

***Submission by***  
**CATHOLIC WOMEN'S LEAGUE TASMANIA INC.**

***to the Inquiry into***  
**SURROGACY BILL 2011 & SURROGACY (CONSEQUENTIAL AMENDMENTS)**  
**BILL 2011**

Catholic Women's League Tasmania Inc. is an organisation dedicated to the promotion of the spiritual, social, cultural and intellectual formation of women. The League also advocates respect for human rights with a particular focus on women and children. Therefore, our members endorse the stated aim of this inquiry, namely to "ensure that any legislation related to surrogacy is of the highest standards and actually achieves its intended purpose – primarily to ensure the best interests of the child are the paramount issue in all considerations." (*Media Release, 23/7/11*)

We understand that the purpose of this inquiry is not to directly deal "with issues such as whether surrogacy should be regulated or the appropriateness or otherwise of access to surrogacy."(*ibid*) The aim of the Inquiry, however, would seem to require acknowledgment that surrogacy is a sub-optimal method of family formation which carries significant risks to all involved parties, especially children, and that this should guide legislative deliberations in this area. In this regard, we make the following brief background points:

- i. The desire to be a parent to a child is both natural and strong, and infertility can be a cause of great suffering. But we are mistaken if we think that adults have a 'right to a child.' Children are the subjects, not the objects of rights, and their interests must be placed before adult desires, however sincere these desires may be.
- ii. The setting which most fully acknowledges the dignity of the child, establishes a relationship of equality between the child and his or her parents, and respects a child's right to enjoy and benefit from an immediate and enduring link with his or her parents, is where a child is conceived, nurtured (including in the womb) and raised by his or her natural parents.
- iii. Admittedly, this does not definitely guarantee a child's wellbeing. Sadly, whether it is due to circumstances within or beyond their control, not all natural parents fulfill their responsibilities towards their children. At the same time, we all know of many

dedicated single parents and other adults who give tirelessly of themselves for the sake of children in their care. Almost all of them wish, however, that things could have been otherwise for these children. Indeed, it is for this reason that society should do everything possible to ensure that children are given the very best start in life. Surrogacy fails in this regard, as from the outset, it intentionally deprives children of the opportunity to be conceived, carried in the womb, and raised by a natural mother and a natural father.

- iv. Individual instances of subjectively successful surrogacy arrangements no doubt exist, and will probably be brought to the attention of this Committee. There is, however, very little in the way of *empirical studies* into the long-term effects that surrogacy has on the child. One review of the literature in this area (Matthew Tieu, "Oh Baby Baby: The Problem of Surrogacy," *Bioethics Research Notes* 9(1): March 2007) notes that studies conducted by Susan Golombok and her group<sup>1</sup> which are frequently cited by supporters of surrogacy as demonstrating that surrogacy does not have a negative impact on the social or emotional development of children, suffer from serious methodological problems. In particular, the studies are limited in their longitudinal extent, with analysis of the development of a child born from an assisted reproductive technology procedure and/or surrogacy arrangement only being studied up to the age of twelve. Also, the issue of disclosure versus non-disclosure is not controlled for in any of the studies. This is crucial because a child who does not know about their origins is unlikely to experience the full impact of the circumstances surrounding their conception, birth and upbringing. The author of this literature review concludes that:

...much more research is required to determine what are the psychological ramifications for all participants of a surrogacy arrangement, and in particular the child, whose welfare ought to be of primary concern. The burden of proof for the legitimacy of surrogacy is upon those who would permit it.

- v. In the absence of conclusive empirical evidence about the long term effects of surrogacy upon children, surrogacy legislation must be approached with caution. **If the parliament is intent upon legislating for surrogacy, it should do all that it can to ensure that the practice is tightly regulated and restricted. It should not be widely endorsed and facilitated as a social good.**

The Catholic Women's League of Tasmania has formed the view that the *Surrogacy Bill 2011* does not achieve an appropriate balance between protecting the best interests of all parties.

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<sup>1</sup> Golombok et al (2004) Families created through surrogacy arrangements: parent-child relationships in the 1st year of life. *Dev Psychol.* 40(3):400-1; Golombok et al (2005) Families created by gamete donation: follow-up at age 2. *Hum Reprod.* 20(1):286-93; Murray et al (2006) Egg donation parents and their children: follow-up at age 12 years. *Fertil Steril* 85(3):610-8; Golombok et al (2006) Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3. *Hum Reprod* 21(7):1918-24.

To this end, the Catholic Women's League of Tasmania submits this series of proposed amendments to the *Surrogacy Bill 2011* for the consideration of the Committee.

