



New South Wales

ATTORNEY GENERAL

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LAW & JUSTICE

Ms Rachel Callinan
The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House, Macquarie Street
SYDNEY NSW 2000

09/004509

17 December, 2009

Dear Ms Callinan

Government response to report 38: Legislation on altruistic surrogacy in NSW

Thank you for the opportunity to respond to the report, "Legislation on altruistic surrogacy in NSW" (**Report**). The Report will be very useful in informing NSW's development of surrogacy laws. I note that the Report is based on extensive consultation with the government and private sector and that it revealed a diversity of views on this sensitive area.

The Government has considered the Report's recommendations and would like to inform you of its views.

Work at a national level through the SCAG process

As you know, the Standing Committee of Attorneys-General (**SCAG**) is developing model provisions for surrogacy, in the interests of national consistency. I note that the majority of the Standing Committee on Law and Justice (**Committee**) stated a preference for NSW to develop surrogacy legislation without awaiting the outcome of the SCAG process, due to concerns that doing otherwise would unduly delay the enactment of legislation in NSW.

The Government's position is that NSW should wait for the outcome of the SCAG process before legislating as it would be undesirable for NSW to enact legislation that is inconsistent with the national model provisions, which could mean NSW has to amend its legislation shortly after its enactment. In the last few months SCAG has made good progress in developing 15 agreed principles as the basis for the development of model provisions. Drafting of the model provisions has started; it is anticipated that they will be ready in the first half of 2010. The Government will consider the model provisions, together with the Report's recommendations, in developing NSW's surrogacy laws.

As the model provisions will focus on the transfer of parentage mechanism and will be based on high-level principles, NSW will need to supplement the model provisions with provisions regulating any other areas that it considers necessary to create a comprehensive regulatory regime. The Government is developing

provisions on these additional areas with the aim of having these ready in the same timeframe for finalisation of the SCAG project.

Key SCAG principles

NSW agrees with the following principles developed by SCAG, as set out in the Consultation Paper that SCAG published in January 2009 (CP) and noted in your Report:

- The rationale for the legislation is to ensure the best interests of the child are the paramount consideration in recognising surrogacy arrangements
- The model regime should aim to minimise scope for dispute between the surrogate mother and the intended parents
- The model should aim for minimal intervention in people's lives.

NSW also agrees that a national model should contain the following key features:

- Commercial surrogacy will remain illegal
- Non-commercial surrogacy arrangements will be lawful but agreements will be unenforceable; in that the birth mother cannot be legally compelled to relinquish the child or to pay damages for refusing to do so
- Informed consent of all parties is essential
- Mandatory specialist counselling
- Court orders will be available recognising the intended parents as the legal parents where the surrogacy arrangement meets legal requirements and is in the best interests of the child.

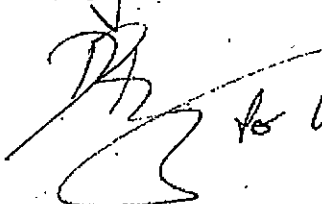
The Government's response

The enclosed table sets out the Government's response to the Report's recommendations. Given the complexity of - and differing views on - many of the issues surrounding surrogacy, further consultation and policy evaluation will be undertaken on several of the points raised by the Committee. The Report contains valuable information that will inform the Government's work on this important topic.

I thank you for your work in relation to this important matter.

Yours faithfully


(John Hatzistergos)

