

Submission on:

Inquiry Into Gestational Surrogacy:
Statutes Amendment (Surrogacy) Bill 2006

A Bill for an Act to amend the Family Relationships Act 1975 and the Reproductive
Technology (Clinical Practices) Act 1988

As Introduced by the Hon John Dawkins MLC on 21 June 2006

to

The Social Development Committee
Parliament of South Australia

by

Southern Cross Bioethics Institute

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

Executive Summary

The following submission outlines and discusses the reasons why the Southern Cross Bioethics Institute is opposed to the Statutes Amendments (Surrogacy Bill) 2006. In addition to the ethically problematic nature of any surrogacy arrangement, this Bill fails to adequately address the issues relevant to any proposed surrogacy arrangement and places a disproportionate burden of the terms of the surrogacy arrangement onto the contractual agreement between surrogate and commissioning couple, as well as onto ministerial discretion.

Section 1 – It is difficult if not impossible for a potential surrogate mother to give informed consent. This is because of the possibility of emotional coercion, especially when the surrogate is a relative of the commissioning couple, which the Bill prefers. Furthermore, there are psychological and physiological health risks that the surrogate cannot be fully aware of prior to entering into a surrogacy arrangement. **Section 2** – 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.

Section 3 – 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 4 – 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. Additionally, studies reveal that the motivation behind the alleged altruism of surrogates is questionable. There is also the probability that the child will suffer from “genealogical bewilderment” by having 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 seriously harmful consequences. Hence legislating to permit surrogacy amounts to an experiment with the child’s life and with all those involved.

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 extent of the bond between mother and gestational child that the way surrogates attempt to cope with relinquishment is through specific counselling and trying to maintain a unique relationship with the commissioning couple. It is questionable how successful this is.

Section 6 – This section summarises the empirical research surrounding specific counselling measures for surrogates and the relationship between surrogate and commissioning couple. Many studies are not representative of the demographic that surrogates belong to.

Furthermore, personality traits of surrogates are an important aspect of decisions to participate. There remain many issues yet to be resolved which are the subject of ongoing research.

Section 7 – The notion of reimbursement to cover medical expenses is not easy to define and as described in the Bill has the potential to act as 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.

Section 8 – The complexity of the permissible surrogacy arrangements in the Bill means that there are a range of genetic relationships possible. This section outlines the possible permutations and the ramifications that they have. There is a strong likelihood that these ramifications will contribute to harm to those involved.

Introduction

It is often a devastating and life changing experience for women to discover that for one reason or another they cannot become pregnant and have children of their own. In some cases, such as those involving repeated unsuccessful attempts at ART or having a non-functional uterus, the remaining option (besides that of adoption) for these women and their partners is surrogacy. However, one of the major concerns about surrogacy is the potential harm that may be inflicted upon the surrogate mother and the child. Therefore, legislation like the *Statutes Amendments (Surrogacy) Bill 2006*, which permits surrogacy arrangements, has to be considered in relation to the possibility that one person's actions harm others. Even if one were to take the liberal view that surrogacy should be presumptively allowed on the basis of autonomy, evidence of harm must be taken seriously. SCBI considers there to be good reasons grounded in empirical evidence to support the view that surrogacy harms the child, the surrogate, and possibly others. Furthermore, the Bill fails to consider the wider socio-moral implications of legislative endorsement of altruistic surrogacy arrangements.

1. Informed Consent

There are good grounds to suggest that surrogacy emotionally exploits the surrogate mother. Women with low self-esteem may be inclined to enter into an arrangement to obtain approval of others and provide themselves with a sense of worth. This may be particularly pertinent where a surrogate acts for a friend or family member^{1,2}. 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 family contexts? Is she aware of the emotional impact of giving up a baby that she has carried for nine months? How can a potential surrogate mother possibly 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 including the nature of the court order, and implications for future relational complexities, let alone the broader ethical implications for the community - about which she may have a genuine interest?

*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.*³

Furthermore, as Dodds and Jones state:

*No two women experience pregnancy in quite the same way and the same woman can experience different pregnancies differently... Thus, how can a woman give fully informed consent to part with a child she will have felt growing and developing inside her, that she will have given form to through her body, before she knows the feelings these experiences will have produced?*⁵ The Bill takes little if any account of the issue of emotional exploitation of relatives. One way of addressing this appears to rely on a determination by the relevant Minister, by way of issuing a certificate, that a non-related surrogate may be used if "the person applying for the certificate has a relationship with the prospective commissioning parents that appears to indicate that the surrogacy arrangements under such an agreement have

¹ Anderson (1990) Is Women's Labour a Commodity? *Philosophy and Public Affairs* 19(1):71-92

² Willmott (2002) Surrogacy: Ill Conceived Rights. *Journal of Law and Medicine*, 10:198-220

³ *Ibid.*, 209.

⁵ Dodd & Jones (1989) Surrogacy and Autonomy, *Bioethics News* 8:1-6

a reasonable prospect of success” [s12(3)(b)] The vague terminology used does little to protect against exploitation.

Surrogacy legislation in Israel appear to acknowledge the problems with exploitation of close relatives by requiring that a surrogate mother be single or divorced, anonymous and not a relative of either of the parents⁶. However, whilst this requirement eliminates exploitation a close relative, it cannot eliminate the exploitative nature of surrogacy arrangements *per se*.

There are also other pressing issues to do with biological and psychological health of the surrogate and the child, all of which relates to the question of whether a potential surrogate can truly give informed consent. These issues will be discussed in the following sections and the problems that they raise with regard to informed consent will become apparent.

