RECOGNISING OUR FAMILIES EQUALLY

SUBMISSION TO THE NSW DEPARTMENT OF COMMUNITIES AND JUSTICE
REVIEW OF THE SURROGACY ACT 2010 AND STATUS OF CHILDREN ACT 1996

August 2024

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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We acknowledge that our offices are on the lands of the Eora Nation and the lands of the Kulin Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Equality Australia is grateful for the opportunity to provide a submission to the NSW Department of Communities and Justice review into the *Surrogacy Act 2010* (NSW) and *Status of Children Act 1996* (NSW).

Families come in all shapes and sizes, and every child deserves the economic and emotional security that comes with the legal recognition of their parents.

Yet children in rainbow families and other families formed through surrogacy may be denied rights and entitlements because their parents are not legally recognised.

This particularly affects:

- children born via surrogacy arrangements where their intended parents are ineligible for parentage transfer orders under inflexible NSW laws (including because they were born via a commercial surrogacy arrangement),
- the children of gender diverse people who have to navigate legal provisions that are expressed in binary gendered terms making their application unclear and uncertain, and
- children in co-parenting arrangements[1] who have legal pathway for the recognition of their families.

In this submission, we suggest reforms to the *Surrogacy Act 2010* and the *Status of Children Act 1996* to better recognise the diversity of families in NSW, ensuring all children have the benefit of the legal recognition of their parents.

Overall, we recommend changes that ensure children are not discriminated against or disadvantaged because of the circumstances of their conception or the gender of their parents. We suggest changes that modernise laws to ensure they apply equally to all parents and address the regulation of surrogacy in NSW in a way which does not punish or harm children because of the circumstances of their birth.

This submission is structured in two parts. In Part 1, we set out key policy principles and recommendations for reform. In Part 2, we respond specifically to the consultation paper questions by reference to the detailed analysis in Part 1.

LIST OF RECOMMENDATIONS

Parentage recognition following surrogacy

1. Adopt the reforms in Schedule 19, [3]-[5] of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) so that the NSW Supreme Court has the discretion to make a surrogacy parentage order in circumstances where it is in the best interests of the child, even where not all the requirements of the scheme have been met or met in full.
2. Allow the NSW Supreme Court to make an interim parentage order during pregnancy that becomes effective from birth and becomes final after birth if all the requirements of the *Surrogacy Act 2010* are otherwise met. This will allow intended parent(s) to have legal recognition as parents from the birth of their child, provided the surrogate and her partner (if any) consent to relinquishing the child and there are no disputes. The interim parentage order could be unwound in the event of a dispute.

[1] In this submission, when we refer to 'co-parenting arrangements' we mean arrangements between two or more persons to conceive a child where those people agree to play a parental role of a significant or equal degree, and where all the people involved are not in a couple relationship with each other. Examples of these arrangements include a lesbian couple who agree to co-parent with a donor-dad or a single woman who agrees to co-parent with another man who is not her partner. Under the *Status of Children Act 1996* (NSW), not all these co-parents are legally recognised as parents and may in fact be conclusively presumed *not* to be parents on the basis that they are sperm or ovum donors: s 14(2)-(3). In this context, we use the term 'donor-dad' to refer to those fathers who are not recognised as legal parents (notwithstanding a co-parenting arrangement is in place) because the law recognises them as a donor.

3. Amend the *Surrogacy Act 2010* (NSW) to recognise prescribed comparable overseas (and interstate) surrogacy parentage schemes or prescribe comparable overseas courts under section 12 of the *Status of Children Act 1996* (NSW).

Moving away from criminalisation towards better regulation of surrogacy

4. Repeal section 11 of the *Surrogacy Act 2010* (NSW).
5. Consider amending the *Surrogacy Act 2010* (NSW) to prescribe a standard surrogacy agreement that sets out minimum safeguards and protections for all persons involved in a surrogacy arrangement, including the child, the surrogate and their partner (if any) and the intended parent(s).

   Incentivise compliance with the standard surrogacy agreement by affording people who adopt the agreement a streamlined process for parentage recognition.

   Render any terms in any agreement which are inconsistent with the standard agreement invalid and unenforceable.

   Consider allowing a limited compensatory payment to be made to the surrogate in recognition of her unique contribution to the pregnancy and birth, in addition to reasonable expenses.

   Roll back criminalisation to instances of exploitation and abuses of power, rather than assuming any commercial surrogacy arrangement is inherently exploitative or abusive.

Recognise trans and gender diverse parents equally

6. Adopt the reforms in Schedule 14 of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) so that courts can construe gender-specific legislation in NSW equally, regardless of the gender of a parent. This will signal that references to 'mothers', 'fathers', 'men', 'women' etc. should be read to include trans and gender diverse parents who have the same bodily capacities and roles as their cisgender counterparts.
7. In addition to recommendation 6, replace unnecessarily gendered terms in the *Status of Children Act 1996* (NSW), *Surrogacy Act 2010* (NSW) and other NSW legislation to ensure that laws clearly apply to all persons with the same bodily characteristics and capacities, regardless of gender.

Recognising co-parented families

8. Amend the *Status of Children Act 1996* (NSW) (or the *Births, Deaths and Marriages Registration Act 1995* (NSW) to introduce a parentage registration scheme that allows recognition of co-parented families. This scheme would allow, upon the birth of a child or as otherwise authorised by a court, the registration and legal recognition of no more than 4 parents with the consent of the people who are recognised as the parents under existing law.

Symbolic recognition for significant people who are not parents

9. Amend the *Births, Deaths and Marriages Registration Act 1995* (NSW) to allow on a child's birth certificate for the symbolic recognition of significant people who are not the legal parents of a child, such as the surrogate or donor. Ensure that children are also provided with a standard birth certificate, so that the family and child have the right to disclose the circumstances of the child's conception only to whom they wish to know.

PART I: LEGAL RECOGNITION OF PARENTAGE

Children deserve the economic and emotional security that comes with the legal recognition of their families. Currently, children may be denied rights and entitlements because their parents are not legally recognised. This particularly affects children born via surrogacy arrangements, the children of gender diverse parents, and children in co-parenting arrangements.

1. FAMILIES COME IN ALL SHAPES AND SIZES

Our laws should recognise and reflect the reality of modern family life in NSW. To ensure our laws do so, it is important to understand that familial diversity, including the diversity of rainbow families.

The Census records 78,425 same-sex couples living together in Australia. 17.3% of these couples have children living with them, accounting for 30% of female same-sex couples and 7% of male same-sex couples.[2] But these statistics do not tell us the full story on rainbow families or LGBTQ+ parenting.

Like non-LGBTQ+ people, LGBTQ+ people become parents through a number of ways, including donor insemination, surrogacy, fostering, adoption and step-parenting of children from previous relationships. Children may be conceived by LGBTQ+ parents through assisted means (such as IVF, donor or home insemination) or through sexual intercourse.[3] Some, but not all of these, families attract equal legal recognition, depending on their method of conception or family formation, and whether the parents were a married, registered or de facto couple at the time of conception.

Common LGBTQ+ family forms include:

- lesbian couples who have children together, with the assistance of a sperm donor (who may or may not have a limited or more significant parental role);
- male couples who have children together, with the assistance of a surrogate and sometimes an egg donor (who may or may not have a limited or more significant parental role);
- people, who are not all members of a couple, who have children together as part of a co-parenting arrangement (e.g. a lesbian couple plus a single gay man; a lesbian couple plus a gay male couple; or a single woman and a single man);
- trans and gender diverse people who have children with their partners.

When we refer to 'parents' in this submission, we make a distinction between parents and step-parents. Parents are those who are involved in conceiving and giving birth to a child, whether with the assistance of other people or not, and who are intending to play a parenting role from birth. Our submission is concerned with the recognition of these people as the legal parents of a child.

Step-parents are the new partners of people who are already parents, and are not generally recognised as legal parents except for specific purposes or if they adopt their step-child under the *Adoption Act 2000* (NSW). They are not the people who are intended to be recognised under the *Surrogacy Act* or *Status of Children Act* as legal parents, and therefore we do not address their recognition in this submission.

