Submission No 36

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Name: Ms Linda Wright

Date Received: 29 October 2008

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Date received: 29/10/2008

Dear Ms Thompson

I am a Lawyer practising in New South Wales in the area of surrogacy.

I made a Submission to and gave evidence to the Committee of the Queensland Parliament who were charged with investigating altruistic surrogacy and who recently published its recommendations.

I have only just become aware of the existence of the current New South Wales inquiry and unfortunately do not have time to prepare a separate Submission.

I do, however, attach the written Submission I made to the Queensland Committee some parts of which will be relevant to your inquiry.

I am forwarding a separate copy of the Submission to your co-worker Rachel Callinan.

Yours faithfully

L M WRIGHT

SUBMISSION TO INVESTIGATION INTO ALTRUISTIC SURROGACY COMMITTEE

As a Lawyer practising in New South Wales in the area of surrogacy who has advised both commissioning parents and the surrogate and her partner in over 40 cases my views may be of relevance and interest to the Committee.

In the past five years I have assisted clients from every State and Territory of Australia (excluding Queensland, the ACT and Tasmania) on the issues and legal barriers they face in pursuing surrogacy arrangements using ART provided in fertility clinics in New South Wales. My principal workload has involved the preparation of lengthy written reports to the Ethics Committee of one particular clinic on the advice provided to both the commissioning parents and the surrogate and her partner. That report is then one of the number of reports the Ethics Committee considers in deciding whether to approve the proposed surrogacy arrangement. I have, however, also provided assistance to patients of other clinics both before the embryo transfer and after the birth.

1. Should the legal restrictions and criminal penalties against altruistic surrogacy be removed from the Surrogate Parenthood Act 1988 (Queensland)?

   In my view the short answer to that question is "yes".

   Whilst the issues paper notes that some Queenslanders are ignoring the potential penalties there must be many others for whom the fear of prosecution would be acting as a deterrent and as such infertile Queensland couples are being denied an option available to all other such couples in the remainder of Australia. Even if the penalties being imposed are so minimal as to encourage the criminal code to be broken if one assumes that it is in the best interests of the child to be fully informed of the circumstances of his/her birth then what becomes of the moral if that birth was as a result of the parents engaging in a criminal act.

2. Should the Queensland Government play a role in regulating altruistic surrogacy arrangements?

   Again, in my view the answer is "yes". If altruistic surrogacy is to be decriminalised then statutory regulation should follow particularly to provide a mechanism for transfer of parentage so that the child is not left in legal limbo as currently occurs in New South Wales. The Queensland Parliament could consider legislation akin to the ACT Parentage Act 2004 which provides a post-birth process for obtaining a Supreme Court Order declaring the commissioning couple to be the child's parents and enabling the issue of a Birth Certificate for the child accordingly.

   Such a post-birth legislative program does not, of course, deal with some of the other issues noted in the issues paper. In New South Wales those issues are matters for the relevant Ethics Committees of the fertility clinics which follow the ethical guidelines of the National Health & Medical Research

Council. In some respects leaving those issues to be dealt with by such Ethics Committees on a one by one basis may be preferable to attempting to legislate on those issues.

3. What criteria, if any, should the commissioning parents and/or surrogate have to meet?

As a general principle I would support the imposition of some criteria including that of the surrogate having to conceive through ART conducted by a registered fertility clinic. In this way monitoring and enforcement of the criteria would be intrinsically linked with the ethical requirements of the medical profession. I would not limit the ART procedure to IVF as there may be medical reasons for other forms of ART to be used in individual circumstances.

(a) *Commissioning parents*

All of my experience to date has been with heterosexual commissioning parents who are either married or in long term de facto relationships and whilst I can understand and appreciate why Victoria and South Australia would be looking at a non-discriminatory approach my view at present is that society is not ready to accept the creation of non-traditional families through processes sanctioned by Government. Legislation both decriminalising and supporting surrogacy will have a far better chance of being passed if it is limited in its scope. Legislation too broad may be doomed to fail.

Assuming the above to the basis for surrogacy then the following criteria should be considered:

- Must be adults.
- Commissioning mother must be infertile, have a health risk associated with bearing a child or have a genetic condition with possible serious health consequences for the child.
- Must not have a mental condition which would impact on capacity to parent. (NB I do not support the same exclusion for a physical disability as many of the parents who would seek to access surrogacy would be excluded eg. if the commissioning mother had suffered cancer to part of her reproductive system leading to a hysterectomy or removal of ovaries.)

