

## **INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW**

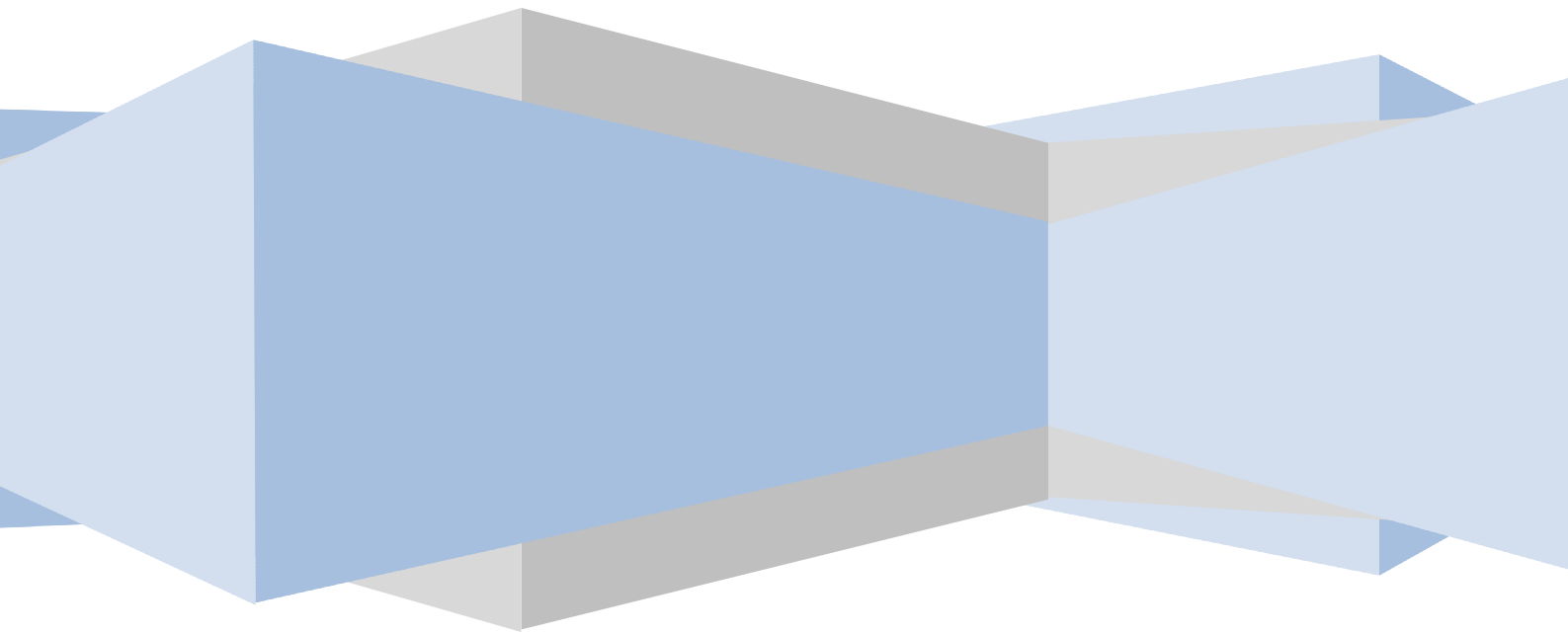
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**Date received:** 16/03/2009

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# Submission for “Legislation on Altruistic Surrogacy in NSW”

By Mark Bartlett, David Beasy



The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
Sydney NSW 2000

*Monday 16 March 2009*

Dear Committee Members

**RE : Legislation on Altruistic Surrogacy in NSW**

Thank you for giving us this rather timely opportunity to present to you our personal journey with respect to altruistic surrogacy.

**Our Personal Journey so far**

Our names are David Beasy and Mark Bartlett. We are a same sex couple who have been together for just over eight years and reside in Sydney, NSW. We have both desired to form a family for several years and have examined numerous options for achieving this. We are currently in New Zealand following the sooner than expected birth of our son Ethan who was born on 10 February 2009. Obviously one of us is his father and his biological (surrogate) mother is a New Zealand resident who has given us the most treasured gift. We plan to return to Australia in several weeks following the completion of some legal matters.