2. KEY POLICY PRINCIPLES

Observing the diversity of family life and formation in NSW, our position on reforms to the *Surrogacy Act* and *Status of Children Act* is underpinned by several key policy propositions. These are:

- All children deserve the emotional and financial security that comes with the legal recognition of their families. No child should be discriminated against or disadvantaged because of the

[2] Australian Bureau of Statistics (2022) 'Same-sex couples living together in Australia', 2 December.

[3] Although it is over 20 years old, for a helpful discussion of the diversity of gay and lesbian families: see Jenni Millbank (2002) *Meet the Parents: A review of the research on lesbian and gay families*, NSW Gay & Lesbian Rights Lobby.

circumstances of their conception. Currently, some children may be denied rights and entitlements because their parents are not legally recognised. This particularly affects children born via surrogacy arrangements and children in co-parented families.

- The denial of legal parentage[4] is not an appropriate way of regulating who may or may not enter a surrogacy arrangement. Denying legal parentage does not serve the best interests of children because it denies them the protection of having their parents automatically responsible for their care, wellbeing and development. It may also leave both the intended parent(s) and surrogate in a legal position that does not reflect the reality and mutual understandings of their roles.
- The overly restrictive regulatory approach to surrogacy in Australia, including criminal offences with extraterritorial reach, has not worked well.[5] In particular:
    - The availability of more accessible surrogacy frameworks overseas means the protections in Australia are not always engaged, leaving children in a legal limbo when their intended parents seek more accessible fertility options overseas. Yet the costs involved in entering surrogacy arrangements prevents people with more limited financial means in realising their dream of starting a family, so there is also an equity issue that arises from overly restrictive domestic regulation.
    - People who agree to become pregnant as surrogates are no better protected by a system that leaves most of their rights and entitlements under-protected or which encourages more people to go overseas. Criminalisation has also driven practices underground or overseas.

  Making surrogacy more accessible domestically ensures that the protections in place for children, surrogates and intended parents are actually engaged as more people undergo surrogacy at home.
- Children deserve a mechanism for the recognition of their parents which addresses historical gaps in our laws, ensuring that reforms capture children who are already born and living in families formed by surrogacy or which involve co-parenting arrangements.
- Trans and gender diverse parents deserve to be recognised consistently with their gender identity, so that their role as mothers, fathers or parents are recognised. Our laws should apply equally to everyone regardless of their gender, meaning that people who have the same bodily characteristics or capacities are treated equally and children are not discriminated against or disadvantaged because their parents are gender diverse.

3. REFORMS TO THE *SURROGACY ACT 2010* (NSW)

This section of our submission addresses reforms needed to the *Surrogacy Act 2010* (NSW) to better recognise children born through surrogacy arrangements, including under commercial surrogacy arrangements. It also sets out our view on a potential future direction for regulation relating to surrogacy that will achieve better outcomes consistent with the desired policy objectives of protecting the rights and interests of everyone involved, including the surrogate, intended parent(s) and the children born through these arrangements.

(a) Allowing courts to put the interests of children first

We support the approach taken in Schedule 19 of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) (**Equality Bill**) to give the NSW Supreme Court a residual discretion to consider whether to depart from some of the present requirements for a surrogacy parentage order if it would be in the best interests of the child.

[4] Legal parentage is the recognition of a person as a legal parent to a child. Legal parentage instils a person with parental responsibility for a child unless that parental responsibility is otherwise revoked or limited by law.

[5] See e.g. Jenni Millbank (2011) 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?', 35 *Melbourne University Law Review* 165; Jenni Milbank (2015) 'Rethinking "Commercial" Surrogacy in Australia', 12 *Journal of Bioethical Inquiry* 477.

CHILDREN BORN THROUGH COMMERCIAL SURROGACY ARRANGEMENTS

Commercial surrogacy arrangements are prohibited in NSW, as is paid advertising for any surrogacy arrangement (whether commercial or not).[6] NSW laws also prohibit commercial surrogacy entered into overseas where the offence is committed by a person ordinarily resident or domiciled in NSW.[7]

Notwithstanding these prohibitions, we know that children have been born through commercial surrogacy arrangements overseas.[8] At least one case before the Family Court involved the intended parents being referred to the Queensland Director of Public Prosecutions.[9] More recently, however, the family courts have approached the matter cognisant that the court should 'take children as it finds them' and ensure that the best interests of the child are the paramount consideration when making parenting orders, no matter the circumstances of the child's conception.[10]

Children who are born through commercial surrogacy arrangements may never be able to have their intended parent(s) legally recognised. This is because NSW law prohibits a surrogacy parentage order being made in circumstances where the child was conceived through a commercial surrogacy arrangement.[11] The effect of this provision is to prevent the transfer of parentage to the intended parents from the surrogate, and their partner (if any). It means a child may not be legally recognised as the child of the intended parents under a range of laws, such as inheritance or superannuation laws.[12] It also means that intended parents who seek the (more limited) parenting orders available through the federal family courts do so in the shadow of the criminal law and may be fearful of being frank with the court regarding the circumstances of the conception of their child. In any event, those parenting orders cannot have effect beyond a child's 18th birthday.

Whatever the arguments for or against commercial surrogacy, a child should not be discriminated against because of the circumstances in which they were conceived. This is particularly so where they were conceived under a surrogacy arrangement that is lawful overseas and in circumstances where the surrogate parent has consented in a fully informed and non-coerced way to the arrangement and the relinquishing of the child to the intended parents.

OTHER TECHNICAL REQUIREMENTS

Further, in our view, the procedural barriers to applying for a parentage order are too high. They prevent people who have failed to meet the highly technical requirements of the scheme from being eligible to apply for a parentage order at all, or otherwise only in *'exceptional circumstances'*.[13] The scheme currently uses the inability to transfer parentage as a regulatory 'stick' to discourage surrogacy other than in particularly prescribed ways. This approach is not child-centred and has the potential to a deny a child legal recognition of the people who are their parents for the rest of their lives.

Among these technical requirements are that:

- counselling and legal advice be obtained *prior* to entering into a surrogacy arrangement;[14]
- the birth mother be at least 25 years (rather than at least 18 years);[15]

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[6] *Surrogacy Act 2010* (NSW), ss 8-10.

[7] *Surrogacy Act 2010* (NSW), s 11.

[8] See e.g. *Seto & Poon* [2021] FamCA 288 at [45]; *Whytham & Teng* [2019] FamCA 705; *Overton & Dyson* [2019] FamCA 20. See also Jenni Millbank (2013) 'Resolving the dilemma of legal parentage for Australians engaged in international surrogacy', *Australian Journal of Family Law*, 27(2).

[9] *Dudley & Chedi* [2011] FamCA 502.

[10] *Ellison & Karnchanit* [2012] FamCA 602.

[11] *Surrogacy Act 2010* (NSW), s 23.

[12] See *Surrogacy Act 2010* (NSW), s 39; *Family Law Act 1975* (Cth), s 60HB.

[13] *Surrogacy Act 2010* (NSW), s 18.

[14] *Surrogacy Act 2010* (NSW), ss 29(2), 35 and 36.

[15] *Surrogacy Act 2010* (NSW), s 27(1).

- the surrogacy arrangement be in writing;[16]
- the intended parent(s) live in New South Wales at the time of hearing;[17] and
- the child lives with the intended parent(s) at the time of hearing.[18]

While many of these requirements have sound policy objectives, they have the potential to punish a child by denying them legal recognition of their intended parent(s) because of a failure that they had no control over. Failure to meet these requirements, even in technical or immaterial ways, could result in a child never having the relationship with their intended parent(s) legally recognised.

THE WAY FORWARD

We recommend that the Supreme Court be given a discretion to make a parentage order when it is in the best interests of the child and it would be appropriate to do so (having regard to the circumstances of the birth parents and the intended parent(s), and the surrogacy arrangement), notwithstanding that one or more of the technical requirements of the scheme have not been met or met fully. This would still allow the Court to consider whether a surrogacy arrangement was one which should not be given the imprimatur of the Court but otherwise ensure that the child's interests are the paramount consideration.