Received at 10:30 am
Friday 18 December 2009
 for Clerk

**NSW GOVERNMENT RESPONSE TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE (LCSC)
REPORT RECOMMENDATIONS**

LCSC Report recommendation	Comment
<p>Recommendation 1 That the NSW Government pursue an amendment to the <i>Assisted Reproductive Technology Act 2007</i> (NSW) to establish a requirement that parties seeking ART treatment to facilitate a surrogacy agreement are assessed for suitability by a counsellor who is independent of any ART clinic, that this assessment counselling must be taken into account by the clinic when determining whether to provide services to facilitate the surrogacy arrangement, and that the term 'independent' be defined for this purpose. The counselling standard should meet the requirements of the NHMRC guidelines.</p>	<p>Agree in principle. The Government notes the distinction between counselling aimed at informing decision making and providing support to parties involved in a surrogacy arrangement (general counselling), as opposed to counselling aimed at assessing the suitability of parties for a surrogacy arrangement (assessment counselling). The Government agrees that ART clinics should consider the results of the assessment counselling when deciding whether to provide services to facilitate a surrogacy arrangement or not.</p> <p>The mechanics of how such a provision would be enacted, whether by amendment to the <i>Assisted Reproductive Technology Act 2007</i> (ART Act), under other legislation or by regulation, will be considered further.</p>

<p><u>Recommendation 2</u></p> <p>That the NSW Government examine the need for a register of counsellors qualified to assess the suitability of parties wishing to implement surrogacy arrangements.</p>	<p>Agree. The Government agrees that it should examine whether it is necessary or desirable to establish a publicly available register of counsellors to assess the suitability of parties wishing to implement surrogacy arrangements. Some of the issues to be considered are:</p> <ul style="list-style-type: none"> • the expertise and experience in surrogacy matters counsellors should have; should "counsellors" be restricted to psychiatrists or other medical practitioners and psychologists or include more general professionals with appropriate training, skills, experience and accreditation? • whether there are enough appropriately qualified people to justify the establishment of a register • how the register would be set up and run; by who; the cost of establishing and maintaining the register.
<p><u>Recommendation 3</u></p> <p>That the NSW Government seek to amend the <i>Assisted Reproductive Technology Act 2007 (NSW)</i> to establish a requirement that all parties entering into a surrogacy arrangement should obtain independent legal advice from a lawyer who holds a full practising certificate from the Law Society of NSW, and that the lawyer issue a certificate stating that the legal advice has been provided.</p>	<p>Agree in principle. The Government is in favour of making it a requirement for the granting of a parentage order that all parties have received independent legal advice about the surrogacy arrangement prior to entering the arrangement. The Government will consider whether such advice should be provided by a lawyer holding a full practising certificate and what form of certification should be provided (for example, should the certificate certify that advice on certain matters has been covered?).</p> <p>The mechanics of how such a provision would be enacted, whether by amendment to the ART Act, under other legislation or by regulation, will be considered further.</p>
<p><u>Recommendation 4</u></p> <p>That the NSW Government examine in detail the screening provisions contained in surrogacy legislation in other jurisdictions, both Australian and overseas.</p>	<p>Agree. The Government notes the useful information in the LCSC Report on screening and eligibility issues and agrees that this area should be examined further, in particular:</p> <ul style="list-style-type: none"> • How the best interests of the child should be considered as part of the screening of intending parents (if the policy decision is taken to regulate this area), for example, the best interests of the child may

