

FROM ALICE AND EVELYN TO ISABELLA

Exploring the Narratives and Norms of 'New' Surrogacy in Australia

Jenni Millbank*

This article explores the role of discourse and narrative in shaping the recent wave of reforms to surrogacy law and policy around Australia. I examine two sites of dialogue – parliamentary debate and media representations – where discourses concerning surrogacy have been reframed dramatically to justify a new era of regulation. The themes that have emerged through these reform dialogues both reflect and recraft contemporary understandings of surrogacy specifically, and non-traditional family formation more broadly. As such, this is both an analysis of the role of evolving discourses of surrogacy, infertility and assisted reproductive technology in Australia, and a case study of a multiple-jurisdiction law reform process dominated by narrative and anecdote.

I cannot think of a more worthy thing for this Parliament to do than to say to those people ... 'We will change the law to enable you to take advantage of technology which is readily available ... and we will utilise the law to enable you to become the legal parent of the child born as the result of that process'. As a matter of public policy, we do not support commercial surrogacy ... That is not something that is part of the Australian culture, if one likes ... This legislation is based upon altruistic surrogacy ... in other words, the couple need ... to have a sister or a best friend who is prepared to carry the child for the couple. What a noble thing to do from an altruistic base! I find it hard to comprehend those people who do not support such a good, wholesome proposition to create human life and to bring that human life into a family that is so desperately keen to extend its love.¹

– Jim McGinty, Shadow Attorney General, Western Australia, 2008

We have all read, particularly in women's magazines, about a sister having children for her sister and, sometimes, a mother having children for her daughter.²

– Linda Burney, NSW Minister for Community Services, 2010

* Professor of Law, University of Technology, Sydney. This research was supported by Discovery Project Grant DP 0986213 from the Australian Research Council. Thanks to Isabel Karpin, Maggie Kirkman, Anita Stuhmcke and the journal reviewers for their comments, and to Eloise Chandler for research assistance.

¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 770.

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 2010, 27120.

Recent years have seen a transformation of surrogacy laws across Australia. Wide-ranging direct and indirect prohibitions on surrogacy in all states and territories, bar the Northern Territory, have been repealed and replaced with a new regime of detailed regulation. These reforms introduced state-based parentage transfer processes that grant legal recognition to intended parent-child relationships and amended assisted reproductive technology (ART) laws, in those states which have them, in order to allow eligibility for IVF in surrogacy in limited circumstances.³

The gulf traversed by these reforms is most acutely evidenced in the state of Queensland, which in the space of just over 20 years introduced and abandoned the harshest regime criminalising all forms of surrogacy. In 1988, the Queensland Minister for Community Services introduced the original legislation thus:

[I]t is the strong belief of members of the Queensland Government that to use *or* to pay another human being to reproduce is the ultimate in dehumanisation. We are of the opinion that a baby must not be treated as a commodity ...⁴

In 2008, Queensland Premier Anna Bligh prefaced reforms by saying:

The reality is that for some people surrogacy is their only hope of starting a family. I believe and the government believes it is grossly unfair that their genuine efforts to do so could land them behind bars.⁵

Thus surrogacy has been transformed from an abhorrent commodification of children to a legitimate family formation avenue – albeit one of last resort.

This article interrogates the role of discourse and narrative in shaping the recent wave of reforms to surrogacy law and policy around Australia.⁶ I argue that the themes that have emerged through these reform dialogues arise from and contribute to the reshaping of contemporary understandings of surrogacy specifically, and of non-traditional family formation more broadly. I examine two sites of dialogue – parliamentary debate⁷ and media

³ For a detailed critique of the substantive provisions, see Millbank (2011). For reasons of space, this article does not reproduce the legislative provisions. Tasmania's reforms remain stalled in the upper house at the time of writing (August 2012).

⁴ Queensland, *Parliamentary Debates*, 23 March 1988, 5546 (PR McKechnie).

