

Submission
No 12

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

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Preamble

The Queensland Bioethics Centre is an agency of the Catholic Archdiocese of Brisbane, serving the Catholic dioceses of Queensland and the wider community. Through its Director, the Centre offers consultation, research, counselling, instruction and provision of information on contemporary questions associated with bioethical issues.

This submission is made by Raymond Campbell, L.Ph., Director, Queensland Bioethics Centre.

In this submission I will first of all discuss some of the many moral issues relating to surrogacy. I will then address the terms of reference.

1. Ethical Issues relating to surrogacy

Before considering the role, if any, of the NSW government in regulating surrogacy, it is important to consider the various moral issues surrounding "altruistic" surrogacy. Only then can decisions about government intervention be founded upon the good of the persons involved and the common good of our society.

General principles

Surrogacy touches upon fundamental issues relating to our respect for human life. As surrogacy is concerned with the begetting and nurturing of new human life it touches upon our respect for the human person in his or her origins. As surrogacy is concerned with what has been termed "family formation" it touches upon our respect for the family. Therefore it seems appropriate to highlight briefly some general principles regarding respect for the human person and respect for the family.

a) Respect for the human person.

All persons are created equal, have an inherent dignity and are deserving of equal respect. This belief and its implications are summed up succinctly in a statement from the Pontifical Commission for Justice and Peace:

"For us Christians, the human person is the apex of everything created. Their great dignity is like a reflection of the divine image, an indelible imprint on their very being, and as such ranks above all other things, so that human beings can never be considered mere instruments to be used for the benefit of others. Unfortunately, modern technological and political mentality sometimes seems to ignore this, forgetting the values and the rights of the human spirit. Since human beings are persons and the subjects of any action, there is no human reason or pretext in the scientific, social, political or economic order which could

ever justify a change in their function or status from subjects to objects." (*The Church and Human Rights*, 1974.)

This recognition of the unique status of human persons and their basic equality is not confined to Christianity. They been recognised by philosophers and ordinary people of many different faiths and of no faith. Their implication is captured in the everyday expression that we should not simply "use" other persons for our own ends. The expression "you used me" is normally understood as one of reprobation implying that the other has acted unjustly towards oneself.

So the committee needs to consider whether surrogacy is respectful of the individual persons involved or are persons being "used" by others to fulfil their own needs or desires.

b) Respect for the family

Respect for the family is closely linked to respect for the individual human person and respect for society.

The paradigm of the family founded upon the exclusive and permanent union of a heterosexual couple has been the foundation of society for thousands of years. It is the understanding of the family revealed in the Judaeo-Christian tradition (*Genesis 1:26-28, 2:28*), but also found in numerous other societies.

"This institution is prior to any recognition by public authority, which has an obligation to recognize it. It should be considered the *normal reference point* by which the different forms of family relationship are to be evaluated" (Catechism of the Catholic Church, n. 2202).

The intrinsic value of marriage understood as a comprehensive sharing of life founded upon the exclusive bodily communion of sexually complementary spouses and naturally ordered to procreation and upbringing of children, can be grasped, and has been grasped, by people of different faiths and by those of no particular faith.¹

The reason why the State has an interest in marriage is because it is the context for the formation of the family, the fundamental unit of society, and the State has a legitimate interest in assisting families because it is where its citizens are formed and nourished.

So it is imperative for the committee to consider whether surrogacy as a method of "family formation" is something which enhances the building up

¹ For a philosophical explanation of the nature of marriage one might consult the works of Professor Robert George, Princeton University, USA, e.g. "What's sex got to do with it? Marriage, morality and rationality", *The American Journal of Jurisprudence*, 49 (2004) 63-85.

of the family and hence the building up of society or is it something which undermines the family.

Bearing these general principles in mind let us consider some of the particular issues.

Ethical issues relating to the child: *Best Interests of the Child*

The question of the “best interests of the child” needs to be addressed about surrogacy itself, not simply after surrogacy has occurred. If surrogacy itself is against the best interests of the child then the government should take reasonable steps to discourage all kinds of surrogacy.

Is surrogacy an appropriate way to bring a new human person into being?

