

The Commission for Children and Young People and Child Guardian

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promoting and protecting the rights, interests and wellbeing of all Queenslanders under 18

Advice to: Altruistic Surrogacy Committee, Legislative Assembly of Queensland

Topic: Investigation into Altruistic Surrogacy

Date due: 20 June 2008

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Thank you for providing the Commission for Children and Young People and Child Guardian (the Commission) with the opportunity to comment on the Altruistic Surrogacy Committee's (the Committee) Issues Paper.

The Commission appreciates the complexity of the issues which decriminalisation and regulation of altruistic surrogacy raises. Given the relatively limited timeframe allocated to respond to the breadth and multiplicity of all issues, the Commission has limited its response to the Committee's core terms of reference. However, as this is a crucial issue for children and young people, the Commission would be pleased to participate in further, more targeted consultation regarding the issues which have been only broadly addressed in this submission.

Summary of the Commission's recommendations:

- Altruistic surrogacy¹ arrangements should be legal when they meet specific criteria and are registered with a regulatory body.
- Parties who participate in and/or procure illegal surrogacy arrangements should continue to be exposed to criminal sanction.
- Registered surrogacy arrangements should activate a presumption of parentage in favour of commissioning parents in order to promote the child's stability and overcome the practical problems of the legal non-recognition of commissioning parents.
- Children born of surrogacy arrangements should have a right to access information regarding their genetic parentage.
- Parties should be required to provide identifying information to the Registry of Births Deaths and Marriages, including details of the parties' full names, contact details, past medical histories and family histories to present a full record of a child's birth circumstances.
- As altruistic surrogacy is a significant issue for children and young people, the Commission requests to be involved in further consultations.

The Commission makes these recommendations on the following grounds:

1. Should altruistic surrogacy be decriminalised in Queensland?

The Commission is supportive of realistic laws reflective of modern society, provided they adequately safeguard children. The Commission considers that this balance would be appropriately achieved by making surrogacy available to parties who seek pre-approval of surrogacy arrangements which:

- are lodged for registration with a specialist regulatory body, and
- meet specific eligibility criteria.

¹ All references in this submission to 'surrogacy' and 'surrogacy arrangements' are to altruistic surrogacy only.

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Should non-compliant surrogacy agreements be decriminalised?

The Commission considers that parties who do not receive formal approval and proceed with an informal surrogacy arrangement, should continue to attract some form of legislative sanction. Given the potential negative consequences for a child if an informal surrogacy arrangement breaks down, it would be unsafe to have no deterrent consequences for parties who proceed with such arrangements which fail to meet standard eligibility criteria designed to protect the parties, and especially the child.

However, an 'out of time' application process for approval of post-conception but pre-birth surrogacy arrangements should be available to parties. Provided the parties meet the relevant criteria for approval, they should still be eligible to receive late approval for the surrogacy arrangement to avoid criminal sanction.

The Commission would be opposed to preventing commissioning parents from adopting, or seeking parenting orders for, children conceived from informal surrogacy arrangements. To do so would have potentially adverse impacts on the welfare of the child as it could lead to an increase in cases of children living with a commissioning couple who have no legal relationship with the child and the surrogate mother retains parental responsibility. Such an arrangement risks disrupting the child's security and stability.

2. What role should the Queensland Government play in regulating surrogacy arrangements in Queensland?

The Commission supports a regulatory approach which would enable parties to apply for legal surrogacy arrangements which:

1. satisfy specific eligibility criteria, and
2. are lodged for approval and registration with a regulatory body.

In the Commission's view, regulation of surrogacy is necessary because it would:

- minimise the risk of harm to children born of surrogacy arrangements
- offer some protection to parties, particularly children born of surrogacy arrangements
- seek to prevent the potential exploitation of surrogate mothers under 18 years of age
- help prevent the development of an underground surrogacy practice in which it would be extremely difficult to protect children against exploitation and abuse, and
- enable parties to surrogacy arrangements to be certain of the relevant laws and how they apply to prevent, or at least limit, distressing conflict and litigation between the surrogate mother and commissioning parents.

