

Submission: Inquiry into Surrogacy.

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‘Dreams, love, babies, illness, death, animals - all these are unmodern’.<sup>1</sup>

In law it is often quoted that when children are involved then the “best interests of the child are paramount.”<sup>2</sup> This means that the consideration of the interests of the adult parties is not to be a “balancing act” but, instead, is subordinated to the interests of the child. Furthermore, Australia is a signatory to the *Convention on the Rights of the Child* and so is expected to consider the rights of children when considering legislation concerning them. Under the *Declaration* a child “of tender years shall not, save in exceptional circumstances, be separated from his mother,”<sup>3</sup> and under the *Convention* a child has, “as far as possible, the right to know and be cared for by his or her parents.”<sup>4</sup> Obviously, therefore, in any consideration of surrogacy law it is imperative that the interests and rights of the child be established, particularly the *interests and rights of newborn infants*. This is the stage in the life of a human being outside the womb when they are at their most vulnerable and are therefore most deserving of adult empathy, compassion and care.

When considering the interaction of surrogacy with both the best interests and the rights of infants it is necessary to consider surrogacy *from an infant’s perspective*. This is because if surrogacy is examined only from adults’ point of view it is far too easy to confuse a baby’s interests with the empowered interests of adults who may be blinded by their own emotions, desperations and ideologies.

When considering surrogacy from the child’s perspective what needs to be remembered is that, *unlike an adult*, a newborn person obviously has no understanding that they have developed from a donated egg or embryo “implanted” into the woman who carries them. What infants’ *do* understand, and understand holistically and on the most profound human level, is that the woman who carries and births them is their mother. How do we know this? “Minutes after birth, a baby can pick out his or her mother’s face – which he has never seen – from a gallery of photos... Their cries of pain are authentic.”<sup>5</sup> Babies react to the voices of their mother immediately after birth in a way they do not to the nurses present. Babies turn their heads and wriggle toward the mother’s breast following the scent of their mother’s milk. The baby has *in no way*, emotionally nor psychologically, separated from this mother: to the baby the mother is still “part of the Self, that core-being or essence of oneself which makes one feel whole.”<sup>6</sup>

Later in life the fact that the person’s birthing mother is not their “DNA” mother will become a major issue in their identity formation – but it has *no meaning* for the newborn baby. When a baby is removed from a surrogate after birth – and it makes no

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<sup>1</sup> Lydia Weavers, ‘Dreaming Modernity’ paper presented at the ASAL conference in honour of Professor Elizabeth Webby, University of Sydney, 2 February 2007

<sup>2</sup> For instance when a court is making a parenting order, the [Family Law Act 1975](#) requires it to regard the best interests of the child as the most important consideration.

<sup>3</sup> *Declaration of the Rights of the Child*, Principle 6. <http://www.cirp.org/library/ethics/UN-declaration/> Accessed Saturday 23 January 2016.

<sup>4</sup> *Convention on the Rights of the Child*, Article 7. <https://www.humanrights.gov.au/convention-rights-child> Accessed Saturday 23 January 2016.

<sup>5</sup> *Babies Remember Birth*. Dr. Chamberlain quoted in *The Primal Wound; Understanding the Adopted Child*, Nancy Newton Verrier p 5.

<sup>6</sup> Verrier p 6.

difference if the surrogate is a “traditional surrogate” or a “gestational carrier” - then you are *removing that baby from his or her mother*. Both Principal 6 of the *Declaration* and Article 7 of the *Convention* are violated.

If a child’s rights are violated by surrogacy, and there are also other child rights violated, in both the *Declaration* and the *Convention* that we are not examining here, then perhaps you can argue that the *interests* of the child can be respected and protected?

Jessica Kern, a “product” of surrogacy, has said of surrogacy:

“We have so much evidence in the adoption communities that its detrimental to a child to separate them from their biology unless it’s a necessity but then we turn around and do it intentionally in this arena and we’re supposed to be grateful and all that stuff. The more you look into it the more problems you find.

On the outside looking in it might look like it’s just a couple but it just gets nastier and nastier the deeper you look in it.”<sup>7</sup>

As members of the “adoption community” that Jessica refers to, our concern is that the interests of the child *in the period after birth* are not being prioritised, *or even duly considered*, especially considering their importance for the well being of the child both in the immediate period after birth and into the future.

