australian Journal of Family Law* 13; McNair, Ruth, *Outcomes for Children Born of ART in a Diverse Range of Families* (Victorian Law Reform Commission Occasional Paper, 2004).

In addition, Council notes that when making parenting orders for Aboriginal and Torres Strait Islander children the Court 'must have regard to any kinship obligations, and child rearing practices, of the Aboriginal or Torres Strait Islander culture'. In determining what is in an Aboriginal or Torres Strait Islander child's best interests, the Court must consider the additional consideration in s 60CC(3)(h) *Family Law Act* which provides that:

- [i]f the child is an Aboriginal child or a Torres Strait Islander child:
  - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
  - (ii) the likely impact any proposed parenting order under this Part will have on that right.<sup>183</sup>

Council is of the view that this consideration should be strengthened by acknowledging the benefit to Aboriginal and Torres Strait Islander children of enjoying their culture with people who have the responsibility to pass on that culture to the child. For example, there have been cases where parenting orders have provided for an Aboriginal child to attend NAIDOC week activities as a means of maintaining the child's connection to his or her Aboriginal heritage.<sup>184</sup> Council's view is that the current provision does not adequately recognise the ways in which a child's Aboriginal identity and connection to their culture is maintained and enhanced.

Council also agrees that the law should provide scope for the recognition of more than two people to have parental responsibility for a child where that reflects the social reality of that child's family.

## 1.9 Recommendations

### Recommendation 1

The Australian Government should conduct a comprehensive review and revision of the decision making provisions of Part VII of the *Family Law Act* to ensure that it provides a consistent approach to decision making for all children regardless of their family form.

### Recommendation 2

Given the evidence of family diversity and children's views about who is a parent, the reference to 'both' of the child's parents should be removed from s 60B(1) of the *Family Law Act* and s 60CC(2)(a) of the *Family Law Act*.

In addition, where the word 'parent' appears in the decision making framework for parenting orders in Part VII of the *Family Law Act*, it should be amended to include a reference to 'other significant adults' or 'other people of significance to the child' where appropriate.

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183 *Family Law Act*, s 60CC(3)(h).

184 See eg. *Sohumba & Egan* [2008] FamCA 778, para 265.

### **Recommendation 3**

The definition of parent in s 4 of the *Family Law Act* should be amended to make it clear that for the purposes of determining parenting orders in accordance with Part VII of the *Family Law Act*, the term parent is inclusive and not limited to parents recognised under the law.

The definition should reflect the empirical evidence of family diversity and children's perspectives of family.

The definition should include a provision that recognises that a parent 'may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.'

### **Recommendation 4**

In determining the best interests of an Aboriginal child, s 60CC(3)(h) of the *Family Law Act* should be amended to include 'the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the benefit to that child to enjoy that culture with other people who have the responsibility to pass on that culture).'

### **Recommendation 5**

Part VII of the *Family Law Act* should make specific provision for the making of orders in favour of one person or more than two persons where that supports the child's best interests.

# CHAPTER 2: The need for clarification of the operation interaction and effect of certain provisions in Part VII of the *Family Law Act*

## 2.1 Introduction

This chapter addresses the question whether there are any amendments that could be made to the *Family Law Act* that will clarify the operation, interaction and effect of the relevant parentage provisions (the second term of reference). This chapter also considers some related areas where there is a lack of consistency between the *Family Law Act* and state and territory legislation and whether there are any amendments that should be made to make the *Family Law Act* more consistent with state and territory legislation that provides for the legal parentage of children.

The key concerns identified in this chapter are the lack of clarity about the operation and effect of the parentage provisions dealing with children born from assisted reproductive technologies (s 60H). There is also a lack of consistency between the *Family Law Act* and state and territory legislation on this issue.<sup>185</sup> This chapter examines both of these issues. Other concerns identified and also discussed in this chapter include the meaning of 'the other intended parent' in s 60H *Family Law Act*; the interaction between the general presumptions of parentage and the more specific provisions that deem certain people to be parents of a child in certain situations; and the court's powers to make declarations of parentage (s 69VA) and to order parentage testing procedures are also reviewed in this chapter. Inconsistencies between state laws and the *Family Law Act* also arise with respect to inclusive definitions of parents that recognise Aboriginal and Torres Strait Islander practices, tradition and custom. The question of the operation of the parentage provisions in relation to surrogacy arrangements is considered in Chapter 3.

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185 Other issues raising questions of consistency between the *Family Law Act* and state and territory laws relating to legal parentage are dealt with in other chapters. Questions of consistency in relation to Aboriginal and Torres Strait Islander children were discussed in Chapter 1. Questions of consistency in relation to surrogacy arrangements are dealt with in Chapter 4.

## 2.2 Overview of the *Family Law Act* provisions on parentage, presumptions of parentage and declarations of parentage

Ryan J has observed that Part VII *Family Law Act* contains a number of different provisions that refer to parentage:

Spread across different divisions in Part VII there are a number of provisions that deal with parentage, presumptions and declarations of parentage. Those in Division 1 subdivision D operate to irrebuttably deem a child for the purposes of the Act, in the circumstances there identified, the child of designated people. Those in Division 12 subdivision D create rebuttable presumptions for the purpose of the Act. Notably by s 69U it is acknowledged that two or more presumptions under that subdivision may apply, in which case (excluding s 69S(1)) it is for the Court to determine which presumption should prevail. Then in Division 12 subdivision E, the Court is empowered to issue a declaration of parentage that is conclusive for the purposes of all laws of the Commonwealth. In essence there is a scheme which operates so that, for the purpose of the Act or federal law, children may variously be deemed, presumed or declared the child of a person.<sup>186</sup>

In addition to the various sections in Part VII *Family Law Act*, s 4 *Family Law Act* also includes a 'definition' of a 'child and a 'parent'. These definitions were discussed in Chapter 1. The current framework reflects in part, the piecemeal amendments that have been made to the *Family Law Act* since its inception. The general presumptions of parentage were first inserted into the *Family Law Act* in 1987<sup>187</sup> to assist the Family Court in determining parentage or paternity for the purpose of making a declaration or finding of parentage under Part VII.<sup>188</sup> The relevant presumptions were set out in the Preface.

Subdivision D of Division 1 contains a number of other provisions relating to how the *Family Law Act* applies to certain children. It should be noted that these provisions are only for the purposes of the application of the *Family Law Act*. That is, they do not apply to Commonwealth law generally.<sup>189</sup> These sections include:

- 60EA Definition of *de facto partner*
- 60F Certain children are children of marriage etc.
- 60H Children born as a result of artificial conception procedures
- 60HA Children of *de facto partners*<sup>190</sup>
- 60HB Children born under surrogacy arrangements

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186 *Ellison and Anor & Karnchanit* [2012] FamCA 602 (Ryan J) para [34].

187 House of Representatives, Second Reading of the Family Law (Amendment) Bill 1987, 29 October 1987, at 1716.

188 Prior to this time, the Family Court had power to make a declaration of paternity under s 92 of the *Marriage Act 1961* (Cth) but there were no presumptions in the *Family Law Act* to guide these decisions. Instead the presumptions in the state and territory Status of Children Acts applied to Family Court proceedings by virtue of s 79 of the Commonwealth *Judiciary Act 1903* (Cth).

189 Although many Commonwealth laws refer to the *Family Law Act* provisions. See further Chapter 4.

190 Section 4AA *Family Law Act* also contains a definition of a *de facto* relationship.

Section 60H *Family Law Act* deals with the determination of parentage where an assisted reproductive treatment has been used. This provision sets out specific and non-rebuttable presumptions of parentage in relation to children born as a result of an 'artificial conception procedure', which is defined in s 4 *Family Law Act*.<sup>191</sup> The *Family Law Act* has contained a provision relating to children born from assisted reproductive technologies since 1983.<sup>192</sup> The section has undergone numerous amendments since then. Subsections (2) and (3) of s 60H *Family Law Act* were enacted in 1995.<sup>193</sup> Section 60H(1) *Family Law Act* was amended in 2008 to recognise same sex partners.<sup>194</sup> The present version of s 60H *Family Law Act* (previously set out in part in 1.5) is as follows:

**60H** Children born as a result of artificial conception procedures

- (1) If:
  - (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the ***other intended parent***); and
  - (b) either:
    - (i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or
    - (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

- (c) the child is the child of the woman and of the other intended parent; and
  - (d) if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person.
- (2) If:
    - (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

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191 Defined in s 4 *Family Law Act* as including (a) artificial insemination and (b) the implantation of an embryo in the body of a woman.

192 The *Family Law Amendment Act 1983* (Cth) inserted s 5A into the *Family Law Act* which extended the definition of a child of a marriage to child born to a woman while married following a medical procedure. The *Family Law Amendment Act 1987* (Cth) repealed s 5A and inserted an amended and extended provision in the then new s 60B of Part VII *Family Law Act*.

193 Prior to the enactment of the *Family Law Reform Act 1995* (Cth), s 60H(1) was found in identical terms in s 60B *Family Law Act*.

194 *Family Law Amendment (de Facto Financial Matters and Other Measures) Act 2008* (Cth).

- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) If:

- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
- (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

(6) In this section:

**this Act** includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Circuit Court Rules.

Part VII was amended in 2008 to include a specific provision in relation to domestic surrogacy arrangements. Section 60HB *Family Law Act* states:

60HB Children born under surrogacy arrangements

- (1) If a court has made an order under a prescribed law of a State or Territory to the effect that:
  - (a) a child is the child of one or more persons; or
  - (b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

**this Act** includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Circuit Court Rules.

Subdivision E of Division 12 *Family Law Act* refers to 'parentage evidence' and includes:

- 69V Evidence of parentage
- 69VA Declarations of parentage
- 69W Orders for carrying out of parentage testing procedures.<sup>195</sup>

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<sup>195</sup> Sections 69X-ZD *Family Law Act* are detailed sections of parentage testing procedures.

## 2.3 The Operation of s 60H in relation to children born as a result of artificial conception procedures

There have been a number of cases that have considered the operation of s 60H *Family Law Act* and applied different approaches. Often, these cases have involved de facto couples or single women and known sperm donors. The issue has also arisen in surrogacy cases, which is discussed in Chapter 3. Traditionally opposite sex couples who have children through assisted reproductive technology have had certainty of legal parentage through state and territory provisions that deemed that the husband of a woman who uses assisted reproductive technology to be the father of the child, and provided that a third party donor of sperm (as was the case historically) was not a parent of the child.<sup>196</sup> However, it should be noted that different provisions applied to the status of donors where a woman did not have a male partner.<sup>197</sup> For example, when the Standing Committee of Commonwealth and state Attorneys-General were recommending uniform legislation concerning the status of children born from assisted reproductive technology the wording in the Victorian Act initially provided that:

Where semen is used in a procedure of artificial insemination of a woman who is not a married woman or of a married woman otherwise that in accordance with the consent of her husband, the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reasons of the use of that semen unless, at any time, he becomes the husband of the mother of the child.<sup>198</sup>

As Brown J noted in *Re Mark*,<sup>199</sup> the section did not say that the sperm donor was not a parent; only that the Victorian statute at the time 'removes the rights and obligations which the law attaches to fatherhood.'<sup>200</sup>

Following the Victorian Law Reform Commission's report on *Assisted Reproductive Technology and Adoption* (2007), the Victorian Act was further amended to make it clear that when single women or lesbian couples conceived through assisted reproductive technology, donors of genetic material are not legal parents.<sup>201</sup> This is consistent with most state and territory legislation (see 2.4 below).

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196 In the *Family Law Act*, see the historical versions. *Status of Children (Amendment) Act 1984*(Vic), s 10C(2); *Status of Children Act 1974* (Vic), ss 13(1)(c), (2), 15(1) (b) (2).

197 *Status of Children (Amendment) Act 1984* (Vic), s 10F.

198 *Status of Children (Amendment) Act 1984* (Vic), s 10F. See Senate Standing Committee on Constitutional and Legal Affairs on National Uniformity in Laws Relating to the Status of Children Born through the use of In Vitro Fertilisation, *IVF and the Status of Children* (1985).

199 [2003] FamCA 822.

200 *Re Mark* [2003] FamCA 822, para 71.

201 *Assisted Reproductive Treatment Act 2008* (Vic), s 147, amending the *Status of Children Act 1974* (Vic), ss 13(1) (c), (2), 15(1) (b) (2). As the Victorian Law Reform Commission noted in its Final Report this also brought the Victorian legislation into line with the status of donors in New South Wales, Western Australia, South Australia, Tasmania and the Australian Capital Territory. It also made the law consistent between opposite sex couples, same sex couples and single women: Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007), p. 136.

Section 60H *Family Law Act* has three main subsections. Section 60H(1) *Family Law Act* applies when a woman has a partner (initially opposite sex, but since 2008 includes a same sex partner).<sup>202</sup> Sections 60H(2) and (3) *Family Law Act* only refer to the situation where a woman has given birth as a result of assisted reproductive technology and under a prescribed state or territory law the child is considered a child of the woman (s 60H(2)), or the child is considered the child of a man (s 60H(3)). There are no state or territory laws prescribed for subsection s 60H(3) *Family Law Act*. Unlike s 60H(1) *Family Law Act* there is no equivalent provision that states that if another person provided genetic material, the child is not the child of that person.

### **The cases**

Two disparate views have emerged from first instance judgments on the question of whether a known sperm donor may be recognised as a parent for the purposes of the *Family Law Act*. The expansive view holds they may and raises questions of inconsistency between the *Family Law Act* and state and territory laws.

The restrictive view is reflected in the reasoning of Guest J in *Re Patrick*.<sup>203</sup> This was a case involving a lesbian couple and their child where a known sperm donor sought contact with the child. Prior to 2008, s 60H *Family Law Act* only referred to opposite sex couples (either married or de facto). Guest J took the view that:

The effect of s 60H(3) of the Act is that where under a prescribed law of a State or Territory the child is a child of a man, the child is also to be regarded as his child under the *Family Law Act*. Thus a child is to be regarded as the child of the biological father and the biological father a 'parent' only if there is a specific State or Territory law which expressly confers that status on a sperm donor for the purposes of the Act. There are no prescribed laws on any State or Territory to that effect.

In the absence of express provisions in federal law, the Act can and should be read in light of such State and Territory presumptions, thereby leaving the sperm donor, known or unknown, outside the meaning of 'parent'. The father is thus not a 'parent' under the Act.<sup>204</sup>

Guest J noted that in *Re B and J*<sup>205</sup> Fogarty J had held that a known sperm donor was not a parent for the purposes of the *Child Support Assessment Act 1989* (Cth), however Fogarty J had queried whether that would necessarily be the case for the purposes of s 60H *Family Law Act*. The difference between the two Acts, is that in the case of the *Child Support Assessment Act 1989* (Cth) the definition of a parent is specifically limited by the terminology that parent 'means' a person who is a parent of the child under section 60H of the *Family Law Act*.<sup>206</sup> Fogarty J noted that,

[t]here is no corresponding provision in the *Family Law Act* which would exclude a biological parent from otherwise being regarded as a parent. That is to say that it is not clear that the

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202 *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

203 [2002] FamCA 193.

204 *Re Patrick* [2002] FamCA 193, paras 5-6.

205 [1996] 21 Fam LR 186.

206 *Child Support Assessment Act 1989* (Cth), s 5.

provisions of s 60H do not enlarge, rather than restrict, the categories of persons who are regarded as a child's parents. In the case of the Assessment Act, it is the word 'means' which makes it clear that the provision is exhaustive. Prima facie, s 60H is not exclusive, and so there would need to be a specific provision to exclude people who would otherwise be parents. Relevantly here, that means the donor of genetic material.<sup>207</sup>

Guest J also referred to the view expressed in the academic literature that the 'expansive' interpretation of s 60H *Family Law Act* was 'a curious result given that all states and territories have laws which presume that a sperm donor is not a parent unless he is the legal or de facto husband of the recipient.'<sup>208</sup>

The expansive view was adopted in the reasoning of Brown J in *Re Mark*,<sup>209</sup> which also raised the scope of s 60H *Family Law Act*. This case involved a child born as a result of a surrogacy arrangement in California. Mark's intending parents, Mr X and Mr Y brought a joint application for parenting orders. Mark's birth certificate named Mr X as his father and Ms S (the surrogate mother) as his mother. A US court order had been obtained prior to the birth certificate that declared that Mr X was the biological father of Mark and that he should be designated as such on all public records. The question was whether Mr X was a parent for the purposes of the *Family Law Act*. Neither the US birth certificate nor the US court order enlivened any of the presumptions in Division 12 as they were not prescribed records or orders.<sup>210</sup>

Brown J questioned the finding by Guest J that a known sperm donor in the situation of Mr X was not a parent:

I do not share Guest J's view that, for the purposes of the *Family Law Act*, s 60H defines "parent", or means that a biological father in the position of Patrick's father or Mr X is only a parent if there is a specific State or Territory law which expressly confers that status on a semen donor in his position, and that law is prescribed for the purposes of s 60H.

Section 60H creates the relationship of parent and child, not by the use of the term "parent", but by deeming a child to be "her child", "his child" or "their child" for the purposes of the *Family Law Act* in certain circumstances.<sup>211</sup>

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207 *Re B and J* (1996) 21 Fam LR 186, 196-197.

208 *Re Patrick* [2002] FamCA 193, para 298 citing Sandor, Danny 'Children born from Sperm Donation: Financial Support and other responsibilities in the Context of Discrimination' (1997) 4(1) *Australian Journal of Human Rights* 175 at p 178. See also Kelly, Fiona, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court - the Case of *Re Patrick*' (2002) 16(3) *Australian Journal of Family Law* 204; Millbank, Jenni, 'De facto relationships, same-sex and surrogate parents: Exploring the scope and effects of the 2008 federal relationship reforms' (2009) 23 *Australian Journal of Family Law* 1.

209 [2003] FamCA 822.

210 It remains the case that there are no prescribed overseas jurisdictions for the purposes of Part VII of the *Family Law Act*. The issue of prescribing overseas jurisdictions is discussed in the chapter on surrogacy arrangements.

211 *Re Mark* [2003] FamCA 822, paras 36-37.

In the recent case of *Groth & Banks*<sup>212</sup> Cronin J has followed Brown J's interpretation that s 60H *Family Law Act* expands rather than restricts the 'categories of people who could be a child's parent.'<sup>213</sup> This case has highlighted how the 'expansive' interpretation of s 60H *Family Law Act* may be inconsistent with state and territory legislation. This is considered in more detail in the next section.

## 2.4 Section 60H and consistency with the state and territory laws in relation to the legal status of the donors of genetic material

The interaction between state and territory laws and the *Family Law Act* in cases of assisted reproduction is complex. Section 60H(1) *Family Law Act* is 'consistent' with state and territory laws—but this is only in relation to women with partners. Section 60H(1) *Family Law Act* contains two limbs. The first limb is independent of any state or territory laws. It simply provides that where a woman gives birth as a result of an assisted reproductive technology 'while the woman was married to, or a de facto partner of, another person (the other intended parent) and the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material [then] the child is a child of the woman and of the other intended parent' for the purposes of the *Family Law Act*. The other limb refers to the situation where under a prescribed state or territory law, the child is a child of the woman and the other intended parent.<sup>214</sup> All states and territories now recognise a lesbian co-mother as a parent following assisted reproductive technology. State legislation in the Australian Capital Territory, New South Wales, South Australia, Tasmania, Victoria and Western Australia also makes it clear that a sperm donor (whether known or unknown) is not a parent whether the woman who gives birth is partnered or not.<sup>215</sup>

The *Family Law Regulations 1984* (Cth) (Family Law Regulations) also prescribe state and territory legislation for s 60H(2) *Family Law Act* but not for s 60H(3) *Family Law Act*.<sup>216</sup> Sections 60H(2) and (3) *Family Law Act* differ from s 60H(1) *Family Law Act* in that they do not specify that a person who provides genetic material is not a parent of the child (the language is that 'the child is not the child of that person' in 60H(1) *Family Law Act*). This has led to inconsistency between state and territory laws and Commonwealth laws on the parentage status of sperm donors when single women use assisted

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212 [2013] FamCA 430.

213 *Groth & Banks* [2013] FamCA 430, para 20.

214 Regulation 12C of the *Family Law Regulations 1984* (Cth) prescribe the following laws:

*Status of Children Act 1996* (NSW); *Status of Children Act 1974* (Vic), sections 10A, 10B, 10C, 10D, 10E, 13 and 14;

*Status of Children Act 1978* (Qld), sections 17, 18, 19, 19C, 19D and 19E;

*Artificial Conception Act 1985* (WA); *Family Relationships Act 1975* (SA), sections 10A, 10B, 10C, 10D and 10E; *Status of Children Act 1974* (Tas), Part III; *Parentage Act 2004* (ACT), section 11; *Status of Children Act* (NT), sections 5A, 5B, 5C, 5D, 5DA, 5E and 5F.

215 Eg. *Status of Children Act 1974* (Vic), ss 13(1)(c), (2), 15(1) (b), (2); *Status of Children Act 1996* (NSW), ss 14(2), (4); *Parentage Act 2004* (ACT), ss 11(5), 12; *Family Relationships Act 1975* (SA), s 10C(4); *Status of Children Act 1974* (Tas), s 10C; *Artificial Conception Act 1985* (WA), s 7(2). The *Status of Children Act 1978* (QLD) maintains a distinction in the wording of the provisions between opposite sex married and de facto couples (s 17) and same sex de facto couples (s 19C) and single women (or women with partners who undergo procedures without the consent of their partner (s 21).

216 See *Family Law Regulations 1984* (Cth), regs 12C and 12CA.

reproductive technology. The wording of the *Family Law Act* refers to the person who provides genetic material—however to date the cases have always involved sperm donors. It is no doubt likely that in future there will be cases involving other donors of genetic material (egg donors or mitochondrial DNA donors for instance). For reasons discussed further in Chapter 3, there is a difference in how the provisions might be applied to egg donors and sperm donors.

In *Groth & Banks*<sup>217</sup> Cronin J decided that there is a direct inconsistency between the *Family Law Act* and the relevant state legislation (in this case the *Status of Children Act 1974* (Vic)). Applying the expansive approach to s 60H Cronin J found that a known sperm donor was a parent for the purposes of the *Family Law Act*.

In *Groth & Banks* the Applicant and Respondent had been in a relationship but had separated in 2002. In January 2008 the mother approached the applicant and suggested they have a child using IVF. The applicant had been diagnosed with testicular cancer and had frozen some sperm prior to his chemotherapy treatment. The mother was aware of the applicant's cancer treatment. The applicant agreed and the child was born in October 2010. Cronin J found that the intention was that they would 'parent any child born as a result of their decision but at the same time, their relationship would be that of separated parents.'<sup>218</sup> The mother agreed in proceedings that the applicant 'was always going to be more than a donor'. However, when the arrangement became 'public' (neither the applicant's nor the respondent's family knew about the arrangement until the middle of 2011) disputes arose around the care of the child and communication between the parties deteriorated. The mother limited the applicant's time with the child from the time when she learned that the applicant had a new partner and the extended family found out about the child.

In terms of the orders sought, the mother's 'major concern was that the applicant should not have parental responsibility in the sense of being responsible for decisions about the child.'<sup>219</sup> The applicant in this case did not seek a declaration of parentage and Cronin J held that it was unnecessary to make such a declaration under s 69VA *Family Law Act* as his Honour was satisfied that the applicant was a parent for the purposes of Part VII *Family Law Act*.<sup>220</sup> The orders also provided that the parents have equal shared parental responsibility, and for the child to gradually spend more time with the father.

Cronin J agreed with the reasoning of Brown J in *Re Mark* in deciding that s 60H *Family Law Act* 'should be interpreted as expanding rather than restricting the categories of people who could be a child's parent.'<sup>221</sup> As the mother did not have a partner, s 60H *Family Law Act* did not operate to exclude the applicant from being considered a father, his Honour noting:

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217 [2013] FamCA 430.

218 *Groth & Banks* [2013] FamCA 430, para 46.

219 *Groth & Banks* [2013] FamCA 430, para 3.

220 This raises the question then, that without such a declaration, the father in this case would not be considered a parent for Child Support Assessment purposes.

221 *Groth & Banks* [2013] FamCA 430, para 20. Cronin J also reviewed the earlier cases of *Re Patrick* and *B v J*—as discussed above.

Only in the event that a child is a child of a man because of s 60H(3) would the biological father of the child to whom that provision applied cease to be the father of the child and a parent for the purposes of the Act. There is no person here that would displace the applicant as a parent under s 60H(3).<sup>222</sup>

Cronin J also commented:

The whole Commonwealth statutory concept as outlined in the Part VII of the Act is one in which biology is the determining factor unless specifically excluded by law.<sup>223</sup>

Cronin J considered the interaction between the *Family Law Act* and the Victorian *Status of Children Act 1974*, and found that there was a direct 'inconsistency' between the two. The Victorian Act contains an irrebuttable presumption that a man who provides genetic material is not the father whether or not he knows the woman.<sup>224</sup>

As Cronin J held that the *Family Law Act* provisions 'provided an applicable and sufficient law as to parentage' he rejected the view that the state laws are incorporated into federal jurisdiction.<sup>225</sup> Furthermore, Cronin J held that there was a direct inconsistency between the *Family Law Act* and the Victorian provisions,

If the applicant is a "parent" under the Commonwealth Act, a right inheres in him that the State legislation, by s 15, seeks to deprive. The Acts are, therefore, directly inconsistent. The inconsistency arises only when parentage has been held to exist under the *Family Law Act*, and as a consequence, the presumption in sub-s 15(2) of the Status of Children Act does not exist because that provision is inoperative.<sup>226</sup>

In summary, the weight of judicial opinion in relation to s 60H *Family Law Act*, insofar as it applies to women without partners, operates in favour of the expansive approach.<sup>227</sup> This produces an inconsistency between the *Family Law Act* and state and territory laws. It also means that s 60H *Family Law Act* distinguishes between women with partners and single women in relation to the status of children born as a result of assisted reproductive technology.

## **2.5 The meaning of 'the other intended parent' in s 60H *Family Law Act***

Another concern with the operation of s 60H *Family Law Act* highlighted in Council's examination of the cases is the meaning accorded to the words 'other intended parent'. The question of whether the 'other intended parent' may be considered a parent under s 60H *Family Law Act* has been considered in obiter (non-binding discussion) by the Full Court of the Family Court in a decision which has highlighted the uncertainty surrounding the issue.

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222 *Groth & Banks* [2013] FamCA 430, para 22.

223 *Groth & Banks* [2013] FamCA 430, para 14.

224 Section 15 *Status of Children Act 1974* (Vic).

225 By reference to ss 79 and 80 of the *Judiciary Act 1983*(Cth).

226 *Groth & Banks* [2013] FamCA 430, para 38.

227 Compare with Watts J in *Re Michael: Surrogacy Arrangements* with regards to surrogacy arrangements discussed further in Chapter 3.

In *Aldridge & Keaton*, a case discussed earlier, the Full Court said:

Although not directly raised in this appeal, the question of whether an “other intended parent” is a “parent” for the purposes of Part VII is not without some doubt. This fact is of significance when considering s 60B(1) and (2) and s 60CC(2) and (3). We would, consistent with principles of statutory interpretation, give a purposive construction to the section, and regard both the birth mother and other intended parent as parents of the child. But we note other provisions of the Act appear inconsistent with this interpretation.<sup>228</sup>

The Act, in s 4, defines “parent” as “when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child”. Section 60H uses the expression “person” and “other intended parent” not “parent”. It appears from the Revised Supplementary Explanatory Memorandum that the drafters intended such a person should be treated in the same manner as a parent, to meet the concerns expressed in representations recorded in the Senate Standing Committee on Legal and Constitutional Affairs’ report on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (“the Senate report”) but the definition of “parent” in the Act was not amended at the same time amendments were made to s 60H.<sup>229</sup>

Commentary by Watts J in *Connors & Taylor*<sup>230</sup> questions the Full Court’s reasoning and asserts that the other intended parent may be considered a parent for Part VII proceedings:

The Revised Supplementary Explanatory Memorandum is in the following terms:

This item repeals subsection 60H(1) and substitutes a new subsection 60H(1) that deals with both married and opposite and same-sex de facto couples. Opposite-sex de facto couples were previously covered in subsection 60H(4). This subsection is repealed.

These changes will mean that section 60H(1) applies, as well as to married couples, to current or former de facto partners who are of the same-sex and to current or former de facto partners who are of different sexes where children are born as a result of artificial conception procedures.

This would mean that female same-sex de facto couples would be recognised as the parents of a child born where the couple consent to the artificial conception procedure and one of them is the birth mother. In addition, genetic material from other than the couple must be used with the relevant donor’s consent. The provision provides that the child is to be the child of the woman giving birth and her de facto partner.

There is a distinction to be drawn between a person being treated “in the same manner as a parent” and a person being “recognised as a parent”. In my view the 2008 amendment to s 60H(1) achieved the intention of the legislature.

The Full Court [in *Aldridge*] at paragraph 17 of their discussion focused on the fact that s 4 defines “parent” as “when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child”. At paragraph 18 the Full Court comment that that definition was not amended at the same time amendments were made to s 60H. It clearly may have been better if

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228 *Aldridge & Keaton* [2009] FamCAFC 229.

229 *Aldridge & Keaton* [2009] FamCAFC 229, paras 16-18.

230 [2012] FamCA 207.

s 4 had been amended but with respect to the Full Court, the fact that it was not amended does not affect the clear words of s 60H(1)(c) FLA. Section 4 is not an exclusive definition of "parent". That much is clear given that the definition of "parent" in s 4 does not include biological parents as parents and it would be absurd for anyone to suggest that biological parents were not parents for the purposes of the FLA because they were not included in the definition of "parent" in s 4 FLA.<sup>231</sup>

## 2.6 The interaction of the parentage presumptions in Division 12 and other provisions in the *Family Law Act*

Council's examination of the *Family Law Act* parentage provisions also exposed uncertainty concerning the interaction of the parentage presumptions and other Part VII provisions. The key question is whether the rebuttable presumptions of parentage in Division 12 of Part VII *Family Law Act* can be rebutted by other sections in Part VII, in particular by s 60H *Family Law Act* and s 60HB *Family Law Act*.

This question was raised by Justice Watts in *Re Michael: Surrogacy Arrangements*<sup>232</sup> where his Honour suggested that parliament should amend s 69U *Family Law Act* to make it clear that the parentage presumptions can be rebutted by the operation of other parts of the Act. *Re Michael: Surrogacy Arrangements* was an altruistic surrogacy arrangement in New South Wales. Michael had been born as a result of IVF using Paul's sperm and Sharon's egg. Sharon's mother Lauren had agreed to act as a gestational surrogate (with her partner's agreement). On Michael's birth certificate, Lauren was named as Michael's mother and Paul as Michael's father. Paul and Sharon made an application to the Family Court of Australia seeking leave to adopt 'Michael'. Watts J found that neither Paul nor Sharon were Michael's legal parents. Section 60HB *Family Law Act* had no application as at the time there was no applicable New South Wales legislation that recognised the surrogacy arrangement.

One of the issues raised in this case was that there was a presumption of parentage in favour of Paul as he was named on the birth certificate (s 69R *Family Law Act*). As Watts J noted, s 69U *Family Law Act* provides that this presumption 'is rebuttable by proof on the balance of probabilities'.<sup>233</sup> However, in the circumstances of this case, the presumption could not be rebutted by proof as Paul 'would be able to pass a parentage testing procedure'.<sup>234</sup> That is because the only 'proof' would be in the nature of DNA evidence and Paul was Michael's genetic father. Watts J then determined that the presumption of parentage raised by s 69R *Family Law Act* could also be rebutted by other provisions in the *Family Law Act* (namely, s 60H). Watts J made a number of statements and recommendations in conclusion:

Sections 60H(1) and 60HB *Family Law Act* now provide an exhaustive definition as to who a parent is in the context of surrogacy arrangements.

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231 *Connors & Taylor* [2012] FamCA 207, paras 86-88.

232 [2009] FamCA 691.

233 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, paras 47-48.

234 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 49.

Those sections lead to an outcome in this case which none of the parties had intended. It will be different in the future if s 60 HB *Family Law Act* is enlivened in New South Wales and s 60H *Family Law Act* is read to be subject to s 60HB *Family Law Act*.

For s 60HB *Family Law Act* to have effect, there will need to be further amending legislation in the States and companion regulations made under the Family Law Regulations.

It would be useful to:

- Amend s 60H *Family Law Act* to make it clear that s 60H *Family Law Act* is subject to the provisions of s 60HB *Family Law Act*.
- Amend s 69U *Family Law Act* to make it clear that parentage presumptions can be rebutted by the operation of other parts of the *Family Law Act*.
- If it is intended that s 60H *Family Law Act* has no application to surrogacy arrangements, to amend s 60H *Family Law Act* to make that clear or alternatively amend the definition of “artificial conception procedures” to exclude surrogacy arrangements from that definition.<sup>235</sup>

## 2.7 Declarations of parentage (the operation of s 69VA *Family Law Act*)

Section 69VA of the *Family Law Act* provides as follows:

As well as deciding, after receiving evidence, the issue of the parentage of a child for the purposes of proceedings, the court may also issue a declaration of parentage that is conclusive evidence of parentage for the purposes of all laws of the Commonwealth.

The main use of this provision involves applications to support a child support assessment application (eg. where a man denies paternity).<sup>236</sup>

A declaration of parentage has been sought by the intended parents in a number of the surrogacy cases (discussed in more detail in Chapter 4) and by the former partners of the child’s mother where the child was conceived using assisted reproductive technology.<sup>237</sup> Several issues are raised by the reported cases regarding the operation and effect of this section.

### 2.7.1 *The limitations of a declaration of parentage under the Family Law Act*

Professor Belinda Fehlberg has noted that the use of this power by the family courts is limited to situations where the application is incidental to the determination of another matter within Commonwealth power.<sup>238</sup> This can create difficulties for applicants, for example, where a parent

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235 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, paras 68-71.

236 See for example, *Jamison & Hanley* [2012] FMCAfam 218; *Lovegood & Creevey* [2010] FMCAfam 113; *Sachs & Beauman* [2011] FMCAfam 11 (Applications brought by mothers). *W & H* [2004] FMCAfam 28 (applications brought by men seeking a declaration that they are not the father of a child).

237 See *Simpson & Brockman* [2009] FamCAFC 73; *Baker & Landon* [2010] FMCAfam 280; *Aldridge & Keaton* [2009] FamCAFC 229

238 Professor Belinda Fehlberg, Consultation, 31 July 2013.

is seeking a declaration of parentage for the purposes of obtaining a passport for a child that is not 'incidental to the determination of any other matter within the legislative powers of the Commonwealth' before the court. Professor Fehlberg noted that in *M v H*,<sup>239</sup> Rowlands J referred to *Brock v White* (unreported) where Coleman J declined to make the declaration of parentage because it was not attached to a separate application.

In the recent case of *Whitely & Ingham*<sup>240</sup> Judge Terry also held that there was no stand-alone power to make a declaration of parentage. In this case a mother was seeking a declaration of parentage in relation to her child's biological father after the father's death. The father's name had not been entered on the birth certificate as he had not consented to this at the time the child was born. The mother and father had separated before the birth of the child. DNA evidence obtained after the father's death confirmed that he was the child's biological father. Judge Terry referred to the decision of Mullane J in *McK & K v O*<sup>241</sup> where Her Honour noted that the wording of the provisions of both s 69VA and s 69V in relation to evidence of parentage:

Make it clear however that this court's power to inquire into and make findings about parentage is not a stand-alone power; it is a power which can be called in aid to assist the court if the parentage of a child is an issue in an application brought under the *Family Law Act 1975* (or the *Child Support (Assessment) Act 1989* by virtue of s. 100 of that Act) for other orders.<sup>242</sup>

In recognition of these problems, four states (New South Wales, Queensland, Tasmania and Victoria) made a reference of power to the Commonwealth between 1987 and 1997 to enable the family courts to make a determination of parentage 'whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth'.<sup>243</sup> However, no other referrals appear to have been made. It seems clear that the Commonwealth has not acted on the existing referrals.

A further limitation is that a declaration of parentage under s 69VA *Family Law Act* is only 'conclusive evidence of parentage for the purposes of all laws of the Commonwealth', and as such is not binding for state and territory matters such as birth registration, inheritance, and enrolling children in school, where the relevant state and territory law does not expressly provide for recognition of family court parentage orders. As Millbank notes,

A declaration of parentage under s 69VA is conclusive in all Commonwealth law, but a declaration, finding or order of parentage from the Family Court does not necessarily carry through to state law and it is the states which register births and control birth records.<sup>244</sup>

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239 [1993] 17 FamLR 416.

240 [2013] FCCA 869.

241 [2001] FLC 93-089.

242 *Whitely & Ingham* [2013] FCCA 869, para 14. See also *McK & K v O* [2001] FLC 93-089.

243 *Commonwealth Powers (Family Law—Children) (Amendment) Act 1997* (Vic), s 4; *Commonwealth Powers (Family Law—Children) (Amendment) Act 1996* (NSW); *Commonwealth Powers (Family Law—Children) Act 1990* (QLD), s 3; *Commonwealth Powers (Family Law) Act 1987* (Tas), s 3.

244 Millbank, Jenni, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23 *Australian Journal of Family Law* 1, p. 157.

Currently, only the Australian Capital Territory, New South Wales and Queensland legislation contain provisions that make a conclusive presumption of parentage on the basis of a finding of parentage made by another state or Commonwealth Court.<sup>245</sup> Tasmania and the Northern Territory have not prescribed any courts for the purposes of recognition of findings in relation to parentage.<sup>246</sup> South Australian legislation only refers to findings of 'paternity' in relation to children born outside of marriage. In Victoria, the legislation includes a rebuttable presumption based on a finding of a court (including a Commonwealth Court), but these presumptions are rebutted by the specific provisions dealing with assisted reproductive technologies.<sup>247</sup>

### **2.7.2 When can a declaration of parentage be made and what is the relevance of a child's best interests**

Other issues raised in relation to declarations of parentage concern the scope of the power and whether declarations of parentage should be subject to the best interests of the child. Professor Chisholm and Professor Keyes noted that the Court can only make a declaration when 'it finds that a person is a parent.'<sup>248</sup> It appears to be the case that 'parentage' for the purposes of s 69VA *Family Law Act* refers only to biological parentage.<sup>249</sup> In the Full Court of the Family Court case of *Tryon & Clutterbuck (No 2)*,<sup>250</sup> Finn J referred to the legislative history and case law in relation to s 69VA *Family Law Act* and noted that,

The precise circumstances and manner in which a declaration of parentage can, or should, be made are, in my view, somewhat unclear given the language of s 69VA itself.<sup>251</sup>

*Tryon & Clutterbuck (No 2)* was a case where a man brought an application seeking time with two children and also a declaration that he was the children's biological father. The mother and her husband contested the application. The putative father claimed that he had had an affair with the mother over a number of years and that she had also told him when she was pregnant with each child that they were his children. Orders were made for parentage testing but the mother and husband failed to carry out the testing procedure. A declaration of parentage was made in favour of the applicant that he was the father. The mother and her husband were unsuccessful on appeal.

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245 *Status of Children Act 1996* (NSW) ss 12, 17; *Parentage Act 2004* (ACT) ss 10(1)(a), 13(2); *Status of Children Act 1978* (Qld) ss 26(1), 30(2). See also Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' [2013] 27 *Australian Journal of Family Law* 135.

246 *Family Relationships Act 1975* (SA) s 7(c).

247 *Status of Children Act 1974* (Vic) ss 8(5)(6), 10C(3), 10D(3), 10E(3), 14(2), 15(2), 16(2).

248 Professor Chisholm and Professor Keyes Submissions p. 24. See also Dr Olivia Rundle's Submission, pp. 7-8.

249 *Tobin v Tobin* [1999] FamCA 446; [1999] FLC 92-848.

250 [2009] FamCAFC 176.

251 *Tryon & Clutterbuck (No 2)* [2009] 42 Fam LR 118, para 29.

Previously there was some doubt about whether a declaration of parentage was a parenting order (under s 64B *Family Law Act*) and therefore subject to the paramountcy principle.<sup>252</sup> Amendments to the *Family Law Act* in 2012 made it clear that a declaration of parentage is not a parenting order.<sup>253</sup>

## 2.8 Applications for parentage testing

Section 69W *Family Law Act* empowers the court to make an order for the carrying out of parentage testing procedures:

If the parentage of a child is a question in issue in proceedings under this Act, the court may make an order (a parentage testing order) requiring a parentage testing procedure to be carried out on a person mentioned in subsection (3) for the purpose of obtaining information to assist in determining the parentage of the child.<sup>254</sup>

It should be noted that this is not a stand-alone power—the question of a child’s parentage must actually be in issue in proceedings.<sup>255</sup>

These cases mostly appear to arise out of the discovery by the applicant around the time of the relationship’s demise that he may not be the child’s father, as he had assumed. In many reported cases the point of the application is to support an application by the man that he not be assessed in relation to the costs of child support (because he is not the child’s biological parent),<sup>256</sup> or to otherwise affect a potential property settlement.<sup>257</sup>

The main concern that has been voiced in relation to these applications concerns the lack of clarity about the extent to which, if at all, the paramountcy principle is relevant to parentage testing orders. In *Brianna & Brianna*,<sup>258</sup> the Full Court of the Family Court commented (without deciding) that even if the paramountcy principle does not apply to parentage testing decisions, the child’s best interests ‘is an essential factor’<sup>259</sup> in exercising the discretion to make such an order or is at least ‘one of the matters to be considered.’<sup>260</sup> The Chief Justice in this case commented that the resolution of this issue may ‘require legislative clarification.’<sup>261</sup>

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252 See *Ellison and Anor & Karnchanit* [2012] FamCA 602.