The requirements of the scheme which we recommend be subject to this discretionary power of the Court are:

- section 16 (application for a parentage order must be made within 6 months of child's birth unless exceptional circumstances apply);
- section 23 (surrogacy arrangement must be altruistic);
- section 26(1) (the child must be under 18 years of age at the time of the application);
- section 27(1) (the birth mother must have been at least 25 years old when she entered into the surrogacy arrangement);
- section 29(2) (evidence of pre-arrangement counselling for intended parents under 25 years of age);
- section 30 (a medical or social need for the surrogacy arrangement must be demonstrated);
- section 32 (applicants must be resident in NSW at the time of the hearing);
- section 33 (child must be living with the applicant or applicants at the time of the hearing);
- section 34 (surrogacy arrangement must be in writing);
- section 35(1) or (2) (pre-arrangement counselling and further counselling for the birth mother and her partner [sic] after birth); and
- section 36(1) or (2) (legal advice, including independent legal advice, must have been obtained from an Australian legal practitioner before entering the surrogacy arrangement).

However, certain safeguards should not be subject to this discretionary power. Among them are the requirements:

- for all affected parties to consent to the making of the parentage order (where that consent must be freely and voluntarily given by a person with capacity to give consent);[19]
- that the birth mother or gestational parent, and the intended parents, be at least 18 years old; and

[16] *Surrogacy Act 2010* (NSW), s 34.

[17] *Surrogacy Act 2010* (NSW), s 32.

[18] *Surrogacy Act 2010* (NSW), s 33.

[19] This is subject to the caveat in s 31(2) if a birth parent has died or lost capacity to give consent, or the birth parent cannot be located after reasonable endeavours have been made to locate him or her.

- that the wishes of the child are considered when making the order, if the child is of sufficient maturity to express their wishes.[20]

RECOMMENDATION 1

Adopt the reforms in Schedule 19, [3]-[5] of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) so that the NSW Supreme Court has the discretion to make a surrogacy parentage order in circumstances where it is in the best interests of the child, even where not all the requirements of the scheme have been met or met in full.

(b) Recognition as parents from birth (interim parentage orders)

The birth of a child can be a joyous yet stressful time and intended parents and surrogates may prefer the certainty of having a parentage order in place prior to birth of the child, which comes into effect upon the birth of the child, should the surrogate and their partner (if any) consent to relinquishing the child.

However, section 16 of the *Surrogacy Act 2010* (NSW) requires applications for surrogacy parentage orders to be made between 30 days and 6 months after the birth of the child, unless exceptional circumstances exist. There are practical issues with this requirement. First, it means that the intended parent(s) have no legal powers or responsibilities for their child from birth. For example, if a child needs medical treatment, they have to obtain the consent of the surrogate or her partner (if any), who remain the legal parents until the parentage order is made. Second, it means that the process for seeking a parentage order occurs in the period where the intended parent(s) most need to be recognised as parent(s) for purposes such as registering a child for Medicare or dealing with immigration processes.

Accordingly, in addition to recommendation 1, we suggest providing a mechanism by which the NSW Supreme Court can make an interim parentage order[21] which becomes a final parentage order after the birth of the child, where certain conditions are met. This option would allow the intended parent(s) to effectively assume parental responsibility for a child from birth. The purpose of this proposal is to give certainty for both the surrogate and their partner (if any) and the intended parent(s) as to the legal parentage of a child born through surrogacy.

Here is how we propose this mechanism would work:

- An application for an interim parentage order would be allowed from the point that the surrogate falls pregnant.
- The NSW Supreme Court could make an interim parentage order which becomes effective only upon the birth of the child / children (even if stillborn). This preserves the rights of a surrogate to manage their pregnancy and birth.
- The effect of an interim parentage order would be to transfer legal parentage to the intended parent(s) from the surrogate and their partner (if any) from birth on the relinquishment of the child.
- To make an interim parentage order, the court must be satisfied of the same requirements for a final parentage order, save for those that assume that a child has already been born.[22]

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[20] *Surrogacy Act 2010* (NSW), ss 26(2), 27(3), 28 and 31.

[21] As an example, see section 15 of the *Adoption Act 1955* (NZ).

[22] This would mean:

- the court being satisfied that the requirements in ss 20, 22-25, 27-32, and 34-36 have been met (subject to the residual discretion suggested by recommendation 1); and
- for the purposes of making an interim parentage order only, dispensing with the requirements in s 26, 33, 35(2), 37 and 38, which assume a child has been born, and instead requiring them to be satisfied after birth and verified by way of a form lodged with the Supreme Court Registry after birth (as described further below).

- The interim parentage order becomes a final parentage order 60 days after birth of the child provided that affected parties fill out a form that includes a standard statutory declaration and lodge it with the Supreme Court Registry confirming prescribed matters relevant to the birth of the child (such as registration of the child's birth, registration of genetic information etc.) and that the surrogate and their partner (if any) do not dispute the parentage order becoming final.[23]
- If the form is duly completed, the Court must make a parentage order without a further hearing (or otherwise the matter can be listed for hearing if there is a dispute).
- If there is a dispute, the court should have the power to:
    - make a parentage order if the statutory conditions are met (or subject to the residual discretion discussed in recommendation 1);
    - revoke the interim parentage order and reinstate the rights of the surrogate and their partner (if any);
    - if the child is born in NSW, order the amendment of details on the births register (and reissuing of birth certificate with corrected details);
    - make such other orders as it sees fit.
- If an interim parentage order is revoked, there should be a statutory provision that states the revocation does not affect any actions taken by third parties on the authority of the intended parents relying on the interim parentage order while it was in place. For example, a doctor who performs a medical procedure on the child with the consent of the intended parents when the interim parentage order was in place does not then become liable for assault by having failed to get consent to the procedure from the surrogate and their partner (if any).

To ensure that this scheme achieves the same legal effect under federal law as a parentage order under section 12 of the *Surrogacy Act 2010* (NSW), NSW should either introduce the scheme under section 12 or ask the Commonwealth to amend reg 12CAA of the *Family Law Regulations 1984* (Cth) to prescribe the new sections of the *Surrogacy Act 2010* (NSW) for the purposes of s 60HB of the *Family Law Act 1975* (Cth).

[23] The form would confirm:

- by the intended parents:
    - the child was born and the date of birth
    - the child is living with the intended parents* (s 33)
    - surrogacy arrangement information has been registered by intended parents under Assisted Reproductive Technology Act 2007 (s 37)
    - birth of child has been registered by intended parents (s 38) (with copy of birth certificate)
- by the surrogate and her partner (if any):
    - surrogate parents have undertaken post-birth counselling* (s 35(2))
    - surrogate mother and her partner (if any) do not dispute the parentage order becoming final.

RECOMMENDATION 2

Allow the NSW Supreme Court to make an interim parentage order during pregnancy that becomes effective from birth and becomes final after birth if all the requirements of the *Surrogacy Act 2010* are otherwise met. This will allow intended parent(s) to have legal recognition as parents from the birth of their child, provided the surrogate and her partner (if any) consent to relinquishing the child and there are no disputes. The interim parentage order could be unwound in the event of a dispute.

(c) Recognition of overseas parentage orders

NSW does not automatically recognise overseas court orders which recognise the parentage of children born through surrogacy arrangements. Section 12 of the *Status of Children Act 1996* (NSW) only recognises the findings of a 'prescribed' court as to parentage, but no courts have been prescribed under this provision. This makes this irrebuttable presumption a dead letter, leaving in place the section 14 irrebuttable presumption arising out of fertilisation procedures, which applies irrespective of where the child was born.[24] By contrast, interstate surrogacy parentage orders are arguably recognised in NSW by virtue of section 118 of the Australian Constitution.

The gap in recognising comparable overseas parentage orders could be addressed by either:

- prescribing overseas (and interstate) courts under section 12 of the *Status of Children Act 1996* (NSW), or
- inserting a provision into the *Surrogacy Act 2010* (NSW), which allows the prescription of comparable overseas parentage schemes, such as those found in the UK[25] and Canada. This would operate similarly to section 16 of the *Relationships Register Act 2010* (NSW), such that a parentage order made under a prescribed overseas (or interstate) scheme would be recognised in the same way as a NSW surrogacy parentage order. NSW could also consider prescribing overseas surrogacy agreement schemes that do not rely on court orders for automatic recognition provided certain conditions are met.

This reform would ensure that parents who have been recognised as the legal parents of a child under a robust surrogacy scheme overseas are also recognised as legal parents in the NSW, should they move to or live in NSW. The obvious candidates for such an approach are overseas schemes that allow a surrogate and their partner (if any) to consensually relinquish their parental status to the intended parent(s) via a comparable court order mechanism.

