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.

I will focus my submission on salient matters that I believe warrant my feedback as a practitioner and expert in surrogacy law practice. I otherwise refer to my Submission in response to the Issues Paper, and my Churchill Fellowship report which has been provided to the Commission.

Proposals accepted

I do not object, nor have any substantial feedback for the following proposals as drafted:

Proposal 11: Repealing prohibitions on advertising.

Proposal 12: Genetic connection between the parties and child.

Proposal 14: Minimum age requirements for surrogates and intended parents.

Proposal 15: Citizenship and permanent residency requirements.

Proposal 16: Requirement of a previous successful pregnancy.

Proposal 17: Requirement for medical screening.

Proposal 22: Requirements for a compliant surrogacy agreement.

Question H – surrogacy agreement provisions: I believe the proposed clauses for a surrogacy agreement are comprehensive.

Proposal 23: Prohibited provisions in a surrogacy agreement.

Proposal 28: Medicare entitlements.

Proposal 29: Medicare entitlements for psychological assessments and counselling.

Proposal 33 - 36: Information, records and a national surrogacy register.

Proposals 40-41: Making it easier to obtain and renew passports.

A supportive institutional framework

Proposal 1: Promoting a nationally consistent approach through harmonisation

I support Proposal 1, that surrogacy should be regulated at the Commonwealth level, as a preference. I support Option 1.1 and believe the only way to achieve absolute consistency is to legislate surrogacy at the national level, with all states referring their powers to the Commonwealth.

As a less preferred model, I support Proposal 1.2, for the states and territories to implement harmonised uniform laws across the country.

Proposal 2: Establishing a National Regulator

I support Proposal 2 in its entirety and including Option 2.1 for a National Regulator for surrogacy and ART broadly.

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*.

Regulatory bodies should be independent from industry and government and informed by expert practitioners and the community. There is disconnect between existing bodies and community expectations, with opaque processes and decision-making, including in Victoria's Patient Review Panel.

Government lacks specialist knowledge and practical experience, while industry may be compromised by business and professional interests. Regulation and setting standards should be a joint endeavour between government and industry, informed by expert practitioners and community lived experience.

A National Regulator should be tasked with managing surrogacy, ART and donor conception across the country. It is impossible to separate the areas or regulate one without reference to the others. By way of highlighting this issue, 35-40% of Australian surrogacy arrangements involve single men and same sex male couples, and all of those arrangements involve donor eggs (or traditional surrogacy). Regulating surrogacy without reference to donor conception regulation would be deficient.

Proposal 3: Permitting and regulating Surrogacy Support Organisations

I support Proposal 3 for establishing regulation and licensing of SSOs. I refer to my Submission in response to the Issues Paper on the need for regulating matching services to protect the parties to a surrogacy arrangement.

Proposals 3.7 and 27 propose to allow SSOs to hold money in escrow. I raise concerns about independence and authority to hold trust funds and note potential conflicts of interest in an SSO supporting a surrogacy arrangement and managing finances between them. Incidents in the USA highlight concerns of inadequate regulation of escrow accounting, and surrogacy agencies engaging in financial fraud, resulting in intended parents losing hundreds of thousands of dollars.

Unless SSOs are strictly regulated, including with nominated officers with appropriate qualifications, I would be concerned about financial mismanagement and inadequate

accountability to the parties. Escrow management should require trust accounting qualifications and accountability.

Question B: *How can we minimise overlap in functions with other organisations, such as ART service providers?*

ART providers and SSOs should be entirely separate with independent roles. There should be clear delineation between the medical services provided for a surrogacy arrangement, and the relationship and process management provided by an SSO. Separating the services allows medical practitioners to perform their roles without conflicting interests. It also allows SSOs to provide management and support to the parties without influencing medical treatment and outcomes.

Under the current framework and based on NHMRC guidelines, fertility clinics are often the final gatekeeper for a surrogacy arrangement proceeding. This, I believe, places ART providers in a position where business interests may conflict with ethical decisions. The establishment of SSOs gives ART providers peace of mind that they can proceed with treatment based on independent SSO advice.

