

Dear Secretariat

I am pleased to make the following submission to the Commonwealth Parliamentary Inquiry into Surrogacy. I do so from the perspective of someone who has worked for many years both as a psycho-social professional and as a researcher, covering work with people at all stages of the fertility process (including where surrogacy is involved), donor-conceived individuals and their families, gamete donors, and adoption. I have also held a number of national positions and engaged in international collaborations:

‘Surrogacy is fast becoming the most ethically and socially challenging aspect of assisted reproduction. Scarcely a week goes by without some new media story about either its wonders or its horrors, especially where cross-border arrangements are involved. For those of us working for children’s rights over many years, there are uncomfortable echoes of past (and some present) practices in inter-country adoption, even taking into account the evident differences between adoption and surrogacy.

A human rights approach to considering surrogacy offers, in my view, an appropriate framework providing that the rights of the children to be conceived or otherwise affected are considered paramount. I start with considering the human rights issues to be considered in relation to adults. These include the potential for exploitation of all parties; surrogates’ capacity to exercise informed consent especially when there is a language barrier and/or where financial inducement is a driver; and commercial aspects of surrogacy including where compensation paid to the surrogate amounts to commercialisation by any other name. It has been argued by some that commercialisation or compensation act as a deterrent to the commodification of women’s bodies (and hence to exploitation); that surrogates should receive financial reward for their ‘work’. Further it has been argued that surrogacy ‘work’ is preferable to work undertaken in sweatshops and that it offers an attractive route out of poverty. This theme is familiar to followers of similar debates in the fields of pornography and sex work. It is incompatible with a human rights approach in my view in that women induced to become surrogates for financial reasons, especially acute poverty, are not being afforded dignity or protection. Poverty needs addressing structurally not through individualised ‘solutions’. In contrast, an altruistic model of surrogacy has the merit of affording dignity to the parties involved and, most importantly, to the children who are born through this route or otherwise affected. Conceiving and bringing to term a child is not treated as paid employment in any other sphere and I can think of no compelling argument to treat surrogacy differently. If surrogates would not come forward in sufficient numbers to meet demand without payment or compensation then so be it. Neither arguments based on ‘supply and demand’ nor those based on the commissioning parents’ ‘right to parent’ should form the basis of a principled approach to surrogacy.

Taking this further, neither is surrogacy compatible with human dignity and human rights when the transaction involves a broker or provider who is a profiteer (which also opens up

the risk of the transactions amounting to child selling); when the surrogate has little say over what happens during the pregnancy, birth and postnatally; and when the commissioning parents neither get to know her nor show much interest in her, including after the birth. The latter runs the danger of reducing the surrogate to a function of being a carrying vessel; it also raises the risk that the surrogate-born child is denied the right of knowing that she was well cared for and about as well as knowing more about her as a person.

There is an important role for the state in restraining the free market forces that can otherwise flourish if surrogacy is treated as a 'baby-making' industry rather than a family formation process that carries lifelong implications for which all involved carry some responsibility. After all, unlike adoption there is no existing child here that needs a family so there should be no compromise on the need to ensure that its surrounding structure pays full attention to human rights with paramountcy given to those of the children affected within a lifespan approach. I am aware of the arguments that say that it will not be possible/enforceable to restrain commercial/compensation forces, or people intent on becoming parents or those willing to provide such services and that therefore criminal sanctions should not be introduced. However the surrogacy 'business' has not by itself developed adequate safeguards. Nor has it evolved sufficiently good practices in record keeping and so on to suggest that they will evolve in the future without state or multi-state intervention. The state cannot abdicate its responsibilities simply because it is difficult to do so effectively.

Attention to children's rights can too often be missing or marginalised in debates around surrogacy; debates which are more likely to be characterised by considering the 'right to parent'. This is not to say that we should in the process marginalise the understandable *desires* of individuals and couples to achieve parenthood and family life. Attention to the procreative rights of commissioning parents comes from both a liberal tradition and also an understandable concern with the plight of those facing involuntary childlessness. However subsumed within those concerns can be a relatively uncontested presumption that commissioning parents are likely to make 'good' parents regardless of the route taken to family life and the unique parenting tasks that accompany surrogacy. There is almost no discussion of whether potential risks to the children might warrant any assessment and preparation of the intended parents and, if so, how, when and by whom. Worryingly, critical comment on the paucity of research into outcomes for surrogate-born children and the children of surrogates is also lacking, even though existing studies are small scale, self selecting and often covering domestic arrangements only; rather they are sometimes cited as evidence that outcomes for children's development and well-being are good.

Existing evidence relating to donor conception outside surrogacy arrangements suggests that the donor can carry meaning for those thus conceived; it has been argued that it is their 'right' to know of and about them. This is a core 'children's rights' matter but frequently absent in the surrogacy arena. Recent years have seen an increase in the use of gestational surrogacy (either using the commissioning mother's egg or a donor egg) relative to genetic surrogacy (using the surrogate's egg) including in cross-border arrangements with developing countries. This is sometimes presented as enabling prospective parents to have a child with a close ethnic match to themselves, sometimes as lowering the risk of the

surrogate failing to relinquish the infant (though there is no robust evidence of which I am aware to support the latter). Neither the potential additional complication for the child of later having to understand and make sense of the use of (and possibly have contact with) an egg donor as well as a surrogate, nor the children's need to understand the cultural context in which they were carried *in utero* is given due weight. Further, I would argue that a children's rights' approach (and an informed consent approach to the adults involved) would open up discussion of the part played by the fact that gestational surrogacy always requires the use of IVF and hence may be more attractive to commercial service providers.

Finally, some commentators have argued for legal parentage to be granted to the commissioning parents at birth but again without full consideration for the implications for children's rights. This should include, for example, the adverse impact on children's right to learn the identity of their genetic parents and/or the woman who gave birth to them (if the latter is not their genetic parent) if the birth certificate only identifies their legal parents at birth, and if no records of the circumstances of their conception are kept to which they have statutory right of access. The problems for children left stateless when their commissioning parents' home country does not recognise cross-border surrogacy arrangements are more clearly delineated. Yet it is essential to consider possible adverse impacts on children's rights of any proposed solutions to these problems. We have to decide what should be given priority in basic acceptable standards before surrogacy should be allowed.

Much of the public space in which surrogacy is discussed currently is occupied by practising or academic lawyers or clinicians, with child welfare practitioners or academics remain frustratingly absent as discussed elsewhere (Fronek and Crawshaw 2015). Such dominance may explain the absence, by and large, of deeper attention to children's rights and to the lifelong aspects of surrogacy. Unlike in inter-country adoption or child trafficking, there is little social work involvement in surrogacy arrangements and, even then, involvement may begin only after the child is born, i.e. far too late. This too may explain why there is not a wider and deeper consideration of children's rights in this field.

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Fronek, P. and Crawshaw, M. (2015) The 'new family' as an emerging norm: A commentary on the position of social work in assisted reproduction. *British Journal of Social Work*, 45(2): 737-746.