

Submission To:

Inquiry Into Legislation on Altruistic
Surrogacy in NSW

By

Southern Cross Bioethics Institute
(SCBI)

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1E/336 Marion Road

North Plympton SA 5037

Tel: +61 8 8297 0022

Fax: +61 8 8297 5738

Email: scbi@bioethics.org.au

Prepared By Mr. Matthew Tieu

Research Officer (SCBI)

Introduction

The following submission outlines and discusses the reasons why the Southern Cross Bioethics Institute (SCBI) is opposed to the legislative sanctioning of altruistic surrogacy in New South Wales. In addition to the ethically problematic nature of any surrogacy arrangement, no legislation can adequately permit surrogacy arrangements without avoiding the real risk of harms towards all parties involved, in particular the child and the surrogate mother, both of whom are the most vulnerable to exploitation and objectification. Furthermore, the legal sanctioning of surrogacy will have the effect of legitimizing, in the public eye, the creation of ambiguity and bewilderment in regards to maternal and familial relationships. The welfare of all parties involved are thus compromised and will lead to further logistical and legal complications, rather than preventing them, in particular the real risks of litigation and custody disputes.

Executive Summary

Section 1 – Due to the public perception that the law is in congruence with what is ethical or moral, legalizing surrogacy will have the effect of legitimizing, in the public eye, the creation of ambiguity and bewilderment in regards to maternal and familial relationships. The result is that society will be forced to radically revise and assimilate our current concepts of mother, father, son and daughter, in light of the exceptional relational outcomes that result from surrogacy. The impetus for the recent state government level inquiries into legislative reform overlooks the ethically problematic nature of surrogacy in general.

Section 2 – It is difficult if not impossible for a potential surrogate mother to give informed consent. This might be due to the possibility of emotional coercion, especially when the surrogate is a relative of the commissioning couple, which in most cases seems to be preferred. Furthermore, there are psychological and physiological health risks that the surrogate cannot be fully aware of prior to entering into a surrogacy arrangement. Studies have also revealed that the motivation behind the alleged altruism of surrogates is questionable. It is uncertain whether the genuine motivation to become a surrogate mother is for purely altruistic purposes or whether some may enter into such arrangements because of feelings of guilt due to loss of a child through abortion for example.

Section 3 – Surrogacy ruptures the maternal/infant bond, which affects both the mother and the child biologically and psychologically. It diminishes the importance of the role of gestation in establishing these bonds, which are critical for the proper development of the child and the welfare of both mother and child. A lack of understanding of these issues adds to the difficulty for a potential surrogate to give informed consent. In a surrogacy arrangement the welfare of the child is subordinated to fulfilling the desires of an infertile couple to have a child. This involves objectification of the child. There is also the probability that the child will suffer from “genealogical bewilderment” by attempting to reconcile the unique circumstances within their family structure, which could lead to long-term psychological and behavioural problems. At this stage the empirical evidence about the long-term effects on the child are inconclusive but with significant grounds for the likelihood of seriously harmful consequences. Hence

legislating to permit surrogacy amounts to an experiment with the child's life and with all those involved.

Section 4 – A Surrogacy arrangement will involve assisted reproductive technology (ART) such as IVF, which carries significant health risks to both the child and the surrogate. Furthermore, contractual issues and disagreements between the surrogate and commissioning couple could result in litigation. Once again this makes it difficult for the surrogate to give informed consent.

Section 5 – Surrogacy objectifies and exploits women. Surrogacy essentially amounts to a woman offering her body and her gestational child – effectively becoming an incubator for another couple. The surrogate mother has to participate in an IVF program which carries with it significant health risks, before eventually having to psychologically cope with relinquishing her gestational child. Such is the inherent nature of the bond between mother and gestational child that the way surrogates attempt to cope with relinquishment is through specific targeted counselling and trying to maintain a unique relationship with the commissioning couple. It is questionable how successful this is.

Section 6 – The notion of reimbursement to cover the surrogate's medical expenses is not easy to define and has the potential to act as inducement or coercion. The result of this is likely to be the exploitation of surrogate mothers and in particular those who belong to a lower socio-economic group.

