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**Submission to the
INVESTIGATION INTO ALTRUSTIC SURROGACY COMMITTEE**

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Executive Summary

The Australian Christian Lobby (ACL) believes that surrogacy should not be legalised, because of serious concerns about its legal and relational consequences, which mean that it fails to secure the best interests of the child concerned, or of the surrogate mother.

ACL sympathises with the deep pain of infertile couples and the situations in which they find themselves, but believes that the benefits that surrogacy may provide for some parents is outweighed by the negative impact that surrogacy could have on many children if it were legalised.

Any discussion of surrogacy must maintain its focus on the best interests of the child, rather than the wishes, however heartfelt, of the adults involved. The best interests of the child must be paramount in any discussion such as this.

After careful consideration and broad consultation, ACL believes that the risk in legalising surrogacy will override the benefits to society. It is not in the public good to allow children to be conceived in arrangements that are fraught with such difficulties and complexities.

These difficulties include:

- Legal challenges as to who is the parent;
- Up to six adults with a biological or strong emotional stake in a child;
- Blurred family relationships and disruption to relationship links between marriage, conception, gestation, birth and motherhood, which are important to human identity;
- No surrogate can know how she will feel once she is required to give up the child she has carried and given birth to;
- Access to singles and same-sex couples, deliberately creating a motherless or fatherless child.

Current Queensland law regarding surrogacy

The Surrogate Parenthood Act 1988 (QLD) makes it an offence to enter into, or offer to enter into a surrogacy contract, whether commercial or altruistic, and whether or not the offence occurs in Queensland or elsewhere.

Surrogacy is not a regulatory offence, as it is not prescribed in the Regulatory Offences Act. Section 3 of the *Surrogate Parenthood Act 1988* (Qld) prohibits a list of actions and Section 4 makes any of these actions offences under the act. Because this behaviour is not otherwise designated a crime or misdemeanour it is therefore not a list of indictable but of simple offences.

ACL believes the current penalties for these offences, being simple offences, should remain. While surrogacy is available in other states ACL believes that Queensland should not follow their path and change our laws to suit.

Views within the Christian constituency

To ensure that our position was informed by the broader Christian view, ACL contacted a number of leading Christian groups and individuals to seek their views on surrogacy. Theologians of many denominations were contacted including Anglican, Baptist, Evangelical, Catholic, Presbyterian and Charismatic/Pentecostal and the overwhelming majority opposed surrogacy. While none of these theologians were speaking for their denomination, common concerns included: the ethical dilemma of excess IVF embryos; concern over allowing one party a biological child outside the marriage; and, primarily, a concern about the impact on children born through surrogacy.

Christians with a focus on women's rights have often had additional reasons for opposing surrogacy, with many believing it represents 'wombs for hire' and some fearing altruistic surrogacy will be a slippery slope to commercial surrogacy, which will exploit poor women in particular.

Terms of Reference

The terms of reference for the committee investigates two questions listed as "a" and "b". The ACL considers question "b" predominately presupposes that the government is going ahead with legalising surrogacy making question "a" somewhat disingenuous.

Given that surrogacy has the potential to adversely affect the child and the surrogate mother and is fraught with legal and relational complexities that are not easily resolved, the principle of caution should apply. As will be argued below, the burden of proving surrogacy harmless rests with those who wish to see it made more widely available. The Government of Queensland should not allow itself to be easily persuaded to favour surrogacy as this would be to neglect its responsibility to protect the weaker parties, namely the child at the centre of the arrangement and the surrogate mother.

Should Altruistic Surrogacy Be Decriminalised?

As previously noted, any discussion of surrogacy must begin with and maintain its focus on the best interests of the child to be born. In ACL's view, surrogacy is not in the best interests of the child and should not be decriminalised.

Considering the best interests of the child

A proposed solution to the pain of childless adults must not unintentionally place a vulnerable young child at risk. This child is not yet in existence but is deliberately brought into being in situation fraught with complexity to meet the needs of the commissioning couple. Given that no child needs to be conceived, the state has a key responsibility to ensure that children are not brought into being in situations that do not serve their best interests.

Blurred family relationships and disruption to relationship links

Any form of surrogacy results in blurred family relationship and disruption to relationship links between marriage, conception, gestation, birth and motherhood, which are important to human identity.

It is conceivable to have up to six different people/stakeholders involved in a surrogacy arrangement. For example, the commissioning couple, the surrogate mother and her spouse (if applicable), a sperm donor and an egg donor. In addition, there may also be existing children of both the commissioning couple and the surrogate couple who may be confused by what is happening.

