

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Organisation: Anglican Church Diocese of Sydney

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**LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND
JUSTICE**

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NSW**

Submission from the Social Issues Executive

Anglican Church Diocese of Sydney

29 September, 2008

We commend the Government for referring this important matter for inquiry and thank the Committee for the opportunity to make a submission. The Social Issues Executive is an advisory group within the Anglican Church Diocese of Sydney. The views expressed in this submission are those of the committee members.

The National Health and Medical Research Council (NHMRC) Ethical Guidelines on Assisted Reproductive Technology (ART) state that "Good regulation (in particular, good legislation) depends in part on a well-informed public discussion of potential benefits, possible risks, potential abuses and other areas of concern". We therefore respectfully suggest that in contrast to recent inquiries in relation to surrogacy in other states, allowing only 6 weeks for interested parties to make submissions on this complex issue is an inadequate amount of time, particularly when a Media Release about the inquiry stated that "we are keen to hear from as many people as possible".

While it is clearly outside the terms of reference, we nevertheless wish to reaffirm at the outset, our opposition to any form of commercial surrogacy.

As legislators you have been asked to consider the legal and practical implications of surrogacy, but at this point it appears to be taking place in isolation from any discussion about the ethical dimensions or appropriateness of surrogacy. Ethical consideration must start with the child. Along with this moral deliberation will be consideration of such concerns as the surrogate mother, the effect on wider society and the commissioning couple. Such a discussion would be welcome in this debate.

We intend to make some initial general comments and will then briefly address points a, b, c, d, f, g, h and i of the terms of reference.

The longing for children

Discussions about surrogacy often begin with an appropriate concern for the grief and the longing for a child by the commissioning couple. In Christian thinking, the desire for children is a part of our created humanity. This longing for children, whether by same or opposite sex couples, married or de facto couples, single men or women, is an expression of a God given desire that is good. As infertility seems to be on the rise, whether it is biological or social infertility, the human quest to control infertility springs from this good desire to have children.

But Christianity also teaches that children are a gift, to be welcomed and cared for within marriage. We state this because we believe that whether a child is planned or unplanned, the child is a gift to be treasured and nurtured and this understanding shapes our attitude to all aspects of reproduction.

With the advent of many forms of ART and the range of options this has opened up, the capacity to control our destiny and decision making in the area of fertility has greatly increased. This is especially the case with the technological possibilities now available with surrogacy arrangements which allow for third parties to be involved at a distance. Previously, some violation of sexual exclusivity in the commissioning couple's relationship was required.

Within Christian bioethical literature there is a range of viewpoints on the place of ART, ranging from complete opposition to any form of artificial intervention, right through to embracing all available technologies as long as no-one is harmed. We rejoice in the medical advances in the area of infertility and the possibilities these open up for couples to experience parenthood, but suggest that they all come with extremely complicated ethical considerations. Since the dawn of humanity children have entered this world through the union of a man and a woman. It is our view that as society moves further away from this 'created order', the ethical problems increase.

Some Christian writers believe that asserting greater control over reproduction somehow distorts the moral and theological significance of parenthood: "instead of seeing procreation as a means of receiving and caring for the gift of a child, it becomes a reproductive project of obtaining a child of one's own. And in doing so, it is difficult to see how such a child cannot be regarded as something other than an artifact or commodity" (Waters, B. *Reproductive*

Technology: Towards a Theology of Procreative Stewardship, 2001). Of course the risk of commodifying children is not limited to the area of ART, but the potential for this to happen is greater as the process of reproduction is removed from the bodily relationship between a man and a woman and is segmented into separate processes of conception, pregnancy and child rearing.

Though not always articulated as such, there seems to be a general consensus within the community (as demonstrated by the many inquiries and the recent decisions of the Standing Committee of Attorneys-General - SCAG) that surrogacy arrangements give rise to some of the most ethically complicated forms of ART and we would certainly place surrogacy at the most complicated end of the spectrum. This is because it moves from a kind of intervention that is therapeutic (that corrects a biological flaw) within the reality of a relationship between a man and a woman; to the involvement of a third party (and indeed sometimes a fourth and fifth party).

While we state our position based on a Christian understanding of humanity and creation, we accept that not everyone shares this religious viewpoint. And yet, we suggest that many others share similar concerns, based not on any religious belief or affiliation, but having come to their own conclusions based on a view of the 'natural order' of the world.