1. Impetus for Reform is Misguided

Generally speaking, it is clear that the impetus for reform is misguided by the implicit assumption that surrogacy arrangements ought not to be banned but rather, accommodated by legislative reform. However, the real issue that must be reconciled first is whether surrogacy is an ethical practice. It appears that many are resigned to surrogacy becoming an inevitable norm in Australian society and that states and territories should introduce nation wide consistent legislative reform to accommodate it. In fact the terms of reference of the "Inquiry into legislation on altruistic surrogacy in NSW" reflect this sense of resignation.

Firstly, much of the impetus for reform, in relation to surrogacy legislature comes from concerns about a lack of legal recognition of parents and children in surrogacy arrangements which can lead to practical difficulties, for example in relation to passport applications, medical treatment, eligibility for child support if commissioning parents separate, eligibility for social security and taxation allowances and inheritance.

Secondly, the difficulties that result are due to the fact that unusual family structures (in particular those that arise from surrogacy arrangements) themselves cause a bewilderment of family relations. Obviously they also conflict with current logistical norms in relation to family law. To argue that reform is required to accommodate merely logistical difficulties is to already either accept or to be resigned to the belief that surrogacy arrangements will become the norm in society. However, the real issue that is being over looked here is whether surrogacy is an ethical practice, for if it is not then there ought to be no legislation that condones such arrangements. The Southern

Cross Bioethics Institute is opposed to any legal sanctioning of altruistic surrogacy for primarily ethical reasons.

2. Informed Consent - Altruistic Motives?

For many women who have undergone repeated attempts at ART or those who have a non-functional uterus, surrogacy is often viewed as a viable alternative and in many cases it is viewed as the only alternative besides that of adoption. It is considered preferable to adoption because of the importance placed on having a genetic and/or gestational link between child and parent, though in the case of surrogacy the best that can be achieved is a close proximity to the gestational process. However, pregnancy is a profound experience that is unique amongst couples in which the outcome and their ability to manage the pregnancy are often unpredictable.

The biological and psychological health of the surrogate and child ought to be considered when commissioning couples and potential surrogates are making an informed decision to enter into an arrangement. However, given that the long-term health outcomes, relational complexities and the social implications of surrogacy are largely unknown, it seems difficult if not impossible for a potential surrogate to give informed consent.

Some countries have opted for legislation permitting altruistic surrogacy (such as in the ACT-Australia) instead of commercial surrogacy (which is permitted in countries such as India, and some states in the US), presumably because the latter gives rise to the potential for exploitation. In the context of altruistic surrogacy, one must ask: Can a close relative or friend, viewed as a potential surrogate mother, provide genuine informed consent? Is she making an autonomous decision free from coercion, particularly in complex family contexts? Is she aware of the emotional impact of giving up a baby that she has carried for nine months? Can a potential surrogate mother be apprised of, process and understand all the details about pregnancy complications, risks associated with ART, psychological ramifications for herself, the child she may carry and others, the terms of a surrogacy contract and implications for future relational complexities, let alone the broader ethical implications for the community - about which she may have a genuine interest?

Consider for example, women with low self-esteem, who may be inclined to enter into an arrangement to obtain approval of others to gain a sense of self-worth. This may be particularly pertinent where a surrogate acts for a friend or family member [1,2]. In many cases, surrogate mothers overwhelmingly report that they choose to bear children primarily out of altruistic concerns [3], which must be distinguished from surrogates who state that money is the prime motive (commercial surrogacy). Other motives include sharing the enjoyment of pregnancy, and redemption from giving up a child for adoption and/or previous abortions [4].

A study by Ragone [5] revealed that for some women, the motivation to become a surrogate mother was due to feelings of guilt about having had a previous abortion and/or having to give up a child for adoption. In this study the statistics indicated that 26% of potential surrogates had previously had an abortion and 9% had placed a child up for adoption. This raises doubts about whether surrogates actually enter an

agreement simply on altruistic grounds which is often taken for granted, as well as whether surrogacy is an appropriate way of dealing with prior loss of a child.

