

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

Organisation: Life, Marriage and Family Centre,
Catholic Archdiocese of Sydney

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The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie St
Sydney NSW 2000

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Dear Sir,

**Submission from the Life, Marriage and Family Centre,
Catholic Archdiocese of Sydney
to the Inquiry into legislation on altruistic surrogacy in NSW.**

In my position as the Director of the Life, Marriage and Family Centre, and drawing on my experience as a family and parent advocate, educator and bioethicist, I wish to forward this submission on behalf of the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney.

The Life, Marriage and Family Centre is an agency of the Catholic Archdiocese of Sydney and has been established to extend the research, policy, educational and pastoral activities the Church undertakes with respect to life, marriage and family issues. Currently there are some 589,000 Catholics in the Archdiocese of Sydney, constituting 32.3% of the general population living within the geographical boundaries of the diocese. Over one million Catholics live in the greater Sydney area and 1.9 million reside in the State of New South Wales.

The Catholic Church has a long and ongoing tradition of caring for children and their families. Catholics hold strong beliefs about the dignity of the human person, including vulnerable children, and of the intrinsic value of marriage and family both for the individual and for the society. We also value the role of the State and of Law in protecting vulnerable citizens, including children, and promoting the integrity of vital institutions such as the natural family.

1. Ethical issues relating to the child

1.1 There is no 'right to a child.'

The desire to be a parent to a child is both natural and strong, and infertility can be a cause of great suffering to a married couple. But we are mistaken if we think that adults have a 'right to a child.' Children are not objects, commodities, or an expression of adult preferences. They ought never to be created in a way that is not respectful of them as a person simply to satisfy adult yearnings and desires.

Children are the subjects, not the objects of rights. They are human subjects, bearers of human dignity, and full members of the human family. Catholic teaching expresses this fundamental and universal insight in the following way:

A child is not something owed to one, but is a gift. The "supreme gift of marriage" is a human person. A child may not be considered a piece of property, an idea to which an alleged "right to a child" would lead.¹

Spouses have a right to try and have a child, but only by means which are respectful of the dignity of that child. Couples should intend only to bring a new human person into the world by conceiving, carrying and nurturing the child within marriage. This is the setting which most fully acknowledges the dignity of the child and establishes a relationship of equality between the child and his parents.

In this area, only the child possesses genuine rights: the right "to be the fruit of the specific act of the conjugal love of his parents," and "the right to be respected as a person from the moment of his conception."²

There are of course, instances such as adoption, where this ideal is unable to be met. However adoption is a very different to surrogacy in that the child is not intentionally conceived with a will to relinquish the child after birth. Adoption does not involve 'commissioning parents.' Adoptive parents do not *contract to create* a child. Instead, they *rescue and welcome* an existing child into their family in situations where biological parents feel that they are unable to care for a child.

1.2 Surrogate motherhood is an intentional abdication of maternal obligations.

Surrogacy is a deliberate activity involving the creation of a human life and a gestational process that does an injustice to a child's right to enjoy an immediate and enduring link with his or her natural parents. It is one matter for children to be separated from their mothers as a result of unintended circumstances. It is quite another matter to intentionally create child-parental bonds with a view to unlinking them to satisfy adult preferences and desires, and for society to be complicit in this process.

The choice to be a surrogate mother may be an act of altruism towards the commissioning couple. With respect to the child, however, surrogate motherhood can only be described as "...an objective failure to meet the obligations of maternal love and responsibility" and an offence against "...the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents."³

Every surrogacy arrangement involves the transfer of parental rights and responsibilities for a child. It is difficult to see how the interest of the child can be enhanced by an arrangement in which that child is created, carried, and born of one mother only to be then handed over to another couple.

¹ Catechism of the Catholic Church, n. 2378.

² *Ibid.*

³ Congregation for the Doctrine of the Faith. *Donum vitae*. Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation. Replies to Certain Questions of the Day, Feb 22, 1987, II, A, 3.

Doctors Marshall H Klaus and John H. Kennel have explored the issue of maternal bonding since the 1980's. They have found that there is a 'sensitive period' at birth when mothers and newborns are uniquely designed to have close and intimate contact with each other. When comparing mother-infant pairs who bonded immediately after birth with those who didn't, they concluded that the early contact mother-infant pairs developed a closer attachment. They suggest that this bonding is really a continuation of the relationship that began during pregnancy. Birth cements this bond and realises the personal relationship.

