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Executive Officer
Secretariat of the Standing Committee of Attorneys-General
NSW Attorney General's Department
GPO Box 6
Sydney
NSW 2001

Via Email: Natalie_Marsic@agd.nsw.gov.au

To the Joint Working Group

CONSULTATION ON PROPOSAL FOR A NATIONAL MODEL TO HARMONISE REGULATION OF SURROGACY

Women's Legal Services Australia (WLSA) welcomes the opportunity to provide comment to the Joint Working Group in relation to a proposal for a national model to harmonise regulation of Surrogacy in Australia.

WLSA is a network of the National Association of Community Legal Centres (NACLC) and is made up of community legal centres specialising in women's legal issues. We represent women in every state and territory in Australia – in cities, regional centres, rural and remote areas.

WLSA members regularly provide advice, information, casework and legal education to women on a wide range of legal issues. A large proportion of our work is in the area of family law. We have a particular interest in ensuring that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Indigenous women, women with disabilities and rural women are not further disadvantaged in the process of negotiating the legal system. This submission was prepared by the Women's Legal Centre (ACT & Region) on behalf of WLSA.

As WLSA's expertise relates specifically to legal issues, our submission does not deal with the entirety of the issues raised in the Joint Working Group's discussion paper. Our general comments are set out below followed by our responses to specific sections of the discussion paper. For the purposes of simplicity, we have used the heading numbers outlined in the discussion paper. However, given that our submission does not deal with all issues, the heading numbers do not follow consecutively.

Women's Legal Services Australia
PO Box 206 Lidcombe NSW 1825 Phone 02 9749 7700

General Comments

Support for a national model

The Joint Working Group's paper recommends a national model to harmonise regulation of surrogacy across Australia. WLSA agrees with the central proposal of the review, which is to ensure that the intended parents in a surrogacy arrangement become recognised throughout Australia as the legal parents of the child, in place of the birth parents. We further support the principles underpinning the proposed model, which are that:

- parentage orders should be made in the best interests of the child;
- intervention of the law in people's private lives should be kept to a minimum; and
- the model should seek to avoid legal dispute between the birth parent(s) and the intended parents.

One of the ongoing issues for our clients is the confusion regarding surrogacy laws in each jurisdiction. To date, there has also been uncertainty regarding how or when state and territory parentage orders will be recognised at a federal level. Recent amendments to the *Family Law Act* 1975 (Cth), specifically, the introduction of section 60HB, have gone a considerable way towards clarifying this confusion by providing for federal recognition of parentage orders made in a state or territory court. In the interests of simplicity and equity, WLSA agrees with the Joint Working Group that there would be substantial benefits in ensuring that the laws applying to surrogacy arrangements are uniform, or as close to uniform as possible, across all states and territories.

The best interests of the child and a human rights approach

In WLSA's submission, it is essential that the national model upholds the best interests of the child as the paramount consideration in decisions regarding parentage. Further, a national model must embody a human-rights approach, ensuring that parties to a surrogacy arrangement are not discriminated against on the grounds of relationship status, gender, or sexual preference. We note that a large proportion of surrogacy arrangements require the use of assisted reproductive technology (ART). As discussed below, some state and territory jurisdictions continue to regulate access to ART on the basis of an individual's gender, relationship status or sexual orientation. In WLSA's submission, the development and roll-out of a national model is the ideal opportunity for all jurisdictions to embrace a human-rights centered approach to regulation of ART and surrogacy.

Recommendation 1: WLSA recommends that:

1 . The national model uphold the bests interests of the child as the paramount consideration.

2. The national model is human-rights focused, eliminating discrimination on the grounds of gender, relationship status and sexual preference.

