

**AT ISSUE DRAFT REPORT ON SURROGACY ISSUED BY THE AUSTRALIAN NATIONAL  
BIOETHICS CONSULTATIVE COMMITTEE-THE DEBATE ON SURROGACY IN  
AUSTRALIA CONTINUES**

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**Synopsis**—The Australian National Bioethics Consultative Committee (NBCC) issued its Draft Report on Surrogacy in September 1989. In this report, surrogacy is discussed as a legitimate means of alleviating infertility, to allow infertile couples to create families. The NBCC also advocates the use of IVF-assisted surrogacy arrangements. In its recommendations the NBCC has said that surrogacy arrangements should not be legislatively prohibited. It proposes that surrogacy should be controlled by national uniform legislation. The control of surrogacy arrangements would include the use of formal contracts and the possible licensing of surrogacy agencies. A second and final report is due to be issued. Women's groups in Australia have responded angrily to this draft report, in that it endorses the exploitation of women and the commodification of children

The National Bioethics Consultative Committee (NBCC), set up by the Australian Federal Government, issued its draft report on surrogacy in September 1989. The National Bioethics Consultative Committee was set up in March 1988 as a national committee on bioethics to advise state and federal governments on issues such as surrogacy, in vitro fertilization, genetic engineering, and euthanasia. The committee includes representatives from areas such as philosophy, moral theology, women's health and social science. While this committee has the role of advising the federal government, it does not have any legislative powers.

The NBCC attempts in its report on surrogacy to formulate a national perspective for considering the social, legal, and public policy implications of "surrogate" motherhood. It proposes that a national policy should form the basis of uniform legislation and guidelines throughout Australia.

In this report, surrogacy is discussed primarily as a legitimate means of alleviating infertility to

allow infertile couples to create families. It proposes that surrogacy contracts and agencies be made legal, with the possibility that surrogacy boards be established and run by the state. A second report is due to be issued which will put forward details of the implementation of the report's recommendations, and will include draft legislation. Notably however, the principles and recommendations of this report run contrary to all state government reports produced in Australia thus far. The report resulted in a great deal of discussion and was open to submissions from the public. FINRRAGE (Australia) groups (Feminist International Network of Resistance to Reproductive and Genetic Engineering) and other women's groups have responded angrily to this report. FINRRAGE was lead to believe that all submissions would be summarised before being presented to members of the Bioethics Committee. As yet, there has been no feedback from the NBCC.

There were dissenting statements to the report made by two members of the NBCC; Heather Dietrich, lecturer in science at the University of Technology in Sydney and Sister Regis Dunne, director of the Queensland Catholic Bioethics Centre. FINRRAGE supports some of the positions put forward in these dissenting reports.

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Thanks to Sarah Ferber, Robyn Rowland, and FINRRAGE (Sydney)—Annie Cossins, Christine Crowe, Ruth Fitzgerald, Jenny Harding, Susanne Lutherbor-row, Vicki Rusina, and Jane Thorn—for their contributions.

Outlined below are the main principles, opinions, and recommendations put forward in the NBCC report, and the corresponding arguments put forward in the FINRRAGE responses to the report. A response submitted by Dr. Robyn Rowland follows.

### SUMMARY OF FINRRAGE RESPONSES

#### *The principle of qualified personal autonomy*

The central principle that the NBCC report uses when considering surrogacy arrangements is that of qualified personal autonomy, that is, that any person should be free to make their own life decisions as long as these decisions do not cause harm to anyone else, and therefore the surrogate mother has the right to freely make decisions about the use of her own body, and that couples have the right to seek a child through a surrogacy arrangement, as long as surrogate mothers and children born of surrogacy arrangements are not used merely for the ends and purposes of others.

In the FINRRAGE response to this report, we stressed that invoking such a principle ignores the power imbalance inherent in any surrogacy arrangement. The right of a woman to choose to do with her own body as she wishes means very little in a society which does not grant women equal status or power. We strongly rejected this notion that a woman who agrees to bear a child and relinquish it is somehow on equal footing and exercising equal rights with the couple who have “commissioned” her to bear the child. Also, the notion of harm is not defined in the report. How is harm to be assessed and predicted in relation to surrogacy arrangements? Who is the most likely to be harmed?

#### *Language and terminology*

From the outset, the language used in the NBCC report on surrogacy is degrading to the woman who carries, bears, and relinquishes the child. The report defines a *surrogate* mother as a “substitute”—this is not questioned or criticised, and the term is used throughout the report without qualification. At other places in the report, the woman who carries the child is referred to as an “agent of gestation.” The report also uses the term “surrogate child.”

A woman who bears a child is in no sense a *surrogate* or a *substitute*. She has experienced a

pregnancy and given birth. The terminology used in the report has the effect in itself of legitimising surrogacy arrangements and endorses the so-called right of infertile couples to commission women to bear children. The terms *commissioning couple* or *the social or commissioning mother* are also used throughout the report without qualification or criticism.

FINRRAGE stressed in its response that such terminology reflects an attitude that couples should be entitled to seek children through any avenue available to them. This language reflects an attitude of the Bioethics Committee that some people have the right to exploit others. Infertility does not automatically bestow any such privilege, no matter how strong the desire for a child is. Terms such as *commissioning couple* and *surrogate* also clearly justify and then seek to maintain the power imbalance between parties in surrogacy arrangements.

#### *Legal framework*

The notion of qualified personal autonomy is invoked in the NBCC report to favour the establishment of a new legal framework to facilitate the relinquishment of children by their mothers, for the purposes of providing infertile couples with babies. The legal sanctioning of surrogacy we believe is the legal sanctioning of women to be exploited for their reproductive functions. This also extends then to women as a group, that is, that they are commodities to be bought.

