# Submission of Emeritus Professor Michael Quinlan to the Australian Law Reform Commission (ALRC) re Discussion Paper 89 "REVIEW OF SURROGACY LAWS" November 2025 (the Discussion Paper)

I am grateful to the Committee for the opportunity to make this submission. I was admitted to the legal profession in 1989 and worked at the commercial law firm Allens where I was a partner for more than 14 years. In 2013, I left Allens to take up the role of Professor of Law and Dean of the School of Law, Sydney at The University of Notre Dame Australia (Notre Dame). In 2020 I was appointed Notre Dame's inaugural National Head of the School of Law & Business. On my retirement, in December, 2024, I was conferred the title of Emeritus Professor. I am a board member of Freedom For Faith (FFF) and of Ethical End of Life Care Limited (EEOLCL ), a member of the Governing Committee of the Rule of Law Education Centre (the Centre), a Member of the Guild of Catholic Scholars (the Guild), a Member of the Editorial Advisory Board of the *Australian Journal of Law and Religion* (the *Journal)*, a Member of the Tribunal Financial Funding Group of the Interdiocesan Tribunal of Sydney (the Group) and a Life Member and Vice President of the St Thomas More Society (the Society). Prior to my retirement, I was a long term member of the Legal Profession Admissions Board and the Council of Australian Law Deans. I was also an inaugural member of the advisory board of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce and the Consultative Committee of the Interdiocesan Tribunal.

This submission is made by me, in my personal capacity, and not as a representative of Notre Dame, FFF, EEOLCL, the Guild, the *Journal*, the Group, the Centre or the Society.

I have a deep interest in the relationship between law and morality and law and religion. I hold *Bachelor of Laws, Bachelor of Arts* and *Master of Laws* degrees from the University of New South Wales and a *Master of Arts (Theological Studies) (with High Distinction)* degree from Notre Dame. I have written extensively in relation to law and freedom of conscience, belief and religion. My published papers include "How the law in Australia is used and can be used to promote or to harm the Catholic faith",[1] "Religion, Law and Social Stability in Australia,"[2] "Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia,"[3] "When the State requires doctors to act against their conscience: the religious implications of the referral and the direction obligations of health practitioners in Victoria and New South Wales,"[4] "Such is Life" Euthanasia and capital punishment in Australia: consistency or contradiction?,"[5] "A great nation? The changing place of religion in law and

[1] *Catholics and Law Congress*, Turon, Poland, November, 2013 accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970833

[2] *22nd Annual International Law and Religion Symposium*, Brigham Young University, Provo, Utah, USA, October 2015 accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970897

[3] (2017) *The University of Notre Dame Australia Law Review*: Vol. 18 , Article 3. accessible at: http://researchonline.nd.edu.au/undalr/vol18/iss1/3

[4] (2016) *Brigham Young University Law Review* 1237 (2017) accessible at: http://digitalcommons.law.byu.edu/lawreview/vol2016/iss4/7

[5] (2016) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*: Vol. 6: Iss.1, Article 6. accessible at: http://researchonline.nd.edu.au/solidarity/vol6/iss1/6

society in colonial and contemporary Australia: reflections on Murray in an Australian context"[6] and "The 21st century Catholic lawyer."[7] My book chapters include: "Taking The Right Way Back: The Truth In An Era Of Challenges to Freedom Of Religion in Australia,"[8] and "Sacrificing Dignity to Protect Dignity: Human Dignity and Exclusion Zones in Australia."[9] I am a regular contributor to *The Catholic Weekly* and *News Weekly* and have also been published in *The Australian*.

The submission follows the numbering and headings used in the Discussion Paper. The submission does not specifically address every topic raised in the Discussion Paper.

## Potential reforms in overview

The Discussion Paper follows Issues Paper 52 which was released in June 2025 (the Issues Paper) and called for submissions between 4 June 2025 and 11 July 2025. Both the Issues Paper and the Discussion Paper respond to Terms of Reference which were issued in December 2024 (the Terms of Reference). There have been a number of recent occurrences and developments in relation to surrogacy since the Terms of Reference were provided to the ALRC by the Attorney-General and indeed since the ALRC issued the Issues Paper. These, at least, raise serious questions about the current appropriateness of the Terms of Reference if they do not warrant the ALRC raising the need for their revision with the Attorney-General. These include:

(i) most importantly, the publication by the Secretary-General of the United Nations, on 14 July 2025 (which was 3 days after the conclusion of the period for the making of submissions called for in the Issues Paper), of the "Report of the Special Rapporteur on violence against women and girls, its causes and consequences. The different manifestations of violence against women and girls in the context of surrogacy"[10] (the Special Rapporteur's Report). The Special Rapporteur's Report was informed by 120 submissions, online consultations with 78 experts (commissioning parents, surrogacy agencies, medical experts and women with lived experiences of surrogacy) and secondary sources. [11] The Special Rapporteur's Report specifically and directly addresses surrogacy and warrants special attention for that reason given that "[t]here are no provisions of international human rights treaties that would explicitly and comprehensively address the issue of surrogacy, as most of them were drafted before it became a widespread concern." [12]

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[6] *St Marks' Review* (2020) 252, 63-78

[7] 16 *Ave Maria Law Review* (2018) 36 accessible at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/avemar16&div=5&id=&page

[8] *Forgotten Freedom No More Protecting Religious Liberty in Australia* (ed Robert Forsyth and Peter Kurti) Connor Court, 2020.

[9] *The Inherence of Human Dignity Volume II: Dignity, Law and Religious Liberty* (ed Barry Bussey, Angus Mengue) Anthem Press, 2020.

[10] Special Rapporteur on violence against women and girls, its causes and consequences, Report of the Special Rapporteur on violence against women and girls, its causes and consequences. The different manifestations of violence against women and girls in the context of surrogacy." United Nations General Assembly A/80/158 https://docs.un.org/en/A/80/158

[11] The Special Rapporteur's Report [2]

[12] The Special Rapporteur's Report [52]

Whilst the Discussion Paper[13] mentions that one of the recommendations, of the Special Rapporteur's Report, is a call for the practice to be banned, the Discussion Paper fails to recognise the real significance of this major consideration of surrogacy and fails to address the fact that the Special Rapporteur's Report calls for the opposite response to many of the Discussion Paper's specific recommendations. Nor does the Discussion Paper respond specifically, adequately or at all to most of the findings made in the Special Rapporteur's Report. For example, the Discussion Paper does not disprove the very serious conclusion of the Special Rapporteur's Report that:

> The practice of surrogacy is characterised by exploitation and violence against women and children, including girls. It reinforces patriarchal norms, by commodifying and objectifying women's bodies and exposing surrogate mothers and children to serious human rights violations.[14]

That is a very serious conclusion particularly given the Terms of Reference call on the ALRC to adopt "a human-rights based approach"[15] and to "identify legal and policy reforms that are consistent with Australia's international obligations."[16] The findings made in the Special Rapporteur's Report must raise for consideration the question of whether the Attorney General would have drafted the Terms of Reference as they were drafted in December 2024 had the Special Rapporteur's Report then been available.

(ii)The publication of an investigative series by *The Age* and *The Sydney Morning Herald* into medical misogyny. [17]

(iii) Continuing reports of many serious issues arising in relation to surrogacy overseas.[18] These include the many issues (including the potential of human trafficking) arising from the use of surrogates in Los Angeles, resulting in one Chinese couple being shown on birth certificates, as the parents of 22 children, of whom 15 were no older than 3. This incident is one clear example of the fact that the issues with surrogacy are not limited to its operation in less developed or impoverished nations. [19]

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[13] Discussion Paper [29]
[14] The Special Rapporteur's Report [69]
[15] Issues Paper [4]
[16] Discussion Paper [17]
[17] See *Sydney Morning Herald* https://www.smh.com.au/national/medical-misogyny-20241204-p5kvq7.html and Charlotte Grieve, "Assaulted by her son. Alison's pain was ignored until she collapsed," *The Sun-Herald* August 17, 2025 8-9
[18] Australian Government, " Issues that have arisen from engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas
[19] Katherine Long and Sara Randazzo, "Mystery of the LA mansion :'infertile' couple wanted a baby – they already had 22," *The Australian*, 8 August, 2025, 8

(iv) The errors – both ascribed to "human error" - which occurred at Monash IVF resulting in a woman giving birth to another couple's baby[20] and the implantation of a patient's own embryo being incorrectly transferred to that patient instead of to the patient's partner;[21]

(v) The proximity of the first trial in Australia of mitrochondrial donation. [22]

(vi) the launch of the Nucleus Genetics 'Nucleus Embryo' service in New York to enable those utilising IVF "to compare their embryos based not only on likelihood of inherited diseases or disabilities but also on characteristics like IQ, eye colour, hair colour, height and body mass index;." [23]

(vii) The publication of Amanuel Gebremedin's research into the disproportionate number of male births among certain migrant populations in NSW and Western Australia in 1994-2015;[24]

(viii) The birth of Thaddeus Daniel from an embryo created more than 30 years ago in an IVF clinic;[25]

(ix) Despite the costs involved and the failure rates of IVF, there has been very substantial growth in the use of IVF;[26]

(x) natural fertility methods are gaining popularity albeit slowly;[27] and

(xi) the development of NaProTechnology [28]

Whilst the Discussion Paper recognises that surrogacy arrangements overseas "may be exploitative and create other harms experienced in Australia for intended parents and children born through surrogacy, such as challenges obtaining legal parentage"[29] it does not respond to this problem, by adopting the recommendation of the Special Rapporteur's

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[20] Ciara Jones, "Monash IVF mix-up that saw woman give birth to another person's baby may set legal precedent," 11 April 2025 https://www.abc.net.au/news/2025-04-11/monash-fertility-ivf-mix-up-brisbane-clinic/105164096

[21] AusSMC, "What does Monash IVF's second mix-up tell us about Australia's assisted reproductive technology industry?" https://www.smc.org.au/news/what-does-monash-ivfs-second-mix-up-tell-us-about-australias-assisted-reproductive-technology-industry

[22] Natasha Robinson, "Three- Parent Babies: Genetic Fix or Risk?" *The Australian*, "Inquirer", July 19-20 July, 2025, 17

[23] Monica Doumit, "The brave new world upon us," *The Catholic Weekly* 29 June, 2025, 25

[24] Natasha Bita, "Boys, not girls: questions on migrant births" *The Australian*, July 1, 2025, 3, Marilyn Rodrigues, "Advocates welcome move to ban sex-selection abortion," *The Catholic Weekly*, 13 July 2025, 1-2

[25] Michael Cook, "What should we do with millions of frozen embryos?" *The Catholic Weekly*, August 18, 2025 https://catholicweekly.com.au/what-should-we-do-with-millions-of-frozen-embryos/

[26] Victoria Devine, "It's time we cut the cost of IVF" *The Sun-Herald*, Sunday July 27, 2025, 34; Kate Aubusson, "There have been 17 million IVF babies. Rebecca was one of the first" *The Sun-Herald*, Sunday, July 27, 2025, 6

[27] Guest Contributor, "The drug-free fertility option" *The Catholic Weekly* 18 August, 2025 https://catholicweekly.com.au/the-drug-free-fertility-option/

[28] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly* https://catholicweekly.com.au/naprotechnology-provides-alternative-to-ivf-for-couples-struggling-with-infertility/

[29] Discussion Paper [21]

Report to take steps "towards eradicating surrogacy in all of its forms."[30] Instead the Discussion Paper indicates that it will canvass the different views about surrogacy in the Final Paper in more detail. [31] This leaves the critical issues raised by the Special Rapporteur's Report for consideration after the recommendations made by the Discussion Paper are considered. This has serious ramifications for what is proposed in the Discussion Paper. For example, it results in a Discussion Paper which no where decries the persistent and systematic failure of State authorities to prosecute breaches of the State prohibitions of commercial surrogacy contained in legislation such as the *Surrogacy Act 2010* (NSW) s8 (which includes penalties of fines and imprisonment) and the geographical reach of that prohibition contained in the *Surrogacy Act 2010* (NSW) s11. [32] The consequence of this failure has not only lead to NSW residents and domiciles entering into surrogacy overseas – including commercial surrogacy - in significant numbers.[33] The failure to prosecute these offences means that we do not actually know how effective prohibition on international commercial surrogacy, under Australian laws, might be if it were enforced. This failure to prosecute has been taking place despite very clear evidence, recognised by the Commonwealth Government itself, of very serious human rights and other issues in engaging in surrogacy overseas.[34] By not addressing the fundamental underlying issues of surrogacy – very clearly laid out in Special Rapporteur's Report, the Discussion Paper does not condemn the passage of the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW)) which seriously undermines the current prohibitions on commercial surrogacy taking place overseas by amending s18(2) and s23(2) of the *Surrogacy Act 2010* (NSW) to allow people who use surrogacy –including commercial surrogacy - overseas to obtain a parental order. Instead the Discussion Paper calls for the removal of criminal sanctions against commercial surrogacy including overseas surrogacy and itself proposes easier pathways to facilitate the recognition of children born via international surrogacy.