I note the Commission is considering whether SSOs would operate on a not-for-profit or capped fee basis. I cannot claim to be an expert on managing a NFP or business offering matching services, but I have observed significant complexities:

1. Not-for-profit does not mean ethical or well-run. It is entirely possible for a not-for-profit service to be exploitative, poorly run and have poor financial management.
2. Some services may appear to be not-for-profit, simply by directing profits to the Directors in the form of luxury expenses, benefits and salary.
3. NFP requirements may dissuade expert professionals from running an SSO, leaving the services to be run by those with less skills. This does not further the interests of the community.
4. The 'free market' that operates in other countries has increased competition which has benefits for the community. Surrogacy agencies rely on providing on positive, personalised experiences for the parties and this improves practices in the industry.
5. I have also observed concerning practices in overseas surrogacy industries. This includes for example, agencies presenting intended parents with potential surrogates, so the agency can claim payment for a 'match,' despite the potential surrogates not meeting criteria or not having passed medical assessments.
6. Profit-driven services may put business interests above the needs of the parties at significant detriment to the surrogate and intended parents.
7. Matching services, whether NFP or for-profit, often do not place the interests of the children born via surrogacy at the forefront of their business model.

Assuming an SSO is privately run, I would expect it to make profit if it is to attract the highest skilled practitioners to run a competitive service. Capping fees may be part of the regulation, but I would urge the Commission to consider the views of experienced industry professionals as to the impact of capped fees.

I do not believe the problem with SSOs is whether they are not-for-profit or for-profit. The issue is whether they are sufficiently regulated and licensed to practice.

I recommend the Commission seek specific and expert advice from international colleagues involved in the practice. Services such as the not-for-profit *Brilliant Beginnings* run by Natalie Gamble and Helen Prosser in the UK and for-profit *Alcea Surrogacy* run by Angela Mook in the USA (and specifically in New York) are two services I would recommend. Several other USA agency representatives, and attorneys from the Academy of Adoption and ART Attorneys would be excellent sources for information and advice.

Proposals 4 and 5: Approving surrogacy agreements

I support in principle the proposal to have a process to approve a surrogacy arrangement, and that the approval should be independent of the medical, legal and psychosocial practitioners providing advice and services to the parties. I refer to my previous Submissions with respect to the risks and consequences of not having an independent approval body.

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)?*

Approval of a surrogacy arrangement should be by qualified practitioners. If approval is to sit with an SSO, they should be required to employ designated and accountable officers. The Patient Review Panel, as an example, is comprised of independent, diverse expertise from the legal and medical fields.

By comparison, Surrogacy Australia's Support Service has no professional standards or skills required of its staff. Likewise, matching services in the USA and Canada are often run by people with lived experience of surrogacy, and no professional qualifications in legal, medical or psychosocial fields.

What regulation would an SSO be required to adhere to, to ensure it is capable of assessing whether an arrangement meets ethical, legal and professional standards? If SSOs are to approve an arrangement that leads to a presumption of parentage, they cannot be run by self-appointed businesspeople with no verifiable qualifications. The legal and psychosocial practitioners would likely not be running an SSO, so there must be consideration for who would be qualified to do so.

I agree with the premise that most arrangements could be approved by an SSO, with an option for the National Regulator to assess all other matters as listed in Proposal 5.4. I would propose that a legal or counselling professional have the option to seek approval via the National Regulator, if they had concerns for any aspect of an arrangement.

Pre-surrogacy approval with an independent body is an important safeguard. I agree with the Commission's statements at paragraph 68 of the Discussion Paper.

I note that comments at paragraph 70 of the Discussion Paper, with respect to submissions from people who may have found pre-approval processes onerous and perhaps a reason for intended parents to travel overseas. With respect, I think much of the concern about the 'onerous' process, might be in reference to the Patient Review Panel and WA's Reproductive Technology Council, and is a public relations issue. The community lacks understanding of the requirements and processes involved, and neither the PRP or RTC engages in public relations or community engagement.

As a practitioner in the industry for the last decade and as someone who has appeared as a party for two separate applications to the PRP, I still do not have a clear understanding of its processes

or decision-making. Community feedback is that the PRP is not inclusive, has historically been homophobic, uncaring and even racist, and lacks cultural understanding and sensitivity.

Some intended parents find the notion of undergoing psychological assessment and counselling to be onerous. Perhaps they feel entitled to pursue surrogacy and any safeguards in the process are an offence to their sense of entitlement. Regardless of the laws in Australia, some intended parents will still pursue international surrogacy as their preferred option.

If an SSO is to be tasked with determining, at first instance, whether to approve an arrangement, it must engage with the community and undertake a public relations exercise to ensure parties do not feel they are being onerously scrutinised, but rather supported to proceed with a healthy, ethical and secure surrogacy arrangement most likely to lead to a clear pathway to parentage.

Perhaps an SSO would be more acceptable in the community by reason of being well-regulated, privately-run, and therefore market-driven to be inclusive, supportive, LGBTQIA+ friendly, culturally sensitive, as well as professional, ethical and adhering to the highest standards of conduct.

