

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Organisation: Australian Family Association (NSW)

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The Australian Family Association

Ms Christine Robertson
The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Ms Robertson,

Submission to the inquiry into legislation on altruistic surrogacy in NSW

From the Australian Family Association

I am writing on behalf of the Australian Family Association. We acknowledge and commend the NSW Government's desire to address the issue of surrogacy, and we thank you for the invitation to make a submission to this inquiry.

Summary

Most discussions of surrogacy identify the negative impact which the practice can have on women participating in surrogacy arrangements. These include the reduction of the role of the surrogate mother to that of "incubator"; concerns for the psycho-social impact of surrogacy on surrogate mothers (including the impact of separating mother and child immediately after birth); and the reinforcement of the predominantly unequal social relationship between commissioning parents and surrogate mothers.¹

The AFA recognises the harmful outcomes of surrogacy for women. It is not, however, our intention to consider in detail the impact of surrogacy on women. It is assumed that these issues will be addressed thoroughly in other submissions to the inquiry. Rather, our submission focuses on the impact of surrogacy on the children who are born through surrogacy arrangements.

Advances in artificial reproductive technologies, including surrogacy, have outpaced the development of the law in that area. As surrogacy becomes more widely available, and more common, there is an urgent need for legislators to consider the impact of surrogacy arrangements on the persons involved, and on society at large. It would appear that surrogacy arrangements necessarily interfere with the fundamental human rights of the children they produce, including the child's right to natural, un-tampered-with biological origins, and the child's right to know and be raised by his or her biological mother and father. What's more, there is evidence suggesting that surrogacy arrangements are detrimental to the

¹ See *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research (2004)*, Australian Health Ethics Committee, National Medical Health and Research Council.



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developmental welfare of children. In developing a legislative framework with regard to surrogacy, the state must intervene to serve the best interests of children by protecting their rights and welfare. Surrogacy should therefore be prohibited.

1. The role of the law

This section addresses points (a) and (e) of the terms of reference.

Article 3 of the United Nations Convention on the Rights of the Child states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.²

Therefore any legal framework governing altruistic surrogacy must first and foremost acknowledge and protect both the welfare and the rights of the child who would be created through the surrogacy arrangement, and must consider any other effects which a surrogacy arrangement may have on the child. The rights and interests of other parties, including the commissioning parents and the birth-mother, must always be regarded as secondary to the welfare and rights of the child.

2. Children's rights, and the responsibilities owed to them

This section addresses points (b), (c), (d), and (f) of the terms of reference.

In discussions relating to surrogacy, the right of a child to know the identity of his or her biological mother and father is often recognised. However it has been suggested that children possess other fundamental rights,³ the most important of these being:

- a. The right to natural biological origins;
- b. The right to be raised by their biological parents.

The right to be raised by one's biological parents is perhaps the more easily recognisable of the two, and research concerning the welfare of adopted children has long indicated as much.⁴ Moreover, it is clear that forcibly removing a child from the care of his or her natural parents where there is no need to do so contravenes that child's basic rights. The plight of the indigenous Australian Stolen Generations illustrates the point emphatically. The forced removal of aboriginal children from their families is now recognised as being wrong principally for the fact that doing so deprived children of a relationship to their natural parents which was their inherent entitlement.

The right to natural biological origins is merely an extension of the right to be raised by one's biological parents, and essentially precedes it. This right precludes interference and artificial interventions in the

2 UN Convention on the Rights of the Child, <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html>

3 See, for example, ethicist Margaret Somerville, Founding Director of the Centre for Medicine, Ethics and Law at McGill University, Canada, http://www.mercatornet.com/articles/view/brave_new_babies/P15/

4 Robin Winkler and Margaret van Keppel *Relinquishing Mothers in Adoption* (1984).



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natural conception and development of the child. Just as we recognise that it would be an infringement of the newborn baby's rights to deliberately send it home with the wrong mother, so should we also recognise that a child *in utero* has the right to be conceived and carried to term in the womb of its natural mother.

Historically it has been unnecessary to recognise these rights in law, given the lack of any alternative to natural conception, gestation and birth. However, as new reproductive technologies have developed, strong calls for the recognition of children's basic rights have been generated, particularly among children conceived and born by the use of such technologies.⁵ Organisations such as Tangled Webs⁶ set out to provide a forum for children born through artificial reproductive technologies, as well as to provide a platform through which they can advocate recognition of the rights and interests of children created through these new technologies.

In exceptional circumstances, it may happen that a child is naturally deprived of the enjoyment of one or other of these rights. A child's mother or father may die, or might abandon the child. Children may be surrendered for adoption. In some cases, children have been forcibly removed from the custody of their natural parents, either for their better protection and wellbeing, or else for some other (usually unjustified) reason.