253 See Schedule 2 *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* adding to s 64B (1 *Family Law Act*): ‘However, a declaration or order under Subdivision E of Division 12 is not a parenting order’.

254 Subsection 69W(3) *Family Law Act* provides that the order may be made in relation to the child, a parent of the child and any other person where the Court thinks the information obtained from the test would assist in the determination of parentage.

255 See *Brianna & Brianna* [2010] FamCAFC 97.

256 See for example, *Scotland & King* [2012] FMCAfam 690, and *Ames & Ames* [2009] FamCA 825.

257 See for example, *Brianna & Brianna* [2010] FamCAFC 97.

258 [2010] FamCAFC 97.

259 *Brianna & Brianna* [2010] FamCAFC 97, per Bryant CJ, para 93.

260 *Brianna & Brianna* [2010] FamCAFC 97, per Finn and Thackray JJ, para 159.

261 *Brianna & Brianna* [2010] FamCAFC 97, per Bryant CJ, para 92.

As noted above in relation to declarations of parentage, the 2012 amendments to the *Family Law Act* made it clear that these orders are not parenting orders and therefore are not subject to the welfare principle.<sup>262</sup> Nevertheless, judicial officers in a number of cases have relied heavily on a consideration of the child's best interests to support their decision. For example, in *Hadley & Pock*,<sup>263</sup> in 2011, Federal Magistrate Roberts (as he then was) refused an application for parentage testing on the basis of his finding that it was likely to do 'more harm than good' and was not, therefore, in the child's best interests.<sup>264</sup> The parties were a formerly married couple who were in dispute over parenting arrangements for their four children. The case involved the mother's application for parentage testing in relation to one of the children, a 13 year old girl. The mother said the girl was the child of her previous husband with whom she had had an affair during the marriage. In support of her application, the mother asserted that the girl had a right to know her genetic heritage. However, the mother was not requesting that her previous husband have a DNA test. The father opposed the application, arguing that the mother was 'trying to drive a wedge' between him and his daughter. The Family Report writer's opinion was that there was no clear advantage to the child in the proposed test. Federal Magistrate Roberts (as he then was) noted that,

Simply knowing the truth for [the] sake of knowing the truth is not a reason to subject a child to DNA testing, especially when it cannot prove what the mother hopes to prove.<sup>265</sup>

## **2.9 Inconsistency between state and territory laws and Commonwealth laws in relation to Aboriginal and Torres Strait Islander children**

In section 1.2.2 above Council referred to the considerable range and variation in Aboriginal and Torres Strait Islander child rearing practices. We also discussed the Torres Strait Island practice of "Kupai Omasker" which involves the permanent giving of a child from one family to another by mutual consent, and Watts J's comments about the limitations of the *Family Law Act*:

The Federal Government has power to amend the *Family Law Act* to enable a court to declare persons in the positions of the Applicants in this case as parents. Alternatively the States have power to amend State legislation to allow full recognition of traditional Torres Strait Islander child rearing practices. Maybe one day the law will be changed.<sup>266</sup>

A number of Queensland Acts now expressly provide broader definitions of 'parent' that include definitions of a parent by reference to Aboriginal and Torres Strait Islander tradition and custom. Torres Strait Islander receiving parents are recognised as parents in three different pieces of

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262 See s 64B *Family Law Act*.

263 [2011] FMCAfam 117.

264 For a discussion of a United Kingdom case see Carol Smart's arguments about a child's right (and best interests) in not wanting parentage testing in relation to a man who claimed to be the biological father of the child: Smart, Carol, 'Law and the Regulation of Family Secrets' [2010] 24(3) *International Journal of Law, Policy and the Family* 397.

265 *Hadley & Pock* [2011] FMCAfam 117, para 142.

266 *Beck and Anor & Whitby and Anor* [2012] FamCA 129, para 75.

Queensland legislation.<sup>267</sup> For instance, section 11 of the *Child Protection Act 1999* (QLD) defines a parent as follows:

- (1) A parent of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child.
- (2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.
- (3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.
- (4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.
- (5) A reference in this Act to the parents of a child or to 1 of the parents of a child is, if the child has only 1 parent, a reference to the parent.

The areas of law in which receiving parents are not recognised as parents are inheritance and birth certificates (see discussion in Chapter 5). At the Commonwealth level, receiving parents are not recognised as parents for the purposes of family law disputes (as discussed above), child support<sup>268</sup> and passports.

## 2.10 Submissions and consultations

### *Operation of s 60H*

A number of submissions raised the ongoing uncertainty around the interpretation and operation of s 60H *Family Law Act*.<sup>269</sup> Professor Jenni Millbank commented on the 'expansive' approach to s 60H *Family Law Act* that:

Many thousands of women in Australia who have utilised donor sperm in an assisted conception procedure would now have a legal father to their child under the *Ellison* interpretation of the FLA (although not under state law) with all of the attendant presumptions, mandatory considerations and restrictions (eg needing permission or a court order for overseas travel for the child) that follow from this. This would apply to known sperm donors whether or not they had involvement

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267 *Child Protection Act 1999* (QLD), s 11; *Education Act 2006* (QLD), s 10; *Public Health Act 2005* (QLD), s 159. The *Housing Act 2003* (QLD), s 6 includes definitions of Aboriginal and tradition and Island custom in the guiding principles.

268 In relation to child support, Deanne Drummond has noted the Child Support Agency recognises that 'a person may have a legal duty to maintain another person if ...the Family court has made consent orders recognising Kupai Omasker (the Torres Strait Islander traditional practice of adoption)': Drummond, Deanne, *Kupai Omasker - Incorporating Traditional Adoption Practices into Australia's Family Law System*, Series Kupai Omasker - Incorporating Traditional Adoption Practices into Australia's Family Law System (17 March 2013), pp. 4-5 citing the Child Support Agency: The Guide 2.6.15—Reason 9—the duty to maintain any other person.

269 Women's Legal Service Victoria Submission, p. 5; Paul Boers Submission, p. 5; ACT Law Society Submission, pp. 1-2; Stephen Page Supplementary Submission, p. 4; Women's Legal Service NSW Submission, p. 1; Family Law Section Submission, paras 22-24; Dr Olivia Rundle Submission, pp. 5-6; Law Institute of Victoria Submission, p. 11.

with the child and would also encompass unknown donors who were later identified (for example donors with whom a mother has made contact via the clinic voluntary contact system in order to satisfy her own or her child's curiosity or need for more information. Recent research into single mothers by choice in Australia, the US and Canada indicate that they are the most likely group to in fact make such contact while children are still quite young).<sup>270</sup>

Professor Millbank submitted that legal status of egg donors or donors of other genetic material has not been adequately considered. For instance, Professor Millbank argues:

It is hard to see how the 'enlarging' approach to legal parenthood could ever be applied to a female intended parent who is a genetic parent (and note that a third or more of arrangements with heterosexual couples may involve an egg donor).<sup>271</sup>

Some submissions recommend that the *Family Law Act* should follow the majority of the states and territories in clarifying that donors of genetic material are not legal parents regardless of whether they are known or unknown.<sup>272</sup> Women's Legal Service Victoria noted:

There are strong public policy reasons for state legislation creating an irrebuttable presumption that a donor is not a parent recognised in law. The presumption creates legal certainty for all parties involved in ART treatment regarding their status as a parent or as a donor. It also creates legal certainty for any child conceived through ART treatment.<sup>273</sup>

Other submissions highlighted that s 60H *Family Law Act* was problematic insofar as it applies to a known donor who intends to parent/co-parent.<sup>274</sup> For instance, The Law Institute of Victoria (LIV) submitted:

The LIV considers that the operation of section 60H in co-parenting arrangements is problematic, as it does not provide a means of ensuring that a co-father will play a role in the child's life where this is initially intended and agreed. While it may be the intention of both the co-parents for the child to spend regular, consistent and significant time with both parents, the reality is that there is no legal process to protect this intent. To address this concern, the LIV proposes that section 60H be amended to provide legal recognition of men who have entered into parenting arrangements in situations where the donor is known to the couple and there is clear and express co-parenting agreement entered into prior to an artificial insemination.<sup>275</sup>

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270 Professor Jennie Millbank Submission, pp 11- 12. Ellison's case (*Ellison and Anor & Karnchanit* [2012] FamCA 602) involved an overseas surrogacy arrangement and is discussed in Chapter 3.

271 Professor Jennie Millbank Submission, especially p. 12.

272 Eg Women's Legal Service Victoria Submission, p.6; Women's Legal Services NSW Submission pp 3-4;

273 Women's Legal Service Victoria Submission, p. 5.

274 Law Institute of Victoria Submission, p. 11.

275 Ibid.

The Law Institute of Victoria also noted:

The LIV supports amendments made under the *Family Law Amendment (De Facto Financial Matters and Other Measures Act 2008* (Cth) insofar as they apply to couples utilising sperm from anonymous donors through fertility clinics. We note the amendments provide an irrebuttable presumption that the donor of sperm is not the father when that sperm is utilised to benefit a non-fertile couple. This applies to both heterosexual and homosexual couples. The LIV considers this to be an appropriate protection of the child's family as the fundamental group unit of society. [...]

The LIV is, however, concerned about the effect of section 60HA *Family Law Act* where all parties intended a co-parenting relationship with the child.<sup>276</sup>

A submission from a Victorian co-father outlined his personal situation of being unable to be registered as a parent on his child's birth certificate under the Victorian presumptions of parentage:

If the birth mother consents, why should a known donor (the biological father) not be permitted to be a legal parent to their child?<sup>277</sup>

On the other hand, Women's Legal Service Victoria submitted that the 'expansive' interpretation of s 60H *Family Law Act* that has led to known sperm donors being found to be parents 'discriminates against a single parent who accesses ART treatment and conceives a child.'<sup>278</sup> In addition Women's Legal Service Victoria noted:

It is important to note that expressly excluding donors from the definition of parent does not exclude that individual from applying for a parenting order under the *Family Law Act*. Section 65C(c) enables any person who is 'concerned with the care, welfare of development of the child' to apply for an order with respect to a child. A known donor who spends time with the child may well have a basis to apply for a parentage order. The issue of whether it is in the best interests of the child to spend time with an individual is separate to the legal recognition of that person as a 'parent'.<sup>279</sup>

Dr Fiona Kelly also recommended that the *Family Law Act* should be amended to accord with the state and territory provisions in this area.<sup>280</sup>

Stephen Page submitted that the approach taken by Cronin J in *Groth & Banks* is one that is based on genetics as the determinant of parenthood rather than the intention of the parties.<sup>281</sup> Stephen Page was also concerned about the consequences that might follow from this decision in relation to the legal parentage of unknown donors.

Dr Olivia Rundle submitted that in the context of assisted reproductive technology, 'a biological test of parentage is inappropriate [as] the people who a child would consider to be his or her parent, and

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276 Law Institute of Victoria Submission, pp. 9-10.

277 Gerard Crosbie Submission, p. 1.

278 Women's Legal Service Victoria Submission, p. 7.

279 Women's Legal Service Victoria Submission, pp. 6-7.

280 Dr Fiona Kelly, Consultation, 22 July 2013.

281 Stephen Page, Supplementary Submission, p. 5.

who caused the child to be conceived with the intention of being a parent, may be treated at law as a stranger to the child.<sup>282</sup> Dr Rundle notes:

At the moment where a (legally recognised) couple conceives a child via assisted reproductive technology with the intention of raising that child as a two parent family, the law reflects the parenting intentions of the family. Otherwise, it does not. Multiple claims may be made to parentage and at the end of the day a biological claim is prioritised over others. Parentage depends largely on the relationship status, at the time of conception, of the woman who gives birth. This is a problematic criteria, as it doesn't reflect the diversity of circumstances in which children are conceived via ART [assisted reproductive technology].<sup>283</sup>

Dr Rundle argued that:

Where a child has been conceived via ART the actual intention of the participants should be more explicitly relevant to the court's determination in addition to evidence of biological parentage. It is inappropriate to determine the matter by biology alone, as this is often contrary to the parenting reality for the child.<sup>284</sup>

Dr Rundle also submitted that it is doubtful that a declaration of parentage could ever be made in favour of a non-biological parent.<sup>285</sup>

On the other hand Women's Legal Centre (ACT and Region) noted:

Section 60H of the FLA, and the equivalent State and Territory presumptions, place an emphasis on the intentions of the parties at the time of conception of the child. The WLC considers that this does not necessarily reflect the lived reality of families. Often when the matter is before the Court there has been a history for the child that does not necessarily follow from the intentions at the time of conception.<sup>286</sup>

The Family Law Section also highlighted the need to clarify the different interpretations of s60H *Family Law Act* and the interaction of Commonwealth and state laws:

A useful starting point would be the complete prescription of all State and Territory law for the purposes of section 60H and section 60HB. That would, at the least, ensure that intending parents entering into ART [assisted reproductive technology] or surrogacy in their State or Territory will have the same parentage presumptions apply to them in that State and Territory as well as under the *Family Law Act*. However FLS recognises that this will still leave a situation where different presumptions apply to intending parents in different State and Territories. FLS submits that such a situation is not in the best interests of children or

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282 Dr Olivia Rundle, Submission, p. 9.

283 Dr Olivia Rundle, Submission, p. 11.

284 Dr Olivia Rundle, Submission, pp. 12-13.

285 Dr Olivia Rundle, Submission, p.8. Compare with *Maurice & Barry* [2010] FamCA 687 where lesbian co-mothers applied for consent orders in relation to having parental responsibility for their two children. Faulks DCJ noted that it would have been appropriate to make a declaration of parentage under s 69VA *Family Law Act* in this case at para 16.

286 Women's Legal Centre (ACT and Region), Submission, p. 2.

intending parents, and that harmonisation of parentage presumptions between States and Territories would be ideal.<sup>287</sup>

Chief Justice Bryant submitted:

If a single woman has a child as a result of an artificial conception procedure using a sperm donor, I do not think the Act should be silent about whether or not the single mother is the parent of the child. In this circumstance, the status of a woman as parent could be confirmed by making an appropriate amendment to s 60H. Nor, in my view, should the Act be silent as to whether the sperm donor for the child of the single mother using an artificial conception procedure is a parent or not.<sup>288</sup>

### ***The meaning of the other intended parent***

A number of submissions recommended that the meaning of the 'other intended parent' in s 60H *Family Law Act* be clarified.<sup>289</sup> Chief Justice Bryant submitted:

I believe it should be clear in ss 60H(1)(c), 60H(2), 60H(3), 60HA and 60HB of the Act that if a child is a "child of a person" then that person is a parent of that child.<sup>290</sup>

### ***Definition of de facto partner***

Women's Legal Centre (ACT and Region) noted that:

The definition of *de facto partner* in s 60EA of the FLA has been tied to the *Acts Interpretation Act 1901*. The WLC notes that the State and Territory legislation prescribed in the *Acts Interpretation (Registered Relationships) Regulations 2008* (Cth) is out of date. The ACT now has a new *Civil Unions Act 2012*, and provisions relating to civil partnerships are now provided for in the *Domestic Relationships Act 1994* (ACT).<sup>291</sup>

The Women's Legal Centre (ACT and Region) also noted that:

The fact that only some jurisdictions have a legislative mechanism for the automatic recognition of *de facto* relationships means that some parties to Part VII proceedings may need to lead complex evidence as to their domestic arrangements while other parties will be able to rely on a certificate from the relevant Registrar of Births, Deaths and Marriages. A non-discriminatory Commonwealth legislative scheme that could provide a similar level of certificate evidence of the intentions of two parties to a relationship would overcome this anomaly.<sup>292</sup>

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287 Family Law Section, Law Council of Australia Submission, p. 5.

288 Chief Justice Bryant Submission, p. 4.

289 Dr Olivia Rundle Submission, pp. 5-6; Paul Boers Submission, pp. 11-12; Women's Legal Centre (ACT and Region) Submission, p. 2; Women's Legal Service NSW Submission, pp. 7-8.

290 Chief Justice Bryant Submission, p. 4.

291 Women's Legal Centre (ACT and Region) Submission, p. 2

292 Women's Legal Centre (ACT and Region) Submission, p. 2. They also noted that because the definition in s 4AA of the Act does not give any explicit weight to registered *de facto* couples that in matters not involving children, these parties will need to lead evidence (sometimes complex) of their relationship.

### **Interaction of presumptions and deeming provisions**

A number of submissions raised the question of the operation and interaction of the presumptions in Division 12 and the other provisions of the *Family Law Act* (eg. in Division 1 of Part VII *Family Law Act*). The NSW Bar Association noted:

The reliance on rebuttable presumptions or irrebuttable presumptions has led to results in the cases referred to which are patently not in the interests of the subject children: e.g. *PJ V DOCS* [1999] NSWSC 340. The use of language which identifies rebuttable or irrebuttable presumptions is not preferred.<sup>293</sup>

The Family Law Section noted:

There are circumstances in which various presumptions arise and are in conflict with each other. Perhaps the best-known example is that dealt with by Watts J in *Re Michael: Surrogacy Arrangements* [2009] FamCA 691. [...] It needs to be borne in mind that this case was determined before the *Surrogacy Act* 2010 (NSW) was enacted, so section 60HB had no effect or operation in New South Wales at the time. It is an example of the possibility for inconsistent application of laws throughout the Commonwealth and the various pieces of state legislation enacted, repealed and amended.<sup>294</sup>

A number of submissions supported Watts J's recommendation in *Re Michael: Surrogacy Arrangements* that s 69U *Family Law Act* (rebuttal of presumptions) should be amended to make it clear that the presumptions in Division 12 can be rebutted by other parts of the *Family Law Act* (eg. s 60H).<sup>295</sup>

### **General Inconsistency between Commonwealth and state and territory Laws**

The Chief Justice commented:

If it were possible I would prefer that there was a uniform set of laws across the country about how declarations of parentage are made.<sup>296</sup>

The Chief Justice noted that it was a matter for the Australian Government to consider the issues, but she made the following suggestions:

- (a) Negotiating with the Council of Australian Governments to attempt to obtain consistent state laws in relation to declaration of parentage, and, in default

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293 NSW Bar Association Submission, p. 11. *PJ v DOCS* [1999] NSWSC 340 had similar facts to *Re Michael: Surrogacy Arrangements* where a mother acted as a surrogate mother for her daughter and son-in-law with the surrogate mother's partner's consent. The child was conceived from the egg and sperm of the intending parents, however the operation of the irrebuttable presumptions led to the conclusion that the surrogate mother and her partner were the legal parents and the intending father and mother were not.

294 Family Law Section Submission, p. 5.

295 Women's Legal Service NSW Submission, p. 2; Paul Boers Submission, p. 15.

296 Chief Justice Bryant Submission, p. 5.

- (b) introducing some federal law into which states can opt, if there was at least some body of support to provide credence to that course of action. As you would appreciate, a reference of powers has proven to be effective in the case of proceedings involving ex nuptial children and property proceedings involving de facto couples, including same sex couples.

It would be unfortunate in my view to return to a situation similar to those which existed prior to 1986, where de facto and other relationship were treated in a different way to children of a marriage relationship.<sup>297</sup>

Harmonisation of parentage laws was broadly considered desirable. Many submissions raised the problem of inconsistency between the states and territories, between the states and territories and the *Family Law Act*, and between the *Family Law Act* and other Commonwealth legislation.<sup>298</sup> Council received a range of recommendations as to how greater consistency and uniformity could be achieved—however, these recommendations varied in terms of how such uniformity could be achieved and what the substantive provisions should be.<sup>299</sup> It was submitted that this issue could be referred to the Standing Committee on Law and Justice.<sup>300</sup>

## 2.11 Council's views

Council is concerned that s 60H *Family Law Act* is being applied inconsistently in relation to state and territory laws that deal with the parental status of single women who use assisted reproductive technology. Council is also concerned about the discriminatory effects of s 60H *Family Law Act* in relation to single woman as opposed to women with partners. Council notes that the amendments to the *Family Law Act* in 2008 only amended the first subsection of s 60H *Family Law Act* and not the other subsections s 60H (2) and (3) *Family Law Act*. Council's view is that s 60H *Family Law Act* should be redrafted in its entirety to clarify the range of issues identified (see further below). Council also agrees that the terminology of 'the other intended parent' in s 60H *Family Law Act* should be amended.

Council further agrees that the parentage provisions should be amended to clarify that the presumptions of parentage can be rebutted by other provisions in the Act. Council agrees with the submissions that recommend amending s 60H *Family Law Act* to clarify that donors of genetic material are not legal parents. Council's view is that the best way to achieve this is to prescribe state and territory legislation for all of s 60H *Family Law Act*. This will mean that at least the *Family Law Act*

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297 Chief Justice Bryant Submission, p. 5.

298 See eg: Chief Judge Pascoe Submission, p. 22, Dr Olivia Rundle Submission, pp. 8-9; Stephen Page Submission, pp. 52-54; ACT Law Society Submission, pp. 1-2; Family Law Section Submission, para 38; National Children's and Youth Law Centre Submission, p. 6; Women's Legal Centre (ACT and Region) Submission, p. 1; Women's Legal Service Victoria Submission, p. 5; Rainbow Families Council Submission, p. 2; Women's Legal Service NSW Submission, p. 1.

299 For example, some recommendations favoured the Commonwealth being consistent with the states whilst other recommendations favoured the Commonwealth and the states changing their position—eg. In relation to surrogacy.

300 Chief Judge Pascoe Submission, p. 22; Women's Legal Centre (ACT and Region) Submission, p. 4.

provisions will maintain consistency with equivalent state and territory provisions. Council agrees with the Family Law Section that although this does not deal with this issue of differences between state and territory laws, at the least it will ensure that 'intending parents entering into ART [assisted reproductive technology] or surrogacy in their state or territory will have the same parentage presumptions apply to them in that state and territory as well as under the *Family Law Act*'.<sup>301</sup>

Council notes the views expressed by the Law Institute of Victoria in relation to the application of s 60H *Family Law Act* to co-parenting arrangements. Council discussed some of the issues in relation to co-parenting arrangements in Chapter 1 and noted the difficulties in predicting child parent relationships. Council does not agree that there is 'no legal process to protect [the] intent of men who have entered into parenting arrangements'. As in other areas, people concerned with the care, welfare and development of a child are able to seek parenting orders in relation to a child.

Council also agrees that ideally parentage laws should be consistent throughout the states and territories. Council recognises, however, that it is not possible for amendments to the *Family Law Act* to effect uniform laws of parentage across the Commonwealth, states and territories. As noted above (2.7) states and territories are responsible for birth registration and the states and territories take different approaches to their recognition of parentage orders made by courts in different jurisdictions. Council agrees that this is a matter that should be referred to the Standing Committee on Law and Justice. However, Council believes that there are a number of legislative changes that the Australian Government could introduce that would assist in this area. Principally, Council recommends that the Australian Government should enact a separate federal Status of Children Act for determining parentage for the purposes of all Commonwealth laws. Council supports the Chief Justice's suggestion that the states and territories could then 'opt in' to a federal Act, if that was supported. In addition, Council is making a further recommendation in Chapter 5 that the Australian Government introduce separate legislation to enable the family courts to transfer parental status to Torres Strait Islander receiving parents (see Chapter 5.6).

Council also notes that a number of states referred powers to the Commonwealth in the 1990s to enable the family courts to make stand-alone declarations of parentage for the purposes of all Commonwealth laws. Council believes the government should seek a similar referral from South Australia and following that, amend s 69VA *Family Law Act* to reflect those referrals.

In relation to parentage testing orders, Council is conscious of the fact that there has been recent legislative amendment that clarified that such orders are not parenting orders (s 64B(1) *Family Law Act*) and therefore a child's best interests are not the paramount consideration (s 60CA *Family Law Act*). Council's view is that the cases suggest that it is, at the least, appropriate for the Courts to consider the best interests of the child in deciding whether or not to exercise its discretion in relation to making parentage testing orders.

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301 Family Law Section Submission, p. 5.

## 2.12 Recommendations

### Recommendation 6

The Australian Government should introduce a federal Status of Children Act that includes power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws.

Council recommends that s 60H of the *Family Law Act*, together with all the other provisions relating to parentage that are currently in Part VII of the *Family Law Act*, should be consolidated in this separate federal Status of Children Act.

### Recommendation 7

Council recommends that the Attorney-General ask the Standing Council on Law and Justice consider further state, territory and Commonwealth cooperation on harmonising parentage laws nationally.

### Recommendation 8

Council recommends that s 60H of the *Family Law Act* be re-drafted to be consistent in its approach to single and couple parents and to be consistent with state and territory laws in this area that make provision about the parental status of donors of genetic material.

### Recommendation 9

Council recommends that s 69U of the *Family Law Act* be amended to make it clear that the presumptions in Division 12 can be rebutted by other provisions in Part VII *Family Law Act*.

### Recommendation 10

The Australian Government should seek a referral of power from South Australia consistent with the referrals from New South Wales, Queensland, Tasmania and Victoria which provide that the family courts may make a determination of parentage 'whether or not the determination of the child's parentage is incidental to the determination of any other matter within the legislative powers of the Commonwealth'.

Upon receiving the referral of power from South Australia, the Australian Government should amend s 69VA of the *Family Law Act* to reflect those referrals.

### Recommendation 11

To remove any doubt, the Australian Government should consider amending s 69W of the *Family Law Act* to make it clear that the court may consider the best interests of the child when deciding whether to make a parentage testing order.

# CHAPTER 3: Surrogacy and Parentage in the *Family Law Act*

## 3.1 Introduction

Council was asked to consider ‘whether there are any amendments that would assist the family courts to determine the parentage of children born as a result of assisted reproductive technology, including surrogacy, where the state and territory Acts do not apply.’ This chapter is concerned with the parentage of children born from surrogacy arrangements and the *Family Law Act*. The parentage of children born as a result of assisted reproductive technology in other contexts has been discussed in previous chapters.<sup>302</sup>

State and territory laws (except in the Northern Territory) in Australia regulate the use of surrogacy to become a parent.<sup>303</sup> These laws provide for a transfer of legal parentage to the intending parents by the relevant state or territory court where certain conditions apply. Although these conditions differ from jurisdiction to jurisdiction, all prohibit commercial surrogacy (see further at 3.3). Legal recognition of parental status is significant for a number of reasons, including the attribution of legal responsibilities and entitlements for parents and children (see further at 3.4).

In recent years the family courts have seen increasing numbers of applications for parenting orders which, in some cases have included an application for leave to adopt the child/ren and/or the seeking of a declaration of parentage where (and because) the surrogacy arrangement which the parties used did not meet the requirements of the relevant state or territory law.<sup>304</sup> In most of these cases the intended parents have used a commercial surrogacy arrangement and the child/ren were born

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302 Chapter 2 discussed the consistency of parentage laws following assisted reproductive technology in state/territory laws and the *Family Law Act*. Chapter 1 discussed the question of who is a parent of a donor conceived child.

303 *Parentage Act 2004* (ACT); *Surrogacy Act 2010* (NSW); *Surrogacy Act 2010* (QLD); *Family Relationships Act 1975* (SA); *Surrogacy Act 2012* (Tas); *Assisted Reproductive Treatment Act 2008* (Vic); *Status of Children Act 1974* (Vic); *Surrogacy Act 2008* (WA).

304 Keyes, Mary and Richard Chisholm, ‘Commercial Surrogacy - Some Troubling Family Law Issues’ (2013) 27 *Australian Journal of Family Law* 105.

outside Australia. As a result, the intended parents were not eligible for a transfer of parentage from the relevant state or territory court.

In such circumstances, the section of the *Family Law Act* that was intended to govern the recognition of parental status arising from the use of surrogacy—s 60HB *Family Law Act*—does not apply. The judgments in these cases have highlighted that as a result of the preparedness of intending parents to commission surrogacy arrangements that do not meet the requirements of the relevant state or territory law, the child/ren born of these arrangements can face the prospect of being unable to secure appropriate and non-discriminatory legal status. Council undertook its task of considering possible amendments that would assist the family courts to determine the parentage of children in surrogacy cases with a view to addressing this issue.

As part of this consideration, Council examined a number of questions that have been raised by the recent cases in the family courts. In particular, Council considered whether s 60HB *Family Law Act* 'covers the field' for the purposes of determining parentage in surrogacy cases, or whether s 60H *Family Law Act* (which deals with children born from assisted conception procedures) or the general parentage presumptions might be used to make a finding or declaration of parentage. Council also considered whether the illegality of the intended parents' conduct (in using a commercial surrogacy arrangement) should be a relevant consideration for the court's determination of the child's parentage. This chapter examines the relevant cases and the submissions received by Council in relation to these questions and makes recommendations for changes to the law to assist the family courts.

In response to the terms of reference, Council received a number of submissions which canvassed the need to consider broader reforms to Australian laws regulating surrogacy, including arguments for legalisation of commercial surrogacy. This issue is not within Council's terms of reference. However, in light of the number of submissions Council received on this point, a discussion of the submissions and Council's views on the questions they raise is included in this chapter.

## 3.2 The practice and use of surrogacy by Australians

A simple definition of surrogacy is 'an understanding or agreement by which a woman—the surrogate mother—agrees to bear a child for another person or couple.'<sup>305</sup>

Surrogacy arrangements may take a variety of forms. 'Partial' or 'genetic' surrogacy involves the use of the surrogate mother's egg and usually the intending father's sperm). 'Full' or 'gestational' surrogacy refers to arrangements where the surrogate mother does not contribute her own genetic material. Gestational surrogacy has been made possible as a result of IVF. In the case of gestational surrogacy, the intending parents may provide the genetic material (egg and sperm), or one or more donors may provide gametes. Thus a child born from a surrogacy arrangement may be genetically related to both, one, or neither intending parent/s. Gestational surrogacy arrangements are now

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305 Morgan, Derek, 'Surrogacy: An Introductory Essay' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics and the Beginnings of Life* (Routledge, 1989) 55, p. 56.

far more common than genetic surrogacy and in some jurisdictions the laws regulating surrogacy arrangements require a gestational surrogacy.<sup>306</sup>

The number of domestic surrogacy arrangements within Australia is relatively small. The Australian Institute of Health and Welfare recorded 16 surrogacy births in 2010 for Australia and New Zealand.<sup>307</sup> Australians are more likely to enter surrogacy arrangements overseas (see below) than within Australia, and these arrangements (along with those domestic arrangements that are not eligible for state or territory orders) may lead to applications being brought in the family courts. The application of the *Family Law Act* in these cases is considered in the next section.

The prevalence of Australians entering surrogacy arrangements overseas is difficult to determine precisely, but a number of sources provide some indication of the numbers of children born overseas as a result of surrogacy arrangements. The former Department of Immigration and Citizenship has noted that the number of international surrogacy arrangements has 'increased consistently since 2008, when the Department was only aware of occasional cases. We estimate that there are now well over 100 cases per year.'<sup>308</sup>

Figures obtained from the former Department of Immigration and Citizenship under a Freedom of Information Request relating to the number of citizenship by descent applications granted to children born to Australian citizens in India showed a jump from 170 in 2008 to 394 in 2011.<sup>309</sup> This figure does not distinguish between surrogacy arrangements and other cases where Australian citizens were living in India at the time of giving birth. However, the sharp increase in the number of applications has been attributed by some commentators to the increase in surrogacy arrangements.<sup>310</sup> According to community group Surrogacy Australia, in 2011 the estimated numbers of births to Australians via surrogacy arrangements were 45 Australian babies born in the US, 45 in Thailand and 315 in India.<sup>311</sup>

Updated figures from the former Department of Immigration and Citizenship for the year 2012/2013 have shown that there were 610 citizenship by descent applications in India and 510 from Thailand. Of these, there were 186 and 21 confirmed surrogacy births in India and Thailand respectively.<sup>312</sup>

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306 Eg. *Assisted Reproductive Treatment Act 2008* (Vic), s. 44. On the other hand the *Surrogacy Act 2010* (QLD) does not require a gestational surrogacy arrangement nor that at least one of the intending parents is genetically related to the child: See Explanatory Notes *Surrogacy Bill 2009* (QLD), p. 8.

307 Macaldowie, Alan et al, *Assisted Reproductive Technology in Australia and New Zealand 2010* (Australian Institute of Health and Welfare, 2012), p. 5. In 2009 the number was 19: Wang, Yueping et al, *Assisted Reproductive Technology in Australia and New Zealand 2009* (Australian Institute of Health and Welfare, 2011), p. 4.

308 Former Department of Immigration and Citizenship Submission, p. 2.

309 As cited in Professor Jenni Millbank's Submission, p. 3. See also Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135.

310 See Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135.

311 Consultation with Sam Everingham, Surrogacy Australia, 13 June 2013.

312 Information provided to the Family Law Council by the Citizenship Policy Section, Department of Immigration and Border Protection, 10 October 2013.

### 3.3 The regulation of surrogacy in Australia

The main laws governing the attribution of legal parental status for intending parents who use a surrogacy arrangement are found in state and territory legislation. Comparative tables of the laws are attached at Appendix E (QLD, NSW and VIC) and Appendix F (WA, SA, ACT and TAS). These laws require the intending parents to apply for a parentage order from the courts in the state or territory in which they live. Without such an order, the surrogate mother and her partner are the child's legal parents. In order to be eligible for such an order, the intending parents must comply with the various requirements of the relevant state or territory law. These generally require the parties to show, for example, that they and the surrogate mother were of a certain age, that the child was conceived as a result of an assisted reproductive technology procedure carried out within the jurisdiction, that all parties have undertaken psychological counselling and have received independent legal advice, and that the surrogate mother and her partner did not receive any material benefit or advantage from the arrangement.<sup>313</sup>

State and territory laws vary in their regulation of surrogacy arrangements. However, all state and territory laws make it illegal for intending parent/s to enter into any form of commercial surrogacy arrangement.<sup>314</sup> In addition, the Australian Capital Territory, New South Wales and Queensland legislation contain extra-territoriality provisions that extend the prohibition on entering commercial surrogacy arrangements to arrangements entered into outside the jurisdiction (ie. overseas arrangements).<sup>315</sup>

The recent legislative developments by the states and the Australian Capital Territory follow from proposals developed in 2009 when the Joint Working Group of the Standing Committee of Attorneys-General, Australian Health Ministers' Conference and the Community and Disability Services Ministers' Conference released its *Proposal for a National Model to Harmonise Regulation of Surrogacy*.<sup>316</sup> That proposal maintained a policy position that commercial surrogacy should not be permitted in Australia.

The proposed model would not permit commercial surrogacy. That practice is already unlawful throughout Australia. It is judged that commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones.<sup>317</sup>

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313 See Appendices E and F which set out the various requirements in the state and territory Acts.

314 For a review of the offences created and the penalties in each jurisdiction see Keyes, Mary and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Issues' [2013] 27 *Australian Journal of Family Law* 105, p. 106.

315 See *Parentage Act 2004* (ACT), s 45(1); *Surrogacy Act 2010* (NSW), s 11(2) *Surrogacy Act 2010* (QLD), s 54(b).

316 Standing Committee of Attorneys-General, Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (2009), available online at: <[www.sclj.gov.au/sclj/standing\\_council\\_consultations/standing\\_council\\_pastconsultations.html](http://www.sclj.gov.au/sclj/standing_council_consultations/standing_council_pastconsultations.html)>.

317 *Ibid.*, pp. 4-5. On page 2 of the Proposal it states that there is 'widespread agreement that commercial surrogacy (where the surrogate mother is remunerated for financial gain or reward) should be banned ...'.

The proposed model does allow, however, for the reimbursement of 'reasonable expenses' to a surrogate mother.<sup>318</sup>

In 2008 the Queensland Parliament commenced an inquiry into the decriminalisation of altruistic surrogacy,<sup>319</sup> which led to the passing of the *Surrogacy Act 2010* (QLD). The Explanatory Notes set out the guiding principles that:

The wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life are paramount;

Each child born as a result of a surrogacy arrangement enjoys the same status, protection and support irrespective of the circumstances of the child's birth or the status of the persons who become the child's parents as a result of a transfer of parentage; [and]

A child should be cared for in a way that promotes openness and honesty about the child's birth parentage;

The autonomy of consenting adults in their private lives should be respected and that the long-term health and wellbeing of parties to a surrogacy arrangement their families should be promoted.<sup>320</sup>

In New South Wales the extension of the prohibition on commercial arrangements to overseas arrangements was introduced by Linda Burney, Minister for the State Plan and Minister for Community Services:

My amendment will [...] give effect to the policy position agreed to by all States and Territories in Australia that commercial surrogacy is not supported in this country. We all know that the desire to be a parent is very powerful. That instinct is an important part of humanity's survival. However, in this brave new world we must protect everybody involved, including the surrogate mother. [...] I acknowledge the sadness of people who cannot realise that dream. However, gaining access to children by circumventing local laws and travelling overseas to engage the services of private clinics and then bring the children back to Australia is not a practice that we as the lawmakers of this State should encourage.<sup>321</sup>

In addition, Ms Burney noted that:

It is crucial to the long-term psychological wellbeing of children to know who they are and where they come from. As Minister for Community Services I see evidence of this time and again. My amendment relates also to the issues of women's rights and to the potential for exploiting women in a vulnerable position, especially women in poor or developing countries. By making commercial surrogacy an extraterritorial offence we will help to prevent

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318 See Appendices E and F.

319 Legislative Assembly Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland*, 2008.

320 Explanatory Notes Surrogacy Bill 2009 (QLD), p. 5.

321 New South Wales, *Hansard* Legislative Assembly, 28 October 2010, 27120 (Ms Linda Burney).

exporting this exploitation of women overseas. We do not support it here so why should we support it overseas?<sup>322</sup>

As outlined in the Preface to this report, the *Family Law Act* was amended in 2008 to include a provision in relation to domestic surrogacy arrangements. Section 60HB of the *Family Law Act* states:

**60HB** Children born under surrogacy arrangements

(1) If a court has made an order under a prescribed law of a State or Territory to the effect that:

- (a) a child is the child of one or more persons; or
- (b) each of one or more persons is a parent of a child;

then, for the purposes of this Act, the child is the child of each of those persons.

(2) In this section:

**this Act** includes:

- (a) the standard Rules of Court; and
- (b) the related Federal Circuit Court Rules.

The enactment of this provision, which deals specifically with the issue of surrogacy, added to the existing parentage provisions in Part VII discussed in Chapter 2.

Section 60HB *Family Law Act* only applies to domestic surrogacy arrangements where the intending parents have already obtained a parentage order. State or territory legislation cannot be relied upon to recognise the legal status of the child other than to give effect to altruistic surrogacy arrangements that are local to the relevant state or territory.

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322 New South Wales, *Hansard* Legislative Assembly, 10 November 2010, (Ms Linda Burney).

### 3.4 The regulation of parentage of children born overseas to Australian citizens/residents

Overseas surrogacy cases present difficulties as Australian states only permit non-commercial arrangements. Accordingly the legal status of such children is unclear. The child may not be entitled to citizenship by descent, and a birth certificate that is issued in an international jurisdiction, or a parentage declaration made by a foreign court, is not binding on an Australian Court.

Adoption of children born from overseas surrogacy arrangements can be difficult. Adoption is also state-based and highly regulated. In some cases intending parents have applied to the family courts for leave to adopt (under s 60G *Family Law Act*).<sup>323</sup> This provision is limited by the fact that only prescribed adopting parents can apply for leave to adopt. Thus it requires that at least one of the intending parents is considered a legal parent of the child.

Couples who have entered into surrogacy arrangements abroad may make an application for shared parental responsibility and an order that the child live with them (often to assist them in their immigration claims for the children).<sup>324</sup> This is merely to give legal effect to the reality of the parenting arrangement in place. Parental responsibility orders do not provide the same protection and certainty as a finding of legal parentage. Parenting orders cease when a child turns 18 (s 61C) and do not grant parental status. As Watts J noted in *Dudley & Chedi*,<sup>325</sup> applicants wishing to be declared a parent do so because of the impact non recognition might have in areas such as:

- 22.1. medical treatment for the child;
- 22.2. registering with Medicare and health funds;
- 22.3. applications for things such as passports or school that require a birth certificate specifying the child's parents;
- 22.4. rights for a child arising upon the death of a parent, including rights to an intestacy and superannuation;
- 22.5. the ability of a child to be referred to as "a child" in a will; and
- 22.6. complications in relation to recognition as to entitlements and liabilities under the child support regime and recognition of a child's rights to entitlements on injury or death of a parent in schemes of workers' compensation.<sup>326</sup>

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323 Section 60G *Family Law Act* refers to the adoption of a child by a prescribed adopting parent. A prescribed adopting parent is defined as a parent of the child or the spouse/de facto partner of the parent of the child: s 4 *Family Law Act*. See *McQuinn & Shure* [2011] FamCA 139—leave to adopt was granted on the basis that Mr McQuinn was the father (on the basis of the DNA evidence); *Re Michael: Surrogacy Arrangements* [2009] FamCA 691—Leave to adopt could not be granted as neither intending parent was a legal parent.

324 Intending parents will have standing to apply for parenting orders under s 65C *Family Law Act* as people 'concerned with the care, welfare or development of the child'.

325 [2011] FamCA 502.

326 *Dudley and Anor & Chedi* [2011] FamCA 502, para 22.