Eligibility criteria

In the Commission's view, a system which approves surrogacy arrangements prior to conception would be the safest option for children. The specific criteria which the

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Commission proposes that parties should be required to satisfy before a surrogacy arrangement is registered and approved, are dealt with in Part 3 of this submission.

Surrogacy agreements that would not include requiring the surrogacy arrangements to be formally registered and requiring the parties to meet certain criteria raise significant concerns for the Commission. These are that:

- Parties would not need to consider the potential complications, impacts or child's interests in surrogacy at any stage prior to a surrogacy pregnancy commencing. Without such considerations and binding agreements parenting disputes would need to be resolved in the Family Court, leaving children exposed and vulnerable until proceedings were finalised.
- Without counselling and a full understanding of legal rights prior to commencing a surrogate pregnancy, it may be more difficult to achieve a completely voluntary and fully informed decision by the surrogate mother. The surrogate mother may be irrevocably contractually committed before understanding and appreciating the potential strength of the bond with the child. This may increase the likelihood of litigation following a child's birth.
- The informality and lack of regulation of private surrogacy arrangements would make it more difficult to assess whether alleged altruistic surrogacy arrangements are commercial.

Specialist regulation

The arrangement inherent in surrogacy requiring a woman to bear and relinquish a child to the care of others, creates a unique set of circumstances requiring specialist regulation which recognises its particular nature. Accordingly, the Commission considers that a regulatory body should be responsible for processing all surrogacy applications and guiding the conduct of approved surrogacy arrangements.

Such a regulatory body could:

- approve proposed surrogacy arrangements according to standard eligibility criteria²
- maintain a register of approved surrogacy arrangements
- collect details relating to children's genetic origin and parties' medical and family histories
- provide advice to parties on what would constitute 'reasonable expenses' of surrogate mothers, the level of such expenses and possibly approve payments for same
- register agencies (including counsellors and legal practitioners) involved in assisting surrogacy arrangements and ensure they comply with good practice and relevant surrogacy legislation
- ensure that registered agencies provide adequate information and support for parties to surrogacy arrangements, including counselling and legal referrals, and
- commission longitudinal surrogacy research to identify and quantify any risks to children, including how they are impacted in adulthood.

² Proposed eligibility criteria are set out in Part 3 of this submission

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The Commission does not consider that a newly created or independent government body needs to regulate surrogacy arrangements. Existing government departments which already deal with complex human relationships would be well equipped to regulate surrogacy matters, provided surrogacy is treated separately. For example, the Department of Child Safety's *Adoption Services Queensland* administers Queensland's adoption legislation and provides statutory services in Queensland to:

- parents considering adoption for their children
- children requiring adoptive placements
- people seeking to adopt children, and
- people seeking information about their adoption.

This unit already deals with complex social and biological adoption relationships and would be well positioned to also consider surrogacy matters. However, the special nature of surrogacy demands separate treatment from existing regulatory processes like adoption and Assisted Reproductive Technology (ART).

Specifically, the Commission considers that adoption and surrogacy should be treated separately on the basis that:

- Adoption deals with children who already exist, whereas surrogacy is (at least initially) concerned with potential children.
- Adoption granted after an informal surrogate conception or birth could potentially be used to consolidate illegal private adoption arrangements.
- If children were to be adopted by commissioning parents as a result of informal surrogacy arrangements, the deterrent value of private adoption offences would be diminished, and
- It would be more difficult to classify commissioning parents as unsuitable after a child is born, with the additional pressure of the child being in existence and requiring care. If commissioning parents were to be assessed as unsuitable and the surrogate mother did not want the child, the child would be left with no parents and would need to enter the child protection system.

