

**Submission to the Investigation
into Altruistic Surrogacy,
Queensland Legislative Assembly**

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1. Introduction

Thank you for the opportunity to present our perspective on altruistic gestational surrogacy in Queensland.

I write on behalf of Women's Forum Australia (WFA). WFA is an independent women's think tank that undertakes research, education and public policy development about social, economic, health and cultural issues affecting women. WFA promotes initiatives that work to improve the lives of all women, especially women from disadvantaged and marginalised backgrounds. WFA advocates an evidence-based approach to public policy formulation and challenges Australians to engage critically in debate about women's issues.

We congratulate the Committee and the Queensland Legislative Assembly for excluding consideration of commercial surrogacy.

Regarding question (a) in the Issues Paper (May 2008), WFA recommends the following:

- Surrogacy should remain illegal.
- The surrogate mother and the commissioning parents should *not* receive criminal penalties (jail terms, fines, or records).
- ART clinics that carry out procedures related to surrogacy should receive criminal penalties (substantial fines).
- Surrogacy contracts should remain null and void, and such situations should be dealt with on a case-by-case basis through the Family Courts, with the best interests of the child as the guiding principle. A contract law approach to surrogacy would be harmful and inappropriate.

- Solicitation and surrogacy agents should remain illegal and receive criminal penalties.
- The Legislative Assembly could investigate the status of adoption in Australia, since a shortage of babies available for adoption is generating some demand for surrogacy.

We offer the following reasons for our recommendations and comments.

2. It is inappropriate and unhelpful for women who have just delivered a baby, or for the commissioning parents, to be subject to jail terms or large fines, particularly since a newborn baby may be involved.

Surrogacy agreements should remain null and void, and Family Courts should decide, where disagreements arise, the outcome that will best serve the child's interests.

3. It is more appropriate for the State to regulate commercial reproductive technology practices to prohibit the practice of surrogacy.

ART clinics have nothing to lose and everything to gain (financially) by being involved in surrogacy agreements. For reasons which will be outlined in the rest of this submission, surrogacy should remain illegal, but this should be enforced through ART clinics rather than exposing families (who are probably already facing great difficulties) to the criminal justice system.

4. Altruistic surrogacy exposes women to risks of very grave violations of reproductive autonomy.

Surrogacy should remain illegal because it is not in the interests of women and children; it puts those involved at an unacceptably high risk of long-term emotional harm. In particular, altruistic surrogacy agreements expose women to risks of very grave violations to their reproductive autonomy. Decriminalisation is likely to increase the numbers of cases of surrogacy, thereby also increasing the numbers of women facing these risks.

5. It is important that a decision about decriminalising surrogacy is not based on happy stories.

An advocate of surrogacy in South Africa writes on her website: "Surrogacy must be a positive experience for everyone involved or it will cease to exist."¹ Here, she is acknowledging that lawmakers rely on families involved in surrogacy to report that all went well, and especially that the children are happy.

¹ <http://bedwards.myweb.absamail.co.za/main4.html>

WFA is concerned about a lack of objective evidence, as the Committee has already identified, that surrogacy does or does not harm surrogate mothers or the children born. For example, COTS in the UK produces research that is widely cited; however they are a surrogacy advocate and agent, and are most certainly not objective about the practice.

We question the ability of research to detect the extent of harm resulting from surrogacy. Women and children involved in altruistic surrogacy may be especially unlikely to report any ill feelings, regret or harm. In a sense, they would be attacking their own friends and family, appearing to be regretful of the birth of a child that they now know and love, or perhaps (in the case of the child) hurting their own parents. Most people are unlikely to do this, and would rather work hard at building their families and friendships rather than tear them down in the name of research.

It is probably unreasonable, for example, to expect Alice Kirkman (born in 1988 in Victoria through surrogacy) to complain about the circumstances of her conception because it would hurt several people in her immediate family. Simply because she is now an adult does not make her any more likely to undermine the family that is the only one she has.

The ‘cognitive dissonance reduction’ that some surrogate mothers undergo is evidence for the effort to which some parties go to make sure surrogacy agreements run smoothly.² This is a technique by which women are encouraged to see themselves as objects, or means to an end.³ Surrogates often need to work hard at *not* becoming attached to the baby they are carrying. It could be argued that they are simply receiving assistance to do what they have already resolved and agreed to do. However in this case it is a type of therapeutic deception, encouraging women to deny their biological reality and their maternal instincts.

It is important also that there is an understanding that surrogacy involves entire families, not just a surrogate and a commissioning couple. Rayven, a commercial surrogate mother, writes “despite what you may be thinking, becoming pregnant for someone else will be a commitment for your entire family.”⁴ This is particularly relevant for Queensland where it is suggested that potential surrogate mothers must have had at least one child already.

Harm from surrogacy is not limited to cases that end up in court, but these are the extreme situations and must be considered.

² Ciccarelli and Beckman (2005), Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy, *Journal of Social Issues* 61(1):30.

³ 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):58.

