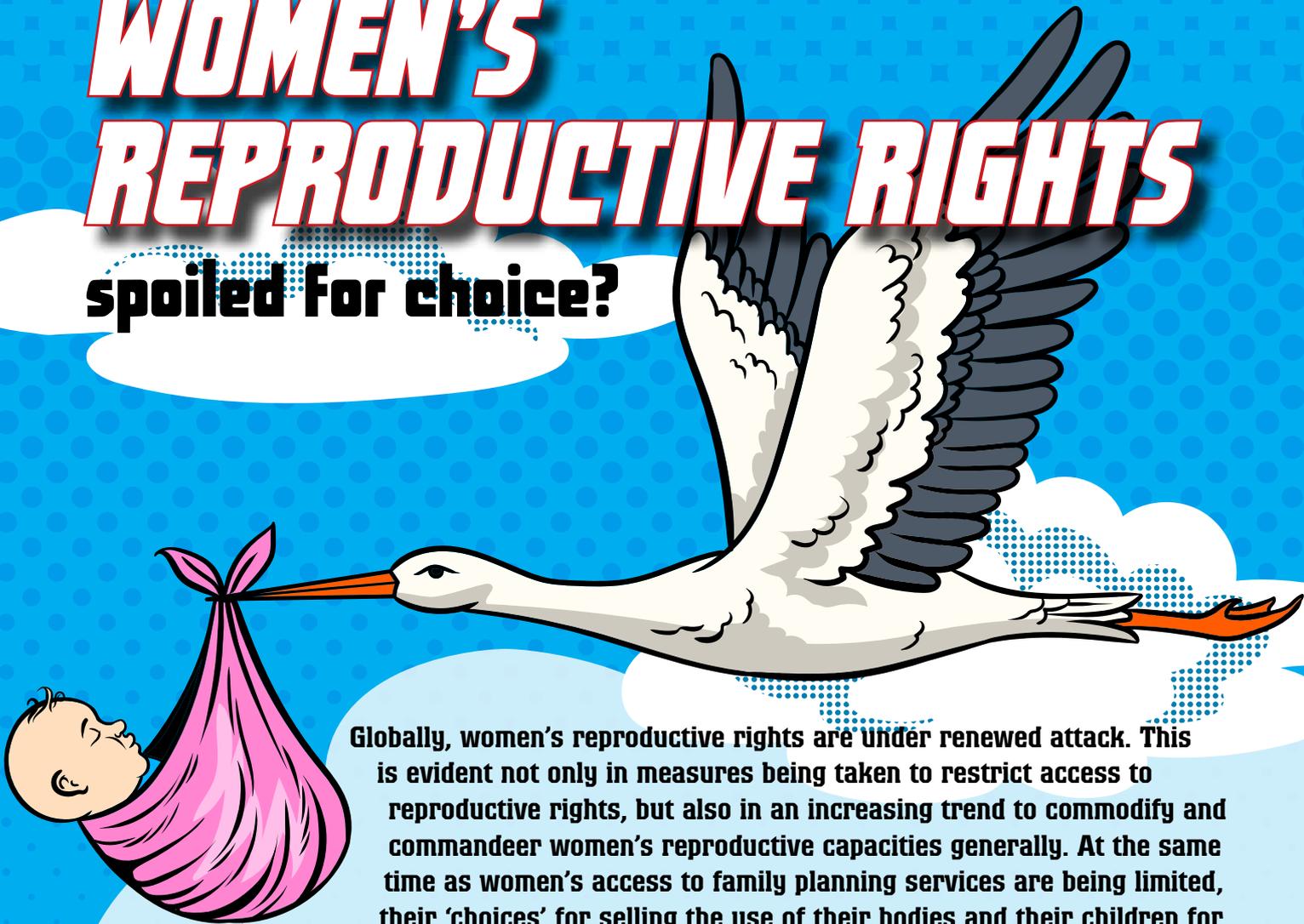


By Anna Kerr

WOMEN'S REPRODUCTIVE RIGHTS

spoiled for choice?



Globally, women's reproductive rights are under renewed attack. This is evident not only in measures being taken to restrict access to reproductive rights, but also in an increasing trend to commodify and commandeer women's reproductive capacities generally. At the same time as women's access to family planning services are being limited, their 'choices' for selling the use of their bodies and their children for the gratification of others are increasing.

