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Australian Law Reform Commission (**ALRC**)
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Submission from Virtus Health to Advisory Committee for the ALRC's Review of Surrogacy Laws

Thank you for the opportunity to provide Virtus Health's input on the ALRC's Review of Surrogacy Laws Discussion Paper (**Discussion Paper**).

1. About Virtus Health

Virtus Health is the parent company for the fertility clinics operated under the brand names IVFAustralia, Queensland Fertility Group, Melbourne IVF, TasIVF and The Fertility Centre. Collectively, we are the largest provider of Assisted Reproductive Technology (**ART**) services in Australia and, every year, we provide ART support for approximately 100 surrogacy transfer cycles.

Surrogacy is, however, a very small part of our overall service provision. As such, the complexities of surrogacy are at the margins of our operations.

Nevertheless, we believe that our long experience in supporting so many patients across multiple regulatory environments places us in a strong position to offer a professional insight into the practical implications of legislative changes for our patients.

2. Overall comments

In preparing this submission, we have focussed on the items on which Virtus Health is best placed to provide our perspective as the leading ART provider in Australia.

At Virtus Health, we are strongly supportive of the essential proposals in the Discussion Paper. If ever translated into legislation, the critical elements of this Discussion Paper would, undoubtedly, make the journey of those people using surrogacy significantly easier. By contrast for the people for whom this is their only option to have a family, the current legal complexities of surrogacy add a significant burden to an already very long and difficult journey.

The critical elements in the Discussion Paper that we particularly support are:

- creating a process of prior approval to replace the uncertainty of having to go to Court to obtain a parentage order after the event;
- clarifying the nature of legal reimbursement and removing potential criminal sanctions for the intended parents for "commercial surrogacy";
- de-criminalising the actions of intended parents and instead replacing this with civil sanctions with appropriate penalties for breaches;
- aspiring to nationally consistent legislation to avoid all the complexities that arise when the intended parents and the surrogate live in different Australian jurisdictions; and
- the stated goal of the Discussion Paper of facilitating the pathway for domestic surrogacy.

3. **Submissions on individual Proposals and Questions**

We provide the following responses to the individual Proposals and Questions set out in the Discussion Paper.

Proposal 1: Promoting a nationally consistent approach through harmonisation

We are strongly supportive of this proposal. This is important as, commonly, intended parents and the surrogate will be resident in different Australian States and Territories. The current inconsistency in legislation creates a complex and often very expensive environment for such people to have their families.

Specifically, in point 4 of Proposal 1, there are 4 different options proposed. From the perspective of the patients who are involved, Option 1.1 (Referring powers to the Commonwealth Parliament) would be the optimum option for empowering and managing the National Regulator that is proposed later in the document.

Any other harmonisation option would be of lesser merit. However, we do understand that achieving a nationally consistent approach will not be easy. Any progress towards national harmonisation, by whatever mechanism is possible, would nonetheless make a big difference to the people involved.

Proposal 2: Establishing a National Regulator

We are strongly supportive of the establishment of the National Regulator. We mainly support the functions for a National Regulator set out in Proposal 2. However, we provide more detailed comments under the specific Proposals below.

Question A: What are the important design principles or safeguards for any regulatory body to have?

The regulatory body clearly needs to be efficient and small as the costs of this will ultimately be borne by the families involved.

The context is that there is a relatively small market for surrogacy in Australia. The annual National Perinatal Epidemiology & Statistics Unit (**NPESU**) report states that in 2023, there were only 307 embryo transfer cycles using surrogacy in Australia and New Zealand with a livebirth rate of 34%.[1] This is likely to represent fewer than 200 surrogacy arrangements per annum in Australia to be regulated.

Of these <200 arrangements, from our clinical experience, around 95% are very straightforward with no complexities, leaving only a handful of cases where the decision-making concerning approval can be difficult.

The regulatory body should, accordingly, be of a scale appropriate for that volume. Accordingly, merging the functions of regulating surrogacy into another body would seem a reasonable approach. However, merging it into other functions of the States and Territories would not appear to support the critical element of national harmonisation.

