ANZICA SURROGACY GUIDELINES

October 2022

1. Mission Statement:

ANZICA (Australia and New Zealand Infertility Counsellors' Association) is the peak professional Australian and New Zealand counselling organisation dedicated to promoting the psychological and social wellbeing of individuals and couples undergoing fertility treatment. Consideration of the best interests of the child to be born from ART techniques, including through surrogacy, is paramount and is a fundamental principle guiding both counselling practice and process.

2. Background

Family formation through the process of surrogacy is considered both a complex psychological and social process. A surrogacy arrangement is one in which before the child is conceived, the intended parent/s and the surrogate (and their partner, if she has one) agree that the surrogate will become pregnant with the intention that the child will, at birth, be given into the care of the intended parent/s to raise as their own. The most common reasons for surrogacy are absence of the uterus (such as after surgery for women, or for men who may be in a same sex relationship or may be single), congenital malformation of the uterus, or a medical condition that compromises pregnancy making it unsafe for the woman or her prospective baby.

Potentially, there are a number of situations that could be encompassed within the definition of surrogacy. A surrogate conception may occur where the genetic material is provided by both intended parents or by one only of them, by both of the surrogate parents, or by one only of them, or by third-party donors who are not involved in the actual surrogacy arrangement. It follows that conception in a surrogacy arrangement has the potential to come about naturally, through assisted reproductive technology, or through the surrogate's self-insemination. Surrogacy as practised in Assisted Reproductive Technology (ART) clinics is primarily IVF or gestational surrogacy, which does not involve any genetic material of the surrogate or their partner; with insemination surrogacy (also known as traditional or partial) being less common; and natural conception surrogacy being extremely rare.

There is significant variation in the laws that govern the practice of surrogacy across the Australian states and territories and New Zealand. Counsellors should therefore have a thorough knowledge of the relevant legislation in their own jurisdiction including knowledge of the assisted reproductive

treatment and psychosocial implications associated with the differing forms of a surrogacy conception arrangement.

Information about the legislated requirements for surrogacy counselling in each jurisdiction is included in an addendum to these guidelines – (see Addendum: Surrogacy Legislation in each state or territory of Australia, and in New Zealand, and requirements for counselling related to surrogacy arrangements.) This information includes the counselling requirements before, during and after a surrogacy birth, in addition to the requirements for the qualifications of counsellors who undertake surrogacy related counselling.

In Australia in May 2016, a report was released following an Inquiry by the House of Representatives, Standing Committee on Social Policy and Legal Affairs, entitled: "Surrogacy Matters: Inquiry into the regulatory and legislative aspects of international and domestic surrogacy arrangements.[1] In the Foreword to this report it was stated *"The Committee recommends that the practice of commercial surrogacy remain illegal in Australia."* The Committee also made recommendations in an attempt to improve the processes related to Australian children born through overseas surrogacy arrangements. The Committee supported altruistic surrogacy in Australia and recommended the development of a nationally consistent legal framework in Australia to be based on:

"Four key principles:

- ***the best interests of the child,***
- ***the surrogate's ability to make free and informed decisions,***
- ***ensuring the surrogate is free from exploitation, and***
- ***legal clarity about the resulting parent-child relationships."***

To date, no nationally consistent framework has been implemented. These counselling guidelines have been written in the context of the Committee's recommendations particularly in regard to the counselling in surrogacy arrangements.

3. Pre-Surrogacy Counselling

The provision of client/patient centred counselling is an indispensable part of the preparation of those wishing to access surrogacy treatment. It should be provided by appropriately qualified and trained practitioners, who are full members of ANZICA. It should also be integral to clinic protocol for surrogacy treatment which might also include consultations with: one or more medical specialists (including an independent gynaecologist); one or two legal practitioners; possibly a psychiatrist; as well as counselling by the clinic counsellor and an assessment by an independent psychologist/counsellor.

[1] (http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into_surrogacy/Report)

The current status of surrogacy counselling by ART clinic counsellors varies from little or no surrogacy counselling (where all such counselling is left up to the independent counsellor) to much more intensive clinic counselling where there are multiple contacts by the clinic counsellor with all parties to a surrogacy arrangement over a number of months. Irrespective of how it is organised, pre-treatment counselling needs to be respectful of the needs of all involved in the surrogacy proposal, including the intended parent/s, the surrogate and partner if she has one, and any children of the intended parent/s or of the surrogate, and of potential unborn offspring of the surrogacy treatment.

A comprehensive biopsychosocial evaluation of a surrogacy proposal, often done by an independent counsellor, includes a personality assessment to exclude psychopathology, consideration of the connections between the parties to the proposal, reproductive history and any history of trauma or loss, possible coercion or financial inducement (explicit or implicit) and expectations of a surrogacy pregnancy and delivery and the implications of medical or psychological complications.