The Discussion Paper proposes to introduce "rigorous safeguards, alongside an approval process" to access domestic surrogacy and claims that doing so would diverts "Australians away from risky overseas surrogacy arrangements" but in doing so it fails to address the attractiveness of less regulated surrogacy and the reality that "[a]ffordability is a major reason for choosing international surrogacy options."[35] Rather than ensuring that children born of surrogacy have not just information about but access to all involved in their development – surrogate mother and providers of all genetic material– some persons, seeking to access surrogacy, may deliberately choose overseas donors and surrogates specifically – or as a factor in this decision - who do not live in their State or in Australia, to minimise the potential for those people to have a relationship with the child. This is not in

[30] Special Rapporteur's Report [70(a)]
[31] Discussion Paper "What we have heard" box which follows [27]
[32] Australian Law Reform Commission, "Issues Paper 52 Review of Surrogacy Laws" June 2025, 80
[33] Australian Law Reform Commission, "Issues Paper 52 Review of Surrogacy Laws" June 2025, 23 https://www.alrc.gov.au/publication/review-of-surrogacy-laws-issues-paper-2025/
[34] Australian Government, "Issues that have arisen from engaging in surrogacy overseas" https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas
[35] Complete Surrogacy, "Why Intended Parents Use International Surrogacy?" https://completesurrogacy.com/why-intended-parents-use-international-surrogacy/

the best interests of the child. Those drivers will remain and likely be stronger if the recommendations of the Discussion Paper – including the decriminalisation of overseas commercial surrogacy – were to be adopted.

A very concerning feature of the Terms of Reference, the Issues Paper and the Discussion Paper is the fact that they seek to consider surrogacy in isolation, rather than allowing for a more holistic approach, which is critical.

## Approach to reform and reform principles

The Discussion Paper gives inadequate weight to the Special Rapporteur's Report and equates commercial surrogacy (currently illegal) with altruistic surrogacy (currently legal within confined limits) in claiming that "Australian governments clearly recognise surrogacy as a legitimate practice by legislating for it." [36] It must also be noted that all such legislation was enacted without any governments having the benefit of the Special Rapporteur's Report.

Claimed support for surrogacy must be weighed against the media support for the practice, the fact that Australians usually see healthy babies and happy parents and not the surrogates who are overseas and out of sight and mind and the lack of reporting and awareness and education about surrogacy (which the Discussion Paper itself recognises).[37] Whilst they appear on the Commonwealth Government website the very serious human rights and other issues in engaging in surrogacy overseas[38] have not received widespread publicity. Similarly the Special Rapporteur's Report has not attracted widespread coverage in the popular media.

Indermaur has argued that on-line public opinion polls are likely to misrepresent and seriously distort the truth and provide an inaccurate measure of public attitudes.[39] He observes that respondents to opinion polls often respond to questions put to them with "top of the head" or "expressive" views which may not equate to their considered opinion if given "more time and information."[40] As a result, he argues that they provide a poor basis for legislating in policy areas such as capital punishment.[41] I would argue that surrogacy

[36] Discussion Paper [30]
[37] Discussion Paper Proposal 7
[38] Australian Government, "Issues that have arisen from engaging in surrogacy overseas" https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas
[39] David Indermaur, "Changing Attitudes to the Death Penalty: An Australian Perspective," *Current Issues in Criminal Justice* Issue 3, Vol 17 (2006) 447-448.

[40] Indermaur, "Changing Attitudes to the Death Penalty: An Australian Perspective," 447 esp.. n 7 and n8.

[41] "The basis of much public opinion is thought to derive from elite opinion and also the political flavour of certain positions. Many will be prepared to look to church leaders for the position to take on social issues, but there is an even more significant psychological process at work that will determine the position on social issues adopted by an individual. This concerns our desire to be part of the mainstream. Studies of public attitude consistently point to the way decisions on which opinion to embrace are shaped by what respondents believe is a 'socially desirable' view. Most people, it seems, want to have an opinion that is in keeping with the majority, particularly in relation to subjects where there is a risk of social isolation from proclaiming an,

falls into the same category. The support by Australians for surrogacy, to which the Discussion Paper refers,[42] must be weighed against the lack of widespread knowledge of the reality of surrogacy and the serious human rights abuses and the adverse consequences which it entails.[43] Given the dearth of knowledge of the issues, support for surrogacy is likely to be significantly exaggerated.

The longitudinal research, to which the Discussion Paper refers in support of the claim that it "tentatively indicates that the outcomes for children born through surrogacy are similar to natural conception,"[44] warrants careful scrutiny given the varieties of surrogacy may all produce quite different outcomes. For example, it might be expected that there may be different short, medium and long term outcomes for children born of surrogacy:

- in which the surrogate mother, the woman who provided eggs and the man who provided the sperm used to produce the child are all in the same State, known by the child and physically accessible to the child;
- in which some but not all of the people involved in the production of the child are in the same State, known by the child and physically accessible to the child;
- in which the surrogate mother, the woman who provided eggs and the man who provided the sperm used to produce the child are not all in the same State, known by the child and physically accessible to the child;
- in which the surrogate mother, the woman who provided eggs and the man who provided the sperm used to produce the child are all overseas, not known by the child and not physically accessible to the child
- in which the surrogate mother's eggs are used;
- in which only one person is proposing to raise the child;
- in which a married man and woman who have provided the eggs and sperm for the production of the child and propose to raise the child;
- in which the surrogate mother is a relative of a married man and woman who have provided the eggs and sperm for the production of the child and propose to raise the child.

These are just some of the multiplicity of variables in surrogacy all of which may impact on the outcomes for any child produced and which may militate against the use of surrogacy at all where "the best interests of the child [is] the primary consideration."[45] This must mean that even though individuals or couples may have an intense desire to have a child and see

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unfashionable or unpalatable view." Indermaur "Contemporary Attitudes to the Death Penalty: An Australian perspective," 448.

[42] Discussion Paper [30]

[43] Australian Government, "Issues that have arisen from engaging in surrogacy overseas" https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas Special Rapporteur's Report[12]-[51]

[44] Discussion Paper [30]

[45] Discussion Paper [34]

surrogacy as the only means to achieve that ambition, this wish should not be accommodated where to do so would not be in "the best interests of the child." This must require consideration of whether a child being produced, at least, in particular forms of surrogacy, is in his or her best interest. The response that the child would not otherwise have been born and that existence is in and of itself evidence of the child's "best interest" and so the child cannot complain is deficient. One anonymously donor conceived adult, who objects to anonymous donor conception, Joanna Rose has argued that: "If I were the product of rape, I would be glad to be alive, but that does not mean that rape is ethically acceptable." [46]

As the Discussion Paper correctly notes "[w]hile surrogacy has been compared to adoption or gamete donation, it raises different questions to those methods of forming family" this does not support an approach of approaching surrogacy entirely "through its own lens"[47] if this means taking into account very sparse research into surrogacy and completely ignoring the more developed research relating to outcomes for children raised in differing circumstances. There are findings from that large body of research which can assist particularly given the dearth and limitations of such research as has been undertaken on outcomes for children born of surrogacy.

The Discussion Paper refers to 4 papers in support of the view that research "tentatively indicates that the outcomes for children born through surrogacy are similar to natural conception."[48] Viveca Söderström-Anttila's paper[49] appears to be a yet to be peer reviewed draft table of very brief summaries of other publications.

Susan Golombok et al's 2013 paper involved a small sample size and the potential for participant bias, as parents concerned about keeping their children's origins secret may have not participated and reproductive donation mothers who did participate may have wished to present their children in a positive light.[50] This study found that at age 7, children born of surrogacy, showed higher levels of adjustment problems than children conceived by gamete donation "suggesting that the absence of gestational connection

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[46] As quoted in Margaret Somerville, "The First Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Child" *News Weekly* No 3193, July 12, 2025, 9

[47] Discussion Paper [32]

[48] Discussion Paper fn [24] Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2016) 22(2) Human Reproduction Update 260, 274; Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1973–1974; Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1230; but see Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653, 658.

[49] Viveca Söderström-Anttila et al, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2016) 22(2) Human Reproduction Update 260, 274

[50] Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653 accessed at https://pmc.ncbi.nlm.nih.gov/articles/PMC3586757/pdf/nihms413838.pdf 8

between parents and their child may be more problematic for children than the absence of a genetic relationship." [51] The study also found elevated levels of child adjustment problems in families where parents had told their child born via surrogate of their biological origins. [52]

Susan Golombok et al's 2017 paper involved a small response rate and potential bias arising from the low response rate of teachers, the high proportion of teachers who mothers did not give permission to be approached and the families from the 2013 paper who chose not to participate.[53] The small sample size also meant that subsets of families who were genetically related or not – let alone the wide range of other variables in surrogacy form – could not be studied.[54] This study of children aged 14 born through egg donation, donor insemination and surrogacy did not find raised levels of mother-adolescent relationship difficulties or adolescent adjustment problems compared with naturally conceived families.[55] It did find less positive mother-adolescent relationships where there was no genetic link between the mother and child.[56] General studies (i.e. studies not focussed on surrogacy) have found that "children living with two biological parents were less likely to experience behavioural or emotional problems than children living in other family types.[57]

Susan Golombok et al's 2018 paper compared parenting and adjustment of children born of surrogacy aged 3-9 years, raised by two same sex attracted males with children born of surrogacy aged 3-9 years raised by two same sex attracted females.[58] It attributed higher levels of behavioural problems with these children to stigmatisation of the family and negative parenting.[59] It found that these children showed high levels of psychological adjustment and positive relationships with their parents.[60] It was subject to many limitations including a moderate sample size, a small sample size of teachers, the use of volunteer samples which poses a risk of bias and the lack of a heterosexual comparison

[51] Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653 accessed at. https://pmc.ncbi.nlm.nih.gov/articles/PMC3586757/pdf/nihms413838.pdf 7

[52] Susan Golombok et al, 'Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' (2013) 54(6) *Journal of Child Psychology and Psychiatry* 653 accessed at. https://pmc.ncbi.nlm.nih.gov/articles/PMC3586757/pdf/nihms413838.pdf 7

[53] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1975

[54] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1975

[55] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1975

[56] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1975

[57] D.Paul Sullins, "The Case for Mum and Dad" *The Linacre Quarterly* (2021) Vol 88(2) 184,188

[58] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223

[59] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1231

[60] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1231

group meant that firm conclusions could not be reached by comparing surrogate children of this age group raised by heterosexual couples. [61] The authors also could not rule out the lower levels of internalized problems of the children being a consequence of the higher incomes of those raising them.[62] Another confounder of this study is the wide age range of the children. It seem from other studies that the psychological adjustment and emotional and behavioural issues vary with the ages of the children with high levels of psychological adjustment in pre-school years, raised levels of problems at age 7 (when children become aware of biological inheritance and the biological concept of family) and that those problems eased off by ages 10 and 14. [63]

It is hard to draw, even tentative positive conclusions from these studies, indicating that the outcomes for children born through surrogacy are similar to natural conception. They say nothing about, for example, children born of surrogates raised by a single person. Various studies have found that children growing up in single-parent households have poorer academic performance, lower physical health and development, higher rates of child mortality, homicide and childhood stunting.[64] The four studies, referenced in the Discussion Paper, also provide limited guidance on the adolescent experience (10-24)[65] during which adopted children show an increase in adjustment problems.[66] They do not provide analysis across a lifespan into adulthood and they measure a limited range of integers. Given the fact that surrogacy involves the production of children, limited studies of the well-being of children born of surrogacy should be given limited weight.

