Dr Penny Zagarelou-Mackieson

02 December 2025

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

To the Australian Law Reform Commission,

Response to *Discussion Paper: Review of Surrogacy Laws*
(Discussion Paper 89, November 2025)

I write in response to the *Discussion Paper* relating to your current *Review of Australian Surrogacy Laws, Policies and Practices*.

Frankly, I am appalled by the ALRC's evident enthusiasm to legalise commercial surrogacy and expand the large and growing donor-assisted reproductive technology (ART) industry in Australia – key components of the global markets in babies, human gametes, and women's reproductive capacity.

I am compelled by principle to advocate for the human rights of individuals born through surrogacy, and to support advocacy for the human rights of their biological mothers.

This submission discusses some key issues and indicates my responses to various proposals made in the *Discussion Paper*. (My earlier submission (#48) provides details of my relevant expertise and experience.) The views expressed in this submission are my own, and I do not seek to represent the views of any other person or organisation with whom I am or have ever been associated.

I consent to this submission being treated as a public document.

My Main Message

Above: Newborn babies at the Queen Victoria Hospital, Melbourne – Awaiting adoption?
(Source: Monash Health Historical Archives Collection, Circa 1960s)

A nurse cares for newborn babies at Kiev's Venice hotel on May 15, 2020 while their foreign parents cannot collect them due to border closures imposed during the pandemic. SERGEI SUPINSKY/AFP via Getty Images

Above: Sourced from Babies Born Via Surrogate in Ukraine Await Parents Amid Virus Lockdown - Business Insider

First, I seek to clarify the main message of my earlier submission in response to your *Issues Paper*. The *Discussion Paper* refers to my earlier submission in Footnote 16 (p. 9), which immediately follows: "Some have compared surrogacy to 'forced adoption', as they view surrogacy as forcing a child's natural parent to give their child away.[16]" While true, that statement does not accurately portray my perspective. As stated in my earlier submission, my focus is primarily:

> *on the human rights and best interests of the most vulnerable and powerless persons affected by surrogacy – the children born through surrogacy arrangements. Surrogacy-born children cannot provide their consent to a surrogacy arrangement, yet they will be the most impacted by such an arrangement throughout their entire lives.* (p. 3)

The parallel that I draw between surrogacy and forced adoption is thus from the perspective of the newborn infant, rather than from the perspective of the natural mother:

> *For a baby, surrogacy is akin to past mother-infant separation practices in the context of forced adoption… Early mother-infant separation is always forced on the baby and, especially when permanent, has a significant – although often unrecognised – developmental impact.* (p. 8)

This parallel is depicted visually through the two photos (above) of hospital nursery wards – the first taken in Melbourne circa 1960s, the other in Ukraine in 2020.

Like parcels in post office pigeon holes …

The photos (above) depict forlorn scenes of numerous newborns arranged impersonally in identical cribs, awaiting collection by their intended socio-legal parents. These photos reflect an unsettling pattern repeated across borders and eras – a relentless reproductive industry that separates newborn babies from their biological mothers and legally severs the babies from their natural parentage.

Issue 1: Language/Terminology

Airbrushing contentious concepts and topics through use of deceptive language can make them sound more palatable than they really are. Many such terms are used in the context of surrogacy – such as 'surrogacy arrangement' in place of 'surrogacy contract'. However, weasel words cannot change facts. For example:

Woman

The *Discussion Paper* states that "Surrogacy is the practice of a person carrying and giving birth to a child for another person or people." (p. 1) In reality, surrogacy is the practice of *a genetic/biological woman* carrying and giving birth to a child for another person or persons. Genetic/biological men do not have a uterus, so cannot (naturally) become pregnant. Use of the word "person" in this context is thus not only inaccurate, but also serves to degrade genetic/biological women.

Parentage

Surrogacy separates genetic and biological parentage and legal parenthood, restructuring the natural genealogical order and requiring different terms to indicate the various roles of a child's parents. Relevant roles include surrogate (i.e. biological) mother, gamete donor(s)/embryo donors (i.e. genetic mother and genetic father), legally presumed parent, intending parent, and legal/socio-legal parent. Several of these terms also apply to, and are commonly used in, the contexts of (plenary) adoption and gamete donation.

However, without reference to the source, the *Discussion Paper* introduces another term for intending parents: 'functional parents'.

Functional parent: Dictionary definitions of 'functional parent' refer to an adult who ***either*** provides a secure, stable and supportive environment for their child by being responsible, consistent and respectful; ***or*** performs the day-to-day parenting role regardless of biology or law (i.e. social parent).

