[SECURITY]

Australian Government
National Health and Medical Research Council

NHMRC

Associate Professor Ronli Sifris
Assistant Commissioner
Review of Surrogacy Laws
Australian Law Reform Commission
PO Box 209
Flinders Lane
Melbourne VIC 8009

Dear Associate Professor Sifris

Thank you for the opportunity to make a submission to the Australian Law Reform Commission review on surrogacy laws. On behalf of NHMRC, I am pleased to provide the attached submission.

Through the work of its Australian Health Ethics Committee, the National Health and Medical Research Council has a legislated responsibility to advise the community on ethical issues regarding human health and for developing Australia's guidelines on the ethical use of assisted reproductive technologies, including surrogacy.

The current ethical position on surrogacy is that whilst altruistic surrogacy (an arrangement where the surrogate receives no financial compensation or inducement, beyond the reimbursement of verifiable out-of-pocket expenses directly associated with the surrogacy procedure, pregnancy or birth) is acceptable, it is ethically unacceptable to allow commercial (or compensated) surrogacy where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy. Further information is contained in the submission enclosed.

NHMRC consents to its submission to this review being published in full.

Yours sincerely

approved electronically

Professor Steve Wesselingh
Chief Executive Officer

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Enc.

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National Health and Medical Research Council submission to the Australian Law Reform Commission Review of Surrogacy Laws

The National Health and Medical Research Council (NHMRC) is Australia's leading government agency for supporting health and medical research for the improvement of individual and population health. It does this by funding high quality research, supporting the translation of research into evidence-based practice and policy, providing guidance on responsible research practices and ethical issues and administration of legislation governing research using human embryos.

NHMRC engages closely with a range of stakeholders across the health system and community to ensure that health and medical research meets the needs of the Australian community. This includes governments, researchers, biotech industries and other business leaders, medical, nursing and allied health practitioners, Aboriginal and Torres Strait Islander health and research leaders, teaching and research institutions, health services, community health organisations, consumers and carers.

Through the work of its Australian Health Ethics Committee (AHEC), NHMRC has a legislated responsibility to advise the community on ethical issues regarding human health and for developing Australia's guidelines on the ethical use of assisted reproductive technologies (ART), including surrogacy.

The current ethical position on surrogacy is that it is ethically unacceptable to allow commercial surrogacy where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy.

Australian Health Ethics Committee

NHMRC has legislated responsibility under the *National Health and Medical Research Council Act 1992* (NHMRC Act) to inquire into, issue guidelines on, and advise the community on ethical issues relating to health. This important function is carried out through the specialised work of AHEC. AHEC is a valuable committee that facilitates the production of high-quality health ethics advice from the best health care and research professionals across Australia.

Members of AHEC are appointed by the Minister for Health and Ageing on the basis of their expertise and experience. AHEC's composition is specified in the NHMRC Act. Members draw on expertise in philosophy, the ethics of medical research, public health and social science research, clinical medical practice and nursing, disability, law, religion and health consumer issues.

The ethical advice provided by AHEC is developed in a robust manner. In the course of its activities, AHEC consults extensively with individuals, community organisations, health professionals and governments, and undertakes formal public consultation when developing guidelines. AHEC's advice is adopted across Australia and integrated into accepted processes.

AHEC's advice on the ethical use of surrogacy is published in the *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research (updated 2023).* Compliance with the guideline is a requirement for every ART clinic in Australia.

Australian ethical guidelines on surrogacy

The *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research* (ART Guidelines) were first issued by AHEC in 2004, and were most recently updated in 2023 to incorporate the 2022 legislative amendments to allow mitochondrial donation techniques in ART research, including clinical trials.

The ART Guidelines provide an overarching framework for the conduct of ART in both clinical practice and research and, when read in conjunction with Commonwealth and state or territory legislation, create a regulatory framework for the conduct of ART in Australia.

In Australia, all persons and bodies offering ART services must be accredited by the recognised accreditation body, the Fertility Society of Australia and New Zealand's Reproductive Technology Accreditation Committee (RTAC), or another body prescribed by the Research Involving Human Embryos Regulations 2017. The accreditation of ART clinics by RTAC requires clinics to comply with the ART Guidelines.