Importantly, it has been shown that when surrogates were asked to justify their decision to become a surrogate mother, the verbal self-reports are often scripted to reflect socially accepted reasons for surrogacy [6]. Most surrogates score within the normal range on personality tests such as the MMPI (The Minnesota Multiphasic Personality Inventory). However, it has been suggested that those who are willing to be surrogates are more independent thinkers and are less bound by traditional moral values. It has been reported that surrogate mothers score lower in 'Conscientiousness and Dutifulness' on the NEO Five Factor Test [7].

This demonstrates that the motivation underlying the decision to become a surrogate cannot always be taken for granted as purely altruistic. Motives such as redemption, guilt or money (as is the case in commercial surrogacy) demonstrate that the decision to become a surrogate is based on a complex range of factors and psychological dispositions. As Ian Willmott states [2]:

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. (pg. 209)

3. Disruption of the Maternal-Infant Bond

Surrogacy entails a contractual agreement before the child is conceived that he or she will be separated from his mother at or soon after birth. Such a contract represents a serious violation of the child's natural rights. The essence of surrogacy is that a child is gestated by one woman and handed over to another at birth or soon after. This means that the bonding that has occurred between the gestating mother and the child she is carrying is fractured by surrogacy. This bonding occurs during pregnancy and immediately after birth. The extent of the possible harm for the child may depend to some extent upon the time the child spends with the surrogate after birth, that is, before relinquishment.

Important biological bonds are established between the mother and her foetus during pregnancy. Even the scent of a newborn can attract the mother, as each mother can identify her own infants' odour when presented with the odour of several other babies [8]. One of the most concrete examples of the importance of the maternal-child bond comes from foetal-maternal physiology. The hormone oxytocin plays a crucial role in priming the gestational mother to respond in accordance with her natural maternal instincts. It is a response triggered by skin to skin contact and eye gazing, which promotes further psychological and physiological bonding [9,10]. An interesting study by Widstrom et al. [11] revealed that if the lips of an infant touch the mother's nipple in the first hour of life, a mother will decide to keep her baby in her room 100 min longer on the second and third day during her hospital stay than another mother who does not have contact with her infant until later. Additionally, the developmental psychology literature indicates that there is a crucial window of time from the moment of birth onwards, whereby a baby begins to form cognitive attachments through interactions with the gestational mother [12]. The cognitive psychology literature on early

childhood development also emphasises the importance of the psychological bonds formed from birth and onwards [13,14,15].

Humans have a very basic response to expressions of emotion in others, and infants in particular display a basic drive to match behaviour and psychological expressions in persons closest to them at the earliest of stages. Numerous studies have revealed that infants react to their mother's emotional expression with their own. They seek out the most immediate emotional being to participate with in an 'inter-subjective game'. Rather than living in a buzz of ambivalence or confusion as envisaged by some, an infant's behaviour is innately fashioned to coordinate with the social behaviour of other people. This demonstrates that an infant already has the cognitive mechanisms and psychological capacities in place to influence as well as be influenced by other people, and in particular his or her birth mother [16,17]. Therefore, at the very least, one ought to be concerned with any process that disrupts the important bonding between mother and child which begins during gestation, and continues after birth. Surrogacy ruptures this bonding.

Such is the strength of the bond and emotional attachment of the surrogate mother to the child that there have been many cases from around the world where a surrogate mother has been unwilling to relinquish her child; consider for example, the Baby M [18] and Evelyn cases [19]. As evidenced in these much-publicised cases, having to relinquish a child can be heart wrenching, the end result being custody battles. Added to this is the evidence that surrogates may live with the psychological burden associated with giving up their gestational child for many years [20]. These matters reinforce the difficulty, if not impossibility for a surrogate mother to give informed consent.

