Submission to the Australian Law Reform Commission

In response to the Discussion Paper: Review of Australia's surrogacy laws

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I thank the Commission for the opportunity to further contribute to the review of Australia's surrogacy laws and provide feedback on the proposals and questions outlined in the Discussion Paper.

My name is Ella McNamara, I am the Founder and Director of Fertility and Family. The company provides consulting and concierge services to people considering IVF, Donation and Surrogacy to understand and assess their options in Australia and abroad and to connect them with vetted providers. Before this I worked for an American IVF clinic in a position encompassing Marketing and Agency relations and previous to that I worked for Growing Families producing conferences for Intended Parents and Surrogates around the world. In all I have worked directly in the IVF field for over 13 years and 11 of those in Surrogacy and Donation.

I broadly support calls for a Nationally consistent legal and regulatory framework for surrogacy, oversight by a National Regulator, the Introduction of Surrogacy Support Organisations to assist both Intended Parents, Surrogates and their families navigate the often-complex domestic surrogacy process, I also applaud the recommendations for making the process easier for Intended Parents who engage in ethical overseas surrogacy arrangements.

I have limited my responses to the proposals and questions that I feel most qualified to comment on, but look forward to collaborating further with my legal, psychological and medical colleagues in developing a functional and fair domestic system and ensuring that

there are safe and ethical international options available to Australians wishing to pursue surrogacy to build their families.

Proposal 3 Surrogacy Support Organisations (SSOs) – Although I am in favour of the introduction of SSOs, there are 2 aspects of this proposal that I would like to address and I want to preface my comments by saying that my objective is not just to get SSOs up and running, but I want to ensure that they are financially viable organisations, because agencies closing midway through journeys can be devastating for all involved.

1) ***Facilitating introductions, or 'matching', of intended parents and surrogates who meet the requirements*** – I believe that finding a suitable surrogate to match with is the primary challenge facing Australian Intended Parents and that SSOs could play an important role in helping this to occur, however I believe there is a tendency to under estimate how difficult that can be. We need to recognise the huge amount of advertising, recruiting, interviewing, educating and screening steps that need to be carried out by a SSO to establish if a surrogate candidate meets the basic criteria to be a surrogate and then to match them with Intended Parents.
   There are also significant costs and risks associated with recruitment of surrogate candidates and screening process that would ready them for matching with Intended Parents, keeping in mind that at any stage the surrogate candidate can be found to be unsuitable for the surrogacy process, or they may simply decide at any stage that they do not want to pursue surrogacy, which means that the cost of any screening steps completed become the responsibility of the SSO or passed on to Intended Parents. US Surrogacy agencies report that the average cost of completing pre-match screening steps cost on average $12-14K, this amount does not include medical screening or legal agreements. One way for a SSO to protect themselves financially, is to as for Intended Parents to pay large fees to cover these costs, without the promise of a match, or a timeframe to do that, which can leave IPs open for exploitation, the other way for the SSO to reduce the cost risk of pre-screening

activities, is to match Intended Parents with entirely unscreened, uneducated Surrogate candidates and the perform all the screening steps after the "match"…. However this generally results in match breaks and Intended Parents expending a lot of time, money and hope on surrogate candidates that have little chance of completing a successful surrogacy journey.

7) "holding funds provided by the Intended Parents in a trust account and managing disbursements of trust account funds to surrogates". – While it is understandable that this proposal seeks to streamline the process so that the financial aspects of the journey are managed by those who are administrating the journey, I believe that SSOs holding IP funds is an incredibly dangerous as we have seen in recent experiences in the US where agency held escrow funds have been (allegedly) embezzled by the agency owner as there was no external oversight into the way funds were being held and managed (https://www.nytimes.com/2025/12/10/health/surro-connections-surrogacy-closure.html). Even if we ignore the incidence of criminal activities by bad actors in this space, we also need to recognise that having a single entity holding large amounts of Intended Parents money can present a significant conflict of interest, and that holding and managing trust accounts for a surrogacy journey should be done by entities and individuals who are professionally qualified to do so(lawyers, CPA or qualified book keepers) additionally it would require software to manage each individual journeys trust account and insurance for the funds that are being held (including insurance for criminal acts by employees and agency owners), the level of cost for the employment of appropriate staff, systems and insurance would generally be unobtainable for most surrogacy support organisations and would carry a high level of liability which would deter suitable operators from running a SSO.

