Professor Ronli Sifris
Assistant Commissioner. Review of Surrogacy Laws
Australian Law Reform Commission
PO Box 209
Flinders Lane
Victoria 8009

By email: surrogacy@alrc.gov.au
22 December 2025

Dear Professor Sifris,

The Australian Christian Lobby (ACL) is grateful for the opportunity to make a submission to the Australian Law Reform Commission's *Review of Surrogacy Laws*.

Thank you for the extension of time and for giving the following submission your careful consideration.

Yours Faithfully,

[redacted]

Michelle Pearse,
CEO, Australian Christian Lobby

SUBMISSION:

The ALRC's Review of Surrogacy Laws Discussion Paper

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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Introduction

This submission presents the ACL's response to the ALRC's Discussion Paper on the review of surrogacy laws in Australia. It is broken into three sections:

- **Section 1 discusses certain concerns regarding the direction of the review.**

  These include: questions over whether it departs from the terms of reference; a failure to distinguish between altruistic and commercial surrogacy; the proposition that "harm minimisation" is the principle objective of surrogacy law; the misstatement of Australia's current position relative to international standards; the introduction of "reform principles" developed by the ALRC; and, the potential for Australia to become a destination country for surrogacy tourism, if the review's proposals are adopted.

- **Section 2 offers a critique of the ALRC's human rights analysis.**

  We note that the ALRC has listed certain rights pertaining to the interests of children born through surrogacy, surrogate mothers and commissioning parents. Of direct relevance to these is the July 2025 report on Surrogacy published by the *Special Rapporteur on violence against women and girls, its causes and consequences*.[1] The ALRC's Discussion Paper acknowledged, but did not engage with, the substantive issues addressed in that report. In certain respects, it appears that the ALRC's understanding of human rights obligations relating to surrogacy do not align with UN standards and these departures will need to be addressed.

- **Section 3 answers the "Proposals" offered to guide discussion in the ALRC's latest Discussion Paper.**

Section 1: Concerns regarding the direction of this review

An apparent departure from the Attorney-General's Terms of Reference

The Terms of Reference (TOR) issued by the Attorney-General on 6th December 2024 asked the ALRC to:

- identify ways in which existing laws, policies and practices related to "domestic altruistic surrogacy" might be harmonised between states;
- ensure that these laws are "consistent with Australia's obligations under international law and conventions" – obligations which require Australia (among

[1] 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, A/80/158, 14 July 2025.

other things) "to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." (article 35, *Convention on the Rights of the Child*).

- protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount.[2]

In undertaking its inquiry, the ALRC was to "consider Australia's human rights obligations" and any findings and recommendations of previous inquiries, all of which recommended maintaining the current prohibition on commercial surrogacy.

On a plain reading, the TOR would allow the ALRC to make recommendations about how to deal with the problems associated with inadequate enforcement of the current prohibitions on commercial surrogacy and about appropriate legal arrangements for children brought here in contravention of those laws.

The TOR do not invite the ALRC either to consider legalising international commercial surrogacy or to develop a regulatory framework for a new industry in domestic commercial surrogacy. The proposals presented in the ALRC's Discussion Paper appear to take the public consultation process in a direction not indicated by the TOR, not consistent with the findings of previous government inquiries, and not consistent with Australia's international human rights obligations.

The ACL's submission to the Issues Paper in July 2025 pointed to problematic departures made in the Issues Paper from the TOR. In particular, the Issues Paper presented a "summarised" version of the TOR in which the Attorney-General's instructions were rephrased and key words were omitted. For example:

- where the Attorney-General had asked the ALRC to suggest "how to reduce barriers to domestic altruistic surrogacy arrangements", the ALRC Issues Paper rephrased this as ""how to reduce barriers to surrogacy arrangements within Australia";
- where the Attorney-General had asked the ALRC to ensure Australian laws "are consistent with Australia's obligations under international law and conventions" this was reframed by the ALRC's Issues Paper as "adopt[ing] a practical and human rights-based approach" to the review.

The ACL expressed concern that the effect of the ALRC's "summary" was to fundamentally change the scope of the review so that some issues that did not fall within the TOR (such as legalising commercial surrogacy in Australia) were prioritised, while other issues that should have been in scope (such as Australia's human rights

[2] Terms of Reference, Review of Surrogacy Laws, ALRC [website]. Accessed 10/12/25.

obligations and the findings of previous government inquiries) became excluded or deprioritised.

Any remaining doubt about the trajectory of the ALRC's review has now been removed by the Discussion Paper, which fortifies our earlier concerns that the ALRC's consideration of these matters is being powerfully directed by opinions and presuppositions at variance with those that inform the current international and domestic prohibitions on commercial surrogacy.

If the TOR had instructed the ALRC to address the following matters then the ALRC's Discussion Paper would appear to be consistent with that instruction:

- Accept the proposition that demand for surrogacy must be met, and review surrogacy laws with a view to expanding access to all forms of surrogacy (commercial and altruistic) in Australia.
- Consider how access to domestic surrogacy might be encouraged – including through government funding for services and monetary remuneration for surrogates.
- Prioritise the minimisation of exploitation (for surrogate mothers and for commissioning parents).
- Disregard the recommendations of previous government inquiries.
- Develop home grown "principles" to guide law reform.
- Regularise activity that is currently illegal, namely the commissioning of children through international commercial surrogacy.
- Establish the regulatory framework for commercial surrogacy in Australia.

Certain Proposals put forward in the Discussion Paper, if adopted, would predictably establish Australia as an attractive destination for reproductive tourism. The ALRC appears to have considered Australia's human rights obligations selectively and to have overlooked (except by passing acknowledgment) authoritative UN sources such as the recent report of the *Special Rapporteur on violence against women and girls, its causes and consequences*.

Regrettably, the contrast between what the ALRC was asked to do, and what it appears to be doing, is such as to expose the review process to serious criticism.

A lack of procedural transparency

The ACL notes that several members of the advisory committee, including the Chair, have previously expressed public support for legalising commercial surrogacy in Australia. It is not clear that the advisory committee represents a range of different perspectives or that potential conflicts of interest have been well managed. The Discussion Paper cites publications and submissions of advisory committee members as evidentiary support for proposals to liberalise access to commercial surrogacy in

Australia. The ACL's Freedom of Information (FOI) request for documents relating to the selection process for the advisory committee assisting with this particular review was refused on the grounds that "it would not be in the public interest to release these documents."[3] More recently, an FOI request for information relating to the development of the "reform principles" enumerated in the Issues Paper, and said to be "shaped by our Terms of Reference, as well as our early consultations and research," was also refused on the same grounds.

The lack of procedural transparency is particularly disappointing, given that the proposals now put forward for public discussion represent a radical departure from long-established government policy. It puts in question whether a matter of such major public concern as this can be seen to be conducted independently and impartially in a way that promotes public trust.

The proposition that there is no meaningful distinction to be drawn between 'altruistic surrogacy' and 'commercial surrogacy'

The TOR require the ALRC to make recommendations about "how to reduce barriers to domestic altruistic surrogacy arrangements in Australia." There is a clear distinction made in the TOR between "domestic altruistic surrogacy arrangements in Australia" (which are to be facilitated across states according to the 2016 Report of the government's *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements Report*)[4] and "surrogacy arrangements made outside of Australia" (which are to be appropriately managed).

Although the traditional distinction between financially incentivised surrogacy and "altruistic" surrogacy is commonly regarded as self-evident and important, the ALRC – citing a single academic paper from 2015 as authority – decided this distinction was "problematic" and a "fiction of law." The Discussion Paper states:

> *"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'. We agree that these terms are unhelpful and not mutually exclusive. For example, regardless of how much a surrogate is paid, they could still have an altruistic motivation or face the risk of being exploited. Therefore, we have not used these terms where possible."*[5]

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[3] Letter from ALRC to ACL, "Request for access to documents under the *Freedom of Information Act 1982*", 20 August 2025.

[4] *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements*, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, 2016. (Hereafter, "*Surrogacy Matters Report*").

[5] Discussion Paper, [33], 10.

It should not need to be pointed out that the question of 'altruism' does not turn on whether the surrogate mother is animated by benevolent intentions. It turns on whether she is financially incentivised to agree to surrogacy. If further certainty were needed, the terms are clearly defined in the *2016 Surrogacy Matters Report (which is listed in the TOR):*

> *"**altruistic or uncompensated surrogacy**: the only fee, reward or other material benefit or advantage provided for is the reimbursement of a surrogate mother's surrogacy costs,*
>
> ***commercial or compensated surrogacy**: where the surrogate mother is remunerated for financial gain or reward."*[6]

One result of the ALRC's decision to obfuscate that key distinction is that the Australian public is now asked to engage with broader questions about how "surrogacy" in general should be regulated. Problematic conflation is the inevitable result. For example, according to the Discussion Paper:

> *"The Terms of Reference ask the ALRC how best to regulate surrogacy, rather than whether it should be allowed as a practice at all. As such, while the ALRC acknowledges that some would prefer to ban surrogacy, this Inquiry will focus on how to make current laws, policies, and practices work better for everyone involved in surrogacy arrangements."*[7]

In contrast, the TOR ask the ALRC to make recommendations on "how to reduce barriers to domestic altruistic surrogacy arrangements in Australia" only. It is open to the ALRC to make recommendations (as the TOR direct) as to "how surrogacy arrangements made outside of Australia should be addressed by Australian law" and "what is the appropriate recognition of legal parentage in Australia for children born of surrogacy overseas." However, the TOR do not invite the ALRC to overturn the recommendations of previous government inquiries[8] by introducing a regulatory framework to support commercial surrogacy of any sort.

The ALRC is ignoring the fact that previous inquiries have settled that the prohibition of commercial surrogacy should remain. Contrary to that, the ALRC seems to have interpreted the TOR as an invitation to consider how to approach commercial surrogacy, begging the question of whether it may do so. The standing prohibition on commercial surrogacy is quietly put aside with the assurance that regulation can and will resolve the problem of exploitation:

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[6] *Surrogacy Matters Report*, 2. Similar definitions are repeated on the A-G's Department Surrogacy website. Accessed 12/12/25.
[7] Discussion Paper, [31], 9.
[8] Recommendation 1, *Surrogacy Matters Report*, xi.

> *"[T]he current regime hinges on prohibiting surrogacy arrangements that are for profit or reward. Other measures are more likely to be effective at achieving the objective of avoiding exploitation, when compared to the current regime. The proposals aim to put into place rigorous safeguards alongside an approval process, which occur at the start of the surrogacy arrangement. People attempting to access domestic surrogacy would need to comply with this approval process, especially as access to assisted reproductive technology, critical to gestational surrogacy (the most common type of surrogacy used), would depend on it."*[9]

This is not consistent with the findings of previous government inquiries, or with the findings of the *Special Rapporteur*, in her report of July 2025. [10] The *Surrogacy Matters Report* concluded that even if commercial surrogacy were legal and regulated in Australia, "the risk of exploitation of both surrogates and children remains significant.[11] According to the *Special Rapporteur*'s surrogacy report, "[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."[12]

Even if designing a framework for commercial surrogacy, both domestic and international, had been consistent with the TOR (which it is not) then the "rigorous safeguards" outlined in the Discussion Paper would be inadequate to deliver on the promised "harm minimisation." Issues pertaining to particular proposals are addressed in Section 3 below.

The more substantive point is that the ALRC proposes changing Australia's long-standing position on commercial surrogacy on the incorrect assumption that the only object of surrogacy law is to minimise "exploitation." As explained next, this assumption is incorrect.

The proposition that 'reduc[ing] the risk of exploitation', or 'harm minimisation' is the proper objective of the current review.

The Discussion paper states, "a key objective of the current legislation is to reduce the risk of exploitation."[13] The *Surrogacy Act 2022 (NT)* is cited as an example of this "key objective."

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[9] Discussion Paper, [23], 5-6.
[10] 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, A/80/158, 14 July 2025. (Hereafter, "Report of the *Special Rapporteur*").
[11] *Surrogacy Matters Report*, 6.
[12] Report of the *Special Rapporteur*, [41].
[13] Discussion Paper, [20], 5.

For clarity, one of the "purposes" of the NT's *Surrogacy Act 2022*[14] (s. 1 (b)) is the criminalisation of commercial surrogacy. s. 6 of that Act establishes certain "guiding principles" that apply to the administration of the law and among these is the principle that "the parties to a surrogacy arrangement should be protected from exploitation."[15] Unaccountably, it seems that the ALRC has ignored what might be called a 'key objective' of the NT's Act and fixed instead upon a 'guiding principle' as the main object. The result is that the objectives of existing legislation are misconstrued.

The problem is compounded by the fact that the ALRC's Discussion Paper does not acknowledge or engage with the compelling reasons for maintaining prohibitions against commercial surrogacy. These are passed over in silence.

The effect of both misconstruction and significant omission is highly misleading. In a document intended to guide public engagement on a contentious issue, this is not a trivial matter.

The inference that previous inquiries pointed only to poorly regulated commercial surrogacy as problematic

The claim that "a key objective of the current legislation is to reduce the risk of exploitation" is immediately followed in the Discussion Paper by the seemingly neutral comment: "Environments with little or no regulation can lead to surrogacy arrangements that are unsafe, and that undermine informed consent and other fundamental human rights."[16] The 2016 *Surrogacy Matters Report* is footnoted.

While the comment is true, as far as it goes, the inference that the *Surrogacy Matters Report* might be supportive of properly regulated commercial surrogacy can only be sustained by means of selective quoting. What the *Surrogacy Matters Report* actually said was this:

> *"The risk of violating the rights of the child is also more acute in such jurisdictions. In extreme cases these arrangements can risk falling foul of the international prohibition on human trafficking. There are also risks of the child's right to know their heritage and genetic background being violated. Commercial surrogacy arrangements in comparatively well regulated countries are not free from these risks, though the risk appears to be substantially less acute in jurisdictions like the United States.*
>
> *Clearly, the current Australian regulatory regime in relation to offshore commercial surrogacy is imperfect. The extra-territorial laws enacted by*

[14] The Discussion Paper footnotes s. 5, which appears to be a mistake because that says nothing about exploitation.
[15] Surrogacy Act 2022 (NT), ss. 5-6.
[16] Discussion Paper, [20], 5.

> *Queensland, New South Wales, and the Australian Capital Territory do not appear to be deterring people from travelling overseas for surrogacy. Further, the evidence provided to this inquiry by the Attorney-General's Department, DFAT and DIBP shows no desire to manage the approximately 250 Australian families who enter into offshore commercial surrogacy arrangements, even when they do so in high-risk jurisdictions. This situation is far from ideal.*
>
> *Consequently it is the Committee's view that the Commonwealth Government should conduct a review of its current laws, regulations and policies as they relate to offshore surrogacy and consider additional options to identify ways in which it may better protect the rights of birth mothers and the children they carry on behalf of Australian citizens. The aim of the review should be to ensure that Australians who broker, facilitate or engage in offshore surrogacy arrangements are aware of the human rights risks those arrangements may pose."*[17]

The *Surrogacy Matters Report* was not supportive of "better regulated" commercial surrogacy. Its first recommendation was "that the practice of commercial surrogacy remain illegal in Australia."[18] Although the TOR of this inquiry states the ALRC "should consider Australia's human rights obligations and any findings and recommendations" of previous inquiries (including the *Surrogacy Matters Report*), the ALRC inquiry seems to be proceeding in direct contravention of Recommendation 1.

Misstatement concerning Australia's current position on commercial surrogacy

The TOR required the ALRC to consider "Australia's obligations under international law." The *Surrogacy Matters Report* listed the relevant international treaties and agreements, as follows:

- the *Convention on the Rights of the Child (CRC)*,
- the *International Covenant on Civil and Political Rights (ICCPR)*,
- the *International Covenant on Economic, Social and Cultural Rights*, and
- the *Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*.[19]

Rather than focussing on UN instruments, the ALRC's Discussion Paper mentions (in one place) certain rights which it tables as being relevant as being "in line with core human rights principles."[20] Otherwise, the Discussion Paper focusses on certain

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[17] *Surrogacy Matters Report*, 31-32.
[18] *Surrogacy Matters Report*, xi.
[19] *Surrogacy Matters Report*, 28.
[20] Discussion Paper, [39], 12.

"reform principles", which have been developed by the ALRC (these are discussed below).

The Discussion Paper addresses certain human rights pertaining to children, surrogate mothers and commissioning parents but the treatment of these rights is superficial and incomplete. (A critique of ALRC's analysis of human rights related to surrogacy and the findings of the *Special Rapporteur* in her recent report on that subject is discussed separately in Section 2 below). There is no clear articulation of the legal standards to which Australia is treaty-bound to adhere.

At one point the Discussion Paper acknowledges that the UN has called for bans on surrogacy:

> *"Recently, the United Nations Special Rapporteur on Violence against Women denounced surrogacy as exploitative and violent. The Special Rapporteur, and others, have called for a ban on surrogacy as a regulatory response."*[21]

However, this is then followed by this statement:

> *"In contrast, Australian governments clearly recognise surrogacy as a legitimate practice by legislating for it."*[22]

The "in contrast" is particularly important to note because it indicates that the long-standing position of Australian governments is, in reality, at variance with the *Special Rapporteur*'s position.