The ART Guidelines does not support compensated or commercial surrogacy, where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy. It is considered ethically unacceptable because it raises concerns about the commodification and exploitation of the surrogate, the commissioning parent(s) and any person born as a result of the surrogacy arrangement.

Clinics and clinicians in Australia must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers (ART Guidelines section 8.8). It is ethically unacceptable in Australia to provide, or offer to provide, direct or indirect inducements for surrogacy services.

The ART Guidelines provides a framework to support altruistic surrogacy by setting out requirements relating to consent, exchange of information and reasonable out-of-pocket expenses. For ART activities requested under a surrogacy arrangement in Australia, sections 8.8 to 8.12 of the ART Guidelines should be followed, unless there is a legal impediment to doing so. The guidance on surrogacy was published in the 2017 update of the ART Guidelines following extensive public consultation (refer to appendix 4 of the ART Guidelines).

The ART Guidelines defines 'altruistic surrogacy' as "an arrangement where the surrogate receives no financial compensation or inducement, beyond the reimbursement of verifiable out-of-pocket expenses directly associated with the surrogacy procedure, pregnancy or birth". The ART Guidelines support altruistic surrogacy, where clinics are responsible for ensuring that the surrogacy arrangement is ethically acceptable. While it is not the role of clinics to provide legal advice, clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal.

The ART Guidelines specify that it is reasonable for the commissioning parent(s) to reimburse a surrogate's verifiable out-of-pocket expenses directly associated with the procedure or pregnancy, which may include:

- medical and counselling costs, before, during, and after the pregnancy or birth
- travel and accommodation costs within Australia
- loss of earnings (surrogates who access paid leave during the pregnancy and birth cannot be reimbursed for loss of earnings. Loss of earnings can be demonstrated by the surrogate providing payslips verifying that unpaid leave was taken.)
- insurance
- childcare costs when needed to allow for attendance at appointments and procedures related to the surrogacy arrangement
- legal advice.

The ART Guidelines require that individuals and couples involved in an altruistic surrogacy arrangement undergo counselling. Section 8.10.2 sets out specific information that must be discussed in counselling for individuals and couples involved in a surrogacy arrangement. Partners and spouses of a potential surrogate are encouraged to be included in the discussions relating to the surrogacy arrangement.

The ART Guidelines state that there should be voluntary exchange of information between persons born via a surrogate, the surrogate and the commissioning parent(s), with the valid consent of all parties. At minimum, persons born via a surrogacy arrangement are entitled to know the details of their birth and to have the opportunity to determine the significance of their gestational connection with the surrogate.

General guiding principles in ART practice

Assisted reproduction raises significant issues for individuals, families and communities. It can be a controversial topic, with opinions influenced by a wide range of political, cultural, religious, ethical, scientific, professional and legal factors. Some may regard assisted reproduction as standard medical practice that should be available with minimal constraints, in the interest of scientific progress and out of respect for an individual's or a couple's reproductive choices.

Others, in contrast, may regard it as ethically problematic, raising a number of issues and dilemmas that challenge humanity's core values, putting the needs and wants of the intended parent(s) above those of the potential child. Some may regard ART to be a direct contradiction of their religious faith. For some, ART may raise questions about the extent to which medicine should 'interfere with nature' or the manner in which medical technology may empower or disempower individuals and the control they have over their own lives, bodies and reproductive futures.

Despite these varied views, ART has an established place in modern health care systems. For individuals or couples facing infertility, assisted reproduction may offer the best, or in some cases, the only option to conceive a much-wanted child. Consequently, those who require ART do not want to face unnecessary obstacles. Rather they desire care that optimises outcomes and minimises risks to both themselves and the child who may be born.

Guiding Principles for the ethical practice of ART in Australia are described in Chapter 2 of the ART Guidelines.

Further information

Further information about the ART Guidelines is available on NHMRC's website.