We have looked at various overseas options among which were going to the United States which has more liberal surrogacy arrangements than most other countries. While we were very keen to have a family this option did not really present the ideals we were after in such an arrangement. Most surrogacy arrangements are made through a Fertility Clinic which charges a fee for the matching of available surrogates and intending parents. In addition to this the surrogate charges a fee which increases with the number of previous successful surrogacy arrangements. We met our potential surrogate outside the network of Fertility Clinics. We were not successful on this occasion as the surrogate chose another couple. Throughout the process there were several aspects of the United States option which we were uncomfortable with. Firstly there was the mindset of the surrogates effectively charging a fee to carry a child which were uncomfortable with and further to this the involvement of the Fertility Clinics which we felt further tried to exploit intending parents by the fees they charged. Further to this was the fact that in most cases the surrogate did not want to be involved with the child afterward.

In New Zealand payment for such arrangements is illegal (except for maternity clothes, supplements, medical expenses, legal fees). The appeal for us of altruistic surrogacy was effectively the mindset of the surrogates. As they were unable to obtain payment for carrying the child, their motivation for being a surrogate was the selfless act of being able to give joy to a childless couple (same sex or opposite sex) through providing to them an opportunity for making their dreams of rearing a family a reality. For us one of the most important aspects of which we were concerned was the ability for our child to know his background and to have some form of contact with his biological mother. Most surrogates we have met through this process wish to be kept informed of the progress of the child and the various milestones of the child's life. We felt this was important to the wellbeing of our child.

Finding the surrogate was by internet based forums where initial contact was made. Over a period of time we kept communicating via emails, telephone conversation and eventually met in person several times. David and I cannot stress enough the importance of both intending parents and surrogate getting to know one another and clarifying all aspects of the pregnancy including amongst others the expectations of each party on the other, care of the child with respect to immunisation, birthing options and circumstances when pregnancy should be terminated, etc. We did not undergo any form of counselling prior to or after the birth. We have been fortunate not to have had any disagreements which we put down to the importance we placed on communication.

In New Zealand the birth mother always remains the mother of the child. It is for this reason we are still in New Zealand finalising a Parenting Order for the Father and Guardianship for the other party. This model does have some problems which exist longer term. In summary these difficulties are summarised below:

1. The birth mother is always the mother – despite obtaining the above mentioned legal documents our understanding is that the mother or her children may be able to make some claim on our estate and may be able to claim care of the child should anything happen to the child's biological father.
2. Family Assistance Payments – if these are applied for by us then the relevant Government organisation making these payments may apply to the surrogate in New Zealand for child support and reduce the family payment – this is the case in both same sex and opposite sex surrogacy matters.
3. Our child may be able to make claims on the estate of the surrogate in the event of her death. (a risk the surrogate currently takes)
4. On the New Zealand birth certificate both the biological mother and father are noted as parents – potentially causing problems with regard to the schooling and health care of the child.

We understand our experience talks about privately arranged altruistic surrogacy arrangements and the legislation proposed is somewhat broader than this in that it also makes reference to Fertility Clinics and the provision of such arrangements through them.

### **Why did we look at overseas options**

Surrogacy in Australia is currently different in each state. In some states it is legal and in others it is not. Surrogacy in Australia does not appear to be as accepted as in some overseas countries which have more progressive laws with regard to surrogacy and local agencies (Government) do not seem to have frameworks in place to adequately deal with such options.

Adoption in Australia was not an option for us due to us being a same sex couple and due to the number of parents desiring such an opportunity and so few children given for adoption each year.

Adoption (in New Zealand) was a possibility and was our preferred option however such adoptions (overseas adoption) for residents of New South Wales require the supervision and approval of DOCS who, in our opinion, is ill equipped to deal with its current case loads of children in actual danger or harm. If overseas adoption was approved then our child would have been under the care of the state and our care would have been supervised for a minimum twelve months. Decisions regarding his care would, according to our understanding, be in the hands of DOCS and there was no guarantee at the end of this period that the state would approve our adoption or that he might not be offered for foster care or adoption to another couple by the state. We would like to add at this point that regardless of the type of parent couple (same sex or opposite sex) then the same rules would apply for overseas adoption or overseas surrogacy.