3. Scope

Agreement to be made prior to the child's conception

WLSA agrees with the Joint Working Group that the national model should only apply to surrogacy arrangements made prior to the conception of the child. Specifically, we note the Joint Working Group's comment that 'to permit surrogacy arrangements to be made during a pregnancy creates a risk of pressure on a vulnerable woman to surrender the care of her child.'[1]

WLSA notes that there are other legal mechanisms, such as adoption and Family Court parenting orders, which recognise alternate care arrangements for a child where the birth mother or birth parents are unable or unwilling to care for the child. Surrogacy arrangements are conceptually unique: the parties agree for the intended parents to become the legal parents prior to the child's conception.

Recommendation 2: WLSA recommends that the national model should be limited to situations where a surrogacy agreement is made before the child is conceived.

Donation of genetic material (Q3.2)

In WLSA's submission, the national model should cover surrogacy arrangements regardless of who has provided the genetic material, or how the child was conceived. This approach reflects the principle that intervention of the law into people's private lives should be kept to a minimum.

For example, WLSA is aware of situations where a woman may offer to become a surrogate for another family member who is unable to conceive. The woman's male partner may also contribute his genetic material to the conception. This situation may mean that the intended parents do not have to seek donated gametes from sources outside the family. The intended parents may prefer to use gametes from within the family to ensure that the child maintains a connection with his or her biological family,

[1] Discussion Paper, p3.

or because they are unable to access donated gametes due to a lack of availability, or because they cannot afford the expense associated with purchasing donor gametes.

WLSA notes that outside the scope of surrogacy arrangements, child are conceived and cared for in many different ways. To embody a principle of minimal legal intervention, WLSA favours a regulation model which focuses on ensuring that the relevant parties receive adequate information, support and legal advice, rather than limiting the genetic contributions that parties can make to a surrogacy arrangement.

Recommendation 3: WLSA recommends that the national model apply to all surrogacy arrangements, regardless of who has provided the genetic material.

Method of Conception (Q3.1)

WLSA is aware that conception of a child pursuant to a surrogacy agreement may occur through intercourse, self-insemination or with the assistance of ART. The chosen method of conception in each instance may depend on a number of factors including:

- whether the surrogate mother is donating her own genetic material;
- the relationship between the surrogate mother and the sperm donor;
- the geographical proximity of the surrogate mother and the sperm donor;
- the availability of ART services, including consideration of:
    - whether the parties 'qualify' for access to ART in the particular state or territory;
    - whether there are ART services geographically available in the town or city where the parties live, or within reasonable travelling distance;
    - whether the parties can financially afford to access ART;
    - whether the parties can access screening of genetic material for infectious and genetic diseases prior to self-insemination;
    - whether previous attempts at conception via intercourse, self-insemination or the assistance of ART have been successful.

Given these range of factors, WLSA submits that parentage orders should not be limited to arrangements where conception has occurred with the assistance of ART.

Recommendation 4: WLSA recommends that parentage orders should be available regardless of whether conception is achieved through intercourse, self-insemination or through the use of Assisted Reproductive Technology.

4. Surrogacy Arrangements

(a) No financial benefit

Reimbursement of necessary expenses (Q4.1)

WLSA notes that the proposed model would not permit commercial surrogacy and that surrogacy agreements would be void and unenforceable. Specifically, the intended parents 'would have no cause of action, whether in contract or at common law, on which to sue the surrogate mother, either for damages or for delivery of the child into their care.'[2]

However, the discussion paper suggests that the proposed model could provide for the intended parents, or someone else on their behalf, to reimburse the surrogate mother for necessary expenses incurred due to the pregnancy.[3] Agreements relating to the reimbursement of necessary expenses could be enforced independently of agreements relating to parentage of the child.

Agreements relating to reimbursement for necessary expenses reflect that fact that, from a practical perspective, the surrogate mother may incur substantial costs relating to conception and pregnancy. The surrogate mother may not be in a financial position to contemplate entering a surrogacy arrangement unless she has the peace of mind that her necessary expenses will be reimbursed.