Proposal 6: Ensuring compliance with operational requirements.

I thoroughly endorse the proposal to make an SSO accountable for decisions and believe Option 6.3 would be most effective – a combination of civil penalties and criminal sanctions. I believe losing a license to deliver services may be as effective a tool as a threat of criminal sanctions.

Proposal 7: Increasing awareness and education

Likewise, I endorse Proposal 7 for the National Regulator to increase awareness and education. The antidote to poor outcomes, exploitative and unethical practices is education and awareness. By raising the profile of ethical, best practice surrogacy, Australia influences international surrogacy industries and frameworks.

Proposal 7.2.b outlines the need for training for surrogacy lawyers, health practitioners and counsellors and I concur with this proposal. Surrogacy is a developing area for research, and many practitioners are learning as we go. I agree that training is needed.

I commend resources such as those developed by Dr Jutharat Attawet and her team (https://surrogacybirthcare.com.au/) to address these issues.

Parameters of lawful surrogacy

Proposal 8: Prohibited domestic surrogacy arrangements

I thank the Commission for deliberately stepping away from the presumptions that commercial surrogacy is inherently bad and that by contrast, altruistic surrogacy is therefore good.

I endorse the proposals to prohibit impermissible profit or reward, and for civil penalties to apply. This strikes appropriate balance between deterrence and retribution, while still protecting the rights of children.

Industry and SSOs should be held accountable for illegal conduct, which does not currently exist in legislation, where parents are instead criminalised.

Proposal 9: Unregistered overseas surrogacy arrangements

The Commission advised that intended parents who had engaged in international commercial surrogacy may be referred to the authorities for breaking the law, if they made submissions to this Review. The Commission has refused to accept anonymous submissions other than via a lawyer, and only on request by me and community members. This option was not publicised by the Commission. I am not an employee of the Commission, and it is not my role to perform duties on behalf of the Commission.

The Review is not inclusive if it does not hear from some parts of the community by reason of threats of criminal repercussions. I have no doubt that the Australian Christian Lobby and various anti-surrogacy lobbyists have strong opinions on criminalising international commercial surrogacy. I would guess that none of them felt concerned for their families' safety when making submissions, however ill-informed they were. And yet, intended parents who have lived experience of surrogacy, felt unsafe engaging in this process.

I reiterate these concerns, noting that Proposals 9 and 10 specifically refer to criminalisation and/or civil penalties for engaging in international commercial surrogacy, and proposals 37-41 canvas feedback relating to international surrogacy. I urge the Commission to seek feedback from the community most impacted by the proposals and to give assurances that any submissions will not give rise to criminal repercussions.

Proposal 9 places a positive obligation on intended parents to register their international surrogacy arrangement. In my experience, about a third of intended parents have already engaged in international surrogacy before seeking legal advice. I would hope that the function of such a proposal does not subject children born via 'unregistered' international surrogacy to stigma or penalty. It is usually ignorance and naivety, not recklessness that leads their parents to head overseas without pre-surrogacy advice.

I consider a civil penalty for engaging in international commercial surrogacy a better alternative to criminal sanction. I wish to note my concerns that civil penalty may present another form of stigma and othering of children born via international surrogacy, and the law itself may be performative virtue-signalling rather than effective at deterrence.

I agree that Australia has an obligation to manage our own citizens engaging in exploitative surrogacy including overseas. I accept that a civil penalty may go some way to signal to the community that the government believes in promoting the rights of surrogates and children beyond our own borders.

Proposal 10: facilitation of prohibited surrogacy arrangements

I appreciate the change from prosecuting or criminalising intended parents, and instead regulating the industry. I consider Option 10.3 to be most likely to be effective. I would like to see the industry be accountable for promoting unethical practices to the community.

I am concerned that third parties, such as trade shows and event promoters may not be captured by Proposal 10 and I would urge the Commission to consider broadening those included in 10.1.a. A trade show should also be accountable for the services they promote, even if the trade show is not directly procuring intended parents to engage in prohibited surrogacy.

Discrete service providers: While the proposal for SSOs assumes such a service will facilitate and support domestic surrogacy, I ask the Commission to consider whether other licenses should be available for service providers, such as:

- Agents and intermediaries, consultants and brokers providing surrogacy and adjacent services and supporting intended parents to engage in international surrogacy.
- Gamete donation banks and their representatives.
- Trade show and third-party promoters and event organisers.
- Courier companies providing gamete/embryo transport services.

