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Article

The Policy and Ethics of Surrogacy in New Zealand: Who is Left Holding the Baby?

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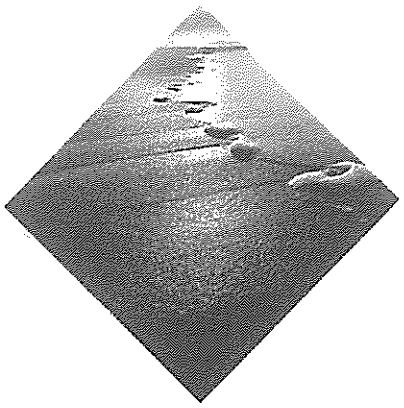

The Warnock Committee Report on Human Fertilisation and Embryology in the United Kingdom stated that 'the question of surrogacy presented us with some of the most difficult problems we encountered. The evidence submitted to us contained a range of strongly held views and this was reflected in our own views. The moral and social objections to surrogacy have weighed heavily with us' (Warnock Report, 1984). Undoubtedly, surrogacy raises some of the 'thorniest' issues that challenge our basic understandings of the meaning of 'parenthood' and 'family'. Because of its controversial nature, surrogacy has engendered a wide spectrum of legislative and policy responses overseas, ranging from no restrictions at all to total prohibition.

In New Zealand, no formal policy or legislation has been put in place to regulate surrogacy practices, but the Interim National Ethics Committee on Assisted Reproductive Technologies (INECART), the body which, until 1995, considered applications from providers of fertility services and researchers, has on two occasions said that ethical approval of IVF surrogacy as presented in the submissions, could not be given. This decision has had the effect, as Moore and Mulgan (1996) point out, of INECART becoming the de facto policy maker in this area in New Zealand. It needs to be noted that, in April 1995, INECART was reconstituted as the National Ethics Committee on Assisted Human Reproduction (NECAHR).

In not giving ethical approval, INECART undertook to produce a position paper outlining the reasons for their decision, and it is this paper that Moore and Mulgan responded to in a previous issue of *Otago Bioethics Report* (October 1996). Providers of fertility services have also been critical of some of the content of the paper and it is therefore appropriate that the matter should be fully debated. It is important to note that INECART said that its position would be subject to review, and at its December 1996 meeting, NECAHR decided to instigate such a review. Debate and discussion of the issues is therefore timely. The purpose of this paper is to place the debate within a context, as it is argued that the policy and ethics of surrogacy have developed in an 'ad hoc' way which does not clarify who is left 'holding the baby'.

The material in this paper was first presented at a seminar on surrogacy held at the University of Canterbury in March 1996, by one of the authors (K. Daniels). This material was then

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developed by the second author (K. Hargreaves) as part of a post-graduate course. It should be noted that while Ken Daniels is a member of NECAHR, he was not part of INECART and therefore involved in the earlier decisions. His contribution to this paper is as a university academic and not as a member of NECAHR.

The paper will provide an abbreviated historical overview of developments in the field of assisted human reproduction (AHR) in New Zealand, focusing particularly on matters relating to surrogacy. This review will highlight the different parties that have played a part in this development and lead to some comments regarding the respective contributions of policy and ethics.

The Historical Perspective

Policy relating to surrogacy must be seen in the context of assisted human reproduction policy in general, as it is within this broader context that considerations for surrogacy have evolved. The term surrogacy first appeared in the literature in New Zealand in 1981, when an American academic, Professor Wadlington, was invited to speak at the New Zealand Law Society Conference. He discussed aspects of assisted human reproduction including IVF, and referred to the practice of surrogacy as 'womb borrowing' (Wadlington, 1981). IVF became available in New Zealand at National Women's Hospital, Auckland, in 1983, and in 1984, a group representing the Royal Society of New Zealand, The New Zealand Law Society, the Medical Council of New Zealand, and the New Zealand Medical Association made a request to government that it appoint a standing committee to consider the legal, moral and social issues arising from IVF, artificial insemination and related problems in biotechnology (Royal Society of New Zealand et al, 1985). This powerful group of organisations had come together because of widespread concern about developments in AHR, and the fact that they believed there needed to be some review and monitoring process in place. The Law Society addressed the issue at its 1981, 1984 and 1987 conferences, indicating its view of the significance of the topic.

