

**Submission
No 15**

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

Organisation: Australian Christian Lobby

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**Submission to the
Legislative Council
Standing Committee on Law & Justice**

**Inquiry into legislation on
altruistic surrogacy in NSW**

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New South Wales Office
PO Box 267,
Windsor NSW 2756

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Executive Summary

The Australian Christian Lobby (ACL) believes that any discussion of surrogacy must primarily focus on the best interests of the child rather than the wishes, however heartfelt, of the adults involved. ACL sympathises with the pain of infertile couples, but believes the benefit of surrogacy for some parents are outweighed by the negative impact surrogacy has on children.

Serious legal and relational consequences are involved, and it is not in the public good to allow children to be conceived in arrangements that are fraught with moral and ethical complexity. Issues include:

- Legal challenges as to who is the parent;
- Blurred family relationships and disruptions to relationship links between marriage, conception, gestation, birth and motherhood, which are important human identity factors; and,
- Access to singles and same-sex couples.

However, if the NSW Government is determined to make surrogacy more easily available, then ACL recommends that:

- Its use be restricted to married heterosexual couples who can provide the long-term stability and male-female care that a child both needs and deserves;
- The surrogate mother be a close friend or relative of the commissioning couple, who already has other children. Her partner must support the arrangement, and thought needs to be given to the potential impact of surrogacy on her existing children;
- Counselling must be provided to all considering surrogacy before a decision to proceed is made. This counselling must be independent of the ART clinic;
- Commissioning parents must use their own gametes to create the child. Donor material should not be used as this further fractures the links between genetic, gestational and social parenthood, to the detriment of the child;
- There should be full disclosure to the child about the circumstances of his or her conception and birth.

Views within the Christian constituency

To ensure that our position was informed by a broad Christian view, ACL contacted a number of leading Christian groups and individuals to seek their views on surrogacy. Theologians from the Anglican, Baptist, Evangelical, Catholic and Presbyterian denominations were contacted.

While none of the theologians spoke for their denomination, they articulated common concerns, including: the ethical dilemma of excess IVF embryos; the adverse impact on a marriage of allowing one party a biological child with another partner; and above all, a concern about the impact on children born through surrogacy arrangements.

Furthermore, Christians who focus on women's rights tend not to support surrogacy, believing it represents "womb's for hire". Many fear altruistic surrogacy will lead inevitably to commercial surrogacy, which will exploit poor women, in particular.

Current New South Wales surrogacy laws

The *Assisted Reproductive Technology Act 2007* is the only New South Wales legislation that explicitly addresses surrogacy. The Act outlaws commercial surrogacy and renders all surrogacy agreements void. It means a commissioning parent is unable to approach a court to force a birth mother to give up a child.

Apart from this Act, surrogacy arrangements are neither regulated nor prohibited. The law provides no encouragement to those who wish to enter a surrogacy arrangement, and offers no special provision to regulate these arrangements.

It is admirable that the New South Wales government has banned commercial surrogacy and drafted criminal penalties into the legislation as a deterrent. However, given the complex nature of altruistic surrogacy, the unregulated nature of current surrogacy provision in New South Wales is clearly an inadequate protection of conceived children and the surrogate mother.

Terms of Reference

Point A in the Terms of reference seeks suggestions for the role, if any, the New South Wales government should play in regulating altruistic surrogacy arrangements in the state. Although ACL is opposed to surrogacy, it regretfully acknowledges the enacting of legislation to regulate, and therefore endorse, altruistic surrogacy in the state is presupposed in additional terms of reference (especially Points B through to F).

The current push from the Standing Committee of Attorneys-General towards nationally consistent surrogacy laws, as indicated in the terms of reference to this inquiry (Point G), the recent introduction of surrogacy legislation in Western Australia and Victoria, parliamentary inquiries in Tasmania and Queensland, and the Commonwealth's same-sex reform bills presume the eventual advent of nationally consistent surrogacy legislation.

Furthermore, the availability of altruistic surrogacy in New South Wales, regardless of current legislative provisions, clearly presupposes the enacting of legislation supportive of altruistic surrogacy in the state.

ACL's recommendations

In consideration of the inquiry's terms of reference, the following recommendations aim to reduce the risks of surrogacy by reducing the complexity of the arrangements and ensuring better protections for those involved.

Term B: Criteria of intended parent/s and/or birth parent/s

Intended parents

ACL argues that, if surrogacy is to be endorsed by the state, its use should be limited to married heterosexual couples who are unable to conceive or carry their own child. Having a child through a surrogate arrangement is complex and difficult, requiring the

mutual support and encouragement of a stable relationship. Only marriage provides the relational stability needed to successfully undertake a surrogacy arrangement.