Part VII *Family Law Act* contains a number of other provisions that are potentially applicable in surrogacy cases. As outlined in the preface to this report, the family courts may find that someone is a parent under the general presumptions in Division 12 subdivision D *Family Law Act*, which may be rebutted or proved by a parentage testing procedure,<sup>327</sup> a person may be deemed to be a parent under s 60H *Family Law Act* (where a child is born as a result of an artificial conception procedure) or s 60HB *Family Law Act* (where a child is born from a surrogacy arrangement and orders transferring parentage to the intended parents have been made under a prescribed law), or the court may declare that a person is a parent for the purposes of Commonwealth laws under s 69VA *Family Law Act*.<sup>328</sup> The general presumptions of parentage were set out in full in the Preface.

The interpretation and operation of s 60H *Family Law Act*, which deals with the determination of parentage where an assisted reproductive treatment has been used, was discussed in the previous chapter. This provision may be relevant in surrogacy cases because surrogacy usually involves the use of an 'assisted conception procedure'.<sup>329</sup> The present version of s 60H *Family Law Act* was reproduced in Chapter 2 at 2.3.

### 3.5 Surrogacy cases and the family courts

As noted at 3.1, the applications which the family courts have seen in recent years have involved surrogacy arrangements which did not meet the requirements of the relevant state or territory law. For example, in *Lowe & Barry and Anor*,<sup>330</sup> the arrangement involved an apparently informal altruistic surrogacy in which the intending parents lived in Tasmania, where the child was born. The law in Tasmania at that time prohibited such arrangements, even if they were altruistic in nature.<sup>331</sup>

The cases raise several issues concerning the coverage and application of the present parentage provisions of Part VII to surrogacy cases, which are relevant to Council's terms of reference. In particular, they raise a question about whether the family courts have power to make a finding or declaration of parentage in surrogacy cases where s 60HB *Family Law Act* does not apply. A second and related question that has been aired in the cases is to what extent, if at all, are public policy considerations (such as the illegality of the parents' conduct in using a commercial surrogacy arrangement), relevant to the court's determination of the child's best interests? A third question concerns the court's capacity to admit DNA evidence that has not complied with the Family Law Regulations, and whether the courts have power to authorise the taking of samples from a child in order to verify whether an intended parent is a biological parent of the child without the consent of the birth mother?

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327 Apart from the presumption arising from findings of a court under s 69S(1) *Family Law Act*, which is conclusive proof of parentage.

328 For a summary description of the scheme of parentage provisions in Part VII, see above at 2.2 citing *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 34

329 Defined in s 4 *Family Law Act* as including (a) artificial insemination and (b) the implantation of an embryo in the body of a woman.

330 [2011] FamCA 625.

331 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691.

### ***Does s 60HB exhaustively define who is a parent in surrogacy cases?***

As noted, the family courts have now seen a number of applications for a declaration of parentage (or for leave to adopt and/or parenting orders) from intended parents whose surrogacy arrangement has not complied with the relevant state or territory legislation. As a result, s 60HB *Family Law Act* has no application to their case. In such circumstances, the family courts have generally considered the potential application of s 60H *Family Law Act*, which applies to 'Children born from artificial conception procedures.' This is because surrogacy arrangements will almost always involve an assisted conception process.<sup>332</sup> However, the cases to date indicate that there is a lack of legislative clarity about whether s 60H *Family Law Act* can be used to determine parentage in surrogacy cases.

One of the early cases to examine this question was *Re Michael: Surrogacy Arrangements*.<sup>333</sup> Although this case involved an altruistic surrogacy arrangement that took place in New South Wales, s 60HB *Family Law Act* did not apply as there was no applicable New South Wales legislation that recognised such arrangements at the time.<sup>334</sup> The intended parents were therefore unable to obtain orders from the state court transferring parentage to them. Paul and Sharon, the intending parents in this case, applied to the Family Court for leave to adopt the child (referred to as 'Michael' in the judgment) under s 60G *Family Law Act*. Michael had been born as a result of IVF using Paul's sperm and Sharon's egg. Sharon's mother, Lauren, had agreed to act as a gestational surrogate (with her partner's agreement). At the time of the hearing the child was being cared for by Paul and Sharon as intended.

In order to grant Paul and Sharon leave to adopt, the Court needed to find that one (or both) of them was a 'prescribed adopting parent' within the meaning of the *Family Law Act*.<sup>335</sup> As no order transferring parentage had been (or could be) made by the New South Wales court, Watts J considered the application of s 60H *Family Law Act*, which refers to children born as a result of artificial conception procedures, to determine whether either or both of the intended parents might be a legal parent within its terms. In doing so, he noted the 'debate in the case law' that had taken place prior to 2008 about whether or not s 60H *Family Law Act* provided an exhaustive definition of 'parent' for the purposes of the *Family Law Act*.<sup>336</sup> Watts J held that as a result of the 2008 amendments, that debate had been resolved, and that

[s]ections 60H(1) FLA and s 60HB FLA provide an exhaustive definition as to who can be called Michael's parents.<sup>337</sup>

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332 It is possible that an informal arrangement could involve sexual intercourse, and therefore not be covered by s 60H *Family Law Act*. In Blyth's study of surrogate mothers in the United Kingdom, it was noted that in one case a child was conceived via sexual intercourse after a number of failed attempts with artificial insemination: Blyth, Eric, "I Wanted to Be Interesting. I Wanted to Be Able to Say 'I've Done Something Interesting with My Life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189.

333 [2009] FamCA 691.

334 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 17.

335 Defined in *Family Law Act 1975* [Cth], s 4.

336 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 19. See discussion above at 2.3.

337 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 25.

As a result, Michael's legal parents were Lauren and Lauren's partner, Clive. In his judgment Watts J recommended that parliament amend s 60H *Family Law Act* to make it clear that it is subject to the provisions of s 60HB *Family Law Act* in surrogacy cases.<sup>338</sup> His Honour also recommended that parliament amend the definition of 'artificial conception procedures' in s 60H *Family Law Act* to expressly exclude surrogacy arrangements from the definition.<sup>339</sup>

*Dudley & Chedi*,<sup>340</sup> another decision of Watts J, concerned an application for parenting orders by the intending parents of twins who had been born to a surrogate mother in Thailand. The intending father was the children's biological father. However, as in *Re Michael: Surrogacy Arrangements*, the intended parents were not able to obtain a transfer of parentage order from the relevant state court as the commercial surrogacy arrangement used by the parties was not permitted by Queensland law. Watts J found that, as a result, the provisions of s 60HB *Family Law Act* were not enlivened.<sup>341</sup> He also held that s 60HB *Family Law Act* 'provides that state law will govern the determination of parentage' in surrogacy cases.<sup>342</sup> However, given the children's need for a legal relationship of some kind with the intended parents, Watts J made parenting orders giving the applicants parental responsibility for the children during their minority.<sup>343</sup>

The 2012 case of *Ellison and Anor & Karnchanit*,<sup>344</sup> which also involved an international surrogacy arrangement, provides a contrast to these decisions. In this case Ryan J considered that there was scope to make a finding or declaration of parentage when the facts did not fall within the terms of s 60HB *Family Law Act* or s 60H *Family Law Act*. Her Honour's view in that case was that

[A]bsent words of exclusion, the wording of s 60HB is specific and only applies in situations where an order had been made under a prescribed law of a State or Territory. As there has been no order made under a prescribed law of a State or Territory s 60HB does not apply to the facts of this case.<sup>345</sup>

In addition, although there was evidence that the surrogate mother was in a de facto relationship Her Honour concluded that the surrogate mother and her partner were not in a relationship at the time of the artificial conception procedure and therefore s 60H(1) *Family Law Act* did not apply: 'It follows that the child is not the child of the birth mother's current de facto partner'.<sup>346</sup> Ryan J also agreed with the 'expansive' interpretation of s 60H *Family Law Act* which meant that Mr Ellison was not excluded from being found to be a parent under that section.<sup>347</sup> Accordingly Her Honour then examined the

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338 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 71.

339 *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, para 71.

340 [2011] FamCA 502.

341 Watts J also found that s 60H *Family Law Act* did not apply as the surrogate mother had not been in a relationship at the time of conception: see *Dudley and Anor & Chedi* [2011] FamCA 502, para 27.

342 *Dudley and Anor & Chedi* [2011] FamCA 502, para 29.

343 The applicants had standing to seek parenting orders under s 65C(c) *Family Law Act* as persons concerned with the care, welfare and development of the children.

344 [2012] FamCA 602.

345 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 68.

346 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 56.

347 *Ellison and Anor & Karnchanit* [2012] FamCA 602, paras 59-61 discussing *Re Mark* [2003] 31 Fam LR 162 (see above at 2.3).

applicability of the general presumptions of parentage to the facts of the case, finding that none of them were relevant in the circumstances. She then went on to consider making a declaration of parentage in favour of the father under s 69VA *Family Law Act*, in light of the evidence that he was the children's biological father. On this point she found that it was in the children's best interests for a declaration of parentage to be made.<sup>348</sup>

In the more recent case of *Mason & Mason*,<sup>349</sup> however, Ryan J reached a different conclusion, deciding (in agreement with Watts J in *Dudley & Chedi*) that there is no power under the *Family Law Act* to make a declaration of parentage in favour of a biological father in an overseas surrogacy arrangement. In this case, Ryan J considered the intention of parliament in introducing the provisions in s 60H *Family Law Act* and s 60HB *Family Law Act* and the relevant principles of statutory interpretation, before 'cautiously' concluding that:

...it is my preliminary view that for the purposes of the Act, the 2008 amendments evince an intention by Parliament that the parentage of children born as a result of artificial conception procedures or under surrogacy arrangements will be determined by reference to those provisions and not the general parentage provisions. This interpretation achieves, on a state by state (and territory) basis, a uniform system for the determination of parentage.

The effect of this is that unless an order is made in favour of the applicant pursuant to the Surrogacy Act, the provisions of the Act do not permit this Court to make a declaration of parentage in his favour. Thus, on reflection, I am inclined to respectfully agree with Watts J in *Dudley and Anor & Chedi* [2011] FamCA 502, where at [29] His Honour determined that ultimately state law will govern the determination of parentage [of children born under surrogacy arrangements] and that state law will be recognised by federal law.<sup>350</sup>

### ***What considerations should govern the court's determination in surrogacy cases?***

Running parallel to the court's examination of question of legislative power in these cases has been judicial (and scholarly) discussion of the relative significance to the court's decision of public policy considerations, such as the illegality of the parents' conduct and concerns about the exploitation of surrogates and the best interests of the children.<sup>351</sup>

As noted above, in *Dudley & Chedi*,<sup>352</sup> Watts J declined to make a finding that the biological father in that case was a parent. The intended parents were residents of Queensland, and were seeking orders in relation to two (of three) children who were born as a result of commercial surrogacy arrangements facilitated by a clinic in Thailand, where the boys were born. Under Queensland law at the time (and currently), it was illegal for a resident of Queensland to enter into surrogacy arrangements of that nature. In the course of his judgment, Watts J noted that state laws had

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348 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 102.

349 [2013] FamCA 424.

350 *Mason & Mason* [2013] FamCA 424, paras 33-34.

351 See Keyes, Mary and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Issues' [2013] 27 *Australian Journal of Family Law* 105.

352 [2011] FamCA 502.

prohibited commercial surrogacy in order 'to protect women and children from what the legislature has seen as abusive practices which potentially surround the commercialisation of surrogacy.'<sup>353</sup> His Honour also noted that despite 'the possible advantages' to the children of making a declaration of parentage in favour of the father, the applicable state law 'made what he did illegal.'<sup>354</sup> He therefore refused to recognise the commissioning father as a parent and referred the matter to the Director of Public Prosecutions.

The applicant father in *Ellison and Anor & Karnchanit*<sup>355</sup> also sought a finding or declaration of parentage in relation to two children who were born as a result of an illegal commercial surrogacy arrangement in Thailand. In this case Ryan J decided to make the declaration of parentage sought by the parents. In doing so she noted that the concerns about illegality raised by Watts J were public policy considerations, which she decided were of 'less weight' than the best interests of the children, whose welfare would be better served if the people who were raising them had the full range of legal responsibilities for their care.<sup>356</sup> In the course of her judgment, Her Honour noted the 'potential for long-term psychological and emotional harm to the children' if the children did not have a secure home with the only people they knew as parents.<sup>357</sup>

However, Ryan J was also conscious of the public policy considerations that underpin the prohibition of commercial surrogacy in Australia, including concerns about the conditions under which the surrogate's consent was obtained, and published a list of 'Best Practice Principles' to guide the conduct of surrogacy cases in the family courts.<sup>358</sup> These principles provide for the appointment of an Independent Children's Lawyer, the preparation of a Family Report that includes an interview with the surrogate mother, and a list of relevant evidence, including the surrogacy arrangement, and affidavit evidence from the birth mother about her personal circumstances and views about the orders sought.

This issue has been the subject of recent discussion by several academic commentators, and was raised in a number of the submissions that Council received (see 3.6). Professor Mary Keyes and Professor Richard Chisholm, for example, have suggested that the application of the paramountcy principle does not preclude the court having regard to relevant policy matters, including evidence that the orders sought 'will give effect to a criminal transaction.'<sup>359</sup>

In the context of this debate, it is worth noting the approach taken by the English courts, which involves a mix of welfare (best interests) and public policy considerations. The relevant legislation in England provides that the welfare of the child must be the court's paramount consideration in making

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353 *Dudley and Anor & Chedi* [2011] FamCA 502, para 14.

354 *Dudley and Anor & Chedi* [2011] FamCA 502, para 32.

355 [2012] FamCA 602.

356 *Ellison and Anor & Karnchanit* [2012] FamCA 602, paras 91-92.

357 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 3.

358 *Ellison and Anor & Karnchanit* [2012] FamCA 602, paras 132-139.

359 Keyes, Mary and Richard Chisholm, 'Commercial surrogacy - Some troubling family law matters' (2013) 27 *Australian Journal of Family Law* 105, pp. 131-132.

parentage transfer decisions (known as 'parental orders' in the United Kingdom).<sup>360</sup> It also requires intending parents who seek parental orders to show that the surrogate mother 'freely, and with full understanding of what is involved, agreed unconditionally to the making of the order', and that 'no money or other benefit (other than for expenses reasonably incurred) has been given or received' for the carrying or relinquishment of the child.<sup>361</sup> Importantly, however, the legislation also provides the courts in parental order application cases with discretion to retrospectively authorise the payment of money or benefits that exceed reasonable expenses. The reported cases suggests that the courts have been willing to authorise payments where they are satisfied that the sum paid to the surrogate was not disproportionate to reasonable expenses and not such as to 'overbear the will of the surrogate'.<sup>362</sup> The cases also indicate that in deciding whether to make a parental order, the courts will have regard to several other public policy considerations, such as whether the parents acted in good faith towards the surrogate at all stages of the process, and whether the parents attempted to circumvent the relevant authorities or child protection laws.<sup>363</sup>

The 2013 case of *J v G* provides an example.<sup>364</sup> This case involved an application for parental orders by two men in relation to twins born to a surrogate in the United States. The surrogate mother had been paid an amount of \$US53,000 as a 'pregnancy compensation fee.' After considering the evidence, the court granted the orders because:

- The welfare report showed the children had a 'clear positive relationship' with the applicants;
- The payment to the surrogate was not disproportionate to her expenses and was not sufficient to overbear her will. She was a 'mature woman with financial means' who had received legal advice;
- The applicants acted in good faith in relation to the surrogate and her family. They went to live nearby during the final stage of her pregnancy and formed a close relationship with her and provided support to her during the pregnancy;
- They had not attempted to circumvent any authorities.

***Can the courts admit non-compliant DNA evidence and authorise the taking of samples from a child without the birth mother's consent?***

In *Ellison*, Ryan J highlighted a further issue in relation to parentage testing procedures and the admissibility of DNA evidence. When the parentage of a child is a question in issue in proceedings, the court may 'make an order requiring any person to give such evidence as is material to the question.'<sup>365</sup>

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360 *Human Fertilisation and Embryology Act 2008* (UK), s 54; *Human Fertilisation and Embryology (Parental Orders) Regulations 2010* (UK), Schedule 1, which incorporates Section 1 of the *Adoption and Children Act 2002* (UK) provisions to the making of parental orders such that 'The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life'.

361 *Human Fertilisation and Embryology Act 2008* (UK), ss 54(6) and (8).

362 *Re X and Y (foreign surrogacy)* [2008] EWHC 3030 (Fam), para 21. See also the consultations conducted in the United Kingdom at 3.6 below.

363 *Ibid.*

364 *J v G* [2013] EWHC 1432 (Fam).

365 *Family Law Act*, s 69V.

Under s 69W *Family Law Act* the court may also make a 'parentage testing order requiring a parentage testing procedure to be carried out on a person...for the purpose of obtaining information to assist in determining the parentage of the child.'<sup>366</sup> The Family Law Regulations make further provisions in relation to parentage testing procedures and the preparation of reports.

In relation to a parenting testing procedure, reg 21F requires that before a bodily sample is taken from a child, consent and completion of the Form 2 affidavit is required from a "person who is responsible for the long-term care, welfare and development of the child" (reg 21F(3)(a)).<sup>367</sup>

In *Ellison's* case, there were two DNA reports submitted to the Court. The first report was originally provided to the Court after proceedings had commenced. This was a photocopy of the DNA reports undertaken by 'S Institute'.<sup>368</sup> The reports included a note that the report did not 'meet the requirements of the *Family Law Act* Regulations.'<sup>369</sup> Ryan J therefore made an order for a parentage testing procedure to be carried out in accordance with the Family Law Regulations. However, instead of undertaking a second DNA test the applicants provided an affidavit from a pathologist from the 'S Institute' along with the copies of the same DNA reports as the first report but without the note about non-compliance with the Family Law Regulations.<sup>370</sup>

The second report was still non-compliant with the Family Law Regulations because the applicant father did not have the 'capacity to authorise the taking of a bodily sample from the children.'<sup>371</sup> The second report was also found to be inadmissible on the basis that the Family Law Regulations render inadmissible an ordered but noncompliant report.<sup>372</sup> Nonetheless, Ryan J found that the first DNA report could be admitted as evidence on the basis that the proceedings were not subject to certain evidentiary rules that would have rendered admissibility a problem. Her Honour noted that:

Sections 69W and 69ZB do no more than provide a mechanism which, following the making of a DNA parentage testing order, renders admissible a compliant DNA certificate which would otherwise be inadmissible. The sections are permissive and do not exclude the admission of other non-ordered forms of DNA evidence provided that material complies with the evidentiary requirements for admission. Clearly, when a parentage testing order has not been made more than mere production of the DNA certificate will be required so as to admit this DNA evidence.<sup>373</sup>

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366 *Family Law Act*, s 69W.

367 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 22.

368 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 19.

369 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 19.

370 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 19. The applicants were apparently advised that this would be sufficient to comply with the parentage testing order.

371 *Ellison and Anor & Karnchanit* [2012] FamCA, para 27.

372 *Family Law Regulations* [Cth], reg 21 M(5); *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 29.

373 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 31.

As Ryan J found that the evidence (from the pathologist) clarified other issues in relation to the collection of the samples and chain of custody of the samples, the evidence was admitted. In effect, the Family Law Regulations only apply to procedures carried out under a parentage testing order made under s 69W *Family Law Act*.<sup>374</sup> In the absence of a parentage testing order the admissibility is determined by evidentiary rules under the *Family Law Act* and *Evidence Act 1995* (Cth). Section 69ZT *Family Law Act* provides that certain provisions of the *Evidence Act 1995* (Cth) do not apply to child related proceedings under the *Family Law Act*.

Ryan J noted the recommendation of the Australian Law Reform Commission that the *Family Law Act* should be amended to provide that parentage testing reports are admissible in proceedings under the Act only if made in accordance with the Regulations. For the reasons articulated by the ALRC, it is timely that consideration is given to that recommendation.<sup>375</sup>

### 3.6 Submissions and consultations

Council received a large number of submissions about the issues raised by consideration 4 of the terms of reference, including numerous suggestions for reform to assist decision making by the family courts in surrogacy cases where the arrangements do not meet the required criteria for a transfer of parentage under state and territory laws. Council also conducted a number of consultations with relevant stakeholders and family law system professionals, and invited a number of interested individuals and organisations to meet with Council.<sup>376</sup>

#### ***Clarifying the limits of s 60H***

The submissions revealed general support for the view that s 60H *Family Law Act* was not intended to apply to surrogacy cases and should be amended to make this clear.<sup>377</sup> The submission from Women's Legal Services NSW explains the rationale for this proposal as follows:

Many of the problems [with the application of s 60H in surrogacy cases] appear to arise because there are two very distinct groups of people who use artificial conception procedures to conceive children. The first group are those who use donor eggs or sperm to conceive a child and intend to raise the child themselves. That is, the birth mother is medically or socially infertile and so needs to use assisted conception procedures to become pregnant, including the use of donor sperm. The second group of people are those involved in surrogacy arrangements, where the intention of the parties is that the birth mother will not raise the child, but rather the commissioning (or 'intended') parents.

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374 *Family Law Regulations 1984* (Cth), reg 21A.

375 *Ellison and Anor & Karnchanit* [2012] FamCA 602, para 33. See Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia, Report No 96* (2003); NSW Bar Association Submission, para 29.

376 A list of submissions is provided in Appendix H. A list of consultations is provided in Appendix G.

377 Australian Human Rights Commission Submission, p. 8; Professor Keyes and Professor Chisholm Submission, p. 10; Professor Millbank Submission, p. 10; Women's Legal Services NSW Submission, paras, 41-43; Law Institute of Victoria Submission, p. 11.

This presents a clear difficulty for the courts. In both groups the intended parents wish to be recognised as parents. Section 60H was evidently written with the first group in mind, and now provides a degree of certainty for both opposite-sex and same-sex couples who use artificial conception procedures. However, applying s 60H to those involved in surrogacy arrangements creates (or appears to create) obvious obstacles for those involved surrogacy arrangements.<sup>378</sup>

Women's Legal Services NSW also supported the proposal by Watts J in *Re Michael: Surrogacy Arrangements* that the definition of 'artificial conceptions procedures' for the purposes of s 60H *Family Law Act* be amended to exclude surrogacy arrangements.<sup>379</sup>

### **Filling the 'statutory gap'**

A number of submissions supported the view that s 69VA *Family Law Act* should not be relied upon by the family courts to make a declaration of parentage in cases involving surrogacy arrangements that fall outside s 60HB *Family Law Act*.<sup>380</sup> In light of Ryan J's decision in *Mason's* case that the courts do not have the power to make such a declaration of parentage, some submissions indicated that this leaves 'a statutory gap' in the *Family Law Act* in relation to determining the parentage of children born from surrogacy arrangements where the relevant state or territory legislation does not apply, and that this leaves the children born as result of that arrangement vulnerable.<sup>381</sup>

The submissions and consultations disclosed a range of responses to this circumstance. These responses fell into three categories: (1) those that argued that commercial surrogacy is appropriately prohibited and that the *Family Law Act* should not provide a mechanism for according parental status to the intended parents; (2) those who argued that the intended parents should be presumed to be the legal parents; and (3) those who supported a mechanism for transferring parentage from the surrogate mother to the intended parents subject to judicial oversight.

Several submissions suggested that there was no need to fill this gap, and that there were good reasons to limit the recognition of intended parents to cases of altruistic surrogacy, as currently exists.<sup>382</sup> This position is also illustrated in the following extract from the submission by Professor Mary Keyes, who argued that it is not appropriate 'for federal law to contradict, undermine and frustrate' the prohibition against commercial surrogacy in state/ACT law:<sup>383</sup>

[T]he current provision of the *Family Law Act 1975* (s 60HB) dealing with the recognition of the status of parents in surrogacy arrangements is entirely appropriate and should not be amended. [...]

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378 Women's Legal Services NSW Submission, paras 40-41.

379 Women's Legal Services NSW Submission, paras 3 & 12.

380 Professor Jenni Millbank Submission, p.13-14; Paul Boers Submission, p. 13

381 See for this terminology, Australian Human Rights Commission Submission, para 33.

382 Professor Dr John Tobin and Elliot Luke Submission p. 5; Dr Sonia Allen Submission, pp. 3-4.

383 Professor Mary Keyes Submission, p. 1 and Consultation with Professor Keyes, 30 October 2012.

The federal government should further state that after a limited period of time—say 24 months from the statement—the parental status of Australian intended parents will no longer be recognised under Australian family, immigration and citizenship law if the arrangement is commercial, and that this should be so even if the child is genetically related to the intending parents.<sup>384</sup>

On the other hand, some submissions argued for the enactment of a presumption of parentage in favour of intended parents in surrogacy cases, including cases involving the use of overseas commercial surrogacy arrangements.<sup>385</sup>

However, most of the submissions that Council received on this issue favoured the enactment of a transfer mechanism at the Commonwealth level, which would allow the family courts to transfer parentage to intended parents (rather than presume or declare their parentage) in certain circumstances,<sup>386</sup> based on a ‘harm minimisation approach.’<sup>387</sup> That is, there was a view evinced in many of the submissions that the family courts should have power to transfer parentage from the surrogate mother to the intended parents where a commercial surrogacy arrangement has been used, provided that certain ‘appropriate safeguards’ to protect the surrogate mother and child/ren have been met.

These submissions reflected a preference for a post-birth transfer process (rather than a presumption or prohibition) for a number of reasons. Key among these was a concern for the position of the surrogate, and the importance of supporting her capacity to choose not to relinquish the child after the birth. Professor Jenni Millbank explained this point as follows:

[A] baby created via surrogacy is not the baby of the birth mother, not because of the operation of contracts, or genetic link to intended parent(s) combined with lack of genetic link to the surrogate mother; rather the baby is not hers because she says so and believes this to be so, before, during and after the pregnancy in which she gestates the child into life.  
...

Because of my concern to centre the surrogate, I argue for continuation of the foundational principle in Australian law that the birth mother is a legal parent at birth, whether or not she is a genetic parent.<sup>388</sup>

Dr Susan Green argued similarly that the surrogate should be ‘regarded as the “mother of the child” and [that] this should be recognised in law prior to adoption to the commissioning parents’.<sup>389</sup>

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384 Professor Mary Keyes Submission, p. 2.

385 Surrogacy Australia Submission, p. 7-8; Stephen Page Submission, p. 28.

386 Professor Jenni Millbank Submission p. 13; Paul Boers Submission p. 13; Law Institute of Victoria Submission, p. 13. Note that this was also the view of several people who made submissions and spoke to Council on a confidential basis.

387 See Michaela Stockey-Bridge Submission, p. 6.

388 Millbank, Jenni ‘Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy’ (2013) 27 *Australian Journal of Family Law* 135, p. 139.

389 Dr Susan Green Submission, p. 2.

Dr Green's position was based on her view, and with reference to the emergent understandings of epigenetics,<sup>390</sup> that the surrogate:

...is the parent that the child initially bonded to in utero and therefore played an important part in the child's history and experience. From the child's perspective this is a critical part of their heritage and surrogate mothers are contributors to their identity; who they are and where they came from.<sup>391</sup>

More generally, the submissions on this point reflected a view that there should be some process of judicial 'scrutiny' of the surrogacy agreement and the child's circumstances given the concerns about exploitation and abuse that have been associated with commercial surrogacy in some jurisdictions.

Many of these submissions emphasised the consequences of not having a mechanism for transferring parentage in overseas surrogacy cases from the perspective of the status and needs of the children involved. Some, for example, raised concerns about the prospect of 'stateless children' where the parents cannot secure parentage orders in Australia.<sup>392</sup> Others, like the Australian Human Rights Commission, were concerned that without a process for transferring parentage, 'then children born of overseas surrogacy arrangements would be unable to have their parent-child relationship legally recognised, possibly leading to breaches of children's rights.'<sup>393</sup> The Australian Human Rights Commission noted in particular the child's rights under the *Convention on the Rights of the Child* to acquire a nationality<sup>394</sup> and to receive maintenance from their parents if the parents separate.<sup>395</sup>

Another submission, by Paul Boers, emphasised concerns about discrimination, and the need to address the 'different treatment' of children born of altruistic surrogacy versus commercial surrogacy.<sup>396</sup> In a similar vein, the Chief Justice of the Family Court pointed to the different outcomes in *Carlton & Bissett and Anor*<sup>397</sup> and *Findlay and Anor & Punyawong*<sup>398</sup> as a result of the operation of the current provisions in Part VII *Family Law Act*.<sup>399</sup> Others noted more generally that although there is always a risk of exploitation in commercial surrogacy arrangements, the best interests of the children 'will most often be served by recognising the children born as a result of commercial surrogacy arrangements as children of the commissioning parents'.<sup>400</sup>

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390 See the *Epigenome Network of Excellence*, <[www.epigenome.eu/](http://www.epigenome.eu/)>.

391 Dr Susan Green Submission, p. 1. Concerns about children's identity are discussed later in this Chapter.

392 D Brown Submission, p. 4; Surrogacy Australia Submission, p.4.

393 Australian Human Rights Commission Submission, para 33. Graeme Edgerton of the Australian Human Rights Commission noted that adoption is not always available as an option for intending parents: Graeme Edgerton, Australian Human Rights Commission, Consultation, 19 December 2012.

394 *Convention on the Rights of the Child*, Article 7.

395 *Convention on the Rights of the Child*, Article 27(4). In relation to the issue of child support, see the Family Law Section Submission, para 44.

396 Paul Boers Submission, p. 10.

397 [2013] FamCA 143.

398 [2011] FamCA 503.

399 Chief Justice Bryant Submission, p. 3.

400 Women's Legal Centre (ACT & Region) Submission, p. 4. See also Professor Keyes & Professor Chisholm Submission, pp. 33-34.

A number of submissions referred to the powers attaching to parental status, and the limitations of an order for parental responsibility in this regard,<sup>401</sup> and suggested that there is a risk that children born as a result of commercial surrogacy may not be told about their origins if the parents lack the security of legal parenthood.<sup>402</sup> The Family Law Section, on the other hand, submitted that '[m]ost of the practical things a parent has the power to do for an Australian born child can be conferred on a non-parent by way of a parental responsibility order'.<sup>403</sup>

### **Criteria for determining a transfer of parentage**

The submissions canvassed a range of criteria that should guide the court's discretion to transfer parentage in commercial surrogacy cases. At one end of the spectrum was a submission which argued that the use of a transfer mechanism for commercial surrogacy arrangements should be limited to 'exceptional or extraordinary circumstances', but did not expand on what those circumstances might be.<sup>404</sup> Most, however, included suggestions about appropriate criteria for the family courts in deciding whether or not to make a transfer of parentage. The justifications for these criteria fell into three broad categories: concerns to ensure that the child's wellbeing and best interests are prioritised; concerns to ensure that surrogates and children are not exploited or abused; and public policy considerations.

There was general agreement in the submissions that the best interests of the child should be the court's primary consideration in any transfer regime. There was also widespread support for the inclusion of human rights' principles affecting children and surrogates. Of particular importance to many submissions was the child's right to identity under Article 8 of the *Convention on the Rights of Child*. Women's Legal Centre (ACT and Region), for example, submitted that 'the question of a child's right to know biological parents', and the child's 'right to information about their biological heritage', must be an integral part of any decision making process.<sup>405</sup> Others suggested that there should be court scrutiny of 'how the child will have access to the surrogate mother', as well as any gamete donor(s).<sup>406</sup>

More generally, the submissions on this point emphasised the need for transparency. A number of submissions highlighted the evidence of the experiences of adoptees in this regard, and the practical problems that may arise in the future for surrogacy children who wish to obtain information about their biological or cultural background if this issue is not part of the criteria for transferring parentage.<sup>407</sup> For example, a submission by Professor Shurlee Swain and Professor Denise Cuthbert

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401 See for example: Australian Human Rights Commission Submission, paras 11-12.

402 Surrogacy Australia Submission, p. 3.

403 Family Law Section Submission, para 15.

404 Dr Sonia Allan Submission, p. 4.

405 Women's Legal Centre (ACT and Region) Submission, p. 4.

406 See for example: Dr Sonia Allan Submission, p. 4.

407 Professor Keyes and Professor Chisholm Submission, p. 34; VANISH Submission, p. 1; Association of Relinquishing Mothers (ARMS) (Vic) Submission, p. 1; Dr Sonia Allan Submission, p. 4; Women's Legal Centre (ACT and Region) Submission, p. 4; Chief Judge Pascoe Submission, p. 17; Professor Swain & Professor Cuthbert Submission, pp. 1-2; Family Law Section Submission, para 45.

drew on their research on adoption and the testimony to the Senate Inquiry into Adoption by adult adoptees. They submitted that:

Adopted children paid a high price for their inclusion in adopted families and even where these adoptive placements were positive, many adult adoptees speak of ongoing legacies of pain, loss and uncertain identity and belonging which flow from not knowing or not having timely knowledge of their genetic identities and inheritance.<sup>408</sup>

On the basis of these experiences, Swain and Cuthbert argued that any process designed to recognise parentage arising from surrogacy arrangements should ensure 'the maximum degree of openness and transparency in any situation in which the genetic and functional parents are different'.<sup>409</sup>

In a similar vein, Professor Keyes and Professor Chisholm noted that the current practice in international surrogacy 'falls far short of international human rights standards relating to intercountry adoption, and, even more, of the rigorous requirements for adoption, and for altruistic surrogacy, that apply under Australian laws'.<sup>410</sup>

Council also heard from individuals from VANISH [Victorian Adoption Network for Information and Self Help] and Tangled Webs, organisations that represent the interests of adopted and donor conceived people, who emphasised the need to be wary of assuming that biological identity is unimportant to children, and spoke about the harm that can be occasioned by secretiveness and a lack of access to biological family.<sup>411</sup> Dr Susan Green (an adoptee, psychologist and founding member of VANISH), submitted:

Given the complexities of reproductive technologies, all parties (i.e. genetic, gestational, social or commissioning) are the child's parents as they have contributed to the child's creation and birth.<sup>412</sup>

On the basis of her experience, Dr Green urged Council

...to recognise the importance of openness and transparency in records about origins and that the parentage of all significant people that created the child are recorded and accessible to the child.<sup>413</sup>

Professor Nahum Mushin also referred to his experience of chairing the Australian Government's Past Forced Adoptions Implementation Working Group, and expressed concern about the rights of the child to know his or her identity and the adequate maintenance of records to protect the child's rights.<sup>414</sup>

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408 Professor Swain & Professor Cuthbert Submission, p. 1.

409 Professor Swain & Professor Cuthbert Submission, p. 2.

410 Keyes, Mary and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Issues' (2013) 27 *Australian Journal of Family Law* 105, pp. 129-130.

411 Damian Adams, Myf Cummerford, Romana Rossi and Charlotte Smith Consultation 22 Feb 2013.

412 Dr Susan Green Submission, p. 1.

413 Dr Susan Green Submission, p. 6.

414 Professor Nahum Mushin, Consultation, 22 February 2012.

In addition to these concerns about the child's identity rights, many submissions highlighted the need to ensure, as far as possible, that the surrogacy arrangement has not taken place in circumstances involving exploitation of the woman who agrees to carry the child, and that the law is not complicit in any exploitation. Professor Jenni Millbank, for example, noted that

...the state has a legitimate objective in trying to ensure that surrogacy is undertaken with the informed and continuing consent of all the parties, and most particularly the surrogate, given the unique impact and significance of the gestational relationship.<sup>415</sup>

Millbank goes on to make clear her position that while surrogacy 'is not a harmful practice to women who make an informed decision to undertake a pregnancy for a surrogacy arrangement and willingly relinquish a baby they do not regard as their own',

This is not to ignore the fact that women's choices can be constrained or debilitated by a range of external factors, including law itself.<sup>416</sup>

As noted above, some submissions stressed the need to recognise the importance of the gestational relationship to the child's development, and expressed concern that the surrogate's role might be treated as simply one of "gestational carrier", akin to a hired tradesperson:

An extreme example of this miss understanding [sic] about the role and influence a surrogate mother plays in an infant's life was cited this week. "They (the commissioning parents) are grateful to the two women carrying their babies, but insist they have no intention of meeting either surrogate. 'She's doing a job for us, how often do you communicate with your builder or your gardener? She'll get paid...we don't need to see her. As long as she's healthy and delivers my babies healthily, she's done a job for us,' says the wife."<sup>417</sup>

Reflecting this concern, Women's Legal Services NSW recommended that a guiding principle for any amendments in this area should be that 'no person should be exploited for their reproductive capabilities, for example in trade'.<sup>418</sup> The Australian Human Rights Commission's submission expressed a similar view, noting that a key objective of the current Australian laws that regulate surrogacy is to prevent the 'exploitation of women who act as birth mothers'.<sup>419</sup>

A number of submissions raised particular concerns about the potential for exploitation of women and children in the context of the largely unregulated commercial surrogacy markets in India and Thailand.<sup>420</sup> Sonia Allan, for example, argued that there would need to be 'extensive scrutiny' of surrogacy

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415 Millbank, Jenni, 'Resolving the dilemma of legal parentage for Australians engaged in international surrogacy' (2013) 27(2) *Australian Journal of Family Law* 135, p. 138.

416 Ibid, p. 139

417 Dr Susan Green Submission, p. 3, citing: 'The couple having four babies by two surrogates', *BBC News (UK)* (27 October 2013), <[www.bbc.co.uk/news/uk-24670212](http://www.bbc.co.uk/news/uk-24670212)>.

418 Women's Legal Services NSW Submission, para 9.

419 Australian Human Rights Commission Submission, para 30.

420 See Professor Keyes and Professor Chisholm Submission, pp. 32-33; Chief Judge Pascoe Submission, pp. 18-20; Former Department of Immigration and Citizenship Submission, p. 4.

arrangements in these contexts, given the potential for abuse of women and children.<sup>421</sup> The former Department of Immigration and Citizenship submitted that it had particular concerns about

[t]he growing number of cases presenting from countries where there is no or limited legal framework surrounding surrogacy, such as India, Thailand and Malaysia. The lack of a legal framework in these countries, coupled with the poverty of many of the population, increases the potential for exploitation of the surrogate mother as well as the risks of child trafficking.<sup>422</sup>

A number of other submissions referred to evidence of abuses and other concerns associated with commercial surrogacy in some countries that are used by Australian couples. Chief Judge Pascoe, for example, referred to the reported case in Thailand where women were trafficked for the purposes of using them as surrogates:

These women had been kept in two houses run by a trafficking syndicate with links to Taiwan, China and Burma. The Thai Minister of Public Health noted "In some cases it looks like [the women] were raped" in an unsophisticated attempt to produce surrogate children.<sup>423</sup>

The submission from the former Department of Immigration and Citizenship also provided a number of case studies that outlined a range of hypothetical scenarios derived from cases that it had seen. For example,

Mr S advised the Australian High Commission in New Delhi that he had come to India to meet his twin biological children, born through international surrogacy arrangements in India. Mr and Mrs S had decided that they wanted to take only one twin back to Australia with them as they could not afford to support both children. Mr S intends to transfer parental responsibility for his son to friends, who are Indian citizens, reside in India and are unable to have a child themselves.

Mr S lodged a citizenship by descent application for his only daughter. DNA testing confirmed his parentage of both children.<sup>424</sup>

Amongst the issues raised by this example, the former Department of Immigration and Citizenship noted that:

At this stage it is uncertain as to whether the proposed transfer of parental responsibility for the other twin to the unrelated Indian couple is possible under Indian law, or whether this twin will be able to obtain Indian citizenship.<sup>425</sup>

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421 Dr Sonia Allan Submission, p. 4.

422 Former Department of Immigration and Citizenship Submission, p. 4.

423 Chief Judge Pascoe Submission, p. 19. Citing AFP, 'Women freed from 'inhuman' baby ring' *ABC News* (25 February 2011), <[www.abc.net.au/news/2011-02-25/women-freed-from-inhuman-baby-ring/1956588](http://www.abc.net.au/news/2011-02-25/women-freed-from-inhuman-baby-ring/1956588)>. See also the references in the Hague Conference on Private International Law—Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012), p. 5.

424 Former Department of Immigration and Citizenship Submission, p. 8.

425 *Ibid.*

A few submissions also addressed the question of whether the parents' illegal conduct in using a commercial surrogacy arrangement should be a relevant consideration for the courts. The Chief Justice of the Family Court of Australia submitted that in her opinion, 'any court has an obligation to consider issues of illegality in the context of the orders it is being asked to make'.<sup>426</sup>

Professor Emily Jackson and Dr Julie McCandless referred to the legal situation in the United Kingdom and the practices of the Courts there. They noted the tendency of the English courts to 'retrospectively' approve payments beyond reasonable expenses, which would otherwise be prohibited under domestic law (see discussion of the English cases at 3.5).<sup>427</sup>

As noted at 3.5, Professor Keyes and Professor Chisholm have suggested that the issue of illegality is likely to be relevant in deciding whether to transfer parentage, along with evidence about the terms of the agreement and the circumstances of the surrogate mother's consent.<sup>428</sup> They argue that a number of aspects of the surrogacy arrangement, including the way the parties behaved, may be relevant to the court's assessment of the child's best interests, for example,

whether they proceeded with the arrangement without any assurance that the child would be able to enter and live in Australia, or showed little or no compassion for the surrogate mother or the egg donor, or were insensitive to the child's identity rights and cultural identity needs.<sup>429</sup>

More generally, a number of submissions endorsed the aims of the Best Practice Principles from *Ellison's case* (see 3.5).<sup>430</sup>

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426 Chief Justice Bryant Submission, p. 3.

427 Professor Emily Jackson and Dr Julie McCandless, Law Department, London School of Economics, Consultation, 18 September 2012. See *Human Fertilisation and Embryology Act 2008* (UK), s 54(8).