We wish to remind the Committee that we are members of an entire demographic of people – nearly 10,000 Australians in my year alone, 1972, and than 250,000 Australians in total<sup>8</sup> - who have been removed from their mothers at birth and who are now adults and *can speak about the experience*. We assert that removing babies from their mothers at birth is cruel and is experienced by the newborn baby as a cruelty and should only ever be done if the child is at risk of harm from that mother. We assert that in the short-term after birth, the loss of the birthing mother is suffered as a trauma: that babies are not psychologically nor emotionally separate from the mother, nor are they ready to separate physically from their mother. We testify that this “premature maternal separation trauma” is experienced as a profound loss of self as the baby instinctively seeks their mother after labour, to seek the nipple and suckle – but instead experiences the mother, that part of the baby’s sense of itself – as vanished, and *felt as a kind of death*.

We testify that this foundational profound experience of loss has long-term effects: in fact, life-long effects because the loss has occurred before long-term conscious memory has formed to help process the experience, before skills are learnt to manage the experience, before the intellect has developed to rationalise the experience. It is nonetheless that person’s foundational experience of life outside the womb and will remain part of that person throughout their adult life and we testify that removal from the mother at birth has lifelong physiological, psychological and emotional impacts. This is despite the rigorous and all-embracing socialisation that will be imposed on that person by the family that raises them and the sections of society that appear to endorse child removal for the purposes of surrogacy such as the American entertainment industry and the Australian media. *Despite the continuity of relationship* with may provided after the removal we testify that children removed from their mothers often

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<sup>7</sup> <https://vimeo.com/125756487> Accessed Saturday 23 January 2016.

<sup>8</sup> *Commonwealth Contribution to Former Forced Adoption Policies and Practices*, 29 Feb 2012, p 6. [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Completed\\_inquiries/2010-13/commcontribformerforcedadoption/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/report/index)

Last accessed 5 February 2016

demonstrate emotional disturbances and behavioural problems such as emotional repression, grief and anxiety as well as more serious dissociative conditions.

We firmly believe that it is only because stranger infant adoption became so normative in Australian society since it was “introduced” en masse by adoption legislation in the 1920s, (reversing the common law crime of abandonment) that our society would even consider accepting surrogacy today. Furthermore, that it is only because of the cult of celebrity and the values constantly delivered into Australian culture from *the only UN member country which has not ratified the Convention on the Rights of the Child*, the United States, – that Australians today may not fully understand the implications of surrogacy for future Australians.

The *National Apology for the Commonwealth’s Role in Forced Adoptions* explained to us that the people who took babies off their mothers in the labour wards thought that they were doing the right thing because we were largely “accidental” pregnancies. How is it then justified in the case of surrogacy where the child is *intentionally conceived* with the wedded intention that it is to be distressed by the loss of his or her mother? It cannot be justified.

As adoptees we say: the loss of the mother’s body at birth is experienced as a trauma which is felt at first as an inexpressible loss (what can the baby do but cry?) and creates a lacuna of despair that never leaves the person despite a lifetime of adaptation and socialisation, and despite that fact that, this trauma having occurred before the development of long-term memory, the trauma is not consciously “remembered.” The experience of loss of part of the self, the mother whom the child seeks after birth, is not somehow left behind because the baby is unable to retain its mental image.

Personal testimony and scientific research<sup>9</sup> that evidences that the removal of infants from their mother’s bodies after birth are traumatic for those infants and may have a life-long impact on their physical and mental health<sup>10</sup> subvert the dominant discourse surrounding adoption and have been popularly suppressed in the broader Australian community even to this day.<sup>11</sup> Is this because Australian history has involved a downplaying of the importance of infant bonding and blood ties in our enthusiasm for the removal of children from Aboriginal families?<sup>12</sup> It is not for us to make a decision to impose this burden on the next generation and hope for the best. And when the children of surrogacy come of age they will have a demographic of adoptees backing their call for a National Apology – some of them trained into lawyers to seek legal action.