It is simply incorrect to assert that Australian governments "clearly recognise [all forms of] surrogacy as a legitimate practice," without distinguishing between altruistic and commercial surrogacy (as already mentioned). Current guidance from the A-G's Department is that "[c]ommercial surrogacy is illegal in all states and territories because it can lead to risks of exploitation of surrogates, babies and commissioning parents."[23] Under "why Australia prohibits commercial surrogacy", the A-G's website on surrogacy states:

> *"There is a growing body of evidence that commercial surrogacy can lead to exploitation of women and children, and focusses on the commissioning parents' wishes rather than the best interests of the child."*[24]

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[21] Discussion Paper, [29], 9.
[22] Discussion Paper, [30], 9.
[23] "Surrogacy in Australia", Attorney-General's Department [website]. Accessed 10/12/25.
[24] "Why Australia prohibits commercial surrogacy", Attorney-General's Department [website]. Accessed 10/12/25.

Australian law allows a narrow exception for altruistic surrogacy. As noted above, the ALRC has erased the distinction between altruistic and commercial surrogacy. It has no authority for doing so.

The justifications offered in the ALRC's Discussion Paper for liberalising access to surrogacy – i.e., that most Australians aged between 18-49 support it; that longitudinal studies tentatively indicate good outcomes; and, that some people have reframed surrogacy as a form of "assisted reproductive technology"[25] – are not relevant and suggest an effort to avoid the material point, which is that Australian law condemns commercial surrogacy. Multiple government inquiries have concluded that the prohibition on commercial surrogacy should remain.

Additional "reform principles" guiding the ALRC review

In addition to "the human rights of children born of surrogacy, their surrogate mothers and intended parents" (as per the preamble to the TOR), the Discussion Paper mentions that the review has been guided by "a set of reform principles" which have been "shaped by our Terms of Reference, as well as submissions, consultations and research."[26]

As noted above, ACL's request made under the Freedom of Information Act for documents relating to the development of these "reform principles" was refused citing "s. 47C and 47E of the FOI Act, and that it would not be in the public interest to release these documents."[27]

The Discussion Paper (on page 13) identifies the following "principles":

- **Risk mitigation** – (Proposals 17-21 and 37). It is proposed that "standard checks and processes" and steering people away from countries where the risk of exploitation is higher will mitigate risks to safety and health.
    - This fails to take into account the inherent risks to the health and mental health of surrogate mother and children born through surrogacy, so that expanding access to surrogacy is incompatible with 'risk mitigation'.
- **Respect and dignity** – (Proposals 26 and 33-35). It is proposed that recognition of the surrogate's unique and vital role in the process and the child's right to access information about their origins is sufficient to ensure the 'respect and dignity' of surrogates and babies.

[25] Discussion Paper, [30], 9.
[26] Discussion Paper, [39], 12.
[27] Letter from the ALRC to the ACL, "Request for access to documents under the Freedom of Information Act 1982", 12 December 2025.

  - This fails to recognise that the commodification of babies and of women's reproductive capacities in commercial surrogacy is inherently incompatible with 'respect and dignity' for either.

- **Accessibility** – it is proposed that "reform efforts should try to ensure that laws are inclusive and do not discriminate." As an example, financial barriers to surrogacy could be reduced by Medicare-subsidised fertility treatment (Proposal 28).
  - This fails to consider that offering government subsidies for surrogacy-related services in the name of 'non-discrimination' will – particularly if the prohibition on commercial surrogacy is lifted as the ALRC seems to suggest it should be – encourage the development of a surrogacy industry within Australia. Further, it is entirely predictable that Australia would become a desirable destination country for commissioning parents from other countries. This possibility is not mentioned in the ALRC Discussion Paper.

- **Pragmatism** – (Proposals 4-5 and 8-10). A regulatory framework is proposed "that is practical and responds to societal needs and advancements in assisted reproductive technology, even where opinions differ about surrogacy." The Discussion Paper reasons that "it is better to encourage compliance before any prohibited conduct occurs and that a civil penalty regime may be more likely to be enforced than criminal sanctions."
  - This presupposes that "societal need" (i.e. market demand) for surrogacy must be met and that it is the business of Australian governments to ensure that it is.
  - The understates the seriousness of the harms caused by commercial surrogacy and the level of culpability associated with child trafficking.

- **Harmonisation** – (Proposal 1). This principle aims to "make the law more consistent, so that it is more efficient, fair, and certain. More consistent laws may also mean that people do not feel the need to travel to other states and territories that they think may be less restrictive."
  - This principle would be uncontentious, but for the fact that altruistic and commercial surrogacy have been conflated. The TOR did not have that outcome in contemplation, for reasons already given.

- **Legal clarity and certainty** – (Proposals 22-24, 25-27, 30-32, and 38) This principle supports "clear and certain laws about the rights and obligations of everyone involved 'at the earliest possible time'. It aims to remove judicial discretion on how issues of legal parentage and the reimbursement of surrogates should be resolved.

  - A lack of certainty is one of the problems identified with regard to altruistic surrogacy in Australia because previous judicial reviews have supported the parental claims of the surrogate mother. The ALRC proposes (Proposal 30) that commissioning parents are recognised as the legal parents of the child upon birth, meaning surrogate mothers would have be apply for judicial review in the event of disputed claims over the child. (The Discussion Paper even raises a question over whether she should have this prerogative or not). While prior agreement on many points relating to altruistic surrogacy would be desirable, there is the risk that this principle could be misapplied to create circumstances in which the Australian government will become the enforcer of human rights violations against women.

- **Principle of least restriction** – According to this principle, "informed decisions by consenting adults should be respected by governments and remain as private arrangements as far as practicable. Oversight of surrogacy arrangements should therefore be limited … and should be no more than is required to prevent harm."
  - This principle seems to allow a great deal of discretion as to how it is interpreted and whose rights are upheld and prioritised. This principle promotes deregulation of matters which according to international standards should be prohibited, or to the extent it is allowed (e.g. for altruistic surrogacy), should be tightly regulated.

It is not clear why the ALRC has paid such close attention to developing its own "reform principles" when the legal standards to be achieved are established by the UN treaties to which it was directed by the TOR. To the extent that the ALRC's "reform principles" displace the correct UN standards, they should be disregarded.

Other debatable presuppositions which have not been put forward for public discussion

The Discussion Paper is informed by several debatable assumptions which, however, have not been put forward for public discussion. These include:

- The presupposition that the Australian government is obligated, in some way, to meet an "increasing demand for surrogacy."
- The suggestion 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."
- The proposition that "surrogacy" (not differentiated) is a legitimate way to start a family.

These are discussed in turn next.

The presupposition that the Australian government is obligated, in some way, to meet an "increasing demand for surrogacy."[28]

The Discussion Paper presents as problematic that "the limited availability of domestic surrogates drives intended parents to access surrogacy arrangements overseas."[29] It suggests that "an overly strict prohibition on reimbursing surrogates, which can leave the surrogate financially out of pocket" may be responsible for a "lack of available surrogates" in Australia (among altruistic surrogates).

The suggestion 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."[30]

The details of what exactly is to be achieved, and how, are not explored in the Discussion Paper but this paragraph footnotes a paper by Sarah Jefford (a member of the advisory committee), who has, in various places, expounded what she believes to be an important distinction between "compensated" and "commercial" surrogacy. According to Jefford's personal submission to this review:

> *"Recent public discourse about the introduction of commercial surrogacy in Australia illustrates a lack of awareness and understanding of the nuance of compensating surrogates for gestational services, as opposed to 'buying babies' and human trafficking … It is disheartening to see media and public commentary dismiss all commercial surrogacy as exploitative while denying that altruistic surrogacy can also be exploitative and failing to consider that a clear way to improve accessibility of surrogacy in Australia is to compensate surrogates. It is patronising to tell a woman she cannot decide what she does with her own body, or that to be paid is exploitative. Everyone has a right to work, the opportunity to gain a living as they freely choose, fair wages and safe and healthy work conditions.*
>
> *For this reason, I suggest framing any recommendations for law reform in favour of compensation, and not commercial surrogacy, and to include compensation as a 'prescribed expense' to be clear that payments are not in exchange for relinquishing a child or the transfer of parentage."*[31]

This strongly advocates commercial surrogacy by means of what Jefford terms "compensated" surrogacy.

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[28] Discussion Paper, [21], 5.
[29] Discussion Paper, [21], 5.
[30] Discussion Paper, [22], 5.
[31] S. Jefford, Submission 128.

The Discussion Paper seems to be following a similar approach. Rather than speaking openly about financial incentives for surrogate mothers, it speaks of the need to "prohibit intended parents and surrogates from engaging in a domestic surrogacy arrangement which is for impermissible profit or reward."[32] As the phrasing suggests, some types of profit or reward would be regarded as "permissible."

The introduction of "compensated" surrogacy would represent a significant departure from established policy (which is strictly limited to altruistic surrogacy - i.e. surrogacy that is not financially incentivised – i.e., where only the recovery of "reasonable expenses" is allowed). If that shift is being contemplated by the review, this should have been pointed out clearly. As it is, the prospect that surrogates might be financially compensated receives only muted acknowledgement in Proposals 25 and 26, where expenses are discussed, and in use of elusive terminology, such as "impermissible profit or reward," which may function to disguise what is actually meant.

As noted earlier, the *Surrogacy Matters Report* did not recognise a distinction between "compensated or commercial surrogacy." It recommended that prohibitions against financially incentivised surrogacy remain in place.

The proposition that "surrogacy" (not differentiated) is a legitimate way to start a family.

The Discussion Paper suggests it is remarkable that "many submissions … challenged it [i.e. surrogacy – undifferentiated] as a legitimate way to have children, or expressed concerns about the risks it can bring."[33] The fact that the ALRC takes a different view is relevant to note because it appears to factor in a particular approach to enforcement. The Discussion Paper suggests that commercial surrogacy should be decriminalised and that only civil – rather than criminal – penalties should apply to those who commission children outside the authorised channels. (Proposal 8)

The missed opportunity to address problems of enforcement

One of the important tasks identified in the TOR was "how surrogacy arrangements made outside of Australia should be addressed by Australian law."

Problems with the current non-enforcement of criminal prohibitions against international commercial surrogacy are well recognised. Surrogacy is regulated by state and territory legislation but there is no mechanism at Commonwealth level to prevent children born through illegal international surrogacy arrangements being brought to Australia by an Australian parent. As John Pasco, former Chief Justice of the Family Court of Australia, has observed, when these parents apply to the Family Court for legal

[32] Proposal 8, Discussion paper, 27.
[33] Discussion paper, 6.

recognition as the parents of children born through commercial surrogacy, the Court is faced with a *fait accompli*.

> *"As the child is already born and in Australia with the commissioning parents, it is almost impossible for courts to determine that it is not in the child's best interests to remain with the commissioning parents even if they have broken the law."*[34]

The Surrogacy Matters Committee commented on these problems in their 2016 report:

> *"1.113 The evidence is clear that extra-territorial offences for engaging in commercial surrogacy have not worked to deter Australians from travelling overseas to use surrogacy services. In the absence of a consistent national ban, credibly enforced, there is little likelihood that this will change, and Australians will continue to use offshore commercial surrogacy services.*
>
> *...1.116 Clearly, the current Australian regulatory regime in relation to offshore commercial surrogacy is imperfect. The extra-territorial laws enacted by Queensland, New South Wales, and the Australian Capital Territory do not appear to be deterring people from travelling overseas for surrogacy. Further, the evidence provided to this inquiry by the Attorney-General's Department, DFAT and DIBP shows no desire to manage the approximately 250 Australian families who enter into offshore commercial surrogacy arrangements, even when they do so in high-risk jurisdictions. This situation is far from ideal.*
>
> *1.117 Consequently it is the Committee's view that the Commonwealth Government should conduct a review of its current laws, regulations and policies as they relate to offshore surrogacy and consider additional options to identify ways in which it may better protect the rights of birth mothers and the children they carry on behalf of Australian citizens. The aim of the review should be to ensure that Australians who broker, facilitate or engage in offshore surrogacy arrangements are aware of the human rights risks those arrangements may pose."*[35]

Recommendations 7 and 9 of the 2016 Surrogacy Matters Inquiry pointed to the need for the Australian government to remedy the problem:

> ***"Recommendation 7:** The Committee recommends that the Australian Government establish an interdepartmental taskforce (which should include eminent jurists with relevant expertise) to report in 12 months on ways to address*

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[34] Pascoe J. Submission 35, House of Representatives Standing Committee on Social Policy and Legal Affairs. *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements. (February 2016).*
[35] *Surrogacy Matters Report,* [1.113-1.117], 31-32.

> *the situation of Australians who choose [to] enter into offshore surrogacy arrangements, with respect to:*
>
> - *protecting the rights of the child, particularly their rights to be free from exploitation, to know their genetic heritage, to know the circumstances of their birth, and to have an ongoing relationship with their birth mother and any siblings or genetic donor/s,*
> - *ensuring birth mothers give their free and informed consent and reducing the likelihood that they face exploitation,*
> - *ensuring that Australians who enter into offshore surrogacy arrangements meet their responsibility to act in the best interest of all of their children, and*
> - *considering whether it should be unlawful to engage in offshore surrogacy in any overseas jurisdiction where commercial surrogacy is prohibited.*
>
> *While not condoning Australians' use of offshore surrogacy, the aim of the taskforce should be to ensure that where the regulatory, economic or social conditions in a particular jurisdiction give rise to an increased risk of exploitation or rights violations, Australians entering into or facilitating surrogacy arrangements in that jurisdiction are made aware of those risks, and are subject to a more stringent investigative process to ensure that the rights of the birth mother and the child have not been infringed."*[36]
>
> ***"Recommendation 9:** The Committee recommends that the Australian Government introduce legislation to amend the Migration Act 1958 such that Australian residents seeking a passport for a young child to return to Australia are subject to screening by Department of Immigration and Border Protection officials to determine whether they have breached Australian or international surrogacy laws while outside Australia, and that, where the Department is satisfied that breaches have occurred, the Minister for Immigration is given the authority to make determinations in the best interests of the child, including in relation to the custody of the child."*[37]

We note that the submission of Emeritus Professor Patrick Parkinson to the ALRC's Issues Paper pointed to the seriousness of this problem and the need to develop a remedy:

> *"As a matter of practice, and notwithstanding laws criminalising commercial surrogacy in every state and territory, there are almost no consequences that*

[36] *Surrogacy Matters Report,* xiii-xiv.
[37] *Surrogacy Matters Report,* xiv.

> *flow from disobeying the law. Indeed, the federal government, and independently of the government, the Federal Circuit and Family Court of Australia (FCFCOA), often aid and abet the circumvention of state and territory laws criminalising international commercial surrogacy … Essentially, once a baby has been brought into the world, there have to be people recognised as having parental responsibility for him or her. The child, if born to an Australian father, is also entitled to citizenship. Yet even when referrals are made, as they have been, to prosecuting authorities, no prosecutions eventuate. To the best of my knowledge, there has never been a prosecution of any person engaging in commercial surrogacy, or assisting in the arrangement of commercial surrogacy, despite hundreds of such cases being known to occur each year and a small cottage industry of professionals practising in various ways in arranging or advising upon surrogacy. It follows that in practice, if not in theory, commercial surrogacy, both domestically and overseas, is not only permitted in Australia; it is almost entirely unregulated, despite there being numerous laws on the books. There are no effective measures in place to ensure that children born to an Australian father will not have been carried in the womb by a woman who is living under conditions of slavery.*
>
> *Apart from anything else, this complete failure to enforce laws that have only recently been enacted and have widespread acceptance in the community, is a rule of law issue.*
>
> *The ALRC, if it makes recommendations for reform, is going to have to address this very serious problem. At the very least it needs to make proposals for reform that will ensure that federal law works harmoniously with state and territory laws giving effect to a common legislative intent across state, territory, and federal Parliaments, and providing practical measures that require immigration authorities to act appropriately in support of the enforcement of those laws."*[38]

Rather than recognise as a problem the fact that children born through international commercial surrogacy are regularly being brought to Australia without consequence to those who engage in these (illegal) practices, the ALRC review has suggested normalising this commerce through regulation and lighter penalties.

> *"84. From a regulatory perspective, sanctions need to be proportionate to the conduct they seek to deter. Criminal sanctions (which may include imprisonment) are the most severe way to regulate behaviour and carry social stigma. In addition to deterring behaviour, criminal sanctions denounce and punish. For this reason, they tend to be used for severe conduct where moral culpability is high, and where other measures have not achieved compliance. By*

[38] Patrick Parkinson, Submission 13.