In relation to the difficulties with relinquishment, certain critical questions must be asked. What happens when there is a reluctance or refusal to stick to the original surrogacy agreement? What if neither the surrogate nor the commissioning parents want the child? By its very nature, a surrogacy arrangement is likely to lead to more custody disputes because the child is born into such unusual circumstances by being the offspring of more than one family group. No legislation permitting surrogacy can accommodate such complications without leading to seriously undesirable consequences such as litigation, custody battles, all of which occur at the expense of the child's welfare.

Furthermore, it is also worth mentioning the debate taking place amongst academics in the fields of anthropology, sociology and political science. There is an interesting ongoing debate about the technology of reproduction and procreation, and how it has forced society to form new concepts of kinship and familial relationships. For instance, because of the unusual familial relations that arise from surrogacy and ART, the concepts of "mother", "father", "son" and "daughter", lose their established meaning and thus force the construction of new categories such as "gestational mother", "surrogate mother", "genetic mother" and so on. Can we rely on existing cultural values and beliefs to guide our concepts and do we even have the legal framework in place to deal with such issues? Obviously this is an ongoing issue that must be unequivocally resolved before any legislation permitting surrogacy can be introduced. Otherwise the risk of incongruous knee jerk legislative responses will create a logistical and legal nightmare for all involved. Indeed a nation wide uniform policy is required,

however, the only logistically sensible outcome, at this stage, is to refrain from any legislative endorsement of surrogacy.

4. Contractual Issues and Health Risks

A diagnosis of disability or disease, even if equivocal, could lead to serious problems with a surrogacy arrangement. For example, a prenatal diagnosis of disability or perceived imperfection could result in the commissioning couple reneging [21]. In the case of a diagnosis of disability, depending on the circumstances and severity, the option of abortion could be considered by the surrogate; however, differing moral perspectives on abortion have the potential to result in an irresolvable stalemate. The surrogate may still wish to proceed with the birth; however, the commissioning couple may no longer want the child. Alternatively, the surrogate may choose an abortion contrary to the wishes of the commissioning couple.

Given that gestational surrogacy involves ART, the health risks in ART are pertinent to surrogacy. According to a recent review, ART is responsible for approximately 50% of all multiple births worldwide [22], and about half of IVF pregnancies in the US result in multiple births, with a high risk of premature delivery [23]. One-third or even one-half of infant mortality is due to complications of prematurity, and a large contributor to prematurity is infertility treatment. In addition to these risks, there is a growing concern that other risks to children born of ART may occur. The point here is that in gestational surrogacy, a contractual arrangement makes these problems more acute as it involves parties whose response to these issues cannot be predicted. Yet these matters have the potential to undermine the whole arrangement in seriously damaging ways. In a gestational surrogacy agreement, the increased chance of multiple births could lead to contractual disputes if the intention of the commissioning couple was to have only one baby. For example, a British woman pregnant with twins sued a California couple because they backed out of their surrogacy contract after she refused to abort one of the fetuses [24].

Whilst pregnancy is a natural process, it is not without risk. Whereas a woman choosing to become pregnant and committed to raising her child is prepared to bear that risk, in surrogacy, the concern is that she bears the risk without the natural benefit of motherhood. There is therefore a sense of futility if something goes wrong for her, which is especially the case if a woman becomes a surrogate for purely altruistic purposes. For example the Daily Mail reported that a surrogate mother, aged 29 had died shortly after giving birth. She developed high blood pressure and a ruptured aorta after the delivery, dying 90 minutes later. Her mother Marilyn said:

Surrogacy caused Natasha's death. People must realise that childbirth isn't something you enter into lightly. It's still dangerous but that is something surrogate agencies don't go into... Natasha didn't want any more children herself but she comes from a big family and she felt for people who couldn't have children. Her children had brought her a lot of pleasure so she wanted other parents to share some of that joy. [25]

Whilst this woman's desire to assist others was generous, her resultant death is all the more tragic because of its circumstances. It could be argued that if she had died bearing

a child she would raise, the tragedy would have been tempered by the authentic commitment to motherhood that her pregnancy entailed.