Noting my comments below in response to **Proposal 37**, I believe service providers, including consultants, provide some benefit in understanding particular destinations. For example, a consultant that advises Australian intended parents about surrogacy in one permitted destination, could be licensed as a service provider only for the purpose of advising about that permitted destination. The license could be restricted to certain advice and services, and accountable to the National Regulator. The licensee could also consult to the National Regulator on the state of affairs in that destination.

I fear that without discrete licenses, underground service providers will continue to operate, and drive intended parents overseas, without any oversight or accountability.

While I think such a license is worth considering, I would query how it could be policed. I note that such consultants and advisors already operate in Australia, with minimal accountability. A licensing system would at least distinguish providers by license and make them accountable within Australia.

As a legal practitioner, I see no concerns in the way Proposal 10 is drafted, for the delivery of legal advice for intended parents who seek to engage in domestic or international surrogacy. It is not a lawyer's role to promote an international surrogacy service, and legal advice is/should be neutral in that respect.

I support the repeal of provisions that criminalise international commercial surrogacy.

Support getting started

Proposal 13: Requirement for a reason to access surrogacy

I support the general principle of Proposal 13, however am concerned with the continued use of the phrase 'intended parents must be *unable* to conceive, gestate, and birth a child…' Anyone with a uterus maybe be 'able' to gestate, including trans men. *Unable* is a definite term, meaning to not be able to do something. In practice, this relies on evidence of inability. I urge the Commission to broaden the eligibility to allow people with a uterus to opt-in for surrogacy without having to prove categorically that they cannot carry a child.

I note that Western Australia's *ART and Surrogacy Bill 2025* makes no mention of medical eligibility, ultimately (when passed) removing any requirement to provide evidence of an inability to carry a pregnancy.

Proposal 18: Requirement for psychological screening

Question D: *Should both the surrogate and the intended parents be required to undergo a psychological assessment?*

I understand the proposal for required psychological assessments is controversial amongst the counselling profession and I cannot comment on the pros and cons. I do believe that if one party must complete a psychological assessment, then all parties must do so. Intended parents and surrogates must be equal parties to the arrangement and therefore must be subjected to the same scrutiny and provided with the same supports as each other. Psychological assessment of the surrogate only, infers that her mental health should be scrutinised, but not the people she intends to carry for. This will lead to power imbalances and inequity between the parties.

Informed consent is assisted by all parties engaging equally in the process including for any required psychological assessments. A surrogate should have the right to be fully informed about the people she intends to carry for.

Proposal 19 Requirement for criminal history check

I endorse **Option 19.1**: There should not be a requirement for intended parents to undergo a criminal history check before engaging in a surrogacy arrangement.

I query why intended parents might be required to complete criminal record checks but not surrogates. What do the checks hope to achieve that they would only apply to some parties but not others? If criminal history (particularly offences related to violence and offences against children) is important, does that concerns not also relate to surrogates?

While I believe criminal record checks should not be mandated, I support SSOs that may require any or all parties to complete criminal record checks, as part of their business model. SSOs will want to establish safeguards and standards to deliver high-quality services, and that may include criminal record checks for parties engaging with their service.

American matching services often require parties to complete background and police checks, as well as home visits and medical assessments including drug testing prior to being accepted into their services.

Question E:

If 19.2 is adopted, I support the provisions of the South Australian *Surrogacy Act,* which provides that the parties must share criminal history checks with each other, but there is no requirement for specific offences to limit access to surrogacy. The decision whether to continue with the arrangement should lie with the parties. Informed consent is necessary.

Proposal 20: Legal advice requirement for intended parents and surrogates

I agree with the proposal as drafted.

Citation 213 of the Discussion Paper notes that in some jurisdictions, such as South Australia, there are very few practitioners that regularly represent the parties, 'leading to the problematic consequence that sometimes a single practitioner will be advising several parties to an arrangement.' I believe this is a misrepresentation or misunderstanding of the reality by someone who does not practice in surrogacy law.

The requirements for independent legal advice are legislated for the pre-surrogacy stage. There are no requirements for any party to be represented at the parentage order stage. In practice, the intended parents can engage a lawyer, who appears for them at the parentage order stage and will draft material on behalf of all parties. There may be a perception that the lawyer is appearing

for all parties, but in my experience, this is not the case and/or is done with full consent of the parties. The lawyer for the surrogate is not required, and the surrogate most often agrees to proceed without being independently represented at the parentage order stage.

It is my experience – advising in 120-150 domestic surrogacy arrangements each year of which 50-80 engage me to assist with the parentage order – that the surrogate does not seek to be legally represented for the parentage order hearing. Lawyers who believe they should be involved may not understand the community they represent, or the nuance of a surrogacy arrangement.