WLSA notes that considerable hardship may be suffered by intended parents where a surrogate mother enforces an agreement to reimburse her for necessary expenses despite the fact that she is refusing to allow the intended parents to become the parents of the child. If a dispute arose in these circumstances, the surrogate mother would have to substantiate her claim by providing evidence of the agreement and the necessary expenses she has incurred.

Nonetheless, in WLSA's submission, this potential hardship should not outweigh the right of the parties to enter into a contract relating to reimbursement of necessary expenses if they choose to do so. Rather, the potential for hardship to the intended parents is a factor which highlights the need for all parties to receive legal advice prior to a child's conception, as discussed further below.

Recommendation 5: WLSA recommends that the surrogate mother should be able to enforce an agreement for reimbursement of necessary expenses incurred due to the pregnancy.

Defining what expenses are 'necessary' (Q4.2)

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[2] Discussion Paper, p5.
[3] Discussion Paper, p5.

WLSA is aware that the nature and amount of 'necessary expenses' may differ markedly between surrogacy arrangements, depending on factors associated with the method of conception and the birth. Factors impacting the quantum and nature of such expenses may include:

- the number of insemination or ART activities required for a successful conception;
- the geographical availability of publicly-funded midwifery and obstetric services;
- the cost and time associated with travel to or from medical care, including the hospital or birth centre; and
- the time off work that the mother is medically directed to take due to any complications associated with the pregnancy.

The discussion paper notes that one option is for legislation or regulations to prescribe what expenses are 'reasonable' or 'necessary' in surrogacy arrangements. This would hopefully minimise the scope of any dispute arising between the surrogate mother and the intended parents regarding the enforcement of an agreement for reimbursement of necessary expenses.

In WLSA's submission, given the broad range of health-related factors related to conception and pregnancy, it would be preferable for individual cases to be considered on their merits. Legislation or regulations could set out a non-exhaustive list of the types of expenses that may be 'necessary'. However, a judicial officer should retain the ability to determine whether a particular expenses is, or was, 'necessary' in all the circumstances of the particular surrogacy arrangement.

Recommendation 6: WLSA recommends that the definition of 'necessary expenses incurred due to the pregnancy' should be considered in the context of the circumstances of each particular surrogacy arrangement.

(c) Form of Agreement

Must the surrogacy agreement be in writing? (Q4.5)

The discussion paper states that regardless of whether or not a surrogacy agreement is in writing, it is not a legal contract and is unenforceable, other than with regard to the reimbursement of necessary expenses incurred by the surrogate mother.[4] Nonetheless, the Joint Working Group has asked for feedback on whether there should be a requirement that all surrogacy agreements to be made in writing.

[4] Discussion Paper, p7.

WLSA notes that it would be prudent for parties to record their surrogacy agreement in writing. The process of developing a written agreement may prompt the parties to seek legal advice (as discussed below). Further, a written agreement may:

- minimise the likelihood of future disputes regarding the content and nature of the agreement; and
- allow the parties to provide the court with evidence of the agreement following the birth of the child, in the context of an application for parentage orders.

Despite the benefits of recording an agreement in writing, WLSA is aware that parties may not choose to take this step. The fact that a surrogacy agreement is unenforceable may strongly influence the parties' willingness to expend scarce resources on the legal advice or assistance required to put their agreement into a written form. Rather, parties may focus on building a personal relationship of good faith. Practical factors such as the affordability and/or accessibility of expert legal advice or drafting skills may also influence this decision.

Even where parties have put their agreement in writing, the terms of the agreement may be unenforceable, may not cover all relevant matters, and/or may be poorly expressed. Further, a written agreement may be amended by a subsequent oral agreement. In summary, a requirement that a surrogacy agreement be in writing is no guarantee as to the clarity or enforceability of the agreement.

Accordingly, it is WLSA's submission that rather than imposing a requirement that surrogacy agreements be in writing, the normal rules of contract law should apply. Where a dispute arises between the parties, or where the court is not satisfied that a surrogacy arrangement was made *before* the child was conceived, parties should be required to prove their case in accordance with the rules of evidence.