The NBCC report sees that the prevention of surrogacy arrangements by law is a violation of the rights of the commissioning couple and the surrogate mother to reproduce as they see fit. The assumption in the NBCC report is that it is the *making of laws* on surrogacy that is problematic, rather than the practice of surrogacy. The idea that prohibitive laws threaten individual rights ignores the reality that as a practice, surrogacy is highly problematic and exploitative. FINRRAGE stressed in its response that there is a mass of literature from countries other than Australia which testify to the problems that it creates (for example, the experiences of Mary Beth Whitehead and Elizabeth Kane in the United States). The Committee has chosen to totally disregard this evidence and the testimonies of women who have acted as surrogate mothers. In Section 2.5.1. of the

report, it is stated that “various statements made by some American surrogate mothers show some of the dangers of emotional and ill-considered attempts at surrogacy, but they do not prove anything about the ethical status of surrogacy.” Such a statement is highly contemptuous of the women who have acted as surrogate mothers and denies their experiences. Instead, the report cites some clearly outdated evidence (from the Old Testament) that surrogacy has been accepted in many cultures. The report also refers favourably to an IVF-assisted surrogacy arrangement in Victoria, Australia, now known as the Kirkman case, which has been publicly promoted as a very positive image of surrogacy.

The overwhelming number of cases where surrogacy has led to bitter disputes and breakdowns in family relationships have been ignored in evidence by the Bioethics Committee.

#### *IVF and surrogacy*

The NBCC report notes that the development of IVF technology has made possible “total surrogacy,” where the gestational mother bears no genetic relationship to the child and therefore this type of surrogacy may reduce the attachment felt by the mother to the child. The procedure of IVF allows the genetic mother, the gestational mother, and the social mother to be all clearly identifiable. The report says that the use of reproductive technologies to facilitate surrogacy arrangements may remove some of the traditional objections to surrogacy, such as sexual intercourse outside marriage.

Firstly, this opinion expressed by the Committee can be interpreted as a promotion of the use of IVF to facilitate surrogacy arrangements, because for some unknown reason, this becomes a less complicated form of surrogacy. This is patently irresponsible. The Committee *does not address any* of the well-documented inherent physical dangers of IVF (e.g., the superovulatory drugs and invasive surgery for egg collection), its low success rate (~8.8% live births/treatment cycle in Australia.<sup>1</sup>), the risk of multiple births, the higher than normal incidence of children born with congenital abnormalities. The report is deficient in not drawing attention to the serious physical and emotional risks for women who undergo IVF. IVF/surrogacy arrangements call up a new market of women for the providers of IVF and therefore

more women will be exposed to this health-endangering and unsuccessful technology.

Secondly, the separation of women into certain categories on the basis of what kind of mothers they are (genetic, gestational, social) is an undermining and fragmenting of women’s integrity. The biological process of motherhood becomes divided from social motherhood, and IVF has specifically advanced the notion that the genetic mother is in fact the *real* mother. The status of the woman who carries the foetus and gives birth to a child is reduced to one of breeder who is seen to have no real links with the child, or as the NBCC report says she is merely “the agent of gestation.” These divisions of genetic mother, gestational mother, and social mother could not have been made without the advent of IVF, where eggs are removed from women’s ovaries for the creation of embryos.

#### *Uterine flushing and surrogacy*

In Section 2.3.6 of the report, the NBCC proposed that uterine flushing could be used as a means of offering the foetus a healthy uterine environment, or “its gestation of choice.” An example is given that a woman who suffers chronic spontaneous abortions could have an embryo flushed from her uterus soon after fertilization and transferred to the uterus of another consenting woman who will gestate the embryo.

Similarly, a woman with uncontrollable diabetes may present her foetus with a hostile or lethal uterine environment: her child however may be safely gestated if it is transferred to the uterus of another woman who freely offers her services. In such cases, surrogacy could offer the foetus the prospect of a healthy development to birth, and be so to speak, its gestation of choice.

FINRRAGE (Australia) has condemned this suggestion made by the Committee that uterine flushing be promoted as acceptable. The so-called rights of a foetus to a healthy environment are being advanced by the Committee here to justify the use of an abhorrent practice.

#### *Relinquishment*

The issue of relinquishment of the child, and the effect of that relinquishment on the woman

who bears the child, on her family, and on the child itself are not addressed in the NBCC report, let alone seen as being highly problematic and alienating. The absence of a discussion of relinquishment is a most serious omission from the report.

*Conclusions and recommendations of the NBCC report*

The NBCC has recommended that:

1. Surrogacy arrangement should not be legislatively prohibited.
2. Surrogacy arrangements should be controlled by uniform legislation.

First, these recommendations are completely contrary to the recommendations of other reports on surrogacy, both in Australia and other countries. Three states in Australia already have legislation—Victorian law prohibits commercial surrogacy and advertising relating to surrogacy arrangements; under South Australian law, surrogacy contracts are illegal and void; and in Queensland, all forms of surrogacy are prohibited as is advertising in relation to surrogacy. Western Australia is currently drawing up legislation.

The NBCC proposes that the control of surrogacy arrangements must include formal approval of contracts, following a process of counselling where the medical, psychological, social, and legal nature and implications of surrogacy “are gradually comprehended and prepared for.” The NBCC also proposes the possible licensing of agencies “to provide advice and assistance to people seeking surrogacy arrangements.” The establishment through legislation of public or approved bodies to “assess the suitability of prospective parents” (Section 6.7) and therefore to decide who shall and shall not procreate is tantamount to an exercise in social engineering.