> *contrast, the purpose of civil penalties is not to denounce or punish. Rather, they seek to deter behaviour, through financial penalties. They are imposed where a 'strong public response' is required, but the conduct is not severe enough to be truly criminal. Where they are sufficiently severe, civil penalties can deter behaviour without the social stigma of a criminal conviction.*
>
> *85. The main aims of the proposals below are to:*
>
> - *prevent domestic surrogacy which is for impermissible profit or reward ('prohibited domestic surrogacy arrangements') (see Proposal 8);*
> - *prevent Australians engaging in overseas surrogacy where there is a high risk of exploitation ('unregistered overseas surrogacy arrangements') (see Proposals 9 and 37);*
> - *prevent people and organisations, including Surrogacy Support Organisations, from facilitating prohibited surrogacy arrangements, or from coercing people to participate in surrogacy (see Proposal 10); and*
> - *maintain the integrity of the domestic surrogacy regulatory regime (see Proposals 1 -5) and overseas surrogacy registration processes (see Proposal 37).*
>
> *86. The proposals try to achieve these aims in a way that is proportionate to the behaviour that is being deterred, and that avoids surrogacy arrangements being driven underground."*[39]

Again, undeclared presuppositions appear to be driving the reasoning of the review in a particular direction. It is suggested, for example, that:

- "the application of the criminal law to surrogacy arrangements stems from a time when all forms of surrogacy were considered unethical,"[40]
- "surrogacy is increasingly recognised as a legitimate way to form a family,"[41] and
- "that criminalisation of overseas conduct cannot be justified for matters where there is no moral consensus, such as commercial surrogacy."[42]

The strong implication is that commercial surrogacy is no longer regarded as the serious crime that it once was and that, accordingly, penalties should be reduced to "destigmatise" these practices. The ALRC's discussion of Proposals 8 and 9 suggest that international surrogacy is not a significant moral problem, that legislation should only prohibit "intentionally or recklessly engaging in overseas surrogacy arrangements"

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[39] Discussion Paper, [84-86], 26-27.
[40] Discussion Paper, [82], 25.
[41] Discussion Paper, [82], 25.
[42] Discussion Paper, [91], 29.

– that is, without having "registered the arrangement with a registration entity."[43] The ALRC suggests:

> *"This would reduce the likelihood of intended parents engaging in surrogacy in high-risk destinations in the first place, whilst recognising the reality that Australians continue to go overseas, even when prohibitions are in place.*[44]

This is, perhaps, an example of the "reform principles" of "harm minimisation" and "pragmatism" at work. It illustrates their power to redirect attention from the proper objective of the review, which – if regard were had to international treaty obligations, as required by the TOR – would have resulted in suggestions for how existing prohibitions could be enforced.

The suggestions put forward in the Discussion Paper are not consistent Australia's international obligations – for example, under the *CRC* article 35, which requires States Parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Neither is it consistent with the findings of previous Australian government inquiries to which the ALRC was instructed by the TOR to have regard.

There is an opportunity cost to the ALRC's decision to pursue the legalisation of commercial surrogacy. It means the problem of how to implement Australia's international obligations has not been addressed by this review.

Prioritising the interests of commissioning parents

It is not clear that the rights and wishes of commissioning parents are not prioritised at the expense of protections for babies and surrogate mothers.

There is considerable concern to avoid "discrimination" and to protect "privacy," even when this would materially reduce the ability of the Australian government, or its licensed agents, to vet potential commissioning parents. For example, the Discussion Paper suggests that criminal history checks on prospective parents may not be required (p. 7) or that perhaps these might be limited to only certain types of crime.

It is proposed that access to Fertility treatment should be contingent upon authorisation by a Surrogacy Support Organisation ('SSO'). However, it is also proposed that "[t]he SSO should review surrogacy agreements 'on the papers', and meetings with the parties should only take place when considered necessary." (p. 21).

[43] Discussion Paper, Proposal 9, 29.
[44] Discussion Paper, [94], 30.

It is suggested, even for "unapproved domestic surrogacy arrangements and overseas surrogacy arrangements, [that] legal parentage can … be transferred through the Federal Circuit and Family Court of Australia." (Proposal 31)

It is debateable whether the "rights and best interests of children" are well-served by "remov[ing] barriers to legal parentage,"[45] where this will facilitate the regularisation of international commercial surrogacy. At the same time that it is suggested that long-standing prohibitions against commercial surrogacy should be removed, it is also proposed that criminal penalties for those who break the (liberalised) laws should be reduced to civil penalties, on the grounds that these are "more likely to be enforced."[46] A consideration of how to combat child trafficking is lacking.

Surrogacy funding and the potential for Australia to become a desirable destination for international surrogacy tourism

The ALRC proposes to extend Medicare rebates to include a generous suite of services – including IVF, screenings, and counselling of all parties – for commercial surrogacy arrangements. According to the Discussion Paper:

> *"Of the submissions received to date that mention Medicare rebates, the overwhelming majority supported extending Medicare access to surrogacy arrangements."*[47]

Again, it appears that the ALRC has conflated support for Medicare rebates related to altruistic surrogacy and those related to commercial surrogacy. Among those cited in support of the above contention is the ACL's submission, which certainly never supported any form of Medicare rebate for commercial surrogacy. The ALRC has misinterpreted – perhaps because it has misunderstood – the scope of the ACL's support for Medicare rebates associated with surrogacy. It is disappointing to find that submissions offered in good faith have been misrepresented as supportive of objectives the ACL has clearly opposed.

It is proposed that a national surrogacy regulator should be established, responsible for issuing licences and guidance to Surrogacy Support Organisations (SSOs) – or that these functions should be subsumed by existing authorities with expanded remits for regulating these arrangements.

The question arises whether it was in the mind of the Attorney-General not only to open the way for a new domestic industry in commercial surrogacy but also to establish Australia as a preferred destination for international reproductive tourists. Given that Australian women acting as surrogates for foreigners would presumably be eligible for

[45] Discussion Paper, [25], 6.
[46] Discussion Paper, [88], 28.
[47] Discussion Paper, [176], 54.

Medicare rebates, this would appear to be one predictable result of the ALRC's current proposals.

Section 2: A critique of the ALRC's Human Rights Analysis

Overview

This critique focuses on the issue posed by the terms of reference that ask the ALRC "to consider Australia's human rights obligations" in undertaking this inquiry. The present focus is primarily on the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Convention on the Rights of the Child* (CRC). These are fundamental among the core UN human rights treaties binding on Australia. Any divergences between the rights recognised in such conventions and the ALRC's "Approach to reform and reform intervals" need to be critically assessed.

The Discussion Paper cites in a footnote an important and highly pertinent report of July 2025 by the *Special Rapporteur*.[48] However, the Discussion Paper conveys none of the substance of that report, even though it is speaks directly to the issue of Australia's human rights obligations. This critique quotes extensively from the *Special Rapporteur*'s report in order to table the fundamental human rights issues it raised, with which the Discussion Paper did not appropriately engage. It is important to give the *Special Rapporteur*'s report prominence, since the Discussion Paper appears to minimise the fundamental human rights at stake in a number of ways.

Firstly, the Discussion Paper suggests an approach be taken to fundamental rights to the effect that "while all these rights and principles are important, they may not be equally important in every situation, and there may be a need to balance competing rights and principles."[49] Since the rights identified by the *Special Rapporteur* include *ICCPR* rights which are absolute (such as article 7 (the prohibition against subjecting a person to inhuman and degrading treatment) and article 8 (human trafficking and other forms of exploitation)), any question of "a need to balance competing rights and principles", when such rights are engaged, is ruled out, contrary to the position advanced by the Discussion Paper. Absolute rights, by definition, cannot be limited or qualified in a balancing exercise under any circumstances. The Discussion Paper does not acknowledge such constraints to any balancing process.

Secondly, the Discussion Paper mentions the rights it considers relevant only in a cursory fashion. This has various consequences:

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[48] A/80/158, The different manifestations of violence against women and girls in the context of surrogacy, Report of the Special Rapporteur on violence against women and girls, its causes and consequences, United Nations General Assembly, Geneva, 14 July 2025. (Hereafter, "Special Rapporteur Report").
[49] Discussion Paper, [32], 10.

- There is no meaningful explanation of how the rights it selects apply in the practical circumstances of surrogacy. The Discussion Paper thereby downplays the gravity of fundamental rights of surrogate mothers and children mentioned by the *Special Rapporteur*. The context in which surrogacy occurs is extremely important. The Discussion Paper does not address the conditions which create live anxiety on behalf of those at greatest risk of exploitation and ill-treatment, namely the surrogate mother and child. It is inappropriate to argue for liberalising surrogacy without fuller and more realistic regard for the context that provides such profound justification for concern as that raised by the *Special Rapporteur*.

- The Discussion Paper obscures the fact that there is an unavoidable asymmetry between rights that are protective of women and children against exploitation, and the rights asserted by the Discussion Paper in support of greater access to surrogacy. Instead, the Discussion Paper creates the impression of equivalence across all the rights tabled by the Discussion Paper. It is important to understand that certain rights claimed by the Discussion Paper, including on behalf of those who may wish to commission surrogacy, are contested. Some rights claims made by the Discussion Paper must be considered somewhat speculative given that, as the *Special Rapporteur* explained, "[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."[50] The *ICCPR* was adopted in 1966, *CEDAW* in 1979 and *CRC* in 1989 and none specifically contemplated surrogacy.

  In contrast, the rights of surrogate mothers and children as explained by the *Special Rapporteur* are based on long established convention principles. The Discussion Paper takes a more transactional approach, pointing to the risks that intended parents face of exploitation, and (while acknowledging the ordinarily accepted need to protect women against human exploitation), the Discussion Paper suggests that restrictions on the availability of surrogacy to enable women to benefit from offering themselves as a surrogate is discriminatory.

In the next section, *The Human Rights at issue*, the Discussion Paper's description of each of the rights of the child, the surrogate mother, and of would-be parents is presented in quotes, and assessed briefly in annotations. Relevant extracts from the *Special Rapporteur* then follow. In this way the Discussion Paper's omissions become visible when compared with the more comprehensive rendering of fundamental rights by *Special Rapporteur*.

[50] *Special Rapporteur Report*, para 52.

The human rights at issue

Children's rights

The ALRC's appraisal

According to the Discussion Paper (pages 10-11), children's rights include:

- *"a right to be safe and free from harm and exploitation."*[51]

The Discussion Paper footnotes *CRC* articles 19, 34 and 36, without any meaningful explanation of how crucial they are in the context of surrogacy. These articles require States to: take measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation; protect the child from all forms of sexual exploitation and sexual abuse; and protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare. It is precisely in pursuit of such rights of the child that commercial surrogacy should be prohibited, and altruistic surrogacy be allowed only under strict conditions. The *Special Rapporteur*'s coverage explains the stark reality behind the relevance of these rights.

- *"a right to be cared for by their parents."*[52]

The Discussion Paper footnotes *CRC* article 7 ("The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents"). The Discussion Paper suggests that the reference to "parents" might be interpreted as including commissioning parents (i.e. the child's "social", as distinct from biological, family). It is contested whether the right to be cared for by *commissioning parents* – as suggested by the Discussion Paper – applies at all in this context, as *CRC* was adopted in 1989 and never specifically contemplated surrogacy (see Introduction above).

- *"as well as a right to privacy, family, and home."*[53]

The Discussion Paper footnotes *CRC* article 16 ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation"). It is not clear to what extent privacy is claimed on behalf of children (as opposed to rights related to the family). It is contested that protection against arbitrary interference with the family applies at all in the circumstances of surrogacy, given it would not have been contemplated at the time of the convention.

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[51] Discussion Paper, [35], 10.
[52] Discussion Paper, [35], 10.
[53] Discussion Paper, [35], 10.

- *"Finally, children born through surrogacy also have rights to preserve their identity, which manifests as a right to access information about their genetic and gestational origins, as well as a right to nationality."*[54]

The Discussion Paper footnotes *CRC* article 7 (see above), which is a right of the child that could be addressed through various means where surrogacy has occurred, without the right providing a basis for liberalising surrogacy.

The Discussion Paper states:

> *"[B]arriers to intended parents obtaining legal parentage risk violating the rights of the child discussed above, as well as the right to be free from discrimination. Such barriers prevent the child's social family from being recognised as their legal family and treat children born through surrogacy differently from other children."*[55]

It is necessary to distinguish the need to attend to such matters in ex-post cases where surrogacy has occurred (whether within the law or not), from the question whether it is appropriate to liberalise surrogacy. The discriminatory aspects of restrictions on surrogates and would-be parents are addressed below (The rights of surrogate mothers, and The rights of parents).

> *"In Australia, failure to recognise a child's intended parent(s) as their legal parent(s) may have an impact on matters such as the child's citizenship rights and ability to obtain a passport, as well as their access to medical treatment."*[56]

See previous comment.

Special Rapporteur appraisal

According to the *Special Rapporteur*:

- Children have a right a right to be cared for by their parents: art 7.

  59. "The Convention on the Rights of the Child serves to protect, as far as possible, the child's right to know and be cared for by their parents, as well as the right to the preservation of identity. The words 'as far as possible' imply that this right must be respected as a general rule, except for situations where other solutions are prompted by the best interests of the child. It cannot, however, be a priori denied. 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. There is also an important relationship between the right to know one's origins and the right to

[54] Discussion Paper, [37], 11
[55] Discussion Paper, [36], 11.
[56] Discussion Paper, [36], 11.

health with regard to access to family medical history necessary for the diagnosis or prediction of hereditary conditions."[57]

- Consequences of separation

"17. Children born through surrogacy are often pursued and cherished by commissioning parents. However, from birth, they experience immediate separation from the woman who carried them and are transferred to the commissioning parents – a process that can be emotionally and developmentally significant.[58] *Individuals with disrupted development of secure attachment are at higher risk of developing mental disorders.*[59] *In some cases, the transfer of a child is also delayed or complicated by legal uncertainties surrounding the recognition of parentage, nationality or identity, leaving the child in limbo.*[60]

18. 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.[61] *Assisted reproductive technology and multifetal pregnancy have reportedly been associated with an increased risk of birth defects.*[62] *Breastfeeding, which is prevented in surrogacy and even contractually prohibited,*[63] *is essential to an infant's healthy development.*[64] *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."*[6566]

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[57] *Special Rapporteur Report*, para 59, 20.
[58] Marcus Agnafors, "The harm argument against surrogacy revisited: two versions not to forget", *Medicine, Health Care and Philosophy*, vol. 17, 2014.
[59] Radovan Hrubý, Jozef Hašto and Peter Minárik, "Attachment in integrative neuroscientific perspective", *Neuroendocrinology Letters*, vol. 32, No. 2, 2011.
[60] Seema Mohapatra, "Stateless babies and adoption scams: a bioethical analysis of international commercial surrogacy", *Berkeley Journal of International Law*, vol. 30, No. 2, 2012.
[61] Irene Woo and others, "Perinatal outcomes after natural conception versus in vitro fertilization (IVF) in gestational surrogates: a model to evaluate IVF treatment versus maternal effects", Fertility and Sterility, vol. 108, No. 6, December 2017.
[62] Ruohua Yan and others, "Assisted reproductive technology and the risk of birth defects mediated by multifetal pregnancy: evidence from the China birth cohort study", American Journal of Obstetrics and Gynaecology, vol. 232, No. 6, June 2025.
[63] Hillary L. Berk, "The legalization of emotion: managing risk by managing feelings in contracts for surrogate labour", Law and Society Review, vol. 49, No. 1, March 2015.
[64] Bandelli, Sociological Debates.
[65] Susan Golombok and others, "Children born through reproductive donation: a longitudinal study of psychological adjustment", Journal of Child Psychology and Psychiatry, vol. 54, No. 6, June 2013.
[66] *Special Rapporteur Report*, para 18, 8.

The *Special Rapporteur* noted, "[w]hile some studies indicate positive experience, the most widely cited study suffers from methodological limitations such as a relatively small original sample, which became smaller by the time of its conclusion."[67]

- Commoditisation

  "50. 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 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. 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.

  51. 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.'"[6869]

- The risk of trafficking

  "46. Unlike in adoption, where parental assessment is recognized as an essential child protection measure, very few, if any, background checks are carried out on commissioning parents. Instead, the primary requirement placed on intending parents is the financial capacity to pay a substantial sum for the surrogacy procedure. This poses particular risks for children born in this way, including the risk of sexual exploitation of girls, as there have been reports of sex offenders commissioning children for surrogacy; the risk of becoming victims of human

[67] *Special Rapporteur Report*, fn. 50, 9.
[68] See Susan Golombok and others, "Families created through surrogacy arrangements: parent–child relationships in the 1st year of life", Developmental Psychology, vol. 40, No. 3 (May 2004); and Susan Golombok and others, "A longitudinal study of families formed through reproductive donation: parent–adolescent relationships and adolescent adjustment at age 14", Developmental Psychology, vol. 53, No. 10 (October 2017).
[69] *Special Rapporteur Report*, para 51, 17.

> *trafficking; and the risk of abandonment, especially when a child is born with disabilities."* [70]

- The child's identity

> *"46 … Children born through surrogacy may also face long-term identity struggles, which are intensified if they are conceived through gamete donation. Knowing one's origins is important for many individuals for psychological and emotional reasons, as well as for family medical history reasons."*[71]

The rights of surrogate mothers

The ALRC's appraisal

According to the Discussion Paper (pages 11–12), surrogates' rights "include":

- "the right to be free from harm and exploitation."
  The Discussion Paper appropriately footnotes *CEDAW* article 6, which reads "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".
- "the right to be free from discrimination (including discrimination based on race or gender)."

