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Growing Families Global Pty Ltd
ABN 43668 356 992

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The Hon. Justice Mark Moshinsky

Australian Law Reform Commission

15 December 2025

Dear Commissioner

Submission for the ALRC surrogacy review

This is my submission to the surrogacy review.

I have provided expert feedback based on the experience I have had in working over the last 15 years with consumers, professionals and surrogacy frameworks in the UK, Australia, New Zealand, Ireland, Africa, India, Thailand, North, South and Central America.

It is made on the basis that my identity is disclosed and the contents published.

Establishing a National Regulator

Question A

What are important design principles or safeguards for any regulatory body to have?

Any regulatory body needs to be independent of the commercial IVF sector to avoid conflict of interest.

Such a body would need to be appropriately funded to ensure it can employ staff with sufficient knowledge and qualifications.

It would require appropriate safeguards to ensure confidentiality of the information it stores and assesses

Such a body needs to have staff with detailed knowledge of how surrogacy operates in practice here in Australia, as well as in a range of international jurisdictions. Such staff need to be familiar with the potential risks inherent in a range of domestic and international arrangements

It should rely on evidence-based practice in making decisions

Have a transparent reporting structure which can provide clear rationales for its decision-making.

Permitting and regulating Surrogacy Support Organisations

Proposal 3

Legislation should enable Surrogacy Support Organisations ('**SSOs**') to be established to provide the following supports and safeguards for intended parents and surrogates:

1. facilitating introductions, or 'matching', of intended parents and surrogates who meet the requirements (**Proposals 13–16**);
2. determining requests to waive residency and citizenship requirements (**Proposal 15**);
3. providing or coordinating the counselling and other services that need to be engaged with to meet the requirements (**Proposals 17–21**);
4. assessing and approving surrogacy agreements that are compliant with legislative requirements (**Proposals 4** and **5**);
5. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;
6. facilitating conflict resolution between intended parents and surrogates; and
7. holding funds provided by intended parents in a trust account and managing disbursement of trust account funds to surrogates (**Proposal 27**).

Question B

How can we minimise overlap in functions with other organisations, such as assisted reproductive technology service providers?

In relation to 1 above, no other organization types are currently mandated to perform this.

In relation to 2 above, is it not appropriate for SSOs to make determinations to waive residency and citizenship requirements. If this responsibility fell to SSOs there is a risk that foreign intended parents would enter the Australian landscape, as has occurred in Canada to detrimental effect. The Regulator should be tasked with reviewing such exceptions.

In relation to 3, 5 & 7 above, Surrogacy Australia's Support Service (which would be replaced by this new model), is the only body which currently provides such services, so there is no overlap with other entities carrying out this function.

In relation to 4, IVF clinics, or in WA and VIC, other regulatory bodies currently provide this function. It is a conflict of interest for IVF clinic ethics committees to be performing this role and it is not appropriate for state-based regulators to perform such a role moving forward, in the interests of efficiency. Such responsibilities should be removed from IVF clinics and state-based bodies to ensure no overlap.

In relation to 6 above, ANZICA registered counsellors are equipped to fulfil this role in cases where surrogacy teams reach out to them for support. However this is very ad hoc and there is no ongoing oversight currently by counsellors of existing surrogacy teams

Approving surrogacy agreements

Question C

Do you think it is appropriate for SSOs to approve surrogacy agreements (where they are compliant with the legislative requirements), or should this responsibility sit with a different entity, such as the National Regulator (or alternative)?

Where arrangements are compliant with the legislative requirements, I believe it is appropriate for SSOs to approve these, however only where the medical and counselling reports recommend the arrangements are suitable to progress. Medical reports should give an indication of the surrogate's risk factors which may make pregnancy and live birth less likely

Requirement for psychological screening

Question D

Should both the surrogate and the intended parent(s) be required to undergo a psychological assessment?

Yes it is imperative that both the surrogate and intended parents undertake assessments, as the stresses inherent in surrogacy arrangements are significant. There is clear evidence from overseas jurisdictions that some personality types do not cope well with surrogacy arrangements and in fact can cause significant emotional distress to the other parties. This makes psychological assessment an imperative screening tool in assessing the risk of psychological harm

Requirement for criminal history check

Question E

If **Option 19.2** is adopted:

Should the criminal history check be limited to specific offences, such as those relating to children or violent offences?;

Yes it should be limited to these.

What should be the purpose of the criminal history check?

These should be provided to the surrogate to facilitate informed consent to the arrangement, to the psychologist undertaking the psychological assessments, **and** to the Surrogacy Support Organisation to determine if the arrangement should be approved.

