

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Citizenship, Minister for Regulatory Reform, and Vice-President of the Executive Council) [5.03 p.m.]: I move:

That this bill be now read a second time.

In May this year I announced the Government's intention to introduce new surrogacy laws for New South Wales, to provide certainty for the parties to surrogacy arrangements and to protect the interests of children born as a result of such arrangements. This bill introduces, amongst other things, a comprehensive scheme for new parentage orders, which may be granted by the Supreme Court to transfer parentage in surrogacy situations, provided certain safeguards are observed. The bill is subject to a guiding principle—that the best interests of children born as a result of surrogacy arrangements are paramount.

By creating the new parentage orders, the bill implements a recommendation of the Legislative Council Standing Committee on Law and Justice, which tabled its report "Legislation on Altruistic Surrogacy in New South Wales" in May 2009. This reform also draws on the work of the Standing Committee of Attorneys-General, which in March 2008 agreed to develop a national model for the legal recognition of parentage achieved by surrogacy arrangements. In November 2009 the Standing Committee of Attorneys-General adopted 15 principles as the basis for drafting model provisions to regulate surrogacy, and the committee then discussed draft provisions at its meeting in May.

The work of the Legislative Council Standing Committee on Law and Justice and the Standing Committee of Attorneys-General followed extensive consultation. The Legislative Council Standing Committee on Law and Justice advertised a call for submissions in August 2008 and it received 40 submissions from government agencies, fertility clinics, a lawyer and a psychologist with experience facilitating surrogacy arrangements, community groups, religious and ethics organisations, academics and private citizens, including parents of children born through surrogacy arrangements. It also held public hearings in November 2008 and March 2009 where it heard from a range of stakeholders.

The work on this issue by the Standing Committee of Attorneys-General was informed by responses to a consultation paper released for public comment in January 2009. In all, 109 submissions were received from a variety of government bodies, institutions, and individuals. The preparation of this bill has drawn on the results of this consultation, and further consultation that has been carried out with NSW Health, the Department of Community Services, the Registry of Births, Deaths and Marriages, and the Supreme Court of New South Wales.

Currently, in most cases, the Status of Children Act 1996 has the effect that a child's legal parents are its birth parents. That is, if a woman gives birth to a child, she and her husband or de facto partner, if any, are usually presumed to be the parents. This means that people who intend to become parents under a surrogacy arrangement, and who may in fact be raising the child, can face significant legal obstacles in obtaining full parental rights. They may, in a practical and emotional sense, be parenting the child, but may have trouble, for example, obtaining a passport for the child, enrolling the child in school, or accessing benefits to which a legal parent would be entitled.

Part 3 of this bill provides a framework for the Supreme Court to grant orders that would transfer full legal parentage of children from their birth parent, or birth parents, to the intended parents under a surrogacy arrangement. This will come as a relief to families who would otherwise have had to turn to adoption processes, which can be a long and laborious process, or parental responsibility orders from the Family Court, which are not permanent and do not apply when children reach adulthood. The new orders will provide relief and certainty for those who seek to become parents under surrogacy arrangements and who have, to date, had to deal with the existing legal schemes that are not designed for surrogacy situations.

These orders will also advance the best interests of children. At present, children born of surrogacy arrangements may live with their intended parents, as agreed by the parties, but without the benefit of full parentage rights for those who care for them. The new parentage orders will give the intended parents the full legal capacity to make decisions in the child's interests. Clause 15 provides that intended parents may apply for a parentage order between 30 days and six months after the child's birth. The 30-day time limit operates as a cooling-off period for the birth mother, who will have the opportunity to carefully consider consenting to the parentage order after the birth of the child. The upper time limit of six months aims to provide certainty to the parties, and to encourage a secure and stable living environment for children.

Under clause 16, an application for a parentage order must be supported by an independent counsellor's report as to whether the order is in the best interests of the child and the reasons for that opinion. This report will assist the court in determining whether to make the order. The bill does not impose pre-conditions in relation to the gender of intended parents, nor their relationship status—apart from a requirement that if two people enter into a

surrogacy arrangement as intended parents, they must be a couple.

