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Infertility  
Network

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20 June, 2008

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Investigation into Altruistic Surrogacy Committee  
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Email: [surrogacy.committee@parliament.qld.gov.au](mailto:surrogacy.committee@parliament.qld.gov.au)

Dear Ms Conway

**Re: Inquiry into the Surrogacy Bill 2007**

Access Australia welcomes the considered approach of the Queensland Government to provide enabling legislation, in a controlled environment, to bring some certainty about the legal parentage of children born from surrogacy and their families.

Access is a consumer controlled, independent charity, committed to providing whole of life support for women, men and their families who have experienced difficulties conceiving. Access strives to raise community awareness by being a national voice to bring the social, psychological and financial concerns of people to governments and the medical and scientific communities. Patrons are Olympic gold medalist, Glynis Nunn-Cearns OAM and Candice Reed, Australia's first IVF baby. Access serves as lifetime resource for support and information on reproductive health needs.

Access raised the issue of the legal parentage of children born through managed surrogacy cases at a meeting with the Federal Attorney General in November 2006 where he advised us that the government would consider implementing a legal mechanism to recognise the legal parentage of children born through surrogacy. He referred us to The Hon Jim McGinty, who invited us to contribute some perspectives for discussion at the Standing Committee of Attorneys-General (SCAG) meeting in April 2007.

The involvement of consumers in public policy development and the regulation of ART clinics is a reassuring demonstration of openness by health ministers, departmental officers and health professionals in ensuring transparency and quality in the delivery of health care services. It is also appropriate as it recognises that ultimately it is consumers of ART healthcare services who must live with the consequences of policy and treatment decisions.

Access would value the opportunity to discuss any aspect of this submission with the committee during the public consultation phase of its deliberations.

Thank you for inviting Access to contribute to this investigation. We look forward to the committee's findings with interest.

Sincerely

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## Introduction

Access Australia distinguishes between **full surrogacy** where the woman who gestates the child also donates the egg and **gestational or IVF surrogacy**, where the biological embryo of the commissioning couple is used. Sometimes donor sperm is used if there is a male factor problem or an egg from another woman, when the intending mother has no eggs. The child is not genetically related to the woman who gestated the child and she never intended that she should be.

Surrogacy is not new. One of the earliest recorded instances of surrogacy appears in the Bible in the book of **Genesis 16:1-14**, where Sarah and Abraham's maid Hagar, gave birth to Ishmael and again in **Genesis 30: 1-13** where Rachael and Jacob's maid Bilhah, gave birth to Dan.

There is a wide disparity of cultural and religious views on the complex subject of surrogacy. For the Hindu couple, while surrogacy is allowed, problems may arise where a male child is not the result, as this is considered a religious duty. Surrogacy is permitted under Buddhist law but questions may arise about family ties and also legal and moral issues. While Jewish law does not forbid surrogacy, questions about the status of the child are raised when one woman is not of the Jewish faith<sup>1</sup>. With traditional surrogacy the resulting Jewish child belongs to the donor of the sperm but this question remains unresolved in the case of IVF surrogacy. In the case of Islam, the practice of surrogacy is viewed as adulterous. In New Zealand, the Maori culture of *whanau* (extended family) sanctions informal surrogacy arrangements. There is no evidence in the literature to suggest that in the vast majority of such arrangements there is any detrimental effect on the child or the other parties involved.

## Issues for Comment:

- 1. Access Australia recommends that the legal restrictions and criminal penalties against surrogacy be removed from the *Surrogate Parenthood Act 1988 (Qld)*.**

These restrictions were based on inaccurate assumptions. In fact:

- Surrogacy services offered in accredited ART clinics do not permit a fee payment to the surrogate;
- Therefore, babies are not treated as commodities;
- There have been no legal battles associated with managed (conducted in accredited ART clinics) surrogacy cases in Australia.

- 2. Access Australia recommends that the Queensland government enact enabling legislation to permit altruistic surrogacy and provide a mechanism to recognise the intending parents as the legal parents within a specified time period after the birth.**

**Access Australia recommends that surrogacy be permitted in law** because surrogacy, in a controlled environment, can provide a successful option for women who for medical reasons are unable to carry a pregnancy safely.

**Access Australia strongly recommends a mechanism to provide for a parentage order to the intending parents**, as this would remove the need for them to adopt their own genetic child.

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<sup>1</sup>. Schenker J.G. (1992) "Religious views regarding treatment of infertility by assisted reproductive technologies", *Jnl Assist Reprod Genet* 1992;(1):3-8. Cited in Nurse/Counsellors Abstracts, Boston, USA, *Potential Cultural & Religious Implications Faced by ART Couples*, Nutting S., 1995 p108

Children have been born from managed, altruistic IVF surrogacy arrangements in NSW and the ACT since 1994. No harm has been done to any party, except by inadequate legislation with unintended consequences, which has left children being raised by their genetic parents, but not recognised as such in law. This has also left the woman who gestated the child in the position of needing to give a child up for adoption, who she never intended to raise and her husband recognised as the legal father, when he has had no part in the conception, gestation or birth of the child.

