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Chapter 5

Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty

Anita Stuhmcke*

I. Introduction

Crime and reproduction are areas of citizen activity that have historically been local or personal phenomena. Traditionally the regulation of such activities has been territorial in the sense that it has been applied within a particular geographical territory. Today, however, the application of extraterritorial criminal provisions to international reproductive practice is increasingly common. This accretion of jurisdiction by a (nation) state over conduct occurring outside its borders has been attributed to the rise of globalisation as '[c]heap travel, advances in technology and telecommunications and the anonymity of the internet have created rapid expansion of transnational crimes such as child sex tourism, terrorism, and human rights abuse'.[1] McSherry and Bronitt frame the emergence of a more flexible approach to jurisdiction and a move away from territoriality as being related to the 'globalisation of crime', observing that:

> Crimes of international jurisdiction are those that international law regards as so 'grave and heinous' that every nation is entitled to try them irrespective of where the conduct occurred. There is disagreement over what crimes fall within this category. It is commonly agreed that war crimes, piracy and slavery fall within it.[2]

Internationally, extraterritorial offences apply to a small number of areas that impinge upon private sexual or reproductive practice. Commercial surrogacy

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1 Danielle Ireland-Piper, 'Extraterritoriality and the Sexual Conduct of Australians Overseas' (2010) 22(2) *Bond Law Review* 16, 32.

2 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Pyrmont, NSW: Lawbook Co., 3rd edn, 2010), 950.

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thus joins this relatively small list of private-life offences, which includes female genital cutting and child sex.[3]

In March 2010, Turkey became the first country to legislate against its citizens seeking third-party reproductive assistance overseas through donor gametes or surrogacy.[4] In doing so, Turkey joined the Australian jurisdictions of the Australian Capital Territory and Queensland, which introduced similar legislative provisions in 1994 (ACT) and 1988/2010 (Qld) respectively. In 2011, New South Wales became the third Australian jurisdiction to apply extraterritorial criminal laws to residents pursuing surrogacy overseas.

It is remarkable that three of the four jurisdictions worldwide which currently impose extraterritorial prohibitions on commercial surrogacy are Australian states and territories. Indeed, given the first extraterritorial commercial surrogacy law was introduced in Queensland almost 30 years ago, Australia has, without fanfare, become a world leader in both quantity and longevity of extraterritorial criminal legislation regulating cross-border assisted reproduction.

This chapter examines the cause, effect and validity of the ACT, NSW and Queensland extraterritorial laws.[5] It questions the justifications offered for the restrictive extraterritorial regulation of commercial surrogacy, and refers to empirical research as to Australian usage of Thai reproductive services,[6] media analysis as to the numbers of Australians who engage in cross-border commercial surrogacy[7] and commentary as to the establishment of Australian owned and operated assisted reproduction clinics in Thailand.[8] Such research reveals no evidence of harm and it is argued that criminal law should not apply to surrogacy in the absence of evidence as to harm[9] and, as authors such as Storrow[10] and Van

3 Wannes Van Hoof and Guido Pennings, ‘Extraterritoriality for Cross-Border Reproductive Care: Should States Act against Citizens Travelling Abroad for Illegal Infertility Treatment?’ (2011) 23 *Reproductive Biomedicine Online* 546.

4 Zeynep B. Gürtin, ‘Banning Reproductive Travel: Turkey’s ART Legislation and Third-Party Assisted Reproduction’ (2011) 23 *Reproductive Biomedicine Online* 555.

5 See also Mary Keyes, ‘Cross-border Surrogacy Agreements’ (2012) 26 *Australian Journal of Family Law* 28; Pip Trowse, ‘Surrogacy: Competing Interests or a Tangled Web?’ (2013) 33(3) *The Queensland Lawyer* 199, Jenni Millbank, ‘Rethinking “Commercial” Surogacy in Australia” (2014) *Bioethical Inquiry*, Published Online 12 July 2014.

6 Andrea M. Whittaker, ‘Reproduction Opportunists in the New Global Sex Trade: PGD and Non-Medical Sex Selection’ (2011) 23 *Reproductive Biomedicine Online* 609.

7 Jenni Millbank, ‘The New Surrogacy Parentage Laws in Australia: Cautious Regulation or “25 Brick Walls”?’ (2011) 35 *Melbourne University Law Review* 165.

8 Andrea Whittaker, ‘Cross-border Assisted Reproduction Care in Asia: Implications for Access, Equity and Regulations’ (2011) 19(37) *Reproductive Health Matters* 108.

