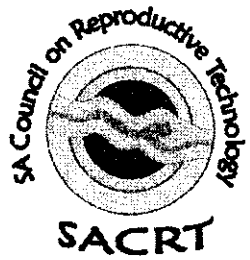

Submission to the QLD's Parliamentary Inquiry into altruistic surrogacy

submitted June 20 2008

Background

The South Australian Council on Reproductive Technology (SACRT) was established under the provisions of South Australia's (SA) *Reproductive Technology Act 1988*. Among its functions are to 'formulate and keep under review, a code of ethical practice to govern the use of artificial fertilization procedures' and to advise 'on the conditions to be included in licenses authorising artificial fertilization procedures'.

It is specifically directed by the Act that 'the welfare of any child to be born in consequence of an artificial fertilization procedure must be treated as of paramount importance, and accepted as a fundamental principle in the formulation of the code of ethical practice'.

SACRT has discussed the issue of gestational surrogacy on a number of occasions in order to provide advice to the Minister for Health, the Department of Health or at the request of bodies such as the Victorian Law Reform Commission.

SA Regulation

Surrogacy (using ARM) in South Australia is regulated under two Acts:

- The *Reproductive Technology (Clinical Practices) Act 1988* (RT Act) regulates eligibility for treatment and is committed to the Minister for Health
- The *Family Relationships Act 1975 (*FR Act) regulates the parentage of children born through assisted reproductive medicine procedures and is committed to the Attorney-General.

Surrogacy procedures are not currently undertaken by clinics in SA because:

- assisted reproductive medicine clinics can only treat infertile people and surrogates are often fertile
- assigning parentage to such children is legally problematic as the intended parents are considered gamete donors under the FR Act and therefore cannot legally be the parents.

The Council has recommended to the Minister for Health and the department of Health that these impediments in the current Act be removed to allow for medically-indicated, non-commercial gestational surrogacy. The Council has also provided advice to the South Australian Parliament's Inquiry into Gestational Surrogacy (2007) and the Victorian Law Reform Commission's issues paper on Surrogacy (2006). This is a reflection of that advice, within the framework of the QLD's proposed questions.

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

SACRT understands that the Commonwealth does not have powers under the Constitution to legislate in the areas of either assisted reproductive technology or family relationships. National-level regulation of assisted reproduction occurs through the application of the NHMRC Guidelines as a requirement for accreditation by the Reproductive Technology Accreditation Committee, which is in turn required for Medical Benefits Scheme funds to be accessed. This provides a robust system of self-regulation.

The diversity between jurisdictional legislation that applies additional regulation to assisted reproduction introduces opportunities for reproductive tourism, and undermines the intent of that jurisdictional legislation.

Commercial surrogacy is illegal in Australia, therefore surrogacy in Australia is mostly altruistic and gestational which seems to provide the best circumstances for an absence of litigation after the birth of a baby.

Any legislative regulation of either the application of surrogacy or parentage issues arising from surrogacy should be considered with great caution due to the extremely complex ethical and legal issues associated with it and the potential for harm to children born through surrogacy. Although SACRT agrees that the protection of surrogates and commissioning parents should be considered in any regulation, the welfare of the child should be the paramount consideration and should not be compromised in order to protect or promote other interests.

All relevant legislation should be clear and unambiguous in relation to surrogacy. Legislation that regulates the application of reproductive technology needs to clearly state whether and when surrogacy may be applied by reproductive medicine clinics. Legislation that regulates parentage needs to be similarly clear and unambiguous about the rights and responsibilities of all parties, with the welfare of the child to be given primacy, and needs to be applicable whether the child was born in that jurisdiction, in another state or overseas.

Definitions

- **Gestational surrogacy**: where the commissioning couple form their own embryos by IVF and these are then placed in the gestational surrogate's uterus. She carries the pregnancy and relinquishes the baby to the commissioning (genetic) parents
- **Altruistic surrogacy**: where the surrogate mother is compensated with 'out of pocket' costs but not paid for her act of surrogacy (R Cook, 2008).

The Council believes that medically indicated, non-commercial gestational surrogacy should be permitted

(a) Medically-indicated

Surrogacy should be medically-indicated, that is, it should only be permitted where there is a medical reason why the commissioning parents need access to assisted reproductive technology (ART). This is currently the case with other ART in South Australia such as IVF.

(b) Non-commercial

Surrogacy should be an altruistic act, not one performed for personal gain. Altruistic surrogacy is more likely to treat the interests of the child as of paramount importance.