1. The use of surrogacy should be reserved for cases of medical need.
2. Same sex couples and single men and women not to be regarded as eligible.
3. To be eligible, couples should be either married or have been in a continuing relationship for at least three years.
4. A written agreement is required, which includes the birth mother's spouse, if any.
5. 50 years maximum age of intended parents.
6. 25 years minimum age of birth mother & intended parents.
7. Birth mother to have already gone through a previous pregnancy and delivered a living child.
8. Need for the provision of genetic material from at least one intended parent.
9. Mandatory counselling of all involved (commissioning couple, surrogate and her partner), by a suitably qualified professional who is independent of the IVF clinic.
10. There should be clarity about 'reasonable costs'.
11. Provision for a register of filial interests allowing for the maintenance of records relating to the genetic origin of the child. Information relating to his/her genetic origin to be accessible by the child when requested by the child.
12. An egg from the birth mother should not be used.
13. Citizens of Tasmania should not be able to circumvent the legal prohibition of commercial surrogacy by engaging in commercial surrogacy arrangements overseas.

**1. The use of surrogacy should be reserved for cases of medical need.**

“The welfare of the child is paramount.”

In view of surrogacy’s unique risks to the child and the birth mother and others involved, surrogacy cannot be justified for reasons of age, social factors or a desire to avoid carrying a pregnancy to term.

Surrogacy should be an option only in cases of medical need, such as where assisted reproductive technology (e.g. IVF) has failed or an expectant mother is not able to carry a pregnancy to term.

## 2. Same sex couples and single men and single women not to be regarded as eligible.

“The welfare of the child is paramount.”

Whilst it is the case that due to necessity some children are raised with care and love by only one parent, to deliberately bring a child into the world with no chance of being raised by a mother and a father is not in the best interests of the child and constitutes a violation of the child’s human rights.

From a public policy perspective, social data supports the widely held understanding that the best interests of the child, both in childhood and in later life, are served through the provision of both a mother and a father who have already made and demonstrated stability in a life time commitment to each other. Empirical evidence supports the position that children from married heterosexual two-parent households do better academically, financially, emotionally and behaviourally than children raised in other forms of relationships. One significant study reported in the journal *Children Australia* compared 174 children living in either heterosexual married, heterosexual cohabiting or homosexual co-habiting homes. The author concluded:

Overall, the study has shown that children of married couples are more likely to do well at school, in academic and social terms, than children of co-habiting heterosexual and homosexual couples...In this study, married couples seem to offer the best environment for a child’s social and educational development. (S. Sarantakos, “Children in three contexts: Family, Education and Social Development,” *Children Australia*, Vol 21, No 3 (1996), 23.)

Accordingly, the American College of Pediatricians states:

In summary, tradition and science agree that biological ties and dual gender parenting are protective for children. The family environment in which children are reared plays a critical role in forming a secure gender identity, positive emotional well-being, and optimal academic achievement. Decades of social science research documents that children develop optimally when reared by their two biological parents in a low conflict marriage. (American College of Pediatricians, March 2009, <http://www.acped.org/Homosexual-Parenting-Is-It-Time-For-Change.html>)

There are no doubt *individual* instances of single persons and same-sex couples who provide loving, stable and nurturing homes to children. There is, however, a paucity of valid research in the *general* community about children growing up in planned single-parent families and planned same-sex families and the social and emotional impact on these children during childhood and adulthood.

The limited research advocating childrearing by homosexual parents has severe methodological limitations. There is significant risk of harm inherent in exposing a child to the homosexual lifestyle. Given the current body of evidence, the American College of Pediatricians believes it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or reproductive manipulation. This position is rooted in the best available science. (*ibid*)<sup>2</sup>

Mothering and fathering are not the same and the best interest of the child require that they have the benefit of both. We find it extraordinary and deeply disturbing, that the proponents of this legislation fail to recognise the needs of children to the extent that they believe the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and the rest of his or her life, are well served in a situation where legal parentage is transferred to a single parent or same sex couple.

As the Bill is framed, children may have different genetic parents, birth parents and intended parents. It is from this complex background, with many unknowns regarding physical and mental makeup and health issues, family history and family culture, that the child and later the adult, will be attempting to understand and establish a sense of their identity. With so many unknowns and challenging consequences in their future, no parliament has the right to deny the child the possibility of being raised by a mother and a father.

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<sup>2</sup> See also: P. Belcastro et al, "A Review of Data Based Studies Addressing the Effects of Homosexual Parenting on Children's sexual and Social Functioning", *Journal of Divorce and Remarriage* 20, 105, 106 (1993); <sup>14</sup> Dr R. Lerner and Dr A. Nagai, *No Basis: What the studies Don't Tell us About Same-sex Parenting*, Washington Ethics and Public policy Centre, (2001): 6. Steven Nock. 2001. *Affidavit to the Ontario Superior Court of Justice regarding Hedy Halpern et al.* University of Virginia Sociology Department.

