

## Opinion

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### **Surrogacy Arrangements: What Happened To Uniform Policy?**

By Anna Krohn

In 1991, a joint meeting of the Australian Health and Welfare Ministers produced a unanimous agreement in which they resolved to encourage state legislators to adopt a consistent policy of restricting and discouraging surrogacy arrangements throughout the country. The Conference found it paramount to protect "women and children from exploitation" and urged the states to declare surrogacy arrangements of any kind legally void, to outlaw arrangements which involved any remuneration and to impose penalties which would deter professionals from abetting in such arrangements.

Prior to the conference, a number of special enquiries within the states had found decisively against the recognition of surrogacy arrangements: "There is widespread opposition to any sanctioning of surrogacy arrangements both in the submissions made to the committee and in resolutions adopted by responsible professional bodies" (120) (Queensland Government Special Committee Enquiry, 1984).

In 1988 the NSW Law Reform Commission recommended that the interests and welfare of children was of paramount concern and far outweighed the interests of any adult parties. It also recommended the invalidating of surrogacy contracts and the formulation of prohibitions against soliciting, servicing, payment or promotion of such contracts.<sup>1</sup>

Victoria, South Australia, Tasmania and Queensland enacted laws which appeared to be consistent with the findings of the Family Law Council and the recommendations of the of the 1991 Ministers' Conference. Surrogacy contracts of both the commercial and non-commercial variety are deemed void and unenforceable. Stronger sanctions and disincentives have also been employed variously in these states.

The Victorian *Infertility Medical Procedures Act* (1984) and its amended form (1995) contain penalties for the payment of surrogates and for the payment of third parties such as advertisers, technicians, mediators, brokers or solicitors. Reproductive technology may only be employed in Victoria upon women who are infertile or at risk of transmitting a serious genetic risk to their children.<sup>2</sup> The Act specifically penalises the immediate parties in a surrogacy contract who offer or receive payment or reward. The government withstood the intense pressure to legalise so-called "altruistic" arrangements during the widely promoted Kirkman sisters case in 1993.

Tasmania's *Surrogacy Contracts Act 1993* similarly deems void all surrogacy contracts and applies criminal sanctions to medical, commercial or technical support of surrogacy.

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<sup>1</sup> A notable exception to the general official opposition to surrogacy was the 1990 Report of the now defunct Australian National Bioethics Consultative Committee. Its report was strongly rejected by a Working Group of the Australian Health Ministers Advisory Council (1990) and by many others of Tonti-Filippini.

<sup>2</sup> In the 1993 Kirkman case the commissioning husband had been sterilised by vasectomy.

In Queensland *The Surrogate Parenthood Act 1988* goes further than the Minister's recommendations in that it penalises all parties involved in any surrogacy arrangements and attempts to prohibit any Queensland resident from entering such arrangements outside the state. All arrangements are void and unenforceable. Several cases have been brought to prosecution (Stuhmcke, A p121).

Although South Australia's *Family Relationships Act 1975* does not directly penalise the commissioning or surrogate parties, it does apply sanctions to any third party seeking to profit from surrogacy or which seeks to promote or procure such an arrangement. Surrogacy contracts are void and illegal in that state.

While there have been some discussions about legislating in New South Wales and Western Australia, these states join the Northern Territory in having no statutory restrictions on surrogacy. However, although there has been little in the way of guidance from common law decisions<sup>3</sup> it appears that such arrangements could be "illegal at common law as conflicting with public policy" and unenforceable despite the absence of statutory regulation (Watson Janu, P p201). It has also been noted that surrogacy arrangements may be in conflict with principles of international jurisprudence, in particular the UN Conventions on the Right of the Child (Watson Janu, 201ff; Tonti-Filippini, N p63-65). All surrogacy arrangements present enormous complications for the legal status of children especially in the face of the reform movement which has taken effect in the States' adoption laws and policy (eg Meggett, M) and in the light of custody and access regulations of The Family Law Act 1975.

### **Into the Breach**

Against this background it is not surprising that the most recent states' legislation, the Australian Capital Territory's *Substitute Parent Agreements Act 1994*, appears to be drafted in the vein of the other States. Its long title reads: "An Act To Restrict The Making Of Substitute Parent Agreements".

It replaces the term surrogacy with "substitute parent agreement", declaring void both commercial and non-commercial agreements and it declares the welfare of the child to "be paramount". However, a Consequential Amendments Bill, which was also passed in 1994, while maintaining the prohibition of commercial surrogacy arrangements, amends sections of the Public Health Regulations and the Children's Services Act 1986. The effects of the amendments, spearheaded by the present Chief-Minister Kate Carnell, have been a dramatic departure from previous legislation. Dr Martyn Stafford-Bell, the director of the Canberra Fertility Centre, is reported to have interpreted the amendment to mean that "We're the only state where the law says "go for it" " (CT 7th March 1996). On August 7th, 1996, he assisted in the embryo transfer, management and delivery of the widely publicised first "surrogate baby" under these Amendments. The story was aired nationally on Nine's *A Current Affair* and in the dailies as a trouble-free, intrafamilial and emotionally warming act of "altruism" between willing adults. So "warming" was the story, that the Chief-Minister personally waived the regulatory 30-day cooling-off period.

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<sup>3</sup> There have been cases involving "baby farming" or trafficking in British law of *Brooks v Blount* (1923), and commercial surrogacy *A v C* (1985).

However, legal tangles surrounding the child's legal status, and the surrogate mother's story of her experience (Tankard Reist, M CT 28/9/96 C3) do little to allay the fears of the welfare and legal critics of surrogacy. It was reported that the surrogate had no regrets about handing back her brother's baby. However it also came to light that 17 embryos were fertilised (4 transferred to the surrogate, the remaining embryos frozen, future unknown), that the surrogate underwent seven ultrasound screens for foetal abnormality and that she coped with the experience by calling herself "an incubator". Despite her own account of a severely toxæmic and dangerous labour, Dr Stafford-Bell reported to the media that it was a "very nice, normal, very controlled delivery".

Although the commissioning couple considered employing a Californian surrogacy clinic (for \$50,000 or more) they settled to spend over \$10,000 on the IVF procedure in Canberra and to sell their story to Channel Nine. Far from being contained within the boundaries of the ACT, infertile couples from other states are seeking out the services of the Canberra Clinic. Rosemary Follet, Shadow Attorney General, warned: "The ACT must ensure that it does not become the focus of jurisdiction-shopping" (CT 9 Mar 1996).

As Tonti-Fillipini notes, "Surrogacy contracts assume that parent-child relationships are created and voided by free choice alone, and make physical kinship relations irrelevant" (Tonti-Fillipini, N p63). The notable silence that followed the ACT Legislature's attempt to bring its adoption laws into line with the recent surrogacy case indicates that no mere act of will can smooth out the legal complications which follow in the wake of surrogacy and relinquishment. It is also impossible to abolish, by law, the implications of "physical kinship" inherent in even the most calmly contracted surrogacy deal.

The law of even the smallest Territory of the Commonwealth, can effectively change the ethos and practise in critical life issues throughout the country.

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