

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU  
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE  
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

*établi par le Bureau Permanent*

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES  
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM  
INTERNATIONAL SURROGACY ARRANGEMENTS**

*drawn up by the Permanent Bureau*

*Document préliminaire No 3 d'avril 2013 à l'attention  
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention  
of the Council of April 2014 on General Affairs and Policy of the Conference*

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES  
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## INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.<sup>1</sup> The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "*filiation*" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".<sup>2</sup>

A detailed chronology of the background to this project is available on the website of the Hague Conference < [www.hcch.net](http://www.hcch.net) >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements<sup>3</sup> ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 – 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < [secretariat@hcch.net](mailto:secretariat@hcch.net) > with the following heading and indication in the subject field: "Questionnaire – Parentage / Surrogacy – [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

<sup>1</sup> Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

<sup>2</sup> Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

<sup>3</sup> See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

**Identification**

Name of State (or territorial unit, where applicable):

**Information for follow-up purposes**

Name and title of contact person:

Name of Authority / Office:

Telephone number:

E-mail address:

## **QUESTIONNAIRE**

**Note:** wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

<b>Part I: Internal law</b> concerning the establishment and contestation of legal parentage
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### **A. Birth registration**

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

The Registrar of Births, Deaths and Marriages  
Births Deaths and Marriages Registration Act 1996 (NT) s6.

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory<sup>4</sup> and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

Upon the birth of a child a 'responsible person' must give notice of the birth to the Registrar within 10 days after the birth (BDM Act s12)

If a child is born in the Northern Territory it must be registered in accordance with the Act (BDM Act s13). A birth is registered by lodging with the Registrar a 'birth registration statement' (BDM Act s14), the statement must be lodged within 60 days of the birth (BDM Act s16). The parents of a child are jointly responsible under the Act for registering the birth of the child, however the Registrar may accept the birth registration statement from only one parent in some circumstances (BDM Act s15).

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative<sup>5</sup> legal mother:

Please tick all which apply:

- a) ☐ Hospital birth record (stating the name of the woman who gave birth to the child)
- b) ☐ Sworn statement by the putative legal mother stating that she gave birth to the child
- c) ☒ Signed statement by the putative legal mother stating that she gave birth to the child
- d) ☐ DNA test to prove a genetic link between the putative legal mother and child
- e) ☐ Other: please explain

Under s12 of the BDM Act a 'responsible person' must notify the Registrar of a birth and supply the following details in accordance with s2 of the BDM Regulations; the full name, maiden family name, date of birth (or age), and usual place of residence of the mother of the child. The statement supplying these details is

<sup>4</sup> See Art. 7 of the United Nations *Convention on the Rights of the Child* ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

<sup>5</sup> "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

then signed by the responsible person in effect attesting to the truth of the contents.

It is also the responsibility of the parents of the child to lodge a 'birth registration statement which includes details of;  
the full name, maiden family name (if applicable), occupation and usual place of residence of each of the child's parents (BDM Regulations s3).

The birth registration statement must also be signed by the mother of the child. This is the only proof of maternity required in order to be registered as a legal mother of a child.

4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:

Please tick all which apply:

- a) ☐ Formal acknowledgement<sup>6</sup> by the putative legal father
- b) ☐ Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify
- c) ☐ Judicial decision (court order) establishing or confirming legal paternity
- d) ☐ Sworn statement by the putative legal father stating that he is the genetic father
- e) ☒ Signed statement by the putative legal father stating that he is the genetic father
- f) ☐ Signed agreement between the legal mother and putative legal father
- g) ☐ DNA test to prove a genetic link between the putative legal father and child
- h) ☐ Other: please explain

When the parent/s lodges a birth registration statement this must include;  
the full name, maiden family name (if applicable), occupation and usual place of residence of each of the child's parents (BDM Regulations s3).

The birth registration statement must also be signed by the father of the child.

This is the only 'proof' of legal paternity required in order to register a birth under the BDM Act and Regulations.

5. What are the legal consequences in the internal law of your State of registering persons in the State records<sup>7</sup> as the parents of a child?

- a) ☒ Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
- b) ☐ Other: please explain

6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?

A person who knowingly makes a false or misleading representation in a document required under the BDM Act (ie on a birth registration statement) is guilty of an

<sup>6</sup> In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11** *et seq.* below.

<sup>7</sup> It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

offence. The maximum penalty being 85 penalty units or 2 years imprisonment (BDM Act s49).

7. Is it possible to give birth anonymously in your State?

- ☐ Yes  
☒ No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:<sup>8</sup>

## **B. Establishment of legal parentage**

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (*i.e.*, with no need for the woman to take any steps to establish her legal maternity)?

- a) ☒ The woman who gives birth to the child  
 b) ☐ The genetic mother (*i.e.*, the woman whose gamete (egg) created the child)  
 c) ☐ There is no legal mother *by operation of law*: please explain  
 d) ☐ Other: please explain Relevant legislation here is the Status of Children Act 1978 NT)

Part IIIA of the Status of Children Act 1978 (NT) concerns children conceived following medical procedures. Section 5C states;

Rule relating to maternity

A woman who gives birth to a child is, for all purposes, the mother of the child, notwithstanding that the child was conceived by the fertilization of an ovum taken from another woman.

This position is reiterated in section 5E which states;

Donor of ovum

Where:

- (a) a woman becomes pregnant as the result of a fertilization procedure; and  
 (b) the ovum used for the purposes of the procedure was taken from another woman,

then, for all purposes, the woman from whom the ovum was taken is not the mother of a child born as a result of the pregnancy.

