

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Organisation: Department of Premier and Cabinet, NSW Government

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New South Wales Government

Department of Premier and Cabinet

TCO/22249

The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie St, Sydney
NSW 2000 Australia

17 OCT 2008

Dear Ms Robertson

I am writing in relation to the inquiry into legislation on altruistic surrogacy in NSW, currently being conducted by the NSW Legislative Council's Standing Committee on Law and Justice.

Please find attached a NSW Government submission to the inquiry.

The NSW government welcomes the opportunity to make a submission, and trusts its advice will assist the Standing Committee in their work on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Schmidt', written over a horizontal line.

John Schmidt
for Robyn Kruk
Director General

TCO/22249

SUBMISSION TO NSW PARLIAMENTARY INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY

Surrogacy is a sensitive and complex issue, and the NSW Government welcomes the Standing Committee's inquiry into the options for regulating altruistic surrogacy.

Currently, commercial surrogacy is illegal in NSW and surrogacy agreements, whether or not they are commercial, are void. This means that non-commercial surrogacy arrangements are permitted, but the arrangements are not enforceable in law in the event of a dispute. There is currently no NSW legislation which could clarify what to do in the event of a dispute, what the limits are to such "altruistic" surrogacy arrangements, what safeguards there are for the welfare of the prospective children, or what the rights and responsibilities of the parties are.

The NSW Government recognises that the debate on surrogacy often dwells on the needs of the "requesting parents". However, when considering the appropriate legislative response to surrogacy, the NSW Government is of the view that the focus should primarily be on the welfare of the children to be born into surrogacy arrangements.

Surrogacy and Adoption

Consistent with this focus, the NSW Government notes that the overarching object of the *Adoption Act 2000 (NSW)* is just as applicable to surrogacy. As stated in section 7(a) of the Act: 'the best interests of the child concerned, *both in childhood and later life*, must be the paramount consideration in adoption law and practice' (emphasis added).

The NSW Government recognises that there are legal and practical differences between surrogacy arrangements and adoption. However parts of the regulatory framework for adoption could inform the framework for surrogacy, and could therefore be considered by the Committee in its inquiry. Relevant areas include:

- provisions concerning adopted children's access to information on their genetic parents and siblings;
- provisions relating to the legal recognition of the adopting parents;
- the criminal records and associated checks required for local adoption processes; and
- penalties for misleading children about their genetic parentage, consistent with the *Assisted Reproductive Technology Act 2007 (NSW)*.

The Department of Community Services (DOCS) has advised that currently the Department may sometimes become involved in facilitating surrogacy arrangements, when approached to facilitate the adoption of a child by the requesting parents in a surrogacy arrangement. However this is not ideal, as surrogacy is outside the core business of DOCS' Adoption and Permanent Care Service, which is to provide adoptive placements for children in out-of-home care or where there are child protection concerns.

National Work

The NSW Government notes that the Standing Committee of Attorneys General (SCAG) has prepared a comprehensive discussion paper for public consultation on a national model law to regulate surrogacy.

The purpose of the discussion paper is to outline the issues to be addressed by a national model law on surrogacy and to invite public comment. The discussion paper has yet to be publicly released for consultation, but publication is expected shortly.

However, SCAG has agreed that a national model regime recognising surrogacy arrangements should be based on principles that:

- ensure that the best interests of the child are the paramount consideration;
- aim to minimise scope for disputes between the surrogate mother and the commissioning parents; and,
- aim for minimal intervention in people's lives.

SCAG also agreed in principle that a national model should contain the following key features:

- commercial surrogacy will remain illegal;
- surrogacy agreements will be legally 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;
- specialist counselling should be mandatory; and,
- court orders should be available to recognise the commissioning parents as the legal parents, where the surrogacy arrangement meets legal requirements and is in the best interest of the child.

SCAG's work aims to develop a harmonised approach, and to ensure that the rights of surrogate mothers, requesting parents and surrogate children do not vary from jurisdiction to jurisdiction.

Further Issues to Consider

In undertaking its role the NSW Government suggests that the Committee may wish to consider:

- whether a criminal records check should be required for requesting parents;
- whether legally binding decisions about the roles and responsibilities of both birth and requesting parents should be settled prior to birth;
- situations where the birth mother is unwilling to relinquish her child to the requesting parents;
- whether or not it is desirable to seek to accommodate surrogacy arrangements in parenting presumptions; and,
- the position of same sex couples.

As background in relation to the last point, it is noted that the NSW Government recently implemented amendments to the *Status of Children Act 1996* to extend parenting presumptions to lesbian couples for children arising out of the use of a fertilisation procedure. This presumption only operates in situations where the birth mother is a member of the couple.

The NSW Government thanks the Standing Committee for the opportunity to provide these comments, and trusts they will assist the Committee in its inquiry.