In 1985, the Law Reform Division of the Justice Department published an issues paper intended to promote and inform public debate on the issues raised by new reproductive methods. The paper, *New Birth Technologies* (1985) did not set out optional responses which the government could act upon, rather, it aimed to encourage New Zealanders to decide for themselves what these options should be and to make submissions to government. A second paper, with the same name, but summarising the results of the submissions to the first paper, was published in 1986. It reported that of the 164 submissions (88 were from individuals and 76 from groups), 99 made reference to surrogacy. About half of these were opposed to surrogacy, on the grounds that, for example, it was exploitative of women, morally wrong, the ethical and legal issues were too complex to allow it, and surrogacy was not in the best interests of the child. Those who favoured allowing surrogacy were divided between those who opposed restrictions, on the basis that persons should not be prevented from 'enjoying the advantages of new technology in this area' if they wished, and those who suggested that some restrictions were in order, including a ban on commercial surrogacy, and the need for state intervention to prevent exploitation of the parties involved. One of the interesting aspects of these 164 submissions was that almost one quarter of them referred to the need for some kind of 'watchdog committee' as overseer of assisted reproduction in New Zealand. The author of *New Birth Technologies* (1986) noted that there was no consensus on the status and purposes of such a committee, which is understandable given the lack of conferment between the various groups and individuals involved. It could also be argued that the preparation of responses supporting this position could have been higher, had it been proposed as a possibility. In a survey of 1400 readers of a women's magazine in New Zealand, 81 per cent felt New Zealand needed 'some kind of legislation/rules to control developments in relation to IVF' (Daniels, 1988).

In response to the submissions, Government decided to establish the Interdepartmental Monitoring Committee for Assisted Reproductive Technologies (IMCART), this being established by the Department of Justice in 1987. IMCART was to act as a repository for information about assisted human reproduction, and advise ministers as appropriate. It therefore had a reactive, rather than proactive function. This group included representation from several government departments, including the Departments of Justice, Health, and the Ministeries of Women's Affairs, Maori, and Pacific Island Affairs (INECART, 1995). The Department of Social Welfare later joined the Committee following submissions that it needed to be represented because of its concern for children. The year 1987 also saw the enactment of the only piece of legislation specifically relating to assisted human reproduction in New Zealand – the Status of Children Amendment Act 1987 (New Zealand Government, 1987) which clarifies the status of children (or, perhaps more correctly, the status of their parents) who have been conceived utilising third party gametes rather than by 'natural' means (Caldwell & Daniels, 1992)

While surrogacy was a major topic at the New Zealand Law Society Conference in 1987, there was still no move to introduce legislation in this area, the Justice Department's Law Reform Division believing that no new legislation was needed to specifically address surrogacy. As it had contended in 1986, the Justice Department retained the view that New Zealand could afford to 'wait and watch developments' in this field (Law Reform Division, 1986). The Law Society maintained that it would be safe to leave any development of the law to the courts, who should make decisions on a case-by-case basis (*Law Talk*, 1992). This view, however, was not held by the judge who sat in the first case involving surrogacy in New Zealand. In 1990, the Nelson District Court considered an application to adopt a child subsequent to a surrogacy arrangement. At the time, the presiding judge, Judge McAloon, made the statement that 'the issue of surrogacy is one which should be addressed by Parliament' (Caldwell & Daniels, 1992). In other words, he did not feel in a position to adjudicate on all the issues involved, because of the lack of law and policy on surrogacy in New Zealand. In addition, INECART, in its conclusions and recommendations, noted that it did not believe that there was in New Zealand a legal framework adequate to protect the interests of parties who wish to be involved in surrogacy arrangements (INECART, 1995).

