Australian Human Rights Commission Submission to the Family Law Council

3 May 2013

Review of parentage laws

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# Introduction

1. The Australian Human Rights Commission makes this submission to the Family Law Council in its review of parentage laws.
2. The terms of reference given by the Attorney-General require the Council to consider and advise on the following issues in relation to who is considered to be a parent of a child under the *Family Law Act 1975* (Cth):
   1. 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.
   2. 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.
   3. 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.
   4. 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?
   5. 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?
3. The Council is required by the terms of reference to have regard to the legal parentage of children as determined by state and territory laws.
4. The Commission has been involved in legal proceedings which deal with the determination of parentage under the Family Law Act following an international surrogacy arrangement. The judgment in those proceedings is reported as *Ellison & Karnchanit* [2012] FamCA 602. A copy of the Commission’s written submissions in that case, redacted to remove identifying material, is available on the Commission’s website.[[1]](#endnote-1)
5. This submission deals briefly with a number of issues arising out of that intervention which are relevant to the Council’s terms of reference.

# Children’s rights

1. The Convention on the Rights of the Child (CRC) provides a strong guarantee of non-discrimination in article 2. In particular, article 2(1) provides that States shall ‘respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind’. Article 2(2) provides that States 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 … of the child’s parents, legal guardians, or family members’.
2. In the case of children born of surrogacy arrangements, there is a real risk that they will suffer discrimination in the fulfilment of their rights under the CRC if parent-child relationships are not recognised.
3. The Family Court has noted that there are a number of implications for children born of surrogacy arrangements that flow from the decision of the Court to grant the intended parents the legal status of ‘parent’ under the Family Law Act. These are listed in *Dudley & Chedi* [2011] FamCA 502 at [21]-[22] and include the impact recognition may have on:
   1. citizenship
   2. medical treatment and registration for Medicare and other health funds
   3. applications for passports or school
   4. rights for a child arising upon the death of a parent, including rights to intestacy and superannuation and the ability of a child to be referred to as ‘a child’ in a will
   5. complications arising under the child support regime and schemes of workers compensation.
4. This list of factors is relevant to a number of rights of children under the CRC. Whether or not children are able to enjoy these rights may be affected by whether or not intended parents are recognised as ‘parents’ under the Family Law Act.
5. The following rights in the CRC are particularly relevant:
   1. **Nationality:** A child has the right to acquire a nationality and to know and be cared for by his or her parents (Art 7). Implicit within that right is the right to all the benefits derived from that nationality.
   2. **Health:** A child has the right to enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (Art 24).
   3. **Maintenance:** States Parties shall take appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child (Art 27(4)).
6. The Commission has identified a number of provisions in Commonwealth legislation which demonstrate the significance of recognising parent-child relationships in order for children to have these rights fulfilled.[[2]](#endnote-2) The Victorian Law Reform Commission has identified a broad range of State laws in Victoria which contain a range of obligations and entitlements which arise out of the parent-child relationship.[[3]](#endnote-3)
7. The review of these laws indicates the importance of recognising parent-child relationships for children born as a result of surrogacy arrangements. Such recognition provides an additional benefit to such children over and above the making of parenting orders and can have the effect of removing discriminatory impacts on these children when compared with other children whose parents or guardians have a different status.