9 Anita Stuhmcke, ‘The Criminal Act of Commercial Surrogacy in Australia: A Call for Review’ (2010) 18 *Journal of Law and Medicine* 601.

10 Richard F. Storrow, ‘Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-Border Reproductive Travel’ (2011) 23 *Reproductive Biomedicine Online* 538.

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Hoof and Pennings[11] argue, it is unjustifiable to impose an extraterritorial criminal law in areas of contested morality such as commercial surrogacy.

II. Overview of the Operation of Australian Extraterritorial Surrogacy Legislation

In Australia, as in the United States, there is a 'state-by-state patchwork quilt of reproductive autonomy'.[12] As there is both a lack of constitutional power and political will on the part of the Australian federal government to make laws in relation to surrogacy, regulation has been left to the states and territories. The result has been described as 'medicine by postcode',[13] where ineligible parents travel interstate for treatment with fertility services in restricted states actively facilitating such travel.[14]

This regulatory dissensus is exemplified by the fact that while almost all Australian jurisdictions (with the exception of the Northern Territory) render commercial surrogacy illegal, only three Australian jurisdictions have passed extraterritorial criminal provisions. Implicit extraterritorial regulatory measures such as geographical nexus requirements and parentage orders,[15] which exist to indirectly restrict access to surrogacy, are not discussed in this chapter as they are discussed in-depth elsewhere in this volume. It is worth briefly noting that any intending parents who have entered into international surrogacy arrangements will have to request parentage orders and apply for visas for their children. A child (subclass 101) visa[16] will enable a child born of a surrogacy arrangement overseas to enter, and reside permanently in, Australia. To obtain that visa, the child must satisfy certain requirements relating to age, biology, custody, health, character and

11 Van Hoof and Pennings, above n. 3.

12 Seth F. Kreimer, 'The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism' (1992) 67 *New York University Law Review* 451, 453.

13 Social Development Committee, Parliament of South Australia, *Inquiry into Gestational Surrogacy* (2007), 51 (Dr Christine Kirby).

14 Kerry Petersen, H.W.G Baker, Marian Pitts and Rachel Thorpe, 'Assisted Reproductive Technologies: Professional and Legal Restrictions in Australian Clinics' (2005) 12 *Journal of Law and Medicine* 373.

15 Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27(2) *Australian Journal of Family Law* 135; Keyes, above n. 5.

16 See Department of Immigration and Citizenship, Australian Government, *Visas, Immigration and Refugees: Family Members: Child Visa (Subclass* 101*)* (2012), available at http://www.immi.gov.au/migrants/family/child/101, accessed 9 February 2015.

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sponsorship.[17] If a visa is granted and the child enters Australia, they may then be able to apply for Australian citizenship by conferral.

While there is a general presumption that offences in state legislation do not have extraterritorial effect,[18] it is now well established that state legislatures are nonetheless competent to make laws that operate extraterritorially by express provision in the relevant statute, as long as there is a sufficient nexus between the legislating state and the prohibited act.[19] Following is a brief summary of the three Australian jurisdictions that have operational extraterritoriality provisions to prohibit their residents engaging in international commercial surrogacy.

A. Australian Capital Territory

The provisions with respect to extraterritorial application were first introduced in 1994 in the *Substitute Parent Agreements Act* 1994 (ACT). The aim of the legislation was to prevent people who are normally residents of the ACT from 'procuring the services of a person for the purposes of a substitute parent agreement, or advertising for a birth mother in another State or country'.[20]

The *Substitute Parent Agreements Act* 1994 (ACT) has since been replaced by the *Parentage Act* 2004 (ACT), section 45 of which provides the extraterritorial prohibition for all offences under Part 4 of the Act. The offences under Part 4 include: intentionally entering into (s 41), procuring someone for (s 42), advertising for (s 43) and facilitating pregnancy for (s 44) a commercial surrogacy arrangement.

The exact wording of s 45, titled 'Geographical nexus for offences', is:

1. A geographical nexus exists between the ACT and an offence against this part if, when the offence is committed, the person who commits the offence is ordinarily resident in the ACT.
2. This section is additional to, and does not limit, the Criminal Code, section 64(2) (Extension of offences if required geographical nexus exists).

In the ACT, the penalty for breaching these provisions is up to one year's imprisonment and/or a $11,000 fine.