The need for changes in the law to serve families better was highlighted in a study conducted, which surveyed 28 families. Questionnaires were sent to 60 individuals, comprising 23 intending mothers, 23 intending fathers and 14 gestational mothers. The response rate was 84 per cent.<sup>2</sup>

The purpose of the study was to provide information and insights about those participating in surrogacy arrangements so that some assessment could be made about the impact that the experience had on the families concerned. Characteristics of the intending mother, father and the surrogate (gestational mother) were explored, as were the legal implications for both families following the birth of the child.

Seventy eight per cent of respondents commented on the legal processes involved in their effort to be recognised as the legal parents of their genetic child. Thirty five per cent of these addressed the adoption process. Some comments in relation to adoption were:

"We have to seek a parenting order in order to be allowed to parent our biological child – this is absurd, frustrating and unethical".<sup>3</sup>

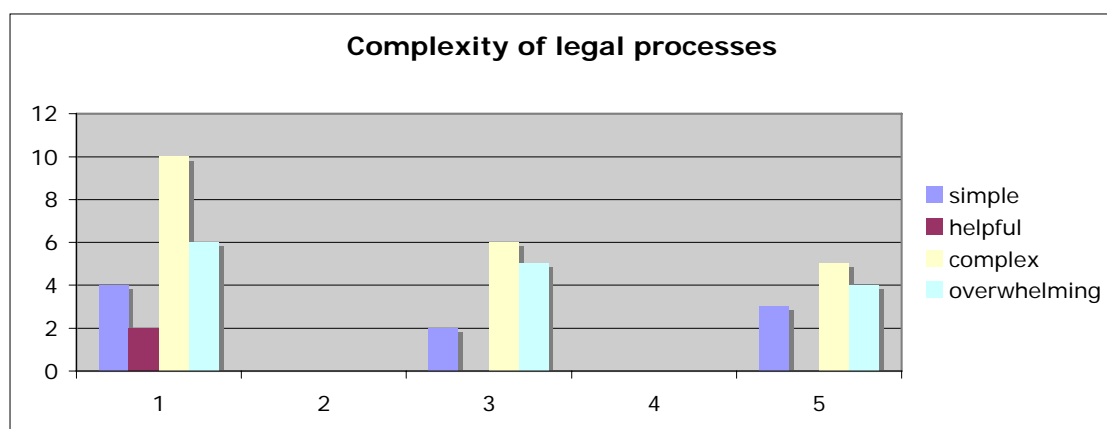
"Australia needs a legal process that . . . clearly recognises the intent of surrogacy by recognising legally each party's role in the process".<sup>4</sup>

"We as parents are in legal limbo at the moment".<sup>5</sup>

"We all feel extremely vulnerable where the law is concerned".<sup>6</sup>

"They should not be forced to adopt their own biological child".<sup>7</sup>

Seventy six per cent of respondents found the legal processes involved in surrogacy arrangements either complex or overwhelming.



<sup>2</sup> Dill S., University of Western Sydney, School of Law, Masters research 2007

<sup>3</sup> Above at 2, Family T, genetic father

<sup>4</sup> Above at 2, Family O, surrogate

<sup>5</sup> Above at 2, Family L, genetic mother

<sup>6</sup> Above at 2, Family I, genetic

<sup>7</sup> Above at 2, Family I, surrogate

There are significant implications in not being recognised as the legal parents of one's genetic children born through a surrogacy arrangement. When the genetic parents need consent for medical treatment for their child, they are required in law to secure this from the surrogate. This is inconvenient for all parties, especially in an emergency. One mother told of a late night visit to the Emergency Room with her two-year-old child. The conversation went like this:

"Are you the child's mother"?

"Yes, he was born at this hospital".

Then after the nurse checked their records:

"You are not named as the child's mother on the birth records. A Mrs XY is".

"Yes, well she is my sister in law and carried my husband's and my embryo to gestate our son until he could be born. He has lived with us since he was born".

"I'm sorry but we will need Mrs XY's consent, or her husband's, to treat the child".

The sister in law was contacted and had to drive an hour to the hospital to give consent for the child to be treated.

Similarly, if parents wish to apply for a passport to take their child out of Australia for a holiday, the consent of the surrogate is also required. Medicare enrolment is also problematic. One parent interviewed spoke of his anxiety for their four year old child who was due to start school during 2008, because adoption laws in New South Wales require a child to be in the care of a family for five years before applying for adoption, their only option for being recognised as their genetic children's legal parents.