2. Fragmentation of Maternal-Infant Bond

There are important biological bonds that are established between mother and foetus during pregnancy. It has been shown that 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 babies⁷. One of the most decisive examples of the importance of the maternal-child bond is through our understanding of foetal-maternal physiology. The hormone oxytocin plays a crucial role in priming the gestational mother to respond in accordance with her natural maternal instincts⁸.

Oxytocin is a chemical messenger released in the brain chiefly in response to social contact, but its release is especially pronounced with skin-to-skin contact. In addition to providing health benefits, this hormone-like substance promotes bonding patterns and creates desire for further contact with the individuals inciting its release. (Palmer, 2002)

In a recent review of the importance of mother-infant bonding⁹, it was stated that the interaction between a mother and her newborn, e.g. skin to skin contact, eye gazing, breast feeding, etc. initiated an important series of physiological processes that helps the newborn develop and the mother to recover. Such experiences result in the simultaneous release of oxytocin in both mother and baby, which creates “feelings of love, drowsiness, euphoria, and pain relief in both of the breastfeeding partners”¹⁰. Furthermore, an earlier study revealed that “if the lips of the 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”¹¹.

⁶ Benschushan and Schenker (1997) Legitimising surrogacy in Israel. *Human Reproduction*, 12: 1832-4. In Soderstrom-Antilla (2002) Experience of in vitro fertilisation surrogacy in Finland, *Acta Obstet Gynecol Scand*, 81; 747-52.

⁷ Kennell and McGrath (2002) Starting the process of mother-infant bonding. *Acta Paediatrica*. 94 (6):775-7.

⁸ Palmer (2002) Bonding Matters – The Chemistry of Attachment. *Attachment Parenting International News*. Vol 5, no. 2. (<http://www.babyreference.com/BondingMatters.htm>).

⁹ Kennell and McGrath (2002) Starting the process of mother-infant bonding. *Acta Paediatrica*. 94 (6):775-7.

¹⁰ *Ibid.* (pg. 776)

¹¹ *Ibid.* (pg. 776) cited from Widstrom et al (1990) Short term effects of early suckling and touch of the nipple on maternal behaviour. *Early Human Development*. 21:153-63.

Additionally, the developmental psychology literature indicates that there is a crucial window of time from the moment of birth onwards whereby the baby begins to form cognitive attachments through inter-subjective interaction with the gestational mother¹². The cognitive psychology literature on early childhood developmental, i.e. social/inter-subjective bonds and attachments, indicates that there are important psychological bonds formed from the moment of birth and onwards^{13 14 15}. The literature indicates that we have a very basic response to expressions of emotion in others and infants have a basic drive to match the behaviour and psychology of another person because they have a system, which seeks out another emotional being to participate with in an “inter-subjective game”. Hence infants do not live in a buzz of ambivalence or confusion as envisaged by some, but rather, an infant’s behaviour is innately fashioned to coordinate social behaviour of other people, i.e. an infant, when born, already has the cognitive mechanisms and psychological capacities in place to influence as well as be influenced by the other people, in particular the birth mother. For example, numerous studies have revealed that infants react to emotional expressions of their mothers with their own emotional expressions¹⁶.

Therefore one ought to be cautious about disrupting the important bonding process between mother and child which begins during gestation, after birth and onwards. Surrogacy ruptures the psychological and biological bond between mother and child and thus diminishes the importance of gestation in its role in establishing the bond. Furthermore, such is the emotional attachment of the surrogate mother that there have been many cases from around the world where the surrogate has been unwilling to relinquish their child, e.g. Baby M¹⁷ and Evelyn cases¹⁸. As evidenced in those much publicised cases, having to relinquish a child is not easy, subsequently resulting in custody battles. There is also evidence of surrogates having to live through the psychological burden of giving up their gestational child for many subsequent years^{19 20}.

It is therefore difficult, if not impossible, for a surrogate mother to be able to give informed consent on such a matter given the nature of the biological and psychological attachments that are established during pregnancy, birth and early infant life. The difficulty of such a decision is evidenced in a variety of examples ranging from refusal to relinquish to psychological ramifications due to the act of relinquishment. What happens when there is a reluctance to stick with the original agreement? What if neither parent want the child? Are there any

¹² Hobson, R. Peter (2002) *The cradle of thought*, Macmillan.

¹³ A. N. Meltzoff & A. Gopnik (1993). The role of imitation in understanding persons and developing theories of mind. In S. Baron-Cohen & H. Tager-Flusberg (Eds.). *Understanding other minds: Perspectives from autism*. Oxford: Oxford University Press.

¹⁴ Gopnik & A.N. Meltzoff (1998). Infant cognition. In *The Encyclopaedia of Philosophy*. Routledge

¹⁵ Hobson, R. Peter (2002) *The cradle of thought*, Macmillan.

¹⁶ Hobson, R. Peter (2002) *The cradle of thought*, Macmillan. (pg. 32)

¹⁷ Whitehead MB, Schwartz L. *A Mother's Story: The Truth About the Baby M Case*. Publisher: St Martins Pr; 1st ed. edition (February 1989) ISBN 0-312-02614-5)

¹⁸ "Re Evelyn" [1998] FamCA 55 (15 May 1998)

¹⁹ Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. Vol 61, No. 1, pp21-43.

²⁰ Goleman, Daniel, "Motivations of Surrogate Mothers" in *The New York Times*, 20/1/1987:

<http://query.nytimes.com/gst/fullpage.html?sec=health&res=9B0DE3D81438F933A15752C0A961948260>

penalties if the agreement is not honoured? Should there be? The proposed legislation is unable to accommodate such complications and will lead to more problems.