⁵ Queensland, *Parliamentary Debates*, 23 April 2009, p 147 (Anna Bligh). The Queensland Attorney-General stated that the reforms would 'assist people to realise their dreams of having a family': Queensland, *Parliamentary Debates*, 26 November 2009, p 3667 (Cameron Dick).

⁶ Discourse is used in the sense proposed by Norman Fairclough – as a mode of action or social practice, as well as a mode of representation (Fairclough 1992).

⁷ This article focuses upon parliamentary debates from Western Australia, New South Wales, South Australia, Queensland and Tasmania because the legislative reforms in those states were specific to surrogacy, whereas in the Australian Capital Territory (ACT) and Victoria, surrogacy provisions were a small part of far broader reforms (to legal parentage

representations – where discourses around surrogacy have been dramatically reframed to justify a new era of regulation. As such, this is an analysis both of evolving discourses of surrogacy, infertility and ART in Australia, and a case study of a multiple-jurisdiction law reform process dominated by narrative and anecdote.⁸ Notably absent from the parliamentary debates was the substantial, and developing, body of empirical research on surrogacy families.⁹ In fact there were only four references to scholarly research on surrogacy: three in the exhaustive three-year Western Australian debates and a single mention in the New South Wales debates.¹⁰

All the legislative debates took place following, or in conjunction with, short-term public inquiries. It is notable that these inquiries, taken together, heard from only a handful of people who had actually gone through surrogacy or were contemplating surrogacy as intended parents, and even fewer women who had been birth mothers. At the same time, several dozen Australian individuals and couples who had either engaged in surrogacy to form their family, or planned to do so in the future, participated in print and electronic media stories about surrogacy.¹¹ Whether categorised as news,

and assisted reproduction, respectively), and there was less focus on issues concerning surrogacy.

⁸ Arguably, this is more common than not in Australian law reform concerning family issues: see Graycar (2000, 2012); Rhoades (2010).

⁹ For overviews, see: van den Akker (2007); Ciccarelli and Beckman (2005). While opponents of reforms regularly claimed that ‘all the research’ supported their position, this ‘evidence’ concerned purported harms of same-sex parenting and donor conception, *not* surrogacy (and was copied wholesale from submissions of Christian think-tanks, in particular the Australian Family Association, with no attribution to any researcher or research institution).

¹⁰ There were two brief references to anthropological and sociological research on the experience of birth mothers and intended parents, in the United States and United Kingdom respectively: Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 2007, p 7059 (Robyn McSweeney, referring to Heléna Ragoné’s work) and Legislative Assembly, 10 May 2007, p 2114 (Jim McGinty, referring to Olga van den Akker’s work). There were two more detailed references to newer psychological research in the United Kingdom by Susan Golombok, Fiona McCallum and their team on the development and well-being of children born through surrogacy: Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, pp 907, 908 (Kim Hames, referring to a summary of research published as a background paper by the Victorian Law Reform Commission); NSW, *Parliamentary Debates*, Legislative Council, 27 October 2010, p 26917 (David Shoebridge). See Golombok et al (2006).

¹¹ The media survey was drawn from Australian media databases FACTIVA and INFORMIT using the search words ‘surrogacy’ and ‘surrogate’, covering the period January 2007 to December 2010. Of these, in 45 cases at least one person (usually an intended parent, less commonly a birth mother) was identified by full name; in fifteen there was identification by first names only; and in nine all adult parties were unnamed (of those nine reports, either the child’s first name was given or the salient facts differed such that it was clear that they were distinct arrangements). Follow-up searches were made using participant names as search terms in the above databases and across the internet

legal, health, current affairs or ‘lifestyle’ articles, these reports comprised narratives of what surrogacy had meant for the participants personally – why they came to surrogacy, how they did it, their joy and fulfilment at the children who resulted; less commonly, their heartbreak if they were as yet unsuccessful. It is notable that most stories contained explicit or implicit comment on the need for, or scope of, proposed law reforms. Families presented their own circumstances as a case study in a manner directed towards changing social and legal barriers to surrogacy, although the great majority of them did not participate in the parliamentary inquiries. Numerous newspaper editorials were published through this period in tandem with the stories, all of which were supportive of surrogacy and promoted liberalisation of surrogacy law.¹² I argue that these media representations demonstrably motivated and informed legislative reforms, although not always in a straightforward manner.¹³