(b) *Surrogates*

- Should not have to be infertile.
- Need to have previously given birth or completed their own family (thus lessening the likelihood that the surrogate will experience difficulty in surrendering the child).
- Ideally should be a relative of either of the commissioning parents or a friend of long standing.
- Should not be the genetic mother.

(c) *Common criteria*

I support all of the criteria listed under this sub-heading at page 6 of the issues paper.

4. What role should a genetic relationship between the child and the commissioning parents and/or surrogate play?

As stated above, it is my view that the surrogate should not be genetically related to the child.

It is also preferable that at least one of the commissioning parents have a genetic relationship although consideration could be given to an exception to that requirement where it can be demonstrated the commissioning father is infertile (in addition to the medical reasons outlined above relating to the commissioning mother). Such a situation would be unusual but not unknown (c.f. the Alice Kirkman case).

Whilst it is acknowledged that prohibiting the surrogate from using her own gametes will involve in some cases a fourth person in the equation (by the use of donor egg) nonetheless it is far more likely to lead to a more successful surrogacy and also lead to less complicated genetic relationships particularly where the surrogate is a mother, sister or cousin of one of the commissioning parents.

5. What legal rights and responsibilities should be imposed upon the commissioning parents and/or surrogate?

(a) *Preconception Agreement*

I would support the concept of a Preconception Agreement as suggested in the WA Surrogacy Bill as evidence of prior deliberation but I would not support such agreement being legally enforceable. A child is not a commodity to be traded and it should be open to the surrogate not to have to agree to transfer parentage to the commissioning parents. This would be particularly important if partial surrogacy was to be permitted.

(b) *Residency*

As I would support a consistent approach to surrogacy throughout the whole of Australia in my view the Committee should not recommend that it be a requirement for the commissioning parents and the surrogate to reside in Queensland. If residency is not a requirement, however, particularly as it relates to the surrogate, then problems may still arise if the birth occurs in another state which has no or inconsistent legislation.

6. Conditions for the transfer of legal parentage

(a) *Approval*

The approval of both surrogate parents should be necessary (not just the birth mother). Such a requirement would be in line with the Family Law Act which clearly recognises that both parents have joint responsibility in relation to parental responsibility.

(b) *Living arrangements*

In terms of the evidence that might be required before the transfer of parentage the Committee could consider imposing a requirement that a counselling report be obtained detailing issues such as bonding, relationship between commissioning parents and surrogate parents and proposals for ongoing contact and communication. (Such a report would be akin to that required under the Family Law Act where an Order is being made in favour of "non-parents".) Such a report could be relatively simple but again would ensure that the transfer of parentage is being done voluntarily.

(c) *Time limits*

Time limits as applicable in the ACT and as proposed by other jurisdictions seem sensible and non-controversial and should be followed. Whether the minimum period is six weeks or four weeks would appear to matter little.

(d) *Change of child's name*

In New South Wales it has proved possible for the surrogate parents to register the child's family name using the family name of the commissioning parents. In this manner the child at least has a Birth Certificate pending adoption which matches the name by which the child will be known. I am unaware of whether this process is available under the relevant Queensland legislation. If not, and if the Committee's recommendation is not to implement legislation for the transfer of parentage then some consideration should be given to recommending an amendment to the relevant registration of birth legislation to at least permit such a process to occur.

(e) *Reasonable expenses for surrogates*

In the matters in which I have practised it is a requirement in most that the commissioning parents provide an undertaking to meet all the expenses of the surrogate and to provide insurance for death and disability arising from the pregnancy and birth. The undertaking must be in writing and acknowledged in writing by the surrogate. Although I have not had direct involvement in the obtaining of such insurance clients have informed me that it is possible to obtain.

One interesting question which has arisen recently is the question of the Federal Government's "baby bonus". In all matters in which I have given advice the surrogate parents have indicated their intention to give the bonus (when received) to the commissioning parents. If in fact that did not occur then the retention of the bonus by the surrogate parents may be seen as giving them a commercial advantage and thereby bring the arrangement into the realm of commercial surrogacy.

(f) *Brokering and advertising*

I would support a prohibition on brokering and advertising. Given my view that one of the criteria for the surrogacy arrangement should be that the surrogate is either related to or has a long term friendship with the commissioning parents then such services should not be necessary in any event.

7. What right should a child have to access information?

The child should have full and free right to all information including original Birth Certificate and donor information.

DATED: 13 June 2008

LINDA WRIGHT