3. Contractual Issues and Health Risks

What if the foetus is diagnosed with or suspected of having a disability or disease? This can make a surrogacy arrangement highly contentious and can lead to further complications, e.g. if there is a prenatal diagnosis of disability or if the child will have some other perceived imperfections, this could result in the commissioning couple reneging on the contract. At least one such case has occurred in the US²¹. In the case of a diagnosis of disability, depending on the circumstances and severity, the option of abortion may be considered, however, differing moral perspectives on abortion would result in an unresolved stalemate, e.g. in the event of a prenatal diagnosis of severe disability the surrogate may still wish to proceed with the birth, however, the commissioning couple may no longer want the child due to its disability. Would the law allow a woman to choose termination if she wanted to? The legislation does not address this and therefore one would imagine that this must be settled in the contractual agreement. This would place an extra burden on the contractual agreement between surrogate and commissioning couple.

It is known that under an IVF program, a woman has a greater chance of multiple births. According to a recent review, IVF is responsible for approximately 50% of all multiple births worldwide²². This could lead to contractual disputes if the intention of the commissioning couple was only to have 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 foetuses²³. Furthermore, in a recent news article by Darshak Sanghavi (a paediatrician from the Massachusetts Medical School) he states that one-third or even one-half of infant mortality is due to complications of prematurity, and a large contributor to prematurity is fertility treatment. About half of IVF pregnancies in the US result in multiple births, with a high risk of premature delivery²⁴. Hence with any surrogacy arrangement that involves assisted reproduction such as IVF, in addition to contractual disputes that may lead to litigation, there will be significant health risks to both child and surrogate.

There are also other significant health risks that surrogate mothers are subject to as a result of an assisted reproduction program, in addition to many other side effects relating to pregnancy and IVF. Pregnancy is natural but not always a “straightforward” process and it is sometimes accompanied by complications that can lead to serious health risks and even death. For example on January 29 the Daily Mail reported that a surrogate mother had died shortly after giving birth. Natasha Caltabiano, 29, who was involved with the agency *Surrogacy UK*,

²¹ Such a case has occurred in the United States. “Spurned baby sparks action on surrogate births” *The Australian*, 27 January 1983; in Singer and Wells (1984) *The Re Production Revolution: New Ways of Making Babies*. Note 12, pg. 118-119.

²² Gurgan T and Demiroglu A (2007) Unresolved issues regarding assisted reproduction technology. *Reproductive Biomedicine Online*. 2007 Feb;14 Suppl 1:40-3.

²³ “Surrogate mother sues California couple”. August 14, 2001. CNN/Law Centre. (<http://archives.cnn.com/2001/LAW/08/13/surrogate.dispute/index.html>)

²⁴ IVF may cause higher infant death rates - More money may lead to worse health, says doctor. BioEdge 241 -- Wednesday, 21 March 2007. (<http://www.slate.com/id/2161899/>)

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." (Daily Mail, 29 January)²⁵

In general, a surrogacy arrangement by its very nature, is likely to lead to more custody disputes because the child starts out in unusual circumstances as the offspring of more than one family group, in comparison to the situation whereby a child is born under the established norms of family structure. Of course the statistics may indicate that there are a relatively low number of cases that end up in court, however, it is the number of cases that do not go to court that is of most significance.

If this legislation is passed, it will be massively complicated by the types of issues discussed here. They will have to be settled in the contractual agreement between the surrogate and the commissioning couple. Hence it appears that the contractual agreement carries a disproportionate burden of the terms of the surrogacy arrangement compared to the actual legislation itself. This is a major logistical limitation of the legislation in its current format.

4. Objectification and Harms to the Child

Motivations Underlying Surrogacy - A major drawback of such a Bill is that it overlooks the morally relevant issues that are not part of a surrogacy contract; in addition to failing to consider the importance of feelings of natural bonding that the surrogate mother and the child experience, and the possible ramifications discussed previously, the Bill neglects another morally relevant factor, i.e. the welfare and interests of the child. One of the major questions that we must ask ourselves is whether a surrogacy arrangement is made with the interests of the child and the interest of society as a whole, or the lone interest of the commissioning couple in mind. Since a surrogacy arrangement involves not only the commissioning couple and the surrogate mother, but the resulting child as well, society therefore has a right to prohibit surrogacy, overriding the principles of freedom and autonomy for which the case in favour of surrogacy relies on, in order to prevent children being born into and under undesirable circumstances (i.e. the possibility of unsuitable commissioning parents, the ruptured maternal-foetal relationship and distorted family relationships). It is obvious that the primary goal of a surrogacy arrangement is aimed at fulfilling the desire of an infertile couple to have a child over and above the welfare of that child.

Additionally, a 1994 study revealed that for some women, the motivation to become a surrogate mother is due to feelings of guilt about having had a previous abortion and/or having to give up a child for adoption; 26% of the sample of potential surrogates had

²⁵ <http://www.spuc.org.uk/news/archive/2005/january/31>

previously had a voluntary abortion and 9% had placed a child up for adoption²⁶. Hence one must also question the alleged altruistic basis that surrogates base their decision to enter into an agreement on.

Furthermore, In contrast to the regulatory processes involved in adoption for example, the proposed Bill would allow surrogacy arrangements to proceed without adequate and objective assessment of the suitability of a commissioning couple to be parents, other than the vaguely defined requirements that involve counselling and issuing of a certificate by a medical practitioner (Section 2 (b)). As a result it appears that the subjective opinion of the relevant minister would be the only major selection criterion.

A surrogacy arrangement involves an artificial and socially constructed family arrangement that does not have the child's welfare as a primary concern. It is therefore, a conscious decision to subordinate the child's welfare for the sake of allowing the infertile couple to have a gestational, and in some cases, a genetically related child.