The Discussion Paper appropriately footnotes *CEDAW* article 2. However, the Discussion Paper does not adequately explain that article 2 requires measures to protect women against discrimination through exploitation. The Discussion Paper instead adopts the attitude that legislation that limits surrogacy is likely to be discriminatory for doing so. In contrast, the *Special Rapporteur* approaches the issue of discrimination against women (surrogate mothers) in the following diametrically opposed way:

> *"53. The principle of human dignity was first enshrined in the Universal Declaration of Human Rights and reaffirmed in subsequent treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women. In the context of surrogacy, it precludes the objectification and commodification of women and children, who have intrinsic and equal value. In its resolution on human rights, the European Parliament echoes this view, condemning surrogacy as a practice undermining 'the human dignity of the woman' specifically because 'her body and its reproductive functions are used as a commodity' and are instrumentalized 'for financial or other gain', which is particularly dangerous to 'vulnerable women in*

[70] *Special Rapporteur Report*, para 46, 16.
[71] *Special Rapporteur Report*, para 46, 16.

> *developing countries'. Reducing women to their reproductive function also contravenes article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women, under which States are obliged to modify social and cultural patterns of conduct based on stereotyped roles for men and women."*[72]

For more on discrimination under international law see annotations below (The rights of parents).

- "the right to be free from slavery and forced labour."

The Discussion Paper appropriately footnotes *ICCPR* article 8 (it is directly relevant to human trafficking and other forms of exploitation), and the *Special Rapporteur*'s report, but does not elaborate the issue in any meaningful way. See the *Special Rapporteur*'s analysis in detail (below).

Citing *ICCPR* article 17, and *CEDAW* article 16, the Discussion Paper states:

> *"the rights to autonomy and bodily integrity require that people are free to make choices about their own body, including by making an informed decision about whether to act as a surrogate, without being coerced or inappropriately induced, and to receive any medical treatment only with informed consent."*[73]

As a right advanced in support of surrogacy article 17 of the *ICCPR* is not as far-reaching as the Discussion Paper suggests: "No one shall be subjected to ***arbitrary*** or unlawful interference with his privacy, family, home or correspondence." There is no violation of this right if the interference is justified because it serves to protect the fundamental rights of those likely to be harmed by surrogacy, notably the surrogate mother and child.

The reference to *CEDAW* article 16 looks like a mistake, since the right to bodily integrity is more closely (but still at best only indirectly) addressed through article 12, which guarantees the right to healthcare services, including those related to family planning.

Special Rapporteur appraisal

According to the *Special Rapporteur*'s overview:

> *"12. Surrogate mothers are generally women or girls who have previously given birth to at least one child. Their motivations are often multifaceted, combining financial, empathetic and social considerations. Many express a desire to help others to experience parenthood while also emphasizing the opportunity that surrogacy provides to support them or their own families financially. This is particularly relevant for single mothers, who frequently cite financial needs as a*

[72] *Special Rapporteur Report*, para 53, 18.
[73] Discussion Paper, 11-12.

central reason for entering into surrogacy arrangements. When they are described as 'service providers' rather than mothers, it creates an impression that compromising their dignity and well-being could be justified by the existence of a contract.

13. Globally, most surrogate mothers come from lower-income backgrounds and have less social status compared with the commissioning parents. Many lack access to effective legal remedies or advocacy mechanisms. Reportedly, migrant women are either specifically targeted for surrogacy or transferred to other countries for the purpose of impregnation and childbirth, often to circumvent legal frameworks.

...22. In international arrangements, surrogate mothers are typically nationals of low-income or developing countries, while commissioning parents tend to be wealthier individuals from Western States – a dynamic that risks reinforcing colonial and discriminatory patterns.

...30. A study of 50 women from India demonstrated that surrogate mothers have higher levels of depression during pregnancy and post-birth. In another research study, surrogate mothers reported difficulties in relinquishing their newborns in 35 per cent of cases and having negative emotions over their decision to go into surrogacy in 39 per cent of cases. Some 33 per cent were at risk of post-traumatic stress disorder or anxiety. Substantial stress was observed in 65 per cent of cases in negative in vitro fertilization outcomes. They experience post-birth trauma linked to the release of high quantities of oxytocin after birth for the production of milk and the establishment of the bond, a process abruptly interrupted by removing the newborn. Surrogate mothers also report concern about their sexual lives during pregnancy, marital disturbance and their own childbirth planning. There was only one study of surrogate mothers indicating no change in their well-being 10 years after surrogacy; however, it elicited methodological concerns.

31. No regulatory framework can fully prevent the serious psychological harm that may result from the separation process. Some surrogacy agencies offer detachment therapies to compel expectant mothers to emotionally separate from children, but the result might be cognitive dissociation between their body and their feelings, rising to the levels of post-traumatic stress disorder.

32. Surrogates are often denied time with the newborn after birth, including not being allowed to hold the baby, and may be cut off from contact with the intended parents and the child after giving birth. Some surrogate mothers report feeling like 'an object of a scientific experiment'.

33. Although recruitment material portrays surrogacy as a medically safe process for eligible women, evidence suggests that surrogate mothers have their health jeopardized to a greater extent than other mothers. Drugs such as Lupron, which surrogate mothers usually self-administer to synchronize their cycle with that of the egg donor before embryo implantation, are classified as hazardous and recommended to be administered only by healthcare workers wearing protective gowns and gloves. Such practice results in a higher rate of maternal health complications for surrogate mothers compared with others. Surrogate pregnancies are more likely to be ectopic and to lead to caesarean section, maternal gestational diabetes, hypertension, pre-eclampsia and placenta previa.

34. Surrogacy contracts also change the dynamic in healthcare settings, particularly in countries where litigation is prolific. Reports from India, Mexico and Nepal indicate that delivery by caesarean section is arranged for surrogates regardless of medical indications or preferences, with risks for post-partum complications, particularly for impoverished women who live in rural areas.

35. Power imbalances between surrogate mothers and commissioning parents have severe consequences when the latter impose an abortion in cases of multiple pregnancies or fetal disability. Surrogate mothers have reportedly been pressured to terminate healthy pregnancies, including beyond the 12 weeks, through coercive tactics such as financial incentives, threats of legal action or the withdrawal of support to both the mother and the baby. Demands are often justified by claims that the child belongs to the commissioning parents.

36. Multiple pregnancies, which are a common outcome of in vitro fertilization procedures, pose heightened health risks for the surrogate mother. In some cases where a multiple pregnancy progresses, commissioning parents also enforce a selective reduction.

37. In societies with a strong cultural preference for male children, surrogacy may amplify existing sexist and gender biases through the incorporation of sex selection into in vitro fertilization service packages.

38. Egregious abuses have been documented against egg donors, with hundreds reportedly exploited for months through the harvesting of their eggs. Girls are also reportedly exploited for their eggs and their wombs. Some reports, including from China, describe scenarios of egg retrieval and embryo transfers being conducted in unregulated, underground laboratories operated by biotechnology companies, where the women undergoing the procedures were identified by codes and categorized as 'high-end' or 'low-end' products, on the basis of their appearance and health status, with each egg priced accordingly. Women with disabilities are not being spared such exploitation and abuse.

…54. 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."

- Discrimination

"23. Many surrogate mothers have experienced multiple and intersecting forms of discrimination and poverty long before entering surrogacy arrangements. Surrogacy arrangements serve to capitalize on these stark inequalities, sharpened by globalization, whereby everything is for sale. Surrogate mothers are often trapped in unequal power dynamics with doctors and agency personnel and have described feeling powerless and being treated 'like a cow'. Many lack access to independent legal advice and representation and may not receive information in a language that they understand – making it difficult to challenge exploitative contracts or unethical practices.

24. Poverty and conflict can further contribute to women's decisions about becoming surrogates and amplify associated risks. In Ukraine, the surrogacy agency reportedly pressured surrogate mothers to leave, as the safe delivery of the child overrode the woman's desire to remain."

- Reinforcement of sexist stereotypes and commodification of female bodies:

"19. Unlike other forms of labour, surrogacy entails the direct and exploitative use of a woman's bodily and reproductive functions for the benefit of others, often resulting in long-lasting harm and in exploitative circumstances. Furthermore, surrogacy does not distinguish between working time and personal life, as surrogate mothers cannot take leave from pregnancy. Commercial surrogacy arrangements place monetary value on women's capacity to bear and give birth to healthy children, reinforcing harmful power imbalances in which individuals and entities with greater financial means exert control over the ability of females to become pregnant and give birth.

20. In contexts where women and girls face structural barriers to exercising basic rights and accessing essential services, surrogacy can further devaluate them, reduce them to solely their reproductive roles and perpetuate the idea that female biology and reproductive capacity are delegable and marketable. Such a view is embedded in the language on surrogacy, referring to women in

disembodied terms such as 'womb', 'a guesthouse' and an 'incubator developing their cells'. Surrogate mothers also report being infantilized as 'good girls' when complying with surrogacy requirements.

...60. Reproductive rights, as understood in the Beijing Declaration and Platform for Action, are the rights of mothers to 'decide freely and responsibly the number, spacing and timing of their children', to 'have the information and means to do so' and include 'their right to make decisions concerning reproduction free of discrimination, coercion and violence'. In the Declaration, the importance of taking into account the needs of future and living children as well as responsibilities towards the community is further stressed. This phrasing cannot be interpreted, therefore, as creating an unconditional right to have a child, which is also absent from other international instruments. Psychological assessments are required for having a child through adoption, and, as the European Court of Human Rights decided, embryos cannot be implanted in a mother against the father's wishes. As emphasized in the Principles for the protection of the rights of the child born through surrogacy (Verona Principles), 'international law and other relevant domestic law do not provide any person, including intending parent(s) in surrogacy arrangements, with a right to a child' who is, instead, an 'independent rights holder'."[74]

- Suffering by the mother

  "55. 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."

- Privacy

  "27. In many contracts, surrogate mothers are required to waive, in advance, their right to make their own medical decisions, or to waive the confidentiality of information obtained by doctors during treatments. Other examples of harmful practices reportedly justified using a contract include the implantation of the maximum number of embryos to increase the chances of successful birth, recourse to selective abortion, constant monitoring by the intended parents, including through uninterrupted camera surveillance, and restrictions on

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freedom of movement, thereby contravening the definition of 'decent and productive work'[75] *and the reasonable limitation of working hours. Surrogacy arrangements, therefore, situate this practice outside the realm of freedom of contract.*

28. There is a risk of falling into a cycle of dependency on payments from surrogacy, especially if women lose or leave their jobs during the process. This problem is particularly relevant in developing countries. Women also sell their eggs between pregnancies or after they are no longer suitable to be a surrogate."

- Slavery/trafficking

"39. The profit-oriented behaviour underpinning surrogacy service provision increases the risk of human trafficking at every stage of the process, including to other countries for forced reproductive labour. In Georgia, for example, at least 100 female victims were reportedly kept in confinement and forced to give up their eggs after being artificially stimulated to ovulate. Even in countries where surrogacy is regulated, such as Greece, risks persist. Foreign women have reportedly been trafficked into the country to serve as surrogate mothers.

40. Surrogacy arrangements can amount to or resemble slavery, as they place surrogate mothers in a position in which any or all of the attributes of the right of ownership are exercised over them. The commissioning parties exercise this right of usus over the woman's body by requiring her to follow a specific diet, refusing her medical treatment or obliging her to undergo 'embryo reduction' or abortion. In Argentina, poorer women were reportedly recruited on social media to become surrogates in conditions that prosecutors described as the 'reduction to servitude'. In Ukraine, women were reportedly forced to live in small, overcrowded apartments, without access to hot water and with severe limitations on their freedom of movement.

41. While 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.

42. Commercial surrogacy, which accounts for the overwhelming majority of surrogacy cases globally, constitutes the sale of children, which is a crime. Without the transfer of the child, there would be no incentive for the surrogacy agreement. Notably, in jurisdictions where commercial surrogacy is allowed, the main difference between the illegal sale of children and legal surrogacy is the point at which parental rights are transferred.

[75] International Labour Office, *Report of the Director-General: Decent Work*, 87th session, Geneva, 1999.

43. It becomes very complex to determine what exploitation and abuse have been committed against the surrogate mother and child after the latter has been transferred to the intended parents. Challenges also arise in determining who should be treated as a perpetrator, a victim or a witness. In some cases, impoverished families traffic daughters into surrogacy networks, including under the guise of employment or marriage. Issues of double criminality arise when surrogacy does not qualify as a criminal offence in all relevant jurisdictions, and transnational law enforcement remains challenging.

44… Family members or friends emotionally blackmail women to help them have a child by becoming a surrogate. … Commissioning parents can reportedly exert extreme and abusive control over the lives of surrogate mothers, demanding to be present at the obstetrical examination and childbirth against the surrogate's wishes.

… 56. Furthermore, under article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, States are required to take all appropriate measures to suppress all forms of trafficking in women. Under article 35 of the Convention on the Rights of the Child, as well as the Optional Protocol thereto on the sale of children, child prostitution and child pornography, the sale of children is explicitly prohibited. In the Optional Protocol, such sale is defined as any act or transaction in which a child is transferred by any person or group to another for remuneration or any other consideration. In the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking in Persons Protocol), there is no requirement of 'exploitation' as a separate element. Instead, the transfer of the child for payment constitutes 'a serious harm and human rights violation in and of itself'. By definition, at least commercial surrogacy involves payment, although in altruistic surrogacy, alleged reimbursement often amounts to actual payment compensation. The main purpose of the arrangement is the transfer of the child to the intended parents.

57. Under the Charter of Fundamental Rights of the European Union and the Convention on Human Rights and Biomedicine (Oviedo Convention) of the Council of Europe, financial gain derived from the human body or its parts is prohibited. Pursuant to article 9 (5) of the Trafficking in Persons Protocol, States are obliged to prevent trafficking in persons, including by discouraging the demand for exploitative practices. In the Model Law against Trafficking in Persons of the United Nations, it is suggested that the use of women as surrogate mothers may constitute a form of exploitation. Under the revised Anti-Trafficking

> *Directive of the European Union, the exploitation of surrogacy as a form of trafficking is explicitly recognized."*

The rights of parents

The ALRC's appraisal

According to the Discussion Paper:

- *"Intended parents … have rights which must be taken into account. Limits on eligibility (for example, based on sex) may amount to discrimination."*[76]

The Discussion Paper footnotes the Universal Declaration article 2 and *ICCPR* article 26, which are general non-discrimination provisions. "Limits on eligibility" is a term used in the Discussion Paper that is not readily understood, and does not elucidate the discrimination issue that is claimed is faced by potential surrogacy parents.

It is also incomplete to mention discrimination without explaining that under international law there is no "discrimination" in differential treatment where there is appropriate justification for it. The term "discrimination" has the same meaning across UN human rights treaties. Under the *ICCPR* for example, differentiation is not discrimination "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate" e.g. in support of a right under a treaty. Differentiation that applies "limits on eligibility" for surrogacy by legal prohibitions in order to justifiably protect the surrogate mother and the child (for compelling reasons raised by the *Special Rapporteur*) would not amount to discrimination, if the criteria applied are reasonable and objective.

- *"Limits to freedom of expression, including the right to receive and impart information, may restrict intended parents' ability to make informed decisions."*[77]

The Discussion Paper footnotes *ICCPR* article 19, the relevance of which is not obvious, and is not explained in context by the Discussion Paper. It could refer to the need for access to information concerning the medical history, especially genetic issues, and pregnancy to safeguard the contractual issues of the would-be parents. This would be a right which would be exercised at the cost to the privacy rights of the surrogate mother.

> *"Also relevant is the right to found a family — while the meaning of this right is contested in the surrogacy context, it is clear that intended parents who are desperate for a child might be at risk of being exploited, deceived, and misinformed in their attempt to form a family."*[78]

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[76] Discussion paper, [40], 12.
[77] Discussion paper, [40], 12.
[78] Discussion paper, [40], 12.

The Discussion Paper footnotes *ICCPR* article 23. The Discussion Paper rightly points out the contested nature of such a claim.[79] There is no human right to have a child enshrined in any international treaty or convention to which Australia is party. The right to found a family does not include the right to have government-enabled surrogacy.

- *"Finally, people with disabilities which affect their ability to conceive or carry a child, who may rely on surrogacy to have a baby, are disproportionately affected by barriers to access."*[80]

The disability claim is one of discrimination (under the Disability Convention). It has the same limits as mentioned above, given the meaning of discrimination under international law.