Prior to the flurry of media attention that accompanied this wave of reforms, two high-profile arrangements, in 1988 and 1998 respectively, set a powerful template influencing the development of Australian discourses around surrogacy. These were the birth of Alice Kirkman and the lengthily disputed arrangement in the *Re Evelyn* litigation.¹⁴ More latterly, the birth in 2006 of daughter Isabella to federal Senator Stephen Conroy was the focus of enormous media attention and a frequently cited trigger for reform. The three girls born through these diverse surrogacy arrangements merit specific attention because of the way in which their individual circumstances have moulded the parameters of debate. Along with a handful of other children who had appeared in the media, Alice, Evelyn and Isabella were referenced in the parliamentary debates throughout Australia as evidence of both the need for and the *outcomes* of surrogacy.¹⁵

using Google. Many participants appeared in a single press report, while others appeared across print, radio and television, or appeared in follow-up articles over a period of time.

¹² See, for example, ‘Update Sterile Laws’, *Herald Sun*, 3 August 2008, p 31; Riley (2008), p 21; ‘Rights of the Child Get Legal Backing’, *Geelong Advertiser*, 8 December 2008, p 21; Walker (2009), p 3.

¹³ In particular, intended parents in the media commentary did *not* propose or promote restrictive legislative models, such as those limiting access to surrogacy on the basis of marital status or genetic connection, discussed below. On the contrary, a number of media participants spoke of the importance of not imposing general rules from their own experience, and indeed some openly advocated non discriminatory access: see, for example, Dibben (2008), p 28; AAP (2010). See also the testimony of Maggie, Linda and Alice Kirkman to this effect at the Queensland inquiry: Queensland Parliament (2008), pp 13, 17, 18. Testimony from intended parents to the South Australia Inquiry was more mixed: two intended mothers opposed restriction of access to heterosexual married couples, one father supported it and another intended mother was more equivocal: Parliament of South Australia (2007), 30 April 2007, pp 161–62; 4 June 2007, pp 165–66.

¹⁴ *Re Evelyn* (1998) 23 Fam LR 53; *JRN & Anor v IEG* [1998] HCATrans 263 (3 August 1998); *JRN & Anor v IEG* [1998] HCATrans 327 (11 September 1998).

¹⁵ On Alice see: South Australia, *Parliamentary Debates*, House of Assembly, 21 November 2007, p 1767 (PL White); Queensland, *Parliamentary Debates*, 10 February 2010, p 159

Parliamentary debates were replete with references to surrogacy stories from the press. Such representations were not limited to papers of record, and included express mention of television current affairs programs and populist ‘women’s magazines’ such as *Woman’s Day*.¹⁶ There were also numerous references to common sense, common knowledge, emotion, heart and instinct by members articulating the basis of their position.¹⁷ Indeed one MP evidenced the importance of genetic identity and the issue of ‘genealogical bewilderment’ through reading into the parliamentary record the entirety of one of her children’s favourite books, ‘Are You my Mother?’¹⁸ In this light, it is a fair inference that members of parliament were informed about surrogacy to a considerable degree through media representations and popular or ‘folk’ understandings, rather than research findings.