The Commission is also concerned that regulation of surrogacy via ART would not adequately address the complexities of surrogacy arrangements on the following bases:

- not all surrogacy cases would require medical assistance via ART which would significantly limit the scope of this form of regulation
- there is no specific legislation in Queensland for the use of reproductive technology and the *National Health and Medical Research Council's*³ guidelines are relied upon
- ART focuses on meeting the desires of infertile people as opposed to children's best interests

³ The *National Health and Medical Research Council* (NHMRC) is the national body responsible for advising the Australian community and Commonwealth and State governments on standards of individual and public health and supports research to improve those standards. States must comply with the NHMRC Guidelines unless specific legislation regulating reproductive technology overrides. The Guidelines recommend that legislation be developed to regulate assisted reproductive technology where it does not exist at present. The Guidelines encompass all aspects of the technologies including accreditation and approval processes, counselling recommendations, research requirements, storage of human tissue, record keeping, complaints and appeals processes and prohibited and unacceptable practices.

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- Although there is a requirement for clinics to provide information, counselling⁴ and discuss with parties *'the likelihood and significance of potential short-term or long-term physical and psychological implications for the person born'*⁵, and any *'published data on morbidity and both long-term and short-term outcomes for persons born through ART'*⁶, the final decision as to whether to proceed with ART rests solely with the parties. There is no actual requirement for any criteria to be met.
- If ART providers were required to assess a resulting child's best interests, it would be extremely difficult to make this assessment objectively given their primary purpose is to assist infertile couples conceive. An impartial body should be allocated this responsibility to ensure the child's needs are considered fully and without the risk of conflict of interest, and
- ART enables parents to experience a normal pregnancy and does not take into account the added complications of a surrogate mother's emotional and possibly genetic vested interests nor does it consider how this dynamic may impact on the child.

Research and monitoring

Due to the lack of evidence regarding the impact of different types of surrogacy arrangements on children, the Commission considers that the Queensland Government should collect information and commission longitudinal surrogacy research to identify and quantify any risks to children, including how they are impacted in adulthood. The results of this research over time could be used to review the appropriateness of surrogacy laws in light of the relevant findings. It is important that this evidence is obtained and evaluated to inform future surrogacy laws and practices for best outcomes for children, as well as meeting the needs of individuals, but particularly the children.

3. What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into a surrogacy arrangement?

Protecting the best interests of the child is one of the most fundamental requirements in all private or public actions involving children⁷. Accordingly, the Commission considers that standard, child-focused criteria need to be in place for parties to satisfy before receiving legal authority for surrogacy agreements. An application form containing the relevant criteria could be developed for completion by parties, supported where

⁴ Part 9.3 of the *National Health and Medical Research Council's Ethical guidelines for the clinical practice of ART*

⁵ Part 9.1.1 of the *National Health and Medical Research Council's Ethical guidelines for the clinical practice of ART*

⁶ Ibid, and Part 9.2.1 of the *National Health and Medical Research Council's Ethical guidelines for the clinical practice of ART*

⁷ The best interests of the child is required to be the primary consideration in any private or public actions concerning children in the *United Nations Convention on the Rights of the Child* - Article 3 .1 *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'*.

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necessary with documentary evidence, and lodged for approval with the relevant regulatory body.

Mandatory counselling

The need to prepare parties for surrogacy arrangements would be critical to ensure they understand the implications of what is intended and are committed to the proposed arrangements. Counselling would assist the parties to fully consider prospective arrangements and the potential complications with, and impacts of, surrogacy arrangements on themselves, the resultant child and any existing children. As it may be difficult for potential surrogate mothers to anticipate how they may feel towards the child upon birth, counselling would assist them to understand the strength of bond that may exist and the emotional impact of having to relinquish the child.