In 1990, some service providers' growing concern at the lack of a government-instituted system of accountability in this area led to their inviting the Reproductive Technology Accreditation Committee of Australia (RTAC) to become the accreditation body for their clinics. This system of accreditation, which was endorsed by the Ministerial Committee on Assisted Human Reproduction (MCART), requires that providers obtain ethics committee approval for new or innovative practices. It is this lack of ethical approval that would place any provider's accreditation by RTAC in jeopardy and which, in effect, stops IVF surrogacy being carried out in New Zealand.

Also in 1990, the New Zealand Infertility Society, which had been formed the previous year, had its first conference. This was an important development, especially as it brought together consumers and professionals in one organisation. The Infertility Society developed a policy on surrogacy which states that surrogacy should be covered by specific legislation, and performed only within a legal contract under judicial review (NZIS Newsletter, 1993).

In 1991, a surrogacy arrangement made headline news in Christchurch. Katherine Cooke, a surrogate mother was said to have been 'sorry to sign her baby away' (*Christchurch Press*, 1991). The child had been born 6-7 weeks prematurely, and was not expected to live. As the result the commissioning couple decided to reduce the fees they were to pay to the surrogate mother, which caused considerable conflict between the parties. The case raised important issues for the health professionals involved (Daniels & Taylor, 1991), and there was some concern that 'knee-jerk' legislative reaction would ensue in the wake of the publicity surrounding the case. However, this did not eventuate, although the case did highlight the uncertainties in this area.

In the same year, the Medical Council commissioned the University of Otago Bioethics Centre to undertake a review of the whole area of AHR. The resulting document, *Biotechnology Revisited* (1991), represented a concern from the medical profession and others as to how to deal with the issue of new reproductive technologies. A recommendation was made that the Justice Department should prepare a discussion document outlining legislative options for surrogacy, and seek public opinion before drafting legislation. Fifty responses to the entire document came by way of submissions. Many expressed concern about professional capture of assisted reproduction, and professional self-regulation. There was clear agreement that an expert advisory panel be formed to establish a system of record-keeping on surrogacy. It was suggested that a separate working party on surrogacy be sponsored by the departments of Justice and Social Welfare (Medical Council of New Zealand, 1992).

The tension between the legal and medical professions on the issue of the need for regulation of assisted reproduction in New Zealand was instrumental in the establishment in 1993 of the Ministerial Committee on Assisted Reproductive Technologies (MCART). The committee comprised two persons – Mr Bill Aitken, a Reader in Law from Victoria University, and Dr Paparangi Reid, a Health Researcher from the Wellington School of Medicine. The Committee submitted its report to the Minister of Justice in July, 1994. As well as reviewing the policy and legislative options in place overseas which might be adopted in New Zealand, MCART recommended the establishment of a Council for Assisted Human Reproduction to act in an advisory and overseeing capacity. This was not intended as a licensing body, but as a focus for Government and the community on matters relating to assisted reproduction (MCART, 1994). Thus, the proposed Council was to have a policy focus.

Because of difficulties encountered by regional ethics committees in connection with protocols in the use of reproductive technologies, in 1993, the Ministry of Health established INECART. It was hoped that this would provide for consistency of decision-making in the field of AHR. In 1993, Fertility Associates of Auckland, applied for ethical approval to perform IVF 'compassionate' surrogacy for a number of couples who had found women willing to provide gestational surrogacy. After considering this application, INECART declined ethical approval on the basis of several considerations, including the lack of legal and policy framework in NZ, the uncertainty of the effects of surrogacy on relationships, and the potential of harm to women and children born of such arrangements. Objections to this decision came from members of the legal profession, on the basis that surrogacy is not illegal in New Zealand, from members of the medical profession concerned to help couples otherwise unable to have their 'own' children , and of course from the couples themselves. The then Minister of Justice, Honourable Douglas Graham was quoted in the Christchurch Press (1994) as saying that he found the committee decision 'a bit odd', on the basis that surrogacy was not illegal. In addition, he referred to the 'medical-ethical deadlock', which might lead to the undesirable practice of couples seeking surrogacy overseas.

