

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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INTRODUCTION

The preamble which follows may appear less than specific with respect to the topic but it is intended to provide a basis for establishing the merit of comments provided later when specifically addressing the issue of the merits and mode of surrogacy.

THE ROLE OF THE SEXUAL UNION AND SEXUAL ACTS

A propelling factor behind much of the impetus for such matters as surrogacy is the fact that the actual physical sexual act for many people has lost its "status and purpose". No longer is it widely considered to be a private, most intimate, meaningful and a very personal act which can result in a child, the child being the evidence of the most intimate contact possible between a species.. Advertisements offer "No strings casual sex, threesomes, swinging partners, one night stands, S and M, bestiality, fantasies etc". The media, art, films advertising etc present it as a casual meaningless routine of no particular significance in life. In a recent magazine article in a Sydney Sunday magazine, a very young man reported that within three hours of meeting her for the first time, he was in bed with the woman but says he does not believe in breaking up relationship so he apparently does not accept that engaging in a sexual union has any elements of a relationship since he went on to confirm that he had bedded at least 50 women. He is a life coach who specialises in date training. One wonders what his advice is to his clients and what he will have to offer the woman with whom he actually hopes to establish a "relationship". Pornography is portrayed purely as entertainment, widely and easily accessible

entertainment; so sex is no longer in an elevated position of intimacy and its uses and ramifications therefore can be construed to almost any objective, not only child creation. Our community is prepared to support prostitution, pornography and various forms of sexual unions and experimentation but if we simply remove or hint at the removal of the concept of agreement by a participant or introduce an arbitrary minimum age, then we consider it to be the heinous crime of rape, so despised by all. On the same principle, if a participant is under an arbitrary age and engages in such activities, we then profess shock and horror because we categorise it as child pornography, paedophilia or child abuse; one day older and it is enjoyment or entertainment. Prostitution is purely a business arrangement but a failure to pay the fee can then initiate a complaint of rape because of a failure of agreement. We also have rape within marriage. It is comparable to boxing, if we agree we can thump each other, then that is acceptable and considered entertainment. However, if I thump someone and knock them about without their agreement, then it is a serious crime. In effect, we condone some actions in an absolute sense unless someone disagrees so we have no regard for the intrinsic nature or purpose of the act itself. Some of our laws including sexual harassment are couched in this way with such terms as “likely to offend a reasonable person”, i.e. a purely subjective assessment which avoids the need to examine the fundamentals of the action.

The all pervading F word is another instance of how the sexual act has lost its significance since the word is constantly used as a form of abuse, as a swear word, as a positive adjective and as a negative adjective as well as in a passive and active sense and is inappropriately applied to inert objects. This has resulted in it not being considered offensive and is the most used word in many instances of communication. The sexual act can be directed as a complimentary remark or a derogatory remark, even in the same conversation.

Despite this attitude, we still recognise, when it suits us, that the sexual union is primarily designed with its intense pleasure to ensure it is participated in for the continuation of the human race, i.e., for the bearing of children; we see the same principle in action with animals. This is confirmed by the fact that when it fails to achieve this natural result, we have continued to strive to find methods to still bear off-spring and even assist the animals to do so. These include IVF, sperm donation, adoption, surrogacy, etc. Simultaneously, there are some 80,000 babies in Australia not brought to birth because their mothers or others do not accept it as being the natural and appropriate result, their life is terminated. There is a difficulty for some people to accept that when the union has its natural result it is an undesirable outcome but for others, when it fails to have that result, it is also an undesirable outcome, so we must find alternatives simultaneously at all costs to both produce the result and prevent the result rather than accept that nature will always have a controlling influence. Such decisions are the result of subjective decisions by individuals which are not universally accepted e.g. Not all people agree we have a right to have children or that extraordinary means should be available to ensure this right. Already we see a parallel instance in the attitude of people with respect to the provision of the means to keep a person alive. One could legitimately argue that having a life maintained has priority over having a child. Currently, much activity centres around working with nature, preserving nature, not interfering with nature, letting nature take its course, etc but we often go to extraordinary means to thwart or circumvent nature when it suits us even though the justification is somewhat dubious or very subjective.

CHILD BEARING'S MARGINAL RELATIONSHIP TO SEXUAL UNION

The comments above are designed to support the contention that the success or failure to produce a baby are no longer intrinsically and necessarily associated with or recognised as fundamental constructs within the act of sexual union itself but may be considered in isolation outside that context.