Recommendation 7: WLSA recommends that there should not be a requirement for surrogacy agreements to be in writing.

Legal advice prior to entering into a surrogacy agreement (Q4.6)

The Joint Working Group has asked for feedback on whether all parties should be required to obtain independent legal advice. In WLSA's submission, it is essential that all parties obtain independent legal advice prior to entering a surrogacy agreement. The question remains as to whether this advice must be:

- specific advice on the terms of the parties' surrogacy agreement; or
- general advice about surrogacy agreements.

If there is no requirement that a surrogacy agreement be recorded in writing, it would be impracticable to enforce a requirement that each party must obtain independent

legal advice about the terms of their *particular* surrogacy agreement. For example, it would be impractical for a party to prove that they had received independent legal advice on the terms of an oral agreement, if the terms of the oral agreement had not been recorded in writing by the parties or the lawyer.

However, parties could be required to seek *general* legal advice from a practitioner who is entitled to practice in the Court which governs surrogacy arrangements in the relevant jurisdiction, about a prescribed list of matters such as:

- the fact that the agreement must be made prior to the child's conception;
- the prohibition on commercial surrogacy agreements;
- that the surrogacy agreement does not give the intended parents a cause of action, whether in contract or at common law, on which to sue the surrogate mother, either for damages or for the delivery of the child into their care after birth;
- the independent enforceability of agreements relating to the reimbursement of necessary expenses incurred by the surrogate mother due to the pregnancy;
- any counselling requirements;
- the types of dispute resolution services available to parties if a dispute arises relating to the surrogacy arrangement;
- the process of applying for parentage orders after the child's birth, including any requirements for legal advice and the matters a court will consider in determining such an application; and
- the desirability of recording the surrogacy agreement in writing.

In WLSA's submission, general legal advice of this nature would be of substantial benefit to the parties in ensuring that:

- the parties are aware that surrogacy agreements can only be made prior to the child's conception;
- the agreement does not include any illegal terms (such as payment to the mother for her surrogacy services);
- the intended parents have reasonable expectations regarding the unenforceability of any surrogacy agreement;
- the intended parents are aware that agreements for reimbursement of necessary expenses associated with the pregnancy may be enforced independently of agreements relating to care of the child;

- the intended parents and the mother comply with any pre-requisites, such as those relating to counseling or legal advice, which may act as a barrier to seeking parentage orders after the child's birth;
- all parties understand the process of applying for parentage orders, the fact that the best interests of the child will be the paramount consideration, and the nature of other matters that the court may consider; and
- the benefits of being able to provide the court with written evidence of the parties' agreement.

Recommendation 8: WLSA recommends that parties be required to seek general legal advice regarding a prescribed list of matter before entering into a surrogacy agreement.

If the parties don't seek legal advice prior to the child being conceived, can the court still make a parentage order? (Q4.6)

WLSA submits that the best interests of the child should be the paramount consideration in relation to parentage orders. It is preferable that all parties obtain independent legal advice prior to entering a surrogacy agreement. However, circumstances may arise where the parties have *not* obtained such advice. There may be a range of reasons for this, including that:

- prior to conception, the parties did not understand that they were bound to obtain independent legal advice as a pre-requisite to applying for a parentage order; and/or
- a lack of availability of legal practitioners with relevant expertise; and/or
- the expense associated with travelling to and/or paying for the requisite legal advice.

We note that issues relating to availability, access and expense may be particularly pertinent to parties living in rural and remote parts of Australia.

Recommendation 9: WLSA recommends that parties should be required to obtain independent legal advice prior to entering an agreement as a pre-requisite to applying for a parentage order. However, judicial officers should be given the discretion to allow an application for a parentage order in circumstances where:

- one of more of the parties did not obtain independent legal advice prior to the child's conception and:
  - each party that did not receive legal advice prior to conception has a reasonable excuse for not having done so; and/or
  - refusing the application for parentage orders would not be in the best interests of the child.

