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INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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1 The ethical and social status of surrogacy itself

The discussion paper starts from a distinction between 'commercial' and 'altruistic' surrogacy, a distinction which implies that what is ethically (and socially) most significant about surrogacy is whether or not it involves a commercial arrangement. There is, however, a prior question, which concerns the ethical status of surrogacy itself.

The ethical status of surrogacy is, of course, controversial. But the ethical issue should be addressed and not set aside. Indeed, since the ethical controversy is about whether all surrogacy arrangements are intrinsically unjust to, and thus not in the best interests of, the child who is born as a result of the surrogacy arrangement, it is extremely odd that the Parliament's Standing Committee on Law and Justice would conduct an inquiry into legislation into so-called 'altruistic' surrogacy (surrogacy motivated by reasons other than commerce) without addressing that primary ethical question (Is surrogacy unjust to the child born of the arrangement ?) and a variety of secondary ethical questions (for example: Is surrogacy unjust to the surrogate mother?). These are not matters of 'private morality' which might be thought not to be the responsibility of the state: they pertain to social arrangements concerning some of the most vulnerable members of our community (children conceived with a view to being separated from their birth mother). Nor are they matters to be settled solely on the basis of the preferences of those who have preferences in the matter. For one thing, those most affected - the to-be-born children – have no chance of expressing their preferences. For another, preference satisfaction in itself is not a sound basis for any social proposal: consent is necessary but not sufficient.

On one view, all surrogate arrangements (whether 'altruistic' or 'commercial') are intrinsically (that is to say, in and of themselves) unjust to the child who is born as a result of the surrogacy. On this view, surrogate arrangements cannot be in the best interests of the child because they violate the biological bond between biological parent and child and thus violate the child's right to be loved and raised by his or her biological parents. (A contrary view is that surrogacy itself is ethically neutral, that what matters ethically are the circumstances under which it is conducted, in particular whether it is associated with a commercial motive.)

There are other ethically-controversial aspects of surrogacy. It can be argued that surrogacy exploits the woman who carries and bears the child by treating her (with her consent or not) as mere incubator of the child. And it can be argued that surrogacy generally involves an unequal (and thus unjust) relationship between the commissioning couple and the surrogate mother.[1]

A Standing Committee on Law and Justice should address these questions.

Indeed, the Parliament of NSW should not enact laws which, by facilitating surrogacy arrangements, will intentionally allow children to be brought into existence in ways that will be unjust to those children. The fact that a surrogacy arrangement is 'altruistic' does not compensate for the more basic fact that surrogacy in and of itself involves an injustice, and foreseeable harm, to the child who is the 'object' of the arrangement. It is surrogacy itself that ought to be prohibited.

In addressing this matter, the Committee should take proper cognizance of the fact that the 'fertility industry' as a whole is an 'interested' party in this inquiry, that is to say, it stands to gain more as laws become more permissive laws and thus trivialize the significance of a child's having and knowing his or her natural biological mother and natural biological father. This is not to impugn the motives of all who work in the fertility industry: it is just to remind the Committee of its social responsibility to take proper account of the possibility of conflict of interest in arguments advanced by anyone who stands to benefit, financially or 'professionally', from facilitating surrogacy arrangements.

2 The law should reflect the rights and responsibilities of natural biological parenthood

The law should (continue to) reflect the natural procreative relationship between one man and one woman who are together committed to caring for and raising their child. It should reflect the significance and social value of human procreation over reproduction. Human procreation should be governed by concern above all for the rights and best interests of children.

[1] Laura M Purdy: Surrogate Mothering: Exploitation or Empowerment? in *Bioethics: An Anthology,* edited by Helga Kuhse and Peter Singer, Blacwells, 1999. Susan Dodds and Karen Jones: A response to Purdy, in Kuhse and Singer, op cit.

For this reason, the right to found a family should be limited by children's rights to have natural origins, to know their genetic identity, to be conceived with natural gametes from an identified living adult man and an identified living adult woma, and to have contact with their biological father and biological mother.

For the sake of children, the basis of family law should be the law's recognition of the natural biological reality of the bonds that exist between parents and their biological children, and thus its recognition of the innate rights that children have with respect to their parents and the innate obligations which parents have with respect to their children. The law's recognition of natural biological parenthood should not be replaced or diluted by the legal fiction of 'legal parenthood' or parenthood by legal nomination.

3 Implications for surrogacy of the UN Convention on the Rights of the Child

Article 7 of the UN Convention of the Rights of the Child provides that the child has 'from birth... as far as possible, the right to know and be cared for by his or her parents.'. Article 8 gives the child the right 'to preserve his or her identity, including nationality, name and family relations as recognized by law.'. And Article 9 imposes a duty on states to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.'.

