



30 April 2014

The Director  
Justice Policy  
Department of Attorney General and Justice  
GPO Box 6  
Sydney NSW 2001

By email: [justice.policy@agd.nsw.gov.au](mailto:justice.policy@agd.nsw.gov.au)

Dear Director,

### Review of Surrogacy Act 2010

1. Women's Legal Services NSW (WLS NSW) thanks the Attorney General for the opportunity to comment on the Review of the *Surrogacy Act 2010*.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. We understand that the purpose of this review of the *Surrogacy Act 2010* ("the Act") is twofold: firstly, to determine whether the policy objectives of the Act remain valid and secondly, to ascertain whether the terms of the Act remain appropriate for securing those objectives.
4. The policy objectives of the Act are to:
  - protect the interests of children born as a result of surrogacy arrangements,
  - provide legal certainty for parties to surrogacy arrangements, and
  - prevent the commercialisation of human reproduction.



### ***Protect the interests of children born as a result of surrogacy arrangements***

5. WLS NSW supports the first policy objective unreservedly and recommends that it is retained.
6. Overall we consider that the Act is largely achieving the aims of this objective.

### ***Provide legal certainty for parties to surrogacy arrangements***

7. WLS NSW supports the second policy objective and recommends that it is retained.
8. We note that there has been criticism of the surrogacy frameworks established in different states and territories across Australia on the basis that they are complex and inconsistent.<sup>1</sup> WLS NSW agrees that having complex sets of rules for parentage transfer that are also different in each state and territory has led to confusion, jurisdiction-shopping and in some instances, uncertainty. Accordingly, we believe national harmonisation of surrogacy regulation is essential.
9. However, WLS NSW is strongly opposed to any amendments to NSW legislation that would mirror discriminatory restrictions contained in the surrogacy legislation of other states, such as restrictions on access by same-sex couples or non-married or single intended parent/s. WLS NSW supports a human-rights approach that ensures that parties to a surrogacy arrangement are not discriminated against on the grounds of relationship status, gender, or sexual preference.

### ***Prevent the commercialisation of human reproduction***

10. We anticipate that many people will make submissions arguing that the third policy objective should be changed to allow for the inclusion of commercial surrogacy within the New South Wales surrogacy framework.
11. We note that despite criminalisation of international commercial surrogacy since the commencement of the Act in 2011 there have been no prosecutions of people who have participated in commercial surrogacy arrangements overseas, despite cases in the family law courts and anecdotal stories of such arrangements being undertaken by people resident in NSW. It seems apparent that the terms of the Act, or at least the lack of enforcement of those terms, has not prevented residents of NSW from engaging in commercial surrogacy in other countries, thereby evidencing a failure of the terms of the Act to achieve the third stated policy objective.
12. We submit that the fact that an offence exists but has not led to prosecution in cases where commercial surrogacy has occurred has led to a situation where there is a significant degree of uncertainty about the legal status of commercial surrogacy, especially when those arrangements are legal in the overseas jurisdiction. We note that people who engage in commercial surrogacy arrangements have been making

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<sup>1</sup> See for example: Harland, Alexandra, 'International Surrogacy, parentage provisions and the need for Australian law reform' (Paper presented at the National Family Law Conference, Canberra, 2010); Millbank, Jenni, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165; Rundle, Olivia, 'Transnational Surrogacy: Mapping the issues' (Paper presented at the National Family Law Conference, Canberra, 2010); and Boers, Paul, 'Surrogacy Arrangements: The Patchwork Legal Landscape' <[www.nicholeslaw.com.au/articles/surrogacy-patchwork.pdf](http://www.nicholeslaw.com.au/articles/surrogacy-patchwork.pdf)>

applications to the family law courts with inconsistent and varied outcomes,<sup>2</sup> leading to a worrying degree of uncertainty for children born through commercial surrogacy.

13. We note suggestions by commentators such as Professor Millbank who recommend that Australia re-evaluate its position against commercial surrogacy.<sup>3</sup> We note that the current situation of tacitly allowing NSW residents to engage in commercial surrogacy may result in the outsourcing of exploitation of women in countries such as India, Thailand, Ukraine and Guatemala, which we oppose.
14. We have two primary concerns about regulating domestic commercial surrogacy. Firstly, we think that it is highly likely that people who wish to become parents would continue to enter into commercial surrogacy arrangements in countries where surrogacy is unregulated and cheaper. Secondly, we are concerned about the potential for exploitation of Australian woman as we consider it likely that in a commercialised fertility market it would, in the main, be the most vulnerable women who would become surrogates.
15. Should the government consider altering the third policy objective, we recommend:
- that there be a new policy objective aimed at preventing the exploitation of women and children involved in surrogacy arrangements, and
  - that an inquiry into the impact of domestic commercial surrogacy be considered.

If you would like to discuss any aspect of this submission, please contact Mari Vagg, Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,  
Women's Legal Services NSW

Janet Loughman,  
Principal Solicitor

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<sup>2</sup> See for example, *Dennis & Pradchaphet* [2011] FamCA 123, *Dudley & Chedi* [2011] FamCA 502, *Ellison and Anor & Karnchanit* [2012] FamCA 602, *Gough & Gough & Kaur* [2012] FamCA 79, *Hubert and Anor & Juntas* [2011] FamCA 504, *Re Michael: Surrogacy Arrangements* [2009] FamCA 691, *Ronalds and Victor* [2011] FamCA 389

<sup>3</sup> Millbank, Jenni, "The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?" (2011) 35(1) *Melbourne University Law Review* 165, 178.