The process of modernisation with its development of reproductive technologies, has been liberating in many respects but without laws to prevent this process being taken to the extreme, ‘liberation could be so relentlessly modernising as to cut people off from

<sup>9</sup> For example see <http://www.sciencedaily.com/releases/2011/11/111102124955.htm>

<sup>10</sup> Nancy Newton Verrier, *The Primal Wound: Understanding the Adopted Child* Baltimore Gateway Press, 1993: <http://nancyverrier.com/the-primal-wound/> accessed 23 September 2012; Dr. Dan Siegel *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are* 2<sup>nd</sup> edn Guilford Press 2012: <http://drdansiegel.com/home/> accessed 23 September 2012.

<sup>11</sup> For example as part of the actress Deborah Lee-Furness’ pro-adoption campaign the impact on pro-adoption policies on pressuring women in third-world countries to abandon their children, in exploiting the poverty of women who place their children temporarily in orphanages, and in traumatizing women and children via separation is consistently downplayed: Adoption Awareness Week <http://www.adoptionawarenessweek.com.au/Home> accessed 23 September 2012.

<sup>12</sup> The ReconciliACTION Network, “Stolen Generations Fact Sheet:” <http://reconciliaction.org.au/nsw/education-kit/stolen-generations/#forced> accessed 23 September 2012.

the ways of their ancestors and take away their reasons for living.”<sup>13</sup> Surrogacy cuts people off, not only from their distant ancestors in most cases, but also, in every case, from the person closest to them: the birthing mother, either in the rare instance forcing her to be a distant carer, and in the majority of instances erasing her altogether.

The only way forward is for Australian law to expressly recognise the particular unique characteristics of an infant’s pre- and post-natal bond with the mother who carries them in pregnancy, regardless of whether or not the egg is from another woman, regardless of the attitude of the birthing mother toward her child. In this way we can re-orientate societal norms that have so drifted away from the needs of the biological systems of infants and continues to subject the next generation to its cruelties and rights violations.

This is best achieved by an explicit acknowledgement *in our domestic law* that we have ratified the *Convention of the Rights of the Child* and stand by our commitment to respect the rights of every child to remain with and be brought up by their own mother and that always, for *every single child*, that “mother” is the woman whom has created that baby by taking them from embryo to fully formed infant, throughout nine months of symbiotic gestation.<sup>14</sup>

This submission is only one argument against any form of legalised surrogacy on the grounds that it is cruel to human infants and a violation of their legal rights. There are a multitude of other reasons to oppose surrogacy in any form, among these reasons being the exploitation of women, and some of these can be found detailed in Kasjsa Ekis Ekman’s *“Being and Being Bought; Prostitution, Surrogacy and the Split Self.”*<sup>15</sup> It is our view that “Altruistic surrogacy” is clearly an oxymoron because it is in no way altruistic to babies, engineering the same cruelty of their separation from their mother. *Commercial* surrogacy, then, should be unthinkable to a modern society that assumes it is on some sort of path toward a greater or “better” humanity. As for any argument that may be made by Surrogacy Australia that permitting and regulating commercial surrogacy in Australia will provide safeguards for the rights of children by preventing people taking them from overseas, it is obvious, when the rights and interests of newborn babies are prioritized and duly considered as they must be, that it is surrogacy itself which violates children’s rights and functions against their interests. Legalising commercial surrogacy only takes this commodification of people and the exploitation of women to its extreme. Human beings should never be supported by government to be “for rent or sale.”

We either accede to what we can only call the violation of the rights of children and the trampling of their interests, by the trafficking of children “benevolently regulated,” or we shut down the manufacturing enterprises that do the trafficking.

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“[F]or love is not to be bought, in any sense of the words.”

Mary Wollstonecraft, *A Vindication of the Rights of Woman*, 1792, Chap IX, para 4.

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<sup>13</sup> Declan Kiberd *Inventing Ireland The Literature of the Modern Nation* Vintage London 1995, 295.

<sup>14</sup> For example see <http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain/>

<sup>15</sup> Kasjsa Ekis Ekman, *Being and Being Bought; Prostitution, Surrogacy and the Split Self*. Spinifex Press, Melbourne, 2013.