

## **For love, not money:**

# **The NSW Council of Churches Response to the ALRC's Discussion Paper 89, 'Review of Surrogacy Laws'**

## **Surrogacy legislation implies a view of human being**

Surrogacy is the use of artificial reproductive technology to intentionally enable a biological woman to gestate a child without sexual intercourse for a family to whom that woman does not belong. The pre-impregnation donative intention differentiates it from adoption, which does not inquire into the woman's intentionality or consent in her pregnancy; it simply focuses on the act of the child borne by that woman becoming a member of someone else's family. In a surrogacy project, the woman consents to that separation before consenting to becoming pregnant.

The ALRC is a secular agency mandated to recommend changes to Australian law. It therefore rightly seeks to justify its recommendations not through philosophical analysis, moral casuistry, or theological dogma, but through analysis of existing Australian and international law and declarations of international rights which the Australian government has recognised. Nevertheless, any legislation which regulates the way human beings are exchanged from one family to another implies an anthropology – a definition of the meaning and significance of, inter alia, motherhood, parenthood, childhood, and family. Legislation therefore cannot avoid expressing philosophical and moral precommitments. Humane legislation requires a right view of what it means to be human.

## **The value of (religiously-informed) moral frameworks**

We raise this preliminary consideration because this discussion paper ('DP') seems to minimise the significance of religiously-grounded moral objections to (for-profit) surrogacy. Paragraphs 29 and 30 contrast "groups who oppose surrogacy on moral or religious grounds" against alleged "increased acceptance in society" of the practice "as a way to become a parent," demonstrated by increasingly liberal governmental regulation.

First of all, moral frameworks are most valuable not when they comfort individual and social consciences, but when they warn them. If the ALRC discerns that Australian society and legislation are becoming unmoored from (religiously-informed) moral convictions, it should serve the nation by pausing to consider whether that trajectory is actually socially beneficial or not. Secondly, religiously-informed moral frameworks can illuminate the individual and social goods which legislation and international covenants seek to establish.

## **Non-relational individualism, prioritisation of the commissioning parents, and commodification of the child**

The DP demonstrates a reductively individualistic view of the human individual which minimises the real historical and relational realities which pre-exist and therefore affect the individual. The DP recognises that the "best interests of the child" should be the "primary consideration" of any surrogacy project (para 34). It also recognises that the current law deems the child's birth mother to be one of the child's parents (para 36). But the trajectory of the DP's arguments and recommendations priorities the commissioning parents'

“right to found a family” (para 40) above those of both child and the surrogate mother. The DP ends up treating the child as a commodity to be sold by the birth mother, and the birth mother as a biological machine who performs biological services for the commissioning parents, potentially for profit.

This inversion of priorities, commodification of the child, and denigration of the birth mother occurs as follows.

First, the DP does not adequately recognise that pre-birth decisions by adults create historical circumstances which can significantly affect a child begotten by those adults. One of the DP’s arguments against recognising the birth mother as the child’s parent is the alleged risk that “children born through surrogacy” may be “treated... differently from other children” (para 36). This ignores the fact that children born through surrogacy *are* different from other children. The history of their conception and birth intentionally, and without the child’s consent, deviates from the historically and biologically normal way whereby children are brought into the world and nurtured as they grow and mature. Surrogacy by its very nature creates an unusual relationship between the woman who bears the child and the child she bore. The birth mother’s consent to conceive the child with the express purpose of giving them over to someone else makes her relationship with her child *different* from all other mother-child relationships – different even from children given up for adoption.

Instead of ignoring that difference, the ALRC should consider how to regulate that difference so that the child experiences it *positively not negatively*. We shall suggest some ways below.

The DP further errs by defining surrogacy arrangements as primarily “private arrangements” between “consenting adults” (para 42 page 13). A surrogacy project also significantly affects the child born through that project, and surrogacy, by its very nature, prevents that child from consenting to those arrangements. While surrogacy is different to adoption, the evolution of adoption law is an example of how a child can be identified with a family other than that of their birth in ways which are best for the child. Adopted children were initially prevented from being able to discover their birth mother’s identity. This intentional isolation of the child from their biological parent was shown to be detrimental to the child, regardless of the love, acceptance, security etc. lavished upon them by their adoptive parents. The law was subsequently changed to permit children a true knowledge of their personal history and the personal relationships which that history entail. Research into the well-being of children born through artificial reproductive technology further demonstrates that children want to know their biological origins. We urge the ALRC not to isolate children born through surrogacy from their birth mother.

Because the DP inadequately recognises the impact of surrogacy upon the child, it treats the child almost like a commodity to be exchanged for profit. We agree that altruism and profit need not always be mutually exclusive (para 33). But the relational implications of bringing a child into the world with the express intention of separating them from their birth mother gives surrogacy projects a moral significance which prevents economic profit from being a valid motivation. All parties to a surrogacy project should ‘profit’ from the *intangible relational benefits* of bringing a child into the world. These relational joys include the child’s right to know and relate to the biological woman who cared enough about them to bear them in their womb and give birth to them, and who also cared enough about the commissioning parents to agree, even before they became pregnant with that child, to donate the child they bore in their body to those commissioning parents.