The Special Rapporteur's draws starkly different conclusions from the research to date from those reached in the Discussion Paper:

> Studies indicate that children born through surrogacy have lower mean gestational age at delivery, higher rates of preterm birth and higher rates of low birth weight. Assisted reproductive technology and multifetal pregnancy have reportedly been associated with an increased risk of birth defects. Breastfeeding, which is prevented in surrogacy and even contractually prohibited, is essential to an infant's healthy development. While research on the long-term emotional well-being of children born through surrogacy is limited, it indicates that the lack of a gestational connection places them at increased psychological risk.[67]

[61] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1230-1231
[62] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1231
[63] Susan Golombok et al, 'Parenting and the Adjustment of Children Born to Gay Fathers Through Surrogacy' (2018) 89(4) *Child Development* 1223, 1224
[64] Kersi Chavda and Vinyas Nisarga, "Single Parenting: Impact on Child's Development" *Journal of Indian Association for Child and Adolescent Mental Health* (2023) 19(1), 14, 15
[65] Susan M Sawyer , Peter S Azzopardi , Dakshitha Wickremarathne , George C Patton, " The age of adolescence*" Lancet Child Adolesc Health* 2018 Mar;2(3):223-228.
[66] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1967
[67] Special Rapporteur's Report [18]

## A human rights approach

### Children's rights

As the most vulnerable of all involved in surrogacy, the child must ethically be placed at the centre of decision making in surrogacy.[68] Commercial surrogacy is contrary to human dignity because it involves the creation or most aptly, given that technical means must be employed, the manufacturing of children and the buying and selling of children as commodities, as merchandise, as a "thing" or "product."[69] Whilst the person or persons wanting to have a child and (subject to the concerns about the inequality of bargaining positions and suborning of consent due to financial need discussed below) the surrogate mother, might consent to the procedures involved, the child born of the process (and the embryos conceived, frozen or discarded) is unable to provide consent.

Children have a right to know who their biological parents are so that they have access to their medical history and for their own self identify. The searches by adopted children and by children born through the use of IVF for their birth parents demonstrate, what Somerville describes as, "a deep human need to know our biological family origins".[70] These are the same issues that impact adopted children:

> **Medical history is so vital for adopted children to know.**
>
> How many of us have gone to the doctor's office and answered the question, "Is there a history of cancer in your family? Heart issues, diabetes...." The list is long. Those who know our family history are better armed to answer these questions. It's also excellent information when the adoptee has a child of their own, not only for their use in the doctor's office but for the generations to come….According to Stephen J. Betchen, an adoptee and a marriage and family therapist, "Some of us who were adopted in "closed states" (or states that don't allow for the free exchange of even the most vital information such as a health history) have a lingering fear that we might drop dead at any moment….
>
> **Who am I? What are my roots?**
>
> Many Adopted children and adults have lingering feelings of being unconnected to their roots. I've heard this feeling described as a void or emptiness that is felt deep in the core of a sense of not belonging.[71]

As Somerville notes:

> Many children born from donated gametes say that they feel deracinated, cut off from their biological families and their genetic origins – they call themselves "genetic orphans." They

[68] Margaret Somerville, "The First Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Child" *News Weekly* No 3193, July 12, 2025, 7

[69] Margaret Somerville, "The First Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Child" *News Weekly* No 3193, July 12, 2025, 8

[70] Margaret Somerville, "The case Against 'Same-Sex Marriage" brief submitted to the Standing Committee on Justice and Human Rights, 2003 accessible at http://www.equalparenting-bc.ca/issues/adobe-pdfs/book_2003-SOMERVILLE-case-against-same-sex-marriage.pdf [6].

[71] Foster VA, "Why Foster and Adopted Children Search For Biological Families" https://www.fosterva.org/blog/why-do-adoptive-children-search-for-biological-families

> describe feeling that "half of them is missing", that "there is a black hole beneath them of which they cannot reach the bottom." They say that they can't understand "how society could have done this to them" by failing to regulate or possibly permit the way that they came into being, let alone society being complicit in the wrongdoing by finding it. [72]

The best interests of the child demand not only that children have a right to know who their biological parents (that is those persons whose genetic materials have been used in their creation) are so that they have access of their medical history and for their own self identify. Children born of surrogacy must also know the identity of the surrogate who has given birth to them. They must also have regularly updated contact details consent from their birth mother and those whose genetic material was used in their generation to being contacted by them so that they can not only know who they are but have the opportunity to meet all of them and to form a relationship with them. The importance of meeting blood relatives so abundantly clear from programs such as *Long Lost Family* which has been in production continuously since 2011.[73]

Children have a right to be cared for by "their parents" under the Convention on the Rights of the Child (the Convention) Article 7. The Discussion Paper notes that some view the surrogate as the child's parent and that this is the starting point of the law but then claims that recognising this "risks violating the rights of the child" under Article 7 of the Convention "as well as the right to be free from discrimination."[74] This right is found in Article 2 of the Convention and reads as follows:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The Discussion Paper must assume, as it does not explain why, the ALRC's view that the commissioning person or persons should be considered as the child born of surrogacy's parents rather than the surrogate mother who has given birth to the child. This is despite the fact that:

> An inherent concern in surrogacy lies in the contractual programming of separation between a woman and the child that she carries, which risks treating the child as a passive object of an agreement between adults or as a commodity. This differentiates surrogacy from adoption, as the latter is focused on the ways of safeguarding the best interests of an already existing child. The intention to separate is particularly problematic given the

[72] Margaret Somerville, "The First Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Child" *News Weekly* No 3193, July 12, 2025, 8

[73] https://www.imdb.com/title/tt1932099/

[74] Discussion Paper [36]

> importance of bonding between a mother and her child during pregnancy for the child's mental and emotional development. The sudden removal of a newborn can undermine the child's early attachment development, negatively affecting their emotional regulation and growth.[75]

The Discussion Paper does not engage with the compelling arguments or international human rights instruments relied upon in the Special Rapporteurs' Report:

> In article 10 (2) of the International Covenant on Economic, Social and Cultural Rights, it is stated that "special protection should be accorded to mothers during a reasonable period before and after childbirth". For the rights of surrogates to be safeguarded, they must be recognized in law as mothers, not merely carriers of the child. Such understanding is also in line with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption and the European Convention on the Adoption of Children, in both of which motherhood is attributed to a woman who has given birth by affirming a mother's right to renounce, but only after a child is born.[76]

## Surrogate's rights

An important tradition and hallmark of human society, is the recognition of a mother's unconditional love for her child for no reason other than that it is her child. Surrogacy challenges that orthodoxy because a woman carries a child consenting, from prior to the insertion of an embryo, to give him or her away at birth.[77] Whilst it is true that adoption has long been a feature of Western society, in that instance the child was not intentionally created but born when the mother was unable to care for him or her. Traditionally, the act of a mother in a precarious circumstance giving her baby up for adoption was seen as a selfless act by a mother (often unwed or otherwise alone) seeking to provide the child with a better life.[78] Today the adverse impacts of separation from one's mother on adopted children may be better understood. Nonetheless adoption is quite different to the deliberate and intentional act of a person or persons who contract to have a child born by a surrogate mother. As Somerville has observed:

> In surrogacy, we have adults wanting a child and having one created with the intention that the child be given away by the gestational mother. In seeing this as ethical and legally facilitating it, surrogacy does damage to societal values that uphold the bonding of parents to their children and their conditional love for them because they are their own children that adoption does not.[79]

[75] Special Rapporteur's Report [50]
[76] Special Rapporteurs' Report [54]
[77] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 13
[78] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 13
[79] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 13

Particularly where the surrogate is overseas and the birth occurs overseas, surrogates are often the forgotten person involved in the process of surrogacy. The media focus on Australians desperately wanting but unable to have children or who have a beautiful baby born by commercial surrogacy overseas but who then find challenges to naturalisation and returning home with their baby. The surrogate mother is usually "out of sight and out of mind." But this is to ignore the reality of surrogacy. In practice issues can include:

- Commissioning parents requiring "selective reduction of a multiple pregnancy"[80]
- Commissioning parents requiring selective reduction of babies when identified with characteristics outside those they desire, such as Down syndrome.[81]
- The dangers posed by any pregnancy including the death of surrogates or their inability to bear their own children[82]
- The impacts on the surrogates' own children;[83] and
- The deception of surrogates. A recent example is the lies told to surrogates carrying children in Los Angeles, resulting in one Chinese couple being shown on birth certificates, as the parents of 22 children, of whom 15 were no older than 3. [84]

The Discussion Paper asserts that rights to bodily autonomy and bodily integrity extend to a right to choose to act as a surrogate. [85] Again not addressed in the Discussion Paper is the Special Rapporteur's compelling observations about consent:

> Consent alone does not render surrogacy ethical. It is widely recognized that consent alone cannot justify human rights violations, including those associated with human trafficking, the sale of organs, slavery or torture. Under the Trafficking in Persons Protocol, the consent of the victim to the intended exploitation is irrelevant. Furthermore, the consent of the person reduced to slavery is also irrelevant. Notably, the definition of slavery in the Convention to Suppress the Slave Trade and Slavery of 1926 does not include any requirement of coercion.[86]

The Discussion Paper seeks to decriminalise commercial surrogacy which takes advantage of vulnerable women who are not in a sufficiently financially secure position to give informed

[80] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[81] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[82] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[83] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[84] Katherine Long and Sara Randazzo, "Mystery of the LA mansion :'infertile' couple wanted a baby – they already had 22," *The Australian*, 8 August, 2025, 8W
[85] Discussion Paper [39]
[86] Special Rapporteur's Report [61]

consent.[87] Even if financially secure, as the Special Rapporteur observes, "[n]o regulatory framework can fully prevent the serious psychological harm that may result from the separation process. "[88]

## Intended parent's rights

Somerville argues that ethical decisions should be based on a primary presumption in favour of the persons affected by the decision who are most vulnerable and to avoid exploitation of impoverished people by taking advantage of their impoverished state.[89] This means that the interests of the child and then those of the surrogate mother should be considered before those of the person or persons wanting to have a child.[90]

Rather than the most vulnerable persons involved in surrogacy being pre-eminent in law-maker and media concerns, it is the anguish and understandable desire of people to have children which is favoured in media focus on surrogacy. Absolutely those who cannot have their own children deserve compassion, respect and sympathy but that does not mean that their wishes should be the priority or sole focus of concern in considering surrogacy. Having children is not a right. As Sloan and Lahl argue:

> Human rights violations against women and children are being reframed as 'human rights' to a child…The women required to breed these children are non-entities, merely 'incubators', 'hosts', 'ovens' or 'gestational carriers'; it is very difficult to imagine anything more objectifying.[91]