17 Requirements include that the child must be: a natural (biological) child of the Australian parent; or an adopted child or a step-child of the Australian parent within the meaning of the *Migration Act* 1958; or a child conceived through an artificial conception procedure; or a child born under surrogacy arrangements, where parentage has been transferred by court order under a prescribed state or territory law. See http://www.immi.gov.au/allforms/pdf/1128.pdf, accessed 16 June 2014.

18 *Morgan v Goodall* (1985) 2 NSWLR 655, 656.

19 *Australia Act* 1986 (UK), s 2(1); *Pearce v Florenca* (1976) 135 CLR 507.

20 Explanatory Memorandum, Substitute Parent Agreements Bill 1994 (ACT), 4.

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B. Queensland

In Queensland, section 3 of the *Surrogate Parenthood Act* 1988 (Qld) initially rendered both commercial and altruistic extraterritorial surrogacy a criminal offence. That is, the legislation prohibited a Queensland resident from entering into a surrogacy agreement, regardless of the jurisdiction in which the surrogacy agreement was entered. As of 1 June 2010, the extraterritorial prohibition in the QLD *Surrogacy Act* 2010 is found in s 54, titled 'Territorial application'. The section reads:

> This part applies in relation to:
> a. acts done in Queensland regardless of the whereabouts of the offender at the time the act is done; or
> b. acts done outside Queensland if the offender is ordinarily resident in Queensland at the time the act is done.

The offences listed in Part 1 to which this section applies are: advertising for (s 55), entering (or offering to enter) into (s 56), giving or receiving consideration for (s 57) and assisting professionally, technically or medically (s 58), a commercial surrogacy arrangement.

In Queensland the penalty for breaching these provisions is up to three years' imprisonment and/or a fine of $10,000.[21]

C. New South Wales

Since March 2011, it is an offence to enter a surrogacy agreement whether within or outside NSW as long as there is a geographical nexus with the state. Section 11 of the *Surrogacy Act* 2010 (NSW) is titled 'Geographical nexus for offences' and states:

> 1. This section applies for the purposes of, and without limiting, Part 1A of the *Crimes Act* 1900.
> 2. The necessary geographical nexus exists between the State and an offence against this Division if the offence is committed by a person ordinarily resident or domiciled in the State.
>
> *Note:* Section 10C of the *Crimes Act* 1900 also provides that a geographical nexus exists between the State and an offence if the offence is committed wholly or partly in the State or has an effect in the State.

Section 8 of the *Surrogacy Act* 2010 (NSW) applies a penalty for paid surrogacy of $110,000 (1,000 penalty units) or imprisonment for two years or both for an

21 The penalty is 100 penalty units which equates to $10,000. See *Penalties and Sentences Act* 1992 (Qld), s 5(1).

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individual. The *Surrogacy Act* 2010 (NSW) also amends the *Assisted Reproductive Technology Act* 2007 (NSW) to prohibit clinics from carrying on business in contravention of the *Surrogacy Act* 2010 (NSW) – meaning that ambiguity now surrounds clinic involvement in facilitating surrogacy overseas such as through the exportation of already generated embryos.

D. Enforcement?

The extraterritorial criminal provisions which apply to commercial surrogacy have never been enforced in any of the three Australian jurisdictions. This remains the case despite the existence of high-profile legal and media cases where residents of the ACT, Queensland and NSW have used international commercial surrogacy agencies. There were only a handful of unsuccessful prosecutions of altruistic surrogacy arrangements in Queensland under the now repealed *Surrogate Parenthood Act* 1988 (Qld). As Brown, Willmott and White outline,[22] there were only three prosecutions under that legislation in Queensland. None of them were extraterritorial in operation. In 1991, two women were charged and the magistrate dismissed them without recording a conviction; similarly in 1993, more women were charged under the Act and the magistrate recommended that the charges against them under the legislation should not proceed. Finally, in 1993, a medical practitioner was fined $2,000 and placed on a good behaviour bond for facilitating altruistic surrogacy.

This lack of appetite to proceed with prosecutions was also seen in a high-profile custody case concerning an altruistic surrogacy arrangement that went without criminal charge. The first case in Australia where the Full Court of the Family Court of Australia determined legal parentage following a dispute over the custody of a child following the breakdown of a surrogacy arrangement concerned a couple from Queensland and a couple from South Australia. In *Re Evelyn*,[23] the court applied the traditional family law test of the child's 'best interests' to place her with the South Australian surrogate mother. There was no prosecution of the Queensland couple under the then-operational s 3 of the *Surrogate Parenthood Act* 1988 (Qld).

