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Dear Dr Limon,

### **Family Law Council - Review of parentage laws**

1. Women's Legal Services NSW (WLS NSW) thanks the Family Law Council for the opportunity to comment on its review of parentage laws for the Attorney-General's terms of reference on surrogacy and parentage.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

### **Introduction**

3. 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. As the Victorian Law Reform Commission stated in its 2007 Final Report *Artificial Reproductive Technology and Adoption* (The VLRC Report):



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The commission believes strongly that it is in the best interests of children that the status of their parents and donors be as clear and certain as possible. Certainty in the law minimises the likelihood of disputes and litigation. It also assists people to understand their rights and responsibilities and to make decisions and arrangements with the benefit of that knowledge.<sup>1</sup>

### *The changing family*

4. Over the past several decades we have seen an increasing shift towards removal of discrimination on the basis of sexual orientation and gender identity in the law. All states and territories and recently, the Commonwealth, have legislated to protect lesbian, gay, bisexual, trans and intersex people from discrimination. This push towards legal equality reflects changing societal attitudes towards people in same-sex relationships, as can be seen in the widespread public support for same sex marriage in polling.<sup>2</sup>
5. Over the same period of time there has been an increase in diversity of family structures, with the nuclear family no longer making up a majority of families in Australia.<sup>3</sup> Statistics on children with parents in same-sex relationships are very incomplete, however census data indicates that the number of same-sex couple households had increased dramatically since 1996, when the ABS first included same-sex relationships as de facto couples rather than as 'unrelated adults'.
6. The availability of reproductive technology and greater legal recognition, means that increasingly more lesbian couples are having children together.<sup>4</sup> In addition, legislation which allows same-sex couples to adopt children and altruistic surrogacy have increased the options for same sex parenting in Australia. International commercial surrogacy does not appear to be a common method for family formation, however, in the past decade we have seen many cases coming before the family law courts, seeking parenting orders and raising difficult and complex issues around parentage laws in Australia.<sup>5</sup>

### *Need for broader reform of Part VII*

7. We note that the amendments to s 60H of the *Family Law Act* came about during the process of bringing de facto property matters into the federal family law regime,<sup>6</sup> rather than as a result of a considered and thoroughly reviewed amendment process aimed at recognising the diversity of Australian families today. WLS NSW welcomes the current Family Law Council review and hopes that it will lead to much needed revision of the *Family Law Act*.

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<sup>1</sup> Victorian Law Reform Commission, *Artificial Reproductive Technology and Adoption*, Final Report (2007), 136 ("The VLRC Report")

<sup>2</sup> A Galaxy Research poll commissioned by Australian Marriage Equality showed support for same-sex marriage at 64 per cent. See Jessica Wright, 'MPs to debate same-sex marriage bill' *Sydney Morning Herald*, 20 August 2012 at: <<http://www.smh.com.au/opinion/political-news/mps-to-debate-samesex-marriage-bill-20120820-24hcy.html#ixzz2MG1zhgNt>>

<sup>3</sup> According to census data the proportion of couples with children has steadily decreased from 59.5% of families in 1976 to 44.6% of families in 2011. (*Family Facts and Figures* (2013) Australian Institute of Family Studies at: <<http://www.aifs.gov.au/institute/info/charts/familystructure/>>

<sup>4</sup> David de Vaus, *Diversity and change in Australian families: Statistical profiles* (2004) 84.

<sup>5</sup> See for example, *Dennis & Pradchaphet* [2011] FamCA 123, *Dudley & Chedi* [2011] FamCA 502, *Ellison and Anor & Karnchanit* [2012] FamCA 602, *Gough & Gough & Kaur* [2012] FamCA 79, *Hubert and Anor & Juntasa* [2011] FamCA 504, *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, *Ronalds and Victor* [2011] FamCA 389

<sup>6</sup> *Family Law Amendment (De Facto and Other Measures) Act 2008* (Cth)

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8. However, we note that the Terms of Reference are limited to matters of parentage and surrogacy and submit that a much broader re-writing of the Act is needed for a number of reasons. Firstly, we note that many have called attention to the convoluted and complex drafting of the Act, and in particular of Part VII, which is in need of revision.<sup>7</sup> We also note concerns expressed by Women's Legal Services Australia, which we endorse, regarding the presumption of equal shared parental responsibility and the operation of equal time and substantial and significant time.<sup>8</sup> We would welcome the Family Law Council calling for a broader review.

### *Guiding principles*

9. In unravelling the complexities of laws around parentage and surrogacy we have considered the issues in the context of the following principles:
  - a. The guiding principle for all decisions about children should be the best interests of the child.
  - b. The law should aim to eliminate all forms of discrimination, including discrimination based on sexual orientation, family type and relationship status.
  - c. All people are entitled to certainty about their legal status in relation to children born through artificial conception procedures.
  - d. No person should be exploited for their reproductive capabilities, for example in trade.

