THE UNIVERSITY OF MELBOURNE

Submission to the Australian Law Reform Commission

Response to invitation for submissions to the Review of Surrogacy Laws

To: Australian Law Reform Commission

By: Peter McMullin Centre on Statelessness

Date: 10.07.2025

Dear Secretary,

Discussion Paper 89 Review of Surrogacy Laws

Thank you for the opportunity to provide this submission in response to the discussion paper on the review of surrogacy laws.

The Peter McMullin Centre on Statelessness (PMCS) is an expert centre at the University of Melbourne's Law School that undertakes research, teaching, and public policy engagement and outreach activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific, and as appropriate more broadly.

This submission responds to four key questions posed by the Australian Law Reform Commission (ALRC) in the Issues Paper – Review of Surrogacy Laws:

- Question S
- Question U
- Question V
- Question W

1. Background

Australia has been party to both the 1954 Convention relating to the Status of Stateless Persons ('1954 Statelessness Convention') and the 1961 Convention on the Reduction of Statelessness ('1961 Statelessness Convention') since 1973.[1] These are the key international treaties to protect stateless people and to prevent and reduce statelessness. The term 'stateless' is defined in Article 1(1) of the 1954 Convention as a person 'who is not considered as a national by any State under the operation of its law.' There is an implied obligation that States must identify stateless persons in their jurisdiction through a statelessness determination procedure (SDP).

[1] Convention Relating to the Status of Stateless Persons, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1950) article 1 ('1954 Statelessness Convention'); Convention on the Reduction of Statelessness, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

Peter McMullin Centre on Statelessness
MELBOURNE LAW SCHOOL
The University of Melbourne | Victoria 3010 | Australia
Phone: +61 3 9035 6720 | Email: law-statelessness@unimelb.edu.au

2. Response to key questions posed by the ALRC in Discussions Paper 89

Question S

In relation to the registration process in Proposal 37:

- *which entity should be responsible? For example, the National Regulator (or alternative) (see Proposal 2); a Surrogacy Support Organisation (see Proposal 3); or a different government department or entity?*
- *what factors should the registration entity consider, when determining which destinations should be 'permitted destinations'? For example, should these be destinations with laws that require the surrogate's informed consent, or transparent gamete donation?*
- *do you think the registration process would work in practice? Are there any changes you would suggest to improve how it works and its effectiveness?*
- *should intended parents be required to demonstrate, as a precondition to registration, that they have made reasonable efforts to engage in domestic surrogacy before they can engage in a registered overseas surrogacy arrangement?*

A process of pre-registration of intended international surrogacy arrangement as proposed by the ALRC in Discussion Paper as outlined in Proposal 37 may further reduce the risk of children being rendered stateless. A pre-registration process may provide a dual purpose of ensuring that the Department of Home Affairs can adequately process applications from citizenship by descent and to reduce the risk of children being abandoned by parents due to either unexpected medical conditions arising or the breakdown of relationships. However, any pre-registration process must not impose too high of an additional administrative burden on intended parents. Doing so would limit the applicability of such a process in practice and reduce the likelihood of prospective parents utilising such a procedure. We support the framing in Proposal 37 that failure to undertake pre-registration will not hinder or bar the recognition of citizenship by descent. This inclusion is critical to ensure that a pre-registration process protects children from statelessness rather than adding an administrative barrier that enhances their vulnerability to being rendered stateless.

Question U

Could limiting access to this streamlined process to registered overseas surrogacy arrangements have any unintended consequences?

There is a minimal risk that prioritizing access to the streamlined process of citizenship applications for children born through registered surrogacy arrangements could delay applications for those born through unregistered arrangements, due to resource diversion. Additionally, a grant of citizenship by descent under s 16(2) of the *Australian Citizenship Act 2007* (Cth) is never automatic and requires Ministerial approval. Therefore, there is also a risk that children born through unregistered arrangements, seeking to acquire citizenship through regular channels, may face increased scrutiny from the Minister, potentially resulting in their applications being delayed.

Question V

Should citizenship by descent also be recognised for children born through overseas surrogacy to Australian Permanent Residents?

