

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

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**Date received:** 20/10/2008

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RECEIVED

17 October 2008

20 OCT 2008

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

Dear Madam Chair

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

Thank you for your invitation to make a submission to the inquiry into altruistic surrogacy in NSW. I understand that the Committee seeks to determine whether NSW legislation requires amendment to better deal with altruistic surrogacy and related matters.

Surrogate motherhood is an arrangement whereby the surrogate mother agrees to bear a child for another person in circumstances where custody of the child will be transferred to the other person at birth.<sup>1</sup> Because the demand for surrogacy is inevitably linked to women or partners of women who are compromised in their ability to reproduce, medical practitioners specialising in reproductive medicine tend to experience a greater exposure to persons seeking surrogacy services.

Next Generation Fertility provides Assisted Reproductive Technology (ART) from seven sites in Sydney and one site in Canberra. Next Generation Fertility's specialists are medical practitioners with specialist qualifications and extensive experience in fertility treatment. In addition to specialist medical practitioners Next Generation Fertility has its own endocrine and embryology laboratories staffed by qualified scientific staff. Patient care during ART is also provided by specialist registered nurses under the supervision of specialist medical practitioners.

Next Generation Fertility is fully accredited for the provision of fertility treatments with the Reproductive Technology Accrediting Council (RTAC) and the National Association of Testing Authorities (NATA).

Next Generation Fertility provides the following submissions with respect to the Inquiry:

- 1. The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW.**

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<sup>1</sup> Stuhmcke, A. 'For Love or Money: The Legal Regulation of Surrogate Motherhood', *Murdoch University Electronic Law Journal* 3, 1 (May 1996)

While legislation has been passed by the NSW Parliament that includes some regulation of surrogacy arrangements, that legislation has not yet commenced. The legislation provides minimal assistance in the regulation of surrogacy in NSW in that it is limited to a prohibition on commercial surrogacy or solicitation of a commercial surrogacy arrangement. It makes all surrogacy arrangements unenforceable.<sup>2</sup>

The NSW Government should provide a regulatory role in the making and supervision of surrogacy arrangement in NSW. That legislation should also clarify the determination of parentage and the storage of biological parentage information.

- 2. The criteria, if any, that the intended parent/s and /or both parent/s should have to meet before entering into an altruistic surrogacy agreement;**

Next Generation Fertility submits that the commissioning mother should be medically infertile. There are two specific categories of medical infertility that should form the basis for eligibility for surrogacy. The first is where the woman is incapable of achieving a pregnancy due to absence of the uterus e.g. MRKH Syndrome<sup>3</sup> or where surgical removal of uterus has occurred. The second is where the commissioning mother has a pre existing medical condition which makes the risk of harm to the mother, associated with carrying a pregnancy to term, life threatening e.g. cardiac failure.

- 3. The legal rights and responsibilities that should be imposed upon the intended parent/s and/ or birth parent/s;**

Currently, the legislative framework in NSW favours the birth process as the basis for determining motherhood. While reproductive technologies have allowed the separation of genetic and gestational mothering, the law has not changed to reflect this separation. In the absence of the regulation of surrogacy, adoption laws are still used to resolve the rights and responsibilities of the parties in a surrogacy arrangement. Clearly, children born as a result of surrogacy arrangements require legislative protection including access to information with respect to the identity of their biological parents.

Currently in NSW where a woman becomes pregnant through the use of another woman's ovum, she is able to rely on a presumption that she is the legal mother of the child with her partner able to rely on the presumption that he is the legal father (providing he has given consent to the insemination). A male donor who provides sperm for the insemination is presumed not to be the father.<sup>4</sup> While these provisions are appropriate for the protection of gamete donors in that they transfer legal parentage for the child to the woman who has undergone the procedure and her consenting male partner, they are not appropriate for the protection of parties to a surrogacy arrangement.

Likewise adoption laws in NSW afford little assistance in adequately resolving legal parenting issues associated with a surrogacy arrangement. Aside from the fact that the relevant legislation makes it an offense to negotiate a private adoption for a non related child,<sup>5</sup> adoption processes are generally linked to whether the adopting parents have a

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<sup>2</sup> Ss42-45 Assisted Reproductive Technology Act 2007 (NSW)

<sup>3</sup> Mayer-Rokitansky-Küster-Hauser Syndrome (MRKH) refers to a condition in a female where the Müllerian ducts fail to develop and a uterus will not be present.

