Investigation into Altruistic Surrogacy
Lindy Willmott
June 2008

Question 1
Yes. Queensland is out of step with all other Australian jurisdictions (and common law jurisdictions throughout the world). Altruistic surrogacy should be decriminalised for the reasons set out in the article, 'Surrogacy in Queensland: Should Altruism Be a Crime?' which has previously been forwarded to the Committee.

Question 2
Yes, the Queensland Government does have a role to play in regulating surrogacy arrangements in Queensland. If a decision is made to allow altruistic surrogacies, the practice needs to be regulated to ensure as positive outcomes as possible. We know there is potential for problems with surrogacy arrangements. Therefore, a government needs to turn its mind to what processes can be put in place to minimise the likelihood of problems. For example:

- Should there be limits on who acts as a surrogate (should she have had a child first?)
- Should there be a requirement for all to undergo counselling?
- Should a genetic link with surrogate be prohibited?

In addition, there are also some public policy issues that a government needs to address (which will also be of significance to commissioning parents). For example:

- Child's knowledge of genetic connection and access to relevant information.

If surrogacy is decriminalised with no changes in regulatory arrangements, some undesirable consequences may flow. For example:

- Clinics would only be subject to professional guidelines such as NHMRC guidelines which do not provide a great deal of guidance on ethical issues;
- Opens up the door for issues of discrimination in terms of who is entitled to treatment.

Question 4
What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement?

Commissioning parents:

- Infertility (either medical or social) or health risks associated with bearing a child, or concern with passing on a genetic condition with serious health impacts;
- At least 18 years of age;
- Exclusion of parties convicted of sexual or violent offences or subject to a child protection order, without specific assessment and approval;
- There should **not** be a requirement for genetic connection of parents to the child. This would discriminate against those parents who are unable to contribute gametes. I am unaware of research that suggests a link between outcomes of a child and genetic connection to parents or guardians.

Surrogate:

- At least 18 years old;
- No genetic connection;
- Should **not** be a requirement that the surrogate has already had a child. (Not all women do or want to have and raise children.)

Question 5
No, the criteria should not be the same. The adoption criteria in Queensland are out of date. It would be unprincipled to model contemporary legislation on outmoded legislation based on outdated thinking.

Question 6
As above, should not be a requirement of genetic connection to the commissioning parents, but a surrogate should be prohibited from providing a gametes. (The case law indicates that there is less likely to be separation issues if there is not a genetic connection between the surrogate and the child.)

Questions 9…

Regulation generally

In my view, surrogacy regulation should be multi-layered.

- Legislation should set out some basic principles. For example:
  - Criteria for assessing whether access to surrogacy should be permitted in terms of eligibility of commissioning parents which should only be medical or social infertility.
  - For parties that satisfy this criteria, whether surrogacy should be permitted in any situation depends on the single criteria of best interests of the child;
  - Issues that may be relevant in assessing best interests may include a range of factors (that should be set out in legislation, but none of which is determinative of best interests). For example:
    - Age of commissioning parents;
    - Relationship with surrogate;
    - Any criminal convictions etc (see earlier comment);
    - Other children of commissioning parents or surrogate etc
  - Issues that are **not** relevant in assessing best interests. For example:
    - Marital status of commissioning parent or parents;
    - Sexual orientation of commissioning parent or parents.
  - The requirement that all parties are counselled before embarking on a surrogacy arrangement.
- Against the backdrop of legislative guidance, the decision about whether the surrogacy should be allowed should be made by the individual clinics (also

guided by professional etc guidelines), in combination with an ethics committee to which the clinic is affiliated.

Transfer of legal parentage

A system such as is in place in the ACT or the UK may be the appropriate framework. This may need to be trialled. The role of such a court (or tribunal) hearing is to ensure that the best interests of the child is being safeguarded.

If the court (or tribunal) approves the transfer of legal parentage, a long form birth certificate should be produced setting out the details of the child's conception including the names of commissioning parents and surrogate parent (or possibly parents), as well as information about any donors involved in conception.

Given the expertise of the Family Court in matters involving parents, children and family arrangements, it would be a good forum for determining surrogacy issues. Of course, the constitutional issues involved with conferral of such power by a State government would cause difficulty.

Question 16

A child should be able to access details of his or her genetic origins.