Genetic bewilderment

In the perhaps unlikely event that the process proceeds without drama, all may appear to be well. Advocates of surrogacy argue that the child will be very well-loved if the parents have gone to such lengths for it and that it is unlikely that the child will feel any confusion about its origins if everyone is open about the situation.

However, the truth is that many children as they develop through teenage years and later through life do struggle with issues of origin and identity, and wrestle through much confusion and heartache.

Many donor conceived children (and children born through surrogacy are often conceived using donated gametes) express a genetic bewilderment because they lack information about, or a relationship with, their genetic parents. Tom Frame notes that, 'in the continuing task of identity awareness, *knowing* our parents always surpasses *knowing about* our forebears¹.' This is borne out in the personal comments made by one woman conceived with donor sperm:

[I feel] angry every day when I think of the rights I am denied. My mother used an anonymous sperm donor. We know only that he was possibly a medical student, possibly a musician. Her doctor told her he didn't keep any more information and to me that's a betrayal of my rights to know myself².

¹ Tom Frame, *Children on Demand: The Ethics of Defying Nature*, UNSW Press 2008, p55

² Caroline Overington, 'Children of a lesser god,' *The Australian*, 2nd June 2007

TangledWebs³, a support group for donor-conceived children, is adamant that the child's interests must come first:

To claim the right to a child is to treat that child, another human being, as an end to satisfying one's own desires, as an object and not a person. To claim a right to a child is to claim jurisdiction over another human being's life when they have no say in the matter, when they have not given their consent, informed or otherwise.

The fact that donor conceived children cannot give consent because they are not yet alive is not an argument for putting their interests to one side; rather it is a powerful argument for ceasing the practice of DC or at the very least being extremely careful about and limited in the ways we practice it.

More research is undoubtedly required regarding surrogacy and donor conception but, given the deep and lasting impact of surrogacy on those involved, the principle of caution should apply. There exists the clear potential for harm and, given that there is a choice about whether or not a child is to be conceived, the state must take the cautious approach of preventing harm. The onus of proving the safety of surrogacy rests with its supporters. Tom Frame notes that:

...the possible coincidence of disadvantage and harm in even one child obliges those who advocate forms of alternative parenthood which knowingly alienate children from their biological parents and genetic information to think very carefully about the best interests of such children and how they can be served before irreversible decisions are made⁴.

Commodification of the child

Surrogacy is essentially an agreement between the commissioning couple and the surrogate mother that she will produce a child for them and supply it to them on birth. But what if the 'product' is not perfect? What if the commissioning couple does not want this particular baby because it is disabled or 'flawed' in some other way? What if the surrogate does not want the child either, because this was never part of the deal she agreed to?

In 1983 Baby Doe was born in Michigan as the result of a (commercial) surrogacy arrangement. Sadly Baby Doe was born with microcephaly and was rejected by the commissioning couple and the surrogate, neither of whom desired to raise a disabled child.

Unequal parenting

Surrogacy involves creating a child outside the marriage bond, introducing another woman (or two) as the gestational and / or genetic mother (in cases

³ TangledWebs www.tangledwebs.org.au/dc.php

⁴ Frame, op cit, p62-63

where the commissioning father is fertile). We must ask ourselves, what implications does this have for the marriage of the commissioning couple and for their relationship with the child? What implications does it have for the marriage or close relationships of the surrogate mother? (Note that most surrogates already have children of their own).

When an infertile couple adopts a child, both are in equal relationship to it. Neither has a genetic relationship with the child but both are its social parents.

In contrast, surrogacy, when using the genetic material of one commissioning parent plus the genetic material of the surrogate or another donor, creates an unequal parenting relationship between the commissioning couple. This situation is arguably closer to that of a child living with one biological parent and one step-parent. Deliberately placing a child into such a situation concerned the Warnock Committee which twenty years ago noted that:

It could be argued there is something potentially damaging in the situation of any child who has been born by means of AID [artificial insemination by donor] or surrogacy...There is an asymmetry built into the family relationships: only one of her two parents is biologically related to her, the other, though legally a parent, is not 'really' so. In this respect, it is argued, adoption is preferable to this kind of 'artificial' family. For in adopting a child, both parents are in the same boat: both have committed themselves to bringing up a child who is biologically not their own. There is no temptation for the non-related parent to blame all the child's unattractive qualities on the other party, whose biological offspring she partly is. In a family that has been created by assisted reproduction, there may be a danger that the parent who is not related to the child except legally may feel jealous of the other parent or inadequate in relation to the child. This does not occur in families with adopted children⁵.