Prominent discursive themes in both parliamentary and media accounts included: surrogacy as a ‘cure’ for infertility; surrogacy as a form of special relationship between family and friends; and genetics as determinative of the ‘real’ or ‘biological’ parents of children. Undergirding these debates is the paradoxical and shifting relation of surrogacy to the ‘natural’ in terms of reproduction methods, parenting practices and parental desire.¹⁹ Interestingly, none of the participants in the reform dialogues across both sites – whether speaking for or against the various reform measures – disputed the idea that parenting was, and ought to be, natural. Rather, they sought to realign experiences of, and perspectives on, surrogacy to accord with shifting claims of naturalness. Genetics, heterosexuality, the desire to parent, the importance of parental love and the march of medicine were all variously framed within a trope of ‘the natural’ to support *and* to oppose the reforms.

(Rosemary Menkens) and 11 February 2010, p 251 (Evan Moorehead). On Evelyn, see note 32. On Isabella, see Queensland, *Parliamentary Debates*, 14 February 2008, p 24 (Anna Bligh); see also Tasmania, *Parliamentary Debates*, House of Assembly, 5 April 2011, p 70 (Elise Archer) and 12 April 2011, p 60 (Rebecca White). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2007, p 1772 (Kim Hames), referring to the Banfield twins and Pippy Rushford: see note 152.

¹⁶ See, for example, Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2007, p 1764 (Kim Hames); NSW, *Parliamentary Debates*, Legislative Council, 27 October 2010, p 26922 (Greg Donnelly); Linda Burney, n 2 at 2; Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 782 (Alannah MacTiernan).

¹⁷ See, for example, Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, p 907 (Alannah MacTiernan and Martin Whitely).

¹⁸ By PD Eastman (1960). Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 2007, pp 6918–20 and again on 13 November 2008, p 249 (Barbara Scott).

¹⁹ On surrogacy and the ‘unnatural’, see ‘Introduction’ in Cook et al (2003), pp 5–6.

You've Come a Long Way, Surrogacy Babies

As far back as 1990, the National Bioethics Consultative Committee (NBCC) noted that surrogacy had received disproportionate attention in Australia, given its infrequent occurrence, and suggested that the powerful symbolism of the mother–child bond lay at the base of this intensity. Indeed, the NBCC characterised the first wave of Australian reforms as an ‘over-hasty and ill-considered reaction’ to a few highly publicised international commercial surrogacy cases in the early to mid-1980s, including ‘Baby Cotton’ in the United Kingdom and ‘Baby M’ in the United States.²⁰ In 1988, Australian sisters Maggie and Linda Kirkman presented a powerful counter-narrative of domestic altruistic surrogacy.²¹

The Kirkmans’ arrangement involved a *gestational surrogacy*: Alice was conceived through IVF involving Maggie’s egg and donor sperm, and carried by Linda. The Kirkman sisters wrote a book, regularly engaged in media comment and public debate on surrogacy, and contributed formal submissions as well as oral testimony to numerous law reform inquiries on ART-related issues from that time forward.²² In doing so, they consistently presented the perspective of both intended mother and birth mother in joint and individual narratives that stressed honesty, communication and familial closeness.²³ The prominence of the Kirkmans in shaping Australian public discourse on surrogacy should not be under-estimated: as well as regular quotes from both sisters upon various surrogacy reform proposals, sustained media coverage of Alice through her childhood caused her to later remark: ‘When I was little I thought everyone got on TV for their birthdays.’²⁴ Alice herself made public statements about surrogacy while still a child, including a presentation to an international conference on assisted reproduction at the age of 11²⁵ and a number of publications about her experience and views.²⁶ As an adult, Alice participated in the Victorian and Queensland reform inquiries and lobbied for the passage of Victorian laws granting broader access to ART as well as surrogacy.²⁷

²⁰ National Bioethics Consultative Committee (1990a), para 2.5.2. See also National Bioethics Consultative Committee (1990b); Stuhmcke (2004).

²¹ See Pitt (1988).