Parentage orders are open to same-sex and de facto couples. Also, there is no restriction on the form of conception that may be used in a surrogacy arrangement for which a parentage order will be available. There are two key reasons for this approach. First, the Government generally agrees with the principle, endorsed by the majority of the Legislative Council Standing Committee on Law and Justice, of minimal State intervention in these matters. Legislation should not prescribe what form families should take. Secondly, the fact is that children are born into surrogacy arrangements involving same-sex, single and unmarried parents, with varying forms of conception. Those children deserve the benefits that will flow from a parentage order as much as any other child.

There are many diverse forms of family and it is necessary, and in the best interests of children in particular, to deal with this reality. However, importantly, the bill creates several safeguards aimed at protecting the wellbeing and interests of the child and the parties to the surrogacy arrangement. As a starting point, clause 21 provides that an order can only be made where this is in the best interests of the child. Clauses 22 and 23 provide that an order cannot be made in relation to a commercial surrogacy arrangement or an arrangement reached after conception.

Clauses 24 to 36 impose further pre-conditions to the grant of a parentage order. They include the following. The parties must obtain counselling and legal advice before entering into the arrangement, to ensure that they understand the social, psychological and legal implications of doing so. The arrangement must be in writing. This requirement aims to focus the parties on the complexity and the potential outcomes of the arrangement. The birth mother must have been at least 25 years old when she entered into the surrogacy arrangement, to ensure that she has sufficient maturity to grasp its implications. However, in respect of arrangements entered into before the bill commences, it is sufficient if the birth mother is 18 years old.

The consent of the birth parents to the making of the parentage order is required. If a birth parent withholds consent, the order cannot be made. This is also consistent with the existing position that surrogacy arrangements are unenforceable. The intended parents must have been at least 18 years old at the time of entry into the surrogacy arrangement. The child must be living with the intended parents at the time of the hearing; demonstrating the willingness of the birth parents to hand the child to the intended parents and the intended parents' willingness to accept care of the child. The parties must have provided information about the surrogacy to the Director General of Health to be recorded on the register administered under the Assisted Reproductive Technology Act 2007, and the birth must have been registered. This ensures that there is a record of the circumstances of the birth, which may be important to the child later in life, and underpins their right to know about their biological inheritance.

The bill also requires for a parentage order to be granted that there must have been a "medical or social need" for the surrogacy arrangement. This requirement restricts the grant of parentage orders to surrogacy arrangements that have been entered into because the intended parent or parents would not otherwise be able to have children. To meet this requirement a woman, single or as part of a couple, who seeks to become a parent through surrogacy, must be unable to conceive or carry a child on medical grounds or likely to conceive a child affected by a genetic condition or disorder passed down by her. A single male or a male couple will automatically meet the requirement of "medical or social need", on the basis that men in such situations cannot conceive a child without the assistance of another party.

Clause 17 gives the court the power to dispense with certain pre-conditions in exceptional circumstances, always subject to the best interests of the child. However, the court will not be able to dispense with the requirements that the agreement is not commercial or that there be a pre-conception surrogacy arrangement. Nor can the court dispense with the requirement that birth parents consent, except in very limited circumstances, such as where a birth parent has died or has lost capacity. The court will be able to make parentage orders also in respect of arrangements entered into before the Act commences, extending the benefits of this reform to children born into existing arrangements.

Some of the pre-conditions to the grant of these orders will not be as strict, since the parties will not have been aware of the conditions they needed to comply with at the time of entry into the arrangement. However, some of the requirements that will still apply are that the arrangement cannot be commercial and must have been entered into before conception, the birth mother must have been at least 18 years old when the arrangement was made, and the child must be under 18 years old and lawfully living with the intended parents. There will be a two-year window following commencement of these laws in which to seek orders in respect of existing arrangements, aimed at providing certainty for the parties and a stable and secure family situation for children.

The bill also provides for closed-court hearings and, in part 4, restricted access to court records and a restriction on the publication of identifying details to the public without a person's consent. These provisions aim to protect the privacy of parties to surrogacy arrangements and to protect the child from possible stigmatisation. Clause 42 provides that a parentage order may be discharged where it was obtained by fraud, duress or other means, where consent to the order was given for fee or reward, or for another exceptional reason.