Otherwise, NSW law currently appears to irrebuttably deem the surrogate and their partner (if any) as the legal parents of the child under section 14 of the *Status of Children Act 1996* (NSW), regardless of whether an overseas court has – with the consent of the surrogate and their partner (if any) – relinquished their parental status to the intended parents. This is because section 14, which is an irrebutable presumption, continues to apply to any child conceived other than through sexual intercourse, including where the child was born outside NSW.

RECOMMENDATION 3

Amend the *Surrogacy Act 2010* (NSW) to recognise prescribed comparable overseas (and interstate) surrogacy parentage schemes or prescribe comparable overseas courts under section 12 of the *Status of Children Act 1996* (NSW).

[24] *Status of Children Act 1996* (NSW), s 4.

[25] *Human Fertilisation and Embryology Act 2008* (UK), ss 54, 54A.

(d) Away from criminalisation and towards better regulation

The overcriminalisation of commercial surrogacy, particularly where conducted lawfully overseas, has not achieved its intended objectives. It does not appear to have reduced the number of children born overseas through commercial surrogacy arrangements. Instead, it appears to have had a negative effect in driving practices underground and preventing children from having the reality of their families legally recognised. Laws that seek to protect people from harm and exploitation cannot operate as intended if they are circumvented by going overseas.

For this reason, we propose at least repealing section 11 of the *Surrogacy Act 2010* (NSW), meaning that a commercial surrogacy arrangement entered into lawfully overseas will no longer be a criminal offence in NSW. This reduces (but does not eliminate) the criminalisation of commercial surrogacy conducted lawfully overseas.

RECOMMENDATION 4

Repeal section 11 of the *Surrogacy Act 2010* (NSW).

There are good policy arguments for going further and seeking to promote surrogacy being undertaken at home rather than overseas. More accessible surrogacy processes domestically could better promote the rights and interests of everyone, including the child, surrogate and intended parent(s) in the following ways:

- It could maximise the potential for the child to have contact with the surrogate and their family, access information about their biological heritage, have the circumstances of their surrogacy arrangement recorded and overseen by local laws, and negate the risks of travel and immigration processes throughout the pregnancy and after birth.
- It could ensure that the surrogate and their partner (if any) would have the benefit of a regulatory scheme that prioritises their agency and self-determination throughout the pregnancy, within an accessible healthcare system. A robust legal framework could guard against their exploitation.
- It could reduce costs and increase protections for the intended parent(s), who could rely on a single robust domestic legal framework with access to support and family at the time that the child is conceived and born. Domestic surrogacy would also be less costly, meaning those who are unable to conceive and carry their own child could be in a better position to avail themselves of the option.

A POSSIBLE WAY FORWARD

Rather than criminalising aspects of the surrogacy process, there are better ways to promote the rights and interests of everyone involved in surrogacy through more detailed regulation. One option is considering some minimum legislated standards that must be contained in a surrogacy agreement, with the incentive that having an ethical surrogacy agreement will streamline the process for obtaining parentage recognition once a child is born.

NSW could consider a statutorily-prescribed standard surrogacy agreement which, if entered into by the intended parent(s) and the surrogate and their partner (if any) with independent legal advice, could automatically confer parentage on the intended parent(s) from birth provided that the surrogate and their partner (if any) have voluntarily and freely consented to the agreement without any fraud, undue pressure or influence. The standard surrogacy agreement could set in place minimum standards and guarantees to protect all parties, including the child born under such an agreement. The laws could also prohibit any additional terms that are inconsistent with the standard terms, meaning that surrogacy agreements are better regulated to avoid terms that are oppressive or contrary to public policy. As part of this, there may be merit in considering allowing some limited compensation in recognition of the reproductive labour of the surrogate to encourage more people to consider surrogacy domestically rather than abroad.

The chief question to be considered in this approach is to what extent, if any, the surrogate and their partner (if any) should maintain the right to revoke the agreement up to a period of time following birth, and thereby invalidate or revoke the transfer of parentage. NSW may also consider whether, in the best interests of the child, the agreement could still be set aside in exceptional circumstances. An additional consideration is the interaction

of this model of regulation with federal law, given s 60HB of the *Family Law Act 1975* (Cth) only takes effect where there is a court order – not merely an agreement. Accordingly, such a scheme might still require a court order to be made giving effect to the agreement, unless the Commonwealth were convinced to reform s 60HB (or another provision) to provide automatic recognition to such agreements.

A statutorily prescribed standard agreement designed to achieve public policy objectives is not a novel idea. Classes of relationship marked by potential power imbalances or vulnerabilities are commonly regulated through statute in a way which provides certainty and protection for all parties through minimum standards and guarantees, and a requirement that voluntarily agreed terms are not inconsistent with those standards and guarantees. Examples of this model of regulation include agreements between tenant and landlord in residential tenancy agreements[26] or between employer and employee in employment agreements.[27]

Establishing such a scheme would not require all the standards terms to be set out ahead of legislation. Instead, the principal legislation could put in place a power to prescribe regulations that set out minimum terms and conditions. Those prescribed terms and conditions could include:

- obligations regarding the reimbursement of reasonable expenses;
- the surrogate's right to manage their pregnancy and birth;
- cooling off periods;
- arrangements for ensuring the genetic heritage of the child are recorded and biological information is available to the child.

This option might offer people considering surrogacy a scaffold for an agreement that protects everyone's rights and provides certainty. It would also ensure transparency for the terms that were contained in a surrogacy agreement, providing a greater level of oversight into the agreements being reached to ensure everyone is protected. It should also reduce the legal costs associated with the surrogacy process given the statutory agreement provides the starting point.

Ultimately, we think there is merit in exploring further this option of regulation, but we think further consultation is required on the detail of any statutorily prescribed standard surrogacy agreement and the legal effect of such an agreement generally as well as on the transfer of parentage (including how and when such an agreement can be revoked, invalidated or set aside).

[26] *Residential Tenancies Act 1997* (ACT), ss 8-10 and Sch 1.

[27] *Fair Work Act 2009* (Cth), ss 43, 44, 55(1) and Part 2.2.

RECOMMENDATION 5

Consider amending the *Surrogacy Act 2010* (NSW) to prescribe a standard surrogacy agreement that sets out minimum safeguards and protections for all persons involved in a surrogacy arrangement, including the child, the surrogate and their partner (if any) and the intended parent(s).

Incentivise compliance with the standard surrogacy agreement by affording people who adopt the agreement a streamlined process for parentage recognition.

Render any terms in any agreement which are inconsistent with the standard agreement invalid and unenforceable.

Consider allowing a limited compensatory payment to be made to the surrogate in recognition of her unique contribution to the pregnancy and birth, in addition to reasonable expenses.

Roll back criminalisation to instances of exploitation and abuses of power, rather than assuming any commercial surrogacy arrangement is inherently exploitative or abusive.

4. RECOGNISING TRANS AND GENDER DIVERSE PARENTS EQUALLY UNDER THE LAW

NSW laws relating to parentage and family formation often use gendered binary terms that may discriminate against trans and gender diverse people and their children. These laws assume certain bodily capacities or roles from the gender of a person. To clarify the operation of NSW laws that refer to gender, we suggest either amending these laws so that they apply to all persons regardless of their gender and/or adopting amendments to the *Interpretation Act 1987* (NSW) as proposed in Schedule 14 of the Equality Bill. This will ensure that all people who have the same bodily capacities and roles are treated equally under law, regardless of their gender.

(a) *Status of Children Act 1996* (NSW)

PARENTAGE PRESUMPTIONS

Part 3, Division 1 of the *Status of Children Act 1996* (NSW) includes a number of presumptions regarding who is a child's legal parent, particularly when children are born as a result of assisted conception procedures (such as home insemination, donor insemination and IVF). Many of these presumptions use gender-specific binary language, making it unclear whether a trans or gender diverse parent would be properly recognised as a parent.