The pre-surrogacy treatment counselling process must give time and space for a thorough consideration of the implications of the proposed treatment and the opportunity for a change of mind, -thus minimising possible rupture of relationships (which may be longstanding). Comprehensive pre-surrogacy counselling is an integral part of ensuring full informed consent as well as assessing surrogacy suitability.

4. Counselling Roles in Surrogacy Counselling

a. Clinic Counsellor:

The role of the clinic counsellor in providing counselling is different from that of a practitioner providing independent psychological assessment and/or advice and guidance. Although it is inevitable that clinic counsellors working with participants to a surrogacy arrangement will note the personality characteristics and functioning of their clients, it is essential that the work of such a counsellor not be confused with that of an independent psychologist/counsellor who has been commissioned to provide surrogacy advice and guidance or a formal assessment on these matters, including participants' suitability for the proposed treatment.

At the pre-surrogacy stage this role varies according to the jurisdiction in which the surrogacy arrangement is to take place. In some jurisdictions the independent counsellor's role is to provide a detailed psychosocial assessment including psychometric testing. In others it may be more focussed on implications counselling and decision making, and it may or may not require a comprehensive report. In other jurisdictions the independent counsellor is not required to do any implications or decision making counselling but has a role restricted solely to assessment of the parties for the purposes of treatment suitability.

During the pre-surrogacy assessment stage, the impact on children, (including those of the surrogate), must further be considered as part of the overall assessment - in some jurisdictions it is a mandatory requirement that children be seen as part of the assessment. Whilst pre-surrogacy counselling addresses many of the issues which may have been raised in implications counselling by a clinic counsellor the primary purpose of an independent assessment is to provide the treating clinic with an objective, succinct, accurate description of the emotional and psychological preparedness of the

participants to the surrogacy proposal. It is not intended for on-going supportive counselling, crisis counselling or psychotherapy.

Subject to legislative requirements a clinic counsellor's report might be requested by clinic management prior to the surrogacy arrangement proceeding. This should be written using a descriptive framework – summarizing the issues that have been discussed. A clinic counsellor would typically focus on current issues including: communication and relationships between all parties, strategies for managing conflict, recommended surrogacy preparations, life priorities, and expectations of treatment. The counsellor should ensure that the best interests of children are paramount - this includes the children of all parties.

b. Independent Counsellor:

In a number of jurisdictions there is a requirement for there to be assessment and counselling conducted by a counsellor who is independent of the treating fertility clinic. This counsellor may be involved at various stages throughout the surrogacy arrangement including: the pre-surrogacy or post-birth stage of a surrogacy arrangement or at times, both. This is consistent with recommendation 3 from the Australian Federal Government Inquiry Surrogacy Matters which stipulates: "The need for mandatory, **independent** and in-person counselling for all parties before entering into a surrogacy arrangement, during pregnancy, after the birth, and at relinquishment." Pre-surrogacy assessment is a requirement mandated by many legislations and a number of treating clinics and would usually include psychometric testing which must be provided by an appropriately qualified professional.

Assessment counselling requires a formal structured counselling process to gather and assess relevant information about the functioning and motivation of all involved in the surrogacy proposal. The assessment process includes structured clinical interviews of all involved (as individuals, as couples and as a group) and often the use of an objective measure of psychopathology as part of the psychosocial screening process. In some jurisdictions there is a legislated requirement for the assessment counsellor to give their written opinion as to the suitability of the parties to participate in a surrogacy arrangement.

Assessment counselling requires there to be at least one occasion in which all the parties to the surrogacy arrangement are seen in person by the mental health practitioner who is undertaking the psychosocial assessment prior to the surrogacy arrangement. This is also required by the guidelines issued by the Family Court of Australia for assessment: Australian Standards of Practice for Family Assessments and Reporting February 2015 [2] where it is stated in Section 14 (page 17):

- Family assessors should conduct at least one in-person interview with each parent and other adults who perform a caretaking role with the children.
- Telephone or video interviews can be used as a supplementary means of interview with adults

[2] (http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and- procedures/asp-family-assessments-reporting

- Where there is no alternative but to interview an adult by telephone, this must be noted as a significant limitation of the assessment, and the reasons for undertaking a phone interview articulated.

ANZICA acknowledges some of the complexities of providing face-to-face assessments created through fluctuating public health safety directions and clinic rules during the era of the COVID-19 pandemic. Therefore it may be appropriate that surrogacy counselling be carried out via telehealth during the COVID-19 pandemic restrictions only. Importantly, where psychometric assessment is undertaken remotely, this is at the discretion of that particular counsellor and they should follow the current guidelines of their professional association.