ACL has two issues in mind in making this recommendation. Firstly, the child deserves the complementary care of a mother and a father, ruling out the deliberate placement of a child in a single parent or same-sex family. Secondly, the child needs that mother and father to be in a long-lasting relationship, which research shows to be marriage.

Research consistently shows that children are more successfully raised in an environment where they have a mother and a father. For example, Coira, Zill and Bloom write that young children without two biological parents are three times more likely to suffer behavioural problems such as attention deficit disorder or autism.¹ In the USA, male teens without a biological father are twice as likely to be incarcerated than teens from two-parent homes.²

It is paramount that in a surrogate arrangement the child is given a stable upbringing considering the complexity and confusion of genetic bewilderment associated with having an outside birth mother. The child will have the best chance of success with a mother and a father in a married relationship, which, by definition, is more committed than a de facto relationship, as the authors of a recent British study attest:

Marriage has been downgraded in official discourse and increasingly undifferentiated from cohabitation despite marked discrepancies in the stability of married and cohabiting couples.³

Starkly, one set of statistics shows 43 percent of cohabiting parents have split up by a child's 5th birthday, compared to less than 8 percent of married parents.⁴ Clearly the marriage relationship is the most stable environment for the upbringing of children who have experienced a complicated birth.

The Standing Committee of Attorneys-General has previously stated its unequivocal commitment to the best interests of the child.⁵ If it is truly committed to this principle the state will not be complicit in having children created to be deliberately placed in less than ideal family situations. Evidence shows that a single man or woman, an unmarried heterosexual couple, two cohabiting men, or two cohabiting women do not provide the best environment in which to successfully raise children.

Certainly, there are children raised by single parents and by same-sex couples, owing to death, desertion or lifestyle choice of adults. However, the state is tasked to act in the best interests of the child. In deliberately allowing the creation of a child through surrogacy, the state must do its utmost to ensure that child has the best start in life.

¹ Coira, Zill & Bloom, 'Health of our nation's children', in *Vital Health Statistics*, National Center for Health Statistics, 1995, Volume 10, p. 191

² C. Harper & S. McLanahan, 'Father absence and youth incarceration', *Center for Research on Child Wellbeing Working Paper*, 2003, pp. 99-103

³ *Breakthrough Britain: Ending the costs of social breakdown*, Family Breakdown, Volume 1. Policy recommendations to the Conservative Party from the Social Justice Policy Group

⁴ K. Kiernana, 'Childbearing outside marriage in western Europe', *Population Trends*, Volume 98, pp. 11-20

⁵ Standing Committee of Attorneys-General, Communiqué, 28 March 2008, <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7>

David Popenoe, Professor of Sociology at Rutgers University in New Jersey neatly underlines this claim:

Based on accumulated social research, there can now be little doubt that successful and well-adjusted children in modern societies are most likely to come from two parent families consisting of a biological mother and father.⁶

Birth parents

ACL further contends that the surrogate mother must be either a close relative or close friend to the commissioning couple. This will reduce the anxiety and anguish reported by surrogate mothers during and after their pregnancy, and allow them to fulfil the natural desire to bond with the child born through the arrangement.

In surrogate arrangements there will always be a risk of the birth mother wanting to keep the child and this risk should be minimised as much as possible. Ensuring the surrogate mother is a close relative or close long-term friend of the commissioning couple may minimise this risk. This gives the surrogate mother regular contact with the child as she is more likely to be present at birthday parties and other family events. It also provides the child with the opportunity to know the woman who carried and gave birth to him or her.

Even though a surrogate mother may start with the best intentions to give up the baby, a growing sense of attachment to the child is very conceivable. As Dodds and Jones explain,⁷ every woman experiences pregnancy differently. Thus it is impossible for a woman to give fully informed consent to part with a child developing inside her prior to knowing the extent of the feelings and emotions this will produce.

On the other hand, a surrogate mother could develop negative feelings towards a baby she has agreed to give up, and seek an abortion to end the 'inconvenience'. A further risk is the possibility of the surrogate mother requiring or requesting money to compensate for unforeseen discomfort or expense.

It is never possible to guarantee the success of any surrogacy arrangement. It is easily possible that a close relationship between the commissioning couple and the surrogate may worsen problems of emotional manipulation if the surrogate feels unable to refuse the request, or knows that she risks an important relationship if she chooses to keep the child. Sensitive counselling will be needed to unearth any hidden issues such as these.

However, despite these risks, ACL believes a close prior personal relationship between the surrogate mother and the commissioning parents goes some way to ameliorating the possible negative impacts of a surrogacy arrangement because the adults involved know each other and can hopefully talk through the issues more easily. Ensuring the surrogate mother has already given birth and raised children of her own also lessens the likelihood of complicated emotional attachments to the child born of the surrogacy arrangement.

