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GeneEthics submission to the Australian Law Reform Commission
Comments on Discussion Paper 89, Surrogacy

1. About GeneEthics

GeneEthics is a national organisation with ~13,000 constituents committed to human rights, biological integrity, and protection of women and children from reproductive exploitation. We defend human dignity and the integrity of living systems so are opposed to the manipulation, commercialisation, and exploitation of human reproductive capacities, including the use of women as gestational carriers for others. We reject the marketing of human eggs and reproductive services. Our submission on Discussion Paper 52 provides the ethical, legal, and international law foundation from which we reject ALRC's reform trajectory. Our opposition to surrogacy is grounded in secular human-rights ethics and international law.

2. Executive Summary

GeneEthics respectfully submits that all forms of surrogacy - commercial, compensated, and so-called altruistic - must be prohibited nationwide. Surrogacy is inherently incompatible with Australia's international human rights obligations, violates the dignity and welfare of women and children, facilitates the commodification of human reproduction, and exposes vulnerable people to coercion and exploitation. No regulatory framework and laws can make surrogacy practically, ethically, or legally acceptable so we advocate a total ban.

The ALRC Discussion Paper frames surrogacy only as a practice requiring more regulation. GeneEthics rejects this assumption. No systems of reform, no screening requirements, and no compliance regimes can ever remove the systemic coercion, psychological harm, and biological exploitation inherent in inducing a woman to gestate a child for others. Surrogacy is incompatible with foundational human rights norms, violates the dignity and personhood of women and children, and must be permanently prohibited.

Surrogacy cannot be effectively and ethically regulated, only prohibited. It violates fundamental human rights, commodifies pregnancy, facilitates trafficking of newborns, and treats women's reproductive capacities as biological services and labour.

We urge the ALRC to amend the focus of its inquiry from how to regulate surrogacy to whether it should be permitted at all. The review must entertain and recommend a total national ban as the best solution to the current dysfunctional regulatory regimes.

3. Recommendations

- Introduce national legislation prohibiting all forms of surrogacy;
- Ban all surrogacy nationwide - commercial, compensated, and “altruistic”;
- Retain and strengthen criminal penalties for overseas surrogacy;
- Prohibit all forms of surrogacy advertising or promotional activity;
- Promote ethical alternatives to surrogacy: e.g. adoption and socially-supported foster care for existing children in need.
- Strengthen public education on exploitation risks and human rights violations associated with surrogacy.

4. Principles

- No person has the “right to a child” as property or product;
- Pregnancy must not be transformed into a reproductive service industry;
- Children must not be subjected to contractual transfer or legal reassignment; and
- Women must not be recruited, incentivised, or pressured into gestation for others.

5. Ethical and Social Considerations

- Surrogacy commodifies human life and turns reproduction into a market transaction;
- Economic pressures create implicit coercion as women often become surrogates through financial necessity, coercion, or persuasion, not autonomous and fully informed choices;
- Children are objectified as deliverables under a contract;
- Surrogacy relinquishment severs the primal maternal-child bonds; and
- Regulation does not prevent exploitation it merely facilitates and sanitises it.

6. The Case for Surrogacy Prohibition as a proposal

Section 31 of the ALRC’s Discussion Paper 89 incorrectly claims that the ALRC is asked to recommend how best to regulate surrogacy, not whether it should be disallowed. This ALRC position must be reviewed and reversed. We do not ask the ALRC to exceed the remit that the Attorney’s Terms of Reference (ToR) set.

The exclusion of surrogacy prohibition from the Discussion Paper is merely an ideological, methodical, and political choice, not a legal constraint that the ToR imposes. Thus, the ALRC must reverse its unjustified, unexplained, and unsupported decision to narrowly define the ToR. Focusing soley on how to modify current laws, policies, and practices for people who enter into surrogacy arrangements is unacceptably narrow in scope.

