The Hon Justice Mordy Bromberg

President, ALRC

Review of Surrogacy Laws, Policies and Practices by Australian Law Reform Commission (ALRC)

Dear Judge

I write to draw your attention to the apparent failure of the ALRC in its recently published Issues Paper, to take into account some of the key requirements/elements of the Terms of Reference in its review into Surrogacy as set out by former Attorney-General Mark Dreyfus last December. I am writing separately to the ALRC with respect to my response to the questions and issues outlined in its Issues Paper.

Report Previous to the Federal Government - which recommended a uniform approach to laws

There has, in fact, been a ***previous*** Report to the Federal Government on Surrogacy (Surrogate Mother Agreements) and Assisted Reproductive Technology (ART). which the ALRC has failed to acknowledge, discuss or draw upon in its Issues Paper.

This first report, of which I was the author, was endorsed unanimously by the Family Law Council (FLC) of which I was a member, and addressed key questions of principle and public policy raised by ART and SMA/surrogacy:

"Creating Children - A uniform approach to the law and practice of reproductive technology in Australia" *(1985).*

As with all earlier reports, the FLC used the term "***Surrogate Mother Agreements***" (SMA) due to the recognition that such **agreements**/arrangements are not possible without a **woman** agreeing, in the first instance, to being a "***surrogate mother***". Hence the use of this terminology in my letter … rather than that of "***surrogate***" and "***surrogacy***" as used by the ALRC, which dehumanise the people involved and the process. In its report, the FLC also recommended that all such legislation be based on the best interests of the **child** thus created being paramount.

The report "***Creating Children***" was drafted by a Committee of the FLC (of which I was also a member) which was chaired by Justice Austin Asche (Judge, Family Court of Australia) … the Report then being adopted unanimously by the Family Law Council, chaired by Justice John Fogarty (Judge, Family Court of Australia), and forwarded by the FLC to the then federal Attorney-General, Lionel Bowen.

However the ALRC appears to have given no consideration to the FLC Report and recommendations … despite the FLC Report having recommended the development of a **uniform approach to the law** in Australia governing the practice of creating children by means of ART and SMA … a central requirement of the ALRC Terms of Reference. The FLC report also recommended the establishment of a **National Council on Reproductive Technology** to advise Federal, State and Territory governments, and assist in the process of achieving uniformity.

The Terms of Reference for a Review of Australian Surrogacy Laws by the ALRC

The Terms of Reference as forwarded by then Attorney-General in December 2024, directed that the Commission undertake:

"a review of Australian surrogacy laws, policies, and practices to identify legal and policy reforms, particularly proposals for ***uniform or complementary state, territory and Commonwealth laws,*** *that:*

** are consistent with Australia's obligations under* ***international law and conventions;***

**** protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates [surrogate mothers] and intending parents,*** *noting that the* ***best*** **interests** ***of children are paramount."*** (emphasis added).

As stated, I write to express my concerns with respect to the apparent failure of the ALRC Issues Paper to adequately or effectively address key issues as set out in the Terms of Reference, particularly those relating to:

- the desirability of developing **uniform laws** with respect to the states, territories, and Commonwealth

- protecting and promoting the **human rights of surrogate mothers**; and
- protecting and promoting the **human rights and best interests of children** born as a result of surrogacy arrangements along with concerns regarding:
- the lack of consideration given to ground-breaking **reports of early State and Federal government expert Committees of Enquiry** which addressed key questions with respect to the **principles** and **public policy** considerations that should underpin the laws and practice of ART and SMA in Australia, including:

(a) Reports to the Victorian government of the *Committee to consider the Social, Ethical and Legal Issues arising from IVF*, chaired by Professor Waller, Monash University (Waller Reports) … including an "*Interim Report"* into IVF (1982), "*Report on Donor Gametes in IVF" (1983),* and the

"Report on the Disposition of Embryos produced by IVF " (1984);

(b) Report to the Queensland government of the *Special Committee appointed to Enquire into the Laws relating to Artificial Insemination, IVF and other related matters,* chaired by Justice Demack (Demack Report, 1984); and the

(c) Report to the Federal government of the FLC *"Creating Children…", 1985* (Asche Report) as referred to above.