[1] Kotevski DP, Newman JE, Chaitarvornkit A, Paul RC, Chambers GM. *Assisted reproductive technology in Australia and New Zealand 2023.* Sydney: National Perinatal Epidemiology and Statistics Unit, the University of New South Wales, Sydney.

One problem is that when complexities in surrogacy do arise, individual cases can pose very difficult questions. The two common problematic scenarios that we encounter are:

- the independent medical professional raises serious concerns about the safety of pregnancy for the planned surrogate; or
- the independent psychologist raises concerns about the effect of surrogacy on the wellbeing of either an intended parent or a surrogate.

The regulatory body would therefore have to be able to access appropriately qualified and experienced advice to enable it to manage difficult cases for approval.

Some sort of governance structure would also be needed to oversee the activities of a regulatory body of this kind. It would be ideal if the governance structure included, as well as government and legal expertise, input from other stakeholders, particularly intended parents.

Proposal 3: Permitting and regulating Surrogacy Support Organisations

We are strongly supportive of the overall process of permitting and regulating surrogacy support organisations (**SSOs**) to function as set out in the Discussion Paper.

We have some reservations about the role of SSOs in the approval of surrogacy agreements as set out below, but are otherwise very supportive of the SSOs concept. In our view, this will improve the surrogacy process for both surrogates and intended parents.

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

We do not see much overlap between these functions and the services provided by an ART provider. The only one of these functions that ART providers also provide is in item 3 of Proposal 3: "*providing or coordinating the counselling and other services that need to be engaged with to meet the requirements*".

Implications counselling of couples with fertility problems of any kind is best provided by Australian and New Zealand Infertility Counsellors Association (**ANZICA**) trained counsellors. ART providers have long employed counsellors with these skills sets. It would make little sense for the much smaller SSOs to have to duplicate this activity.

Otherwise, all of the other functions listed in Proposal 3 are beyond the scope of the services provided by an ART provider and there is little real overlap.

Proposal 4: Approving surrogacy agreements

We are strongly supportive of the principle of providing approval of the surrogacy agreement before attempting to achieve a pregnancy.

The exact meaning of "achieving a pregnancy" is however ambiguous and item 2 of Proposal 4 is, consequently, highly problematic.

Building a family through surrogacy involves a complex series of steps, particularly for a male/male couple. In many cases, a couple will need to source a suitable egg donor as well as a suitable surrogate to assist them. As a result, very commonly, couples will need to go through the embryo creation phase at a time when their planned egg donor is available. This can often be before a

surrogate has even been identified. As a result, the process of embryo creation can take place a long time before a planned transfer and thus before any planned surrogacy arrangement is in place.

Of the two elements of the surrogacy process, the creation of the embryo and the transfer into the surrogate, the first element is the much more involved and thus more expensive one. To make approval of any IVF procedure (and its public funding) dependent on having an approved surrogacy agreement in place would be highly limiting for many people trying to navigate surrogacy.

We would instead submit that, while approval of the surrogacy agreement should be in place prior to any transfer of an embryo to achieve a pregnancy, neither the legal permission for the embryo creation phase nor the provision of Medicare support for the embryo creation phase should be dependent on having an approved surrogacy agreement in place.

Proposal 5: SSO approval of surrogacy agreements

We have significant concerns about Proposal 5.

SSOs are, quite properly, the paid agents of the intended parents. Their role, as engaged by the intended parents, is to progress the surrogacy arrangement through to a successful conclusion. To simultaneously give the SSOs the responsibility for policing the surrogacy arrangement, through making them, simultaneously, responsible for provision of approval for the arrangement, will necessarily create a serious conflict of interest.

Many aspects of the approval process are straightforward, and, in our view, for over 95% of surrogacy arrangements, the approval process will be straightforward. However, there will be the occasional difficult decision that will arise if professionals raise concerns about risks to participants. It is very difficult for an SSO working on behalf of the intended parents to resolve this, and the potential risk of exploitation of a surrogate remains.