More recently, Justice Watts in the Family Court of Australia referred two Queensland surrogacy cases to the Director of Public Prosecutions with respect to contraventions of the extraterritorial provisions of the former *Surrogate Parenthood Act* 1988 (Qld). The first case, *Dudley & Anor v Chedi*,[24] concerned an application for parentage of two boys born in August 2009 through surrogacy in Thailand. The boys were conceived using Mr Dudley's sperm and donated eggs, and were carried

22 Catherine Brown, Lindy Willmott and Ben White, 'Surrogacy in Queensland: Should Altruism Be a Crime?' (2008) 20(1) *Bond Law Review* 1.
23 (1998) 145 FLR 90.
24 [2011] FamCA 502.

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to term by a Thai surrogate. The second case, *Findlay & Anor v Punyawong*,[25] was an application to the Family Court by Mr Findlay and Ms Adrei to have equal shared parental responsibility for two children born in Thailand in January 2011, pursuant to a surrogacy arrangement. Like in *Dudley*, the surrogacy arrangement involved Mr Findlay providing his sperm to be used with eggs donated by an egg donor with the resulting embryo carried to term by a Thai surrogate mother. In each case it was reported that the egg donor was unknown and was not a party to the proceedings. Each Thai birth certificate showed the name of the father – Mr Dudley and Mr Findlay as applicable – and the name of the surrogate mother as the parents of the children.

In each case, the applicants applied to the Family Court for orders under the *Family Law Act* 1975 (Cth) for parental responsibility and for the children to live with them at their home in Queensland. The applicants required the said orders to assist them to apply for Australian citizenship for the children. Each surrogate mother consented to the orders being sought by the applicants. In each case, the Court examined whether the orders sought by the applicants were in the children's best interests and made orders for the children to live with the applicants and for the applicants to have equal shared parental responsibility for making decisions about both long-term and day-to-day issues in respect of the children.

In both cases, the Australians travelling to Thailand were Queensland residents and, at the time the children were conceived (prior to 1 June 2010), had committed an illegal act under the *Surrogate Parenthood Act* 1988 then in force. The Court made an additional order that a copy of the judgment be provided to the Office of the Director of Public Prosecutions, Queensland for consideration of whether a prosecution should be instituted against the applicants under section 3 of the *Surrogate Parenthood Act* 1988 (Qld). In the final paragraph in *Dudley* at [32] (and in similar words in *Findlay* at [32]) Justice Watts stated:

> It appears that what the applicants have done in this case is illegal. I would direct the Registrar to send a copy of the judgment to the Office of the Director of Public Prosecutions, Queensland for consideration of whether a prosecution should be instituted against the applicants under s 3 *Surrogate Parenthood Act 1988* (Qld) and if requested, the Registrar is to supply any document on the court file to the Office of the Director of Public Prosecutions.

There have been no resulting prosecutions.

The ongoing absence of any prosecution supports the view that the Australian laws are an exercise in pure symbolism. Of course this observation does not deny that even where laws are symbolic in application, symbolism can cause great

25 [2011] FamCA 503.

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harm.[26] For example, symbolism often uses pejorative language,[27] which not only results in immediate frustration and disappointment for those individuals who wish to use commercial surrogacy but casts people who evade the extraterritorial laws through travel as morally degenerate and even a national threat.[28]

In this sense, the fact that the recent referral to the Director of Public Prosecutions was made in a family law case with respect to an act of international commercial surrogacy takes on fresh significance. Today in Australia, extraterritorial reproductive autonomy provisions have created two tiers of citizens with respect to liberty to travel freely – those from states and territories that do not impose extraterritorial regulation on reproduction and those that do. Australian regulation of surrogacy therefore entails a 'moral Balkanization, in which competing moral agendas seek without restraint to conquer foreign territories … a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain'.[29] The criminal referral with respect to international surrogacy confirms that the moral sovereignty of the Australian state of Queensland no longer ends at its borders. Infringement upon the liberty of NSW, ACT and Queensland residents to avoid the moral prohibition of their home jurisdiction with respect to reproductive choice is complete.