428 Keyes, Mary and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Issues' [2013] 27 *Australian Journal of Family Law* 105, p. 128.

429 *Ibid*, p. 130.

430 Eg. Paul Boers Submission, p. 16; Family Law Section Submission, para 43; Women's Legal Service NSW Submission, paras 63-64; Chief Judge Pascoe Submission, p. 24; NSW Bar Association Submission, para 54. The Law Institute of Victoria considered that the list of Best Practice Principles was too onerous: Law Institute of Victoria Submission, p. 15.

## **Prescribing overseas jurisdictions for the purposes of parentage presumptions in the Family Law Act**

Several submissions proposed that an alternative way of filling ‘the statutory gap’ noted above may be to recognise parentage as determined by another jurisdiction. This could be achieved by prescribing overseas jurisdictions for the recognition of either birth certificates or court orders in the *Family Law Act*.<sup>431</sup> For example, Surrogacy Australia suggested that:

The Commonwealth should name prescribed overseas jurisdictions under section 69R of the *Family Law Act* so that overseas birth certificates are recognised; and so that 70G provisions, registration of overseas orders, such as those made in the US, are able to properly activated.<sup>432</sup>

## **Parentage testing orders and procedures**

Professor Keyes and Professor Chisholm expressed doubt about the admissibility of DNA evidence which is improperly obtained (as was the situation in *Ellison's* case):

Where no s 69W order has been made, section 69ZC and the Regulations would simply not apply and the admissibility of the DNA evidence is governed by the general law of evidence.<sup>433</sup>

In their opinion, s 138 of the *Evidence Act 1995* (Cth) would apply in such a case. This section provides that a court may admit such evidence if the ‘desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.’<sup>434</sup> There are a number of factors that the Court should consider including whether the ‘impropriety’ was ‘inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights.’<sup>435</sup> Keyes and Chisholm suggest that taking a sample from a child without authority is ‘arguably’ a breach of the child’s rights.<sup>436</sup>

The Chief Justice of the Family Court raised the problems with the admissibility of DNA evidence in surrogacy cases in her submission. The Chief Justice noted that s 138 of the *Evidence Act* may raise certain difficulties. Her Honour suggested amending s 69ZC *Family Law Act*:

So that it is clear that a non-compliant report may be admitted into evidence if the Court is satisfied it should be. This would mean, in a particular case, a court may not need to order that a second set of samples be taken from the child pursuant to s 69W and s 69X.<sup>437</sup>

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431 Stephen Page Submission, pp. 6, 29-31; Surrogacy Australia Submission, p. 7; Law Institute of Victoria Submission, p. 14. This approach has been taken by several jurisdictions, which recognise intending parents as legal parents from before birth (eg California) or at birth (eg. India).

432 Surrogacy Australia Submission, p. 7.

433 Professor Keyes and Professor Chisholm Submission, p. 17.

434 *Evidence Act 1995* (Cth), s 138(1).

435 *Evidence Act 1995* (Cth), s 138(3)(f).

436 Professor Keyes and Professor Chisholm Submission, p. 18.

437 Chief Justice Bryant Submission, p. 4.

The Chief Justice further recommended:

that the *Family Law Act* and/or the *Family Law Regulations 1984* (Cth) should make it clear that there is power to authorise the taking of samples from a child in order to verify whether the sperm donor is the father without the consent of the birth mother or the gestational mother.<sup>438</sup>

### **Legalisation of commercial surrogacy in Australia**

As noted in the introduction to this chapter, a number of submissions raised broader policy issues regarding the regulation of commercial surrogacy in Australia. For example, many submissions noted that the present system of prohibition of commercial surrogacy has been ineffective in preventing commercial surrogacy,<sup>439</sup> with some arguing that its illegality may simply lead to couples being more secretive, with negative consequences for the child.<sup>440</sup> The apparent lack of interest in prosecuting people for entering such agreements was also noted in some submissions.<sup>441</sup>

For these reasons a number of submissions suggested that, in the interests of children, consideration should be given to permitting commercial surrogacy in Australia.<sup>442</sup> One such submission, from the Chief Judge of the Federal Circuit Court of Australia John Pascoe, raised two factors in support of this position. His first argument was that the risks of exploitation within Australia do not appear as great as may have been assumed in the past, and that appropriate safeguards may provide sufficient protection for all parties. The Chief Judge noted Anita Stuhmcke's arguments about the lack of public consultation and evidence for the ongoing domestic prohibition.<sup>443</sup> Secondly, his Honour recommended:

Commercialised (or financial benefit) surrogacy arrangements should be permitted within Australia and provisions should be put in place to prevent any further inter-Australian surrogacy arrangements. Adequate safeguards should be put in place to protect all the parties involved in a surrogacy arrangement.

This recommendation is seen as being the best option for addressing the "not in my backyard" phenomenon that has arisen. It would appear that governments in Australia are already giving tacit consent to commercialised arrangements in their refusal to enforce the law against those who openly flaunt it. Ignoring the problem does nothing to assist the vulnerable women and children outside of Australia. It also does not address the serious

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438 Chief Justice Bryant Submission, p. 4.

439 See Professor Jenni Millbank Submission, p. 5; Law Institute of Victoria Submission, p. 12; Surrogacy Australia Submission, p. 3; Stephen Page Submission, pp. 32-33; Rainbow Families Council Submission, p. 2; Michaela Stockey-Bridge Submission, pp. 5-6; Paul Boers Submission, p. 14.

440 Professor Jenni Millbank Submission, p. 5, Surrogacy Australia Submission, p. 3, Stephen Page Submission, p. 45; Michaela Stockey-Bridge Submission, p. 6;

441 Chief Judge Pascoe Submission, p. 13; Paul Boers Submission, p. 14; Law Institute of Victoria Submission, p. 12; Stephen Page Submission pp. 35-36.

442 Chief Judge Pascoe Submission, pp. 22-23; Law Institute of Victoria Submission, p. 13; Surrogacy Australia Submission, p. 9; Stephen Page Submission p. 57; Paul Boers Submission, p. 14.

443 Chief Judge Pascoe Submission, p. 15; Stuhmcke, Anita, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18 *Journal of Law and Medicine* 601.

problems posed by inter-Australian arrangements such as the child's right to know their genetic background and origins.<sup>444</sup>

Professor Millbank noted that

Having overseas providers as the main avenue for surrogacy is unfair and unsafe.

While I do not think that cross border surrogacy should be prevented and I understand why parents undertake it, it is far from ideal that this should be the main avenue in which Australian intended parents undertake surrogacy. Reproductive travel is not 'tourism'. It is stressful, expensive and risky. It exposes Australian intended parents and foreign born surrogates and egg donors to unsafe or less safe clinical practices, less desirable ethical practices, inadequate provision for children's possible future needs and uncertain legal regimes.

If surrogacy is accepted as a valid option for treatment of infertility and family formation avenue, it should be possible for those who need it to undertake it domestically.<sup>445</sup>

A number of submissions proposed that commercial surrogacy arrangements should be the subject of Commonwealth regulation. The Law Institute of Victoria, for example, recommended that commercial surrogacy 'be legalised, dealt with at a Commonwealth level, and regulated'.<sup>446</sup> An alternative position, such as that proposed by the Family Law Section, would require harmonisation of state and territory laws.<sup>447</sup>

The Family Law Section also submitted that 'further consideration and community consultation should take place in relation to legalising commercial surrogacy within Australia. Legalisation would have the benefit of putting in place safeguards for birth mothers and children, similar to those in place for altruistic surrogacy arrangements'.<sup>448</sup>

Surrogacy Australia supported the position that the Commonwealth should recognise and regulate parentage in commercial surrogacy arrangements based on the intention of the parties involved as evidenced by a written surrogacy agreement.<sup>449</sup> Surrogacy Australia proposed the following in relation to overseas surrogacy arrangements:

- a. A presumption that the "parent" is any intended parent named in the written surrogacy agreement, whether biologically related to the child/ren or not;
- b. A presumption that a court order granting a person parental responsibility means that person is a "parent";

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444 Chief Judge Pascoe Submission, pp. 22-23.

445 Professor Jenni Millbank Submission, pp. 6-7 (references omitted).

446 Law Institute of Victoria Submission, p. 13. See also Paul Boers Submission, p 14; NSW Bar Association Submission, para 56.

447 Family Law Section Submission, p. 5.

448 Family Law Section Submission, p. 8.

449 Surrogacy Australia Submission, pp. 7-8; Stephen Page Submission, p. 28.

- c. A presumption that if a person is named as a “parent” under a legal, administrative or judicial process of an overseas jurisdiction (e.g. a court order or birth certificate) then that person is a “parent”;
- d. The person is genetically a “parent” of the child and has signed a surrogacy agreement indicating intent
- e. The de-facto or married partner of a person who is a “parent” of the child is also a “parent” of the child.<sup>450</sup>

On the other hand, several submissions strongly opposed the legalisation of commercial surrogacy. Professor John Tobin and Elliot Luke submitted that:

There is a strong argument to suggest that an international commercial surrogacy arrangement amounts to the sale of a child in contravention of article 35 of the CRC [*Convention on the Rights of the Child*] and article 2 of the Option Protocol [on the Sale of Children]. If this argument were accepted, Australia would be under an international obligation to prohibit such arrangements within its own jurisdiction and to cooperate with other jurisdictions to prohibit such arrangements.<sup>451</sup>

Tobin and Luke add, with respect to the definition of the sale of a child, that:

The identity of the person transferring the child is irrelevant thus the fact that the persons involved in a surrogacy relationship may have a biological or birth connection to the child is irrelevant.<sup>452</sup>

### 3.7 Research on surrogacy

There is now a body of empirical literature on surrogacy arrangements, mostly from the United States and the United Kingdom. Ciccarelli and Beckman (2005) identified 27 empirical studies between 1983 and 2003.<sup>453</sup> Many of these studies involved small sample sizes and were focused on psycho-social issues such as surrogate mothers’ motivations, relationships with intending parents, and experiences of relinquishment. Some studies have also considered the socio-demographic characteristics of surrogate mothers and the concerns about the potential for economic exploitation of surrogates. Early research, such as Eric Blyth’s 1994 study of surrogate mothers in the United Kingdom, indicated that the ‘experience of being a surrogate mother is neither problem-free nor necessarily as horrendous as reported by some surrogate mothers.’<sup>454</sup> The nineteen women in Blyth’s study were not in ‘gross poverty’ and, although financial motives were present, most claimed that it

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450 Surrogacy Australia Submission, pp. 7-8.

451 Professor John Tobin and Elliot Luke Submission, p. 1. Consultation with Professor John Tobin, 16 October 2012.

452 Professor John Tobin and Elliot Luke Submission, p. 5.

453 Ciccarelli, Janice C and Linda J Beckman, ‘Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy’ (2005) 61(1) *Journal of Social Issues* 21.

454 Blyth, Eric, ‘I Wanted to Be Interesting. I Wanted to Be Able to Say ‘I’ve Done Something Interesting with My Life’’: Interviews with Surrogate Mothers in Britain’ (1994) 12 *Journal of Reproductive and Infant Psychology* 189, p. 195 (references omitted).

was not the main reason for their decision to carry a child for another couple. Other reasons, such as opportunities for funding education, the enjoyment of pregnancy and childbirth, and a sense of value and achievement were also noted.

Research from the United States similarly suggests that whilst surrogate mothers may not be as economically well-off as intending parents, neither are they impoverished women. This literature shows that 'most surrogate mothers are in their twenties or thirties, white, Christian, married, and have children of their own', and that most have 'modest' (as opposed to low) family incomes and come from 'working class backgrounds'.<sup>455</sup>

Other studies have suggested that it is the relationship between the surrogate mother and the intending parents that is significant in terms of the surrogate mother's overall experience, with a number of studies suggesting that many surrogates 'have reported high satisfaction with the process and report no psychological problems as a result of relinquishment'.<sup>456</sup>

This research also demonstrated that some surrogate mothers feel sorrow at relinquishing the child, and that some ultimately choose not to relinquish the child,<sup>457</sup> although this is rare. For example, Busby and Vun, reviewing the US, Canadian and United Kingdom research, observed that there have been remarkably few reported cases involving disputes between surrogates and intending parents.<sup>458</sup> It has also been reported that intending parents are more likely to change their minds than the surrogate mother.<sup>459</sup>

These studies generally lend support to the practice of surrogacy as a method of family formation, at least where the surrogate can choose the commissioning couple and where there is a positive relationship between the surrogate mother and the intending parents. However, although some of the broad concerns about the potential negative consequences for surrogates and children of surrogacy arrangements in the United States and the United Kingdom have been challenged by this research, there is, as yet, relatively little evidence with respect to the impact of the growing overseas commercial surrogacy markets in developing countries. In particular there has been little research, to date, on the impact on women and children involved in commercial surrogacy arrangements in countries such as India and Thailand, where growing numbers of Australian couples are pursuing

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455 Ciccarelli and Beckman (2005), above n 454, p. 31 (references omitted).

456 Teman, Elly, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) *67 Social Science & Medicine* 1104.

457 Blyth (1994), above n 455, p. 195.

458 At the time of their 2009 paper, they noted there had been only 1 disputed case in Canada, 3 cases reported in the United Kingdom, and that there had only been one disputed case in the US since 1990. In the US they cite estimates that there are 1000 surrogacy arrangements annually in the US: Busby, Karen and Delaney Vun, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) *26 Canadian Journal of Family Law* 13, p. 35–37.

459 A blog by Andrew Vorzimer, a US reproductive law attorney and CEO of Egg Donation Inc, noted that since 1979 there have been only 32 reported cases of surrogates refusing to relinquish the child compared to 74 intended parents who have reneged on the surrogacy agreement: The Spin Doctor, 'Ohio Appellate Court Awards Custody of Baby to Intended Mother who used Surrogate & Donor Gametes', 8 June 2010, <[www.eggdonor.com/blog/2010/06/08/ohio-appellate-court-gives-custody-of-baby-to-intended-mother-who-used-surrogate-donor-gametes/](http://www.eggdonor.com/blog/2010/06/08/ohio-appellate-court-gives-custody-of-baby-to-intended-mother-who-used-surrogate-donor-gametes/)>.

surrogacy arrangements. Pamela Laufer-Ukeles, who supports a 'mixed commodification' approach to domestic surrogacy arrangements, which recognises both the physical and emotional intimacy of surrogacy arrangements, argues that

Domestic surrogacy is of limited relevance, particularly if it is restricted through regulation; the new frontier in surrogacy is the hiring of foreign surrogates, and the question of how to consider and address such arrangements is pressing. Indeed, under precisely the same framework and based on the same normative concerns and empirical data, international surrogacy arrangements are cause for greater concern. [...] In the context of international surrogacy, the concerns regarding commodification and exploitation are most pronounced and the empirical data most undermines the advisability of the process.<sup>460</sup>

The Centre for Social Research based in New Delhi, India, has recently conducted a study of the Indian commercial surrogacy market.<sup>461</sup> The research was conducted in Gujarat, where there are a large number of assisted reproductive technology clinics. Three districts were surveyed: Anand, Surat and Jamnagar. One hundred surrogate mothers and fifty commissioning couples were included in the study. The study found:

Women, who undertake these assignments in India, usually come from lower class to lower middle class backgrounds, are married, and are often in need of money. Their need for money is so acute that more than often, childless couples can negotiate a better price as a result of competition. The amount of money given to a surrogate mother in India may appear very miniscule from any reasonable perspective, however, the amount may serve as the economic lifeblood for the families, and will be spent on the needs of the family (a house, education of the children, medical treatment). These are basic needs and may seem trivial from a notably rich westerner's perspective, but they become mega needs in a country like India, which lack social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society.<sup>462</sup>

A further study by Amrita Pande, which involved 42 Indian surrogate mothers in Anand, concluded that:

Eurocentric portrayals of and speculations about surrogacy cannot incorporate the reality in India, where commercial surrogacy has become a survival strategy and a temporary occupation for some poor rural women, where women are recruited systematically by fertility clinics and matched with clients from India and abroad.<sup>463</sup>

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460 Laufer-Ukeles, Pamela, 'Mothering for Money" Regulating Comercial Intimacy' [2013] 88(1) *Indiana Law Journal* 1, pp 6-7. See also Storrow, Richard F, 'New Thinking on Commercial Surrogacy' [2013] 88 *Indiana Law Journal* 1281.

461 Centre for Social Research, *Surrogate Motherhood - Ethical or Commercial* [2013], <[www.csrindia.org/](http://www.csrindia.org/)>

462 Ibid, p. 4.

463 Pande, Amrita, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Workder' [2010] 35(4) *Signs: Journal of Women in Culture and Society* 969, p. 971.

Pande cites an Indian surrogate mother:

Who would choose to do this? This is not work, this is *majboori* [a compulsion]. It's just something we have to do to survive. When we heard of surrogacy, we didn't have any clothes to wear after the rains—just one pair that used to get wet—and the roof of our house had collapsed. What were we to do?<sup>464</sup>

These studies suggest less positive effects of surrogacy arrangements for surrogates in India than for the women surveyed in the United States and United Kingdom studies described above. Commentary and research highlights the complex dynamics surrounding the economic questions arising from surrogacy in India. A number of commentators have questioned the assumption that Indian women who work as surrogates are necessarily exploited,<sup>465</sup> arguing that commercial surrogacy can provide financial opportunities that would not otherwise be available to poor women. Sharmilla Rudrappa's research, for example, notes that the Indian women in her study

...did not necessarily see selling eggs or surrogacy as benign processes. Nor did they misread their exploitation. However, given their employment options and their relative dispossession, they believed that Bangalore's reproduction industry afforded them greater control over their emotional, financial, and sexual lives. In comparison to garment work, surrogacy was easy.<sup>466</sup>

The existing research on surrogacy is fairly limited in scope. An area of high importance, which has not been systematically examined, is the experience of children born of commercial surrogacy arrangements. Vasanti Jadva and colleagues have recently published some material from their 10 year longitudinal study of 33 surrogacy families (22 children) in the United Kingdom.<sup>467</sup> They note that this was the first study to examine the 'the views and experiences of surrogacy from the perspective of children themselves.'<sup>468</sup> Their study provides the following insights from children:

Well my Mum's womb, I think ...well it was a bit broken, so [...] [surrogate mother] carried me instead of my Mum.

[She] was really kind about [...] like carrying me in her tummy.

I think she is kind and she's lovely and funny.

Um, I feel fine. I don't feel bad or cross in anyway. It's just pretty much nature so I can't do anything about it. I wouldn't like to do anything about it...<sup>469</sup>

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464 Ibid, p. 987. See also Pande, Amrita, 'It May Be Her Eggs but It's My Blood': Surrogates and Everyday Forms of Kinship in India' (2009) 32 *Qualitative Sociology* 379.

465 See also Michaela Stockey-Bridge Submission, pp. 4-5.

466 Rudrappa, Sharmila, 'India's Reproductive Assembly Line' (2012) (Spring) *Contexts*, <[www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/](http://www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/)>.

467 Jadva, V et al, 'Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27(10) *Human Reproduction* 3008.

468 Ibid, p. 3012.

469 Ibid, pp. 3011-3012.

This study also considered issues of disclosure to children (91% of intending parents had disclosed the surrogacy to their child but where there was a genetic surrogacy arrangement only 58% of those intending parents had disclosed that the surrogate mother was also the child's genetic mother).<sup>470</sup> The issue of the importance of disclosure to children has been considered in more depth in relation to donor conceived children and adults in other families.<sup>471</sup> A recent publication based on Australian families formed through donor conception noted that only 35% of couples had told their primary school age children about their donor conception.<sup>472</sup> In this respect Javda et al noted that

[i]n contrast to families who use gamete donation to have a child, this study shows that families who use surrogacy are more open with their child about their use of assisted reproduction.<sup>473</sup>

Javda et al's study was also concerned with the quality of relationships between all the parties. Fourteen children's families were still in contact with the surrogate mother and those children expressed their views about the level of contact with their surrogate mother: nine children wished to see more of their surrogate mother and five said the level of contact was just right.<sup>474</sup>

There have been some references to anecdotal views expressed by older children born from commercial surrogacy arrangements. Usha Renagachary Smerdon cites two cases. For example, one fourteen year old girl born of a gestational surrogate remarked:

I can't really remember how I felt about it when I was younger, but now that I'm older, I can see from my mother's point of view how much she wanted a daughter.... It helps me realise, it doesn't really matter how I was born and that my mother didn't actually carry me. But it does matter that I am here. I am born.

In contrast, a nearly eighteen year old boy born of a traditional surrogate wrote:

How do you think we feel about being created specifically to be given away? ... I don't care why my parents or my mother did this. It looks to me like I was bought and sold.... When you exchange something for [m]oney it is called a commodity. Babies are not commodities. Babies are human beings. How do you think this makes us feel to know that there was money exchanged for us? . . . Because somewhere between the narcissistic, selfish or desperate need for a child and the desire to make a buck, everyone else's needs and wants

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470 Ibid, p. 3011.

471 See Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing: A guide to the Report* (2013); Johnson, Louise and Helen Kane, 'Regulation of Donor Conception and the "Time to Tell" Campaign' (2007) 15 *Journal of Law and Medicine* 117; Turner, A J and A Coyle, 'What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy' (2000) 15(9) *Human Reproduction* 2041.

472 Kovacs, GT, S Wise and S Finch, 'Functioning of Families with Primary School-Age Children Conceived Using Anonymous Donor Sperm' (2013) 28(2) *Human Reproduction* 375, p. 37.

473 Javda et al (2012) above n 468, p. 3013.

474 Ibid, p. 3012.

are put before the kids['] needs. We, the children of surrogacy, become lost. That is the real tragedy.<sup>475</sup>

What is also lacking in the empirical evidence base is a longer term perspective on the experience of surrogacy, from the viewpoint of all those involved; intending parents, surrogates, gamete donors, and most importantly, children.

A recent study has proposed guidelines for ethically based minimum standards of care in cross-border reproductive services.<sup>476</sup> These authors note that:

Quality and safety issues are especially pertinent in the area of third party reproduction such as oocyte donation and surrogacy. Clinical and research experience of the authors indicates that not all patients are given accurate or comprehensive information regarding medical treatment and outcome, there can be a lack of transparency regarding the overall cost of treatment as well as the legal implications. In countries without legislation or binding guidelines there is little or no information regarding the medical procedures that oocyte donors or surrogates undergo or the financial compensation or "payment" they receive.<sup>477</sup>

In addition, Thorn et al propose a number of guidelines based on their clinical research and experience in the fields of assisted reproduction:

Intended parents, donors and surrogates can voice their interests and take active decisions when embarking on ART. The future offspring is the only party who at the time of treatment cannot be involved in the decision process and informed consent procedure of using medical assistance, of using third party reproduction and of using anonymous or identifiable donors. Offspring will have to accept the decisions taken by other parties.

From our point of view, it is therefore vital a) not to limit their autonomy right from the start, which includes the possibility of having access to the identity of their donor. b) to treat them justly and to grant them the same rights as adopted persons, who in most countries are no longer denied the knowledge of their biological origins, c) to avoid the risk of harm resulting from profound anger and frustration over the lack of information regarding their biological origins.<sup>478</sup>

### **3.8 Approaches to surrogacy and parentage in other jurisdictions**

#### **Canada**

In Canada the federal *Assisted Human Reproduction Act 2004* prohibits commercial surrogacy arrangements. Section 6 prohibits offering payment for surrogacy and payment for acting as an

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475 Smerdon, Usha Renagachary, 'Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India' (2008) 39 *Cumberland Law Review* 15, p. 60 (references omitted).

476 Thorn, Petra, Tewes Wischmann and Eric Blyth, 'Cross-Border Reproductive Services - Suggestions for Ethically Based Minimum Standards of Care in Europe' (2012) 33(1) *Journal of Psychosomatic Obstetrics & Gynecology* 1.

477 Ibid, pp. 1-2.

478 Ibid, p. 4.

intermediary in arranging a surrogacy agreement. It also sets a minimum age of 21 for acting as a surrogate by means of a provision prohibiting the necessary medical treatment if the person carrying out the procedure knows or has reason to believe that the woman is under 21.

However, as in Australia, parentage falls within the jurisdiction on the provinces. There is no uniform approach. The majority of provinces do not have legislation that deals expressly with parentage in relation to children born as the result of a surrogacy arrangement.<sup>479</sup> Case law in a number of Canadian jurisdictions supports the establishment of legal parentage for intending parents through a court declaration of parentage and accompanying order that they should be named as parents in the birth register. In *Rypkema v British Columbia (Rypkema)*<sup>480</sup> the Supreme Court of British Columbia considered an application for an order that a couple be declared the parents of a child born as the result of a surrogacy arrangement and that they be registered in the birth record as such. The intending parents were both genetically related to the child. Three Canadian cases and three American cases were considered by the court as supporting the proposition that the genetic parents of the child should be considered the legal parents and so recorded in the birth record. The case was decided before the passage of the *Assisted Human Reproduction Act 2004* and no consideration was given to whether surrogacy agreements were consistent with public policy, although the court appeared to take into account that no payment was made in relation to the surrogacy.

In *J.C. v. Manitoba*<sup>481</sup> the court was asked to make a declaration in advance of the birth of the child that the intending genetic mother was the mother of the child. The court said that the Department of Vital Statistics was set up to record births (defined as the extraction from a mother of the product of conception) and should record the surrogate mother as the birth mother, but that a declaration of parentage in favour of the intending genetic mother could follow the birth.

In Alberta and British Columbia there is recent legislation dealing with retrospective consideration of surrogacy arrangements to see if the conditions for transferring parentage to the commissioning couple has been met: in Alberta, the *Family Law Statutes Amendment Act of Alberta 2010* and in British Columbia, the *Family Law Act 2011*.<sup>482</sup>

### **United Kingdom**

Laws in the United Kingdom prohibit commercial surrogacy but non-profit making surrogacy agencies can make a not-for-profit charge for facilitating surrogacy arrangements and can advertise those services.<sup>483</sup> The prohibition on commercial surrogacy means that payments to the surrogate must not exceed her reasonable expenses. However, as noted at 3. 5, when considering

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479 Hague Conference on Private International Law—Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012), footnote 51, <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)>.

480 2003 BCSC 1784.

481 2000 MBQB 173 (discussed in *Rypkema*).

482 Hague Conference on Private International Law—Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012), footnote 65, <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)>.

483 United Kingdom Border Agency, *Inter-country Surrogacy and the Immigration Rules*, Home Office, available online at: <[www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/intercountry-surrogacy-leaflet](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/intercountry-surrogacy-leaflet)>.

an application for a parental order the courts have discretion to retrospectively approve payments in excess of reasonable expenses,<sup>484</sup> and have apparently done so on a regular basis.<sup>485</sup> The cases indicate that in exercising this discretion, the courts will carefully scrutinise, on public policy grounds, the circumstances surrounding the payments.<sup>486</sup> Issues that the court will consider include:

- Whether the sum paid was disproportionate to reasonable expenses.
- Whether the applicants were acting in good faith in their dealings with the surrogate.
- Whether the applicants were involved in any attempt to defraud authorities.
- Whether the surrogacy arrangement was an attempt to circumvent child protection laws and provide approval to people would not be considered suitable to have the care of a child.
- Whether the arrangement amounted to buying a child or whether the amount was such as to overbear the will of the surrogate<sup>487</sup>

Intending parents can apply under section 54 of the *Human Fertilisation and Embryology Act 2008* for an order that a child born as the result of a surrogacy arrangement is to be treated in law as their child (a parental order). The *Human Fertilisation and Embryology (Parental Orders) Regulations 2010* apply various parts of the *Adoption and Children Act 2002* to applications for parental orders. This means that the child's welfare throughout its life is the court's paramount consideration when considering whether or not to make a parental order.<sup>488</sup> The effect of a parental order is the same as an adoption order but avoids the need for an adoption application. Parental orders can be made in favour of couples in a marriage, a civil partnership or living as partners in an enduring family relationship. The application must be made within six months of the birth of the child and there is no capacity to extend the time.

The judgment of Sir Nicholas Wall, President of the Family Division of the High Court, in the case of *Re X and Y (Parental Order: Retrospective Authorisation of Payments)*<sup>489</sup> sets out the way the law operates and the matters that must be taken into account by the court. Wall J made the anonymised judgment public because of the public importance of the subject of international surrogacy. The case concerned two children born a few days apart to two Indian women who entered surrogacy agreements with the intending couple. Central to Wall J's judgment was how to balance the public policy considerations behind the legislative prohibition on payment of more than 'reasonable expenses' to surrogates with the requirement to make the welfare of the children throughout

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484 *Human Fertilisation and Embryology Act 2008* (UK), s 54(8).

485 See *J v G* [2013] EWHC 1432 (Fam); *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); Professor Emily Jackson and Dr Julie McCandless, Law Department, London School of Economics, Consultation, 18 September 2012.

486 Bednall, Laura, 'Distant Relatives', 21 October [2011] *New Law Journal*, 1433, <[www.newlawjournal.co.uk/nlj/content/distant-relatives](http://www.newlawjournal.co.uk/nlj/content/distant-relatives)>.

487 Hutchinson, Anne-Marie, Hassan Khan, Barry O'Leary and Andrew Vorzeimer, 'International Surrogacy Arrangements: Between California and England and Wales' October [2011] *Family Law* 1104, p. 1108

488 *J v G* [2013] EWHC 1432 (Fam), para 18; *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam) at 29, 30; *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), para 9.

489 [2011] EWHC 3147 (Fam).

their lives the paramount consideration. Ultimately, Wall J found that the two considerations could be aligned—although the payments were more than ‘reasonable expenses’ they were not disproportionate and could be retrospectively approved by the court and the parental orders, which were clearly in the best interests of the children, could be made. However, he endorsed the following remarks of Hedley J in *Re X and Y (Foreign Surrogacy)*:<sup>490</sup>

I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child’s welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.

### **New Zealand**

New Zealand has legislation concerning assisted reproductive technology that specifically regulates certain aspects of surrogacy arrangements and includes an ethics approval process for surrogacy arrangements involving IVF.<sup>491</sup> However, there is no legislation regulating the legal parentage of children born as a result.<sup>492</sup> Altruistic surrogacy is legal in New Zealand but commercial surrogacy is not.<sup>493</sup>

In New Zealand the legal status of a child born as a result of a surrogacy arrangement is determined by the *Status of Children Act 1969* (NZ), whether the child is born in New Zealand or outside New Zealand. A genetic relationship between an intending parent and a child born as a result of a surrogacy arrangement does not result in them becoming the legal parent of that child. The surrogate mother and her consenting partner if she has one are the legal parents of the child under New Zealand law.<sup>494</sup> However, a legal parent/child relationship can be established through a domestic or intercountry adoption order.

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490 [2008] EWHC 3030 (Fam), para 24.

491 *Human Assisted Reproductive Technology Act 2004* (NZ), ss 14, 16. Surrogacy is not an ‘established procedure’ under the *Human Assisted Reproductive Technology Act 2004* (NZ) and therefore requires the approval of an ethics committee: *Re An Application by BWS to adopt a child* [2011] NZFLR 621, para 84.

492 Hague Conference on Private International Law—Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012), footnote 63, available online at: <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)>.

493 *Human Assisted Reproductive Technology Act 2004* (NZ), s 14.

494 International Surrogacy Information Sheet, Advisory Committee on Assisted Reproductive Technology, New Zealand, available online at: <[www.acart.health.govt.nz/moh.nsf/pagescm/22/\\$File/international-surrogacy-factsheet.pdf](http://www.acart.health.govt.nz/moh.nsf/pagescm/22/$File/international-surrogacy-factsheet.pdf)>.

The effect of the New Zealand *Status of Children Act 1969* (NZ) is that a child born outside New Zealand as a result of a surrogacy arrangement in most cases is not eligible to claim New Zealand citizenship by descent through one of the intending parents and consequently not eligible to hold a New Zealand passport.<sup>495</sup> Access to citizenship is provided when the commissioning couple obtains legal parentage through adoption. In the case of an international surrogacy arrangement, this requires the intended parents to make an application to the New Zealand Family Court for an adoption order. The applicants are required to undergo a social work assessment to determine whether they are 'fit and proper persons to adopt a child', before an adoption order is granted.<sup>496</sup> Once the adoption order has been made, the parents can apply for New Zealand citizenship for the child.

In *Re An Application by BWS to adopt a child* Judge Walker considered an application by intending parents to adopt a child born from a surrogacy arrangement in California:

Section 11(a) prevents the Court from making adoption orders unless it is satisfied that the applicant or applicants are fit and proper persons.

There appears to be no dispute that the applicants are fit and proper persons to raise L and R. The reports provided by Child, Youth and Family for the Ministry of Social Development are extremely positive about the applicants' parenting abilities; they raise no concerns about the applicants being fit and proper persons to raise the twins. The reports were prepared with information from a variety of sources including police and medical reports, references, home and office visits, consultations and other communications. The writer is confident that the applicants will continue to love and protect the children regardless of the outcome of this adoption, concluding:

'I have found both applicants to be consistently honest and open with a strong sense of doing what is "right" for the children. In my view they are fit and proper and have more significant than usual understanding of children's needs and development due to their contact with, and care of, [foster] children in the past.'

Likewise, a family study report received by Child, Youth and Family from a Hague accredited adoption agency in the United States revealed no concerns about children's care or safety with the applicants.<sup>497</sup>

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495 Ibid.

496 *Adoption Act 1955* (NZ), s 11(a); *Re An Application by BWS to adopt a child* [2011] NZFLR 621; *Re An Application by KR and DGR to adopt a female child* [2011] NAFLR 429; *Re KJB and LRB [Adoption]* [2010] NZFLR 97; *In re application by L* [2003] NZFLR 529.

497 *Re An Application by BWS to adopt a child* [2011] NZFLR 621, paras 72-74.

Judge Walker made further comments under the consideration of the child's best interests and the issue of payment (which was found not to be a breach of the *Adoption Act 1955*). The Judge concluded:

Despite the policy considerations, I am prepared to exercise my discretion to grant the adoption orders, as I think this is the best outcome for the children and I have found no legal impediment. I would however, strongly encourage the applicants to facilitate any inquires the children may wish to make in the future regarding their genetic mother. I am pleased to read that the applicants intend to maintain regular contact with the twins' surrogate mother, whom I believe is a close family friend. Much progress has been made to open up the adoption process for the benefit of adopted persons, and it is important that this transparency be carried over to arrangements involving assisted reproductive procedures.<sup>498</sup>

### 3.9 Council's views

Council was asked to provide advice about possible amendments that might assist the family courts to determine the parentage of children born through surrogacy arrangements where the state and territory Acts do not apply. Council's review of recent decisions of the family courts suggests that the current provisions of Part VII *Family Law Act* have significant limitations in this context, in that some confusion exists about the capacity to make a declaration of parentage when the arrangement does not fall within s 60HB *Family Law Act*. The cases also demonstrate a lack of certainty and consistency about when or if s 60H *Family Law Act* applies to a surrogacy arrangement or if the family courts are able to make a declaration of parentage in favour of an intended biological parent. This indicates there is a need for legislative reform to provide greater clarity to the family courts and intended parents.

Council agrees with the 'cautious' view expressed by Justice Ryan in *Mason's* case that declarations of parentage should not be made in relation to surrogacy arrangements that fall outside s 60HB *Family Law Act*, and that parliament's intention in enacting s 60HB *Family Law Act* was that the issue of parentage in surrogacy cases should be determined by state and territory law. Council also supports the suggestion by Justice Watts in *Re Michael: Surrogacy Arrangements* that s 60H *Family Law Act* should be amended to clarify that it does not apply to surrogacy cases. Council agrees with the submission of Women's Legal Services NSW that there should be separate provisions governing cases where an assisted conception procedure is used by parties to conceive and carry a child they intend to parent and cases where the intention of the parties is that the birth mother will not raise the child. Section 60H *Family Law Act* was never intended to be used for surrogacy arrangements and the recent cases (discussed in 3.5) illustrate the difficulties of attempting to apply its provisions in this circumstance.

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498 *Re An Application by BWS to adopt a child* [2011] NZFLR 621, para 86.

Council notes that the effect of this position is that there is currently no capacity for the family courts to recognise or accord parental status to intended parents where children are born as a result of a commercial surrogacy arrangement. Council is aware, however, that a significant and apparently growing number of children are being born as a result of commercial surrogacy arrangements outside Australia (more than several hundred each year), and that very few cases have come before the family courts seeking parentage orders. As a consequence, it would seem that a large number of young children are growing up in Australia without any secure legal relationship to the parents who are raising them. The question that arises is how to address this problem.

Council notes at the outset that this is a difficult question that raises a number of competing considerations. In considering its response, Council was particularly conscious of the 'potentially irreconcilably conflicting concepts' described by Justice Hedley in *Re X and Y (Foreign Surrogacy)*, namely the need to apply 'full rigor' to the prohibition against commercial surrogacy and the need to protect the welfare of the child created by such an arrangement.<sup>499</sup> Mirroring the divergent and passionately held views expressed in the submissions and the broader community, Council's deliberations reflected a diversity of opinions about the appropriate legal response to this issue. However, Council agreed on the need for reform to address the lived reality for children born as a result of commercial surrogacy arrangements, and to ensure they are not disadvantaged by the way in which their family was formed or the status of the adults who are raising them. Council concluded that the paramount concern for the family courts must remain the best interests of the child, and that decisions regarding the prohibition or regulation of commercial surrogacy are a matter for government.

Council acknowledges and supports the policy aims underpinning Australia's state and territory laws that prohibit commercial surrogacy (see 3.3), and notes that these aims accord with the concerns highlighted in the submissions supporting a transfer of parentage process subject to judicial oversight (see 3.6). Council agrees that any reform to Commonwealth law must be underpinned by these aims and concerns. In particular, Council notes the importance of protecting the child's right to know of their birth parentage, the concerns expressed about the potential for exploitation of surrogates, and the need to ensure that children enjoy 'the same status, protection and support irrespective of the circumstances of the child's birth.'<sup>500</sup>

Council is conscious that the number of children conceived as a result of overseas commercial surrogacy arrangements has increased dramatically in the past several years, despite the existence of laws prohibiting such arrangements, and that, to its knowledge, none of the intended parents in these cases has been prosecuted. Council is also aware of recent media reports which indicate that the marketing to and use of overseas commercial surrogacy services by western couples is

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499 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

500 Explanatory Notes Surrogacy Bill 2009 (QLD), p. 5. See also New South Wales, *Hansard* Legislative Assembly, 10 November 2010, (Ms Linda Burnley).

a growing business,<sup>501</sup> and is mindful of Professor Tobin and Elliot Luke's view that the practice of commercial surrogacy amounts to the sale of a child in contravention of the *Optional Protocol on the Sale of Children*.<sup>502</sup> Council also notes the unregulated nature of some of the overseas surrogacy markets that provide services to Australian intended parents. Council believes that this issue requires a coordinated international regulatory response of the kind embodied in the Hague Adoption Convention,<sup>503</sup> and supports the Hague Conference on Private International Law's current work in this regard.<sup>504</sup>

The reality however, is that an international treaty is some years away. In the meantime, the evidence indicates that Australian couples are continuing to use surrogacy arrangements in overseas jurisdictions as a method of family formation. Against this background, Council's recommendations for amendments that can assist the family courts are aimed at addressing the concerns that currently underpin state and territory surrogacy laws whilst also recognising the need to ensure that children born as a result of commercial surrogacy arrangements are not disadvantaged by their lack of legal status.

In considering its response, Council was guided by the recent developments in other jurisdictions, such as Canada, the United Kingdom and New Zealand (see 3.8). Council notes in particular the United Kingdom legislation, which provides the courts with power to retrospectively authorise an otherwise unlawful payment to the surrogate mother,<sup>505</sup> and the position adopted by the English courts, which encourages intended parents to apply for parentage orders so that their relationship with the child will have 'a secure legal footing'.<sup>506</sup>

In Council's view, a similar approach should be adopted in Australia. Council's view is that the most appropriate way to protect the interests of children born to Australians through overseas surrogacy arrangements (pending an international solution) is by enactment of a Commonwealth law providing the family courts with a discretionary power to transfer parentage from the surrogate mother to the intended parents where certain 'safeguard' criteria have been met. In Council's view, this provision should be located in a new federal Status of Children Act (see Chapter 2). Council is mindful of the fact that a transfer of parentage under a federal Status of Children Act will only operate in relation to Commonwealth laws and will not lead to legal recognition of parenthood under state and territory laws; nor will it entitle intending parents to be registered as the parents of the child/ren under state

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501 Michael Nicholls QC, 'International Adoption and Surrogacy Arrangements', Legalwise Seminars, Second International Family Law Conference, Siem Reap, Cambodia, September 2012. See also 'The couple having four babies by two surrogates', *BBC News (UK)* [27 October 2013], <[www.bbc.co.uk/news/uk-24670212](http://www.bbc.co.uk/news/uk-24670212)>; 'The baby factory: In a huge clinic in India, hundreds of women are paid £5,000 each to have Western couples' babies', *Mail Online (UK)* [3 October 2013], <[www.dailymail.co.uk/news/article-2439977](http://www.dailymail.co.uk/news/article-2439977)>.

502 Professor John Tobin and Elliot Luke Submission, p. 1.

503 *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Adoption Convention).

504 Council consulted Hannah Baker, Senior Legal Officer and Laura Martinez-Mora, Principle Legal Officer, Hague Conference on Private International Law, 5 September 2013. See the Hague Conference on Private International Law, project website at: <[www.hcch.net/index\\_en.php?act=text.display&tid=178](http://www.hcch.net/index_en.php?act=text.display&tid=178)>.

