

Our Ref: LW

Your Ref:

27 March 2009

Ms Rachel Callinan

**EMAIL: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)**

Dear Rachel

Re: Enquiry into Legislation on Altruistic Surrogacy in New South Wales

I attach my written responses to remaining questions from hearing.

Yours faithfully,  
DGB LAWYERS

per:



**L WRIGHT**

Encl.

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**STANDING COMMITTEE ON LAW AND JUSTICE**  
**Inquiry into legislation on altruistic surrogacy in NSW**

**REMAINING QUESTIONS FROM HEARING**

**Ms Linda Wright, lawyer**

**Legal advice**

1. On average, how many clients do you advise in relation to surrogacy per year?
2. Do all your clients utilise artificial reproductive technology to facilitate their surrogacies?
3. How do parties wishing to enter into a surrogacy arrangement find a lawyer qualified to give them legal advice on this issue?
4. Your submission (p1) notes that you have provided advice to clients from many Australian jurisdictions. What cross-jurisdictional issues arise in this area?

**Government regulation of altruistic surrogacy**

5. It has been suggested that if NSW does not act to regulate altruistic surrogacy and the issue of legal parentage, the practice of people travelling to countries such as India to enter commercial surrogacy arrangements will increase. What are views about this?
6. Do you think that preconception agreements should be part of an approval process for surrogacy, as has recently been legislated for in Victoria?
  - Who do you think should be responsible for approving arrangements?
  - How should such an approval body be constituted?
  - What options should be available to applicants who do not receive approval?

**Legal parentage**

7. Would a recognised surrogacy agreement help streamline the court process of transferring parentage and give intending parents a greater degree of confidence they will be granted legal parentage of the child?
  - Are there examples of non-legally binding agreements in other areas that are recognised by the courts and which streamline court processes?

**National consistency**

8. While the Standing Committee of Attorney General's has recently released a discussion paper proposing a national model to harmonise regulation of surrogacy, jurisdictions like Victoria have already enacting legislation to deal with altruistic surrogacy. How should NSW approach the issue of national consistency?

## WRITTEN RESPONSES TO REMAINING QUESTIONS FROM HEARING

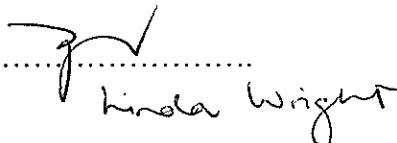
### INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NEW SOUTH WALES

1. 10-12 (2) Yes.
- (3) I can only speak for how parties find me. They are generally referred by the Fertility Clinic with which they are dealing; some have found me through a Google search and others have been referred by Psychologists there are consulting as part of the ethical requirements of the Fertility Clinic. (Not all clinics appear to require legal advice.)
- (4) The obvious issue arises where the commissioning parents and the birth parents live in different States and the child is to be born in a State different to the State of residence of the commissioning parents. When I first started to give advice in the surrogacy area in 2003/2004 only the ACT had legislation in place and each State had different legislation regarding registration of birth, ability to place a child in the care of a third party, adoption, etc. Queensland, of course, had legislated to criminalise surrogacy so it was impossible for either party to be residing in that State. As the various States have moved forward with their legislative program it has become less common for me to see clients from States other than New South Wales although recently I have had to grapple with two scenarios where the surrogate was living in New Zealand and the birth was to occur there while the commissioning parents intended to continue to reside in Australia with the child.
- (5) I am not sure the primary reason people travel to countries such as India is because of the lack of legislative framework and the issue of legal parentage. From the media reports I have read the couples who travel overseas are not motivated so much by the issue of legal parentage as by the fact that they do not qualify for surrogacy procedures locally according to the legislation in their jurisdictions and the ethical standards of the various Fertility Clinics (eg. single sex couples or couples whose reasons for infertility cannot be identified and who fail to conceive through a number of IVF cycles). The needs of these couples may or may not change depending on the criteria, if any, that are to be established by Regulation.

Legal parentage, while it is an issue for commissioning parents, is not the primary focus in my experience. Their primary focus is on having the child in their care. The parentage issue, while not ideal, in my experience has never prevented couples who qualify

for surrogacy undertaking surrogacy procedures in New South Wales.

- (6) I have some difficulty with the notion of setting up a Review Panel as an instrument of Government. The creation of another bureaucratic instrument, the cost, the intervention of Government in an intensely personal part of people's lives is one that needs to be carefully thought through. There would also need to be some appeal process from an administrative law perspective and a further question arises as to whether the Panel would be bound by precedent. In my view, on balance, I am more in favour of the individual Fertility Clinics setting up Ethics Committees and approval being controlled in that way (particularly if some basic criteria for surrogacy applicants is to be proscribed by legislation). In coming to that conclusion I recognise there could be criticism of that type of process as to the Clinics are, after all, commercial ventures. However, in my experience the Ethics Committees are not rubber stamps and they do refuse applications.
- (7) It goes without saying that if one of the legislative requirements is for a Substitute Parent Agreement (as its called in the ACT) then an agreement in writing would help streamline any Court process for the transfer of parentage. The real question appears to be whether these agreements are to be recognised as binding or voidable (and therefore they may only be one of a number of considerations for the Court which is being asked to make the transfer of parentage Order).
- One example of a non-legally binding agreement is a Parenting Plan under the Family Law Act. These Plans are not binding in the same sense as Court Orders but a Court exercising jurisdiction under the Family Law Act is required to take the existence of Parenting Plans into account. Whether or not that requirement actually streamlines Court processes is doubtful.
- (8) This question is not really within my area of expertise. It seems to be a political issue particularly given that many of the other States have either already enacted legislation or are proceeding down that path. It may therefore prove quite difficult to persuade those States to amend legislation in such a way as to achieve complete consistency.

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Linda Wright