III. The Justifications for the Extraterritorial Laws

The regulatory dissensus that applies to commercial surrogacy throughout Australia is legally justifiable on the basis that the powers of a state to make laws are found in state constitutions. Kirby J outlined the historical view of extraterritoriality in *Mobil Oil Australia Pty Ltd v Victoria*:[30]

> At the time of federation, the prevailing view was that the colonial legislatures were incompetent to enact legislation having an extraterritorial operation. That view was reflected in the early decisions of this court concerning the legislative powers of the states. However, in 1932 this approach was abandoned, so far as the dominions of the Crown were concerned, by the decision of the Privy Council in *Croft v Dunphy* [[1933] AC 156].[31]

26 Storrow, above n. 10, 542.

27 Joan C. Callahan (ed.), *Reproduction, Ethics, and the Law: Feminist Perspectives* (Bloomington, IN: Indiana University Press, 1995), 27.

28 Storrow, above n. 10, 542–3. For an example of a Family Court decision concerning international commercial surrogacy which does not address extraterritoriality, see, *Fisher-Oakley & Kittur* [2014] Fam CA 123 at [22].

29 Kreimer, above n. 12, 463.

30 (2002) 211 CLR 1.

31 Ibid., 53.

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That 'the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation' was later enshrined in s 2(1) of the *Australia Act* 1986 (UK). In *Union Steamship Company of Australia Pty Ltd v King*,[32] the High Court held unanimously that the words 'peace, welfare [or order], and good government' in state constitutions are not to be read as words of limitation.[33] Thus, legislation of a state parliament having extraterritorial effect 'should be held valid if there is any real connexion – even a remote or general connexion – between the subject matter of the legislation and the State'.[34]

While this proposition is regarded as settled law, there is very little constitutional debate as to the extent of any 'territorial limitations upon the legislative powers of the States which arise from the federal structure of which each State is a part'.[35] Kirby J in *Mobil Oil* suggested that state power may be curtailed to 'the extent of any implied limitation derived from the federal Constitution controlling the exercise of that power'.[36]

More fundamentally, the fact that extraterritorial legislation is permissible does not determine whether it is justified in the regulation of any particular subject matter. If, as McSherry and Bronnitt suggest,[37] the option of extending geographical jurisdiction will be 'hard for legislators to resist', it becomes more pressing to examine the reasonableness and desirability of states' expanding their jurisdictions internationally.

Clearly the extension of moral sovereignty over cross-border reproductive travel has proliferated at a state and territory level with respect to commercial surrogacy. Less clear, however, is whether such restrictive Australian extraterritorial legislation is both principled and well thought through. This point is important to consider given the priority placed upon clear justification of an extension of criminal law extraterritorially. For example, as a former Attorney-General noted: 'Naturally, it is intended that extended forms of jurisdiction will only be applied where there is justification for this, having regard to considerations of international law, comity and practice'.[38]

32 (1988) 166 CLR 1.

33 Ibid., 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

34 *Pearce v Florenca* (1976) 135 CLR 507, 518 (Gibbs J); *Union Steamship* (1988) 166 CLR 1, 14; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 372.

35 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 271 (Brennan CJ, Dawson, Toohey and Gaudron JJ). See also *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 369–73.

36 (2002) 211 CLR 1, 54.

37 Bronitt and McSherry, above n. 2, 952.

38 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1999, 12 464 (Daryl Williams, Attorney-General).

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In contrast to federal attempts to extend jurisdiction according to 'international law, comity and practice', such principles are not readily applicable at the state and territory level to extraterritorial criminal laws on commercial surrogacy. Queensland is the only jurisdiction where the 1988 extraterritorial provisions were debated at any length by parliament. In the ACT and NSW the extraterritorial provisions were introduced with a noticeable absence of comprehensive parliamentary debate as to the import and impact of the extraterritorial restrictions.

In the original 1988 Queensland parliamentary debates, the then Opposition moved a last-minute amendment, which was subsequently defeated, to remove the extraterritorial provisions of the Surrogate Parenthood Bill 1988 (Qld). The amendment was brought by Ms Warner (Member for South Brisbane, who became Minister for Families), who stated: 'The Opposition will be opposing the extraterritorial provision, which is quite outside the scope of the legislation and brings to mind some frightening developments',[39] and went on to explain that:

> The reason the Opposition seeks an amendment is that the second part of the clause attempts to use Queensland law in an extraterritorial sense, that is, to chase the residents of Queensland all over the other Australian States and perhaps all over the world to try to limit their activities according to the norms which apply in this State … It seems that the Queensland Government has a desire to proclaim almost anybody a Queenslander. The Opposition also has difficulty in accepting the term 'ordinarily resident in Queensland'. What does that term mean? Does it apply to a person who goes away for a week, two weeks, three weeks of a year?[40]