Given such potential harms that a surrogate faces, surrogacy agencies must provide appropriate measures and counselling services. The services and programs that surrogacy agencies provide for surrogates are an attempt to ensure the greatest likelihood of a successful outcome for all parties involved. This is especially the case with commercial surrogacy agencies, where unsuccessful arrangements are detrimental for business. Whilst this is appropriate and both the interests of the agency and surrogate are taken into consideration, one of the psychological counselling strategies involves a deliberate effort to de-emphasise the significance of the gestational maternity of the surrogate, in order to allow the surrogate to cope with relinquishing the child. This is referred to as 'cognitive dissonance reduction'. In the following section I will argue that such a measure requires what is essentially an objectification of the surrogate mother.

5. Objectification of the Surrogate Mother

It is rather counterintuitive to consciously decide to terminate one's parental rights and duties prior to conception. Legal norms typically affirm parental duties and the existing moral obligations that come with it, but the concept of parenthood is grounded largely in biology and not in an arbitrary agreement. Hence, there is a sense in which even though a gestational mother has decided to relinquish her child (parenthood discharged via an agreement) she is still the child's mother (parenthood grounded in biology) [26]. Therefore there is a sense in which, at best, a re-conception of motherhood, or at worst, self-deception, are required on the part of the surrogate in order to break the natural, biological, maternal bond she has with her child in order to make it easier to relinquish the child she has nurtured in her womb.

Transferring parental rights does not annul the existing parental bonds, which for many are grounded in biology, between the gestational mother and her child. Therefore, one must go further and depersonalise the whole process of pregnancy and childbirth in order to reconcile ones intuitive concept of parenthood with ones altruistic motives, as Rosalie Ber states:

The question of whether the suffering of a childless woman is greater than that of the gestational surrogate, who 'abandons' her baby, is 'solved' when the surrogate mother is de-personalised, and looked upon solely as a 'womb for rent'. [27]

That is, a surrogate mother must become a commodity for the purposes of conceiving and producing a child who is to be relinquished to the commissioning couple. Treating the surrogate as mere means to an end may be a method by which some attempt to deal with the disruption to natural relationships that surrogacy entails, however, this also places the surrogate at greater risk of exploitation. Indeed there is much evidence demonstrating the need for surrogate mothers to reconcile the circumstances of the surrogacy arrangement with the norms of maternal-foetal relationships. There is evidence that the attempted reconciliation proceeds in a manner that is deceptive or underhanded, for in order to make it easier for a surrogate to relinquish the child, she

must invoke a number of ‘cognitive dissonance’ reduction strategies which I will argue, amount to a form of objectification via self-deception.

In a study by Ciccarelli [28], fourteen surrogate mothers were asked to report their feelings or concerns about relinquishing the child. One mother reported emotional distress over the relinquishment and two others reported a strong instinctual urge to bond with the child. The remaining eleven did not feel bonded with the child, which may seem to indicate that for the majority of surrogates the issue of having to relinquish the child did not appear to be a problem. However, surrogates employ cognitive dissonance reduction strategies to cope with their loss, implying that the issue is much more deep seated, which accords with knowledge about the strength of the bond between gestational mother and child, and our intuitive concept of parenthood. So why did it seem relatively easy for eleven out of fourteen mothers to relinquish the child in this study? The typical response given was that ‘I had it in my mind from the beginning that it was not my child, I didn’t feel bonded’, or ‘I almost felt guilty for not feeling bad about giving up the baby’ [29].

In another study by Van Zyl and Van Nierkerk [30] the typical responses given by surrogate mothers, with regard to how they felt about their relationship with the foetus, were as follows: ‘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’. Hence, having effectively denied that the surrogate is the mother of the child, the only logical outcome is to view the relationship as one of ownership, the surrogate as a ‘human incubator’ and the child as the ‘product’ who bears no relationship to her other than partly being the result of her biological and physical labour [31].