(c) Gestational

(i) This is the form of surrogacy least likely to result in confusion for the child about its parentage, and least likely to result in conflict between surrogate mother and the commissioning parents.

(ii) There is no need for gametes to come from one or both of commissioning parents. While, in such a case, it may be more appropriate for the commissioning couple to seek to adopt a child, there appears to be no reason for such an arrangement to be prohibited. Since couples may donate excess embryos from their ART treatment for use in treatment by others, it seems reasonable that such embryos could be donated to a couple for use in a surrogacy arrangement.

It must also be born in mind that the number of people that may be affected by any changes to legislation are only small. Since 2002, Sydney IVF has provided surrogacy for

about 60 couples. The Council has been told of women risking their lives (and that of their future baby) to have a family due to serious medical conditions. For these people, surrogacy is the safest and last option.

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2. **Should the Queensland Government play a role in regulating altruistic surrogacy arrangements in Queensland? If so, how can the Government regulate altruistic surrogacy arrangements in a way that:**
    a. **ensures that the best interests of the child are protected;**
    b. **minimises intrusion into people's private lives;**
    c. **protects the health and wellbeing of all parties; and/or**
    d. **ensures that any conflict between the surrogate and the commissioning parents is prevented or minimised?**

3. **What other issues should be addressed by the government?**

Access to Information

For some time SACRT has urged that amendments to the SA Reproductive Technology Act be made to ensure that people conceived through donor gametes have access to information about their genetic parentage should they request it. SACRT would expect that any rights to information of donor-conceived people would also be extended to people conceived through surrogacy arrangements. Access to information about their conception and birth should be consistent with those for adoptions.

The Council suggests that the current birth certificate is inadequate to accommodate the range of information about a birth that may arise through the use of assisted reproduction and has also recommended to the Minister for Health that this be reviewed with a view to ensuring it is accessible.

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4. **What criteria, if any, should the commissioning parent/s and/or surrogate have to meet before entering into an altruistic surrogacy arrangement? In responding to this question, please outline:**
    - **the reason for your choice;**
    - **how you believe criteria could be monitored and enforced;**
    - **any consequences or dilemmas you see in adopting the criteria; and**
    - **any suggestions you may have to manage any of the issues identified**

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

The Council believes that to be eligible to be commissioning parents, it needs to be the case that:

(i) neither spouse is subject to a term of imprisonment or to outstanding charges for an offence for which imprisonment may be imposed on conviction;
(ii) neither spouse has been found guilty of a sexual offence involving a child;
(iii) neither spouse has been found guilty of an offence involving violence; and
(iv) neither spouse has had a child permanently removed from his or her guardianship (other than by adoption).

Currently in SA, parties seeking to use ART must sign a statutory declaration to this effect. SACRT is concerned that this system is clearly open to abuse and has recommended to the Minister that the statutory declaration requirement be removed if the SA legislation were to be reviewed.

Rather, SACRT recommended that assessment of the welfare of the child should be based on evidence of past behaviours that may reasonably be expected to provide an indication of future behaviours that would place any child born as a result of the ART procedures at risk of abuse or neglect. Clinic counsellors are in the best position to assess clients against the welfare of the child criteria, and SACRT has proposed the establishment of an eligibility assessment panel with the capacity to access all relevant information and consult appropriate professionals in cases where the clinical team holds concerns.

Counselling and Assessment

There are two separate aspects of pre-conception counselling: assessment of the parties to ensure each party has canvassed all the relevant issues and a psychologist recommends that it is appropriate to proceed; the second part is specialist counselling to support the parties initially and throughout the process.

It is important that a person or couple who wish to commission a woman to carry a child on their behalf must receive counselling about the social and psychological implications of entering into a surrogacy arrangement and receive advice and information about the legal consequences of such an arrangement.

A woman intending to be a surrogate mother must be assessed by an obstetrician specialising in ART and by a counsellor or psychologist as physically and mentally capable of acting as a surrogate. She must consent to all aspects of the arrangement, including the use of ART, have already experienced pregnancy and childbirth, receive counselling about the social and psychological implications of entering into a surrogacy arrangement and receive advice and information about the legal consequences of doing so.

SACRT is not concerned that there be a requirement for different counselling services to be used by different parties to an agreement.