We strongly assert that a total ban on human surrogacy is a permissible, coherent, and arguably a required outcome of fully and faithfully following the ToR. The ToR do not only request or require a narrow pre-commitment to the reviewers’ adoption and regulation of all aspects of surrogacy. A ban on surrogacy is a viable alternative to regulation that fully justifies ALRC consideration and recommendation.

A ban would be the most foolproof, efficient, and humane way to manage the ethically and morally contentious set of ART techniques, reproductive processes, and social relationships which surrogacy creates, promotes, and on which it depends.

The ALRC Discussion Paper wrongly asserts that “the ALRC has not been asked to consider whether surrogacy should be permitted or banned”. The ToR do not require or assume that surrogacy will, can, or must continue. On a proper construction of its intent, the ToR both allows and requires that the ALRC consider prohibition where that is the only or the superior means of:

- protecting and promoting the human rights of children and surrogate mothers;
- ensuring compliance with our international human rights obligations; and
- addressing the systemic, unresolvable risks of exploitation and commodification that the ALRC itself identifies as a trenchant problem.

ALRC acknowledges that we and many other groups and individuals strongly advocate for surrogacy prohibition and it is unacceptable that ALRC chooses beforehand not to entertain our representations. The ALRC's unaccountable and exclusionary decision marginalises, denigrates and devalues the very strong case for the widely supported option of a national prohibition on all kinds of surrogacy - altruistic, compensated, and commercial.

The ban option must be reinstated to the ALRC's consultations and proposals before proceeding any further towards a final report!

7. Reasons to reinstate and consider a surrogacy ban

A. The Terms of Reference are rights-based

The ToR do not instruct the ALRC to "enable", "facilitate", or "expand" surrogacy. Instead, they are framed around risk, harm, and rights protection.

The Attorney-General's ToR expressly direct the ALRC to focus on:

> "the human rights of children born of surrogacy, their surrogate mothers and intended parents, and the risks commercial surrogacy can pose to vulnerable women and children"

and to identify reforms to the law that:

> "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."

Nothing in this language precludes prohibition as an option and it would be the most effective and enduring way overall to achieve the intended goals. On conventional public-law principles, where a regulated practice is found to be inherently incompatible with protected rights**,** prohibition is not only an available solution but is very common. This reflects a core principle in human rights law and constitutional law, that when a practice fundamentally violates a protected right and cannot be modified to be compatible, the parliament and courts can prohibit those practices that violate such basic rights.

B. "Review and rationalisation" includes a ban when regulation fails

The ALRC has the task of reviewing laws, policies, and practices to identify reforms that are consistent with international law and effectively protect children's and women's rights.

The Surrogacy Inquiry Discussion Paper – Explainer repeatedly concedes the systemic regulatory failure of present regulations**,** stating that:

> "Australia's existing surrogacy regulatory regime does not adequately meet its policy intent and is confusing, restrictive, and not fit for purpose." (S1.7)

and that the current laws:

> "are not meeting the important objective of avoiding exploitation overall, and in many instances, are not giving primacy to the rights and best interests of the child." (S1.8)

Where a regulatory regime is structurally and functionally incapable of meeting its stated objectives**,** rationalisation may entail repeal of the existing laws and the introduction of a prohibition. Instead, the ALRC favours, expounds, and advocates for national regulatory expansion and rationalisation that may further entrench many of the failings of the present regimes in numerous jurisdictions.

C. International human rights law supports prohibition as legitimate

The ToR require consistency with international law and conventions**,** including the Convention on the Rights of the Child (CRC).

The Discussion Paper acknowledges that:

> "safeguards are critical to ensuring that surrogacy is conducted in a way that does not amount to the sale of children, in contravention of the Convention on the Rights of the Child." (P10)

and further concedes that:

> "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." (P9)

Where credible UN mandate-holders conclude that a practice is inherently exploitative, a State's decision to prohibit that practice is fully consistent with international human rights obligations. Thus, the ALRC must view Prohibition objectively, not summarily dismiss it, and withdraw the fabricated pretext that it is outside the ToR of its review.

