

## EXECUTIVE SUMMARY

### Focusing on the best interest of the child created by surrogacy

This document addresses the advantages and disadvantages of Australian surrogacy practice and of international surrogacy practice and includes recommendations for improvement.

#### Current practice in Australia is ethical and world class because:

1. The primary focus is on the child's needs. The child has information available about their surrogate (and donor if used) and the opportunity to know them
2. The arrangement is based on altruism so neither the child the child nor surrogate is commodified
3. There is respect for the wellbeing of all parties
4. The surrogate and intended parents follow a process of fully informed preparation and consent, support, and transparency following a model of optimal psychosocial, legal and medical practice.

#### There are serious concerns regarding Australian children gestated via commercial surrogacy occurring overseas. They include:

- Lack of information or contact with the surrogate or donor (if used)
- Intended parents and surrogate are not subject to the similar high levels of domestic medical practice, counselling and legal practice often resulting in poor health outcomes for the children
- The surrogate is motivated by financial incentives
- Concerns about the possible exploitation of the surrogate
- the legal status of the child born is ambiguous

#### There are some iregarding surrogacy within Australia. These include:

- Inconsistency of legislation across the States
- A lack of consistency across Australia regarding what is considered acceptable reimbursement to the surrogate
- The difficulty for intended parents to find a surrogate
- Discrimination against single and same-sex intended parents in some States
- Lack of Medicare funding
- The lack of support services including counselling and community education for intended parents and families created from surrogacy as there is for adoption
- The lack of research in Australia into surrogacy outcomes for all parties

## RECOMMENDATIONS

### **Towards ethical, consistent, national guidelines and national self-sufficiency in reproductive resources**

1. Harmonisation of surrogacy legislation across the States
2. Consistency in the amendment of birth certificates to reflect a substitute parentage order across Australia.
3. Amendments to legislation to ensure that before an Australian birth certificate is issued for child/ren from an overseas surrogacy arrangements evidence that the treating clinic has required similar pre surrogacy processes, as are required in Australia. For example, documentary evidence of pre-treatment medical, psychosocial and legal reports, including evidence that there is retention and longer term access to identifying information on donors and surrogates by a government organisation in the country of treatment.
4. Access to surrogacy across Australia for same-sex and single people as well as heterosexual couples.
5. National guidelines on reimbursement of the surrogate to ensure she is not out of pocket including clarity on: maternity clothing, legal fees, counselling fees, life and disability insurance, travelling and accommodation to and from medical appointments, medical expenses, child care, dietary supplements and self-care, house cleaning, loss of earnings.
6. Legislation enabling intended parents and clinics to advertise for surrogates across Australia as is permitted for donors (on the proviso that they are altruistic).
7. Support services to assist in the recruitment of surrogates and donors.
8. Access to better public information about surrogacy for prospective patients. Many intended parents are still not aware that surrogacy is legal in Australia. Wider community education on surrogacy in general such that it is considered a legally viable and ethically administered process in family formation.
9. Medicare funding for surrogacy to encourage people to access treatment in Australia rather than abroad.
10. Increased ease of access to counselling and support services during the pregnancy and beyond, similar to those provided to families who adopt.
11. Ongoing investment in evaluation and research into longitudinal outcomes on the wellbeing of all parties regarding outcomes of surrogacy with particular focus on the welfare of the child.

## **ALTRUISTIC SURROGACY IN AUSTRALIA - ADVANTAGES**

### **General Advantages:**

- the welfare of the child is paramount
- equality and respect for the wellbeing of all parties and for any other third parties to reproduction, such as egg, sperm or embryo donors
- optimal legal, psychosocial, medical and obstetric practice
- a process of fully informed consent, transparency, and information availability
- emphasis on altruism ensuring the surrogate is not motivated by money
- an open and hopefully ongoing relationship between the intended parent, child and surrogate
- surrogate arrangement breakdowns are rare

### **For the child:**

- legal status
- straightforward pathways to change birth certificate
- less chance of having long term health issues due to less risk of being a multiple pregnancy
- more likely to be born at term, rather than through a convenience caesarean, and hence better neonatal health outcome
- access to information about their birth and genetic history
- ease of contact with the surrogate mother or donor who contributed genetic material
- ease of residence in their parents' home
- minimisation of psychological attachment disruption through post birth contact with the surrogate immediately, in the post natal period, and often throughout their lives.

### **For the Intended Parents:**

- pre-conception counselling ensures thorough consideration of the long term implications for themselves and their children
- psychosocial support during the surrogacy arrangement
- world class medical practice reduces the risk of multiple birth and preterm birth
- legal protections which ensure the longer term opportunity for their child to know their genetic and birth history, aiding their sense of identity
- legal processes regarding recognition of parentage
- the surrogate is more likely to have a similar value set, cultural background, and language
- convenience - rather than having to travel to an overseas destination
- legal documents prepared in English and therefore ease of informed consent

- less potential exploitation by surrogacy agency rules (middle man process)
- greater support by local family and friends
- greater opportunity for involvement with the pregnancy from transfer to delivery

### **For the Surrogate:**

- priority given to her health and wellbeing
- pre-conception counselling ensures thorough consideration of the long term implications for themselves, their partner and children
- psychosocial support throughout the surrogacy arrangement
- best medical practice - single embryo transfer resulting in lower chance of twins with less chance of the associated health risks and difficult symptoms
- agency over her own body related to decisions about who she acts as a surrogate for, or termination of pregnancy and birthing decisions
- caesarean delivery only when medically required rather than to suit the intended parents or clinic timetable
- obstetric services focussed on her needs and decisions as well as those of the intended parents, and the offspring of the surrogacy arrangement
- increased availability of the intended parents to offer support to the surrogate
- post-delivery contact with the baby/s born of the surrogacy arrangement which minimises relinquishment pain, physiological loss & reduces the possibility of post natal depression
- knowledge of the longer term outcomes of the surrogacy adds meaning to her having participated in the surrogacy arrangement.
- greater capacity to share pregnancy experience with intended parents (e.g. ultrasound attendance)