Schedule 2 to the bill includes consequential amendments to the Interpretation Act 1987, the Property

(Relationships) Act 1984, the Relationships Register Act 2010, the Succession Act 2006 and the Workplace Injury Management and Workers Compensation Act 1998. The majority of these amendments relate to how family relationships are determined at law. For example, where a person dies intestate amendments to the Succession Act 2006 have the effect that if a parentage order names that person as a child's parent, they will be treated as the child's legal parent for the purposes of distribution of the estate. These amendments ensure that the practical benefits and implications of a transfer of parentage flow through to other areas of law. The bill also amends the Status of Children Act 1996 to make it clear that the parentage presumptions in that Act do not impact on the effect of these parentage orders.

The Government believes that the children of surrogacy arrangements should have access to information about the circumstances of their birth and genetic history. This is important for the child's psychological wellbeing and sense of identity, allowing them to avoid "genealogical bewilderment". It may also be important in terms of the child's future health and medical treatment. While counselling will usually emphasise the importance of intended parents being open with a child about their birth mother and genetic origins, the bill nevertheless provides safeguards for affected children. The bill contains two mechanisms for accessing information about surrogacy arrangements and the affected parties.

Once a parentage order has been made, amendments to the Births, Deaths and Marriages Act 1995 have the effect that new birth certificates will refer only to the intended parents. However, the original birth certificate will remain available to the affected parties and to the child once he or she reaches 18 years of age. Also, once the child is 18, any new birth certificate for which he or she applies will attach an addendum stating that further information is available. These provisions aim to ensure that children have access to information about the circumstances of their birth, but also to ensure they have sufficient maturity to cope with any new information about this. However, birth certificates will record only some details of the legal birth parents.

To ensure that other important information is recorded, the bill also expands the existing register for recording the information of gamete donors under the Assisted Reproductive Technology Act 2007 to apply to surrogacy situations. When children born into surrogacy situations reach adulthood, they will be entitled to access the information on the register. A birth parent or gamete provider will also be able to access non-identifying information about the child or identifying information to which a child consents once he or she reaches adulthood.

The bill, in item [4] of schedule 2, also amends the Assisted Reproductive Technology Act 2007 to impose an additional requirement on the use of assisted reproductive technology for surrogacy cases. The treating clinic must, before providing treatment, receive and take into account a report from an independent counsellor assessing the suitability of parties to the arrangement. This provision implements a recommendation of the Legislative Council standing committee, which was concerned that counsellors' recommendations about people's suitability for surrogacy arrangements should not be influenced by any form of financial dependence on ART clinics.

Commercial surrogacy will remain a criminal offence and surrogacy arrangements will remain unenforceable, as is currently the case under the Assisted Reproductive Technology Act 2007. This offence aims to prevent the commercialisation of human reproduction. As the Standing Committee of Attorneys-General noted in its 2009 discussion paper, "commercial surrogacy commodifies the child and the surrogate mother, and risks the exploitation of poor families for the benefit of rich ones". However, a new provision has been inserted to implement a recommendation of the Legislative Council standing committee. This will allow parties to enforce an obligation under the arrangement to pay the birth mother's reasonable surrogacy costs. Those costs include the reasonable costs of becoming or trying to become pregnant, as well as the costs of a pregnancy or birth, or a surrogacy arrangement. A list of costs that meet this description is included for the sake of clarity.

Advertising in relation to commercial surrogacy will remain an offence, and will be extended to altruistic surrogacy arrangements where the advertisement is made for fee or reward. Such advertisements may increase the risk of surrogacy arrangements that are, in fact, commercial. For advertisements about altruistic surrogacy, a lower maximum penalty will apply due to the lesser seriousness of such advertisements. This bill is an important step towards creating legal certainty for people who turn to surrogacy arrangements because they are otherwise unable to have children, and towards protecting the interests of children born into surrogacy arrangements. It is also intended to encourage those who turn to such arrangements to follow processes designed to ensure they thoroughly understand the psychological, social and legal complexity of their decisions, and the lasting impact those decisions will have on the child yet to be born. I commend the bill to the House.