505 *Human Fertilisation and Embryology Act 2008* (UK), s 54(8).

506 *J v G* [2013] EWHC 1432 (Fam), para 30.

and territory birth registration laws. Nevertheless, Council believes that this is currently the best way to protect the best interests of children born from overseas surrogacy arrangements.

Council believes that a process of judicial oversight (rather than a presumption of parentage approach) is necessary for several reasons. First, the current, largely unregulated, circumstances of some overseas surrogacy markets, means that it cannot be assumed from the surrogate's signature (which is sometimes evidenced by a thumbprint) on the contract (which is often not written in the surrogate mother's first language) that her consent to the process has been freely given. Council notes that several submissions provided experience-based information that surrogates in India are not exploited,<sup>507</sup> and Council acknowledges the need to be cautious about assuming a lack of agency on the part of women who act as surrogates. However, Council also notes the position articulated by Professor Millbank that the current situation 'exposes Australian intended parents and foreign born surrogates and egg donors to unsafe or less safe clinical practices, less desirable ethical practices, [and] inadequate provision for children's possible future needs'.<sup>508</sup> Council further notes the reports of abuse and exploitation in some submissions.<sup>509</sup> Council is also aware that there has been limited research on the use and impact of overseas commercial surrogacy arrangements in jurisdictions like India and Thailand to date.<sup>510</sup>

For these reasons Council believes that court oversight, in the form of a transfer of parentage mechanism, is needed. This position is also consistent with the concerns underpinning the current state and territory surrogacy laws.

Second, Council believes that judicial oversight is necessary in order to protect the child's ability to know about and have access to information about their biological and cultural identity in the future. Whilst the limited research that exists on the developmental wellbeing of surrogacy children suggests that there are no significant differences across family types,<sup>511</sup> Council notes that the relevant studies have, to date, been limited to young children who have been informed by their parents about the circumstances of their conception. As yet, we do not know about the future impact on identity needs for children born from surrogacy arrangements and what we have heard from adoptees and donor conceived adults suggests that we need to proceed with caution.<sup>512</sup>

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507 Stephen Page Submission, pp. 14-15; Michaela Stockey-Bridge Submission, pp. 4-5.

508 Professor Jenni Millbank Submission, pp 6-7.

509 Chief Judge Pascoe Submission, pp. 19-21; Dr Sonia Allan Submission, pp. 1-2.

510 See former Department of Immigration and Citizenship Submission, pp. 4-5.

511 Golombok, Susan et al, 'Families Created through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at Age 7' (2011) 47(6) *Developmental Psychology* 1579, p. 1584.

512 See Thorn, et al (2012), above n 477.

On this point, Council notes with particular concern the case-study raised by the former Department of Immigration and Citizenship of the separation of siblings born as a result of an overseas surrogacy arrangement and the potential impacts on those children. Domestic laws regulating the transfer of parentage in surrogacy arrangements have responded to the situation of multiple births by requiring the courts to consider all children born in such circumstances. For example, the *Surrogacy Act 2010* (NSW), s 20 provides that:

Birth siblings must be kept together

(1) If a child has any living birth siblings, the Court is to make a parentage order in relation to the child only if the Court also makes or proposes to make a parentage order in relation to each birth sibling, so that the child and all his or her living birth siblings become children of the same applicant or applicants.

(2) A “**birth sibling**” of a child is any brother or sister of the child who is born as a result of the same pregnancy as the child.

(3) However, the Court may make a parentage order, despite non-compliance with subsection (1), if the Court considers it in the best interests of the child to make an order even if the parentage of his or her birth sibling is not transferred to the same applicant or applicants.<sup>513</sup>

Third, Australia’s international human rights obligations require that in all actions concerning children, the best interests of the child shall be a primary consideration, and that children have a right to a nationality.<sup>514</sup> Court oversight is the appropriate way to ensure that these obligations are met.

In Council’s view the relevant criteria for the court’s consideration should include a mix of best interests and public policy considerations, as recommended by many of those who made submissions, including consideration of the circumstances in which the surrogate mother’s consent was obtained and the willingness of the intending parents to ensure the child will have knowledge of his or her biological family. These are set out in Council’s recommendations below. Council’s view is that the court’s decision should be assisted by the preparation of a Family Report.

Council has considered the argument that providing a mechanism for a transfer of parentage to the intended parents would undermine the domestic prohibition of commercial surrogacy, and that there is no way of ensuring that any minimum safeguard requirements will be met. Council acknowledges that the way in which the discretion to transfer parentage will be exercised in individual cases will be a matter for the family courts, and that the jurisprudence on this issue may take some time to develop. Council notes that a transfer of parentage is not the same as a parenting order, and that there would be a number of options available to the courts in making orders, including the discretion not to transfer parentage in cases where that would not be in the child’s best interests. In addition, referral for prosecution in appropriate cases would remain a possibility.

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513 See also *Parentage Act 2004* (ACT), s 27; *Surrogacy Act 2010* (QLD), s 24; s 20; *Family Relationships Act 1975* (SA), s 10HB(1); *Surrogacy Act 2012* (Tas), s 17; *Surrogacy Act 2008* (WA), s 24.

514 *Convention on the Rights of the Child*, Articles 3 and 7.

The broader question raised in some submissions of whether the Commonwealth should legalise the practice of commercial surrogacy within Australia is a question that cannot be answered within the context of Council's present reference, which concerns amendments to assist the family courts. Council's view is that this is the responsibility of government and urges its consideration of this issue. In Council's view, any reform in this area will need to be preceded by broad community consultation and public debate.

In terms of the state and territory position on domestic surrogacy arrangements and parentage orders, Council agrees that uniformity of laws would be beneficial. This is a matter for the states and territories to consider, along with their position on commercial surrogacy. Council agrees that it would be appropriate for the Standing Committee on Law and Justice to consider this matter.

### **3.10 Recommendations**

#### **Recommendation 12**

The new federal Status of Children Act (see Recommendation 7) should contain provisions specifically dealing with applications for transfer of parentage in surrogacy cases where state and territory Acts do not apply. This should be based on a transfer of parentage process and not a presumption of parentage.

#### **Recommendation 13**

The provisions in the new federal Status of Children Act dealing with the transfer of parentage in surrogacy cases where state and territory Acts do not apply should contain a set of minimum requirements based on the proposals considered by Ryan J in *Ellison and Anor & Karnchanit* [2012] FamCA 602 with the aim to ensure compliance with Australia's international human rights obligations, including the following:

- That any order is subject to the best interests of the child;
- Provision is made for when the parties change their minds;
- Evidence of the surrogate mother's full and prior informed consent;
- Evidence of the surrogacy agreement, including any sums paid;
- Consideration should be given to whether the intending parents have acted in good faith in relation to the surrogate mother;
- Evidence of the intending parent/s actions in relation to ensuring the child will have access to information concerning the child's genetic, gestational and cultural origins;
- Provision is made that where a surrogacy arrangement involves multiple births, orders must be made in relation to all children born;
- The legality of the surrogacy arrangement should be a relevant consideration for the court when determining parentage.

#### **Recommendation 14**

Council recommends that s 60H of the *Family Law Act* should be amended so that it is clear it does not apply to surrogacy arrangements. This amendment should be effected irrespective of whether the Australian Government introduces a new Status of Children Act.

#### **Recommendation 15**

Council recommends that s 60HB of the *Family Law Act* should be retained (in some form) to recognise state and territory orders that transfer parentage in domestic surrogacy arrangements. This recommendation should apply irrespective of whether the Australian Government introduces a new Status of Children Act.

#### **Recommendation 16**

Council recommends that the Australian Government should pass amendments to:

- Clarify whether the court has power to authorise the taking of a sample from a child without the consent of a parent.
- Amend s 69ZC of the *Family Law Act* to make it clear that a non-compliant report may be admitted into evidence if the court is satisfied it should be.

This should be effected irrespective of whether the Australian Government introduces a new Status of Children Act.

# CHAPTER 4: Parentage for the purposes of other Commonwealth laws

## 4.1 Introduction

The terms of reference asked Council to consider whether any amendments could be made to the *Family Law Act* to assist other Commonwealth agencies, such as those responsible for immigration, citizenship and passports, to identify who the parents of a child are for the purposes of Commonwealth laws. This chapter outlines the problems identified by a number of stakeholders in the interaction of various Commonwealth laws including citizenship, migration and passports. In particular, a number of inconsistencies have arisen in different areas of Commonwealth laws in how various Commonwealth agencies determine who the parent of a child is. This is despite the fact that many pieces of Commonwealth legislation explicitly refer to the *Family Law Act* parentage provisions in Part VII.<sup>515</sup> Although the focus in this chapter is on citizenship and international surrogacy arrangements, Council is mindful that there are other situations where these laws interact. In particular, child support is an important area of legal responsibility where legal parentage is largely determinative of liability.<sup>516</sup>

## 4.2 Overview of Commonwealth laws relating to parent-child relationships

As outlined in the Preface, there is a difference between having the status of a legal parent and having 'parental responsibility'. People who are not legal parents may still be granted parental responsibility by a court order.<sup>517</sup> Legal parents automatically have parental responsibility unless a court orders otherwise: 'Each of the parents of a child who is not 18 has parental responsibility for the child.'<sup>518</sup>

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515 See Appendix D: Table of significant Commonwealth legislation.

516 Generally only parents are liable to pay for child support. There are some limited circumstances in which a step-parent may be liable to pay for child support: s 66D *Family Law Act*.

517 *Family Law Act*, s 65C(c).

518 *Family Law Act*, s 61C.

Parental responsibility is not affected by the change in the relationship of the parents.<sup>519</sup> Importantly, the legal status of being a parent is permanent (unless there is a court ordered transfer—as in adoption and surrogacy), and is not limited by a child turning 18 years old.

Parental responsibility under the *Family Law Act* means ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.’<sup>520</sup> These duties and responsibilities are derived from common law and legislation and include the day-to-day care of, and decision making for children in a number of areas.

In addition to the legal consequences that flow from a parent-child relationship, the significance of legal recognition as a parent also has a broader social and symbolic status.<sup>521</sup> In *G v H*<sup>522</sup> Brennan and McHugh JJ commented that ‘a finding that a particular man is the child’s father might well be of the greatest significance to the child in establishing his or her lifetime identity.’<sup>523</sup>

A number of Commonwealth laws relating to benefits in the areas of tax,<sup>524</sup> superannuation,<sup>525</sup> Medicare etc. already contain broader definitions of parentage than the *Family Law Act* definition—although they often incorporate the *Family Law Act* definitions as well.<sup>526</sup> Legal parentage seems to be most significant in relation to child support, citizenship, migration (all regulated federally) and inheritance (state laws). As discussed in Chapter 1, the *Family Law Act* itself contains a number of provisions that refer specifically to parents. The following sections consider the main areas of Commonwealth law.

### 4.3 Citizenship and surrogacy arrangements

Australian citizenship is determined by the *Australian Citizenship Act 2007* (Cth) (*Citizenship Act*). Australian citizenship may be acquired automatically (as in the case of a child born in Australia to Australian parents<sup>527</sup>) or may be acquired by application.<sup>528</sup> The *Citizenship Act* does not contain a definition of parent, although it does contain a definition of a child in Section 3:

**child:** without limiting who is a child of a person for the purposes of this Act, each of the following is the **child** of a person:

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519 *Family Law Act*, s 61C(2).

520 *Family Law Act*, s 61B.

521 The symbolic significance of legal parentage can be very important for children: McNair, Ruth, ‘Outcomes for Children Born of ART in a Diverse Range of Families’ (Victorian Law Reform Commission Occasional Paper, 2004).

522 [1994] HCA 48; (1994) 181 CLR 387.

523 *G v H* [1994] HCA 48; (1994) 181 CLR 387, para 8.

524 *A New Tax System (Family Assistance) Act 1999* (Cth), s 22 defines a ‘family tax benefit child’

525 *Superannuation Industry (Supervision) Act 1993* (Cth), s. 10: ‘child’ includes ‘(a) an adopted child, a stepchild or an ex-nuptial child of the person; and (b) a child of the person’s spouse; and (c) someone who is a child of the person within the meaning of the *Family Law Act*’.

526 See Appendix D which lists the main provisions in Commonwealth laws.

527 See s 12 of the *Citizenship Act*, ‘Citizenship by birth’.

528 See Division 2 of the *Citizenship Act*, ‘Acquisition of Australian citizenship by application. Subdivision A—Citizenship by descent.’

- (a) an adopted child, stepchild or exnuptial child of the person;
- (b) someone who is a child of the person within the meaning of the *Family Law Act 1975*.

In the case of surrogacy arrangements, where children are born overseas, a route to citizenship has been to apply for citizenship by descent.<sup>529</sup>

The eligibility requirement for applying for citizenship by descent has raised the problem of the status of the intending parents at the time of birth of the child overseas. The former Department of Immigration and Citizenship (DIAC)<sup>530</sup> advises that its policy has been to grant citizenship by descent where at least one intending parent can demonstrate a biological connection with the child.<sup>531</sup>

In addition, an application for citizenship by descent for a child under 16 years of age requires the consent of a 'responsible parent'.<sup>532</sup> A responsible parent is defined in s 6 of the *Citizenship Act*:

- (1) For the purposes of this Act, a person is a **responsible parent** in relation to a child if and only if:
  - (a) the person is a parent of the child except where, because of orders made under the *Family Law Act 1975*, the person no longer has any parental responsibility for the child; or
  - (b) under a parenting order the child is to live with the person (whether or not the person is a parent of the child); or
  - (c) under a parenting order the person has parental responsibility for the child's longterm or daytoday care, welfare and development (whether or not the person is a parent of the child); or
  - (d) the person (whether or not a parent of the child) has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.
- (1A) In paragraph (1)(a):

**parental responsibility** has the same meaning as in Part VII of the *Family Law Act 1975*.

- (2) Expressions used in paragraphs (1)(b) and (c) have the same meaning as in the *Family Law Act 1975*

529 *Citizenship Act*, s 16.

530 This chapter refers to the former Department of Immigration and Citizenship, as it made its submission and consulted with Council prior to its name changing to the Department of Immigration and Border Protection in September 2013. When referring to this Commonwealth agency, the acronym DIAC will be used.

531 DIAC Submission; *Australian Citizenship Instructions* as at 1 July 2013, 19.2 'Meaning of Parent' and 19.7 'Children born overseas as a result of a surrogacy arrangement'. See also DIAC's 'Fact Sheet 36a—International Surrogacy Arrangements', available online at: <[www.immi.gov.au/media/fact-sheets/36a\\_surrogacy.htm](http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm)>.

532 *Citizenship Act*, s 46 (2A).

As a result of differences in the legal status of surrogacy arrangements in different countries (and jurisdictions), determining who has parental responsibility may vary depending on the laws of the other jurisdiction.<sup>533</sup>

Citizenship for the purposes of children born in Australia as a result of a surrogacy arrangement is linked to the *Family Law Act* provisions, which in turn reflect the state/territory parentage laws and surrogacy transfer provisions. Section 8 of the *Citizenship Act* defines a 'child born as a result of artificial conception procedures or surrogacy arrangement' by reference to sections 60H *Family Law Act* and 60HB *Family Law Act*.

8 Children born as a result of artificial conception procedures or surrogacy arrangements

- (1) This section applies if a child is:
  - (a) a child of a person under section 60H or 60HB of the *Family Law Act 1975*; and
  - (b) either:
    - (i) a child of the person's spouse or de facto partner under that section; or
    - (ii) a biological child of the person's spouse or de facto partner.
- (2) The child is taken for the purposes of this Act:
  - (a) to be the child of the person and the spouse or de facto partner; and
  - (b) not to be the child of anyone else.

DIAC has proceeded on the basis that the definition in s 8 *Citizenship Act* does not apply to surrogacy arrangements entered into overseas.<sup>534</sup> The reason why s 8 *Citizenship Act* is said not to apply is because, as has already been discussed, s 60HB *Family Law Act* only applies to domestic surrogacy arrangements where state court orders have been made under the relevant state and territory laws.<sup>535</sup> In addition, the DIAC has also concluded that s 60H *Family Law Act* (children born as a result of artificial conception procedures) of the *Family Law Act* does not apply in the case of overseas surrogacy arrangements. The lack of clarity around the interpretation of s 60H *Family Law Act* in relation to surrogacy arrangements generally was discussed in the previous chapter (see 3.5). In light of this, DIAC has developed its own guidelines for interpreting the provisions of the *Citizenship Act*. As DIAC noted in its submission to Council:

Until 2010, it was the Department's position that, except where section 8 applies, 'parent' meant a biological parent. On 15 September 2010, the Full Federal Court found that 'parent' for the purposes of the *Australian Citizenship Act 2007* (the *Citizenship Act*) cannot be

533 See the *Australian Citizenship Instructions*, 20.3, on Responsible parent and overseas surrogacy arrangements.

534 DIAC Submission. See also the *Australian Citizenship Instructions* (ACIs). The ACIs set out how the Department interprets the relevant sections in the *Family Law Act* that are referred to in section 8 of the *Citizenship Act*.

535 That is, the state and territory legislation prescribed for the purposes of s 60HB *Family Law Act*. See the discussion in Chapter 3, above at 3.3.

restricted to biological parents and is a question of fact, with regard to all the circumstances, including biological, social and legal. This ruling increased the vulnerability of the citizenship program to child trafficking and/or abduction cases. Cases where there is no biological link with an Australian intended parent, including those involving international surrogacy, are dealt with on a case by case basis, with close scrutiny of the evidence.

It is also our policy that the provisions relating to s 60H of the *Family Law Act* (about artificial conception procedures) do not apply to international surrogacy cases because the birth mother is not an intended parent, allowing us to recognise the biological intended parent as a parent for the purposes of the Citizenship Act.<sup>536</sup>

This policy has produced inconsistencies with both the *Family Law Act* and state and territory laws, which provide that a woman who gives birth to a child is always considered to be a legal parent of that child.

In addition, an important case of the Full Court of the Federal Court has considered the definition of a parent in the context of applications for citizenship by descent.<sup>537</sup> Although this decision did not involve a surrogacy arrangement, the Full Court's consideration of the meaning of 'parent' for the purposes of the *Citizenship Act*, has implications for children born from surrogacy arrangements, as discussed below.

***Does a 'parent of a person' in the Citizenship Act (s 16(2)) mean only a natural or biological parent of the person?***

In *H v Minister for Immigration and Citizenship (H's case)*<sup>538</sup> the Full Court of the Federal Court considered the question whether the definition of a 'parent of a person' in s 16(2) of the *Citizenship Act* means only a natural or biological parent. The Court held that this is a question of fact in accordance with the 'ordinary meaning' of the word 'parent'.<sup>539</sup>

*H's case* involved two separate appeals from decisions of the Administrative Appeals Tribunal of Australia.<sup>540</sup> One of the appeals involved a two year old boy who had been born in China. His mother was a Chinese citizen and his father (H) was an Australian citizen. The parents had married a couple of months before the child was born. The father was named on the child's birth certificate as the father. However, it was accepted that the father was not the biological father of the child. Both the Minister's delegate and the Tribunal had held that 'parent' meant 'biological parent'.<sup>541</sup>

The second appeal involved a woman (Ms McMullen) born in Fiji in 1988. Her mother was a Fijian citizen as was Ms McMullen. At the time of Ms McMullen's birth it was assumed that Mr McMullen, an Australian citizen, was her father. Ms McMullen's mother had had sexual relationships with two men

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536 DIAC Submission, p. 3.

537 *H v Minister for Immigration and Citizenship* [2010] FCAFC 119.

538 [2010] FCAFC 119.

539 [2010] FCAFC 119, paras 129-130.

540 *H v Minister for Immigration and Citizenship* [2009] AATA 833 and *McMullen v Minister for Immigration and Citizenship* [2009] AATA 638.

541 *H v Minister for Immigration and Citizenship* [2010] FCAFC 119, para 5.

around the time of her conception (Mr McMullen and Mr Davidson). However the mother had advised Mr McMullen that he was the father. He had then visited the mother during the pregnancy and after the birth. As Mr McMullen had had doubts about his paternity, blood tests were done shortly after birth. These indicated that the daughter had the same blood type as Mr McMullen but not her mother and so it was accepted by all that Mr McMullen was the father. Ms McMullen and Mr McMullen had continued to have a father-daughter relationship ever since. However in 2008 a DNA test indicated that the original assumption about paternity was incorrect. The Tribunal therefore determined that 'Ms McMullen had a biological father in the late Mr Davidson and an accepted father in Mr McMullen'. The Tribunal rejected the argument that a parent was limited to biological parentage, and found that a father/daughter relationship existed between Mr McMullen and Ms McMullen. The Minister appealed that finding.<sup>542</sup>

In the Full Court of the Federal Court, Moore, Kenny and Tracey JJ, rejected the Minister's arguments for a limited meaning of parent.

Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological. Once, in the case of an illegitimate child, biological connection was not enough; today, biological connection in specific instances may not be enough: Citizenship Act, s 8 referring to ss 60H and 60HB of the *Family Law Act*, in turn picking up prescribed State and Territory laws such as the *Status of Children Act 1974* (Vic). Perhaps in the typical case, almost all the relevant considerations, whether biological, legal, or social, will point to the same persons as being the "parents" of a person. Typically, parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own.

The ordinary meaning of the word "parent" is, however, clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning. Applying s 16(2)(a), the Tribunal is bound to determine whether or not, at the time of the applicant's birth, he or she had a citizen parent. 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.<sup>543</sup>

Consistent with the Full Federal Court's decision, a genetic connection may no longer be a necessary requirement to be eligible to apply for citizenship by descent.

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542 *H v Minister for Immigration and Citizenship* [2010] FCAFC 119, para 7.

543 *H v Minister for Immigration and Citizenship* [2010] FCAFC 119, paras 129-130.

DIAC advised Council that some intending parents who have entered overseas surrogacy arrangements are not undertaking DNA testing and are seeking to rely on foreign birth certificates and the decision in *H's* case as a basis for their applications for citizenship for the children.<sup>544</sup> It is also possible that DNA testing might not support the claim of a biological relationship where either donated sperm and eggs were used or where there has been an error in the treatment. So whilst the intending parents may have had a genuine belief of a genetic connection this turns out to be mistaken.<sup>545</sup> The current *Australian Citizenship Instructions* provide that in these cases (where there is no evidence of biological connection) the decision maker 'should assess the claimed parent-child relationship in the light of any other relevant factors.'<sup>546</sup> These include evidence of consent to be named on a birth certificate, and in the case of surrogacy arrangements, 'a formal surrogacy agreement entered into before the child was conceived and lawful transfer of parentage before or at time of birth in the country in which the surrogacy was carried out.'<sup>547</sup>

It is important to emphasise that a finding that a person is a parent for the purposes of the *Citizenship Act* does not mean that the person is a parent for the purpose of other Australian law, and, as discussed in the previous chapter, it does not mean the person is a parent for the purposes of the *Family Law Act*.

## 4.4 Passports

Australian citizens are entitled to be issued with an Australian passport. The *Australian Passports Act 2005* (Cth) (*Passports Act*) provides as follows:

7 Australian citizen is entitled to be issued an Australian passport

- (1) An Australian citizen is entitled, on application to the Minister, to be issued with an Australian passport by the Minister.
- (2) An Australian citizen's entitlement to be issued with an Australian passport is affected by section 8 and by Division 2.
- (3) An application for an Australian passport must be:
  - (a) made in the form approved by the Minister; and
  - (b) accompanied by the applicable fee (if any).

8 Minister to be satisfied of person's citizenship and identity

Before issuing an Australian passport to a person, the Minister must be satisfied:

- (a) that the person is an Australian citizen; and
- (b) of the identity of the person.

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544 DIAC Consultation, 1 November 2012.

545 DIAC Submission, p. 8.

546 *Australian Citizenship Instructions* 1 July 2013, Chapter 19.3.1. Available online at: <[www.citizenship.gov.au/\\_pdf/acis-july-2013.pdf](http://www.citizenship.gov.au/_pdf/acis-july-2013.pdf)>.

547 *Australian Citizenship Instructions* 1 July 2013, Chapter 19.4.2. Available online at: <[www.citizenship.gov.au/\\_pdf/acis-july-2013.pdf](http://www.citizenship.gov.au/_pdf/acis-july-2013.pdf)>.

Children born overseas as a result of a surrogacy arrangement, (where citizenship by descent has been granted) will also need to obtain a passport in order to travel to Australia. Under s 11 of the *Passports Act* there are special considerations relating to issuing passports for children:

- (1) The Minister must not issue an Australian passport to a child unless:
  - (a) each person who has parental responsibility for the child consents to the child travelling internationally; or
  - (b) an order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally.<sup>548</sup>

In the absence of the consent of 'each person who has parental responsibility for the child' or an order of the court, it is possible to apply to a delegate of the Minister in specified circumstances.<sup>549</sup>

To determine who has parental responsibility, s 11(5) of the *Passports Act* refers to the child's parent ('including a person who is presumed to be the child's parent because of a presumption (other than in section 69Q) in subdivision D of Division 12 of Part VII of the *Family Law Act 1975*.<sup>550</sup>) This section refers to the traditional presumptions of marriage, birth registration, acknowledgment etc, but excludes the presumption of paternity arising from cohabitation (s 69Q *Family Law Act*). Subsections 11 (5)(b) and (d) *Passports Act* also recognise parental responsibility based on parenting orders, or other Commonwealth and state laws under which a person is entitled to 'guardianship or custody of, or access to, the child'. As the Department of Foreign Affairs and Trade notes, in overseas surrogacy cases intending parents are not legal parents for the purposes of Australian law and do not have parental responsibility unless (and until) such an order is made by the family courts of Australia.<sup>551</sup> This means that the consent of the surrogate mother, as the parent of the child, is required. The Department of Foreign Affairs and Trade also notes that foreign court orders have no application under the *Passports Act*. So a surrogate mother would retain parental responsibility under Australian law even if there is a foreign court order that expressly extinguishes her parental responsibility.

The Department of Foreign Affairs and Trade also raised the issue of who has parental responsibility even after an Australian court order has been made granting parental responsibility to intending parents. In these cases, they submit it is unclear whether the surrogate mother retains parental responsibility and, as a consequence, would be required to consent to future passport (renewal) applications.<sup>552</sup>

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548 Department of Foreign Affairs and Trade Submission, p. 1; *Passports Act*, s 7.

549 *Passports Act*, s 11(2).

550 *Passports Act*, s 11(5).

551 Department of Foreign Affairs and Trade Submission, p. 2. Compare this with DIAC's recognition of a 'responsible parent'.

552 The issue of passport renewals was also raised by Surrogacy Australia Submission, p. 6; Stephen Page Submission, pp. 28-29.

## 4.5 Visas and immigration

As DIAC reports, in order to enter Australia 'a child born overseas must apply (and be eligible) for either Australian citizenship (by descent) or a visa for Australia.'<sup>553</sup> The majority of children born overseas as a result of surrogacy arrangements have at least one intending parent who is an Australian citizen and so applications for citizenship by descent have been the usual route. DIAC reports that the numbers of such applications have been steadily increasing since 2008.<sup>554</sup> In other cases, intending parents will need to apply for a visa in order to bring the child/ren to Australia.

In addition, DIAC also sees applications from 'established families' who have older children (ie. not newborns) who were born as a result of lawful surrogacy agreements in their country of origin. These applications are typically made by non-Australians or expatriate Australian parents. The following categories of visas are relevant:

### **Child Visa (Subclass 101)**

This visa allows a parent (but not an adoptive parent) to sponsor their child for permanent migration to Australia. It must be applied for outside Australia.

DIAC notes that it is not possible to tell how many visas in this category have been granted to children born under international surrogacy agreements, but they estimate it is only a small number each year.<sup>555</sup>

### **Child Visa (Subclass 102—Adoption Visa)**

This visa provides for the permanent migration of a child who is either:

- adopted (or to be adopted) with the involvement of an Australian state/territory adoption authority (either under the Hague Convention, the bilateral agreement with the PRC or another adoption agreement) or
- adopted by expatriate Australians who have been living overseas for more than 12 months.<sup>556</sup>

### **Child Visa (Subclass 802)**

These visas allow an eligible parent or an adoptive parent to sponsor their child to stay permanently in Australia. This visa must be applied for inside Australia. Some children may also be included on a parent's visa application as a secondary applicant in other classes of visa such as 'Business (Long Stay) (subclass 457) visa.

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553 DIAC Submission, p. 3.

554 Applications for citizenship by descent to infants born in India rose from 170 in 2008 to 394 in 2011: DIAC, 'Citizenship by Descent applications granted to infants by India and USA posts' (5/5/2012). Although it is not possible to tell precisely how many of these applications related to children born from surrogacy, it has been noted that large increases in applications have come from India and Thailand: See discussion by Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135.

555 DIAC Consultation, 1 November 2012.

556 DIAC, Procedures Advice Manual (PAM3) as at 1 September 2013, clause 102.211.

Eligibility for a Child Visa (Class 101) depends on the recognition of a parent-child relationship. The *Migration Act 1958* (Cth) (*Migration Act*) defines a 'child of a person' as:

5CA Child of a person

- (1) Without limiting who is a child of a person for the purposes of this Act, each of the following is the child of a person:
  - (a) someone who is a child of the person within the meaning of the *Family Law Act 1975* (other than someone who is an adopted child of the person within the meaning of that Act);
  - (b) someone who is an adopted child of the person within the meaning of this Act.<sup>557</sup>

As DIAC noted 'these definitions are inclusive, rather than conclusive—together, they ensure that for migration purposes, we recognise parent-child relationships covered under the *Family Law Act*, and also recognise both formally and customarily adopted children, as well as step-children.'<sup>558</sup>

DIAC advises that its current policy in relation to the *Migration Act* is that:

[i]n the absence of specific provisions such as those at s 60H or s 60HB of the *Family Law Act*, or those relating to adoption, a parent must be the biological parent of the child. For international surrogacy cases, we therefore generally require that there be a biological link between the intended parent and the child in order for the parent-child relationship to be recognised.<sup>559</sup>

In addition to the eligibility requirements based on the recognition of a child-parent relationship, there are also public interest criteria relating to parental responsibility in Schedule 4 of the *Migration Regulations 1994* (Cth). Public Interest Criteria 4015 and 4017 require that:

The Minister is satisfied of 1 of the following:

- (a) the law of the additional applicant's home country permits the removal of the additional applicant;
- (b) each person who can lawfully determine where the additional applicant is to live consents to the grant of the visa;
- (c) the grant of the visa would be consistent with any Australian child order in force in relation to the additional applicant.<sup>560</sup>

The Minister is satisfied of 1 of the following:

- (a) the law of the applicant's home country permits the removal of the applicant;

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557 The *Migration Regulations 1994* (Cth), Reg 1.04, See Appendix D for summary.

558 DIAC Submission, p. 4.

559 DIAC Submission, p. 4.

560 Public Interest Criteria 4015, Schedule 4, *Migration Regulations 1994* (Cth).

- (b) each person who can lawfully determine where the applicant is to live consents to the grant of the visa;
- (c) the grant of the visa would be consistent with any Australian child order in force in relation to the applicant.<sup>561</sup>

## 4.6 Submissions and consultations

### ***Citizenship and parentage***

DIAC provided information in relation to its current policies and processes in relation to assessing applications for citizenship by descent. DIAC's position is that s 60H *Family Law Act* does not apply to overseas surrogacy arrangements because the 'birth mother is not an intended parent.'<sup>562</sup> This is inconsistent with cases decided under the *Family Law Act*<sup>563</sup> and the state and territory parentage laws. DIAC grants citizenship by descent based on a genetic relationship to an intending parent. In addition, DIAC will also consider citizenship by descent in the absence of evidence of a genetic relationship following the decision in *H v Minister for Immigration and Citizenship*<sup>564</sup> that the ordinary meaning of parent is not restricted to biological definitions.

DIAC expressed concern about the lack of legal regulation in the destination countries and the uncertain legal framework as well as the inconsistencies arising from the application of country specific approaches. The risks of bypassing international adoption regulations, child trafficking, and the potential for exploitation of women and children in international surrogacy arrangements were also of concern to DIAC. DIAC notes that they are not always able to determine if a surrogacy arrangement has taken place.

From DIAC's point of view, it would like the *Family Law Act* to be amended to include a clear definition of a parent (and who is not a parent) in international surrogacy cases. DIAC noted that this may be subject to some minimum requirements but expressed the view that it should not be too complex.

DIAC suggested three options:

1. A specific provision in the *Family Law Act* setting out minimum requirements (based on state/territory legislation and with regard to laws in relevant jurisdiction).

DIAC suggested a minimal set of requirements relating to the age of the parties, a requirement for a biological link, and that the agreement is lawful in the overseas jurisdiction. DIAC thought that counselling requirements (as are required in domestic laws) might be difficult to assess.

<sup>561</sup> Public Interest Criteria 4017, Schedule 4, *Migration Regulations 1994* (Cth).

<sup>562</sup> DIAC Submission, p. 3.

<sup>563</sup> Ryan J rejected a similar argument made in *Ellison's* case. Other submissions raised the contradictions between DIAC's interpretation of the *Citizenship Act* and the *Family Law Act*: Professor Jenni Millbank Submission, pp. 7-8; NSW Bar Association Submission para 61; Surrogacy Australia Submission, p. 5; Stephen Page Submission, pp. 18-19; Paul Boers Submission, pp. 16-17; D Brown Submission, pp. 5-6; Women's Legal Service NSW Submission, para 65; Dr Olivia Rundle Submission, p. 4.

<sup>564</sup> [2010] FCAFC 119.

2. Prescribing certain overseas jurisdictions for the purposes of recognising surrogacy arrangements.
3. Access to the family law courts in Australia to determine parentage. This option is to provide a process of judicial oversight whereby intending parents would apply to the Courts. DIAC expressed the view that this option might lead to less consistent outcomes and might cause difficulties for non-Australians.

In addition, DIAC recommends that some provision is needed for Australian residents, expatriates and other nationals who have established family through surrogacy arrangements overseas that were legal and undertaken when those intending parents were resident in that other country (similar to the recognition of expatriate (private) overseas adoptions that take place when the parents were usually resident in that country).<sup>565</sup>

The inconsistency between DIAC's determination of parentage for the purposes of citizenship by descent and the *Family Law Act* definition was noted in other submissions to Council.<sup>566</sup> Surrogacy Australia and Stephen Page recommend that the *Family Law Act* should follow DIAC's definitions of parents. Surrogacy Australia also submitted that the *Citizenship Act's* definition of parent should be broadened to include intending parents without a genetic link.<sup>567</sup>

Whereas, the Law Institute of Victoria submitted that DIAC and other Commonwealth agencies should 'defer to the FLA [*Family Law Act*] regarding requirements for parentage and allow commissioning parents who have entered into overseas surrogacy arrangements to access the Australian state and territory transfer of parentage mechanisms.'<sup>568</sup>

Paul Boers noted:

It is submitted that it is not the responsibility of the *Family Law Act* to assist other Commonwealth agencies to identify parentage arising out of artificial conception procedures or surrogacy. For immigration purposes, the Department of Immigration will need to set out clear guidelines in order to obtain citizenship by descent, or at the very least an entry visa, for a child born into an overseas surrogacy arrangement, dependent upon the country where it occurred and the status of the intended parent(s) in terms of parentage in each country.<sup>569</sup>

Professor Millbank referred to DIAC's current approach as 'citizenship before parentage is the cart before the horse.'<sup>570</sup> As Professor Millbank submitted:

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565 Michael Nicholls QC also noted the need for some recognition rules in relation to cases where citizens, or other nationals, have been domiciled overseas: Michael Nicholls Submission, pp. 3-4.

566 Professor Jenni Millbank Submission, pp. 7-8; NSW Bar Association Submission para 61; Surrogacy Australia Submission, p. 5; Stephen Page Submission, pp. 18-19; Paul Boers Submission, p. D Brown Submission, pp. 5-6; Women's Legal Service NSW Submission, para 65; Dr Olivia Rundle Submission, p. 4.

567 Surrogacy Australia Submission, p. 7.

568 Law Institute of Victoria Submission, p. 16. Council notes that intending parents are not eligible to apply to State based transfer of parentage as the law currently stands.

569 Paul Boers Submission, p. 16.

570 Professor Jenni Millbank Submission, p. 7; See also Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' [2013] 27 *Australian Journal of Family Law* 135.

In various incarnations over the past four years the citizenship instructions have become more detailed, but they do not, and cannot, provide oversight to ensure informed consent of surrogates and a best interests inquiry for the child in the way that Australian law and policy to date have deemed necessary.

Grants of citizenship by descent are taking place at a low level of administrative operation, often in the space of one or two weeks. In doing so, officers utilise documentation from fertility providers (usually in conjunction with but sometimes in place of DNA results) and defer to local law by relying on surrogacy contracts and local rules on parentage in surrogacy to treat the birth mother as if she is not a parent. This implicit deference to local law even though it is in conflict with Australian law, which holds that the surrogate is always a parent, is apparent in the contrast between the approach to applications from different countries of birth.<sup>571</sup>

Professor Millbank submitted that parentage should therefore be determined before citizenship. This would require a new system allowing for a grant of a

[v]isa and/or temporary or discretionary status to enable parents and children to enter Australia and apply for orders and to address their status until orders were granted. As in the United Kingdom, citizenship by descent could then automatically follow from parentage orders. Close co-operation would be needed between the FamCA, DIAC and DFAT to enable this process to happen with efficiency and clarity.<sup>572</sup>

Surrogacy Australia did not support the proposal that intending parents should apply for parenting orders before citizenship. They submitted:

In practice, this would potentially mean the child entering Australia on a visa until parentage (and Citizenship) were processed. This approach would also require communication between various government departments (eg the court system and DIAC). There are a number of significant concerns in regard to such a solution:

- a) It would add a huge layer of bureaucracy to what should be a simple issue to define;
- b) It would block up a court system designed to assist families in conflict and children in need, with cases in which there are no adversarial claims and no issues of parental neglect or malfeasance;
- c) Such children and their intended parents would lack access to any social security benefits until their Citizenship was processed (eg Medicare, Centrelink payments, leave entitlements); [and]
- d) It would risk many intended parents concealing the nature of their children's birth in order to circumvent the need for parenting orders (where both parents names appear on the foreign birth certificate).<sup>573</sup>

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571 Professor Jenni Millbank Submission, p. 8.

572 Professor Jenni Millbank Submission, p. 16 (references omitted). See also Paul Boers Submission, p. 16.

573 Surrogacy Australia Submission, p. 7.

Karyn Anderson and Hannah Dickenson noted that there is already in place administrative processes and familiarity with similar types of considerations in relation to visas in international private adoption that could be adapted to international surrogacy arrangements.<sup>574</sup>

Megan Noyce of the New Zealand Ministry of Justice provided Council with information in relation to the legal situation in New Zealand. She advised that

[w]hen a child is born overseas as a result of an international surrogacy arrangement commissioned by New Zealanders, New Zealand law does not consider the NZ commissioning parents to be the child's legal parents. This means that the child is not a New Zealand citizen and is not entitled to enter (or stay in) New Zealand. However, the Minister of Immigration has a statutory discretion to grant a visa for entry into or residence in New Zealand. Similarly, the Minister of Internal Affairs has discretion to grant citizenship to applicants who do not meet the requirements of the Citizenship Act 1977.<sup>575</sup>

### ***Immigration and Children in other cases: Refugee and humanitarian entrants***

The Refugee Council of Australia (RCOA) raised the situation of children who are customarily adopted in the context of forced migration. The RCOA noted that customary adoption of children is common in these situations—either by extended family relatives, or others. These children who enter Australia on humanitarian visas may be presented as biological children of the adults who accompany them. RCOA submitted that DIAC's processes for assessing and granting humanitarian visas does not recognise children who are customarily adopted.<sup>576</sup> RCOA recommended that children who are 'customarily adopted overseas who migrate to Australia as a nuclear family should be recognised in Australian law'.<sup>577</sup>

The Refugee and Immigration Legal Service (RAILS) referred to the *Migration Act* and the *Migration Regulations* definitions of child and parent. These definitions incorporate the *Family Law Act* definitions, with the exception of a child who is adopted within the meaning of the *Family Law Act*. The *Migration Regulations* contain separate definitions of the meaning of an adopted child. These definitions include 'customary adoption in specific circumstances'.<sup>578</sup>

RAILS generally supported the current interrelationship of the *Family Law Act* provisions with the *Migration Act* and *Migration Regulations* but submitted that greater clarity within the migration laws about the application of the presumptions of parentage and parentage testing procedures would benefit their clients. For instance, RAILS referred to the operation of the general presumptions in Australian law (such as those arising from marriage, birth certificates and acknowledgments) but referred to DIAC policy that relates to requests for DNA testing if there are significant doubts

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574 Karyn Anderson and Hannah Dickinson, Clothier Anderson & Associates, Consultation, 31 May 2013.

575 Megan Noyce, Ministry of Justice New Zealand, Consultation, 16 January 2013.

576 Compare with DIAC policy in relation to surrogacy as discussed above. RCOA advised that the difficulty for humanitarian entrants is often the inability to provide documentary support for their claims, and/or the added burdens for those whose families have been affected by conflict, flight and resettlement.

577 RCOA Submission, p. 2.

578 RAILS Submission, p. 3 citing the Supplementary Explanatory Memorandum Same Sex Relationships (Equal Treatment in Commonwealth Laws—General Laws—General Law Reform) Bill 2008.

about a claimed biological relationship. RAILS submitted that although DNA testing is said to be a 'last resort', in their experience 'certain caseloads are being required to provide DNA testing by DIAC officers as an instance of first resort. It was noted that this requirement is onerous for many refugees. RAILS recommended that there should be greater statutory guidance on the application of the presumptions of parentage to migration proceedings.

