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**Submission by the Australian Association of Social Workers
Queensland Branch**

**Regarding the investigation into possible
decriminalisation and regulation of altruistic
surrogacy in Queensland**

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CONTENTS

INTRODUCTION	4
SHOULD ALTRUISTIC SURROGACY BE DECRIMINALISED?	5
APPROACHES TO LEGAL AND REGULATORY REFORM	5
WHAT CRITERIA SHOULD SURROGATES AND COMMISSIONING PARENTS HAVE TO MEET?	7
WHAT ROLE SHOULD A GENETIC RELATIONSHIP PLAY?	8
WHAT LEGAL RIGHTS AND RESPONSIBILITIES SHOULD BE IMPOSED?	12
WHAT RIGHTS SHOULD A CHILD HAVE TO ACCESS INFORMATION?	16
OTHER MATTERS	17
REFERENCES	18

INTRODUCTION

The Australian Association of Social Workers (AASW) is the key professional body representing more than 6000 social workers throughout Australia. In addition to advocating on behalf of our members and the profession, the AASW has a long history of advocating for and on behalf of vulnerable groups in society.

The social work profession is committed to social justice, self-determination, human rights and the pursuit and maintenance of human well being. In agreement with the International Federation of Social Workers (IFSW), the AASW supports the view that 'even where social workers are not directly engaged in the provision of services, their common role as the conscience of the community mandates their engagement with these issues' (IFSW 2008, p.8).

The AASW commends the Queensland Government for considering the issues regarding altruistic surrogacy in Queensland and believes that it is timely to investigate the limitations of the current legislation, given the increased demand for reproductive medical techniques across Australia and the decrease in children available for adoption (Victorian Law Reform Commission 2007; Queensland Department of Child Safety 2008). In accordance with the mandate of our profession, the AASW engages with this issue to ensure that the rights of all individuals involved in surrogacy are adequately protected, with particular emphasis on the rights of any children born of an altruistic surrogacy arrangement. In agreement with the United Nations Convention on the Rights of the Child, which requires that States act in the best interests of the child, the AASW strongly recommends that the Queensland Government ensure that both the legislation and the intent behind the legislation meets the requirements of the Convention (United Nations 1989).

Given the highly personal nature of the issue, the AASW recognises the need to proceed with a degree of caution in considering the many complex issues that arise

as a result of investigating altruistic surrogacy. This complexity is accentuated by the number of possible parties to a surrogacy arrangement, as well as the ethical and moral issues that such arrangements raise for those involved and for society as a whole. Ultimately, the AASW takes the position that the welfare and best interests of children are of the highest priority.

SHOULD ALTRUISTIC SURROGACY BE DECRIMINALISED?

1. Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the *Surrogate Parenthood Act 1988* (Qld)?

The AASW supports the removal of legal restrictions and criminal penalties against altruistic surrogacy from the *Surrogate Parenthood Act 1988* (Qld), believing that a path of regulation and education would better serve the interests of all parties involved in altruistic surrogacy, and most especially those of any children born as a result of this practice. The AASW considers that matters involving reproductive choices and complex relationship dynamics are better managed outside of the criminal system.

In accordance with all surrogacy legislation in other States and Territories of Australia, the AASW does not condone commercial surrogacy arrangements.

APPROACHES TO LEGAL AND REGULATORY REFORM

2. Should the Queensland Government play a role in regulating altruistic surrogacy arrangements in Queensland?

In support of the key ethical principle of reproductive autonomy, the AASW recommends that the role of Government in regulating altruistic surrogacy arrangements in Queensland hold as paramount the rights of any children born as a result of this practice. In understanding that overly prescriptive Government regulation may impede processes, encourage individuals to operate outside of regulations and in doing so, jeopardise the

interests of any child born from an altruistic surrogacy arrangement, the AASW supports the view that legislation be primarily centred upon principles of fairness, equity and non-exploitation of all parties.