Yes, broadening the grant of citizenship by descent to children born to Permanent Residents via international surrogacy arrangements may reduce the risk of both intergenerational statelessness and the creation of new cases of statelessness.

Question W

Should there be a retrospective process for children who are stateless, who have been born through overseas surrogacy to intended parents who are Australian citizens or permanent residents, to obtain Australian citizenship? If so, how would this work?

Yes. A simplified nationality verification procedure should be enacted to retrospectively recognise these children as citizens by descent. However, current administrative processes for recognition of citizenship by descent are onerous and place high administrative burdens on intended parents and should not be replicated for retrospective applications. Several policy instruments guide the Department's decision making.[2] However, they are not publicly available. Instead, the Department of Home Affairs provides guidance via their website as to the processes required to be followed by parents in support of an application for citizenship by descent for a child born through surrogacy arrangements. While the information provided by the Department of Home Affairs is detailed, following principles of transparency and clarity, we propose the ALRC recommends that the Department: (1) simplifies the process for both prospective and (potential) retrospective applications for citizenship by descent, and (2) makes public and accessible any policy instrument that will guide their decision making.

The right to a nationality is a fundamental human right, meaning everyone is entitled to a nationality, and no one should be arbitrarily deprived of their nationality or denied the right to change it. This right is recognized in the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child* ('CRC') and the *International Covenant on Civil and Political Rights* ('ICCPR').[3] Article 24 of the ICCPR stipulates that every child shall be registered immediately after birth and shall have a name and that every child has the right to acquire a nationality. Article 7 of the CRC provides that children should be registered immediately after birth and have the right from birth to, inter alia, acquire a nationality, and that States parties should ensure the implementation of these rights in accordance with national law and international obligations, in particular where the child would otherwise be stateless.

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[2] The Department of Home Affairs, 'Australian Citizenship: Policy Statement' (8 October 2020) <https://www.homeaffairs.gov.au/foi/files/2022/fa-220100994-document-released.PDF>; specifically lists CPI 21 - Australian Citizenship by Descent - VM-5297 and CPI 23 - Determining Parent-Child Relationship for the Purposes of the Citizenship Act - VM-5299 as relevant documents, both of which have been referred to be relevant courts and tribunals in their decision making.

[3] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) article 15 ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 14668 (entered into force 23 March 1976) article 24 ('ICCPR'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 7 ('CRC').

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While we support the implementation of a Statelessness Determination Procedure within Australia, such a procedure is not appropriate for children born to Australian citizen or Permanent Resident parents. Where children are born to Australian citizen or permanent resident parents through surrogacy arrangements, they are entitled to citizenship by descent under s 16(2) of the *Australian Citizenship Act 2007* (Cth) and their statelessness has likely arisen due to non-compliance with administrative procedure or administrative error. By contrast, Statelessness Determination Procedures are recommended for persons in migratory setting without established links to Australia. As such, children born through surrogacy arrangements, who have strong established links with Australia, should be entitled to citizenship and the process of verification of this status should occur retrospectively. Notably, Article 34 of the 1954 Statelessness Convention directs States to facilitate the assimilation and naturalization of stateless persons, while making every effort to expedite naturalization proceedings and to reduce as far as possible the administrative costs of such proceedings.[4]

3. Conclusion

In summary, PMCS provides the following recommendations to the ALRC in response to some of the questions raised in Discussion Paper 89 on the Review of Surrogacy Laws:

- Ensuring that the pre-registration process of intended international surrogacy arrangement, as outlined in Proposal 37, does not impose too high of an additional administrative burden on intended parents and that failure to undertake the pre-registration process will not hinder the recognition of citizenship by descent.

- Broadening the grant of citizenship by descent to children born to Permanent Residents via international surrogacy arrangements to reduce the risk of intergenerational statelessness as well as the creation of new cases of statelessness.

- Enacting a simplified nationality verification procedure to retrospectively recognise as citizens by descent those children who are stateless, who have been born through overseas surrogacy to intended parents who are Australian citizens or permanent residents. Additionally, any policy instruments that guide this decision making should be made publicly available and accessible.

[4] 1954 Statelessness Convention, article 32.

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