### ***Parentage for the Purposes of other Commonwealth Laws—Child Support***

The determination of who is a child's legal parent has particular significance in the context of assessing liability for child support. The parents of a child have the primary duty to maintain the child.<sup>579</sup>

The *Child Support (Assessment) Act 1989* (Cth) (CSAA) defines a parent by reference to the *Family Law Act* definitions:

parent:

- (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 a person who is a parent of the child under section 60HB of the *Family Law Act 1975*.<sup>580</sup>

The question of the interaction of the *Family Law Act* and the CSAA was also raised in the course of Council's inquiry.<sup>581</sup>

The ACT Law Society noted the different outcomes for whether a known sperm donor is considered a legal parent under the *Family Law Act* and the CSAA.<sup>582</sup> This issue was touched upon in Chapter 2 where for example, in *Re B and J*<sup>583</sup> Fogarty J had held that a known sperm donor was not a parent for the purposes of the CSAA, however Fogarty J had queried whether that would necessarily be the case for the purposes of s 60H of the *Family Law Act*. The difference between the two Acts, was that in the case of the CSAA the definition of a parent was specifically limited by the terminology that a 'parent' "means" a person who is a parent of the child under s 60H of the *Family Law Act 1975*.<sup>584</sup> In contrast,

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579 CSAA, s 3; *Family Law Act*, s 66C Principles—parents have primary duty to maintain.

580 CSAA, s 5.

581 Eg. ACT Law Society Submission, p. 3; Family Law Section Submission, para 44.

582 ACT Law Society Submission, p. 3.

583 [1996] 21 Fam LR 186

584 *Re B and J* [1996] 21 Fam LR 186, p. 197. See also *BM and DA* [2007] FMCAfam 770 where Federal Magistrate Henderson (as she then was) agreed that the definition of a parent for child support purposes is different to that under the *Family Law Act*: 'a person who is not an Assessment Act parent may still be a Family Law parent': *Re B and J* [1996] FLR 186 at 197. The CSAA now contains a definition in relation to surrogacy but as noted, that depends on the presence of a State/Territory Court order.

in cases where known sperm donors have sought parenting orders under the *Family Law Act* (but not declarations of parentage) some judicial officers have taken the 'expansive' approach to s 60H *Family Law Act* so that for the purposes of the *Family Law Act* a known sperm donor may be considered a parent in limited circumstances.<sup>585</sup>

As the ACT Law Society noted, there are examples where a known sperm donor has been able to obtain parenting orders to spend time with a child, and restrict the child's mothers from relocating, but without incurring any child support liability.<sup>586</sup>

The Family Law Section also referred to a number of situations where the current parentage provisions would lead to outcomes that might not be in the best interests of children:

So, for example, if a lesbian couple conceived a child via an artificial conception procedure, but only start cohabiting closer to the birth of the child, then should that family separate years later, the non-birth mother has no liability to pay child support. If a surrogacy fails and the commissioning parents fail to take on the child, instead leaving it with the surrogate, the commissioning parents have no liability to pay child support, although the surrogate's current partner might.<sup>587</sup>

In addition to the examples above, in the case of children born from surrogacy arrangements where s60HB *Family Law Act* does not apply (ie. when there hasn't been a state/territory court order transferring parentage), on the basis of the current state of the law, neither intending parent would be liable for child support, as neither intending parent is a legal parent. Furthermore, even if there was a power for the courts to grant a declaration of parentage in favour of an intending parent with a biological relationship, it is unlikely that this would extend to the partner of the biological parent. An intending mother (whether genetically related or not) or a non-biological intending father would not be legal parents.<sup>588</sup>

The Family Law Section recommended that this area of the law needs review:

FLS recommends that the question of who is liable to pay child support/maintenance for children be reviewed. FLS submits that it is inconsistent, and not in the best interests of a child, for persons who obtain parenting orders in relation to that child but not a declaration of parentage, to have no liability to support that child.<sup>589</sup>

Similarly, the Department of Human Services also pointed out the apparent inconsistency in approach to child support liability as between a man who has a one-off sexual relationship with a woman (who would be considered a parent and therefore liable) and a known sperm donor where there is agreement that he will play some role in the child's life but because the man and the woman

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585 Eg. *Groth & Banks* [2013] FamCA 430—known sperm donor held to be a parent. As noted in Chapter 2 however, such a finding is only possible now where a woman does not have a partner at the time of conception in assisted reproductive technology cases.

586 ACT Law Society Submission, p. 3.

587 Family Law Section Submission, p. 3-4 (references omitted).

588 Professor Jenni Millbank Submission, pp. 12-13.

589 Family Law Section Submission, p. 8

are not in a de facto relationship at the time of conception he would not be considered a parent under the CSAA.<sup>590</sup>

## 4.7 Council's views

Council is of the view that the *Family Law Act* is not the appropriate legislative vehicle for identifying who is a parent of a child for the purposes of other Commonwealth agencies. Council's view is that a new legal framework is required which protects the best interests of children, is consistent with current state and territory law to the greatest extent possible, and is consistent with Australia's international human rights' obligations.

As previously noted, Council recommends that the Government consider the introduction of a separate federal Status of Children Act that would provide for the determination of parentage for the purposes of all Commonwealth laws by courts exercising federal jurisdiction.<sup>591</sup>

As discussed in the previous chapter, Council agreed with those submissions that recommended a transfer of parentage process for surrogacy arrangements where state and territory laws do not apply.<sup>592</sup> The grant of citizenship by descent does not mean the intending parents are considered legal parents in Australian law and this means these children are vulnerable if there is no legally recognised parent in Australia. The great majority of intending parents do not seek parenting orders when they return to Australia as they generally have obtained overseas birth certificates, citizenship, and a passport.<sup>593</sup> As noted, there have been only nineteen reported cases dealing with overseas surrogacy arrangements in the family courts. This means that the great majority of children born as a result of surrogacy arrangements overseas do not have the legal protection of having a legally recognised parent in Australia.

Council is of the view that it is in the best interests of children born from international surrogacy arrangements that a child has at least one parent in Australia who is legally recognised as a parent. Council agrees that a process of transfer of parentage, with judicial oversight, is the preferred option. (See further 3.8).

Council acknowledges that this does not resolve the issue of parentage for the purposes of the *Citizenship Act*. However, given Council's views in relation to how the determination of parentage in overseas surrogacy cases should be approached, Council supports the view that parentage should be determined before citizenship.

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590 Department of Human Services Consultation, 2 October 2013.

591 See the following chapter for further explanation on the proposed recommendation.

592 See 3.5 above and Professor Jenni Millbank Submission, pp. 15-16; Paul Boers Submission, p. 13; Olivia Rundle Submission, p. 13.

593 eg. Professor Jenni Millbank Submission, p. 6; Surrogacy Australia Submission, p. 5; Stephen Page Submission, p. 18; Paul Boers Submission, p. 12.

Council recommends that other Commonwealth agencies consider adapting regulatory models developed around inter-country adoption arrangements.<sup>594</sup> This could include giving consideration to:

- A specific visa class in international surrogacy cases where the minimum requirements are established (eg. Evidence of full, prior informed consent of the surrogate mother, evidence of the agreement, evidence relating to identity of gamete donors/surrogate mothers, evidence of any financial transactions etc.)
- Applications to the Courts in Australia for a transfer of parentage should be brought within a set timeframe (eg. 6 months from return/arrival in Australia).

Council considers that prescribing overseas jurisdictions may also be an option in some cases. However, Council notes that even in those jurisdictions where commercial surrogacy is legal (eg. California) the standards of regulation may not be uniform and so a set of minimum requirements would still be required (beyond the simple fact that an arrangement was lawful within the prescribed jurisdiction). Prescribing overseas jurisdictions could also be considered in relation to the situation where Australians, or other nationals, have undertaken legal arrangements in another country when it was their usual country of residence. This would be similar to the current situation in relation to children adopted by expatriate Australians who have been living overseas for more than 12 months.<sup>595</sup>

Council notes DFAT's submission about the ambiguous effect of parenting orders made in Australia—that is, whether or not such orders extinguish the parental responsibility of the surrogate mother. Council's view, however, is that it is not possible for the *Family Law Act* to provide definitive guidance to other Commonwealth agencies on these matters.

Council acknowledges the concerns and issues raised by the RCOA and the RAILS in relation to children who are entering Australia as refugees. As with other areas of Commonwealth laws, Council's view is that the most appropriate response is for a separate Status of Children Act to be enacted that would be the basis of determination of parentage for all Commonwealth laws.

## 4.8 Recommendations

### Recommendation 17

Council recommends that the Attorney-General ask the Australian Law Reform Commission to conduct an inquiry into the full range of issues raised by international surrogacy and its impact on Commonwealth laws.

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594 Karyn Anderson and Hannah Dickinson advised that the administrative/regulatory framework that already exists for processing private overseas adoption applications, could provide a template for a similar framework for surrogacy: Anderson and Dickinson Consultation, 31 May 2013.

595 See the guidelines for Child Visa 102 in relation to 'expatriate (private) overseas adoptions'. These set out a number of requirements including evidence of an adoption order, details of the parties involved, and evidence that the overseas residency was not contrived to circumvent Australian State/Territory adoption authority requirements: Department of Immigration and Citizenship, Procedures Advice Manual (PAM3) as at 1 September 2013, clause 102.211.

# CHAPTER 5: A federal Status of Children Act and related matters

## 5.1 Introduction

This chapter is concerned with a number of matters that arose in the course of Council's inquiry. In particular, Council's recommendation that the government should consider introducing a federal Status of Children Act is discussed in more detail in this chapter. A number of other issues relating to the parentage of children are also considered. Lastly, Council has also noted a related matter of birth registrations and birth certificates and provides some comments below.

## 5.2 A federal Status of Children Act

As a result of Council's consideration of the wide range of issues raised by the terms of reference, it became clear to Council that Part VII *Family Law Act* is not well suited to providing a definition of legal parentage for the purposes of Commonwealth laws in general. As discussed in previous chapters, the main focus of Part VII *Family Law Act* is the parenting arrangements for children when there is a dispute. Although the question of who is or who are a child's legal parents is an important one, in terms of the *Family Law Act*, the considerations involved in determining what is in a child's best interests in parenting disputes go beyond the determination of legal parentage.<sup>596</sup>

In addition to the above rationale, Council has also highlighted the complexity and fragmentation of the current parentage provisions in Part VII *Family Law Act*.<sup>597</sup> Council is of the view that these provisions should be consolidated and simplified along the lines recommended in this report. Council is of the view that it would be preferable for these provisions to be consolidated within a separate, stand-alone Act. A separate Act would also be more accessible to the general community than the current framework

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<sup>596</sup> See the discussion of the cases in Chapter 2.

<sup>597</sup> See in particular the discussion in Chapters 2 and 3.

The aims of a federal Status of Children Act should be as follows:

- It should provide a clear, accessible and consistent statement of the legal parentage of children for the purposes of all Commonwealth laws and for all courts exercising federal jurisdiction.
- It should include all the current parentage provisions in Part VII *Family Law Act*, as amended, based on the recommendations in this report.
- It should provide a mechanism for the family courts to transfer parentage in surrogacy arrangements.

### **5.3 Legal recognition for Torres Strait Islander customary adoption (Kupai Omasker)**

Council discussed the Torres Strait Islander practice of customary adoption—Kupai Omasker—in Chapter 1. Council noted that receiving parents are not recognised as parents for the purposes of the *Family Law Act* and that the current legal framework has meant that declarations of parentage cannot be made in favour of receiving parents under the current provisions of the *Family Law Act*.<sup>598</sup> Instead, the family courts have dealt with these cases by making parenting orders granting sole parental responsibility to the receiving parents.<sup>599</sup> As noted, parental responsibility is not the same as legal parenthood, and is a ‘lesser’ form of recognition as it does not extend beyond the child reaching 18 years of age and it is not automatically recognised for the purposes of inheritance in intestacy.<sup>600</sup> In addition an order granting parental responsibility does not enable the receiving parents to be named as parents on the child’s birth certificates. Birth certificates are important for a range of legal and administrative matters, for instance, enrolling children in school and sporting clubs as well as for applications for drivers’ licenses, passports and marriage.<sup>601</sup> Because receiving parents are unable to apply for amended birth certificates, the children and their families are affected in a number of ways.<sup>602</sup>

In her submission to Council, the Chief Justice of the Family Court of Australia recommended that the Commonwealth pass separate legislation to enable legal recognition of Torres Strait Islander receiving parents.<sup>603</sup> Council agrees with the Chief Justice’s recommendation.

It is proposed that provision is made to enable the courts to make an order transferring parentage from the giving parents to the receiving parents. The conditions for the court exercising this power would be based on the best interests of the child and that the arrangement was entered into

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598 See *Beck and Anor & Whitby and Anor* [2012] FamCA 129. See the discussion above, in Chapter 2.

599 *Lara and Lara & Marley and Sharp* [2003] FamCA 1393 [para 39]; *Beck and Anor & Whitby and Anor* [2012] FamCA 129.

600 See eg. *Succession Act 1981* (QLD), s. 40.

601 Ban, Paul, ‘Customary “Adoption” in the Torres Strait Islands Towards Legal Recognition’ (1994) 5 *Aboriginal Law Bulletin*.

602 See references above at notes 78–80 and Council’s consultations with Ivy Trevallion and The Honourable Alastair Nicholson, 21 February 2013 and with Josephine Akee (Family Court Cairns Registry).

603 Chief Justice Bryant Submission, p. 6.

voluntarily, with the understanding that the receiving parents would raise the child. Council notes that in the past the court had adopted Practice Directions in relation to the making of orders.<sup>604</sup>

## 5.4 Transfers of parentage for surrogacy arrangements (outside state/territory laws)

A federal Status of Children Act could also respond to the gaps identified in relation to the parentage of children born from surrogacy arrangements where state and territory laws do not apply. Council recommended in Chapter 3 that s 60H should be amended to make it clear that it does not apply to surrogacy arrangements. This means that for the purposes of the *Family Law Act* only state or territory court orders transferring parentage to the intending parents in a surrogacy arrangement would be recognised. For the reasons discussed in Chapter 3 (see 3.8), Council has recommended (Recommendation 12) that the federal Status of Children Act should make provision for the courts exercising federal jurisdiction to transfer parentage in surrogacy arrangements that do not meet the requirements of the relevant state and territory laws. This would cover both inter-state domestic arrangements that do not meet state based requirements as well as overseas surrogacy arrangements. A transfer of parentage process would be consistent with the current process in state and territory laws.

## 5.5 Birth registration and birth certificates

Issues in relation to birth registration were also raised in the course of Council's reference. Birth registration is a matter for the states and territories.<sup>605</sup> As is the case with parentage laws, these laws vary by each state and territory. The relevant state and territory laws require the notification of births and the registration of all births within the relevant jurisdiction.<sup>606</sup> In general,

[t]he parents of a child born in the jurisdiction are jointly responsible for having the birth of the child registered by lodging with the registrar a 'birth registration statement' in the approved form and containing the prescribed particulars.<sup>607</sup>

The prescribed particulars are specified under the relevant regulations or in the Registrar's approved forms.<sup>608</sup> For example, in New South Wales, the prescribed particulars include:

- (a) the sex and date and place of birth of the child;
- (b) the weight of the child at birth;
- (c) whether or not the birth was a multiple birth;

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604 See *Lara and Lara & Marley and Sharp* [2003] FamCA 1393 [paras 41-42].

605 *Births, Deaths and Marriages Registration Act 1997* (ACT); *Births, Deaths and Marriages Registration Act 1996* (NT); *Births, Deaths and Marriages Registration Act 1995* (NSW); *Births, Deaths and Marriages Registration Act 2003* (QLD); *Births, Deaths and Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1999* (Tas); *Births, Deaths and Marriages Registration Act 1996* (Vic); *Births, Deaths and Marriages Registration Act 1998* (WA).

606 Eg. *Births, Deaths and Marriages Registration Act 1995* (NSW), ss 12(1), 12(5), 13(1), 15(1).

607 *Halsbury's Laws of Australia*, 'Registration of Births', para 205-7295 (current as at 4 October 2011).

608 *Ibid.*

- (d) the full name (including, if applicable, the original surname), date of birth (or age), place of birth, occupation and usual place of residence (at the time of delivery) of each parent of the child;
- (e) the date and place of marriage of the parents of the child (if applicable);
- (f) the full name, sex and date of birth of any other children (including any deceased children) of either of the parents of the child;
- (g) whether or not either of the parents of the child is of Aboriginal or Torres Strait Islander origin; and
- (h) if either parent of the child was born outside Australia, the period of residence in Australia of that parent.<sup>609</sup>

A birth certificate is an 'official certified copy of the registration data held by the Registry, and is commonly used to help establish a person's identity.'<sup>610</sup>

Olivia Rundle and Samantha Hardy have written recently that the current system of birth registration in Australia is not working as well as it should.<sup>611</sup> Rundle and Hardy raise a number of issues that have arisen, including: 'inconsistency in what is recorded on birth certificates', 'uncertainty about who should be recorded as parents, and why'; and that 'the various birth registration practices in Australia have not adapted to support different family formations.'<sup>612</sup> Assisted reproductive technologies, including surrogacy arrangements, and related changes to the law with respect to legal parentage have impacted the laws in relation to birth registration.

The Senate Legal and Constitutional Affairs References Committee's recent inquiry into donor conception practices in Australia also noted the divergence in community views about birth certificates and donor conception practices.<sup>613</sup> The Committee noted for instance;

The committee heard evidence that many donor conceived people support the annotation of birth certificates of donor conceived people to ensure that they have a way to access information about their genetic heritage. The committee is sympathetic to arguments that identifying a person's biological parents in their birth certificate would help ensure donor conceived individuals do not have their identity withheld from them and could minimise the risk of consanguine relationships. However, annotated birth certificates should not be used as a way of forcing parents to tell their children about their parentage.

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609 *Births, Deaths and Marriages Registration Regulation 2011* (NSW), r. 5.

610 See NSW Registry of Births Deaths and Marriages, <[www.bdm.nsw.gov.au/bdm\\_bth/bdm\\_bct.html](http://www.bdm.nsw.gov.au/bdm_bth/bdm_bct.html)>.

611 Rundle, Olivia and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26 *Australian Journal of Family Law* 116.

612 *Ibid*, p. 117.

613 Senate Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia* (2011), see Chapter 6, especially paras 6.34-6.51. See also the recent United Kingdom inquiry into related issues: Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing: A Guide to the Report* (2013), available online at: <[www.nuffieldbioethics.org/sites/default/files/Donor\\_conception\\_short\\_guide\\_to\\_report.pdf](http://www.nuffieldbioethics.org/sites/default/files/Donor_conception_short_guide_to_report.pdf)>.

Instead, it is the committee's view that donor conceived children should have a notation made on their birth certificates so that, when a donor conceived person over the age of 18 applies for a birth certificate, they will be told that further information is available and asked if they want to access that information. This proposal emphasises the importance of each State and Territory establishing their own registers so that this information can be provided to donor conceived people.<sup>614</sup>

For example, in Victoria, the law was changed in 2008 to require a notation on the registration relating to a person's donor conception.<sup>615</sup> This means that when a donor conceived person applies for a copy of their birth certificate they will receive an addendum to the effect that there is further information available on the Register.<sup>616</sup>

It is important to note that there are differences in views as to what a birth certificate is for and what it should be for. Historically, the development of the system of birth (civil) registrations was not about biological relationships, but about legal relationships, and property in particular.<sup>617</sup> Rundle and Hardy argue that:

[t]here needs to be significant reform in relation to how biological and legal parents' relationships with their children are recorded. There needs to be a clear means of recording a child's biological heritage, and also a clear means of recording those people who are responsible at law as parents of the child. At the moment, the birth certificate laws frequently confuse the two, and many members of the public do not understand the difference. While the authors acknowledge that such reforms would be ambitious and require review of a number of different areas of law, across federal, State and Territory jurisdictions, such reforms would promote the best interests of children in Australia. Uniform laws in this area would be ideal; however, at the very least there needs to be improved clarity about the role of birth certificates and who should be recorded on them, and also some attempt to educate the general public about these things. It is argued that a clearer distinction should be made between a right to information about biological heritage and a right to know and be cared for by legal parents. Such a distinction may guide appropriate responses to the highlighted difficulties with the current system.<sup>618</sup>

In a number of parenting cases the inclusion of details on a birth certificate have been disputed in the family courts. A number of cases have involved a party seeking to have a birth certificate changed to

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614 Senate Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia* (2011), paras 7.62-7.63.

615 *Births, Deaths and Marriages Registration Act 1996* (Vic), s 17B.

616 *Births, Deaths and Marriages Registration Act 1996* (Vic), s 17B(2) and (3). The addendum is only issued to the donor conceived person who applies to the Registrar.

617 See Blyth, Eric et al, 'The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception' (2009) 17 *International Journal of Children's Rights* 207; Rundle and Hardy (2012) above n 612.

618 Rundle and Hardy (2012) above n 612, pp. 118-119 (footnotes omitted).

include their name as a parent. A number of cases have involved the non-biological parent in cases of assisted reproductive technology.<sup>619</sup>

For instance, *Dent & Rees*<sup>620</sup> involved a lesbian couple and their three children who were each conceived by assisted reproductive technology. Ms Dent was the biological mother of one child and Ms Rees was the biological mother of two children. The children were all born prior to amendments to the New South Wales *Births, Deaths and Marriages Registration Act 1995*, which now provides for lesbian co-mothers to both be named as parents on the child's birth certificate. Following the mothers' separation, the applicant (Ms Dent) sought an order to have both mothers' names included on each of the children's birth certificates. Ms Rees opposed the application and also argued that the Court did not have the power to make such an order. Ms Rees' reasons for objecting to the addition of the other parent's name to the birth certificates was her belief that the 'children's biological heritage is of primary importance'.<sup>621</sup> In addition, Ms Rees argued that changing the birth certificates would be confusing for the children. Federal Magistrate Terry (as she then was) noted that Ms Rees agreed that all the children viewed Ms Dent and Ms Rees as their parents. All the children had been given the surname Dent-Rees, and the parents were the children's legal parents. Federal Magistrate Terry (as she then was) granted the application to add the name of the other parent to the birth certificate noting that the New South Wales Act provides that a 'woman who is presumed to be a parent of a child can apply to the Registrar to have her name added to the birth certificate'.<sup>622</sup> Where the birth mother does not consent, then a court order is required before the Registrar can make the change. Section 19(2) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) provides that:

If any court (including any court of another State or the Commonwealth) makes a finding about a birth or a child's parents, the court may order registration of the birth or inclusion of registrable information about the birth or the parents in the Register.<sup>623</sup>

Similarly, *Halifax & Fabian*<sup>624</sup> involved separated lesbian mothers disputing an issue in relation to the birth certificates of their two children. Ms Halifax was the biological mother of Y and she was named on the birth certificate along with the known sperm donor. Ms Fabian was the mother of X and she was the only parent named on the birth certificate. Both mothers were the legal parents of each child (s 60H). Ms Halifax wanted to be recorded on X's birth certificate and Ms Fabian did not want to be named on Y's birth certificate. In this case, Cronin J declined to make an order to change the birth certificates on the basis that it would not be in the best interests of the children.<sup>625</sup>

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619 Eg. *Dent & Rees* [2012] FMCAfam 1303; *Maurice & Barry* [2010] FamCA 687; *Halifax & Fabian* [2010] FamCA 1212; *Kemble & Ebner* [2008] FamCA 579.

620 [2012] FMCAfam 1303.

621 *Dent & Rees* [2012] FMCAfam 1303, para 247.

622 *Dent & Rees* [2012] FMCAfam 1303, para 241.

623 *Births, Deaths and Marriages Registration Act 1995* (NSW), s 19(2). There is a lack of uniformity in state and territory provisions relating to the recognition of court orders of parentage in other jurisdictions; compare, for instance, *Births, Deaths and Marriages Registration Act 1996* (Vic), s 20.

624 [2010] FamCA 1212.

625 *Halifax & Fabian* [2010] FamCA 1212 at para 174.

Other cases have involved applications to include the names of biological fathers on a birth certificate. In *Whitley & Ingham*<sup>626</sup> a child's mother made an application in the Federal Circuit Court of Australia to have the name of the child's father added to the child's birth certificate following his death. The mother was seeking a declaration of parentage in relation to her child's biological father. The father's name had not been entered on the birth certificate as he had not consented to this at the time the child was born. The mother and father had separated before the birth of the child. DNA evidence obtained after the father's death confirmed that he was the child's biological father.

Judge Terry noted:

This court can order the inclusion of registrable information about a child's parents in the Register of Births kept by the Registrar of Births Deaths and Marriage in NSW provided that it makes a finding about the parentage of the child.<sup>627</sup>

However, Judge Terry found that in the circumstances of this case she had no power to make the order sought by the mother on the basis that the Court had no stand-alone power to make the declaration of parentage in regards to the child's deceased father.

On the other hand, in *Letsos & Vakros*<sup>628</sup> Rees J made an order requiring the mother of a child to return an incorrect birth certificate to the NSW Registrar of Births Deaths and Marriages in a case where the mother maintained that her partner was the father of the child despite a court order that had made a declaration of parentage in favour of the father.<sup>629</sup>

## 5.6 Recommendations

### Recommendation 18

Council recommends that the Australian Government should pass separate legislation to enable the family courts to transfer parental status to Torres Strait Islander receiving parents.

### Recommendation 19

In line with Recommendation 8, Council further recommends that the related matter of birth registration be reviewed at the same time and that consideration be given to harmonisation of records so that one search can track births (deaths and marriages) in all states and territories.

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626 [2013] FCCA 869.

627 *Whitley & Ingham* [2013] FCCA 869, para 12. See s 19(2) *Births, Deaths and Marriages Registration Act 1995* (NSW).

628 [2013] FamCA 217.

629 The mother and father had had a relationship, which ended before the child was born. The mother had denied the father's paternity and had refused to undergo DNA testing.

# References

Aboriginal Family Violence Prevention and Legal Service Victoria, 'Strengthening on-the-ground service provision for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault in Victoria' (Aboriginal Family Violence Prevention and Legal Service Victoria, June 2010)

Allan, Sonia, 'The Surrogate in Commercial Surrogacy Arrangements: Ethical Issues and Legal Regulation' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy: A Human Rights Perspective* (Federation Press, forthcoming)

Allan, Sonia, 'Donor Conception, Secrecy and the Search for Information' (2012) 19 *Journal of Law and Medicine* 631

Allen, Sonia, 'Gatekeeping Parenthood: Should the State Play a Role in Determining Eligibility Criteria for Assisted Reproductive Treatment?' (2012) 2 *Family Law Review* 149

Australia, 'Government Response to the Senate Legal and Constitutional Affairs References Committee Report: Donor Conception Practices in Australia' (Australian Government, 2012)

Australian Bureau of Statistics, 'Same-Sex Couple Families' *Reflecting a Nation: Stories from the 2011 Census, 2012-2013* (Cat No 2071.0) <[www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013)>

Australian Bureau of Statistics, 'Australia's Diverse Population', *Migration Australia 2009-10* (Cat No 3412.0) (2011)

Australian Bureau of Statistics, *Australian Standard Classification of Cultural and Ethnic Groups* (Cat No 1249.0) (2005)

Australian Institute of Family Studies, *Family Facts and Figures: Australian Families*. <[www.aifs.gov.au/institute/info/charts/familystructure/index.html#ftype2011](http://www.aifs.gov.au/institute/info/charts/familystructure/index.html#ftype2011)>

Australian Institute of Family Studies, *Family Facts and Figures: Glossary*. <[www.aifs.gov.au/institute/info/charts/glossary.html#intact](http://www.aifs.gov.au/institute/info/charts/glossary.html#intact)>

Bailey, Alison, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' (2011) 26(4) *Hypatia* 715

- Bainham, Andrew, 'Parentage, Parenthood and Parental Responsibility: Subtle Elusive yet Important Distinctions' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What Is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 25
- Ban, Paul, 'The rights of Torres Islander children to be raised within the customs and traditions of their Society,' Submission to Queensland Government Joint Select Committee on Surrogacy 2008
- Ban, Paul, 'Customary "Adoption" in the Torres Strait Islands Towards Legal Recognition' (1994) 5 *Aboriginal Law Bulletin*
- Bednall, Laura, 'Distant Relatives', 21 October (2011) *New Law Journal*, 1433  
<[www.newlawjournal.co.uk/nlj/content/distant-relatives](http://www.newlawjournal.co.uk/nlj/content/distant-relatives)>
- Beeson, DR, PK Jennings and W Kramer, 'Offspring Searching for Their Sperm Donors: How Family Type Shapes the Process' (2011) 26(9) *Human Reproduction* 2415
- Bessant, Judith and Rob Watts, 'Children and the Law: An Historical Overview' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 3
- Blyth, Eric, 'Discovering the 'Facts of Life' Following Anonymous Donor Insemination' (2012) 26(2) *International Journal of Law, Policy and the Family* 143
- Blyth, Eric, "'I Wanted to Be Interesting. I Wanted to Be Able to Say 'I've Done Something Interesting with My Life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology* 189
- Blyth, Eric et al, 'Donor-Conceived People's Views and Experiences of Their Genetic Origins: A Critical Analysis of the Research Evidence' (2012) 19 *Journal of Law and Medicine* 769
- Blyth, Eric et al, 'The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception' (2009) 17 *International Journal of Children's Rights* 207
- Boetto, Heather, 'Kinship Care: A Review of Issues' (2010) 85 *Family Matters* 60
- Boyd, Susan B, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' (2007) 25 *Windsor Yearbook of Access to Justice* 63
- Brunet, Laurence et al, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament. Directorate General for Internal Policies: Citizens' Rights and Constitutional Affairs, 2013)
- Busby, Karen, 'Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere' (2013 forthcoming) *Canadian Journal of Women and the Law*
- Busby, Karen and Delaney Vun, 'Revisiting *the Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law* 13
- Callus, Thérèse, 'A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales?' (2012) 32(3) *Legal Studies* 347
- Campbell, Angela, 'Law's Suppositions About Surrogacy against the Backdrop of Social Science' (2012) 43(1) *Ottawa Law Review* 29

- Carney, Terry, 'Women and Social Security/Transfer Payments Law' in Patricia Eastal (ed), *Women and the Law in Australia* (LexisNexis Butterworths, 2010) 424
- Casey, Polly et al, 'Families Created by Donor Insemination: Father-Child Relationships at Age 7' (2013) 75 *Journal of Marriage and Family* 858
- Centre for Social Research, 'Surrogate Motherhood - Ethical or Commercial' (2013) <[www.csrindia.org/](http://www.csrindia.org/)>
- Chisholm, Richard, 'Information Rights and Donor Conception: Lessons from Adoption?' (2012) 19 *Journal of Law and Medicine* 722
- Chisholm, Richard, 'Did the 2006 Amendments Downgrade Non-Parents? Aldridge v Keaton' (2010) 24 *Australian Journal of Family Law* 123
- Chisholm, Richard, 'When a 'Father' Turns out Not to Be, Does the Act Give Priority to the (Biological) Mother? Mulvany v Lane' (2010) 24 *Australian Journal of Family Law* 128
- Chisholm, Richard, 'Children and the *Family Law Act*: The 1988 Changes' (1988) 11 *University of NSW Law Journal* 153
- Ciccarelli, Janice C and Linda J Beckman, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 61(1) *Journal of Social Issues* 21
- Cleaver, Hedy, Ira Unell and Jane Aldgate, *Children's Needs - Parenting Capacity* (TSO, 2nd ed, 2011)
- Cook, Rachel, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What Is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 121
- Cowden, Mhairi, "No Harm, No Foul": A Child's Right to Know Their Genetic Parents' (2012) 26(1) *International Journal of Law, Policy and the Family* 102
- Crawshaw, Marilyn, Eric Blyth and Olga van den Akker, 'The Changing Profile of Surrogacy in the UK: Implications for National and International Policy and Practice' (2012) *Journal of Social Welfare & Family Law* 1
- Cushing, Amber L, "I Just Want More Information About Who I Am': The Search Experience of Sperm-Donor Offspring, Searching for Information About Their Donors and Genetic Heritage' (2010) 15(2) *Information Research* 428
- Cuthbert, Denise, 'Introduction: Waiting for a Better World: Critical and Interdisciplinary Perspectives on Intercountry Adoption' (2012) 11(03) *Social Policy and Society* 375
- Cvejić Jančić, Olga, 'A Child's Origin and Parenting' (2011) 2 *International Journal of Jurisprudence of the Family* 335
- Daniels, Cynthia R and Erin Heidt-Forsythe, 'Gendered Eugenics and the Problematic of Free Market Reproductive Technologies: Sperm and Egg Donation in the United States' (2012) 37(3) *Signs: Journal of Women in Culture and Society* 719

- Daniels, Ken R et al, 'The Best Interests of the Child in Assisted Human Reproduction: The Interplay between the State, Professionals, and Parents' (2000) 19(1) *Politics and the Life Sciences* 33
- de Vaus, David, *Diversity and Change in Australian Families* (Australian Institute of Family Studies, 2004)
- Dempsey, Deb, 'Surrogacy, Gay Male Couples and the Significance of Biogenetic Paternity' (2013) 32(1) *New Genetics and Society* 37
- Dempsey, Deb, 'Active Fathers, Natural Families and Children's Origins: Dominant Themes in the Australian Political Debate over Eligibility for Assisted Reproductive Technology' (2006) 4(1) *Australian Journal of Emerging Technologies and Society* 28
- Dempsey, Deborah and Christine Critchley, 'Comfort with Use of Assisted Reproductive Technologies (ART) for Family Formation by Same-Sex and Heterosexual Couples: A Survey of Australian Social Attitudes' (2010) 6(2) *Gay & Lesbian Issues and Psychology Review* 90
- Department of Immigration and Citizenship, *Living in Australia: A National Action Plan to Build on Social Cohesion, Harmony and Security* <[www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/nap.htm#e](http://www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/nap.htm#e)>
- Department of Immigration and Citizenship, 'Immigration history 2006 to today', *Annual Report 2009-2010* <[www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf](http://www.immi.gov.au/about/reports/annual/2009-10/pdf/diac-annual-report-2009-10-full-version.pdf)>
- Dewar, John, 'Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia' (2010) 22 *Child & Family Law Quarterly* 377
- Dewar, John, 'The Normal Chaos of Family Law' (1998) 61(4) *The Modern Law Review* 467
- Dewar, John, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217
- Diduck, Alison, 'If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved': Law, Identity and Parenthood' (2007) 19 *Child & Family Law Quarterly* 458
- Dimopoulos, Maria, 'Implementing legal empowerment strategies to prevent domestic violence in new and emerging communities (Australian Domestic and Family Violence Clearinghouse, Issues Paper 20, 2010)
- Donchin, Anne, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24(7) *Bioethics* 323
- Drummond, Deanne, 'Kupai Omasker - Incorporating Traditional Adoption Practices into Australia's Family Law System', (Paper delivered at the World Congress on Family Law and Children's Rights, Sydney Australia, 17 March 2013)
- Edwards, Ben, 'Growing up in Australia: The Longitudinal Study of Australian Children. The First Decade of Life' (2012) (91) *Family Matters* 7
- Ehrensaft, Diane, *Mommies, Daddies, Donors, Surrogates: Answering Tough Questions and Building Strong Families* (Guilford Press, 2005)

- English, B, 'Inter-Country Adoption: The Context of Recent Developments and the Need for Research' (1990) 15 *Children Australia* 16
- Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (Family Law Council, 2012)
- Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds* (Family Law Council, 2012)
- Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22: Pathways Report, out of the Maze* (Family Law Council, 2004)
- Fehlberg, Belinda and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008)
- Freeman, T et al, 'Gamete Donation: Parents' Experiences of Searching for Their Child's Donor Siblings and Donor' (2009) 24(3) *Human Reproduction* 505
- Fronek, Patricia and Denise Cuthbert, 'History Repeating ... Disaster-Related Intercountry Adoption and the Psychosocial Care of Children' (2012) 11(3) *Social Policy and Society* 429
- Gamble, Natalie, 'International Surrogacy Law Conference in Las Vegas, October 2011' (2012) 42(Feb) *Family Law* 198
- Goldstein, Joseph, Anna Freud and Albert J Solnit, *Beyond the Best Interests of the Child. New Edition with Epilogue* (The Free Press, 1973)
- Golombok, Susan et al, 'Families Created through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at Age 7' (2011) 47(6) *Developmental Psychology* 1579
- Golombok, Susan et al, 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' (2006) 21(7) *Human Reproduction* 1918
- Golombok, Susan et al, 'Families with Children Conceived by Donor Insemination: A Follow-up at Age Twelve' (2002) 73(3) *Child Development* 952
- Golombok, Susan et al, 'The European Study of Assisted Reproduction Families: Family Functioning and Child Development' (1996) 11(10) *Human Reproduction* 2324
- Grover, Stephanie A et al, 'Assisted Reproduction in a Cohort of Same-Sex Male Couples and Single Men' (2013) 27 *Reproductive BioMedicine (Online)* 217
- Gunning, Jennifer and Helen Szoke (eds), *The Regulation of Assisted Reproductive Technology* (Ashgate, 2003)
- Hague Conference on Private International Law—Permanent Bureau, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (Preliminary Document No 10, March 2012) <[www.hcch.net/upload/wop/gap2012pd10en.pdf](http://www.hcch.net/upload/wop/gap2012pd10en.pdf)>

- Hanna, Jason K M, 'Revisiting Child-Based Objections to Commercial Surrogacy' (2010) 24(7) *Bioethics* 341
- Harder, Lois and Michelle Thamarat, 'Parentage Law in Canada: The Numbers Game of Standing and Status' (2012) 26(1) *International Journal of Law, Policy and the Family* 62
- Harper, Patricia, 'Changing Law for Changing Families' (Institute of Family Studies Discussion Paper No 9, 1982).
- Hayes, Alan et al, 'Families Then and Now: 1980-2010' (Australian Institute of Family Studies, 2010)
- Henaghan, Mark, 'International Commercial Surrogacy and the Judiciary' (2013) (July) *International Family Law* 198
- Herring, Johnathan, *Family Law* (Pearson Education, 3rd ed, 2007)
- Herring, Johnathan, 'Farewell Welfare?' (2005) 27(2) *Journal of Social Welfare & Family Law* 159
- Herring, Jonathan and Oliver Powell, 'The Rise and Fall of Presumptions Surrounding the Welfare Principle' (2013) (May) *Family Law* 553
- Hodson, David and Louisa Ghevaert, 'Surrogacy' in David Hodson (ed), *The International Family Law Practice* (Family Law, 2nd ed, 2012) 503
- Horse, Kirsty, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22(4) *Child & Family Law Quarterly* 449
- Horse, Kirsty, 'Unconsidered Inconsistencies: Parenthood and Assisted Conception' in Kirsty Horse and Hazel Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007) 155
- Horse, Kirsty and Hazel Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007)
- Horse, Kirsty and Sally Sheldon, 'Still Hazy after All These Years: The Law Regulating Surrogacy' (2012) 20 *Medical Law Review* 67
- Howard, Sue, 'Fathering and Indigenous Families—a North Queensland Community Partnership' (Paper presented at the Helping Families Change Conference, Melbourne, 23 -24 February 2011, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011, p. 123)
- Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements. National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007)
- Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)
- Hunter, Cathryn and Rhys Price-Robertson, 'Family Structure and Child Maltreatment' (Child Family Community Australia, 2012)
- Huntington, Clare, 'Staging the Family' (2013) 88 *NYU Law Review* 589

Huntington, Clare, 'Neuroscience and the Child Welfare System' (2012) 21 *Journal of Law and Policy* 37

Hutchinson, Anne-Marie, Hassan Khan, Barry O'Leary and Andrew Vorzeimer, 'International Surrogacy Arrangements: Between California and England and Wales' (2011) (October) *Family Law* 1104

Jadva, Vasanti et al, 'Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27(10) *Human Reproduction* 3008

Jadva, Vasanti et al, 'Surrogacy: The Experiences of Surrogate Mothers' (2003) 18(10) *Human Reproduction* 2196

James, Allison, 'Parents: A Children's Perspective' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What Is a Parent? A Socio-Legal Analysis* (Hart Publishing, 1999) 181

Jones, Caroline and Ingrid Holme, 'Relatively (Im)Material: MtDNA and Genetic Relatedness in Law and Policy' (2013) 9(4) *Life Sciences, Society and Policy* 1

Karen, 'When the Children Grow Up' in Mikki Morrissette (ed), *Behind Closed Doors: Moving Beyond Secrecy and Shame. Voices of Donor Conception Vol 1* (2007), 51

Kaspiew, Rae et al, 'The Australian Institute of Family Studies' Evaluation of the 2006 Family Law Reforms: Key Findings' (2010) 24 *Australian Journal of Family Law* 5

Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009)

Kelly, Fiona, 'Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-Led Families' (2013) 64 *University of New Brunswick Law Journal* 253

Kelly, Fiona, 'Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family' (2009) 21 *Canadian Journal of Women and the Law* 315

Kelly, Fiona, 'Redefining Parenthood: Gay and Lesbian Families in the Family Court - the Case of Re Patrick' (2002) 16(3) *Australian Journal of Family Law* 204

Kenny, Pauline et al, 'Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices. (Research Report No. 21)' (Australian Institute of Family Studies, 2012)