In ensuring that the best interests of the child are protected, intrusion into reproductive privacy is limited, protection of the health and well being of all parties is enhanced and potential conflicts between parties is minimised, the AASW recommends the Queensland Government invest considerable resources into ensuring that all parties have equitable access to an educative and supportive counselling process. Engaging in counselling processes would afford a mechanism to address potential ethical issues, including informed consent, psychological effects on all parties, issues arising from the birth of a child with a disability, how the child should be informed about the circumstances of their conception and birth, record keeping and access for the future child to their genetic history. In an effort to ensure that all parties are well supported, the AASW endorses a comprehensive counselling model, from early intervention programs through to post-surrogacy counselling. Research on the impact of counselling programs in the areas of adoption and assisted reproductive technologies supports the view that a comprehensive counselling program provides positive benefits to parties involved and enhances positive outcomes for any children born of these methods (van den Akker 2006; Donegan, 1994; Smith et al. 2000).

3. What other issues should be addressed by the Government?

In accordance with the social work profession's Code of Ethics (1999), which requires that individuals are supported to make informed decisions with full awareness of their rights and responsibilities, the AASW recommends that the Government endorse a process that ensures all adults involved in a surrogacy arrangement are encouraged to access an independent counselling process which will enhance their ability to give full informed consent.

WHAT CRITERIA SHOULD SURROGATES AND COMMISSIONING PARENTS HAVE TO MEET?

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

The AASW supports the view that any criteria applied to commissioning parents and/or surrogates be informed by the *Anti-Discrimination Act 1991 (Qld)*, ensuring that no individual is discriminated against due to their sex, marital status, parental status, age, race, religion or lawful sexual activity (Queensland Government 1991). The AASW further draws on its professional Code of Ethics, which requires that the profession has an obligation to pursue social justice, ensuring that individuals receive 'equal treatment and protection under the law' (AASW 1999, p. 8). Consistent with the AASW's view that the duty to any child born of such an agreement is of paramount concern, we believe that criteria should ensure that the Anti-Discrimination Act is upheld, *unless the interests of the child are jeopardised*.

The AASW supports the proposed criteria suggested by the Investigation into Altruistic Surrogacy Committee Issue paper, including a demonstration of informed consent through specialist and independent legal advice, the preference for surrogacy arrangements to be agreed pre-conception and the exclusion of parties convicted of sexual or violent offences or subject to a child protection order. In upholding the belief that individuals should be afforded choice, the AASW does not support the addition of criteria that require that parties are resident in the jurisdiction.

Due to the complex nature of altruistic surrogacy, consequences and dilemmas that may arise, as a result of not being overly prescriptive in applying criteria, are potentially serious. For example, in ensuring that individuals are not discriminated against on the basis of their age, there is potential that parents may choose to enter into a surrogacy agreement in the later stage of their lives, and in doing so, potentially have reduced long

term parenting availability. In managing the complex issues that may arise, the AASW suggests that potential consequences be addressed on an individual basis with the rights of any child born from a surrogacy agreement held as paramount. The AASW identifies a preference for a comprehensive early intervention counselling process to assist with minimising potential conflicts and dilemmas.

5. Should criteria for commissioning parents be similar to that for adoptive parents?

The AASW does not recommend the use of current criteria used for adoptive parents where this criteria contravenes the Anti-Discrimination Act, an example of which is the requirement that adoptive parents be heterosexual, married and deemed infertile (Department of Child Safety 2004-2008). These criteria clearly discriminate against same sex couples entering into an agreement and do not reflect the realities of the changing nature of Australian families (Human Rights and Equal Opportunity Commission 2007; Victorian Law Reform Commission 2007). The AASW supports the exclusion of any criteria which requires individuals to be heterosexual, married and deemed infertile in both the altruistic surrogacy and adoption legislation and in doing so seeks to ensure that individuals are not discriminated against on the basis of their sexuality.

WHAT ROLE SHOULD A GENETIC RELATIONSHIP PLAY?

6. What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in an altruistic surrogacy arrangement?

Given the number of genetic relationships that are possible within surrogacy arrangements and the resulting complexity of family relations (Figure 1), the AASW suggests that decisions concerning the role of genetic relationships between the child and commissioning parent/s and/or surrogate be primarily drawn from the evidence base. Although there is not a large literature on the impacts of the different combinations of relationships in surrogacy, research conducted with both children born of a surrogacy arrangement, commissioning parent/s and surrogates report findings that the experience

was seen to be positive. Regardless of the differences in gestational or genetic surrogacy arrangements, no significant differences were found in psychological functioning between groups (van den Akker 2003). This early research suggests that the role of genetic relationships may not overly impact on the health and well being of the parties involved. As there is at present limited research on the impacts of surrogacy arrangements on children past their early childhood years, it is not possible to determine the long term effects of the role of genetic relationships in surrogacy arrangements. The AASW therefore supports the view that more research is needed to examine this issue and that until further detailed findings are available, individuals should be highly resourced prior to entering into any agreement, through access to legal advice and a supportive counselling process, so that they may make fully informed decisions as to the model of surrogacy they choose.