Using the first definition of 'functional parent' (in the box above) to refer to an intending legal parent is disrespectful and derogatory to the other parents who contribute to the conception, carriage and birth of a child through surrogacy. Meanwhile, there is already a term for the second definition (above) – namely, 'social parent'. As far as I know, the term 'functional parent' is not used in surrogacy legislation anywhere in the world. For these reasons, I strongly object to use of the term in the surrogacy context in Australia. In the interests of accuracy, consistency, and avoiding unnecessary disrespect, those shaping Australian surrogacy legislation should not be permitted free rein to invent new terms, or to appropriate them from unknown/questionable sources. Terminology and language around parental roles in the context of surrogacy policy, law and practice should be consistent with that used in relation to children, families, and other third-party means of having children. Therefore:

I am opposed to part 5 of Proposal 1 – unless surrogacy legislation uses terminology consistent with that used in other relevant legislation concerning children, families, and reproduction.

Parentage Order: Commonly used in surrogacy contexts across Australia, a Parentage Order effects a significant 'fiction of law', as do other legal parentage mechanisms – e.g. a plenary Adoption Order. A Parentage Order and an Adoption Order each transfer legal responsibility for the *parenting* of a child. They both also legally lie about the child's origins – by replacing the identifying details of the child's genetic/biological *parentage* on their official birth certificate with those of their socio-legal parents, as if the child were naturally born to their socio-legal parents.

Commercial surrogacy

The *Discussion Paper* rationalises a preference to refer generically to 'surrogacy' rather than to differentiate between the forms widely known as 'altruistic' and 'commercial', ostensibly because this categorisation is 'a fiction of law'. (p. 10) However, referring only to 'surrogacy' is misleading – it blurs and obfuscates the valid distinction between commercial and non-commercial surrogacy practices in the same way that the valid distinction between *parentage* (the identities of one's natural parents) and *parenting* (the responsibilities and arrangements conferred on an adult for raising a child) is blurred through use of Parentage Orders.

Referring generically to 'surrogacy' is like referring generically to 'adoption', rather than specifically to 'plenary/full adoption' (used in Australia) and 'simple adoption' (used in several other countries).

In any event, not referring to surrogacy practices as commercial (where applicable) does not mean that those practices are not, in fact, commercial in nature. Regardless of the country or era, "commercialisation commodifies human reproduction and can lead to exploitation." (*Discussion Paper*, p. 26) The Australian Government should not tolerate commercial surrogacy for the same reasons that it does not tolerate human trafficking or slavery. Businesses are held accountable for identifying and addressing modern slavery risks in their supply chains and operations. Likewise, individuals and couples seeking to have a child through third-party means should be held accountable for engaging in and fuelling commercial surrogacy practices, given that the Australian Government is well aware of the shonky practices that commonly accompany the commercial surrogacy industry. Consistent with current policy, Australians should not be permitted to engage in commercial surrogacy practices – either in Australia or overseas, and whether or not they register their intention to do so with an Australian 'regulator' beforehand. This ban should be extended across all Australian states and territories; supported by a civil and criminal penalty regime; and such regime should be consistently enforced. For these reasons:

I am opposed to Proposals 8–9, and Proposals 37–41.

Issue 2: Siloed Approach to Surrogacy

The *Discussion Paper* rationalises the decision to consider surrogacy "through its own lens", rather than to consider it in the context of relevant issues and lessons from gamete donation and (plenary) adoption. (p. 10) However, as stated in my earlier submission, surrogacy, donor-ART and adoption are all third-party means to have children. As such, they have many significant aspects in common.

National regulation

It is vital that parallel issues and relevant lessons from plenary adoption, donor-ART and surrogacy be considered in deliberations about any particular one of them – especially in light of the 2013 National Apology to people affected by past forced infant-mother separation practices for the purpose of adoption to ensure that past mistakes are not repeated. It is also essential that oversight of third-party means to have children be integrated and coordinated. Considering them in isolation from each other increases – rather than decreases – the risk of problems for surrogacy-born children.

The risks include a propensity for fragmented and contradictory laws, and unequal treatment of children. A deliberately siloed approach to surrogacy also suggests wilful overlooking of how restrictions in one context push demand into another, creating new vulnerabilities for and exploitation of women of reproductive age, children, and gamete and embryo donors.