- the **terminology** used - which has the effect of "dehumanising" key participants in surrogate mother arrangements … particularly with respect to the woman who becomes pregnant, carries a child *in utero* for 9 months, gives birth to her baby, then immediately after birth relinquishes her baby into the custody and care of an infertile couple/individual; and
- the lack of **balance** in the membership of the ALRC Advisory Committee, with respect to representation from organisations representing each of the three key participants in surrogate mother arrangements and who can bring their personal/lived experience to consideration of the issues before the Commission.

Central to a comprehensive review of Surrogate Mother Agreements (surrogacy), such as that of the ALRC, is the need to consider and take into account the following considerations … which require careful consideration by the ALRC but which are not addressed in the Issues Paper.

(1) The role of ART in "creating children" - In its report, ***Creating Children***, the FLC described the role that ART plays in assisting infertile couples/individuals to have a child. The report states that

*"Reproductive technology refers to **the body of medical and scientific knowledge and research which, when applied enables the creation of a child who could not have been conceived/born without the intervention and application of that technology**. … Both reproductive technology and "technological" conceptions are only made possible through the **allocation of substantial resources by the community**. These resources are paid for by the community through the funding of **hospital** facilities and equipment, hospital staff salaries, and expertise, through the funding of **research**, the education and **training** of doctors and other professional staff, the provision of **counselling** services, and through **medical benefit payments**. … Reproductive technology programs, moreover, involve the use of human embryos in ways previously not possible. This raises major **social**, **moral**, **legal**, and **ethical questions** for the community as to the purposes for which human embryos should be used." (Emphasis added)*

There is a clear public interest in understanding the role and implications of ART and SMA in creating a child, who would not otherwise be born … particularly for the child born of such procedures, and for the surrogate mother who relinquishes her child at birth … which warrants consideration and discussion by the ALRC.

(2) The desirability of developing a uniform approach

As stated above, the FLC in 1985 recommended to the Federal Attorney-General and Federal Government that a:

- *"**National approach** be taken by Federal, State and Territory governments to the issues arising out of the research and practice of reproductive technology in Australia … and recommended that an "independent national multidisciplinary body, to be known as the **National Council on Reproductive Technology**[NCRT] be established by federal cabinet on the recommendation and advice of the federal Attorney General following consultation with state and territory Attorneys-General and with federal, state and territory ministers for health and for community/welfare services".* (emphasis added). The role of the NRCT would be to advise on matters relating to all aspects of ART with a view to establishing a national/uniform approach to such matters.

The ALRC Issues Paper however fails to discuss the FLC report and its recommendations with respect to achieving a uniform approach to ART … or seek feedback to issues raised in the FLC report from respondents to the Issues Paper. Under Part 3 of the Issues Paper, reference to the AG's requirement that the ALRC Review "identify legal and policy reforms, particularly proposals for uniform or complimentary state, territory and Commonwealth laws" is limited to five paragraphs … and four dot points listing possible solutions. The dot points include developing uniform state and territory legislation, amendments by the states and territories to achieve consistency, and the referral of powers by the states and territories to enable the Federal Government to legislate to establish "one national law on *surrogacy".*

Having been centrally involved in the process, from 1975 to 1988, to persuade the states to refer their family law powers with respect to the "*custody*, guardianship, and *maintenance*" of *ex-nuptial children* to the Federal government, so that these matters could be dealt with by the Family Law Act and by the Family Court of Australia, it should be noted that the referral process took 13 years, and that the states refused to refer their powers with respect to adoption. Given the parallels between the provision of adoption services and the provision of ART/SMA services, there is a strong public policy argument in favour of the states and territories retaining these powers. Based on my 40+ years experience in the area of law reform, I would not support any proposal that states and territories refer their "surrogacy" laws to the federal government.