These are:

- Section 9 (presumptions of parentage arising from marriage) which refers to a child born to a woman, but not a child born to a trans man or non-binary birth parent;
- Section 10 (presumptions of paternity arising from cohabitation) which refers to a child born to a woman and her male cohabiting partner, but not a child born to a trans man or non-binary birth parent and a cohabiting partner who is capable of conceiving through sexual intercourse;
- Section 13 (presumptions of parentage arising from acknowledgments) which refers to a man being presumed a child's father if the man executes a formal paternity acknowledgment, but not a child born to a trans woman or non-binary birth parent who wishes to execute a similar biological parentage acknowledgment;
- Section 14 (presumption of parentage arising out of use of fertilisation procedures) which refers to children conceived through fertilisation procedures to an 'opposite sex' married or de facto couple, or a female 'same-sex' married or de facto couple. These provisions ensure that a couple who undergo home insemination, donor insemination or IVF are recognised as the child's legal parents, and that any sperm or ovum donors are not the legal parents of the child. These provisions assume that the birth parent will always be a cis woman, that a sperm donor will

always be a man, and that an ovum donor will always be a woman. They also assume that each partner's gender will be either male or female, given couples are delineated as being either of the opposite or same sex;

- Section 4(1)(d) which extends application of these parentage presumptions to 'fathers' and 'mothers', regardless of their place of domicile.

We recommend that sections 4(1)(d), 9, 10, 13 and 14 of the *Status of Children Act 1996* (NSW) are amended to remove gender-specific language that excludes the equal application of these legal parentage presumptions to trans and gender diverse people who give birth, are involved in the conception of a child through sexual intercourse with their partner, or who donate sperm or an egg to facilitate the conception of a child.

In the alternative to specific amendments, we support amendments to the *Interpretation Act 1987* (NSW) as proposed by the Equality Bill. This is similar to the statutory interpretative principles found in section 28D of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

ACKNOWLEDGMENT OF 'PATERNITY'

Part 3, Division 2 of the *Status of Children Act 1996* (NSW) enables a 'man' to acknowledge 'paternity' of a child under an instrument countersigned by the 'mother' of the child. These terms are all gender-specific, making it unclear whether trans or gender diverse biological parents can take advantage of these provisions.

We recommend that sections 19 and 20 of the *Status of Children Act 1996* (NSW) are amended to allow any person who has been involved in the conception of a child through sexual intercourse to acknowledge biological parentage of the child under an instrument countersigned by the birth parent of the child. This mechanism should allow people to acknowledge biological parentage regardless of the gender of the parents. Regulation 13 and Schedule 1, Form 4 of the *Status of Children Regulation 2019* (NSW) should also be amended to implement this new gender-neutral ability to acknowledge biological parentage.

In the alternative to specific amendments, we support amendments to the *Interpretation Act 1987* (NSW) as proposed by the Equality Bill.

(b) *Surrogacy Act 2010* (NSW)

The *Surrogacy Act 2010* (NSW) discriminates against transgender and gender diverse people in two ways.

Intended parents

In respect of intended parents, the *Surrogacy Act 2010* (NSW) frames eligibility for recognition under a parentage order by reference to the intended parents' 'medical or social needs'. These 'needs' make assumptions about gender. 'Men' (whether single or as part of a couple) are always eligible to qualify as intended parents while 'women' (whether single or as part of a couple) are required to demonstrate eligibility by reference to their inability to conceive, carry a pregnancy to term or give birth in a manner which does not harm the health of the mother or child.[28] For couples involving two women, *both* women must be unable to conceive, carry a pregnancy to term or give birth in a manner which does not harm the health of the mother of the child.[29]

The intended parent(s) envisaged here by the Act are cisgendered. Assuming trans men and trans women are respectively recognised as 'men' and 'women' under the Act (which itself is not clear), trans men and women will always be eligible intended parents under the Act. This is because men are always eligible, and trans women will likely meet the requirement of being unable, *'on medical grounds, to carry a pregnancy or to give birth'*.[30] However, people who do not identify as men or women, may be rendered entirely ineligible to qualify as intended parents

[28] *Surrogacy Act 2010* (NSW), s 30.

[29] *Surrogacy Act 2010* (NSW), s 30(2)(b)(iii).

[30] *Surrogacy Act 2010* (NSW), s 30(3)(b).

because they will never meet the description of being a 'man' or an 'eligible woman', or being part of a couple between 'a man and an eligible woman', '2 men', or '2 eligible women'.[31]

There are several potential solutions to fix the discriminatory eligibility requirements placed on intended parents. They include:

- repealing section 30 altogether, so no one has to demonstrate a medical or social need for a surrogacy arrangement;
- making subsection 30(2) a non-exhaustive example of what constitutes 'a medical or social need', so that transgender or gender diverse individual can demonstrate 'a medical or social need' by relying on the ordinary meaning of those words in subsection 30(1). To do this, subsection 30(2) could be amended by adding words such as, *'Without limitation to the circumstances which may demonstrate a medical or social need, there is a medical or social need for a surrogacy arrangement if…'*;
- amending section 30 to describe eligibility in a gender-neutral way such that the person (or both people in a couple) are unable to conceive, carry a pregnancy or give birth in a manner which would not harm the health of the birth mother or gestational parent, or the child.

Gestational parents

The *Surrogacy Act 2010* (NSW) contains many provisions that confer rights, obligations, protections or entitlements using the term 'woman' or 'birth mother'.[32] These rights, obligations, protections and entitlements should be conferred on any person, regardless of gender, who is the gestational parent in a surrogacy arrangement.

There are a number of ways in which this could be implemented. They include:

- replacing specific references to 'woman' with 'person', and 'birth mother' with 'birth or gestational parent';
- including interpretative principles, similar to section 28D of the *Births, Deaths and Marriages Registration Act 1999* (Tas), in the *Interpretation Act 1987* (NSW) as proposed by the Equality Bill.

(c) Other legislation referring to parentage

In reviewing the *Surrogacy Act 2010* (NSW) and *Status of Children Act 1996* (NSW), it is worth also considering similar amendments to other legislation that relates to parentage.

ASSISTED REPRODUCTIVE TECHNOLOGY ACT 2007 (NSW)

One of the objectives of the *Assisted Reproductive Technology Act 2007* (NSW) is to protect the interests of women undergoing assisted reproductive technology (ART) treatment.[33] This is an important objective. However, it omits trans men or non-binary people who may also be seeking medical treatment to achieve pregnancy.

There are many provisions in the *Assisted Reproductive Technology Act 2007* (NSW) which confer rights, obligations, protections or entitlements using the term 'woman' or 'women'.[34] These rights, obligations, protections and entitlements should be conferred to any person, regardless of gender, who is undergoing ART treatment.

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[31] *Surrogacy Act 2010* (NSW), s 30(2).

[32] See e.g. *Surrogacy Act 2010* (NSW), ss 4(1) (definition of 'birth mother', 'birth mother's partner'); 5 (surrogacy is an arrangement where a 'woman' agrees to become or to try to become pregnant; definition of 'birth mother'); 7 (birth mother's surrogacy costs); 27 (age of birth mother); 36(2) (legal advice obtained by birth mother and the birth mother's partner).

[33] *Assisted Reproductive Technology Act 2007* (NSW), s 3(b).

[34] See e.g. *Assisted Reproductive Technology Act 2007* (NSW), ss 12(1) (counselling services must be available to any 'woman' who seeks ART treatment from the ART provider, and their spouse); 13(1) (provision of information to a 'woman' seeking ART treatment); 15(1)(a)(iii) (disclosure of donor information to a 'woman' who is pregnant); 17(4) (revocation of donor consent up until the gamete or embryo is implanted or placed in the body of a 'woman'); 23 (treatment on a 'woman' after death of gamete provider); 31 (records to be kept by ART provider in respect of 'woman' receiving ART treatment).

There are a number of ways in which this could be implemented. They include:

- replacing specific references to 'woman' with 'person';
- including interpretative principles, similar to section 28D of the *Births, Deaths and Marriages Registration Act 1999* (Tas), in the *Interpretation Act 1987* (NSW) as proposed by the Equality Bill.

ADOPTION ACT 2000 (NSW)

Much of the *Adoption Act 2000* (NSW) uses gender-neutral terms to refer to the birth parents and adoptive parents of a child. However, in some places, the Act makes specific reference to 'birth mothers', 'birth fathers', 'presumptive fathers' and similar gendered terms.[35] These terms may exclude trans women and trans men, as well as non-binary people, who are the birth parents, or presumptive birth parents of a child.