These recommendations explicitly endorse the use of surrogacy contracts, which will work in the interests of the commissioning couple (which is

often in reality the commissioning man). Such contracts will necessarily impose restrictions on the woman who is to give birth. For example, it is likely that she will be obliged to undergo prenatal diagnosis and possibly abortion if the foetus is deemed defective, and her behaviour will be restricted according to the wishes and demands of the commissioning couple, and the contract. Inevitably, of course, in the scenario drawn by the NBCC, she will be obliged to relinquish the child. (Indeed, under the Legal Rights and Duties section in the report, it is stated that the surrogate mother has a duty to abstain from behaviour or activities which would negligently endanger the health of the child in utero and to obtain adequate prenatal care. This is an inaccurate representation of the *current* legal situation surrounding surrogacy arrangements in Australia.) If such contracts are legally sanctioned and validated, we can only foresee the further exploitation and commodification of women and children.

In FINRRAGE (Australia)’s final statement to the NBCC, we have said that we cannot express any confidence in the NBCC Draft Report on Surrogacy. We do not accept the invoking of a principle such as qualified personal autonomy, which means that women will be exploited to provide infertile couples with babies. We have recommended that the NBCC discard this present report as a basis for a national policy on surrogacy. Instead, a national policy should be drawn up which recognises that surrogacy is the commodification of women and children. Otherwise, we must express a lack of confidence in a bioethics committee that endorses the exploitation of women.

**ENDNOTE**

1. Batman, Gail. (1988). *Commonwealth perspectives on IVF funding*. Canberra: Commonwealth Department of Community Services and Health.

## **AT ISSUE RESPONSE TO THE DRAFT REPORT OF THE NATIONAL BIOETHICS CONSULTATIVE COMMITTEE (NBCC), *SURROGACY***

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I note that this first report from the committee is establishing principles, so it is essential that these be addressed, even though there are also errors of fact in the report, such as suggestions in 4.3.5.2 that sperm donors are paid, where in the State of Victoria they are not. I find the report to be inaccurate, poorly researched, and embedded in a philosophical debate current in the United States of America but not relevant to the Australian situation. The report relies on the work of Bernard Dickens and John Stuart Mill, giving it a purely libertarian slant.

The report implies that all other Australian reports which have gone before lacked principles and were “ill considered” and “hasty” (2.5.2). If the background to legislation in Australia is researched, it will be found that all the State government committees which have deliberated on these topics to date have done so for a period of between three and five years before they presented legislation.

The report also argues for regulation of surrogate motherhood on the primary principle of personal autonomy. It implies that ethical principles were missing from previous reports, yet the fact is that the NBCC report merely *disagrees* with the principles which have been previously laid down.

Before dealing with the principle being established in this report, I want to take issue with a number of aspects of the report itself.

### **1. THE POLITICAL USE OF LANGUAGE**

This report shows the committee’s political use of language in structuring the responses it wants from those from whom they are elicited. Time and again the report discusses surrogacy as being a solution for the infertile, yet evidence indicates that people who are not infertile in the sense that they can

never have a child are using surrogacy in this and other countries. Women on in vitro fertilisation (IVF) often have a child and cannot have a second, are sterilised and in a second marriage, or have a husband who is infertile. Use of terms like *family formation* and *alternative procreation* hide the reality of *surrogacy*—the use of a woman’s procreative capacity, labour, and body to suit the purposes of others (1.7).

The term *surrogate motherhood* is itself a misnomer. The woman is in no way a substitute mother. The woman who carries and gives birth to a child is the *birth mother*. It is very important that the language which has been used in this report encapsulates the dis-enfranchisement of birth mothers. This is part of the ongoing process of interference in procreation through the use of reproductive technology. Women have, through reproductive technology, become merely body parts, disconnected and dismembered. They are referred to as eggs, ovaries, and wombs.

Robert Winston, an IVF specialist in the United Kingdom referred to women who entered surrogacy contracts as “endocrinological environments”; Judge Harvey Sorkow, who brought down the Marybeth Whitehead judgement, referred to such women as “alternative reproduction vehicles”; and the American Fertility Society used the term “therapeutic modalities” to describe *women* (Corea, 1988).

The NBCC report has likewise engaged in the dehumanising and depersonalising of birth mothers. The report describes women as willing to “gestate an embryo” or “carry the child” as if there is no physical, emotional, and psychological relationship between a woman and her developing fetus (2.3.6). Some women have a “hostile or lethal uterine environment” (2.3.6). The logical result of these word games is that the committee has

developed something it chooses to call *total surrogacy*, implying a total substitution—one wonders who carries the child at all—or *partial surrogacy*, which implies that the act must be done in a rather half-hearted manner.

The logical end result of this kind of language means that women are totally fragmented. They become “not real” in terms of their own pregnancies and birth. In this report, these women are finally equated merely with donated sperm or embryos—donation of sperm or embryo is the same situation as surrogacy and the infertile can “legitimately make use of another’s womb, if it is willingly and freely donated” (4.2.2.2). It is as if the womb itself can be extracted and donated and the woman slips quietly into the background.

Ironically, while the birth mother is being dehumanised, the fetus takes on a life of its own and is described as exercising “gestation of choice” (2.3.6), an absurdity in what is not yet a living and independent being.

But the final absurdity is reached when the report discusses “the surrogate *child*” (2.6.3). We can only ponder confused on what it is that makes a child a substitute.