Furthermore, a study by Ragone [32] identified the surrogate’s perception that the child was not hers as crucial in determining her experience of the whole surrogacy arrangement. In one instance, therapy that was designed to maintain the ‘desired state of mind’ of the surrogate was withdrawn due to the surrogacy agency becoming bankrupt, and as a result all of the surrogates involved subsequently expressed intense separation anxiety, as Ragone states:

When the support services are removed and the structure of the program dissolves, it is difficult, if not impossible to maintain the prescribed and desired boundaries between the surrogate and her child: hence, surrogates report feelings of loss, pain, and despair when parting with the child. [33]

This entirely unusual and discordant ongoing effort to deal with a surrogacy arrangement, and the subsequent relinquishment, underscores the damage that some surrogates go through, even though in most cases it is masked at least temporarily by considerable cognitive dissonance reduction techniques. Thus a woman’s natural intuitions are being subverted by cognitive dissonance reduction strategies. It is clear from these studies and the statements by surrogates, that the nature of such strategies requires the surrogate to view herself as an object or as mere means. This view is reinforced by other researchers in this area, for example Baslington who states:

During the research I discovered that the surrogate mother membership were encouraged by the self help group to think of their surrogacy arrangement as a job incorporating payment, suggesting that the

subcultural influences engendered by the social organization of surrogacy arrangements were important in the detachment process. [34]

In this study by Baslington, the majority (ten out of fourteen) of the surrogates reported that they were able to cope well with the relinquishment, though the general experience was to feel unhappy in the short term but if a good relationship was forged with the commissioning couple then this also eased the burden of relinquishment. However, the study also revealed that one of the surrogates still suffered from feelings of guilt, regret and loss after having relinquished her baby two and a half years earlier. Another surrogate found it hard to relinquish her baby, grieving the loss more than expected, suffering post-natal depression and experiencing a sense of guilt. These and other studies highlight recurring themes such as self-denial, objectification and the need for subverting natural intuitions for the sake of the surrogacy arrangement.

One other interesting observation was that a major cause of emotional distress or regret on the part of the surrogate depended on whether a relationship was maintained with the commissioning parents. What this indicates is concern on the part of the surrogate to develop a relationship with the commissioning parents that actually goes beyond the surrogacy arrangement, and beyond the mere utilisation of a functional womb. The surrogate wanted to be more than just a 'womb for rent'. She did not want to feel used, merely because she has a womb that works, but rather she wanted to be a part of the commissioning couple's lives. As Van Den Akker comments:

It is seen as a betrayal when the intended couple with the surrogate baby disappears from the surrogate and her children's lives. [35]

It would be hard to imagine that commissioning couples could be legally obliged to enter into a long-term relationship with the surrogate, even though she might suffer without that relationship. Hence this data further demonstrates how a surrogate is objectified by virtue of requiring the subsequent negative experiences to be quelled via maintaining a good relationship with the commissioning couple, in addition to the cognitive dissonance reduction strategies mentioned above.

To summarise this argument:

1. Surrogacy is destructive of the natural and intuitive intimate mother/child relationship.
2. To try and circumvent this problem surrogates employ, and agencies promote, a number of cognitive dissonance reduction strategies.
3. The cognitive dissonance reduction strategies implicitly require the objectification of the surrogate.
4. If the first premise is correct, then surrogacy is morally problematic; if the second and third premises are correct, then surrogacy is additionally morally problematic.
5. There is empirical evidence to support premises 1, 2 and 3.
6. Therefore surrogacy is morally problematic.

In relation to cognitive dissonance reduction, the principle of not using people as 'means to an end' are deliberately undermined in an attempt to uphold the principle of 'do no harm'. In attempting to reduce her own psychological pain from relinquishing

her baby, the surrogate has to think of herself as an object. Furthermore, perhaps the strategies not only objectify surrogates but also act to deny the reality that a problem exists, and in doing so only serve to bury the problem which may then emerge later with significantly increased power to harm the surrogate. Whether this is the case will depend on further longitudinal studies. However, there is no doubt that the potential for exploitation exists.