Surrogacy legal representation is entirely different from other practice areas. The parties are most often, consenting and in full agreement with each other. It is the legal process that makes them oppose each other – a reflection of our outdated adversarial systems and not of the parties' relationships. The Supreme Court of NSW parentage order documents refer to the parties as 'plaintiffs' and 'defendants,' language which the parties find confronting and upsetting. The birth parents are not *defending* an application to transfer parentage; they are consenting to it.

In my experience, state-based judicial officers have minimal to no experience of surrogacy, and some may approach it with a lens of scepticism and fear, seeking to find evidence of exploitation and coercion even when there is no reason to suggest it. I have had to explain *traditional surrogacy* and *gestational surrogacy* to judicial officers who have not previously come across those terms. Most state judges have not practiced in family law and unless I am mistaken, not one judicial officer in Australia has ever practiced in surrogacy law.

There are minimal definitions of what constitutes the best interests of a child in state and territory surrogacy legislation.

Our court systems do not reflect community expectations for surrogacy and the transfer of parentage. Matters of surrogacy that require judicial decision, should be referred to the Federal Circuit and Family Court of Australia where a specialist list is established. Judicial officers must be trained and experienced with family law and surrogacy.

I endorse Proposal 20.3 for law societies to develop practice accreditation for surrogacy lawyers, although in practice I do not think it would be viable. There are only 6-8 practitioners that would practice sufficiently in surrogacy law at this time; I hope the practice will grow and develop in the coming years. A specialist practice group should be recognised for delivery of surrogacy law services.

Proposal 21: Implications counselling

I generally agree with the proposals, leaving the detailed feedback to my counselling colleagues.

I am concerned with Proposal 21.1.c and query the need for two practitioners to be involved at the pre-surrogacy stage. I encourage the Commission to seek specific feedback from counsellors about the need or otherwise of having one practitioner complete psychological assessments and another to provide implications counselling. Victoria's PRP has dispensed with this required, and WA will be repealing that requirement.

I value the expertise of my colleagues in the Australian and New Zealand Infertility Counsellors Association however note that ANZICA is not a legislated regulatory body, and it does not have power to manage professional standards of its members. It is problematic to make ANZICA membership a requirement for a surrogacy counsellor, when the body is not itself established or resourced as anything other than an industry organisation.

I propose that ANZICA's regulation fall within the proposed National Regulatory body such that standards can be established and ANZICA be accountable to that same body. I believe ANZICA members would support more robust regulation.

Question F: *Should the surrogate's partner be required to undergo implications counselling?*

Yes, I believe it is beneficial for the partner to be involved in counselling. As a party to the arrangement, and the surrogate's main support throughout the process, I believe it is crucial that the partner be involved in all aspects. It is also a safeguard for the best interests of the child that may be born.

Question G: Should there be additional counselling requirements?

There should be provision for ongoing counselling for a period after the surrogacy arrangement has ended, including that the intended parents make counselling available for the surrogate. Post-birth counselling should not be required to transfer parentage.

Proposal 24: Enforcing surrogacy agreements

I agree with the premise that an arrangement should be enforceable save for those matters outlined in Proposal 23.

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?*

To both parts of the question, I think there should be provision to allow a party to enforce the arrangement even if the agreement is not compliant. It would appear to be a lawyer's role to ensure an arrangement is compliant and therefore does not make sense to disqualify an arrangement because of a lawyer's error. The parties should not be disadvantaged for non-compliance if the intention and aspects were clear.

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

If an arrangement includes provisions that are not outlined in Proposal 22, there must be allowance for them to not be enforceable. Some agreements include provision to nominate guardians to a child, if the intended parents are unable to take custody. Such a provision cannot be enforced on the nominated guardians. Other provisions, for example, may nominate the birth arrangements and hospital, which cannot be enforced if circumstances change.

Question K: *What is the best method of enforcement, for example a court?*

I question how an arrangement can be enforced, for example if the intended parents choose not to take custody of a child and the surrogate wishes to relinquish the child to them. Are we forcing the care of a child on people who do not want to care for it? In practice this is not possible, so the advice to the surrogate is that in fact, the arrangement is not enforceable against the intended parents, but that it can be enforced against her if she chooses not to relinquish.