Neo-liberalism has worked hard to co-opt feminism by subsuming it within a narrative of choice which frames women's actions as the exercise of free will and an expression of individualism. Within this framework, demands for reproductive rights have been expanded to include the right for women to hire out their bodies for the benefit of others.

But how often are these 'choices' being made under financial duress or in a context of social coercion?¹ Women continue to make decisions about their bodies in circumstances where their options are limited by the unequal conditions in which they live. Can we assume that women are truly acting of their own volition when in many cases their lives are so susceptible to the control of others? Or should we be sceptical of claims of 'free choice' and 'consent' in contexts that so clearly fail to advance the liberation of women and

smack of abuse and shameless exploitation?

This article briefly explores three areas where women's reproductive rights are being actively impeded by those with power and wealth – namely, abortion, adoption and surrogacy.

ABORTION

'Not the church, not the state, women must decide their fate!'

Despite this rallying cry by feminists, women's rights to access abortion are still closely circumscribed by laws made by largely male parliaments, heavily influenced by patriarchal religious bodies and then administered by legal and medical professions which continue to be dominated by men at the higher levels.

At least 50 per cent of Australian women may still have difficulty accessing a termination because they live in a state that continues to designate it as a crime; namely, NSW and Queensland.² In NSW, ss82-84 (the notorious Division 12) of

the *Crimes Act 1900* renders women and those assisting them liable to up to 10 years imprisonment, and under ss224-225 of the *Criminal Code 1899* (Qld) penalties range up to 14 years of imprisonment for actions taken with intent to procure an abortion. Recent attempts to bring these archaic laws up to date and decriminalise abortion in these jurisdictions were defeated in 2017.³ The churches were influential in resisting the proposed reforms.⁴

Public outcry has been muted because women are largely unaware of the issue. In practice, middle class women have ready access to abortions in these two states. Case law has interpreted the antiquated legislation so that abortion may be found lawful in circumstances where the woman's health is otherwise endangered.⁵ In NSW, we can thank former High Court judge Kirby J for broadening the circumstances in which abortion is lawful to include cases where the woman is experiencing economic and social stress.⁶

However, these judicial decisions are a fragile protection for an essential human right. Article 12 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) creates an obligation on states parties to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure... access to health care services, including those related to family planning'. This is further reiterated by Article 14 in reference to rural women. Furthermore, Article 16 of CEDAW specifically creates 'rights to decide freely and responsibly on the number and spacing of their children'.

However, although Australia has signed and ratified CEDAW, the Commonwealth government has so far failed to translate these provisions effectively into domestic laws or to ensure that state and territory legislation accords with these international human rights obligations. This lack of legislative protection is particularly concerning in view of repeated efforts to curtail the rights of women by according the unborn embryo or foetus a separate legal identity to that of its mother. This was seen most recently when Fred Nile reintroduced the Crimes Amendment (Zoe's Law) Bill 2017, which seeks to criminalise harm to, or destruction of, a child *in utero*. A Bill of the same name was allowed to lapse in 2014 in the face of opposition, after having passed successfully through the lower house.⁷

No doubt as a result of the uncertain legal position, abortions are not generally available through the public health system in NSW and a woman wishing to have a termination will need to raise a sum in the vicinity of \$500 to pay a private provider. Difficulty accessing the funds necessary to pay for an abortion in a timely fashion can mean that some women are effectively forced into late terminations or even continuing with an unwanted pregnancy. Despite this, there was very little outcry when Sydney's oldest abortion clinic, and apparently the last provider of free abortion services, closed its doors in 2015. The clinic had been relentlessly picketed by religious groups, which claimed its closure as a victory.⁸ Women therefore continue to be coerced not only by their partners, families and financial constraints, but also by the law and religious bodies which actively impede their ability to access safe and timely abortions.

Fortunately, prosecutions for abortions in Australia are relatively rare. A case in Queensland in 2009, *R v Leach and Brennan*,⁹ involved the prosecution of a couple for arranging for a relative to send from the Ukraine a supply of the drugs misoprostol and mifepristone, used in medical abortions. The couple was decisively acquitted on the basis that the drugs were not a 'noxious' substance but only after enduring 18 months of uncertainty between charge and verdict. Legislative amendment was subsequently made providing doctors with a defence if they administer a medical treatment for the mother's benefit. However, the sanctions against abortion have still generally been left in place.

