

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

Organisation: The Law Society of NSW
Name: Mr Hugh Macken
Position: President
Date received: 10/10/2008



**The Law Society
of New South Wales**

170 Phillip Street, Sydney NSW 2000
Australia; DX 362 Sydney
Tel (02) 9926 0333 Fax (02) 9231 5809
ACN 000 000 699 ABN 98 696 304 966
www.lawsociety.com.au

9 October 2008

The Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Att: Rachel Callinan
fax: 9230 3416

Dear Ms Robertson

Re: Inquiry into legislation on altruistic surrogacy in NSW

I refer you to our letter dated 2 October 2008 and I thank you for allowing these additional comments to form part of the submission of the Family Issues Committee.

Firstly, the Committee wishes to clarify what is meant by altruistic surrogacy? Is it:

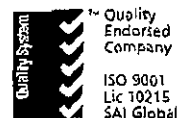
1. where a birth mother conceives and gives birth to a child using the sperm of a donor being one of the commissioning parents?
2. where a birth mother conceives and gives birth to a child using the sperm of a donor not being one of the commissioning parents (whether an anonymous donor or not)?
3. where a birth mother carries and gives birth to a child of the egg from a female donor being one of the commissioning parents fertilised by the sperm of a donor being one of the commissioning parents?
4. where a birth mother carries and gives birth to a child of the egg from a female donor being one of the commissioning parents fertilised by the sperm of a donor not being one of the intended 'parents'? or
5. any other models?

In response to the Terms of Reference, the following supplementary comments are provided:

a. The role that the NSW Government should play in regulating Altruistic Surrogacy arrangements in NSW.

There are arguments for and against the Government becoming involved in any form of regulation.

Commercial surrogacy is not legal in NSW, however if it were, an action for breach of contract may be available if a birth mother changed her mind and wanted to keep a child.



The Law Society of
New South Wales is a
constituent body of the
Law Council
of Australia



A similar action might lie in non-commercial surrogacy arrangements where presumably a contract of some sort would be in place. Would the level of regulation control the rights of the parties to a contract or would there be another level of regulation, for example, in negligence if the birth mother drank during the pregnancy resulting in adverse health issues for the child. Could a child sue a commissioning parent for choosing a birth mother who had a known drinking problem? Hence is there to be regulation controlling tortious actions?

The issue of parental relationships and parental responsibility are covered by the current suite of laws and, in particular, the *Family Law Act (Cth) 1975 (s.60CA)* which states that the best interests of the child is the paramount consideration.

One foundation for regulation may be that certain adult rights are at stake rather than children's rights, however conversely it could also be argued that creating certainty is in a child's best interests. Although regulation may create a legal pathway, it may not change the social context as surrogacy often involves close family relationships such as a sister.

b. The criteria, if any, that the intended parents and/or birth parents should have to meet before entering into an Altruistic Surrogacy arrangement.

In addition to the recommended expert counselling of all parties, psychological screening would also be beneficial. There is of course the question of how to handle the outcome if the screening indicates results in contra-indicators.

The legal profession may not be the best placed to comment on criteria however the following are suggested:

1. there being a minimum age;
2. a restriction on what family relationships may be involved (or be precluded);
3. genetic testing and
4. whether there should be any limit or qualification as to the number of people who can engage a surrogate mother, for example can a single individual engage a surrogate or can 3 people do so?

There could also be arguments against all of these.

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

Parentage presumptions are important however there were differing views as to whether a child born as a result of surrogacy should automatically be presumed to be the child of both commissioning parents. In a surrogacy arrangement there is no question that the birth mother is in fact a parent so it might be contemplated removing that person's parental role and/or parental responsibility (as opposed to creating it for others).

There may be a temptation to analogise surrogacy to adoption however in adoption the birth mother (and father) makes a conscious decision after birth. They have the chance, and choice, to reconsider.

There is no question that a birth mother changing her mind in a surrogacy arrangement would cause issues and conflict. If the child's best interests is paramount, then the

perceived rights, contractual or otherwise, of the commissioning parents are secondary. So too are the rights of the birth mother. To say otherwise is to reduce a child to a commodity.

It can therefore be argued that the law as it now stands is sufficient. This is particularly so where the birth mother may not be in NSW, or Australia.

Also, consideration should be given to whether a birth mother should or should not be given the option, after birth, of:

1. retaining the child
2. retaining a relationship with the child.

d. The role that a genetic relationship between the child and the intended parents and/or intended birth parents should play in any Altruistic Surrogacy arrangement.

The importance of genetic information being available goes also to the relationship in existence, created and going forward.

Again, the legal profession may not be best placed to answer this question however research into adoption shows that no matter what the 'quality' of parenting, adopted children very often seek out their birth parents.

e. The legislative arrangements that should be made to clarify the legal status of any child born of such an arrangement.

There should be consistency between State and Federal level.

f. The rights that a child born through an Altruistic Surrogacy arrangement should have to access the information regarding his or her genetic parentage and who should hold this information.

(See d.)

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

There should be a national consistency.

h. The interplay between existing state and federal legislation as it effects all individuals involved and affected by surrogacy.

There should be a national consistency.

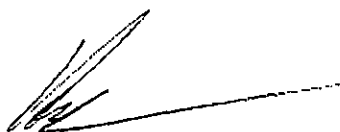
i. Any other matter.

There is a large body of research into surrogacy, much of which is available through internet searches. Questions raised include:

1. should surrogacy be available at all?
2. should it in fact be commercially available? (one argument for that appears to be that it will avoid the surrogacy being primarily within close family bonds and therefore running the inherent risks of children born from relationships being too genetically close);
3. on the other hand, there is the argument that surrogacy is least likely to lead to psychological disorders when the child is born to close supportive family relationships;
4. some studies show that psychological effects of surrogate arrangements are notable and occur over an extended period of time;
5. unquestionably there should be counselling in place for not only the intended parents but the birth mother, and should also be available to all involved well after the child is born and
6. there is the issue of putting in place good strong support networks, for all concerned.

I also note that an invitation has been extended for representatives of the Law Society to give evidence at the public hearing on Wednesday 5 November 2008. As soon as the names of the attendees are finalised, I will advise the Principal Council Officer.

Yours sincerely



Hugh Macken
President