Similarly, it is extremely important that the surrogate mother's partner (if she has one) is supportive of the arrangement. Considerable thought needs also to be given to the impact on the surrogate's existing children of watching their mother experience a

⁶ D. Popenoe, 'Can the nuclear family be revived?' *Sopciety*, no. 36, pp. 28-30

⁷ S. Dodds & K. Jones, 'Surrogacy and autonomy', *Bioethics News*, Volume 8, 1989, pp. 6-18

pregnancy and then give up the child – on this occasion there is no new sibling to welcome into the family, which some children may find hard to understand.

Term C: Legal rights and responsibilities of intended parent/s and/or birth parent/s

It is essential that all parties to the surrogate arrangement receive approved counselling independent of any IVF or ART provider, as these organisations have a competing financial stake in negotiations. This will ensure the emotional and psychological concerns of the participants are adequately addressed prior to making any agreement without undue coercion.

There is a range of complex issues involved in surrogacy that go beyond those of normal IVF procedures. Those involved will require counselling on a range of complex issues, such as helping the birth mother prepare for giving away the baby (and counselling her, according to her best interests, if she finds herself unable to do so).

Given that not all volunteer surrogate mothers will be appropriate birth mothers, counselling must address the suitability of candidates. The independence of the counselling service from the IVF service provider will ensure all participants are properly prepared for the difficult process to follow, and will not work from the assumption that entering into the surrogacy arrangement is mere formality.

ACL does not believe that the existence of a surrogacy agreement should force a surrogate mother to give up a child she has given birth to. Indeed, the parties to Australia's greatest surrogacy success story, Linda and Maggie Kirkman, state that:

The family holds strongly to the view that no woman should ever be forced to relinquish a baby who's grown inside her body, regardless of the baby's genetic origins. Linda didn't form a maternal bond with Alice, but other women have done so...to protect the interests of the child, the family favours a four-week period of grace after the birth during which a gestational mother can ascertain her feelings and be supported in her decision to relinquish or not. Once that month is up, the child must be allowed to develop a stable relationship with whom-ever is then considered to be the mother. There's no going back⁸.

Comments such as these reinforce the complex and difficult issues that surrogacy arrangements of any kind present. It could be argued that it is very difficult for any piece of legislation, no matter the provisions, to deal with such complexity. While Linda came to the conclusion that she was happy to hand the child over to the commissioning couple, many surrogate mothers who have given birth would struggle with this as the Kirkman family fully recognise.

Term D: Genetic relationship between the child and the intended parent/s and/or birth parents

The implanted embryo must be produced from gametes derived from the commissioning mother and father. This recommendation respects the marriage bond by ensuring that both parents are equal partners. It also excludes donors of any kind,

⁸ Maggie Kirkman, Linda Kirkman and Alice Kirkman, 'IVF surrogacy: a personal perspective' ACCESS Australia http://www.access.org.au/resources/library/ivf_surrogacy

thereby negating the possibility of complex surrogacy arrangements. Surrogacy is essentially an infertility service for married couples, and it should remain so.

ACL believes the child's best interest is not served if he or she has multiple parents. This leads to 'genetic bewilderment' and confusion of identity. The best interest of the child is served if brought up by his or her genetic parents. This is the best possible type of surrogacy should it be legalised. It is the most uncomplicated arrangement, and involves the least fracturing of the normal relational connection between conception, birth and parenting.

There is no way to avoid the fact that a child born through surrogacy has had an unusual start to life and may feel some emotional confusion about having been carried and borne by a woman other than his or her 'mother'. There is potential for even greater genetic bewilderment or emotional confusion with the use of donor gametes, giving him or her potentially five different 'parents'.

The pain of donor-conceived children needs to be heard in this debate, as the focus is too easily on the pain of infertile adults only. Consider this:

My surname ties me to one family, yet my blood ties me to another ... I feel as though I have three families, but that I don't wholly belong to any of them; that I exist in a limbo, torn between the expectations of who and what should or shouldn't matter to me. I feel as though my paternity was split down the middle; that I am a branch grafted onto a different tree. I have flourished, but my fruit is not the same and my roots lie elsewhere. I feel a loss from knowing that I have three unknown half-sisters out there somewhere. It's difficult to articulate how deep that emotions runs in me. I do know that just thinking about it brings me to tears.⁹

TangledWebs¹⁰, a support group for donor-conceived children, is adamant that the child's interests must come first and are not served by donor-conception:

To claim the right to a child is to treat that child, another human being, as an end to satisfying one's own desires, as an object and not a person. To claim a right to a child is to claim jurisdiction over another human being's life when they have no say in the matter, when they have not given their consent, informed or otherwise.

