

notify the Genetic Manipulation Advisory Committee and any relevant State or federal government department. The supervisory government agency — such as the Victorian Department of Agriculture and Rural Affairs — should be required to conduct an environmental assessment before any release and to advertise the release proposals Statewide. This procedure will ensure that interested individuals can obtain information and participate in decision-making before the proposal is approved. □

surrogate motherhood

I began receiving photographs of a beautiful, brown-eyed infant with chubby cheeks. He no longer looked exactly like his father as he did at the time of birth. Instead the top half of his face was identical to mine. Only then did I recognise the fact that he was my son, too. He would carry my genes with him from one generation into the next. And I had exchanged the right to ever see him again for \$11 500.

Elizabeth Kane, June 1988

controlled surrogacy. The National Bioethics Consultative Committee (NBCC) has issued a draft report on surrogacy in which it recommends that surrogacy arrangements should not be legislatively prohibited and should be controlled by uniform legislation. This conflicts with recommendations made by the New South Wales Law Reform Commission (NSWLRC) in its March 1989 report on Surrogate Motherhood (LRC 60).

no surrogacy. In its report the NSWLRC took the view that surrogacy should be discouraged by all practicable means available to the law because it is not in the interests of the community or the children created by its use for surrogacy to become a widely used method of overcoming infertility. For the same rea-

son, the Commission also recommended that IVF surrogacy be prohibited.

The NSWLRC recommended that surrogacy should be discouraged because:

- it involves the deliberate creation of new life for the purpose of alleviating infertility;
- the body of woman is put to the service of the commissioning parties;
- the practice entails the planned separation of child and birth mother at a very early age and permanently;
- it ignores the interest of other members of the families of the participants;
- both the woman who is to act as the surrogate and the woman who commissions the child are placed at significant risk by the process because of the possibility of pressure being exerted on them to comply. Even in altruistic surrogacy arrangements there can be no guarantee that both women have exercised freedom of choice.

For a full discussion of the NSWLRC report see [1989] *Reform* 104.

why surrogacy should be permitted. The NBCC draft report states

- In summary, the central principle to be considered in relation to surrogate motherhood is that of qualified autonomy. This involves the right of procreative freedom, that is the right of a couple to make arrangements to form a family. However, the involvement of a third party in these arrangements, namely the surrogate mother, renders this right conditional. The same principle of personal autonomy can be applied to the rights of a woman to use her body as she sees fit, including the right to act as a surrogate mother if she so desires and freely consents.

- While recognising the rights of these parties to enter into surrogacy arrangements, it goes without saying that any such arrangements should be entered into freely and that participants (including the family of the surrogate mother) are fully informed of the legal, medical and social ramifications of such action. As noted before, the requirement of informed consent has particular relevance here. Such a process should eliminate the potential for exploitative arrangements and prevent the establishment of unregulated agencies.
- Because surrogacy arrangements are neither immoral nor anti-social, and because of the small number of people likely to seek such arrangements in Australia, and also because the social and legal ramifications of surrogacy are as yet unclear, the Committee is of the opinion that it is not necessary to enact legislation prohibiting surrogate motherhood.
- It is therefore recommended that surrogacy arrangements should not be legislatively prohibited.
- Such legal toleration of surrogacy does not imply positive encouragement of surrogacy arrangements on an unrestricted basis. Rather surrogacy should be seen as a legitimate means of alleviating infertility and of family formation in certain cases.
- The Committee recognises the dangers of allowing a *laissez faire* approach to surrogacy, particularly in light of some of the widely publicised cases. To avoid these problems it is recommended that surrogacy arrangements should be controlled by uniform legislation.

The NBCC was established to advise Health Ministers on the social, ethical and legal issues arising from:

- reproductive technology, including human embryo experimentation and the bearing of offspring;
- bio-medical and health related research;
- the application of scientific and medical technology; and
- the provision and delivery of health services.

dissents. Two members of the Committee, Sister Regis Dunne and Ms Heather Dietrich, dissented from acceptance of surrogacy.

Sister Dunne's dissent was based on her difficulties with the application of the principle of personal autonomy; the treatment of women and children as commodities and the impact of the formal establishment of surrogacy on public policy.

principle of autonomy. Sister Dunne said she believed the right to personal autonomy as an ethical base to support the recommendation that surrogacy be allowed is not convincing. While she agreed the right to autonomy extends to the right to procreate, she believes this does not extend to the right to use the body of another woman to establish a pregnancy.

effect on biological mother. In her dissent Sister Dunne pointed out that every pregnancy changes a woman and 'the involuntary relationship with her baby may change her views, plans and the subsequent course of her life'. She cited the case of Elizabeth Kane who suffered considerable trauma as a result of a surrogacy arrangement. ([1988] *Reform* 187-191.)

women and children as commodities.