Genealogical Bewilderment - As discussed above in relation to the effect that surrogacy may have on the bonding between surrogate mothers and their child, it is the deviation from traditional and biological norms of family development that gives rise to feelings of genealogical bewilderment and the need to reconcile the situation with the traditional and biological norms that most families adhere to. Given that assisted reproduction is a relatively new phenomenon there is little by way of case studies to examine the long term effects on the children born from such circumstances, however, the problems associated with genealogical bewilderment are clear in the case of adoption.

Many studies have shown the long term effects that being adopted has on one's life, which has lead David Kirschner, a clinical/child psychologist, to coin the term "Adopted Child Syndrome"²⁷.

In case after case, I have observed what I have come to call the Adopted Child Syndrome, which may include pathological lying, stealing, truancy, manipulation, shallowness of attachment, provocation of parents and other authorities, threatened or actual running away, promiscuity, learning problems, fire-setting, and increasingly serious antisocial behavior, often leading to court custody. It may include an extremely negative or grandiose self-image, low frustration tolerance, and an absence of normal guilt or anxiety.

Of course there is a well established history of problems associated with not knowing one's origins if the genealogy of an adoptee were kept secret, however, knowing one's genealogical

²⁶ Parker (1983) Motivation of Surrogate Mothers: Initial Findings. American Journal of Psychiatry. 140:117-119. In Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. Vol 61, No. 1, pg. 30.

²⁷ Kirschner (1990) The Adopted Child Syndrome: What Therapists Should Know, Psychotherapy in Private Practice, vol. 8 (3) Hayworth Press.

origins does not necessarily alleviate an adoptee's sense of inner turmoil. In some extreme cases, an adoptee's awareness of their origins has led to extreme antisocial behaviour - consider the following accounts as quoted below²⁸.

On September 23, 1992, Attorney Donald Humphrey...called attention to the Syndrome as a factor in cases where children murdered their adopters in "Violence in Adoption," a talk he gave at a conference of the American Adoption Congress.

In 1993 and 1994, the Syndrome was used as a defence in two cases of juvenile adoptees who murdered their adopters. Kirschner, a child psychologist, identified the Syndrome as a contributing factor with regard to Patrick DeGellecke who was 14 when he killed his adopters by setting fire to their home.

Adoption, whether legal or illegal, is a dysfunction of kinship, and that the adoptee perceives many people in his world as "strangers...there may be a reaction experienced by the adopted child that is the most primitive wound to the psyche, and is experienced at the very essence of his/her humanity even in adulthood. By and of itself, the adoptee's specific loss of the most elementary biological kinship, in the process known as adoption, may cause "paleo-psychological regression" experienced as uncontrollable rage deep from within his/her own ancient history which, when focused, may find its end as predatory violence.

Of course this is not an objection against adoption given that the crucial distinction between adoption and surrogacy, is that the latter is an intentional decision to give birth to a child on the basis of the commissioning couple's desire to have a child, without having the child's welfare as a primary concern. Whereas adoption is, in a sense, a "rescuing" of a child from difficult circumstances and so it is the child's welfare that is of primary concern here. However, a surrogacy arrangement is clearly not the ideal situation for a child and the prospect of the child having to come to terms with their origins can have important psychological ramifications that are likely to parallel those observed in cases of adoption. Hence society must be cautious about the motives and priorities that underpin the desire to enter into a surrogacy arrangement. In the long term we believe that this could give rise to undesirable psychological ramifications for the child as well as the surrogate.

Golombok Studies - Whilst there are little by way of recent empirical studies into the long term effects that surrogacy has on the child and the family the child is adopted into, a quick search through the relevant literature databases will reveal a seemingly disproportionate number of studies by Susan Golombok and her group. They are the only group who have reported that the various methods of assisted reproduction and surrogacy do not have a negative impact on the social or emotional development of all parties involved^{29 30 31 32}.

²⁸ <http://www.amfor.net/acs/>

²⁹ Golombok S, Lycett E, MacCallum F, Jadvá V, Murray C, Rust J, Abdalla H, Jenkins J, Margara R. (2004) Parenting infants conceived by gamete donation, *J Fam Psychol*;18(3):443-52.

³⁰ Golombok S, Jadvá V, Lycett E, Murray C, MacCallum F. (2005) Families created by gamete donation: follow-up at age 2. *Hum Reprod*;20(1):286-93.

However, there are a number of caveats to these studies that must be pointed out – firstly, the studies are limited in their longitudinal extent, in that analysis of the quality of development of a child born from an assisted reproduction program and/or surrogacy arrangement has only been analysed up to the age of twelve. Secondly, the issue of disclosure vs non-disclosure is not controlled for in any of the studies. This is crucial because a child who does not know that they were the product of ART is cocooned in a blissful ignorance from the possibility of genealogical bewilderment. Thirdly, the participants in the studies are recruited from surrogacy agencies primarily in the UK and US, where it is known that there are stringent selection criteria for surrogacy candidates, which are specifically designed to circumvent any problems that may arise, such as the appearance of exploitation of the surrogate^{33 34}.

The counselling services and programs that these agencies provide for the participants of a surrogacy arrangement are in place to ensure the greatest likelihood of a successful outcome for all parties involved. This is especially the case with commercial surrogacy agencies in the US, where unsuccessful arrangements are detrimental for business³⁵. This is also a crucial point that is discussed in section 5 below, because 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): As Susan Golombok herself has stated in personal correspondence, when asked if she was aware of the specifics of counselling procedures³⁶:

I'm afraid I don't know the answer to your question except to say that surrogacy agencies may encourage surrogate mothers not to think of the baby as their own in order to reduce cognitive dissonance.