Regulation of all third-party means to have children – including donor-ART methods, surrogacy and adoption – should come under the same national body. The *Discussion Paper* acknowledges that the creation of a new national regulator exclusively for surrogacy is not the most *efficient* strategy. (p. 19) More importantly, nor is an exclusive surrogacy regulator the most *effective* strategy, as it would work against development of deep expertise, and consistency in standard setting and ensuring compliance with those standards. For these reasons, in line with recommendation 4 of my earlier submission:

Regarding **Proposal 1: I am opposed to part 2** – unless national regulation of surrogacy is fully integrated with national regulation of donor-ART and adoption.

I otherwise support parts 1.a, and Option 1.1 of part 4.

Regardless of the specific form that national surrogacy regulation may take, such a body should not be responsible for standard setting, oversight of surrogacy agreements and enforcing compliance on the one hand, and for community awareness and information provision on the other. These two sets of roles obviously conflict with each other – a body responsible for enforcing compliance with the standards set for surrogacy cannot also be tasked with promoting engagement in surrogacy practices, even if administered under separate units/line management. A fundamental principle of governance is that a regulator cannot be seen to act as a propaganda machine. Regulatory legitimacy and trust are founded on impartiality, transparency, and evidence-based decision-making. A regulator would not be perceived as neutral if its messaging focused on persuasion (i.e. propaganda) – such as selectively emphasising the benefits of surrogacy to intending parents, minimising the risks involved in surrogacy, or framing opposition to surrogacy as illegitimate – rather than on objective facts. Such promotion would blur the line between *informing* the public (which regulators are required to do) and *persuading or manipulating the public* (which erodes legitimacy). For example, this was a fundamental problem with the Victorian Assisted Reproductive Treatment Authority (VARTA) established in 2008. VARTA's involvement in fertility education and support and donor conception services quickly became its major focus, rather than ensuring regulatory compliance by ART providers or promoting the best interests of donor-conceived persons. A restructure of health regulation functions in Victoria eventually saw VARTA cease operations at the end of 2024, and its functions transferred to the Department of Health Regulator and the Donor Conception Registrar. For these reasons:

I am opposed to Proposal 2 and Proposal 7.

Relatedly, advertising in relation to surrogacy should not be permitted under any circumstances – for the same reasons that advertising is not permitted in Australia in relation to adoption. Advertising children for adoption or for seeking adoptive parents is explicitly banned on all media. The reasons for this prohibition are that it helps to prevent exploitation, trafficking, and commodification of children; ensures that adoption is managed through regulated, transparent systems; and protects birth parents and prospective adoptive parents from coercion, fraud, or undue influence. Accredited agencies are permitted to provide general educational material about adoption laws and procedures, but they are not permitted to solicit specific adoption arrangements. A similar advertising ban should be applied to surrogacy. For these reasons:

I am opposed to Proposal 11.

Private agency/intermediary involvement

I reiterate – irrespective of the ALRC's preference for an exclusive focus on surrogacy – that relevant lessons from other third-party means of having children must be considered in relation to surrogacy. Another of these lessons, as discussed in my earlier submission, is that private adoptions – meaning adoptions arranged directly between natural parents and adoptive parents, or facilitated by private lawyers or other intermediaries outside an authorised not-for-profit adoption agency – have been prohibited across Australia since the mid-1960s. That ban was introduced for very good reasons – primarily because parties involved in private adoptions are inherently vulnerable to exploitation (and, in the past, people were exploited), especially through the coercion of natural mothers into 'consenting' to relinquishment of their children; and because it is morally wrong for intermediaries to profit financially from this vulnerability.

Likewise, parties involved in private surrogacy arrangements are also inherently vulnerable to exploitation. The *Discussion Paper* acknowledges this: "It is clear that those who facilitate or stand to profit from facilitating surrogacy arrangements may engage in exploitative conduct, particularly where there is a power imbalance with those seeking to enter into surrogacy arrangements." (p.31)

As such, the blatant attempt to establish a new commercial intermediary industry – through the proposal to introduce private Surrogacy Support Organisations (SSOs) – in the already contentious surrogacy context is deeply troubling. It is another conflict of interest evident in this Review. Under no circumstances should this naked grab for power and profit be permitted.

I am opposed to <u>Proposal 3</u>
– and any other proposals that assume a role for SSOs.

Issue 3: The Human Rights of the Child

The *Discussion Paper* rightly talks about human rights of the individuals involved in surrogacy arrangements. It states, "When regulating surrogacy, it is important to consider the rights of people born through surrogacy, surrogates, intended parents, and parents through surrogacy — with the best interests of the child being a primary consideration." In effect, however, individuals born through surrogacy arrangements are treated by surrogacy law as *objects*. This is because surrogacy is transactional in nature, with the degree and form of transaction depending on whether the surrogacy arrangement is a commercial one or an altruistic one.