D. Banning surrogacy may optimise the "best interests of the child"

The ToR specify that:

> "the best interests of children are paramount."

But the best-interests principle applies to children who exist, not to hypothetical future children who might be created and harmed if a practice were permitted.

International law does not recognise a right to be created through surrogacy, nor a right of adults to access all possible means of family formation or procreation. Thus, a complete ban on all surrogacy:

- does not remove any child's existing rights;
- does not violate Article 7 CRC (no child is prevented from knowing parents); and
- has the benefit of preventing foreseeable rights conflicts before they arise.

A precautionary reading of the best-interests principle favours preventive prohibition. It is both compatible with the principle and may be required under it.

E. Discussion Paper's exclusion of a ban is a choice not mandated

The Discussion Paper states:

> "The ALRC has not been asked to consider whether surrogacy should be permitted or banned." (S1.4)

But this statement is a narrow interpretation of the ToR. They contain no limitations on the ALRC considering and possibly adopting a ban as an option, which it may also prefer. This analysis should have been canvassed in the Discussion Paper.

Indeed, the Explainer explicitly acknowledges that:

> "many submissions opposed surrogacy from a moral or ethical standpoint… (and) often called for surrogacy to be banned." (P6)

The ALRC therefore accepts that prohibition is a tenable policy position, within its scope. But instead it chose, without any credible excuse or explanation, not to develop prohibition as even one among its many proposals. This is a monumental failure as a complete ban is the simplest, most effective, easiest to monitor, and most enforceable proposition.

F. A ban is consistent with national uniformity and legal clarity

One of the ALRC's central objectives is harmonisation. A national prohibition would:

- eliminate jurisdictional inconsistency;
- remove incentives for regulatory arbitrage;
- prevent reproductive tourism; and
- provide maximum legal clarity.

This is fully aligned with the ToR emphasis on resolving:

> "current inconsistencies in legislative arrangements across Australian jurisdictions."

Uniform prohibition is, in regulatory terms, the strongest and clearest form of harmonisation**.**

G. Prohibition is within the review's scope and is defensible

In summary, a ban on all surrogacy is:

- not excluded by the Terms of Reference;
- supported by international human rights analysis that the ALRC acknowledges;
- fully consistent with the pre-eminence of children's rights; and
- responsive to the ALRC's own findings of unmanageable systemic exploitation and of many existing regulatory failures.

The ALRC's claim that prohibition is outside the scope of the ToR is merely an institutional preference and is not a Ministerial constraint. The multiple public and organisational submissions that argue cogently for a ban are squarely within the scope of the review. The ALRC is therefore duty-bound to substantively address in its Final Report a national prohibition on all surrogacy arrangements and to evaluate it fully and fairly as a strong, realistic, and viable option.

8. GeneEthics Case for Prohibition

Our submission argues for the total prohibition of all forms of surrogacy in Australia**,** aligned with binding international human rights norms. Surrogacy commodifies women's reproductive labour, violates the rights and welfare of children, and enables transactional forms of biological outsourcing that cannot be reconciled with core legal and ethical standards.

GeneEthics respectfully submits that all forms of surrogacy - including commercial, compensated, and so-called altruistic - must be prohibited nationwide. Surrogacy is inherently incompatible with Australia's international human rights obligations, violates the dignity and welfare of women and

children, facilitates the commodification of human reproduction, and exposes vulnerable people to coercion and exploitation. There is no regulatory framework that can make surrogacy ethically or legally acceptable.

Surrogacy, even when termed “altruistic,” violates the human rights of egg donors, the women whose bodies are used for gestation, and the children who are intentionally separated from their birth mother at birth. Children cannot consent to being the subject of contractual transfer and women cannot ethically or legally sign away their fundamental maternal rights in advance of the birth of a child they are carrying. Surrogacy reduces pregnancy to a service transaction and treats children as mere products, without inherent rights.