Of course, if a researcher is unaware of such caveats this brings into question the representativeness of the participants in her studies and clearly demonstrates a flaw in the experimental design, namely the absence of necessary experimental controls. Needless to say that much more research is required to confirm that there are no psychological ramifications for all participants of a surrogacy arrangement, in particular the child, whose welfare ought to be of primary concern. The burden of proof of the efficacy of surrogacy is solely placed upon those who favour surrogacy, but given that proof of efficacy is yet to be shown, such legislation amounts to nothing less than a dangerous experiment with human lives. Of course researchers in this area with little social/moral conscience would welcome such legislation as a means of generating valuable data.

³¹ Murray C, MacCallum F, Golombok S. (2006) Abstract Egg donation parents and their children: follow-up at age 12 years. *Fertil Steril*, 85(3):610-8.

³² [Golombok S, Murray C, Jadva V, Lycett E, MacCallum F, Rust J](#). Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3. *Hum Reprod*;21(7):1918-24. Epub 2006 Mar 3.

³³ Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. Vol 61, No. 1, pg. 31.

³⁴ Baslington (2002) The Social Organisation of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process. *Journal of Health Psychology*, 7(1); 57-71.

³⁵ <http://www.growinggenerations.com/program?GGID=c6c1a88a9db956eb73f8c40be16fc815>

³⁶ Personal Communication – Tuesday, March 13 2007; 2:29 pm CST

5. Objectification and Exploitation of the Surrogate Mother

It is highly counterintuitive to consciously decide to terminate one's parental rights and duties prior to conception. Legal norms may affirm parental duties and the already existing moral obligations that come with it, however, the issue is whether parenthood is a relationship grounded in biology or grounded in an agreement. There's a sense in which even though a gestational mother has decided to relinquish her child (parenthood rooted in an agreement) she is still the child's mother³⁷ (parenthood rooted in biology). Therefore there is a sense in which self-deception is required on the part of the surrogate in order to break the natural bond between gestational mother and child in order to make it easier for the surrogate mother to relinquish the child after having nurtured it in the womb and many months beyond. The transferral of parental rights does not annul the already existing psychological parental bond between the gestational mother and child, as Rosalie Ber states³⁸:

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'".

Therefore, a surrogate mother becomes a commodity for the purposes of conceiving and producing a child who is to be relinquished to the commissioning couple.

It has been argued that if one believes in the value of traditional family and interpersonal relations, then surrogacy will be destructive of such intimate relationships. In order to circumvent this problem, in relation to the bond between the surrogate and the child, one can only do so by treating both the surrogate and child as mere means to an end, hence surrogacy becomes exploitative³⁹. Firstly, is there any empirical evidence of this, i.e. the need for a surrogate mother to reconcile the circumstances of the surrogacy arrangement with the norms of maternal-foetal relationships? And secondly does the reconciliation proceed in a manner that is deceptive or underhanded? There is fairly sound evidence of this kind of approach - In order to make it easier for the surrogate mother to relinquish the child, she must invoke a number of "cognitive dissonance reduction strategies"⁴⁰, which in the case of surrogacy, it will be argued, amounts to a form of objectification via self deception.

In a study by Ciccarelli⁴¹, fourteen surrogate mothers were asked to report their feelings or concerns about relinquishing the child – one mother reported emotional distress over the

³⁷ van Zyl and Nierkerk (2000) Interpretations, Perspectives and Intentions in Surrogate Motherhood. *Journal of Medical Ethics*, 26:404-409.

³⁸ Ber, (2000) Ethical Issues in Gestational Surrogacy. *Theoretical Medicine and Bioethics*, 21:153-169.

³⁹ Ozolins (1998) Surrogacy: Exploitation or Violation of Intimacy? Twentieth World Congress of Philosophy, in Boston, Massachusetts from August 10-15, 1998. <http://www.bu.edu/wcp/Papers/OApp/OAppOzol.htm>

⁴⁰ "Cognitive Dissonance" is a communication theory adopted from social psychology. "Cognitive" refers to the act of thinking and "Dissonance" refers to inconsistency or conflict. "Cognitive Dissonance" is therefore the psychological conflict that arises from holding two or more incompatible beliefs simultaneously.

⁴¹ Ciccarelli (1997) The Surrogate Mother: A Post-birth Follow-up. PhD dissertation, California School of Professional Psychology, Los Angeles, C.A. *Dissertation Abstracts International*, 58(3), 1522B

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 vast majority of surrogates this issue of having to relinquish the child is not a problem. However, it is the cognitive dissonance reduction strategies that allow surrogates to cope with their loss, implying that the issue is much more deep seated, which accords with our intuitions about the strength of the bond between gestational mother and child. So why was it 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”⁴².

In another study by Van Zyl and Van Nierkerk⁴³ 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 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 physical labour⁴⁴.

A study by Ragone⁴⁵ found that the surrogate’s perception that the child was not theirs is 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.

No wonder cognitive dissonance reduction strategies are imperative to help reconcile one’s natural intuitions. However, it ought to be clear from the studies cited above and the statements given by surrogates, that the nature of such strategies implicitly requires the surrogate to view herself as an object or as mere means. This is indeed the opinion of a number of researchers in this area, for example as Baslington⁴⁶ she 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

⁴² Ibid, pg. 56.

⁴³ van Zyl and Nierkerk (2000) Interpretations, Perspectives and Intentions in Surrogate Motherhood. *Journal of Medical Ethics*, 26: pg. 405.

⁴⁴ Ibid. pg. 406.

⁴⁵ Ragone (1994) Surrogate Motherhood: Conception in the Heart. Boulder, San Francisco, Oxford: Westview Press; pg. 74-78, Quoted in van Zyl and Nierkerk (2000) Interpretations, Perspectives and Intentions in Surrogate Motherhood. *Journal of Medical Ethics*, 26: pg. 407-408.