<sup>4</sup> Status of Children Act 1996 (NSW) Ss5 (1) (b), 14(3), 14(1) (a), 14(2). Family Law Act Ss 60H and 60D

<sup>5</sup> S51 Adoption of Children Act 1965(NSW)

genetic link to the child. Agency intervention is mandatory unless the genetic link is present or the adoptees are related to the child.<sup>6</sup>

It is therefore submitted that the current legal framework in NSW that associates the birth process with legal parentage is inadequate to protect the rights of parties to a surrogacy arrangement, including the birth child. It is submitted that separate and specific legislation is required to determine issues of social and biological parentage associated with surrogacy arrangements.

- 4. The role that a genetic relationship between the child and the intended parent/s and or birth parent/s should play in any altruistic surrogacy arrangement;**

Surrogacy is usually undertaken as a partial or full surrogacy (also known as gestational carriage). In partial surrogacy the child is related to one of the commissioning parents through the use of one of the commissioning parent's gamete. In full surrogacy the commissioning parents provide all the genetic material for the child.

In partial and full surrogacy arrangements the commissioning parents require their parentage to be afforded legislative protection.

- 5. The legislative amendments that should be made to clarify the legal status of any child born of such arrangements;**

Legislative amendments are required to clarify the legal status of a child borne of a surrogacy arrangement. That protection should be based on the presumption of parentage to the commissioning parents.

- 6. The rights that a child born through an altruistic surrogacy arrangement should have to access information relating to his or her genetic parentage, and who should hold this information;**

It is submitted that the principle that underpins the creation of a central ART Register in the *Assisted Reproductive Technology Act 2007 (NSW)* should apply to the recording of genetic parenting information for the purposes of storing and allowing access to children created through a surrogacy arrangement. It is submitted that the information should be stored in the form of a register under the control of the Director General, NSW Health.

- 7. The efficacy of surrogacy legislation in other jurisdictions and the possibility and desirability of working towards national consistency in legislation dealing with surrogacy;**

While many jurisdictions attempt to regulate surrogacy, that regulation generally ranges from a total prohibition to partial or ad hoc regulation. Israel is one of the only jurisdictions to comprehensively regulate surrogacy. The Israeli government has provided a structure under which surrogacy is permitted under the supervision of government regulation. A public committee authorises and supervises every case with only gestational carriage being permitted. Commercial surrogacy is not permitted,

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<sup>6</sup> Ss18(2), 21 Adoption of Children Act 1965 (NSW)

however the reasonable expenses of the surrogate mother are paid. In that jurisdiction, the child is placed under the supervision of a government social worker until adoption is finalised.

It may be of interest to note that during the formulation of the Israeli surrogacy legislation, the Aloni Committee believed that by recognising a woman's right to contract including her right to receive economic compensation for the supply of reproductive services, empowered rather than enslaved her<sup>7</sup>. Regulators should be cautious that surrogacy arrangements have the potential to reinforce the concept that it is inappropriate to mix love and intimacy with commerce, but appropriate to undertake actions out of generosity, regardless of the potential for emotional exploitation of the surrogate mother.<sup>8</sup> For this reason it is submitted that legislation should provide for payment of the reasonable expenses incurred by the birth mother during the surrogacy arrangement. Consistent with other third party reproduction, Next Generation Fertility supports the premise that such arrangements should be altruistic.

**8. The interplay between existing State and Federal legislation as it affects all individuals involved in, and affected by, surrogacy;**

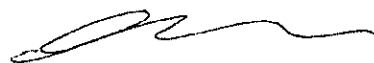
There is considerable inconsistency in the regulation of surrogacy across most Australian states and territories. Where there is regulation commercial surrogacy is illegal with all surrogacy arrangements unenforceable. No jurisdiction has dealt with the issue of parentage outside of current adoption or children's rights legislation. Clearly there is a need for uniform and comprehensive regulation across the Australian states and territories. Whether this is achieved by transfer of power to the Federal government or a uniform scheme between states and territories is largely a matter for the legislature.

Thank you for the opportunity to make this submission to the Committee. Should you require any further information please do not hesitate to contact us.

Yours sincerely



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Medical Director  
Next Generation Fertility**



**Ms Susan Hatcher  
Chief Executive Officer  
Next Generation Fertility**

<sup>7</sup> Shalev, C., Birth Power: The case for Surrogacy 1989.

<sup>8</sup> Stuhmcke, A. For Love or Money: The Legal Regulation of Surrogate Motherhood, Murdock University Electronic Journal of Law, 3(1), May 1996