In all such cases it has been recognised that, for the child, the unintentional deprivation of the benefit of an ongoing relationship with his or her natural mother and father is of itself a negative outcome. Certainly under no circumstances has it been considered acceptable to create a child with the intention of depriving that child of the benefit of an unbroken relationship with his or her biological parents, from the moment of conception, through gestation, and indeed, through childhood.

3. Impact of surrogacy on children's rights

This section addresses points (d) and (f) of the terms of reference.

Children born through surrogacy arrangements are subject to serious infringements upon these fundamental rights. A child's natural heritage is necessarily and deliberately confounded by the very nature of a surrogacy arrangement.

The child may be deprived of the right to be born to his or her genetic mother, or else may be conceived with the intention of being carried to term by the genetic mother, and then given away. Under both circumstances, the child is forcibly subjected to a complex network of social, biological and genetic relationships from the moment of conception.

Whereas similarly complex family relationships often arise in cases of adoption and divorce/remarriage, in the case of surrogacy, these complex relationships are imposed upon the child knowingly and

⁵ See, for example, <http://www.biotechnologynews.net/storyview.asp?StoryID=69548> and <http://globecareers.workopolis.com/servlet/Content/fastrack/20060930/COWENT30?section=Technology>

⁶ www.tangledwebs.org.au



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deliberately. That is to say, in the interests of fulfilling their desire to have children, persons who commission childbirth by surrogacy deliberately and knowingly deprive the child of the basic right to natural biological origins.

Furthermore, in many surrogacy arrangements, the persons raising the child will not usually be that child's genetic parents. Again, while comparisons to cases of adoption and divorce/remarriage succeed to some extent, the fact that in the case of a surrogacy arrangement the child has been conceived with the express intention of depriving the child of the right to be raised by both biological parents demonstrates the unique manner in which surrogacy unavoidably deprives children of certain fundamental human rights.

In light of these observations, we respectfully submit that it is the responsibility of the state, through the law, to prevent the deliberate infringement of children's fundamental human rights wherever possible, even if this means disallowing the practice of altruistic surrogacy.

4. The rights and responsibilities of parents

This section addresses points (b), (c) and (d) of the terms of reference.

Although it has been suggested that by outlawing surrogacy, a state unfairly denies citizens the right to have children and to found a family, we contend that no person has the *right* to a child, even if they express an earnest desire to have children. To the contrary, we submit that to assume the *right* to bring a child into the world by whatever means possible is to treat a child as a means to an end, a means to fulfilling another person's desires. This is a sentiment strongly shared by children born through artificial reproductive methods.⁷

Surrogacy arrangements also attract the distinct possibility of custodial disputes between surrogate mothers and commissioning parents.⁸ Such disputes highlight the confusion which surrogacy inherently entails, pitting the rights of persons with genetic links to the child, against the rights of a woman who, as the birth mother of the child, retains the ordinary right of custody. Where such ugly disputes can be avoided, they should be, particularly for the welfare of the child involved. Since avoiding surrogacy arrangements would clearly have the effect of avoiding such disputes, surrogacy arrangements should be avoided.

5. Impact of surrogacy on children's welfare

This section addresses points (d), (e) and (f)

Given the limited amount of research in the area, it cannot be said that the impact of surrogacy on children is at present fully understood. However the responses of children born through artificial

⁷ <http://www.tangledwebs.org.au/dc.php>

⁸ See, for example, the Australian Family Court case of *Re Evelyn* (1998), and *In the matter of Baby M*, a case from the Supreme Court of New Jersey, USA, 1988.



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reproductive methods, as evidenced by groups such as Tangled Webs, suggest that negative psychological and social outcomes commonly result where children have been subjected to such methods of conception. In light of these observations, we submit that it is unconscionable for the state to facilitate or condone conduct what is essentially a vast social experiment, at the expense of the welfare and intrinsic rights of children.

6. Responses of other states

This section addresses point (g) of the terms of reference.

Several states have enacted legislation which either expressly or impliedly makes altruistic surrogacy legal. We submit that where states have endorsed the practise of altruistic surrogacy, they have not done so on the basis of sound policy, but have rather responded in an *ad hoc* manner to proliferation of surrogacy arrangements within their jurisdiction. In doing so, they have (presumably unintentionally) failed to give sufficient regard to the rights of children as is demanded by the UN Convention on the Rights of the Child.

Under such circumstances, we submit that the state of NSW should not follow the example of states in legislating on this matter.

7. Recommended approach

This section addresses point (a) of the terms of reference.

The NSW government should adopt and implement a policy which protects and affirms the rights and welfare of children by prohibiting all forms of surrogacy. Rather than follow the lead of other states which have legalised altruistic surrogacy, legislators should establish a firm precedent which protects and affirms the rights and welfare of children, which other states may later follow. In this, the NSW government has an opportunity to show leadership on an issue of grave importance to the children of Australia.

Sincerely,

Tim Cannon
Research Officer,
Australian Family Association.