Legal advice prior to applying for parentage orders (Q4.6)

Advice for the intended parents

WLSA understands that under the proposed national model, the intended parents will be able to apply to the relevant court in their state or territory for a parentage order. Such an order will have the effect that the intended parents will be the child's only legal parents.

WLSA submits that the intended parents should be required to seek a certificate of independent legal advice as a pre-requisite to applying for such an order. This certificate should attest to the fact that they have received legal advice regarding:

- the effect of a parentage order, including the conferral of legal parentage on the intended parents and the issuing of a new birth certificate to the child;
- the matters that a court will consider before making a parentage order;
- the fact that proceedings for a parentage order will not deal with any dispute in relation to where the child will live or who he or she will communicate or spend time with, and that these are matters for the Federal Magistrates Court and the Family Court.

This requirement would act as a safeguard in ensuring that the intended parents are fully informed regarding the nature and permanent effect of such an order. It would also assist the parties to understand the types of evidence that they will be required to provide in support of their application.

Recommendation 10: WLSA recommends that the intended parents should be required to seek a certificate of independent legal advice as a precondition to applying for a parentage order.

Advice for the surrogate mother and her partner

The Joint Working Group proposes that one of the preconditions that must be met before a court can make a parentage order is that 'the surrogate mother (and her partner, if the partner is the genetic parent of the child) freely, and with a full understanding of what is involved, agree to the making of the order.'[5] WLSA submits that this precondition would be best satisfied by requiring that the surrogate mother (and her partner, if the partner is a genetic parent of the child) obtain a certificate of independent legal advice regarding the implications of consenting to the making of a parentage order. As discussed further below at '6. Consent', WLSA also submits that the surrogate mother's partner should be required to obtain such a certificate if he or she is the child's second legal parent. The certificate from the legal practitioner could state, for example:

> I have given [insert surrogate mother's name, and name of her partner, if the partner is a genetic or legal parent of the child] independent legal advice as to the meaning and effect of the orders sought by the intended parents and explained their rights, entitlements and obligations.

Recommendation 11: WLSA recommends that the surrogate mother (and her partner, if the partner is a genetic or legal parent of the child) should be required to seek a certificate of independent legal advice as a precondition to consenting to a parentage order.

The issue of consent is further discussed below, at heading 6.

Access to legal advice

WLSA submits that in the interests of access to justice, grants of legal aid for independent legal advice:

- prior to entering into a surrogacy agreement;
- prior to applying for parentage orders; and
- prior to consenting to an application for parentage orders

should be made available through Legal Aid Commissions in each state and territory. Applicants for such grants should be subject to the Commission's usual means tests.

Further, roll out of a national model must involve appropriate professional training for legal practitioners. Leading training providers, such as the Law Institutes or Law Societies in each jurisdiction, or the Family Law Council of the Law Council of

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[5] Discussion paper, p9.

Australia, could be approached to provide such training. Such training will be essential to ensure that parties are able to access expert legal advice in relation to their rights and obligations in the context of surrogacy agreements.

Recommendation 12: WLSA recommends that:

1. Grants of aid for independent legal advice regarding surrogacy arrangements should be available through Legal Aid Commissions.

2. Roll out of a national model must involve appropriate professional training for legal practitioners.

5. Parentage Orders

Precondition to making an application for a parentage order (Q5.1)

As outlined above, WLSA submits that the intended parents should be required to provide a certificate of independent legal advice as a precondition to seeking a parentage order.

Preconditions before a court can make a parentage order

Framework preconditions (Q5.1)

There are several 'framework' preconditions which we understand are crucial to the underpinnings of the proposed national model. These are that:

a) the surrogacy agreement was made before the child was conceived;

b) the surrogacy agreement is not a commercial surrogacy agreement (other than in relation to the reimbursement of necessary expenses incurred due to pregnancy); and

c) the surrogate mother (and her partner if the partner is a genetic or legal parent of the child) freely, and with a full understanding of what is involved, agree to the making of the order.

