



**AUSTRALIAN
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FOR
HUMAN RIGHTS**

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18 July 2012

The Honourable Jarrod Bleijie MP
Attorney-General and Minister for Justice
State Law Building
50 Ann Street
BRISBANE QLD 4000

By email: attorney@ministerial.qld.gov.au

Dear Mr Bleijie

Re: Objections to the proposed amendments to the Surrogacy Act 2010

Introduction

1. We write on behalf of Australian Lawyers for Human Rights ("ALHR") to urge you, as the Attorney-General and Minister for Justice, to reconsider the Government's plan to amend the Surrogacy Act 2010. Our concerns have arisen out of recent news articles and reports that have been circulating through the media.

About ALHR

2. ALHR was established in 1993 and is a network of Australian law students, lawyers and legal academics active in the practice and promotion of international human rights law standards and principles in Australia. ALHR has a national membership of over 2000 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia and its membership collectively holds extensive experience and expertise in international human rights law policy and advocacy in Australia.

Current legislation

3. As it stands, under the Surrogacy Act 2010, any person, regardless of his or her relationship status, will be able to enter into a surrogacy arrangement. Intended parents may be a married or de facto couple (including same-sex de facto couples) or a single person.

The proposed amendments

4. The proposed amendments will repeal provisions that enable same sex couples, de facto couples of less than two years and singles from entering into surrogacy arrangements in order to start a family and criminalise those that choose to do so.
5. ALHR considers that the proposed amendments to the Surrogacy Act 2010 would legislate for discrimination and inequality in breach of international human rights standards.

International treaties

International Covenant on Economic, Social and Cultural Rights ("ICESCR")¹

6. It is submitted that the proposed amendments would discriminate against members of the community on the bases of sexual orientation, marital and family status and against women so as to be in breach of the International Convention on Economic, Social and Cultural Rights (ICESCR) to which Australia became a signatory on 18 December 1972 and, subsequently, ratified on 10 December 1975.
7. For reasons which are set out below, ALHR submits that the proposed amendments are incompatible with and in contravention of the ICESCR and other international human rights instruments under which Australia also has legal obligations. Specifically, it is submitted that the proposed amendments will breach the following articles of the ICESCR, namely, articles 2(2), 3, 4, 10(3), 12(1).

8. Article 2

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

9. As explained by the Committee on Economic, Social and Cultural Rights, "other status" includes sexual orientation², marital and family status³ and health status⁴.

Discriminatory Effect of Proposed Amendments:

10. The Amendments will breach Article 2(2) by discriminating against de facto and same sex couples of less than two years standing and against lesbian co-mothers by not recognizing them as parents.

¹ The ICESCR adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976, in accordance with Article 27.

² See: Committee on Social, Cultural and Economic Rights, General Comment No. 14, The right to the highest attainable standard of health (article 12), E/C.12/2000/4, Geneva, 25 April-12 May 2000, paragraph 18 and General Comment No. 15, The right to water (arts. 11 and 12), E/C.12/2002/11, at paragraph 33 and General Comment No 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2(2)), E/C.12/GC/20, Geneva, 4-22 May 2009, paragraph 32.

³ See Committee on Social, Cultural and Economic Rights, General Comment No 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2 (2)), E/C.12/GC/20, Geneva, 4-22 May 2009, paragraph 31.

⁴ See Committee on Social, Cultural and Economic Rights, General Comment No. 14, paragraph 12b, 18, 28, and 29 and General Comment No 20, paragraph 33.

11. Article 3

Article 3 of the ICESCR states:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Discriminatory Effect of Proposed Amendments:

12. The Amendments will offend Article 3 as they discriminate against men and women in same sex relationships and hetero de facto relationships of less than two years standing as well as single women and men. The proposed amendments will directly discriminate against women by ceasing to recognise lesbian co-mothers as "parents".

13. Article 4

Article 4 of the ICESCR states:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Discriminatory Effect of Proposed Amendments

14. ALHR is concerned that the proposed amendments involve discriminatory conduct in breach of the ICESCR that are neither compatible with the protected rights nor solely for the purpose of promoting the general welfare in a democratic society.

17. Article 10 (3):

Paragraph 3 of Article 10 of the ICESCR states:

The States Parties to the present Covenant recognize that:

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions ...