In the ideal situation a human person is conceived, carried and nurtured within marriage. This follows from the nature of marriage itself. As an exclusive and permanent union of male and female marriage provides the stable and nourishing environment for the begetting and nurturing of children. As the political scientist James Q. Wilson concluded after examining the institution of marriage over time and across cultures, marriage endures because it is about children.²

Empirical evidence also points to marriage between a man and a woman as being the best environment within which to raise a child. Maggie Gallagher, President of the Institute for Marriage and Public Policy (USA) refers to a summation of research given by *Child Trends*:

Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes... There is thus value for children in promoting strong, stable marriages between biological parents.³

It is in the best interests of the child, and in the interest of the community, for the State to encourage such family formation as the norm and where reasonable to discourage deliberately creating situations which have a risk of being detrimental to the child.

² Cf. James Q. Wilson, “Marriage, Evolution and Enlightenment”, lecture, American Enterprise Institute, Washington, D.C., May 3, 1999, available at:
http://www.aei.org/publications/pubID.10370,filter.all/pub_detail.asp

³ Cited in Maggie Gallagher, “(How) Does Marriage Protect Child Well-Being?” in Robert George and Jean Elshtain (eds) *The Meaning of Marriage: family, state, market and morals*, (Dallas) Spence Publishing Company, 2006.

It is true that in our society we find a great diversity of family types including extended, nuclear and blended families and families headed by single parents and same-sex couples. However the existence of different family types does not mean that they are all equally desirable. If we take "blended families" as an example: no-one sets out as part of their life project to form or be part of a blended family. A young adult does not say, "I plan to marry and have children and then divorce, and remarry preferably someone with children so I can have a blended family"! Similarly with the great majority of single parent families, the parent did not set out to be a single parent. These are situations which arise because of circumstances, often tragic circumstances. It is one thing for such families to have "social recognition", it is an entirely different matter for the government to assist in and intend the creating of such situations.

Surrogacy betrays the fundamental relationship between a child and its parents, a relationship founded upon their equal dignity.

In a surrogacy agreement, whether it is commercial or not, the child is the object of an arrangement aimed at fulfilling the needs of the commissioning parents. The child to this extent is commodified. Every surrogacy arrangement involves the transfer of parental rights and responsibilities for a child. It is difficult to see how the interests 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.

Surrogacy creates circumstances of ambiguous parenthood in which a child may have a matrix of parents - social mother, gestational mother, genetic mother, social father, genetic father and the men (if any) who partner the gestational and genetic mother.

This ambiguity is particularly highlighted when the surrogacy creates genetic confusion for the child i.e. where the gestational mother is also the genetic mother of the child - she is the child's mother. The experience of children whose genetic origins are so confused is sometimes referred to as "genealogical bewilderment". In surrogacy adults knowingly set about to create a situation where the child's genetic parentage, gestational parentage and social parentage will be discontinuous. Once known to the child (and often suspected even when not told) the child's personal identity is called into question. Personal identity is a complex reality, but it certainly includes our genetic heritage.

As expressed by Professor Margaret Somerville, children have certain rights as to their biological origins. They have a right to know who their biological mother and biological father are and, unless the contrary is indicated as being

in the 'best interests' of a particular child, to be reared by those parents.⁴ Surrogacy involving the use of donor gametes (whether the surrogate mother's or not) is clearly in breach of this right.

There is little empirical evidence of the experience of people conceived under a surrogacy arrangement. But we do have the experience of adult donor conceived (DC) children. Their experience is very relevant to the discussion on surrogacy as most surrogacy will involve a similar kind of genetic confusion, although in this case it will usually be the genetic mother who is missing from the child's life.

Experience of Donor conceived children

Myfanwy Walker who was conceived through donor insemination describes the experience of many DC children.

"My surname ties me to one family, yet my blood ties me to another ... I feel as though I have three families, but that I don't wholly belong to any of them; that I exist in a limbo, torn between the *expectations of who and what should or shouldn't matter to me*. I feel as though my paternity was split down the middle; that I am a branch grafted onto a different tree. I have flourished, but my fruit is not the same and my roots lie elsewhere. I feel a loss from knowing that I have three unknown half-sisters out there somewhere. It's difficult to articulate how deep that emotions runs in me. I do know that just thinking about it brings me to tears."⁵

Many DC children are fighting for the right to know their origins and to have their origins recognised. They want to know what everyone else knows. Many speak about how their self-concept, their identity has been affected by donor insemination. Walker sums up the dichotomy she sees in society: "identity and genetic familial ties are attributed such great value in wider society, [yet] are open for debate and ambiguously construed within the realm of donor conception."⁶ For her, identity goes beyond societal value. To Walker, her very sense of identity "built on the belief of belonging to a certain family, a certain culture, a certain history and heritage, had been nullified, the foundations of whom I was and where I came from were demolished."⁷

⁴ Margaret Somerville, "Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive technologies", *Journal of Family Studies* 13 (2007) 179-201.

