



Committee Secretary

House of Representatives Standing Committee on Social Policy and Legal Affairs

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Dear Sir/Madam

Inquiry into Surrogacy

Thank you for the opportunity to provide a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements.

This submission is prepared by the Social Issues Committee of the Anglican Church of the Diocese of Sydney, and endorsed by the Archbishop of Sydney.

1. Introduction

Legislative approaches to topics as intimate as the bearing of children cannot be considered outside the ethical implications of the actions involved. Surrogacy cannot be viewed in isolation from the Assisted Reproductive Technologies (ART) which are routinely involved in its modern practice. We are aware of the great pain experienced by those who suffer from infertility and long for a child of their own, and sympathise with their plight. However, we do not believe that a 'right' to have a child exists, and can see no grounds by which such a right would be established.

We therefore do not accept the premise that any means available to obtain offspring should be made available to individuals suffering from infertility. There are already many children in our society in need of nurture and parental care which can be given through means, such as through adoption or fostering, that are ethically non-contentious. ART has influenced modern discourse on what constitutes parenthood, such that intention is now seen as sufficient to confer motherhood or fatherhood, and traditional norms such as engaging in sexual intercourse and mutual provision of gametes are no longer required. Our view of parenthood differs. All submissions to this inquiry will be grounded in the particular worldview of the authors. We approach this subject in the context of the following biblical understanding of family, a view which is widely held in our community:

- **Marriage** (lifelong commitment between a man and woman) is the ideal foundation for a family, whereby through the act of sexual intercourse, the child is conceived by a mother and begotten by a father, creating continuity between biological and social roles. While the vicissitudes of life can prevent this ideal from being realised, we nonetheless believe this should be the aim in the creation of new families.
- **Parenthood** We believe that parenthood is a blessing, not a right, and that children are not commodities to be commissioned at will. We believe that the privileges and responsibilities of parenthood extend beyond the provision of gametes and/or gestation to the ongoing nurture of offspring.

- **Value of human life** We believe that human life begins at fertilisation (joining of the male and female gametes) and that it should be respected from that time onwards.

While surrogacy may seem to be a reasonable response to the problem of infertility, many of our objections are based on concerns for the welfare of those involved. While research regarding the long-term effects of surrogacy is scanty, there is evidence that potential dangers exist. In our submission we differentiate between **commercial surrogacy** (where the surrogate is paid beyond the expenses incurred) and **non-commercial (altruistic) surrogacy** (where financial gain is not provided).

Commercial surrogacy

We do not support commercial surrogacy in any context. It commodifies children. Second, it exploits financially needy women, who may engage in surrogacy for profit when they would not do so otherwise.(1) Such concerns are evident in developing countries involved in the international surrogacy trade. The socio-economic disparity between commissioning parents and surrogates is often great, leading to unequal bargaining power between the two, and reports of unfair and dangerous treatment of vulnerable women in some overseas countries.(2, 3) This has created an ethically problematic situation over which we have little control. To support such enterprises would amount to moral complicity. Attempts to legalise commercial surrogacy in developed countries, such as the United Kingdom (in a ‘harm minimisation’ approach), have not resolved ethical issues, such as disputes arising when a surrogate wants to withdraw from the commercial contract; nor have they led to public acceptance of the notion of a mother willfully relinquishing her child.(4)

Non-commercial surrogacy

However, we recognise that there is a valid clinical place for non-commercial surrogacy, for example, where a uterus is removed to control postpartum haemorrhage (5) or to treat cancer.(6) In such situations we support non-commercial surrogacy for the purpose of the transfer of *pre-existing* human embryos for which the woman involved is responsible. This is for the purpose of giving the embryos an opportunity to develop based on the view that the primary focus shifts to the interests of the child in this situation. Nonetheless, we do not support the creation of human embryos for the explicit purpose of using non-commercial surrogacy.

We have concerns about the wisdom of non-commercial surrogacy in other situations, however, if it is to remain legal in Australia we would recommend the following points be taken into consideration.

If non-commercial surrogacy is made more widely available in Australia, ideally it would be subject to those arrangements and requirements that apply to adoption with regard to the suitability of the parents and ongoing relationship of the child to all parties involved. However, as a minimum, we would propose restricting access to married couples and those who have successfully completed a working with children check. We would also recommend promoting an open relationship between all parties as occurs currently in open adoption. We address the remaining terms of reference below.