### Recommendations

1. Amend the definition of 'parent' in s 4 of the *Family Law Act* to be more inclusive.
2. Amend s 60H of the *Family Law Act* to remove doubt as to the parental status of the 'other intended parent' by specifically including the term 'parent' in s 60H.
3. Amend s 60H of the *Family Law Act* to make it clear that s 60H is subject to the provisions of s 60HB.
4. Amend s 69U of the *Family Law Act* to make it clear that parentage presumptions can be rebutted by the operation of other parts of the Act. Alternatively give consideration to inclusion of rebuttable and irrebuttable parentage presumptions, similar to the *Status of Children Act 1996* (NSW).
5. Amend s 60H of the *Family Law Act* to make that clear that that s 60H has no application to surrogacy arrangements or alternatively amend the definition of "artificial conception procedures" to exclude surrogacy arrangements from that definition.
6. Where a woman becomes pregnant as the result of a treatment procedure using donor sperm

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<sup>7</sup> For example, see Richard Chisholm, 'Simplifying the Family Law Act: Saying Less, and Saying it Better' (2011) 21(3) *Australian Family Lawyer* 11

<sup>8</sup> Women's Legal Services Australia, Submission on the Family Law Amendment (Family Violence & Other Measures) Bill 2011, 29 April 2011, 11-14, at: <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=84937170-03e9-405c-a798-17f4d6020e40>

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(whether carried out in a licensed clinic or not), the man who donated the sperm should be presumed for all purposes not to be the father of any child born as a result of the pregnancy.

7. Where a woman becomes pregnant as the result of a fertilisation procedure using a donated egg, she should be conclusively presumed to be the mother of any child born as a result of the pregnancy. The woman who donated the egg should be presumed for all purposes not to be the mother of any child born as a result of the pregnancy.

## Parentage

### ***Amend the definition of 'parent' in s 4 of the Family Law Act to be more inclusive***

10. There is no central definition of 'parent' or 'child' across federal law, which means each piece of legislation is open to a purposive interpretation based upon its own terms.
11. Within the *Family Law Act* the only assistance in interpreting the meaning of the word 'parent' is contained in s 4(1), which says that 'parent when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child'.
12. For people who apply to the family law courts seeking parenting orders, the question of whether or not they are categorised as a 'parent' can be vitally important due to the fact that many sections of the *Family Law Act* apply only to 'parents'. Whilst parenting orders can, and frequently are, made in relation to people who are *not* parents, there are several major differences for parents and non-parents under Part VII. These are:
  - A parent is not required to meet the threshold test in s 65C, which requires a person seeking a parenting order in their favour to be 'a person concerned with the care, welfare or development of the child'.
  - The objects of the Part VII set out at s 60B only refer to 'parents' at several points.<sup>9</sup>
  - While it is clear that parental responsibility can be allocated to non-parents,<sup>10</sup> in the absence of an order, only 'parents' automatically have parental responsibility.
  - The legislative pathway for deciding children's matters is different for parents and non-parents. In particular the presumption of equal shared parental responsibility and the ensuing legal decision-making process prescribed in s 65DAA apply only to parents.<sup>11</sup>
  - Section 60CC, which sets out how a court is to determine what is in a child's best interests, is peppered with references to 'parents'. The Full Court in *Donnell & Dovey* made it clear that a 'non-parent' cannot be treated as a 'parent' in the context of a discussion of the s 60CC best interest factors.<sup>12</sup>
13. For these reasons, the question of whether or not one is a parent can result in very different outcomes for those involved in a family law children's matter. This means that the manner in which we define the term 'parent', can make a significant difference.

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<sup>9</sup> For example s 60B(1)(a) states that the best interests of children are met by 'ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives'.

<sup>10</sup> *Family Law Act 1975* (Cth) ss 64B(2)(d), 65DAC.

<sup>11</sup> *Family Law Act 1975* (Cth) ss 61C and 61DA. See *Donnell & Dovey* [2010] FamCAFC 15, [86].

<sup>12</sup> *Donnell & Dovey* [2010] FamCAFC 15, [75]-[122].

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14. In the absence of a more thorough definition of 'parent' in the *Family Law Act* itself, judicial officers have turned to the dictionary meaning of the word 'parent' for guidance. In the case of *Tobin v Tobin* the Full Court stated:

... 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", from the Oxford English Dictionary (2nd ed. Vol. 9)

...

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>13</sup>

15. An illustration of this is the international commercial surrogacy case of *Ellison v Karnchanit*.<sup>14</sup> In that case Ryan J cited the matter of *Tobin* and concluded that by employing the 'natural meaning' of the word 'parent' she was able to use s 69VA to make a declaration of parentage in favour of the commissioning father who was a biological parent.<sup>15</sup> Similarly, in the recent matter of *Groth & Banks*<sup>16</sup>, involving a single woman who conceived a child through assisted conception procedures with a known sperm donor, Cronin J found that the sperm donor was a parent. Regarding the definition of 'parent' His Honour stated:

6. In s 4(1) of the Act, the word "parent" is not exhaustively defined... The definition is unhelpful where the child has not been adopted. The lack of a comprehensive definition means that the word "parent" should be given its ordinary dictionary meaning. That approach is consistent with the use and obvious intention used throughout the Act but also in the authorities considered below.

...