## 2. DEFINITIONS OF MOTHERING AND FATHERING

The report noticeably fails to come to grips with the issue of fatherhood in comparison to motherhood. The report claims that there is a “genetic mother,” a “gestational mother,” and a “social mother” (2.3.1). Yet again language is attempting to privilege the mere donation of eggs. There can be no such thing as “genetic motherhood”; rather, there is “genetic lineage.” The reason for this is that *motherhood is a relationship*, not a status position.

Mothering as a relationship can begin for a woman when she is pregnant and carrying the child through to birth. A woman who does this is a *birth mother*. Mothering can also take place if a woman rears a child, whether it is genetically related to her or not, and this would indeed be *social mothering*. Many women have successfully done this mothering through adoption. The important experience that both the birth mother and a rearing mother would have in common is that they have formed a *relationship* with the child. But the genetic donor has not necessarily done this.

The reification of the genetic egg donor comes from the old fashioned definition of fatherhood. Traditionally, fatherhood has been defined by the origin of sperm. If a child was illegitimate, it was because no man claimed it came from his sperm.

Men can only be either genetic donors or social fathers. They cannot be birth fathers because this experience is not open to them. This is a marked difference between the experiences of motherhood and fatherhood which the report ignores.

Mothering has always been experienced by women in terms of relationship. So we can talk about a man who may mother a child, but we would never talk about a woman who fathered a child. By trying to deny the birth mother’s real experience of relationship with her developing fetus and resulting child, an alienated definition is being imposed on women. For women, the relationship is complex and not merely one which turns her into a capsule carrying around a developing seed. The fetus that is growing is intimately linked with her body. Her blood, the food she eats, the air she breathes are all part of the developing child. Male obstetricians often talk about the first time a woman touches her child as being after the birth. Yet women know quite well that they have already been touching the child for a nine-month period.

The NBCC report describes this special and intimate relationship of a birth mother as “a basically gestational role” (2.4.1.2), devaluing it and making it sound less important than the genetic or social role.

The differing experiences in practice and in terms of reproductive consciousness between men and women often make it difficult for men to understand that the birth mother experience and relationship is both valid and primary to the woman. That same kind of experience cannot be part of the male relationship with his child or children, but that is no justification for denying the reality of that experience to women. Men often tend to stress the genetic relationship they have more strongly than do women because of this alienation. In their research with couples using a variety of reproductive technology procedures, Lasker and Borg found that “men usually appear to be the driving force behind the preference for a biological child. Many women told us they would be happy to adopt, but their husbands wanted a genetic connection. The men agreed” (1987, p. 16).

The report also becomes confused about fathering. On page 6 of the report, the man becomes a “genetic father,” which is not possible if fatherhood is a relationship, and in other places he is the “sperm donor” or the “natural” father (2.4.2).

Because of the specific and unique relationship of women to child bearing and rearing, the comparisons between so-called surrogacy and organ donation are not valid. In surrogacy, we are

talking about a child which is created, without whom the commissioning couple would not die. Neither are comparisons with the hiring of “steeples-jacks” relevant or useful because again they deny the unique relationship being discussed (2.4.4.6).

### 3. THE NATURE OF “SURROGATE” MOTHERHOOD

So what is “surrogate” motherhood? If the report were the only document available to the public, people could believe that this action of the deliberate creation of a child for the purpose of giving it away is unproblematic and, in practice, is intended only to alleviate “infertility for infertile couples for whom other forms of infertility treatment are inappropriate” (1.7). Yet this is a misleading picture. Many surrogates who bear children for others in other countries have done so for people who have existing families (Klein, 1989; Rowland, in press).

In Australia, people using IVF have varied experiences of infertility. Some have existing families from a previous marriage and now cannot conceive in a second marriage. Some have adopted children and have decided to try for a child *of their own*. Some have secondary infertility. Likewise, the people who would want to use surrogate services are not an homogeneous group (Corea, 1985). The NBCC has not tackled the question of the complexity of the group of people who they describe as “commissioning couples.”

Neither has the report discussed the complexity of surrogacy itself and the variations which are possible. In the nexus of technologies available, considering the use of donor egg, donor sperm, donor embryo, a woman to bear a child, and finally a woman to rear a child, it is simplistic to present surrogacy as one of two cases: (1) when a woman uses her own egg and relinquishes the child and (2) when a woman uses the egg of another (her sister or friend) in order to give the friend or sister a child.

### 4. ASSESSING THE EVIDENCE FOR THE NBCC POSITION

The committee argues that the new ways of “forming families” are no longer seen as “unnatural or aberrant” (2.3.6). This statement is

based on one piece of evidence that comes from a New South Wales Gallop Poll which showed that 51% “were not opposed” to surrogacy. This does not indicate how many people approved. Even so, the statistics are fairly meaningless when we do not know if we have an educated population. These kind of generalised findings are not useful in this field of complex social and political issues.

Throughout the report, too much emphasis is placed on one single case, that of the Kirkman sisters, the long-term results of which are as yet unknown. Reading their book, the power imbalance between the sisters is obvious. Yet these women are held up as the prototype for successful surrogacy. The report is contradictory in its approach to this kind of evidence. It refers to a “small number of widely published cases” which are negative, yet it hallows the only one positive case which it has available (2.4.4.8). In spite of warning us against looking at the individual case, the Kirkmans are highlighted. Those women who have had negative experiences are not named. They become “various statements made by some American surrogate mothers” who underwent “emotional” and “ill-considered attempts” at surrogate motherhood (2.5.1). The women are blamed for their problems with surrogacy because their experience was “ill-considered.” Yet in the Kirman’s case, it is seen as one sister helping another to overcome her infertility (2.4.4.2). The stories of American women who feel exploited and abused by surrogacy in the United States — Marybeth Whitehead, Alexandra Munoz, Patricia Foster, Nancy Barrass, and Elizabeth Kane (Klein, 1989) are summarily dismissed (2.4.4.2.). The Australian case of Terese McFadden who refused to relinquish her child and suffered considerably for it, is also ignored (Scutt, 1988).