(**3) The role of infertility** - Discussion Paper (Number 9) of the AIFS, Changing Laws for Changing Families noted that *"It is only since the mid 1970s that, mainly as a result of the declining numbers of children available for adoption, increasing use has been made of AID procedures [and other forms of ART to enable infertile couples to have a child]" (p. 20)*

This raises the important question of the parallels between the adoption experience and the ART/SMA experience … an issue of vital importance to explore, given the parallels that exist, and given the failures with respect to adoption law and practice (with respect to "forced adoptions") that caused both the Federal government and the Victorian government to issue a formal **Apology**. In addition, Victoria also established a **Redress Scheme**, providing a compensation payment and counselling in recognition of the continuing impact of living with the ongoing harmful effects of relinquishing mothers' experience of "forced separation". It should be accepted that there are highly likely to be similar harmful effects for surrogate mothers, due to the ongoing effects of their experience of what they may well see as "forced separation" from the children they relinquished in accordance with a surrogate mother agreement.

The desire of infertile couples/individuals to have a child is central to an understanding of the request for access to adoption, on the one hand, and the request for access to ART and SMA procedures in Australia, on the other … as illustrated by the changes that have occurred over recent decades with respect to adoption and ART, as follows.

- **Adoption** - In Australia by 1972, it is estimated that some 250,000 **women** had become pregnant and carried a **child** *in utero* for the 9 months of their pregnancy, then **relinquished** their child immediately after birth into the care and custody of an **infertile couple**/individual who proceeded to **adopt** the child. Thus by 1972, there were some 250,000 **children** who had been **relinquished** by their birthmother, immediately following their birth, to the custody and care of an infertile couple/individual … as a consequence of an **adoption** agreement.

From the early 1970s, however, there was a significant drop in the number of children relinquished by women/single mothers for adoption … due in large part to the introduction in 1973 of the Supporting Mothers Benefit, along with increasing access to abortion services … a consequence of which was that increasingly **fewer babies were available for adoption by infertile couples/individuals.**

- **ART** and **SMA** - In Australia, since the early 1980s, following the introduction and development of IVF and ART, a relatively small number of **women**/**surrogate mothers** have also been involved in the process of becoming pregnant, and carrying a child in utero for 9 months, with many (not all) relinquishing their child

However the exact number of **children** who have been **relinquished** by their birthmother/surrogate mother immediately following their birth to the custody and care of an infertile couple/individual as a consequence of a **surrogate mother agreement involving ART,** is unknown. The Issues Paper states that "*it has been reported that 76 children were born through domestic surrogacy in 2020" … and that the "Department of Home Affairs data indicates that 275 children were born through international surrogacy in the same year … [with the] number increased to 375 in 2023".*

By the late 1960s, there was increasing awareness of the fact that adoption had become a means to "solve" two social problems … the "problem" of what to do with "unmarried mothers" who had relinquished their baby at birth … and the

"problem" of how to respond to the desire of infertile couples to have a child. Many in society saw adoption as the means to solve these problems, which became the practice over several decades.

However, with the dramatic decline in the number of babies available for adoption by infertile couples/individuals, such couples/individuals have turned to ART and SMA for the baby they desire. While there continues to be a demand for getting "a baby of their own" through Surrogate Mother Arrangements, many question whether such arrangements are in the interests of either the baby borne as a result of such arrangements … or of the woman who has agreed to become a surrogate mother and "give up" her baby at birth.

Such important questions of public policy in respect of surrogate mother arrangements require that account be taken of key consideration, such as those outlined in the Demack Report to the Queensland Government, which remain relevant today albeit that the Demack report was drafted in 1984, such considerations including:

* to use/pay another human being to reproduce is the ultimate in dehumanisation;

* a baby must not be treated as a commodity to be purchased; and must not be the subject of traffic in any form;

* the development of the embryo in the uterus is of such physical and emotional significance to the pregnant woman that it is likely to cause unsolvable emotional, and legal conflicts if she is required to give up the child;

* the right of a woman to the child she has born must not be abrogated;

* any form of profiteering with human life is abhorrent;

* poor women could be used virtually as paid slaves to the wealthy, and surrogacy could become a new form of prostitution;

* the child could become nobody's child if rejected by the contracting parties. (FLC, p 66, 6.6.10)

Such considerations require careful consideration by the ALRC in light of its Terms of Reference requiring it to "protect and promote the human rights of … surrogates", which to date have not been identified or addressed.