⁴⁶ Baslington (2002) The Social Organisation of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process. *Journal of Health Psychology*, 7(1); 57-71.

incorporating payment, suggesting that the subcultural influences engendered by the social organization of surrogacy arrangements were important in the detachment process.

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 and if a good relationship was forged with the commissioning couple then this also eased the burden of relinquishment. However, quite alarmingly, the study revealed that one of the surrogates still suffered from feelings of guilt, regret and loss, 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. Hence there is ample research indicating a number of recurring themes such as self-denial, objectification and the need for reconciliation of ones natural intuitions with the requirements of the surrogacy arrangement.

Furthermore, one of the major causes of emotional distress or regret on the part of the surrogate is whether there is a relationship maintained with the commissioning parents. What this indicates is that there is a concern on the part of the surrogate for developing a type of relationship with the commissioning parents that actually goes beyond the mere surrogacy arrangement, which is essentially the utilisation of a functional womb. The surrogate wants to be more than just a “womb for rent” after which she becomes irrelevant. She does not want to feel used, merely because she has a womb that works, but rather she wants to be a part of the commissioning couple’s lives. As van den Akker states⁴⁷, “it is seen as a betrayal when the intended couple with the surrogate baby disappears from the surrogate and her children’s lives.”

Hence there is an intrinsic sense of objectification of the surrogate mother to begin with, which has to be reconciled by cognitive dissonance reduction for which maintenance of a good relationship with the commissioning couple is a necessity. The legislation is very vague on what the contractual agreement between surrogate and commissioning parents should include and it seems doubtful that it would force commissioning couples into a long term friendship/relationship with surrogate. This is a major oversight of the legislation and indicates that it is not very well informed.

To summarise this argument:

1. Surrogacy is destructive of traditional intimate child/maternal relationships.
2. To circumvent this problem one must conjure a number of cognitive dissonance reduction strategies.
3. The cognitive dissonance reduction strategies implicitly require the objectification of the surrogate.

⁴⁷ Van den Akker (2007) Psychosocial Aspects of Surrogate Motherhood. *Human Reproduction Update*, Vol 13, no. 1, pg 57.

4. If the first premise is correct then surrogacy is morally problematic, if the second and third premises are correct, then surrogacy is likewise morally problematic.
5. There is empirical evidence that premise 1, 2 and 3 are correct. (Discussed in sections 1, 2, and 3, respectively)
6. Therefore surrogacy is morally problematic.

This is a structured argument that shows that surrogacy objectifies surrogate mothers, but of course there is also harm to the child (as discussed in sections 2, 3, and 4). The interesting thing about the surrogacy situation in relation to cognitive dissonance reduction, is that the principles of not using people as “means to an end” are deliberately undermined so as to uphold the principle of “do no harm”. In other words if the surrogate does not want to psychologically suffer from relinquishing her baby, then the surrogate has to think of herself as an object. But the studies cited in the above sections have shown that this might not be a very successful strategy and that in some cases, harm does eventuate in the long term.

Compared with surrogacy, one would expect there to be a greater incidence of emotional regret at having to relinquish a child in the cases where mothers had to give up their child for adoption⁴⁸. This is because surrogacy is planned, and hence the cognitive dissonance reduction strategies can be put in place from the start. Furthermore in many surrogacy arrangements, in particular in some US states where commercial surrogacy is legal, there are many avenues of professional counselling available. The studies cited here and many others which suggest that surrogates do not have psychological issues with having to relinquish their child may be true, but a major caveat to bear in mind (as mentioned section 4) is that due to the availability of good quality counselling services and very rigorous screening processes, whereby only those surrogate mothers who are more able to cope with relinquishment are selected for, one would expect disputes and negative outcomes to be minimal. For example one of the largest surrogacy agencies in the US known as *Growing Generations* makes the following statement⁴⁹:

All of our surrogates are fully screened medically, psychologically and financially before admittance into our program. In addition they must qualify for and obtain private health insurance designed to cover the costs of maternity medical expenses. Only about 1 in 10 surrogate applicants is approved during the screening process to become a Growing Generations surrogate.

So if having to reconcile one’s emotional bond with the child is not a serious issue, then why is there such a rigorous screening process and why do surrogates have to undergo welfare and counselling services? However, what is relevant to the argument in this section is whether such counselling services facilitate the cognitive dissonance reduction strategies by implicitly objectifying the surrogate. The empirical evidence discussed above makes it obvious that this is indeed that case.

⁴⁸ Ibid. (pg. 60-61).

⁴⁹ <http://www.growinggenerations.com/program?GGID=c6c1a88a9db956eb73f8c40be16fc815>

6. The Empirical Research - In a recent paper⁵⁰, the authors summarise the outcomes of empirical research dating back to the 80s, into the social and psychological outcomes of those involved in surrogacy arrangements. There were a number of interesting findings, which are listed below:

i). Public Attitudes – There is generally a lower approval rate of reproductive technologies when it involves third parties (e.g. Assisted Reproductive Technologies - ART and surrogacy)⁵¹

ii). Motives for Surrogate Mothers – Surrogate mothers overwhelmingly report that they choose to bear children primarily out of altruistic concerns⁵², however, there are some surrogates who have stated that money is a prime motive (especially where commercial surrogacy is legal in some US states). Other motives include sharing the enjoyment of pregnancy and redemption from giving up a child for adoption and/or previous abortions⁵³.