Concern has also been raised about existing children of the surrogate mother and any distress that may be caused to them by seeing their mother give away a child she has carried and given birth to. Surrogacy generates incredibly complex scenarios that may be contributing factors with arrangements that go wrong. Specific issues that must be addressed in counselling need to be specified, and could be included in Regulations in the same way that the SA *Code of Ethical Clinical Practice* prescribes requirements for reproductive technology counselling. SACRT suggests that initial and ongoing support could be mandated, at least until the process is finalised and the families settled.

According to Roger Cook who assesses Victorian couples for clinics in Canberra and Sydney (for which he assesses couples as surrogacy in Victoria is not allowed) require that an independent psychological assessment be provided for consideration by the relevant Institutional Ethics Committee (IEC). These assessments must include both members of the commissioning couple; the proposed surrogate mother and her partner. Children aged 4 or older of any of these people must be assessed for the Canberra Clinic.

In all, couples must consult a psychologist, a lawyer, a psychiatrist (Sydney), a gynaecologist and the clinic counsellor.

The assessment process, undertaken by Dr Cook, involves at least the following:

- initial interview with the commissioning couple
- interview with the proposed surrogate and her partner
- administration of the MMPI-2 (psychometric test)
- second interviews with these couples and any of their children over 4 years. Individual interviews are also conducted and these include feed back from the MMPI-2
- further interviews with all parties including a group discussion
- the assessment process usually takes between six and ten weeks
- reports are provided to the IEC and to the commissioning couple.

According to Roger Cook's (2004) research potential gestational surrogate mothers must:

- be in a stable marital or de facto relationship
- have concluded their own families
- be fertile
- be prepared to relinquish any child born
- be prepared to undertake IVF as well as the usual risks of pregnancy
- be prepared for the risk of a multiple pregnancy
- understand that they will be carefully assessed before treatment
- be prepared for a lack of success.

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6. **What role should a genetic relationship between the child and the commissioning parent/s and/or surrogate play in an altruistic surrogacy arrangement? In responding to this issue, you might wish to consider any evidence or experience relevant to:**
    - **the role genetic relationships may play in the outcomes for the surrogate, commissioning parents and child;**
    - **the impact of genetic relationships on the legal parentage of the child; and**
    - **any other relevant matters.**

7. **Should at least one of the commissioning parents have a genetic relationship with the child?**
8. **Should the surrogate be able to use her gametes or should she have no genetic relationship to the child?**

Close Genetic Relationship

SACRT wishes to draw attention to the fact that in the majority of surrogacy arrangements involving SA couples, the surrogate mother has not been a close relative of the commissioning couple. It may be that the stringent counselling processes undertaken by participants outlined above would be sufficient to address such concerns.

It is important that the participants commence treatment with as little delay as possible to maximise the chances of success. The Regulations could prescribe such a process, or it could sit at the level of a policy document. It is important that consumers know what to expect.

The NHMRC Guidelines also highlight the importance of knowledge of identity for people born through assisted reproductive medicine and require clinics not to undertake practices that confuse parentage. It is SACRT's view that gestational surrogacy is the form of surrogacy least likely to result in confused parentage.

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9. **What legal rights and responsibilities should be imposed upon the commissioning parent/s and/or surrogate? If relevant, it would be helpful to detail your comments in relation to the following:**
    - **conditions for access to assisted reproductive technology;**
    - **conditions for transfer of legal parentage;**
    - **reasonable expenses for surrogates;**
    - **monitoring and enforceability of surrogacy agreements; and**
    - **access to advertising and brokerage services.**

To be eligible to be commissioning parents, it needs to be the case that:

(v) neither spouse is subject to a term of imprisonment or to outstanding charges for an offence for which imprisonment may be imposed on conviction;
(vi) neither spouse has been found guilty of a sexual offence involving a child;
(vii) neither spouse has been found guilty of an offence involving violence; and
(viii) neither spouse has had a child permanently removed from his or her guardianship (other than by adoption).

As previously stated, currently in SA, parties seeking to use ART must sign a statutory declaration to this effect. SACRT is concerned that this system is clearly open to abuse and has recommended to the Minister that the statutory declaration requirement be removed if the SA legislation were to be reviewed.

Rather, SACRT recommended that assessment of the welfare of the child should be based on evidence of past behaviours that may reasonably be expected to provide an indication of future behaviours that would place any child born as a result of the ART procedures at risk of abuse or neglect. Clinic counsellors are in the best position to assess clients against the welfare of the child criteria, and SACRT has proposed the establishment of an eligibility assessment panel with the capacity to access all relevant information and consult appropriate professionals in cases where the clinical team holds concerns.

