
Surrogacy banned

by Barry Hunt

The National Bioethics Consultative Committee recommended that surrogacy be strictly controlled by legislation. Governments have rejected their recommendation. This article examines legal, ethical and political issues associated with the surrogacy debate.

In March of this year the Australian Health and Social Welfare Ministers decided that surrogate parenthood should be accorded no legal standing and that penalties should be imposed upon any 'third parties' who seek to facilitate surrogacy arrangements. This decision was reached during the Ministers' deliberations of the National Bioethics Consultative Committee's (NBCC) *Surrogacy Report 1* (April 1990). The committee's recommendations were based on the premise that surrogacy is neither inherently immoral nor anti-social. In summary they recommended that non-contractual or voluntary surrogacy arrangements should be permitted but under strict controls. More specifically that:

- the practice of surrogacy should not be totally prohibited
- the practice of surrogacy should not be freely allowed
- the practice of surrogacy should be strictly controlled by uniform legislation

- uniform legislation should render all surrogacy arrangements unenforceable and include controlling mechanisms for agencies and advertising controls.

Whilst the Ministers' decision is in line with both the Victorian and South Australian legislation currently in place, the Queensland legislation will need to withdraw its ban that covers all aspects of surrogate motherhood and the associated criminal penalties that apply to all parties — including the birth mother and commissioning parent/s — that are involved with the activity. (Surrogacy is when an infertile couple arranges with another woman to bear a child for them.)

Not just a medical procedure

The NBCC was established in 1988 to advise Health Ministers (see [1989] *Reform* 209—211). Its thirteen members covered a range of disciplines and community interests. In its 1985 report, *Creating*

Children, the Family Law Council had recommended the establishment of an independent, multidisciplinary body along the lines of the NBCC whose role would be to advise federal, State and Territory governments. It said that reproductive technology is not just a medical procedure but is concerned with creating a child, with family formation, and it is therefore essential that the matter be monitored by a national body which is representative of all of the interests vitally involved and not confined to medical interests. The Family Law Council said the questions raised by reproductive technology raise fundamental social, moral, legal and ethical issues which involve the whole community. 'These are broad and fundamental questions of public policy and of the public interest — of which medical procedures are but one component'. They include the well-being and interests of Australian families and children, women's health and welfare, access to and allocation of public

resources, the keeping of records, the introduction of legislation and questions of government regulation and control. 'They should not be dealt with in a medical framework'.

NBCC disbanded

Australian Health Ministers disbanded the NBCC in April 1991 and created a new committee, the Australian Health Ethics Committee, which will be part of the National Health and Medical Research Council. Ms Robyn Layton, the Adelaide barrister who chaired the NBCC, will chair the Australian Health Ethics Committee.

The AHEC

Like the NBCC, the Australian Health Ethics Committee (AHEC) will represent a wide spectrum of interests. However, it will now only be partly funded by the Australian Health Ministers Conference and will no longer report to federal and State Health Ministers but to the National Health and Medical Research Council. Six of the thirteen members of the AHEC are former members of the NBCC. They are: Robyn Layton who chairs the committee; Professor Don Chalmers, a lawyer; Professor Max Charlesworth, a philosopher; Sister Regis Mary Dunne, a Sister of Mercy and director of the Provincial Bioethics Centre for the Queensland Catholic Diocese; Professor John Funder, Deputy Director of the Baker Medical Research Institute; Dr Sandra Gifford, Department of Social and Preventative Medicine, Monash Medical School.

Other members of the AHEC are its Deputy Chair, Professor Ross Kalucy, Flinders Medical Centre, who chaired the ethics committee of the NHMRC; Dr Heather Mitchell, an epidemiologist; and — Professor Ann Woolcock, a medical practitioner. Three other members are to be appointed.

They will include:

- a person knowledgeable in the regulation of the medical profession (to be appointed after consultation with the Australian Medical Council and the Australian Health & Medical Advisory Council)
- a person appointed for their background and knowledge in the field of nursing or an allied health area
- a person appointed after consultation with the Consumers Health Forum.

National conference on surrogacy

Surrogacy is a difficult and divisive issue. The National Conference on Surrogacy in February 1991 recommended it should not be permitted. The conference was organized by the Mission of St James and St John.