Whilst it is true that bonding is not a "now or never" reality, and "catch up bonding" is possible at later stages during the child's development, it is clear that the best possible outcome for the mother and child, is to continue that bonding relationship from the first moments after birth.⁴

Marjorie L. Rand, PhD, DAPA agrees that the most important time for bonding is the first hour after birth and beyond this, the first eight days of a child's life. Therein, a relationship pattern emerges that lasts a lifetime. Additionally, evidence firmly suggests that the in-utero infant is a conscious and aware being, and that this original relationship imprint is to be found within the prenatal period of development.⁵

There is little empirical evidence about the specific effects of surrogate motherhood upon children, but from what we know about maternal-infant bonding, there are reasonable grounds for concern that a child is affected in some way when the woman who intimately nurtures that child for nine months, gives birth, and usually nurses that child, is 'trying not to bond' with the baby because she is 'only' the surrogate mother.

1.3 Surrogacy arrangements will usually involve assisted reproductive technology (ART) which carries additional health risks to the child.

According to a recent review, ART is responsible for approximately fifty percent of all multiple births worldwide⁶ resulting in high risk of premature delivery and morbidity. There is also a growing concern that children born as a result of ART are at greater risk of some genetic defects. In an Australian study, 8.6% of children born by IVF had defects at birth, double that of the control group.⁷ A recent analysis of 25 scientific studies published in the *British Medical Journal* concludes that single pregnancies from assisted reproduction have a significantly worse perinatal result in relation to the normal population.⁸

⁴ Drs Marshall H Klaus and John H. Kennel, *Maternal Infant Bonding: The Impact of Separation or Loss on Family Development*, St Louis, Mosby, 1976. *Bonding: Building the Foundations of Secure Attachment and Independence*, New York, Da Capo, 1996.

⁵ Marjorie L Rand, PhD, DAPA *As it was in the Beginning: The Significance of Infant Bonding in the Development of Self and Relationships*. *Journal of Child and Youth Care* (1996), Vol 10 (4), 1-8.

⁶ T Gurgan and A Demirel (2007) Unresolved issues regarding assisted reproductive technology. *Reproductive Biomedicine Online*. 14 Suppl 1:40-3.

⁷ Koren, G.: "Adverse Effects of Assisted Reproductive Technology and Pregnancy Outcome," *Pediatric Research*, 2002.

⁸ Frans M. Helmerhorst et al.: "Perinatal Outcome of Singletons and Twins After Assisted Conception" A Systematic Review of Controlled Studies," *British Medical Journal*, 2004; 328:261.

1.4 Some surrogacy arrangements deny children the right to be raised by their biological parents.

The child also suffers indignity and harm when the surrogate mother is the genetic mother of the child, (i.e. in cases where she is also the ovum donor), or when gametes which do not belong to either the commissioning couple or the surrogate mother are used.

Margaret Somerville has recently proposed that the most fundamental human right of all is a child's right to be born from natural biological origins.

"Knowing who our close biological relatives are and relating to them is central to how we form our human identity, relate to others and to the world, and find meaning in life. Children – and their descendants – who don't know their genetic origins cannot sense themselves as embedded in a web of people, past, present and future, through whom they can trace the thread of life's passage down the generations to them. [Therefore] ...children's rights with respect to their biological origins are:

- For those origins to be natural;
- To know the identity of the progenitors of those origins; and
- To be in contact with those progenitors within a family structure – that is, to be reared by their biological mother and father within their genetic family."⁹

Somerville also writes:

"All these rights of children are of the same basic ethical nature – obligations of non-maleficence, that is, obligations to first do no harm. Consequently, as a society, we have obligations to ensure respect for these rights of children. It is one matter, ethically, not to interfere with people's rights of privacy and self-determination, especially in an area as intimate and personal as reproduction. It is quite another matter for society to become complicit in intentionally depriving children of their right to know and have contact with their biological parents and wider family, or their right to be born of natural biological origins."¹⁰

Surrogacy arrangements *deliberately* overlook the rights of the child in this area.

There is an increasing body of biographical accounts of how discontinuity between a child's genetic parentage, gestational parentage or social parentage can result in an experience of 'genealogical bewilderment'. Here, the experiences of adult donor-conceived individuals are particularly relevant to any consideration of the effects of surrogacy upon children. Joanna Rose, a donor-conceived adult living in Queensland writes: "I have spent my life living with the consequences of short sighted solutions to infertility. This solution has given me and others like me life-long burdens of our own. With third party conception there is an intentional trading away and fracturing of the child's parental kinship."¹¹ Blogs

⁹ Margaret Somerville. "Brave New Babies," *Mercatornet* at www.mercatornet.com/articles/brave_new_babies/

¹⁰ Ibid.