Therefore, having a child simply ranks with other preferences or desires we all have and the failure of a sexual union to produce a child is now almost irrelevant to the primary purpose of the act and is therefore only of marginal significance since we can achieve a child in alternative ways not involving sex and sexual union now provides a greater number of more popular outlets for the majority. Having children by a variety of means is now simply one facet of a life style and is far removed from its original context of sex and the sexual union, sex is incidental to the whole issue. Therefore, the bearing of a child cannot be considered a right as a result of a sexual union and if it fails there is no right to demand that the community support the artificial construct of a right to have a child. This is already confirmed by our current selective prohibitions referred to earlier. Surrogacy seeks to support such a pseudo right by demanding another extraordinary procedure to meet a person's wishes. Actually, we have special medication and techniques being very widely used to prevent the conception of a child but then we have such techniques as IVF, sperm donation being used to produce the opposite – conception. In the mind of the community, these two opposite results now represent only a minor part in the total ambit of sexual activity since this activity no longer holds or represents a special status or purpose and various combinations and manipulative procedures are used to achieve particular results. Therefore one could ask why do we need to offer any further options for the minority affected by a union which no longer has its primary purpose recognised and supported? Is there really a right to be a parent? Is there a limit to how far we should go to accommodate people's wishes? Many resources are devoted to preventing child bearing so is it reasonable to negate this by attempting to introduce a contra activity for a minority claiming a right which has never been established?

Statistics released in August 2008 show that 75 percent of the households comprising the richest 10 percent of households have no children and these are likely to be the group who can afford the costs which will accompany surrogacy if it is to be viable. Demands from this relatively small group for

additional facilities should not be given undue weight. In many instances the failure to conceive has occurred as a result of the pursuit of wealth and postponing child bearing up to an age where it then has a very low probability of occurring. It can be expected that Medicare and health funds would be pressured into providing additional funds to meet the surrogacy costs.

Because of the conception facilities and opportunities now available including births outside hospitals etc, do we really know who are the natural parents. We certainly have seen cases of new born babies abandoned and parents not being located and DNA tests have established that those assumed to be parents were not so. Is there really a legitimate need to introduce yet another type of parent option?

THE RIGHT TO HAVE A CHILD

The initial issue which appears to be totally ignored in this context of child bearing is the validity of the argument that there is almost an inalienable right for any person to have a child and extraordinary efforts must be undertaken to achieve their rights. When it affects us positively (particularly emotionally or subjectively) we say yes but then we say no in various other contexts. Some of the many instances are examined below so that they may be compared and contrasted with surrogacy.

There are various prohibitions on child bearing which have grown up and are worldwide and vary between cultures and communities. They are being altered and added to as groups alter their views. There are prohibitions on attempting to bear children from the union of close relatives but even these prohibitions differ in different cultures. Further, we may not be aware of those occurring and the incidence of unrecorded sperm donations will also be having an effect in this area. The age prohibitions for engaging in a sexual union (primarily because of the possibility of a child resulting)

differ very significantly and we have the example in Australia of young children being betrothed to old Aboriginal men as occurs in other cultures. The selection by the family for husbands for their daughters is also still a practice in some families hence deciding who will bear children. Young teenagers may engage in a pre-legal sexual union which results in a child and they are able to retain custody of the child. They are not considered old enough to engage in sexual behaviour but if it occurs and results in a child then they are old enough to retain the child. Many single women and single men retain custody of children so we accept that being a single parent by design or default is acceptable for having a child. Now the issue of lesbian and homosexual couples and singles having children (including by adoption) is being supported this represents another form of child bearing removed from the context of natural parents from a sexual union. Permanent surgery is carried out on both males and females to prevent the possibility of conception so they can continue to engage in sexual unions and not necessarily with the same person. This removes further the sexual union from its relationship to child bearing as referred to earlier. It has been a practice to sterilise females whom it is considered should not be allowed to bear children. Men have been punished in a comparable manner to prevent their activities from producing results considered undesirable.

When a couple have their child, they are able to retain that child without any assessment or evaluation and it is only when a perceived problem is brought to the fore that the authorities may act to remove the child. The authority has no knowledge of the nature of the family, the family set up, or if indeed there is a family until there is an issue brought to their notice. On this perspective one could say that parenting is very easy, intuitive, not an area needing to be monitored or, possibly, we have a lax attitude to child rearing until there is a crisis. Contrast this with the prolonged, invasive, costly and exhaustive process involved if one opts to apply to adopt a child. There is no such regimen required

when any person or persons of either sex or the same sex decide to create a child by whatever means they can which now may ultimately affect surrogacy.