## **ALTRUISTIC SURROGACY IN AUSTRALIA - DISADVANTAGES**

### **For children**

- as surrogates are often family members or friends, if in the unlikely event there were a falling out between the intended parents and the surrogate; this will impact on the child

### **For Intended Parents:**

- increased initial medical, psychological and legal costs compared to Third World country options (not compared to USA)
- possible increased time delay because:
  - the intended parents need to find their own surrogate. This is may be quite a daunting process

- medical and psychosocial best practice requirements for pre-treatment medical, counselling and legal consultations and approval processes which although is best practice is perceived as an additional hurdle

### **For the Surrogate:**

The possibility of:

- interpersonal conflict with intended parents if she were to make a different decision than their wishes related to foetal reduction or termination of pregnancy
- of being financially disadvantaged in those jurisdictions where some expenses may not be reimbursed, or where the intended parents refuse to pay some expenses e.g. where the surrogate is self-employed and so doesn't have maternity leave or sick leave provisions, or where her medical insurance cost increases post surrogacy
- of there being a different type or frequency of contact with the offspring of the surrogacy arrangement than she had anticipated or hoped for
- of her changing her mind about relinquishment particularly if she had used her own eggs for the surrogacy arrangement

## **SURROGACY IN OTHER COUNTRIES - ADVANTAGES**

### **Overall Advantages:**

#### **For children:**

- in commercial surrogacy overseas the surrogate is obligated to relinquish the offspring of the arrangement and hence there is perhaps less possibility of a child being caught up in a legal dispute between the surrogate and the intended parents. Parents, however, can still refuse to take responsibility of the child as occurred with the Baby Gammy case.

#### **For the intended parents:**

- the agency finds a woman to act as a surrogate
- they may feel less obligation to the surrogate and/or feel more comfortable as she is being financially compensated.
- usually no requirement for them to undertake pre-surrogacy legal consultations or counselling, which they may perceive as intrusive or interfering.
- this may mean that the surrogacy arrangement proceeds more quickly, particularly if in Australia they do not have access to or are not prepared to look for a woman to act as a surrogate for them
- initial costs of commercial surrogacy overseas may be lower than for altruistic surrogacy in Australia, which has significant medical, psychological and legal costs. This is particularly the situation in developing countries. (However commercial

surrogacy in the USA, has many of the advantages of altruistic surrogacy in Australia without the need for the intended parents to source their own surrogate, but the overall costs are higher.)

**For the surrogate:**

- the creation of a human life and the financial compensation for doing so is an inducement particularly in a developing country

**SURROGACY IN OTHER COUNTRIES – DISADVANTAGES**

\*Particularly in developing countries, (less so in countries such as the USA where there is more attention paid to the wellbeing of the surrogate in the arrangement)

**For children:**

- increased chance of having lifelong adverse health implications related to the common practice of multiple embryo transfers (3+). (This also has consequences for the National health budget from bringing home preterm babies who may have long term physical deficits delivered (from multiple pregnancies) back to our own neonatal health system)
- if the intended parents decide, because of disability or relationship breakdown for example that they do not want to accept the child, then the child may be abandoned
- there is no centralised recording of identity details of the surrogate or donor for longer term knowledge or access to information or contact with the surrogate or donor
- may experience increased psychological attachment disruption problems related to the method of obstetric delivery, and/or lack of post-delivery contact with the surrogate mother
- the legal status of the child born is ambiguous
- if the child is able to have contact with the surrogate they are likely to face language, cultural and social differences inhibiting communication and relationships

**For intended parents:**

- there is no requirement for them to have pre-surrogacy counselling to consider the implications for them and for the surrogate, before, during or after the surrogacy
- in some Australian jurisdictions it is illegal for intended parents to undertake commercial surrogacy overseas, and whilst this does not seem to be acting as a deterrent, there are problems related to bringing the children to Australia, and there could be legal implications for parentage and citizenship.

- there are often multiple embryo transfers, resulting in parents undergoing selective terminations to reduce the number of babies to twins. Twin births still have increased risks of neonatal death, prematurity and health problems for the offspring which may lead to significantly increased costs of both money and time, and there may be lifelong health implications for the children and their parents in rearing them
- some agencies transfer multiple embryos into more than one surrogate concurrently, increasing the chances of a number of babies being born at the same time. E.g. three or four babies hence putting additional emotional and financial strains on the parents particularly if the babies have health problems due to prematurity.(see above)

**For the surrogate<sup>1</sup>:**

- may have inadequate information about medical risks and/or independent legal advice
- may be restrictions on personal autonomy associated with the surrogacy process e.g in some clinics -constant monitoring of diet, sleep and mobility, inadequate exercise and restricted movement outside the surrogacy residence, inadequate post-pregnancy medical care
- may have enforced isolation/separation from children and families
- may have non-negotiable foetal reductions and abortions
- pressure to continue a pregnancy even if the surrogate desires termination
- may have mandated and non-medically indicated caesarean sections (routine in some clinics),
- capacity to give informed consent in third world countries where literacy rates are low
- the potential for social ostracizing and separation of the surrogate from her family
- may have little opportunity to have information about the child following the birth which increases the meaning of acting as a surrogate and minimises relinquishment pain, physiological loss & reduces the possibility of post natal depression

---

<sup>1</sup> ISS Report Global Surrogacy Practice, Working Paper No 601, December 2014