As outlined above, we submit that a further 'framework' precondition should be that:

d) the intended parents provide the court with a certificate of independent legal advice.

Best interests of the child paramount in relation to other preconditions (Q5.2, Q5.3)

In relation to all other preconditions, WLSA submits that the best interests of the child should be the *paramount* consideration. This approach would reflect that of the *Family Law Act* 1975 (Cth) relating to parenting orders. For example, section 60CA of the *Family Law Act* 1975 (Cth) states:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

WLSA notes that there are a number of other suggested pre-conditions outlined at page 9 of the discussion paper. In order to ensure that the best interests of the child are paramount, it is WLSA's submission that judicial officers should have the discretion to waive compliance with these other pre-conditions if making a parentage order is in the best interests of the child. An example of how this waiver may be exercised in relation to the requirement that parties obtain legal advice is discussed above at 4(c)(iii). As per the examples set out on page 9 of the discussion paper, the court may be required to consider matters such as:

- whether the application is made at least 28 days, but not more than 6 months, after the birth (subject to a discretion to extend time in exceptional circumstances);
- whether all parties had received the required counselling before the child was conceived;
- whether all parties had received the required legal advice before entering the surrogacy agreement; and
- whether the child is now living with, and being cared for by, the intended parents.

However, in circumstances where one of more of these preconditions is not met, the court should retain the discretion to waive the precondition and make a parentage order, if it is in the best interests of the child to do so.

Recommendation 13: WLSA recommends that other than the three 'framework' preconditions, the best interests of the child should be the paramount consideration in relation to what preconditions must be met prior to the making of a parentage order.

6. Consent

***Consent from the surrogate mother's partner* (Q 6.3)**

The Joint Working Group have sought feedback on what say, if any, the surrogate mother's partner should have if he or she is not genetically related to the child. In WLSA's submission, the surrogate mother's partner's consent should be required if her partner is the genetic *or* legal parent of the child.

Whether or not the surrogate mother's partner is the child's genetic parent is a question of fact. Whether or not the surrogate mother's partner is the child's legal parent is a matter of law. For example, various state, territory and federal laws declare that if a woman's partner consents to her undergoing an ART procedure, that partner is deemed to be the resulting child's second legal parent.[6] Some such laws—for example, section 60H of the *Family Law Act* —do not discriminate on the basis of whether the woman is married or in a de facto relationship with her partner, or whether her partner is of the same or of the opposite sex.[7]

Other laws only recognise a woman's partner as the second legal parent in this context if the woman is married to him. In the interests of equity and simplicity, WLSA notes that the roll-out of the national model is the ideal opportunity for states and territories to embrace a non-discriminatory, nationally-consistent approach to parenting presumptions. This would avoid situations where a child's second legal parent is recognised for the purposes of federal law but not in a particular state or territory.

In WLSA's submission, it is essential that if an individual is conclusively deemed to be a child's second legal parent, that individual's consent must be given as a precondition to the court making a parentage order.

Recommendation 14: WLSA recommends that it should be a 'framework' precondition to the making of a parentage order that the surrogate mother's partner (if the partner is a genetic or a legal parent of the child) consents to the making of the order.

***Informed and Voluntary Consent* (Q6.2)**

In WLSA's submission, it is essential that the surrogate mother's consent to parentage orders (and her partner's consent, if her partner is a genetic or legal parent of the child)

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[6] For example, see *Family Law Act* 1975 (Cth) s 60H(1), *Artificial Conception Act* 1985 (WA) s 6A(1), *Family Relationships Act* 1975 (SA) s 10d, *Parentage Act* 2004 (ACT) s 11(4), *Status of Children Act* 1996 (NSW) s 14, *Status of Children Act* 1974 (VIC) s 10C, *Status of Children Act* 1974 (Tas) s 10C, *Status of Children Act* 1978 (Qld) s 15.