In those cases where there is a prosecution, it is the woman who is most at risk of being penalised. This is despite the fact that often the woman's 'choice' has been dictated by her circumstances, including the demands of her partner or their unwillingness to provide financial support. In a recent case in NSW, it was reported that a mother of five was told by her partner when she was 19 weeks' pregnant that he didn't want to have the child. Having been refused assistance by doctors due to the advanced state of her pregnancy, she then found a man on the internet willing to provide her with the necessary pills in exchange for \$2,000, which she purchased and used. It was reported that the woman was subsequently convicted for self-administering a drug with the intent of procuring her own miscarriage by Magistrate Geoff Hiatt at Blacktown Local Court in July 2017. However, there was no mention of any action being taken against either of the two men respectively responsible for compelling and facilitating her actions.¹⁰

ADOPTION

Whether a woman has an abortion or proceeds with a pregnancy only to relinquish the child for adoption, they typically do so in a context of economic and social duress. However, the 'choice' to proceed with an unwanted pregnancy only to have the baby removed for adoption is likely to have a devastating impact on both the mother and infant. Adoption trauma suffered by both relinquishing mothers and adoptee children is well documented.¹¹ However, until the introduction of the Supporting Mother's Benefit by the Whitlam government in 1973, it was common for the babies of unwed mothers to be adopted. Since then, the number of babies available for adoption has dropped dramatically. The link between the woman's 'choice' and the financial resources available to her is quite clear.

Historically, women whose children were removed for adoption were typically pressured by family members, religious ideology, doctors, social workers, financial hardship, or a combination of all these factors. They were often compelled to sign binding legal documents, often while still under the influence of sedatives and painkillers, with no opportunity to obtain legal advice. Many examples of this practice drawn from the 1940s to the 1980s are extensively documented in the Senate Community Affairs Reference Committee Report, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* released in February 2012.

Although this level of coercion has abated, women and girls who are Aboriginal, disabled, incarcerated, extremely young, in out-of-home care, or affected by substance abuse or mental health issues remain vulnerable to having their children removed under duress. Their 'consent' is still frequently given in a context of personal and financial crisis and under pressure from others.

However, there is no doubt that there are far fewer Australian babies available for adoption than in the past. As a result, some couples instead adopt from overseas. Of course, these children too may be sourced from desperate and impoverished women. Disturbing stories have come to light of children being sold or kidnapped and passed off as orphans to sustain this lucrative trade.¹² The unpleasant fact is that adoption creates trauma and lifelong suffering for both the natural mother and child, and the white middle class people who make up the majority of adoptive parents are benefitting almost invariably at the expense of the poor and oppressed.¹³

Aside from the economic realities, the psychological pressure applied to women in these circumstances is also immense. Relinquishing a newborn in the context of adoption is cast as a noble sacrifice for the good of the child and an act of kindness to an infertile couple. There is tremendous pressure on mothers to live up to this altruistic ideal. Therefore, even in those cases where lawyers may be satisfied that the woman made an 'informed choice', it is often a Hobson's choice of the worst kind that facilitates a systemic reversal of the Judgement of Solomon.

Aside from the trauma to the woman, there is also a continuing tendency to disregard the extremely distressing impact on an infant of being removed from its natural mother,¹⁴ and to ignore the ongoing breach of human rights as recognised by the United Nation's Convention for the Rights of the Child. As the gestational mother is included in the definition of 'parent', children have an explicit right to be known and cared for by their gestational mother as far as is possible pursuant to Article 7 and a right not to be separated from her under Article 9, as well as a right to have their identity preserved under Article 8. Australia, as a party to the Convention, also has an obligation to take appropriate measures to 'prevent the abduction of, the sale of or traffic in children in any purpose or in any form' pursuant to Article 35.

Despite these provisions and an increasing understanding of the traumatic effects of removal following the string of apologies now given to those removed in the past,¹⁵ adoption is again increasing in favour as a response to disadvantage.¹⁶ Recently, some state child protection authorities have renewed policies to remove children from their parents at an earlier stage with a view to making them available for adoption.¹⁷ This has the benefit for governments of reducing the numbers of children who are legally wards of the state, cutting the expense of providing ongoing welfare checks in relation to the placement of these children and limiting the government's exposure to liability for failures in the system.