The effect on the parties to a surrogacy arrangement

It has been said of surrogacy that the "the transferring of one woman's pain to another woman" is not the solution in any society to the problem of infertility (Kane, cited by Frame in *Children on Demand: The Ethics of Defying Nature*, 2008). While some may contest this view of transferring the burden of one to another, by citing examples of 'happy' surrogacy outcomes, the statement recognizes that pregnancy itself is a powerful combination of biological and relational connections. In our view, to carry a baby with the intention of giving it up, is counter intuitive and indeed against our created purpose, to carry a baby with the intention of giving it up. Pregnancy becomes a service rather than a relationship. It is at this point that surrogacy and adoption are significantly different in that adoption is the response to an unplanned pregnancy, whereas surrogacy involves the intention of carrying a baby only to relinquish it. Rae (in Kilner, J.F. [ed.] *The Reproduction Revolution: A Christian Appraisal of Sexuality, Reproductive Technologies, and the Family*, 2000) puts it like this:

"...they would be bringing about a situation in which they were encouraging a pregnant mother – indeed, the mother of 'their own child' – to do precisely the opposite of what God created her to do. She was created to pour herself, physically and emotionally, into her developing child. Yet she would be asked to refrain from at least the emotional dimension of the investment she would normally make in the child. If all dimensions of our being are important parts of an integrated whole, such an arrangement would undoubtedly prove destructive for the child and for the woman herself, to a degree that, at present, God only knows".

We will now briefly comment on the following terms of reference:

a. The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW.

While the legal technicalities of this discussion go beyond our expertise, we strongly support Government regulation of surrogacy arrangements and believe this is in the best interests of all parties. We particularly stress the need to proceed cautiously.

Clearly citizens do not expect to have government interference in private decisions about reproduction (and yet freedom in this area is not unlimited, for example governments have rightly made laws about incest). There is nevertheless an important distinction in the case of surrogacy. As people depart from the 'natural order' of procreation, however good the intention, the risks to the commissioning parents, the surrogate mother and particularly to the child greatly increase. We believe it is the responsibility of government to protect the interests of these individuals, particularly those who are most vulnerable to harm, but also the interests of society as a whole.

We note that in the NHMRC Ethical Guidelines at point 13.1 it states that "It is ethically unacceptable to undertake or facilitate surrogate pregnancy for commercial purposes. Clinics must not undertake or facilitate commercial surrogacy arrangements". If the Government were to agree to altruistic surrogacy, it is unclear who will determine the appropriate compensation for medical and other expenses, and when such an arrangement crosses the line to become a commercial arrangement by another name. We suggest that in the context of altruistic surrogacy, some clinics may be indirectly facilitating commercial arrangements (perhaps unintentionally). We recommend that the committee consider investigating how such practices might already be occurring and what measures would need to be instituted (such as how to police such a ban), to be confident they would not occur in the future.

b. The criteria, if any, that the intended parent/s and/or birth parent/s should have to meet before entering into an altruistic surrogacy arrangement.

In deliberating the criteria for entering into a surrogacy arrangement it becomes increasingly clear that there is no easy way forward as the interests of all parties are not necessarily consistent with each other. We do not intend to make detailed or comprehensive recommendations about criteria, other than to say that any requirements should be based on the principle of what is primarily and ultimately in the best interests of the child. Based on this principle we make the following brief comments:

The Commissioning parents – we suggest the primary criteria for entering into a surrogacy arrangement should relate to the mother's inability to carry a baby to full term. If a couple's fertility problems relate to conception only, we would recommend other techniques such as IVF be exhausted. An example where surrogacy may be appropriate is if a couple has had an embryo harvested through IVF but due to complications (such as an unexpected hysterectomy) it is no longer possible for the embryo to be implanted in the mother's uterus. Rather than discarding the embryo, it would be preferable in this situation to arrange for a surrogate mother to carry the baby to full term.

The surrogate mother – We suggest that it should be a requirement for the surrogate mother and her partner/husband to receive counselling about the social and psychological implications of entering into a surrogacy arrangement. Similarly they should receive advice and information about the legal consequences of entering into a surrogacy arrangement. We support in general the principle that the surrogate mother should have reached an age of maturity and have experienced pregnancy and childbirth. However, we also note that this requirement in turn, raises other complications. If the surrogate mother already has children, whether genetically related to the 'commissioned' child or not, these children are vulnerable to emotional harm as a result of either a 'successful' or 'unsuccessful' surrogacy outcome. We also believe that the possible motivations for altruistic surrogacy should be explored, so that if any pathology is present, it can be identified and treated appropriately.

c. The legal rights and responsibilities that should be imposed upon the intended parent/s and/or birth parent/s.