When the Convention was drafted, the new reproductive technologies were not in contemplation. However, when the words in the Convention are given their usual meanings, any arrangement which separates children from their biological parents intentionally contravenes these articles in the Convention. Margaret Somerville has recently pointed out that, given the advent of the new reproductive technologies and the powerful commercial forces associated with them, there is now a need to make the implications of these Articles explicit, that is to say, there is now a need to give legislative recognition of the following two human rights of children: (1) The right to be conceived with a natural biological heritage - that is, to have unmodified biological origins - in particular to be conceived from a natural sperm from

one identified living adult man and a natural ovum from one identified living adult woman. (2) The right to know the identity of one's biological parents.[2]

The law should (continue to) reflect and support biological family formation as the context for human procreation. It should support the natural biological relationship between parents and children. Any exception to that (as in adoption)should be recognized only on the basis of the best interests of a particular child, for example when separating a child from his or her biological parents is either unavoidable or the least harmful option.

It is one thing for a society, in the best interests of a child, to separate a child from his or her biological parents (as in adoption when that results from an accidental pregnancy). It is quite another thing for someone deliberately to arrange that a pregnancy in circumstances in which the child is be removed from its biological mother or father or both (as in planned surrogacy). In reflecting on these practices, Australians cannot avoid recalling the horrors of past practices in relation to indigenous children.

In order to avoid intentionally facilitating injustice to to-be-born children, society ought not to be complicit in setting up such arrangements. Nor should the permissibility of exceptional arrangements which separate children from their biological parents (as in adoption) be used as the basis for a claim that, since such separation is ethically and socially legitimate in the case of adoption, it should be thought to be ethically and socially legitimate more generally (as in planned surrogacy).

4 Same-sex parenting orders

Same-sex parenting orders (which no doubt are proposed with the best of intentions towards homosexual adults) would deny children their right to a mother and a father, in particular their own biological parents. Such orders confuse the identity of children of surrogate arrangements. Adopted people and donor-conceived people both attest to this universal need (and not mere preference) for confidence with respect to one's own (biological) identity. Same sex parenting orders would create confusion with respect to the child's identity. Even if a child were told the identity of his or her natural parent(s), there is a vast difference between a child mere knowing such facts about his or her identity and a child actually developing his or her own

[2] Margaret Somerville: Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive technologies, *Journal of Family Studies* (2007), 13: 179-201 Extensive use has been made, in this submission, of the ideas found in this article.

identity in the context of growing up as a member of one's natural biological family with one's natural biological parents.

Since research is increasingly showing that men and women parent differently[3], that certain genes in young mammals are activated by parental behaviour[4], those arguing that same-sex parenting is just as good for children have the burden of proof. They have not discharged this burden, for the evidence is lacking.

The Parliament recently gave legal recognition to the child's right to knowledge of his or her biological parents when it banned anonymous donation of gametes. The Parliament should maintain its commitment to recognizing the ethical and social priority of the best interests of the child over the (even heart-felt) preferences of same-sex couples. The community should not be complicit in any arrangement which would confuse a child's natural biological identity. For this reason, same-sex couples should not be eligible for 'parentage' orders .

5 AHEC requires that participants understanding the ethical implications of surrogacy

The Australian Health Ethics Committee (AHEC) has pointed out that clinics should not facilitate surrogacy unless every effort has been made to ensure that participants have a clear understanding of the ethical, social and legal implications of surrogacy.

AHEC's requirement would certainly not be met by 'counselling' as anticipated in NSW's position paper.

At the very least it would require the attempt to ensure that participants understand:

(a) that surrogacy (whether or not it is 'altruistic') is ethically controversial,

(b) that on one view it is intrinsically unjust to the child (because it involves the deliberate separation of the child from his or her biological mother) and to the surrogate mother (because it involves

[3] See references in Somerville, M, op cit.
[4] See reference in Somerville, M, op cit.

treating her (whether she consents to this or not) as a mere incubator, that is: a mere means to an end),

(c) that it involves experimental social arrangements in which the most vulnerable person, the child, has no opportunity to consent to being the subject of such a social experiment,

(d) that since (on one view) conferring legal parentage orders on same-sex couples may deprive the child of his or her right to know and have contact with a mother and a father (preferably his or her biological mother and biological father), it should not be facilitated by society except on the basis of the best interests of a particular child, that is to say, when separating a child from his or her biological parents is either unavoidable or the least harmful option.

6 Conscientious objection

If laws which approve surrogacy procedures are introduced, those laws should also provide robust provisions which secure respect for conscientious objection to participation in such procedures and which require that no one be disadvantaged because of a conscientious objection. People who have conscientious objections to assisting pregnancy for single women, or on behalf of a homosexual couple through surrogacy, should have their rights to conscientious objection respected.