I would hope that early dispute resolution methods would be employed for most disputes, with the parties engaging with qualified counsellors, lawyers and/or mediators and potentially via an SSO, at first instance. *Brilliant Beginnings* in the UK employs a qualified mediator. Perhaps similar

provisions to those in the *Family Law Act* for a section 60I certificate can be implemented, with court recourse if necessary and in urgent circumstances.

Proposal 25: Cost recovery for surrogates

I agree with the provisions for cost recovery outlined in Proposal 25. Some disputes arise around the time allowed for a surrogate's loss of earnings, and for the time limit on expenses being payable after the birth or the arrangement ends. I would hope the National Regulator establishes time limits that provide clarity for all parties and for the community.

The proposal at 25.2 directs that *'intended parents must reimburse the surrogate…'* and '*this must include…'* I have advised some surrogates carrying for a friend or family member and they ask whether they *must* seek reimbursement from the intended parents. Of course, the answer is no. The framing of the legislation should ensure the surrogate's costs are reimbursable and enforceable and allows for her to decide not to claim some expenses, as is not unusual amongst friends and family.

I support Proposal 25.4 for the National Regulator to formulate a monthly allowance to cover any common incidental expenses.

I endorse the recommendation outlined in paragraph 162 for broad categories and monthly allowance for incidental expenses. It is my professional experience that pressure on surrogates to receipt every expense can cause conflict between the parties.

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

Yes, I believe the National Regulator would be an appropriate entity to set caps including for the monthly allowance. However, such caps need to reflect the diversity of experiences, noting that some surrogates have more dependents and commitments on their time than others, and the cost of living would vary between locations. Colleagues have suggested a formula based on location and cost of living calculations.

Citation 240 references my submission and that of A. Whittaker, which I have read. The figures of $1,000 to $2,000 per month appear reasonable (to me), however I am reluctant to be responsible for choosing a figure. I am not invested in a particular figure. Many surrogates would find any figure too much. I recommend the Commission find independent ways for monthly payments to be calculated.

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

I do not endorse the use of the word *hardship*, which is defined as 'severe suffering' or 'a condition that is difficult to endure, suffering, deprivation, oppression.' Pregnancy can be difficult, and is risky, but I doubt many would describe it as 'severe suffering' and certainly not most surrogates who enjoy pregnancy and have willingly offered to carry for someone. Framing it as hardship may dissuade surrogates from seeking such payments and suggest to intended parents that it is not reasonable unless there has in fact been severe suffering.

Alternative phrases that I think are more neutral than *hardship* may include 'support payment' or 'compensation.'

I endorse the proposal in principle, and for a National Regulator to establish maximum caps for payments.

I also consider the framing of 26.2.a to be potentially problematic. 'Pain and suffering' could be rephrased to 'effort and time' which would broaden the concept for surrogates who do not suffer or find pregnancy painful. Or alternatively, the words 'effort and time' could be added to that clause. This comment could be taken as partial answer to **Question M**.

Every surrogacy, and pregnancy, involves effort and time, and an assumption of risk. Most endure some level of 'pain and suffering' through childbirth, if not in pregnancy. The framing of 26.2.a suggests only those that 'suffer' should claim payments, rather than encompassing all the time, effort and challenge of surrogacy and pregnancy.

I am concerned that Proposal 26.2.b may lead to disharmony between parties, however I accept the premise of it. In the case of a surrogate enduring a stillbirth, there would likely be pressure on her not to claim the additional payment, as the intended parents have also suffered a stillbirth and loss of their child. An independent management of escrow may alleviate some of the discomfort in those circumstances – the payment would not be discretionary if the escrow holder is directed to make payment after a triggering event.

I encourage the Commission to engage with US escrow companies to consider their models and payment regimes. SeedTrust Escrow Services www.seedtrustescrow.com is one reputable company.

I endorse the proposal for the National Regulator to manage payment caps and to establish standards for reimbursement.

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?*

Yes, I think Proposal 26.2.a could be broadened for payments for effort and time, not just pain and suffering. Surrogacy takes effort and time, regardless of whether a pregnancy and birth occur. Surrogates who do not deliver a baby should be compensated – or have the option to be compensated – for their time and effort for engaging in the process, which can be consuming for weeks and months before and even if no pregnancy is achieved.

Support when the child is born

Proposal 30: Administrative pathway to legal parentage

I thoroughly endorse Proposal 30 as drafted. I appreciate in particular the proposal for a specialist court list to be created for surrogacy applications.

Question N: Should the surrogate have a right to seek a declaration that they are the parent.

Yes, I do not think that right should be extinguished, and I consider that the Court should always be empowered to make such an order if it considers it appropriate to do so.

Proposals 31 and 32: Judicial pathway to legal parentage

I support these proposals.

