

**Investigation into Altruistic Surrogacy Committee
Queensland Parliament**

by

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Thank you for the opportunity to make a submission to the *Investigation into Altruistic Surrogacy Committee* of the Queensland Parliament.

Basis for submission

(a) I make this submission on the basis of my academic knowledge and experience in the discipline of applied ethics. I have researched matters relating to ethics and reproductive technology, conducted paid consultancy of ethical issues relating to gamete donation, eligibility for IVF treatment and pre-implantation genetic diagnosis. I have also written papers on the ethics of adoption and presented on that topic at national and international conferences.

(b) I am also a person adopted in the State of Queensland and I am currently the President of Jigsaw Queensland Inc. I am a late discovery adoptee; that is, I was not informed of my adoptive status until I was 24 years of age, following the death of my adoptive mother.

Decriminalisation

Altruistic surrogacy does not appear to be intrinsically wrong and ought to be decriminalised. Nevertheless, decriminalisation brings with it an obligation on the part of all parties involved, including the government, to acknowledge a range of social responsibilities.

Lessons from adoption

Altruistic surrogacy can be socially embedded in a range of social and emotional contexts that need to be carefully considered to ensure socially responsible practice.

Based on the adoption experience, decriminalisation of altruistic surrogacy will require close attention to two particular ethical concerns: (a) identity rights, (b) the provision of adequate pre-surrogacy and post-surrogacy support services.

Identity rights

With respect to identity rights, it is clear that family life ought to be founded on truth and honesty. To a large degree, this is a matter for families to deal with themselves. Nevertheless, every citizen ought to be entitled to a complete and accurate legal account of their parentage, legal and biological. A child ought not to be bought up in a 'cloud of deception'; not knowing the identity of her or his

biological relations. In the past, such family secrecy has been abetted by the 'legal fiction' of birth certificates which hide to truth about one's origins.

Surrogacy is but one example of the many new ways of becoming a family made possible by new technologies and changing social mores. In general, it is time for the government to establish the right of all persons to an *original birth certificate*; that is, a certificate that contains a complete and accurate record not only of an individual's date of birth, but also the manner of their birth and the nature of their social and biological connections at the time. This original birth certificate need not be a document for public consumption; there could still be a form of full birth certificate that provides the information necessary to establish one's legal identity. The need for an automatic right to an original birth certificate is not unique to surrogacy. There are some indications, for example, that although best practice in Artificial Reproductive Technology is to give donor offspring the right to information about their donor parents at the age of 18 years, in practice, many parents find this hard to do and easy to circumvent. A right to an original birth certificate will make it more difficult for individuals to subvert the spirit of best practice guidelines, which have been based in part on responding to the voices of donor offspring and adoptees describing the negative impacts of secrecy on their lives.

Establishing a right to an original birth certificate will also promote some consistency and uniformity across a range of practices, including surrogacy, gamete donation and adoption.

Pre-surrogacy and post-surrogacy support services

Decriminalisation of altruistic surrogacy will require providing increased resources to ensure that good practice is not intentionally or unintentionally subverted into coercive practice. Altruistic surrogacy is not an everyday event and, therefore, truly informed consent cannot be based upon participants' everyday knowledge. In the context of the experience of altruistic surrogacy informed consent will require a significant process of education and self-reflection.

Adequate resourcing of pre-surrogacy and post-surrogacy support services ought to be legislatively mandated. Simply allowing surrogacy to happen, creating a registry to ensure it is altruistic, and having accurate legal documents indicating parentage would not fulfil the state's duty of care towards all those involved.

Undoubtedly, in many ways, families created by surrogacy will be just like other families—for better or worse—and they will access general services available to all. Nevertheless, they will be unlike other families in one important respect, they will all have to deal with the lifelong impact of surrogacy on their lives, including the reasons that surrogacy was chosen, the experience of surrogacy and of the relinquishment of the child and the consequent climate of honesty and openness or otherwise that flows from that event. For example, experience in the adoption field would suggest that matters relating to new forms of family connection may involve what has been called the seven core issues: loss, rejection, guilt/shame, grief, identity, intimacy, mastery/control. These issues may be experienced differently by the surrogate, their partner, the commissioning couple, or the child.

Ideally, counselling about the legal, social and ethical implications of surrogacy ought to be provided independently and separate from the momentum of fertility services.

Complete altruism

The Background Paper provided by the Committee has already identified that the concept of altruism is central to identifying socially responsible forms of surrogacy.

The principle of altruism itself is, I believe, the most effective counter to the risk that commercial considerations might come into play and that the act of bearing children and children themselves will become commodities. The concept of altruism would seem to logically preclude contractual obligation.

I believe this altruism ought to be complete; that is, although some costs might be shared, there is no right to be reimbursements and the relinquishment of the child is ultimately entirely the surrogate's decision. A surrogate mother should set out being willing to bear the full costs of pregnancy. Any exchange of costs or gift-giving can involve obligations which could subvert altruism and open both parties to potential exploitation.