Human rights are considered to be **universal**, inalienable and indivisible. **Inalienable** means that human rights cannot be taken away, given up, or transferred. So, even if a government ignores a human right, or introduces a law that violates a human right, the right still exists. **Indivisible** means that human rights are interconnected, are equally important, and cannot be separated or ranked – in effect, neglecting or violating one human right undermines the others. Together, this means that governments cannot pick and choose which rights to uphold – they must respect them in full, not selectively.

A baby born through a surrogacy arrangement is not – indeed, *cannot* – be a *party* to it, but is instead the *object* of the arrangement. In law, the baby is treated as an *object* – effectively, as *property* (as in the contexts of property law and contract law) – to be transferred from the surrogate (biological) mother to the intending parents.

The *United Nations Convention on the Rights of the Child 1989 (UNCRC)* focuses attention on the human rights particularly relevant to children. The Australian Government ratified the *UNCRC* in 1990 but has not incorporated it into any specific laws since, and translation of the *UNCRC* into relevant state and territory laws has been highly inconsistent and incomplete. This reflects the relatively low priority that is, in practice, placed on children's rights in Australia.

The articles of the *UNCRC* with which I am most concerned are those that directly address birth registration; and preservation, and restoration where necessary, of a child's natural/original identity:

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. (Article 7, Part 1)

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. (Article 8, Part 1)

Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re- establishing speedily his or her identity. (Article 8, Part 2)

These articles refer to natural – meaning genetic and/or biological – parents and identity. "The motives behind the inclusion of [these rights] into the text of the CRC indicate that the basic aim was to protect the natural, biological origin."[1] However, surrogacy law separates a baby's genetic, biological and social origins to facilitate the physical separation of newborn babies from their surrogate mothers – that is, from their biological/legally presumed mothers. The *Discussion Paper* indicates dissatisfaction with the *status quo* whereby the biological mother is the legally presumed mother in a surrogacy arrangement – even though law has for centuries and across jurisdictions presumed that the woman who gives birth is the legal mother of the child at birth.

The *Discussion Paper* proposes an administrative pathway for intending parents in surrogacy arrangements to be recognised as the child's legal parents at birth (i.e. at the point of birth registration). That proposal is primarily aimed at simplifying and expediting acquisition of legal parentage for intending parents. While the *Discussion Paper* also argues that such a process would help uphold the child's "right to identity", it refers to the child's socio-legal identity, not their genetic/biological identity. In reality, an administrative pathway to legal parentage would remove judicial scrutiny of a surrogacy arrangement, and allow intending parents to more easily pretend that the child was naturally born to them – in the same way that the cancellation and re-issue of a child's original birth certificate in a plenary adoption enables adoptive parents to pretend that the adopted child was naturally born to them. I emphatically reject the argument that an administrative pathway to legal parentage could better uphold the rights of the child to their natural identity in the surrogacy context. Indeed, such a process would only serve to minimise and further subordinate the importance of the child's genetic and biological origins and relationships. For these reasons:

I am strongly opposed to Proposal 5, and Proposal 30.

Relatedly, **I am opposed to Proposal 31, and Proposal 32.**

[1] Stanić, G. (2022). 'The child's right to know their biological origin in comparative European law: Consequences for parentage law', in *Global Reflections on Children's Rights and the Law* (2022). Marrus, E., and Laufer-Ukeles, P. (Eds)., Routledge, p. 199.

Despite the *Discussion Paper*'s stated preference to consider surrogacy "through its own lens", it proposes to largely replicate "existing systems relating to donor-conceived people" in regard to the collection of, and access to, information about a surrogate mother's details. There is some merit in such replication – including promoting consistency across third-party means to have children.