Special Rapporteur appraisal

The following issues concerning contractual arrangements would be needed in order to protect the interests of would-be parents in very limited circumstances that surrogacy is permitted (such as altruistic surrogacy):

> *"44. Surrogacy agencies and brokers are frequently identified as primary perpetrators of violence when they target and exploit economically vulnerable women, use misleading information or coercive recruitment and impose restrictive contractual clauses. Both agencies and fertility clinics are frequently incentivized to prioritize the interests of parents over those of the surrogate. Medical professionals commit acts amounting to obstetric and reproductive violence, such as unnecessary or coercive invasive medical interventions. Family members or friends emotionally blackmail women to help them have a child by becoming a surrogate. Commissioning parents can reportedly exert extreme and abusive control over the lives of surrogate mothers, demanding to be present at the obstetrical examination and childbirth against the surrogate's wishes.*
>
> *...61. 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*

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[79] See e.g. *Special Rapporteur*'s comment at para 11 that "The Supreme Court of Spain has held that article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) does not establish a "right" to become a parent by surrogacy23 and, in another decision, found that surrogacy contracts "violate the dignity and the free development" of both the surrogate and her child by treating them as "mere objects" – with the Court declining to recognize a surrogacy judgment.' Note too para 8: 'Italy passed legislation in 2024 designating surrogacy as a "universal crime" that exposes Italian citizens to prosecution for engaging in surrogacy abroad'.

[80] Discussion paper, [40], 12.

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.

62. The irrelevance of consent in such circumstances served a protective purpose for persons at risk. For example, some impoverished surrogate mothers become repeatedly pregnant without having sufficient time to recover from a previous birth or miscarriage. Many of them are unaware or not fully aware of the additional risks. Sometimes, the terms of a contract are too legalistic and written in a language that the surrogate mother cannot understand.

63. When women and girls feel that surrogacy is their only option, or when they lack knowledge of the consequences, their consent is neither free nor informed. A similar stance was presented in the explanatory memorandum to the report of the Parliamentary Assembly of the Council of Europe on children's rights in the context of surrogacy, in which the Rapporteur noted that the promise of "a 'life-changing' amount of money" casts doubt on the validity of consent provided by the surrogate mother. Emphasizing "choice" as a central element in surrogacy arrangements discourages surrogate mothers from acknowledging harm, including health-related harms, or seeking assistance.

64. 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.

65. Under the Guiding Principles on Business and Human Rights of the United Nations, businesses, which in surrogacy arrangements include, for instance, fertility clinics, agencies, medical intermediaries, legal advisers and cross-border facilitators, have an independent responsibility to respect all internationally recognized human rights, even when domestic law is silent or permissive. This requires compliance with due diligence obligations and (a) assessing and continued monitoring of instances of coercion, exploitation or psychological harm and implementing adequate policies; (b) providing all parties, and in particular surrogate mothers, with accurate information about associated risks; and (c) establishing effective grievance channels to raise concerns and prompt investigation. Moreover, the general obligation of businesses is not to engage in illegal activity, and therefore, businesses must not assist clients in circumventing the bans."

Obligations on Australia noted by the Special Rapporteur

> *"66. States have the obligation to respect, protect and fulfil human rights and to exercise due diligence in all their actions, without discrimination. The obligation to respect requires the State and its agents to abstain from any conduct that would cause or exacerbate harm related to surrogacy. This means, for example, that surrogate mothers who have experienced violence and abuse should not be criminalized and that children born through surrogacy must not be mistreated or discriminated against. States must also prevent third parties from violating the rights of persons affected by surrogacy. They must adopt positive measures to ensure that women are not forced into situations where they feel that surrogacy is their only means of escaping poverty.*
>
> *67. States must also provide access to justice, remedies and protection for women and children exploited in surrogacy arrangements, including by guaranteeing their proper legal representation, as well as by preventing revictimization.*
>
> *68. Irrespective of its position on surrogacy, a State continues to be obliged to prioritize the best interests of the child for those born through surrogacy arrangements. This includes ensuring that a child does not suffer from any kind of discrimination, is protected at all times and has his or her right to identity, nationality, healthcare or education upheld. The best interests of the child must be incorporated into the decision-making on whether to ban or regulate surrogacy, as well as into the design of legal solutions for safeguarding the child's rights."*

Section 3: ACL's responses to specific Proposals

Proposal 1

1. Surrogacy should be regulated either:

    a. uniformly by Commonwealth legislation; or

    b. with substantial consistency across states and territories through a co-ordinated and harmonised set of Commonwealth, state, and territory laws.

The ACL is supportive of the government's proposal to harmonise legislation between states and territories and to remove unnecessary complexity. We recommend that legislation with strong protections for surrogate mothers and children be taken as the model, so that protections are standardised upwards, rather than being reduced.

2. This legislation should establish a National Regulator (preferred) or empower existing agencies or departments to perform the functions outlined in **Proposal 2**.

We support the proposition that a national regulatory body should be clearly identified as having responsibility for:

- Approving domestic arrangements;
- Reviewing international surrogacy claims;
- Monitoring compliance and breaches;
- Refer any criminal matters for enforcement;
- Providing guidance on ethical practice;
- Referring parties for legal advice, psychological assessment and counselling;
- Maintaining a surrogacy registry and facilitate record keeping; and,
- Licensing SSOs.

All groups potentially directly involved in surrogacy arrangements or the surrogacy industry more broadly should be subject to oversight, such as:

- Clinics and fertility and health professionals.
- Lawyers and surrogacy brokers.
- Counsellors and psychologists.
- Any groups involved in surrogacy advertising.
- Any surrogacy agencies.

An advantage of having a single, national body is that it can address the problem of non-enforcement of Australian law that prohibits international commercial surrogacy. We note that this Review does not appear to be considering that issue.

Establishing a National Regulator would provide a way of implementing several of the Special Rapporteur's recommendations, including that States Parties:

> *"(n) Establish and maintain registries of egg and sperm donors and make the information available to children born through surrogacy;*
>
> *(o) Ensure the compliance of all relevant actors with their positive obligations to prevent, monitor and punish all human rights violations and abuses related to surrogacy;*
>
> *(p) Hold surrogacy agencies, intermediaries and others that profit from or facilitate surrogacy arrangements accountable, including through criminal sanctions and asset confiscations;*
>
> *(q) Provide training for judges and lawyers on a human rights-based approach to surrogacy disputes;*
>
> *(r) Create specialized judicial and law enforcement mechanisms to address surrogacy-related matters, and train law enforcement to detect and address risks of cross-border surrogacy arrangements; [and],*

> *(s) Systematically gather disaggregated data related to surrogacy, including surrogate mothers and children born through surrogacy."*

3. The regulatory framework should be structured so that:

> a. the substance of any obligation, right, entitlement, or prohibition conferred or imposed is dealt with in legislation; and
>
> b. any necessary corresponding detail is dealt with by delegated legislation, guidelines, or standards set by the National Regulator (or alternative) (**Proposal 2**).

It is relevant to note the recommendation of the Special Rapporteur (at [70[(c)] that countries:

> *"Adopt a legal and policy framework for surrogacy that is modelled on the Nordic model for prostitution and includes pillars for penalizing buyers, clinics and agencies to end the demand for surrogacy; decriminalizing surrogate mothers; providing exit support strategies for surrogate mothers, surrogacy agencies and other intermediaries that facilitate surrogacy arrangements and profit from them; and conducting education campaigns on the harms inherent in the practice and the illegality of commissioning and facilitating relevant arrangements."*

We commend this suggestion for consideration by this review.

4. The Commonwealth, states, and territories should enter into an inter-governmental agreement to implement nationally consistent surrogacy laws through one of the following options:

- **Option 1.1** Referring powers to the Commonwealth Parliament, followed by the Commonwealth implementing federal surrogacy legislation;
- **Option 1.2** Developing national mirror legislation on surrogacy arrangements, to be passed by each state and territory;
- **Option 1.3** The Commonwealth, or a state or territory, passing surrogacy legislation and each other jurisdiction legislating to apply that Act in that jurisdiction; or
- **Option 1.4** A hybrid of the above three options.

The ACL has no stated preference as to which of these approaches is taken.

5. Legislation developed under any of the options above should adopt consistent and updated terminology.

Yes. In particular, that legislation should make plain the distinction between altruistic (legitimate) surrogacy arrangements and financially-incentivised (illegitimate) surrogacy arrangements.

The potential for material changes to Australian law to be obscured by the use of disguised language was noted in Section 1. For example, where the TOR make a distinction between "domestic altruistic surrogacy", the ALRC "summarised" this in the Issues Paper as "surrogacy." The Discussion Paper then provides a spurious reason for suggesting that meaningful distinctions cannot be made between altruistic and commercial surrogacy.

It is important that "updating the terminology" in legislation does not become the opportunity to introduce important changes to the law with something less than full transparency.

Proposal 2

1. Legislation should create a regulatory framework for surrogacy, with a National Regulator (or alternative) holding the following functions and responsibilities:

Standard setting

a. developing and maintaining standards, guidelines, and processes on cost recovery for surrogates (see **Proposals 25**–**27**);

b. developing a standardised draft surrogacy agreement which parties may use as a basis for an agreement that is compliant with legislative requirements (see **Proposal 22**);

Compliance

c. setting licence conditions for Surrogacy Support Organisations ('SSOs'), licensing SSOs, and monitoring compliance with licensing conditions (see **Proposal 3**);

d. enforcing compliance under any civil penalty regime or criminal sanctions enacted by the legislation (see **Proposals 8**–**10**);

Oversight of surrogacy agreements

e. reviewing SSO decisions not to approve a surrogacy agreement, at the request of parties to the surrogacy agreement (**Proposals 4** and **5**);

f. assessing complex applications to approve surrogacy agreements, at the SSO's request (**Proposals 4** and **5**);

g. keeping records of approved surrogacy arrangements, after an SSO has lodged the approval (**Proposals 4** and **5**);

h. registering overseas surrogacy arrangements and reviewing applications to engage in surrogacy in unapproved destinations (**Proposal 37**);

Community awareness and information provision

i. developing information to address misunderstandings about surrogacy in the community (**Proposal 7**);

j. providing public information about domestic and overseas surrogacy laws, processes, and requirements, including the potential risks that may arise in overseas surrogacy (**Proposal 7**);

k. developing guidelines on the provision of healthcare to surrogates and intended parents, to be adopted by healthcare providers, including hospitals and medical professionals (**Proposal 7**);

l. managing the surrogacy register and providing information held on the register to people born through surrogacy (see **Proposals 34**–**36**); and

m. providing or overseeing the provision of training or training materials for professionals who provide services to parties to surrogacy arrangements, such as lawyers, healthcare professionals, and counsellors.

The ACL opposes Proposal 2. Surrogacy agencies have a commercial interest in normalising and promoting surrogacy, which contradicts ethical and human rights standards. If, as should be the case, the prohibition on commercial surrogacy remains in place, there is no need for a National Regulator, or for SSOs, or for the elaborate and burdensome administrative framework proposed by the ALRC.

2. Responsibility for administering the regulatory framework should sit within:

Option 2.1 (**preferred**) A National Regulator for surrogacy, or assisted reproductive technology more broadly; or

Option 2.2 Some responsibilities and functions placed with an existing national regulatory body or Commonwealth department, and/or some responsibilities and functions placed with state and territory health departments or other agencies, or regulated through the existing assisted reproductive technology regulatory framework.

Option 2.2 will provide adequate support for the number of altruistic surrogacy arrangements that typically occur in Australia.

Question A

What are important design principles or safeguards for any regulatory body to have? You might think about measures to ensure the body is efficient, accessible, accountable, and transparent.

A regulatory body with responsibility for the administration of altruistic surrogacy should have powers and responsibilities similar to those associated with adoption decisions. It should be required to prioritise the best interests of the child, to be alert to signs of exploitation. It should be empowered to offer support to the surrogate mother where needed and tasked with ensuring the suitability of intended parents through thorough assessment.

Proposal 3

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

1. facilitating introductions, or 'matching', of intended parents and surrogates who meet the requirements (Proposals 13–16);

2. determining requests to waive residency and citizenship requirements (Proposal 15);

3. providing or coordinating the counselling and other services that need to be engaged with to meet the requirements (Proposals 17–21);

4. assessing and approving surrogacy agreements that are compliant with legislative requirements (Proposals 4 and 5);

5. providing information, case management, and support for intended parents and surrogates throughout the surrogacy arrangement;

6. facilitating conflict resolution between intended parents and surrogates; and

7. holding funds provided by intended parents in a trust account and managing disbursement of trust account funds to surrogates (Proposal 27).

The ACL is concerned that the proposals relating to SSOs provide the framework for commercial enterprises that benefit from expanding an industry and lobbying for easier access to surrogacy services as a commercial product. No financial incentives should exist for professional service providers tied to surrogacy outcomes.

As noted in Section 2, a recommendation of the Special Rapporteur is that "the advertising of surrogacy services and agencies must be prohibited."[81] To the extent that advertising is allowed, this should be restricted to official government channels, not via social media or commercial platforms, to prevent exploitation and abuse. Existing restrictions on surrogacy advertising should remain in place.

Some of the powers proposed for SSOs are extraordinary and the penalties for misconduct remarkably insignificant. For example, the Discussion Paper proposed SSOs that facilitate "prohibited arrangements" or are found to have been "coercing

[81] Special Rapporteur's Report, [70(c)].

people to engage in surrogacy" should be "subject to penalties … including having their licence revoked, and [possibly] civil and criminal sanctions."[82] Under Proposal 6, the Discussion Paper suggests that "if an SSO intentionally or recklessly fails to comply with legislative requirements, or engages in behaviour that undermines the regulatory framework or risks exploitation" that appropriate penalties might include "a civil penalty regime … [which] is likely to be more effective and efficient,"[83] as a way of dealing with such problems.

In combination, these proposals suggest that the ALRC regards as non-serious the very significant harm that could be done by a rogue SSO. The lack of regard for safeguarding is disconcerting because the potential for these proposals to facilitate abuse seems obvious.

Question B

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

N/A

Proposal 4

Legislation should provide that:

1. parties to a surrogacy agreement must obtain approval of their surrogacy agreement before attempting to achieve a pregnancy; and

2. an assisted reproductive technology service provider may only conduct an in-vitro fertilisation procedure or otherwise facilitate an attempt to achieve a pregnancy where satisfied that there is an approved surrogacy arrangement in place.

The ACL agrees that legislation should require thorough screening of intended parents prior to an attempt to achieve a pregnancy and that access to fertility services ought to be contingent upon authorisation.

Proposal 5

Legislation should provide that:

1. the approval process (**Proposal 4**) should incorporate the following elements:

    a. Parties should seek approval from a Surrogacy Support Organisation ('SSO') (see **Proposal 3**). The SSO should review surrogacy agreements 'on the papers',

[82] Discussion Paper, [65], 20.
[83] Discussion Paper, [73], 23.

and meetings with the parties should only take place when considered necessary.

b. The SSO should assess all supporting evidence provided by the parties, and approve the surrogacy agreement if satisfied that the parties have met all the requirements for approval (see **Proposals 13**-**21**).

c. There should be a presumption in favour of approving a surrogacy agreement if all the requirements are satisfied.

These proposals offer insufficient safeguards for children commissioned through surrogacy. There can be no justification for setting the bar so low. The TOR specified that laws recommended by the ALRC must "protect and promote the human rights of children born as a result of surrogacy arrangements, surrogates and intending parents, noting that the best interests of children are paramount." The current proposals are not consistent with that instruction.

2. when a surrogacy agreement has been approved ('**approved surrogacy arrangement**'):

a. approved surrogacy arrangements can proceed on the administrative pathway and intended parents will be the child's legal parents at birth (see **Proposal 30**); and

b. the SSO should lodge the approved surrogacy arrangement with the National Regulator (or alternative) (see **Proposal 2**).

It should not be the case that intended parents are the child's legal parents at birth. Legislation should ensure the surrogate mother retains legal parentage until such time as she voluntarily gives the child up to the intended parents. Legislation should prohibit the enforcement of contract terms that determine parentage, assign parental responsibility, or otherwise limit the surrogate mother's rights over the child against her wishes.

We note that this is consistent with the recommendation of the Special Rapporteur that countries:

> *"(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".*

3. surrogacy arrangements that are not approved by the SSO ('**unapproved surrogacy arrangements**') cannot proceed on the administrative pathway to legal parentage (see **Proposal 30**). The judicial pathway to legal parentage will remain available (see **Proposal 31**); and

Problems with regularising "the judicial pathway" are discussed more fully below, under Proposal 31. In brief, since it is virtually impossible for judges to do anything other than make parentage orders in favour of commissioning parents, this offers no meaningful protections to children. The fact that this is currently providing a means of circumventing prohibitions on international commercial surrogacy should have been recognised as a problem and effort directed at addressing that problem. The approach taken by this review – basically, "harm minimisation" with the presupposition that regulation can and will minimise abuse – has meant that the opportunity to do that has been missed.

4. approval of a surrogacy arrangement should be sought from the National Regulator (or alternative) if:

> a. the medical assessment does not certify that the surrogacy arrangement should be allowed to proceed (see **Proposal 17**), and the parties wish it to proceed;
>
> b. the psychological assessment does not recommend that a party should be allowed to proceed with a surrogacy arrangement (see **Proposal 18**), and the parties wish it to proceed;
>
> c. the SSO regards it as a complex surrogacy arrangement; or
>
> d. the SSO denies approval and the parties to the surrogacy arrangement request a review (see **Proposal 2**).

The National Regulator is not required and SSOs should not be established or given the powers proposed by this 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)?

SSOs should not be given these powers. A National Regulator is not necessary. Authority and responsibility for approving altruistic surrogacy agreements should reside with the appropriate authority at state and territory level.