In no circumstances will an egg donor be a legal 'parent' by operation of law unless a subsequent order for parental responsibility is made under the Family Law Act 1975 (Cth).

9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (*i.e.*, with no need for the man to take any steps to establish his legal paternity)?

- a) ☒ The husband of the woman who gave birth is *presumed* to be the legal father  
 b) ☒ The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (*e.g.*, the couple must be cohabiting, etc.)

<sup>8</sup> In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the *extract* from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (*e.g.*, if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid*.

There are presumptions concerning parentage arising from marriage which operate under s4A of the Status of Children Act. The section states;

- (1) If a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.
  - (2) If:
    - (a) at a particular time:
      - (i) a marriage to which a woman is a party is ended by death; or
      - (ii) a purported marriage to which a woman is a party is annulled; and
    - (b) a child is born to the woman within 44 weeks after that time,
 the child is presumed to be a child of the woman and the former husband or purported husband.
  - (3) If:
    - (a) the parties to a marriage separated at any time;
    - (b) after the separation, they resumed cohabitation on one occasion;
    - (c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and
    - (d) a child is born to the woman within 44 weeks after the end of cohabitation but after the dissolution of the marriage,
 the child is presumed to be a child of the woman and the former husband.
  - (4) For the purposes of subsection (3), a marriage dissolved by a decree of dissolution shall be deemed to have been dissolved on the making of the decree nisi under the Family Law Act 1975 of the Commonwealth in relation to the marriage.
- c) ☒ The genetic father (*i.e.*, the man whose gamete (sperm) created the child)
- d) ☐ There is no legal father *by operation of law*: please explain
- e) ☐ Other: please explain

For the purposes of this answer it should be noted that a presumption of paternity also applies automatically in fertilization procedures. Section 5D of the Status of Children Act states;

Rule relating to paternity

- (1) Where a married woman undergoes, with the consent of her husband, a fertilization procedure as a result of which she becomes pregnant:
  - (a) the husband shall, for all purposes, be presumed to have caused the pregnancy and to be the father of a child born as a result of the pregnancy; and
  - (b) in the case where the semen used in the fertilization procedure was not that of the husband, the man who produced the semen shall, for all purposes, be presumed not to have produced that semen and not to be the father of a child born as the result of the pregnancy.
- (2) A presumption of law that arises by virtue of subsection (1) is irrebuttable.
- (3) In a proceeding in which the operation of subsection (1) is relevant, a husband's consent to the carrying out of a fertilization procedure in respect of his wife shall be presumed, but that presumption is rebuttable.

In this section a reference to a 'spouse' means the following;

- (2) A reference in this Part to the husband or wife of a person:
  - (a) is, where the person is living with another person of the opposite sex as his or her spouse on a bona fide domestic basis although not married to the other person, a reference to that other person; and
  - (b) does not, in that case, include a reference to the spouse, if any, to whom the person is lawfully married,
 and "married woman", in those circumstances, has a corresponding meaning.



If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to "rebut" these presumptions:

Any presumption under the Status of Children Act 1978 (NT) is rebuttable on the balance of probabilities (s16).

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a "declaration") establishing or confirming the legal parentage of a child?

- ☒ Yes – go to **Question 0 b)**.  
☐ No – go to **Question 11**.

b) Please explain to which State authorities such an application should be made:

- i. ☐ The authority responsible for birth registration (see **Question 1** above)
- ii. ☒ The judicial authorities (*i.e.*, the courts): please specify The Supreme Court of the Northern Territory (Status of Children Act ss 11 and 12) also the Family Court of Australia
- iii. ☐ Other State administrative authorities: please specify
- iv. ☐ Other: please explain

c) Please explain who may bring such an application:

- i. ☐ Only the individuals currently considered to be the legal mother and / or father and / or the child
- ii. ☒ Any person claiming to be the legal mother and / or father of a child
- iii. ☐ Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:
- iv. ☐ Any person
- v. ☒ Other: please explain Persons having a 'proper interest in the result' in the determination of whether a relationship of father/ mother and child exists between two persons may also apply for a declaration of paternity or maternity.

The relevant sections to this answer are;

s11 of the Status of Children Act which states;  
 Paternity

(1) A person who:

- (a) alleges that a named person is the father of her child;
- (b) alleges that the relationship of father and child exists between that person and any other named person; or
- (c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between 2 named persons,

may apply to the Supreme Court for a declaration of paternity and, if it is proved to the satisfaction of the Court that the relationship exists, the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.

and Section 12 of the Status of Children Act which states;  
 Maternity

(1) Any person who:

- (a) alleges that any named person is the mother of his child;
- (b) alleges that the relationship of mother and child exists between that person and any other named person; or

- (c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of mother and child exists between 2 named persons,  
may apply to the Supreme Court for a declaration of maternity and, if it is proved to the satisfaction of the Court that the relationship exists, the Court may make a declaration of maternity whether or not the mother or the child or both of them are living or dead.
- (2) Notwithstanding anything in subsection (1), the Court may refuse to hear an application for a declaration of maternity if it is of the opinion that it is not just or proper to do so.
- (3) Where a declaration has been made under subsection (1) and it appears to the Court that new facts or circumstances have arisen that have not previously been disclosed to a court and could not, by the exercise of reasonable diligence, have previously been known, the Court may revoke such declaration which shall, upon revocation, cease to have any force or effect.

d) Is there a timeframe within which such an application must be made?

- ☐ Yes, please specify:  
☒ No  
☐ In certain situations: please explain

11. Is it possible in your State for a putative legal father to "voluntarily acknowledge"<sup>9</sup> his legal paternity (if his legal paternity has not arisen by operation of law – see **Question 9** above)?