We do need this “anecdotal evidence” which is so easily dismissed. We cannot base argument on this evidence alone, but we should critically listen to it and learn from it. Using one positive case to bolster an argument while dismissing any who disagree with the position is not adequate use of this anecdotal material.

The report stresses that discussion should be based on “solid rational considerations.” Yet we know that “rationality” is socially constructed and has in particular in the last 20 years been seen as only contributing partially to knowledge and understanding. The mind/body/feeling split has

long since been discounted and decision-making shown to be based in emotional as well as intellectual processes. In areas which involve human value and morality, as discussions of reproduction do, it is essential that all forms of knowledge and understanding be brought to bear on decisions that are made.

### 5. THE NATURE OF SO-CALLED "SURROGATE" MOTHERHOOD

Because the report fails to deal with the real experiences of surrogacy, it is worth making some cogent points here. So-called surrogacy takes place in three main ways: through commercial surrogate agencies; within families or between close friends; and in independent arrangements, often contractual with money exchanging hands, made outside established institutions. It takes place in association with artificial insemination by a donor, with IVF, with sex selection, and with amniocentesis.

Surrogacy often involves the financial exploitation of women. And this financial exploitation may occur in a financial transaction or outside of it. Many women who undergo surrogacy are in need of financial help. And many, like Elizabeth Kane, end up with financial problems because of their involvement in surrogacy. Some of the women are accused of welfare fraud and others have difficulty with the taxation department (Kane, 1988, 1990). In the United States, a number of baby brokers have discussed the advantage of employing poor women in the industry because these women have no resources on which to base a refusal to relinquish their child (Corea, 1985).

Some Australian ethicists have no problems with this situation. Alan Rassaby, who was advising the health department in Victoria and is now with Community Services, wrote that "given a choice between poverty and exploitation, many people [women?] may prefer the latter" (1982, p. 102). In contrast, men who are contracting women are usually well off and from professional groups (Twomey, 1983).

Surrogacy also involves **physical** exploitation of women, again whether it be in a commercial or non commercial situation. The woman yields control to the contracting man or to those in the medical program, or the commissioning couple, that is, those buying her services.

Surrogacy is using a woman's body as if it were a useful mechanical device that could be employed at will. The cost to her, the pregnancy and the dangers involved, are never discussed. For those undergoing the invasive procedures of in vitro fertilisation, the risks to her of the use of drugs and of the medical invasion of the technique itself may put at risk her health, well-being, and fertility.

The **emotional** exploitation of women is one of the paramount areas of concern with respect to surrogacy, yet again the NBCC report does not even mention it. Women's identity is supposed to be selfless, self-sacrificing, and self-denying to the point where some women find it extremely difficult to have a sense of themselves as worthy people in this world. Those whom are low in self-esteem are emotionally needy and easy to manipulate with promises of love or approval. In her epilogue to her book *Birth Mother*, Elizabeth Kane quotes from Lori Jean, a woman who acted as a surrogate for her sister and is still fighting a custody battle over her child. Lori Jean points out that she thought her sister would love her more for her act of generosity. (Kane, 1990). Women may bear children for others in order to be attended to and to feel important, to be noticed in a world which makes women both politically and emotionally invisible.

But the emotional exploitation of women is most obvious in discussions of so-called altruistic or compassionate family surrogacy. These labels are misleading and seductive. Whatever the arrangement may be, there is a contractual agreement, whether it was based on a commercial enterprise or not. Women acting for their friends or for their sisters, whether using reproductive technology or not, are contracting both their bodies and their resulting children away.

Family surrogacy is often discussed as if it is unproblematic in comparison to the exploitation involved in commercial situations. There are three assumptions in the arguments of advocates of altruistic surrogacy. They assume that power dynamics do not operate within families, that a woman is less connected to a child which is not from her own egg, and that genetics determine the most important relationships. But these arguments are false. Power plays in families are seen every day. A woman can be physically, financially, or, most often, emotionally coerced to assist an infertile sister or friend. Once having agreed to



bear a child for her sister, the dynamics of the family make it even more difficult for her to refuse to relinquish the child should she so desire. What woman would want to lose the love and affection of all the members of her family by refusing to give the child away? And if surrogacy is approved of by the state, it will become more difficult for fertile women to resist the guilt which is imposed on them if they say no to carrying a child for their sister. Any avenue which encourages technologically assisted surrogacy will make it impossible for many women to say no.

And the experience of relinquishing a child is totally underestimated by the NBCC report. All of the surrogate mothers in Renate Klein's book who write about their experiences, talk about the pain which they and their families are undergoing because of the relinquishment of the child. Here a comparison with adoption is useful. It is appalling that the NBCC report claims that adoption relates to "parentless or unwanted children." This is a grossly negative perception to place upon women who gave up their children because they felt they were unable to care for them. This kind of callous statement reflects the lack of concern for women in this draft report (5.7). A woman who relinquishes her child does not walk away and forget about it.