⁴ <http://www.stay-a-stay-at-home-mom.com/surrogate-mother.html>

6. Altruistic surrogacy poses great risks to those involved.

As the Committee has already discussed, it is important for Parliament to discuss the potential scenario in which the surrogate mother is unwilling to relinquish the child, or where the commissioning couple refuse to accept the child.

There have been many known cases available for scrutiny, overseas and here in Australia, some of which the Committee has already identified.

It is possible that the commissioning couple may decide they do not want the baby, for example if a premature or traumatic birth resulted in the child having acquired severe disabilities.

In altruistic surrogacy arrangements, the surrogate mother is not forced by law to relinquish the baby after birth. It is presumed to be her gift and her choice.

But it is possible that women involved in altruistic surrogacy would be under even greater emotional coercion to hand over the baby than in commercial surrogacy; not necessarily deliberate coercion by others, but coercion implicit in her circumstances.

If she broke her promise to relinquish, she would risk the destruction of family relationships and friendships. Her family and friendships might be at risk, and these contribute substantially to her social support, her history and her identity. If she simply stood to lose a large sum of money or spend some time in jail, these might be easier than losing friends and family.

The most serious potential violation of reproductive autonomy lies in the possibility that the surrogate mother – or the commissioning parents – may argue for abortion, for example if an ultrasound or other test indicates the child may have a serious disease or disability.

Other possibilities are situations such as change of mind, estrangement of the commissioning couple, or other changes in circumstances. It is true that these things happen in natural conception cases as well, but surrogacy is a highly unusual and carefully manufactured situation and presents far higher risk of things going wrong.

WFA believes that surrogacy agreements expose women to risks of grave violations of their reproductive autonomy. Relinquishing a child that one has carried for nine months, if the surrogate mother in fact strongly desires to keep the child, would be a terrible ordeal.

On the other hand, if the surrogate mother is allowed to keep the child, the genetic parents would find it extremely traumatic to never be able to raise the child that they see as their own.

In either of these two situations, are any natural rights violated? The right to be a mother is unclear at present, but certainly both situations would be extremely distressing and would involve much grief.

We encourage the Legislative Assembly to ensure that these situations are avoided at all costs. Legally enforced surrogacy is not the answer, and nor is tightly regulated altruistic surrogacy.

7. Commercial surrogacy is illegal in Australia, and rightly so. But the lack of binding contract and the force of law creates different problems.

Confusion over the legal parentage of children born through surrogacy is a major concern motivating this Inquiry. But this confusion is not only technical and legal; it arises from biological confusion; who, really, is the child's mother? Is it just whoever wants her the most? Surrogacy is a complex matter, and the law is a blunt instrument.

Surrogacy advocates on the Internet frequently refer to the great importance of carefully drafted legal agreements. Amongst proponents of commercial surrogacy, there seems to be a resistance to the idea of altruistic surrogacy. For example, "Rayven", who has delivered three children as a commercial surrogate, writes to condemn the idea that the surrogate should never be coerced to relinquish:

"I just don't understand why you would want to encourage women to steal each other's children. ... A surrogate carrier is *not* the mother of the child... she is simply a pre-natal babysitter. Not everyone is able to become a surrogate... that is fine... but to say "well, TRY to be a surrogate and if you find that you get too attached to the baby, well, you can just keep it" is lunacy. It would cause so much more harm than good and would attract the wrong sort of women to this role."⁵

Altruistic surrogacy often represents incredible generosity and a monumental sacrifice on the part of the surrogate, and a high level of trust on the part of the commissioning parents. A key assumption, in the Australian context, is that the surrogate mother has the parenting rights and gives them as a gift to the commissioning couple.

Rayven seems to believe that motherhood is either legally or genetically constructed (not gestationally). While we don't endorse Rayven's perspective that commercial surrogacy is good and appropriate, we note that she sees altruistic surrogacy problematic *precisely* because the birth mother has the status of motherhood and the legal parenting rights until she decides to relinquish. She says this after having extensive experience as a surrogate and having developed a strong opinion about the need for watertight legal contracts before surrogacy goes ahead. On another website, she writes: "No matter what you are told, you will absolutely need your own lawyer, and will not be able to share the same lawyer as the intended parents."

We are concerned that while legally binding surrogacy contracts are extremely harmful to women and children, altruistic surrogacy agreements are harmful in a slightly different way.

Responding to question 15 in the Issues Paper, we believe that in cases of surrogacy, the birth mother should continue to be recorded as the child's mother. One reason is that it is never absolutely certain that the child is not genetically related to the surrogate until a DNA test is complete after birth.

⁵ <http://julieshapiro.wordpress.com/2008/04/19/further-thoughts-on-altruistic-surrogacy/>

8. What is motherhood?

This is a central question in the matter of surrogacy, yet it is one that the Committee did not address in the Issues Paper.

Motherhood is a concept arising from a biological reality and an embodied experience for women.

This is exactly why many women long for pregnancy or at least a genetically related child. This is also exactly why surrogate mothers often grieve or have difficulty relinquishing the child. To re-construct motherhood as a legal relationship, or one that can be given away, is not a solution to these problems.

