

Wednesday, 2 July 2008

The Hon Linda Lavarch MP
Chair
Investigation into Altruistic Surrogacy
Legislative Assembly
Parliament House
Cnr of George and Alice Streets
Brisbane, QLD, 4000

Dear Ms Lavarch,

Thank you for the invitation to submit. I am sorry to be late in responding. I have been away and I have a serious illness that has restricted my availability. Thank you also for the invitation to the public hearings. However I am unable to attend and wish the committee well in its deliberations. I do hope that this submission is considered by your committee.

The issue of surrogacy is a matter of grave importance because it affects the interests of children born or to be born. If there was just one thing to say it would be that the committee make its decisions not on the basis of ART being a service, but on the basis of the overriding importance of the State protecting the interest of children however they come to be.

These are matters that are of fundamental concern for the right of a child to an identity and family relations, the right to know and be cared for by both his or her father and mother, and the right to maintain personal relations and direct contact with both parents on a regular basis.

These matters are also of concern because they in our contemporary context and emphasis on access to services, the decisions made may be based on an imply a right to a child. The latter is not an acceptable concept within the context of the rights of children because it implies the commodification of children. A child can only be the subject of rights. No child should be considered the object of someone else's rights.

Many of the proposals in this area may also confuse the child's personal and parental identity, replacing it with an arbitrary declaration of parenthood.

This was the case with the recent Victorian Law Reform Commission recommendations. In summary the VLRC recommends on reproductive technology that

- (a) Same sex couples should be allowed to apply to adopt children;
- (b) Victorian law should recognize the female partner of a birth mother as a parent of the child;
- (c) The requirement that women must be married or in relationships with men to access ART clinical services needs to be removed from the legislation, because it has been found to be discriminatory;

- (d) A fertile woman who does not have a male partner be entitled to seek ART treatment on the grounds that she is in 'in the circumstances in which she finds herself, unlikely to become pregnant other than by a treatment procedure';
- (e) Doctors and counsellors who believe that any child born as a result of reproductive treatment would be at risk of abuse or neglect should ask a clinical ethics committee to decide if treatment should be permitted;
- (f) Birth certificates should list the people who are the legal parents of a child, including nonbirth mothers, and that as well as using the terms 'mother' and 'father', birth certificates include the option of being listed as a 'parent'
- (g) Surrogacy is to be facilitated such that the commissioning couple not the birth mother are considered the parents of the child.

In submitting, I thought that it might be best if I kept to the VLRC recommendations as the most recent set of recommendations, rather than seek to speak to the Queensland context of which I am less familiar.

A major overall concern is that the VLRC recommendations represent a significant attempt to move the Victorian community away from the traditional paradigm of the family founded upon the marital relationship of a man and a woman. This has never been the only way that families exist, but it has been the paradigm that provided a model of what is best for the nurturing of children by both a mother and a father and secured by the parents' loving commitment to each other and thus to the child.

This paradigm found expression in the international rights instruments in relation both to the rights of the child and in relation to family formation. It is a right of men and women of marriageable age to marry and form a family.¹

This paradigm has formed the basis of adoption legislation, where relinquishment of parental responsibilities meant that the State sought another couple to take on the parental relationships within the traditional paradigm of ideally what constitutes the formation of a family and preserves the security of identity and nurturing of the child within that relationship.

In 1984, the Victorian Infertility (Medical Procedures) Act retained the notion that the technology should only be used to create families within the marital context, but broke away from the marital paradigm by endorsing the use of sperm and eggs from outside the marital union. In 1995, the need for security of the relationship was lost in the inclusion of couples who were not committed to each other by marriage. The Federal Court decision about that legislation in the McBain case further eroded the principle by allowing access by single infertile women, though the Court considered this only as an individual's right of access to a medical service, and did not consider the implications that this had for the rights of a child to know, to have access to, and to be nurtured by his or her parents, and the particular significance of family creation.

The new VLRC proposals represent a huge further step away from the biblical and traditional paradigm of family relations by completely privatising who may be considered a parent and by totally separating the notion of parenthood from the biological and psychosocial reality of a relationship between a man and a woman

¹ UN Universal Declaration of Human Rights 1948, article 16(1)

as mother and father to a child. The new notion of parenthood becomes a voluntary engagement to be a member of a committee of parents, without regard to the realities of natural connectedness through genetic and gestational parenthood, and the coming to be of a child through a relationship between the parents.