¹¹ Melinda Tankard Reist. "Motherhood deals risk real anguish, *Online Opinion*, 30/11/2006. <http://www.onlineopinion.com.au/view.asp?article=5211>

and websites like *Tangled Webs*¹² are often the only way that individuals like Joanna can express their sense of loss and confusion within an ambivalent community. Any move to legislate for surrogacy should take careful account of the harm that donor conception has caused to a generation of young Australians.

1.5 The indignity of surrogacy is compounded by the use of contractual arrangements.

Surrogacy instrumentalises children by placing the process of their conception, birth and upbringing under a contract. In a surrogacy agreement, whether it is commercial or altruistic, the child is the object of an arrangement aimed at fulfilling the needs of the commissioning parents.

Moves to enshrine surrogacy contracts in law are often motivated by the desire to protect children from harmful custody battles. However while this is well intended, it overlooks the personal and cultural consequences of further commodifying children by making them the objects of formal contracts.

1.6 Surrogacy is an unacceptable form of experimentation involving children.

In the absence of conclusive empirical evidence about the long term effects of surrogacy upon the child, legislating to regulate surrogacy would be an experiment in child welfare.

Legalised surrogacy would be a social experiment which is highly unethical because of the risks to the child and because the principle subject of the experiment, the child, is unable to give his or her consent to the process. The child who is the subject of adult surrogacy arrangements cannot be consulted until it is too late.

The United Nations *Convention on the Rights of the Child*, 1989 states that "...the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." In view of these serious and binding obligations, the State should adopt a precautionary approach to surrogacy in the best interests of the child.

2. Ethical issues relating to the family.

2.1 Surrogacy is an invalid means of family formation.

Surrogacy is an invalid method of 'family formation' which undermines the role and ability of the natural family to contribute to the flourishing of persons, communities and society.

Surrogacy "...sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families."¹³ It thereby weakens

¹² For further information on the experience of donor-conceived children see <http://www.tangledwebs.org.au/>

¹³ *Donum vitae* II, A, 3

the integrity and functionality of the family by confusing relationships between children and parents, as well as relationships between spouses/partners. As a result of surrogacy, a child may come to have a matrix of parents: a genetic mother, a gestational mother, a social mother, a genetic father, a social father and the men (if any) who partner the gestational and genetic mother.

Surrogacy can also have detrimental effects upon the family relationships of the commissioning couple, as well as the surrogate mother and her husband/partner. This is because surrogacy is contrary to the unity of spouses. It is a reproductive method that entails the dissociation of husband and wife by the intrusion of a person other than the couple (by means of the donation of a surrogate uterus, and possibly donor ovum) into what should be an exclusive relationship. In so doing, surrogacy betrays the spouses' "right to become a father and a mother only through each other."¹⁴

The conclusions of the Australian Health Minister Advisory Council Reproductive Technology Working Group in 1989 remain extremely relevant to the current inquiry:

"Surrogacy is a practice which involves real risk of harm to parties who may become involved, and that substantial uncertainties attach to the practice as a means of family formation...Many of these issues cannot be resolved satisfactorily...[A]ttempts to regulate the practice could well compound the inherent complexity and uncertainty of surrogacy arrangements. Regulation would institutionalise surrogacy as a form of family formation, and serve to promote...a risky and undesirable means of family formation."¹⁵

2.2 Surrogacy contributes to the deconstruction of parenthood.

Altruistic surrogacy arrangements, in their various forms (i.e. involving married or same-sex couples, the commissioning couple's gametes or donor gametes) would contribute to the developing legal and cultural deconstruction of parenthood. Surrogacy promotes the de-linking of the legal notion of parenthood from traditional understandings and natural ties. It contributes to a vision of family life dominated by adult desires, where children and parents are instrumentalised, and 'choice' is exalted as the reigning value.¹⁶

3. Ethical issues relating to the surrogate mother

3.1 It is doubtful that a legally authorised body could ensure, with sufficient confidence, that a surrogacy arrangement is genuinely free and informed.

Emotional coercion, however subtle, is a serious possibility when the potential surrogate mother is a relative or close friend of the commissioning couple.