18. Article 12 (1):

Article 12 paragraph 1 of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

19. The Committee on Economic Social and Cultural Rights General Comment No 14 at paragraphs 8 and 14:

*8. The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, **including sexual and reproductive freedom, and***

the right to be free from interference ... ⁵

Effect of Proposed Amendments

20. The proposed amendments have the effect of jeopardizing the welfare of children born by use of surrogacy by using a discriminatory process to subject parents of certain children to criminal penalty. The same process of discrimination is used to prevent access to the surrogacy process which may be properly considered to be an aspect of the right to health protected by the convention.

Convention on the Rights of the Child ("the ICRC")

21. The amendments have implications for the registration of birth of the children born by the surrogacy arrangements which are proposed to be criminalised. Even the amendments do not prevent the details of the surrogacy arrangements being reflected in the birth certificate, the practical result of making the arrangements unlawful will be that such details will not be recognised on the child's birth certificate. This will have the effect of depriving the child of a right to having their parents recognised and will breach various articles of the ICRC including:

Article 7(1):

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, **the right to know and be cared for by his or her parents.***

Article 14(2):

2. *States Parties shall respect **the rights and duties of the parents** and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*

Article 18(1):

1. *States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. **Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.***

Universal Declaration of Human Rights ("UDHR")

21. The proposed amendments to the Surrogacy Act discriminate against sexual orientation, marital and family status under the Universal Declaration of Human Rights ("UDHR") adopted by the General Assembly on 10 December 1948 to which Australia is not only a signatory but a founding party.
22. The proposed amendments contravene this treaty, in particular Articles 2 and 16 (1) for reasons provided below.
23. Article 2 states that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political

⁵ See Committee on Social, Cultural and Economic Rights, General Comment No. 14, above n1, paragraphs 8 and 14.

or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

24. Article 16 further states:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Discriminatory Effect of Proposed Amendments

25. Article 16 (1) of the UDHR allows men and women the right to found a family. Article 2 provides that all rights and freedoms set out in the Declaration may not be the subject of discrimination the basis of sex or other status.
26. ALHR considers that the proposed legislation will be contravening the UDHR on the basis that it discriminates against those of the same sex, de facto relationships of less than two years and singles to access a surrogate to start a family.

Endorsement of letter

27. Further to the above contravention of the international treaties to which Australia is a signatory, ALHR supports the public policy arguments against the proposed changes as outlined in Mr Stephen Page's letter to the Attorney-General and Minister for Justice dated 28 June 2012. A copy of Mr Page's letter is annexed hereto.
28. In summary of Mr Page's letter:
- ALHR agree that after granting a certain class of people rights, Parliament will be removing these same rights;
 - ALHR agree that limiting those able to enter into surrogacy arrangements does not change the desire to have children despite differences in relationships or sexuality;
 - For the reasons set forth in the preceding paragraph, the proposed changes are unlikely to be effective. People whose rights are restricted by the proposed changes and who intend to be parents may move interstate or internationally where it is legal or alternatively they will do it without knowledge of authorities;
 - The proposed changes appear to legislate for conduct that would otherwise be and may still be in breach of section 22 of the *Sex Discrimination Act* which makes it unlawful for a person to refuse to provide services to another person on the ground of the other person's marital status (We note that s. 22 is expressly binding on the Crown in right of a State); and
 - ALHR agree that the proposed changes target an already vulnerable group. As LGBTI people already feel marginalized by society, they will feel they are being targeted by the wider community because they are perceived as being different.
29. Further to the potential contravention of international treaties and public policy issues listed above, the changes would, of themselves, have detrimental impacts upon the human rights of Queenslanders. Not only will the laws marginalise groups within society, the people of Queensland will lose faith and trust in a Government that clearly stated before the election that laws relating to surrogacy will not change.
30. Accordingly, ALHR encourages the government in which you are Attorney-General to rethink these proposed changes.
31. Finally, ALHR would request an opportunity for representatives of ALHR, Mr Page, and a member of Surrogacy Australia, to meet with you to allow the issues raised herein to be further outlined.

We look forward to hearing from you.

Regards,



Stephen Keim SC
President, Australian Lawyers for Human Rights

Alex McKean
Sharne Hobill
Queensland Convenors, Australian Lawyers for Human Rights