

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

Organisation: Women's Forum Australia
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The Hon Christine Robertson MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street Sydney NSW 2000

26 September 2008

Dear Ms Robertson

Re: Inquiry into legislation on altruistic surrogacy in NSW

Thank you for your invitation to provide a submission to this inquiry. Women's Forum Australia (WFA) is an independent women's think tank that conducts research, education and public policy development about social, economic, health and cultural issues that affect women.

In summary WFA recommends the following:

1. The law should discourage all forms of surrogacy.
2. The current law that holds surrogacy agreements as void should be maintained, pursuant to section 45 of the *Assisted Reproductive Technology Act 2007*.
3. It should be an offence to advertise, promote or solicit surrogacy arrangements in any form.
4. It should be an offence to receive a fee in connection with professional services (such as ART) to assist any form of surrogacy.
5. In the event that surrogacy occurs, the surrogate mother and the commissioning parents should *not* be subject to penalty.
6. In the event that surrogacy occurs, the birth mother and her partner should be the legal parents unless and until there is a legal transfer of parentage.
7. Legal transfer of parentage should be effected by court order with the child's best interests as paramount, with the consent of the birth mother after a 'cooling off' period and should take place within a set time and only if the child is residing with the commissioning parents.
8. The Legislative Council could investigate the status of adoption in Australia, since a shortage of babies available for adoption is generating some demand for surrogacy.

As a women's organisation the reasons for our recommendations are largely focussed on the experience of the surrogate mother and the wider ethical and social policy implications for the status of women.

Why should altruistic surrogacy be discouraged?

From some perspectives, altruistic surrogacy is a selfless and compassionate response to infertility. Some advocates view it as the logical addition to the suite of ART services currently available.

While acknowledging the serious distress experienced by infertile people and the generosity that motivates people involved in surrogacy arrangements, WFA believes that the law should nevertheless discourage altruistic surrogacy.

There is a disturbing lack of objective evidence about the long term impact of surrogacy on the surrogate mothers, the children and the families of the commissioning parents. The studies by Susan Golombok et al are frequently cited in support of surrogacy which they report does not have a negative impact on the social or emotional development of all parties involved.¹

However, the studies have only limited longitudinal significance. So far they have not followed surrogate children into adolescence and adulthood nor reviewed the experience of their families and birth mothers at this later stage. The Investigation into Altruistic Surrogacy Committee in Queensland recently noted that some questions remain about the validity of this research and suggested that 'the results should be interpreted with caution.'²

WFA questions the ability of research to detect the extent of harm resulting from surrogacy. Women and children involved in altruistic surrogacy may be especially unlikely to report any ill feelings, regret or harm. In a sense, they would be criticising their own friends and family, appearing to be regretful of the birth of a child that they now know and love, or perhaps (in the case of the child) hurting their own parents.

The limitations of available research into the harms of surrogacy were acknowledged by the Victorian Law Reform Commission Report.³ Thus it cannot be asserted that 'no harm has been done to any party' due to surrogacy, as one consumer advocacy group claimed in a recent submission.⁴

Surrogacy risks the violation of women's reproductive autonomy

WFA believes that surrogacy agreements expose women to serious risks to their reproductive autonomy

One of the reasons commercial surrogacy is prohibited across Australia is that financial payment could put pressure on disadvantaged women to act as surrogates, thus undermining the voluntariness of this decision.

In altruistic surrogacy arrangements, the surrogate mother is not motivated by material gain. The baby is her gift and, it is assumed, her choice. But the language of altruism can disguise other types of pressures that can impact on the surrogate. It is possible that surrogate mothers would experience significant emotional pressure to carry the pregnancy in the first place and secondly to relinquish the baby. Not necessarily deliberate coercion by others, but pressure or coercion implicit in the woman's circumstances, particularly since the surrogate mother is frequently a relative or friend of the commissioning couple. The risk is that some women might experience 'altruistic' surrogacy as a duty, belying the language of autonomy.

There is evidence of social and cultural expectations of feminine altruism which impact on women. In her ground breaking work on psychological development Carol Gilligan observed that:

...while society might affirm publicly the woman's right to choose for herself, the exercise of such choice brings her privately into conflict with the conventions of femininity, particularly the moral equation of goodness with self-sacrifice...it is... in their care and concern for others that women have both judged themselves and been judged.⁵

Another theorist has characterised the stereotype of the 'good woman' thus: "She is loyal and loving, compliant and altruistic ... good women can be distinguished by their abandonment of their own interests and their overriding concern for the interests of family members".⁶

Gilligan's methodology is not without its critics. However, even some of those who question her empirical rigour admit that the stereotype of female self sacrifice resonates strongly: "It is clear that women have a greater *reputation* for altruism and empathy than do men, and that women accept its validity. Whether the reputation is deserved is a more complicated question".⁷

'Altruistic' surrogacy, especially if the surrogate mother is a relative or friend of the infertile person resonates strongly with this powerful stereotype of female self sacrifice. This will be particularly strong for women who lack a sense of self worth and thus enter a surrogacy arrangement to win the approval of others.⁸ The risk is that some women experience an expectation that they become a surrogate for their loved one and eventually surrender the child. Moreover, if the surrogate mother broke her promise to relinquish, she would risk the destruction of family relationships and friendships so essential to her social support, her history and her identity.