**3. Eligible couples must be able to demonstrate they are either married or have been in a continuing relationship for at least three years.**

“The welfare of the child is paramount.”

In view of the inherent risks and complications surrounding their conception and birth, legislation should ensure that the child of a surrogacy arrangement has the maximum opportunity for safety and stability as they grow to adulthood

Therefore we support the inclusion of the following after Clause 10

A. Meaning of 'eligible couple'

- (1) For an application of a parentage order the intended parents must be an eligible couple.
- (2) An 'eligible couple' means a man and a woman who at the time they enter the surrogacy arrangement:
  - (i) are married or can show they have been in a continuing relationship for at least three years
  - (ii) the medical reasons for being unable to conceive a child referred to in subsection (2) do not include a reason arising from a person's age.

**4. A written agreement is required which includes the birth mother's spouse, if any.**

“The welfare of the child is paramount.”

In a matter of surrogacy a myriad of unexpected circumstances can arise with the potential for profound consequences for the birth mother and her spouse (if any), the intended parents, and most importantly, the child.

In order to deal with these with justice for all concerned, there must be documentation of the surrogacy agreement so that any necessary dealings in the courts can be satisfactorily resolved.

The Committee accepts that there is much wisdom in requiring the prospective parties to an altruistic surrogacy agreement to enter into a formal pre-conception agreement detailing all of the anticipated roles, contributions, expectations and potential outcomes (both short-term and long-term) relating to the agreement. While such an agreement should remain legally unenforceable, it should be a document of which, once lodged with a Court, a Court can subsequently take due cognisance when making any subsequent orders relating to a child born as a result of an altruistic surrogacy agreement. (*Legislative Council Committee on Surrogacy Tas.*,2008.)

If the birth mother has a spouse, he should be party to the written agreement, since the two form one team. Therefore clause 14(2) should be amended by omitting paragraph (a) and substituting the following paragraph:

The surrogacy arrangement –

- (i) is in the form of an agreement in writing signed by the birth mother, the birth mother's spouse (if any) and the intended parents;
- (ii) was made after each person who was a relevant party at the time the relationship was entered into received independent legal advice about the arrangement and its implications and the implications of a parentage order; and
- (iii) was not a commercial surrogacy arrangement.



**5. 50 years maximum age of intended parents.**

“The welfare of the child is paramount.”

It has long been accepted that eligibility for adoption has an age minimum lower than fifty. This is based on the understanding that these parents will be responsible for the care of the child until he/she reaches adulthood.

Similar age restrictions should apply to the intended parents in a surrogacy arrangement to maximize the possibility that the child will receive ongoing care as he/she advances through childhood to at least 18 years of age.

## 6. 25 years minimum age of birth mother and intended parents.

“The welfare of the child is paramount.”

It is true that many women well under the age of 25 have children. However the decision to act as a surrogate mother involves many complex factors that do not usually occur in normal pregnancies. It is difficult for a potential surrogate mother to give properly informed consent due to complicated issues such as:

- emotional coercion (a serious possibility when the potential surrogate is a relative or close friend of the intending parents)
- psychological and physiological health risks that she may not be fully aware of,
- the stresses and risks of assisted reproduction technology
- the emotional and psychological impact of giving up a baby she has intimately nurtured for nine months
- possible diagnosis of a disability or perceived imperfection in the baby.

Both the birth mother *and* the intended parents need maturity to deal with issues such as these.

In law, minimum age varies for a range of matters such as the capacity to enter contracts, marry or vote. It is vital for the welfare of the child, the birth mother and the all involved that they have reached a significant degree of maturity before engaging in a surrogacy arrangement.

Given the seriousness of the matter, Tasmania should follow Queensland and Western Australian legislation which stipulate the age of 25 for both the intended parents and the birth mother. This is supported by research carried out by child and adolescent psychiatrist Jay Giedd, MD in his role as chief of brain imaging in the child psychiatry branch of the National Institute of Mental Health USA. In a submission to the *Inquiry into the Commonwealth Commissioner for Children and Young People Bill 2010*, Dr Giedd reported:

Research demonstrates the inability of young people under the age of 25 to fully understand the consequences of their actions. In a study conducted by the National Institutes of Health (NIH) in the U.S., it was found that the region of brain that inhibits risky behaviour and is important for controlling reason, organisation, planning and impulse control, does not fully form until age 25. This implies that young people aged 18 years to just under the age of 25 are still at risk of making mistakes that may have profound effects on their lives and consequently require special protection.