Proposal 6

1. Legislation should prohibit Surrogacy Support Organisations ('**SSOs**') from intentionally or recklessly approving a surrogacy agreement which does not comply with the legislative requirements.

2. Compliance with the prohibition should be enforced by:

Option 6.1 A civil penalty regime; or

Option 6.2 Criminal sanctions; or

Option 6.3 A combination of civil penalties and criminal sanctions.

Please see our comment above, in answer to Proposal 3. SSOs should not be established or given the powers proposed. The proposition that civil penalties would provide a sufficient deterrent for abuse of those powers fails to engage with the very great profits to be made from child trafficking.

To repeat, these proposals suggest that the ALRC regards as non-serious the very significant harm that could be done by a rogue SSO. The lack of regard for safeguarding is disconcerting because the potential for these proposals to facilitate abuse seems obvious. It is not clear why such proposals have even been put forward for public consultation.

Proposal 7

1. The National Regulator (or alternative) (**Proposal 2**) should publish and promote information to:

    a. address common misunderstandings in the community about surrogacy and Australia's surrogacy laws;

    b. inform intended parents and surrogates about surrogacy in Australia and Australia's surrogacy laws; and

    c. inform intended parents about surrogacy laws, policies, and practices overseas, any associated risks, and the need to register overseas surrogacy arrangements (**Proposal 37**).

2. The National Regulator (or alternative) (**Proposal 2**) should also develop educational materials for professionals who provide services in surrogacy arrangements. This should include:

    a. guidelines for providing appropriate and inclusive care in surrogacy arrangements, to be adopted by healthcare providers such as hospitals and medical professionals; and

    b. training or training materials on surrogacy and surrogacy laws for professionals, such as lawyers, healthcare professionals, and counsellors.

Proposal 7 relies on the assertion that "surrogacy" – including financially incentivised surrogacy, which is currently illegal in Australia – "is increasingly recognised as a legitimate way to form a family"[84] and should be regularised.

[84] Discussion Paper, [82], 25.

The Discussion Paper acknowledges "[c]oncerns remain that commercialisation commodifies human reproduction and can lead to exploitation." But goes on to suggest that regulation can bring the risk of exploitation within acceptable boundaries; "these concerns are greater in jurisdictions where surrogacy is unlawful, or poorly regulated, and lacking in transparency."[85]

This fails to engage with the inherent problems of surrogacy which include the commodification of babies and the objectification of women as 'gestators'. Concerns regarding commercialisation are accentuated by the fact that this review seems set on establishing a regulatory framework for a commercial surrogacy industry in Australia.

Financially-incentivised surrogacy should remain illegal. There is no need for a National Regulator. Appropriate information to support altruistic surrogacy can be offered by existing authorities.

Proposal 8

1. Legislation should prohibit intended parents and surrogates from engaging in a domestic surrogacy arrangement which is for impermissible profit or reward. Surrogacy arrangements which comply with the requirements in **Proposals 25** and **26** are not for impermissible profit or reward.

2. Compliance with the prohibition should be enforced by a civil penalty regime.

3. Existing criminal offences which prohibit commercial surrogacy should be repealed.

The ACL opposes Proposal 8.

The use of the term "impermissible profit or reward" is problematic because it suggests that some forms of profit or reward are "permissible". Consistent with Recommendation 1 of the Surrogacy Matters Report, the legislative prohibition of commercial surrogacy should be retained. Reimbursement should be strictly limited to the repayment of reasonable expenses to prevent commercial surrogacy by stealth.

The Discussion Paper suggests that there is "no moral consensus" on commercial surrogacy and that criminal prohibitions may not be appropriate to the severity of the offense.[86] The statement is debatable but also largely irrelevant because the TOR do not provide a permission structure for liberalising access to commercial surrogacy in the way that is currently being proposed.

The very strong reasons for establishing prohibitions against commercial surrogacy in the first place remain. The desire for children is entirely understandable and it is predictable that many will be willing to engage in illegal commercial surrogacy in order

[85] Discussion Paper, [82], 25-26.
[86] Discussion Paper, [91],29

to gratify that desire. This is why strong legislation, appropriately enforced, is needed. Commercial surrogacy violates the fundamental human rights of vulnerable women and their children and significantly increases the risk of child trafficking.

To name just one of the relevant international obligations to which the TOR for this review pointed, Article 35 of *CRC* requires States Parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." The current proposals to only minimise these harms through regulation falls well short of discharging that obligation.

The Discussion Paper asserts that the primary goal of existing criminal prohibitions is to "deter behaviour and prevent exploitation, rather than to punish."[87] As noted in Section 1 of this submission, it seems that "reducing the risk of exploitation" has been identified as the "key objective" of this review on the initiative of the ALRC. This conclusion relies on a misinterpretation of state and territory law which in fact identifies protecting "the best interests of any child born under a surrogacy arrangement", as the "paramount consideration."

The best interests of the child – also identified as the priority consideration by the TOR for this review – requires that criminal prohibitions on commercial surrogacy are retained. This is not consistent with the review's proposed approach for harm minimisation through decriminalisation and regulation.

The approach taken by the review departs from the TOR and is wrong in principle.

Proposal 9

1. Legislation should prohibit intended parents from intentionally or recklessly engaging in overseas surrogacy arrangements, unless they have registered the arrangement with a registration entity (see **Proposal 37**).

2. Compliance with the prohibition should be enforced by a civil penalty regime.

3. Existing extraterritorial criminal offences in the Australian Capital Territory, New South Wales, and Queensland, which prohibit engagement in commercial surrogacy overseas, should be repealed.

Legislation should prohibit intended parents engaging in overseas surrogacy arrangements, regardless of whether this is done "intentionally or recklessly" or not and regardless of whether they have registered the arrangement with a registration entity or not.

[87] Discussion Paper, [87], 28.

Civil penalties are paltry in response to the recognised harms of commercial surrogacy. The ALRC's proposals could create a regulatory environment in which child trafficking could be expected to flourish.

Existing extraterritorial criminal offences in the Australian Capital Territory, New South Wales, and Queensland, which prohibit engagement in commercial surrogacy overseas, should be retained and replicated across all states and territories.

Proposal 10

1. Legislation should prohibit individuals and organisations, including Surrogacy Support Organisations, from:

    a. intentionally or recklessly facilitating, inducing, or procuring (including by advertisement), or attempting to facilitate, induce, or procure, the involvement of a person in a prohibited domestic or unregistered overseas surrogacy arrangement (see **Proposals 8** and **9**); or

    b. intentionally or recklessly coercing or attempting to coerce (by pressure, force, or fraudulent means) the involvement of a person in any surrogacy arrangement.

2. Compliance with the prohibition should be enforced by:

- **Option 10.1** A civil penalty regime;
- **Option 10.2** Criminal sanctions; or
- **Option 10.3** A combination of civil penalties and criminal sanctions.

Option 10.2 – criminal sanctions should apply to anyone engaged in any form of commercial surrogacy. This should not be limited to only certain types of domestic commercial surrogacy or only to "unregistered" overseas surrogacy arrangements.

We understand the intention of the review is to encourage Australians to engage in international commercial surrogacy in those countries that offer better regulation and, hopefully, avoid the most egregious types of abuse. However, we maintain that the intention is fundamentally misguided. It ignores the fact that the exploitation of vulnerable women and the commodification of children are unavoidable aspects of commercial surrogacy.

As noted in our response to Proposal 8, "harm minimisation" efforts fall well short of Australia's obligations under international human rights law.

Proposal 11

1. Legislation should provide that advertising in relation to surrogacy is permitted, unless it relates to a prohibited surrogacy arrangement (see **Proposals 8**–**10**).

2. Where existing legislation prohibits all advertising in relation to surrogacy, those provisions should be repealed.

The ACL disagrees with this proposal. Advertising surrogacy risks commodification of women's bodies and children. It also risks normalising this practice and increasing the prevalence of surrogacy. If allowed at all, only government-regulated, not-for-profit registries with strict oversight should be permitted to advertise and only through official government channels, not via social media or commercial platforms, to prevent exploitation and abuse.

If allowed at all, advertising must not include inducements, financial incentives, or emotional manipulation. It must not resemble commercial promotion in any way. Advertising should essentially only seek to practically connect parties with each other who wish to enter into surrogacy arrangements.

Existing legislation prohibiting all advertising in relation to surrogacy, those provisions should be retained.

Proposal 12

1. Legislation should treat surrogacy arrangements in the same way, regardless of whether or not a genetic connection is present between the surrogate and the child, or the intended parent(s) and the child.

2. Victoria should legalise and treat traditional surrogacy in the same way as gestational surrogacy, consistent with the approach adopted in other jurisdictions.

Since harmonisation of laws relating to altruistic domestic surrogacy is a key objective, aligning Victoria's law with the approach taken by other states seems sensible. It does not follow, however, that the presence of absence of a genetic connection between the surrogate mother and/or the intended parents and the child is immaterial *in all circumstances* or that this should be recognised as meaningless in legislation.

A great deal depends on what aspect of the surrogacy arrangements are in question. Access to fertility services should not, perhaps, turn on whether or not there is a genetic connection between mother and child. On the other hand, the presence or absence of a genetic connection would be highly significant to the question of parentage, in the event that a surrogate mother does decide to keep the child.

The Discussion Paper states as fact "the reality that a genetic connection is not essential to the parent-child relationship."[88] While it is true that family bonds can be formed without a genetic connection (as in cases of adoption, for example), it is also true that the presence of a genetic connection between surrogate mother and child strengthens her connection with the child and adds a dimension to their relationship

[88] Discussion Paper, [110], 34.

beyond the bonding that occurs naturally in the course of pregnancy. It also strengthens her claim to legal parentage.

The Discussion Paper suggests that "studies have dispelled [the] common belief" that "traditional surrogates are less likely to relinquish the child."[89] This is consistent with the opinion of Sarah Jefford, who is a member of the ALRC's advisory committee.[90] Others, however, have reached very different conclusions on this point. For example, on the basis of the empirical evidence of case law from the US, the UK and Australia, Pip Trowse concluded

> *"there is a greater likelihood of failure by the surrogate mother to relinquish the child when the surrogate and the child are genetically related … The writer concludes that legislation dealing with surrogacy should discourage arrangements where the surrogate's gametes are used in the creation of an embryo. If the commissioning mother is unable to supply oocytes, donated eggs should be used. The surrogate mother's eggs should only be considered as a last resort and subject to very strict guidelines in terms of counselling and medical support."*[91]

A law that was blind to the presence or absence of a genetic connection between surrogate mother and her child would narrow the scope for judicial review in cases of disputed custody. In the cases of Baby M (1988) and Re Evelyn (1998) (on appeal), Australian judges have upheld the claim of biological surrogate mothers over those of commissioning biological fathers.

It seems that this question may have in view legislation that would narrow the grounds on which surrogate mothers could apply for judicial review of custody arrangements, or else prevent judges making orders in the mother's favour. If so, that is an outcome that ACL would oppose for the simple reason that it would be profoundly morally wrong for the state to enforce a contract that requires a woman to give up her child against her wishes.

The argument is made that "differentiating between traditional and gestational surrogacy reinforces the stigma attached to traditional surrogacy."[92] This would deliver clear benefits to the surrogacy industry at the expense of Australian surrogate mothers.

Proposal 13

Legislation should provide that:

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[89] Discussion Paper, [109], 34, fn 167.
[90] Sarah Jefford, "Will the Surrogate Keep the Baby?" [blog], undated.
[91] Pip Trowse, Surrogacy: Is it harder to relinquish genes?, Journal of Law and Medicine, vol. 18(3), 2011, 614-633.
[92] Discussion Paper, [109], 34.

1. to access surrogacy, the intended parents must be unable to conceive, gestate, and birth a child for a medical, biological, or psychological reason; and

2. this requirement may be dispensed with by the National Regulator (or alternative).

We agree that access to altruistic surrogacy should be conditional on a couple's medical inability to conceive and carry a child and that it should be available as a matter of convenience or personal preference. Further, that the definition of "medical need" should be clearly stated, so as to avoid confusion for all parties, including medical practitioners and fertility service providers.

The reasons for including "biological" and "psychological" reasons are less clear. If these terms were interpreted broadly, they could produce a permission structure for "surrogacy for convenience" in all but name. It would be important to ensure that individuals with psychological problems of a sort that would negatively impact their parenting ability are not permitted to access surrogacy services.

Intended parents should be required to undergo extensive screening (including criminal checks) similar to those that occur in cases of adoption. Both surrogate and intended parents should be within a safe and appropriate age range and in good physical and mental health.

Same-sex couples or single parents should not be eligible to enter surrogacy arrangements, as this would effectively deny the child the ability to be raised by both a mother and a father.

Single parent arrangements also pose an additional costly economic burden on Australia's welfare system, through various sole parenting supports throughout the life of the child until adulthood.

The powers of the National Regulator (if there is one) to alter these requirements should be strictly limited, objectively justifiable, and transparent. It should not have the power to simply waive eligibility requirements at its own discretion.

Proposal 14

Legislation should provide that:

1. a surrogate must be at least 25 years old, unless otherwise approved by an accredited counsellor, and have the legal capacity to make an informed decision; and

2. an intended parent must be at least 18 years old and have the legal capacity to make an informed decision.

Both surrogates and intended parents should have attained a minimum age of 25, to ensure sufficient maturity (including completed brain development) to make informed

decisions on such a serious issue. This needs to be a hard minimum, not able to be waived with the approval of a counsellor.

Proposal 15

1. Legislation should provide that at least one intended parent must be either an Australian citizen or permanent resident, unless this requirement is dispensed with by a Surrogacy Support Organisation (see **Proposal 3**).

2. State or territory-based legislation imposing residency requirements should be repealed.

Legislation should require that all parties to altruistic surrogacy arrangements are Australian citizens and/or permanent residents in the country.

State or territory-based legislation imposing the requirement that parties to altruistic surrogacy arrangements are resident in the state or territory should be amended to state that residence in Australia is sufficient.

SSOs (if these are established) should not have authority to waive the requirement for citizenship or permanent residency status.

Proposal 16

Legislation should provide that:

1. the surrogate must have previously carried a pregnancy and given birth to a live child; and

2. this requirement may be dispensed with in circumstances where a medical practitioner or a psychologist is satisfied that the surrogate and intended parent(s) understand the potential risks and are making a free and informed decision to continue with the surrogacy arrangement (see **Proposals 17** and **18**).

Women who have not previously been pregnant should not be eligible to be surrogates, given their lack of experience with the physiological and psychological issues and changes involved in being pregnant and birthing a baby.

It should not be open to a medical practitioner or psychologist to waive this requirement. The Discussion Paper suggests that this may be desirable to ensure that "surrogates who are certain that they do not want to be parents are not completely barred from being surrogates."[93] On the other hand, a woman who has never been pregnant and had a baby cannot be expected to know what is entailed in relinquishing a baby which compromises their ability to provide informed consent.

[93] Discussion Paper, [123], 37.

Proposal 17

Legislation should provide that:

1. the surrogate must undergo a medical assessment by an independent medical practitioner. The independent medical practitioner must certify that the surrogacy can proceed without undue risk to the surrogate's health; and

2. the independent medical practitioner must provide their report to the surrogate, as well as to the surrogate's nominated Surrogacy Support Organisation, so that it can form part of the approval process (see **Proposals 4** and **5**).

The ACL agrees with this proposal. The costs of this assessment should be borne by the intended parents.

Proposal 18

Legislation should provide that:

1. the surrogate and the intended parent(s) must undergo a psychological assessment by a psychologist who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA'), to determine their social, emotional, and psychological suitability to enter a surrogacy arrangement without undue risk to their own or another person's health or wellbeing;

2. the surrogate and the intended parent(s) must disclose any current or previous diagnosed mental health conditions to the independent psychologist; and

3. the independent psychologist must provide their report to the party, as well as to the party's nominated Surrogacy Support Organisation, including a recommendation of whether the party should be allowed to proceed with a surrogacy arrangement, so that it can form part of the approval process (see Proposals 4 and 5).

The ACL supports this proposal but legislation need not specify a particular peak body as the only recognised accreditation authority. Professionally accredited counsellors registered with other professional bodies should also be eligible – such as the Australian Psychological Association, the National Association of Practicing Psychiatrists, or the Royal Australian and New Zealand College of Psychiatrists.

Question D

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

Yes.

Proposal 19

- Option 19.1 There should not be a requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.
- Option 19.2 There should be a legislated requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.

Option 19.2. It should be a requirement that all parties receive robust counselling and independent legal representation. A comprehensive ethical review process should ensure that the arrangement is not coercive, financially exploitative, or contrary to the best interests of the child.

Question E

If Option 19.2 is adopted:

- should the criminal history check be limited to specific offences, such as those relating to children or violent offences?
- what should be the purpose of the criminal history check? You might want to consider if it should be provided to the surrogate to facilitate informed consent to the arrangement, to the psychologist undertaking the psychological assessments, or to the Surrogacy Support Organisation to determine if the arrangement should be approved?