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

I think that the framing of this issue is important and that rather than being concerned about overlapping of functions, we look to create systems that ensure that nothing falls

through the cracks which may create conflict, legal problems or delays for all parties involved. One way of achieving this is by ensuring that there is an overlap of independent practitioners providing checks and balance. Another part of this is framing the ongoing role of the agency/SSO as a coordinator of the entire process (a speciality in its own right) and the other providers involved in the surrogacy as specialists who will perform specific roles at times throughout the process.

I generally explain the Agency (SSO's) role to Intended Parents as being like a Builder when you build a house – they are responsible for the entire project, the licenses, permits and keeping the project moving towards completion, throughout the project they will help you to engage specialist providers (or work with providers you have already selected) for aspects of the journey, like a plumber or an electrician (or in the case of surrogacy an IVF clinic, a lawyer, psychologist etc) and the Agency or builder, will project manage the process and the "subcontractors" to make sure you end up with a house that is compliant (and in a surrogacy case make sure you have met all the requirements set out by the National Regulator, make good on your responsibilities to the surrogate and to establish parentage of your child).

In relation to points 65, 66 and 67, I have some general comments

- For profit vs price capped fee basis – I strongly oppose capping the fees for SSOs, I believe that like Lawyers, IVF Clinics and Counsellors and Psychologists involved in the surrogacy process, SSO's provide a critical professional service. I note that none of the aforementioned providers have their fees capped (nor is there any suggestion that being for profit organisations exposes their IPs and Surrogates to potential exploitation) and I am unsure why SSO's would be any different. There are also going to be significant costs to set up an SSO ie Journey management software – no out of the box

solutions currently exist, Licensing costs from the regulator, Insurance Costs (currently very difficult to get insurance for non legal/medical surrogacy related service providers), the cost of recruiting and employing appropriate staff), the threat of financial penalty from the regulator for non-compliance which the other professionals in this process are not subject to. Added to that as I have previously mentioned, a surrogate can choose to withdraw from the process at any stage until she is pregnant and this means SSOs experience a high level of risk as they have made considerable investment, in advertising, recruitment, screening, education and matching a surrogate that may never complete the process and to remain viable SSO's will need to be able to charge for their services with allowances for these risks.

- **Should SSOs be associated with existing entities, such as assisted reproductive technology service providers or surrogacy advocacy bodies, or established separately** – I believe that SSO's should be able to run by existing entities such as advocacy bodies but do not believe that they should be run by ART providers such as IVF clinics. IVF clinics play such an important role in providing the medical screening and treatment of Intended Parents, Donors and Surrogates, however I feel that their business interests and the huge amounts of Medicare dollars that are potentially available to them through the provision of medical procedures, may compromise their ability to appropriately assess the suitability of the surrogacy candidate outside the medical suitability. We have certainly seen poor outcomes for surrogates who work with "in-house agencies in the US" where education and support were sacrificed and some red flags ignored in favour of the clinics business objectives.
- I acknowledge that conflicts of interest exist when moving to a more formal and commercial model of operation and I believe that one way of ensuring that ALL providers provide independent advice, guidance and treatment is to make it illegal for SSO's to earn referral fees from IVF clinics, Lawyers,

Psychologists and vice versa, this should not preclude professionals from collaborating together for marketing or educational purposes, but each organisation should make recommendations for service providers based on their suitability for the Intended Parents, donors and surrogates who have engaged them, alternatively I would request that SSO's and the professionals be compelled to disclose any benefit or fee they may receive for the referral they make.

