

8 February 2016

Committee Secretary
House of Representatives Standing Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Secretary

Re: Inquiry into surrogacy

Below, please find my submission to the inquiry.

National consistency

The clarity and effectiveness of laws about surrogacy in Australia would be considerably improved if the Commonwealth led a process of harmonisation, in conjunction with the states and territories. Current arrangements vary considerably between jurisdictions, leading to an unnecessarily complicated legal landscape, which adversely affects intended parents, potential surrogates and the judicial system. Existing legislation treats Australians who live in different parts of the country in fundamentally different ways. For example, a person living in Queensland would commit an offence to engage in surrogacy overseas, while someone living in Victoria would not break the law to do the same thing. Variation between laws also embeds higher costs for those people who need to navigate an already stressful set of circumstances and encourages ‘jurisdiction shopping’, which makes access to legal surrogacy opportunities available differentially depending on the financial resources a person can muster. This situation cannot be countenanced. As has occurred in a range of areas in recent years, the Commonwealth should lead and facilitate the promulgation of a national law on surrogacy in Australia.

Commercial surrogacy

Commercial surrogacy should be legalised in Australia. Current legislation forces most Australians who wish to pursue surrogacy to do so overseas. It also forces them ‘underground’, and thus vulnerable to exploitation and intimidation themselves. Women in Australia are discouraged from becoming surrogates because they cannot be remunerated for their efforts. The most effective way to bring the majority of surrogacy arrangements into an Australian legal framework is to permit paid surrogacy in Australia.

Taking such an approach would limit the potential for Australia to breach its international obligations, reduce the possibility of exploitation of both Australian intended parents and surrogates who live outside Australia and could facilitate more meaningful and continuing links between surrogates and the children they carry.

If accompanied by appropriate changes to Medicare, legalising paid surrogacy in Australia would put such arrangements on an equal footing with IVF, removing a financial barrier to surrogacy that

unjustifiably discriminates between different methods of family formation. Currently, MBS rebates are not available for procedures undertaken for the purposes of surrogacy.

It is an anachronism that the law currently prevents a woman being paid to carry a child for another person or couple. With an appropriate regulatory framework in place, there is no sensible argument that a woman should not be able to agree to help others who require it, and receive an appropriate payment if she desires. All participants in altruistic surrogacy arrangements (which are legal) are paid (e.g. lawyers, doctors, etc.), except the woman performing the most burdensome and valuable activity! This exposes a false distinction between paid and unpaid surrogacy arrangements – it is not true that payments are not permitted for surrogacy in Australia; it is just that it is the surrogates themselves who miss out on being remunerated for their services.

Lawmakers must avoid the unquestioned application of the dominant discourse of motherhood, to conclude that no rational woman could truly and genuinely consent to carrying, then gifting, a child to another person or couple in exchange for payment. In almost all cases, there is no genetic link between the surrogate and the child, so likening it to an unaided pregnancy with a child biologically linked to the mother is incoherent. To impute an absence of consent despite the potential for a regulatory psychological assurance approach smacks of paternalism.

In short, women should be empowered to provide paid surrogacy services to others within Australia if they desire and with appropriate regulatory protections to reduce the possibility of exploitation of the intended parents, the surrogate and the child.

International surrogacy

Australians should also be permitted to undertake commercial surrogacy overseas. Current legislation in a number of jurisdictions, including Queensland and NSW, makes overseas paid surrogacy illegal for residents of those states.

Most of the arguments against allowing commercial surrogacy are based on the suggestion that women from low- and middle-income countries are poorly educated and thus susceptible to exploitation by unscrupulous businesspeople and rich foreigners. As noted above, it is entirely feasible to embed within regulation, an approach to assessing an intended surrogate's psychological and intellectual understanding of a planned surrogacy arrangement. Such evaluations could be coordinated by Australian embassies (on a fee-for-service basis) in countries where commercial surrogacy is permitted. Alternatively, the Australian intended parents could fly the intended surrogate to Australia for this to occur, with assessments being made by Australian qualified professionals. In the overall scheme of costs and burdens that arise from a surrogacy arrangement, the imposition would be modest. Such an approach would be a meaningful way for Australia to demonstrate good international citizenship and contribute to safe, mutually beneficial surrogacy agreements for Australians and intended surrogates.