Furthermore, a study has shown that such verbal self-reports are scripted to reflect socially accepted reasons for surrogacy⁵⁴, hence there seems to be at best some equivocation on the question of motivation, and at worst, morally questionable grounds underlying motivation such as redemption or guilt, both of which are examples of the general problem of having the child's welfare secondary to the (allegedly) altruistic and monetary (example of US) desires of the surrogate to help an infertile couple.

iii). Exploitation of Women – There is evidence to suggest that surrogacy contracts are not exploitative of young, single or ethnic minority women, however, this is likely to be due to the rigorous screening processes that surrogacy agencies run, which are specifically designed to circumvent the appearance of exploitation^{55 56}. The family incomes of surrogates are generally modest (but not low income) and they are usually of working class background. Also women of colour were greatly underrepresented among surrogate mothers. However, there is no doubt that the potential for exploitation exists, even more so under a commercial arrangement, given the disparity in income and social class between potential surrogates and commissioning parents. Some studies have indicated that the majority of surrogates in the US (where commercial surrogacy is legal in some states) are from relatively affluent sections of the community. However, such a surrogacy demographic is likely to be due to the screening processes that surrogacy agencies employ to circumvent the appearance of exploitation⁵⁷.

⁵⁰ Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. Vol 61, No. 1, pp21-43.

⁵¹ Ibid. (pg. 29)

⁵² Ibid. (pg. 30)

⁵³ Parker (1983) Motivation of Surrogate Mothers: Initial Findings. *American Journal of Psychiatry*. 140:117-119.

⁵⁴ Ragone (1994) *Surrogate Motherhood: Conception in the Heart*. Boulder, San Francisco, Oxford: Westview Press; pg. 74-78.

⁵⁵ Baslington (2002) The Social Organisation of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process. *Journal of Health Psychology*, 7(1); 57-71.

⁵⁶ Ciccarelli and Beckman (2005) Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy. *Journal of Social Issues*. Vol 61, No. 1, pg. 31.

⁵⁷ Ibid. (pg. 29).

iv). Personality Traits of Surrogates – Most surrogates are in the normal range on personality tests such as the MMPI. Though interestingly there is the suggestion that those who are willing to be surrogates are more independent thinkers and are less bound by traditional moral values. It was reported that surrogate mothers scored lower on the “Conscientiousness and Dutifulness” on the NEO Five Factor Test⁵⁸. Hence legislating for surrogacy would vindicate those who are less bound by traditional moral values and also encourage people to become less bound by those values.

v). Postnatal Attitudes of Surrogate – The paper reports a study that shows surrogate mothers are generally satisfied with their experience as surrogates. However, respondents were selected based on their willingness to participate in the study and were identified through surrogacy agencies. Hence one could question the representativeness of the respondents. Several other studies have confirmed that surrogates form a close relationship with the commissioning couple (more so with the mother) rather than the child. They evidence lower attachment to the foetus during pregnancy than other pregnant women. Hence it is the quality of the relationship between the surrogate and the commissioning couple that determines the level of satisfaction with her experience. However, if the relationship tapers off over time the surrogate can feel abandoned and objectified which could lead to increasing long term dissatisfaction and psychological turmoil.

vi). Negative Outcomes – The authors cite a study, which indicated that a surrogate’s dissatisfaction over the surrogacy arrangement may increase over time as contact with the commissioning couple diminishes. Furthermore, in a UK study, a minority of women (25%) reported experiencing significant emotional distress, however, this could be due to a number of reasons, such as the lack of professional support (this study was done in Great Britain where commercial surrogacy agencies are illegal). The lack of intervention and professional therapy may explain why the incidence of dissatisfaction increases over time.

vii). Interview Study - The authors cite an interview study, which looks at attitudes and concerns of the commissioning parents:

1. There was some awkwardness of maintaining contact with surrogate, particularly on the part of the father.
2. Another study revealed that a dominant theme that emerged was the desire to have a genetic link to the child.
3. Another study concluded that biological relatedness was a primary motivation for couples pursuing surrogacy. However, surrogacy violates accepted cultural norms, thus requiring couples to use various cognitive dissonance reduction strategies to resolve the problems and ambiguities of surrogacy arrangements. For example the father of an AI surrogacy arrangement felt discomfort that a woman other than his wife is the mother of the child.

⁵⁸ Ibid. (pg. 31).

4. There are two main strategies that couples and surrogates employ to resolve cognitive dissonance in relation to maternal-foetal relationships, and that is to downplay the significance of the biological and gestational link to the child.
5. Another study revealed that intending social parents scored low on the Marlow Crowne Social Desirability Scale, indicating less need to present in a socially desirable way.

The data indicates that those entering into a surrogacy arrangement are making a radical departure from established social norms of motherhood and parenthood. There is a need on the part of those entering into a surrogacy arrangement to reconcile their situation with those established societal norms which has led to issues of parental, familial and psychological bewilderment. The consequences of such a situation has resulted in harms being inflicted on all parties involved, in particular the surrogate who faces the greatest challenge because of her intimate relationship with the child. After all it is the surrogate mother that has to face the burden of becoming pregnant through means of assisted reproduction, carry out the pregnancy, give birth and then relinquish the child. Whilst there needs to be more empirical data to verify the extent to which surrogate mothers are affected both physically and psychologically, the evidence indicates that there is at least the potential for objectification and long term psychological harm, both of which ought to be of concern for both policy makers and health care providers.

7. Reimbursement and Valuable Consideration

According to Division 3, section 10HA, subsection 2-(ix), part (B) of the Bill, it is stated that “no valuable consideration is payable under, or in respect of, the agreement, other than for expenses connected with” general out of pocket expenses, ranging from the costs of, becoming pregnant, birth or care of child, counselling or medical services and legal services.