[7] However, s60H of the *Family Law Act* 1975 does require that the woman's partner be the other 'intended parent'. This requirement may not be met in relation to a surrogacy arrangement where the woman's partner was never 'intended' to be the other parent.

is fully informed. As noted above, WLSA recommends that the surrogate mother (and her partner, if her partner is a genetic or legal parent of the child) be required to obtain a certificate of independent legal advice from a legal practitioner. The certificate could state, for example:

> I have given [insert surrogate mother's name, and name of her partner, if the partner is a genetic or legal parent of the child] independent legal advice as to the meaning and effect of the orders sought by the intended parents and explained their rights, entitlements and obligations.

In addition to obtaining the certificate of independent legal advice, the surrogate mother (and her partner, if her partner is a genetic or legal parent of the child) should be required to sign an affidavit, or a statutory declaration, stating, for example:

> I have received independent legal advice as to my rights under the [*insert relevant legislation*] and the effect and consequences of orders being made in the terms proposed. I consent to orders being made in the proposed terms.

This two-step process would provide the court with written evidence that the surrogate mother (and her partner, if her partner is a genetic or legal parent of the child) had received legal advice and consented to the proposed orders.

Recommendation 15: WLSA recommends that in order for the court to be satisfied that the surrogate mother (and her partner, if her partner is a genetic or legal parent of the child) consent to the making of a parentage order, the surrogate mother (and her partner, if her partner is a genetic or legal parent of the child) should be required to present the court with:

1. a certificate of independent legal advice; and

2. an affidavit or statutory declaration confirming that they have received independent legal advice and consent to orders being made in the terms sought.

7. Eligibility for a parentage order – same-sex couples (Q7.1, Q7.2)

In WLSA's submission, the national model must embody a human-rights approach to the regulation of surrogacy, ensuring that individuals are not discriminated against on the grounds of gender, relationship status, or sexual preference.

As outlined at page 13 of the consultation paper, we note that a large proportion or surrogacy arrangements involve the use of ART, and that some state and territory jurisdictions continue to regulate access to ART on the basis of an individual's gender, relationship status or sexual orientation.

A growing body of research indicates that it is the *quality* of a child's parenting, rather than the *identity* of the parents which is central to a child's well-being. For example,

McNair's extensive review of research concludes that, overall, children of same-sex couples do not differ from other children in their emotional, social and psychological development.[8]

In 2007, the Victorian Law Reform Commission (VLRC) released its Final Report on Assisted Reproductive Technology and Adoption. The VLRC was asked to examine the eligibility criteria for access to ART. Part of this research included examination of social science literature relating to the effects on children of growing up in families with parents in same-sex relationships. In relation to the studies examined by the VRLC, the Report concludes:

> This research provides strong evidence that it is the quality of family processes and relationships which determines emotional, social and psychological outcomes for children, rather than the structure of the family into which they are born. Relevant processes are such things as the quality of parenting, the quality of relationships within the family, including the level of cooperation and harmony between parents, the family's social support and level of connection with others, and the family's access to resources. Family structure, such as the gender of parents and the number of parents, is not shown to be a significant factor in child outcomes.[9]

In WLSA's submission, the development and roll-out of a national model to harmonise regulation of surrogacy is the ideal opportunity for all jurisdictions to embrace a human-rights approach to regulation of ART *and* surrogacy. Accordingly, WLSA submits that a person or couple should be eligible to apply for a parentage order regardless of the person or couple's relationship status or sexual orientation.

Recommendation 16: WLSA recommends that the national surrogacy model should not allow states or territories to discriminate against a party to a surrogacy arrangement on the basis of that party's gender, relationship status or sexual orientation.