# Definition of ‘parent’

1. There is no general definition of ‘parent’ in the Family Law Act. Rather, there is an inclusive definition which provides that when the term ‘parent’ is used in Part VII (Children) in relation to a child who has been adopted, it means an adoptive parent of the child.
2. At common law, the primary meaning of the term ‘parent’ is the biological mother or father of a child.[[4]](#endnote-4)
3. The Full Court of the Family Court rejected an argument in *Simpson v Brockmann*[[5]](#endnote-5) that persons other than biological parents were parents for the purposes of the Family Law Act. In that case, Ms Simpson and Ms Brockmann were partners who had lived together for more than 9 years. Each of them had a child during the relationship through IVF using sperm from the same anonymous donor. At the time the children were born, s 60H(1) had not been amended to include same-sex couples. The Family Court considered that each of them was the parent of the child they had borne, but not the parent of the other child. If this situation were to occur again today, then both partners would be considered to be parents of both children. However, this is not because of an expansion of the ‘ordinary’ meaning of parent for the purposes of the Family Law Act. Rather, it is because of the deeming effect of s 60H(1) and would be an exception to the ‘ordinary’ meaning of parent. This difference can be significant in cases where the deeming provisions do not apply.
4. When dealing with questions of citizenship, the Federal Court has taken a broader view about what it means to be a parent. The Full Court of the Federal Court held in *H v Minister for Immigration and Citizenship*[[6]](#endnote-6) that the term ‘parent’ as used in s 16(2) of the *Citizenship Act 2007* (Cth) was not limited to biological parents, and had its ordinary English meaning. The Court observed that the term is used today to signify a social relationship to another person and reflected a widespread contemporary awareness of families that include non-biological parent-child relationships.[[7]](#endnote-7) The Court considered that being a parent within the ordinary meaning of the word was a question of fact and may depend on various factors, including social, legal and biological factors.[[8]](#endnote-8)
5. 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.
6. **Recommendation 1: Consideration be given to amending the Family Law Act to include a general definition of parent that is consistent with contemporary understandings of parent-child relationships** **including de facto partners and non-biological parents.**

# Surrogacy arrangements

1. Each Australian jurisdiction other than the Northern Territory has laws which permit surrogacy subject to certain conditions.[[9]](#endnote-9) Typically, these conditions include a requirement that the arrangement was not a ‘commercial surrogacy arrangement’, meaning that the surrogate mother is not paid more than an amount to cover her reasonable medical and legal costs involved in having the child.
2. The conditions under which surrogacy arrangements are permitted in Australia differ from jurisdiction to jurisdiction. These differences include things such as the identity of the ‘intended parents’ or ‘commissioning parents’ (for example, single people or couples, heterosexual or same sex couples); the characteristics of the surrogate mother (for example, her age and whether she has previously had children); and the nature of advice and counselling to be provided to the parties to the agreement.
3. The Standing Committee of Attorneys-General (now the Standing Council on Law and Justice) published a paper in 2009 titled ‘A Proposal for a National Model to Harmonise Regulation of Surrogacy’.[[10]](#endnote-10) Draft surrogacy principles were endorsed by the SCAG in November 2009 and referred to the Australian Health Ministers’ Conference and the Community Services Ministers’ Conference (now the Health, Ageing, Community and Disability Services Ministerial Council) to consider. The Commission is unaware of the current status of these harmonisation proposals. Harmonisation will be an important step towards ensuring outcomes that are appropriate, non-discriminatory and consistent for children.
4. Following the birth of a child, the intended parents can approach State and Territory courts for orders that they are the parents of the child.[[11]](#endnote-11) If a State or Territory court has made an order, then the parent-child relationship will be recognised for the purposes of the Family Law Act (s 60HB).[[12]](#endnote-12) However, where a court has not made an order under a prescribed State or Territory law, for example because the surrogacy took place overseas, then s 60HB of the Family Law Act does not apply.[[13]](#endnote-13) In these cases, the provisions in the Family Law Act dealing with children born as a result of artificial conception procedures may apply (s 60H).[[14]](#endnote-14)