14. The fact that a child has two parents who are her or his biological progenitors permeates the language of the Act. 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>17</sup>

16. We are concerned that a definition of parentage as being biological does not operate in the best interests of the child and leads to discrimination on the basis of sexual orientation and marital status.
17. Since the *Family Law Act* was passed in 1975 there has been a dramatic shift in both societal acceptance and the legal status of people in same-sex relationships. It is necessary that the law shifts away from the focus on the heterosexual nuclear family as the default family structure.
18. WLS NSW is concerned that relying on a dictionary definition of 'natural' parenthood often has the result of prioritising 'traditional' family structures over 'non-traditional' families, such as lesbian couples and single women and results in a failure to recognise the diversity of and reality of modern Australian families, which leads to discriminatory outcomes for both adults and children living in non-traditional families.

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<sup>13</sup> *Tobin v Tobin* (1999) FLC 92-848, [42],[45]

<sup>14</sup> [2012] FamCA 602

<sup>15</sup> *Ellison v Karnchanit* [2012] FamCA 602, [73]-[77]

<sup>16</sup> [2013] FamCA 430

<sup>17</sup> *Groth & Banks* [2013] FamCA 430, [6], [14]

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19. Use of technology to assist reproduction has increased the use of donated sperm and eggs by both same-sex and opposite-sex couples, but the reality is that biology never was the sole determinant of parentage. Adoption and surrogacy arrangements have existed throughout recorded human history. Access to modern reproductive technology and changed societal attitudes to same-sex relationships means that there is now much greater diversity in family structures and it is vital that family law adapts.
20. In many cases, the 'natural' meaning of the word 'parent' has been used to import a biological father into the family as a 'parent'.<sup>18</sup> Common examples of this are sperm donors in cases involving lesbian couples or single women and biologically related commissioning fathers in surrogacy arrangements. This may be a positive thing for many of the children based on their particular circumstances, however, we are concerned about this as a trend on several accounts.
21. Firstly, it appears to result in prioritising biological relationships over non-biological ones. In many family law cases the use of the 'natural' meaning of the word 'parent' has resulted in a reliance on, and privileging of, biological relationships. Whilst we strongly argue for recognising the importance of biological relationships and believe that it is essential for people who are adopted or born with the assistance of donor gametes or surrogacy arrangements to have access to information about their biological background, we do not support the privileging of biological relationships as an absolute. We are gravely concerned by the tendency for judicial officers to import a parental relationship onto a biological parent in families not based around biological relationships.<sup>19</sup> Whilst we are aware that there are some families who intend for a donor-conceived child to have three or four parents, we understand that the vast majority of people who use donor sperm draw a distinction between a donor and a father.<sup>20</sup>
22. Additionally, we are alarmed at the reasoning in *Groth & Banks* [2013] FamCA 430, which involved a dispute between a single woman and a sperm donor about the donor's parental status. In that case, the reasoning rested on an implied plural definition of parent, as a result of the numerous references to 'parents' throughout Part VII. As discussed below, we consider it appropriate to enact amendments to secure the rights of single women to become parents through the use of assisted conception procedures and in addition, we recommend that the definition of 'parent' in s 4 be amended to read as singular and/or plural.
23. WLS NSW submits that it is essential that the spectrum of diversity in Australian families be adequately recognised in the *Family Law Act*, not in the current *ad hoc* manner which has left gaps, created uncertainty and lead to inconsistent outcomes for children. Therefore, WLS NSW recommends that the definition of 'parent' in s 4 be amended.
24. WLS NSW anticipates that proposals will be made to enable the court to make orders in favour of non-parents without having to go through the current convoluted decision-making process in Part VII. We are concerned about some of the potential implications of this proposal and believe that appropriate thought would have to be given to the potential for eroding the unique position of parents, noting in particular that non-parents, such as sperm donors and grandparents, usually play an important, but distinct role in a child's life, and protections for

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<sup>18</sup> See for eg, *Groth & Banks* [2013] FamCA 430, cases such as *Wilson and Anor & Roberts and Anor* (No. 2) [2010] FamCA 734 and *Re Patrick: An application concerning contact* [2002] FamCA 193, in which a donor is given substantial time with the child, and many of the surrogacy cases noted above at n 5.

<sup>19</sup> *Ibid.*

<sup>20</sup> See the VLRC report, 137. This is also consistent with the reported experiences of our clients.

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those who wish to create a family on a non-biological basis may be necessary. Rather than dealing with such an amendment in this Review, we recommend that considerations along these lines are made as part of a much broader evaluation of Part VII of the *Family Law Act*, along the lines of the current research being conducted by Professor Rhoades et al. We would expect that appropriate consultation would occur around any significant proposals along these lines.

### **Recommendation 1:**

Amend the definition of 'parent' in s 4 of the *Family Law Act* to be more inclusive.

Current definition:

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

Proposed definition:

'"**parent**"', when used in Part VII means one or more persons who are:

- (a) a biological parent of a child conceived through sexual intercourse;
- (b) a parent of a child lawfully adopted by them;
- (c) a parent recognised under s 60H of the *Family Law Act*; or
- (d) a parent recognised under state laws prescribed by the *Family Law Act* (ie, state laws granting transfer of parental status in surrogacy arrangements).

### **Amendments to section 60H and section 60HB**

25. WLS NSW submits that there are several problems with the s 60H as presently drafted that require amendment to improve certainty and consistency.

