

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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Declaration: Although I am a member of the NHMRC Australian Health Ethics Committee (2006-9), this is a personal submission as a philosopher and Catholic ethicist.

1. I distinguish between questions of **ethics** and questions of law. Ethics concerns all aspects of morality, i.e. of what it is to live a good human life. The focus of the **Law** is narrower: issues of **justice**, the **common good**, the **protection** of the vulnerable etc. – i.e. those aspects of morality that bear upon our living together in a democratic, civilised society.
2. Although morality and law are distinct, the law has an **educative** role: for many people, whatever is legal (or not illegal) is also ethically permitted.
3. In relation to surrogacy arrangements, ‘law makers’ face a **dilemma**: on the one hand, marriage, parenting arrangements, and the best interests of children are obviously issues for legal regulation; on the other hand, it is not obvious how surrogacy can be legally regulated in a satisfactory way:
 - a. At present NSW law says nothing about surrogacy – this sends an ambiguous message, and does not regulate abuses, but at least it doesn’t encourage surrogacy or suggest it is ethically unproblematic.
 - b. If a new law were made to regulate surrogacy, this might add some useful protections, but it could also imply that surrogacy is ethically a good thing in itself, and this is highly debatable.
4. Some key philosophical **distinctions** in relation to ethics:
 - a. Between **MEANS** and **ENDS**
 - i. A good end (e.g. the birth of a child) does not necessarily justify the means used to attain that end.
 - b. Between **MOTIVATIONS** and **ACTIONS**
 - i. A good motivation (e.g. compassion or altruism) does not necessarily justify the action a person takes to help another.
5. Surrogacy is a means, not an end in itself: is it a *good* means? Is it good to ask or to allow a woman to carry and give birth to a child who is then to be given away to ‘commissioning’ ‘parents’ who will raise that child apart from its birth mother?
6. This arrangement is sometimes described in terms I find distasteful: “rent-a-womb”, a woman as “incubator” etc. If you agree with me, I invite you to reflect on why these terms are distasteful. Isn’t it because they *de-humanise the role of the birth mother* and commodify her relationship with the child she carries? If, on the contrary, we respect the full meaning of the relationship between a mother and the child she gives birth to, then we begin to appreciate why many of us believe surrogacy is not a good thing to do, even if the purpose is to help people. Surrogacy contradicts the natural bond between mother and child.
7. Surrogacy is bad in many respects:
 - a. It creates confusion for the child between his various “parents” (genetic, birth, legal etc.)
 - b. It either de-humanises the birth mother (by treating her merely as a means) or - to the extent that there is a real human bond between birth mother and child - it creates anguish as the bond between birth mother and child is broken.
 - c. It doesn’t truly enable the commissioning mother “to have a child of her own” – but merely to have a child to raise as if it were her own.

8. It is not surprising, therefore, that surrogacy arrangements are fraught with difficulties:
 - a. Birth mothers who do not wish to give up their child;
 - b. A power imbalance between commissioning parents and birth mothers, the latter commonly from economically deprived backgrounds, poor countries etc.
 - c. Lack of transparency on birth certificates;
 - d. Confusion about genetic parentage, etc.
9. Ideally, the Parliament of NSW should prohibit all surrogacy arrangements. But...
 - a. If there is no consensus on prohibition, then it is not obvious whether the parliament would be better to say nothing about the practice or to try to regulate it. Both options would have good and bad consequences. It is not clear that any form of regulation can succeed in lessening or preventing the difficulties already mentioned.
 - b. If some form of regulation is attempted, its guiding principle must be **"what is in the best interests of the child"**. Since we cannot predict the future, these best interests must be determined on the basis of fundamental human rights and common principles for a good human life, along with whatever limited empirical evidence is available. Any regulation should ensure:
 - i. Transparency and full disclosure (since the child has the right to full information about his genetic parentage)
 - ii. Surrogacy arrangements remain 'non-binding' (thus giving priority to the natural bond between birth mother and her child)
 - iii. Same-sex parenting orders for children born through surrogacy are not permissible (since every child has the right to a mother and a father).
 - iv. Recognition of the right to conscientious objection on the part of individuals, agencies and institutions that do not wish to be involved in any surrogacy practices. (This right must remain applicable across all health care services – it is a right that should be characteristic of any society that believes it is 'liberal' and 'democratic').
10. Reply to some objections:
 - a. *"Aren't surrogate mothers free adults and volunteers?"* Perhaps they are, notwithstanding various forms of inducements and power imbalances, but in any case, we don't always allow people to do whatever they want to volunteer for; that's one reason we have Human Research Ethics Committees – to protect (good) people from making potentially unwise decisions!)
 - b. *"Some surrogacy arrangements seem to work out happily for all involved"*. Perhaps they do – though it may still be too early to judge – but in any case, every surrogacy arrangement involves a grave risk – to the welfare of the child and the adults affected. We have enough experience by now in relation to the practice of removing Aboriginal children from their natural parents, the adoption systems past and present, the debates about anonymous gamete donation, etc. to know just how problematic all such situations are. How will future generations judge this generation if we endorse surrogate parenting and its inevitable harms and injustices for some, even if not, all its participants? Our laws should give priority to protecting the vulnerable, rather than expanding the domain of the powerful. If our Parliament does not speak for, and protect the rights of, the children of the future, who will?
 - c. *"It's happening anyway, so let's legalise it"*. Well, it's happening *in very small numbers*, but before we legalise it we must seriously reflect on whether we think surrogacy arrangements really are good things in themselves, whether in principle they really benefit children. This is far from obvious. Most of the discussions at this Standing Committee have focussed on finding

ways of lessening or preventing the various harms that are inevitably associated with these arrangements. This should remind us that the whole practice is ethically dubious! There is a danger that by explicitly legalising the practice of surrogacy we would be “normalising” the practice. I think it would be better to tolerate the very small number of surrogacy arrangements that take place, without giving them legal endorsement. The main legal regulations we require concern agreed matters such as: that children have the right to know their genetic parentage; that parenting orders are made only in the best interests of the child; that mandatory counselling occur prior to the use of artificial reproductive technologies, and so on. Such regulations need only focus key issues applicable in a wider range of situations, without necessarily referring to – or endorsing – surrogacy as such.

Thank you for the opportunity to make this submission.

March 19th, 2009.