In its report, MCART stated its disagreement with the INECART decision

Visitors

to the Centre

Arthur Frank will be the Centre's next William Evans visiting fellow. He is a prominent Bioethicist with numerous publications in journals such as the *Hastings Center Report*. We are expecting that he will be here for five to eight weeks from mid February 1998, hopefully soon enough to be part of the Summer Seminar. One of his most well-known books is *The wounded storyteller: body, illness, and ethics.*

Robert Downey is a professor of Philosophy at the University of Glasgow. He has an interest in humanities in the medical curriculum, intensive care ethics and casuistry. He will be here from 6 - 8 October. Professor Downie is spending a month at the Centre for Values, Ethics and the Law in Medicine in Sydney before coming to Dunedin.

As mentioned elsewhere in this *Report*, **Professor Miles Little** visited the Centre during March 1997. It was a great experience for the staff and students of the Centre to have him here; his enthusiasm and energy were contagious. We're hoping to continue involvement with Professor Little and his Sydney centre.

to decline to give ethical approval for IVF surrogacy. Based on its finding that INECART had made an ill-founded decision to disallow IVF surrogacy in New Zealand, MCART recommended that Fertility Associates resubmit their application to perform IVF non-commercial surrogacy. Fertility Associates submitted their application for a second time at the end of 1994, and again, INECART declined to provide ethical approval. In a press release issued by the Committee in December, 1994, it was stated that the Committee was concerned about the risks to all parties of the IVF surrogacy procedure, and in particular considered that the uncertainties of the outcome for the child represented an unacceptable level of risk. Despite its decision, the Committee acknowledged that ongoing debate on the subject should be encouraged to continue throughout New Zealand – in essence, the decision was not to be considered their 'last word' on IVF surrogacy.

The Justice Department's response to the Ministerial Committee's report was to establish an Officials Committee in 1995 to explore the recommendations and to provide advice to government. The Officials Committee, with representatives from the Departments of Justice, Te Puni Kokiri, Women's Affairs, Social Welfare and Health, has recommended against the establishment of a Council. In the meantime, the Officials Committee has suggested that some of the tasks that were suggested for a Council might best be grafted on to the National Ethics Committee. This would have the effect of taking NECAHR beyond the domain of ethics and into the policy arena.

If this eventuates, and the matter is still under consideration, it is likely that the NECAHR will play an increasingly proactive role in future policy development on surrogacy and other forms of assisted human reproduction.

Commentary

This historical overview shows that it is now 13 years since the first call was made for an appropriate policy group to be developed in New Zealand. That call has been echoed many times over, including from the Government appointed Advisory Committee (MCART). In the absence of such a policy group, INECART and then NECAHR have been left in the position of creating 'de facto' policy and this is inappropriate. There will be many considerations that lead to policy development, one, but only one of which will be ethical considerations.

Another consideration is that issues do not usually become the target of state intervention until they have been established as areas of legitimate social concern, and have been discussed and debated across various public forums. Media attention arising from such high profile cases as the Baby M case in the USA, and other similar cases in the United Kingdom in the late 1980s prompted public debate that led to the development of public policy and legislation on surrogacy in these countries. This has not been the case in New Zealand, and although some controversial cases have come to the attention of the media, they have not engendered wide public debate on the topic. Public concern is a major factor influencing the development of public policy, and without this there has been little incentive for government to develop policy on surrogacy. It could be said that issues surrounding surrogacy in New Zealand are being discussed 'in-house', i.e. by those most intimately involved as stakeholders.

A further observation is the way in which Government Departments have acted in this matter. As noted, the original initiatives come from the Law Reform Division of the Justice Department. Their focus quite clearly was law reform and this led to New Zealand's only piece of specific legislation regarding AHR. If the Policy Division of the Justice Department had been given responsibility for this area, the outcome might have been quite different. The Ethics Committee was established as a ministerial committee under section 46 of the Health and Disability Services Act 1993 with members being appointed by the Minister of Health. The division of policy, law reform and ethics between the Department of Justice and the Ministry of Health does not at this point in time seem a wise one.