The fact that donor conceived children cannot give consent because they are not yet alive is not an argument for putting their interests to one side; rather it is a powerful argument for ceasing the practice of DC or at the very least being extremely careful about and limited in the ways we practice it.

In the best interests of the child, surrogacy should be kept as simple as possible, using only gametes from the commissioning parents.

Term F: Rights of the child to access information relating to his/her genetic parentage

ACL believes it is important the child is respected with honesty about the situation in which he or she was born and understands the roles of all people involved in the

⁹ Myfanwy Walker, "Misconception," *Australian Rationalist*, Numbers 75/76, 2006: 23-27, 24, http://www.rationalist.com.au/archive/7576/p23-27_walker.pdf. Accessed 26 September 2008.

¹⁰ TangledWebs www.tangledwebs.org.au/dc.php

relationship. This information should be provided to the child as a natural part of life, with age-appropriate details shared in conversations throughout development.

Keeping important details relating to a child's existence secret is fraught with danger. Earlier this year *The Australian* reported the case of twins who were separated at birth through adoption. They later met each other without knowing their genetic connection. They fell in love and married, only to find out years later of their sibling relationship.¹¹ A complex birth and upbringing requires the honesty and full disclosure of information of those in the more powerful, knowledgeable position to ensure the emotional and psychological well being of the child.

A well-known Australian surrogacy case demonstrates the benefits of maintaining an honest relationship with the child. In May 1988 Linda Kirkman gave birth to her niece, Alice, who is raised by commissioning parents, Maggie and Sev. With commendable forward planning, the family has been able to positively address the emotional issues of their complex situation. Members of the family are now sought after speakers and authors on surrogacy issues.

The information pertaining to his or her birth must be readily available to the child born of a surrogate arrangement. Creating an environment of openness and honesty will avoid the grief and anguish experienced by the child should full disclosure occur by accident later in life. As well-intentioned parents may struggle to find the right words to explain the child's origins, there may be an ongoing role for the independent counselling obtained prior to entering into the surrogacy arrangement. Nonetheless, there will no doubt be some parents who never intend to tell the child about the surrogacy. To protect the child's right to know about its origins, it may be necessary to note on a birth certificate that the child was born through surrogacy.

Conclusion

The Australian Christian Lobby remains concerned about the implications that would arise from surrogacy arrangements, affecting the birth mother, commissioning parents, and most importantly, the child.

If surrogacy is to be made more readily available, ACL would like to ensure that the following measures are clearly articulated into the legal framework regulating altruistic surrogacy in New South Wales to ensure the best interests of the child are met and maintained throughout his or her life:

- The commissioning parents must be in a married heterosexual relationship, as this is the best environment for the stable upbringing of a child who has been brought into the world through a complex arrangement fraught with various emotional and psychological dangers;
- The surrogate mother must be a close relative or close long-term friend of the commissioning couple, which allows her to form a healthy and comfortable bond with the child. This is best for her emotional well being, and lessens the likelihood of refusing to 'hand over' the child to the 'parents' as agreed upon prior to entering into the arrangement;

¹¹ 'Rules of attraction take strange twist', *The Australian*, 14 January 2008

- The commissioning couple, surrogate mother and all other affected parties must receive counselling independent of the IVF service prior to entering into the arrangement. This overcomes problems with conflict of interest, and ensures all parties are properly prepared for the likely consequences and emotional complexity of the arrangement;
- The implanted embryo must be produced from gametes derived from both the commissioning mother and commissioning father. This ensures the parents have an equal biological relationship with the child, which overcomes the possible emotional problems for the couple associated with unequal parenting and certainly protects the child against the confusion experienced by many donor-conceived offspring;
- Children born through surrogacy must be fully informed of the circumstances in which they were brought into the world, thereby protecting their emotional well being. ACL suggests the provision of on-going counselling services to ensure all parties involved are sufficiently equipped to discuss matters with the child and, in recognition of the fact that some parents will not wish to make an honest disclosure, a note about surrogacy to be placed on the child's birth certificate.

Whilst ACL is opposed to surrogacy, whether commercial or 'altruistic', because it is fraught with obvious complexity and wide-ranging psychological consequences for all involved, it understands the nationwide thrust to regulate, and therefore endorse, altruistic surrogacy through state and territory legislative reforms. The terms of reference to this inquiry presuppose the enacting of similar legislation in New South Wales. Given the magnitude of the legislation, and the complexity of surrogacy, it is paramount that it is drafted with due consideration to the best interests of the child, not the desires of the adults.

ACL thanks the Committee for the opportunity to comment on this difficult topic, and implores the government that any likely reforms must protect the best interests of children in deed and action rather than by word alone.

**ACL New South Wales
September 2008**