- ☒ Yes  
☐ No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (e.g., it must be the genetic father, the man must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

- (1) There are no restrictions on who can undertake an acknowledgement of this nature.  
 (2) The acknowledgement must be executed as a deed and be under the law of the Territory, the Commonwealth, a State or another Territory of the Commonwealth or a prescribed overseas jurisdiction. (Status of Children Act 198 (NT) s9A also see Family Law Act 1975 Cth s69T).  
 (3) the acknowledgement must be signed by a parent of the child.

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (e.g., usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

12. Is it possible in your State for a putative legal mother to "voluntarily acknowledge" her legal maternity?

- ☐ Yes

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<sup>9</sup> See note 6 above.

- ☐ No
- ☒ Not applicable – legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (e.g., it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (e.g., usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

13. Please explain the legal consequences in your State of a "voluntary acknowledgement" of legal parentage:

- a) ☒ Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
- b) ☐ The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State's acceptance of that issue
- c) ☐ Other: please specify

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- ☐ Yes
- ☒ No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate:

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- ☒ Yes
- ☐ No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) ☒ Operation of law: s5DA of the Status of Children Act provides that if a woman in a same sex defacto relationship gives birth to a child the womans partner is presumed to be a parent of the child. However, the same presumption does not apply to male de facto partners.
- b) ☒ Order of the court or other State authorities: The Family Court of Australia can also make parenting orders regarding the allocation of parental responsibility for children to same sex defacto partners. Family Law Act 1975 (Cth) s4AA.
- c) ☐ Adoption:
- d) ☐ Other:

**C. Establishment of legal parentage where assisted reproductive technology ("ART")<sup>10</sup> has been used<sup>11</sup>**

16. Is ART permitted in your State?

- ☒ Yes, all forms of ART are permitted  
☐ Yes, but there are certain restrictions on the services available and who may access these services: please specify  
☐ No, all forms of ART are completely prohibited – **please go to Section D.**  
☐ Other: please explain

17. Is there regulation of the use of ART in your State?

- ☐ Yes, legislation regulates the use of ART: please briefly explain  
☒ Yes, there are rules or "codes of practice" concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain The National Health and Medical Research Council of Australia has produced the 'Ethical Guidelines on the use of Assisted Reproductive Technology in Clinical Practice and Research'. These guidelines can be found at [http://www.nhmrc.gov.au/\\_files\\_nhmrc/publications/attachments/e78.pdf](http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e78.pdf)  
☐ No, there are no rules at all – **go to Question 19**  
☐ Other: please explain

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) ☐ Who may access ART services (e.g., relationship status; age or health requirements; nationality / residency requirements, etc.):  
b) ☐ Who may perform ART services:  
c) ☐ The regulation of medical or other institutions which perform ART services (e.g., the licensing of clinics or hospitals):  
d) ☐ Which ART services may be performed:  
e) ☒ Whether egg donation is permitted and, if so, under which conditions: Ethical Guidelines for the Ethical Practice of ART section 6.1 provides guidelines regarding which people may donate gametes.

The section states;

In using gamete donations, clinicians must carefully consider the physical, psychological and social wellbeing of the person to be born and the participants.

Treatment in Australia using either gametes donated overseas or embryos created from gametes donated overseas must not take place unless all the relevant conditions of these guidelines and any relevant legislation have been fulfilled.

6.2.1 Children and young people (who are defined as 'minors' in each jurisdiction) should not be allowed to donate gametes for use by others in a reproductive procedure.

6.2.2 Clinics should not use gametes donated by older men and women unless the potential recipient understands the implications and increased risks of such an arrangement.

<sup>10</sup> In this document, "assisted reproductive technology" ("ART") is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: e.g., two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to "do-it-yourself" or "DIY" methods of non-procreative conception: i.e., where medical third parties are not involved in the procedure.

<sup>11</sup> Please note: surrogacy arrangements are dealt with separately in **Section D** below.

- f) ☒ Whether sperm donation is permitted and, if so, under which conditions: See above answer for (e) which provides the guidelines for gamete donation.
- g) ☐ The costs of ART (including the amount paid to any gamete donors):
- h) ☒ The anonymity of gamete donors: Persons conceived as a result of ART have the right to know their genetic parents. Clinics must not use donated gametes unless the donor has consented to the release of identifying information about themselves. (Guidelines for the Ethical Practice of ART section 6.1).
- i) ☒ The right of the child to know his / her genetic or birth origins: See above answer for (h) which provides that children have a right to know their genetic parents (Guidelines for Ethical Practice of ART section 6.1).
- j) ☐ The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) ☐ Other: please explain

19. Please explain the consequences of ART for legal *maternity* arising *by operation of law*:

- a) ☒ The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
- b) ☐ Other: please specify

Please explain whether the above position results from legislation, rules, case law or other source(s) of law: Status of Children Act NT s5E states;

Donor of ovum

Where:

- (a) a woman becomes pregnant as the result of a fertilization procedure; and
  - (b) the ovum used for the purposes of the procedure was taken from another woman,
- then, for all purposes, the woman from whom the ovum was taken is not the mother of a child born as a result of the pregnancy.