²² See Kirkman and Kirkman (1988). The NBCC Report (1990a) lists separate submissions from Linda, Maggie and Sev Clarke, Alice’s non-biological father (p 99). Maggie, Linda and Alice appeared jointly as witnesses at the Queensland Surrogacy Inquiry, and Maggie and Alice attended two consultation roundtables as part of the Victorian ART Inquiry.

²³ See, for example, McCarthy (1993), p 2: ‘according to Maggie and Linda Kirkman, the experience has only tightened bonds that were already strong’; Kirkman (1993): ‘gestating my sister’s child has enhanced, not threatened, family relationships’.

²⁴ Brown (2008).

²⁵ Taylor (1999).

²⁶ Kirkman and Kirkman (2002). See also Kirkman (1995, 2005).

²⁷ See Barry (2008).

The Kirkmans became an influential example of a positive experience of surrogacy that was altruistic, intra-familial and gestational – all elements that came to be prioritised in the reforms.²⁸ They also established a strong tradition of narrative focus on women in press coverage of surrogacy – indeed, one article referred to it being ten years since Linda and Maggie Kirkman had gone public with ‘*their pregnancy*’.²⁹ Sev Clarke, Maggie’s husband and Alice’s non-biological father, although frequently mentioned by the women, was never a focus of, and rarely a participant in, the stories.

Alice’s tenth birthday coincided with the release a week earlier of the decision of Full Court of the Family Court of Australia concerning the first (and to date only) contested surrogacy case in Australia, *Re Evelyn*, giving rise to direct comparisons between the two situations. *Re Evelyn* involved two couples who had been long-term friends (named the Qs and the Ss in the judgments), who entered into a surrogacy arrangement that did not involve IVF, using the sperm of the intended father (Mr Q) and the egg of the birth mother (Mrs S). This form of arrangement has variously been called ‘genetic’, ‘traditional’ or ‘partial’ surrogacy, in which the birth mother is also a genetic mother to the child. Evelyn was initially raised by the Qs but Mrs S sought the return of the child when she was seven months old. The trial judgment, undisturbed on appeal, was that it was in Evelyn’s best interests to be returned to and raised by the Ss and have monthly contact with the Qs. At the conclusion of the litigation, the birth mother called for all forms of surrogacy to be banned in Australia.³⁰ The case was extensively covered in the print media³¹ and has cast a long shadow: more than a decade later, it continues to be cited in the press and parliamentary debates as an example of the inherent dangers of surrogacy.³²

²⁸ This is not to suggest that the Kirkmans actually supported aspects of the debated Bills or ultimate legislation that prescribed restrictions or exclusions concerning these issues. Maggie Kirkman posits that the meaning of genetic connection is deeply individual, such that no general approach can be taken regarding gestational versus genetic surrogacy. She has also repeatedly expressed the view that intra-familial surrogacy should not be seen as ‘ideal’ because of the prospect of emotional pressure within families: see, for example, Queensland Parliament (2008), pp 13–14. While Linda Kirkman made some statements opposing commercial surrogacy (Kirkman 1993, p 17), Maggie’s remarks focus much more on the importance of knowing the birth mother in order to maintain connection, rather than opposing commercial payment *per se*: see McCarthy (1993), p 2; Thomas and Sutton (1997), p 1; Queensland Parliament (2008), p 14.

²⁹ Dixon and Freeman (1998).

³⁰ Ruben (1998).

³¹ Of over 80 articles see, for example, Fitzpatrick (1998).

³² See, for example, Adam (2002); Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 2008, p 261 (Brian Ellis); Legislative Assembly, 2 December 2008, p 749 (Peter Abetz); South Australia, *Parliamentary Debates*, Legislative Council, 27 September 2006, p 762 (Andrew Evans); Queensland, *Parliamentary Debates*, 10 February 2010, p 159 (Rosemary Menkens); NSW, *Parliamentary Debates*, Legislative Assembly 28 October 2010, p 27124 (Greg Smith).