(4) Women and Surrogate Motherhood - it is important to recognise that that no SMA can be entered into without the involvement of a **woman** … who is required to consent to relinquishing a child immediately after birth as a result of entering into legal agreement/SMA to become pregnant, carry a baby in utero for 9 months, give birth to her baby, then relinquish her baby immediately after birth into the custody and care of an infertile couple/individual … such an arrangement carrying with it the risk of manipulation, exploitation and significant emotional trauma.

Significant research has been undertaken into the consequences for women/mothers of relinquishing a child at birth, such as the ground-breaking Australian National Survey by Professor Robin Winkler and Margaret van Keppel, ***"Relinquishing Mothers in Adoption: their long-term adjustment",*** published by the AIFS in 1984. Their findings with respect to the impact and implications of relinquishment on mother who have "given up" their child immediately following birth, include that:

- *"The effects of relinquishment on the mother are negative and long-lasting*

- *Approximately half the women reported an increasing sense of loss over periods of up to 30 years, with the sense of loss being worse at particular times, e.g., birthdays, Mother's Day;*

- *The relinquishing mothers surveyed reported that the relinquishment of a child was the most stressful thing they had ever experienced, compared with other major stressful events in their life."*

and were reflected in comments made by mothers

"Nothing could ever replace the agony of those lost years – part of me is dead"

"My sense of loss is worse now that she has reached her teens – have things worked out for her ? I wonder if she thinks that I don't love her, and if she will want to meet me one-day."

Winkler and van Keppel's research, along with the 1983 Report of the Victorian Adoption Legislation Review Committee (VALRC), resulted in ground-breaking new legislation in 1984: namely the new *Adoption Act* and its companion legislation, the *Children (Guardianship and Custody) Act.*

In its Report ***Creating Children***, the FLC drew attention to the implications of a SMA, particularly in respect of "*the implications for the mother of relinquishing her child. Further consideration has also been given to the coercive elements of surrogate mother contracts/arrangements, particularly with respect to commercial enterprises, and the implications for women, children and the community of institutionalising such policies. Discussion and understanding of these issues has been greatly facilitated by the research of Dr Robin Winkler and Ms Margaret van Keppel who carried out a national survey on the long term effects of relinquishing a child for adoption".*

The FLC went on to note that "

While it is recognised that relinquishing a child at birth for adoption by an infertile couple, and relinquishing a child at birth into the care of an infertile couple [under a surrogate mother arrangement], may not necessarily have the same effects on the mother, nevertheless, the research gives us useful insights into the implications of relinquishment for the mother". (p. 63, 4.4.4)

It is clearly essential that, as part of its terms of reference, the ALRC gives careful consideration to the impact on women/surrogate mothers and children born as a result of ART/SMA on such important issues of public policy.

(5) Surrogate Mother Arrangements/SMA (surrogacy) and ART - It should be recognised that ART is a central component of all surrogate mother arrangements … unless in exceptional circumstances the commissioning husband/individual has sexual intercourse with the surrogate mother (or a turkey-baster is used).

(6) Australian law - Under Australian law, the mother of a child is the woman who gives birth to that child … regardless of whether the child was conceived naturally or through assisted reproductive technology/ART.

While the ALRC Paper suggest that one possibility is to legislate for the commissioning couple to be made the legal parents prior to the conception of the child, or prior to the birth - presumably to ensure that the birth mother has no legal recourse to change her mind - this will represent a considerable shift in the understanding of who is, or is known to be, the mother of the child.

(7) National Apology - the consequences of failed law and practice - Both the Federal and State Governments have taken account of the harm caused by poor past practices and laws. A consequence of the experience and research into adoption has also led to the increasing acceptance of the "**forced**" nature of many adoptions … which has resulted in both the Federal Government and the Victorian Governments issuing apologies.

As a consequence of failed adoption law and practice, the ***National Apology for Forced Adoption*** was made by Prime Minister Julia Gillard on in March 2013. This followed the ***Victorian Apology for Past Adoption Practices*** made by the Victorian Premier Ted Baillieu and the Victorian Parliament in 2012 to the *"mothers, fathers, sons, and daughters, who were profoundly harmed by past adoption practices in Victoria".*

A **Redress Scheme** was also established by the Victorian government in 2024 to acknowledge the impact of forced adoption practices, and provide financial support (a one-off financial payment of $30,000) and counselling to the many mothers who relinquished their child and continue to live with the ongoing effects of their experience of forced separation.