The deep psychological suffering of an infertile woman who wants a child is very real and attests to the intrinsic value of motherhood as an aspiration for many women. Demand for surrogacy (or any other reproductive technology) also attests to the value of motherhood as an embodied experience. It shows that women want a child who is either genetically, gestationally or legally attached – or preferably all at once – to be their own. When a friend or relative offers to carry a baby for an infertile woman, she is responding with compassion to this aspiration and desire.

Motherhood as an embodied, physical reality is the basis for the assumption that all over the world (except where commercial surrogacy is practiced), the woman who gives birth to a baby is assumed to be the mother in every sense, and her husband is assumed to be the father. This is firmly based on the way women's bodies work.

We believe that, out of respect for and protection of women's biological reality, women *should* have a right to be assumed in every sense to be the mother of the child she delivers, with all corresponding rights and responsibilities, and any changes to that situation should be on a case-by-case basis, involving Family Courts.

Why should anyone assume that the surrogate mother could be free from these feelings towards the child she carries? There have been enough cases of surrogate mothers trying to keep the baby to suggest that the maternal instinct might be unpredictable and extremely strong. We refer again to the practice of "cognitive dissonance reduction" as evidence that surrogate mothers and surrogacy agents know full well that they have to fight this instinct in order for surrogacy agreements to work.

We argue that surrogacy undermines the value of embodied motherhood by requiring that the law diminish the importance of BOTH genetic and gestational motherhood, and instead reducing motherhood down to whoever wants or wins the child. That is, motherhood is made to be a legal construct instead of a biological reality, in response to the distressing situation in which some women cannot achieve biological motherhood but who very much want to.

The usual response to this argument is "What about adoption? Isn't an adoptive mother a real mother?"

9. The differences between adoption and surrogacy

Adoption is child-centred, since the child already exists. It is an act of rescue for a child who needs protection and love and belonging.

Surrogacy, on the other hand, is adult-centred, involving the creation of a child to fulfil the adults' desires for a child.

In cases of adoption where the birth mother relinquishes her baby, she is always known as the "birth mother" or the "biological mother". Generally, women who relinquish continue to see themselves as the mother of the child in some way. So the child comes to realise that she or he has two mothers; an adoptive mother, and a birth or biological mother. While it is not ideal for a child to have two mothers, it is a good outcome for an otherwise tragic situation.

Legal surrogacy, on the other hand, deliberately creates a situation where a child has more than one "mother". (In the case of commercial surrogacy in the US, the surrogate is considered to have never been a mother at all. Altruistic surrogacy is quite different; the Issues Paper by the Committee mentions that a child could in fact have six parents involved, three men and three women.)

The existence of surrogacy is evidence that women in fact want to be *the mother of their own child*, not one of two or one of three mothers. Commissioning couples do not seek to be part of a parenting commune – they want their own nuclear family. Surrogacy is often their last option for achieving this, a means to an end.

Many people who cannot afford or cope with the requirements for adoption, or who want an Australian-born baby but cannot adopt one, turn to surrogacy.

10. Adoption requirements

We note that the question of surrogacy arises partly because so there are so few Australian-born babies available for adoption. WFA recommends that the Legislative Assembly consider the issue of adoption, perhaps asking the following questions. Are the demands and expenses reasonable? Why is there such a shortage of babies available for local adoption? Why is it so difficult to adopt from overseas, and is this an appropriate level of difficulty?

11. Exposing women to the dangers of IVF

WFA also objects strongly to exposing women to IVF as an essential part of most surrogacy processes. IVF involves significant health risks to women, particularly the hyperovulation processes, the increased risks of premature birth, and disability in the child. Would all these risks be understood by the surrogate mother? And if any of these were to happen, would a written agreement have prepared for these possibilities?

12. Harm to existing children of the surrogate mother

WFA is concerned about the existing children of the surrogate mother, given that the proposal in Queensland seems to be requiring surrogates to already have given birth to one child. Would young children understand what is happening? Would the witnessing of a surrogacy arrangement cause children to question their security as a member of the family, or cause them to question their parents' unconditional love for them?

13. Additional matters and concluding comments

In response to specific questions from the Issues Paper:

Question 10. Our understanding is that surrogacy by definition involves pre-conception agreements only.

Question 14. If the status quo is maintained, families involved in surrogacy agreements will be subject to decisions made by the Family Court, where the best interests of the child will be the determining factor. We acknowledge that no one to date has received such a penalty, and so we have reason to hope that if criminal penalties remain for families involved in surrogacy, the judge will be trusted to consider all relevant circumstances and select from the range of sentences.

Question 15. Children born through altruistic surrogacy agreements – or indeed under any circumstances – should have rights to access all information about his or her genetic parentage. Deliberately withholding genetic information, which is important for a child's identity, should be illegal.

Thank you for the opportunity to comment. We look forward to the Committee's final report.

Yours sincerely

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This submission has been authorised by the Board of Directors of Women's Forum Australia.

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