# Artificial conception procedures

1. The Family Law Act deems certain parental relationships to exist for the purposes of the Act through the operation of ss 60H, 60HA (dealing with children of de facto partners) and 60HB. These provisions displace the ordinary meaning of ‘parent’ in certain circumstances. Section 60H applies to some (but not all) children born as a result of artificial conception procedures.
2. Given that surrogacy arrangements will typically be carried out as a result of an artificial conception procedure, s 60H may apply in circumstances where s 60HB does not apply, such as overseas surrogacy arrangements.
3. The underlying presumption in s 60H(1) is that the woman who has given birth to the child and her consenting partner will be the parents of the child, and persons who have donated sperm or ova will not be parents. This is consistent with what are likely to be the intentions of people who are sperm donors or egg donors. However, this is not consistent with the intention of people who enter surrogacy arrangements.
4. Section 60H(2) provides that if State and Territory laws provide that a woman who gives birth as a result of an artificial conception procedure is the parent of the child, then this relationship will also be recognised for the purposes of the Family Law Act.[[15]](#endnote-15) Unlike s 60H(1), this subsection does not deem sperm or egg donors not to be parents.
5. No laws have been prescribed for the purpose of s 60H(3), so that sub-section currently has no operation.
6. There are some cases where neither s 60HB nor s 60H will apply to a child born of a surrogacy arrangement (even if the child was born as a result of an artificial conception procedure). One such case is where the surrogate mother is not married or in a de facto relationship. In that case s 60H(1) does not apply. If the woman gives birth in Australia, it may be that she will be deemed to be a parent as a result of the operation of s 60H(2). However, if she gives birth outside Australia, State and Territory legislation may not apply to her. Further, neither s 60H(1) nor s 60H(2) says anything about the status of a person who donated sperm or eggs where the woman giving birth is single.
7. This was the case in relation to Mr Ellison in *Ellison & Karnchanit*.He had donated sperm to be used in a surrogacy arrangement with the intention that he would be the father of any children who were born. Ms Karnchanit, a Thai national, gave birth in Thailand to twins following an artificial conception procedure which used Mr Ellison’s sperm and an egg from an anonymous egg donor. The Family Court found that s 60H extended to surrogacy arrangements in Thailand, but did not have any operation because Ms Karnchanit was not married or in a de facto relationship. Following DNA evidence led in accordance with the Family Law Regulations, it was established that Mr Ellison was biologically related to the twins. In these circumstances, Justice Ryan made a declaration that Mr Ellison was the father. However, if Ms Karnchanit had been married or in a de facto relationship with someone who consented to the surrogacy arrangement, Mr Ellison would not have been a parent and Ms Karnchanit’s partner would have been a parent. It seems anomalous that Mr Ellison’s parental status should depend on the relationship status of Ms Karnchanit, but this is the conclusion required as a result of the current operation of the Family Law Act.
8. The Commission notes that there have been criticisms of the current system of regulation of surrogacy in Australia and questions raised about whether it is effective in achieving its objectives of preventing exploitation of women who act as birth mothers, preventing the commercialisation of reproduction and protecting the interests of children born as a result of surrogacy arrangements.[[16]](#endnote-16) The Commission also notes that the Council’s terms of reference require it to have regard to the legal parentage of children as determined by State and Territory laws. The Commission’s current brief submissions do not deal with the larger question about how surrogacy arrangements should be regulated at a State and Territory level and are limited to identifying current gaps in Commonwealth law.
9. It appears that s 60H is designed to deal with artificial conception procedures where the people involved do not intend that the sperm or egg donors will be parents. The Commission submits that this section should be explicitly limited to these situations.
10. **Recommendation 2: The application of section 60H of the Family Law Act should be limited to artificial conception procedures where the people involved do not intend that people who provided genetic material (other than the woman who gives birth to the child or her partner) will be parents.**
11. If the above recommendation is accepted, then there will be a statutory gap in determining the parentage of children born of surrogacy arrangements that do not fit within the terms of s 60HB. This gap will need to be filled. If it is not, then children born of overseas surrogacy arrangements would be unable to have their parent-child relationships legally recognised, possibly leading to breaches of children’s rights.
12. There are a number of ways in which this gap can be filled. One would be expanding the State and Territory surrogacy regimes. Millbank suggests that these regimes could be expanded to include commercial and out-of-jurisdiction surrogacy arrangements so that courts at these levels could engage in a ‘focused and thoroughgoing inquiry into the consent of all parties and the fairness of the arrangement’.[[17]](#endnote-17) While this may be outside the Council’s terms of reference, the Commission raises it for consideration, including in the context of the harmonisation project referred to above.
13. A second way of filling this gap would be to include a broader general definition of parent in the Family Law Act. The Commission’s first recommendation goes to this issue and may have the effect of acting as a ‘safety net’ in the absence of other specific statutory rules.
14. A third way of filling, or partially filling, this gap would be to include provisions in the Family Law Act that deal explicitly with the determination of parentage in the case of international surrogacy arrangements. Currently these arrangements are dealt with in accordance with an unsatisfactory combination of legislative provisions designed for other purposes and (where these are not applicable) common law principles based on biological links.
15. **Recommendation 3: Consideration be given to amending the Family Law Act to set out the criteria for determining parent-child relationships in circumstances where a surrogacy arrangement is entered into overseas.**