#### **(a) Uncertainty about the status of 'the other intended parent' in s 60H**

26. Section 60H of the *Family Law Act* sets out who will be recognised as the legal parents of a child born as a result of an artificial conception procedure. One of the primary purposes of the section is to ensure that the 'other intended parent' (that is, the partner of the birth mother) has full parental responsibility for the child.

27. The Full Court in *Aldridge & Keaton* raised some questions about the drafting of Part VII of the *Family Law Act*, which deals with children's matters. In particular they stated that 'the question of whether an "other intended parent" is a "parent" for the purposes of Part VII is not without some doubt.'<sup>21</sup>

28. Their Honours expressed the following concerns:

- 16. ... 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

<sup>21</sup> *Aldridge & Keaton* [2009] FamCAFC 229, [16]

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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.

17. 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”.
18. **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.
- ...
22. We think from reading the Senate report, it was intended that following amendments to s 60H that children, the subject of proceedings under the Act, regardless of the circumstances of their conception or birth, should have the same rights, protections and privileges under the Act to receive proper parenting from either a biological parent, or that biological parent’s partner (including a same-sex co-parent), as biological children born to men and women who have been legally married, living in a de facto relationship or who have never lived together. **We are not sure the legislation has had that effect.** However, while some issues in this appeal do focus on the term “person” and “parent” it is unnecessary we say anything further about s 4, s 60H, s 69VA in the context of this appeal, other than to note further legislative amendment may be necessary to clarify the non-biological person’s status as a parent (emphasis added).

29. As noted by Watts J in *Connors & Taylor* [2012] FamCA 207 at [87]:

‘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”.’

30. In that case Watts J found that:

‘The doubts expressed by the Full Court in *Aldridge & Keaton* have been both explicitly and implicitly rejected in cases where the issue has arisen in a way that required it to be determined.’<sup>22</sup>

However, WLS NSW considers it vital that the terms of the legislation are clarified to remove any doubt about the parental status of the ‘other intended parent’, particularly in the context of dramatic inconsistencies in the application of the definition of ‘parent’ from case to case.

31. WLS NSW recommends that the uncertainty contained in s 60H as presently drafted be rectified by way of an amendment to remove any doubt as to the parental status of the ‘other intended parent’ by specifically including the term ‘parent’ in s 60H and by amending the definition of parent as discussed above at Recommendation 1.

### **Recommendation 2:**

Amend s 60H of the *Family Law Act* to remove doubt as to the parental status of the ‘other intended parent’ by specifically including the term ‘parent’ in s 60H.

<sup>22</sup> *Connors & Taylor* [2012] FamCA 207 at [81]

**(b) Whether s 60H provides an exhaustive definition of who is a 'parent' of a child conceived with the assistance of artificial conception procedures**

32. *The VLRC Report* described the impact of uncertainty about the status of sperm donors:

The uncertainty about the status of donors is detrimental to children and has implications for them, as well as parents and the community in general.

Uncertainty about the legal parental status of donors may lead to:

- stress and anxiety and make it difficult for people to plan their arrangements successfully—many women who make arrangements with known donors feel uneasy that these arrangements have no legal force
- disputes about the status of donors and their role in families
- disputes about the rights and liabilities of third parties (such as the state in relation to statutory compensation schemes) under Victorian law
- confusion about whether the name of a donor should be registered as a parent of the child on the register of births.<sup>23</sup>

33. Despite amendments to s 60H in 2008, there continues to be considerable uncertainty about the position of sperm donors under the *Family Law Act*.

34. Prior to the reforms judicial interpretation of s 60H had held both that a sperm donor is not a parent<sup>24</sup> and that a sperm donor is to be considered a parent.<sup>25</sup> Justice Watts summarised the differing views in this way:

19. Prior to December 2008 there had been a debate in the case law about whether or not, for the purposes of the FLA, s 60H of that Act defined "parent". Guest J in *Re Patrick: An application concerning contact* [2002] FamCA 193; (2002) FLC 93-096, concluded that a sperm donor was not a parent for the purposes of the FLA but rather, in that case, found that the sperm donor was a person concerned with the care, welfare and development of the child.

20. Brown J in *Re Mark: An application relating to parental responsibilities* [2003] FamCA 822; (2003) FLC 93-173, expressed a number of reservations about the analysis by Guest J, and by way of obiter, expressed the view that the natural meaning of the word "parent" in the context of Part VII FLA includes the biological mother or father of a child and that s 60H FLA did not provide an exhaustive definition of parent for a child conceived by artificial conception procedures.<sup>26</sup>

35. Unfortunately this was not resolved by the amendments to s 60H in 2008.<sup>27</sup>

36. Some judicial officers such as Watts J in *Re Michael* are of the view that as a result of the 2008 amendments to s 60H the previous uncertainty had been resolved:

It seems that the debate between Brown J and Guest J has been legislatively decided. **Sections 60H(1) FLA and s 60HB FLA provide an exhaustive definition as to who can be called Michael's parents** (emphasis added).<sup>28</sup>

<sup>23</sup> *The VLRC Report*, above n 1, 136

<sup>24</sup> *Re Patrick: An application concerning contact* [2002] FamCA 193 (5 April 2002).

