

## Foreword

# The need for full reform of the law on surrogacy

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The Report of the Committee of Inquiry into Human Fertilisation and Embryology, published in 1984, was hostile to recognition or legal regulation of surrogacy as a remedy for infertility. We proposed that no surrogacy agreement entered into between an infertile couple and a would-be surrogate should be legally binding, or have any status in law. If a surrogate gave birth to a baby, and then changed her mind about giving it to its would-be parents, they would have no redress. Moreover, we proposed that it should be a criminal offence to set up a commercial surrogacy agency or to advertise surrogacy services in the press or elsewhere.

A minority of the Committee disagreed with this conclusion, and wrote a minority report to that effect. They argued that the same kind of regulation and monitoring should apply to surrogacy as to other kinds of assisted childbirth and that there was nothing intrinsically wrong with surrogacy unless it were left in a state of legal confusion and uncertainty. I have to admit to having urged the majority position on the Committee and allowed what I hope was uncharacteristic weight to the opposing view. My views were partly personal and sentimental, partly rationally based on the current state of affairs at the time in the USA and in this country.

To take the sentimental first: I had found the experience of giving birth to a new life profoundly moving, deeply emotional and utterly unique. I had not much enjoyed my five pregnancies, but the moment of birth was something so wonderful to me that I thought it wrong to ask anyone, even if they had agreed in advance to do so, to forego the joy of a new baby, another child of one's own; and that to make such an agreement was somehow to downgrade child birth. I admit now and I admitted then that this was not a rational argument. But there were others who shared it or somehow felt they ought to assent to it.

Nevertheless, the point about downgrading childbirth was strongly reinforced by the commercialisation of surrogacy that was becoming prevalent in the USA at the time, and this was threatening to spread to this country. For example, I was appalled on a visit to New York in 1983 or 1984 by participating in a broadcast with a young reporter who had just come from a commercial surrogacy agency, which occupied a studio whose walls were covered in pictures of girls in seductive poses; and he said 'it's wonderful, I could choose a tall brunette,

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or a lovely little blonde or a dramatic redhead to be the mother... anything I liked' (and because IVF was little known in the USA at the time, I'm fairly sure he was thinking of ordinary methods of conception). I was as much horrified by his attitude to women as I was by his attitude to children. And then at the same time we heard that an Englishwoman was aiming to set up such an agency in the South of England.

After we had published our report but before the 1990 Human Fertilisation and Embryology Bill was introduced into Parliament, a fearsome character called Dr Handel came over from California to the UK with whom I also took part in a broadcast. He referred to his 'workforce', the potential surrogates, as 'my girls' and he ruled them with a rod of iron. I asked him at one point what happened if one of his girls changed her mind and wanted to withdraw and keep the baby. He merely said: 'I see to it that my girls don't change their minds'. The gap between his fees to the would-be parents and the pay to the surrogates was also formidable. I could not imagine a scenario with more scope for exploitation.

However, that was the 1980s, when IVF was still an emerging technology, and surrogacy was barely known. I now think the time has come to revise our law on surrogacy. This is partly because our attitudes have changed to what used to be referred to as 'the artificial family'. We are infinitely more relaxed than we were thirty years ago about family types other than what used to be the 'Ladybird book' norm. Perhaps because we did so firmly stamp on commercialism at the beginning, in many if not most cases now, as this issue bears witness, a friendly relationship grows up between the surrogate and the aspirant parents, the surrogate sometimes becoming an actual or virtual godmother to the child she carried. And, in part for this reason, our law now seems to be unduly protective of the surrogate, too much based upon the assumption that she is open to exploitation, which was certainly the assumption that informed our 1984 Report.

Examples of aspects of the law that require reform include the gap of time after the birth of the baby during which the surrogate is legally entitled to refuse to give it up or to demand it back. This is excessively long, making the period of uncertainty for the aspirant parents almost unbearable, and prolonging to a damaging extent for all concerned the delay before they can really settle down with their new family. Moreover, the process of registering as the parents is intensely and it seems quite unnecessarily complicated. Both these aspects of the law, in my opinion, need urgently to be reconsidered. I would also like to see a reconsideration of birth certificates or birth registration of children born by surrogacy. I strongly believe that, for the sake of the child, his or her birth record should tell the truth and not contain a *suggestio falsi*.

It is for these reasons that I am delighted to introduce and to commend this fascinating collection of essays. I hope that what it speaks to as a whole, as well as the individual contributions within it, will be taken heed of by our legislators, and widely discussed, and that it will have the consequence that the law governing surrogacy will be changed, and brought into line with modern understandings of the family.

Mary Warnock, London 2016