Circumstances change

What happens when the circumstances of either the surrogate or the commissioning couple change during the pregnancy? What happens if the surrogate mother finds this pregnancy too difficult and wants to have an abortion? Can or should the commissioning couple be able to prevent the destruction of 'their' child? Can or should they be able to compel a woman to continue a pregnancy against her will?

What happens when the commissioning couple's relationship breaks down as happened in the California case of Jaycee Buzzanca in 1995? Jaycee was born through a commercial surrogacy arrangement using a donated egg and a donated sperm implanted into a surrogate on behalf of commissioning couple John and Luanne Buzzanca. Before Jaycee's birth, the commissioning

⁵ *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, London, HMSO 1984, p63

couple divorced and John refused to accept any responsibility for Jaycee on the grounds that she was not the child of the marriage. The courts ruled that genetics determined parenthood and that, in effect, Jaycee had no parents as neither Luanne nor the surrogate was her mother, and John was not her father. Three years later, that ruling was overturned and John and Luanne were declared to be her legal parents. It seems hard to imagine that this ongoing custody dispute served poor Jaycee's best interests in any way.

Custody disputes

Once a contract is finalised, the child becomes the object of that contract and may be considered under laws relating to property – something widely seen as abhorrent⁶. At present, surrogacy contracts are unenforceable in Australia. There remains the possibility that either the commissioning couple or the surrogate will change their minds. Such leeway is crucial if the right of the surrogate mother to keep the child she has given birth to is to be protected.

Custody disputes arising from surrogacy are complex and bitter. Australia's first litigated surrogacy case was that of Baby Evelyn, who was born in 1996 as the result of an agreement between an Adelaide couple with three children, known as the Ss, and a Brisbane couple with no children, known as the Qs. The Ss and the Qs were friends for many years. Knowing that Mrs Q couldn't conceive, Mrs S offered to be a surrogate. She was inseminated with Mr Q's semen and in 1996, gave birth to Evelyn.

For the first two years, the child lived with the Qs as planned. However the Ss had a change of heart and sought an order in the Family Court to remove Evelyn from the care of the Qs. The Qs appealed the case in the High Court but lost, with the court ordering that Evelyn should live with her biological mother, Mrs S, with 4 days per month awarded to Mr Q as her biological father.

Such circumstances are extremely difficult for adults to deal with. How much more detrimental to the well-being of the child concerned must such situations be?

Single and same-sex parenting

ACL believes that it is in the best interests of any child to be raised by its own biological father and mother, who are preferably committed to one another for life in marriage, thus providing a permanent and stable environment.

Where the biological parents cannot raise their child themselves, the next best option is for another married couple to raise the child, thus still

⁶ Frame, op cit, p158

providing a stable family environment with the different contributions of a mother and a father.

It is important that children are given the best possible upbringing and are not subjected to the confusion or genetic bewilderment associated with having an outside birth mother. The child will have the best chances of this with a mother and father in a married relationship, which by definition carries more commitment than a de facto relationship. As the authors of a recent British report lament:

Marriage has been downgraded in official discourse and increasingly undifferentiated from cohabitation despite marked discrepancies in the stability of married and cohabiting couples⁷.

One stark statistic demonstrates the greater stability that its parents' marriage provides to a child: by a child's 5th birthday, less than 8 per cent of married parents have split up, compared to 43 per cent of cohabiting parents⁸.

The breakdown of its parents' relationship has lasting adverse effects on children. Research shows that children are more successfully raised in an environment where they have a mother and a father. British economist and Labour peer, Richard Lanyard, notes that if, by the age of a 16, a child lives with only one of its biological parents, it is likely to suffer multiple disadvantage compared to other children, including being 70 per cent more likely to have a criminal conviction by age 15, twice as likely to leave school with no qualifications, twice as likely to become a teenage parent, 50 per cent more likely to be doing nothing by age 20, more likely to die young, and more likely to get divorced⁹.

Coira, Zill & Bloom¹⁰ write that young children without two biological parents are three-times more likely to suffer behavioural problems such as attention deficit disorder or autism. In the US, male teens without a biological father are twice as likely to be incarcerated than teens from two-parent homes¹¹.

Though the circumstances of life mean that some children are raised by only one parent (due to death, desertion or divorce), and some are raised by homosexual parents, ACL contends that these circumstances are less than

⁷ *Breakthrough Britain: Ending the costs of social breakdown*, Family Breakdown, volume 1. Policy recommendations to the Conservative Party from the Social Justice Policy Group.