The proposed solution that the SSO should be penalised with civil penalties if they get these decisions wrong does not alleviate the potential conflict of interest. Indeed, given the complexities and uncertainties that will arise in the occasional case, the proposal that that SSOs may be penalised should they make a wrong decision in good faith, seems unnecessarily punitive.

We would instead propose that the SSO prepare a submission to the National Regulator for approval. The National Regulator is the body that should be responsible for providing the approval. In the vast majority of cases, this will be a simple approval exercise but there may arise the occasional case where more consideration will be required.

At the very least, there should be a mechanism, and indeed an obligation, for the SSO to refer any difficult cases to the National Regulator for review.

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

For the reasons set out above for Proposal 5, we think the responsibility for approval should sit with the National Regulator.

Proposal 6: Ensuring compliance with operational requirements

As outlined in our response to Proposal 5, we do not think that the SSOs should have responsibility for approval and, given the complexities of the occasional surrogacy case, think that penalising the SSOs is inappropriate. The use of the words "intentionally or recklessly" does not provide meaningful protection to the SSOs.

Proposal 7: Increasing awareness and education

This is a laudable suggestion and it is difficult to object to increasing awareness. It is, however, significant that past similar public education processes in the area of fertility, have only had a limited impact on public awareness or education.

Intended parents, who are highly motivated, are already very well informed about the process with their legal and medical advice.

As regards creating guidelines and training materials for professionals, our experience is that the awareness of professionals in relation to surrogacy arrangements has been patchy. Some legal and medical practitioners and some birthing hospitals are very conscious of the needs of intended parents pursuing surrogacy while others are not, to the detriment of the care provided to intended parents. Therefore, there may be a case for greater provision of educational resources for professionals for whom this work is not a common event.

Proposal 8: Prohibited domestic surrogacy arrangements

We are strongly supportive of Proposal 8.

In particular, one of the strengths of this Discussion Paper is the use of the language of "impermissible profit or reward" rather than the unclear definition of "commercial surrogacy". The much clearer definition and the replacement of criminal sanctions with a civil penalty regime provides far more clarity for intended parents and surrogates striving to create a family.

People seeking, in good faith, to have a family through surrogacy within the laws of Australia should not be subject to the risk of criminal proceedings.

Proposal 9: Unregistered overseas surrogacy arrangements

We are supportive of this approach to the regulation of overseas surrogacy arrangements. This approach provides far more clarity to intended parents than the current criminal legislation in some Australian States.

Proposal 10: Facilitation of prohibited surrogacy arrangements

This seems to be a very reasonable approach to legislation in this area. In our experience, extreme pressure or coercion of surrogates is extremely rare, given the existing protections.

Proposal 11: Connecting intended parents and surrogates

Connecting intended parents to surrogates is a critical aspect of facilitating legal surrogacy arrangements in Australia. Given the safeguards proposed elsewhere in the Discussion Paper to prevent exploitation and coercion of surrogates, advertising should be considered as a safe and effective approach to connecting intended parents and surrogates.

Proposal 12: Threshold requirements for a surrogacy arrangement

Genetic connection between the surrogate and the child

There has, in the past, been concern about arrangements involving a genetic connection between the surrogate and the child. However, as the Discussion Paper describes, there is now increasing evidence that this does not carry the risks previously suggested and we would be supportive of permitting these arrangements.

Genetic connection between the intended parents and the child

In our experience, surrogacy arrangements with no genetic connection between any of the parties and the child are extraordinarily rare. Our estimate would be that there would have been only a tiny number of such cases of this in Australia.

However, to completely prohibit such arrangements seems an unnecessary restriction for the very small number of individuals that this would affect.

The critical element in these discussions is the long-term welfare of the child, conceived from such an arrangement. There is now abundant evidence from studies of adoption and embryo donation that these children shown normal ranges of emotional, social and cognitive development and similar rates of mental health problems to other children. From these studies, it is apparent that it is the quality of the family environment that is important, not the genetic connections.