1. Australian Human Rights Commission, *Summary of Argument*. At <http://www.humanrights.gov.au/sites/default/files/content/legal/submissions_court/intervention/20111125-Ellison_and_Karnchanit%20.doc> (viewed 18 April 2013). [↑](#endnote-ref-1)
2. Australian Human Rights Commission, *Summary of Argument* at [68]-[83]. At <http://www.humanrights.gov.au/sites/default/files/content/legal/submissions_court/intervention/20111125-Ellison_and_Karnchanit%20.doc> (viewed 18 April 2013). [↑](#endnote-ref-2)
3. Victorian Law Reform Commission, Report: *Assisted Reproductive Technology and Adoption*, June 2007 at 113-114. At <http://www.lawreform.vic.gov.au/projects/art-adoption/art-and-adoption-final-report> (viewed 19 April 2013). [↑](#endnote-ref-3)
4. *B v J* [1996] FLC 92-716 at 83,614; *Tobin & Tobin* (1999) 24 Fam LR 635 at [40]-[42]; *Re Mark* (2003) 31 Fam LR 162 at 169. [↑](#endnote-ref-4)
5. *Simpson v Brockmann* (2010) 43 Fam LR 32 at [48]. [↑](#endnote-ref-5)
6. *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [47]-[48] and [127]-[131] (the Court). [↑](#endnote-ref-6)
7. *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [48] (the Court). [↑](#endnote-ref-7)
8. *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [129]-[130] (the Court). [↑](#endnote-ref-8)
9. The *Surrogacy Act 2012* (Tas) has been passed but is still to be proclaimed. [↑](#endnote-ref-9)
10. Standing Committee of Attorneys-General, Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, January 2009. At <http://www.sclj.gov.au/agdbasev7wr/sclj/documents/doc/surrogacy_consultation_paper_final.doc> (viewed 19 April 2013). [↑](#endnote-ref-10)
11. *Status of Children Act 1974* (Vic), s 22; *Surrogacy Act 2010* (Qld), s 22; *Surrogacy Act 2008* (WA), s 21; *Parentage Act 2004* (ACT), s 26; *Family Relationships Act 1975* (SA), s 10HB; *Surrogacy Act 2010* (NSW), s 12; *Surrogacy Act 2012* (Tas), s 16 (still to be proclaimed). [↑](#endnote-ref-11)
12. *Family Law Act 1975* (Cth), s 60HB; Family Law Regulations 1984 (Cth), reg 12CAA. Note that the Tasmanian legislation is not yet prescribed for the purposes of s 60HB. [↑](#endnote-ref-12)
13. *Ellison and Anor & Karnchanit* [2012] FamCA 602 at [68]. [↑](#endnote-ref-13)
14. *Ellison and Anor & Karnchanit* [2012] FamCA 602 at [49]. [↑](#endnote-ref-14)
15. Family Law Regulations 1984 (Cth), reg 12CA. [↑](#endnote-ref-15)
16. For example, see J Millbank, ‘The New Surrogacy Parentage Laws in Australia: Cautionary Regulation or ‘25 Brick Walls’?’ (2011) 35 *Melbourne University Law Review* 165. [↑](#endnote-ref-16)
17. J Millbank, ‘The New Surrogacy Parentage Laws in Australia: Cautionary Regulation or ‘25 Brick Walls’?’ (2011) 35 *Melbourne University Law Review* 165 at 205. [↑](#endnote-ref-17)