See also s5C which states;

Rule relating to maternity

A woman who gives birth to a child is, for all purposes, the mother of the child, notwithstanding that the child was conceived by the fertilization of an ovum taken from another woman

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) ☒ The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment: The husband of the woman who gave birth to the child must have consented to the treatment. His consent is presumed, however this presumption is rebuttable.
- b) ☒ The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment: The male partner must have consented and his consent is presumed however, this presumption is rebuttable.
- c) ☐ The genetic father will always be the legal father:
- d) ☐ Other: please explain

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

Status of Children Act Nt s5D states;

Rule relating to paternity

(1) Where a married woman undergoes, with the consent of her husband, a fertilization procedure as a result of which she becomes pregnant:

(a) the husband shall, for all purposes, be presumed to have caused the pregnancy and to be the father of a child born as a result of the pregnancy; and

(b) in the case where the semen used in the fertilization procedure was not that of the husband, the man who produced the semen shall, for all purposes, be presumed not to have produced that semen and not to be the father of a child born as the result of the pregnancy.

(2) A presumption of law that arises by virtue of subsection (1) is irrebuttable.

(3) In a proceeding in which the operation of subsection (1) is relevant, a husband's consent to the carrying out of a fertilization procedure in respect of his wife shall be presumed, but that presumption is rebuttable.

Reference to the husband or wife for the purposes of the Act means the following;

(2) A reference in this Part to the husband or wife of a person:

(a) is, where the person is living with another person of the opposite sex as his or her spouse on a bona fide domestic basis although not married to the other person, a reference to that other person; and

(b) does not, in that case, include a reference to the spouse, if any, to whom the person is lawfully married (s5A Status of Children Act NT) and "married woman", in those circumstances, has a corresponding meaning.

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

Generally no. At common law the 'parentage of a child is determined by the person who produced the ovum and sperm from which the child derives' (W v G (1996) 20 Fam. L.R 49 at 62,64). However, this common law rule has been overridden by the provisions of the Status of Children Act NT.

It should be noted that a sperm donor will generally not be considered a parent of a child born as a result of his donation. However, if the sperm donor later becomes the husband of the mother of the child he will incur the rights and liabilities which attach to a father of the child. These rights and liabilities will not apply retrospective of his marriage to the birth mother. (Status of Children Act s5F).

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

A child's mother will be the woman who gave birth to the child regardless of any ART used to conceive the child. As such, a woman who is in a same sex relationship and gives birth to a child will be the child's mother. The woman's de facto partner is then presumed to be a parent of the unborn child and a child born as a result of the pregnancy. This presumption will only operate if the de facto partner consented however, the presumption of consent is rebuttable on the balance of probabilities. (Status of Children Act NT ss 5C, 5DA and 5E).

A same sex male couple would not be considered legal parents of a child born through ART. Same sex couples are not able to adopt children in the Northern Territory (Adoption of Children Act NT s13). It would also not be possible for one person within the relationship to adopt the child unless the child was in the care of

the State and 'exceptional circumstances' exist which make it desirable for the Court to make the order (s14). However, the couple could seek an order for shared parental responsibility of the child under the Family Law Act 1975 (Cth).

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

- ☐ Yes: please provide a copy of, or a link to, the information  
☐ No  
☐ Other: please explain

#### **D. Surrogacy arrangements**

##### ***Regulation of surrogacy***

24. Does your State permit surrogacy arrangements?

- a) ☐ Yes, *all* forms of surrogacy arrangements are permitted:  
 i. ☐ As a result of express legislation or rules: please specify  
 ii. ☒ By default, because surrogacy is unregulated in internal law.  
       Go to **Question 26**.
- b) ☐ No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition:  
       Go to **Question 26**.
- c) ☐ It depends upon the nature of surrogacy arrangement (e.g., commercial surrogacy arrangements are prohibited): please specify
- d) ☐ Other: please specify

Please provide any clarification, where necessary:

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

- a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?
- ☐ Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:  
☐ No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:  
☐ Other: please specify
- b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

- i. ☐ Who may be intending parents<sup>12</sup> to an arrangement, including:  
 a. ☐ Nationality, domicile or residency requirements:<sup>13</sup>

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<sup>12</sup> Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

- please specify
- b. ☐ Marital or other relationship status:
  - c. ☐ Age requirements:
  - d. ☐ Health requirements:
  - e. ☐ Psycho-social requirements:
  - f. ☐ Other:
- ii. ☐ Who may be a surrogate mother, including:
- a. ☐ Nationality, domicile or residency requirements:<sup>14</sup>  
please specify:
  - b. ☐ Marital or other relationship status:
  - c. ☐ Age requirements:
  - d. ☐ Health requirements:
  - e. ☐ Psycho-social requirements:
  - f. ☐ The surrogate mother must already have her own children:
  - g. ☐ Other:
- iii. ☐ Which types of surrogacy arrangements are permitted, *e.g.*, traditional and / or gestational,<sup>15</sup> etc.: please specify
- iv. ☐ Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify
- v. ☐ Which other bodies or persons may facilitate a surrogacy arrangement (*e.g.*, by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, "matching" surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify
- vi. ☐ Whether financial remuneration can be paid to the surrogate mother:
- a. ☐ No financial remuneration at all is permitted
  - b. ☐ Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such "reasonable expenses":
  - c. ☐ Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
- vii. ☐ Whether the surrogacy arrangement is contractually enforceable: please specify
- viii. ☐ Who may make decisions concerning the pregnancy (*e.g.*, whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
- ix. ☐ The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
- x. ☐ Other: please specify

<sup>13</sup> See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

<sup>14</sup> See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

<sup>15</sup> See the **Glossary** for the definition of the terms used in this paper.