Proposal 13: Requirement for a reason to access surrogacy

We are supportive of Proposal 13. We also support the proposal to adopt a liberal and inclusive definition of "unable to conceive, gestate and birth a child for a medical biological or psychological reason".

In our experience, this definition adequately covers all the intended parents who have approached us for treatment using surrogacy while still limiting any abuses of the approach.

Proposal 14: Minimum age requirement for surrogates and intended parents

We are supportive of these age contraints. Younger people are more vulnerable to even subtle exploitation or making decisions that may not be in their own long-term interests as a result, for instance, due to family pressure to assist older close relatives.

We would not be supportive of a waiver for this based on a counsellor's opinion as even skilled and experienced medical practitioners and counsellors remain sensitive to pressures from the parties involved and can make subjective decisions.

Proposal 15: Citizenship and residency requirements

We are supportive of this requirement. One of the intended parents planning a surrogacy arrangement in Australia should be an Australian permanent resident or citizen. Otherwise, the basis is created for international reproductive tourism and potential exploitation of Australians.

We would not, however, support an SSO having the capacity to dispense with the requirement, given the potential conflicts of interest for SSOs (who are being employed by the intended parents) discussed above.

In addition, the abolition of State-based residency requirements would be an important step in national harmonisation to facilitate the common situation where the intended parents and surrogate live in different Australian States or Territories.

Proposal 16: Requirement of previous successful pregnancy

A requirement to have had a previous successful pregnancy is the basis of most reputable surrogacy regulation around the world. We think this should be a requirement in Australia for the following reasons.

Firstly, an uncomplicated first pregnancy gives a high likelihood that a subsequent pregnancy on behalf of someone else would also have a low risk of complications. On the other hand, if complications have occurred in a previous pregnancy, this would provide guidance to the surrogate and the surrogate's medical advisors about the risk of complications in the subsequent pregnancy that, through a true understanding of risk, aids the process of giving informed consent.

Secondly, even in the best circumstances, handing over a baby that the surrogate has carried for nine months is a demanding and traumatic experience. This is even more so for someone who does not have any children at the time of the surrogacy (and may not have any children in the future).

Finally, and most importantly, it is exceptionally difficult to give truly informed consent to a process of which you have no lived experience. Carrying a pregnancy and giving birth to a baby is a physically and emotionally difficult experience. It is difficult to see that someone who has not already gone through this is truly in a position to provide informed consent.

We would not be supportive of a waiver for this based on a medical pracitioner or psychologist's opinion as, even skilled and experienced medical practitioners and counsellors remain sensitive to pressures from the parties involved and can make subjective decisions.

Proposal 17: Requirement for medical screening

We are supportive of these requirements. By using an independent medical practitioner, all parties can be satisfied that the surrogate is receiving impartial advice about the risks involved in being a surrogate.

As highlighted above, it will happen from time to time that the independent medical practitioner will raise concerns about the potential risks to the surrogate from the surrogacy arrangement. These concerns cannot simply be referred for action to the SSO, who are acting as the agents of the intended parents, but should instead be referred to the National Regulator (or other regulatory body).

Proposal 18: Requirement for psychological screening

We are supportive of this requirement. We are particularly supportive of item 1 of Proposal 18. This is not about assessing the suitability to become a parent but is about ensuring that the psychological safety of all the participants in the arrangement is protected.

Once again, as discussed above, any significant concerns raised by an independent psychologist about the welfare of a surrogate should be referred to the National Regulator (or other regulatory body) for assessment and not to the SSO.

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

We agree that both the surrogate and intended parents should be required to undergo a psychological assessment, as this is primarily about protecting all participants' psychological safety.

Proposal 19: Requirement for criminal history check

Our view is that there should be no requirement for intended parents to undergo a criminal history check, as per Option 19.1. Criminal history checks are completely inappropriate for an environment where people are striving in good faith to become parents and should not be a mandatory part of preparation for surrogacy.

Question E: Requirement for criminal history check

Given our view, we have not responded to Question E (which is premised on the adoption of Option 19.2).

Proposal 20: Legal advice requirement for intended parents and surrogates

We are strongly supportive of the requirement for legal advice as detailed in Proposal 20.