On this basis, the surrogate mother and commissioning parents should be required to provide a declaration from a registered counsellor certifying that all parties received counselling about the proposed surrogacy. The underlying focus of counselling should be to protect any existing and future child or children, as well as any adults who are involved, from possible distress and complications. Some of the issues which should be covered in pre-conception counselling sessions to better prepare the parties for potential issues, include:

- the needs of any resulting child from the surrogacy arrangement, in particular, their need for information and possible contact with the surrogate mother in the future
- the potential emotional impact of handing over the child after birth on the surrogate mother
- the views of the parties in the event of an unplanned multiple pregnancy including the risks to any resulting child, and to the surrogate, as well as the proposed arrangements for the resulting children
- the discussion and understanding between the parties about the surrogate mother's management of a surrogate pregnancy
- considering the inclusion of any parties' existing children in counselling
- particular life experiences (for example, psychiatric problems, substance/physical/sexual abuse, criminal history) which may predispose any of the persons to risk when moving into a new situation, or which may pose a risk to any resulting child
- the possibility of a pregnancy termination by the surrogate mother or the surrogate mother deciding against a termination (if for example, foetal abnormalities are diagnosed or the surrogate mother's health or life is at risk during the pregnancy) and the subsequent care of any resulting child
- the possibility of a breakdown in the surrogacy arrangement (for example, if the surrogate mother wants to keep the child, or the commissioning parents do not wish to continue the agreement)
- the risk of rejection of any resulting child (for example, if the child is born with a disability or abnormality)
- a process for the primary resolution of disputes about the agreed care arrangements for the resulting child before resorting to court proceedings (for example, mediation at a Family Relationship Centre)

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- the relationship between the commissioning parents and the surrogate mother
 - concerns for any resulting child's wellbeing as a result of the absence/presence of ongoing contact with the surrogate mother
 - the social history of the parties, including significant life experiences, and
 - the possibility of any media involvement regarding the surrogacy arrangement, and the impacts on all parties, including the child.

Mandatory legal advice

Parties should be required to obtain independent legal advice so that all parties are clear about their respective legal and financial responsibilities for the child to avoid, or at least minimise, potential disputes or confusion regarding such matters upon the child's birth.

Legal advice should be independently obtained by each party (or at least separate advice for commissioning parents and the surrogate mother to avoid conflicts of interests) and should address the following matters:

- a) how the presumption of legal parentage operates in surrogacy cases
- b) what rights the surrogate mother would have to see the child after it is born
- c) what would happen if the parties disputed the agreement and sought parenting orders
- d) what reasonable expenses would be payable to the surrogate mother and what would not be allowable
- e) medical intervention rights and who will determine what medical tests will be undertaken during the pregnancy, and
- f) circumstances when commissioning parents can "opt out" of the arrangement or compel a termination (for example, if a serious genetic deformity or health matter is discovered).

A declaration or certificate from the legal representative confirming that this advice was provided to the client, the client understood the advice and that the client provided informed consent to the surrogacy arrangement, should be required to be provided by each party.

Other criteria

Other conditions which would be necessary to protect a child's best interests include:

- the provision of a declaration from a medical specialist stating that the parties have been assessed and advised of the potential risks of the pregnancy and any procedures they may undergo. It could also state the results of the medical assessment of the surrogate mother and the identification of any risk factors
- surrogacy should be an option of last resort available only where pregnancy is unreasonably dangerous or impossible
- a surrogacy arrangement can only be made prior to the surrogate mother becoming pregnant
- a surrogate mother must be at least 18 years old

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- a surrogate mother must have had children previously and completed her own family (to stabilise relinquishment issues and minimise the risk of parentage disputes following the child's birth – although there may need to be room for flexibility around this in some surrogacy amongst related parties)
 - the commissioning parents must not suffer from a physical or mental condition, or have a physical or mental disability, to an extent that they could not provide a high level of stable, long term care for a child
 - consent of the surrogate mother and any donors of genetic material to release identifying and genetic information to the prospective child
 - the provision of undertakings from the commissioning parents to advise the child of his/her genetic origin
 - the parties must have no convictions of for serious sexual or violent offences and must not be subject to child protection orders or domestic violence orders (it must be a fundamental pre-requisite of protection of the child's welfare to ensure that his or her prospective parents have no record of child abuse or related criminal conduct), and
 - the parties must have been married or in a relationship for at least two years (to demonstrate a stable family environment for the prospective child).