- c) Please explain any legal consequences, both criminal (*e.g.*, penal sanctions) and civil (*e.g.*, for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with:
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

### **Surrogacy and legal parentage**

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (*i.e.*, without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law:

The woman who gave birth to the child and her partner/ husband (provided he or she has consented to the procedure) will be the parents of the child. This is a result of legislation in place in the Northern Territory namely the Status of Children Act NT

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) ☐ Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) ☒ Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

The ability for intending parents to claim a parentage order for total parental responsibility arises under the Family Law Act. The Court is able to make a parentage order for parental responsibility for intending parents where the order would be 'in the best interests of the child' in accordance with the Family Law Act.

There are no nationality/ domicile/ residency requirements to be met in order for a parentage order to be made.

There is extensive case law on this issue, an example of which can be found at;

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2012/602.html?stem=0&synonyms=0&query=surrogacy%20and%20parentage%20order>

in the case of *Ellison and anor & Karanchanit* [2012] FamCA602 (1 August 2012).

- c) ☐ No

- d) ☐ Other: please specify
- e) ☐ Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.
- f) ☐ Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- ☐ Yes: please describe exactly what will be on the record and / or certificate
- ☒ No: please explain

No, only the child's parents will be recorded on the birth certificate (ie the woman who gave birth to the child and her partner). Northern Territory legislation does not provide for recognition of a surrogate parent.

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- ☐ Yes: please provide a copy of, or a link to, the information
- ☐ No
- ☐ Other: please explain

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- ☐ Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring:
- ☐ No
- ☐ Other: please explain

#### **E. Contestation of legal parentage**

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?

- a) ☐ The authority responsible for birth registration (see **Question 1** above)
- b) ☒ The judicial authorities (*i.e.*, the courts): please specify The Family Court of Australia and the Supreme Court of the Northern Territory.
- c) ☐ Other State administrative authorities: please specify
- d) ☐ Other: please explain

32. Who may bring an action to challenge legal parentage?

- a) ☐ Only the individuals currently considered to be the legal mother and / or father and / or the child
- b) ☐ Any person claiming to be the legal mother and / or father of a child
- c) ☐ Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question
- d) ☐ Any person
- e) ☒ Other: please explain

Family Law Act 1975 (Cth) s69C(2) states that proceedings relating to a child's parentage can be brought by;

- (a) either or both of the child's parents; or
- (b) the child; or
- (c) a grandparent of the child; or
- (d) any other person concerned with the care, welfare or development of the child.

33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?

- ☐ Yes, please specify:
- ☒ No
- ☐ In certain situations: please explain

34. On what grounds may legal *maternity* be challenged before the authorities in your State?

- a) ☒ Only on the basis that the "mother" did not, in fact, give birth to the child
- b) ☐ Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)
- c) ☐ Other: please explain

35. On what grounds may legal *paternity* be challenged before the authorities in your State?

- a) ☒ Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
- b) ☐ Other: please explain

36. What are the legal consequences of a successful challenge concerning legal parentage?

- a) ☒ The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)
- b) ☐ The decision of the State authorities will only be binding for limited, specific purposes: please explain
- c) ☐ It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
- d) ☐ Other: please explain

37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?

- a) ☐ The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
- b) ☐ The birth record and / or certificate is amended but the original record and / or certificate is retained
- c) ☐ Other: please explain

#### **F. The acquisition of nationality by children**

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- a) ☒ By birth within the territory of the State
- b) ☒ By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question

of who is / are the child's *legal* parents for the purposes of determining nationality:

- Australian Citizenship Act 2007 (Cth) s6 definition of 'responsible parent' includes biological parents of the child (except where their parental responsibility has been removed under the Family Law Act), people who have a parenting order in place which requires the child to live with that person, people who have parental responsibility conferred on them by a parenting order irregardless whether that person is the biological 'parent' of the child and people who have custody over the child whether through adoption or operation of a law or court order or otherwise.
- c) ☐ By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
  - d) ☐ If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):<sup>16</sup> please specify
  - e) ☐ Other: please specify

### **G. Legal developments**

39. Please state whether the law in your State concerning the matters covered in **Part I** above (*i.e.*, birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before parliament or before the courts) to change the law in future:
40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

## **Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage**

### **A. PIL and co-operation rules concerning birth registration**

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:
- a) ☒ Only when the child is born on the territory of the State
  - b) ☐ When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
  - c) ☐ When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child
  - d) ☐ When the child is considered a national of the State,<sup>17</sup> regardless of the place of birth of the child

<sup>16</sup> As to which, see note 4 above, citing Art. 7 of the UNCRC.

<sup>17</sup> As to which, see **Question 38** above.

e) ☐ Other, please specify:

42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?<sup>18</sup>

- a) ☒ The *lex fori* (i.e., the internal law of your State) is always applied by the relevant authorities
- b) ☐ If the situation has foreign elements (e.g., the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules:
- c) ☐ Other: please specify

43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (e.g., the child is registered in your State as the State of birth, and in the State of the parents' nationality and the registers conflict)?

- ☐ Yes: please explain the circumstances of the case(s) and the difficulties which arose:
- ☐ No

44. Are there any bilateral or multilateral<sup>19</sup> agreements in force between your State and any other State such that:

a. When a child's birth is registered which involves foreign elements (e.g., one or more foreign national parents), this information is communicated to the authorities in the other relevant State?

- ☐ Yes: please specify
- ☐ There are no formal agreements but this may happen in practice: please explain
- ☒ No

b. When there are changes to a child's legal parentage *subsequent to* birth registration as a result of steps taken in your State (e.g., due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

- ☐ Yes: please specify
- ☐ There are no formal agreements but this may happen in practice: please explain
- ☐ No

## **B. PIL rules concerning the establishment of legal parentage**

### ***By operation of law or agreement***

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?<sup>20</sup>

<sup>18</sup> Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

<sup>19</sup> E.g., the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< [www.ciec1.org](http://www.ciec1.org) >).