⁵ Myfanwy Walker, "Misconception," *Australian Rationalist*, Numbers 75/76, 2006: 23-27, 24, http://www.rationalist.com.au/archive/7576/p23-27_walker.pdf. Accessed 4 April 2008.

⁶ Walker, "Misconception," 23.

⁷ Walker, "Misconception," 24.

Myfanwy Walker now knows her genetic father, and he has joined her in speaking out against artificial donor insemination. Similarly women who have acted as surrogates have spoken out against the practice of surrogacy.⁸

Christine Whipp, another donor conceived child expresses the ethical question:

“I could not understand how the pioneers of AID had thought it possible to translate the breeding principles of animal husbandry into the more complex arena of human relationships and “family building”. Why should the pain of childlessness of one generation take precedence over the needs and rights of the next?”⁹

The State should not in any way assist to create the situation in which these children find themselves. How can we say we are acting in the best interests of the child if we are creating such situations for them?

Object of experiment without consent

Finally as regards children, surrogacy is a social experiment, and the principal subject of that experiment is the child, who of course, is the one person who is not given the opportunity to consent to this experiment.

Our Prime Minister has just recently apologised to a generation of indigenous people. It is to be hoped that in thirty years to forty years time that some other politician does not have to apologise to another generation of children whose rights to be raised within their natural family were ignored.

Ethical issues relating to the (gestational) mother

The ethical issues do not relate only to the best interests of the child. There are multiple issues relating the gestational mother.

The inquiry is considering so called “altruistic surrogacy”. One has to ask what is it that establishes that a surrogacy arrangement is altruistic?

Altruistic means to have regard for the well being of others. It is hard to see how it can be said that the gestational mother is motivated by the well being of the child. It would appear that her altruism is directed to the supposed well being of the commissioning parents. But how does one establish that this is the motivation? The surrogate could be acting from a low self-esteem and a desire to please others as did Elizabeth Kane, the first legal surrogate mother

⁸ See, for example, Elizabeth Kane “I was a surrogate mother”, *New Woman*, June 1998, p.176.

⁹ Christine Whipp, “Worrying the wound: the hidden scars of donor conception,” in *Who am I? Experiences of donor conception*, foreword and afterword by Dr Alexina McWhinnie (Warwickshire: Idreos Education Trust, 2006): 21.

in the U.S.¹⁰ A prospective surrogate could also be acting out of guilt after an earlier termination of pregnancy. Or the surrogate might simply be someone who “enjoys” being pregnant. Or the surrogate herself might be a victim of emotional exploitation.¹¹ The government cannot ensure that the surrogacy arrangement is “altruistic”, and *it can never be “altruistic” vis-à-vis the child.*

Another problem associated with the gestational mother is the question of informed consent. How can the woman give informed consent in advance regarding the surrendering of the child she has carried in the womb for nine months? The fact that a woman might have already have had children and has “finished” having her family does not mean that she can predict her emotional and psychological state at the end of nine months pregnancy. As the common wisdom says, “every pregnancy is different.”

Even if the surrogate freely enters into the arrangement still,

“surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends 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; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families.”¹²

The division referred to here is not only the “family” created by the commissioning parents and the surrogate. It can also be understood as referring to divisions created within the surrogate’s family. If the surrogate has a partner and other children, then they too will be impacted by the surrogacy arrangement. Marriage involves a commitment of the married couple to each other. Part of that commitment is to have children only with one’s spouse. By breaking this commitment surrogacy undermines the surrogate’s own family.