There is no right to have a child by surrogacy or otherwise.[92] Limits on the eligibility of people to access surrogacy or to raise a child born of surrogacy, set in the best interests of the child or the surrogate mother, should not be prevented by claims of discrimination. As the Spanish Supreme Court has observed "a person's desire to be a parent however noble it may be cannot be fulfilled at the expense of other people's rights." [93] The focus rightly should be on the most vulnerable persons in surrogacy – the child and the surrogate mother. For this reason, as the Special Rapporteur's Report recommends, "any transfer of parental rights from the birth mother [should] occur only through judicial adoption processes that include parental suitability screening, equivalent to normal adoption procedures."[94]

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[87] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[88] The Special Rapporteur's Report [31]
[89] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Mother" *News Weekly* No3194, July 26, 2025, 7
[90] Margaret Somerville, "The First Tottering Steps Towards Allowing Commercial Surrogacy: Effects on the Child" *News Weekly* No 3193, July 12, 2025, 7
[91] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 14
[92] Special Rapporteur's Report [11],[60]
[93] Special Rapporteur's Report fn 196
[94] The Special Rapporteur's Report [70]

## Other key reform principles

### Risk Mitigation

The serious issues with international surrogacy – most, if not all, of which is commercial surrogacy – have been recognised by the Commonwealth government and, whilst available on the internet, [95] and "steering people away" from accessing overseas surrogacy[96] is manifestly insufficient. The issues are very serious and include:

> …many verified and widely publicised examples in recent years of issues for surrogates, children and commissioning parents. Examples are below.
>
> **Surrogates**
>
> - trafficked internationally and forced into surrogacy arrangements.
> - made to sign surrogacy agreements without understanding the terms
> - health and well-being – before, during and after the birth of the baby – not considered or compensated in surrogacy arrangements.
> - paid only a very small portion of what commissioning parents paid to surrogacy clinics.
> - removed from their families and confined in accommodation of the provider of surrogacy services.
> - not paid at all when they didn't give birth to a live child or when the commissioning parent refused to accept the child.
> - with multiple embryos implanted and then forced to have selective abortions.
> - prosecuted and jailed after laws changed with little or no notice.
>
> **Parents**
>
> - discovered in later years that clinics used the wrong egg or sperm to create an embryo or implanted the wrong embryo.
> - paid large sums for surrogacy arrangements where services were then not provided.
> - experienced difficulties collecting their children after laws changed with little or no notice or when national crises (such as war or natural disaster) have occurred.
>
> **Children**
>
> - denied their human right to preserve their identity (including being unable to access information about their biological family because of inaccurate records of the surrogate and donors).
> - left parentless, and sometimes stateless, when commissioning parents rejected them or changed their mind.
> - trafficked for abuse, servitude and sexual exploitation.[97]

[95] Australian Government, " Issues that have arisen from engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas
[96] Discussion Paper [42]

[97] Australian Government, " Issues that have arisen from engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas

**Respect and dignity**

**E**veryone is entitled to respect and dignity but the proposals do not secure that.

**Accessibility**

As noted above no person has a right to have a child. Accessibility always needs to be judged against the best interests of the child and the rights of others. [98]

**Pragmatism**

This is not a sound principle to govern legislation where the evidence of heinous conduct internationally is clear.

**Harmonisation**

The principle of harmonisation assumes that Australia is indivisible and that the peoples of all of its States and Territories are of the same mind when it comes to moral issues such as surrogacy. This is an incorrect view. Australia is becoming more and more different. NSW is a multi-cultural community and it is increasingly so.[99] More than 25% of Australians were born overseas, and another 25% have at least one parent born overseas. In NSW, these proportions are even higher – 34.6% of people were born overseas, and 56.3% have at least one parent born overseas.[100] There are suburbs in Sydney, such as Fairfield, that have more than 150 different ethnic groups in the one local government area, speaking a multitude of languages at home. In the last three decades, relatively few new migrants have come from Europe or countries of the Anglophone world, where religious adherence has declined in recent decades. Many migrants and refugees are devoutly religious and, even if they are not, most have come from cultures with quite traditional views about sex and family life. The proportion of the population that holds to traditional moral positions on sex and family life will only increase in the next three decades. This is not only because current migration patterns are very likely to continue, but because people from these cultures have much higher birth rates than secular Caucasian Australians.

*Religious NSW*

Whilst there has been a significant fall in the numbers of people identifying as Christians, a huge growth in the numbers of people identifying as being of no religion and a substantial growth in adherents to non-Christian religious faith,[101] NSW remains the most religious state in Australia with only 33.2% selecting no-religion in the latest census, compared to 38.9% nationally.[102] Some religious traditions – such as Catholicism - proscribe surrogacy and all

[98] Special Rapporteur's Report fn 196
[99] Australian Bureau of Statistics, "Cultural Diversity: Census" https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021
[100] https://www.abs.gov.au/census/find-census-data/quickstats/2021/1

[101] Australia Bureau of Statistics, "Religious Affiliation in Australia." https://www.abs.gov.au/articles/religious-affiliation-australia
[102] Australia Bureau of Statistics, "Religious Affiliation in Australia." https://www.abs.gov.au/articles/religious-affiliation-australia

artificial reproductive technology (ART). This is particularly important in NSW because Catholicism is the largest denomination in NSW[103] and Sydney the most Catholic city in the country with the largest percentage of people identifying as Roman Catholic.[104] In Australia there is not only an "astonishing level of religious ignorance and oblivion,"[105] as Christian Brugger has observed, but the country has seen increasing division among those with differing with moral approaches to life – particularly as regards sexual morality.

Contemporary Australia society demonstrates a distinct lack of regard or respect for Christianity. In 2022 McCrindle published the results of a survey in a paper titled "The changing faith landscape of Australia." [106] It showed an Australia with very varied attitudes towards Christianity. Whilst 30% of Australians considered themselves Christian, McCrindle found that about the same percentage were cold to Christianity with 6% passionately opposed to it, 13% having strong reservation or no interest in Christianity and 9% having some issues with Christianity which "isn't for them."[107] There is no reason to think that a significant number of health professionals in NSW do not share in this "astonishing level of religious ignorance and oblivion"[108] if not in an aversion to Christianity. As such there is a need for increased understanding, among health professionals, of the motivations and beliefs of their patients so that they are able to provide them with personal and individualised medical advice. To do so they must be cognisant of the fact that surrogacy may be rejected by their patients and they must develop attitudes which respect the beliefs of their patients. According to Salam and Salam:

> Today, assisted reproduction is accepted in nearly all its forms by Judaism, Hinduism and Buddhism, although most Orthodox Jews refuse third party involvement. On the contrary assisted reproduction is totally unacceptable to Roman Catholicism, while Protestants, Anglicans, Coptic Christians and Sunni Muslims accept most of its forms, which do not involve gamete or embryo donation. Orthodox Christians are less strict than Catholic Christians but still refuse third party involvement.[109]

In the Catholic religious tradition, whilst children are considered a blessing, all forms of ART and the use of surrogates is gravely immoral, as is any approach in which a child might be considered a piece of property or a right. As the official teachings of that Church as contained in the Catechism of that Church (the Catechism) explains:

> 2373 Sacred Scripture and the Church's traditional practice see in large families a sign of God's blessing and the parents' generosity.

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[103] .id informed decisions, "Australia community profile" https://profile.id.com.au/australia/religion?WebID=100

[104] Debbie Cramsie, "Sydney official the most Catholic Australian city," *Catholic Outlook* 19 March 2018 https://catholicoutlook.org/sydney-officially-catholic-australian-city/

[105] Quoted in Eddie O'Neil, "Lifting up the faith downunder" *National Catholic Register* (29 July 2017) https://www.ncregister.com/features/lifting-up-the-faith-down-under

[106] https://mccrindle.com.au/app/uploads/reports/The-changing-faith-landscape-of-Australia-Report-2022.pdf

[107] ibid

[108] Quoted in Eddie O'Neil, "Lifting up the faith downunder" *National Catholic Register* (29 July 2017) https://www.ncregister.com/features/lifting-up-the-faith-down-under

[109] HN and NH Sallam, "Religious aspects of assisted reproduction" *Facts, Views, Vis Obgyn*, 2016 Mar 31;8(1):33–48.

2374 Couples who discover that they are sterile suffer greatly. "What will you give me," asks Abraham of God, "for I continue childless?" and Rachel cries to her husband Jacob, "Give me children, or I shall die!"

2375 Research aimed at reducing human sterility is to be encouraged, on condition that it is placed "at the service of the human person, of his inalienable rights, and his true and integral good according to the design and will of God."

2376 Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' "right to become a father and a mother only through each other."

2377 Techniques involving only the married couple (homologous artificial insemination and fertilization) are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that "entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children." "Under the moral aspect procreation is deprived of its proper perfection when it is not willed as the fruit of the conjugal act, that is to say, of the specific act of the spouses' union .... Only respect for the link between the meanings of the conjugal act and respect for the unity of the human being make possible procreation in conformity with the dignity of the person."

2378 A child is not something owed to one, but is a gift. The "supreme gift of marriage" is a human person. A child may not be considered a piece of property, an idea to which an alleged "right to a child" would lead. In this area, only the child possesses genuine rights: the right "to be the fruit of the specific act of the conjugal love of his parents," and "the right to be respected as a person from the moment of his conception."

2379 The Gospel shows that physical sterility is not an absolute evil. Spouses who still suffer from infertility after exhausting legitimate medical procedures should unite themselves with the Lord's Cross, the source of all spiritual fecundity. They can give expression to their generosity by adopting abandoned children or performing demanding services for others.[110]

Differences between states in attitudes to moral issues militate against the otherwise desirable principle of harmonisation.

**Legal clarity and certainty**

Legal clarity and certainty is an important principle.

**Principle of least restriction**

This principle should not be adopted. It fails to apply the “best interests of the child” approach and considers the adults seeking a child only. There are many issues with

[110] Catechism [2373]-[2379] (references omitted) https://www.vatican.va/archive/ENG0015/__P86.HTM

surrogacy which militate against it being considered simply as another option for anyone wanting to have a child. As a result it should be tightly regulated and, if contrary to the views of the Special Rapporteur, it continues to be permitted, it should be available only to infertile couples who have exhausted all other options.

### Supportive institutional framework

### Promoting a nationally consistent approach through harmonisation.

Proposal 1 should be rejected. As noted above, Australia is a diverse nation with growing and significant cultural and religious differences between states which militate against a national approach of the type proposed.

### Establishing a National Regulator

Proposal 2 should also be rejected to the extent to which it assumes harmonisation given the significant cultural and religious differences between states.

*Community awareness and information provision*

There is a need for greater community awareness and information provision however the Proposal treats surrogacy, separately from other associated issues, when there is a need for an holistic approach to infertility. There are many issues with surrogacy. These include costs, the prospects of success, the potential for error, the generation of excess embryos, as well as moral, conscientious and religious issues. As a consequence patients, experiencing difficulty in falling pregnant, should be provided with a holistic response and a sound understanding of their options and the pros and cons of each, including the issues with surrogacy and the potential for treatment of any underlying conditions adversely impacting on conception and carrying a baby to birth, discussed below. The starting point must be improving medical treatment of women generally.