Further on in the debates, Mr Wells (Qld Attorney-General 1988–95) added:

> To give extraterritorial effect to a clause such as that is contrary to the spirit of the common law, contrary to the spirit of the statute law of Queensland and contrary to sound policy, and is a symptom of a degree of legal paternalism that is creeping through this Parliament … We are dealing with Queenslanders who have every right to make up their minds to be law-abiding citizens in whatever place they choose.[41]

While the Queensland debate was limited, in that the Government offered minimal justification for the extraterritorial provisions (see further below), it provided a wealth of discussion when compared to that in the ACT and NSW. In the 1994 Australian Capital Territory parliamentary debates, the only comment made was by the ACT Attorney-General and Minister for Health, Mr Connolly, that:

39 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1988, 662 (Ms Warner).

40 Ibid., 682 (Ms Warner).

41 Ibid., 683, 686 (Mr Wells).

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> There was also no objection in the submissions to the provision that a person may be liable for an offence where the action occurs in the ACT, regardless of the whereabouts of the person at the time, or if the person is normally resident of the ACT, irrespective of where the action occurs.[42]

In NSW, the extraterritorial provision was introduced in a last-minute amendment by Linda Burney, the NSW Community Services Minister. Even then the amendment did not excite much comment. Mr Aquilina in NSW in the Legislative Assembly debate on the Surrogacy Bill 2010 observed:

> that only a few members have opted to contribute to debate on this Bill. That is not surprising because I think members are feeling emotionally exhausted from the substantial amount of legislation that is being brought forward that requires them to look deeply into their consciences and to provide a personal response to issues that will have a huge impact on the individual lives of many people in this State.[43]

It is clear that the justifications given in favour of passing the ACT, NSW and Queensland extraterritorial provisions are sparse. The following four justifications are the clearest enunciations supporting the passage of the restrictive laws.

The first is the view that children should know their ancestry: 'I believe very much that a child has an absolute right to know who they are and where they come from and that's not possible if they're a surrogate child from overseas.'[44] The second is the view that commercial surrogacy is not available 'in our backyard' and therefore nor should it be available in anyone else's: 'This amendment would simply ensure a consistent standard: commercial surrogacy is not supported in New South Wales, therefore citizens in New South Wales should not be able to circumvent the law by engaging in commercial surrogacy arrangements overseas.'[45]

The third view is that surrogacy – especially commercial surrogacy – encourages exploitation. Ms Burney stated:

> In some countries where commercial surrogacy is allowed, such as the United States, some regulation is in place to protect the wellbeing of surrogate mothers. In other countries regulation is mostly absent. In my mind it would be irresponsible and indeed immoral to legislate in New South Wales but to be

42 ACT, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1732 (Mr Connolly).

43 NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, 27 583 (Mr Aquilina).

44 Linda Burney, ABC Radio, *AM*, 4 December 2010, available at http://www.abc.net.au/am/content/2010/s3084682.htm, accessed 9 February 2015.

45 NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, 27 598 (Ms Burney).

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> silent on the potential exploitation by our own citizens of vulnerable women overseas, especially in the face of mounting evidence that commercial surrogacy is a growth industry in many countries.[46]

Former Sex Discrimination Commissioner Pru Goward shared Burney's view:

> Women are not cows; they are not animals and their job is not to bear children for money because other people want children. If it is good enough to ensure that Australian women cannot be exploited commercially for this purpose, out of respect for women around the world – particularly the vulnerable women of Asia and other countries where commercial surrogacy flourishes – we should be particularly mindful that if we do not support this amendment, effectively we are saying that there is one rule for our women and another rule for women in poor countries. That is not good enough. Whilst this Parliament does not have a leading role in international relations and affairs, it should, as much as it is able, uphold Australian values, which must mean respect for all and the rights of all to live lives free of exploitation. Voting the right way will reflect our commitment to women in those poor countries and reinforce their rights as human beings.[47]

The fourth rationalisation is a simple one that merely observes that surrogacy is bad: 'The Government … wants to give the strongest message possible to the people of Queensland that it believes that surrogacy and the problems that are caused by it are bad.'[48]

IV. Justifying the Justifications?

In one sense the above justifications miss the point entirely. There is not only a marked absence of discussion as to the applicability of extraterritorial provisions applying to enforce moral sovereignty over commercial surrogacy but there is also no debate as to the appropriateness of criminal law restricting liberty with respect to reproductive choice.[49]

Indeed there is a lack of proof that criminal law works in this area of highly personal choice. Paternoster and Simpson note[50] that criminologists focus on two

46 Ibid.

47 NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, 27 599 (Ms Goward).

48 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1988, 686 (Mr McKechnie).