	<p>be advanced by the collection of the child's medical, social and cultural history at an early stage of the surrogacy process</p> <ul style="list-style-type: none"> • Whether certain types of surrogacy arrangements should be prohibited, for example, those that would involve co-sanguinity • Criminal records checks related to sexual and violent offences and child protection orders. • Whether there should be a requirement to use ART through a registered clinic and, indeed, whether ART should be required for all surrogacy arrangements. The Government notes the LCSC's comment that the Government should collect more information about the prevalence of unregistered clinics facilitating surrogacy arrangements in NSW and whether the practice, if it exists, is problematic. The Government will endeavour to collect more information on this issue before making a decision. • Criteria applying to intending parents, such as the age and duration of their relationship, intending parents' genetic connection to the child, the position of same-sex couples, unmarried couples and single parents. The Government notes that the majority of the LCSC: <ul style="list-style-type: none"> ◦ does not believe that genetic connection between intending parents and the child should play a part in determining eligibility for surrogacy; and ◦ prefers to leave the position on same-sex couples, unmarried couples and singles to counsellors and clinicians with relevant experience in surrogacy matters. • Criteria applying to the birth mother, such as minimum and maximum ages, whether or not she has had previous children and/or completed her own family, and the genetic connection she may or may not have with the child. The Government notes that the majority of the LCSC: <ul style="list-style-type: none"> ◦ agrees with the minimum age of 18 years applying to birth mothers in surrogacy arrangements using ART under the
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	<p>ART Act; and</p> <ul style="list-style-type: none"> o believes that whether a birth mother has had children and/or completed her own family should be a factor considered during pre-treatment assessment counselling (but not a requirement). <p>The Government further notes the LCSC's general:</p> <ul style="list-style-type: none"> • preference against making recommendations about criteria that refer to particular characteristics of the individuals involved in surrogacy arrangements, leaving counsellors and clinicians with experience in surrogacy matters to determine on a case-by-case basis whether particular characteristics of the intending parents or birth mother strengthen or undermine the particular surrogacy arrangement; and • belief that individual clinics should be free to apply the criteria they feel is appropriate. <p>The LCSC's view is consistent with the principle of minimal government intervention. However, the Government is mindful that the risk of forum shopping increases by leaving the criteria that should be applied to parties to surrogacy arrangement in the hands of individual clinics. Therefore, careful consideration will be given to striking the right balance between adequate regulation of important issues in surrogacy arrangements on the one hand, and avoiding undue government intervention in people's lives on the other.</p>
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<p>Recommendation 5</p> <p>That the NSW Government should consider the desirability of establishing an independent, government appointed, expert review panel that would oversee surrogacy arrangements.</p>	<p>Agree. The Government will consider this issue further. It notes the majority position of the LCSC against establishing a regulatory body, in keeping with its general view that the regulation of surrogacy should be left largely in the hands of expert practitioners in the field. Under the minimal intervention principle, the Government must consider factors such as:</p> <ul style="list-style-type: none"> • whether government intervention in this very personal part of people's lives is justified; • whether the cost of running the panel, the potential delays and complexity involved for parties is justified; and • whether, if the establishment of an expert regulatory body is not deemed appropriate, a body or person representing the best interests of children, such as Community Services, should be involved in some part of the surrogacy process, for example, at the assessment counselling stage (see recommendation 1).
<p>Recommendation 6</p> <p>That the NSW Government review the Assisted Reproductive Technology Act 2007 (NSW) in relation to the prohibition on advertising and brokerage activity associated with surrogacy.</p>	<p>Agree. The Government will consider whether the prohibition on advertising and brokerage activity associated with commercial surrogacy under the ART Act should be extended to altruistic surrogacy arrangements or not. Consideration may be given to the applicability of the advertising and brokerage provisions for fostering and adoption.</p>
<p>Recommendation 7</p> <p>That the NSW Government seek to amend Part 4 of the Assisted Reproductive Technology Act 2007 (NSW) to clarify the definition of commercial surrogacy and provide a clear indication of what reasonable expenses may be legally reimbursed to the birth mother in an altruistic surrogacy arrangement, and provide that any reimbursements must be verifiable and that any other payments or incentives are prohibited to discourage commercial</p>	<p>Agree in principle. The Government agrees that commercial surrogacy arrangements should be clearly prohibited and that the current definition of commercial surrogacy does not clearly distinguish between commercial surrogacy and the reimbursement of reasonable expenses to the birth mother in altruistic surrogacy arrangements. The Government supports the view that commercial surrogacy is anything that puts the birth mother or her partner in a better (financial) position than they would have been had they not undergone the surrogacy. The legislation should aim to ensure that any reimbursements are clearly circumscribed and that any payments or incentives that would fall foul of this principle are forbidden.</p>