We are also strongly supportive of the measures proposed to increase the availability of skilled legal advice for the intended parents and the surrogate. In our experience, while intended parents and surrogates can easily access suitably skilled and experienced legal advice in major metropolitan centres, outside these areas, this can be more difficult.

We would suggest that the legal advice to surrogates and intended parents should be from different legal professionals independent of each other.

Proposal 21: Implications counselling requirement for intended parents and surrogates

We are strongly supportive of the provision of implications counselling for all participants involved in the surrogacy arrangement. This has long been routine for all parties involved in either surrogacy or donor arrangements in Australia, and would not be a problem to implement.

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

In our view, involving the surrogate's partner in counselling is always highly desirable. Being a surrogate has enormous and very implications for one's own family, and involving the partner or other family members in the planning and preparation, including in implications counselling, is very important. This should always be advised.

However, the person deciding to go through surrogacy is an independent person and is capable of giving their own autonomous consent to a medical undertaking such as this. This should not require the consent of the partner. Accordingly, desirable as involving the partner in the counselling undoubtedly is, there should be no absolute legislated requirement to make surrogacy conditional on the surrogate's partner taking part in a counselling process.

Question G: Should there be additional counselling requirements?

Most surrogacy arrangements proceed smoothly and, in most cases, subsequent counselling is not required. However, supportive counselling for the surrogate should be available as an option, to be financially covered by the intended parents for 6 months or so after the birth.

Proposal 22: Requirements for a compliant surrogacy agreement

Proposal 22 is beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Question H: Requirements for a compliant surrogacy agreement

Question H is beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Proposal 23: Prohibited provisions in a surrogacy agreement

The surrogate's right to autonomy, particularly once pregnant, should be reinforced in legislation and we support the prohibition of any invalidation of this in a surrogacy agreement.

Proposal 24: Enforcing surrogacy agreements

Proposal 24 is beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Questions I, J and K: Enforcing surrogacy agreements

Questions I, J and K are beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Proposal 25: Reimbursing surrogates for expenses

We are strongly supportive of Proposal 25 as detailed in the Discussion Paper.

We are strongly supportive of the much clearer definition of legitimate reimbursements that is included in Proposal 25. This allows surrogates to achieve adequate compensation without the potential for exploitation of profit-based surrogacy models.

One of the major challenges our intended parents experience is understanding the acceptable boundaries of reimbursement. This approach as well as a National Regulator providing further detail would make the journey, and the limits, much clearer for both intended parents and surrogates.

In particular, we are strongly supportive of the language of "impermissible profit or reward" rather than the language of "commercial surrogacy", as well as the consequent change from criminal legislation to civil penalties for any breach.

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

We consider that this would be a practical measure that would provide valuable guidance to intended parents and surrogates to both set expectations for both parties and to enable all participants to comply with legal requirements.

Proposal 26: Reimbursement for hardship, at the surrogate's election

We are supportive of Proposal 26. Surrogates make an extraordianry sacrifice to support the intended parents. In this circumstance, a carefully regulated reimbursement for hardship should be be supported while avoiding the potential for profit for exploitation.

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

In our view, this should be allowed, but careful boundaries and conditions will need to be applied to protect both surrogates and intended parents.

Proposal 27: Holding the funds in a trust account

We are supportive of the proposed arrangements for surrogacy reimbursement to be held in a trust account. Establishing this mechanism provides protection for all the parties involved.

Proposal 28: Medicare entitlements

We are strongly supportive of Proposal 28. It has long been a source of extraordinary discrimination whereby patients who are unable to have a family because of problems with their ovaries, testes or fallopian tubes can have Medicare support for the professional care needed to have a family, while those who are unable to the family because of problems with or an absence of the uterus have been explicitly excluded from Medicare support.

As the Discussion Paper highlights, in the past this exclusion has been based on the previously illegal nature of surrogacy, which is now a thing of the past. In addition, the absolute number of treatments is only a small part of the overall fertility treatment budget. As a consequence, the cost to the Federal Government of this change would be minimal.