### **Our Support for Altruistic Surrogacy**

Unfortunately in Australia there is limited opportunity for couples unable to conceive to realise their dreams of creating a family. Adoption of Australian born children is very limited and overseas adoption requires prior Government approval and is a long and tedious process with no guarantee of adoption on return to Australia. Surrogacy in Australia has not yet received the adequate support of government or the clear guidelines required by various courts. Many Australian couples have to resort to the expensive option of trying to realise their dream by seeking overseas surrogacy arrangements.

Legislation of altruistic surrogacy in Australia presents the best opportunity many infertile Australian citizens have had in years if passed and guidelines thought out thoroughly. It opens further opportunities and increases the available options for those wishing to start a family.

One concern we have is increasing the involvement of Fertility Clinics in providing counselling and other services that may be insisted on if this legislation is approved. We think this would add further to the costs which have to be met by infertile couples and be open to manipulation by the fertility clinics.

### **With direct reference to the terms of reference we wish to make the following statements:**

- A. With respect to the involvement of the NSW Government in regulating altruistic surrogacy arrangements in NSW, we feel that such arrangements should be monitored by court

processes only. Documentation such as Parenting Orders (and possible Guardianship etc.) will be applied for through a court process. It would be timely for the court to review the process at this stage and to ensure possibly through affidavits to the court from the relevant parties that the surrogate was not paid for carrying the child other than reasonable out of pocket expenses. Using adoption as an example, the NSW Government through DOCS has in our opinion too much involvement in monitoring and approving such matters. To our understanding the child is effectively a ward of the state for at least twelve months before adoption is approved. Such excessive Government involvement whilst well intentioned is disproportionate to the risks to the child. Any fertile couple can rear a child with no government supervision so why is it necessary to treat childless couples who have to opt for options such as adoption or surrogacy any differently further highlighting their infertility and complicating the process.

- B. The intending parents and birth parent obviously have to come to mutual understandings through effective communication to prevent any unforeseen problems arising during or after the birth. As stated, we did not receive or seek any counselling although we did offer this to the surrogate if she wished. We understand that we are in a fortunate situation where there were no disagreements between the surrogate and ourselves. We were concerned (as most intending parents would be) that when it came time for the surrogate to part from the baby there would be difficulties. Fortunately for us she did this as she had agreed. Given that we know you can never predict human behaviour we do believe that it would be appropriate for all intending parents and their surrogates to have some form of counselling both together and then independently to discuss the various issues and "what ifs" that might arise. We feel that this should be done by an independent counsellor. Particularly in relation to the fertility clinics we do not think it appropriate that such counselling be offered by those with a vested interest nor do we think it appropriate to allow the clinics to see this as an opportunity to further add to the costs (and their profits). Counselling will not eliminate all potential problems between the parties though it could be a useful tool in minimising them.
- C. One of the significant problems we have found with our own personal experience is that the biological mother appears to have significant rights and obligations under the law (possibly more so than the father). In our own personal situation the birth mother will always be considered "the mother" and have legal rights despite us obtaining "Parental Orders" and "Guardianship". We trust that under our verbal agreement we have clarified these matters and there will be no further input from the mother with respect to the day to day care of the child. We do not think it appropriate to legislate for the mother to hand over the child to the intending parents, though if this were not to happen we think it appropriate for the surrogate to return any payments made with respect to maternity wear, health care, etc. Of course this would raise legal issues in so far as the biological father is concerned. Would he be required to pay child support? Effective counselling and communication between all parties should minimise this problem. The intending parents should have full legal responsibility for the raising of the child free from input from the surrogate. The surrogates legal rights and responsibilities should end when documents allowing the "Parental Orders" are signed.
- D. The role that a surrogate will play in the life of the child after birth depends largely on the wishes of the intending parents and surrogate communicated beforehand. In our personal circumstance it was always our desire for our child to be aware of his biological mother (genetic relationship). It was also her wish (before we proceeded) to be a part of his life. This

was discussed and is intended to be regular emails, occasional photos and regular briefings on various milestones in our child's life. We do not think this role can be clearly defined because it will change from each surrogacy based on the individuals' collective wishes. It would be appropriate to have this discussed at the counselling stage and mentioned on documentation presented to court when "Parental Orders" are obtained.