<p>surrogacy arrangements. Issues to be considered in this regard include medical, legal, travel, clothing and accommodation costs associated with the pregnancy, and income forgone by the birth mother as a result of becoming pregnant and giving birth.</p>	<p>The Government proposes that, while surrogacy arrangements will not be enforceable, the surrogate mother will be able to enforce an arrangement for the reimbursement of reasonable expenses.</p> <p>The mechanics of how such a provision would be enacted, whether by amendment to the ART Act, under other legislation or by regulation, will be considered further.</p>
<p>Recommendation 8</p> <p>That the NSW Government pursue legislation establishing a transferral of parentage mechanism specifically for surrogacy arrangements, preserving the presumption of legal parentage on the birth of the child in favour of the birth mother, and allowing intending parents in a surrogacy arrangement to apply to the NSW Supreme Court, after six weeks of the birth of the child born through the arrangement, for full legal parentage of the child to be transferred to them.</p> <p>The fundamental requirement for the issue of a parentage order will be that such an order is in the child's best interest. The Court should continue to have its unfettered discretion to decide where lies the child's best interest.</p>	<p>Agree. The Government supports the establishment of a transferral of parentage mechanism for surrogacy arrangements that preserves the presumption of legal parentage on the birth of the child in favour of the birth mother and allowing intending parents to apply to the NSW Supreme Court for a parentage order within a prescribed time period. The definition of the time period, namely, the minimum "cooling-off" period and the maximum period within which applications must be made, will be considered further when model provisions being developed through the Standing Committee of Attorneys-General (SCAG) have been finalised.</p> <p>Agree in part. The Government agrees that the paramount issue for granting a parentage order is that the order is in the child's best interests. However, the Government will consider whether legislation should prescribe factors that the court should take into account when making the judgment as to what is in the best interests of the child.</p>
<p>That the legislation should also provide that the factors the court must consider when considering applications by intending parents in surrogacy arrangements for full legal parentage of the child born through the surrogacy arrangement to be</p>	

<p>transferred to them should include, but not be confined to:</p> <ul style="list-style-type: none"> • Evidence of a pre-conception surrogacy agreement • Evidence that all parties have received independent legal advice • Evidence that all parties have received appropriate counselling both prior to conception and the application to transfer parentage 	<p>Agree.</p> <p>Agree.</p> <p>The Government agrees that a court should consider whether all parties have undergone appropriate counselling. It will consider whether it is necessary for counselling to have occurred both prior to conception and prior to the application to transfer parentage. In most circumstances, counselling will occur prior to conception and entry into a surrogacy arrangement and this would cover issues related to transfer of parentage. Therefore, it may not be necessary to include an additional presumption in favour of counselling at a second stage prior to an application to transfer parentage.</p> <p>Agree.</p>
<ul style="list-style-type: none"> • Evidence that all parties to the surrogacy agreement consented to the agreement upon entering into it, and still consent to it being implemented and parentage transferred to the intending parents • Evidence the child is residing with the intending parents at the time of the application. 	<p>Agree.</p>

<p><u>Recommendation 9</u></p> <p>That the NSW Government pursue legislation requiring that the original birth certificate issued for a child born through a surrogacy arrangement record the names of all parties to the arrangement, including the birth parent(s), the intending parent(s) and gamete donors where they exist.</p>	<p>Agree in principle. The Government agrees that information about the birth parent(s), the intending parent(s) and gamete donors where they exist should be made available to a child born through a surrogacy arrangement. However, how this information would be made available will need to be considered further and be consistent with any SCAG model provisions on the topic. For example, a complete picture of the child's genetic heritage and legal parentage could be made available through a combination of the information recorded on the original birth certificate, the new birth certificate and a central donor register.</p>
<p><u>Recommendation 10</u></p> <p>That the NSW Government pursue legislation requiring that an amended birth certificate be issued for a child born through a surrogacy arrangement following the transfer of parentage to the intending parent(s) and that the amended birth certificate record the names of the intending parent(s) only and include a notation that an original birth certificate exists. The original birth certificate should be retained and made available to the child under the same requirements provided in the <i>Births, Deaths and Marriages Registration Act 1995 (NSW)</i> relating to all birth certificates.</p>	<p>Agree in principle. The practicalities of registration and access to the birth certificates will need to be considered further. It is likely that the original birth certificate will be treated as a "closed certificate", which will determine the method of notation on the register and access to the certificate.</p>