Conclusion

Caldwell and Daniels (1992), in writing on assisted reproduction, the law and social policy have concluded that a review of the history of policy and legislation decision-making in the area of assisted reproduction reveals a strong reluctance on behalf of Government to legislate in the morally contentious area of assisted reproduction. Clearly, to date, Government has taken a reactive, rather than a proactive approach. Although, like abortion, the area of assisted reproduction is fraught with difficulties it has not prevented countries like the UK and Australia from developing relevant policies and legislation on assisted human reproduction. In contrast, the New Zealand approach is unlikely to lead to coherent policy and legislation. It seems apparent, however, that an area as contentious as assisted reproduction requires a proactive approach to policy and legislative development with widespread public discussion and involvement.

A former High Court judge, Sir John Jeffries, noted in 1993 the reluctance of Government to legislate on moral and ethical issues, and the resulting anguish and suffering this was causing people seeking solutions to moral dilemmas. Responsibility to act, he said, was falling increasingly on the medical and legal professions, yet recent cases in New Zealand and overseas showed that in the absence of legislative backing the solutions they found were at best temporary. His comments included specific reference to developments in AHR (*Christchurch Press*, 1993).

This paper has sought to provide something of the context within which ethical decisions in AHR and surrogacy in particular are being made. It is a context that is unsatisfactory, as there still does not exist in this country a committee/group/body which is representative of all the interested parties, including the public, which can develop policy in this area. It is regrettable that the recommendations of MCART for a Council for Assisted Human Reproduction are not being actioned, as until there is such a body, policy decisions will be made by de facto policy groups, and there will be doubt as to who should be or is holding the baby.

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Island, or Charisma? In all likelihood we will end up doing all three, in some form or another. But on balance I think we are unwise. We would be better to find alternative ways of producing eggs, to experience the grief that we have wiped out yet another species (and then allow our grief to motivate us to look after the world's ecosystems), and to accept that it is no great disaster that equestrian eventing still combines a combination of training, skill, *and* breeding.

Information for Contributors

The *Otago Bioethics Report* publishes short papers on Bioethics, particularly those with an emphasis upon current New Zealand issues.

Authors should send their written material to John McMillan, Editor *Otago Bioethics Report*, Bioethics Centre, Otago Medical School, PO Box 913, Dunedin.

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The Cloning of Dolly

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The final issue concerns the *implications for humanity* – the cultural ideal we want for ourselves. This issue relates to the sort of people we want to become – people who regard the non-human world as a means to an end, or people who respect the non-human world for its own sake. It is this aspect which has captured much of the public and media attention. Someone who sees nature as a resource to be used might defend cloning, whereas someone who considers all life forms sacrosanct might not. Many of us take the middle ground, accepting that while nature is a source of raw materials, it is also something to be used wisely and with care. Similarly, we accept that there needs to be a balance between human and animal needs, and that animals may be used but only if that use is humane.

It is well to remember that cloning in animals might well have some positive spin-offs for humans; for instance, cloning animals may produce humans health products or products which allow improved goods to be produced. Also, developing the technology in animals may help develop human cloning for assisted reproduction and organ transplantation programmes. However, human cloning raises ethical issues beyond the scope of this paper.

Undoubtedly, the most well-known implication, if not fear, for humans is that which we normally associate with Hitler and *The Boys from Brazil* – the multiplication of undesirable so-called 'elite' individuals. This aspect has gained most recent attention, leading one critic to comment '*The real sheep are the media who have blindly followed the cloning story, shrieking of its horrors.*' The newspaper reports of the cloning of Megan and Morag last year, included headlines such as '*scientists welcome move to clone sheep*' and that it may '*herald a brave new farm world*'. However, the newspapers also picked up on something which was not presented in the original science article, that some animals suffered serious defects. In contrast, this year's report of the cloning of Dolly resulted not only in headlines such as '*science of the lambs*' and '*clone on the range*' but more significantly that such technology '*raises alarm over humans*', and '*Frankenstein fear revived*'. Thus, at present, we appear to be debating the morality of cloning of animals on human grounds. Is this sensible for the future of both animals and humans? It is accepted that animals and humans can be treated differently (for example, moribund animals must, by law, be euthanased). It would be a pity if the benefits of animal cloning were not fully realised, because of the perceived harms of human cloning.

Further reading

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