A study by Robin Winkler and Margaret van Keppel (1984) has shown that the grieving process can last for 30 or more years when women relinquish their children. And the loss of a child affects not just the birth mother, but her parents, who are losing a grandchild, and her children, who lose their brothers and sisters to other families. Again, surrogates have documented the tragic effect of the loss of a child on the remaining sisters and brothers, documenting the insecurity, fear, grief, and anger which they experience. Nancy Barrass writes:

The "surrogacy" arrangement has disrupted my family forever. I did not realise the effect it would have on my daughter. When I came home from hospital, my daughter, aged 8 at the time said: "Mummy, if I am a bad girl, are you going to give me away too?" For months she could not sleep at night and frequently asked if I was going to give her away or if I had ever thought of giving her away. The psychologist who counselled my daughter after her brother

was born said this will affect her for the rest of her life. (Klein, 1989, p. 158)

Similar stories come from other mothers. Many of them stress that their children now need intensive counselling and are always fearful.

And what of the commissioning couple? We know that there is a man who is often the sperm donor and who is basically the one who orchestrates surrogate situations. The wife, who is usually the infertile partner, is put in an invidious position. Her infertility is not alleviated nor eliminated. She is left with rearing a child which is often forcibly taken from a woman who does not want to relinquish. She may be left anxious lest the child to whom she gives care and affection might finally be taken from her by the courts and returned to the birth mother. In a situation of divorce, her position may be tenuous as she cannot claim a biological or genetic connection to the child if the egg has not come from her. In a situation in which she is the egg donor, she struggles to convince herself that she is in fact the mother, even though she has not given birth.

And finally, what of the child who is produced from this arrangement. The NBCC report dismisses the issue of the paramount welfare of children. This is a convenient position, quite out of step with developments in the adoption area over the last 10 years. We cannot estimate what the impact may be on a person of feeling that they were a commodity, that they were a product that was made to order. Added pressure may be placed on children to perform for the parent who has gone to so much trouble to create them.

No potential problems were discussed by the NBCC report. What if the child is born imperfect. Is it the committee's intention then that the state will take care of this child? And care for the brothers and sisters from which the child has been cut off? It seems that to deal with the aftermath of surrogacy, the state would also need to introduce extensive and heavily funded counselling facilities.

The NBCC report indicates that the distinction between so called altruistic and commercial surrogacy is confusing (2.4.4.9). Yet in fact the dynamics are similar whether the contract be based in personal connections, in a state-operated baby-making board, or through commercial transactions. By its nature, surrogacy induces women to sell their bodies out of one kind of need

or another. It also makes the child into a **commodity**, a product that can be bought or arranged for, just as other products in our society are ordered. Consumed by desire to control everything, consumed by the middle-class capitalist ethic of “money will buy anything,” people may well avail themselves of surrogacy even if they do not need it in the way the NBCC envisages. Convenience babies, like convenience foods, will not necessarily be sought because they are needed.

## 6. THE ROLE OF TECHNOLOGY IN “SURROGACY”

The NBCC report basically dwells on surrogacy that can be created using the egg from a woman who will be the social mother. It is therefore envisaged in association with the use of reproductive technology. The report camouflages this fact, which has huge implications.

In vitro fertilisation is a basically failed technology. The Australian Federal Government’s report indicates that it has a success rate in terms of live healthy unproblematic births of around 5% (Batman, 1988). In other words, it has more than a 90% failure rate. It is also a very expensive procedure, costing \$17 million a year alone in Medicare benefits. This does not include hospital expertise, hospital space, and staff. It does not include the extensive neonatal care facilities that are required because of the high rate of multiple births.

IVF itself is an experimental procedure. Normally healthy fertile women would be put at risk using any of these procedures. Their own fertility could be damaged or lost. It is also a dangerous technology and there is increasing concern about the drugs which are used to superovulate women (Klein & Rowland, 1988). Some women die undergoing the procedures, and if the state approved of surrogacy, it would be an interesting dilemma to consider who would be responsible for such events.

To assume an unproblematic use of these technologies without coming to grips with the issues surrounding them shows the NBCC’s report to be simplistic and superficial in this area.

## 7. PRINCIPLES SUPPORTING THE PREMISES ESTABLISHED IN THE REPORT: A CRITIQUE OF RIGHTS

The basic principle in this report is that **personal autonomy** is paramount; in fact it is privileged over social responsibility. It is one of the logical inconsistencies of the report that ultimately this concept of personal autonomy has to become “*qualified* personal autonomy” (3.3.2) because naturally personal autonomy cannot be allowed to reign unchecked otherwise our society would be based on anarchic principles. In this world of personal autonomy established by the report, surrogacy becomes “liberty” (3.3.4), yet nowhere is this argued. We merely see a rhetorical flourish to satisfy self-interest. I question a concept of liberty which involves the use of a woman’s body and her unique procreative capacity, alongside the commodification of children, to justify the liberty only of commissioning couples.

The report derides the principle of the **best interests of the children**, implying that the welfare of children is not an issue which should be of concern in the area of surrogacy. It compares surrogacy with adoption, only with the intention of disenfranchising the children involved in surrogacy (who have by this point in the report become “surrogate children”). By stressing “the needs of the commissioning couple” as paramount (3.3.1), the report makes the child into a commodity which can be produced to suit their purposes and their desires. It should be remembered that desire is a socially constructed concept. The argument around children (5.7 and 5.8) establishes a straw argument – no one is actually saying the children would be better off not born. This is merely a philosopher’s game. Surrogacy is made as an approximation to “normal parenthood,” which it is not. In normal parenthood, people create children to love and to rear, not to give away.