*"With all the paper work involved, including BIRTH CERTIFICATES, there will be much distress and anxiety in attempting to explain the situation, without drawing undue, unwanted and unnecessary attention to the particular circumstances of our son's birth! At a time when normality and regularity are in high demand, this added stress would be most unwelcome".<sup>8</sup>*

In one family interviewed, the woman's mother acted as a surrogate for her daughter. One consequence was that the surrogate and her husband had to change the provisions in their wills to exclude the children she gave birth to for her daughter and son in law, so that they were not treated as children of the marriage but as their grandchildren. The genetic parents of the children were also required to change their wills to ensure that they could inherit, as they were not recognised as children of the marriage.

#### **4. Access recommends the following criteria for an altruistic surrogacy arrangement:**

- a) Surrogacy should be available for women who are without a uterus or who for medical reasons are unable to carry a pregnancy safely.
- b) Everyone concerned should be likely to be better off as a result of the surrogacy, not just the infertile couple and not just the child, but also the woman who carries the pregnancy and her immediate family.
- c) A woman acting as a surrogate should ideally have completed her family but at least have had one child of her own.

<sup>8</sup> Above at 2, Family W, genetic father

- d) The primary concern should be for any child born from a surrogacy arrangement. Intending parents should have an existing relationship with the surrogate and be committed to continuing an open association, even at some distance.
- e) Surrogacy should be provided in ART clinics accredited by the Reproductive Technology Accreditation Committee (RTAC). RTAC is recognised in Commonwealth legislation and provides an existing mechanism for comprehensive implications counselling for those considering gamete donation or surrogacy.
- f) The practice of surrogacy, including specific policy and procedures, should be approved a properly instituted ethics committee. Each case should be examined by a clinic Surrogacy Review Panel.
- g) Successful surrogacy is dependent on the maturity, responsibility and bona fides of the parties involved. Qualified, experienced professionals working in RTAC accredited clinics can best assess these qualities and assist all parties involved to come to the best decision for their circumstances. This includes, in addition, a qualified psychologist, independent of the ART clinic, providing expert advice for all parties considering surrogacy.
- h) Where donated gametes have been used to create the embryo, the child should have access to information about his or her biological origins as a minimum requirement. This complies with NHMRC Ethical Guidelines, which state that children born from ART procedures "are entitled to know their genetic parents".<sup>9</sup>

Examples of areas covered in pre treatment counselling in ART clinics that undertake surrogacy are reflected in the Victorian LRC recommendations and include:

- o the implications of surrogacy for relationships between members of a commissioning couple and between the surrogate mother and any partner
- o the implications of surrogacy for the relationship between commissioning parent(s) and the surrogate mother
- o the implications of surrogacy for any existing children of the surrogate mother and/or the commissioning parent(s)
- o the possibility of medical complications
- o the possibility that any of the parties may change their mind
- o refusal of the surrogate mother to relinquish the child refusal of the commissioning parent(s) to accept the child
- o the motivation and attitudes of the surrogate mother
- o attitudes of all parties towards the conduct of the pregnancy
- o attitudes of the commissioning parent(s) to the possibility that the child may have a disability
- o attitudes of all parties to investigation of a genetic abnormality, the possibility of termination of pregnancy or other complications
- o a process for the resolution of disputes
- o the commissioning parent(s)' intentions for custody of the child, if one of them should die
- o possible grief reactions on the part of the surrogate mother and/or her partner

<sup>9</sup> *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, 2004 (as revised in 2007) s 6.1, Australian Health Ethics Committee, National Health and Medical Research Council.

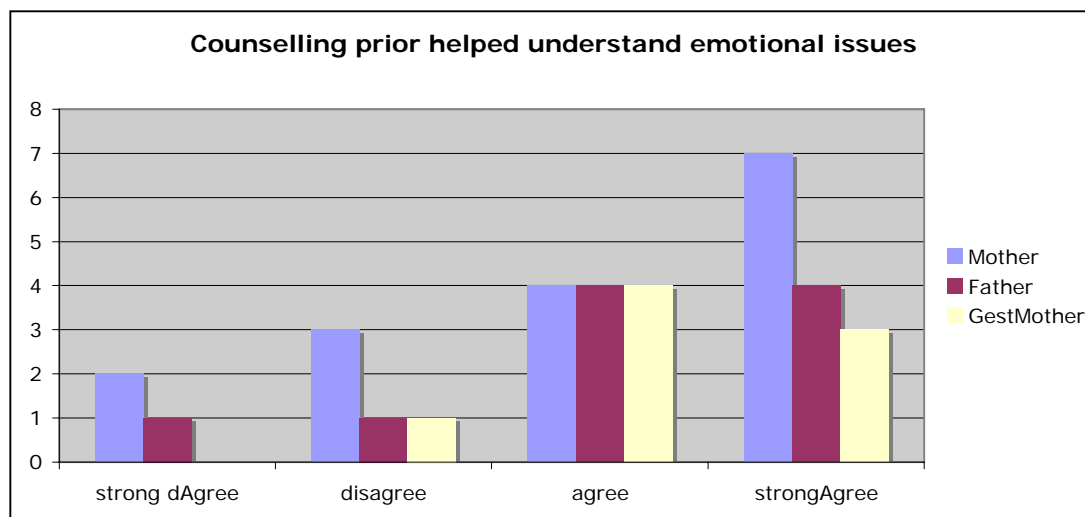
- ways of telling the child about the surrogacy
- attitudes to an ongoing relationship between the surrogate mother and the child
- access to support networks.