We therefore do *not* recommend that SSOs “operate on either a capped fee or for-profit financial model” (para 67). Surrogacy projects and the Surrogacy Support Organisations (‘SSOs’) which administer them belong in the *not-for-profit* (‘NFP’) sector. Numerous NFP organisations already exist. They are staffed by

people who enjoy both the intangible benefits of achieving the organisation's charitable goals and also earn an honest salary. And NFP organisations already administer arrangements which differentiate between cost recovery and economic profit.

We also disagree with the DP's recommendations about removing criminal penalties against commercial surrogacy, especially with respect to overseas surrogacy which in many cases is commercial and enslaving. It is well known that 'baby farms' operate in overseas jurisdictions where women are subjected to conditions which are tantamount to modern slavery. We have been informed that Australians have accessed children from such places. The *Modern Slavery Act 2018 (Cwlth)* and other similar legislation express our nation's abhorrence against all forms of slavery. Surrogacy laws should not subvert them. We have also been credibly informed that the fear is that internationally, paedophiles have used commercial surrogacy to obtain children for their vile purposes. We urge the ALRC not to unintentionally facilitate such atrocities by lowering the barriers against them.

### **The public should not be required to fund a private, morally contentious endeavour**

We also do *not* recommend that surrogacy be eligible for Medicare, for three reasons.

First, taxpayer-funded public healthcare should be used for public health – for medical and therapeutic needs which are demonstrably common to all or the vast majority of the public. The possession of children does not meet this threshold. Possessing children, while a genuine good, is not in the same category of necessity as, say, cancer treatment. The right to found a family certainly entails certain 'negative' protections like the right to not be forcibly sterilised. Access to surrogacy would facilitate a 'positive' expression of this right.

But the extent of contractual and technological intervention required for surrogacy gives it the character of a *private* arrangement, not a public necessity. This is supported by the DP's characterisation of surrogacy as "private arrangements" between "consenting adults." The principle of least restriction implies minimal public financial support. Surrogacy should not be publicly funded.

The second reason is that surrogacy is not viewed as a universal human right. The DP recognises that the Australian people and government consider surrogacy to be legitimate in principle, therefore focus on regulating it through legislation. We believe the ALRC should advocate for those who hold to the basic human rights principals of the sanctity of the life of the child and the protection of women from exploitation and violence (for example see UN report "Special Rapporteur on violence against women and girls"). Those opposed to surrogacy, commercial or otherwise, stand in a strong human rights tradition and should not be forced to financially contribute to it.

The third reason is more specific to the religious conscience. The churches represented by this Council hold, as a matter of religious faithfulness, to the sanctity of biological parenthood. Public funding of surrogacy would force conscientious Christians to participate in what they would see as a breach of God's laws, provision and purpose. Article 18 of the ICCPR proscribes "coercion which would impair" a person's "freedom to have" and "manifest" their "religion or beliefs," limited only by public safety etc. and other "fundamental rights and freedoms." This Council does not advocate 'theocracy' – the imposition of our religious values upon the general populace. We expect the general populace, represented by the government and its agencies, including the ALRC, to reciprocally extend equal respect our religious values. A significant way of respecting our religious conscience is by not expecting us to participate in the public funding of activities we consider to be immoral.

## **An alternative model (but for reasons above still not supported by NSWCC)**

We criticised the DP's implicit anthropology as being reductively individualistic in ways which ignore the historical facts of how a child was conceived and borne. We here present an alternative anthropology which seeks to overcome these limitations. Our religious convictions prevent us from advocating for this model – we remain opposed to it. But by better recognising the relational nature of human being, we expect it to be more humane, therefore, to result in better overall social outcomes than the model implied by the DP.

The intention to separate the child from its birth mother which gives surrogacy its distinct character also gives the relationship between the birth mother and her child a distinct character. The law should maximise the possibility for all parties to the surrogacy project to experience that act of separation in an ongoingly positive manner – as an act of 'love.' Such ongoing love does not define the birth mother as primarily performing a commercial service of renting out her body under contract for profit, but sees her as being willing, motivated by love for the yet-unborn child, to donate her body to host that child, and also being willing, out of love for the commissioning parents, to donate the child she bore to be reared by someone else – by the commissioning parents. Surrogacy arrangements should not permit the commissioning parents to exclude the birth mother from the child's life but require the birth mother be known to the child in age-appropriate ways during the duration of the child's childhood as the person who loved both the child and the child's commissioning parents in this particular way. This maximises the possibility of the child enjoying positive relationships with all the adults who were involved in their conception, birth, and upbringing. It also incentivises the adults involved in the surrogacy to construct relationships which are deeper than merely financial gain, and to be involved in each other's lives to some degree, like an extended family. This quasi-familial solidarity in turn should have a positive impact on the child. If domestic surrogacy is to legally occur within Australia, let it be for "love" not money.

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Thank you for allowing us to make this submission. Please contact us if further information would be helpful or would assist. We would welcome the opportunity to appear before the ALRC review panel.

Yours sincerely,

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