Issues that may need consideration in pre-surrogacy counselling:

Psychological Wellbeing:

- Reproductive and infertility history, how these have been coped with.
- Consideration of the emotional challenges to and capacity of the intended mother to manage the challenges of another woman carrying her baby.
- Mental health history and current psychological state.
- Psychological Entitlement – the sense that the world owes them.
- Any other stress factors – major upheavals or transitions.

Relationships:

- How discussions about the surrogacy arrangement with the surrogate first came about.
- Relationship between the individuals involved and implications of surrogacy (capacity to make independent decisions – financial or emotional dependence issues.)
- Relationship stability of all parties to the surrogacy arrangement.
- Commitment to and motivation for surrogacy and its unique demands, potential benefits and cost to the surrogate and her family.
- Implications for any existing partner and risk factors (i.e. partner support)
- Implications for any existing children and risk factors such as any loss issues and how parents intend to deal with them. (Some jurisdictions require for children between 4 and 18 years to be counselled in an age appropriate manner. Most legislations do not require that the children be seen, but that the issues of the children be considered in the counselling.)
- Differences in parenting styles.
- Possible complications that may affect a couple or individual, e.g. relationship breakdown, medical problems, even death.
- Contraceptive measures used by all parties and the psychosocial implications if a spontaneous pregnancy were to occur during surrogacy treatment.
- Expectations regarding ongoing relationships and the role of the surrogate with the future child.

Gametes/Embryos:

- If donor gametes or embryos are to be used - the implications and understanding of all parties to the surrogacy arrangement.
- If the intended parents are a same sex couple, decision making around whose sperm is to be used to form the embryos in the surrogacy arrangement.
- Decision making about number of embryos to be transferred.
- Intentions re disclosure and explanation to others.
- The availability of a permanent, accurate record of conception, gestation and birth for the child born of surrogacy.
- Decision making regarding additional embryos and any plans for another child.

Surrogacy Treatment:

- The amount of perceived control that the intended parent/s have over the surrogate's behaviour during the pregnancy and whether this is a concern.
- Lifestyle factors that may be of concern during a surrogacy pregnancy.
- Pregnancy risk factors: pre-eclampsia, gestational diabetes, risk of death of surrogate
- The possibility of a multiple birth, and positions of all parties.
- Attitudes to pre-natal screening and termination of pregnancy.
- The possibility of legal termination of a pregnancy if a child is diagnosed before birth with a disability or abnormality.
- The possibility of the surrogate deciding against a termination in the above situation and subsequent care of the child.

Legal/Process:

- Forensic history of all parties.
- Awareness and acceptance of legal ramifications, and informed consent issues.
- Information on research outcomes in ea.
- Change of mind by a party before or during the process.
- The possibility of a breakdown in the arrangement, such that the surrogate refuses to relinquish the child to the intended parents and/or wishes to keep the baby.
- The possibility of a breakdown in the arrangement, such that the intended parent/s refuse to accept and patent a child born with a disability.
- The need for the parties to agree on a process for resolving disputes if there is any conflict or significant difference of opinion over issues such as treatment decisions, The reimbursement of expenses, or post-delivery issues.

Summary: ANZICA Counselling Pre-Treatment Practice Standards

Based on the aforementioned, the following are best practice minimum standards psychosocial/counselling guidelines recommended by consensus by the ANZICA Executive Committee.

It is recognised that legislative requirements and clinic policy may override these ANZICA counselling guidelines.

ANZICA recommends that:

- Counselling is only undertaken by a counsellor eligible for full membership of ANZICA.
- All parties and their partners must have separate interviews with a minimum of 2 interviews for each party; and a joint session with all parties.
- All counselling should be undertaken with sufficient time between sessions for all parties to consider and reflect on the gravitas and complexities of the arrangement as well as to have relevant discussions with each other as needed.
- Counselling with all parties in the arrangement must not be completed in one day.
- A further joint counselling session after a 3 month cooling off period before the arrangement is allowed to proceed. This process may vary between clinics and jurisdictions but will usually include an independent counsellor and a psychological assessment of all parties.
- Ideally, the youngest child of the surrogate is at least 12 months old before the surrogacy arrangement is allowed to proceed.
- Given the complexities involved in surrogacy, it is recommended that face-to-face counselling is the optimal mode of conducting the pre-surrogacy counselling sessions and psychometric testing. The providers of online counselling and online psychometric assessments must take responsibility for their own practice decisions and outcomes and test standardization and security should always remain paramount.

5. Counselling during ART treatment and surrogacy pregnancy

Counselling requirements, if any, including mode of counselling, frequency of counselling and provider of counselling are determined by specific legislation in each jurisdiction. (See Addendum) Even if not legislated there may arise a need for counselling during treatment or after a pregnancy (but before delivery of the baby).