Existing children of surrogates, who are also counselled, if they are old enough to understand what is happening, can have a pragmatic approach to their mother's generosity towards an infertile couple. One surrogate has reported:

"So when my son went to school on Monday morning, and the teacher asked how everyone's weekend went; he said 'My Mom had twins'. And she said, 'Oh, what did she name them?' He said, 'I don't know – they weren't hers.' " <sup>10</sup>

### Research responses to counselling support

Participants were asked if the counselling required, helped them to understand the emotional challenges they were to face. Sixty eight per cent of responding intending mothers agreed or strongly agreed, as did 80 per cent of intending fathers and 87 per cent of surrogates.



### 5. Access recommends that criteria for intending parents seeking to undergo surrogacy be specific to surrogacy.

Surrogacy is not analogous with adoption, where there is a crisis situation seeking to place with another family, an existing child who cannot be raised by her natural mother. Conversely, in a surrogacy arrangement, the child has been planned and the surrogate, who had no interest in becoming pregnant, has agreed to gestate the child for another couple with the specific purpose of giving her up at birth. It is the basis of the agreement. The surrogate would not have given birth to the child but for the surrogacy arrangement.

### 6. As in 4 d) above:

The primary concern should be for any child born from a surrogacy arrangement. Candidates should have an existing relationship with the surrogate and be committed to continuing an open association, even at some distance. The genetic link between intending parents and the child is a fact of the arrangement, except in rare

<sup>10</sup> Smith, S. *The Fertility Race, Part 4: Surrogate Motherhood* (1998), [http://news.mpr.org/features/199711/20smiths\\_fertility/part4/sidebar1.shtml](http://news.mpr.org/features/199711/20smiths_fertility/part4/sidebar1.shtml)

circumstances where the intending parents are not able to use their own gametes. Family diversity is an accepted fact of life.

## Research findings:

### Concerns about relinquishment

A major concern about surrogacy arrangements relates to the expected anticipation of the surrogate to regret her decision, bond with the child and decide not to relinquish the child to the intending parents. However, results showed that this was not a concern of the majority of intending parents. Only twenty three per cent (M) and 33 per cent (F) were concerned that the surrogate would regret her decision to help them. None of the surrogates in the study expressed concerns about relinquishment. Their attitudes are reflected in the following examples of two surrogates in the study.

In an email interview, Linda Kirkman said she had never felt maternal towards Alice and that she had never been emotionally attached to her.

"I had no intention of doing so, and it was not a problem. She was already loved and wanted by Maggie and Sev, so was not denied love. This to me implies that the maternal bond is not necessarily innate; we have some control over it. . .I was able to gestate Alice because that was my clear intention. It worked because I wanted it to work."

To those who would have prevented Alice's conception, she states that she believed that Alice "chose to be born into our family. She has a right to exist and I am proud to call her my niece."

Sharon Ryan, who offered to gestate a child for her brother and sister in law has said that while she and her husband Brendan loved Hamish, they always saw him as their nephew. In responding to the suggestion that she had to "forget" she was pregnant<sup>11</sup> wrote:

"I did not, in fact, have to forget that I was pregnant. Rather my intention from the beginning, in offering to be a surrogate, was to carry a baby who was genetically my niece or nephew and therefore, by definition, the pregnancy was unique. A large focus of pregnancy and motherhood is, I believe, the intellectual and emotional projection of that child growing up in your immediate family. For me it was always clear that our nephew would rightfully grow up with his biological parents and therefore become part of our extended family. He was never my child as Ms Tankard suggests. It is not that I did not feel an 'essential bond with this baby that I carried under my heart for nine months' but rather the bond was of a different nature – no less strong, but very different.

All other surrogates interviewed expressed similar disinterest in the subject. However, one said that in spite of this it was important to her to have the opportunity to freely give up the child at birth and not to feel that she was coerced or required by law to do so. She said:

"If I had had no real choice about keeping or handing over the baby it would be have much more difficult. I would have felt powerless. Within that powerlessness there might have been a temptation to try to hang on to the baby, not because I wanted a baby, but because I wanted a sense of control."