⁸ K Kiernan, 'Childbearing outside marriage in western Europe' *Population Trends*, vol 98, pp11-20

⁹ Richard Lanyard, *Happiness: Has social science a clue?* Lionel Robbins Memorial Lectures, London School of Economics 2003

¹⁰ Coira, Zill & Bloom, 'Health of our nation's children,' in *Vital Health Statistics*, National Center for Health Statistics, 1195, vol 10 p191

¹¹ Harper C and McLanahan S, 'Father absence and youth incarceration' *Center for Research on Child Wellbeing Working Paper*, 2003 pp 99-103

ideal as they do not provide the different and complementary care of a mother and a father.

David Popenoe, Professor of Sociology at Rutgers University in New Jersey argues that:

Through identification and imitation, sons learn from their fathers as they cannot learn from their mothers, how to be a man. Making the shift from boyhood to constructive manhood is one of life's most difficult transitions, especially since boys as they grow up must break away from the comfortable female arena of their mothers. They typically do this through identifying and bonding with their fathers¹².

Elsewhere, Popenoe underlines the importance of a child being raised by its own mother and father:

Based on accumulated social research, there can now be little doubt that successful and well-adjusted children in modern societies are most likely to come from two-parent families consisting of a biological mother and father¹³.

ACL is concerned that surrogacy, already fraught with potential pitfalls, will be used by single people or same-sex couples who cannot naturally produce children of their own. However loving and well-motivated such people may be, they cannot provide the love of both a father and a mother which a child both needs and deserves.

Deliberately creating a child to be placed in a situation where it will lack either a mother or a father is irresponsible and the state should not be complicit in such an action. Research shows that heterosexual married couples provide the best and most stable environment in which to raise the child.

Considering the best interests of the surrogate mother

Many objections to altruistic surrogacy are founded on concern for the wellbeing of the surrogate mother. A child born through surrogacy owes its existence to the surrogate mother. Without the protection and nourishment provided by her body, the child would not exist. Yet surrogacy can too easily play down the importance of gestation to parenthood. As Tom Frame argues:

Experience makes plain that there is an essential link between them [gestation and parenthood]. The woman who gives birth to a child is the child's mother for a period of nine months. There is no other means of describing surrogacy than motherhood. The surrogate mother's whole being is oriented towards a child that will be born only to be relinquished. Additionally, the law regards the woman who gives birth to a child as the child's legal

¹² David Popenoe, *Life Without Father*, Harvard University Press 1996, p142

¹³ David Popenoe, 'Can the nuclear family be revived?' *Society*, no 36, pp28-30

mother. However much we might try, the biological cannot be separated from the relational¹⁴.

In many cases, the surrogate is a family member or friend, motivated by concern for a childless couple she loves. One can imagine that it would be very hard for a woman blessed with her own children and empathising with the deep pain of a childless sister or friend to refuse a request to act as a surrogate for her.

Important relationships between the surrogate and her family or friends are therefore at stake, even before the child is conceived. For these reasons, one US lawyer believes 'altruistic surrogacy is more exploitative than commercial surrogacy' because:

The existence of family dynamics may make it impossible for her [the surrogate mother] to keep the child if she so desires – the loss of her family as retribution may be too much for her to give up¹⁵.

No surrogate, however free her choice, can know how she will feel once she is required to give up the child she has carried and given birth to. 'Informed consent' is a highly problematic concept in surrogacy, as the gestational mother cannot yet fully realise what she is being asked to consent to. As two philosophers with expertise in bioethics and feminism explain:

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?¹⁶

Mothers who relinquished a child for adoption were once expected to simply get over it. We now accept that such mothers can suffer terrible grief. The same is true of women who have had abortions¹⁷ and of surrogate mothers. It is impossible to pretend that this central human experience of motherhood has simply not happened.

America's first legal surrogate mother was Elizabeth Kane, who gave birth in 1981. Ms Kane became an advocate for the National Coalition Against Surrogacy insisting that surrogacy was akin to 'reproductive prostitution' and

¹⁴ Tom Frame, *Children on Demand: The Ethics of Defying Nature*, UNSW Press, 2008, p152

¹⁵ Anita Stuhmke, 'For love or money; the legal regulation of surrogate motherhood,' *Murdoch University Electronic Journal of Law*, vol 3, no 1, 1996, p14

¹⁶ Susan Dodds and Karen Jones, 'Surrogacy and autonomy,' *Bioethics News*, vol 8, no 1989, pp6-18

¹⁷ Melinda Tankard Reist, *Giving Sorrow Words: Women's stories of grief after abortion*, Duffy & Snellgrove, Sydney 2000

that 'the transferring of one woman's pain to another woman is not the solution [to infertility] in any society'¹⁸.