Kenny, Pauline et al, 'Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices. Executive Summary' (Australian Institute of Family Studies, 2012)

Keyes, Mary, 'National Reports on Surrogacy: Australia' in Katrina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart, 2013) 25

Keyes, Mary, 'Cross-Border Surrogacy Agreements' (2012) 26 *Australian Journal of Family Law* 28

Keyes, Mary and Richard Chisholm, 'Commercial Surrogacy - Some Troubling Family Law Issues' (2013) 27 *Australian Journal of Family Law* 105

Kirkman, Maggie and Alice Kirkman, 'Sister-to-Sister Gestational 'Surrogacy' 13 Years On: A Narrative of Parenthood' (2002) 20(3) *Journal of Reproductive and Infant Psychology* 135

- Kirkman, Maggie, Doreen Rosenthal and Louise Johnson, 'Families Working It Out: Adolescents' Views on Communicating About Donor-Assisted Conception' (2007) 22(8) *Human Reproduction* 2318
- Lafferriere, Jorge Nicolás, 'Artificial Reproductive Techniques and Parenting: Trends and Paradoxes' (2011) 2 *International Journal of Jurisprudence of the Family* 265
- Laufer-Ukeles, Pamela, 'Mothering for Money: Regulating Commercial Intimacy' (2013) 88(1) *Indiana Law Journal* 1
- Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (August 2012)
- Law Commission and Te Aka Matua O Te Ture, *New Issues in Legal Parenthood* (2005) (New Zealand)
- Law Reform Committee Victoria, *Inquiry into Access by Donor-Conceived People to Information About Donors* (Parliament of Victoria, 2012)
- Leckey, Robert, 'Law Reform, Lesbian Parenting, and the Reflective Claim' (2011) 20 *Social and Legal Studies* 331
- Legislative Assembly of New South Wales Committee on Law and Safety, *Inclusion of Donor Details on the Register of Births Report 1/55* (2012)
- Legislative Assembly Investigation into Altruistic Surrogacy Committee, Parliament of Queensland, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008)
- Macaldowie, Alan et al, 'Assisted Reproductive Technology in Australia and New Zealand 2010' (Australian Institute of Health and Welfare, 2012)
- MacCallum, Fiona, 'Parenting Genetically Unrelated Children: A Comparison of Embryo Donation and Adoption' in Kirsty Horsey and Hazel Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish, 2007)
- MacCallum, Fiona, Susan Golombok and Peter Brinsden, 'Parenting and Child Development in Families with a Child Conceived through Embryo Donation' (2007) 21(2) *Journal of Family Psychology* 278
- Mackenzie, Robin, 'Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation' in Kirsty Horsey and Hazel Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge Cavendish, 2007) 181

Mahlstedt, Patricia P, Kathleen LaBounty and William Thomas Kennedy, 'The Views of Adult Offspring of Sperm Donation: Essential Feedback for the Development of Ethical Guidelines within the Practice of Assisted Reproductive Technology in the United States' (2010) 93(7) *Fertility and Sterility* 2236

Marquardt, Elizabeth, Norval D Glenn and Karen Clark, 'My Daddy's Name Is Donor' (Commission on Parenthood's Future: Institute for American Values, 2010)

McAuley, Colette, Caroline McKeown and Brian Merriman, 'Spending Time with Family and Friends: Children's Views on Relationships and Shared Activities' (2012) 5 *Child Indicators Research* 449

McCandless, Julie and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *The Modern Law Review* 175

McClain, Linda C and Daniel Cere (eds), *What Is Parenthood? Contemporary Debates About the Family* (New York University Press, 2013)

McIntosh, Jennifer E, 'Guest Editor's Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understanding for Family Law' (2011) 49(3) *Family Court Review* 418

McLeod, Sonia and Andrew Pote, 'Is M for Mother? Applying Current Legislative Frameworks on the Implications of 'Genetically' Parenting a Child to the Issue of MDNA Transfer' (2012) (April) *Family Law* 438

McNair, Ruth, 'Outcomes for Children Born of ART in a Diverse Range of Families' (Victorian Law Reform Commission Occasional Paper, 2004)

Meyer, Michael J, 'The Idea of Selling in Surrogate Motherhood' (1990) 4(2) *Public Affairs Quarterly* 175

Millbank, Jenni, 'De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms' (2009) 23 *Australian Journal of Family Law* 1

Millbank, Jenni, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27 *Australian Journal of Family Law* 135

Millbank, Jenni, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21(1) *Griffith Law Review* 101

Millbank, Jenni, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?' (2011) 35 *Melbourne University Law Review* 1

Millbank, Jenni, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 *International Journal of Law, Policy and the Family* 149

Millbank, Jenni, 'Unlikely Fissures and Uneasy Resonances: Lesbian Co-Mothers, Surrogate Parenthood and Fathers' Rights' (2008) 16 *Feminist Legal Studies* 141

Millbank, Jenni, 'If Australian Law Opened Its Eyes to Lesbian and Gay Families, What Would It See?' (1998) 12 *Australian Journal of Family Law* 99

- Morgan, Derek, 'Surrogacy: An Introductory Essay' in Robert Lee and Derek Morgan (eds), *Birthrights: Law and Ethics and the Beginnings of Life* (Routledge, 1989) 55
- Mykitiuk, Roxanne, 'Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies' (2001) 39(4) *Osgoode Hall Law Journal* 771
- National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007)
- Neale, Bren, Amanda Wade and Carol Smart, 'I just get on with it: Children's experiences of family life following parental separation and divorce' (Leeds University, Centre for Research on Family Kinship and Childhood, 1998)
- Nelson, Erin, 'Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy' (2013) 41(1) *Journal of Law, Medicine and Ethics* 240
- Nicholls, Michael, 'International Adoption and Surrogacy Arrangements' (Paper presented at the Second International Family Law Conference, Siem Reap, Cambodia, 19-21 September 2012)
- Nicholson, Alastair, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 11 *Australian Journal of Family Law* 13
- Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing: A Guide to the Report* (2013)
- Owen, Lucy and S Golombok, 'Families Created by Assisted Reproduction: Parent-Child Relationships in Late Adolescence' (2009) 32 *Journal of Adolescence* 835
- Page, Stephen and Alexandra Harland, 'Tiptoe through the Minefield: A State by State Comparison of Surrogacy Laws in Australia' (2011) 1 *Family Law Review* 198
- Pande, Amrita, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' (2010) 35(4) *Signs: Journal of Women in Culture and Society* 969
- Pande, Amrita, 'It May Be Her Eggs but It's My Blood': Surrogates and Everyday Forms of Kinship in India' (2009) 32 *Qualitative Sociology* 379
- Pascoe, John, CFM, 'Intercountry Surrogacy - a New Form of Trafficking?' (Paper presented at the Second International Family Law Conference, Siem Reap, Cambodia, 19-21 September 2012)
- Polikoff, Nancy D, 'Response: And Baby Makes ... How Many? Using in Re M.C. To Consider Parentage of a Child Conceived through Sexual Intercourse and Born to a Lesbian Couple' (2012) 100 *The Georgetown Law Journal* 2015
- Power, Jennifer J et al, 'Understanding Resilience in Same-Sex Parented Families: The Work, Love, Play Study' (2010) 10 *BMC Public Health* 115
- Pryor, Jan and Bryan Rodgers, *Children in Changing Families: Life after Parental Separation* (Blackwell, 2001)
- Qu, Lixia and Ruth Weston, 'Parental Marital Status and Children's Wellbeing' (Australian Institute of Family Studies, 2012)

- Ragoné, Helena, 'The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism' in Rachel Cook, Shelley Day Sclater and Felicity Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart Publishing, 2003) 209
- Ragoné, Helena, *Surrogate Motherhood: Conception in the Heart* (Westview Press, 1994)
- Rainbow Families Council, 'Rainbow Families and the Law: An Information Kit for Same-Sex Couple and Single People in Victoria' (2010)
- Ralph, Stephen, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12 *Australian Journal of Family Law* 140
- Rathus, Zoe, 'A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making' (2012) 26 *Australian Journal of Family Law* 81
- Rhoades, Helen, 'Children's Needs and 'Gender Wars': The Paradox of Parenting Law Reform' (2010) 24 *Australian Journal of Family Law* 160
- Rhoades, Helen, 'Revising Australia's Parenting Laws: A Plea for a Relational Approach to Children's Best Interests' (2010) 22 *Child & Family Law Quarterly* 172
- Roberts, Dorothy E, 'Race, Gender, and Genetic Technologies: A New Reproductive Dystopia' (2009) 34(4) *Signs: Journal of Women in Culture and Society* 783
- Roberts, Dorothy E, 'The Genetic Tie' (1995) 62(1) *The University of Chicago Law Review* 209
- Robinson, Elly et al, *Children and Their Families: Best Interests Cases Practice Model. Specialist Practice Resources* (Victorian Government Department of Human Services, 2012)
- Rodino, Iolanda S, PJ Burton and KA Sanders, 'Donor Information Considered Important to Donors, Recipients and Offspring: An Australian Perspective' (2011) 22 *Reproductive BioMedicine Online* 303
- Rudrappa, Sharmila, 'India's Reproductive Assembly Line' (2012) (Spring) *Contexts*  
<[www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/](http://www.contexts.org/articles/spring-2012/indias-reproductive-assembly-line/)>
- Rundle, Olivia and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26 *Australian Journal of Family Law* 116
- Ruska, Keryn and Zoe Rathus, 'The Place of Culture in Family Law Proceedings: Moving Beyond the Dominant Paradigm of the Nuclear Family' (2010) 7(20) *Aboriginal Law Bulletin* 8
- Satz, Debra, 'Remaking Families: A Review Essay' (2007) 32(2) *Signs: Journal of Women in Culture and Society* 523
- Satz, Debra, 'Markets in Women's Reproductive Labor' (1992) 21(2) *Philosophy & Public Affairs* 107
- Schneller, Edwina Anne, 'The Rights of Donor Inseminated Children to Know Their Genetic Origins in Australia' (2005) 19 *Australian Journal of Family Law* 222
- Scott, Elizabeth S, 'Surrogacy and the Politics of Commodification' (2009) 72 *Law and Contemporary Problems* 109

Secretariat of National Aboriginal and Islander Child Care, *Growing up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (Secretariat of National Aboriginal and Islander Child Care, 2011)

Secretariat of National Aboriginal and Islander Child Care, *Working and Walking Together: Supporting Family Relationship Services to Work with Aboriginal and Torres Strait Islander Families and Organisations* (Secretariat of National Aboriginal and Islander Child Care, 2010)

Selman, Peter, 'The Global Decline of Intercountry Adoption: What Lies Ahead?' (2012) 11(03) *Social Policy and Society* 381

Senate Community Affairs References Committee, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012)

Senate Legal and Constitutional Affairs References Committee, *Donor Conception Practices in Australia* (2011)

Senate Standing Committee on Constitutional and Legal Affairs on National Uniformity in Laws Relating to the Status of Children Born through the use of In Vitro Fertilisation, *IVF and the Status of Children* (1985).

Senate Standing Committee on Legal and Constitutional Affairs, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 [Provisions]* (2008)

Sheldon, Sally, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68(4) *The Modern Law Review* 523

Sifris, Adiva, 'Known Semen Donors: To Be or Not to Be a Parent' (2005) 13 *Journal of Law and Medicine* 230

Smart, Carol, 'Law and the Regulation of Family Secrets' (2010) 24(3) *International Journal of Law, Policy and the Family* 397

Smerdon, Usha Rengachary, 'Birth Registration and Citizenship Rights of Surrogate Babies Born in India' (2012) 20(3) *Contemporary South Asia* 341

Smerdon, Usha Renagachary, 'Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India' (2008) 39 *Cumberland Law Review* 15

Smith, Leanne, 'Tangling the Web of Legal Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements' (2013) 33(3) *Legal Studies* 355

Spar, Debora L, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* (Harvard Business School Press, 2006)

Spar, Debora L, 'For Love and Money: The Political Economy of Commercial Surrogacy' (2005) 12(2) *Review of International Political Economy* 287

Standing Committee of Attorneys-General, Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference, 'A Proposal for a National Model to Harmonise Regulation of Surrogacy' (2009)

- Stark, Barbara, 'Transnational Surrogacy and International Human Rights Law' (2012) 18(2) *ILSA Journal of International & Comparative Law* 369
- Stewart, Miranda, 'Are You Two Interdependent?' Family, Property and Same-Sex Couples in Australia's Superannuation Regime' (2006) 28(437-476) *Sydney Law Review*
- Stewart, Miranda and Michael Flynn, *Death & Taxes: Tax-Effective Estate Planning* (Thomson Reuters, 5th ed, 2009)
- Storrow, Richard F, 'New Thinking on Commercial Surrogacy' (2013) 88 *Indiana Law Journal* 1281
- Stuhmcke, Anita, 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' (2011) 18 *Journal of Law and Medicine* 601
- Swain, Shurlee, 'Market Forces: Defining the Adoptable Child, 1860–1940' (2012) 11(03) *Social Policy and Society* 399
- Swain, Shurlee, 'Adoption, Secrecy and the Spectre of the True Mother in Twentieth-Century Australia' (2011) 26(68) *Australian Feminist Studies* 193
- Teman, Elly, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 *Social Science & Medicine* 1104
- Thorn, Petra, Tewes Wischmann and Eric Blyth, 'Cross-Border Reproductive Services - Suggestions for Ethically Based Minimum Standards of Care in Europe' (2012) 33(1) *Journal of Psychosomatic Obstetrics & Gynecology* 1
- Thorpe, Rachel et al, 'In the Best Interests of the Child? Regulating Assisted Reproductive Technologies and the Well-Being of Offspring in Three Australian States' (2012) 26(3) *International Journal of Law, Policy and the Family* 259
- Tieman, Wendy, Jan van der Ende and Frank C Verhulst, 'Young Adult International Adoptees' Search for Birth Parents' (2008) 22(5) *Journal of Family Psychology* 678
- Tobin, John, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (forthcoming 2014) *International and Comparative Law Quarterly*
- Tobin, John, 'Donor-Conceived Individuals and Access to Information About Their Genetic Origins: The Relevance and Role of Rights' (2012) 19(1) *Journal of Law and Medicine* 1
- Trimming, Katarina and Paul Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing, 2013)
- Trimming, Katarina and Paul Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7(3) *Journal of Private International Law* 627
- Triseliotis, John, 'Long-Term Foster Care or Adoption? The Evidence Examined' (2002) 7 *Child and Family Social Work* 23
- Trowse, Pip, 'Surrogacy: Is It Harder to Relinquish Genes?' (2011) 18 *Journal of Law and Medicine* 614

- Turner, A J and A Coyle, 'What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy' (2000) 15(9) *Human Reproduction* 2041
- van den Akker, Olga, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2010) 21(2) *Journal of Reproductive and Infant Psychology* 145
- van den Akker, Olga, 'Psychosocial Aspects of Surrogate Motherhood' (2007) 13(1) *Human Reproduction* 53
- van den Akker, Olga, 'Psychological Trait and State Characteristics, Social Support and Attitudes to the Surrogate Pregnancy and Baby' (2007) 22(8) *Human Reproduction* 2287
- van den Akker, Olga, 'A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy' (2005) 26(4) *Journal of Psychosomatic Obstetrics & Gynecology* 277
- van den Akker, Olga, 'The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK' (2000) 15(8) *Human Reproduction* 1849
- van Zyl, Liezl and Anton van Niekerk, 'Interpretations, Perspectives and Intentions in Surrogate Motherhood' (2000) 26 *Journal of Medical Ethics* 404
- van Zyl, Liezl and Ruth Walker, 'Beyond Altruistic and Commercial Contract Motherhood: The Professional Model' (2013) 27(7) *Bioethics* 373
- Victorian Government, Department of Human Services, *Protecting Children: The Next Steps* (Office for Children, Victorian Government Department of Human Services, 2005)
- Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007)
- Wald, Deborah H, 'The Parentage Puzzle: The Interplay between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage' (2007) 15 *American University Journal of Gender, Social Policy & Law* 379
- Walker, Myfanwy, 'Misconception' (2006/7) 75/76 *Australian Rationalist* 23
- Wallbank, Julie, 'The Role of Rights and Utility in Instituting a Child's Right to Know Her Genetic History' (2004) 13 *Social and Legal Studies* 245
- Wallbank, Julie, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' (2002) 10 *Medical Law Review* 271
- Wallbank, Julie, Shazia Choudhry and Johathan Herring (eds), *Rights, Gender and Family Law* (Routledge, 2010)
- Walton, Jessica, 'Supporting the Interests of Intercountry Adoptees Beyond Childhood: Access to Adoption Information and Identity' (2012) 11(3) *Social Policy and Society* 443

Warrki Jarrinjaku ACRS Project Team, 2002, Warrki Jarrinjaku Jintangkamanu Purananjaku 'Working Together Everyone and Listening', Aboriginal Child Rearing & Associated Research: A Review of the Literature, Department of Family and Community Services, Canberra, as cited in Secretariat of National Aboriginal and Islander Child Care (SNAICC), *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practices Matrix* (2011, p. 24)

Weston, Ruth and Lixia Qu, 'Working out Relationships' (Australian Institute of Family Studies, 2013)

Willing, Indigo and Patricia Fronek, 'Constructing Identities and Issues of Race in Transnational Adoption: The Experiences of Adoptive Parents' (2012) (1-18) *British Journal of Social Work*

Wilson, Sarah, 'Identity, Genealogy and the Social Family: The Case of Donor Insemination' (1997) 11 *International Journal of Law, Policy and the Family* 270

Winddance Twine, France, *Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market* (Routledge, 2011)

Yeo, Soo See, 'Bonding and Attachment of Australian Aboriginal Children' (2003) 12(5) *Child Abuse Review* 292

### **Media Reports**

Australian Broadcasting Corporation, ABC Radio, 'Thai Police Bust Asian Surrogacy Ring' (28 February 2011) <[www.radioaustralia.net.au/international/radio/onairhighlights/thai-police-bust-asian-surrogacy-ring](http://www.radioaustralia.net.au/international/radio/onairhighlights/thai-police-bust-asian-surrogacy-ring)>

ABC Radio National, 'Law lags as Aussies employ overseas surrogate mums,' *The Law Report* (23 October 2012) <[www.abc.net.au/radionational/programs/lawreport/surrogacy/4327320](http://www.abc.net.au/radionational/programs/lawreport/surrogacy/4327320)>

Aston, Heath, 'It Was Like Going to a Supermarket to Pick up Your Baby,' *The Sydney Morning Herald* (Sydney) (2 September 2012)

Aulakh, Raveena, 'Couple fights federal surrogacy policy to bring their boy back to Canada,' *The Star* (online) (20 August 2011) <[www.thestar.com/news/gta/2011/08/20/couple\\_fights\\_federal\\_surrogacy\\_policy\\_to\\_bring\\_their\\_boy\\_back\\_to\\_canada.html](http://www.thestar.com/news/gta/2011/08/20/couple_fights_federal_surrogacy_policy_to_bring_their_boy_back_to_canada.html)>

Corderoy, Amy, 'More Parents Defy Law with Overseas Surrogacy,' *The Age* (14 September 2013)

Daily Mail Reporter, 'The baby factory: In a huge clinic in India, hundreds of women are paid £5,000 each to have Western couples' babies,' *Mail Online (UK)* (3 October 2013), <[www.dailymail.co.uk/news/article-2439977](http://www.dailymail.co.uk/news/article-2439977)>

Dhillon, Amrit, 'Mothers for Hire,' *The Age* (Melbourne) (7 September 2012)

Doherty, Ben, 'Sylvia's Double Dose of Pride and Sadness,' *The Sydney Morning Herald* (Sydney) (2 September 2012)

Medow, J, 'Dreams fulfilled as donor use soars,' *The Age* (3 November 2013)

Poonam, Taneja, 'The couple having four babies by two surrogates,' *BBC News (UK)* (28 October 2013)

SMH, 'Booming Surrogacy Demand Sparks Exploitation Fears,' *Sydney Morning Herald* (Sydney) (2 September 2012)

Whitelaw, Anna, 'Hundreds Pay for Overseas Surrogacy,' *The Age* (Melbourne) (3 June 2012)

# Appendix A: Table of Legislation

## AUSTRALIA

### **Commonwealth**

*Acts Interpretation Act 1901*

*Australian Citizenship Act 2007*

*Australian Passports Act 2005*

*Child Support (Assessment) Act 1989*

*Evidence Act 1995*

*Fair Work Act 2009*

*Family Law Act 1975*

*Family Law Amendment Act 1983*

*Family Law Amendment Act 1987*

*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*

*Family Law Amendment (Shared Parental Responsibility) Act 2006*

*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*

*Family Law Reform Act 1995*

*Family Law Regulations 1984*

*Health Insurance Act 1973*

*Judiciary Act 1903*

*Marriage Act 1961*

*Migration Act 1958*

*Migration Regulations 1994*

*A New Tax System (Family Assistance) Act 1999*

*Paid Parental Leave Act 2010*

*Social Security Act 1991*

*Superannuation Industry Supervision Act 1997*

**Australian Capital Territory**

*Parentage Act 2004*

**New South Wales**

*Assisted Reproductive Technology Act 2007*

*Assisted Reproductive Technology Regulations 2009*

*Status of Children Act 1996*

*Surrogacy Act 2010*

**Northern Territory**

*Status of Children Act*

**Queensland**

*Adoption Act 2009*

*Status of Children Act 1978*

*Surrogacy Act 2010*

**South Australia**

*Assisted Reproductive Treatment Act 1988*

*Assisted Reproductive Treatment Regulations 2010*

*Family Relationships Act 1975*

*Reproductive Technology (Clinical Practices) Act 1988*

**Tasmania**

*Status of Children Act 1974*

*Surrogacy Contracts Act 1993*

*Surrogacy Act 2012*

**Victoria**

*Adoption Act 1984*

*Assisted Reproductive Technology Act 2008*

*Assisted Reproductive Technology Regulations 2009*

*Human Tissue Act 1982*

*Status of Children Act 1974*

## **Western Australia**

*Artificial Conception Act 1995*

*Family Court Act 1997*

*Family Court (Surrogacy) Rules 2009*

*Human Reproductive Technology Act 1991*

*Human Reproductive Technology Act Directions 2004*

*Surrogacy Act 2008*

*Surrogacy Regulations 2009*

## **CANADA**

*Assisted Human Reproduction Act, SC 2004, c 2*

*Family Law Act, SBC 2011, c 25*

*Vital Statistics Act, RSBC 1996, c 479*

## **NEW ZEALAND**

*Adoption Act 1955*

*Care of Children Act 2004*

*Citizenship Act 1977*

*Human Assisted Reproductive Technology Act 2004*

*Status of Children Act 1969*

## **UNITED KINGDOM**

*Children Act 1989*

*Human Fertilisation and Embryology Act 2008*

*Surrogacy Arrangements Act 1985*

# Appendix B: *Family Law Act 1975*

## Part VII Objects and Principles

### 60B Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best interests of children are met by:
  - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
  - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
  - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
  - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
  - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
  - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
  - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
  - (d) parents should agree about the future parenting of their children; and
  - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

- (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- (a) to maintain a connection with that culture; and
  - (b) to have the support, opportunity and encouragement necessary:
    - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
    - (ii) to develop a positive appreciation of that culture.
- (4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website ([www.austlii.edu.au](http://www.austlii.edu.au)).

# Appendix C: Cases

## AUSTRALIA

Aldridge & Keaton [2009] FamCAFC 229  
B v B: Family Law Reform Act 1995 (1997) FLC 92-755  
Re B and J (1996) 21 Fam LR 186  
Bagley & Snell [2010] FamCAFC 8  
Baker & Landon [2010] FMCAfam 280  
Beck and Anor & Whitby and Anor [2012] FamCA 129  
BM & DA [2007] FMCAfam 770  
Brianna & Brianna [2010] FamCAFC 97  
Bunyon & Lewis [2013] FamCA 64  
Connor & Bourke and Anor [2008] FMCAfam 69  
Connors & Taylor [2012] FamCA 207  
Re CP [1997] FamCA 10  
Danes & Danes & Anor [2013] FMCAfam 281  
Dent & Rees [2012] FMCAfam 1303  
Dept of F&CS & Carrol and Ors [2012] FamCA 784  
Dixon & Barnes and Ors [2013] FamCA 12  
Donnell & Dovey [2010] FamCAFC 15  
Dunstan & Jarrod and Anor [2009] Fam CA 480  
Fantini and Anor & Isar [2013] FamCA 84  
Fraser & Farwell [2012] FMCAfam 1088  
G v H [1994] HCA 48; (1994) 181 CLR 387

Goode & Goode [2006] FamCA 1346  
Groth & Banks [2013] FamCA 430  
H v Minister for Immigration and Citizenship [2010] FCAFC 119  
Haddock & Anor & Haddock & Anor [2013] FCCA 936  
Halifax & Fabian [2010] FamCA 1212  
Harris & Calvert [2013] FCCA 955  
Henderson & Chopke [2011] FamCA 631  
Holman & Bailie and Anor [2012] FamCA 827  
Hood & Cormack and Anor [2008] FamCA 774  
Hort & Verran [2009] FamCAFC 214  
Irving and Anor & Tatupa [2013] FamCA 538  
Jacks & Samson [2008] FamCAFC 173  
Jones & Azarac [2012] FamCA 872  
Jordan & Lloyd and Ors [2010] FamCA 288  
KAM & MJR and Anor [1998] FamCA 1896  
Kitsannis & Netopoulos and Anor [2010] FamCAFC 214  
Knightly & Brandon [2013] FMCAfam 148  
Lara and Lara & Marley and Sharp [2003] FamCA 1393  
Re Lynette [1999] FamCA 1239  
M v M [1988] HCA 68  
McK & K & O [2001] FLC 93-089  
McKenzie & McKenzie and Anor [2012] FamCA 266  
Martin & Floyd and Anor [2013] FamCAFC 46  
Masden & Kaplan [2012] FMCAfam 251  
Maurice & Barry [2010] Fam CA 687  
Maxwell & Finney [2013] FMCAfam 131  
MRR v GR [2010] HCA 4  
Mulvany & Lane [2009] FamCAFC 76  
Nineth & Nineth (No 2) [2010] FamCA 1144  
Oscar & Acres and Anor [2007] FamCA 1104  
Packer & Irwin & Anor [2013] FCCA 658

Re Patrick [2002] FamCA 193  
Pavli & Beffa [2013] FamCA 144  
Pita & Anor & Manard & Anor [2013] FMCAfam 296  
Potts & Bims and Ors [2007] FamCA 394  
Rice v Miller (1993) 16 FamLR 970  
Russell & Russell and Anor [2009] FamCA 28  
Salway & Hackley & Anor [2013] FMCAfam 328  
Scarinity and Anor & Wolodzko [2010] FamCA 1258  
Selkin & Artliff-Selkin [2013] FamCAFC 19  
Simpson v Brockmann [2010] FamCAFC 37  
Sohumba & Egan [2008] FamCA 778  
TNL & CYT [2005] FamCA 77  
Tobin v Tobin [1999] FamCA 446; (1999) FLC 92-848  
Tomas and Anor & Murray [2011] FamCA 641  
Tryon & Clutterbuck (No 2) [2009] 42 Fam LR 118  
Valentine & Lacerra and Ors [2013] FamCAFC 53  
Yamada & Cain [2013] FamCAFC 64  
Vaughan & Vaughan & Scott [2010] FMCAfam 863  
White & White & Anor [2012] FamCA 804  
Whitely & Ingham [2013] FCCA 869  
Whitton & Whitton and Anor (No 2) [2010] FamCA 1119  
Wilson and Anor & Roberts and Anor (No. 2) [2010] FamCA 734  
Zempler and Anor & Page and Anor [2012] FamCA 689

**Surrogacy Cases:**

Cadet & Scribe [2007] FamCA 1498  
Carlton & Bissett and Anor [2013] FamCA 143  
Collins & Tangtoi [2010] FamCA 878  
Dennis and Anor & Pradchaphet [2011] FamCA 123  
Dudley and Anor & Chedi [2011] FamCA 502  
Edmore and Anor & Bala [2011] FamCA 731  
Ellison and Anor & Karnchanit [2012] FamCA 602

Findlay and Anor & Punyawong [2011] FamCA 503  
Gough and Anor & Kaur [2012] FamCA 79  
Hubert and Anor & Juntasu [2011] FamCA 504  
Johnson and Anor & Chompunut [2011] FamCA 505  
Lowe & Barry and Anor [2011] FamCA 625  
McGee & Duchampes [2010] FamCA 1230  
McQuinn & Shure [2011] FamCA 139  
Re Mark [2003] FamCA 822  
Mason & Mason & Anor [2013] FamCA 424  
Re Michael: Surrogacy Arrangements [2009] FamCA 691  
Ronalds & Victor [2011] FamCA 389  
Rusken & Jenner [2009] FamCA 282  
Schone & Schone & Anor [2012] FMCAfam 1126  
Wilkie & Mirkja [2010] FamCA 667

#### **CANADA**

AA v BB and CC (2007) ONCA 2  
C (J) v Manitoba [2000] MBQB 173  
DWH v DJR [2011] ABQB 608  
DWH v DJR [2013] ABCA 240  
D (M) v L (L) [2008] CarswellOnt 1290  
R (J) v H (L) [2002] CarswellOnt 3445  
Rypkema v British Columbia [2003] BCSC 1784  
W (HL) v T (JC) [2005] CarswellBC 2898  
W (JA) v W (JE) [2010] CarswellNB 605

#### **NEW ZEALAND**

Re An Application by BWS to adopt a child [2011] NZFLR 621  
Re An Application by KR and DGR to adopt a female child [2011] NZFLR 429  
Re KJB and LRB [Adoption] [2010] NZFLR 97  
In re application by L [2003] NZFLR 529

## **UNITED KINGDOM**

A v B & Anor [2012] EWCA Civ 285 (Court of Appeal)

A and another v P and others [2011] EWHC 1738 (Fam)

In re B (A Child) [2009] UKSC 5

Re D (Contact and PR lesbian mothers and known father) No 2 [2006] EWHC 2 Fam

Re D and L (Minors) (Surrogacy) [2012] EWHC 2631 (Fam)

Re E and F (Assisted Reproduction: Parent) [2013] EWHC 1418 (Fam)

Mr G v Mrs G [2012] EWHC 1979 (Fam)

Re G (Children) (Residence: Same-sex partner) [2006] UKHL 43

Re IJ (Foreign Surrogacy Agreement: Parental Order) [2011] EWHC 921 (Fam)

J v G [2013] EWHC 1432 (Fam)

Re L (Commercial Surrogacy) [2010] EWHC 3146 (Fam)

Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)

Re X and Y (Parental Order: Retrospective Authorisation of Payments) [2011] EWHC 3147 (Fam)

Z, B v C, Cafcass Legal as Advocate to the Court [2011] EWHC 3181 (Fam)

# Appendix D: Table of Significant Commonwealth Legislation in relation to who are the parents of a child

Act and Benefit/Responsibility	Definitions
<p><i>Australian Citizenship Act 2007</i> Eligibility for Citizenship by descent</p>	<p>Section 3: <b>child</b>: without limiting who is a child of a person for the purposes of this Act, each of the following is the <b>child</b> of a person:</p> <ul style="list-style-type: none"> <li>(a) an adopted child, stepchild or exnuptial child of the person;</li> <li>(b) someone who is a child of the person within the meaning of the <i>Family Law Act 1975</i>.</li> </ul> <p>Section 8 Children born as a result of artificial conception procedures or surrogacy arrangements</p> <p>(1) This section applies if a child is:</p> <ul style="list-style-type: none"> <li>(a) a child of a person under section 60H or 60HB of the <i>Family Law Act 1975</i>; and</li> <li>(b) either: <ul style="list-style-type: none"> <li>(i) a child of the person's spouse or de facto partner under that section; or</li> <li>(ii) a biological child of the person's spouse or de facto partner.</li> </ul> </li> </ul> <p>(2) The child is taken for the purposes of this Act:</p> <ul style="list-style-type: none"> <li>(a) to be the child of the person and the spouse or de facto partner; and</li> <li>(b) not to be the child of anyone else.</li> </ul>

Act and Benefit/Responsibility	Definitions
<p><i>Australian Passports Act 2005</i></p> <p>Each person with parental responsibility is required to give consent.</p>	<p>Section 11 (1) The Minister must not issue an Australian passport to a child unless:</p> <p>(a) each person who has parental responsibility for the child consents to the child travelling internationally; or</p> <p>(b) an order of a court of the Commonwealth, a State or a Territory permits the child to travel internationally.</p> <p>For the purposes of this section, a person has <b>parental responsibility</b> for a child if, and only if:</p> <p>(a) the person:</p> <p>(i) is the child's parent (including a person who is presumed to be the child's parent because of a presumption [other than in section 69Q] in Subdivision D of Division 12 of Part VII of the <i>Family Law Act 1975</i>); and</p> <p>(ii) has not ceased to have parental responsibility for the child because of an order made under the <i>Family Law Act 1975</i>; or</p> <p>(b) under a parenting order:</p> <p>(i) the child is to live with the person; or</p> <p>(ii) the child is to spend time with the person; or</p> <p>(iii) the person is responsible for the child's long-term or day-to-day care, welfare and development; or</p> <p>(d) the person is entitled to guardianship or custody of, or access to, the child under a law of the Commonwealth, a State or a Territory.</p>
<p><i>Child Support (Assessment Act) 1989</i></p> <p>Child support payment responsibility</p> <p>Parents have a duty to maintain their children: s. 3</p>	<p>s. 3(1) The parents of a child have the primary duty to maintain the child.</p> <p>The CSAA defines a parent by reference to the <i>Family Law Act</i> definitions in Part VII:</p> <p>Section 5: <b>parent</b>:</p> <p>(a) when used in relation to a child who has been adopted—means an adoptive parent of the child; and</p> <p>(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 <i>Family Law Act 1975</i>; and</p> <p>(c) when used in relation to a child born because of a surrogacy arrangement—includes a person who is a parent of the child under section 60HB of the <i>Family Law Act 1975</i>.</p>

Act and Benefit/Responsibility	Definitions
<p><i>Fair Work Act 2009</i> Parental Leave</p>	<p><b>17 Meaning of child of a person</b>            (1) A <b>child</b> of a person includes:            (a) someone who is a child of the person within the meaning of the <i>Family Law Act 1975</i>; and            (b) an adopted child or step-child of the person.            It does not matter whether the child is an adult.            (2) If, under this section, one person is a child of another person, other family relationships are also to be determined on the basis that the child is a child of that other person.</p> <p><i>S 67 Meaning of birth-related leave</i>            (4) <b>Birth-related leave</b> means leave of either of the following kinds:            (a) unpaid parental leave taken in association with the birth of a child (see section 70);            (b) unpaid special maternity leave (see section 80).</p> <p><i>Meaning of adoption-related leave</i>            (5) <b>Adoption-related leave</b> means leave of either of the following kinds:            (a) unpaid parental leave taken in association with the placement of a child for adoption (see section 70);            (b) unpaid pre-adoption leave (see section 85).</p>
<p><i>Health Insurance Act 1973</i> Medicare Eligibility is based on coming within the definition of an 'Australian resident' in s. 3.</p>	<p>The Act defines 'registered families' in s10AA:            For the purposes of this section and sections 10AB to 10AE inclusive, the following are the members of a person's family:            (a) the person's spouse;            (b) any dependent child of the person or of the person's spouse.            A dependent child means:  <b>'dependent child'</b>, in relation to any person, means:            (a) a child under 16 who is:            (i) in the custody, care and control of that person; or            (ii) where no other person has the custody, care and control of the child—is wholly or substantially in the care and control of the first-mentioned person; or            (b) a student child who is wholly or substantially dependent on the person.</p>

Act and Benefit/Responsibility	Definitions
<p><i>Migration Act 1958</i>            Visa eligibility</p>	<p><b>5CA Child of a person</b>            Without limiting who is a child of a person for the purposes of this Act, each of the following is the <b>child</b> of a person:</p> <ul style="list-style-type: none"> <li>(1) someone who is a child of the person within the meaning of the <i>Family Law Act 1975</i> (other than someone who is an adopted child of the person within the meaning of that Act);</li> <li>(a) someone who is an adopted child of the person within the meaning of this Act.</li> <li>(b) The regulations may provide that, for the purposes of this Act, a person specified by the regulations is not a <b>child</b> of another person specified by the regulations in circumstances in which the person would, apart from this subsection, be the child of more than 2 persons for the purposes of this Act.</li> <li>(2) Subsection (2), and regulations made for the purposes of that subsection, have effect whether the person specified as not being a child of another person would, apart from that subsection and those regulations, be the child of the other person because of subsection (1) or otherwise.</li> <li>(3)</li> </ul>
<p><i>Migration Regulations 1994</i>            Definition of Adoption</p>	<p><b>REG 1.04 Adoption</b></p> <ul style="list-style-type: none"> <li>(1) A person (in this regulation called <b>the adoptee</b>) is taken to have been adopted by a person (in this regulation called <b>the adopter</b>) if, before the adoptee attained the age of 18 years, the adopter assumed a parental role in relation to the adoptee under:           <ul style="list-style-type: none"> <li>(a) formal adoption arrangements made in accordance with, or recognised under, the law of a State or Territory of Australia relating to the <u>adoption</u> of children; or</li> <li>(b) formal adoption arrangements made in accordance with the law of another country, being arrangements under which the persons who were recognised by law as the parents of the adoptee before those arrangements took effect ceased to be so recognised and the adopter became so recognised; or</li> <li>(c) other arrangements entered into outside Australia that, under subregulation (2), are taken to be in the nature of <u>adoption</u>.</li> </ul> </li> <li>(2) For the purposes of paragraph (1)(c), arrangements are taken to be in the nature of <u>adoption</u> if:           <ul style="list-style-type: none"> <li>(a) the arrangements were made in accordance with the usual practice, or a recognised custom, in the culture or cultures of the adoptee and the adopter; and</li> <li>(b) the child-parent relationship between the adoptee and the adopter is significantly closer than any such relationship between the adoptee and any other person or persons, having regard to the nature and duration of the arrangements; and</li> <li>(c) the Minister is satisfied that:               <ul style="list-style-type: none"> <li>(i) formal adoption of the kind referred to in paragraph (1)(b):</li> <li>(A) was not available under the law of the place where the arrangements were made; or</li> <li>(B) was not reasonably practicable in the circumstances; and</li> <li>(ii) the arrangements have not been contrived to circumvent Australian migration requirements.</li> </ul> </li> </ul> </li> </ul>

Act and Benefit/Responsibility	Definitions
<p>A New Tax System (Family Assistance) Act 1999</p> <p>Family Tax Benefit</p> <p>Schoolkids Bonus</p> <p>Baby bonus</p> <p>Child Care Benefit</p> <p>Child Care Rebate</p> <p>Single Income Family Supplement</p>	<p><b>22 When an individual is an FTB child of another individual</b></p> <p>(1) An individual is an <b>FTB child</b> of another individual (the <b>adult</b>) in any of the cases set out in this section.</p> <p><i>Individual aged under 16</i></p> <p>(2) An individual is an <b>FTB child</b> of the adult if:</p> <p>(a) the individual is aged under 16; and</p> <p>(b) the individual is in the adult's care; and</p> <p>(c) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult; and</p> <p>(d) the circumstances surrounding legal responsibility for the care of the individual are those mentioned in paragraph 5(a), (b) or (c).</p> <p><i>Individual aged 16-17</i></p> <p>(3) An individual is an <b>FTB child</b> of the adult if:</p> <p>(a) the individual has turned 16 but is aged under 18; and</p> <p>(b) the individual is in the adult's care; and</p> <p>(c) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult; and</p> <p>(d) the circumstances surrounding legal responsibility for the care of the individual are those mentioned in paragraph 5(a), (b) or (c); and</p> <p>(e) the individual satisfies or is exempt from the FTB activity test.</p> <p><i>Individual aged 18-19</i></p> <p>(4) An individual is an <b>FTB child</b> of the adult if:</p> <p>(a) the individual is aged 18 or is aged 19 and the calendar year in which the individual turned 19 has not ended; and</p> <p>(b) the individual is in the adult's care; and</p> <p>(c) the individual is an Australian resident, is a special category visa holder residing in Australia or is living with the adult; and</p> <p>(d) the individual is a senior secondary school child.</p> <p><i>Legal responsibility for the individual</i></p> <p>(5) The circumstances surrounding legal responsibility for the care of the individual are:</p> <p>(a) the adult is legally responsible (whether alone or jointly with someone else) for the day-to-day care, welfare and development of the individual; or</p> <p>(b) under a family law order, registered parenting plan or parenting plan in force in relation to the individual, the adult is someone with whom the individual is supposed to live or spend time; or</p> <p>(c) the individual is not in the care of anyone with the legal responsibility for the day-to-day care, welfare and development of the individual.</p>

Act and Benefit/Responsibility	Definitions
<p><i>Paid Parental Leave Act 2010</i></p>	<p>Section 6 defines a “parent” based on the FLA definitions:</p> <p>(a) when used in relation to a child who has been adopted—means an <u>adoptive parent</u> of the child; and</p> <p>(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 <u>parent</u> of the child under section 60H of the <i>Family Law Act 1975</i>; and</p> <p>(c) when used in relation to a child born because of a surrogacy arrangement—includes a person who is a <u>parent</u> of the child under section 60HB of the <i>Family Law Act 1975</i>.</p>
<p>Social Security Act 1991 Eligibility for Parenting Payment (s. 500 D)</p>	<p>s. 5 “child” without limiting who is a <u>child</u> of a person for the purposes of this Act, someone is the <b><u>child</u></b> of a person if he or she is a <u>child</u> of the person within the meaning of the <i>Family Law Act 1975</i> .</p> <p><b>“parent”</b> means:</p> <p>(a) (except in Part 2.11, section 592L and the Youth Allowance Rate Calculator in section 1067G):</p> <p>(i) in relation to a person (the <b>relevant person</b>), other than an <u>adopted child</u>—a natural <u>parent</u> or <u>relationship parent</u> of the relevant person; or</p> <p>(ii) in relation to an <u>adopted child</u>—an <u>adoptive parent</u> of the <u>child</u>; or</p> <p>(b) in Part 2.11, section 592L and the Youth Allowance Rate Calculator in section 1067G, in relation to a person (<b>relevant person</b>):</p> <p>(i) a natural <u>parent</u>, <u>adoptive parent</u> or <u>relationship parent</u> of the relevant person with whom the relevant person normally lives; or</p> <p>(ii) if a <u>parent</u> referred to in subparagraph (b)(i) is a <u>member of a couple</u> and normally lives with the other member of the couple—the other member of the couple; or</p> <p>(iii) any other person (other than the relevant person’s partner) on whom the relevant person is wholly or substantially dependent; or</p> <p>(iv) if none of the preceding paragraphs applies—the natural <u>parent</u>, <u>adoptive parent</u> or <u>relationship parent</u> of the relevant person with whom the relevant person last lived.</p>

Act and Benefit/Responsibility	Definitions
<p>Superannuation Industry Supervision Act 1997 and Superannuation Industry (Supervision) Regulations 1994</p> <p>Entitlement to the distribution of benefits on the death of a person</p>	<p><b>s. 10 "child"</b>, in relation to a person, includes:</p> <ul style="list-style-type: none"> <li>(a) an <u>adopted child</u>, a <u>stepchild</u> or an <u>ex-nuptial child</u> of the person; and</li> <li>(b) a <u>child</u> of the person's <u>spouse</u>; and</li> <li>(c) someone who is a <u>child</u> of the person within the meaning of the <i>Family Law Act 1975</i>.</li> </ul> <p>Reg 6.21 Compulsory cashing of benefits in regulated superannuation funds</p>

# Appendix E: Comparative Table of Surrogacy Legislation in Australia—QLD NSW and VIC

	QLD	NSW	VIC
Legislation	Surrogacy Act 2010	Surrogacy Act 2010 Commenced 1 March 2011	Assisted Reproductive Treatment Act 2008
Parties to a surrogacy arrangement	Intended parents can be <sup>630</sup> : Married Heterosexual de facto Same-sex de facto Single	Intended parents can be <sup>631</sup> : Married Heterosexual de facto Same-sex de facto Single	Intended parents can be: Married Heterosexual de facto Same-sex de facto Single
Age	Surrogate must be 25 years but can be lowered in exceptional circumstances; Surrogate's partner must be 25 years but can be lowered in exceptional circumstances; Intending parent/s must be 25 years but can be lowered in exceptional circumstances. <sup>632</sup>	Surrogate must be 25 years; Intended parents must be 25 years but can be lowered to 18 years in exceptional circumstances. <sup>633</sup>	Surrogate 25 years; Intending parent/s 18 years. <sup>634</sup>
Residency	The intending parents must be resident in Qld, but the surrogate can be a non-resident <sup>635</sup>	The intended parents must be resident in NSW but the surrogate can be non-resident <sup>636</sup> .	It is likely that the intended parents must be resident in VIC but the surrogate can be non-resident <sup>637</sup> .

