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Attorney-General's Department
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By Email: surrogacy@sa.gov.au

Thursday 14 February 2019

Dear Attorney-General,

Submission in relation to the draft *Surrogacy Bill* 2018

Feminist Legal Clinic Inc. is a new community legal service based in Sydney that works to advance the human rights of Australian women and girls through a combination of targeted casework, community legal education and law reform work.

We welcome efforts to ensure that commercial surrogacy remains illegal in South Australia. However, we would go further than the draft *Surrogacy Bill* 2018 and suggest that banning surrogacy altogether would provide simpler and more comprehensive protection from exploitation for South Australian women and children. We agree that a uniform national approach in this regard would be ideal.

Our service has assisted groups working with mothers who have experienced the forced removal of a child (Origins Australia Inc.) as well as those representing the rights of adoptee children (Australian Adoption Rights Action Group). Based on this work and our research in the area generally, we have formed the view that the risks of surrogacy for both women and children cannot be adequately addressed by way of regulation and that a complete ban is more appropriate.

Like the sale of body parts, surrogacy is inherently exploitative and beset with ethical problems that cannot be solved through contractual provisions, lawyer's certifications or court orders. Relinquishing a newborn in the context of surrogacy is often characterized as a noble sacrifice for the good of the child and an act of kindness to an infertile couple. There is tremendous pressure on mothers to live up to this altruistic ideal. Even in those cases where lawyers may be satisfied that the woman made an 'informed choice', it is often a Hobson's choice of the worst kind that facilitates a systemic reversal of the Judgement of Solomon.

Rather, altruistic arrangements should not involve legal falsehoods which have the potential to deprive the child of knowledge of its identity and origins and strip the mother of her rights in relation to the child she has carried even before it is born. Guardianship arrangements should be adequate in those rare cases involving genuinely altruistic agreements, such as between close sisters. Such an arrangement would require unusual love and trust between the parties, who if genuine, would not be expected to support contractually negating the rights of the gestational mother, or forcibly removing the baby to satisfy a desire for 'ownership'.

'Best Interests' of the Child?

We note that section 6 of the draft *Surrogacy Bill* 2018 states that the best interests of the child are regarded as paramount. However, the child is not able to consent to a surrogacy arrangement or even articulate its feelings in a manner that will be taken into account.

In fact, a newborn baby has an attachment to the mother who has carried it during pregnancy and experiences immediate distress upon separation from her. In contrast, the same baby is oblivious to a biological parent who has supplied only genetic material. Any decision to create circumstances requiring the removal of a baby from its mother at birth is made without consideration for the extensive suffering this will necessarily inflict on the baby and is clearly not serving the child's best interests.

The appointment of a separate legal representative as provided for under section 21 cannot add more to these considerations, since the child is unable to provide instructions. This influential role would therefore primarily operate to give a practitioner a free hand to express support or opposition for the arrangement based on their personal ideology, which may or may not serve the best interests of the child.

Limiting the Rights of the Surrogate Mother

This draft legislation is inherently paternalistic since it assumes that there is in every case a higher authority in relation to a child's best interests than that of the mother who has given birth to the child. There is inadequate recognition given to the right of a mother to make decisions for the care of a child which she has carried throughout pregnancy and given birth to at a great personal cost. That cost is both physical and emotional and cannot be made good through the mere payment of financial expenses. The surrogacy principles articulated in section 7 are manifestly inadequate since they provide only that a woman should not suffer financial disadvantage because of a lawful surrogacy agreement, without consideration of the physical and psychological investment and inevitable experience of loss upon removal of the child.

Penalty for Breach

Since any breach of this legislation or associated regulations can attract only a maximum fine of $10,000, it hardly acts as a deterrent for couples contemplating spending far more than that to obtain a child via a costly commercial arrangement overseas. The $5,000 fine for failure to offer and pay for counselling for a surrogate mother under section 15 is a relatively cheap price to pay compared to the risk of the woman changing her mind because of said counselling.