Australia's most well-known surrogacy success story is that of the Kirkmans and even they recognise that surrogates struggle to hand over 'their' child. In May 1988, Linda Kirkman gave birth to her niece, Alice, who was conceived from her mother Maggie's egg, fertilised by sperm from a donor. Maggie had no uterus and her husband, Sev, had no sperm. It was the first example in Australia (and one of the first in the world) of IVF surrogacy. With commendable forward planning, the family has been able to handle the emotional issues extremely well and Maggie, Linda and Alice are now sought after speakers and authors on surrogacy issues.

While this is hailed as a success story and certainly one of the more positive, it's important to note certain comments Linda and Maggie Kirkman make in telling their story for the benefit of ACCESS, Australia's national infertility network. One comment was that, "Linda doesn't call herself a "surrogate" because she doesn't feel that she is a substitute for anyone; she is a gestational mother." The Kirkmans further note that:

The family holds strongly to the view that no woman should ever be forced to relinquish a baby who's grown inside her body, regardless of the baby's genetic origins. Linda didn't form a maternal bond with Alice, but other women have done so...to protect the interests of the child, the family favours a four-week period of grace after the birth during which a gestational mother can ascertain her feelings and be supported in her decision to relinquish or not. Once that month is up, the child must be allowed to develop a stable relationship with whom-ever is then considered to be the mother. There's no going back¹⁹.

Comments such as these reinforce the complex and difficult issues that surrogacy arrangements of any kind present. It could be argued that it is very difficult for any piece of legislation, no matter the provisions, to deal with such complexity. While Linda came to the conclusion that she was happy to hand the child over to the commissioning couple, many surrogate mothers who have given birth would struggle with this as the Kirkman family fully recognise.

Feminist author Melinda Tankard Reist tells the stories of some such surrogate mothers²⁰.

Sydney surrogate mother Shona Ryan told a conference in Canberra: "I had to forget I was pregnant. There was not the same joy and wonderment. In

¹⁸ Renate Klein, *The Ultimate Colonisation: Reproductive and Genetic Engineering*, Attic Press, Dublin 1992, p163

¹⁹ Maggie Kirkman, Linda Kirkman and Alice Kirkman, 'IVF surrogacy: a personal perspective' ACCESS Australia http://www.access.org.au/resources/library/ivf_surrogacy

²⁰ Melinda Tankard Reist, 'Motherhood deals risk deeper anguish' *Online Opinion*, 30 November 2006

some ways I felt sorry for this baby that it didn't receive the same attention [as my others]. I had to deny the pleasures of pregnancy."

The emotional impact worsened on the birth of the baby.

"My subconscious, my body, my emotions, knew I'd given birth and were screaming out for that baby. I kept having the urge to tell people, 'I've had a baby!' The physical symptoms, the hormones, [it was] all pain, no gain.

"I had no motivation, energy, I'd sleep most of the day, was teary, [gained] enormous weight, was out of control, my life falling apart. I still react to newborns, still have bad days. My extended family didn't understand why I couldn't just get over it. The personal cost to me and my family [was too high]. I came to the conclusion I couldn't recommend surrogacy to anyone".

Other stories told by Reist include:

Mary Beth Whitehead, surrogate mother in the famous Baby M case in the US, said: "Something took over. I think it was just being a mother".

Jane Smith from Sydney said of the son she carried: "I couldn't let him go."

Another surrogate mother has said: "In the beginning it is easy to see things in an unrealistic way. When there is no real baby, it is easy to be idealistic."

Should women be allowed to hire out their wombs in this way, even if their choice is based on altruism? Most societies rightly place limits on an individual's freedom to sell themselves as they recognise that some things should not be for sale. ACL would argue that this is true of a woman's reproductive capacity. It can be argued that the state has an interest, in its promotion of the common good, not only to prevent harm to children, but also to promote practices, which assist all to flourish. In recognition of the fact that the primary goal of a surrogacy arrangement is to fulfil the autonomous choices of the commissioning couple at the potential expense of the welfare of the child and the surrogate, the state has a responsibility to act on behalf of the more vulnerable parties in the first instance.

Conclusion

Any consideration of surrogacy must have the child's best interests as its central concern. ACL believes that it is not in the child's interest or the public's interest to allow children to be conceived in arrangements such as surrogacy. Whilst there may be occasional positive stories, the balance of evidence suggests that legalised surrogacy is likely to do more harm than good. Such arrangements are fraught with significant legal and relational complexities, leading to significant negative consequences for those involved.

ACL's position is that in Queensland the status quo be maintained and all forms of surrogacy continue to be banned by legislation.