In establishing how genetic relationships should impact on the legal parentage of a child, the AASW believes that the current definition of 'parent', based solely on a biological understanding, may not provide children born of surrogacy arrangements with a suitable level of legal clarity. A commitment to examining the current definitions of legal parentage with a view to considering expanding the definition of parenthood to incorporate both a social and biological understanding, may provide a method of ensuring that children born of a surrogacy arrangement are afforded legal certainty as to their parentage. The AASW supports the view expressed by Fuscaldo (2003, p. 66) who states that when looking at empirical evidence 'it is the quality of nurturing provided rather than the biological or ethnic relationship or gender balance in the rearing family that is important for children's welfare'.

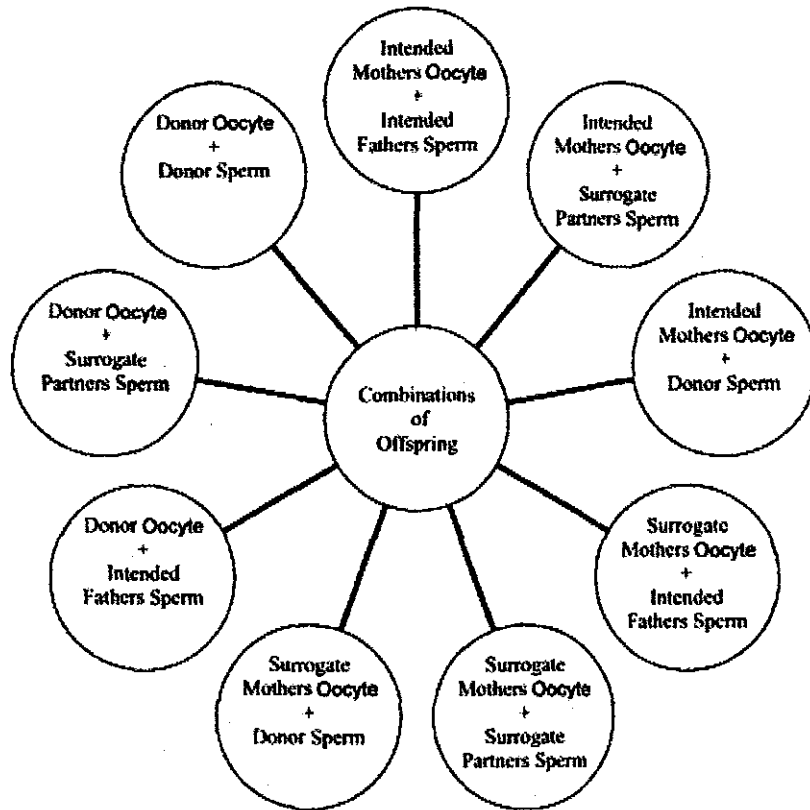


Figure 1. The nine (theoretically) possible combinations of offspring resulting from surrogate arrangements, where the gestation in all instances is with the surrogate mother.

(van den Akker 2006, p. 2)

7. Should at least one of the commissioning parents have a genetic relationship with the child?

The AASW Code of Ethics (1999) lists self-determination as a principle of practice and as such supports the rights of individuals to determine their own reproductive choices, free from undue legislative intrusion. The AASW therefore endorses the view that legislation should not prescribe any conditions on genetic relationships within a surrogacy arrangement.

It is important to consider that any legislation that requires commissioning parents to have a genetic relationship with the child would disadvantage individuals who were unable to contribute their own gametes. The diagram (Figure 1) is again useful in clarifying the potential combinations of surrogacy arrangements, which include use of donors, as well as the surrogate and surrogate's partner. Again, the potential complexity of these relationships indicates the need for serious consideration of the implications the further the child moves from a genetic connection with the commissioning parents. For this reason, the AASW supports the Victorian Law Review Commission report, which informed that although a genetic connection between the child and commissioning parents is preferred, individuals should not be excluded if they are unable to contribute their gametes. In supporting this position, the AASW is attempting to promote a non-intrusive approach which minimalises the State's involvement in personal reproductive choices.