However, there are also some significant problems with adopting the system user in donor-conception because it is flawed. First, the information collected about surrogacy-related births (outlined in Proposal 33, part 1) should include not only the surrogate's identifying details, but also the identifying details of the child's gamete donors. Second, while the information so collected should be maintained in an appropriate Register (outlined in Proposal 33, part 2), it is not sufficient for the existence of this information to be denoted on the child's birth certificate by an "an addendum — stating that additional information is available and may be obtained via the … surrogacy register". Such a measure – intended to indirectly enable a surrogacy-born individual to access information about their origins when they become an adult – does not meet the standard required by the relevant articles of the *UNCRC* (quoted in the blue box on the previous page) in relation to upholding the child's ***right to know … his or her* [natural] *parents***. Surrogacy *per se* also generally violates the child's right to ***be cared for by his or her* [natural] *parents*.** (Article 7, Part 1)

Children (i.e. individuals under 18 years of age) have a right to know – and, at an absolute minimum, to know about – ***their natural parents*** from their earliest years. Obscuring and/or delaying a child's access to such vital information about ***their own origins*** is detrimental to their identity development; risky to their health and relationships in a range of other ways; and unjustifiable in light of the *UNCRC*. From the perspective of a child, there is no compelling reason to legally deprive them of information regarding some/all elements of their natural origins or, indeed, to mislead them about their natural origins. Identifying information about all the parents with a role in a child's birth should be mandatorily collected, supported where relevant through DNA verification (and enforced through civil and criminal penalties); and this information should be clearly recorded on any and every official birth certificate issued upon/after registration of the child's birth. Such measures would ensure that all children are treated equally in relation to their origins information and birth certificates – regardless of the circumstances of their conception, birth, or socio-legal parent(s). For these reasons:

In principle, **I support part 1 of Proposal 33, and part 1 of Proposal 34** – although they do not go far enough because gamete donors' identifying details should also be recorded (and DNA verified).

I also support Proposal 35.1, part 1 of Proposal 36, and Proposals 36.1 *and* 36.2.

However, I do not support part 2 of Proposal 33, or part 2 of Proposal 35.

Concluding Comments

The list of proposals in the *Discussion Paper* reads like the talking points of commercial surrogacy advocates. This serves to highlight the profound conflicts of interest involved in this Review (as noted in relation to the membership of the Advisory Committee in my previous submission), and to highlight that the primary focus of the Review is not to pursue the human rights and best interests of children.

Meanwhile, in reality, surrogacy is an inherently morally contentious means to have a child, and facilitating would-be parents to engage in surrogacy – particularly commercial surrogacy, whether domestically or overseas – is tantamount to aiding and abetting the commodification and exploitation of children, human gametes, and women's reproductive capacity.

I have endeavoured to make clear in this submission that I am strongly opposed to any and all proposals that seek to: legalise commercial surrogacy practices; establish a new commercial intermediary industry in the surrogacy context; or facilitate a 'soft landing' for intending parents who intentionally violate existing surrogacy laws.

From the perspective of a baby born through surrogacy, their human rights are violated the moment they are conceived – having been expressly bred for the purpose of immediate and permanent separation from their biological mother to be raised by another adult/other adults, who are often genetic strangers.

To mitigate the risks and challenges faced by a surrogacy-born individual in the future, a foundational measure to support their right to know, or at the very least to know about, all the parents involved in their conception and birth is to record the identifying details of all those parents and include them on the child's birth certificate from the time of birth registration.

I reiterate that surrogacy has numerous parallels with other third-party means of having children, and that there are many relevant lessons to be learned from plenary adoption and donor conception – both positive and negative. These lessons should be addressed together, in an integrated and coordinated manner, rather than in isolation from each other. For these reasons, I reiterate the key asks outlined in my earlier submission.

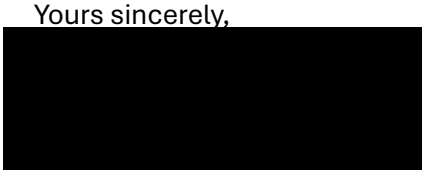
Recommendations

I strongly recommend that the Australian Government:

1. **Introduce a nationally consistent birth certificate** – which:
    - accurately records and preserves the facts of the person's genetic and biological origins;
    - incorporates biometric authentication with DNA; and
    - is included on any and all birth certificates issued for the individual concerned from the time their birth is registered.

2. **Ensure full integration of the human rights of the child (as outlined in the *UNCRC*) into law, policy and practice** – across all areas of law concerning children and families and across all Australian jurisdictions, genuinely enshrining prioritisation of the human rights and best interests of the child as *the paramount consideration*.
3. **Retain judicial responsibility for all transfers of parenting arrangements for a child** – including in the context of a surrogacy arrangement.
4. **Consider issues relating to any particular third-party means of having children together with all the other third-party means of having children.**
5. **Specifically in relation to surrogacy:**
    - Extend the existing state/territory bans to a nationwide ban on accessing commercial surrogacy, applicable both domestically and overseas; and
    - Enforce the civil and criminal penalties associated with this ban.

Yours sincerely,



Dr Penny Zagarelou-Mackieson