Child Identity Protection (CHIP)[1] welcomes this opportunity to provide input to the Australian Law Review Commission's (ALRC) Discussion Paper Review of Surrogacy Laws (Discussion Paper). CHIP appreciates the openness of the ALRC to consider input by accepting two rounds of comments, including on this Discussion Paper by 19 December 2025. CHIP's response is aligned with its other work on a human rights-based approach to surrogacy under the leadership of its President, Maud de Boer-Buquicchio, former UN Special Rapporteur on Sale and Sexual Exploitation of Children.

Children born through surrogacy have the same rights as all other children under the United Nations Convention on the Rights of the Child (UN CRC) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC).

This response to the Discussion Paper is thematic rather than comprehensive, grounded in the rights of the child.[2]

1) The law review process seeks to have a human rights-based approach

It is encouraging that the ALRC is considering "Australia's human rights obligations." While there is no international framework dedicated exclusively to surrogacy, a number of authoritative sources provide guidance. These include the UN CRC Committee's recommendations, the UN Special Rapporteur on sale and sexual exploitation of children reports (2018 and 2019),[3] the *Principles for the Protection of the Rights of the Child Born Through Surrogacy* (Verona Principles, 2021),[4] and the UNICEF and Child Identity Protection (CHIP) briefing note: *Key Considerations – Children's Rights and Surrogacy* (2022).[5] The Hague Conference on Private International Law has also undertaken considerable work, including through its Working Group of experts, on the development of a potential global instrument designed to address the private international law issues relating to legal parentage and international surrogacy arrangements (ISAs).[6] The UN Special Rapporteur on violence against women and girls has drafted a 2025 report calling for a total prohibition of all surrogacy practices, together with interim measures to safeguard children when it nevertheless occurs.[7]

Taken together, this international guidance highlights a number of children's rights that are directly implicated in surrogacy arrangements, notably the right to human dignity, non-discrimination, best interests determination, the right to identity (including birth registration, name, nationality and family relations), and the right not to be sold. It is clear that all of these rights should be given due and equal consideration.

This Discussion Paper addresses some of these rights, including legal parentage, the right to identity including a register, birth registration and nationality. However, several other human rights obligations appear insufficiently addressed in terms of their implementation in Australia. Of particular concern is that the Discussion Paper does not address the child's right to human

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[1] Child Identity Protection (CHIP) (www.child-identity.org) collaborates with States, UN agencies, international organisations and other stakeholders to ensure that international and regional standards are fully respected. In that capacity, CHIP has a particular interest in the protection of the rights of the child in surrogacy arrangements.
[2] Prepared by David Smolin, CHIP Special Advisor with input from Maud de Boer-Buquicchio, Nigel Cantwell, Mia Dambach and Katarina Trimmings
[3] https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy
[4] https://bettercarenetwork.org/sites/default/files/2021-03/VeronaPrinciples_25February2021.pdf
[5] https://www.unicef.org/media/115331/file
[6] https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy
[7] Report on the different manifestations of violence against women and girls in the context of surrogacy presented by Reem Alsalem, UN Special Rapporteur on violence against women and girls, its causes and consequences (A/80/158)

dignity and right to not be sold. It likewise does not comprehensively address all elements of the child's right to identity.

2) **The law review process initiated by the Attorney General appears flawed from the outset because it is premised on a supposed "right to a child", with a primary purpose of fulfilling adult demand for children.**

The Terms of Reference by the Attorney General of Australia to the ALRC begin with: "I, the Hon Mark Dreyfus KC MP, Attorney-General of Australia, having regard to [...] surrogacy providing Australians who are unable to give birth an opportunity to have a child."[8] This and a number of accompanying statements suggest that the primary impetus of the reform is to increase the availability of surrogacy arrangements in order to satisfy this demand for children.[9] This occurs in a context where the right to found a family is distorted to a right to use the reproductive capacities of others in pregnancy and childbirth in order to fulfil the adult's desire for a child.