A change in this area is therefore long overdue.

However, as highlighted in our response above to Proposal 4, linking Medicare eligibility to approval of the surrogacy arrangement is highly problematic. As highlighted above, the most expensive aspect of fertility care is the creation of the embryos and this can often be done well before a surrogate has been identified.

We therefore recommend that the discriminatory Medicare prohibition on medical services connected to surrogacy be simply abolished and not be connected to approval of the surrogacy arrangement.

Proposal 29: Medicare entitlements

Where Medicare provision is available for counselling in other areas of fertility care, it should similarly be available for participants in surrogacy arrangements. To maintain any other arrangement highlights the discrimination against intended parents who have to use surrogacy to create their family.

Proposals 30, 31 and 32: Pathway to legal parentage

Proposals 30, 31 and 32 are beyond our expertise and experience as an ART provider and we make no detailed comments in this submission. However, as noted in our overall comments above, we are generally supportive of creating a process of prior approval to replace the uncertainty of having to go to Court to obtain a parentage order after the event.

Questions N, O and P: Pathways to legal parentage

Questions N, O and P are beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Question Q: Parental leave entitlements

Question Q is beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Proposal 33: Information available through birth certificates

Proposal 33 is beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Proposals 34 and 35: Accessing information through a Surrogacy Register

We have long been supportive of the establishment of a national donor register. The current situation of State-based registers is fragmented and suboptimal for all parties, including donors, intended parents and, critically, people who have been conceived through donor or surrogacy arrangements.

Exactly the same arguments apply to surrogacy. The inclusion of surrogacy births in a national donor register would be the optimum approach to providing all the participants in surrogacy arrangements, particularly the people conceived from these arrangements, with future access to identifying information.

Question R: Does it capture all the appropriate and relevant information that should be included on the surrogacy register?

Given the complex and varied nature of surrogacy arrangements, the full detail of the gamete providers should also be included in the registration of the birth in the surrogacy register. Including the surrogacy register as an integral part of a national donor register would avoid duplication of this information.

Further information that should be included are:

- the date and location of the embryo transfer; and
- the date and location of the birth of the child.

Question R: Who should be responsible for providing that information?

Currently, the States and Territories running donor registries put the onus on the ART provider to provide this information. This is because the ART providers are the only organisations with access to the source documents about the final detail of identification of the gamete providers and surrogate, and the dates of the relevant procedures involved.

As a consequence, the SSO or the intended parents would have to source the information from the ART provider in any case. It would seem sensible for the ART provider to continue to submit the information directly to the surrogacy register, as already happens with State-based registers. However, to the extent that any information is not within the ART provider's direct knowledge (such as the date of birth of the child, which relies on the intended parents reporting that information to the ART provider), ART providers should only have the obligation to take reasonable steps to obtain such information.

Proposal 36: Ensuring information is collected

It is not clear that sanctions are required to enforce compliance with information collection requirements, although a civil penalty regime would be preferable to criminal sanctions.

This is because, in our decades as an ART provider of being required to ensure information is collected and provided to registers in different Australian States and Territories, it has not been necessary for legislated sanctions to ever be applied to enforce compliance with any information collection requirements.

Proposals 37, 38, 39, 40 and 41: Regulating overseas surrogacy

Proposals 37, 38, 39, 40 and 41 are beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

Questions S, T, U, V, W and X: Regulating overseas surrogacy

Questions S, T, U, V, W and X are beyond our expertise and experience as an ART provider and we make no formal comment in this submission.

4. **Ongoing Engagement and Consultation**

Virtus Health remains available to:

- provide detailed feedback on draft proposals and recommendations;
- assist with operational insights to support effective consultation and implementation; and
- participate in industry briefings or reference groups as needed.

We thank you again for your time and engagement, and look forward to contributing further to the development of a clear, consistent and patient-focused legislative framework for surrogacy in Australia.

Please do not hesitate to contact us should you require any further clarification or input.

Yours sincerely,

James Pyne
Chief Executive Officer
Virtus Health