Plunkett Centre for Ethics

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The Director
Australian Law Reform Commission

Dear Director

Re Review of Surrogacy Laws in Australia

The Plunkett Centre, a research centre of Australian Catholic University, promotes the values of compassion and fellowship, intellectual and professional excellence, and fairness and justice, in healthcare and medical research. The Centre expresses this commitment through research, teaching and community engagement, as these are informed by the Catholic tradition. As a member of staff, I write in reply to the invitation to the public to make a contribution to the ALRC's Review of Surrogacy Laws

My submission addresses both (a) the general statement of the Attorney General's reference to the ALRC for a review of Australian surrogacy laws, policies and practices, and (b) the fourth specific issue the ALRC is asked to consider, that is, the information that should be available to children born from surrogacy arrangements, including what information should be included on a child's birth certificate in order to meet Australia's human rights obligations under the Convention on the Rights of the Child.

Re (a)

1 Given that the best interests of the child are to be 'paramount' and generally accepted as the most important consideration, I submit that 'protecting and promoting the best interests of the child' should be included in the reform principles (rather than relegated to a section on 'rights' where that notion is limited to rights as specified in law and in international instruments). Law and international instruments derive from prior ethically objective notions.

2 In this regard, Frank Brennan points out that the *'rights to a natural biological heritage and to knowledge of biological origins are natural rights of the human person in that <u>they are not dependent for philosophical cogency on the positive or common law of the state</u>. No matter what our jurisprudential disposition, we cannot postulate a just law that denies either of these rights. Each of these rights is constitutive of the human person's self-identity, which precedes citizenship and which cannot be denied by other citizens or the state, even in the interests of other citizens who seek the prerogative to bear children without these rights. The right to bear children does not include the right to bear children denied their natural rights of biological identity and knowledge*.'[1]

3 In 1996 the National Health and Medical Research Council (in the Ethical Guidelines on Assisted Reproductive Technology prepared by the Australian Health Ethics Committee) pointed out that*: Children born from the use of ART procedures are entitled to knowledge of their biological parents. Any person, and his or her spouse or partner, donating gametes and consenting to their use in an ART procedures where the intention is that a child may be born must… be informed that children may receive identifying information about them.* If this entitlement arises in the case of assisted reproductive technology, it also arises, *a fortiori,* in the case of surrogacy (whether 'altruistic' or 'commercial').

4 The inquiry should specify the content of the principle of respect for the best interests of the child. The term should not be used as though it is uncontroversial. In this regard, Margaret Somerville has argued that [children] have '*a right to a natural biological heritage – that is, a right to be conceived from the union of a natural sperm from a living, identified, adult man and a natural ovum from a living, identified, adult woman; a right to know what that heritage is; and unless an exception is justified in the best interests of the particular child, as in some cases of adoption, a right to be reared by their own biological parents within their wider biological family*.'[2]

5 Given Somerville's argument, it follows that all surrogacy arrangements are *inherent*ly unjust to the to-be-born child. This injustice should not be exacerbated by further liberalizing surrogacy arrangements in different Australian jurisdictions. The ALRC should not assume that law *should* provide (and then regulate) opportunities for Australians who are unable to give birth an opportunity to have a child.

6 As the ALRC would know, the law has an 'educative' effect. People commonly think that what is legal is ethical and what is illegal is unethical. For this reason, any law which prohibits Australians from entering into commercial surrogacy arrangements ought to be maintained, notwithstanding the fact that it is ignored by a minority. One can be confident that, if the law were changed to permit commercial arrangement, there would be many

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[1] Frank Brennan, *Acting on Conscience: How Can We Responsibly Mix Law, Religion And Politics?* University of Queensland, 2016, p 189 (emphasis added)

[2] Margaret Somerville, 'Talking ethics, doing ethics', pp. 68–98 in Jonathan Mills (ed.), *Ethically Challenged: Big questions for science,* Miegunyah Press, Melbourne, 2007, p. 78

more children subject to this form of injustice (and many more poor women subject to this form of exploitation).

7 The ALRC should resist any pressure to further liberalize relevant laws under the guise of the desirability of 'uniform Australian legislation'. Uniformity is *a* value, but it should not come at the expense of further injustice as is entailed in any proposal to legalize commercial arrangements, whether that is in specific circumstances only or more generally. Indeed, it is reasonable to assume that once legalized, commercial surrogacy arrangements will be progressively widened, on the grounds that permitting them in some but not all circumstances is arbitrary.

8 The ALRC should take seriously a growing trend around the world to recognize that surrogacy arrangements are unjust not only to the to-be-born child (for the reasons given above) but also to the surrogate mother (who typically is exploited by citizens of relatively affluent countries). The ALRC should recognize that commercial surrogacy represents the exploitation of socially and economically vulnerable women by socially and economically affluent women and men. One does not need to endorse a radical feminist approach to see the wrongness of this exploitation of some women by men and indeed by other women.[3] Nor does one need to focus only on the worst forms of this exploitation.[4] The practice itself is exploitative. [5]

Re (b)

9 If, however, surrogacy arrangements are to continue to be legal in some circumstances, that ALRC should ensure that adults, including commissioning adults, their partners, the surrogate mother, etc are not taken to be the only parties to a surrogacy arrangement. Children born of surrogacy arrangements, and children to-be-born of surrogacy arrangements should be acknowledged and treated as parties to any legal arrangement The desires of the commissioning adults, understandable as they are, ought not to be treated as taking priority over the interests and moral rights of the to-be-born child.

10 The ALRC should ensure that the biological (and, if different, gestational) origins of a child born of a surrogacy arrangement are always accessible by that child (during childhood and into adulthood), and arrangements to secure this entitlement of the child/adult should take priority over arrangements justified in the name of promoting consistency between State and Commonwealth parentage laws.

11 The ALRC should ensure that access to a truthful account of the child's biological origins is not made impossible in any arrangement aimed at ensuring that 'intended parents' have the certainty of parentage that is necessary for them to act as parents (eg to authorize medical treatments and inheritance, etc), and that this entitlement to truth about the

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[3] See Janice Raymond. *Women as Wombs*, Spinifex Press, 1995

[4] Horsey, Kathy . The future of surrogacy: a review of current global trends and national landscapes. *RBMO*, vol 48, issue 5, 2024

[5] 'The inside of a woman is being used as a workplace.' Julie Bindel, as quoted in *The Economist*. What's driving the baby-business boom? 21 September 2023

biological (and if different gestational) origin of the child/adult should take priority over any other arrangement (however that arrangement is justified, eg promoting consistency between State and Commonwealth parentage laws). Once again, it is apposite to recall the NHMRC's ethical standard, that children *born from the use of any assisted reproductive procedure are entitled to knowledge of their biological parents.*

Yours sincerely

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