<sup>25</sup> *Re Mark: An application relating to parental responsibilities* [2003] FamCA 822 (28 August 2003)

<sup>26</sup> *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 (3 August 2009), [19]-[20]

<sup>27</sup> *Family Law Amendment (De Facto and Other Measures) Act 2008* (Cth)

<sup>28</sup> *Re Michael: Surrogacy Arrangements* [2009] FamCA 691 (3 August 2009), [25]

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37. However, other judicial officers have continued to apply the interpretation of Brown J, despite the 2008 amendments. For example, in the case of *Ellison v Karnchanit*,<sup>29</sup> Ryan J referred to an opinion of McMillan J who interpreted s 60H in the same manner as Watts J:
57. ... McMillan J in *Gough & Gough & Kaur* [2012] FamCA 79, a case in which the factual circumstances are similar, found that s 60H(1) nonetheless applied and had the effect of **excluding the applicant father in that case from being a parent**. In considering the application of s 60H(1), her Honour found that “[t]he first named applicant in this case was not the husband or defacto partner of the respondent. Whilst he provided genetic material, the child is not his child for the purposes of the Act.”
58. I respectfully disagree with this interpretation of s 60H(1).
59. In *Re Mark: an application relating to parental responsibilities* (2003) 31 Fam LR 162, which case concerned a child born to a same sex couple through an international surrogacy arrangements, Brown J considered the reach of s 60H. Her Honour [at 40] determined that “To the extent that s.60H could be said to define ‘parent’ for the purposes of the Family Law Act I am not satisfied it is an exhaustive definition. To use the language of Fogarty J in *B v J* (1996) FLC 92-716, **its provisions enlarge, rather than restrict, the categories of people who may be regarded as the child’s parent.**”
60. Similarly, in *Stone v Bowman* [2000] FamCA 1280 (unreported, 28 February, 2000) Faulks J (as he then was) concluded that s 60H **expanded rather than limited the categories of people who are deemed to be parents**.
61. Read in the context of Part VII, s 60H(1) is not intended to be an exhaustive definition and thus does not operate to exclude a person as a parent if his or her circumstances do not coincide with those identified in the section (emphasis added).<sup>30</sup>
38. The two surrogacy matters of *Dennis & Pradchaphet* [2011] FamCA 123 and *Dudley & Chedi* [2011] FamCA 502 highlight the need for clarification of s60H(1). These cases involved the same heterosexual couple who had commissioned two surrogate mothers at the same time. Separate parenting applications were made in relation to the children of each of the surrogate mothers. One case came before Stevenson J, who found the commissioning father was a parent and the other came before Watts J, who declined to make a finding that the commissioning father was a parent. The fact that two diametrically opposing determinations of parentage could be made on such similar fact scenarios is illustrative of the need for the legislature to clarify s 60H to avoid such alarmingly inconsistent outcomes.
39. When surrogacy cases come before the court, there is an evident desire on the part of many judicial officers to find a way for the intended parents to be found to be the child’s parents at law, although in all these cases it has not been possible for the intended mother to be a legal parent since the mechanism for parental recognition relied upon the biological connection of the commissioning father whose sperm was used to conceive the child. One of the problems with this is that in trying to find a way for the commissioning father to be found to be a parent, many judges are opening up s 60H, which causes additional uncertainty for those who have children with the aid of a donor and in particular for single women, as discussed below.

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<sup>29</sup> [2012] FamCA 602

<sup>30</sup> *Ellison v Karnchanit* [2012] FamCA 602 [57]-[61]

**(c) Issues with the parentage presumptions and surrogacy arrangements**

40. Many of the problems 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 who 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.
41. 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 in surrogacy arrangements.
42. In the surrogacy matter of *Re Michael* Watts J took the view that he was unable to implement the intentions of the parties in that case and made several recommendations for amendments to resolve some of the problems with the current provisions that had arisen. WLS NSW considers these amendments to be both sensible and necessary. His Honours proposals are:
- 71.1. Amend s 60H FLA to make it clear that s 60H FLA is subject to the provisions of s 60HB FLA.
  - 71.2. Amend s 69U FLA to make it clear that parentage presumptions can be rebutted by the operation of other parts of the FLA.
  - 71.3. If it is intended that s 60H FLA has no application to surrogacy arrangements, to amend s 60H FLA to make that clear or alternatively amend the definition of "artificial conception procedures" to exclude surrogacy arrangements from that definition.
43. WLS NSW supports this amendment for the reasons outlined by Watts J:
- Section 60H FLA is not expressed to be subject to s 60HB FLA. If s 60HB FLA was in the future enlivened in New South Wales by State law and Federal regulations, it might mean that s 60HB FLA and s 60H FLA produce irreconcilable results. Michael could be said to be a child of Sharon and Paul by s 60HB FLA and said not to be a child of Sharon and Paul by s 60H FLA. Reading s 60H FLA as not applying to surrogacy arrangements, would avoid this inconsistent result.<sup>31</sup>
44. The second amendment is required because the *Family Law Act* does not adequately address conflicting presumptions of parentage that arise in the context of surrogacy arrangements. The difficulties were clear in *Re Michael*, because the sperm of the commissioning father was used and his name was recorded on the child's birth certificate, creating a presumption of parentage under s 69R. Unlike presumptions in some state and territory legislation, the *Family Law Act* does not contain a hierarchy of presumptions that are rebuttable and irrebuttable to resolve situations where there are conflicting presumptions. In *Re Michael* Watts J had to untangle the interaction of the presumptions in the context of that case,<sup>32</sup> and as a result recommended that s 69U be amended to make it clear that the presumption arising from s 69R may be rebutted by the operation of another provision of the *Family Law Act*.