**7. Birth mother to have already gone through a previous pregnancy and delivered a living child.**

“The welfare of the child is paramount.”

The Catholic Women’s League agrees with the recommendation of the Legislative Council Committee Report on Surrogacy (2008) that: ‘all prospective surrogate women should have carried at least one previous child to term before being eligible to enter into a pre-conception altruistic surrogacy agreement.’

The birth mother’s metabolism provides the nutrients for the baby. It is she who feels the nausea often accompanying pregnancy. It is she who feels the first kicks and maybe later, kept awake by them, imagines what the baby is like. It is her back that aches as delivery approaches. It is she who experiences the birth, and the rush of joy when she sees the baby for the first time.

We believe it is not possible to give informed consent to the experience of pregnancy and birth unless one has already experienced a pregnancy and given birth to a living child.

As a consequence of this provision, however, counselling should ensure that the woman’s other children are of sufficient age to understand that they too are not in danger of being given away by their parents, as will occur with the baby that their mother is carrying.

## 8. Need for the provision of genetic material from at least one intended parent.

“The welfare of the child is paramount.”

The Catholic Women’s League is concerned that many surrogacy arrangements deny children the right to be raised by their biological parents (e.g. when gametes which do not belong to the commissioning couple are used).

This provision would help to protect the child in that he/she would benefit from having some biological connection with the commissioning parents. It could also encourage the commissioning parents to accept a child who may have special needs.

The American Academy of Pediatricians confirms the common sense view that ‘biology matters.’

Over thirty years of research confirms that children fare best when reared by their two biological parents in a loving low conflict marriage. Children navigate developmental stages more easily, are more solid in their gender identity, perform better academically, have fewer emotional disorders, and become better functioning adults when reared within their natural family.<sup>2,3,4,5,6,7,8</sup> This is, in part, because biology contributes to parent-child bonding.<sup>9</sup> (“Homosexual Parenting: Is It Time For Change? American College of Pediatricians, March 2009.

<http://www.acpeds.org/Homosexual-Parenting-Is-It-Time-For-Change.html>)

There is also an increasing body of biographical accounts of how discontinuity between a child’s biological and social parentage can result in the harmful experience of ‘genealogical bewilderment’.<sup>3</sup>

There are of course, instances such as adoption, where this ideal is unable to be met. However adoption is a very different to surrogacy in that the child is not intentionally conceived with a will to relinquish the child after birth. Adoptive parents do not contract to create a child. Instead, they rescue and welcome an existing child into their family in situations where biological parents feel that they are unable to care for a child, and to this extent, they surely act in the interests of both the existing child and society.

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<sup>3</sup> For further information on the experience of donor conceived children see <http://www.tangledwebs.org.au/>

**9. Mandatory counselling of all involved (commissioning couple, surrogate and her partner), by a suitably qualified professional who is independent of the IVF clinic.**

“The welfare of the child is paramount.”

The serious nature and inherent risks of surrogacy, particularly to the child, require that any counselling process take place in an environment which best allows for wide ranging and effective decision making and informed consent. As there would be a serious conflict of interests if counselling were provided through an accredited assisted reproductive technology provide, any mandatory counselling should be clearly separated from for-profit clinics.

We recommend that the final paragraph of Clause 14 (2) (d) be amended to:

‘counselling from an accredited counsellor who is independent of an assisted reproductive technology clinic, about the arrangement and its social and psychological implications.’

## 10. There should be clarity about 'reasonable costs.'

"The welfare of the child is paramount."

The Bill is too vague regarding the scope of costs to be met by the intended parents and this opens the way to exploitation of the birth mother or the intended parents and costly litigation.

Clause 7 should be amended by leaving out all words after 'are' and inserting:

- (1) The birth mother's reasonable costs associated with any of the following matters:
  - (a) becoming or trying to become pregnant;
  - (b) a pregnancy or a birth; or
  - (c) entering into and giving effect to a surrogacy arrangement.
  
- (2) The reasonable costs associated with becoming or trying to become pregnant, including any reasonable medical, travel or accommodation costs associated with becoming or trying to become pregnant.
  