- E. Ideally from our perspective any legislative requirements made to clarify the legal status of any child born to altruistic surrogacy should reflect both the intending parents as having full legal guardianship of the child and having full parental responsibility. This eliminates potential problems when intending parents enrol the child in school, obtaining birth certificates and when seeking medical care of the child.
- F. We feel strongly that any child born as part of a surrogacy arrangement should have the complete honesty of the intending parents in informing that child of his/her genetic parentage. Personally we have determined that our child will always be aware of this from birth. He will always be aware of his birth mother who resides in New Zealand. He will be aware of this because we will maintain contact with her via emails, phone calls and occasional visits. Further to this he will be aware of his genetic parentage through reference to his birth certificate. We believe it to be in the best interests of the child to be aware of this matter. Obviously the State and child would be reliant on the honesty of the parents in this case. In the ideal world, if it were possible, we feel that any child born as a result of an altruistic surrogacy arrangement should be able to obtain a birth certificate stating clearly the names of the biological parents and further to this have a separate section stating clearly the legal parents (intending parents).
- G. We feel that it is imperative that any altruistic surrogacy legislation be consistent between all States and Territories and be nationally consistent. We also feel that the involvement of State should be limited to ensuring that the surrogacy arrangement is altruistic (possibly through the court process). We do not think it fair that the State impose into the arrangement any further than this on the basis that for fertile couples the State does not impose on them and supervise their suitability for parenting. Consistency between States and Federal governments is imperative for all forms of altruistic surrogacy. That is to say that the laws should be consistent between privately arranged surrogacy, fertility clinic assisted surrogacy and altruistic surrogacy arrangements made overseas. It is imperative that full parental responsibility be given to the intended parents and no further claims to the child be permitted under law by the surrogate. It is important that laws protect the estate of the surrogate from claims on the estate by children birthed through surrogacy arrangements.

## Summary

We fully support altruistic surrogacy. We believe addressing the following would create a fair and reasonable situation:

- Court review to ensure that any surrogacy arrangement in Australia is altruistic at the time "Parental Orders" are sought.

- Counselling of all parties both together and separately should be undertaken to minimise any problems arising and such counselling should be done with a private practitioner (not one arranged through a fertility clinic).
- Birth certificate (if possible) should state names of biological parents with a separate section stating the names of the legal parents.
- On approval of "Parental Order" then no further claims either by or on the surrogate is permitted.
- Advertising for altruistic surrogacy arrangements be allowed on internet based forums and clinics should not be allowed to seek surrogates through advertising.
- Fertility Clinics should not be able to locate surrogates for couples. The couple should source their own surrogate privately then employ the services of the clinic if required. (otherwise this would provide the clinic with another opportunity to exploit the intending parents by charging a fee). We do not feel that this would enable the surrogacy process to be altruistic and greys the boundaries.
- Surrogates should be enabled to obtain payment for health care costs, vitamin supplements and medications, maternity wear, lost income, life insurance policy while pregnant, health insurance premiums, house cleaning, legal costs, etc.

We trust we have given an adequate overview of our own personal circumstances. We cannot ever express to you how important this matter is to all of us. We have experienced many emotions during our journey to parenthood, many of which have been trying to deal with various Federal and State Government Laws both locally and internationally. For many people (same sex and opposite sex) overseas adoption or surrogacy is the only alternative as local adoption/surrogacy is almost non-existent. Many submissions will no doubt be based on theological grounds. Of course in a democracy all are entitled to their own views. It is not always pleasant to hear them because more often than not they tend to reinforce existing prejudices and have no regard to the individuals personal journey of infertility or circumstance. Our journey is not theologically based. It is reality based. Anything that enables childless couples the opportunity to experience raising a family would be welcomed.

Should any committee members wish to meet our family to discuss our personal journey please feel free to contact us.

Once again, thank you for this opportunity.

Regards

David Beasy & Mark Bartlett