To ensure birth parents of any gender are recognised equally under the Act, we suggest updating the *Adoption Act* by implementing reforms such as:

- amending gender-specific references to 'birth mother', 'birth father' and 'presumptive father' to ensure that these terms recognise transgender and gender diverse biological parents in the same circumstances;
- including interpretative principles, similar to section 28D of the *Births, Deaths and Marriages Registration Act 1999* (Tas), in the *Interpretation Act 1987* (NSW) as proposed by the Equality Bill.

'MATERNITY' AND 'PATERNITY' LEAVE

There are several other laws that make reference to 'maternity' and 'paternity' leave, thereby assuming the gender of the parents of the child and excluding non-binary people and other gender diverse parents. For example, the *Payroll Tax Act 2007* (NSW) exempts wages from payroll tax obligations if payable in respect of a '*maternity leave*' for a '*female employee*', thereby potentially omitting pregnancy-related leave for non-female employees.[36] Similar provisions appear to apply in respect of '*paternity leave*' and '*male employees*'.[37] In addition to the *Payroll Tax Act 2007* (NSW), we have identified the following laws that may requirement review and amendment:

- *Essential Services Act 1988* (NSW);
- *Police Regulation (Superannuation) Act 1906* (NSW);
- *Public Authorities Superannuation Act 1985* (NSW);
- *State Authorities Superannuation Act 1987* (NSW);
- *State Public Service Superannuation Act 1985* (NSW);
- *Superannuation Act 1916* (NSW).

OTHER LAWS ASSUMING PARENTAL GENDER

Other laws that have similar issues include:

- *Industrial Relations Act 1996* (NSW) which contains provisions dealing with:
  - gender pay equity that relate only to men and women,[38]

[35] See e.g. *Adoption Act 2000* (NSW), ss 56, 68, 72, 73, 118, 124, 133A, 180 and 180A.

[36] *Payroll Tax Act 2007* (NSW), ss 53-54.

[37] *Payroll Tax Act 2007* (NSW), Sch 2, s 13A.

[38] *Industrial Relations Act 1996* (NSW), ss 3, 21(b), 23 and Dictionary (definition of 'pay equity'). The Act refers to '*equal remuneration and other conditions for men and women doing work of equal or comparable value*'.

    - entitlements to maternity leave that assume only female employees are capable of pregnancy, giving birth or feeding their children,[39]
    - entitlements for adoption leave that relate only to *'female or male'* employees,[40] and
    - the gender-binary parentage presumptions in the *Status of Children Act 1996* (NSW).[41]
- *Crimes Act 1900* (NSW) which contains provisions dealing with causing the death of a foetus or pregnant woman (other than in cases of abortion), as well as a number of other offences dealing with pregnancy, that do not equally protect pregnant people who are not women.[42] Similar issues arise in the *Victims Rights and Support Act 2013* (NSW) definitions of *'grievous bodily harm'*.[43]
- *Electoral Act 2017* (NSW) which recognises that an elector may be unable to attend a voting centre if they are a *'woman … approaching maternity'*, thereby omitting trans men and non-binary people in the same position.[44]
- *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW) which makes it an offence to create a human embryo for any purpose other than achieving pregnancy in a *'woman'*, defined to a mean a *'female human'*.[45] On a strict reading, this may prohibit the creation of human embryos to facilitate the pregnancy of a trans man or non-binary person.
- *Law Enforcement Conduct Commission Act 2016* (NSW) which defines a serious injury as only including the *'destruction of the foetus of a pregnant woman'*.[46]

RECOMMENDATION 6

Adopt the reforms in Schedule 14 of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 (NSW) so that courts can construe gender-specific legislation in NSW equally, regardless of the gender of a parent. This will signal that references to 'mothers', 'fathers', 'men', 'women' etc. should be read to include trans and gender diverse parents who have the same bodily capacities and roles as their cisgender counterparts.

[39] *Industrial Relations Act 1996* (NSW), s 55, 66(3), 70 and 71.

[40] *Industrial Relations Act 1996* (NSW), s 55(4).

[41] *Industrial Relations Act 1996* (NSW), Schedule 4, cl 48.

[42] *Crimes Act 1900* (NSW), ss 4(1) (definition of 'grievous bodily harm'), 22A, 54A and 54B.

[43] *Victims Rights and Support Act 2013* (NSW), s 18.

[44] *Electoral Act 2017* (NSW), ss 6(e), (f) and 118(2)(b).

[45] *Human Cloning for Reproduction and Other Prohibited Practices Act 2003* (NSW), s 7.

[46] *Law Enforcement Conduct Commission Act 2016* (NSW), s 108(1) (definition of 'serious injury').

RECOMMENDATION 7

In addition to recommendation 6, replace unnecessarily gendered terms in the *Status of Children Act 1996* (NSW), *Surrogacy Act 2010* (NSW) and other NSW legislation to ensure that laws clearly apply to all persons with the same bodily characteristics and capacities, regardless of gender.

5. CO-PARENTING ARRANGEMENTS

NSW law recognises that a child can have up to two legal parents.[47] This model of parentage does not allow recognition for rainbow families (and other families) in co-parenting arrangements where not all the parents are members of a couple.

The consequences of non-recognition are that the child potentially misses out on legal rights and obligations which would otherwise be owed to them if all parent-child relationships were legally recognised. This means that the non-recognised parent(s) will not be considered as a parent of the child for all legal purposes and instead may be forced to rely on ad hoc definitions in federal and state laws that extend rights and entitlements to people who are functionally in the position of a parent.[48] This may have consequences for situations such as:

- the child's right to inherit or receive property or superannuation without adverse tax implications;[49]
- who owes duties to the child (such as under s 43A of the *Crimes Act 1900* (NSW)).

Following a consultation in the early 2000s, the NSW Gay & Lesbian Rights Lobby advocated for ways to recognise families with more than two parents. Recognising that three- and four-parent families differed considerably in their co-parenting arrangements, in the *And Then… The Brides Changed Nappies* report, the NSW Gay & Lesbian Rights Lobby advocated for:

- amending the Births, Deaths and Marriages Regulations to enable biological fathers of children born through donor insemination to be named on a birth certificate without raising legal presumptions of parentage;[50] and
- considering amendments to the *Adoption Act 2000* (NSW) to include a new provision for co-parent adoption granting legal status for more than two parents.[51]

These recommendations recognised that the role of donor-dads in rainbow families significantly differed among families. That is, in some families, the donor was not intended to be a parent, but was known to the child and had some contact. In other families, the donor was intended to have a significant or equal parenting role.[52]

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[47] Whether that assumption is correct for the purposes of the *Family Law Act 1975* (Cth), and thereby under most Commonwealth law, is not clear: see *Masson v Parsons* [2019] HCA 21 at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[48] See e.g. *Health Insurance Act 1973* (Cth), s 10AA(1), 10AA(7); *National Health Act 1953* (Cth), s 84B(1), 84B(4).

[49] See e.g. *Succession Act 2006* (Cth), s 127; *Duties Act 1997* (NSW), s 68; *Income Tax Assessment Act 1997* (Cth), ss 302.195(1)(b)-(d) (definition of 'dependant'), 302.60-302.75; *Superannuation Industry (Supervision) Act 1993* (Cth), ss 10(1) (definition of 'dependant' and 'child') and 59; *Superannuation Industry (Supervision) Regulations 1994* (Cth), r 6.17A.

[50] Jenni Millbank (2003) *And Then… The Brides Changes Nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, NSW Gay & Lesbian Rights Lobby: Sydney, recommendation 4.

[51] Jenni Millbank (2003) *And Then… The Brides Changes Nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, NSW Gay & Lesbian Rights Lobby: Sydney, recommendation 7.

[52] See Jenni Millbank (2003) *And Then… The Brides Changes Nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise*, NSW Gay & Lesbian Rights Lobby: Sydney, at 5-6.

Some states in Canada and the United States now allow more than two parents to be listed and recognised on a child's birth certificate.[53] It is time for NSW to consider a simple administrative process that enables a child to have their third or fourth parent recognised as a legal parent.