Proposal 4

I wholeheartedly support Legislation that protects Intended Parents and Surrogates and ensures that there is a surrogacy agreement in place before a transfer takes place, I do believe that SSO's, Lawyers and Clinics would all feel comforted by having a legislation that prescribes all of the requirements that must be completed prior to an embryo transfer.

Proposal 5 – The approval process

Question C – Do you think it's 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)

I believe that SSO's should be given the authority to approve a surrogacy agreement, they should be granted that authority to do so by the National Regulator. Similarly to the way that a Marriage Celebrant is licensed to conduct weddings on behalf of the Attorney General's Department once they have proven that they are a fit and proper person, have undertaken education and received qualifications and have committed to ongoing education and professional development to maintain high professional standards. I believe that a similar approach would be the most efficient and streamlined and would allow the National Regulator to focus on setting standards and framework for the surrogacy process,

ensuring that fit and proper people operate SSO's and then focus on ensuring that's SSO's are educated and updated on their responsibilities and are compliant with those responsibilities.

I think that the vast majority of Surrogacy cases can be managed at the SSO level and the National Regulator be involved in complex cases, cases denied by an SSO and also to provide an avenue for Intended Parents, Surrogates and other professionals to report concerns of misconduct by their SSO or other providers.

One challenge in regard to a Regulator deciding who is an appropriate person to operate an SSO is that there are no recognised Qualifications is operating a SSO, there is no university offering a Bachelors of Surrogacy, which means that the regulator will either need to create some sort of educational qualification that must be obtained to run a SSO, or will need to look for transferrable skills or experience to determine who may run an SSO.

Proposal 18 Question D Should both the Surrogate and Intended Parent(s) be required to undergo a psychological assessment?

I firmly believe that all parties to a surrogacy agreement should undergo psychological assessment, the surrogacy process is particularly difficult on all involved and if a psychological assessment can assist us in either stopping surrogacy arrangements that are high risk, or for ensuring that additional psychological supports are available, in place (financially accounted for and formalised in a contract) it provides a framework to ensure that the correct support is in place for all participants.

Proposal 19 Criminal History Check - Question E If 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?**

I believe all parties to the Surrogacy Arrangement should undergo comprehensive criminal history checks, this includes the Intended Parents, the Surrogate, her spouse if she has one. I believe that this should be part of the initial application process for both Surrogates Candidates and Intended Parents with the SSO being allowed to decline candidates that have criminal histories that would make them unlikely to be successfully matched in their program (ie if an Intended Father had a criminal history of offenses against children or violent offenses against women who disappoint them, or a surrogate candidate had a history of Criminal Drug Offenses or child abuse). For candidates that were declined by the agency, they would be able to seek service from other SSO's or appeal to the National Regulator for permission to proceed with an arrangement.

For those candidates who have a criminal history, but an SSO believes they can match that candidate, I believe that the criminal history should be disclosed to the opposite party so that they can make an informed decision before proceeding with a match, I believe that this information should be passed from the SSO to the Surrogacy Lawyer drafting the agreement and that all parties must acknowledge that they have exchanged checks before a surrogacy agreement can be signed.

I accept that many people believe that criminal history checks are over-reach, however, there are so many aspects of the surrogacy process where Intended Parents and Surrogates are asked to provide proof that they do not pose an obvious risk to the opposite party or the resulting child - for example we conduct Infectious disease screening on the gamete providers to ensure they don't pass on communicable diseases to the Surrogate, we don't

just take their word for it, similarly Surrogates also undergo Infectious disease testing to ensure that they don't carry infectious diseases that may impact the child they are carrying, again we don't just take her word for it, we require proof.

As always, our primary focus is on the safety of the child, but I also think the safety and financial security of the Intended Parents and Surrogate are important too, it would negligent of us to not examine the criminal history of the parties and then to find that we have a surrogate with a history of extortion or an Intended Parent with a history of stalking or violent behaviour towards pregnant women.