Implications counselling requirement for intended parents and surrogates

Question F

Should the surrogate's partner (if any) be required to undergo implications counselling?

If the surrogate has a partner, then yes it is vital that they are involved in implications counselling. While surrogates engage in such arrangements based purely on their own motivations, their partner forms an integral part of the surrogate's 'care' team during the process. Implications counselling needs to address this

Question G

Should there be additional counselling requirements? If so, what should these requirements be?

Post-birth counselling should be mandatory for the surrogate, given evidence shows that surrogates commonly experience some level of psychological grief following relinquishment of a child they carried. Intended parent(s) should be required to cover the cost of the surrogate's counselling for up to a year post birth.

Requirements for a compliant surrogacy agreement

Question H

In relation to surrogacy agreements, Proposal 22 meets all recommended requirements

Cost recovery for surrogates

Question I

Cost recovery provisions within unlawful surrogacy agreements should be enforceable in order to ensure the surrogate is not left disadvantaged, despite the lack of lawfulness

Reimbursing surrogates for expenses

Question L

Should the National Regulator (or alternative) set caps on the amounts that can be recovered for specific costs, and for the monthly allowance?

Yes it would be appropriate to set caps on recoverable amounts to ensure there are appropriate controls in place on claimed expenses

Reimbursement for hardship, at the surrogate's election

Question M

Should legislation allow intended parents to pay the surrogate an additional support payment beyond reimbursement for the costs and losses outlined in Proposals 25 and 26, to recognise the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement?

No I don't believe it to be appropriate in the Australian context for payments beyond what is already proposed. If this were put in place, the landscape could easily begin to resemble the USA, where surrogate compensation is led by market demand

Administrative pathway to legal parentage

Question N

In relation to approved surrogacy arrangements, where intended parents are the legal parents upon the birth of the child, should the surrogate have a right to seek a declaration that they are the parent (per Proposal 30(1)(b))?

Part of the rationale for surrogacy law reform in Australia is to provide intended parents with greater certainty and confidence in the legal transfer of parentage post birth. Published quantitative research has clearly documented this concern. Thus if the intentions of law reform are to encourage a greater proportion of surrogacy arrangements to take place in Australia, rather than in international jurisdictions which provide legal certainty post-birth about the surrogates' rights to parentage in that country, then the Australian surrogate should not have a right to se a declaration of parentage. This is compatible with the thorough up-front counselling processes which the Australian system provides, which provides sufficient education and time for each party to assess their motives and suitability before engaging in the process.

Judicial pathway to legal parentage

Question P

Should there be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement (see Proposal 37); and are recognised in the birth country as the legal parents of the child?

There should be a streamlined pathway to legal parentage for those who engaged in a registered overseas arrangement and are recognized as the legal parents in the birth country. Given there will always be a segment of the Australian infertile population unable to locate an Australian surrogate, up-front registration of overseas arrangements could better ensure that intended parents are engaging with reputable providers in jurisdictions with appropriate structures in place to conduct surrogacy ethically. Such a streamlined process also better ensures the best interests of the child are protected by allowing parentage to be recognized for essential purposes such as Medicare enrolment and hospital admissions post birth.

Accessing information through a Surrogacy Register

Question R

In relation to Proposal 34, does it capture all the appropriate and relevant information that should be included on the surrogacy register;

Proposal 34 fails to capture alternative contact details for the surrogate such as her email address and phone number, however if the purposes of the register are to simply record the surrogates identity rather than facilitate communication when the child comes of age, this may be appropriate.

Who should be responsible for providing that information?

The relevant Surrogacy Support Organisation would best be tasked with providing this information given they are a neutral third party and have a case management role across the full surrogacy process.

Registering overseas surrogacy arrangements

Question S

In relation to the registration process in **Proposal 37**:

Which entity should be responsible?

Registration of international surrogacy arrangements requires a detailed understanding of the landscape in order to better ensure ethical practice. It may be safer for this registration process to be centralized to a National Regulator (or alternative) to ensure consistency. There are so many 'red flags' in relation to responsible registration that go far beyond the 'permitted destination' that decision-making may best be centralized, as long as there are sufficient resources available to ensure extended wait times are avoided.

What factors should the registration entity consider, when determining which destinations should be 'permitted destinations'?

Destinations in which surrogacy is legal for foreign intended parents may include Canada, many US states, Ukraine, Georgia, Kazakhstan and Kyrgyzstan. Other jurisdictions such as Colombia, Ghana, Uganda and Mexico offer surrogacy to foreigners based on legal 'workarounds' or past court judgements. In jurisdictions such as Colombia, Ukraine, Ghana, Uganda, Kazakhstan and Kyrgyzstan gamete donation is mostly anonymous either based on law or social customs.