<sup>20</sup> Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

- ☐ Yes: please specify  
☒ No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

- ☐ Yes: please specify  
☐ No: the *lex fori* (i.e., the internal law of the State) will always be applied where a question of legal parentage arises  
☒ Not applicable: it is not possible to establish legal parentage by agreement

**By voluntary acknowledgement**

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

Please tick all which apply:

- a) ☐ When the child is (habitually) resident in your State: please specify  
b) ☐ When the child is a national of your State  
c) ☐ When the individual acknowledging the child is (habitually) resident in your State: please specify  
d) ☐ When the individual acknowledging the child is a national of your State  
e) ☐ Other: please specify

Please specify whether these criteria (i.e., the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. ☐ At the time of the child's birth  
ii. ☐ At the time of the acknowledgement, or  
iii. ☐ At another time: please specify

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, i.e., whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:  
i. ☐ The *lex fori* (i.e., the internal law of your State)  
ii. ☐ The law of the State of the child's nationality  
iii. ☐ The law of the State of the (habitual) residence of the child: please specify  
iv. ☐ The law of the State of the putative parent's nationality  
v. ☐ The law of the State of the putative parent's (habitual) residence: please specify  
vi. ☐ Other: please specify
- b) For the substantive validity of the acknowledgement:  
i. ☐ The *lex fori* (i.e., the internal law of your State)  
ii. ☐ The law of the State of the child's nationality  
iii. ☐ The law of the State of the (habitual) residence of the child: please specify  
iv. ☐ The law of the State of the putative parent's nationality  
v. ☐ The law of the State of the putative parent's (habitual) residence: please specify  
vi. ☐ Other: please specify

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child's birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a)
- b)

### **C. PIL rules concerning the recognition of legal parentage established abroad**

#### ***Birth certificates***

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State *as validly establishing the legal parentage of those persons recorded within it* (*i.e.*, the recognition of the content of the certificate).<sup>21</sup>

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition (*e.g.*, the birth certificate must be authenticated by way of legalisation or apostille<sup>22</sup>); and
- d) any grounds of *non*-recognition.

A birth certificate drawn up in a 'prescribed overseas jurisdiction' will be recognised in Australia as establishing the legal parentage of the child registered on the certificate. This occurs by operation of a presumption to this effect. The relevant legislation is as follows;

The Family Law Act 1975 (Cth) which states;

69R Presumption of parentage arising from registration of birth

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

This presumption operates automatically but is rebuttable on the balance of probabilities.

The Family Law Court of Australia will be responsible for determining whether the birth certificate will be recognised.

There are no conditions for recognition imposed.

Also see the Status of Children Act (NT) which states;

s9 Presumptions of parentage arising from registration of birth

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

<sup>21</sup> It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

<sup>22</sup> See, in this regard, the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Apostille Section".

This presumption is also automatic but is rebuttable on the balance of probabilities.

There are no conditions for recognition imposed.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

### **Voluntary acknowledgements**

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State *as validly establishing the legal parentage of the author of the acknowledgement (i.e., the recognition of the content of the acknowledgement)*.<sup>23</sup>

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

Both the Northern Territory Status of Children Act and the Family Law Act apply here.

Under the Family Law Act a presumption of paternity will arise from a voluntary acknowledgement which occurs in a prescribed overseas jurisdiction. The relevant section states;

SECT 69T

Presumption of paternity arising from acknowledgments

If:

(a) under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and

(b) the instrument has not been annulled or otherwise set aside;

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

A similar provision is contained within the Status of Children Act. Under this act a voluntary acknowledgement of paternity will be recognised if the requirements set out in s9A are met. The section states as follows;

(1) If:

(a) under subsection (2) or another law of the Territory, the Commonwealth, a State or another Territory of the Commonwealth or a prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and

(b) the instrument has not been annulled or otherwise set aside,

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

(2) Where an instrument is signed by the parent of a child and by a man acknowledging that he is the other parent of the child and the instrument:

(a) is executed as a deed; or

(b) is signed jointly or severally by each of those persons in the presence of a legal practitioner,

the persons named are presumed to be the parents of the child.

<sup>23</sup> It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).



'Prescribed overseas jurisdiction' means a jurisdiction provided for in Schedule 1A of the Family Law Regulations 1984 (Cth).

In both instances the Births Deaths and Marriages Registrar will be responsible for determining whether the acknowledgement will be recognised. However, if a dispute arises parties can apply to either the Darwin Local Court or the Family Court of Australia under the respective legislation.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

### **Decisions of judicial authorities**

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (*i.e.*, a court judgment or order) will be recognised in your State as validly establishing legal parentage.<sup>24</sup>

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

An order made in an overseas jurisdiction will be recognised in Australia, pursuant to the Family Law Regulations (Cth), in the following circumstances;

The order must be certified and originate in a prescribed overseas jurisdiction;

A certificate must accompany the order, signed by an officer of the court or by some other authority in that jurisdiction, in relation to the order and containing a statement that the order is, at the date of the certificate, enforceable in that jurisdiction; and

There are reasonable grounds for believing that any of the following persons is ordinarily resident in, present in, or proceeding to, Australia:

- (i) the child who is the subject of the order;
- (ii) a parent of that child;
- (iii) a person having the right to have the child live with him or her, or

the right of custody of or access to the child, or the right to spend time or communicate with the child.

Any dispute as to the validity of an overseas child order would be determined by the Family Court Australia.