Whilst there is little in the way of empirical studies into the long-term effects that a surrogacy arrangement has on the surrogate, the child and the family of the commissioning couple, there have been extensive studies conducted by Susan Golombok and her group. They report that the various procedures in ART and surrogacy do not have a negative impact on the social or emotional development of all parties involved in ART procedures and surrogacy arrangements [36, 37, 38, 39].

However, the studies are limited in their longitudinal extent and at this stage more research is required before one can be certain that the potential for harm is non-existent. One of the major limitations of the Golombok's research is the lack of experimental control for the effect of disclosure about one's genealogy, which is an important factor that no doubt has a bearing on the child's welfare. However, it is uncertain as to whether children who have yet to reach adulthood are able to understand the issue of their unusual genealogy. Such is the nature and limitation of performing research using subjects under the age of twelve. It is therefore inaccurate to extrapolate from such studies that there is no negative impact on the welfare of the child.

When children born of a surrogacy arrangement reach adulthood, important facts about their identity may become pertinent. One important issue is knowledge about genetic heritage, an issue that has already arisen in ART where children born of donor sperm or eggs are concerned [40]. The same could hold in a surrogacy arrangement if either donor sperm or eggs were concerned, and if the details of the surrogacy were kept secret for whatever reason.

6. Reasonable Expenses

It is often acknowledged that a surrogate may receive money for expenses associated with the pregnancy and birth, i.e. out of pocket costs, such as health insurance, counselling and legal advice, and lost earnings. However, it is difficult to calculate costs due to lost time, lost income or psychological distress so, it not only could result in coercion, but also generate tension between the commissioning couple and the surrogate, which could affect the outcome of later arrangements. Where payment constituted compensation rather than reimbursement of out of pocket expenses, the risk of exploitation of those who are of lower socio-economic class would exist. This is because members of different socio-economic class value money differently. If the legislation permits compensation for lost earnings as part of a contract, then the agreement may in effect become commercial, which is recognised and acknowledged in the document. It might become commercial because it would be viewed as unfair for a higher wage earner to be compensated in accordance with her higher wage, and a low wage earner in accordance with hers, when both undergo the same procedure. Possibly the only way to circumvent this would be to reimburse in accordance with average

wages, but this will create a “windfall” for the lower wage earner and a disincentive for the higher wage earner. The result could only be exploitation of the lower wage earner.

Conclusion

The evidence and arguments discussed in this submission indicate that those entering into a surrogacy arrangement know they are making a radical departure from natural intuitions and social norms of parenthood, and in attempting to reconcile their situation with those established norms, they experience parental, familial and psychological bewilderment. This is particularly true for the surrogate who faces a great challenge because of her intimate psychological and gestational relationship with the child. After all, it is the surrogate mother who must face the challenge of becoming pregnant, carry out the pregnancy, give birth and then relinquish the child. Furthermore, surrogacy fails to respect the dignity and primacy of the welfare of the child. It ignores the fact that foetal/early infant development is a critical determinant of a child’s welfare, whereby the biological and psychological bond between the surrogate and the child is of crucial significance for this development. It requires the subordination of the welfare of the surrogate and her child in favour of the commissioning parents’ desires to have a child. At best, legislating to permit surrogacy amounts to an experiment with a child’s life and with all those involved. So far all state proposals for legislative reform in relation to surrogacy thus appear to merely pay lip service to the notion of the primacy of a child’s welfare.

Finally it is also worth reiterating that the debate about surrogate motherhood and ART are linked to ongoing debates about the future of family, in light of rising rates of divorce, single mothers, working mothers, gay marriage and gay parenthood. It is only in recent times that the state and federal governments have considered legislative reform in regard to surrogacy, ART, and gay marriage, however, this is taking place despite the ongoing debate about the appropriateness of such relations and such families. As Susan Markens states in her recent book on the challenges of legislative responses to ART and surrogacy [41]:

The deep divisions over how to best address the rapid developments in biomedicine have proven difficult to resolve, perhaps because of their unique combination of ideological overlap and contradiction. Consequently, new and different reproductive and procreative arrangements continue to be pursued without a clear sense of what rights and responsibilities accrue to the various parties involved. (pg. 180)

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