8. Should the surrogate be able to use her gametes or should she have no genetic relationship to the child?

The AASW does not support legislating against the inclusion of surrogates who wish to contribute their gametes, on the grounds that individuals should have the right to make reproductive decisions free from overly prescriptive external interference. In preference, the AASW supports a transparent educational process that resources individuals to make their own informed decisions.

As current research suggests that outcomes for all parties are more positive when the surrogate is not the genetic parent of the child, the AASW promotes the view that individuals considering a surrogacy arrangement are cognisant of these findings and are supported in making a decision with full knowledge of any increased psychological risks that may result from their choices (van den Akker 2006).

WHAT LEGAL RIGHTS AND RESPONSIBILITIES SHOULD BE IMPOSED?

9. What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate?

In determining appropriate legal rights and responsibilities of commissioning parent/s and /or surrogates, the AASW restates that underlying legalities should be the principles of protecting the best interests of the child, optimising the wellbeing of all parties and minimising intrusion into individual's rights to reproductive autonomy. In respect of such principles, the AASW does not endorse prescriptive criteria in relation to fertility status, levels of genetic contribution or residency requirements. In support of the Victorian Law Review Commission (2007), the AASW recommends that all parties involved in surrogacy agreements be at least 18 years of age, demonstrate informed consent and are encouraged to establish a pre-conception agreement. Pre-conception agreements could provide a suitable means of ensuring that all adult parties access legal advice and consider issues such as general expectations of all parties, reasonable expenses to cover the medical costs to the surrogate, and processes to follow should there be a breach of any of the conditions of the agreement.

The current process to transfer legal parentage in New South Wales, whereby a family court judge will do so on condition of receipt of counselling, would further provide a mechanism to engage all adult parties in a process of educative and supportive counselling. Such a process would seek to facilitate informed decision making and provide opportunities to enhance the wellbeing of all parties.

In agreement with the Victorian Law Reform Commission (2007), the AASW recognises that there may be a need to consider allowing the legal enforcement of pre-conception agreements in relation to specific issues, such as payment of 'reasonable' expenses to the surrogate.

Drawing on the ethical responsibilities in the social work profession's Code of Ethics to uphold an individual's right to self-determination, the AASW does not seek to limit access to advertising and brokerage services, but highlights the benefits of utilising a brokerage service as a means of affording a central access point which may further disseminate information on best practice to all parties involved (AASW 1999).

10. Should the definition of altruistic surrogacy only include pre-conception agreements in Queensland?

Reducing the definition of altruistic surrogacy to include only pre-conception agreements is not recommended by the AASW as such a narrow definition would not afford protection for those who chose to proceed with a surrogacy arrangement without a pre-conception agreement. There are many situations where people negotiate their own agreements and never utilise the services of fertility clinics. The AASW supports the view that legislation on altruistic surrogacy should attempt to protect the rights of all children born of such an arrangement, regardless of the process that the adults involved chose to follow in establishing the surrogacy.

The AASW strongly advocates for encouraging all individuals considering an altruistic surrogacy arrangement to develop a pre-conception agreement, as it is clear that such planning would promote the rights of any child born of such agreement and minimise potential conflicts. The social work profession's Code of Ethics requires supporting individuals to make informed decisions with full awareness of their rights and responsibilities (AASW 1999). A pre-conception agreement would provide such a mechanism, enhancing the ability for all parties to make decisions based on informed consent.

11. If infertility and/or health risk to the mother or child is a criterion for surrogacy, how should these criteria be defined?

The AASW does not support the addition of criteria for surrogacy based on infertility and/or health risk to the mother as such criteria would discriminate against individuals who wish to proceed with a surrogacy arrangement on other grounds. It is felt that an overly prescriptive approach would encourage individuals who did not meet the criteria to proceed with a surrogacy outside of the law and as such, the protections afforded to all parties may be compromised.

12. How well does the transfer of legal parentage in a surrogacy arrangement fit with contemporary approaches in family law and adoption?