49 Jenni Millbank, 'From Alice and Evelyn to Isabella: Exploring the Narratives and Norms of "New" Surrogacy in Australia' (2012) 21 *Griffith Law Review* 101.

50 Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30 *Law & Society*

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informal costs, the 'shame for doing something which the actor considers morally wrong', and 'social censure or disapproval by significant others' and observe that both have the potential to shape behaviour and encourage or discourage compliance with the law. The difficulty with the application of criminal law to assisted reproduction is that both sites are complex. There is shame associated with infertility and social censure and disapproval in relation to the childless. It is not surprising that criminal law does not operate to dissuade individuals from pursuing all available options of family formation available to them – including possibly illegal commercial surrogacy – as in the eyes of the infertile individual and society the worse crime is often that of being childless. It is therefore difficult to argue that the extraterritorial criminal legislation will meet the objective of preventing commercial surrogacy. As Keenan states:

> The decision to commit a crime is complicated and influenced by many factors, among them the probability of being caught, the expected legal sanction, the probability of actually suffering the legal sanction, and social norms. Norms against committing a crime must be stacked next to the other reasons that a person might commit a crime. It is wrong to assume that persons who have decided to commit a crime are not influenced by positive norms.[51]

Rendering commercial surrogacy illegal will not promote openness and transparency. If criminal law will not stop the practice the result is that it will be driven underground. The result of evasive reproductive practice will clearly not end in the justification stated where children know their genetic heritage.[52] Indeed, as is seen from the referrals to the Director of Public Prosecutions in Queensland, the provisions in the ACT, NSW and Queensland may turn some parents into criminals. As Mr Wells stated in the Queensland parliamentary debates:

> If a Queensland resident went to Victoria or South Australia to legally undergo a [surrogacy] and then returned to Queensland, in principle that person could be thrown into gaol for three years. The legislation is silent about what would happen to the child who was born as a result of that act, an act which was perfectly legal in the place where it was carried out.[53]

Problematic, too, is the language of exploitation used to justify the extraterritorial illegality of the practice. The root of the assertion is that infertile individuals

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Review 549, 579.

51 Patrick J. Keenan, 'The New Deterrence: Crime and Policy in the Age of Globalization' (2006) 91 *Iowa Law Review* 505, 537.

52 See Paula Gerber and Katie O'Byrne's Chapter 6 in this volume entitled 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy'.

53 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 September 1988, 683 (Mr Wells).

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take advantage of liberties which are not available in their home jurisdiction and travel from their own developed 'sending' country to another, often less developed, 'receiving' country[54] to engage in exploitative reproduction. Under this rationalisation a resident of the ACT, NSW and Queensland will owe their state or territory obedience no matter where they are, and any effort to take advantage of other legal regimes is an improper evasion of this obligation. This view borrows support from the traditional terminology applied in this area. For example, the Standing Committee of Attorneys-General Joint Working Group referred to travel for reproductive purposes as 'forum shopping'.[55] This language, alongside terms such as 'sex tourism', 'reproductive tourism', 'fertility tourism' and 'procreative tourism'[56] indicates a casual, enjoyable and blasé misuse of power. This terminology thus embodies notions of choice – that the infertile individuals who travel to access commercial surrogacy do so as a matter of choice and from a position of power. It follows therefore that their 'choice' must involve equal gain for themselves and exploitation of others, and that to enforce the 'at-home' restrictive policy the international pursuit of the practice must be illegal.

This assumption of exploitation is problematic for a number of reasons. First, the condemnation of commercial surrogacy seems ad hoc – there are other illegal Australian reproductive practices that remain legal to seek overseas, such as sex selection.[57] Second, application of exploitative terminology to characterise the infertile is not consistently applied. For example, the dialogue of exploitation has shifted in the ACT between 1994 and 2012. On 19 May 1994 the Australian Capital Territory Attorney-General and Minister for Health, Mr Connolly, stated in the parliamentary debate with respect to the passing of the Substitute Parent Agreement Bill 1994 that 'commercial agreements involve making a business and a profit out of the perceived needs of others'.[58] But this was a reference to surrogacy agencies making a business and a profit out of the needs of the infertile rather than the infertile exploiting the weaknesses of others.