As the first UN-based human rights document specifically analysing surrogacy stated in 2018:

> *"[T]here is no 'right to a child' under international law. A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing a 'right to a child' would be a fundamental denial of the equal human rights of the child. The 'right to a child' approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights."*[10]

Every child has the right to human dignity and not to be commodified. Respect and dignity cannot be limited to having access to information from the child's perspective. The principle of "least restriction of government involvement for consenting adults" is inadequate where the rights of children are concerned. Instead, there should be a proactive commitment to upholding the rights of every affected person, particularly the child.

3) **The Discussion Paper goes beyond the scope of the Terms of Reference by undermining Australia's universal prohibition on commercial/for-profit domestic surrogacy arrangements and relevant international obligations**

The Terms of Reference (TORs) asks the ALRC to consider:

> *"how to reduce barriers to **domestic altruistic** surrogacy arrangements in Australia, including by ensuring surrogates are adequately reimbursed for legal, medical and other expenses incurred as a consequence of the surrogacy." (emphasis added)*

The TORs thus seeks to ensure adequate reimbursement for surrogate mothers, but they do not suggest removing the distinction, fundamental to Australian law and common in international law discourse on surrogacy, between commercial (for-profit) and altruistic surrogacy.

It is unclear on what basis the ALRC considers itself mandated to reconsider the prohibition of commercial surrogacy in current Australian law when it acknowledges that "currently, it is a criminal offence in all Australian jurisdictions to engage in commercial surrogacy."[11] Yet, the Discussion Paper frequently undermines this fundamental premise of Australian law. For example:

> *"The ALRC notes that the terms 'altruistic surrogacy' and 'commercial surrogacy' are often presented as mutually exclusive. This binary categorisation of surrogacy has been viewed as problematic and 'a fiction of law', which fails to reflect 'evidence of the reality of the practice'.*[28] *We agree that these terms are unhelpful and not mutually exclusive. For example, regardless of*

[8] https://www.alrc.gov.au/inquiry/review-of-surrogacy-laws/terms-of-reference/
[9] Cf: Para. 17 "The terms of reference ask the ALRC to consider how to reduce the barriers to accessing domestic surrogacy and other issues" and Para. 40.
[10] Para. 64; see also Para. 25, 28. https://docs.un.org/en/A/HRC/37/60
[11] Para. 81

how much a surrogate is paid, they could still have an altruistic motivation or face the risk of being exploited.[29] Therefore, we have not used these terms where possible." (para. 33).

The Discussion Paper's single cited source for removing this distinction runs contrary to international standards (see relevant international standards in Section I) – given the multiple human rights-based concerns associated with commercial surrogacy. The UN Special Rapporteur on the sale and sexual exploitation has clearly stated that :

Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law.[12]

It is concerning that the ALRC's use of supply and demand mirrors commercial market logic and therefore risks contributing to the commodification of children. It is not the language of protecting the fundamental human rights of children.

Further, the Discussion Paper seems questionable in its reliance on paid surrogates having an "altruistic motivation." Commercial and for-profit corporate activity of various kinds may be accompanied by an altruistic motivation and belief that the services sold benefit people. That certainly does not mean that the profit motivation is not a key purpose of the activity.

The ALRC implicitly proposes to remove the prohibition of commercial surrogacy in Australia and replace it with a "key objective …to reduce the risk of exploitation."[13] However, although the term exploitation is used more than twenty times, the Discussion Paper never defines it, either generally or specifically in relation to surrogacy.