It is clearly important that the ALRC consider the ramifications, consequences and undesirability of introducing/institutionalising laws and practices which have significant human, social and personal consequences … which if such laws and practices fail could, in future, potentially require a formal apology and/or redress scheme with respect to some of the consequences of the law and practices of ART.

(8) Allocation of Health Care Resources - In its report, ***Creating Children***, the FLC noted that "*both reproductive technology and technological conceptions are only made possible through the allocation of substantial resources by the community; and that these resources are paid for by the community through the funding of hospital facilities and equipment, hospital staff salaries and expertise, through the funding of research, the education and training of doctors and other professional staff, the provision of counselling services, and through medical benefit payments".*

The FLC Report went on to discuss the need for a national system of priorities in the allocation of very substantial resources to healthcare programs, recommending that:

"Criteria be established for ranking priorities for the allocation of healthcare funds, with particular consideration given to the fundamental question of allocating resources between treatment and prevention." (P. 99, 6.10.12)

The ALRC does not appear to have given consideration to these issues raised by the FLC report.

(9) Terminology - The use of terms such as "*surrogate*" or "*gestational carrier*" and "*gestational surrogacy*" … and not "*surrogate mother*", the descriptor used by the ALRC … has the effect of **dehumanising** the woman who acts as a surrogate mother by becoming pregnant, carrying a child in utero for 9 months and, immediately following the birth of her child, relinquishing her baby to the custody and care of an infertile couple/individual

It is noted that the ALRC Issues Paper avoids any use of the terms "*relinquish*" or "*relinquishment*" when describing/defining the act of the surrogate mother in "giving up" her baby into the care and custody of infertile couples/individuals. Yet the act of a woman in "giving up" or "relinquishing" her baby in adoption is the same as the act of a woman in "giving up" or "relinquishing" her baby under a surrogate mother agreement. It is the fact that it is a "woman who giving birth" who is central to both processes.

Nor does the ALRC Issues paper refer to the centrality of "*infertility*" in any discussion of the development of ART and SMA programs and services … as discussed in (3) above.

All the earlier reports into ART/SMA refer to "*surrogate mother arrangements*" (including Waller, Demack, FLC) to refer to the process by which a woman agrees to become a "*surrogate mother"* under an arrangement in which she "*relinquishes*" her baby after birth into the care and custody of an infertile couple/individual. The ALRC, on the other hand, refers to the terms "*surrogate*" and "*surrogacy*" to describe this process … which has the effect, as stated, of dehumanising the process and the woman who agrees to become a surrogate mother, as well as the child born of such an arrangement.

(10) Membership of advisory committees to government on key public policy issues

Reports of advisory bodies established by governments to advise on particular areas of legislation and/or practice are fundamental to the process of law reform.

This was particularly true with respect to adoption law reform in Victoria, touching as it did on complex issues of public policy … as is equally the case with ART and SMA. In 1978, the then Attorney-General with the Minister for Community Welfare established the Victorian Adoption Legislation Review Committee (VALRC). The membership of the VALRC included representatives of the 3 parties to the adoption process … natural/relinquishing mothers, adopted persons, and adoptive parents (as nominated by their respective organisations) … in addition to adoption agency workers, lawyers, and representatives of the departments of AG and DCW. Following extensive community consultation, the Report of the VALRC led to the successful introduction and unanimous passage by the Victorian Parliament of a ground-breaking new *Adoption Act* and new *Children (Guardianship and Custody) Act* in 1984, legislative reforms that led not only the rest of Australia, but internationally.

Central to the unanimous recommendations of the VALRC, and the unanimous passage of the legislation by Parliament, was the fact that all 3 parties to the adoption process were participants in the VALRC and throughout the reform process.

In light of the success of the representative and balanced membership of such advisory committees as the VALRC, it is unfortunate that this knowledge and experience is not reflected in appointments to membership of the ALRC Advisory Committee … which currently has no voice representing/reflecting the experience of thousands of Australian **women** who have relinquished a child at birth to an infertile couple/individual … or the experience of thousands of Australian **children**/adults who were relinquished at birth by their mother to another couple/individual … which reflects the experience of a child who is born, and relinquished by her/his mother as a consequence of a Surrogate Mother Arrangement. Nor is there a voice for the experience of thousands of donor-assisted children/adults who have lived experience of assisted reproductive technology/ART who could also bring important views to the table.