Question O: Should judicial officers be required to consider any specific factors when determining the application?

Judicial officers should refer to the best interests of the child and in particular those matters outlined in section 60CC of the *Family Law Act* and human rights principles. Reference should also be made to the intentions of the parties in cases where the agreement may not comply with the requirements of an approved surrogacy arrangement.

Question P: Should there be a simpler pathway to legal parentage for intended parents who have engaged in a registered overseas surrogacy agreement?

Yes, registered surrogacy arrangements will likely include jurisdictions that have clear recognition of surrogacy and parentage, such as many states in the USA. It would seem appropriate that a registered surrogacy arrangement can have parentage recognised via an administrative process rather than court proceedings.

Question Q: What changes should be made to laws, policies or practices to ensure that intended pants have access to fair and adequate parental leave and surrogates have access to fair and adequate leave to recover from pregnancy and birth?

Parental leave policies either do not mention surrogacy or are confusing with respect to who is entitled to leave and for how long.

Parental leave policies should include specific reference to surrogacy including for:

- The pregnant and birthing employee entitlements to at least 6 weeks post-partum.
- The parent employee who will need to take leave to care for the child, and second parent leave to take leave for the birth.

Policies should be inclusive as to gender and marital status. Care policies should recognise that birthing is not synonymous with caring for a newborn. Discriminatory provisions should be repealed.

Regulating overseas surrogacy

Proposal 37: registering overseas surrogacy arrangements

I accept and endorse that Commission's principled approach to international surrogacy to encourage intended parents to either engage in domestic surrogacy, and to mitigate the risks of exploitative international surrogacy and promoting the rights and best interests of children.

Proposal 37 provides for intended parents to register the surrogacy arrangement prior to engaging in the arrangement and for the registration entity to provide a list of 'permitted destinations.' I reiterate my comments in response to Proposal 9 that a third of my clients do not seek advice about engaging in international surrogacy until after the fact, and oftentimes after a pregnancy is established.

What mechanism does the Commission propose for establishing what is a permitted destinations and on what basis? The surrogacy landscape changes week to week, and as a practitioner I cannot keep up with other countries' frameworks or processes, nor am I equipped to understand their legal frameworks which can be inaccessible or written in a language other than English.

Argentina might have been a popular destination for surrogacy, until legal and political developments in 2024 made it less viable. One reason for its popularity was that both intended parents were recognised as the child's parents; this changed in 2024 while surrogacy pregnancies were underway. A Supreme Court ruling declared that future surrogacy births would be required

to register the surrogate and biological father as the parents. That decision was not communicated to me, an Australian lawyer, via any formal channels. Most information is shared via media and social media after the fact.

If a practising surrogacy lawyer cannot keep up with the changing landscape, intended parents have no capacity, resources or knowledge to be able to do so.

Proposal 37.1.c.ii provides that intended parents must satisfy the registration entity that the surrogacy arrangement is non-exploitative. Noting that any surrogacy contract can be called 'altruistic' despite commercial payments being made, it would be naïve to assume that calling an arrangement 'non-exploitative' makes it so. The surrogacy industry is prone to virtue-signalling without any framework to establish any ethical standards.

I have no doubt that international industry professionals will be ready to pay lip-service to Australian standards, while they promote their services to Australian intended parents. An example is the World Egg and Sperm Bank which has claimed to be "Australian approved" and puts the word 'ethical' on all its promotional material – and has sponsored and attended the Fertility Society of Australia & New Zealand conference.

Proposal 37.1.d outlines that intended parents may be subject to civil penalty if they engage in 'intentionally or recklessly' engage in unregistered international surrogacy. Is it reckless to not have known of the requirement to register their surrogacy arrangement? Intended parents, including those from culturally diverse backgrounds, are vulnerable to exploitation, including from international surrogacy brokers. Chinese Australian intended parents, for example, are often courted by Chinese-based agents who facilitate surrogacy in Kyrgyzstan.

I recently provided legal advice to parents who had returned from Mexico with their second child born via surrogacy. Their first child was born via surrogacy in Australia. They were aware of the legal process for surrogacy and the transfer of parentage in Australia, prior to engaging in surrogacy in Mexico. And yet, even with this knowledge, they travelled to Mexico to engage in surrogacy to have their second child and did not seek legal advice until after returning to Australia. I do not believe they were reckless in their conduct, they were simply unaware.