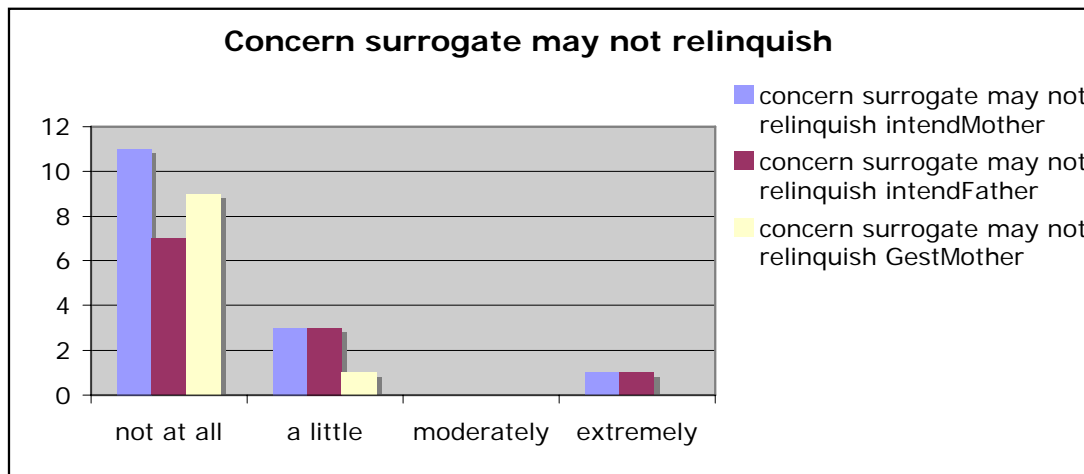
The intending mother in this arrangement accepted this. When asked in interview how she would have reacted if the surrogate had decided to keep the child she said:

"It would have been difficult, but I recognised from the beginning that there was a chance it may not work as we had hoped. My feeling was that we had everything to gain if it did, and if it did not, we had nothing to lose; we would just be back to being childless. Of course, I don't want to minimise the effect of having hopes raised then dashed; that would have been awful. But we proceeded because we thought the chances of that were slim"

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<sup>11</sup> Tankard M., "Motherhood deals risk deeper anguish" in *Sydney Morning Herald, Opinion* 8/11/2006

The lack of concern about relinquishment on the part of the surrogates was reflected in the study in the following table:



This has been reflected in a study in the United Kingdom where all 15 participant surrogates had successfully handed the child to the genetic parents. Some of their comments were:

"I gave the baby to the mother",

"Baby was asleep in her crib, I went and kissed her and then went to see her new 'mum' and 'dad' and said, 'love her for me' then I left them as a family",

"Very normal and glad the birth was over. Could not make a connection to the baby inside me".<sup>12</sup>

Golombok, who found that surrogate mothers did not generally experience major problems with intending parents, family and friends or with relinquishment, supports this. She found that emotional problems experienced by a few diminished over time.<sup>13</sup>

### Experience of the children

Due to the evolution of IVF surrogacy, there is little evidence about the impact on the child of surrogacy arrangements. Anecdotal evidence is encouraging but further research is required.

As a result of this lack, only two sources can be referred to, one is Alice Kirkman from Australia and the other Melissa Stern from the USA. Alice Kirkman gave her first (unedited) written thoughts to the world at age 7. She describes her birth as "amazing":

"I am seven years old and it is amazing I was born. It is amazing that my Mum and Dad even thought of having a child this way. It is amazing that Linda said "Yes". She gave birth to me. Linda is really my aunt because it was Mum's egg and because it was my parents who wanted to bring me up and not Linda, and even because Linda didn't want another child. I am her niece. Heather and Will are my cousins. Heather's OK, but Will - he's not so good because he's nearly always mean and nearly always gets in trouble. I love him just the same. My family is the best family ever, but my Mum and Dad are the best. In my family, there's Linda and Jim, Cynthia and Bruce, Heather, Will, Andrew, Chris, Mark and Grandma (usually called Vonnie). There's also Dad's family, but I'm only talking about the Kirkmans. Grandpa had a good life but died last year. He was very proud of me.

<sup>12</sup> van den Akker, O., 'Genetic and gestational surrogate mothers' experience of surrogacy, *Journal of reproductive and Infant Psychology*, Vol. 21, No.2, May 2003, pp145-161

<sup>13</sup> Jadva V, Murray C, Lycett E, MacCallum F and Golombok S., 'Surrogacy: the experiences of surrogate mothers' in *Human Reproduction*, Vol. 18, No. 10, pp2196-2204, 2003



I've got a dog. His name is Henry. He's the bestest dog anyone could have. I am in Grade 1 at school. School's fun. There's lots of hard work for me to do. Being an only child is fun, but sometimes not so much fun because you don't have someone to play with. But I am lucky that I am an only child because there is no-one to bug me except for my Mum and Dad. I play football in the local team. Football's pretty tough. I play tennis too and do ballet. I am glad that I am alive and I am lucky to be alive."<sup>14</sup>

At age 11 Alice reflects:

"I love Linda as my aunt but I do not think I should be growing up with her. Maggie and Sev have looked after me since the age of ten seconds . . . we make a real family . . . I know exactly where I come from."<sup>15</sup>

Alice at age 14:

"I've been around for 14 years. I'm in Year 9 at high school . . . I play the drums, bass guitar and guitar and I'm learning to sing. I'm the drummer in a band called Black Tartan. Mostly I live on the computer and internet . . . And oh yeah: I was the first baby in Victoria to be born by IVF surrogacy. To make me, mix:

1 father's good idea

1 mother's egg

1 sperm donor's sperm

Stir, then place in 1 aunt, wait 8 months then serve warm.