The Interests of the Child are Paramount

The interests of children are paramount in the provision of services which aim to achieve pregnancy, and the interests of children are best safeguarded in the context of a family formed upon the security and commitment of a marriage between a man and a woman.

Children need relationships with both a mother and a father, and the example of male and female identity in the love between their parents, and between each parent and the children. Sometimes it happens that this ideal becomes fragmented by death, illness or choice, or the individuals are less than ideal in fulfilling their responsibilities to each other and their children, but the ideal remains.

The protection of the interests of children is a *parens patriae* responsibility of the State and the law should promote those circumstances that are most likely to achieve that protection. It should be noted that notwithstanding the recent exclusive focus on the issue of discrimination on the basis of marital status, Australia has ratified the UN Convention on the Rights of the Child which recognises the right of a child to an identity and family relations (Art. 8), and the right to know and be cared for by his or her parents (Art. 7) and to maintain personal relations and direct contact with both parents on a regular basis (Art. 9).

Australia has also ratified the International Covenant on Civil and Political Rights which does not recognise a right to a child, but does recognise the right of men and women of marriageable age to marry and to found a family (Art. 23), in which marriage means a contract entered into between a man and a woman for life. That article also holds that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The recommendations of the Commission would, in effect, give single women a right to the technology to achieve pregnancy without regard to the rights of children to know, to be cared for and to have access to their fathers as well as their mothers. I strongly oppose the proposed treatment of children as though they are a commodity to which a person can have a right. The proper relationship to children is one of responsibility, a responsibility of both his or her mother and father. No-one has a right to a child.

Clinical Ethics Committees

The Victorian Commission places great trust in clinical ethics committees. Currently, clinical ethics committees are relatively uncommon. Research institutions such as hospitals and universities often have human research ethics committees established under guidelines issued by the National Health and Medical Research Council, but there are no established standards and principles for the composition, appointment and conduct of clinical ethics committees. In these circumstances it would be irresponsible to transfer matters related to the welfare of children to clinical ethics committees.

Birth Certificates

The Commission recommends that birth certificates now contain the ambiguous word “parent” for the purposes of including the female partner of the birth mother. This is an illconsidered proposal that changes the meaning of what a parent is and consequently the responsibilities of parenthood. Natural parenthood is conferred by the nature of the relationship by which a child comes to be. Adoptive parenthood is a solution to a problem where the relationship of natural parenthood does not continue by circumstance or choice. By convention, adoption is a public decision made by the State in the interests of the child. The Commission’s proposal is to privatise such decisions without requirements as to the consideration of the best interests of the child.

Social Infertility

As a general rule, social problems require social solutions, not medical solutions. The limitation of services to achieve pregnancy to couples who are infertile, recognises that there is no right to a child, but there is a right of men and women to marry and form a family. It also recognises that medical services should be restricted to meeting medical needs. It is not the role of medicine to substitute for the lack of a male or female partner.

Surrogacy

Surrogate motherhood represents an objective failure to meet the obligations of maternal love and responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his or her own parents. It sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families. It involves the use of a woman as a mere incubator. It also creates a new confusion as to the identity of the child’s mother.

It would be unfortunate if surrogacy agencies were established in Victoria. The law should continue to discourage the involvement of medical, legal and other professionals in fostering the practice, by making it an offence to:

- a) advertise or promote surrogacy arrangements or
- b) receive a fee in connection with professional services to assist surrogacy.

In the event that surrogacy does occur, I would suggest that the woman who gives birth should remain the legal mother of the child, until and unless she relinquishes the child for adoption. In the latter case, a court decision authorising adoption would be required to be made in the child’s best interests. The latter decision must always be made in the interests of the child and ensuring that it is a Court decision is the best way of ensuring that that is so given the messiness of arrangements around surrogacy and the potential for the child and his or her rights and parental relationships to be at least confused in the agreements entered into or entered into and then broken.

Yours sincerely,

A/Prof Nicholas Tonti-Filippini