The following statement was passed without dissent by participants at the final Conference plenary session:

- Surrogacy, in whatever form, *should not be permitted* because it is contrary to public policy as:
 - treating children as commodities
 - it uses women's bodies as a means to an end and exploits women
 - it is destructive to the family of the woman who acts as a surrogate.
- The Conference supports the enactment of uniform State and Territory legislation which *discourages surrogacy arrangements*, whether commercial or non-commercial, and which prohibits certain practices involved in surrogacy arrangements.
- The Conference rejects the proposals of the National Bioethics

Consultative Committee for the institutionalisation and regulation of *surrogacy*.

The Conference's ethical stance

Ms Wendy Weeks of the Phillip Institute, in a statement at the Conference, summed up the ethical stance which she said had emerged at the Conference. She described its features

- Children and their interests and needs are valued highly and this is reflected in public policy.
- The issue of relinquishment is profound and should not be overlooked.
- Surrogacy should be viewed in context. While there are insufficient funds for family support services, there have been proposals for counselling services and record keeping for surrogacy situations.
- There is a lot of concern for children's identity issues and women's and children's pain in relation to relinquishment and separation.
- Arguments in favour of surrogacy suggest that human beings can split minds, bodies and spirit without great personal and social costs.
- There is concern about society's tendency to resort to risky and dangerous technological practices in the interests of 'the few'.

Ms Weeks also said that many were disappointed that 'the NBCC had not rightfully fulfilled their brief to advise on ethics and engage in public education and information sharing'.

Is surrogacy immoral?

Nicholas Tonti-Filippini, Research Officer for the Australian Catholic Bishops, discussed the ethical implications of surrogacy at the National Conference. He criticised the NBCC report for failing to

distinguish between ethics and the law. He said the fundamental ethical issue is not whether a woman should be legally free to bear a child for another but whether she ought to do so. He said a woman does not have the moral right to be a surrogate mother because surrogate motherhood violates a woman's obligations to the child as the child's natural mother. It also violates her obligations to society which 'has an obligation to protect children and consequently to uphold the social institution which offers the necessary elements of love and security afforded by the mutual love parents have for each other. Anything which fragments or risks the relationship between parents and consequently between parents and children is of direct social concern.' He also quoted psychiatric studies which indicate that becoming a surrogate mother can cause psychiatric problems.

He said the question to the addressed by ethics committees is not whether surrogacy should be prohibited but rather should surrogacy be encouraged or discouraged. He discussed the function of an ethics committee:

The function of an ethics committee as a persuasive rather than a coercive social instrument means that ethics committees can seek to promote ideal social arrangements rather than sinking to the level of the lowest common denominator which tends to be the standard of the law.

A different view

Professor Max Charlesworth, formerly the Professor of Philosophy at Deakin University (and a member of a number of bioethics committees including the AHEC and NBCC), disagrees with Nicholas Tonti-Filippini. He commented on the ethics of surrogate motherhood at the Conference. He said surrogacy is not immoral.

In my view then there are no convincing arguments of moral principle against surrogate motherhood. It does not of itself necessarily involve treating women as means to the ends of other women, or exploiting them, or treating them as 'slaves'. On the contrary, it affirms the 'pro-choice' principle that a woman should be allowed to choose for herself how she is going to use her body and it affirms the 'pro-life' principle that having children is a central human good.

Professor Charlesworth concluded that the State does not have the right to prohibit surrogacy arrangements.

In my view, as will by now be clear, I see the choice of the infertile couple to enter into a surrogacy arrangement, and the choice of a surrogate mother to offer to bear a child for them, as being wholly within the sphere of personal morality which it is not the law's business to enter. The State has of course the right to regulate the practice as it does with adoption, artificial insemination, IVF and other modes of family formation, but it does not have the right to prohibit it. ... The crucial thing here is the reasons for and against surrogacy and I can only report, after almost three years study of the matter, that I do not find any of the reasons against surrogacy to be convincing.

In its *Surrogacy Report* (April 1990) the NBCC addressed the ethical issues involved in surrogacy. It identified three principles in the surrogate motherhood debate

- the principle of personal autonomy
- the principle of justice, and
- the principle of the common good.

Personal autonomy

This principle refers to the notion that a couple should, as far as

possible, be free to make their own procreative arrangements to form a family so long as this does not involve demonstrable harm to others and that a woman should be free to make decisions about the use of her own body and to gestate a child for another woman so long as this does not demonstrably harm others.

The principle of justice requires fair treatment and protection of the interests of all involved.

The principle of the common good means that society has a stake in ensuring that as far as possible parent-child relationships are established in an orderly way, that information about parentage be valid and accessible and that the institution of the family should not be subverted.