Improving medical treatment of women generally

Poor treatment of women in the provision off medical treatment has been labelled medical misogyny in a *Sydney Morning Herald* and *The Age* series of articles.[111] Whilst there is debate as to whether, medical misogyny is the cause, according to Hofffman and Auld:

> Research does show discrepancies in care and health outcomes between men and women. A literature review commissioned by the Australian Government found women disproportionately experience delayed diagnosis, polypharmacy, and lack of investigation into their symptoms, and are less likely to get appropriate care than men.[112]

[111] See *Sydney Morning Herald* https://www.smh.com.au/national/medical-misogyny-20241204-p5kvq7.html and Charlotte Grieve, "Assaulted by her son. Alison's pain was ignored until she collapsed," The Sun-Herald August 17, 2025 8-9

[112] Lynette Hoffman and Sophie Auld, "Medical misogyny headline grab misses the real issues, GPs say" *Heathed* 6 June, 2025 https://www.healthed.com.au/clinical_articles/medical-misogyny-headline-grab-misses-the-real-issues-gps-say/

In the view of, former RACGP president, Professor Karen Price, "Medicare has inherent bias towards short consultations and everything the government has done has now rewarded high volume care." In her view this makes the management of complex issues like endometriosis, which take time and continuity of care, difficult. She argues that Medicare reform is crucial to addressing this problem.[113]

The need for holistic advice to patients on supports for infertility

According to the Centre for Disease Control and Prevention, infertility is common. About 20% of married women in the US between the ages of 15 and 49 who have not already had a child are not able to fall pregnant within a year of trying of struggle with infertility.[114] There are a range of causes – including treatable causes – of these problems. These underlying conditions should be identified and (where possible) addressed and potentially addressed once and for all, so that women who wish to have a child have the impediments to them doing so and to future pregnancies removed, without the need to access surrogacy.

Education should include information about the fact that fertility declines with age and the role of both sexes in procreation. [115] As Devine has observed:

> …a healthy woman with no pre-existing conditions in her 20s has a 25 to 30 per cent chance of falling pregnant naturally, but this starts to decline in her late 20s and early 30s. Once she hits 35 this decline becomes swift, and by the time she's 40 the chance of falling pregnant naturally is about 5 per cent.[116]

Education should also include steps which they can take to fall pregnant without accessing surrogacy including natural fertility methods[117] and NaProTechnology.

Education about surrogacy

Education and information about surrogacy should include the costs, prospects of success, the issues of identity for children born of surrogacy, the impact of surrogacy on surrogate mothers, the risk involved in international surrogacy, the generation of excess embryos and the moral, conscientious and religious issues.[118]

The potential to fall pregnant naturally

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[113] Quoted in Lynette Hoffman and Sophie Auld, "Medical misogyny headline grab misses the real issues, GPs say" *Healthed* 6 June, 2025 https://www.healthed.com.au/clinical_articles/medical-misogyny-headline-grab-misses-the-real-issues-gps-say/

[114] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly* https://catholicweekly.com.au/naprotechnology-provides-alternative-to-ivf-for-couples-struggling-with-infertility/

[115] Kate Aubusson, "There have been 17 million IVF babies. Rebecca was one of the first," *The Sun-Herald*, July 27, 2025, 6

[116] Victoria Devine, "It's time we cut the cost of IVF," *The Sun-Herald*, July 27, 2025, 34

[117] Guest Contributor, "The drug-free fertility option" *The Catholic Weekly* 18 August, 2025 https://catholicweekly.com.au/the-drug-free-fertility-option/

[118] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly*

For some couples, experiencing issues in falling pregnant, there may be other steps which they can take to fall pregnant without accessing surrogacy:

> Monitoring basal body temperature, using ovulation predictor kits, or tracking changes in cervical mucus are effective ways to identify the most fertile days in a menstrual cycle. Moreover, maintaining a healthy lifestyle, including a well-balanced diet, regular exercise, adequate sleep, and stress reduction techniques can positively impact fertility.[119]

NaProTechnology

One holistic approach to these issues which, where appropriate, includes surgical responses is NaProTechnology. This term is an abbreviation of "natural procreative technology." It is "a treatment model or women's health science that evaluates, diagnoses and treats the underlying causes and reproductive issues using a natural family planning, or NFP, method called the Creighton Model Fertility Care System known as CrMS."[120] NFP methods such as CrMS allow "couples to avoid or achieve pregnancy by tracking the fertile window of a woman's cycle."[121]

Where couples, who wish to conceive, fail to do so utilising CrMS, NaProTechnology specialists then look to find any impediments to falling pregnant, which may be conditions such as polycystic ovarian syndrome, untreated thyroid disease, endometriosis, a blocked fallopian tube or other conditions. Where the gynaecological issues, which are identified, are treatable they can be treated, whilst CrMS charts - tracking biological signs or biomarkers – of the woman's cycle are followed.

Whilst NaProTechnology was inspired by Catholic teaching and it is consistent with that Church's teaching, that sexual intercourse has a procreative and unitive impact for a married couple, it is accessed by patients of any and no religion. Whilst all health professionals may not personally subscribe to this perspective, they should be aware that surrogacy and other forms of ART are not going to be a response to infertility that all patients are able to embrace. They should therefore be aware of other options which might be appropriate for such patients including NaProTechnology and adoption. The Catholic roots of this approach should not discount its consideration as a legitimate and beneficial response to infertility.

The generation of excess embryos

There are estimated to be nine million embryos left over from IVF.[122] As surrogacy involves the use of IVF, increased availability of and access to surrogacy will likely only add to these numbers. As the NHMRC has observed, "There are different views held in the Australian

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[119] Shree IVF **Cli**nic. "Natural Pregnancy After Failed IVF: Hope and Considerations" (updated 30 September 2023) https://www.shreeivfclinic.com/blogs/natural-pregnancy-after-failed-ivf/

[120] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly*

[121] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly*

[122] Michael Cook, "What should we do with millions of frozen embryos?' *The Catholic Weekly*, August 18, 2025 https://catholicweekly.com.au/what-should-we-do-with-millions-of-frozen-embryos/

community about the status attributed to a human embryo: "To different individuals the same embryo can be seen as a living human entity in the earliest stages of development, a potential life or a group of cells."[123]

Individuals seeking to access surrogacy and women considering acting as a surrogate, need to understand that that they "may need to make difficult decisions about the use, continued storage or discard of those stored …embryos."[124] It is not necessary to have a particular religious background or belief system to "recognise that the creation and use of a human embryo requires serious consideration."[125] This is recognised by the special status given to the human embryo in *The Research Involving Human Embryo Act 2002* (Cth) and the *Prohibition of Human Cloning for Reproduction Act, 2002* (Cth). This means that those who wish to consider accessing surrogacy and women considering acting as a surrogate, each need to grapple for themselves, with the status that they attribute to embryos, which they have caused to be created. In considering the challenge of this task, before embarking on a process which will create embryos excess to those required for a single patient to fall pregnant, patients would be wise to consider the words of Saint John Paul II who said in 1996 that "there seems to be no morally licit solution regarding the human destiny of the thousands and thousands of 'frozen' embryos which are and remain the subjects of essential rights and should therefore be protected by law as human persons."[126]

Accurate estimations of costs

As Devine has observed in connection with IVF but the same is true in relation to surrogacy ," People's physical and financial safety are closely linked, and all women have the right to be safe on their journey to parenthood in both respects."[127] Those seeking surrogacy need to be provided with accurate estimates of the full cost – including exigencies – which may be incurred.

The legal position

Persons considering surrogacy or considering acting as a surrogate,should have access to clear and accurate advice about the legal position governing surrogacy at the time of their inquiry. Education and information about Commercial Surrogacy, consistent with current law, should include the fact that it is illegal in NSW[128] and it is also unlawful, under NSW law,

[123] National Health and Medical Research Council. "Ethical guidelines on the use of assisted reproductive technology in clinical practice and research," 2017 https://www.nhmrc.gov.au/about-us/publications/art 21
[124] National Health and Medical Research Council. "Ethical guidelines on the use of assisted reproductive technology in clinical practice and research," 2017 https://www.nhmrc.gov.au/about-us/publications/art 55
[125] National Health and Medical Research Council. "Ethical guidelines on the use of assisted reproductive technology in clinical practice and research," 2017 https://www.nhmrc.gov.au/about-us/publications/art 21
[126] Quoted in Michael Cook, "What should we do with millions of frozen embryos?" *The Catholic Weekly*, 24 August 2025, 29.
[127] Victoria Devine, "It's time we cut the cost of IVF," *The Sun-Herald*, July 27, 2025, 34

[128] *Surrogacy Act 2010* (NSW) s8

if it takes place overseas. [129] The penalties – fines or imprisonment for 2 years or both[130] – should be emphasised.

### Permitting and regulating Surrogacy Support Organisations (SSOs)

It is critical to avoid conflicts of interest. An example of an approach to be avoided is IVF. IVF is a profit driven business which is worth more than $6 billion.[131] Average IVF cycle costs and between $9,000 and $15,000 with significant out-of-pocket costs.[132] The financial benefits of IVF providers cannot be disregarded in recognising that IVF can be proposed as the first response to couples wishing to fall pregnant.[133] According to Obstetrician-gynaecologist, Dr Christopher Stroud, "In gynaecology that happens every day. The woman says, "I'm not pregnant' and they say "Let's do IVF, you'll be pregnant." And the woman says, "But aren't you interested in why I'm not pregnant?""[134] Creating SSOs with a financial incentive to encourage and facilitate surrogacy arrangements would similarly risk conflicts of interest.

### Approving surrogacy agreements

Proposal 4 is sensible. Proposal 5 would appear to place the SSO in a position of conflict. SSO's should not be able to approve surrogacy agreements. Proposal 5 proposes an approach which is inconsistent with the Special Rapporteur's Report

> In article 10 (2) of the International Covenant on Economic, Social and Cultural Rights, it is stated that "special protection should be accorded to mothers during a reasonable period before and after childbirth". For the rights of surrogates to be safeguarded, they must be recognized in law as mothers, not merely carriers of the child. Such understanding is also in line with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption and the European Convention on the Adoption of Children, in both of which motherhood is attributed to a woman who has given birth by affirming a mother's right to renounce, but only after a child is born.[135]

and with the recommendations of the Special Rapporteur that States:

> (f) Adopt legislation recognizing the birth mother of a child born through surrogacy as the legal mother, allowing the transfer of parental rights only after birth and within a defined period to allow for reconsideration;
>
> (g) Oppose the recognition of surrogacy arrangements, including those undertaken abroad, as conferring legal parentage upon any person genetically unrelated to the child while ensuring that decisions concerning the establishment of parental relationships are

[129] *Surrogacy Act 2010* (NSW) s11
[130] *Surrogacy Act 2010* (NSW) s8
[131] Victoria Devine, "It's time we cut the cost of IVF," *The Sun-Herald*, July 27, 2025, 34
[132] Victoria Devine, "It's time we cut the cost of IVF," *The Sun-Herald*, July 27, 2025, 34
[133] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly*
[134] Katie Yoder, "Na ProTechnology provides alternative to IVF for couples struggling with infertility," 5 August, 2025 *The Catholic Weekly*
[135] The Special Rapporteur's Report [54]

> prioritized. In the interim, treat the children born through surrogacy that are left behind by their birth mother as unaccompanied minors to be placed in alternative care pending adoption, with priority given to family-based solutions. When deemed in the best interests of the child born through surrogacy, the partner of the biological father could be allowed to adopt the child, thereby avoiding the normalization of surrogacy and maintaining the original parentage
>
> (k) Require that any transfer of parental rights from the birth mother occur only through judicial adoption processes that include parental suitability screening, equivalent to normal adoption procedures.[136]

These recommendations are not addressed by the Discussion Paper and sensibly favour as legal parent of a child born of surrogacy - first the surrogate mother who has born the child and then the child's biological parents.

#### Increasing awareness and education

See discussion above under the heading *Community awareness and information provision* noting the need for an holistic approach to increasing awareness and education about infertility and responses to it. Proposal 7 should adopt this holistic approach rather than focussing only on surrogacy.