While it may be cost effective, this policy creates a legal fiction that hurts women and children and endangers their safety and wellbeing. Once adopted, the government is no longer obliged to conduct regular welfare checks on these

children – despite the fact that it is unlikely that rates of child abuse in foster care will end just because the children have instead been adopted. Unfortunately, the numbers of young people currently affected by abuse in out-of-home care (whether adopted or fostered) are largely undocumented because no follow-up studies are conducted. The Royal Commission into Institutional Responses to Child Sexual Abuse commented on the difficulties associated with the limited data available, but was able to report that rates of child sex abuse were considerably lower for children in relative care than for those in foster or residential care.¹⁸ The Northern Territory Children's Commissioner has also recently reported that last year 10 per cent of young people in out-of-home care had a substantiated case of serious abuse.¹⁹

The evidence of widespread abuse of children who are removed from their families undermines arguments that removal for adoption provides greater safety for children. It is clear that outcomes for all would be improved if greater focus were instead put on supporting women to care for their children. However, inadequate resources are directed at addressing the welfare needs of mothers so that they are supported to retain care of their offspring, with many of them trapped in abusive relationships that precipitate the removal of their children. Indeed, Indigenous mothers in difficult circumstances are increasingly at risk of being themselves incarcerated, with many refused bail on relatively minor charges, and the authorities then using this as an opportunity to remove their children.²⁰

SURROGACY

Although across the globe impoverished women are often struggling to secure the financial and social support needed to have and keep their own children, they are increasingly being offered payment to gestate babies for others, or engage in what can be regarded as reproductive prostitution. In Australia, commercial surrogacy is largely illegal, but altruistic surrogacy is allowed in some states.²¹ Understandably, however, there are very few women who are willing to have a baby for someone else on an entirely altruistic basis. Meanwhile, a number of factors, including the growth in gay male couples desiring to raise a family, for example, has seen a significant increase in demand for this 'service'.²²

As a result, increasing numbers of Australians are seeking commercial surrogacy arrangements overseas, even taking the risk of breaking the law in some states. Indeed, Australia is reported as the largest client market for international surrogacy arrangements,²³ with former Family Court Chief Justice Diana Bryant observing that 25 per cent of all international surrogacy arrangements are being contracted by Australians.²⁴ Although it is a criminal offence in the ACT, NSW and Queensland for residents to engage in commercial surrogacy arrangements anywhere in the world, very few prosecutions have been brought. Instead, there are increased calls for commercial surrogacy to be legalised²⁵ and an approach by the courts that is largely tolerant of surrogacy arrangements made overseas in defiance of domestic laws.²⁶ There are strong suggestions being made that regulation, rather than prohibition, will ultimately provide a solution to this dilemma.

The extension of pro-choice arguments to campaigns to legalise and regulate commercial surrogacy is a divisive issue for feminists. Some argue it is a woman's choice to hire out her body and that she should be empowered to sell her eggs and her breast milk, rent herself as an incubator and receive payment in exchange for the delivery of a child. But even cases of altruistic surrogacy for friends or relatives are beset with ethical problems that no amount of regulation will cure. Women's 'choices' are severely compromised by the unequal conditions and social constraints within which they live. Any level of inducement or coercion has the potential to compromise the safety and wellbeing of mothers and children and further entrenches a view of women and their offspring as commodities to be traded.

While most would agree that it is not the surrogate mother who should risk imprisonment for entering these arrangements, there is concern that surrogacy is fundamentally exploitative and should be banned altogether.²⁷ Women choosing to be surrogates often agree to these arrangements as a means of earning money needed to support their existing family. There is nothing empowering about selling the use of reproductive organs to meet your living expenses. Indeed, it is comparable to selling your body parts as a means of survival and this is banned by the Australian government, with good reason. However, since 1985 when the advent of gestational surrogacy first enabled a woman to carry a child genetically unrelated to her, there has been an

exponential growth in the popularity of the procedure – since the legal situation is more favourable to those commissioning the birth. This is despite the fact that gestational surrogates continue to experience attachment and have difficulty relinquishing the baby, as exemplified in the early US case of *Calvert v Johnson*,²⁸ in which the genetic composition of the child was ultimately decisive and the role of the gestational mother reduced to that of a vessel.