Punishing Vulnerable Women

We are also concerned that the offence created by section 18 does not distinguish between someone contracting the services of a woman for the purposes of surrogacy and a vulnerable woman agreeing to this arrangement for financial reasons. Women choosing to be surrogates often agree to these arrangements as a means of earning money needed to support their existing family. Women continue to make decisions about their bodies in circumstances where their options are limited by the unequal conditions in which they live. Financial duress in addition to social coercion means that women's decisions are often susceptible to the control of others. We do not think women who are vulnerable to exploitation of this type should be further victimised by the threat of imprisonment, potentially while pregnant.

Illegal Arrangements Validated

The provisions for the making of court orders as to parentage also conjure up some chilling scenarios with the contemplation under section 23(4) of orders in the absence of consent where the surrogate mother is dead, incapacitated or mysteriously unable to be contacted. Such provisions are incongruous with a truly altruistic arrangement made with full consent. Section 23(6) also appears to create significant and concerning loop holes by which illegal arrangements may nevertheless be retrospectively approved by the court as lawful agreements.

Wrongful Removal causes Irreparable Harm

Certain decisions made by the Australian Family Court, such as the notorious Baby Gammy case[1], have already attracted significant international reprobation. In this context, section 23(10) is insufficient to allay fears. The provisions to revoke orders that have been made in cases involving fraud, duress or improper means hold no real promise of undoing the irreparable damage to a child and their mother because of a wrongful removal. Unlike chattels, babies cannot simply be removed and then restored to their "owner" without causing irreparable harm.

Gestational surrogates continue to experience attachment and have difficulty relinquishing babies, as exemplified in the early problematic US case of *Calvert v Johnson*,[2] in which the genetic composition of the child was ultimately decisive and the role of the gestational mother reduced to that of a vessel. Unless there are extenuating circumstances, children should be left in the care of their mothers who are biologically best equipped to meet their needs and should be given every support to do so. No contractual provisions should override this and allow for a forcible removal that disregards fundamental human rights of both the mother and child.

[1] https://www.smh.com.au/national/australian-couple-leaves-down-syndrome-baby-with-thai-surrogate-20140731-zz3xp.html

[2] See Casebriefs, *Johnson v Calvert* <https://www.casebriefs.com/blog/law/health-law/health-law-keyed-to-furrow/reproduction-and-birth/johnson-v-calvert/>; S Mydans, 'Surrogate denied custody of child', *The New York Times* (online), 23 October 1990, <http://www.nytimes.com/1990/10/23/us/surrogate-denied-custody-of-child.html>.

Limiting the Liability of the Crown

Finally, the attempt in section 27 to limit the liability of the Crown in facilitating arrangements which will foreseeably entail breaches of fundamental human rights for both women and children is unconscionable. It seems this Bill has been drafted in contemplation of the inevitable governmental apology and law suits that will necessarily follow. Furthermore, the provision for a $10,000 penalty for an individual alerting the public to the travesties of justice likely to follow in the administration of this legislation, demonstrates that exposure of the process is a greater concern to government than a surrogate mother's well-being (since a transgression of those provisions only attracts a $5,000 fine).

Conclusion

International evidence would indicate that a total ban on surrogacy is the best means of reducing the demand for these services on a commercial basis. Even cases of altruistic surrogacy for friends or relatives are beset with ethical problems that no amount of regulation will cure. Women's 'choices' are severely compromised by the unequal conditions and social constraints within which women live. Any level of inducement or coercion has the potential to compromise the safety and wellbeing of mothers and children and further entrenches a view of women and their offspring as commodities to be traded. Legislation like this which seeks to regulate the reprehensible, unwittingly provides it with a tick of approval and thereby increases demand for services which necessarily involve exploitation of economically disadvantaged and otherwise vulnerable women.

Further references in support of this submission can be found cited in the article'*Women's Reproductive Rights: Spoiled for Choice?*'by the writer and published by the Australian Lawyers Alliance in January 2018.[3]

Yours faithfully,

Anna Kerr
Principal Solicitor

[3] 'Anna Kerr 'Women's Reproductive Rights: Spoiled for Choice?' (2018) 144 *Precedent* 28.