1. The role and responsibility of States and Territories to regulate surrogacy, both international and domestic, and differences in existing legislative arrangements

We support the introduction of uniform legislation across the States and Territories to avoid confusion and jurisdiction ‘shopping’ by Australian citizens, and to clarify the legal position where no legislation exists. This would promote greater familiarity with local policy in relation to local non-commercial surrogacy and reduce the likelihood of commissioning parents finding they cannot bring their offspring home from international surrogacy sites. A uniform legal framework will also provide

clarity for people considering an international surrogacy arrangement. While the surrogacy regulations of other countries may differ, it is not the role of the Commonwealth or State governments to facilitate access by Australian citizens to surrogacy arrangements overseas. Instead, Australian law should be based on what is right and ethical. It would therefore be the role and responsibility of States and Territories to enforce Australian standards in regard to use of both domestic and international surrogacy, as is currently the case, in particular, maintaining the ban on commercial surrogacy.

2. Medical and welfare aspects of all parties involved, including regulatory requirements for intending parents and the role of health care providers, welfare services and other service providers

The advent of ART has allowed the development of social experiments, such as families with a combination of biological, surrogate and social parents for a single child, which are too recently established to allow adequate longitudinal empirical analysis. What research has been done is difficult to generalise due to methodological problems such as non-representative sampling.(4) A review of the psychosocial research into surrogate mothers, commissioning mothers and offspring (4) has shown that there are multiple issues of concern:

(a) Welfare of the child

Welfare of the child born from surrogacy should be a priority in any arrangements. We object to surrogacy arrangements that prioritise the preferences of commissioning parents, as this promotes the model of offspring as commodity. Our view of the value of the human embryo leads us to support the transfer to a uterus of all embryos created through ART. Once a child is conceived, their life should be preserved regardless of a change of preferences by the adults involved. We address the need for adequate financial support of the child below.

There is evidence that babies are highly attuned to their mothers while in utero.(7) It is not yet known what impact the loss of one's gestational mother at birth has on the child. The failure to recognise the importance of pre-natal attachment suggests a desire to minimise the importance of attachment, separation and loss for the baby. Surrogacy may be at the cost of denying these basic needs in the case of the baby as well as (all) the parents.

The importance of lineage has been clearly expressed by ART offspring.(8) Therefore we do not support the introduction of a third parent into the child's heritage in the case of partial surrogacy (the situation where a surrogate carries a child who is not genetically related to her). We do not support the anonymity and/or ambiguity of origins which can be created for offspring as a result of legislation in jurisdictions where parentage, other than biological parentage, can be recorded on a birth certificate. The distress of ART offspring who do not know their biological origins and family lineage was well documented in the NSW Government enquiry investigating the need for a central donor register.(9) We commend those governments that have introduced legislation to assist with the exchange of information about origins of donor-conceived offspring.

(b) Welfare of the surrogate

A surrogate mother is not pregnant through unplanned pregnancy, as is often the case in situations of child adoption or abortion. She becomes pregnant on purpose and plans to relinquish the child at birth to the commissioning parents. Therefore understanding of the dynamics of adoption and/or abortion have limited application here. There has been a little research on the motivation of such women, and results are mixed. While financial gain and need for personal fulfilment is a reason for

some women undertaking surrogacy, some women are motivated by the opportunity to give the gift of life.(4) There is consistent research indicating that surrogate mothers believe that the surrogate arrangements should be disclosed to offspring, and that they benefit from ongoing relationships with children born.(10, 11) This supports our contention that surrogacy should be non-commercial, and also that the current restriction of advertising for surrogates should remain unlawful. If non-commercial surrogacy is considered, it should involve women already in relationship with the commissioning parents, to allow their ongoing parental responsibilities to be exercised.

The natural bond that develops between the gestational mother and her child is well known.(12) Surrogacy is based on the premise that this will be broken by the surrogate relinquishing the child at birth. This has led to problems of contested custody which we believe is not in the interest of any of the parties involved. The long-term effects of the psychological impact of relinquishing a child have not been well examined, but there is some evidence that surrogates are often deeply upset by the process, suffering separation anxiety and depression when they have to hand over the baby, and that even when happy to relinquish the child at birth, the surrogate's beliefs and preferences may not be stable over time.(11) Reports exist of the surrogate's own children fearing that they may be relinquished.(13)

We believe that women engaging in non-commercial surrogacy should legally have their expenses covered by the commissioning parents. Making the distinction between compensation for burdens and payment for a service has the advantages of not distinguishing between surrogates on the basis of outcome, ensuring surrogates have their expenses covered regardless of circumstances and reducing the risk of commodification of the surrogate. In the case of non-commercial surrogacy, we believe a cap should be in place for payments to avoid surreptitious compensation (and the risk of coercion), as has occurred in the past. We recognise that it will be difficult to police these arrangements in all circumstances, however, the legislation should make a very clear statement that these arrangements are to be on a non-commercial basis and any enforceable penalties should apply to the commissioning parents. The law is educative and can be a deterrent to some.