This shift appears to be based on the purported "right to a child" by increasing the availability of domestic surrogacy arrangements. The primary problem identified is the "limited availability of domestic surrogates,"[14] and the implied solution is that greater financial incentives may encourage more women in Australia to become surrogate mothers. This is expressed both through undermining the prohibition of commercial surrogacy, as noted, while also claiming that "*the surrogate's costs and losses can be more fully recovered without compromising the objective of prohibiting surrogacy arrangements that are for profit or reward*."[15]

While Para. 22 reaffirms the prohibition of commercial surrogacy, paragraph 23 immediately critiques such prohibitions, creating an inconsistent and contradictory policy direction. Ultimately, the Discussion Paper would, in substance, permit domestic commercial/for-profit surrogacy in Australia, while maintaining a nominal civil prohibition on "impermissible profit or reward."[16] In effect, the Paper endorses exactly the types of payments and practices characteristic for commercial/for profit surrogacy systems.[17]

The UN Special Rapporteur warned in 2018 that:

In theory, a truly "altruistic" surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries. Hence, in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. Therefore, labelling surrogacy arrangements or surrogacy systems as "altruistic" does not automatically avoid the reach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and it is necessary to

[12] See Para 41, 2018 Report https://docs.un.org/en/A/HRC/37/60
[13] See Para. 20 and Explainer 1.6
[14] See Para. 22
[15] See Para. 22
[16] See Para. 85
[17] See Proposals 8, 25, 26

appropriately regulate altruistic surrogacy to avoid the sale of children. Courts or other competent authorities must require all "reimbursements" to surrogate mothers to be reasonable and itemized, as otherwise "reimbursements" may be disguised payments for transfer of the child. Payments to intermediaries, whether for-profit or not-for-profit, may be considered an indication of commercial surrogacy, and should be reasonable and itemized. There is particular risk when significant reimbursements or payments are made using open-ended categories such as "pain and suffering" or "professional services".[18]

The Discussion Paper proposes many of the very same categories of "reimbursement" that the UNSR has warned could constitute the sale of children. The proposal for "another optional support payment…in recognition of the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement"[19] is plainly a form of payment for services, labour and work, which is precisely the defining feature of commercial surrogacy. Similarly, Proposal 26 provides "hardship payments" which include "optional monthly payments to recognise the ordinary pain and discomfort of pregnancy,"[20] allowing "the surrogate to recover the physical and emotional costs of the surrogacy…" These payments again mirror compensation for labour, not reimbursement of costs.

The assertion that such payments do not constitute "impermissible profit"[21] is a transparent legal fiction. If being paid for the hardship, time, effort, inconvenience, and unique contribution of pregnancy and childbirth is not commercial /for-profit surrogacy, what would be left as for-profit surrogacy? Breaking down the elements of the surrogate mother's "unique contribution"---pregnancy and childbirth---into multiple elements or monthly payments does not change the reality of paying the surrogate mother for those services. Ultimately, to "reimburse" for the "ordinary pain and discomfort of pregnancy" and for the "surrogate's time, effort, inconvenience, and unique contribution" is the same as to pay surrogate mothers for the service and work of pregnancy and childbirth and hence the same as commercial surrogacy. Disaggregating pregnancy and childbirth into multiple payment categories does not change the fundamental reality: the surrogate mother is being paid for the service of gestation and childbirth.

Contrary to the UNSR's warning that all expenses should be itemised, the Discussion Paper permits monthly allowances without receipts for incidental expenses such as babysitting or fuel used to drive to appointments.[22] There is no policy justification for avoiding itemisation of such expenses. This proposal contributes further to a system that functionally enables commercial surrogacy, and is yet another way to undermine Australia's prohibition of for-profit or commercial surrogacy.

The apparent purpose of these proposed commercial surrogacy-type payments is to induce more Australian women to serve as surrogate mothers. In a context where single mothers in Australia experience disproportionate rates of poverty, such payments risk inappropriately inducing participation, creating conditions ripe for exploitation.[23]

4) The Discussion Paper proposes extensive uses of paid, for-profit intermediaries in domestic surrogacy in ways typical of commercial/for-profit surrogacy systems, while also assigning quasi-governmental regulatory roles to these private for-profit entities.

The use of paid or for-profit intermediaries to bring the parties together is characteristic of commercial/for-profit surrogacy systems. This is precisely what the Discussion Paper proposes by virtue of private, "Surrogacy Support Organizations (SSOs)", which may operate on "either a capped fee or for-profit financial model" and are intended to be "more commercially viable than a not-for-profit model."[24] The Discussion Paper envisages that "SSOs would help connect intended parents and surrogates."