Therefore the Council suggests that pre- conception specialist counselling be mandatory. This would ensure all parties are aware of their legal and ethical responsibilities. Issues to be canvassed in counselling could be included in the regulations but should consider the following:

- psychological and marital stability of both couples
- relationships between the couples, now and future
- the need for independent decision making; no coercion
- motivation for surrogacy by proposed surrogate & partner
- capacity to manage stress both existing and future
- psychological health and stability of all participants
- implications of a change of mind by one person
- possibility of complications: medical and obstetric; relationship
- relinquishment by surrogate; refusal to accept by commissioning couple
- attitudes to prenatal screening and pregnancy termination
- implications for existing children

It is not uncommon in surrogacy arrangements for the surrogate mother to travel interstate to undertake the treatment. SACRT believes that such travel expenses and other reasonable medical expenses should be remunerable. There is a question about whether there should be legal recourse to recover expenses if arrangements break down eg surrogate does not relinquish the child. Whatever agreements are made, counselling should canvass the possibilities and what actions the parties would take. It is also important that each party obtain separate legal advice. This could either be prescribed in the Act or in the regulations.

Surrogacy contracts should not be enforceable, that is the surrogate should not be forced to relinquish the child, regardless of whose gametes are used. There is evidence which suggests that if parties undertake specialist counselling and all possible issues and scenarios have been explored, it is less likely the surrogate would refuse to relinquish the child. If the surrogate perceives that she is only 'doing a job' or 'carrying the child' for the commissioning couple, and there is no genetic relationship, she is more likely to relinquish the child.

10. Should the definition of altruistic surrogacy only include preconception agreements in Queensland?

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

Currently clinics utilise the WHO definition of infertility which is current standard practice nationally. Both the assessment infertility and health risk to the mother or child are clinical decisions and the Council believes this should remain the case. It can be problematic to prescribe definitions. Defining clinical aspects of practice in legislation could have the unforeseen effect of excluding access for those who you actually want to include. Clinical decisions should remain that, especially if the principle of minimal intervention in people's lives is to be upheld.

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

Currently legal parentage is under state jurisdiction, as is adoption. Family law is under commonwealth jurisdiction, but does not regulate legal parentage. The family court only hears cases for custodial and financial arrangements, not legal parentage. The Council has had advice that adoption is not a suitable option for surrogacy, particularly if the commissioning parent's own gametes were used. In effect, they would literally be 'adopting' their own child. Parentage orders for children born from surrogacy would need to be heard in a state court and a process for this could be set out either in legislation or in the regulations.

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?

To uphold the welfare of the child principle as paramount, it is important for all parties, particularly children born, that there are clear legal parentage arrangements. These could be outlined in legislation and supported by regulations and guidelines. This avenue would be fair for the child to be born (legal recognition of their parents) both the commissioning parents and the surrogates, ensuring informed consent and mandatory pre-conception counselling are pre-requisites to the process.

It is important that commissioning parents, as the primary care-givers to surrogate children, have full capacity to provide care, such as the ability to make medical decisions on behalf of the child, obtain passports and enrol their children at school.

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

If the current situation remained in QLD, the welfare of children born from surrogacy arrangements, whether in QLD or born elsewhere and now living in QLD, would be unprotected. QLD is the only state in Australia which criminalises surrogacy. Surrogacy arrangements would still be taking place and the children born from such arrangements must be protected. The welfare of the children born is placed at risk because of the current laws. in effect it is creating a 2 tier class of children, those whose welfare is protected through legal parentage and donor information and those whose welfare is placed at risk because of lack of legal protection.

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?

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

All children born from assisted reproductive medicine should have access to information about their genetic parentage. It would be best held by a central register to ensure access when the person turns 18 should they choose. The Council has recommended to the Minister for Health that a state controlled register be established in SA as soon as impediments to providing identifying information are removed in the current Act.

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

Cook's research concludes that:

- no difficulty in relinquishing the child due to cognitive adaptation processes of the surrogate
- many circumstances and attitudes were found in common which motivated the offer of gestational surrogacy – these included valuing family, a quality of helpfulness, empathy toward the commissioning mother, and developed coping and relationships skills
- that partners of gestational surrogate mothers should not be discounted from the process
- these partners should also have had their own experience of pregnancy, birth and child rearing.
- provision of psychological support throughout the surrogate process is essential for all parties involved