The following pre-requisites should also apply to assist regulation of surrogacy in the absence of a nationally uniform approach:

- the parties must be resident or domiciled in Queensland, and
- at least one of the parties must be an Australian citizen.

These requirements would ensure commercial surrogacy arrangements would still be caught under the *Surrogate Parenthood Act 1988* and would prevent Queensland becoming a 'surrogacy centre' for residents of states and nations where surrogacy is not permitted.

Reasonable expenses of surrogate

Foreseeable expenses should be established prior to conception and include only genuine expenses associated with the pregnancy and the surrogate mother should be required to produce documentary evidence where possible. In order to protect against possible commercial surrogacy arrangements, one of the responsibilities of the regulatory body could be to provide advice on and approve expenses incurred in association with surrogacy arrangements. Some allowable expenses might include:

- maternity clothing
- counselling fees
- legal fees
- life and disability insurance
- travel to and from hospital/clinic
- medical expenses
- ovulation and pregnancy tests
- overnight accommodation
- insemination and IVF costs (if required)
- child care to attend hospital/clinic, and

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- medicines and vitamins.

If the surrogate mother is employed when she enters into the surrogacy arrangement and has to take time off work in connection with the pregnancy or birth, her actual loss of earnings should be reimbursed. The time taken off work should be in accordance with medical advice and statutory guidelines and documentary proof of the actual loss of earnings should be provided.

Other considerations

- When ART is included as part of the surrogacy arrangements, there should be separate medical practitioners for the surrogate and commissioning mother to avoid conflict of interest. Surrogacy assisted by ART is similar to an organ transplant with a live organ donor, because both the surrogate and commissioning mother may face medical and psychological risks and their needs may come into conflict. Accordingly, a different physician should care for each woman during the in vitro fertilization process, and the physician or midwife caring for the surrogate during pregnancy should have no duty of care or other responsibilities for the commissioning mother because each health care provider must be free to pursue the best interest of the patient.
- Consideration should be given to whether, as in adoption, there should be a maximum number of children already in commissioning parents' custody in order to limit the number of surrogacy arrangements/applications.
- For partial surrogacy arrangements, consideration is required as to what extent genetic connection between the surrogate mother and commissioning parent is permitted in order to prevent possible birth complications (if for example the surrogate mother in a partial surrogacy uses gametes from her brother, who is also one of the commissioning parents).

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

Provided sufficient counselling and pre-conception assessments are in place to determine a surrogate mother's suitability for a surrogacy pregnancy, people who cannot contribute genetic material should not be precluded from applying for surrogacy. The Commission agrees with the recommendation by the Victorian Law Reform Commission that *"a genetic connection between the child and the commissioning parent/s is to be preferred, but people should not be excluded from commissioning a surrogacy if they are unable to contribute their own gametes"*.

However, this position should be subject to the results of any future research on the impacts of different types of surrogacy, particularly on children.

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

Legal parentage and parental responsibility

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In the Commission's view, legal parentage and parental responsibility⁸ for surrogate children should be based on 'intent' as opposed to a child's biology⁹ for the following reasons:

- Currently, prima facie parentage for a surrogate child would be ascribed to the surrogate mother/couple who theoretically do not intend to keep the child. This does not automatically promote a child's stability and security when it is intended that the commissioning parents will parent the resulting child.
- Parties to surrogacy arrangements need to be clear on their respective legal roles and responsibilities to avoid confusion or conflict when a surrogate child is born. The existing presumption would create confusion for parties to surrogacy arrangements as it is contrary to the parties' intentions and the purpose of surrogacy arrangements, therefore increasing the likelihood of protracted Family Court litigation.
- A surrogate mother's right to apply for other parenting orders in relation to the child from the Family Court would not be displaced by a presumption of parentage in favour of commissioning parents.