In relation to international surrogacy arrangements in many developing countries, it is increasingly evident that the potential for exploitation of women is high, even if the commissioning parents undertake the process with the best of intentions. Such arrangements are often conducted through for-profit third parties operating in jurisdictions where regulation and legal oversight is weak. It is reported that around two-thirds of the fees paid for international surrogacy goes to such agents.(14) The Australian legal framework should discourage citizens from accessing such arrangements which exploit vulnerable women for profit.

(c) Responsibilities of intending parents

Commissioning a child to be born is a significant undertaking and those involved need to be held responsible for their actions.(15) We have already indicated our view that commissioning parents should not be able to withdraw their intention to parent, once a surrogate is pregnant. We believe this should be an absolute responsibility, regardless of any unexpected events such as multiple pregnancy and/or detection of abnormality in the child. The risk of this occurring is real, as illustrated by the much-publicised example of Baby Gammy in 2014. If the surrogate is unwilling to retain parenthood of the child, the parents should be legally and financially responsible for the ongoing nurture of any children born until the age of 18 years, unless this legal responsibility is transferred to another, according to current Australian law.

(d) Role of the healthcare provider

Given that ART will usually be employed in a local non-commercial surrogacy, the physical safety of the surrogate will be ensured by adherence to the NHMRC's *Ethical guidelines on the use of Assisted Reproductive Technology in clinical practice and research* (2007) (ART guidelines).(16)

We support the current ART guidelines which prohibit healthcare providers from facilitating commercial surrogacy, and potentially distancing the surrogate from the family of the offspring.

3. Issues arising regarding informed consent, exploitation, compensatory payments, rights and protections for all parties involved, including children

In order for comprehensive informed consent to be present in the case of non-commercial surrogacy it is necessary for the risks of surrogate pregnancy to be clear to all parties concerned. The ART guidelines make healthcare providers responsible for ensuring that all participants in non-commercial surrogacy have undertaken counseling before engaging in the practice 'to consider the social and psychosocial significance for the person born as a result of the arrangements, and for themselves.'(16) We support this standard.

The infrequent use of surrogacy requires that an adequately informed counselor be available to assist in obtaining informed consent. A registered accredited ART counselor should be used, and we recommend the introduction of this requirement in the next version of the ART guidelines. We support current recommendations of various states that require intended surrogates to be over 25 years of age, to have already given birth to a live baby, and to have completed their own family. We agree that these conditions improve the opportunity for informed consent to exist in surrogacy arrangements. Research has shown reduced psychosocial pathology for such women following relinquishing of their child.(4)

4. Relevant Commonwealth laws, policies and practices (including family law, immigration, citizenship, passports, child support and privacy) and improvements that could be made to enable the Commonwealth to respond appropriately to this issue (including consistency between laws where appropriate and desirable) to better protect children and others affected by such arrangements

In the rare cases of non-commercial surrogacy, we support uniform arrangements in Australia which transfer custody to social parents as soon as possible after the child has been relinquished to ensure legal consent can be given in case of emergency. Currently, the intended parents of a child born through surrogacy can apply to the NSW Supreme Court for a parentage order 30 days after the child is born. A parentage order grants them full parenting rights and their names go on the child's birth certificate. While this timeframe is commendable, we strongly oppose the practice where the birth certificate contains no reference to the surrogacy arrangements or the gestational mother, as it reduces the chances for offspring to discover this fact in the event that commissioning parents withhold the information from them.

The ART guidelines must be followed by all ART clinics in Australia in order to achieve accreditation. The current version forbids ART clinics from undertaking or facilitating commercial surrogacy and provides guidelines for safe and responsible engagement with non-commercial surrogacy, such as limiting the number of embryos transferred at one time. These guidelines are an important factor in ensuring best practice of care for those involved and we support continuation of this policy in the forthcoming revision of the guidelines by the NHMRC.