Ethical issues relating to the commissioning parents

Attention also needs to be given to the position of the commissioning parents. For a married couple to discover that they are unable to have children can be a life shattering event. Part of the life project which they thought they would

¹⁰ Cf. Anna Duffy, “The Question of Surrogacy: Mrs Elizabeth Kane”, *St Vincent’s Bioethics Centre Newsletter*, Vol.7 (1989) No.1, p.11.

¹¹ For an early study of the motivation of surrogate mothers see: Philip J. Parker, “Motivation of Surrogate Mothers: Initial Findings”, *American Journal of Psychiatry* Vol 140 (1983) 117-118.

¹² Sacred Congregation for the Doctrine of the Faith, *Donum Vitae*, available at: http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html

share together, having and raising children, appears to disappear before their eyes. They often become desperate to have children and might consider all possible means. They are also very vulnerable at this time. They may be tempted to bring a child into being which is not the fruit of their marriage and marital union. This child is not the child they would have liked to have had. So in the end *their own desire cannot be fulfilled through surrogacy.*

It can be the case that the wife in the relationship is subjected to pressure to consent to her husband conceiving a child with another woman. This can have an ongoing negative impact upon their own relationship, and also on the child. Once again by virtue of their marriage they have consented to become parents only with and through each other. Surrogacy breaches that commitment and the child could well become a constant reminder to the wife of her inability to give her husband children.

Conclusion of ethical consideration

From our understanding of the equal respect due to all human persons, from our understanding of the nature of marriage and the family, and from empirical evidence we are led to the conclusion that surrogacy can never be in the best interests of any of the parties involved. On numerous accounts it is an unethical way to attempt to form a family. Most importantly it ignores the rights of the child so conceived.

The position is summed up in the document *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation* from the Sacred Congregation for the Doctrine of the Faith. The document states:

“The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage: it is through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper development.”¹³

2. Terms of reference

a) *The role, if any, that the NSW Government should play in regulating altruistic surrogacy arrangements in NSW.*

Having considered just some of the serious moral issues involved in surrogacy we must now consider how the government should respond.

Laws serve various purposes in a community. Laws seek to protect people from injustices. In particular they should protect the most vulnerable in the

¹³ Available at:

http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html

community. The Law also has an educational role teaching people about appropriate behaviour for living in a community. Observance of the Law fosters the flourishing of all the members of a community.

However not all behaviour is appropriately regulated by the Law. The criminal law is not always the best instrument for protecting and promoting human values. Sometimes making something a crime may lead to greater harm. This is possibly the case regarding surrogacy.

We do not believe that surrogacy should be a criminal offence as regards the surrogate mother and the commissioning parents, but 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.

The government should not become involved in "regulating" altruistic surrogacy. For the government to seek to facilitate surrogacy by further regulations 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. The government itself would be involved in formal cooperation with surrogacy arrangements by sanctioning them.

Hence we recommend that surrogacy "contracts" should remain null and void, i.e. they should be unenforceable. Furthermore the government should seek to discourage surrogacy by making it an offence to:

- advertise or promote surrogacy arrangements;
- receive a fee in connection with professional services to assist surrogacy (this would include IVF procedures);
- Medicare should not fund medical procedures involving surrogacy arrangements;
- in the event that surrogacy occurs the woman who gives birth should be recognised as the mother of the child.

Back in 1989 the National Bioethics Consultative Council urged that altruistic surrogacy be regulated. Several other inquiries had argued to the contrary. The NBCC recommendations were roundly criticised.

"The Australian Health Minister Advisory Council established a Reproductive Technology Working Group to consider the NBCC report.

"The working Group recommended that all surrogacy arrangements be made illegal and void, that commercial surrogacy should be prohibited, that advertising of and for surrogacy should be prohibited, and that the provision of technical and professional services to facilitate surrogacy should be made an offence."

"The Working Party had concluded:

*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."*¹⁴

Nothing substantial has changed since that Working Party delivered its view and our recommendations are in accord with that review.

In the case of the birth of a child through surrogacy the situation should be treated much the same as a child who is born outside of marriage. The woman who gives birth should be regarded as the mother. If she does not want to keep 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.

If the ethical position outlined above is followed by the government and by governments in other states, then the rest of the terms of reference become redundant.

¹⁴ Cited in: Kevin Andrews, "Surrogacy, Public Policy and the Law", *St Vincent's Bioethics Centre Newsletter*, Vol 11 (1993) No.2, 1-3.