Once again the specific legal questions are beyond our knowledge area, however we provisionally suggest that an adoption order may be an appropriate mechanism to provide legal protections to commissioning parents, the surrogate mother and the child born of a surrogacy arrangement. In particular we support the process of assessing both the commissioning couple and the surrogate mother (and her partner where relevant) for their suitability to be parents, particularly in the event that the arrangement may not proceed as originally intended. We also support the right of the surrogate mother to decide against relinquishing the baby and that there should be adequate legal provision for this possibility.

d. The role that a genetic relationship between the child and the intended parent/s and/or birth parent/s should play in any altruistic surrogacy arrangement.

We do not intend to comment specifically other than to say that surrogacy arguably raises more problems than it solves and there is no legal mechanism that ever can perfectly protect everyone's interests if it anything goes wrong. Notwithstanding the cases where surrogacy has been a 'success', we suggest that surrogacy always carries with it the potential for significant harm to any or all of the parties. It seems that for every potential benefit of a particular surrogacy arrangement (e.g.: the surrogate mother having no genetic relationship to the child, so as not to form an attachment) there is a potential negative outcome (e.g.: if the surrogate mother refuses to relinquish a baby, who genetically belongs to the commissioning parents). We suggest that the existence of a genetic relationship between the commissioning parents and the baby should not override the birth mother's natural right to keep the baby after birth.

f. The rights that a child born through an altruistic surrogacy arrangement should have access to information relating to his or her genetic parentage, and who should hold this information.

We strongly support the rights of children born through surrogacy arrangements to have access to identifying information about their genetic origins. This right of the child to access information should also be conveyed to all the parties to surrogacy prior to entering into the arrangement. We urge the government to safeguard the records, rather than leaving this responsibility to the service providers. We also suggest that consideration be given to how best to maintain the accuracy and integrity of the birth certificate. One limitation in having a donor register is that it is dependent on the child/adult having first been advised that they were conceived through ART, therefore birth certificates might also be a suitable source of information about genetic parents or at least contain information to be made available at 18 years of age.

g. The efficacy of surrogacy legislation in other jurisdictions and the possibility and desirability of working towards national consistency in legislation dealing with surrogacy.

h. The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by surrogacy.

In relation to points g. and h. we wish only to support the commitment of the SCAG to look at uniform laws in relation to surrogacy. We also draw your attention to a recent Federal Bill, *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Bill 2008* (which at the time of writing this submission, is currently before a Senate Inquiry), the intention of which is to remove discrimination to same-sex couples in relation to financial and work related entitlements. It is our interpretation of this Bill that it inadvertently gives validation to surrogacy arrangements which are not necessarily in harmony with State laws and pre-empts the current State inquiries into this complex and sensitive area.

i. Any other matter.

It is well accepted that there are dangers associated with commercial surrogacy, particularly in relation to the exploitation of couples and potential surrogate mothers, not to mention the questionable ethics of profiting from surrogacy. Although well-regulated altruistic surrogacy would not involve financial coercion, it can nevertheless result in unintended psychological coercion. A surrogate mother may begin with a sincere commitment to help a couple have a child. But powerful expectations that she will relinquish the child will cause distress should she change her mind. This inescapable and inadvertent pressure is arguably greatest for surrogate mothers who are related to or have a close relationship with the couple, and we believe it places the surrogate mother in an untenable position.

Conclusion

We suggest that altruistic surrogacy is an example of a practice that exists to achieve a good end, but the practice is itself extremely problematic. Even for those who exclude God from the discussion, on any account of human anthropology there is a biological and emotional connection between a mother and her child that should not be broken by design. The segmentation that occurs in altruistic surrogacy between conception, pregnancy and child-rearing breaks this relational connection, and in so doing creates a constellation of ethical, practical and legal dilemmas.

We are inclined to agree with Tom Frame who writes in his book *Children on Demand: The Ethics of Defying Nature*:

"Surrogacy meets the desire of adults who want to be parents. Our society must first consider the needs of the children such adults wish to produce by this means. The issue here is not one of harming the child born through surrogacy but one of potentially adding to the burdens that make living more difficult..."

We urge the government to give careful consideration to this area of law and bioethics and to legislate in a cautious way that limits altruistic surrogacy to extremely rare situations and protects the interests of all parties, primarily the child, who is unable to consent in any way to the arrangement.

We thank you once again for the opportunity to make this submission and would be willing to address the committee in person if required.

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