For example, in Australia mothers may donate their excess milk to those unable to breastfeed – but a prohibition on payment avoids inducing donors to compromise their (or their babies') health by giving too much.²⁹ Again, however, this ban is not vigorously enforced and there have been recent reports of Australian women selling their breast milk for up to \$500 per litre to customers including athletes, cancer patients and fetishists, as well as parents of newborn babies.³⁰ Furthermore, since last year an Indian company has also been given permission to import breast milk into Australia,³¹ with minimal consideration given to regulation or governance of the process. This trade clearly facilitates the exploitation of women from a low-income country for the benefit of those in a developing country and may potentially adversely affect the health and wellbeing of the donors' own offspring.³² In March 2017, Cambodia acted to ban the sale of breast milk following reports of impoverished mothers selling their milk to supplement their incomes, thus depriving their own babies of optimal nutrition.³³

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AUSTRALIA'S LEADING SAFETY AND ERGONOMICS EXPERTS

Late last year, Cambodia also cracked down on the surrogacy trade in that country, with an Australian nurse arrested for running an illegal clinic servicing many Australian couples.³⁴ It has been argued by some, including the former Family Court Chief Justice Diana Bryant,³⁵ that if commercial surrogacy is legalised, it can be properly regulated and will curb the growth in couples entering surrogacy contracts with women in developing countries.³⁶ But for many people, international arrangements in developing countries will continue to be attractive because they are substantially cheaper.³⁷ Regulation merely legitimises an inherently unethical industry that profits from human desperation. In contrast, in those countries where all surrogacy (including altruistic) is banned, the practice does not have social acceptability and the demand is lower.

Some recent cases have highlighted other ethical problems with a trade in babies. The Baby Gammy case involved an Australian couple hiring a Thai surrogate.³⁸ Following the birth, the biological parents returned to Australia with only the twin sister, while the twin brother with Down Syndrome was left to be raised by the surrogate who had become emotionally attached to the babies while they were in utero. It was also found that the Australian couple misrepresented the genetic makeup of the child in their original application to the court, in which they failed to mention the existence of a twin brother. Furthermore, it also emerged that the biological father was convicted of 22 child sex offences, and that a protection order was sought by the authorities should the child be left in the couple's care. Despite all these factors, Thackray CJ ordered that it was in the baby girl's best interests to continue living with the applicant couple rather than be returned to her birth mother in Thailand, given the strong relationship she had developed with the applicants, and that her birth mother was a stranger to her.

Another case investigated by Interpol involved a 24-year-old Japanese businessman, Shigeta Mitsutoki, who fathered 15 children using Thai surrogates (the 'Baby Factory' case).³⁹ Despite suspicions over child exploitation and trafficking, there was no evidence that the millionaire was breaking any Thai or Japanese laws. Following widespread international condemnation of these cases, the Thai government has banned foreigners from travelling to Thailand to enter commercial surrogacy arrangements and India has also moved to restrict surrogacy to heterosexual couples from countries where surrogacy is legal. As these foreign markets close, there is increased pressure to follow the lead set by various states of the US and legalise commercial surrogacy arrangements here in Australia.

The recent judgment by the Court of Appeal of the Family Court in *Bernieres and Anor & Dhopal and Anor*⁴⁰ will certainly bring this issue to a head. This case relates to an appeal against a failure by a Family Court judge to make declarations of parentage or grant leave for a step-parent adoption in relation to a child born overseas as the result of a commercial surrogacy arrangement. Despite one of the appellants being the biological father, it was found that this did not translate into him being the legal parent for the purposes of the *Family Law Act* 1975 (Cth). As a result of this decision,

many overseas surrogacy arrangements will be beset with immense immigration and other legal difficulties.⁴¹

CONCLUSION

For lawyers, the field of reproductive rights holds great potential for a brave new world of litigation – not only medical negligence, but also class actions against the state and other potential civil claims by the women and children whose lives are now being damaged by laws and policies that breach their human rights. Given the international nature of some of these arrangements, conflict of laws is also likely to present challenges. While some governments are finally beginning to compensate for their past discriminatory programs,⁴² Australia has to date issued largely empty apologies to stolen generations and mothers who have had children taken, and is still continuing to implement laws and policies that will establish an Atwoodian dystopia that should provide the basis for litigation well into the future. It is clear that current Australian laws, and even international human rights provisions, do not adequately recognise and protect the natural and fundamental bond between a mother and the child she carries and must urgently be strengthened to prevent further development of a culture in which women's reproductive capacities are commandeered and their offspring traded as mere commodities by wealthy men. In view of recent progress made with the development of artificial wombs,⁴³ the next issue for women may not be gaining access to pregnancy terminations but having a say in relation to the future of any aborted embryo – which may otherwise be sold to the highest bidder. While this would assuage right to life concerns, it would have serious consequences for the role of women and further establish the endorsement of wealth by our society as the highest qualification for parenthood. ■

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