The most telling argument against an inalienable right to have children is the fact that nature obviously does not intend nor permit that to be an option for everyone. Even most spontaneous miscarriages are a recognition that either the mother or the child is not as intended so nature takes over. In every aspect of our lives and our makeup there are instances that we would like to have changed to suit us but we are different and it is these differences which maintain the human race. Research already confirms that the inability to create children is often transmitted to children conceived by alternative means (eg. sperm donation so these alternatives are increasing the future numbers of infertile people). One could argue that if a person was unable to conceive, then is this not a message from nature which should be considered seriously. Bearing children is now almost a perfectly optional decision which may not be able to be exercised by everyone because nature has decreed otherwise. However, nature has also decreed that many people will live without options in many aspects of their life and with absolutely no opportunity to even ameliorate their effect. Another aspect which is relevant, is the fact that by reinforcing the notion that having a child is a golden goal we will adversely affect those who are not successful in achieving it no matter what process they attempt. Further, introducing another person into the relationship will have some effect on the couple including covert jealousy on the part of the infertile partner. This is compounded when the external person is still being acknowledged within the relationship. The subsequent effect on the child will be problematical especially if a family of children have different surrogate mothers.

ISSUES WHICH NEED TO BE ADDRESSED FOR SURROGACY LEGISLATION

There would be major issues arising during the surrogacy which may not be anticipated or provided for in legislation. In the comments which follow, where appropriate, the term “surrogate mother” includes the term “proposed surrogate mother” also.

What will be the duty of care on the part of the surrogate mother and who will determine that level?

Can restrictions be placed on the surrogate mother on the basis of their effect on the baby, e.g. alcohol consumption, medications, life style, sexual activity, etc?

Should the baby be harmed by some action of the surrogate mother, can there be any redress?

There could well be disagreement between the surrogate mother and one or both of the other couple as to what is acceptable and what is unacceptable on a variety of critical issues both before conception and after.

Who has their wishes met and who decides especially if one partner then agrees with the surrogate mother? What will be the role of the surrogate mother’s partner in the matter, if any?

Will this partner be able to object to the surrogacy?

If the surrogate mother is married or in a de facto relationship, will this have an effect on those issues already referred to?

What will be the effect of the surrogate mother entering into a new or alternative relationship subsequent to the commencement of the surrogacy?

Who will make a decision if an abortion is requested?

Who will meet the medical and other expenses involved in the selection of a healthy surrogate mother and the subsequent expenses?

Will potential surrogate mothers be able to advertise their availability?

Will there be any residual responsibilities of any nature remaining with the surrogate mother after the birth?

Should the surrogate mother experience illness during the pregnancy, will it be obligatory for all costs and compensation for loss of income etc to be met by the other couple?

Will the male partner of the surrogate mother be eligible to obtain some compensation for the disturbance and marital restrictions placed on him by his partner's pregnancy?

Is permission required for tests on the developing baby and from whom?

Will a single person, either male or female be eligible to seek a surrogate mother arrangement?

Will a person be permitted to use more than one surrogate mother, or a mother more than once, or two mothers concurrently?

Has there been any research on the possibility that some aspects of the surrogate mother will be transferred to the child? Heart transplant patients already report comparable occurrences.

Must a woman be proven infertile before a surrogate mother can be used?

If a pregnancy is likely to have complications for a woman can she simply elect to use a surrogate mother?

If a woman detests the idea of nine months pregnancy can she simply elect to use a surrogate mother?

Must it be the woman's egg used for the pregnancy or can an alternative egg be obtained by her and she provides it to the surrogate mother?

Must the egg be fertilised by the woman's partner?

Can the woman elect to have the egg fertilised by another male's sperm?

If the pregnancy or birth results in serious continuing medical or psychological problems for the surrogate mother, will there be an onus on the receiving couple to take responsibility?

Will a surrogate mother have any rights with respect to maintaining some knowledge of the child, its whereabouts, its progress and will she be able to contact the child?

Will there be provision for the child be made aware of the nature of their conception and birth?

CONCLUSION

The tenor of my submission is:-

There is no absolute right to have children.

There are already methods available to meet existing needs for those who want children.

Child bearing is no longer a significant issue in the context of sexual unions and therefore it can be considered as simply another aspect of life desired by some, ie. the failure of this now minor aspect of the sexual union can no longer be considered a devastating event.

It is mainly the wealthy who could afford surrogacy and such households are in the minority.

There would be difficulty in establishing an all embracing piece of legislation to cover the many issues and situations as outlined above.

For these reasons, I believe the development of a surrogacy program should not occur.