Family Law Regulations (Cth) r23.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

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<sup>24</sup> *Ibid.*

52. Please specify the *effects* of the recognition of the legal parentage established abroad (see **Questions 49 to 51** above) and which law(s) govern(s) these effects:

**D. PIL rules concerning the contestation of legal parentage**

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) ☐ When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) ☐ When the child whose parentage is disputed is a national of your State
- c) ☒ When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) ☒ When a putative parent disputing legal parentage is a national of your State
- e) ☒ Other: please specify The Family Law Act will also have jurisdiction over a person who is ordinarily resident in Australia for a period of more than one year.

For discussion of this issue please see; In the Marriage of Woodhead (1997) 23 Fam LR 559.

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. ☐ At the time of the child's birth
- ii. ☒ At the time the relevant State authorities are seised with the dispute, or
- iii. ☐ At another time: please specify

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) ☒ The *lex fori* (*i.e.*, the internal law of your State)
- b) ☒ The law of the State of the child's nationality
- c) ☐ The law of the State of the (habitual) residence of the child: please specify
- d) ☐ The law of the State of the putative parent's nationality
- e) ☐ The law of the State of the putative parent's (habitual) residence: please specify
- f) ☐ Other: please specify

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

**E. "Cross-border reproductive care"<sup>25</sup> and the consequences for legal parentage**

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (*e.g.*, the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

☐ Yes: please explain

<sup>25</sup> In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

- ☒ No  
☐ Other: please explain

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

- ☐ Yes: please provide details  
☒ No

#### **F. Legal developments and practical challenges**

57. Please state whether the law in your State concerning the matters covered in **Part II** above (i.e., the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (e.g., in government, before Parliament or before the courts) to change the law in future:

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered:

#### **Part III: The particular challenges concerning International Surrogacy Arrangements<sup>26</sup> ("ISAs")**

*This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:<sup>27</sup>*

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: i.e., those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: i.e., those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

<sup>26</sup> See the **Glossary** for the definition of the terms used in this paper.

<sup>27</sup> Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: e.g., the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

**A. Incoming cases**<sup>28</sup>

- ☐ **This Section is inapplicable – there have been no “Incoming cases” of ISA in this State. Go to Section B.**

***Basic empirical data***

59. Do you have any information concerning:

- a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?

- ☐ Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

- ☐ No information is available

- b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

- ☐ Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

- ☐ No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State<sup>29</sup> and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years:

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

<sup>28</sup> *I.e.*, those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

<sup>29</sup> Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

### ***The procedure for Incoming cases of ISA***

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

- a) Enter your State with a child born abroad as a result of an ISA:  
To bring a child to Australia to live, the intended parents of the child will need to apply for either Australian citizenship by descent or a permanent visa for the child. Where a child becomes an Australian citizen by descent, the intended parents will also need to apply for an Australian passport for the child.
- b) Reside permanently in your State with the child:  
The parents of the child will need to apply for citizenship of the child by descent.
- c) Have their legal parentage recognised (or established) under the law of your State (*if* this is possible):  
A parent-child relationship is a question of fact to be determined by the department with regard to all the relevant circumstances.

In the majority of surrogacy arrangements, at least one of the intended parents is also a biological parent of the child. Normally, the biological parentage can be readily determined through medical records and/or DNA testing. Provided that DNA testing is carried out to approved standards the result of DNA testing is given substantial weight when determining if a person is a parent of another person.

Where there is no biological connection between an Australian citizen who is the intended parent and the child born through an international surrogacy arrangement, or where such a biological connection has not been satisfactorily established, it is necessary for an Australian citizen to provide other evidence to demonstrate that the Australian citizen was in fact the parent of the child at the time of the child's birth. The type of evidence that would support such a claim is likely to require greater scrutiny and verification than DNA evidence. Consequently, an application based on such evidence may take significantly longer to decide.

Please see:

[http://www.immi.gov.au/media/fact-sheets/36a\\_surrogacy.htm](http://www.immi.gov.au/media/fact-sheets/36a_surrogacy.htm)

Please include an estimate of the time it may take to complete each stage of this process:

- a)
- b)
- c)

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- i. ☐ The country in which the child was born: please explain
- ii. ☐ The particular document(s) produced by the intending parents to establish their legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain

- iii. ☐ Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- iv. ☐ The nationality of the intending parents: please explain
- v. ☐ Any other factor: please explain

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

- ☐ Yes – please specify:
- a) Which authorities in each State were involved:
  - b) The nature of the co-operation:
  - c) Whether the co-operation resulted from legislation, guidelines or practice:
  - d) The result:
- ☐ No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) ☐ A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary:
- b) ☐ An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
- c) ☐ A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary:
- d) ☐ A post-birth court order from the State of birth (*i.e.*, transfer of parentage): please state from which countries these orders originate and any other details necessary:
- e) ☐ An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention<sup>30</sup> was attempted by either State<sup>31</sup>:
- f) ☐ Other: please specify

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases:

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) ☐ The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

- b) ☐ The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain
- c) ☐ The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases
- d) ☐ Other: please explain

<sup>30</sup> Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < [www.hcch.net](http://www.hcch.net) >, under "Intercountry Adoption Section".