Do I feel like something that has been manufactured? No, I don't. All I feel is that my parents couldn't make their own bundle of expense (aka bundle of joy), so they got scientists to do it for them."<sup>16</sup>

Melissa Stern (Baby M), who turned 21 years of age on 27 March 2007, is now a junior at George Washington University majoring in religious studies. She hopes to become a minister.

When she turned 18 in March 2004, Melissa Stern formally terminated all parental rights of her genetic mother, Mary Beth Whitehead and formalized Elizabeth Stern as her legal mother through adoption proceedings. In a magazine interview in March 2007 she said:

"I love my family very much and am very happy to be with them," Melissa Stern told a reporter for the *New Jersey Monthly*, referring to the Sterns. "I'm very happy I ended up with them. I love them, they're my best friends in the whole world, and that's all I have to say about it."<sup>17</sup>

7. A genetic relationship with at least one of the intending parents would be preferable and indeed likely in most circumstances. However, should there be a situation where both intending parents need to use donated gametes, in addition to a surrogate, this should not be excluded.

Existing counselling services in RTAC accredited ART clinics are equipped to prepare candidates about the implications of undertaking surrogacy.

8. A decision for a surrogate to use her own eggs in a surrogacy arrangement should be taken in rare circumstances.

Existing counselling services in RTAC accredited ART clinics are equipped to prepare candidates about the implications of undertaking surrogacy.

<sup>14</sup> Alice Kirkman (1995) *Amazing!*, ACCESS National Newsletter Vol: 2 Iss:7

<sup>15</sup> 11<sup>th</sup> World Congress Papers, *Towards Reproductive Certainty*, Parthenon Press, 1999

<sup>16</sup> Kirkman, A., 'Take one egg' in *Good Weekend*, March 5, 2005 p49

<sup>17</sup> "Now It's Melissa's Time", *New Jersey Monthly*, March (2007)

## 9. Legal rights and responsibilities for the intended parents and the surrogate

**Conditions for access to ART** for the purpose of considering surrogacy should be as detailed in 4 a), b) and c) above.

### ***Conditions for transfer of legal parentage***

**Access Australia recommends that provision be made for a parentage order application be made to Supreme Court judge with the following criteria:**

- a) at least six weeks and no more than six months must have elapsed since the birth
- b) the child's home must be with the genetic parents
- c) the birth parents must be in agreement freely and with full understanding of what is involved.
- d) both genetic and birth couple must have received assessment and counselling from a service other than that carrying out the IVF procedure.

### **This approach would:**

- Ensure that the courts, known for their conservative approach, retain control of judging what the best interests of the child are.
- Primarily, provide certainty to any children born as to his/her parentage, thus allowing their best interests to be served.
- Importantly, ensure that the wishes of the altruistic surrogate mother are considered in any application for a parentage order.
- Humanely, provide humane closure for the genetic parents who may have undergone many years of medical treatment in order to have a child and who have lived with uncertainty from the outset, knowing that their child may be deemed legally theirs only when a court so orders.

### ***Reasonable expenses for surrogates***

Access Australia recommends that reasonable expenses be paid for the surrogate so that she is not out of pocket as a result of her generosity in helping the infertile couple to have a child. These could include associated health costs, insurance, counselling, legal, lost earnings, child minding for existing children.

### ***Monitoring and enforceability of surrogacy agreements***

In jurisdictions where surrogacy is undertaken, they have oversight of the national accrediting body and their institutional ethics committee. In addition data is collected and published by the National Perinatal Statistics Unit and the Australian Institute of Health and Welfare.

10. **Access recommends** that each state enact legislation for its particular jurisdiction.

11. **Access believes** that "health risk" is the criteria. Any evaluation of this would be a clinical matter conducted by an infertility specialist and based on the circumstances of the particular woman.

## 12. The law lags behind in recognising the legal parentage of children born through surrogacy.

While Governments, conservative or otherwise, idealise so-called 'traditional' family structures to secure electoral support, they would do well to also accord some respect for the diversity in family formation that exists in multi cultural and pluralistic countries. This was highlighted by Prime Minister Blair's government's *Supporting Families* Government Paper, following former Prime Minister Major's expressed concern about the lack of "traditional" family structures and single motherhood, which were blamed for a range of social problems.<sup>18</sup>

Those who argue for the practice of surrogacy to be normalised include The Human Fertilisation and Embryology Authority in the United Kingdom. It's annual report stated:

"Times change, and the medical and ethical worlds move on. We recognize the need regularly to update our views and advice."<sup>19</sup>

Callman argues for normalisation in a society with ever changing social expectation and parameters in which surrogacy has a role to play, drawing on other disciplines where regulation, legislation and normalisation have been successfully introduced.<sup>20</sup> Posner is critical of the attitudes of some American judges in relation to surrogacy:

"So deficient is the court's reasoning that the explanation of its results must be sought elsewhere than in the analytical pros and cons of enforceable contracts of surrogate motherhood. The elsewhere, I think, is in the hostility of markets, a hostility characteristic of American intellectuals, including some judges; and in the fear of novelty, which is a common characteristic of middle-aged persons and middle-aged judges in particular. I think our judicial systems can do better. And the beginning of wisdom is a determination to evaluate surrogate motherhood rationally."<sup>21</sup>

Bainham et al describe the term "parent" as a contested concept, one that has a fluid, shifting meaning that is subject to disruptions. They challenge our assumptions about family and caution us that we should not consider the current definition of a parent in isolation from a changing historical and social context.<sup>22</sup>

The introduction of new technologies to assist couples that need medical assistance to have a family has further complicated the landscape by introducing the concept of "social" and "biological" parents. This can pose problems for law and policy makers.<sup>23</sup> The more recent advent of some men seeking DNA testing to establish paternity is also based on scientific advances which present fatherhood in biological rather than social terms.

The community and policy makers need to reconsider their perceptions about surrogate parenting and be willing to acknowledge increasing understanding in the community about the controlled practice of surrogacy. A Morgan Gallop Poll conducted in 1994 showed that 52 per cent of Australians approved of altruistic surrogacy being available for infertile married couples.<sup>24</sup>

The Family Law Act 1975 (Cth) says that each of the parents of a child who is not 18 has parental responsibility for the child. However the Act also broadens the concept of a

<sup>18</sup> Bainham, A., Sclater, S.D. and Richards, M. (eds.), *What is a Parent? A Socio-Legal Analysis* (London, Hart Publishing, 1999).

<sup>19</sup> Human Fertilisation and Embryology Authority (1997) *Sixth Annual Report*

<sup>20</sup> Callman, J. 'Surrogacy – a case for normalization', *Human Reproduction* vol. 14 no.2 pp277-278, 1999

<sup>21</sup> Above at 2

<sup>22</sup> Above at 37

<sup>23</sup> Deech, R., "The rights of fathers: social and biological concepts of parenthood" in J. Eekelaar and P. Sarcevic (eds.), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century* (London, Martinus Nijhoff, 1993)

<sup>24</sup> Leeton, J. Fact sheet *IVF surrogacy*, ACCESS Infertility Network 1996

parent to include and adoptive parent of a child. The ACT also provides for a person either alone or jointly with another person to be given legal guardianship of a child. Hale reminds us that marriage is no longer essential to the legal concept of “family”.<sup>25</sup>

If one purpose of the law is to reflect community attitudes then legislation should be flexible enough to allow couples considering surrogacy to proceed in a way which best meets their needs, while protecting the parties involved, especially the offspring. This would primarily provide a greater degree of certainty for a child about her legal parentage.

A precedent for the law to reflect changing established, standard medical practices has been demonstrated in New South Wales. The *Status of Children Act 1996* (NSW) has provisions which respect the intentions of intending parents and the donor in donor insemination arrangements, in recognising the birth mother and her husband as the legal parents of any offspring.<sup>26</sup>

**There has been some judicial support in Australia for legislative attempts to adapt to changes in family formation assisted by new technologies. Brown J. said that section 60H of the Family Law Act (Cth) which defines ‘parent’ for the purposes of children conceived through assisted reproduction, is not intended to restrict the meaning of the law but rather to enlarge it.**<sup>27</sup> Yet, while the Act provides for circumstances where a child is born with the use of donated gametes, it remains silent about surrogacy arrangements in effect recognising the surrogate as the legal mother, even though she may not be genetically related to the child.

### 13. The legal mechanism

Changes to the Status of Children Act in each State or specific legislation regarding IVF Surrogacy arrangements, would be the most appropriate mechanisms to deal with legal parentage following IVF surrogacy arrangements, bringing a consistent approach across Australia. However, to allay community anxieties about this means of forming families, it can be argued that current law, which recognises the birth mother as the legal mother, should remain. The recommendations of The Victorian Law Reform Commission, The Western Australian Bill and the South Australian report recognise this cautious approach. All recognise the process of adoption in these circumstances as inappropriate.

- 15 & 16. Sixteen per cent of respondents in the aforementioned research felt that the birth certificate of the child should contain the genetic parent's names. Some comments were:

“Changes should be made so the genetic parents names go on the birth certificate, then hopefully, they would not be forced to adopt their own biological child”.<sup>28</sup>

“The birth certificate should have the mother's name, not the surrogate's”.<sup>29</sup>

“Surrogacy needs to be made legal in Qld. Intending parents' names should go on the birth certificate. The law seems to protect the surrogate but not uphold the rights of the commissioning couples. This makes me exceedingly angry”.<sup>30</sup>

<sup>25</sup> Hale, Dame B., “Private Lives and Public Duties: What is Family Law For?” 8th

<sup>26</sup> *Status of Children Act 1996* (NSW) s14 (1) (a) & (b)

<sup>27</sup> Unreported decision of Justice S Brown, Family Court of Australia, 28 August, 2003

<sup>28</sup> Family I, surrogate

<sup>29</sup> Family Z, genetic father

<sup>30</sup> Family T, genetic mother

However, five families believed that the names of all gamete donors should appear on the birth certificate.