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<sup>31</sup> *Re Michael* [2009] FamCA 691, [30.1]

<sup>32</sup> *Re Michael* [2009] FamCA 691, [46] [-52]

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45. We recommend that His Honour's proposed amendment be adopted. A possible alternative resolution would be for the presumptions in the *Family Law Act* to be rewritten to include rebuttable and irrebuttable presumptions, similar to the NSW *Status of Children Act 1996*.
46. WLS NSW also supports Watts J's third recommendation of an amendment to remove surrogacy arrangements from s 60H, as it could be a clear way of catering appropriately for the distinct needs of the two groups of people who use artificial conception procedures and their children as noted above.
47. However, under state and territory surrogacy and parentage laws presumptions relating to artificial conception procedures do apply until a parentage transfer order has been made. There are good reasons for this arrangement, for example, it keeps the power of medical decisions in the hands of the surrogate mother during pregnancy and birth, and allows her to change her mind about the surrogacy arrangement.<sup>33</sup> WLS NSW considers these protections to be essential given the potential vulnerability of surrogate mothers when they do not have control over their bodies or the power to make decisions about parenthood once the child has been born. Therefore, thought would need to be given to how ss 60H and 60HB would operate if a surrogate mother changed her mind after the birth of a child, and what would happen in other circumstances where parentage transfer is not possible.

### **Recommendation 3:**

Amend s 60H of the *Family Law Act* to make it clear that s 60H is subject to the provisions of s 60HB.

### **Recommendation 4:**

Amend s 69U of the *Family Law Act* to make it clear that parentage presumptions can be rebutted by the operation of other parts of the Act. Alternatively give consideration to inclusion of rebuttable and irrebuttable parentage presumptions, similar to the *Status of Children Act 1996* (NSW).

### **Recommendation 5:**

Amend s 60H of the *Family Law Act* to make that clear that that s 60H has no application to surrogacy arrangements or alternatively amend the definition of "artificial conception procedures" to exclude surrogacy arrangements from that definition.

### **(d) Status of single women under s 60H**

48. Unlike the situation in State and Territory parentage legislation, the wording of the *Family Law Act* makes it unclear whether or not s 60H applies to single women who have conceived a child through the use of artificial conception procedures. Several cases have found that 's 60H(1) has

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<sup>33</sup> Millbank, Jenni, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?" (2011) 35(1) *Melbourne University Law Review* 165, 178.

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no effect in relation to a birth mother who was not married or in a de facto relationship at the relevant time.<sup>34</sup> Similarly, in *Groth & Banks* Cronin J considered each subsection of s 60H35 and concluded:

'Thus, s 60H does not operate on these facts to restrict the applicant from being a parent because the mother was neither married nor in a de facto relationship.'<sup>36</sup>

49. Justice Cronin points out that the results of his analysis of s 60H of the *Family Law Act* for single women is at odds with the clear terms of the state parentage legislation contained in s 15 of the *Status of Children Act 1974* (Vic).<sup>37</sup>

Section 15 creates an irrebuttable presumption that where a woman who has no partner “undergoes a procedure as a result of which she becomes pregnant”, the man who provided the genetic material is not the father. This presumption applies as a result of the wording of s 15(1)(b), “whether or not the man is known to the woman”.<sup>38</sup>

50. His Honour considered the *Judiciary Act 1903* (Cth) and s 109 of the Constitution and concluded that s 15 of the *Status of Children Act 1974* (Vic) does not apply. Accordingly His Honour found that the sperm donor was the child's parent.

51. WLS NSW submits that it is discriminatory to treat single women differently from married or partnered women. We note the VLRC considered in detail the issue of single women undergoing artificial conception procedures. The VLRC concluded that:

it does not make sense for donors to have a different legal status in relation to children depending on the relationship status of the women who receive the sperm. This is particularly the case if donors do not know who are the recipients of the sperm.

The commission also felt that the policy underlying the extinguishment of a donor's parental status is an important one which should apply universally. It would be problematic to make special provisions for particular families. In this regard we were mindful of the fact that arrangements where the donor is regarded within the family as a parent of the child are relatively rare.<sup>39</sup>

Accordingly the VLRC recommended that ‘sperm donors should be presumed at law not to be the father of any children conceived by women without male partners as a result of their donation’.<sup>40</sup>

52. WLS NSW notes that the family law courts can make orders for a donor to spend time with a child as a person concerned with the care, welfare or development of the child. As with many other family members, it is possible for a donor to have a close and loving relationship with a child without being a ‘parent’, and to seek orders in the family law courts should there be conflict with the child's parent or parents.