Finally, Van Hoof and Pennings suggest that the reasons why international commercial surrogacy is exploitative have little to do with the practice itself and are solely grounded in the poor economic situation of the surrogate.[59] It is, of course, possible to access surrogacy in well-regulated international jurisdictions

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54 Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' (2002) 8(2) *Australian Journal of Human Rights* 101.

55 Standing Committee of Attorneys-General Joint Working Group, *A Proposal for a National Model to Harmonise Regulation of Surrogacy* (January 2009), 14.

56 Zeynep B. Gürtin and Marcia C. Inhorn, 'Introduction: Travelling for Conception and the Global Assisted Reproduction Market' (2011) 23 *Reproductive Biomedicine Online* 535.

57 Whittaker, above n. 6, 614.

58 ACT, *Parliamentary Debates*, Legislative Assembly, 19 May 1994, 1730 (Mr Connolly).

59 Van Hoof and Pennings, above n. 3.

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where there is a body of empirical research into the soundness of the practice. For example, California has a well-regulated practice of commercial surrogacy and an equivalent country background yet the practice of surrogacy in that jurisdiction was not mentioned in any of the parliamentary justifications for extraterritorial laws in Australian jurisdictions. The exploitation justification is therefore flawed with respect to commercial surrogacy as there is the possibility of non-exploitative legal regulation of its practice.

V. Conclusion

In the Australian context there is an absence of discussion as to the international consequences of extraterritorial criminal law applying to surrogacy and a lack of inquiry into the criminalisation of the practice. Indeed, in Queensland and NSW, this lack of discussion is highlighted by the fact that the most recent extraterritorial prohibitions are the result of government inquiries into altruistic surrogacy which had expressly excluded commercial surrogacy from their terms of reference.[60]

Extraterritorial legislative prohibition upon surrogacy in the ACT, NSW and Queensland condemns the practice both morally and legally. This has been done without extensive debate as to whether laws which restrict reproductive choice are justifiable given 'international law, comity and practice'. Further, there has been little attempt to be informed by individuals who have engaged in cross-border reproductive travel. This is despite the fact that research by Millbank has determined, through media reporting, that a significant number of Australians engage in cross-border commercial surrogacy. From the period 2007–10, 69 distinct families had been involved in surrogacy. Of these 69 cases, travel to 'evade restrictive local laws or to access donor gametes unavailable in home jurisdictions occurred in 44 cases'.[61] Travel to another Australian state was reported in 9 arrangements while international travel occurred in 35 cases. The omission to speak to people who have engaged in cross-border reproductive travel is significant, especially as a UK study found that participants 'saw the ability to access treatment wherever they choose to as an important right in a liberal democracy'.[62]

Australian legislators have disregarded any consideration of such a right in creating ad hoc exceptions in favour of extraterritoriality for specific offences and in extending the law of the state to offences outside state geographical borders.

60 Queensland, *Investigation into Altruistic Surrogacy*, Report (October 2008); NSW, Standing Committee on Law and Justice, *Legislation on Altruistic Surrogacy in NSW*, Report 38 (May 2009).

61 Millbank, above n. 7.

62 Nicky Hudson and Lorraine Culley, 'Assisted Reproductive Travel: UK Patient Trajectories' (2011) 23 *Reproductive Biomedicine Online* 573, 579. Australian research is currently underway see: Sam Everingham, Martyn Stafford-Bell & Karin Hammarberg, 'Australian's use of surrogacy' (2014) 201(5) *Medical Journal of Australia* 1–4.

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Senz and Charlesworth state that '[e]xtraterritorial legislation is a controversial category of law'[63] that impinges upon the sovereignty of the country where the criminalised conduct takes place, suggesting that it is an underhand means of promoting foreign policy objectives. Here, the exact foreign policy objectives of reproductive commercial surrogacy laws are ill-defined. While there is an international obligation not to push our unwanted practices into other countries,[64] there is also an obligation to the residents of a home jurisdiction to ensure that laws which will restrict their offshore choices are passed in a principled and considered policy environment. Both aspects have been sorely lacking with respect to the extension of moral sovereignty being applied to restrict access to cross-border commercial surrogacy.

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63 Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69, 70.

64 Richard F. Storrow, 'Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory' (2005–06) 57 *Hastings Law Journal* 295.

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