The arguments in favour of full transparency weigh more heavily than those in favour of only limited disclosure of any criminal record. The same standards used to determine adoption decisions should apply in surrogacy decisions. It is not necessarily the case that all aspects of a criminal record will be considered an impediment to proceeding with a surrogacy arrangement. On the other hand, with full disclosure, the risk that something significant will be missed is reduced. In the same way that a comprehensive psychological assessment should be conducted and this information shared, if the best interests of the child are to be prioritised, full disclosure of a criminal past is necessary.

Proposal 20

1. Legislation should provide that all parties must receive independent legal advice before entering a surrogacy arrangement. The advice must cover the following matters:

    a. the surrogate's right to bodily integrity, reproductive autonomy, and informed consent in relation to medical treatment or procedures that directly affect them (see Proposal 23);
    b. legal parentage under the domestic administrative pathway or the judicial pathway (see Proposals 30 and 31);
    c. the enforceability of the surrogacy agreement (see Proposal 24);

d. the operation of the reimbursement provisions (see Proposal 25) and the optional hardship payments (see Proposal 26); and
e. the right of the child born through surrogacy to know their genetic and gestational origins, including their right to access registered information (see Proposals 33–35).

2. Legislation should provide that the legal practitioner who provides the advice must provide the party with written confirmation that the matters outlined in paragraph 1 were discussed and the requisite advice provided, and that the legal practitioner believes that the party appeared to understand the advice.

3. Law societies in each jurisdiction should provide accreditation for lawyers providing legal advice on surrogacy arrangements.

The ACL agrees that clear legal advice on the issues listed here is necessary. Surrogate mothers and intended parents should be advised by different lawyers, to avoid the problem of a conflict of interests.

Proposal 21

1. Legislation should provide that all parties must undergo counselling before entering a surrogacy arrangement. The counselling must:

a. be provided by a psychologist or counsellor who is a full member of the Australian and New Zealand Infertility Counsellors Association ('ANZICA');

b. include at least:

i. one independent counselling session with the intended parent(s);

ii. one independent counselling session with the surrogate; and

iii. a joint counselling session with all the parties present;

c. not be provided by a psychologist who has been involved in the parties' independent psychological assessments; and

d. include discussion of the following matters:

i. the implications of the surrogacy arrangement for the relationships between the parties and their respective families;

ii. the attitudes of the parties to genetic screening, possible termination of pregnancy, and any other complications that may arise during medical treatment, pregnancy, or birth;

iii. the possibility of any party deciding not to proceed with the surrogacy arrangement, including the implications if the surrogate is already pregnant, or if the surrogate seeks a parentage declaration;

iv. the attitudes of the parties towards the conduct of the pregnancy, including how much input the intended parent(s) should have into the surrogate's lifestyle choices during the pregnancy;

v. the implications if the intended parents separate during the surrogacy arrangement;

vi. the attitudes of the parties to how and when the child should be told about their genetic and gestational origins;

vii. the attitudes of the parties to the surrogate or the surrogate's family having an ongoing relationship or contact with the child born through the surrogacy arrangement, and the extent of such contact; and

viii. how the parties will resolve any disputes that arise during the surrogacy arrangement.

2. Legislation should provide that the counsellor must advise the parties that ongoing counselling is available to them individually and collectively throughout the course of the arrangement, and may be initiated at the reasonable election of any party to the surrogacy arrangement.

3. Legislation should provide that the counsellor must provide each party with written confirmation that the matters outlined in paragraph 1(d) were discussed and the counsellor believes that the party appeared to understand the counselling and the personal consequences of the surrogacy arrangement.

The ACL agrees with these proposal, with the caveat (as per our answer to Proposal 18) that legislation should not specify only one peak body as able to grant recognised accreditation.

Legislation should specify a certain age at which the child must have been told about their origins and given the opportunity to contact their surrogate if they wish.

Question F

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

Yes. Legislation should specify a certain age at which the child must have been told about their origins and given the opportunity to contact their surrogate if they wish.

Question G

Should there be additional counselling requirements? If so, what should these requirements be? You may wish to consider whether post-birth counselling should be optional or mandatory, or for how long after the birth the intended parent(s) should be required to cover the cost of the surrogate's counselling.

Yes. Ongoing psychological support should be provided to surrogates, children, and intended parents, particularly to address grief, identity issues, or regret. This should be provided by independent counsellors from a list approved by the government agency with oversight for surrogacy. The counsellor should not have a conflict of interest or any ongoing relationship with those involved in organising the surrogacy arrangements.

Financial allowance for this should be generous, with costs to be borne by the intended parents.

Proposal 22

1. Legislation should provide that for a surrogacy agreement to be compliant and eligible for approval, it must:

a. be in writing and signed by the surrogate, the surrogate's partner (if any), and the intended parent(s);

b. be entered into before the surrogate attempts to achieve a pregnancy;

c. contain provisions relating to permitted payments to the surrogate that are consistent with **Proposals 25** and **26**;

d. state whether the surrogate elects to receive either or both of the optional hardship payments (see **Proposal 26**);

e. contain a provision that ongoing counselling must be available to the parties, both individually and at joint sessions, at the reasonable election of any party, and paid for by the intended parent(s) (see **Proposal 21**);

f. include the statement required by **Proposal 23**; and

g. identify the following threshold requirements and confirm that they have been satisfied:

i. legal advice requirements have been met (see Proposal 20);
ii. counselling requirements have been met (see Proposal 21);
iii. a medical assessment has been conducted, and the medical practitioner has certified that the surrogacy arrangement can proceed (see Proposal 17);

iv. a psychological assessment has been conducted, and the psychologist recommended that the surrogacy arrangement can proceed (see Proposal 18); and

v. intended parents have completed a criminal history check (if this becomes a proposed requirement (see Proposal 19)).

2. Legislation should provide that evidence that the requirements in paragraph 1(g) have been met must be attached to the surrogacy agreement.

Yes. The ACL agrees with this proposal in terms of the items listed. Our concerns about the parameters of particular proposals listed against those items are discussed separately.

Question H

In relation to surrogacy agreements, should:

- any other subject matter or requirements be included?
- any of the subject matter or requirements identified be removed?
- any clauses be prohibited, taking into account Proposal 23?

Please see our answers to Proposal 22 and 23.

Proposal 23

1. Legislation should prohibit the inclusion of, and invalidate, any provision in a surrogacy agreement that inhibits the surrogate's right to autonomy, bodily integrity, and informed consent in relation to medical treatment or procedures that affect them.

2. Legislation should require that a statement confirming these rights must be included in a surrogacy agreement for the agreement to be compliant.

The ACL agrees with this proposal.

Proposal 24

Legislation should provide that surrogacy agreements that comply with the legislative requirements are enforceable. Provisions that are prohibited (see Proposal 23) or otherwise unlawful are not enforceable.

Yes. However, legislation should not enforce a contractual obligation on the part of the surrogate mother to give up her child (see our response to Proposal 22 above). This applies *a fortiori* where there is a genetic connection between the surrogate mother and the child.

Question I

Should the following be enforceable:

- surrogacy agreements that do not comply with the legislative requirements but are otherwise lawful?
- certain provisions within unlawful surrogacy agreements, for example, cost recovery provisions?

The regulatory framework should ensure that surrogate mothers (who, it is assumed, do not benefit financially from agreeing to act as surrogates) are not left to bear the financial burden of medical, legal or counselling costs incurred.

Question J

For otherwise compliant surrogacy agreements, should there be any provisions that are unenforceable, other than those captured by Proposal 23?

A contractual obligation on the part of the surrogate mother to give up her child (see our response to Proposal 22 above) should not be enforceable. This applies *a fortiori* where there is a genetic connection between the surrogate mother and the child.

Question K

What is the best method of enforcement? For example, by a court?

Yes. Those who refuse or fail to comply should be penalised for doing so.

Proposal 25

Legislation should provide that:

1. a surrogacy arrangement that entitles surrogates to the reimbursement of payments provided for in this proposal is not, for that reason only, for impermissible profit or reward;

2. consistent with this proposal, intended parents must reimburse the surrogate for all expenses reasonably incurred by the surrogate or their partner (if any) in relation to the surrogacy arrangement. This must include, but is not limited to:

    a. costs related to assessments and other preconditions that are required for a surrogacy agreement to be compliant with the legislative requirements and eligible for approval (such as counselling, medical and psychological assessments, and legal advice);

    b. medical and wellbeing costs;

    c. pregnancy-related items, including dietary items and supplements;

    d. care of dependants;

    e. additional assistance if unable to perform daily tasks (such as meal delivery and house cleaning);

f. travel and accommodation for the surrogate and any necessary support person;

g. loss of earnings (including superannuation contributions);

h. health, life, and income protection insurance during the surrogacy arrangement and following the birth of a child, miscarriage, or stillbirth;

i. birth support;

j. any product or service recommended by the surrogate's healthcare provider; and

k. medical expenses following:

i. the birth of a child, miscarriage, or stillbirth (such as counselling or physiotherapy); and

ii. in the case of no successful pregnancy occurring, parties agreeing to cease attempts to achieve a pregnancy.

3. the period during which intended parents must reimburse the surrogate's reasonable expenses must be agreed upon by the parties to a surrogacy arrangement, but may be extended after commencement of the agreement if all parties agree; and

4. the National Regulator (or alternative) (see **Proposal 2**) should be empowered to develop standards and guidelines in relation to the expenses, costs, or losses which are to be regarded as reasonably incurred in relation to a surrogacy arrangement, as well as formulate a monthly allowance to cover any common incidental expenses for which receipts are difficult or inconvenient to obtain.

It is important that commercial surrogacy remains illegal in Australia. Care is needed to ensure altruistic arrangements do not become *de facto* commercial arrangements with financial incentives offered indirectly, for example, in the form of over-compensation for expenses incurred, luxury holidays for the surrogate, "loss of earnings" or "hardship" payments far higher than the surrogate's actual earnings, etc. Caps should apply, and no "goodwill" payments should be permitted. Reimbursements should be processed through a trust account, and all claims must be supported by receipts. This is necessary to prevent the exploitation of financially vulnerable women.

If "compensation for loss of earnings" is given, documentary evidence to demonstrate such loss would need to be presented and should apply to particular medical needs, not to the whole period of the pregnancy. In generally, only direct, documented costs related to medical treatment, legal advice, and counselling are reimbursable. Surrogates should have access to medical leave and paid leave prior to the baby's birth, but not parental leave, as they are not taking custody. Intended parents should only access parental leave after legal parentage is established.

The "monthly allowance" proposed here would need to carefully scrutinised and strictly limited to essential costs associated with the pregnancy.

Question L

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

Yes, for reasons stated above, under Proposal 25.

Proposal 26

1. Legislation should provide that a surrogacy arrangement is not for impermissible profit or reward by reason only of the entitlement to the hardship payments provided for in this proposal.

2. Legislation should provide that, where a surrogate has elected to receive one or both of the hardship payments listed below, the intended parents must pay the surrogate:

> a. a payment to recognise loss incurred by reason of the commonly experienced discomfort, pain, suffering, and assumption of risk involved in pregnancy and childbirth;
>
> b. an additional payment made to acknowledge an extraordinary loss associated with the surrogacy arrangement, including pain and suffering caused by serious medical complications arising from the pregnancy or childbirth (such as stillbirth or hysterectomy). This is only payable if and when extraordinary loss occurs.

3. The National Regulator (or alternative) (see **Proposal 2**) should be empowered to set a maximum cap for the hardship payment (see paragraph 2(a)). This should be set at a level that fairly approximates the likely loss experienced by a surrogate.

4. The National Regulator (or alternative) should also be empowered to develop guidelines to identify events that would give rise to the hardship payment (see paragraph 2(b)), and set a maximum cap for permitted payments. This should be set at a level that fairly approximates a surrogate's loss in a given situation.

What is proposed here is *de facto* commercial surrogacy, which we strongly oppose. The Discussion Paper presents the current restriction on financial incentivisation as

> *"fail[ing] to acknowledge the significant physical, emotional, and sometimes ongoing costs to the surrogate. It can also symbolise a lack of respect for the surrogate within a highly monetised system, where many others are paid. Not*

> *having the full cost of the arrangement recognised may discourage Australians from acting as surrogates."*[94]

It is proposed that "hardship payments" could be made at the surrogate's election, including,

- *"an optional monthly payment to recognise the ordinary pain and discomfort of pregnancy; and,*
- *an optional payment to be made only if extraordinary medical complications arise.*

Surrogates may elect to receive one or both of these payments. It is anticipated that not all surrogates would request the payments. For example, in some arrangements that occur between family members, the surrogate may choose to forgo the monthly hardship payment."[95]

This opens the gate wide to exactly the sort of financially incentivised surrogacy that is currently prohibited and which – according Recommendation 1 of the Surrogacy Matters Report and different international human rights obligations (discussed in Section 2) – should continue to be prohibited.

It is not clear the TOR invited the ALRC to consider such a radical departure from long-established government policy. The ALRC was asked 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."*

What is proposed here amounts to payment – i.e. the financial incentivisation of surrogacy, which is not consistent with the definition of "altruistic surrogacy." It seems that the ALRC has elided the distinction between "altruistic or uncompensated surrogacy" and "commercial or compensated surrogacy", which are clearly defined in the *2016 Surrogacy Matters Report*.[96]

The ACL strongly opposes any move to introduce commercial or compensated surrogacy to Australia. The criminal penalties that exist in the legislation of some states and territories should be standardised to apply everywhere as part of the harmonisation process. Effort should be applied to the question of how to enforce those penalties.

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[94] Discussion Paper, [164], 52.
[95] Discussion Paper, [165-6], 52.
[96] *Surrogacy Matters Report*, 2. Similar definitions are repeated on the A-G's Department Surrogacy website. Accessed 12/12/25.

Question M

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

No. Such payments should be prohibited and those prohibitions should be credibly enforced.

Proposal 27

Legislation should provide that:

1. before parties to a surrogacy arrangement attempt to achieve a pregnancy, intended parents should pay an agreed upon sum of money (set in **Proposals 25** and **26(2)(a)** into the trust account managed by their Surrogacy Support Organisation (see **Proposal 3**) or other body;

2. the sum of money should cover the full estimated cost of the approved surrogacy arrangement, excluding the hardship payment for extraordinary complications (see **Proposal 26(2)(b)**); and

3. the disbursements to the surrogate are to be made by the Surrogacy Support Organisation from this trust account as costs are accrued (see **Proposal 25**) or in the case of the monthly hardship payment and monthly allowance, in monthly instalments (**Proposals 25** and **26**).

We agree that a system to ensure prompt reimbursement of genuine expenses is a good idea. Please see our responses to Proposals 25 and 26 for our concerns about the financial incentivisation of surrogacy – proposals that would amount to the introduction of commercial surrogacy to Australia.

Proposal 28

The Health Insurance (General Medical Services Table) Regulations 2021 (Cth) should be amended to allow Medicare rebates for assisted reproductive services to apply to treatment carried out for the purpose of surrogacy.

According to the Discussion Paper, the only reason surrogacy-related services were excluded from Medicare rebates was because surrogacy was still illegal in some states at the time. It is suggested, "[g]iven these prohibitions have since been repealed and surrogacy is now legal in all the states and territories, [that] the rationale for excluding surrogacy treatments from Medicare no longer exists. A federal review of reproductive

healthcare has also recommended the surrogacy exclusion be removed from the legislation."[97]

These statements cite [4.87] and Recommendation 33 of the 2023 Senate and Community Affairs References Committee Report on *Ending the Postcode Lottery: Addressing Barriers to Sexual, Maternity and Reproductive Healthcare in Australia* report and a submission by Mr Stephen Page as authority for these statements. Of note, Recommendation 33 specifies that the Australian Government should amend the Medicare schedule to remove "the exclusion of in vitro fertilisation (IVF) services for altruistic surrogacy purposes."

A regrettable effect of the ALRC's failure to distinguish between commercial and altruistic surrogacy is that recommendations made in a specific context are misrepresented as having broader application. Clearly the government was not recommending that the costs of commercial surrogacy should be covered on the Medicare schedule. Particularly if there is no requirement for both parents to be Australian citizens or permanent residents (Proposal 15), then Medicare funding for commercial surrogacy arrangements would predictably turn Australia into an attractive destination country for international reproductive tourism, subsidised by the Australian taxpayer. Care must be taken to avoid this outcome.

ACL is of the view that administrative barriers to altruistic surrogacy are sufficiently reduced if inconsistencies between state and territory legislation are removed and a national framework established. It is another proposition altogether to expect the taxpayer to fund these arrangements. The cost of fertility treatments should be borne by the intended parents. It is up to private medical insurers to decide what, if any, of these costs they will subsidise.

Proposal 29

The *Health Insurance (General Medical Services Table) Regulations 2021* (Cth) should be amended so that Medicare rebates are available for psychological assessments and prearrangement counselling undertaken in pursuit of a surrogacy agreement which complies with the legislative requirements for approval, as well as counselling undertaken during an approved surrogacy arrangement.

ACL is of the view that administrative barriers to altruistic surrogacy are sufficiently reduced if inconsistencies between state and territory legislation are removed and a national framework established. It is another proposition altogether to expect the taxpayer to fund these arrangements. The cost of fertility treatments should be borne by

[97] Discussion Paper, 54.

the intended parents. It is up to private medical insurers to decide what, if any, of these costs they will subsidise.