(a) A parentage registration scheme

We suggest amendments to the *Status of Children Act 1996* (NSW) (or the *Births, Deaths and Marriages Registration Act 1995* (NSW)) to provide for the recognition of co-parented families through a parentage registration scheme (similar to the *Relationships Register Act 2010* (NSW) or Part 4 and 4A of the *Births, Deaths and Marriages Registration Act 1995* (NSW)).

The provisions of the scheme should include that:

- With the registration of the birth of a new child and up to 6 months from birth, a person may also apply to the Births, Deaths and Marriages Registrar to register as an additional parent of the child if:
    - all persons who would otherwise be recognised as a parent to the child under common law, this Part or under the *Status of Children Act 1996* (NSW) consent to the registration;
    - no orders exist granting parental responsibility to another person.
- No more than 4 parents can be recognised as the legal parents of a child.
- Upon registration under this Part:
    - the child is recognised as the child of the registered person for the purposes of NSW law alongside the other parents; and
    - the child is provided a birth certificate with all their parents named as 'mother', 'father' or 'parent' (at their parents' choice).
- For children born before this Part commences, or if after 6 months from birth, a person should be able to apply to the District Court to allow the Registrar to register the person as an additional parent of a child (including an adult child) if:
    - all persons who would otherwise be recognised as a parent to the child under common law, this Part or under the *Status of Children Act 1996* (NSW) consent to the registration;
    - the child consents (to the extent that they have sufficient maturity to do so); and
    - in respect of a minor child, it would be in the best interests of the child to recognise the person as a parent.
- The registration of a person as a parent under this Part should be subject to any law or order granting parental responsibility to another person.

Consequential amendments to the *Status of Children Act 1996* (NSW) should also be made, so that:

- sections 14(2)-(3) – the presumptions that a sperm or ovum donor are not legal parents – do not apply to a person registered as a parent under this Part;
- a person registered as a parent under this Part is presumed a parent and that presumption is an irrebuttable presumption.

Optionally, the scheme could also include provisions similar to those in section 44 of the *Surrogacy Act 2010* (NSW) allowing the District Court to discharge the registration of a parent under this Part where consent to the registration was obtained by fraud, duress or other improper means.

[53] Courtney Joslin and Douglas NeJaime (2022) 'The next normal: States will recognize multiparent families', *The Washington Post*, 28 January; Verity Stevenson (2018) 'Quebec families with more than 2 parents fight for recognition', *CBC News*, 12 May.

Legal effect of the parentage registration scheme under NSW law

Unlike adoption, the parentage registration scheme proposed above should not extinguish the rights of any legal parent. That is, it adds a third or fourth parent, but does not remove the rights of existing parents. In most cases, the existing parents will be the two people who conceived the child through sexual intercourse or, in the case of assisted conception, the birth parent and their married or de facto partner (for example, two mums in a de facto or married relationship who intend to have a child together and conceive through donor insemination or IVF).[54]

It may be necessary to audit NSW laws to ensure that laws which refer to the terms 'child' or 'parent' are also updated. For example, a new provision like section 109 or 109A of the *Succession Act 2006* (NSW) may need to be inserted into that Act to ensure a child recognised by the parentage scheme is treated as a child of the person for the purposes of distributing their property on intestacy. Alternatively, it may be possible to insert a new interpretative principle into the *Interpretation Act 1987* (NSW) stating that, for the purposes of NSW law, a person registered as an additional parent under the parentage registration scheme established by this Part is to be treated as a parent of the child under NSW law.

Legal effect of the parentage registration scheme under federal law

While this scheme cannot alter the various definitions of a child or parent under federal law, the registration of a parent under this scheme may provide proof of the parent-child relationship sufficient to meet Commonwealth parent-child definitions that are non-exhaustive.[55] The creation of a new registration of parentage scheme in NSW would also allow for advocacy of further reforms at the Commonwealth level and the inclusion of a provision similar to section 60HB of the *Family Law Act 1975* (Cth) covering people recognised as parents under such schemes.

However, this parentage scheme would not alter the child support obligations under the *Child Support (Assessment) Act 1989* (Cth), given the definition of a 'parent' under that Act is likely exhaustive.[56] This would mean that further federal reforms would be necessary to adjust the federal child support scheme to recognise child support obligations shared among more than two parents. In the meantime, if more than two parents may be recognised under the *Family Law Act 1975* (Cth) as parents,[57] the federal family courts may be able to make child maintenance orders in respect of the child.[58] Alternatively, there may be an argument that an agreement to conceive and co-parent a child may be enforceable in respect of the financial aspects of the agreement under common law or equity.

Families likely to benefit from the scheme

This scheme draws upon but builds on the proposal suggested by Professor Jenni Millbank for the NSW Gay & Lesbian Rights Lobby in 2003. By narrowing the registration of an additional parent to the time of birth or shortly thereafter, this proposal allows an administrative scheme to operate without the need for court proceedings for most families where there is agreement on the role of the donor-dad (and their partner, if any). By allowing the District Court to lift the bar on the Registrar registering an additional parent after 6 months or for children born before this Part commences, it establishes a process similar to co-parent adoption but that does not require the Supreme Court.

This scheme would benefit a family such as that of:

- a lesbian couple with a (donor) dad (and his partner) who intend to raise a child together;
- a single woman with a (donor) dad who intend to raise a child together, but not as a couple.

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[54] *ND v BM* (2003) 31 Fam LR 22; *Status of Children Act 1996* (NSW), s 14.

[55] See e.g. *H v Minister for Immigration and Citizenship* [2010] FCAFC 119. In *Masson v Parsons* [2019] HCA 21, the majority of the High Court also left open the question as to whether the *Family Law Act 1975* (Cth) (which does not exhaustively define the meaning of a 'parent') allowed the recognition of more than two people as parents: at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[56] *Child Support (Assessment) Act 1989* (Cth), s 5(1) (definition of 'parent'). See *Masson v Parsons* [2019] HCA 21 at [28] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[57] See *Masson v Parsons* [2019] HCA 21 at [26] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ.

[58] *Family Law Act 1975* (Cth), ss 66F and 66G.

Families who could not rely on this scheme may still be able to obtain parenting orders from the federal family courts.[59] These grant more limited rights and responsibilities in respect of a child aged under 18 years (and who is not married or in a de facto relationship),[60] and may work alongside other ad hoc definitions of parent-child relationships found in NSW and federal laws. This would also be an option for multiparent families who do not have consensus on the parental role of each of the persons involved.

Future reforms may wish to consider reforms to the *Adoption Act 2000* (NSW) if there is a need for multiparent adoption (particularly if it includes the relinquishment of a birth parents' rights).

RECOMMENDATION 8

Amend the *Status of Children Act 1996* (NSW) (or the *Births, Deaths and Marriages Registration Act 1995* (NSW) to introduce a parentage registration scheme that allows recognition of co-parented families. This scheme would allow, upon the birth of a child or as otherwise authorised by a court, the registration and legal recognition of no more than 4 parents with the consent of the people who are recognised as the parents under existing law.

6. SYMBOLIC RECOGNITION FOR PEOPLE WHO ARE NOT PARENTS

NSW may also wish to consider providing families the option to name on a child's birth certificate (in a place other than that reserved for the parents) the names of significant people involved in the child's conception, where all affected parties consent. This option would be suitable for people who want to symbolically recognise a significant person such as a surrogate or donor but stop short of recognising them as a legal parent. This symbolic recognition would be meaningful to some families formed through surrogacy or donor conception.

This option would give a child a document that recognises their genetic heritage and the people who contributed to their life. This certificate could be issued alongside a standard birth certificate that only names the legal parents, so that the family and the child have the right to disclose the circumstances of the child's conception only to those who they wish to know. This option should raise no presumptions under section 11 of the *Status of Children Act 1996* (NSW).

RECOMMENDATION 9

Amend the *Births, Deaths and Marriages Registration Act 1995* (NSW) to allow on a child's birth certificate for the symbolic recognition of significant people who are not the legal parents of a child, such as the surrogate or donor. Ensure that children are also provided with a standard birth certificate, so that the family and child have the right to disclose the circumstances of the child's conception only to whom they wish to know.

[59] See e.g. *Wilson v Roberts* [2010] FamCA 734.

[60] *Family Law Act 1975* (Cth), s 65H(1).