The second reason for Sister Dunne's dissent related to the possible exploitation of the poor. She said: 'I see surrogacy as a further movement towards commodification of life and towards treating people and parts of people . . . as commodities in a consumer society.'

public policy. A third reason for the dissent is based on public policy. At present the law refuses to enforce contracts of personal service. Sister Dunne says that 'if surrogacy becomes established such enforcement might be a necessary ingredient in surrogacy contracts'. She also expresses concern that in future in custody arrangements the paramount consideration may not be the welfare of the child but contractual arrangements.

reproduction as socially constructed set of regulations. Ms Heather Dietrich said in her dissent that 'surrogacy emphasises reproduction as a biological event not a socially constructed set of relations in which women have prime responsibility and power . . . Commercial surrogacy reduces a mother to an incubator and the child as a commodity. Altruistic surrogacy exploits the gift of mothering to deny the importance of the particular physical, emotional and social relationship built in pregnancy'.

adoption and ethics. Ms Dietrich commented that adoption often causes pain in later life. However she said that knowing you were conceived deliberately to be given away could cause even more trauma. She also points out that: 'under present law and welfare practice parents cannot harm, sell their children or relinquish them except through state scrutiny in adoption. It seems strange and mistaken to go to great lengths to institute special laws and agencies to allow surrogacy arrangements'.

Ms Dietrich also asks: if social responsibility is taken as the prime principle of guiding policy on surrogacy, the questions that need to be asked are:

- What is the nature of the current system of family/social relations?
- Where does the prime duty of care lie?
- Does surrogacy further or detract from humane and non-alienating social relations?

The Committee is seeking views on whether surrogacy should be allowed but controlled. Their address is: GPO Box 9848, Adelaide, South Australia, 5001 (telephone: (08) 210 9565). The final report on surrogacy will be issued in 1990.

other reports. The NBCC draft report point out that various international and Australian reports and inquiries have addressed the issue of surrogacy.

These reports have generally considered surrogacy to be undesirable, particularly where private entrepreneurs making surrogacy arrangements for a profit are involved and have recommended action ranging from discouragement of surrogacy arrangements to the introduction of criminal sanctions against those either assisting or involved in such arrangements. In these reports surrogacy has been variously considered to be contrary to the welfare and interests of the child and contrary to public policy. Several reports recommended that the birth mother always be considered to be the legal mother of any child born and some have recommended the prohibition of any advertising in relation to surrogacy.

Several reports distinguish between surrogacy for profit or those arrangements involving the exchange of money and surrogacy for 'altruistic' reasons. Most considered the former to be undesirable and

some went as far as recommending criminal sanctions. The latter, 'altruistic' situation was generally fraught with problems; some however also recommended criminal sanctions in this situation, whereas other report adopted a more liberal acceptance of such private arrangements.

The Ontario Law Reform Commission recommended that surrogacy arrangements be legislatively regulated by the courts because it was considered that such arrangements were not immoral nor against public policy and to prevent the dangers of clandestine private arrangements likely if surrogacy is totally prohibited.

government control needed. The NBCC argues that there needs to be Government control of surrogacy arrangements. The draft report states:

In general, it can be argued that both total prohibition and total tolerance of surrogate motherhood completely fail to address the legal and related issues that arise when children are actually born following surrogacy arrangements. Such issues concern the children's legal status, support rights and inheritance rights. Legislation that forces the surrogate mother, against her will, to be the legal mother clearly has implications for the child and the interest of the child require that such issues be addressed. Again, a system of penal prohibition of surrogate motherhood must consider the consequences for the child born through surrogacy arrangements of the criminal conviction of parental participants.

Given the obvious and serious arguments against

- the total legislative prohibition of surrogate motherhood arrangements, and
- the uncontrolled allowance of surrogate motherhood arrangements,

the option of allowing but controlling surrogacy demands closer examination and discussion.

Thus, as we have seen, it can be argued that there needs to be control by the

State of surrogacy arrangements because of the interests of the children born through such arrangements, the possible dangers of exploitation of surrogate mothers, the possible abuses of surrogacy arrangements when they are controlled by private entrepreneurs, the interests of commissioning couples, the innovative character of legal surrogacy and the need to monitor its effects on all the parties concerned, and finally the lack of a complete community consensus about surrogacy.

elizabeth kane. An article reviewing surrogacy and the law in various States of Australia appears in [1988] *Reform* 187. The article also discusses the experience of Elizabeth Kane, the first commercial surrogate mother in the USA. Although initially supportive of surrogate motherhood, Elizabeth Kane underwent traumatic repercussions from her act and since then has campaigned actively against it. □

national bioethics consultative committee

The egg it is the source of all.
'Tis everyone's ancestral hall.
The lowest thief that e'er was caught,
The harlot's lip, the maiden's leg,
They each and all came from an egg.

Clarence Day, 'Thoughts on
Peculiar Dawns,'
Thoughts Without Words 1928.

The National Bioethics Consultative Committee (NBCC) was established in March 1988 to provide guidance to policy makers on ethical and moral problems. The need for such a committee was identified by a Senate Select Committee of the federal Government which was considering the Human Experimentation Bill (1985) and the Family Law Council's inquiry *Creating Children*. A number of State government organisations also recommended