The commodification of children is ignored by this report, yet that is one of the areas of potential harm. I have already pointed out the kind of impact on both the children born and given away, and their brothers and sisters in the originating family. The pain of these experiences should not be ignored.

It is particularly important to look at the children in this situation because they are the least powerful in this game. Within the principles which most of our community hold to be important, that is, a balance between personal autonomy and social responsibility, children are a community

responsibility and not a product which belongs to an individual person.

The report consistently conflates **paternalism** (3.3.11) with social responsibility. It uses the terms such as *paternalism* and *morality* in order to imply that women in particular should be very wary of claims for legislation to ban surrogacy. It implies that this is telling women what to do with their lives, as if women are not already told what to do with their lives, as if our social fabric does not instruct *all people* with respect to some social behaviours. It implies that morality is dogmatic and outmoded, yet it uses terms such as “immoral” (option 4) when convenient, with no discussion or definition.

It is important to clarify this issue of morality, which is seen in the report as something to be resisted.

Our society is constructed on sets of **moral values**. This is different to the kind of **empty moralism** which the report is probably intending to refer to. There is a distinction between prescriptive moralism and what has been called “moral intelligence” (Dworkin, 1983). Moralism is a set of rules which are learned by rote and enforced upon people. Yet moral intelligence “constructs values” and “moral activity is the use of that intelligence, the exercise of moral discernment” (Dworkin, 1983, p. 52).

It is our obligation as members of the community involved in great social change to look beyond the self and a kind of bourgeois individualism bordering on selfishness, to engage in this moral activity. This often means coming up against painful decisions. It often means a very difficult path in working our way through from the first principles we believe in, to take a position on some of the most contentious issues of our time. But as Dworkin advocates:

Moral intelligence demands a nearly endless exercise of the ability to make decisions; significant decisions; decisions inside history, not peripheral to it; decisions about the meaning of life; decisions that arise from an acute awareness of ones own mortality . . . (1983, p. 53).

Behind this moral intelligence and this courage that is required to make decisions about social constraint are a set of values which are held dear in

our society. One set of values which we struggle to maintain is that of not turning children into commodities. Another is the struggle to give integrity to women, not just at the individual level, but at the level of the social group. Like all societies, we need to assist individuals to fulfil their potential, while at the same time developing accountability to our society as a social group. In striving for this balance between individual fulfilment and social responsibility, the concept of rights and personal autonomy in which the NBCC report is based have an empty and hollow ring.

The concept of **rights** appeals strongly to those who have some possibility of exercising them. It comes from a liberal stream of philosophical thought which sets up the individual as paramount (see the NBCC reliance on John Stuart Mill). It implies that there is a concept such as free choice. But *rights* is a concept divorced from social and political context. And it is within this context that not only women but all people live their lives. We are all shaped by forces of economics, social ideology, personal psychology, and various power structures in our society. Choices are hedged around by structured constraints depending on a person’s race, class, age, marital status, sexuality, religion, culture, and sometimes disability. We do not live in a world with no power imbalances. **We live in a world structured along hierarchies with some people deliberately given more advantages than others.** The world operates on inequities, which many of us are trying to eliminate rather than reinforce. There is no equality in the alternatives offered to people as choices and there is no equality in those who are choosing.

Surrogacy can only occur as a reinforcement of the power imbalances in our society. If institutionalised by the state and run by state agencies, it will be institutionalising a situation in which poorer women and women who have particular needs, whether they be emotional or financial, will be induced to partake in this new enterprise of capitalism.

It is pointless, therefore, for the report to state that women cannot be exploited, particularly if they are informed. Our history of informed consent is a poor one. And informed consent is not educated consent, where people are presented with the complexity of dilemmas around such extensive issues as reproductive technology (Rowland, 1986).

And what of the woman who does exercise educated consent and wants to be a surrogate mother? Even if her desire were equal to that of the commissioning couples – and this is unlikely – as a society we should still say that this is inappropriate and socially unacceptable. The grounds on which we would do this would be based in the great common good; that by her individual action, the woman would be feeding into an identity women which makes them merely reproductive vehicles; that it would be turning a human being the product, into a saleable good. This process itself would debase what it is to be human.

It takes a great deal of moral courage to make these statements. Previous reports from many state governments have developed positions which take into account this balance of social responsibility. The NBCC report is embarrassingly ignorant in its lack of account of these greater social issues. Its principles are embedded in a selfish individualism which is unacceptable at this time in history, and is certainly class-based with respect to increasing the opportunities of the privileged at the cost of those who are least powerful in our society.

Surrogate motherhood is only partially about morality. It is primarily about **power**. If the State approves of surrogacy by implementing option 3 as suggested in this report, it would be implying that our society approves of the use of women in this way. And here we have another logical inconsistency in the report. It argues against a paternalistic state, yet wants to establish state-regulated surrogacy. This is not a passive act as implied by the report, but **active approval** through institutionalisation and the use of state resources to establish surrogacy (3.3.11 and 3.4.3). The State would apparently ensure that surrogacy is not used as a “means of overcoming social and psychological dilemmas within the family.” It would need the medical profession, with its history of the abuse of women, to be part of its regulatory process. So even in the report, personal autonomy in the end has to be balanced by qualification – state-determined rules (4.4 and 4.3).

The issue of **harm** is paramount here too. Repeatedly the report indicates that there is no harm done by surrogacy, yet the personal agony experienced by women undergoing this process is ignored and one case alone which is said to have been successful, is reified. Much literature has been generated about the agony of surrogacy (see

Klein, 1989; Kane, 1988, 1990; Scutt, 1988), yet this is ignored by the report. The harm done by surrogacy relates not only to all of the parties involved, but also to our concept of society.