## Parameters of lawful surrogacy

#### Criminal law in the surrogacy context

Somerville argues that surrogate motherhood in general is unethical for reasons which include the following:

> …surrogate motherhood breaches children's human rights regarding their coming-into-being; it exploits vulnerable, socioeconomically deprived women; its international commercialisation has opened up dehumanising scenarios, such as FedEx-ing frozen embryos to "warehouses" of surrogates in developing countries; and it seriously harms societal values governing parent-child bonding, in particular that we have unconditional love for our children just because they are our children.[137]

Somerville argues that commercial surrogacy commodifies the human person and the human body and the most intimate of all relationships being that between mother and child. [138] She argues that:

> …surrogacy involves using human beings simply as a means, rather than as an end in themselves; it is to treat human beings and human life as objects or things, to commodify them. That offends the human dignity of the surrogate. It is to do wrong and, no matter how much good we might realise, good ends do not justify unethical means. "Commercial surrogacy" is also wrong because it breaches principles of equity and justice. In practice,

[136] The Special Rapporteur's Report [70]
[137] Margaret Somerville, "Are We Taking The First Tottering Steps Towards Allowing Commercial Surrogacy?" *News Weekly* No3192, June 28, 2025, 8, 9
[138] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 15

> desperately poor, vulnerable women with no other options are exploited as surrogates for rich, privileged, commissioning parents. [139]

The "baby Gammy case" is just one example of the issues that can arise with commercial surrogacy. In that case Justice Thackray of the Family Court of Western Australia" observed that the case:

> should also draw attention to the fact that surrogate mothers are not baby-growing machines, or 'gestational carriers.
>
> They are flesh and blood women who can develop bonds with their unborn children.
>
> The appalling outcome of Gammy and Pipah being separated has brought commercial surrogacy into the spotlight.
>
> Quite apart from the separation of the twins, this case serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities, with all the usual fallout when contracts go wrong.[140]

The current prohibition on commercial surrogacy in NSW should be maintained and adopted nationally. The extra-territorial reach of the current prohibition on commercial surrogacy in NSW should be maintained and adopted nationally, publicised (along with examples of the egregious nature of international surrogacy) and prosecutions pursued with vigour. The serious issues with international surrogacy have been recognised by the Commonwealth government and are set out above. [141] They are very serious and insurmountable other than by prohibition and enforcement. All Australian citizens and residents should be aware that international surrogacy can involve human trafficking and exploitation of surrogates and – for reasons including the risk that the identity of the biological parents of the children conceived abroad cannot be guaranteed – they are contrary to the best interests of children. Australian law cannot successfully seek to regulate the provision of surrogacy abroad, the issues are serious and the practice of commercial surrogacy abroad and at home is rightly unlawful.

The prohibition must be enforced if the practice is going to be prevented. It is a crime for very good reason. It will only be stopped when those who engage in the practice are prosecuted. The fact that enforcement may separate, those who have engaged in this crime, from the baby born as a consequence, is not a sound reason for prosecutions not taking place. Sadly the incarceration of criminals who are parents separates them from their children and this is a common occurrence in NSW when individuals who are parents are convicted of a crime and are incarcerated. The changes to *the Surrogacy Act 2010* (NSW)

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[139] Margaret Somerville, "Tottering Steps Towards Allowing Commercial Surrogacy: Societal and Global concerns" *News Weekly* No 3195, August 9, 2025, 15

[140] *Farnell & Anor v Chanbua* [2016] FCWA 17

[141] Australian Government, " Issues that have arisen from engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas

made to facilitate the making of parentage orders in relation to foreign surrogacies[142] send an entirely the wrong message to NSW residents and domiciles and should be reversed.

International surrogacy is not a victimless crime. Prospective parents, prosecutors and the judiciary along with the general population need to be educated on the victims of commercial surrogacy along with the risks that the practice exposes children, surrogates and prospective parents to. Civil Penalties are insufficient and will prove ineffective as deterrence. Effectively facilitating access to international surrogacy, by removing criminal sanctions, undermines all of the safeguards which the Discussion Paper proposes for domestic surrogacy.

#### Prohibited domestic surrogacy arrangements

Commercial surrogacy should remain criminal. Existing criminal offences should not be repealed.

#### Unregistered overseas surrogacy arrangements

All overseas surrogacy should be criminalised. Existing criminal offences should not be repealed. Providing this pathway to recognition for unregistered overseas surrogacy arrangements will only further encourage people to seek out the cheapest surrogacy arrangement they can find abroad knowing that to do so will not attract any criminal sanctions.

#### Facilitation of prohibited surrogacy arrangements

All who facilitate prohibited surrogacy arrangements, which should include all international surrogacy arrangements and all commercial surrogacy arrangements, should be subject to criminal prosecution.

## Support Getting Started

#### Connecting intended parents and surrogates

Advertising in relation to surrogacy should be prohibited.

## Threshold requirements for a surrogacy arrangement

The best interests of the child should govern the approach.

#### Genetic connection between the parties and the child

The best interests of the child should govern the approach. Intended parents seeking to create a child through surrogacy are already creating a situation in which they involve a woman in the process as a surrogate. This is already creating a challenge for the child's identity. It is not discriminatory for legislation to prefer the interests of a child by preferring intended parents to have a genetic connection with the child, to minimise the number of

[142] The passage of the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) ) which amended s18(2) and s23(2) of the *Surrogacy Act 2010* (NSW) to allow people who use surrogacy –including commercial surrogacy - overseas to obtain a parental order

persons involved in the creation of the child and to minimise the identity issues the child will face in future. Research in this area in underdeveloped but Susan Golombok et al's 2017 paper found less positive mother-adolescent relationships where there was no genetic link between the mother and child.[143] General studies have found that "children living with two biological parents were less likely to experience behavioural or emotional problems than children living in other family types.[144]

### *Requirement for a reason to access surrogacy*

Given the issues, that surrogacy creates, it should be seen as a last rather than a first option and be accessible only in the circumstances of established biological infertility.

### *Citizenship and residency requirements*

Legislation should require that all involved in producing the child – the surrogate mother, donors of any genetic material and the intended parents are citizens and residents to maximise the prospects of the child, born of the process, being able to meet and develop a relationship with everyone involved in the child's creation.

### *Requirement of previous successful pregnancy*

Proposal 16 is sensible however should include a requirement that the potential impact on existing children of the surrogate mother are considered. All pregnancies involve some danger and surrogacy may interfere with the ability of the surrogate to parent her existing children. As the Special Rapporteur observes:

> Moreover, since many surrogacy agencies require a prospective surrogate to be the mother of at least one child already, such separation also creates confusion for existing children of a surrogate, who see their mother pregnant but cannot expect to have a sibling.[145]

### *Requirement for medical screenings*

Proposal 17 is sensible. Intended parents should similarly be subject to medical screening to determine their capacity to parent the child intended to be born.

### *Requirement for psychological screenings*

Proposal 18 is sensible. Intended parents should similarly be subject to psychological screening to determine their capacity to parent the child intended to be born.

### *Requirement for criminal history check screenings*

Intended parents should be subject to a criminal history check. They should not be able to proceed to enter into a surrogacy arrangements where the criminal history check suggests any risk to the child born of surrogacy's future wellbeing.

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[143] Susan Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14.' (2017) 53(10) *Developmental Psychology* 1966, 1975

[144] D.Paul Sullins, "The Case for Mum and Dad" *The Linacre Quarterly* (2021) Vol 88(2) 184,188

[145] The Special Rapporteur's Report [50]

### *Requirement for criminal history check screenings*

As noted under the heading *Community awareness and information provision* above those considering entering into surrogacy arrangements as intended parents or surrogates need to be provided with a range of information considering the issues they are facing holistically.

### *Legal advice requirement for intended parents and surrogates*

Legal advice is also critically important but it should be given in a context in which the lawyer can be satisfied that the clients have had access to and considered information about the topics discussed in the *Community awareness and information provision* section above. Children should be entitled to access those who form part of their genetic and gestational origins not just to access information about who they are. Surrogacy agreements must be consistent with international law and protect the rights of the surrogate mother:

> The International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment guarantee the right to be free from torture and cruel, inhuman or degrading treatment. Circumstances in which surrogate mothers are exploited, trafficked, kept in confinement, compelled to separate against their will from the children they have borne, forced to undergo abortions or subjected to invasive, unnecessary and harmful medical procedures may amount to such treatment.[146]

Surrogates, intended parents and any donors of genetic material should be provided with independent legal advice before any surrogacy agreement is put into place.

### *Implications counselling requirements for intended parents and surrogates*

Intended parents and surrogates should be subject to counselling requirements. This should include counselling of the surrogate is relation to "the serious psychological harm that may result from the separation process. "[147]

### *Surrogacy agreements*

Intended parents, surrogates and any providers of genetic material used in the creation of the intended surrogate child, should be part of the surrogacy agreement and agree that they will be willing to participate in the life of the child born of surrogacy to the extent to which the child requests or requires it. Each should be required to provide up to date contact details and notice of any change to these. The specific ramifications and consequences of the inclusion of the Proposal 23 statement should be spelt out in detail in the agreement.

### *Enforcing surrogacy agreements*

It is understandable that surrogates, wishing to ensure that their expenses and compensation is paid, and intending parents, wishing to ensure co-operation in the transfer

[146] The Special Rapporteur's Report [55]
[147] The Special Rapporteur's Report [31]

of the child, may wish to ensure that their surrogacy agreement is legally enforceable. However, circumstances may change over a period of at least 9 months as to make variation of the contract appropriate. Financial, health and psychological health of one or more of the parties may change over this time as may their desire for a child. To guard against this surrogacy agreements should expressly deal with the circumstances in which a surrogate mother wishes to raise the child. Or the intended parents no longer wish to do so.

The overarching factor should be the best interest of the child but protection of a surrogate woman's "autonomy, bodily integrity and informed consent to medical treatment or procedures" is hollow if it does not permit the surrogate mother to change her mind when the baby is born. Given that, according to one study 35 per cent of surrogate mothers reported difficulties in relinquishing their baby, [148] this potential should be taken into account and allowed for. Contractual arrangements which do not allow for this was a concern raised by the Special Rapporteur:

> Particularly concerning are jurisdictions in which a surrogate mother legally forfeits all parental rights while still pregnant, such as in Ukraine. Legal systems that serve to prioritize safeguarding the rights and parentage of commissioning parents often do so at the direct expense of the surrogate mother, effectively stripping her of any meaningful recourse should she change her mind and wish to keep the child.208[149]
>
> Notably, in this context, the Committee on the Rights of the Child has raised concerns about determining parentage solely on the basis of contractual arrangements established before conception or birth. [150]

## Support through the surrogacy journey

### Cost recovery for surrogates

#### *Reimbursing surrogates for expenses*

If the State is to permit altruistic surrogacy, it is reasonable to permit the payment to the surrogate of expenses directly related to the surrogacy so that they are not financially disadvantaged. There will however need to be tight controls (rather than broad categories) over this to avoid it – if not immediately then over time - effectively become commercial surrogacy with all the manifest issues that that practice adds.

#### *Reimbursing surrogates for hardship, at the surrogate's election*

Again, if the State is to permit altruistic surrogacy, it is reasonable to permit the payment to the surrogate of compensation for hardship within strict confines and financial caps. Again there would need to be tight controls (rather than broad categories) over this to avoid it – if not immediately then over time - effectively become commercial surrogacy with all the manifest issues that that practice adds.