Proposal 30

1. The Family Law Act 1975 (Cth) should be amended to provide that:

    a. where there is an approved surrogacy arrangement and a child is born, the intended parent(s) who are parties to that agreement are, upon birth (including stillbirth), the legal parent(s) of the child;

    b. within three months of the birth (or stillbirth) of the child, the surrogate may apply for a declaration that the surrogate (and the surrogate's partner, if any) are the legal parent(s) of the child; and

    c. the Federal Circuit and Family Court of Australia is empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.

2. The Federal Circuit and Family Court of Australia should create a specialist list for dealing with surrogacy-related applications.

The ACL disagrees with this proposal. The default position should be that the surrogate mother is the legal parent of the child, until different parentage orders are made by the Family Court.

According to the recommendation of the Special Rapporteur, countries should:

> *"(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."*

Further, that States Parties should:

> *"(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."*

A further suggestion of the Special Rapporteur, which ACL commends to the ALRC for consideration is that Australia:

> *"(i) Establish effective justice mechanisms, including redress and reparations for women and children subjected to harm through surrogacy arrangements, such as free or low-cost legal aid, psychosocial support and financial assistance, including for surrogate women who choose to keep the child after birth."*

Question N

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

The proposition that the surrogate mother should have the right to seek a declaration that she is the parent should be uncontroversial – it is well below any minimum recognition of her rights that can reasonably be expected.

The surrogate mother, not the intended parents, should be recognised as the legal parent until the Family Court makes different parentage orders. The default position should be to safeguard the interests of the child. Trauma associated with the separation process is recognised (please see comments of the Special Rapporteur in Section 2) and care should be taken to minimise the adverse effects of this on both mother and child, including by facilitating ongoing contact between the surrogate and child.

Proposal 31

1. The *Family Law Act 1975* (Cth) should be amended to provide that where there is an unapproved surrogacy arrangement (which includes all overseas surrogacy arrangements) (see **Proposals 4** and **5**) and a child is born:

> a. the surrogate, and the surrogate's partner (if any) are, upon birth (or stillbirth), the legal parents of the child;
>
> b. the intended parents must make an application for a declaration of legal parentage to the Federal Circuit and Family Court of Australia, within three months of the child being born (for domestic arrangements) or entering Australia (for overseas arrangements); and
>
> c. the Federal Circuit and Family Court of Australia is empowered to consider and determine the application taking into account all relevant considerations, but giving paramount consideration to the best interests of the child.

2. The application should be heard and determined in the specialist list (see **Proposal 30(2)**).

In answer to a) the surrogate mother should be recognised as the child's mother upon birth, regardless of whether or not the arrangement has been the subject of prior approval. The issues raised in the Discussion Paper, including leave entitlements in the case of bereavement can be dealt with by methods that do not reduce the rights of the surrogate mother.

The effect of b) would be to provide a pathway for the regularisation of international commercial surrogacy arrangements that are currently illegal and should remain so.

The Discussion Paper states that "Proposal 30, considered with Proposal 31, provides a strong incentive for people to engage in surrogacy domestically, through an approved surrogacy arrangement."[98] This might be true, where commissioning parents feel they are likely to be approved through the authorised channels. However, Proposal 31 offers those unlikely to be approved as intended parent an alternative pathway to accessing children which is only slightly less attractive than the authorised channels.

The main disadvantage of the unauthorised pathway would seem to be a greater administrative burden and an element of uncertainty as to the outcome of Court deliberations over parentage orders. As demonstrated by the 300+ applications for such orders presented to the Australian Family Court each year, this is no disincentive for people determined to access children illicitly.

The inability of the Family Court to do anything other than grant parentage orders to commissioning parents has been explained in Section 1, under the heading "the missed opportunity to address problems of enforcement."[99] Recommendations 7 and 9 of the Surrogacy Matters Report pointed to the need for the Australian government to address the problem of non-enforcement of criminal the prohibitions on international commercial surrogacy. This review had the opportunity to address this problem, but has chosen instead to direct its attention to "harm minimization."

Even that low-bar goal is not served by this proposal. On the contrary, Proposal 31 would seem to create abundant opportunity for child traffickers to operate with only minimal inconvenience. This approach is wrong in principle and should not be adopted.

At a minimum, the ALRC could consider addressing the issue of children brought to Australia with no genetic connection to the adults who have brought them here. Following the recommendation of the Special Rapporteur, Australia should:

> *"(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 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*

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[98] Discussion Paper, [189], 57.

[99] According to former Chief Justice Pasco, "As the child is already born and in Australia with the commissioning parents, it is almost impossible for courts to determine that it is not in the child's best interests to remain with the commissioning parents even if they have broken the law." (Pascoe J. Submission 35, House of Representatives Standing Committee on Social Policy and Legal Affairs. *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements. (February 2016).*

> *allowed to adopt the child, thereby avoiding the normalization of surrogacy and maintaining the original parentage."*

Proposal 32

Legislation should provide that the process outlined in **Proposal 31** is retrospectively available in respect of children born through surrogacy arrangements that occurred before the proposed amendments come into effect.

The same objection raised in response to Proposal 31 applies here. It would provide a pathway for the regularisation of international commercial surrogacy arrangements that are currently illegal and should remain so.

Question O

When there is an application to determine legal parentage (see Proposals 30, 31, and 32), should judicial officers of the Federal Circuit and Family Court of Australia be required to consider any specific factors when determining the application? If so, what should those factors be?

We do not agree that the Family Court should be used to regularise commercial surrogacy arrangements that are currently illegal and should remain so.

The Family Court is bound to prioritise the best interests of the child. It is for this reason that it has been unable to enforce the prohibition on international commercial surrogacy. A different mechanism is needed to address the problem of non-enforcement at Commonwealth level. This review would have provided an opportunity to consider that question, but has chosen to focus on harm minimisation through decriminalisation and regulation instead. The ACL's objections to this approach have been aired in Section 1.

Question P

Should there be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement (see Proposal 37); and are recognised in the birth country as the legal parents of the child? For example, should legal parentage be recognised in Australia without the need for a court order?

No. Establishing a pathway to parentage regularises international commercial surrogacy arrangements that are illegal and should remain so.

The Discussion paper explains:

> *"Limiting access to legal parentage aims to encourage compliance with the legislative requirements. However, this ignores the reality that children continue to be born from surrogacy arrangements that do not comply with the law. Preventing access to legal parentage in these cases contravenes the rights and*

> *best interests of the child and treats them differently based on the mode of gestation. Failure to recognise the child's functional parents as their legal parents can have social or psychological impacts on the child's wellbeing; create practical problems in relation to the child's care; and affect the child's rights and entitlements, including those related to child support and inheritance."*[100]

The reasoning here is perverse. It focuses on the situation of a particular child whose best interests have already been set aside (contrary to the law) by the very people who now expect legal parentage to be recognised, in the best interests of the child.

The Court is faced with a *fait accompli*. Even in obviously sub-optimal circumstances, such as the Baby Gammy case, there is very little it can do other than grant custody of the child to people who have obtained the child by illicit methods.

"Harm minimisation" for that particular child might point decision making in a particular direction but the result is the creation of a pathway (albeit, currently only an informal and obstacle-ridden pathway) to the parenthood for child traffickers, which puts other children at risk.

This review should avoid creating a regulatory framework that can be exploited by child traffickers. The problem of the current non-enforcement of prohibitions on commercial surrogacy still remains to be addressed.

Question Q

What changes (if any) should be made to laws, policies, or practices to ensure that intended parent(s) have access to fair and adequate parental leave and surrogates have access to fair and adequate leave to recover from pregnancy and childbirth?

Surrogates should have access to medical leave and paid leave prior to the baby's birth, but not parental leave, as they are not taking custody. Intended parents should only access parental leave after legal parentage is established.

Proposal 33

1. Legislation should require birth registration statements and other documents seeking to register the birth of a child born in any Australian state or territory to include a section to collect information about surrogacy-related births. Information collected should include the surrogate's identifying details such as full name, address, and date and place of birth.

2. Legislation should provide that where the above information has been provided to the registry of births, deaths, and marriages, an addendum – stating that additional information is available and may be obtained via the national surrogacy register (or

[100] Discussion Paper, [195], 60.

relevant state or territory-based register) (see **Proposal 35**) – must be attached to either:

- **Option 33.1** Every copy of the birth certificate issued to the person born through surrogacy from birth; or
- **Option 33.2** Every copy of the birth certificate issued to the person born through surrogacy after they have reached the age of 16.

The ACL agrees with Proposal 33.[101] Children born through surrogacy should have a right to:

- Know the identity of their biological mother and father.
- Know the health history of their biological parents and their families so they can be aware of any major potential health issues.
- Understand the circumstances of their conception and birth.
- Access records related to their surrogacy, including contracts and communications between parties.
- Maintain a relationship with their birth mother where possible and appropriate.
- Access such information at a young age (e.g. they should not be required to wait until they become an adult to access such information).

This should be facilitated through:

- Legislated Requirements for access to the child for the surrogate mother.
- Legally Mandated Record Keeping: All surrogacy arrangements (including associated health and contractual documents) should be recorded in a centralised register accessible to the child when they reach an appropriate age.
- Age-Appropriate Disclosure: Intended parents should be supported and encouraged to share this information with their child in a sensitive, age-appropriate manner.
- Access to Counselling: Children and families should have access to psychological support and counselling, including to assist with identity issues arising from surrogacy.
- Birth certificates: Birth certificates of children conceived through surrogacy should wherever possible reflect the true genetic history and heritage of the

[101] We note, it is consistent with the Special Rapporteur's recommendation: "(n) Establish and maintain registries of egg and sperm donors and make the information available to children born through surrogacy".

child. If intended parents wish to be recognised as parents on the birth certificates, this could be accommodated in a way that does not displace accurate documentation of the child's biological heritage.

Option 33.1 is preferred over Option 33.2 to avoid different versions of a birth certificate being circulated. It is rare that children under 16 need to see their birth certificates and, in any case, it would ordinarily be expected that parents had informed children of their history well before that age. For medical reasons, it should not be the case that a child can go through life without knowing that they were born through surrogacy and this is a risk with Option 33.2.

Proposal 34

1. Legislation should require the following information to be provided to the National Regulator (or alternative) for inclusion on a surrogacy register (or state and territory donor conception register — see Proposal 35) within three months of the birth of a child through surrogacy:

a. identifying information about the surrogate, including:

i. full name;

ii. date and place of birth;

iii. home address; and

iv. ethnicity and physical characteristics;

b. whether the surrogacy was a traditional surrogacy or gestational surrogacy; and

c. details of the relevant fertility clinic and doctor (if any).

2. Legislation should provide that if a parentage order is obtained (see Proposals 30–32), it must be provided to the surrogacy register in addition to the information listed in paragraph 1(a) to 1(c) above.

The ACL agrees with this proposal. In cases where genetic material has been contributed by individuals other than the surrogate and the intended parents, information about these biological parents should also be included.

Question R

In relation to **Proposal 34**:

- does it capture all the appropriate and relevant information that should be included on the surrogacy register; and

- who should be responsible for providing that information? For example, the relevant Surrogacy Support Organisation, assisted reproductive technology service provider, or the legal parents?

Either the assisted reproductive technology provider, or the SSO (if there is one).

Proposal 35

1. Legislation should require the information listed in **Proposal 34** to be included in either of the following:

- **Option 35.1 (preferred)** A national surrogacy register established for this purpose; or
- **Option 35.2** Existing state and territory donor conception registers (the Northern Territory and Tasmania, which have not established donor conception registers, should establish them).

2. Legislation should provide that:

a. people born through surrogacy have a right to access the information contained in the register from age 16 (or in the case of **Option 35.2**, the age at which the relevant legislation allows access to information held on the register); and

b. a person born through surrogacy who is under the age of 16 may access this information if the National Regulator (or alternative) is satisfied that such access would not be harmful to that person's welfare. The regulatory body may request that a counselling certificate or similar documentation from an accredited counsellor be provided to assist in its assessment.

A national register would be more accessible and could also accommodate information about individuals born through commercial surrogacy. The ACL agrees with these proposals.

Proposal 36

1. Legislation should impose sanctions for the failure to collect and provide information to include in the national, or state or territory-based, surrogacy register as required by **Proposal 34**.

2. Legislation should provide that failure to comply with the requirement will be enforced through:

- **Option 36.1** A civil penalty regime; or
- **Option 36.2** Criminal sanctions.

The ACL agrees with comments in the Discussion Paper as to stricter culpability for entities, if they are responsible for recording that information (which is preferred, over the proposal that this responsibility might rest with legal parents). It seems sensible to align requirements relating to surrogacy registers to those relating to donor conception registers.

Proposal 37

1. Legislation should provide that:

    a. an Australian citizen or permanent visa holder (intended parent), who is residing in Australia and is intending to engage in an overseas surrogacy arrangement, must register their intention to engage in an overseas arrangement with a registration entity before attempting to achieve a pregnancy via surrogacy. Intended parents residing outside Australia are not required to register overseas surrogacy arrangements with the registration entity;

    b. the registration entity must provide the intended parent(s) with information on surrogacy overseas, including a list of overseas jurisdictions where surrogacy is legal and generally well-regulated ('permitted destinations');

    c. the intended parent(s) must then advise the registration entity in which country the arrangement will occur:

        i. if it is a permitted destination, the arrangement will be registered ('registered overseas surrogacy arrangement');

        ii. if it is not a permitted destination, the intended parent(s) will need to satisfy the registration entity that the surrogacy arrangement is non-exploitative before it can be registered; and

    d. if the intended parent(s) intentionally or recklessly proceed with an arrangement, without registering with the registration entity ('unregistered overseas surrogacy arrangement'), they will be subject to a civil penalty regime (see Proposal 9).

2. Legislation should provide that proceeding with an unregistered overseas surrogacy arrangement will not prevent an intended parent from applying for:

    a. Australian citizenship, a passport, or a visa, on behalf of a child born from the unregistered overseas surrogacy arrangement; or

    b. legal parentage (see **Proposal 31**).

The effect of this Proposal is to regularise international commercial surrogacy which is currently illegal and should remain so, in accordance with Recommendation 1 of the Surrogacy Matters Report and with Australia's international obligations to prevent child

trafficking. We maintain that the review's preferred approach – harm minimisation through decriminalisation and regulation – is wrong in principle.

Proposal 38

The *Family Law Act 1975* (Cth) should be amended to provide that intended parents who have engaged in an overseas surrogacy arrangement must make an application to the Federal Circuit and Family Court of Australia for legal parentage to be recognised (see **Proposal 31**) within three months of returning to Australia with the child.

Attention needs to be directed to the problem of non-enforcement of current prohibitions on international commercial surrogacy. These prohibitions should be maintained. Their violation should not be regularised.

Question S

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

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

The ACL opposes this proposal. Please refer to answers given to Propositions 37 and 38.

Proposal 39

Federal legislation or processes should be introduced to provide that where an Australian citizen or permanent visa holder (intended parent) has entered a registered overseas surrogacy arrangement:

1. the intended parent(s) may start applying for Australian citizenship, an Australian passport, or a visa, before the child's birth, to facilitate expedited processing of such applications upon the child's birth. This streamlined process is not available for unregistered overseas surrogacy arrangements; and

2. to access the streamlined process in paragraph 1, the intended parent(s) must provide the following documentation:

    a. before the child is born: a copy of the surrogacy agreement and the documentation required to make the application(s); and

    b. after the child is born: the surrogate's consent to relinquish the child to the intended parent(s), confirmed in a signed affidavit (in the language of the surrogate); and details of the child's birth necessary to finalise the application/s.

The ACL opposes this proposal. Please refer to answers given to Propositions 37 and 38.

Question T

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

No. There should be no streamlined processes.

Question U

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

There should be no access to streamlined processes.

Question V

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

No. Citizenship is different to Permanent Residency status.

Question W

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

There should be a process for stateless children to be given Australian citizenship.[102] This should be done without rewarding those who have contributed to the circumstances that have made them so. These children should become wards of the state and given up for adoption to parents other than the commissioning parents.

Question X

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

No. This would facilitate international child trafficking.

Proposal 40

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for an initial passport application for a child born through overseas surrogacy, if the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate), and submitted as part of the application.

The ACL opposes this proposal. The prohibition on international commercial surrogacy should remain. The proposal is clearly open to abuse by unethical surrogacy providers exploiting vulnerable women.

Proposal 41

Federal legislation and processes should be amended to provide that the surrogate's consent is not required for each passport renewal for a child born through overseas surrogacy, where:

1. the intended parents are recognised in Australia as the legal parents of the child;

2. the surrogate's consent to relinquish the child to the intended parents has been confirmed in a signed affidavit (in the language of the surrogate); or

3. the surrogate consented to the initial passport application.

The ACL agrees with this proposal, provided the proper procedures and checks have been observed for the initial passport application.

[102] We note, this is consistent with the Special Rapporteur's recommendation: "(m) Guarantee every child the right to a nationality and prevent statelessness by ensuring that the child acquires the nationality of the mother or the State of birth."