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[18] See Para. 69, 2018 Report https://docs.un.org/en/A/HRC/37/60
[19] See Para. 170
[20] See Para. 165
[21] Cf. Para. 85, 163, 167
[22] Cf. Para. 162
[23] Cf. Para. 39
[24] See para. 64 – 67 and chart.

Using a model that seems unprecedented internationally, SSOs would not only carry out "support functions" but also have authority to approve surrogacy agreements. The Paper indicates that these functions would "operate separately from each other,"[25] though it is unclear how such separation would be implemented or safeguarded in practice.

Even if different SSOs were to carry out each function, that still means that private, paid intermediaries would have approval powers normally exercised by governmental authorities. In other words, private entities with a financial interest in facilitating surrogacy arrangements would effectively have the authority to also approve the very arrangements from which they profit.

Under the proposed framework, SSOs would typically review surrogacy agreements "on the papers", ordinarily without meeting the parties. Approval by an SSO would allow surrogacy arrangements to proceed on the "administrative pathway,"[26] with intended parents becoming the child's legal parents at birth.

While claiming to create a regulated surrogacy system, the Discussion Paper instead proposes to create a private for-profit surrogacy system with private intermediaries paid to self-approve their own, or other paid intermediaries', surrogacy arrangements. Such a structure creates powerful financial incentives for SSOs to approve surrogacy agreements widely, including those that may raise concerns regarding exploitation or the potential sale of children.

To our knowledge, there is no precedent in surrogacy systems for such a thorough outsourcing of the regulatory and administrative functions to private, paid intermediaries. In comparable jurisdictions, approval of surrogacy agreements is treated as a core State function, typically performed by courts, child-welfare authorities, or specialised governmental bodies precisely because of the high stakes for the rights and welfare of children.

In the system contemplated by the Discussion Paper, the risk of conflict of interests is obvious and substantial. SSOs would be incentivised, either explicitly or implicitly, to approve each other's surrogacy arrangements. In these situations, there would be a great risk of sale of children and the exploitation of surrogate mothers and intending parents.

5) The Discussion Paper does not give full and equal attention to all elements of the child's right to identity

The Discussion Paper gives signification attention to the child's right to legal parentage, which is indeed an important element of the child's right to identity. However, there are concerns about "the ALRC's intention that the intended parents would therefore be able to register the child's birth and be recorded on the birth certificate as the child's parents."[27] While it is important to include information about the intending parents, a birth certificate records facts about the child's birth and should therefore also include the surrogate mother. Limiting the birth certificate to recording information about legal parents alone amputates essential components of the child's identity, including information about their biological and gestational origins. The State of New South Wales addresses this issue in adoption matters through an integrated birth certificate, which duly captures includes information about both birth and adoptive families. A similar model could help ensure that children born through surrogacy have access to accurate and complete identity information.

Proposal 33, which includes capturing the "surrogate's identifying details such as full name, address, and date and place of birth" as part of the birth registration statements, is positive. From the child's perspective, however, birth registration statements should also include information about the gametes used (i.e. eggs and/or sperm), as well as information about potential siblings. This information ensures

[25] Cf. Para. 65
[26] See Proposal 5
[27] See Para. 188

that the child has a full identity, which contributes to a number of other rights, including the right to physical and mental health.

Proposal 34 for a surrogacy register is likewise positive, but such a register should include all relevant identity information, as outlined in the preceding paragraph. Approval of any surrogacy arrangement should be preconditioned on all this information being made available.

While the ALRC aims to provide a framework for Australia to meet its human rights obligations in relation to surrogacy, it is clear that there are further opportunities for better alignment and coherency. It is of particular concern that certain Proposals explicitly contravene some of these obligations by creating an enabling environment for the sale of children and promotes an amputated identity.

Child Identity Protection (CHIP) remains available to provide further information to help ensure that every child born through surrogacy can enjoy the full spectrum of their rights.