#### *Holding funds in a trust account*

[148] Special Rapporteur's Report [29]
[149] Special Rapporteur's Report [64]
[150] Special Rapporteur's Report [59]

This should be required but only under strict regulation to ensure that the funds and held by a suitable fiduciary and that defalcation does not occur contrary to the experience in other, even well-developed, jurisdictions.[151]

### Medicare entitlements

The prohibition on Medicare rebates for assisted reproductive services in relation to surrogacy should remain. There are many issues with surrogacy. There is no right to a child under the Beijing Declaration and Platform for Action or any other international instruments. [152]

## Support when the child is born

### Pathways to legal parentage

#### *Administrative pathways to legal parentage*

Intended parents should not be determined as a child's legal parents at birth. The surrogate should be recognized in law as the mother.[153] Any transfer of parental rights should occur only after birth and after a legislated period to allow for reconsideration by the parties to the surrogacy agreement. It should not be consequent on any administrative procedure but be subject to judicial processes that include parental suitability screening, equivalent to normal adoption procedures.[154]

#### *Judicial pathways to legal parentage*

The starting point for any request for the recognition of parentage by any person other than the woman who gave birth to the child, in relation to surrogacy agreements which were not approved, should be that the surrogate birth mother is the legal parent. The fact that a surrogacy agreement has been made with a surrogate outside Australia (which should be an illegal or criminal act attracting a serious term of imprisonment) or within Australia but contrary to law, should in itself militate very strongly (if not determinately) against any award of custody or recognition of parental rights of intended parents. The orders would only be subject to the best interests of the child after a careful consideration of the treatment of the surrogate, any evidence of modern slavery or human trafficking and the circumstances of the child's birth. This process should take into account the fact of criminal conduct and penalties (which should usually be imprisonment) of one or both intended parents. The Court should not assume that the intended parents' decision to commission the production of the child and the child's mere existence, as a consequence, are themselves in the best interests of the child. It is only with very serious consequences for breaking the law – which should extent to those facilitating the surrogacy arrangements

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[151] See e.g. Rosa Flores, Emma Tucker and Sara Weisfeldt,,"Nearly 2 dozen families claim owner of Houston surrogacy escrow company stole millions to fund lavish lifestyle" CNN US, July 19, 2024 https://edition.cnn.com/2024/07/19/us/houston-surrogacy-escrow-company-fraud-scheme-lawsuit

[152] Special Rapporteur's Report [60]

[153] The Special Rapporteur's Report [54]

[154] The Special Rapporteur's Report [70]

contrary to the law - the intended parents – and surrogacy facilitators - will be discouraged from doing so. The Discussion Paper's observation that "[l]imiting access to legal parentage aims to encourage compliance with the legislative requirements"[155] but that "this ignores the reality that children continue to be born from surrogacy arrangements that do not comply with the law"[156] itself ignores the fact that the laws which criminalise commercial surrogacy at home and abroad have simply not been enforced and no one has been subject to criminal sanctions. This needs to change.

### Parental leave entitlements

The extent of entitlements should be dependent on who is raising the child born of surrogacy.

### Parental Information about a person' gestational history

Children born of surrogacy must be entitled to detailed information including contact details (which is updated in cases of change) of the surrogate woman who gave birth to them and to anyone who provided genetic material to enable their production. They must also be able to have physical contact with these people if they wish to do so.

## Regulating overseas surrogacy

This must be banned and subject to enforced criminal sanctions against anyone who participates in the practice. The current practice of the Department of Home Affairs effectively undermines the existing criminal prohibitions of international commercial surrogacy and allows those laws to be circumvented. [157] The law should make it clear that children born overseas by surrogates will be recognised as the children of their surrogate mother.[158] This is not a step to disadvantage or prejudice children born of surrogacy, contracted by one or more Australians abroad, but to bring an end to the practice. Australia cannot regulate the practice of surrogacy abroad and the Discussion Paper's approach of seeking to regulate overseas surrogacy will not be successful. As the Special Rapporteur has observed, " [w]hile it has been argued that regulations and oversight can decrease the risk of the trafficking of women and girls in surrogacy arrangements and reduce harm, existing evidence does not support such conclusions.[159] Australia can however legislate to prevent its citizens, residents and business from engaging in practices infected by slavery, human trafficking, the exploitation of woman, children and intended parents. [160]

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[155] Discussion Paper [195]
[156] Discussion Paper [195]

[157]Department of Home Affairs, "International surrogacy arrangements" https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements

[158] Special Rapporteur's Report [54]
[159] Special Rapporteur's Report [41]
[160] Australian Government, " Issues that have arisen from engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas

### Registering overseas surrogacy arrangements

This should not be permitted. It is an invitation not to follow Australian law.

### Streamlining processes to return to Australia

This should not occur. It is an invitation not to follow Australian law.

### Making it easier to obtain and renew passports

This should not occur. It is an invitation not to follow Australian law.

## Other suggestions for reform of Australian surrogacy law

Australian surrogacy laws could benefit from a number of reforms not mentioned in the Discussion Paper as follows:

*The need for prohibition of sex-selection surrogacy*

The *Global Public Health* journal has published research led by Edith Cowan's Amanuel Gebremedin into the disproportionate number of male and female births among certain migrant population in NSW and Western Australia in 1994-2015. [161] The study found that:

> Indian and Chinese mothers had much higher induced abortion rates in early pregnancy than their Australian counterparts, which coincided with the introduction of non-invasive prenatal testing.
>
> This study provides the most compelling observational evidence to date of male-biased sex ratio at birth among overseas born mothers which appears to be attributed to prenatal sex determination followed by selective abortion of females. [162]

Gebremedin has expressed concern about sex-selection practices undermining "broader commitments to gender equality and non-discrimination," resulting in pressure on women to have sons and making it harder for men to find partner if a population imbalance results.[163] The Special Rapporteur has observed that:

> Girls can also be victims of sex-selective abortion, as surrogacy contracts sometimes include clauses for "selective reduction" based on the sex of the child. A similar situation exists for children with disabilities. There are even surrogacy agencies that promise that "if the imperfection manifests later in the pregnancy, interruption of the pregnancy is guaranteed by abortion".[164]

[161] Natasha Bita, engaging in surrogacy overseas," https://www.surrogacy.gov.au/surrogacy-overseas/issues-have-arisen-engaging-surrogacy-overseas "Boys, not girls: questions on migrant births" *The Australian*, July 1, 2025
[162] As quoted in Natasha Bita, "Boys, not girls: questions on migrant births" *The Australian*, July 1, 2025
[163] Natasha Bita, "Boys, not girls: questions on migrant births" *The Australian*, July 1, 2025
[163] Natasha Bita, "Boys, not girls: questions on migrant births" *The Australian*, July 1, 2025
[164] Special Rapporteur's Report [51]

These are compelling reasons for sex-selection surrogacy to be prohibited in Australia as Queensland's recently enacted *Assisted Reproductive Technology Act 2024* (Qld) s24(1) does.

*The need for prohibitions of characteristic-selection surrogacy*

The launch of the Nucleus Genetics 'Nucleus Embryo' service in New York to enable those utilising IVF "to compare their embryos based not only on likelihood of inherited diseases or disabilities but also on characteristics like IQ, eye colour, hair colour, height and body mass index" [165] provides an impetus for Australia to pre-emptively legislatively respond to prohibit such characteristic surrogacy before it is introduced into this country.

*Conscientious Objection*

Conscientious objection – and freedom of religion – are important human rights which are recognised in Australian domestic law and attract international protection. Particularly if any or all of the reforms proposed in the Discussion Paper were enacted into law and surrogacy became more widely accessed in Australia the issues relating to surrogacy and other forms of artificial reproduction technology (ART) are likely to braise more frequently and create more issues.

Whilst freedom of conscience and conscientious objection are not subsumed by freedom of religion, Australian Courts have made numerous statements recognising the importance of religious freedom in particular. It has been described as "the paradigm freedom of conscience,"[166] "the essence of a free society,"[167] "a fundamental concern to the people of Australia,"[168] "a fundamental freedom"[169] and as "a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity."[170] Australian Courts have recognised "the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching."[171] The inclusion of a religious freedom provision in the *Australian Constitution* itself demonstrates that this freedom was considered one of particular moment in Australia at Federation. Whilst the *Australian Constitution* gives the Commonwealth powers in "what may be broadly described as public economic or financial subjects" [172] and protects or confers very few rights on individuals, s116 contains a proscription on the Commonwealth establishing a State religion or imposing any religious test for the holding of any

[165] Monica Doumit, "The brave new world upon us," *The Catholic Weekly* 29 June, 2025, 25
[166] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 130 per Mason ACJ and Brennan J and *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 557
[167] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 150 per Murphy J
[168] *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 543
[169] *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552 and 555
[170] *Christian Youth Camps Ltd v Cobaw Community Health Services Limited* [2014]] VSCA 75 [560] per Redlich JA.
[171] *Evans v New South Wales* 168 FCR 576 [2008], 580
[172] *Russell v Russell* [1976] 134 CLR 495, 546 (*Russell v Russell*).

Commonwealth office. It also prevents the Commonwealth from prohibiting the free exercise of religion.[173]

Freedom of conscience and religious belief is an important principle both in Australian and international law. Australia is party to a number of international agreements which recognise the right to freedom of religion. For example, Article 18 of the 1948 *Universal Declaration of Human Rights* provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18(1)-(3) of the *International Covenant on Civil and Political Rights* (ICCPR), which Australia has been a party to since 1980, provides that:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or beliefs in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and **are necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The United Nations Human Rights Committee, established under Article 29 of the ICCPR, has recognised that:

> The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts …[174]

Under Article 2 of the ICCPR, Australia undertook to respect and ensure that everyone within Australia and subject to Australian jurisdiction, recognises the rights in the ICCPR. Article 9 of the *European Convention on Human Rights* (ECHR), which recognises the right to freedom of thought, conscience and religion, is in substantially the same terms as Article 18(1) of the ICCPR. As a matter of international law freedom of thought, conscience and belief should be interfered with only where necessary for the limited purposes set out in Article 18(3) of the ICCPR.

The European Court of Human Rights (ECHR) has observed that the maintenance of pluralism is dependent on maintaining freedom of religion.[175] Whilst Australian Commonwealth law has not domesticated the obligations of Article 18 of the ICCPR and the

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[173] Section 116 of the *Australian Constitution* provides that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

[174] General comment no 22 [4])

[175] *Case of Eweida And Ors v The United Kingdom* ECHR 48428/10,59842/10,51671/10 and 36516/10 15 January 2013 (*Eweida*) 30 [79]

HR Act enacts a different standard to Article 18(3) there are some good Australian examples of the accommodation of conscientious objection, religious freedom and belief. [176]

*Surrogacy and conscientious objection*

As noted, earlier in this Submission, some religious traditions proscribe surrogacy and other forms of ART. As noted above, according to Salam and Salam, surrogacy and other forms of ART is totally unacceptable to in Catholicism and Orthodox Christians and most Orthodox Jews refuse third party involvement.[177] Protestants, Anglicans, Coptic Christians and Sunni Muslims do not accept surrogacy and other forms of ART involving gamete or embryo donation.[178] As a consequence, surrogacy and other forms of ART createsserious issues for some religious believers and others who have a conscientious objection to the practices. It is not just a Catholic issue but as that tradition is the largest single religious denomination in NSW it warrants specific attention. For Catholics, seeking to live in accordance with the teachings of their Church, facilitating or participating in surrogacy and other forms of ART – such as by informing patients who seek surrogacy and other forms of ART or ART services – is a very serious sin.[179] As the Catechism observes:

> **1868** ….we have a responsibility for the sins committed by others when we cooperate in them:
> - By participating directly or voluntarily in them;
> - By ordering, advising., praising or approving them,
> - By not disclosing or hindering them when we have an obligation to do so;
> - By protecting evil doers.