To affirm that the choice and consent of a surrogate mother can be influenced and pressured is not to claim that the woman is incapable of choosing. But it is important to acknowledge that the surrogate mother's decision always occurs within the context of powerful expectations of the commissioning parents for a child and the anticipation of the wider family and friends, all of whom are likely to have a close relationship with the surrogate herself. In many surrogacy arrangements, 'altruism' will disguise the serious risks to the surrogate's reproductive autonomy.

Surrogacy undermines the meaning of motherhood and objectifies women

Motherhood is both a biological reality and an embodied experience for women. There is a significant body of research to confirm the important psychological and physiological bonds that are created between the gestational mother and the foetus during pregnancy.⁹ This is also why surrogate mothers often grieve or have difficulty relinquishing the child. Surrogacy undermines the intrinsic meaning of motherhood by re-constructing motherhood as something that can be given away, a legal relationship based on whoever wants – or in the case of a dispute – wins the child. Unlike adoption which is a child centred 'act of rescue', surrogacy is an adult centred response to an adult's desires which deliberately creates a situation where a woman must relinquish the child she has carried.

The 'cognitive dissonance reduction' strategy that some surrogate mothers employ is also evidence that surrogacy arrangements disrupt the normal maternal-foetal relationship. This strategy involves the surrogate self-objectifying and viewing herself as a means to an end, rather than a mother.¹⁰ Research has identified some typical responses of surrogate mothers to their relationship with the foetus: 'I don't think of the baby as mine. I donated an egg I wasn't going to be using'; 'The baby isn't mine. I am only carrying the baby' and 'I am strictly a hotel'.¹¹ Inherent to surrogacy is thus a type of therapeutic deception which encourages women to deny their biological reality and their maternal instincts.

What should be the response of the NSW government to altruistic surrogacy?

Because the long term effects of surrogacy are simply unknown, and because there are good reasons to be concerned about the impact of surrogacy on individual women and the well being and status of women generally, WFA recommends a very cautious legislative approach to surrogacy. Although the rationale of regulation might be to safeguard against harm, the risk is that such legislation would promote or facilitate surrogacy by legitimising it in the public's perception.

This Parliament should discourage surrogacy by:

- Maintaining the current law that holds surrogacy agreements as void, pursuant to section 45 of the *Assisted Reproductive Technology Act 2007*.
- Amending the law to create an offence of advertising, promoting or soliciting any form of surrogacy arrangements.
- Amending the law to create an offence of receiving a fee in connection with professional services (such as ART) to assist any form of surrogacy.

WFA does not consider it appropriate to impose penalties on the surrogate mother or commissioning couples. The better way to discourage surrogacy is to create these new offences which would discourage the participation of legal, medical or other professionals and prevent the establishment of surrogacy clinics whereby ART providers would profit from the expansion of surrogacy practice.

Legal status of children born through altruistic surrogacy

Even if surrogacy is discouraged as we have recommended, it is likely that some surrogate births will nevertheless occur. WFA recommends that, out of respect for and protection of women's biological reality, the surrogate mother and her partner (if relevant) should be presumed to be the parents of the child she delivers, with all corresponding rights and responsibilities.

The surrogate mother should not be forced to relinquish her child. If she does, however, and the child resides with the commissioning parents as primary care givers we recommend a practical legislative response to the problem of the legal status of the child.

A parenting order from the Family Court is not a sufficient response to the problem because it only confers a range of limited powers and responsibilities for the child and not full parental status. Adoption is usually not an option because private adoption in NSW is not allowed unless one of the adopting parents is a relative of the child which will not be the case in all surrogacy arrangements.

The reality is that unless there is a legal transfer of parentage to the commissioning parents all parties are caught in a legal limbo and the child is likely to be the most disadvantaged. WFA recommends that the law be amended to effect legal transfer of parentage by court order with the child's best interests as paramount, with the consent of the birth mother after a 'cooling off' period and should take place within a set time and only if the child is residing with the commissioning parents.

In the context of our other recommendations which aim to discourage surrogacy, WFA does not regard such a transfer of parentage as promoting surrogacy. Rather it is a practical and compassionate response to a far from ideal situation and one which recognises the reality that the birth mother has relinquished her child and that the commissioning parents are the primary care givers of the child. If surrogacy is discouraged as we have recommended, we hope that this difficult situation would be relatively rare.

We acknowledge that even if NSW law is amended, it cannot exclude the jurisdiction of the Family Court. If a dispute arose about where or with whom the child should live, the Family Court has the power to determine the dispute, regardless of the child's status under NSW law.

Adoption investigation

We note that the question of surrogacy arises partly because there are so few Australian born babies available for adoption. WFA recommends that the Legislative Council consider the issue of adoption, perhaps asking the following questions. Are the requirements and expenses associated with adoption reasonable? Why are there so few babies available for local adoption? What are the obstacles to adopting a child born overseas?

Thank you for the opportunity to comment. We look forward to the Committee's final report.

Yours sincerely



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This submission was authorised by the Board of Directors of Women's Forum Australia.

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- ⁴ Access Australia, Submission to the Investigation into Altruistic Surrogacy, Queensland Legislative Assembly, 20 June 2008, at 3.
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