Submission to the West Australian Review of the Human Reproductive Technology Act 1991 and the Surrogacy Act 2008

From:

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[redacted]

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Human Reproductive Technology Act 1991 and the Surrogacy Act 2008

I applaud the Western Australian Government for undertaking this difficult review and am grateful for the opportunity to voice my opinions.

I am strongly opposed to any suggestion of allowing commercial surrogacy, and believe that altruistic surrogacy is the thin edge of the wedge to possibly allowing that pernicious practice (commercial surrogacy) to be undertaken legally in Australia. The miniscule penalties in the Act **(8.-11.)** would hardly be significant in amount to deter those involved in the multi-million dollar surrogacy industry from achieving their aims. Any form of surrogacy is against the best interests of the child, who is destined from before conception to be separated from its mother and in actual fact, to be sold. When commenting in 2016 on his judgment in the Baby Gammy case, Justice Thackray said "… *this case serves to highlight the dilemmas that arise when the reproductive capacities of women are turned into saleable commodities*, …". Justice Thackray also said "… *surrogate mothers are not baby-growing machines, or 'gestational carriers*". I believe that surrogacy completely disregards the trauma of separation of mother and child, and this has been borne out by the Federal and State Government's apology for past wrongs with regard to adoption practices. We must learn from the mistakes of the past.

"The child's best interests" is a phrase used regularly throughout the Surrogacy Act and I believe this term requires clear definition.

- **13.(1)** says the child's best interests are paramount but in **13.(2)** it is presumed in the best interests of the child for the arranged parents to be the parents.
- **21.(2)(g)** again uses the term "the best interests of the child", but nowhere is this term defined.
- There is a conflict of interest in **23.** The court may rule that it is 'justice' to do something which may well not be "for the welfare and in the best interests of the child". The concept of justice seems to be reserved for the commissioning parents, while the birth mother is virtually excluded.

I am also concerned about the use of **independent legal advice** in this process. Counselling, assessment by a clinical psychologist and independent legal advice can all be tweaked by commissioning parents to promote their rights and diminish those of the surrogate.

To this end, I oppose strongly the **court's power of dispensation with all of the following**:

- **21.(2)(b**) the court can dispense with the requirement for a birth parent to have received counselling. This should be compulsory, not dispensed with.
- **21.2(d)** the court may even dispense with the requirement for a birth parent's consent. The situation/s in which such a dispensation may be granted are not specified.
- **21.(3)** the court may dispense with several requirements which were designed to protect the rights of the birth parents if the arranged parents have been unable to contact birth mother. "Reasonable efforts" is far too loose a description of the search made to contact the birth mother.

Given the gravity and complexity of surrogacy, I would argue that a court's power of dispensation under the present Act needs to be minutely re-assessed, and that amendments prescribe that the court must **in every case ensure**:

- that counselling is a requirement
- that truly independent legal advice has been sought
- that the birth mother has given her consent (unless deceased or physically unable to do so)
- that the birth mother's agreement to the Plan is made without duress and its fulfilment can be legally enforced

21.(4) This section is meant to apply if the birth mother is not the child's genetic parent. The court, and in consequence surrogacy agencies, are thus able to take a very narrow view of surrogacy as being only a social policy instrument. There is a mountain of scientific evidence, academic research and personal experience that indicates that surrogacy is a highly complex and fraught emotional, psychological and social landscape which does not rest exclusively on whether the birth parent is also the genetic donor. The birth mother has carried the baby for nine months and given birth and has most certainly bonded with the child.

22. I believe that the approved plan should be prepared with both parties having truly independent legal advice during preparation. Although the court should be able to inspect the plan, it must do so with the rights of both parties in mind and not lean towards either party when ruling on what is "reasonable in the circumstances". In regard to **30. (Varying approved plan)** I would argue that it should be compulsory for the birth mother to have legal representation if there is an application for an approved plan to be varied and such legal representation should be funded. Without strong protection, the commissioning parents may initially make a plan of which the mother approves, knowing that they are able at a later stage to request the court to change the plan. I would also like to see that a birth mother is entitled to have funded legal representation if an approved plan is breached **(31)**.

34.2 relates mainly to who can access Births Deaths and Marriages and court Order information about the child. It does not in any way consider the birth mother's rights, and such rights are unlikely to be included in the pre-conception contract. Furthermore, in relation to **36.** I believe that it's imperative that the court not have power to exclude access by the birth mother or the child to ALL information.

17. It is vital that the contract which is entered into prior to conception is checked by the court to ensure that every effort has been made to genuinely consider the rights of each of the parties. At the very least, it should have provision to be revoked and should include a pre-paid life insurance policy on the mother's life should she lose that as a result of the pregnancy or birth, payable without argument to the birth mother's family.

44.(2) It does not seem just to potentially limit to either set of parents (but especially the birth mother) knowledge of the full effects of surrogacy. This could be the outcome if "regulations may be made as to what is appropriate counselling".

The Act in its current form does not address investigating the suitability of a commissioning couple. I believe that the State has this obligation to both the prospective child and the birth family.

The requirements for surrogacy approval under **17(a)** may be overridden by Council, which I think is an area for concern, and **17(d)** mentions that a birth mother must be confirmed by a medical practitioner to be medically suitable to be involved in a surrogacy arrangement. This assessment must include whether she fully understands the emotional implications of forever giving away a child that she has nurtured throughout her pregnancy.

21. is a good example of where the Act does not treat all parties equally, but leans more to protecting the commissioning couple and even the economic interests of the surrogacy agencies. It should be made clear that all parties have entered into a contract freely and openly and that all their rights are protected equally.

I would also like to see the Act amended to legislate that the birth mother's consent is not to be given until a suitable length of time has elapsed after the birth, perhaps 30 days. It is a difficult, complex and emotional time and a revocation period should also be stipulated. The child should be in the birth mother's care during at least the first 30 days of life.

26.(1)(b) Whilst I understand the intention is to give legal standing to the commissioning couple, it is not in society's interests to do that by creating a lie (directing that the birth parents are to be treated as *not being parents of the child*.) In the event that there are legal challenges about implementation of an agreed plan, the standing of the birth parents could be diminished if by law they are treated as not being parents.

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