In some religious traditions participation in such actions could be immoral not only in its own right but also because of the risk of scandal. This could be so in the context of participation in surrogacy and other forms of ART in the Catholic religious tradition – particularly for a Catholic health facility - for example:

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[176] For example, although voting is compulsory in Australia if an elector has a religious belief that it is his or her religious duty to abstain from voting this will constitute a reasonable excuse under s 245(14) of the *Electoral Act* and s 45(13A) of the *Referendum Act see* Australian Electoral Commission, *Electoral Backgrounder: Compulsory voting* [41] *available at* http://www.aec.gov.au/About_AEC/Publications/backgrounders/compulsory-voting.htm. Exemptions are provided to religious bodies from a range of discrimination provisions to enable them to operate schools and to comply with their own doctrines in managing their own operations (e.g. *Sex Discrimination Act, 1984* (Cth) ss 5, 5A,14,21(3),23(3)(b), 37(1)(a),37(1)(d),37(2) and 38, *Age Discrimination Act 2004* (Cth) s35, the *Anti-Discrimination Act, 1977* (NSW) ss 8, 38S(2)(c), 49ZT(2)( c), 49ZXB(2)(c),49ZYB,49Y and 56()) and the *Equal Opportunity Act, 2010* (Vic) ss 83(1)-(2). For a summary of the exemptions from various discrimination provisions which are afforded to religious (and other) schools in Australia see Greg Walsh*, Religious Schools And Discrimination Law* (Central Press,2015) 1-11.

[177] HN and NH Sallam, "Religious aspects of assisted reproduction" *Facts, Views, Vis Obgyn*, 2016 Mar 31;8(1): 33–48.

[178] HN and NH Sallam, "Religious aspects of assisted reproduction" *Facts, Views, Vis Obgyn*, 2016 Mar 31;8(1): 33–48.

[179] *Catechism of the Catholic Church* [2373]-[2379]

> 2284 Scandal is an attitude or behavior which leads another to do evil.
> The person who gives scandal becomes his neighbor's tempter. He damages virtue and integrity;
> he may even draw his brother into spiritual death. Scandal is a grave offense if
> by deed or omission another is deliberately led into a grave offense.
>
> 2285 Scandal takes on a particular gravity by reason of the authority of those who cause it or
> the weakness of those who are scandalized. It prompted our Lord to utter this curse:
> "Whoever causes one of these little ones who believe in me to sin, it would be better for him to have
> a great millstone fastened round his neck and to be drowned in the depth of
> the sea."[85] Scandal is grave when given by those who
> by nature or office are obliged to teach and educate others. Jesus reproaches the scribes and
> Pharisees on this account: he likens them to wolves in sheep's clothing.
>
> 2286 Scandal can be provoked by laws or institutions, by fashion or opinion. Therefore, they
> are guilty of scandal who establish laws or social structures leading to the decline of morals and
> the corruption of religious practice, or to "social conditions that, intentionally or not,
> make Christian conduct and obedience to
> the Commandments difficult and practically impossible." This is also true of business leaders who
> make rules encouraging fraud, teachers who provoke their children to anger,[88] or manipulators of pub
> lic opinion who turn it away from moral values.
>
> 2287 Anyone who uses the power at his disposal in such a way that it leads others to
> do wrong becomes guilty of scandal and responsible for the evil that he
> has directly or indirectly encouraged. "Temptations to sin are sure to come; but woe to him by whom
> they come!" [180]

As the Australian Bahai Community noted, in their Submission to Australian Human Rights Commission, *Inquiry Into Freedom of religion and Belief in 21st Century Australia* in 2011, "[T]here is a tendency to treat the right to freedom of religion or belief as less important than certain other civil and political rights and this right is often treated as a 'second class citizen' in the sphere of human rights.'[181] As Laycock and Berg have observed:

> [C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.[182]
>
> No religious believer can change his understanding of divine command by any act of will…Religious beliefs can change over time…But these things do not change because government says they must, or because the individual decides they should … [T]he religious believer cannot change God's mind.[183]

Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able to worship and live their faith. As Anthony Lester has observed:

> Reconciling equality and religious freedom is particularly difficult. In a plural democratic society, cultural differences should be accorded equality for respect unless they are abusive or repressive.

[180] *Catechism of the Catholic Church* [1868] https://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm
[181] Submission No 1921
[182] Douglas Laycock and Thomas Berg, S*ame-Sex Marriage and Religious Liberty* 99 *VIR. L.REV* 1.[2013], 3
[183] Ibid 4.

> What to one group is praiseworthy to another group may seem anti-social; for example, wearing a niqab from head to toe.[184]

As I have previously observed:

> Australia is a pluralist, multi-faith, multi-racial society. The religious landscape of Australia is a constantly evolving one, but Australia has deep historical Christian roots. From the first census in 1911, "the majority of Australians have reported an affiliation with a Christian religion." Even though this affiliation has been declining "from 96% in 1911 to 61% in 2011," the Christian faith traditions continue to dominate in Australia, with Catholicism being the largest
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> Although statistics showing the religious affiliation of health practitioners in Australia are not available, if the percentage of Catholic health practitioners replicates the general trend indicated by the census data, about one-quarter of health practitioners in Australia have an affiliation to Catholicism. The European Court of Human Rights (the "ECHR") has observed that maintaining pluralism is dependent on maintaining freedom of religion.[185]

Medical practitioners especially require protection of their religion, conscience and belief because their occupation requires them to give advice to their patients about what procedures are most appropriate for them and that necessitates them expressing their honest beliefs and opinions. Protections should be enacted to avoid creating a circumstance in which medical advisers, who have a conscientious or religious objection to surrogacy and other forms of ART, are forced to inform patients of surrogacy and other forms of ART services. This could be detrimental to their mental health because medical practitioners who act against their conscience can experience moral distress. As I have previously observed:

> Moral distress involves feelings of helplessness, anxiety, anger, guilt, sorrow, and frustration. It can have adverse effects on self-respect, self-esteem, patient care and job satisfaction. It can cause burnout, and contribute to health practitioners leaving their vocation. Some studies indicate that moral distress is most likely to affect nurses (and one might extrapolate from these studies to apply to other health practitioners) whose ethical beliefs are most influenced by their religious faith. Health practitioners who consistently act against their conscience can also become desensitized to it. They are at greater risk of developing indifference to patients and "doubling" or "compartmentalization," leading to a weakened ability to make the types of ethical decisions critical for health practitioners.[186]

If the State requires medical practitioners to act against their conscience, it is setting up a regime which undermines their ability to make ethical choices and give ethical advice. I have written elsewhere about the risks of mandating participation by health professionals in such activities:

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[184] Anthony Lester*, Five Ideas To Fight For* (OneWorld, 2016) 56.

[185] Michael Quinlan, "When the State Requires Doctors to Act Against their Conscience: The Religious Freedom Implications of the Referral and the Direction Obligations of Health Practitioners in Victoria and New South Wales", 2016 *BYU L. Rev*. 1237 (2017) 1254-1255.

[186] Michael Quinlan, "When the State Requires Doctors to Act Against their Conscience: The Religious Freedom Implications of the Referral and the Direction Obligations of Health Practitioners in Victoria and New South Wales", 2016 *BYU L. Rev*. 1237 (2017) 1270-1271. Available at: https://digitalcommons.law.byu.edu/lawreview/vol2016/iss4/7118.

> There is growing evidence that requiring health practitioners to act against their conscience can lead to physical and mental symptoms known as 'moral distress' and to desensitising of conscience. This particularly affects health practitioners who consistently act against their conscience. These practitioners are left at greater risk of developing indifference to patients and "doubling" or "compartmentalization" which leads to a weakened ability to make the types of ethical decisions critical for health practitioners.[187]

For these reasons, Australian legislation should protect, the rights of registered health – professionals – and others - to freedom of conscience and belief. In particular, a registered health practitioner who has a conscientious objection to surrogacy and other forms of ART should have the right to refuse to:

- provide information about surrogacy and other forms of ART;
- participate in surrogacy and other forms of ART;
- attend training or establish competence in providing information about surrogacy and other forms of ART.

*Conscientious objection at health care facilities*

Health care facilities, which are part of a religious tradition, should not be forced to provide surrogacy and other forms of ART services or to permit surrogacy and other forms of ART to occur on their premises. Australian law and international human rights law recognise that freedom of religion is not limited to individuals. In manifesting their religious beliefs, religious believers in some religious traditions, have established entities which carry out works such as education, the provision of charity, the provision of food or housing to the underprivileged, the provision of palliative or aged care or hospitals. These entities founded by religious believers are a communal demonstration of religious faith and service and a manifestation of that faith in their own right. They are also seen by others as representative of a religious faith. The religious objects or mission of an entity may preclude that organisation from enabling acts contrary to the teachings of that faith to be performed on premises owned or operated by that entity. The institutional beliefs or such entities warrant protection. In *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 the Grand Chamber of the European Court of Human Rights stated that:

> [136] The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable**[188] **[emphasis added]**

The nature of the right to freedom of religion in Australia, was considered by Kenny, Greenwood and Logan JJ of the Federal Court of Australia in *Iliafi.* The Court there noted:

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[187] Quinlan, Michael (2016) ""Such is Life": Euthanasia and capital punishment in Australia: consistency or contradiction?," *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*: Vol. 6 : Iss. 1 , Article 6, 22

[188] *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 [136] as quoted in *Iliafi v Church of Jesus Christ Of Latter Day Saints Australia* (2014**)** 311 ALR 354 (*Iliafi*) [77]

> The right to freedom of religion is a complex right regarding religious beliefs and practices of worship. In *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHHR 13 (*Church of Bessarabia*), the European Court of Human Rights described religious freedom in the following way (at [114] and [117]):
>
> > **[114] While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares. *Bearing witness in words and deeds is bound up with the existence of religious convictions.* That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion** … Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief …
> >
> > [117] [I]n principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs *or the ways in which those beliefs are expressed.* [Citations omitted; emphasis added.] [189]

As the Court in *Iliafi* further noted:

> In *Church of Bessarabia*at [118], the European Court expressly linked individual religious freedom to the protection of the autonomy of the collective church, stating that:
>
> > [118] [S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference … **Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Articles 9 affords …** [Citation omitted; emphasis added.]
>
> The European Court of Human Rights has repeatedly affirmed this statement: see, for example, [78] below; see also J Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227.

Health care facilities should be permitted not just to refuse to provide surrogacy and other forms of ART services but also to refuse to permit surrogacy and other forms of ART to be provided on premises or to otherwise participate in surrogacy and other forms of ART in any way due to an 'institutional conscientious objection." It is an appropriate recognition of the importance of religious organisations. They are a key aspect of the respect for diversity and difference in Australia and a visible demonstration of pluralism. It would be reasonable to require such institutions to inform the public of their position. Providing or facilitating surrogacy and other forms of ART, should not be a practice in which entities with a religious mission or foundation which consider such activities to be immoral, are obliged to participate.

All medical facilities and medical practitioners should also not be required against their conscience or religious beliefs to provide surrogacy and other forms of ART or to participate in the procedure by being required to provide referrals or to inform patients of surrogacy and other forms of ART services because mandating such conduct would be a positive discouragement for people with a religious or conscientious conviction against assisting patients to access surrogacy and other forms of ART from becoming medical practitioners. It would also be a positive discouragement to hospitals and other health care facilities

[189] *Iliafi* [74]

operated by religious organisations which consider surrogacy and other forms of ART to be immoral, from beginning or continuing to provide those services. Given the number of organisations of this kind operated by the Catholic Church, for example, the withdrawal of the operations of those providers would be deeply problematic for the State and for patients wishing to access other health services.

In a multi-faith, plural society respect for difference and diversity ought be demonstrated by recognizing that individuals and entities are different and not all can or ought be obliged to participate in every practice which the State has determined to make lawful.

16 December 2025

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E: [redacted]