Although the current practice used to transfer legal parentage in family law and adoption provides a useful model to inform surrogacy legislation, the complex nature of family arrangements that exist within surrogacy may not be able to comprehensively serve the needs of surrogacy in relation to transfer of legal parentage. Further, commissioning parents inform that they would prefer a system that does not require them to adopt their own genetic child, as is currently the case. In recognition of this, the AASW supports the South Australian Committee Report's recommendations that a process be developed to consider removing this requirement (Social Development Committee 2007). In supporting investigation around this issue, the AASW draws from its professional Code of Ethics, which requires that priority of clients' interests be considered (AASW 1999).

13. How important is it for there to be a mechanism for the transfer of legal parentage that is specific to surrogacy arrangements? What would this be?

Due to significant differences between adoption and surrogacy, the AASW supports the development of mechanisms for the transfer of legal parentage that are specific to surrogacy arrangements and take into full consideration the different combinations of genetic relationships possible in a surrogacy arrangement. The current practice in New

South Wales, which requires a Family Court judge to transfer legal parentage on receipt of counselling and legal advice, is thought to be a suitable model to utilise in Queensland.

In developing a suitable surrogacy arrangement for the transfer of legal parentage, the AASW recommends that issues of privacy and confidentiality for all parties be considered. Holding as central the best interests of the child born of a surrogacy agreement, the AASW believes that the development of specific surrogacy legal practices will ensure that there is clarity around who is legally responsible for the child.

14. What are the consequences for children born of a surrogacy arrangement in Queensland of maintaining the status quo?

The AASW gives primacy to the welfare of any children born of a surrogacy arrangement and supports the view that the current illegality of surrogacy may result in negative consequences to the wellbeing of such children. The current law provides no specific mechanisms to resource commissioning parent/s and surrogates to make informed decisions, have access to a comprehensive counselling process or develop legal agreements that would provide certainty regarding legal parentage. Due to these omissions, any children born of a surrogacy arrangement may face uncertainties with regards to their legal status and ambiguity in relation to their biological, cultural and genetic heritage. The lessons learned from adoption and donor conception inform that such lack of access to key identity markers can have devastating consequences on the quality of life for the individual involved (Landau 1998; Hartman 1993; NSW Law Reform Commission 1992).

15. Should the surrogate's rights to be automatically recorded as the child's parent on the birth certificate and to approve legal transfer after birth remain if she has no genetic connection to the child?

The AASW recommends that in considering this issue, the needs of any child born of such an arrangement to have access to information on their parentage, be the determining

factor in decision making. For this reason, the AASW supports the development of a birth certificate that allows all parties details to be recorded, thus promoting an open and transparent process. The AASW suggests that the rights of all parties to privacy and confidentiality be considered when drafting such a document.

WHAT RIGHTS SHOULD A CHILD HAVE TO ACCESS INFORMATION?

16. What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his or her genetic parentage? Who should hold this information?

The United Nations Convention on the Rights of the Child informs that children have a right to their identity and that States shall provide assistance and protection in assisting individuals to re-establish their identities (United Nations 1989). In agreement with the International Federation of Social Workers (2008), the AASW endorses the rights of all individuals to full information regarding their genetic heritage and recognises that such access contributes to the positive welfare of the individual involved. All adults involved in a surrogacy arrangement should be fully informed of the negative effects of concealing information on the genetic heritage from the child and supported in sensitively informing the child at an appropriate age. Donor Conception and Adoption provide a useful model to establish best practice in supporting adults with regards to sharing information on the nature of their birth with children (Donor Conception Network 2006).

Central to determining which body should hold information on the genetic parentage of individuals conceived of a surrogacy arrangement is the consideration of access to for all parties regardless of the method they chose to pursue in establishing the surrogacy. For this reason, the current model used in Donor Conception, whereby Fertility Clinics store such information, is not seen as best practice in surrogacy as it does not cover surrogacy arrangements that are established outside of such clinics. The Family Court or other appropriate Agency that affords maximum access regardless of the method of surrogacy

followed, is therefore seen as preferable in relation to storing genetic parentage information.

OTHER MATTERS

17. What, if any, other matters should be considered in the regulation of this issue?

Committed to principles of social justice and respect for human dignity, and in support of the rights of individuals to self-determination and equitable access to information, the AASW recommends that these principles and rights serve as a guideline in considering any additional matters related to the regulation of surrogacy. The AASW highlights the need for surrogacy legislation to reflect an open commitment to supporting all parties involved through education and counselling, shared and transparent records and information keeping, recognition of the rights for an individual to make their own decisions around reproductive fertility and the overarching rights of the child.

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