Three families interviewed were so concerned about the uncertainty of being recognised as the legal parents of their genetic child that they paid significant amounts to take their embryos overseas where this could be finalised in a court before returning home. One family had just had their embryos frozen and stored “until we can find the money to go overseas”.<sup>31</sup>

Other comments in relation to the legal processes, or lack of them included:

“The hospital was wonderful but we still had to ask the surrogate’s permission to take our own children home”.<sup>32</sup>

“We were worried about the hospital’s reaction at the birth, if they found out it was surrogacy and called DOCS”.<sup>33</sup>

“The law should recognise the biological parents. They made the baby”.<sup>34</sup>

“The only thing that the law contributed was that it was not legal”!<sup>35</sup>

“The surrogacy agreement should be made legal in Australia between consenting parties so people like us don’t have to travel to America (and bring young babies home) to ensure satisfactory completion of the arrangement”.<sup>36</sup>

“A surrogate mother not using her own eggs should be considered as a donor uterus”.<sup>37</sup>

“Surrogacy should be made legal. Infertility is not a choice”.<sup>38</sup>

“The child is two and still hasn’t been adopted by her “real” mother. The parents, who are solicitors, are finding the law surrounding their case complicated”.<sup>39</sup>

“The law should help families and protect them – not hinder them”.<sup>40</sup>

“Knowing that the genetic parents would have all rights to the baby would let the surrogate and her family get on with their lives”.<sup>41</sup>

To allow the parties to record the full circumstances of the child’s birth, **Access Australia recommends a mechanism for the surrogate’s name to appear on the child’s birth certificate as the birth mother or on a 2<sup>nd</sup> tier that would be available only to the child**, to allow for families to choose what may be best for their particular circumstances would be desirable. This will ensure that the child is not open to embarrassment or ridicule

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<sup>31</sup> Family Q, genetic mother

<sup>32</sup> Family M, genetic parents

<sup>33</sup> Family AA, genetic mother

<sup>34</sup> Family Y, surrogate

<sup>35</sup> Family Y, genetic parents

<sup>36</sup> Family D, genetic parents

<sup>37</sup> Family I, genetic father

<sup>38</sup> Family U, genetic father

<sup>39</sup> Family W, surrogate

<sup>40</sup> Family AA, genetic mother

<sup>41</sup> Family F, surrogate

when a birth certificate is required for identification. This could also include any person who donated gametes to the creation of the embryo.

Reflections of families where the law has been adapted to support their intentions are reassuring. One surrogate's perspective follows. They are particularly poignant given that at the age of 17 years, her younger son had died of leukaemia a year prior to writing.

"Nine years later I still do not in any way regret the decision I took to be a surrogate mother, nor to subsequently fight in the ACT legislature to have the legal status of children born in such circumstances recognised. Some of the arguments denouncing surrogacy are in fact the same cogent arguments that equally support implementation of stringent controls and screening processes to ensure a successful outcome for all – most importantly the child. I agree that surrogacy cannot be taken lightly and so argue that legislation must exist to ensure that all parties are protected, especially the child. But let us learn from proven experience – the ACT model works and is a sound basis on which to establish broader nationwide legislation"<sup>42</sup>.

### *17. Comments re a suggested approved plan*

Access Australia argues that the responsibilities of the surrogate are completed with the birth of the child and her rights terminated when she agrees to the parentage order.

ACCESS believes that the arranged parents should be strongly encouraged to have an ongoing relationship with the surrogate. This is addressed in the pre treatment counselling. However, to formalise this in law seems unrealistic, as other family relationships are not legislated. At the time of the parentage order, the arranged parents assume legal responsibility for the child. For an aspect of any proposed plan to incorporate "rights and responsibilities" of the surrogate and her husband, would undermine that presumption and arguably create uncertainty for child about her parentage.

In a surrogacy arrangement, the child has been planned and the gestational mother, who had no interest in becoming pregnant, has agreed to gestate the child for another couple with the specific purpose of giving her up at birth. It is the basis of the agreement. The surrogate would not have given birth to the child but for the surrogacy arrangement.

If such a plan were to be introduced this would give rise to the court's powers in dealing with an alleged breach and would create the possibility an adversarial climate between the legal parents and the surrogate. The surrogate agreed to gestate a child for a couple with the and has given as arranged, to the intending parents to raise. When the surrogate agreed to the parentage order, she gave up all legal rights to the child.

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<sup>42</sup> Letter to Sydney Morning Herald, unpublished via email communication with S. Dill, 9/11/2006