PART II: SPECIFIC RESPONSES TO DISCUSSION PAPER QUESTIONS

DISCUSSION PAPER QUESTION	RESPONSE
Surrogacy Act 2010 (NSW)	
Principles and objective; general questions	
1. What do you think of the guiding principle and policy objectives of the *Surrogacy Act*? Do you think they are still valid?	Subject to our response to questions 7-10, the guiding principle and policy objectives of the *Surrogacy Act* are still valid. However, we consider that the objective of prohibiting commercial surrogacy arrangements, if it is to be retained, should be retained in a way which does not punish or discriminate against children born through such surrogacy arrangements which are lawful overseas. See further Part I, sections 3(a)-(d) of our submission.
2. Does the *Surrogacy Act* ensure that the best interests of the child are paramount in every case?	No. The *Surrogacy Act* punishes children by denying them legal parentage in circumstances where the requirements of the scheme have not been complied with. See further our responses to questions 7-10 and Part I, sections (a)-(d) of our submission.
3. Does the *Surrogacy Act* offer sufficient protections for birth mothers?	No. A criminalisation approach has not worked to protect surrogates, and we propose moving away from criminalisation towards a better regulatory model that incentivises ethical surrogacy agreement making. See further Part I, section 3(d) of our submission.
4. Does the *Surrogacy Act* adequately meet the needs of various family structures, including LGBTIQA+ families, families who conceive using fertilisation procedures and families created through surrogacy arrangements?	No. The *Surrogacy Act* prevents many children born through surrogacy arrangements from having the economic and emotional security that comes from the legal recognition of their parents. In Part I, sections 3(a)-(c) we propose three reforms that will improve this: • A residual discretion for the NSW Supreme Court allowing it to make a parentage order if it is in the best interests of the child even when certain requirements of the scheme have not been met or met fully;

DISCUSSION PAPER QUESTION	RESPONSE
	• Allowing the NSW Supreme Court to make an interim parentage order during the pregnancy which becomes effective upon birth. This will ensure the intended parent(s) are recognised as legal parents from birth, subject to certain requirements (including consent to relinquishment from the surrogate and their partner (if any)). • Recognising overseas parentage orders under comparable schemes. Families come in all shapes and sizes. In Part I, sections 5 and 6 of our submission we set out a way to recognise that diversity through: • a co-parenting registration scheme that allows up to 4 parents to be recognised as the legal parents of a child; • symbolic recognition on an additional birth certificate for people who are not intended to be parents.
Surrogacy arrangements	
5. Do you have any comments about the definition of surrogacy arrangements?	No.
6. Do you have any comments about the extent to which surrogacy arrangements can be enforced?	Yes. As set out in Part I, section 3(d) of this submission, we suggest a proposed legal model that would incentivise ethical surrogacy agreement-making by prescribing a standard agreement. The standard agreement would have minimum guarantees and safeguards for all people involved, including the child, surrogate and their partner (if any) and the intended parent(s). If such a regulatory approach were adopted, aspects of that agreement could be made enforceable or otherwise provide a more streamlined approach to parentage recognition.
Commercial surrogacy arrangements	
7. Do you have any comments about the prohibition of commercial surrogacy arrangements in NSW?	Yes. A criminalisation approach has not worked to protect the child, surrogates or intended parent(s), and we propose moving away from criminalisation towards a better regulatory model that incentivises ethical surrogacy agreement-making. This could have a limited compensatory payment being made to

DISCUSSION PAPER QUESTION	RESPONSE
	the surrogate in recognition of their unique contribution to the pregnancy and birth of the child. See further Part I, section 3(d) of our submission.
8. Do you have any comments about the prohibition on NSW residents entering into commercial surrogacy outside of NSW?	Yes. We recommend repealing section 11 of the *Surrogacy Act 2010* (NSW). See further Part I, section 3(d) of our submission.
9. Do the offences and penalties for commercial surrogacy in the Surrogacy Act meet the policy objectives?	They meet the objective criminalising commercial surrogacy arrangements, but they do not meet the policy objectives of ensuring the best interests of a children are the paramount consideration. See our response to questions 1-4, 7-8 and 10.
10. What disadvantages may be experienced by children born through commercial surrogacy agreements due to parentage orders not being available in NSW?	Children are denied the economic and emotional security that comes with the legal recognition of their parents. This means that they may be denied rights and entitlements such as: • the recognition of their intended parents as legally responsible for their care, welfare and development (i.e. 'parental responsibility') (without a parenting order from the federal family courts which expires by the time they turn 18 years); • an automatic entitlement to inherit property or superannuation from their parents.
Advertising surrogacy arrangements	
11. Do you have any comments about advertising for altruistic surrogacy arrangements? Do you think individuals should be able to pay for advertising related to altruistic surrogacy arrangements?	As set out in Part I, sections 2 and 3(d) of our submission, there are benefits from encouraging surrogacy to take place in NSW rather than seeing people go overseas. If that is to occur, then we need to reduce barriers that result in people going overseas. One of those barriers is the difficulty in facilitating introductions in NSW between people who are willing to become surrogates with people who seeking to become parents. 'Advertising' does not need to occur in an unregulated or brazen way, but there needs to be a mechanism for people to lawfully connect with each other.
12. Do you have any comments about the lack of a central register recording details of women willing to be surrogates and/or intended parents?	The purpose of a donor registry is to give children information on their biological heritage when they are older and in circumstances where they may incorrectly presume that they are biologically related to their parents. The policy objectives for a central register recording surrogates and/or intended parent(s) is not set out and would interfere with familial privacy. Without a justification for such a proposal, it is not clear the benefits of such a proposal.

DISCUSSION PAPER QUESTION	RESPONSE
Parentage orders	
13. Do you have any comments about the process for obtaining parentage orders in NSW?	Yes. See Part I, section 3(a)-(b) of this submission.
14. Do you have any comments about the preconditions to obtaining parentage orders?	Yes. See Part I, sections 3(a)-(b) of this submission.
15. Do you think the process for obtaining parentage orders adequately protects birth mothers and other parties to a surrogacy arrangement?	No. See Part I, sections 3(a)-(b) of this submission.
16. Do you think the parentage order process meets the policy objectives of the Act, including providing legal certainty and promoting the best interests of the child?	No. See Part I, sections 3(a)-(b) of this submission.
17. Do you have any other comments about the provisions of the Surrogacy Act?	Yes. See Part I, sections 3(c) and 4(b) of this submission.
Status of Children Act 1996 **(NSW)**	
Policy objective; general questions	
18. What do you think of the policy objectives of the Status of Children Act? Do you think they are still valid?	Yes, but they are not comprehensive. The principal objective should be to ensure that children are treated equally, regardless of the circumstances of their conception, birth or the gender of their parents.
19. Does the Status of Children Act ensure the equal status of children regardless of family structure?	No. The *Status of Children Act* assumes a two-parent family model, and uses binary gendered language, that may discriminate against rainbow and other families. See Part I, sections 1, 4(a), 5 and 6 of this submission.

DISCUSSION PAPER QUESTION	RESPONSE
20. Does the Status of Children Act adequately establish parentage?	Subject to our response to questions 22-23, yes.
Equal status of children	
21. Do you have any comments about the general rule regarding the equal status of children in NSW?	Yes. Consideration should be given to updating section 5 so that the equality of children is not only defined by reference to the marital status of the parents, but is also agnostic to the manner of conception or the gender of their parents.
Presumptions of parentage	
22. Do you have any comments about the parentage presumptions contained in the Status of Children Act?	Yes. See Part I, section 4(a) of this submission.
23. Do you think there are any situations not covered by the current presumptions that should be included?	Yes. See Part I, section 5 of this submission.
Applying for a declaration of parentage and testing procedures	
24. Do you have any comments about the categories of persons who can apply to the Supreme Court for a declaration of parentage?	Yes. See Part I, section 4(a) of this submission.
25. Do you have any comments about the pathway to obtaining a parentage declaration?	Yes. See Part I, section 4(a) of this submission.
26. Do you have any comments about the categories of persons who can apply for a parental testing procedure?	Yes. See Part I, section 4(a) of this submission.
27. Do you think the Court has sufficient powers to order parentage testing?	See Part I, section 4(a) of this submission.

DISCUSSION PAPER QUESTION	RESPONSE
28. Do you have any other comments about the provisions of the Status of Children Act?	No.