The report implies that the arguments around surrogacy are the same as those for **abortion**. The two situations are so different that it is unfortunate they have been linked in this report without clarification. In abortion women have claimed a right to control their own bodies and their lives. A pregnancy has unfortunately begun which it is necessary to terminate. This action is rarely done without some grief and sense of loss. This is a vastly different situation to the deliberate creation of a child, now on the NBCC recommendations supported by the State, for the purposes of giving it away, often to an unknown group of people. The two experiences are not comparable.

If the state is truly concerned to implement new family formations to remedy the problems and pain of infertility, there are many more alternatives than the use of a woman as if she is merely a vehicle to serve someone else's purposes. Increased funding for social programmes which would socially contract people to be part of families and assist with the development and care of children would be one way to go. Many other possibilities could be implemented if the state were truly concerned with family formation.

## 8. A NOTE ON OPTIONS

There are a few points here in response to the section of the report dealing with the options and discussion of options.

*Option 2* – Its primary principle, personal autonomy, is illusory and contradictory.

4.2.3.1 People will continue to make arrangements at a personal level, but they will be outside state approval and support.

4.2.3.2 A black market in the commercial sense would be unlikely, in the technological sense impossible. Only sister/friend and natural conception surrogacy could take place, which would be individual and privately organised. The state would have no need and no place to intervene in this.

4.2.3.3 There is no evidence to support this claim concerning the Kirkmans. No poll has been taken on whether society approved

or disapproved. Again an anecdotal case has been used conveniently to support the position of NBCC.

*Option 3* – The principle of qualified personal autonomy is naive and unacceptable. Arguments in this section are paving the way for actual payment of surrogates, which is not canvassed in the report itself.

4.3.5.2 Payments are **not** made to sperm donors and donors of blood and organs in the State of Victoria. Payment necessarily acts as an inducement (refer to the Asche committee report).

4.3.2 The suggested controls here will not control it at all, there will always be the possibility of woman-to-woman assistance.

4.3.4.2. I am astonished that the committee thinks that the state can protect a woman against “direct or indirect [psychological, economic, social, etc.] coercion.” So far it has a very poor record of protecting women from domestic violence, incest, and rape. I would like to see arguments put forward to support the contention that it could protect women in the area of surrogacy!

## 9. RESPONSE TO SECTION 5, DISCUSSION OF OPTIONS

5.1 There is no way of knowing how popular it would or would not be. This is pure speculation on the part of the committee. But convenience babies may become like convenience food. People do not need it either.

5.2 *Legislation is needed.* Already cases in Victoria and Western Australia of so-called altruistic surrogacy have taken place. Further overtures have also been made to the Standing Review and Advisory Committee in Victoria by Professor John Leeton to allow more cases to go ahead. Both Handel and Keane, baby brokers from the United States, have investigated the possibility of establishing commercial enterprises here. Again it astonishes me that these errors *of fact* have occurred in a report from a Federal body.

5.5 The report indicates that legislation would be an infringement of personal autonomy and

procreative liberty. As indicated above, these conceptualisations are false based on a total lack of power analysis of our society. The report indicates that we are discussing “prohibition of a basically personal arrangement” in surrogate motherhood. This is certainly not a personal arrangement, **but is a political and social arrangement and this is why the state is even discussing it in the first place.**

5.6 The committee indicates that it is concerned that “offshore” surrogacy arrangements would increase if surrogacy were prohibited. Again this is a logical inconsistency. If these arrangements are already taking place, then they supposedly would continue to take place even if legislation were enacted. One way of ensuring that the situation does not occur in Australia is to legislate against surrogacy and to legislate against the immigration of children created offshore for these purposes. Surely in a logical sense if surrogacy were approved, we would be flooded with such cases. Instead of exploiting women offshore, women would be exploited on the home ground.

## 10. PUBLIC POLICY ISSUES

I am astonished that there is no discussion here of public policy implications. The NBCC is essentially wanting to establish a national set of state-run surrogate agencies with all the attendant medical and counselling facilities. They insist that this would be used for only a small number of people, as only a few would be interested and would be acceptable according to their criteria, as yet undefined. Is our society prepared to accept these enormous costs for so few people? And the counselling would be needed not just for the couples involved, but for the continuing problems of the children born, the relinquishing mothers, and the brothers and sisters of children who are given away.

Hospital expertise, hospital facilities, and hospital staff would be used in this enterprise and I assume that the NBCC intends all of this to be available through the government’s Medicare.

Assessment procedures would need to be established for those who want access, including an appeals system for those who were excluded and want to take legal action to make sure that they have access.

At a period when many members of society are very concerned about the costs of IVF and other reproductive technologies that have a high failure rate and take up enormous resources in our society, it would hardly be acceptable to introduce yet another version of these expensive procedures to help what the committee assumes will be a few people.

I am surprised that no account of the public costs have been incorporated in this report, but then, this fits very well with the individualistic and rather selfish approach of basing an entire report in "personal autonomy."

**A version of Option 1 is the preferred option.** But I think it needs to be very carefully considered and this has not been done in the report. What we need is prohibition of commercialisation of surrogacy and of technologically assisted surrogacy. But it should not be "parental participants," as indicated in 5.1.4, who are accountable and therefore turned into "criminals" with a child becoming a "child of criminals." Prohibition will obviously work if it becomes illegal to advertise, to run a commercial agency, to profit by, and to use technological assistance in order to create children for the purposes of surrogacy.

These are not difficult laws to draft.

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