Informed consent from the surrogate is mandated in some jurisdictions (eg US, Canada, Ukraine & Georgia) and commonly practiced though not mandated in others (eg Mexico and Colombia), however in either case whether and how well this is carried out in practice varies hugely from agency to agency.

In a global landscape where international surrogacy agencies are completely unregulated in how they function by either government or industry bodies, it is not sensible to base registration on destinations per se, without looking at how individual agencies screen, educate and support surrogates and donors and how communication with intended parents is facilitated. For example, Australians have recently reported to me of being matched by Canadian agencies with surrogates who are undocumented refugees.

However if 'destination' were to be one criterion used to establish permissibility, then it would make sense to include only destinations which have laws which

- recognize up to two intended parents on the birth certificate (US, Canada, Georgia, Ukraine, Ghana, Uganda, Kazakhstan and Kyrgyzstan)
- Mandate informed consent and appropriate screening of surrogates

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?

Basing registration of overseas arrangements on destination completely fails to protect any party to the arrangement, given the abundance of bas actors in this space.

Following increasing concerns about inappropriate surrogate screening and case management by agencies in the US, Canada, Mexico, Georgia, North Cyprus and elsewhere, Growing Families has spent the last six months in developing an agency verification process with the assistance of a panel of international independent legal experts in this space. This verification process is still being finalized, but includes collecting evidence of Agency resourcing, years of operation; Country of operation, Case to staff ratios, Surrogate screening and care protocols, cross-cultural training; Informed consent protocols; utilization of foreign surrogates; surrogate accommodation; how surrogate communication is facilitated with intended parents; provision of psych support to surrogates.

An expert advisory group consisting of fertility and human rights lawyers from the US, UK, Canada, Australia, UK and mainland Europe has been formed to set minimum standards for agencies to abide by.

The limitation of this process is its resource intensiveness and requirement for an annual audit of each agency's procedures based on paperwork rather than physical inspection. However in the absence of any international regulation, and in the interests of harm minimization, Growing Families is introducing this process globally

Only a limited number of surrogacy agencies globally look to be prepared to undergo such scrutiny, which may mean a more limited pool of verified international aqencies can be eligible for registered arrangements.

Question S

In relation to the registration process in **Proposal 37**:

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?

Yes given the inherent risks of overseas arrangements, I believe that a precondition of registration of an overseas arrangement should require evidence of having made reasonable efforts to engage domestically. Such efforts could include

- having informed family and friends of their need for surrogacy in the hope that someone

they know comes forward; and/or

- having spent at least six months in searching for an Australian surrogate through an SSO and/or
- having engaged unsuccessfully with an Australian surrogate and/or
- evidence that their Australian surrogate is unable/unwilling to engage in a subsequent surrogacy arrangement after carrying the intended parent(s) first child.

Streamlining processes to return to Australia

Question T

Are there other ways that the applications listed in Proposal 39 could be streamlined or further aligned, in terms of the process or documentation required?

No, this process is sufficient

Question U

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

No, I don't believe so. It should encourage intended parents to engaged in arrangements that can be pre-registered

Question V

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

Yes this would be a very sensible amendment to the current process, given it can otherwise mean a child born via surrogacy spending a long time away from their parents country of residence while the appropriate visa is applied for and granted. Such a reality is not in the best interests of the child when they cannot easily to their parents place of residence without a long delay. There have been a significant number of cases where infants have been left with relatives in a third country until paperwork to grant entry to Australia is finalised

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 such a process should be available in the best interests of the child. This type of case

appears rare, but does occur amongst Australian citizens with poor English or poor administrative skill who are unable to understand and complete the required paperwork. Their children should not be disadvantaged as a result.

It could work via a suitable SSO and other relevant authorities being engaged to conduct outreach to affected families to identify relevant cases and a child advocate, migration agent or SSO be engaged to assist with the required paperwork. This paperwork would require DNA test results, written evidence of proof of surrogacy arrangements (eg IVF clinic records), evidence of a surrogacy agreement, surrogate consent, pregnancy records and a hospital birth report.

Question X

Should a temporary visa, which allows children born through surrogacy to enter Australia, be introduced?

In cases where the intended parents have engaged in a pre-approved surrogacy arrangement and are not able to enter Australia on a foreign passport (entry on a foreign passport is possible for US and Canadian births), then a temporary visa allowing entry to Australia with a foreign passport is far preferable to the current reality which requires many families to spend up to four months post birth in an overseas jurisdiction, while they wait for approval of Australian citizenship and granting of an Australian passport.

Yours sincerely,

Sam Everingham

BSc, MA MPH