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**
   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).

I believe that as part of the matching process the SSO would work with the Surrogate to create an estimate of her expected expenses for the journey and create a cost estimate that is shared with the Intended Parents as part of the matching process and this cost estimate would be provided to their respective lawyers to finalise in the surrogacy agreement, I

would like it to be a condition of the agreement that an embryo transfer can not be attempted until the agreed estimated funds are deposited into an Independently administered escrow account.

As per point 2, all the expected costs should be included in the escrow deposit, as well as an allowance for complications.

Its also really important to reinforce to Intended Parents that they are liable for costs, even if it exceeds the initial escrow amount or the cost projection completed by the SSO, some of the common reasons that costs exceed the initial estimate include multiple embryo transfers, Intended Parents or Surrogates insisting on Private Obstetric care as opposed to public healthcare.

I do not think that the SSO should hold these funds, as previously mentioned, SSO's and agencies do not generally have the specialist skills and qualifications to manage large amount of funds over an extended period. I feel that an Independent External Escrow Provider should hold the funds and disburse them as per the terms of the contract. The SSO can be involved in an administrative capacity – ensuring that surrogates submit their receipts in a timely fashion and working with the Intended parents in tracking their budget and ensuring they have adequate opportunity to top up their escrow account to meet their obligations. However they should not actually hold or disburse the funds themselves.

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).

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**

I wholeheartedly believe that many of the changes in this discussion paper will expand the availability of domestic surrogacy for many Australians, I feel that demand will still significantly outweigh supply and many Australians will still consider overseas surrogacy as the most appropriate option for them. I support the registration of overseas arrangements and Australian Intended Parents would be incentivised if there was a smoother path to legal parentage available to them if they comply.

One of the key reasons that Australian Intended Parents will continue to look to overseas options for their surrogacy journeys, is our distinct lack of egg and sperm donors in Australia and the lack of diverse donors available, this means IPs from minorities, IPs who are genetic carriers of inheritable conditions and many others are forced to look at overseas options to create embryos, once embryos are created in a foreign country it is exceedingly difficult and often impossible to bring those embryos to Australia, which leaves the Intended Parents with few options but to engage in overseas surrogacy. I understand that donor issues are outside the scope of this review, but I think its important to understand the intrinsic link between the two and the fact that there are many factors that will mean domestic surrogacy is not an option for many Intended Parents.

Although I like the idea of a list of permitted destinations, I simply don't think that its feasible. Over the last 11 years I have seen wonderful providers deliver safe, successful surrogacy experiences in markets that are poorly regulated and exist in the absence of laws that outright prohibit surrogacy and I have seen devastating damage done to surrogates and

intended parents by unscrupulous providers in what we would consider ethical surrogacy destinations.

My feeling is that it would be near impossible and certainly too resource heavy for the National Regulator to assess every country and every provider, but I think it would be more feasible to set a list of criteria that a permissible surrogacy agreement must contain and then have the SSO or National Regulator approve the specific agreement rather than the destination. I believe that not all SSOs that provide domestic surrogacy support, should be able to provide approval for registered overseas surrogacy agreements, and that SSOs that do must demonstrate a higher level of knowledge and experience in international surrogacy to register these arrangements.

I do not believe Intended Parents should be required to demonstrate that they have made reasonable efforts to engage in domestic surrogacy before engaging in International Surrogacy, similarly to the fact that Single Women have been made to “prove” their infertility to be allowed to engage in surrogacy, whereas single men are not subjected to the same burden of proof, I think this requirement would have a similar impact, which would force IPs to waste time and money “qualifying” to be allowed to engaging in International Surrogacy, one of the un-intended consequences could be that the cost of “qualifying” could significantly impact their surrogacy budget resulting in them looking for cheaper and less established surrogacy destinations.