5. Australia's international obligations

Commercial surrogacy constitutes a form of human trafficking as defined by the United Nations Optional Protocol Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.(17) Furthermore, commercial surrogacy arrangements threaten rights of the child as recognised by the Convention on the Rights of the Child (CRC) (18) and the International Covenant on Civil and Political Rights (ICCPR).(19) These documents, to which Australia is a signatory, recognise human rights that States must provide to all children, regardless of to whom, or under what arrangements, they are born. The overarching principle is that the best interests of the child should be paramount in all actions concerning them (CRC Article 3).

Rights of the child relevant to surrogacy include the right to be registered immediately after birth, to acquire a nationality, name and family relations, to be cared for by their own parents and not separated from them against their will, and protection of the family as the natural and fundamental group unit of society (CRC Articles 7,8,9 and ICCPR Articles 23, 24). The uncertainty which exists in international commercial surrogacy, such as who is the 'parent' from whom the child should not be separated, and which nationality should the child be (particularly when the possibility of the child being stateless exists), means that Australia, having ratified these treaties, has the obligation to oppose this trade.

6. The adequacy of the information currently available to interested parties to surrogacy arrangements (including the child) on risks, rights and protections

We commend the Federal Government's provision of extensive information on relevant websites warning Australian citizens who are considering use of international surrogacy arrangements to familiarise themselves with local regulations, and make recommendations for independent legal counsel. While we are aware that changes in law by some foreign governments have caught some current commissioning parents unawares and caused delay in repatriation of offspring, this is a temporary situation which should not dictate Australian policy. We have already commented on the need for some form of recognition on the birth certificate when a child is born through surrogacy arrangements.

7. Information sharing between the Commonwealth and States and Territories, and the laws, policies and practices of other countries that impact upon international surrogacy, particularly those relating to immigration and citizenship.

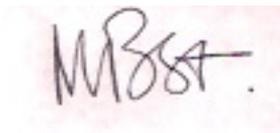
Even if the practical arrangements of surrogacy go smoothly, there are many examples of parents finding it difficult to get citizenship for children born in overseas jurisdictions.(20) We are aware that the suggestion has been made that the current employment of international surrogacy agencies by Australians (reported as approximately 350 babies per year in India alone), (21) represents a failure of local policy, thereby necessitating legalisation of commercialisation of surrogacy in Australia.(15, 22) We disagree. Australia is not able to influence directly the practice of commercial surrogacy in other jurisdictions, and the proliferation of the international situation is also the result of weak legal frameworks exploited by for-profit entities. However our international legal obligations require that we do all we can to protect children here. Information sharing between the Commonwealth, States and Territories is to be encouraged so as to facilitate enforcement of national legislation and ensure that Australia's citizenship provisions are not used to circumvent adoption laws and other child welfare laws.

8. The laws, policies and practices of other countries that impact on international surrogacy, particularly those relating to immigration and citizenship

As a party to the United Nations Treaties CRC and ICCPR, Australia recognises obligations to prevent the abduction, sale, or trafficking of children. Furthermore, commercial surrogacy involves exploitation of women and commodification of children born. Ethical concerns such as multiple embryo transfers to ensure a live birth with subsequent termination of pregnancy, or foetal reduction to the number of offspring desired by parents, are other unscrupulous practices which have been reported within this industry.⁽³⁾ We recommend that the Australian Government **work directly with** countries, particularly those in the Asia-Pacific region, where commercial surrogacy is currently legal or operates in a grey zone, to encourage a stronger domestic policy and legal framework that outlaws commercial surrogacy.

It is not in the interest of a child born from surrogacy arrangements to be left without nationality or legal parents. We do not support punitive measures which would disadvantage a child due to the choices of commissioning parents, but neither do we believe it is in the interests of children generally to support unethical surrogacy arrangements in other jurisdictions. We believe Australian governments should criminalise use of international commercial surrogacy agencies, but allow a window before introduction of sanctions where children already commissioned would be eligible for Australian citizenship. Thereafter it should be a requirement that the children born of commercial surrogacy overseas would be registered as citizens of the country of their birth rather than Australian citizens. Commissioning parents should have to undertake legal adoption which would make it harder and less attractive to seek an overseas surrogacy arrangement, thereby undermining this unethical practice in the future.

We would be happy to explain our views further if the committee is agreeable.



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