53. In her submission to the Senate Legislative Council Inquiry prior to the 2008 amendments of the *Family Law Act*, Professor Millbank noted:

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<sup>34</sup> *Ellison v Karnchanit* [2012] FamCA 602, [61]

<sup>35</sup> *Groth & Banks* [2013] FamCA 430, [18]–[19]

<sup>36</sup> *Groth & Banks* [2013] FamCA 430, [22]

<sup>37</sup> *Groth & Banks* [2013] FamCA 430, [28]

<sup>38</sup> *Groth & Banks* [2013] FamCA 430, [29]

<sup>39</sup> *The VLRC Report*, above n 1, 138–139

<sup>40</sup> *Ibid*, 136.

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In addition while all of the state and territory laws sever parental status of an egg or sperm donor who is not a party to the relationship, such provisions are not reflected in the Family Law Act. This has led to considerable confusion as to whether the court is bound only by the terms of s60H when considering a child born through ART or whether it can look beyond the section to grant parental status to genetic parents who do not fit within its terms in certain circumstances (such as surrogacy arrangements: see eg *Re Mark* [2003] FLC 93-173; *King v Tamsin* [2008] FamCA 309). This situation has led to considerable uncertainty for lesbian families with known sperm donors as well as for surrogate families, and ought to be clarified.

The current s60H has been demonstrated to be confusing, inconsistent with state law, uncertain in operation and discriminatory. It is in clear need of amendment.<sup>41</sup>

54. Unfortunately, much of the uncertainty and confusion described by Professor Millbank has continued since the amendment of s 60H. We therefore submit that the section remains in clear need of amendment to ensure certainty for children born through assisted conception procedures.
55. Additionally, we consider that it is inconsistent to recognise sperm donors as legal parents to children born to a single woman through assisted conception procedures but not to recognise them where the birth mother has a partner. We also point out that egg donors are never recognised as a parent and that there should be consistent treatment of all gamete donors.
56. WLS NSW submits that it does not make sense for donors to have a different legal status in relation to children depending on the relationship status of the women who receive the sperm.
57. Finally, we consider the distinction between conception through sexual intercourse and assisted conception procedures to be a logical boundary line, that provides an easy to comprehend distinction for the attachment of legal parenthood. Given the history of confusion around the parental status of people involved in family formation with the aid of reproductive technology, we submit that clear, simple and logical distinctions should be drawn whenever possible.
58. We endorse the recommendations of the VLRC in relation to the status of donors.<sup>42</sup>

### **Recommendation 6:**

Where a woman becomes pregnant as the result of a treatment procedure using donor sperm (whether carried out in a licensed clinic or not), the man who donated the sperm should be presumed for all purposes not to be the father of any child born as a result of the pregnancy.

<sup>41</sup> Jenni Millbank, Submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008, Parliament of Australia, 2, at: < [http://www.aphref.aph.gov.au\\_senate\\_committee\\_legcon\\_ctte\\_completed\\_inquiries\\_2008-10\\_family\\_law\\_submissions\\_sub\\_14.pdf](http://www.aphref.aph.gov.au_senate_committee_legcon_ctte_completed_inquiries_2008-10_family_law_submissions_sub_14.pdf) >

<sup>42</sup> *The VLRC Report*, above n 1, 136-138

**Recommendation 7:**

Where a woman becomes pregnant as the result of a fertilisation procedure using a donated egg, she should be conclusively presumed to be the mother of any child born as a result of the pregnancy. The woman who donated the egg should be presumed for all purposes not to be the mother of any child born as a result of the pregnancy.

## Surrogacy

59. Over the last few years there have been several cases involving surrogacy arrangements where the parties have not been able to rely on parentage transfer provisions in state legislation. In applications to the Family Law Courts commissioning parents have sought orders for parental responsibility and in some cases the applicants were clear that they were seeking family law orders in order to assist them in immigration applications because the surrogacy arrangements had taken place overseas.
60. It is clear that the courts have struggled with the position they find themselves in: on the one hand having to decide what is in the best interests of a child who may end up as a stateless orphan if the orders sought are not made and on the other, a clear policy position from parliaments across the country against commercial surrogacy.<sup>43</sup>
61. Professor Millbank points to the UK case of *Re X and Y (Foreign Surrogacy)* [2008] EWHC (Fam) 3030 (9 December 2008), where the Court discussed this difficulty:
- In coming to the decision to retrospectively authorise the payment, the Court noted that it was torn between two competing and irreconcilable concepts — Parliament's clear intention to prevent commercial surrogacy at the level of general policy versus the court's duty to mitigate such policy by consideration of the child's welfare in the individual instance.<sup>44</sup>
62. Like many others, WLS NSW is extremely concerned about the inconsistent outcomes seen in cases involving children born through international surrogacy arrangements.<sup>45</sup> We regard a uniform approach to treatment of such matters under Australian law to be essential.
63. We welcome steps to develop a consistent approach, however, we have several concerns about regulation of international commercial surrogacy. Of primary concern, is the high risk of exploitation of women who are surrogate mothers and egg donors. Many writers have raised

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<sup>43</sup> See: *Surrogacy Act 2010* (NSW) s 6(1), *Assisted Reproductive Treatment Act 2008* (Vic) s 45, *Surrogacy Act 2010* (QLD) s 14(1), *Parentage Act 2004* (ACT) s 41, *Surrogacy Act 2008* (WA) s 7, *Surrogacy Act 2012* (TAS) s 10(1), *Family Relationships Act 1975* (SA) ss 10G and 10HA, and while the Northern Territory has no legislation governing surrogacy, Medical practitioners who provide reproductive services are subject to the 2007 National Health and Medical Research Council's Ethical guidelines on the use of Assisted Reproductive Technology in clinical practice and research. Those guidelines state that 'Clinics must not undertake or facilitate commercial surrogacy arrangements' at 53.