The feminist perspective

Dr Robyn Rowland, a social psychologist and Associate Professor in Women's Studies at Deakin University who has worked in the area of reproductive technology over the last five years, wants to make it illegal to use reproductive technology 'for the purposes of creating children in order to give them away'. She said for the State to approve surrogate motherhood would be to institutionalise it:

What we are talking about is institutionalising so-called surrogate motherhood, that is, the State setting up a system that organises, pays for, approves and thereby encourages the use of women's procreative ability as if it is an object for sale or exchange, and through this, the creation of a new commodity — a child.

Exploiting women

Dr Rowland said that surrogacy involves the financial and emotional exploitation of women and that surrogacy, by its nature, turns a child into a commodity. This is cause for alarm:

We cannot estimate the impact on a person of feeling that they were the next desired commodity in the middle-class home.

She pointed out that 'surrogate motherhood' is a misnomer. The surrogate mother is not a substitute mother, but a birth mother. The use of such terms as surrogate motherhood disenfranchises birth mothers. She criticised the NBCC for de-emphasising the relationship between a woman and her developing foetus.

The National Bioethics Consultative Committee likewise de-personalised birth mothers, describing them as women willing to 'gestate an embryo' as if there were no physical, emotional and psychological relationship between a woman and her developing foetus. It discussed the use of 'a mother's womb' which could be 'freely donated' as if the womb itself could be extracted and donated while the woman slips quietly into the background. Again, Professor Max Charlesworth argues that 'a woman has the right to use her body as she chooses'. This is the logical extension of the objectification of women, and perverts the feminist position that women should have control over their bodies. Only if you consider a woman's body to be an object can it be 'used'. Interestingly, men rarely discuss their own bodies to be available for 'use'.

Dr Rowland said a woman does not have a right to have a child. She said:

Women must have a right not to reproduce and mother. Because the alternative would mean that they were compelled or forced to do so. Coercive motherhood is an assault both on the women and on the child ... but there is no accompanying right to have a child. The right to live without coercion is very different to an argument that says that an individual has the right to draw on public funds and resources as if

she or he is owed a child. The State does not owe children to people and people do not have a right to demand this of the State.

NBCC Chair responding

Ms Robyn Layton defended the NBCC's recommendations at the Conference. She said the NBCC had concluded there is nothing inherently immoral or anti-social about surrogacy but there were certain risks of potential exploitation in the practice of surrogacy which should be controlled. They did not consider that surrogacy should be available to other than infertile women and were united that surrogate mothers should not be required to relinquish the child but instead should have the right to retain the child if they so chose. They also thought it essential for information about the surrogacy arrangement and the parties to be kept to pass on to the offspring.

Current laws confusing

Ms Layton pointed out that the current law is very confusing and it varies between the States. In all States the birthing mother is treated as the legal mother and the husband or the de facto of the birthing mother, if he consents, is treated as the legal father. However, this situation is complicated by the federal Family Law Act which applies in all States except Western Australia and Queensland. The effect of that Act is that in the case of artificial conception, if the husband or de facto of the birthing mother does not consent and if the commissioning father donates the sperm, then the commissioning father may be regarded as the legal father. This has resulted in considerable confusion.

Other complications

Ms Layton said the NBCC took other matters into account. It heard anecdotal cases of falsification of birth certificates. People have been

getting around legal difficulties by the surrogate mother going into hospital under the name of the commissioning parent and so there has been a falsification of birth certificates. The NBCC also had some anecdotal material about off-shore arrangements, and people travelling from one State to another depending on whether or not there criminal sanctions applied.

Informal surrogacy arrangements

The Committee knew that people were entering into surrogacy arrangements without proper counselling. As a consequence, in the current situation, there is no protection from financial or emotional exploitation for the small numbers of people involved in surrogacy. Thus the NBCC preferred recognition and regulation of surrogacy.

Further questions

As ALRC President, Justice Elizabeth Evatt, says in the foreword to the conference's published proceedings *Surrogacy — In Whose Interest?*, certain questions remain unanswered. Prohibiting a practice does not eliminate it. What support should be given to people who enter into informal surrogacy arrangements? What protection should be provided to children born as a result of informal surrogacy arrangements?

The NHMRC was reconstituted by the Federal Executive Council in December 1990. One of its functions is to make recommendations to the Commonwealth, the States and the Territories on ethical issues in relation to health. The AHEC will report to the council of the NHMRC. However its agenda has not yet been set and *Reform* understands that, given that the AHEC's functions are extremely broad, it is unlikely that it will return to reproductive technology issues. □