Through these two cases, a powerful narrative contrast was developed between the 'good' surrogacy of the Kirkmans and the surrogacy-gone-wrong of *Evelyn*.³³ Some coverage explicitly contended that the Kirkmans were successful because the surrogacy was gestational³⁴ – such that the intended mother Maggie was the 'true' mother. In contrast, *Evelyn* involved genetic surrogacy such that it was the surrogate mother, Mrs S, who was the 'natural mother' (also 'biological mother'), and her difficulty in relinquishing the child was therefore seen as inevitable.³⁵ Some articles referred to the genetic surrogacy in *Evelyn* as 'illegitimate surrogacy' and not 'true surrogacy'.³⁶ A major discursive trend was established: genetic surrogacy as dangerous and unnatural; gestational surrogacy as safe (or safer), and intra-familial surrogacy as ideal.

In 2006, a federal senator announced the birth of his child, Isabella, through gestational surrogacy. Stephen Conroy and his partner, Paula Benson, had a daughter with the assistance of two women, one of whom was the birth mother and the other an egg donor. Although Senator Conroy made this statement via a media release, while Ms Benson and the two unnamed women involved made no public statements at all, the case appeared in nearly 200 print media reports alone in Australia.³⁷ Conroy later appeared in a number of television and radio interviews discussing surrogacy law reform, and gave personal testimony to the 2008 Tasmanian surrogacy inquiry in a public hearing in which media were present. At that time he characterised the press coverage as '95 per cent ... overwhelmingly positive'.³⁸

Interestingly, in media coverage of Conroy the egg donor and surrogate were commonly characterised as '*family* friends', a designation bridging the intra-familial arrangement of the Kirkmans and the (former) friendship of the Qs and Ss. (In 2008, Conroy acknowledged that both women were Isabella's godmothers, another quasi-familial designation.³⁹) The involvement of a donor egg both reinforced and contradicted the evolving discourse of the importance of genetics in surrogacy. The common wisdom arising since *Evelyn*, that gestational surrogacy is 'safer' and less likely to give rise to disputes and issues of relinquishment than genetic surrogacy, was reflected in Conroy's statements that this was a motivation for utilising a donor egg⁴⁰ as well as a quote from an IVF specialist that genetic surrogacy

³³ See, for example, Horin (1998); Fynes-Clinton (1998).

³⁴ See also Bone (1993): 'the fact that Alice was *not her natural daughter* ... made all the difference to Linda Kirkman's ability to hand the child to Maggie ... this is a crucial difference ...'

³⁵ See, for example, Egan (1998).

³⁶ Fynes-Clinton (1998); see also Lamperd (1998)

³⁷ See, for example, Murphy (2006); Dunlevy (2006).

³⁸ Tasmania, Legislative Council, Select Committee on Surrogacy, 1 July 2008, Senator Conroy, Testimony, p 3.

³⁹ Senator Conroy, n 47, p 4.

⁴⁰ See Coorey (2005); Senator Conroy, n 47, p 5.

'had *often resulted* in the surrogate mother later making a claim as the baby's legal mother'.⁴¹ Numerous reports referred to both egg donor and surrogate as 'surrogates', or to the arrangement as 'double surrogacy', and suggested that this was highly novel, or an Australian 'first'. In fact, as we will see, the use of donor eggs appears to be a relatively common aspect of contemporary surrogacy, but one that confounds the prevailing trope of genetic connectedness as the axis of parentage.

The other major theme that arose in the coverage of Isabella's birth was the restrictive role of law and the prevalence of evasive travel within Australia. Conroy and Benson were excluded by law from accessing clinical assistance for surrogacy in their home state of Victoria, and thus undertook IVF treatment in New South Wales, where the child was subsequently born. Just as representations of the Kirkmans valorised intra-familial surrogacy and *Evelyn* symbolised the perils of genetic surrogacy, Isabella came to symbolise the oppressive role of law. Virtually every article stated that the couple had been 'forced' to travel because of Victorian law. Conroy advocated publicly as well as politically for the 'harmonisation' of Australian surrogacy laws, and was widely credited with being the catalyst for, as well as a force behind, the nationwide move to liberalisation.⁴² Isabella is also a fascinating anomaly in the media accounts of surrogacy in that the coverage focused exclusively upon the male parent. In almost all other media accounts, it is the female intended parent – whether or not a genetic parent – who is the focus.