It may be true that it would be more difficult for surrogates living overseas to maintain a connection with a child they gestated for the intended parents. However, given most children born through surrogacy are not genetically related to the surrogate, this argument is generally erroneous. While I agree it is desirable for children to be readily able to maintain links with their biological parents,

this would require greater attention to regulating the donation of eggs and sperm to Australians, rather than regulating surrogacy per se.

While a child may wish to establish or maintain a connection with the woman who bore him/her, it is considerably more likely he/she would instead seek a relationship with his/her biological parents. However, the issue of children maintaining links with a surrogate mother should be carefully disentangled from issues of genetic origin, rather than being used as a reason to deny Australians the option of legally undertaking surrogacy outside Australia.

Arguments about economic imbalance being a barrier to (or completely vitiating) the consent of a surrogate must be carefully appraised. The sums involved are life changing for many women in low- and middle-income countries. It is hardly the role of Australian legislators to deny such women the capacity to positively influence their own economic well-being and future. Surrogacy may be, in some cases, the only chance a woman has to acquire the capital required to start a business or fund her own further education. As in altruistic (unpaid) surrogacy, it is fanciful to suggest that someone would be enticed into such a physically and emotionally invasive process on the basis of *one factor alone*. The motivations of altruistic surrogates generally remain unexamined (because the impetus is assumed to be a desire to give the ‘gift’ of motherhood to a ‘sister’ (actual or colloquial)). Yet our perception is that money taints and eclipses the explicitly consent of paid surrogates in ways that unspoken family pressures apparently do not for their altruistic equivalents.

All of this concern would be addressed by a regulatory regime that ensures decisions are made with a comprehensive understanding of the risks and rewards (of all types) relevant to a surrogacy agreement, with individual assessments by Australian psychologists and other health professionals. Such a regime should apply equally to surrogacy arrangements entered into by Australians, regardless of which country the surrogate hails from. To prohibit overseas commercial surrogacy due to the (poorly evidenced perception of the) risk of undue financial influence is unnecessary over-reach, and will continue to drive Australians to commit crimes by going overseas to undertake surrogacy in countries where local laws permit it.

It is unlikely there will ever be sufficient women in Australia prepared to become surrogates to meet entirely the demand for such services from people unable to have children in other ways. Permitting Australians to undertake surrogacy overseas, with appropriate protections for both intended parents, surrogates and children, is a sensible and compassionate way of enabling people to fulfill their desire to form families.

On a personal note

My partner and I undertook commercial surrogacy in India and Thailand between 2012 and 2014. We were fortunate to eventually have a child, born in Bangkok in 2014. The lack of women prepared to undertake unpaid/altruistic surrogacy in Australia drove us overseas. We are aware we committed an offence by doing so. However, we are very happy with our decision and confident our interactions with the Thai clinic, surrogate and egg donor were uniformly and mutually positive. Our surrogate offered us something we could never have achieved without her, and she received a significant financial reward. We remain in contact, with a view to enabling our son to meet her when he is old enough. Our son has brought immense delight to our lives and we consider we are

decent people raising a happy, well-rounded child. We hope our child will contribute significantly to our country in future.

Contrary to Judge Pascoe's comments before the committee on 4 February 2016, the process of undertaking paid surrogacy overseas was not at all 'easy' nor 'cheap'. His ill-informed, anecdotal and fanatical comments misunderstand the motivations of Australians who travel overseas for this purpose. It is frequently desperation that drives them, and desperation is largely insensitive to cost or convenience. We were constantly worried about the health of our child and the surrogate; it was impossible to regularly visit, to reassure ourselves as to the surrogate's well-being or to gauge the quality of medical care being provided. All of this would have been much easier if the arrangement has been local, legal or was underpinned by Australian regulatory assurances.

One of Judge Pascoe's sensible observations, with which I agree, was:

"...what is the best legal regime to protect people who would otherwise be very vulnerable to exploitation?"

While I disagree passionately that the default paradigm in which surrogacy exists is one of exploitation, it is important Australia and Australians act responsibly to maximise benefits and minimise risks for all parties. In my submission, I have made multiple suggestions for a regulatory regime that should apply equally to surrogacy arrangements, regardless of where they occur and whether they are paid or unpaid. I hope the committee will consider my suggestions seriously, so as to dispense with the current unfair prohibition on commercial surrogacy and ensure Australians have legal access to a significant family formation method.

Thank you for the opportunity to make a submission to the inquiry. I look forward to its findings.