Supportive counselling would be provided at this stage though sometimes issues may arise between the parties to the surrogacy arrangement which can call for intensive implications and relationship counselling. Counselling can also include discussion of plans for the delivery and handover of a baby, and discussion of planned post-delivery contact.

Counselling at this stage tends more often to be completed by the clinic counsellor, but there may also be contact with an independent counsellor, depending on the preferences of the parties to the surrogacy arrangement. In this latter situation it may necessitate a review of the external counselling implicit 'contract' to move from an assessment role to a supportive or therapeutic counselling role. Follow up counselling after treatment, whether there is a pregnancy or not, is however highly recommended and should be available to all parties to a surrogacy arrangement. It is however not common for there to be a legislated requirement for surrogacy pregnancy counselling before delivery of a child/ren conceived through a surrogacy arrangement or if there is a miscarriage. (See Addendum for guidance on legislation for each jurisdiction)

6. Post Surrogacy Birth counselling:

Follow up counselling of the surrogate and her partner after delivery of a surrogacy baby is highly recommended and should be available to all participants. In some jurisdictions, there is a formal requirement for counselling post-delivery which may be provided by either the clinic counsellor or the independent counsellor. This professional may or may not be the same person who has completed the pre- surrogacy assessment counselling.

And in some jurisdictions a post surrogacy birth report, for use in an application for a parentage order, must be prepared by an independent and appropriately qualified counsellor with there being a legislated requirement for this to be an independent counsellor other than the counsellor who did the pre-surrogacy counselling. Therefore there are two different forms of counselling required after delivery of a child/ren conceived through a surrogacy arrangement:

a. Relinquishment Counselling, of surrogate and her partner:

The focus of this counselling is on the needs of the surrogate and her family after the delivery of a baby through a surrogacy arrangement.

Issues that may need consideration in relinquishment counselling:

- The surrogacy pregnancy and how it was the same and different from the
- surrogate's own previous pregnancy/s;
- The delivery and handover of the baby – how it proceeded, who was present, and reactions of all parties during delivery and afterwards;
- Emotional and physical reactions of the surrogate before, during and after delivery of the baby;
- Effects on the surrogate's partner and family;
- Post birth contact of the surrogate with the baby and the intended parents;
- A review of the overall impact of the surrogacy experience compared with expectations and how any differences have been experienced and dealt with, as well as plans for the future.

b. Parentage Order Counselling:

In counselling for parentage order reports the focus of the counselling is on the best interests of the child/ren born of the surrogacy arrangement.

Implications for pre-existing children of the surrogate should also be considered. Sometimes a report for the court is required following this counselling, in other situations there may only be a requirement for the counsellor to sign a certificate confirming that the counselling has occurred.

Issues that may need consideration in parentage order counselling:

- The understanding of all parties involved in the surrogacy arrangement of the social and psychological implications of the making of a parentage order (both in relation to the child and to any affected parties);
- Each party's understanding of the principle that openness and honesty about a child's birth parentage is in the best interests of the child/ren;
- The care arrangements proposed by the intended parent/s in relation to the child/ren;
- Any contact arrangements proposed in relation to the child/ren and the intended parent/s with his or her birth parent or parents or biological parent or parents;
- The parenting capacity of the intended parent/s;
- Whether any consent given by the birth parent or parents to the parentage order is informed consent, freely and voluntarily given;
- The wishes of the child/ren, if the counsellor is of the opinion that the child is of sufficient maturity to express his or her wishes.
- Consideration of whether the making of a parentage order would be for the wellbeing and in the best interests of the child/ren.

7. Conclusion

The counselling role varies depending upon the stage of the surrogacy arrangement and legislative requirements. Each counsellor must ascertain the specific requirements of practice in their particular situation to ensure that the counselling protocol fits the regulatory requirements. (See Addendum) Whilst there are differing legislative situations in each state of Australia and in New Zealand which outline the counselling before, during and after a surrogacy pregnancy and delivery, the key aspects of surrogacy counselling remain as outlined in these guidelines.

Differences in whether the counselling is done in-clinic or by a practitioner independent of the clinic or by a combination of both depend on the requirements of differing jurisdictions (See Addendum to these guidelines) as well as the approaches of individual ART clinics. It is however the responsibility of any counsellor undertaking any part of surrogacy related counselling, to ensure that the issues listed in these guidelines are covered, either by themselves or by another counsellor/s involved in the surrogacy case.

8. Addendum to Surrogacy Guidelines

Surrogacy legislation and corresponding counselling requirements varies according to state or country of counselling practice. For further information ANZICA members are directed to the document called *Addendum: Surrogacy Legislation in each state or territory of Australia, and in New Zealand, and requirements for counselling related to surrogacy arrangements August 2016" located in the ANZICA members resource section of the FSANZ website.*