'New' Surrogacy

The range of discussion offered in the parliamentary debates is unusually rich – in my view, owing to the extraordinary fact that all of them bar one involved a conscience vote on at least one side of parliament. Indeed, the majority involved a conscience vote on both sides of parliament.⁴³ In all, there were over 200 speakers in the Australian parliamentary debates on

⁴¹ 'Using Two Surrogate Mums May Prevent Later Court Battles', *AAP*, 7 November 2006.

⁴² See also 'Govt Flags National Consistent Surrogacy Laws', *AAP*, 10 November 2006; 'Conroy to Press Colleagues on Surrogacy Laws', *AAP*, 4 December 2007; 'States to Act over Surrogacy', *Courier-Mail* (Brisbane), 9 April 2007.

⁴³ In New South Wales and Victoria, the Bills were moved by Labor governments; both government and opposition offered a conscience vote. In Western Australia, the Bill was drafted by a Labor government but after it lost office the Bill was moved in exactly the same form by a conservative Coalition government; both sides offered a conscience vote. In Queensland, the Bill was moved by a Labor government, which offered its members a conscience vote, while the opposition held a party vote against. (The opposition put its own Bill forward to which it offered its members a conscience vote, while the government had a party vote against). In South Australia, the original Bill was a Private Member's Bill moved by John Dawkins, an opposition Liberal MP. After lapsing, the Bill was moved by the Shadow Minister for Health and later extensively amended in committee with the support of the Minister for Health. Both sides offered a conscience vote. Tasmania was alone in having a party vote on both sides (and stalled as a result of a majority of independent members in the Legislative Council).

surrogacy. In addition, in two states (South Australia and Western Australia), the debates were prolonged over a three-year period. In most of the jurisdictions under discussion, debate did not divide firmly along party lines, such that the views expressed about surrogacy in general, and the legislative proposals specifically, were largely individualised rather than party-based.

Only a handful of voices opposing surrogacy as a practice *per se* were raised in either parliamentary debate or media representations.⁴⁴ It is striking that only 20 years after surrogacy had been seen as a profound threat to Australian family life,⁴⁵ virtually every Member of Parliament who spoke against the various Bills argued that they did not oppose surrogacy *in principle*, and would support a different version of surrogacy laws than the one on offer. Parliamentary discussion was characterised by a chorus of sympathy and support for those who need to resort to surrogacy, with opposition to the reforms focused on establishing the right *kind* of surrogacy. At the heart of this was contention over (1) access of same-sex couples and single people to surrogacy and (2) mandating genetic connection of the child to intended parents (and absence of such connection to the birth mother). Both of these controversies rested on a construction of the natural as absolutely requiring either (or both) heterosexual coupled parenting and genetic parenting – in a manner which trumped or perhaps renaturalised the presence of another woman as gestational parent.

There were also some marked differences in the two sites of reform dialogue. Parliamentary debates uncritically perpetuated the stark dichotomisation of ‘altruistic’ and ‘commercial’ surrogacy, which has been a notable feature of Australian laws and policy to date, with members unanimous in their vigorous condemnation of ‘commercial’ surrogacy. In contrast, many of the families who participated in media had engaged in commercial surrogacy overseas and spoke positively of the benefits of payment. In my analysis, the press reports revealed a surprisingly nuanced approach to payment, which included some aspects of authorial tone that retained condemnation (‘womb for rent’) but also explored the role of payment in particular situations and allowed for a wider range of meanings around the roles in commercial surrogacy. This ‘unpacking’ of payment

⁴⁴ See Queensland, *Parliamentary Debates*, 10 February 2010, p 193 (Andrew Powell), and pp 161–63 (Elizabeth Cunningham); NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, pp 27583–84 (John Aquilina).