A presumption in favour of commissioning parents would be in line with all of the parties' original intentions and enable them to be clear about their legal roles and responsibilities before entering into surrogacy arrangements, minimising confusion and legal disputes following a child's birth.

Duty to inform child of genetic origins

A surrogate child's legal parents should be required to inform the child of his/her genetic origins and should support the child in exercising his/her rights to access this information for the reasons outlined below in Question 6.

Not having access to this information prior to attaining the age of 18 could be damaging to children born as a result of surrogacy arrangements. Accordingly, if genetic origin becomes an issue for a child prior to the age of 18, there could be a requirement for the commissioning parents to participate in counselling and, if the counsellor considers appropriate, the child should be involved to address this issue in a manner which best meets the child's emotional and psychological needs.

Medical intervention with surrogate pregnancies

Medical procedures and the general management of a surrogate pregnancy should be determined prior to conception as far as possible. However, decisions involving critical medical intervention or procedures which could detrimentally impact on the surrogate mother's health and wellbeing, should be made by the surrogate mother.

6. What rights should a child born through an altruistic surrogacy arrangement have to access information relating to his/her genetic

⁸ *parental responsibility* in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children (s.61B of the *Family Law Act 1975*).

⁹ Section 69P(1) of the *Family Law Act 1975* currently provides if a child is born to a woman while she is married, the child is presumed to be a child of the woman.

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parentage? Who should hold this information?

In the Commission's view, children born of surrogacy arrangements should have a right to access information regarding their genetic parentage. Support for this entitlement includes international law and research regarding children's need to define their identities¹⁰.

The *United Nations Convention on the Rights of the Child* includes a number of provisions which seek to protect the rights of children regarding their relationship with their parents. Of particular importance in this regard is Article 8, which commits States to respect the right of the child to "*preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference*". Article 7 also supports this argument and provides that a child shall have "*as far as possible, the right to know and be cared for by his or her parents*". The Commission considers that the rights afforded by the *United Nations Convention on the Rights of the Child* should be regarded as the minimum standards to be applied in matters relating to children.

Of additional concern is the prospect of a child not having access to relevant genetic information which may be critical for the health of the child at any stage of his/her life. Accordingly, children born of surrogacy arrangements should have access to information regarding their genetic identity.

There is currently no system for genetic relationships involving surrogacy to be recorded¹¹. Accordingly, a statutory requirement for all parties to provide identifying information to a central body, for example the Registry of Births, Deaths and Marriages should be created. The information could be kept with a child's birth certificate together with details of the parties' full names, contact details, past medical histories and family histories to present a full and current record of a child's birth circumstances. Alternatively, this information could be provided to the regulatory body which would compile it and send it to the Registry of Births, Deaths and Marriages together with confirmation of an approved surrogacy arrangement.

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

Overseas and inter-state surrogacy arrangements

Consideration needs to be given to preventing or deterring people entering into surrogacy arrangements overseas or inter-state which are not compliant with Queensland's surrogacy regulations.

¹⁰ "After many years of unnecessary secrecy, evasiveness and often falsification, studies have now shown how important it is for all children, whether adopted, fostered or brought up in step-parent relationships, to know the truth about their parentage and origin." J Triseliotis, *Recent Developments in Adoption* Mimeo 17 April 1980.

¹¹ Birth certificates are only a record of the legal parentage of an individual and do not represent an accurate biological record of that person's genetic background or birth.

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The Commission consents to the Committee referring to and quoting from this submission and the Committee may identify the author of this submission in its report and publications regarding this investigation.

Please do not hesitate to contact Yvette Norris, Principal Policy Officer, Strategic Policy and Research Program (ph:3008 8986; e-mail: Yvette.Norris@ccypcg.qld.gov.au) should any aspects of this advice require clarification.

Signed 

Date: 20/6/08

Elizabeth Fraser
Commissioner for Children
and Young People and Child Guardian