<sup>44</sup> Millbank, above n 33, 200

<sup>45</sup> See above n 5.

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concerns about commercial surrogacy practices in countries such as India, Thailand, Greece, Guatemala, Ukraine and others.<sup>46</sup>

64. Unfortunately, we do not anticipate that use of the *Best Practice Principles* recommended by the Australian Human Rights Commission and the Independent Children's Lawyer in the *Ellison* case<sup>47</sup> will create sufficient safeguards for those involved in the surrogacy arrangement, nor resolve the question of what the courts should do when the commissioning parents fail to comply with steps such as obtaining informed consent. Given the focus of the judicial officer is, as it must be, on the best interests of the *individual* child, it remains highly likely that it will be considered to be in the best interests of the child for orders in favour of the commissioning parents, over making the child a stateless orphan, regardless of how poorly the surrogate mother may have been treated.
65. We are very concerned that Australian High Commissions and Embassies such as those in India and Thailand have developed guidelines for applications for Australian citizenship by descent for children born outside Australia as a result of surrogacy arrangements which rely upon the local laws, including for example, evidence of an enforceable surrogacy contract,<sup>48</sup> despite stated policy against such contracts in every state and territory. As Professor Millbank notes:

To be clear: the ability to compel the birth mother to relinquish the child under foreign law is a factor being taken in favour of granting recognition of parentage through Australian citizenship.<sup>49</sup>

WLS NSW agrees with Professor Millbank when she argues that '[t]he legal parentage of such children should be remedied by a more direct, transparent and inclusive legislative response.'<sup>50</sup>

66. WLS NSW holds serious concerns about the capacity of regulation to obtain acceptable outcomes for many women involved in commercial surrogacy. We believe that it is important to look at the opinions of women who are from the countries where Australians are travelling to engage in commercial surrogacy, and ideally, to listen to the voices of the women themselves. We note that writers from countries such as India are often very concerned about the global fertility market. For instance Gupta argues 'for a ban on commercial egg donation and surrogacy and a social-justice approach that would hold the state responsible for providing basic social goods to low-income households'.<sup>51</sup> She is concerned to find alternatives so that 'women would not be compelled to adopt surrogacy as a strategy for survival and upward social mobility'.<sup>52</sup>

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<sup>46</sup> In particular, we note the following articles: Olivia Rundle, 'Transnational Surrogacy: Mapping the issues' (Paper presented at the National Family Law Conference, Canberra, 2010), Aneita Browning, 'As the stork flies from India to Australia: Intercountry commercial surrogacy arrangements' (2011) 107 *Precedent* 22, and John Pascoe, 'Intercountry Surrogacy – A new form of trafficking?' (Paper presented at the LegalWise 2nd Annual International Family Law Conference, Cambodia, 2012)

<sup>47</sup> *Ellison & Karnchanit* [2012] FamCA 602

<sup>48</sup> Australian Embassy, Thailand, *Children born as a result of a surrogacy arrangement in Thailand* <[http://www.thailand.embassy.gov.au/bkok/DIAC\\_Children\\_surrogacy.html](http://www.thailand.embassy.gov.au/bkok/DIAC_Children_surrogacy.html)> and Australian High Commission, India, *Children born through Surrogacy Arrangements* <[http://www.india.embassy.gov.au/ndli/vm\\_surrogacy.html](http://www.india.embassy.gov.au/ndli/vm_surrogacy.html)>

<sup>49</sup> Above n 33, 203

<sup>50</sup> *Ibid.*

<sup>51</sup> Jyotsna Agnihotri Gupta, 'Reproductive Biocrossings: Indian egg donors and surrogates in the globalised fertility market' (2012) 5(1) *International Journal of Feminist Approaches to Bioethics* 25

<sup>52</sup> *Ibid.*

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67. We note suggestions by commentators such as Professor Millbank who recommend that Australia re-evaluate our position against commercial surrogacy.<sup>53</sup> We have two primary concerns about such a proposal: firstly, we think that it is highly likely that people who wish to become parents would continue to enter into commercial surrogacy arrangements in countries where surrogacy is unregulated and cheaper. Secondly, we are concerned about the potential for exploitation of Australian woman as we consider it likely that in a commercialised fertility market it would, in the main, be the most vulnerable women who would become surrogates.
68. If you would like to discuss any aspect of this submission, please contact Mari Vagg, Solicitor or Janet Loughman, Principal Solicitor on 02 8745 6900.

Yours faithfully,

Women's Legal Services NSW

Janet Loughman,  
Principal Solicitor

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<sup>53</sup> Above n 33