<sup>31</sup> See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

If possible, please state which of the four outcomes above occurs most frequently in your State:

### ***The challenges encountered***

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) ☐ The embassies / consulates in the State of the child's birth
- b) ☐ The immigration authorities
- c) ☐ The judicial authorities (*i.e.*, the courts): please specify which
- d) ☐ The Ministry of Justice (or equivalent)
- e) ☐ The Ministry of Foreign Affairs (or equivalent)
- f) ☐ The Ministry of Health (or equivalent)
- g) ☐ The Ministry of Social Affairs (or equivalent)
- h) ☐ Other: please explain

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

*Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.*

Problems relating to:

- a) ☐ The child being able to leave his / her State of birth:
- b) ☐ The child being able to enter your State:
- c) ☐ The child being able to reside in your State:
- d) ☐ The child's nationality:
- e) ☐ The child's legal parentage:
- f) ☐ The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (*e.g.*, trafficking, sale of children, exploitation of women, etc.):
- g) ☐ The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) ☐ The breakdown of the ISA: *e.g.*, due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) ☐ Other: please explain

Please provide any further information you consider relevant concerning the above problems:

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) ☐ Medical costs:
- b) ☐ Legal costs:
- c) ☐ Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:
- d) ☐ Expenses and / or other costs paid to the surrogate mother:

able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- ☐ Yes, they have to meet the following conditions – please specify:
- ☐ Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:
- ☐ No
- ☐ It depends upon the State of residence or nationality of the intending parents: please specify

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (e.g., where this law forbids surrogacy arrangements).<sup>34</sup>

- ☐ Yes – please explain how this law is taken into account:
- ☐ No
- ☐ It depends upon the State of residence or nationality of the intending parents: please explain

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

*Your response to this question will likely depend upon your answer to **Questions 26 to 27** above.*

Please tick all which apply:

- a) ☐ They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
- b) ☐ They can obtain an amended birth certificate: please explain
- c) ☐ They can obtain a *pre*-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
- d) ☐ They can obtain a *post*-birth court order (i.e., a transfer of parentage): please explain any conditions for obtaining such an order
- e) ☒ They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard<sup>35</sup>
- f) ☐ Other: please specify

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

<sup>34</sup> E.g., see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition to similar effect: i.e., that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

<sup>35</sup> See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".



77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

Please state the time it may take to complete this process:

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- a) ☐ The country in which the intending parents live: please explain
- b) ☐ The particular document(s) produced by the intending parents to establish legal parentage (e.g., a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- c) ☐ Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- d) ☐ The nationality of the intending parents: please explain
- e) ☐ Any other factor: please explain

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

☐ Yes – please specify:

- a) Which authorities in each State were involved:
- b) The nature of the co-operation:
- c) Whether the co-operation resulted from legislation, guidelines or practice:
- d) The result:

☐ No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) ☐ The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.  
Please explain how this is achieved:
- b) ☐ The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
- c) ☐ The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
- d) ☐ The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) ☐ Other: please explain

If possible, please state which of the five outcomes above occurs most frequently in your State:

### ***The challenges encountered***

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

*Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.*

Problems relating to:

- a) ☐ The child being able to leave your State:
- b) ☐ The child being able to enter the State in which his / her intending parents are resident:
- c) ☐ The child being able to reside in the State in which his / her intending parents are resident:
- d) ☐ The child's nationality:
- e) ☐ The child's legal parentage:
- f) ☐ The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
- g) ☐ The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) ☐ The breakdown of the ISA: e.g., due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) ☐ Other: please explain

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) ☐ Medical costs:
- b) ☐ Legal costs:
- c) ☐ Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) ☐ Expenses and / or other costs paid to the surrogate mother:
- e) ☐ Other: please explain

### **Areas of concern**

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) ☐ The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) ☐ The nationality of children born to ISAs:
- c) ☐ The right of children born to ISAs to know their (genetic and birth) origins:
- d) ☐ The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) ☐ The psychological impact of an ISA on the surrogate mother:
- f) ☐ The medical or other care provided to the surrogate mother:
- g) ☐ The financial aspects of ISAs:

- h) ☐ The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) ☐ The (mis)-information provided to intending parents or surrogate mothers:
- j) ☐ The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):
- k) ☐ Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) ☐ Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

### **Legal developments**

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- ☐ Yes: please explain
- ☐ No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

### **Part IV: Current bilateral or multilateral instruments in the field**

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;
- b) Any matters specifically related to surrogacy arrangements;

Please provide any detail you consider necessary:

### **Part V: Thoughts on possible future work**

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify:

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

*In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.*

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

***The child's legal status***

- a) ☐ Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment
- b) ☐ Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment

***Safeguards***

- c) ☐ The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned: please comment

***Co-operation***

- d) ☐ The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

***Other***

- e) ☐ Other: please specify

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,<sup>36</sup> which of the following general features *may* be desirable to include in such an instrument?

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<sup>36</sup> See **Part III** of the Questionnaire above.

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

### ***The child's legal status***

- a) ☐ Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment
- b) ☐ Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment
- c) ☐ Provisions concerning the child(ren)'s nationality: please comment

### ***Safeguards***

- d) ☐ The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, *i.e.*, the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (*e.g.*, the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.)
- e) ☐ Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (*e.g.*, surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment
- f) ☐ Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment

### ***Co-operation***

- g) ☐ The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;<sup>37</sup> and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

### ***Other***

- h) ☐ Provisions concerning the financial aspects of international surrogacy arrangements: please comment
- i) ☐ Other: please specify

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<sup>37</sup> Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) ☐ High priority / urgent
- b) ☐ Medium priority – desirable but not urgent
- c) ☐ Low priority – possibly desirable but other projects should take priority
- d) ☐ No priority – no further work should be done in this field
- e) ☐ Other: please specify

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) ☐ High priority / urgent
- b) ☐ Medium priority – desirable but not urgent
- c) ☐ Low priority – possibly desirable but other projects should take priority
- d) ☐ No priority – no further work should be done in this field
- f) ☐ Other: please specify

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire:

**Thank you for your time: this information will greatly assist the work of the Permanent Bureau.**