We – experienced practitioners - often become aware of risky practices after the fact – and only when the media reports on it. For many years I have declared that the USA is, as a general rule, a 'good' option for surrogacy. But there are 50 states in the USA and purported to be over 800 surrogacy agencies across the country. American colleagues tell me that one in every two US surrogacy agencies close within two years of operating.

Recent events establish that the USA is open to exploitation (e.g. www.theguardian.com/us-news/2025/jul/16/california-kids-surrogate-mom), and a changing, volatile government (see: Trump generally, and specifically in relation to birthright citizenship and the erosion of reproductive rights). What happens when an 'approved' destination steps into exploitative or poorly regulated territory? It is unlikely that the Australian government would have the expertise, motivation or resources to run an up-to-the-minute register of approved destinations, when those of us in the industry cannot keep up.

The concept of "permitted destinations" suggests that a static answer can be provided to a dynamic question.

Instead of a list of 'permitted' destinations, I think the Australian government should put more resources into education and raising awareness of what ethical surrogacy involves, and the

human rights principles that should guide their decision-making. I am often asked by intended parents "Is X country a good option for surrogacy?" and my answer is that it is not about which country is 'good' but what safeguards are in place and whether the human rights of the parties and the child are protected – at the time they seek to enter the arrangement. The history of surrogacy whack-a-mole across the world means that approving destinations is risky for anyone providing that approval, as well as for intended parents.

I agree with Proposal 37.2 that if there is to be penalty for engaging in approved international surrogacy, that this should not prevent the intended parents from seeking that their child be granted Australian citizenship, a passport or a visa, or legal parentage.

Proposal 38: Legal parentage under the Family Law Act

I support a process for legal parentage to be recognised in the *Family Law Act;* however, I query whether they 'must' make an application, or that it should require a hearing. If criteria are met, I would propose that such a pathway be available as an administrative option, similar to how we lodge applications for Consent Orders in parenting matters.

Question S: In relation to the registration process in Proposal 37.

If there is to be a registration entity, it should be either the National Regulator or an SSO.

If there are to be permitted destinations, then assessments should be based on human rights principles and ethical practices including:

1. Identified surrogates (noting anonymous surrogates are becoming more prevalent).
2. Informed consent.
3. Medical screening of the surrogate.
4. Independent legal advice in the destination country.
5. Access to psychological assessment and support.
6. Age limitations (ie. that a surrogate be over 25).
7. The surrogate must be able to communicate in her preferred language and/or have access to a qualified, independent interpreter, and written documents in her preferred language.
8. Residency and citizenship requirements for the surrogate to avoid 'travelling surrogates' involving glorified human trafficking.
9. Recognition of the surrogacy arrangement in the country of destination. Clear pathways to parentage would be preferable, but noting proposals for pathways to parentage in Australia, should not be mandated.
10. The child's right to a birth certificate, identity and nationality are not compromised.
11. Information about the surrogate and child's access to adequate healthcare.
12. Identified or information-release donor conception.

At this present point in time, I would expect that only USA and Canada could confirm all those elements. Other countries could confirm most elements, while others could easily provide lip-service. To verify any of them would require independent counsel in those countries to advise the National Regulator at the time. No one in Australia is qualified to give that advice, even if they claim to be able to verify providers.

I am not convinced the registration process would work however I think for some intended parents it would provide clarity about their options for international surrogacy. The registration process and particularly the requirement for the registration entity to provide information about best

practice surrogacy and human rights principles, would raise the standard for what intended parents should expect and seek when engaging in international surrogacy.

I do not believe nor endorse any approach that would require intended parents to establish that they have made reasonable efforts to engage in domestic surrogacy before engaging in international surrogacy. There is some sense of entitlement in that suggestion – that somehow Australia owes all intended parents a surrogate, before they can travel overseas.

Even if we had sufficient women offering to be surrogates in Australia, which is highly unlikely, some intended parents will seek alternatives overseas because it suits their budget, timeline and expectations. For some intended parents, international surrogacy offers them some control over the process such that they do not wish to engage in domestic surrogacy.

Streamlining processes to return to Australia

Proposal 39: Front-loading citizenship, passport and visa applications

I agree with the proposal as drafted. I endorse any proposal that assists intended parents to access services for their child born via international surrogacy, to protect the rights, identity and citizenship for the child.

Question T-X.

I would seek feedback from registered migration agents and intended parents who have engaged in the process about this proposal and these questions. I refer to my comments at Proposal 9 that intended parents are best placed to provide this feedback but may not feel safe in making submissions.

I appreciate the work of the Commission in accepting feedback and submissions and working toward a framework for ethical, accessible surrogacy in Australia.

Sarah Jefford OAM

24 November 2025