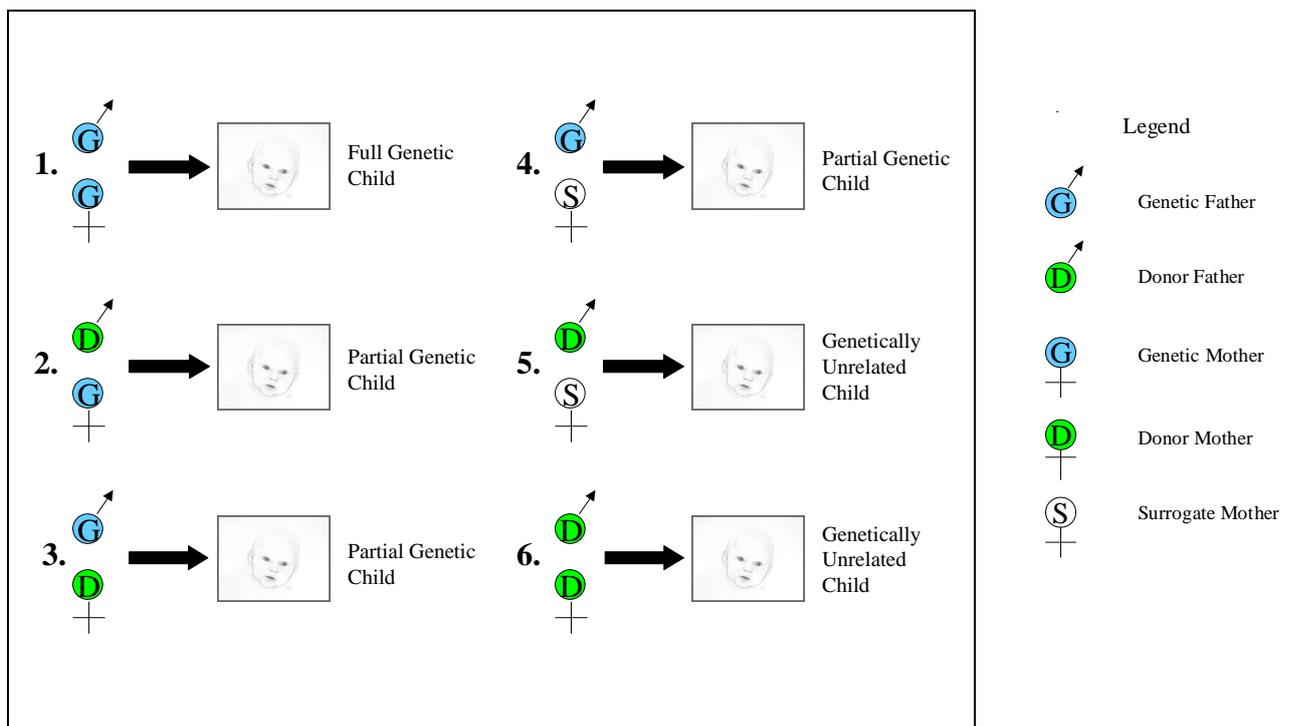
Subsection 2-(ix), part (E) allows for the payment of expenses connected with “any other matter prescribed by the regulations for the purposes of this provision”, however, this is difficult to define. What about costs due to lost time, lost income and psychological stress? This aspect of the Bill allows for equivocation on what counts as out of pocket expenses versus reward and is likely to create tension between the commissioning couple and the surrogate, which might affect the outcome of the later court order for adoption.

Furthermore, reimbursement of out of pocket expenses does not rule out the possibility of exploitation of those who are of lower socio-economic class. This is because an amount of money is valued differently by members of different socio-economic class. If reimbursement for lost earnings is applicable then the agreement may inadvertently lapse into a commercial one. This is because it may be viewed as unfair if a higher wage earner is reimbursed in accordance with her higher wage despite the fact that the lower wage earner is undergoing the same procedure. Perhaps the only way to circumvent this is 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 is that exploitation of the lower wage earner is likely to occur⁵⁹.

8. The Significance of Genetics and Gestation for Parenthood

According to Division 3, section 10HA, subsection 2-(viii), part (B) of the Bill, it is stated that “at least one of the commissioning parents will provide human reproductive material with respect to creating an embryo for the purposes of the pregnancy, unless the commissioning parents have a certificate issued under subsection (5)”. Hence the following surrogacy arrangements are possible:



	<u>Genetic Father</u>	<u>Genetic Mother</u>	<u>Donor Father</u>	<u>Donor Mother</u>	<u>Surrogate Mother</u>
1	✓	✓			
2		✓	✓		
3	✓			✓	
4	✓				✓
5			✓		✓

⁵⁹ This argument is an adaptation of an argument presented in a paper by Father [Name] in Fleming: *Is Trade in Human Body Parts Inherently Wrong?* 2007 National Conoquium for Catholic Bioethicists.

Given the following permutations, there are a number of ramifications: firstly, there are two possibilities for a child to be conceived without having any genetic relation to the commissioning couple, i.e. combinations 5 and 6. Hence one could argue that this outcome is more akin to adoption and would therefore obviate the need for a surrogacy arrangement so long as there is a child available for adoption. Interestingly the legislation has a preference for the surrogate to be a close relative, which raises the possibility of the surrogacy being akin to gestational incest. Secondly, because of the extra emphasis on the importance of a genetic link between parents and their children, combination 5, which involves a genetic link with the surrogate, may pose a greater challenge for the surrogate to relinquish the child. Generally speaking the possible permutations ought to illustrate the complexity of the possible surrogacy arrangements and outcomes, the implications of which have not been considered in this Bill.

Conclusion

Generally speaking, surrogacy fails to respect the human dignity of the child and the surrogate by subordinating the surrogate's and child's welfare in favour of the commissioning parents' desires to have a child, and ignoring the fact that foetal/early infant development are critical determinants of a child's welfare, whereby the biological and psychological bond between the surrogate and child is of crucial significance for this development. Additionally the inadequacies of the Bill will facilitate further complications due to the nature of surrogacy arrangements, which may lead to litigation and cause further distress and harm for all parties involved.