¹⁴ c.f. *Donum vitae* II, A, 3.; *Catechism of the Catholic Church* n. 2376

¹⁵ Australian Health Minister Advisory Council Reproductive Technology Working Group, 1989, cited in: Kevin Andrews, "Surrogacy, Public Policy and the Law", *St Vincent's Bioethics Centre Newsletter*, Vol 11 (1993) No.2, 1-3.

¹⁶ William C. Duncan. "Deconstructing Parenthood," *The Family in America*, No 1, 2008.

It is also extremely difficult to ensure that a surrogate mother is sufficiently informed to give legitimate consent to any altruistic surrogacy arrangement. It is highly questionable whether a surrogate mother can be fully aware of her potential physical, emotional and psychological state at the end of nine months of pregnancy, prior to entering into a surrogacy arrangement. Is she aware of the emotional impact of giving up a baby she has nurtured for nine months? Of all the risks associated with ART, pregnancy and birth complications, for her and the child?

Willmott argues that the very notion of consent in surrogacy is dubious because: "Any consent given by a potential surrogate mother cannot be regarded as a real consent, the mother being motivated by factors other than her own or any future child's best interests."¹⁷

3.2 Surrogate mothers may incur physical, psychological and social harm as a result of surrogacy arrangements.

The rupture of the maternal-infant bond has the potential to harm the surrogate mother, as well as the child, as the surrogate mother seeks to cope psychologically with the relinquishment of the child that she has nurtured in the most intimate way for nine months. An inability to relinquish the child may result in a bitter and protracted custody disputes. In these circumstances, government regulated surrogacy might secure the 'delivery' of a child to the commissioning parents, but it will never erase the personal suffering caused by surrogacy in the first place.

There are also physical risks to be considered. Any pregnancy carries some risk to the mother. The surrogate mother, however, will usually also have to undergo and be subject to the additional risk associated with assisted reproductive technology. Furthermore, in surrogacy she must bear this risk without the natural benefit of motherhood.

4. Conclusions in relation to the Inquiry's Terms of Reference.

4.1 The NSW Government should play no role in regulating altruistic surrogacy arrangements in NSW. TOR (a.)

We oppose any move to legislate for the regulation of altruistic surrogacy arrangements in NSW as this would give in principle support to, and encourage, an unethical practice.

An important function of the Law is to protect people from injustice, especially vulnerable members of the community like children. The Law also functions to education people about appropriate behaviour for living well together in community.

Moves by the government to regulate surrogacy would be seen by the community as condoning surrogacy and facilitating a form of family formation which is against the best interests of the child and the common good.

¹⁷ Willmott (2002) Surrogacy: Ill Conceived Rights. *Journal of Law and Medicine*, 10:198-220.

Hence we recommend that surrogacy 'contracts' should remain unenforceable. Furthermore, in the interests of the child and of the common good, the government should do what it reasonably can in order to discourage all forms of surrogacy.

It follows that:

- 4.2 There should be no legislated criteria that the intended parent/s and/or birth parent/s should have to meet before entering into an altruistic surrogacy arrangement. TOR (b.) This is because to codify surrogacy in law would inevitably involve its normalisation and encouragement.**
- 4.3 There is no requirement for specific legislation on the legal rights and responsibilities that should be imposed upon the intended parent/s and/or birth parent/s. TOR (c.)**
- 4.4 There is no requirement for specific legislation specifying 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. TOR (d.)**
- 4.5 No legislative amendments should be made to clarify the legal status of any child born of an altruistic surrogacy arrangement. Where private surrogacy arrangements are made, the birth mother should continue to be lawfully deemed to be the legal parent. TOR (e.) If the birth mother wishes to relinquish the child then the principle of the child's best interests should be used to ensure that a decision about social parenthood is determined not by a surrogacy contract, but according to a judicial decision in the child's favour. This circumvents the idea that a child's interests can be subject to a contractual arrangement and ensures that the child's best interests are determined by an independent, objective body.**
- 4.6 A child born through an altruistic surrogacy arrangement does, however, have a right to access information relating to his or her genetic parentage. TOR(f)**

Thank you for the opportunity to make a submission to NSW Legislative Council's Standing Committee on Law and Justice. I would be happy to meet with any relevant persons to discuss the issue outlined above should that be useful. I can be contacted on 02 93905368 or by email on marriageandfamily@sydney.catholic.org.au

Yours sincerely,



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