The work of the ALRC would benefit from a similar approach … which could be achieved by the nomination of individuals by organisations such as the Association Representing Mothers Separated by Adoption/ARMS, Mothers Adoption Loss Alliance, Victorian Adoption Network for Information and Self Help/VANISH, Adoptee Rights Australia/ARA, ORIGINS, Tangled Web who can bring their professional expertise as well as lived experience to the discussion of the key public policy issues raised by surrogate mother arrangements.

ALRC Issues Paper and Questions - In contrast … the focus of the issues in the ALRC Issues Paper, rather than addressing the issues/considerations abo, is directed at a series of 27 questions which effectively go to the process of the steps required to establish a surrogacy program, including:

- Barriers to surrogacy
- Validity and enforceability of surrogacy agreements
- Process requirements for surrogacy
- Limits on advertising
- Reimbursing and compensating surrogates
- Passports and visas

In conclusion, my comments are based on my extensive experience, both professional and personal, and as a member of advisory bodies to governments, both Federal and State, as outlined below. In particular, I draw on my experience in the public debate in respect of ART and surrogacy since the early 1980s, and the associated public policy issues, human rights principles, laws, and reports relating to the practice and law with respect to ART and surrogate mother arrangements.

My experience with respect to ART and SMA includes, in particular, being a Member of the Family Law Council (chaired by Justice John Fogarty, Family Court of Australia) and of the FLC Sub-Committee (chaired by Justice Austin Asche, Family Court, Melbourne) which unanimously adopted the Report, ***Creating Children - towards a uniform approach to the law and practice of reproductive technology in Australia*** (of which I was the author) and which was the first report to the Federal government on the laws and practice of ART and surrogacy in australia. I was also invited by the Infertility Treatment Authority/ITA of Victoria to present a paper at the ITA 2000 Seminar, **The Welfare and Interests of Persons born as a Result of Assisted Reproduction.** My paper, ***"Mummy: Grandpa's your Daddy ! Who's my Daddy"*** drew on the principles articulated in the UN Convention on the Rights of the Child (UNCROC) to identify and elaborate on the rights and interests of the children born as a result of ART.

Thank you for giving these matters your attention.

Kind regards

Tricia Harper AM

Member, Victorian Honour Roll of Women

Experience

Professional: Research Fellow, AIFS/Australian Institute of Family Studies; Director, Policy Development, Dept of Community Services Victoria; Director, Law & Justice, Dept of Premier & Cabinet

Tribunal: Member: VCAT, Refugee Review Tribunal, Social Security Appeals Tribunal, Mental Health Tribunal, Forensic Leave Panel, Child Protection Out-of-Home-Care Suitability Panel, Council of Australasian Tribunals: Victorian Chapter

Advisory: Family Law Council ; Victorian Adoption Legislation Review Committee/VALRC; Deputy Chair, Child Welfare Practice and Legislation Review of Victoria; Convenor, Women's Advisory Council to the Premier, Victoria; National Women's Consultative Council; Women's Advisory Body Working Party to the Prime Minister.

Community: Founding member, Council for the Single Mother and her Child (CSMC) Victoria; Founding member, National Council for the Single Mother and her Child (NCSMC); Board member, ACOSS; A/CEO VCOSS; Member, Standing Committee on Adoption & Alternative Families, Victoria.

ART: Member, Monash/Epworth/Queen Victoria Hospital *Committee on Psycho-Social Research in AID and IVF* (nominee of the Australian Institute of Family Studies); Infertility Society of Australia (ISA): member, inaugural AGM establishing the IFS in Sydney in 1982

Personal / lived experience: Single mother who made the decision not to relinquish her child for adoption (following the breakdown of an agreement with her sister & husband that they would "adopt" my baby, the arrangement being unilaterally "revoked" by them 6 weeks before birth … resulting in enormous damage to family relationships (parallels with SMA experience)

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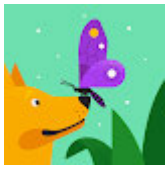
Patricia Harper

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