- (3) The reasonable costs associated with a pregnancy or birth including the following:
  - (a) any reasonable medical costs associated with the pregnancy or birth (both prenatal and post-natal);
  - (b) any reasonable travel and accommodation costs associated with the pregnancy or birth;
  - (c) any premium paid for health, disability or life insurance that would not have been obtained by the birth mother had the surrogacy arrangement not been entered into;
  - (d) any reasonable costs, including reasonable medical costs, incurred in respect of a child (being the child of the surrogacy arrangement);
  - (e) the cost of reimbursing the birth mother for a loss of earning as a result of the unpaid leave taken by her, but only for the following periods:
    - (i) a period of not more than two months during which the birth happened or was expected to happen; or
    - (ii) any other period during the pregnancy when the birth mother was not able to work on medical ground related to the pregnancy or birth.
  
- (4) The reasonable costs associated with entering into and giving effect to a surrogacy arrangement include the following:
  - (a) the reasonable costs associated with the birth mother and the birth mother's partner, if any, receiving counselling in relation to the surrogacy arrangement (whether before or after entering into the arrangement);

- (b) the reasonable costs associated with the birth mother and the birth mother's partner, if any, receiving legal advice in relation to the surrogacy arrangement or a parentage order relating to the surrogacy arrangement;
- (c) the reasonable costs associated with the birth mother and the birth mother's partner, if any, being a partner to the proceedings in relation to a parentage order, including reasonable travel and accommodation costs.

(5) A cost is reasonable only if:

- (a) the cost is actually incurred; and
- (b) the amount of the cost can be verified by receipts or other documentation.

(6) In this section -

- (a) legal costs include fees for obtaining legal advice and legal representation, court fees and registry fees associated with the registration of a birth and transfer of parentage; and
- (b) medical costs means a medical cost to the extent that it is not recoverable arrangement;
- (c) the reasonable costs associated with the birth mother and the birth mother's partner, if any, being a partner to the proceedings in relation to a parentage order, including reasonable travel and accommodation.

Other situations regarding costs which may need to be considered include:

- i. When a birth mother keeps the baby and costs have already been covered by the commissioning parents.
- ii. Counselling costs when the proposed birth mother withdraws following counselling.
- iii. Cases of stillbirth or miscarriage.
- iv. Counselling for the birth mother as a result of distress following relinquishment of the baby.

**11. Provision for a register of filial interests allowing for the maintenance of records relating to the genetic origin of the child**

*and*

**Information relating to his/her genetic origin to be made accessible to the child when requested by the child.**

“The welfare of the child is paramount.”

A child born through a surrogacy arrangement has a right to information relating to the fundamental biological reality of his or her genetic parentage, genealogy and birth. Adequate records should be kept and preserved so that children can, in due course, gain full access to all information surrounding their conception and birth.

We therefore endorse the recommendation of the Select Committee of the Legislative Council on Surrogacy, 2008, that there be established a complementary "register of filial Interests" to allow for the maintenance of records, relating to appropriate parental and parental-like interests, for the benefit of children with expanded filial circumstances.



**12. An egg from the birth mother should not be used.**

“The welfare of the child is paramount.”

The connection between a mother and her child is profound and lasting. If a woman acts as a surrogate mother to her own biologically related child, parting with the child is more likely to lead to distress and upheaval both for herself, and in due course, the child. She may always regard that child as hers, which he or she is.

To protect all parties of a surrogate arrangement, especially children and birth mothers, there must be genetic separation between the surrogate mother and the child she is carrying.

**13. Citizens of Tasmania should not be able to circumvent the legal prohibition of commercial surrogacy by engaging in commercial surrogacy arrangements overseas.**

“The welfare of the child is paramount.”

Commercial surrogacy is always and everywhere unethical because it commodifies children and surrogate mothers. It also carries a particularly high risk that socially and economically vulnerable women may feel compelled to ‘rent’ their wombs to carry a child for another person or couple. Many overseas commercial surrogacy arrangements lack even basic documentation, regulation and appeal mechanisms to protect the interests of the children and prevent exploitation of persons for commercial gain.

If we do not allow commercial surrogacy in Tasmania, the same law should apply to Tasmanian citizens overseas. It would be unethical and irresponsible to legislate against commercial surrogacy in Tasmania but to be silent on the potential exploitation by our own citizens of vulnerable women and children born as a result of commercial surrogacy overseas.

This amendment strengthens the legislative framework of the bill by making sure that the offence of commercial surrogacy has extraterritorial application for citizens in Tasmania. The point of the amendment is to create a very clear deterrent and prevent further growth in the overseas commercial surrogacy industry. This is consistent with provisions already in place in Queensland, New South Wales and the Australian Capital Territory.

This amendment would not disadvantage children whose parents proceed with commercial surrogacy. There is no provision in the bill, or elsewhere, that would preclude these children from being adopted or stop family law orders being made to provide legal recognition. Applicant parents will, however, have to admit that they did the wrong thing under Tasmanian law and accept the consequences.