Complete altruism is the one way to prevent gradients of financial bias from entering into surrogacy arrangements. Economic risks are part of the burden of risk that the altruistic surrogate ought to bear. It will also be a strong counterbalance to the burden of emotional risks that might result from being approached to bear a child for a friend or relative.

If there are no offers for reimbursement of expenses or contributions there is no 'contract' or obligation to fulfil and a surrogate mother must seriously assess and evaluate their vulnerabilities and risks before entering into a surrogacy arrangement.

It is in the child's best interests that a surrogate mother must be willing and able to not only bear the child but to raise that child if need be, even if the surrogacy relationship breaks down.

Resolving conflicting claims

Decriminalisation will require the creation of legislative frameworks that protect the rights of those involved, in particular the rights of the children.

Decriminalisation should not involve the replacement of criminal codes with contractual arrangements.

It is likely conflicts about the transfer of parental rights will vary from case to case and it would be inappropriate to provide a template for resolving such issues. Fundamentally, such conflicts may involve a breakdown in trust between the parties concerned. It is unlikely that an enforcement of contracts will satisfactorily resolve matters. Arguably, the inherent riskiness of surrogacy arrangements provides a natural barrier to them being entered into lightly. A court room should not be the first point of call, other conciliation and mediation structures must be provided.

Both child-bearing and genetic connection establish some rights; however surrogacy is a narrative process embedded in a network of social relations. It would be difficult to assert that in all cases there is a moment which parental rights are transferred, once and for all. Given a set of particularly tragic circumstances, for example the death of the commissioning parents, or the death of the surrogate's spouse, responsibilities and desires would be likely to shift.

Rights of the surrogate mother

Non-criminalisation has the effect of basing the legal right to parent on the act of giving birth (subject only to restriction in specific circumstances, where a person's capacity to parent is in question).

Informed consent is a claim that coercive factors are absent and the fully autonomous consent of individuals is gained. How informed can one's consent be in matters of child bearing, if one has not carried and given birth to a child or carried, given birth and relinquished a child? (E.g., how informed is a sperm donor when he is a student compared to when he is creating a family himself?).

It is a principle of informed consent in research, for example, that those giving their consent can withdraw it at any time. It is hard to see how this should not also apply in surrogacy arrangements.

It could be argued that, to a considerable extent, all parties are vulnerable in surrogacy arrangements (certainly emotionally); however, a case could be made that the surrogate is the most physically vulnerable of the knowing participants and her consent is the most important.

Does a surrogate have a moral claim to the child? This would be based on the recognition of the rights of mothers to keep their children unless they are clearly unfit to do so or they voluntarily relinquish the child, based on their demonstrable commitment to the nurture of the child for nine months.

It is sometimes claimed that with full surrogacy the risk of bonding to the child after pregnancy is less because the surrogate is not genetically related to the child. Adoption experience tells us that this assumption is not necessarily true. Most adoptive parents successfully overcome bonding difficulties. At the same time, most birth mothers find it difficult to relinquish a child for adoption. A sense of genetic connection is undoubtedly a factor in this, but a significant factor is also the relationship that has developed between the child and mother during the pregnancy. Some would argue that so-called bonding difficulties experienced among adoptive parents are due to the baby's loss of this physical, not genetic, connection with the birth mother.

Generally, then, the right to parent a child ought to remain with the person who gives birth to that child. A situation of full surrogacy will increase the commissioning couples moral claim to parent, but would not constitute an automatic legal right.

Rights of genetic parents

Without the contribution of the genetic parent(s) there is no pregnancy. There is some claim that the child is 'theirs'. This might also apply to embryo donation;

however, that embryo may be claimed as 'theirs' by the original genetic couple, the IVF clinic, or, as in some overseas situations, by the commissioning couple who acquires it by covering some of the expenses of the original IVF treatment and storage, etc.

The commissioning parents may argue that one ought to keep one's promises. However, we generally recognise that several factors may mitigate the requirement to the keep a promise—exploitation, undue duress or influence.

What moral principles can the commissioning parents use to argue that the surrogate mothers claim to a right to parent is limited?

A claim to parental right based solely on genetic connection or 'ownership' of gametes raises the question of the subsequent *moral identity of the surrogate mother*? Is she merely a voluntary service provider?

I would suggest that such a moral identity is logically inconsistent with the nurturing role and responsibilities required of and accepted by the surrogate mother during their pregnancy and labour.

Commodification risks

Pregnancy and birth are not services that can be sold; they are the establishment of a morally significant relationship between a mother and a child. Caring is central to that relationship and it is a responsibility that can be negotiated but not deflected or traded.

Contractual rights may be seen as a subset of the general obligation to keep promises. However, making contractual arrangements the focus of the direct transfer of children seems to risk commodification. Contracts establish surrogacy as a transaction not founded on trust, whether or not the surrogate is paid, as there seems to be an exchange of consideration or service. The Background Paper indicates the Committee is fully aware of these issues.

Trevor L Jordan, 13 June 2008