9. International Human Rights Framework

Surrogacy conflicts with Australia’s obligations under the UN Convention on the Rights of the Child (Art. 35), the Slavery Convention (Art. 1), the EU Charter (Art. 3), and the Oviedo Convention (Art. 21). These instruments contain an unequivocal prohibition on treating human bodies or children as commercial assets.

- **United Nations Slavery Convention**: pregnancy under "ownership-like control" constitutes reproductive servitude.
- **United Nations Convention on the Rights of the Child**, Article 35: prohibits trafficking and sale of children.
- **Optional Protocol on the Sale of Children**: requires states to outlaw child procurement.
- **EU Charter of Fundamental Rights, Article 3**: prohibits making the human body and its parts a source of financial gain.
- **Oviedo Convention, Article 21**: declares the human body and its parts shall not give rise to financial gain.

These obligations require the prohibition not regulation of surrogacy.

10. GeneEthics Rejects all ALRC Paper 89 regulatory proposals

- GeneEthics supports national uniform surrogacy legislation only insofar as it bans all forms of surrogacy in Australia. Harmonisation must not serve to legitimise or expand surrogacy access or promotion, and must prohibit it entirely.
- If a regulator exists, its sole purpose must be the monitoring and enforcement of surrogacy prohibitions and the prosecution of surrogacy-related offences. We oppose any national surrogacy regulator whose role includes the regulation or facilitation of approved surrogacy.
- We object to the framing of Option 2.1 as (preferred). The strong implication is that the ALRC is advocating acceptance and that ban options will not get a full or fair hearing.
- We are asked to think about a new oversight body being “efficient, accessible, accountable, and transparent”. Such benchmarks all fail to address the well-known problems enumerated in the Discussion Paper. For example, the paper (S57) notes that “where there is oversight, it often comes too late.” National laws and a new body are likely to also miss the boat and be toothless tiger unless there were enforceable sanctions.
- GeneEthics trenchantly opposes all SSO proposals. Any commercial or other organisation that solicits, matches, or brokers women to sell eggs or serve as gestational labourers introduces market structures, processes, and imperatives into human reproduction. This would carry a substantial risk of further exploitation that could not be policed, prevented, or remediated, especially if profit motives were allowed.
- No mechanism for surrogacy approval should be created. No agreement can ethically or legally transfer maternal rights to a child prior to birth. Surrogacy approvals should not be permitted under any conditions.
- We agree that criminal offences for commercial and overseas surrogacy must be retained and strengthened, within the framework of total prohibition. Civil penalties are an inadequate disincentive for non-compliance with a ban. Surrogacy-associated enforcement

should treat procurement of gestational labourers and the transfer of newborns like human trafficking for other purposes.

- We absolutely oppose any legalisation of advertising in all media, for any aspect of surrogacy products and services. Advertising is recruitment of biological labour for reproductive outsourcing, the provision of biological materials, and harvesting eggs.
- In other jurisdictions, advertising and promotion hide the long-term hazards, hidden costs, and high risks of negative health and emotional impacts. Such ads tend to target and exploit financially and socially impoverished women, so surrogacy is banned across much of Europe, parts of Asia, the Middle East, and Africa, resulting from their unmanageable and negative experiences.
- We support national uniform laws for abolition, not facilitation. National consistency must ban all forms of surrogacy, following the examples of countries such as France, Germany, Italy, Spain, Bulgaria, India, Nepal and Thailand.
- In rare cases where surrogate births may occur despite the ban, the birth mother and child's best interests would be served if she is the legal mother recorded on the newborn's birth certificate. A substantial period post-birth to decide to keep or relinquish the baby would help to protect her rights.
- By prohibiting surrogacy, registries and identity documentation would not be required.
- Overseas surrogacy must remain criminalised, not normalised through registration.

11. Conclusion

Surrogacy cannot be ethically sanitised through more regulation. It must be prohibited on the grounds of human dignity, child and women's welfare, and non-commodification of reproductive labour. GeneEthics urges the ALRC to recommend a national ban on surrogacy in all its forms.