630 s7(1) Surrogacy Act 2010 (Qld)

631 s5(6) Surrogacy Act 2010 (NSW)

632 ss22(f), (g) and 23 Surrogacy Act 2010 (Qld)

633 ss27-29 Surrogacy Act 2010 (NSW)

634 s40(1)(b) Assisted Reproductive Treatment Act 2008 (VIC); s23(2)(a) Status of Children Act 1974 (VIC)

635 s22(g) Surrogacy Act 2010 (Qld)

636 s32 Surrogacy Act 2010 (NSW)

637 s40 Assisted Reproductive Treatment Act 2008 (VIC)

<p>Definition and types of "surrogacy arrangement"</p>	<p><b>QLD</b></p> <p>No definitions</p> <p>Must be a pre-conception, non-commercial surrogacy arrangement.</p>	<p><b>NSW</b></p> <p><b>Pre-conception surrogacy arrangement</b></p> <p>An arrangement whereby a woman agrees to become (or try to become) pregnant with a child and transfer parentage of the child to another person/s<sup>638</sup>.</p> <p><b>Post-conception surrogacy arrangement</b></p> <p>An arrangement whereby a pregnant woman agrees that parentage of a child born as a result of the pregnancy be transferred to another person/s<sup>639</sup>.</p> <p><b>Commercial surrogacy arrangement</b></p> <p>The provision of a fee, reward or other material benefit or advantage is made to a person to enter into or agree to a surrogacy arrangement, given up the child of a surrogacy arrangement or consent to the making of a parentage order<sup>640</sup>.</p> <p><b>Altruistic surrogacy arrangement</b></p> <p>The only fee, reward or other benefit or advantage is provided to reimburse the mother's surrogacy costs<sup>641</sup>.</p>	<p><b>VIC</b></p> <p><b>Assisted reproductive treatment (ART)</b></p> <p>A registered ART provider may only carry out a procedure under a surrogacy arrangement if the arrangement has been approved by the Patient Review Panel<sup>642</sup>.</p>
<p>Enforcement of surrogacy arrangements</p>	<p>Cannot be enforced anywhere in Australia</p> <p>e.g. change of mind by either party</p>	<p>Cannot be enforced<sup>643</sup></p> <p>e.g. change of mind by one party.</p>	<p>Cannot be enforced anywhere in Australia</p> <p>e.g. change of mind by either party</p>

638 s5 Surrogacy Act 2010 (NSW)

639 s5 Surrogacy Act 2010 (NSW)

640 s9(1) Surrogacy Act 2010 (NSW)

641 s9(2) Surrogacy Act 2010 (NSW)

642 s39 Assisted Reproductive Treatment Act 2008 (VIC)

643 s6(1) Surrogacy Act 2010 (NSW)

	QLD	NSW	VIC
Receipt of compensation by surrogate	Cannot receive a payment or reward for entering a surrogacy agreement, other than reimbursement of the birth mother's surrogacy costs <sup>644</sup> .	An obligation under a surrogacy arrangement to pay or reimburse a mother's surrogacy costs is enforceable only if it is a pre-conception surrogacy arrangement <sup>645</sup> .	Surrogate mother cannot receive any material benefit or advantage aside from prescribed costs incurred as a direct consequence of the surrogacy arrangement <sup>646</sup> .
Advertising availability to enter into surrogacy arrangement	Cannot advertise or publish in relation to surrogacy agreements. <sup>647</sup>	Advertising of surrogacy arrangements is prohibited. <sup>648</sup>	Prohibited to advertise or publish availability to enter into surrogacy arrangement. <sup>649</sup>
Preconditions to surrogacy arrangement	Preconditions for surrogacy arrangement: Both the birth parents, and the intended parents, must each obtain independent legal advice and counselling; <sup>650</sup> Surrogacy agreement must be prepared in writing. <sup>651</sup>		When considering whether to approve the surrogacy arrangement, the Patient Review Panel must be satisfied that a doctor is of the opinion that the commissioning parent: Is unlikely to become pregnant; or Is unlikely to be able to carry a pregnancy or give birth; or The life of the mother or the baby could be at risk if the mother become pregnant, carries a pregnancy or gives birth. <sup>652</sup> Further, panel must be satisfied that: Surrogate mother is at least 25 years old; Surrogate has previously carried a pregnancy and given birth to a child; Surrogate is not the biological mother <sup>653</sup> All parties have received counselling. <sup>654</sup>

644 s57 Surrogacy Act 2010 (Qld)

645 s6(2) Surrogacy Act 2010 (NSW)—for a list of the costs recoverable by the birth mother, see section 7

646 s44 Assisted Reproductive Treatment Act 2008 (VIC)

647 s55 Surrogacy Act 2010 (Qld)

648 s10 Surrogacy Act 2010 (NSW)

649 s45 Assisted Reproductive Treatment Act 2008 (VIC)

650 ss30 and 31 Surrogacy Act 2010 (Qld)

651 s25 Surrogacy Act 2010 (Qld)

652 s40 Assisted Reproductive Treatment Act 2008 (VIC)

653 s44 Assisted Reproductive Treatment Act 2008 (VIC)

654 s43 Assisted Reproductive Treatment Act 2008 (VIC)

	QLD	NSW	VIC
Parentage at birth	Surrogate / birth mother is the parent until a parentage order is made. <sup>655</sup> Surrogate's husband, surrogate's heterosexual de facto partner and surrogate's lesbian partner considered parents.	Surrogate / birth mother is the parent until a parentage order is made. <sup>656</sup> Surrogate's husband and surrogate's lesbian partner considered parents.	Surrogate/birth mother is the presumed mother of the child. <sup>657</sup> Surrogate's husband and surrogate's lesbian partner considered parents.
Parentage Orders		Supreme Court can make parentage orders in respect of a child of an altruistic surrogacy arrangement, transferring parentage rights to the intended parents under the arrangement. Once the child is born and the birth mother consents to waiving her parental rights, the application can be made. The Supreme Court has the power to make a parentage order for the transfer of the parentage of a child. <sup>658</sup>	Commissioning parents can apply to the County Court of Supreme Court for a substitute parentage order. <sup>659</sup>
Time to make application for parentage order	No earlier than 28 days after the birth and no later than 6 months after the birth, without leave of the Court. <sup>660</sup>		No earlier than 28 days after birth and no later than 6 months after birth. <sup>661</sup>

655 s17 Surrogacy Act 2010 (Qld)

656 s39 Surrogacy Act 2010 (NSW)

657 s19 Status of Children Act 1974 (VIC)

659 s20 Assisted Reproductive Treatment Act 2008 (VIC)

660 s21 Surrogacy Act 2010 (Qld)

661 s20 Assisted Reproductive Treatment Act 2008 (VIC)

	QLD	NSW	VIC
Preconditions to making a parentage order	<p><b>Mandatory preconditions:</b></p> <p>The birth of the child must be a registered birth by the birth parents;<sup>662</sup></p> <p>A surrogacy guidance report must be obtained from a counsellor;<sup>663</sup></p> <p>The order is for the wellbeing and is in the best interests of the child;</p> <p>The surrogacy arrangement was made with each party's consent;</p> <p>The arrangement was entered into before conception of the child;</p> <p>The arrangement is a non-commercial arrangement.</p>	<p><b>Mandatory preconditions</b></p> <p>Best interests of the child are paramount<sup>t665</sup></p> <p>The surrogacy arrangement must be altruistic (not commercial)<sup>t666</sup></p> <p>The arrangement must be a pre-conception surrogacy arrangement<sup>t667</sup></p> <p>The intended parent must be single or part of a couple (either de facto or married)<sup>t668</sup></p> <p>The child must be under 18 years and, if the child is of sufficient maturity to express his/her views the Court should take those into account if appropriate<sup>t669</sup></p> <p>Birth mother must at least 18 years when entering into arrangement,<sup>t670</sup></p> <p>The intended parents must have been at least 18 years old at the time of the arrangement<sup>t671</sup></p> <p>If the intended parent was under 25 years old at the time the arrangement was made, that parent must demonstrate that they were of sufficient maturity to understand the social and psychological implications of making the parentage order<sup>t672</sup></p>	<p><b>Mandatory preconditions</b></p> <p>The order is in the child's best interests;</p> <p>The commissioning parents are living with the child;</p> <p>The commissioning parents are living in Victoria at the time of making the application;</p> <p>The ART procedure, if performed by an ART providing, was pre-approved by the Patient Review Panel;</p> <p>The surrogate mother consents to the order being made;</p> <p>The surrogate mother's partner consents to the order being made (if the partner was a party to the surrogacy arrangement).</p> <p><b>Preconditions if no ART provider:</b></p> <p>Surrogate mother was at least 25 years old</p> <p>Parties received counselling and information regarding the legal circumstances of the arrangement<sup>t684</sup></p>

- 662 s25 Surrogacy Act 2010 (Qld)
- 663 s32 Surrogacy Act 2010 (Qld)
- 665 s22 Surrogacy Act 2010 (NSW)
- 666 s23 Surrogacy Act 2010 (NSW)
- 667 s24 Surrogacy Act 2010 (NSW)
- 668 s25 Surrogacy Act 2010 (NSW)
- 669 s26 Surrogacy Act 2010 (NSW)

- 670 s27 Surrogacy Act 2010 (NSW)
- 671 s28 Surrogacy Act 2010 (NSW)
- 672 s29 Surrogacy Act 2010 (NSW)—mandatory precondition to the making of a parentage order; not a mandatory precondition to pre-commencement surrogacy arrangement
- 684 s22 Status of Children Act (Vic)

	QLD	NSW	VIC
<p>Preconditions to making a parentage order (cont.)</p>	<p><b>Discretionary preconditions:</b>  The child reside with the birth parent for at least the first 28 days;  The application for parenting orders be made between 28 days and 6 months after birth;  There is evidence of a medical or social need for the arrangement;  Each of the parties obtained legal advice beforehand;  Each of the parties obtained counselling beforehand;  The arrangement is in writing signed by both parties;  The applicant is at least 25 years old and resident in Qld;  The guidance report supports the making of the parentage order;  Both parties consent to the making of the order at the time of hearing<sup>664</sup>.</p> <p><b>BUT</b>  The court may only dispense with the discretionary requirements if:  There are exceptional circumstances for giving the dispensation; and  The dispensation will be for the wellbeing, and in the best interests of the child.</p>	<p><b>Discretionary preconditions</b>  The birth mother must have been at least 25 years old when she entered into the arrangement<sup>673</sup>  There must be a medical or social ground for the surrogacy arrangement to be needed – i.e. a woman must demonstrate that they are unable to conceive, to carry the child to birth, to suffer medical consequences in pregnancy/birth or will pass on a genetic disorder<sup>674</sup>  The birth parent consents<sup>675</sup>  Each parent must consent<sup>676</sup>  Applicant/s must be resident in NSW<sup>677</sup>  Child must be living with applicant/s<sup>678</sup>  Surrogacy arrangement must be in writing<sup>679</sup>  Counselling must have been obtained by each of the parties<sup>680</sup>  Legal advice must have been obtained by each of the parties<sup>681</sup>  Birth of the child must have been registered<sup>682</sup>  Information must be included for provision in the Central Register<sup>683</sup></p>	

- 664 s23 Surrogacy Act 2010 (Qld)
- 673 s27 Surrogacy Act 2010 (NSW)
- 674 s30 Surrogacy Act 2010 (NSW)
- 675 s31 Surrogacy Act 2010 (NSW)
- 676 s31 Surrogacy Act 2010 (NSW)
- 677 s32 Surrogacy Act 2010 (NSW)
- 678 s33 Surrogacy Act 2010 (NSW)
- 679 s34 Surrogacy Act 2010 (NSW)
- 680 s35 Surrogacy Act 2010 (NSW)
- 681 s36 Surrogacy Act 2010 (NSW)
- 682 s38 Surrogacy Act 2010 (NSW)
- 683 s37 Surrogacy Act 2010 (NSW)

# Appendix F: Comparative Table of Surrogacy Legislation in Australia—WA SA ACT and Tasmania

	WA	SA	ACT	TAS
Legislation	Surrogacy Act 2008	Family Relationships Act 1975	Parentage Act 2004	Surrogacy Act 2012
Parties to a surrogacy arrangement	Intended parents can be <sup>685</sup> : Married Heterosexual de facto Single (women only) Other: An egg or sperm donor and the donor's spouse is also a party to the surrogacy agreement <sup>686</sup>	Intended parents can be <sup>687</sup> : Married Heterosexual de facto (together for at least 3 years)	Intended parents can be <sup>688</sup> : Married Heterosexual de facto Same-sex de facto	Intended parents can be <sup>689</sup> : Married Heterosexual de facto Same-sex de facto Single
Age	Surrogate 25 years; Surrogate's partner—at least one party is 25 years; Intended parent/s 18 years. <sup>690</sup>	Surrogate 18 years; Surrogate's partner (can be a husband only) 18 years; Intended parent/s 18 years. <sup>691</sup>	Surrogate 18 years; Intended parent/s 18 years. <sup>692</sup>	Surrogate 25 years; Intended parent/s 21 years <sup>693</sup>
Residency	The intended parents must be resident in WA, but the surrogate can be non-resident <sup>694</sup> .	The intended parents must be resident and domiciled in SA and but the surrogate does not have to be resident in SA <sup>695</sup> .	The intended parents must be resident in the ACT but the surrogate can be a non-resident <sup>696</sup> .	All parties to the surrogacy agreement must be resident in Tasmania at the time of the arrangement. <sup>697</sup>

685 s 19 Surrogacy Act 2008 (WA)

686 s 17 Surrogacy Act 2008 (WA)

687 s 10HA Family Relationships Act 1975 (SA)

688 s 24 Parentage Act 2004 (ACT)

689 s 5 Surrogacy Act 2012 (Tas)

690 ss 17, 19 Surrogacy Act 2008 (WA)

691 s 10HA Family Relationships Act 1975 (SA)

692 No specific reference, so taken to be 18 years

693 s 16 Surrogacy Act 2012 (Tas)

694 s 17 Surrogacy Act 2008 (WA)

695 s 10HA Family Relationships Act 1975 (SA)

696 s 24 Parentage Act 2004 (ACT)

697 s 16(f) Surrogacy Act 2012 (Tas)

Definition of "surrogacy arrangement"	<p><b>WA</b></p> <p>Surrogacy arrangement is an arrangement for a woman (the birth mother) to seek to become pregnant and give birth to a child for a person or persons other than the birth (the arranged parent/s) to raise the child. Does not include arrangements that came into place after the birth mother was already pregnant<sup>698</sup>.</p>	<p><b>SA</b></p> <p><b>Commercial surrogacy arrangements</b>          Illegal to enter into a contract or receive valuable consideration for surrogacy or to induce another to enter into such an arrangement<sup>699</sup>.</p> <p><b>Permitted arrangements</b>          A surrogacy arrangement is permitted and recognised if the surrogate mother agrees to become pregnant or to seek to become pregnant and to surrender custody of and rights in relation to, a child born as a result of the pregnancy, to two other persons (the commissioning parents)<sup>700</sup>.</p>	<p><b>ACT</b></p> <p><b>Substitute parent agreements</b>          A contact/agreement under which:          A woman agrees:          That the woman will become pregnant; and          The a child born as a result of a pregnancy will be taken to be the child of someone else;<sup>701</sup>          A woman who is pregnant agrees that a child born as a result of the pregnancy will be taken to be the child of someone else<sup>701</sup>.</p> <p><b>Commercial substitute parent agreements</b>          A substitute parent agreement under which a person agrees to make or give to someone else a payment or reward, other than for expenses connected with the pregnancy or the birth/care of the child born as a result of the pregnancy.<sup>702</sup> NB— expenses do not need to be reasonable.</p>	<p><b>TAS</b></p> <p><b>Surrogacy arrangement</b> is an arrangement for a female person (the birth mother) to seek to become pregnant and give birth to a child; and the child to be treated as the child of a person or persons other than the birth mother (the intended parent or intended parents. Does not include arrangements that came into place after the birth mother was already pregnant<sup>703</sup></p> <p><b>Commercial surrogacy arrangements</b>          If it provides for a person to receive a payment, reward or other material benefit or advantage (other than the reimbursement of the birth mother's surrogacy costs) for the person or another person: Agreeing or entering the arrangement; giving up a child born as a result of the arrangement; or, consenting to the making of a parentage order.<sup>704</sup></p>
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702 s40 Parentage Act 2004 (ACT)

703 s5 Surrogacy Act 2012 (Tas)

704 s8 Surrogacy Act 2012 (Tas)

698 s3 Surrogacy Act 2008 (WA)

699 s10H Family Relationships Act 1975 (SA)

700 s10HA(2)(ix) Family Relationships Act 1975 (SA)

701 s24C Parentage Act 2004 (ACT)

	WA	SA	ACT	TAS
Enforcement of surrogacy arrangements	Cannot be enforced anywhere in Australia e.g. change of mind by either party—common law. Can only enforce component relating to payment of surrogacy-related expenses <sup>705</sup> .	Cannot be enforced anywhere in Australia e.g. change of mind by either party—common law.	Cannot be enforced anywhere in Australia e.g. change of mind by either party—common law. Common law position confirmed in the Act “a substitute parent agreement has no legal effect other than under this division.” <sup>706</sup>  If the birth mother changes her mind after the birth of the child, the intended parents have no cause of action except by seeking parenting orders under Part VII of the <i>Family Law Act</i> , in which case the best interests of the child are the paramount consideration.  If the substitute parents change their mind, the birth parents cannot insist on compliance with the agreement <sup>707</sup> .	Cannot be enforced. <sup>708</sup>

705 s7(1) *Surrogacy Act 2008 (WA)*

706 s31 *Parentage Act 2004 (ACT)*

707 s25(2) *Parentage Act 2004 (ACT)*

708 s10 *Surrogacy Act 2012 (Tas)*

	WA	SA	ACT	TAS
Receipt of compensation by surrogate	Cannot make a surrogacy arrangement that is for reward <sup>709</sup> .	The agreement must state that there is no valuable consideration payable other than for expenses connected with: A pregnancy (including attempts to become pregnant) that is the subject of the agreement; The birth or care of a child born as a result of the pregnancy; Counselling or medical services provided; Legal services provided; Any other matter prescribed by the Regulations.	An obligation to pay or reimburse a mother's surrogacy costs does not appear to be enforceable as there is no specific provision in the legislation for recovery and that the Act states that the substitute parent agreement has no legal effect other than under this Division <sup>710</sup> . Commercial substitute parent agreements are prohibited. Offence—intentionally entering into a commercial substitute parent agreement <sup>711</sup> . Offence—facilitating a pregnancy in another person in circumstances where they know that the person intends to be a party to a commercial substitute parent agreement <sup>712</sup> .	An obligation under a surrogacy arrangement to pay or reimburse a mother's surrogacy costs is enforceable. <sup>713</sup>
Advertising availability to enter into surrogacy arrangement	Cannot advertise availability—offence <sup>714</sup> .	Illegal to publish an advertisement to the effect that a person is willing to enter into a surrogacy contract or is seeking to enter into such a contract, or is willing to arrange a contract on behalf of another <sup>715</sup> .	Offence—advertising in relation to a substitute parent agreement <sup>716</sup> .	Offence—Commercial brokerage or advertising of surrogacy arrangements prohibited. <sup>717</sup>

709 s8 Surrogacy Act 2008 (WA)

710 s31 Parentage Act 2004 (ACT)

711 s41 Parentage Act 2004 (ACT)

712 s44 Parentage Act 2004 (ACT)

713 s10 Surrogacy Act 2012 (Tas)

714 s10 Surrogacy Act 2008 (WA)

715 s10H Family Relationships Act 1975 (SA)

716 s43 Parentage Act 2004 (ACT)

717 s41 Surrogacy Act 2012 (Tas)

Preconditions to surrogacy arrangement	<p><b>WA</b></p> <p><b>Requirements<sup>718</sup>:</b></p> <p>The surrogate must have given birth to a live child, unless there are exceptional circumstances;</p> <p>All parties to the agreement have signed the agreement in writing;</p> <p>At least 3 months prior to the approval being given, all of the parties have undertaken counselling, been assessed by a clinical psychologist, received independent legal advice;</p> <p>The birth mother has not yet become pregnant.</p> <p>In addition:</p> <p>The surrogacy agreement must be approved before any parentage order can be made<sup>719</sup>;</p> <p>There is an approved plan that balances the rights and responsibilities of the parties, promotes the child's long-term welfare and is reasonable in the circumstances<sup>720</sup>.</p>	<p><b>SA</b></p> <p><b>Requirements:</b></p> <p>All parties to the agreement over 18 years;</p> <p>Commissioning parents domiciled in Australia;</p> <p>Parties must be the surrogate mother and, if she is married, her husband plus the commissioning parents;</p> <p>Commissioning parents must be legally married or have cohabited continuously as de facto husband and wife for no less than 3 years preceding the date of the agreement;</p> <p>Same sex couples cannot be commissioning parents;</p> <p>The female commissioning parent must be or appears to be infertile OR there appears to be a risk of a serious genetic defect, disease or illness will be passed to the child.<sup>721</sup></p>	<p><b>ACT</b></p> <p>No specific reference to "altruistic surrogacy arrangements" but the provisions re parentage orders only apply to a child if there is a non-commercial substitute parentage agreement<sup>725</sup>.</p>	<p><b>TAS</b></p> <p><b>Requirements:</b></p> <p>All parties to have received independent legal advice prior to the arrangement;</p> <p>The arrangement is not a commercial surrogacy arrangement;</p> <p>Intended parent/s over 21 and surrogate mother over 25;</p> <p>The surrogate must have given birth to a live child;</p> <p>All parties to the agreement have signed the agreement in writing;</p> <p>All relevant parties to receive counselling prior to the arrangement and after birth prior to application for parentage orders;</p> <p>All parties were resident in Tasmania at time of arrangement;</p> <p>There is a medical or social need for the surrogacy arrangement.<sup>726</sup></p>
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718 s17 Surrogacy Act 2008 (WA)

719 s16 Surrogacy Act 2008 (WA)

720 s22 Surrogacy Act 2008 (WA)

721 s10HA Family Relationships Act 1975 (SA)

725 s24(c) Parentage Act 2004 (ACT)

726 s16(2)(d) Surrogacy Act 2012 (Tas)

Preconditions to surrogacy arrangement (cont.)	<p><b>WA</b></p>	<p><b>SA</b></p> <p><b>Counselling:</b> The surrogate mother must be assessed and approved by a counselling service in accordance with the legislative criteria</p> <p>Surrogate mother and both commissioning parents must each have a certified issued by a counselling service that complies with legislative requirements.<sup>722</sup></p> <p>Provision of human reproductive material: At least one of the commissioning parents must provide human reproductive material unless there is a certificate from a medical practitioner stating that both commissioning parents appear to be infertile or there is a medical reason by the material should not be used<sup>723</sup>.</p> <p><b>Formalities:</b> Agreement must be in writing signed by both parties and accompanied by a lawyer's certificate<sup>724</sup>.</p>	<p><b>ACT</b></p>	<p><b>TAS</b></p>
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722 s10HA(3) Family Relationships Act 1975 (SA)

723 s10HA(5) Family Relationships Act 1975 (SA)

724 s10HA(6) Family Relationships Act 1975 (SA)

	WA	SA	ACT	TAS
Parentage at birth	Surrogate / birth mother is the parent until a parentage order is made <sup>727</sup> Surrogate's husband / surrogate's lesbian partner are consider parents, but not a de facto heterosexual partner.	Surrogate / birth mother is the parent until a parentage order is made <sup>728</sup> Surrogate's husband considered parent.	Surrogate / birth mother is the parent until a parentage order is made <sup>729</sup> Surrogate's husband, surrogate's heterosexual de facto partner and surrogates lesbian partner are considered parents.	Surrogate / birth mother is the parent until a parentage order is made. <sup>730</sup> Surrogate's husband, surrogate's heterosexual de facto partner and surrogate's lesbian partner are considered parents
Parentage orders		The effect of the parentage order is that the relationship between the child and commissioning parent is that of parent/child. The relationship of all other persons to the child (e.g. siblings) are to be determined according to this change.	The effect of a parentage order is to make the substitute parent/s the parents of the child as if they had adopted the child <sup>731</sup> . The child has the surname of both the substitute parents (or as otherwise approved by the Court) <sup>732</sup> .	The effect of a parentage order is that the child becomes a child of the intending parent/s and the child ceases to be a child of the birth parent/s. <sup>733</sup>
Time to make application for parenting orders	When the child is between the ages of 28 days and 6 months <sup>734</sup> .	When the child is between the ages of 4 weeks and 6 months <sup>735</sup> .	When the child is between the ages of 6 weeks and 6 months <sup>736</sup> .	When the child is between the ages of 30 days and 6 months <sup>737</sup>

727 ss5-7 Artificial Conception Act 1965 (WA)

728 ss7, 8, 10C, 10D and 10E Family Relationships Act 1975 (SA)

729 ss7, 8, 9, 11 Parentage Act 2004 (ACT)

730 s26 Surrogacy Act 2012 (Tas)

731 s29 Parentage Act 2004 (ACT)

732 s28 Parentage Act 2004 (ACT)

733 s26 Surrogacy Act 2012 (Tas)

734 s20(2) Surrogacy Act 2008 (WA)

735 s10HB Family Relationships Act 1975 (SA)

736 s25(3) Parentage Act 2004 (ACT)

737 s15 Surrogacy Act 2012 (Tas)

WA	SA	TAS	ACT	TAS
<p>Preconditions to making parentage order</p>	<p><b>Requirements:</b>  Surrogate is generally required to have previously given birth to a child<sup>738</sup>;  The child's best interests are the paramount consideration<sup>739</sup>;  Parentage order cannot be made unless the surrogacy agreement has been approved by the Western Australian Reproductive Technology Council<sup>740</sup>;  The birth parents and intended parents have received counselling and legal advice<sup>741</sup>;  The child is in the day-to-day care of the arranged parents;</p>	<p><b>Requirements:</b>  The child was born under the terms of a recognised surrogacy agreement;  The commissioning parents are domiciled in SA;  The child was conceived as the result of a fertilisation procedure carried out in SA;  The birth mother fully and freely consents to the order EXCEPT where the birth mother is dead/incapacitated or cannot be contacted.  Considerations in making order:  Whether the child's home is and was with the commissioning parents;  If one commissioning parent applies, that the other parent agrees with full understanding of what is involved;  Whether valuable consideration has been given or received;  Any submission made by the court on behalf of the birth father;</p>	<p><b>Mandatory requirements</b><sup>742</sup>:  The child was conceived as a result of a procedure carried out in the ACT;  Neither birth parent of the child is the genetic parent of the child;  There is a substitute parent agreement and the substitute parent/s have indicated their intention to apply for a parentage order;  At least one of the substitute parents is the genetic parent of the child;  The substitute parents live in the ACT;  Making the order is in the best interests of the child;  Both birth parents must freely, and with full understanding of what is involved, agree to the making of the order<sup>743</sup>.  Limited exception where the birth parent is dead or incapacitated or cannot contact the birth parent after making reasonable enquiries<sup>744</sup>.</p>	<p><b>Requirements:</b>  All parties to have received independent legal advice and counselling prior to the arrangement and counselling prior to the application for a parentage order;  The arrangement is not a commercial surrogacy arrangement;  Intended parent/s over 21 and surrogate mother over 25;  The surrogate must have given birth to a live child;  All parties to the agreement have signed the agreement in writing;  All parties were resident in Tasmania at time of arrangement;  There is a medical or social need for the surrogacy arrangement.<sup>745</sup>  If there are two intending parents and only one applies, the other parent must be notified.<sup>746</sup></p>

738 s 17 Surrogacy Act 2008 (WA)  
739 s 13 Surrogacy Act 2008 (WA)  
740 s 16 Surrogacy Act 2008 (WA)  
741 s 21 Surrogacy Act 2008 (WA)  
742 s 24 Parentage Act 2004 (ACT)

743 s 26(1)(b) Parentage Act 2004 (ACT)  
744 s 26(2) Parentage Act 2004 (ACT)  
745 s 16(2)(d) Surrogacy Act 2012 (Tas)  
746 s 16(2)(h) Surrogacy Act 2012 (Tas)

WA	SA	ACT	TAS
	<p>Whether the commissioning parents are fit and proper parents to assume the role of parents of the child; Any other matter the court considers relevant.</p>	<p>Relevant considerations for the Supreme Court in deciding whether to make a parentage order: Whether the child's home is with the substitute parents; Whether both substitute parents are over 18 years; If only one substitute parent has applied, the other substitute parent freely and with full understanding agrees; Whether payment or reward (other than for expenses reasonably incurred) has been given or received by any parent for or in consideration of the making of the order, the agreement, the handing over of the child etc; Whether both birth parents and substitute parents have received appropriate counselling; Anything else relevant</p>	<p>At the time of hearing: The child is living with the intended parent/s and each intended parent is resident in Tasmania.<sup>747</sup> All relevant parties consent to the making of the parentage order.<sup>748</sup> The order is in the best interests of the child.<sup>749</sup> Non discretionary requirements: that it is not a commercial arrangement. Intending parent/s over 21.<sup>750</sup> Court may make orders without the consent of the birth mother's or birth mother's spouse where: They lack mental capacity, death, or cannot be contacted and the child is living with the intended parent's and it is in the child's best interests.<sup>751</sup> <b>Additional requirements:</b> If multiple births the Court must make parentage orders about each living birth sibling.<sup>752</sup></p>

747 s16(2)(j) Surrogacy Act 2012 (Tas)

748 s16(2)(j) Surrogacy Act 2012 (Tas)

749 s16(2)(k) Surrogacy Act 2012 (Tas)

750 s16(3) Surrogacy Act 2012 (Tas)

751 s16(4) Surrogacy Act 2012 (Tas)

752 s17 Surrogacy Act 2012 (Tas)

# Appendix G: Consultations

## ORGANISATIONS

### **Australian Human Rights Commission:**

Graeme Edgerton, Senior Lawyer, Legal Section

### **Department of Foreign Affairs and Trade:**

Penny Williams, Executive Director, Australian Passports Office

Graeme Swift, Assistant Secretary Passport Client Services Branch

Samantha Callinan Director, Passport Policy and Operations Section

Sharon O'Rourke, Manager of the Approved Senior Officer Team, Passport Policy and Operations Section

Indra McCormac, Executive Officer, Passports Policy and Operations Section

### **Department of Immigration and Citizenship:**

Wendy Southern PSM, Deputy Secretary Policy and Management Group

Sophie Montgomery, Assistant Secretary, Visa Framework and Family Policy Branch

Robert Day, Director, Family Section

Anne Vickers, Assistant Director, Family Section

Frances Finney, a/g First Assistant Secretary, Citizenship, Settlement and Multicultural Affairs Division

Adrian Burn, a/g Assistant Secretary Citizenship Branch

Colin Rowell, Assistant Director, Citizenship Policy Section

### **Hague Conference on Private International Law:**

Hannah Baker, Senior Legal Officer

Laura Martinez-Mora, Principle Legal Officer

**Department of Human Services:**

Belinda Lewis, Senior Lawyer, Program Advice Branch, Legal Services Division

Yvonne Marsh, Director, Policy Advice (Assessment), Families and Child Support Policy Advice Branch, Families Division

Naomi McCartin, Senior Advisor, Policy Advice (Assessments), Policy Advice & Support

**Department of Justice, Victoria:**

Chris Humphreys, Director, Civil Law Policy

Ruvani Wickremesinghe, Assistant Director, Civil Law Policy

Katie Howie, Civil Law Policy

**Family courts:**

Josephine Akee, Family Court Cairns Registry

Karen Barker, Family Consultant, Sydney Registry

Deborah Fry, Regional Co-ordinator NSW/ACT Child Dispute Services Family Court & Federal Circuit Court

The Honorable Alastair Nicholson AO RFD QC, Former Chief Justice, Family Court of Australia

The Honourable Chief Judge John Pascoe AO CVO, Federal Circuit Court of Australia

The Honourable Justice Ryan, Family Court of Australia, Sydney

The Honourable Justice Watts, Family Court of Australia, Sydney

**Hague Conference on Private International Law:**

Hannah Baker, Senior Legal Officer

Laura Martinez-Mora, Principle Legal Officer

**Ministry of Justice New Zealand:**

Megan Noyce, Senior Advisor, Electoral and Constitutional Team, Civil and Constitutional Group, Ministry of Justice, Tāhū o te Ture

**New South Wales Legal Aid:**

Alexandra Harland, Solicitor Advocate

Alexandra Wearne, Independent Children's Lawyer

**Rainbow Families Council Australia:**

Felicity Marlowe, Co-Convenor

**Surrogacy Australia:**

Sam Everingham, President

**VANISH (Victorian Adoption Network and Information Self Help):**

Leigh Hubbard, Chair, Committee of Management

Pauline Ley, Adopted person and founding member of Tangled Webs (voice of advocacy for donor conceived people) and VANISH

**Victorian Aboriginal Child Care Agency:**

Professor Muriel Bamblett AM, Chief Executive Officer

**INDIVIDUALS**

Damian Adams

Karyn Anderson and Hannah Dickinson,

Clothier, Anderson & Associates (Immigration Lawyers)

Dr Lauren Burns

Myf Cummerford

Dr Giuliana Fuscaldo, Victoria University Melbourne

Professor Belinda Fehlberg, Melbourne Law School, University of Melbourne

Professor Emily Jackson and Dr Julie McCandless, Law Department, London School of Economics

Dr Fiona Kelly, La Trobe Law School, La Trobe University

Professor Mary Keyes, Faculty of Law, Griffith University

Professor Jenni Millbank, Faculty of Law, University of Technology, Sydney

Professor The Honorable Nahum Mushin, Faculty of Law, Monash University and Chair of the Past Forced Adoptions Working Group

Stephen Page, Harrington Family Lawyers

Romana Rossi

Charlotte Smith

Professor Shurlee Swain, Australian Catholic University

Professor John Tobin, Melbourne Law School, The University of Melbourne

Ivy Trevallion, Social Worker, Community Child & Adolescent Social, Emotional & Spiritual Well-Being Service, Family Support Program, Torres Strait—Northern Peninsula Hospital & Health Services

# Appendix H: Submissions

Submissions were received from the following persons and organisations in response to the Family Law Council's Reference (in alphabetical order).

ACT Law Society	28 June 2013
Dr Sonia Allan (Deakin University)	5 August 2013
Association of Relinquishing Mothers (Victoria)	28 June 2013
Australian Human Rights Commission	3 May 2013
Australian Institute of Family Studies	21 June 2013
Paul Boers (Richard Calley Family Lawyers)	26 June 2013
D. Browne	28 June 2013
The Honourable Chief Justice Diana Bryant AO (Family Court of Australia)	4 October 2013
Gerard Crosbie	19 December 2012
Myf Cummerford	22 February 2013
Department of Foreign Affairs and Trade	26 June 2013
Department of Immigration and Citizenship	25 June 2013
Family & Relationship Services Australia	12 July 2013
Family Law Section, Law Council of Australia	13 September 2013
Dr Susan Green	31 October 2013
Alexandra Harland	1 May 2013 (Confidential)
Indigenous Issues Committee of the Law Society of NSW	25 June 2013
International Social Service Australia	7 August 2013
Professor Mary Keyes (Griffith University)	24 April 2013
Professor Mary Keyes (Griffith University) and Professor Richard Chisholm (ANU)	16 July 2013
Law Institute of Victoria	31 July 2013
Professor Jenni Millbank (University of Technology Sydney)	1 May 2013
National Children's and Youth Law Centre	28 June 2013
New South Wales Bar Association	29 April 2013

Michael Nicholls QC	17 October 2012
Stephen Page (Harrington Family Lawyers)	5 June 2013
Stephen Page (supplementary submission)	28 June 2013
His Honour Chief Judge John Pascoe AO CVO (Federal Circuit Court of Australia)	21 February 2013
Rainbow Families Council	28 June 2013
Refugee & Immigration Legal Service	5 July 2013
Refugee Council of Australia	5 July 2013
Dr Olivia Rundle (University of Tasmania)	2 July 2013
Michaela Stockey-Bridge (Macquarie University)	28 June 2013
Surrogacy Australia	3 June 2013
Professor Shurlee Swain (Australian Catholic University) and Professor Denise Cuthbert (Swinburne University)	14 March 2013
Associate Professor John Tobin and Elliot Luke (The University of Melbourne)	29 July 2013
VANISH	28 June 2013
Women's Legal Centre ACT and Region	28 June 2013
Women's Legal Service Tasmania	28 June 2013
Women's Legal Service Victoria	28 June 2013
Women's Legal Services NSW	1 July 2013

# Appendix I: Function and membership of the Family Law Council

The Family Law Council is a statutory authority that was established by section 115 of the *Family Law Act 1975*. The functions of Council are set out in sub-section 115(3) of the *Family Law Act 1975* which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

Members of the Family Law Council (as at December 2013):

Professor Helen Rhoades (Chairperson)  
Ms Kylie Beckhouse  
Justice Robert Benjamin  
Mr Jeremy Culshaw

Ms Jennie Hannan  
Dr Rae Kaspiew  
Judge Kevin Laphorn  
Ms Colleen Wall

The following agencies and organisations have observer status on the Council (with names of attendees):

Australian Institute of Family Studies—Professor Lawrie Moloney

Australian Law Reform Commission—Prof Rosalind Croucher/Mr Khanh Hoang

Department of Human Services—Ms Yvonne Marsh

Family Court of Australia—Principal Registrar Angela Filippello/Mr Phillip Cameron

Family Law Courts (Family Court of Australia and Federal Magistrates Court of Australia)—  
Ms Pam Hemphill

Family Court of Western Australia—Justice Susan Duncanson/Principal Registrar David Monaghan

Family Law Section of the Law Council of Australia—Mr Geoff Sinclair

Federal Magistrates Court—Ms Adele Byrne

Family & Relationships Services Australia—Mr Steve Hackett

## **Secretariat:**

Ms Sarah Teasey and Mrs Kim Howatson (Attorney-General's Department)

## **Research Fellow:**

Dr Cressida Limon (Melbourne Law School)