9. Eligibility for ART – infertility treatment (Q9.1)

The Joint Standing Committee must decide whether the national model should include a prerequisite that the intended parents can only apply for a parentage order if the surrogacy arrangement has been facilitated through ART. For the reasons outlined at page 2 of this submission, under 'Scope', WLSA agrees with the view that 'in line with the principle of minimal intervention in people's lives and to prevent the legal status of children being determined by the manner of their conception, surrogacy arrangements not involving ART should be capable of being recognised with parentage orders.'[10]

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[8] R McNair for the Victorian Law Reform Commission, *Outcomes for Children Born of A.R.T. in a Diverse Range of Families* (2004).
[9] Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Final Report* (2007) at 32.
[10] Discussion Paper, p16.

Recommendation 17: WLSA recommends that surrogacy arrangements involving ART and those not involving ART should both be capable of being recognised with parentage orders.

14. Retrospectivity / Transitional Arrangements (Q14.1, Q14.3)

In WLSA's submission, it would be preferable for the national model to include retrospective transitional provisions which allow for parents who are raising children conceived through a surrogacy arrangement made prior to the new law to apply for parentage orders. This submission is based on the fact that the national model laws are likely to provide such families with significant benefits compared to existing legal mechanisms.

For example, such families may have sought Family Court parenting orders to transfer parental responsibility to the intended parents. However, Family Court parenting orders only operate until a child turns 18 and do not necessarily create a legal child-parent relationship which will allow a child to access a range of rights and benefits under other state, territory and federal laws.[11] For example, a range of laws relating to:

- distribution of an estate where an intended parents dies without a will;
- when a child can access death benefits from a deceased parent's superannuation fund; and
- when a child can access payments under statutory victim or accident compensation scheme upon the death of a parent

may require proof that the applicant is a legal child of the deceased in order for the child to access relevant benefits or payments. For this reason, WLSA recommends that it should be possible to seek parentage orders in relation to surrogacy arrangements entered into before the new laws commence, even if the child is now over 18.

WLSA notes that in Western Australia, applications for parentage orders relating to children born or conceived before the commencement of the new laws must be made within one year of the commencement of the Act.[12] Women's Legal Services across Australia are consistently engaged in community education campaigns relating to changes in the law. However, WLSA is aware that there are many reasons why individuals may not become aware of changes to the law for some time after they commence. For this reason, WLSA would not support the introduction of a specific time period within which applications for parentage orders must be made following commencement of the new laws.

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[11] J Millbank for the NSW Gay and Lesbian Rights Lobby, *And then…the brides changed nappies* (2003) at 12.

[12] Discussion Paper, p21.

Recommendation 18: WLSA recommends that:

1. The national model should include retrospective transitional provisions which allow parents who are raising children conceived through a surrogacy arrangement made prior to the new law to apply for parentage orders.

2. Such retrospective applications should be able to be made even if the child concerned is over the age of 18.

3. The transitional provisions should not require retrospective applications to be made within a particular period of the new law commencing.

17. Mutual recognition

WLSA notes the Joint Standing Committee's intention that 'a parentage order made in an Australian jurisdiction be recognised in all other Australian jurisdictions'. WLSA strongly supports this intention, to ensure that a child's legal parents are recognised regardless of which state or territory the child resides in.

Recommendation 19: WLSA recommends that parentage orders made in any Australian jurisdiction be recognised in all other Australian jurisdictions.

Summary

WLSA recognises that there are significant benefits in introducing a national model to harmonise regulation of surrogacy across Australia. WLSA calls upon the Joint Working Group to ensure that the national model embodies a human-rights approach to the regulation of surrogacy, ensuring that parties to a surrogacy arrangement are not discriminated against on the grounds of gender, relationship status, or sexual orientation.

If you would like to discuss any aspect of this submission, please contact Heidi Yates at the Women's Legal Centre (ACT & Region) on (02) 6257 4377 or hyates@womenslegalact.org or WLSA's Law Reform Coordinator, Edwina MacDonald, on (02) 9749 7700 or Edwina_MacDonald@clc.net.au.

Yours Sincerely,

Signed

Heidi Yates
Committee Member
Women's Legal Services Australia