⁴⁵ For example, the 1988 Report of the New South Wales Law Reform Commission recommended that ‘surrogate motherhood should be discouraged by all practicable legal and social means’: New South Wales Law Reform Commission (1988), paras [4.6] and [4.7]. In 1991, the Minister for Community Services in Victoria made a public speech in which she likened surrogacy to slavery: Jacovac (1991). Organised feminist opposition to surrogacy based on the premise that the practice is inherently exploitative of women also appears to have dissipated: contrast the high-profile participation of FINRRGE (Feminist International Network of Resistance to Reproductive and Genetic Engineering) in the 1999 West Australian parliamentary inquiry with the absence of any feminist opposition in the 2008 Queensland parliamentary inquiry.

appears to be a new development in Australian public discourses on surrogacy. The themes common to both sites are discussed below, followed by an exploration of the main area of divergence, money.

Infertility and the Natural

The parliamentary debates are quite startling for their personal and at times frankly revelatory tone, reflecting the focus on personal narratives of family formation present in the media accounts. Almost every MP, speaking for or against the measures, situated themselves as parents or grandparents at the commencement of their address. Many MPs also offered detailed narratives of formative incidents in their own family lives, including miscarriages, the premature delivery of babies, childhood accidents and mortality, time spent as a sole caregiver of children, the raising of adopted children and step-children and their own experiences as children who were adopted, had an adopted sibling or were raised by a single parent. As one Tasmanian MP stated:

I absolutely accept that every one of us has our own story as it relates to family, children, fertility matters and the rest of it. Each one of us has our own story that informs us.⁴⁶

These detailed personal narratives were openly utilised to establish authority in competing claims about *what matters* in childrearing based on experience and observation.

The debates contain countless statements about the joys (and challenges) of childrearing, an experience posited as universal except inasmuch as it is denied to the infertile.⁴⁷ The individual desire to parent was persistently naturalised in the debates, as was a collective drive for, and social interest in, reproduction:

[I]t really is not our place to legislate against [IVF or surrogacy] because reproduction and survival of the race is a natural urge ...

If you want a child you want a child, and you will go to the ends of the earth to have one.⁴⁸

We cannot govern the wind, we cannot administer the tides and we should not try to control human reproduction.⁴⁹

⁴⁶ Tasmania, *Parliamentary Debates*, House of Assembly 5 April 2011, p 74 (Rene Hidding).

⁴⁷ For example: 'Those of us with children and grandchildren will know what a delight and joy a healthy, happy child is ... The Bill recognises that there is a human need within us all, I believe to have and to care for children.' New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 2010, p 27125 (Barry Collier).

⁴⁸ South Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, pp 3377, 3381 (Ann Bressington).

⁴⁹ Queensland, *Parliamentary Debates*, 10 February 2010, p 188 (Dean Wells).

It was widely argued that parliament should not ‘stand in the way’ of the desire to have children, an argument made with whimsical poignancy in the following vignette:

You’re saying that all these people shouldn’t have children. You’ve had children and have grandchildren; you know what it’s like ... What you’re saying is that you don’t want these other people to have that blessing. That’s just something I can’t understand.

There is nothing more precious to a parent, or to anyone else, than a child, and now we have an opportunity to allow someone else to feel that love. I have a granddaughter, and I feel so blessed. At 5.45 this morning she came into my bedroom, landed her Elvis doll on my head, cuddled her little bottom into me and went to sleep and snored for an hour. Things like that are priceless ...⁵⁰

The role of IVF as a ‘cure’ for infertility was crucial to the discursive construct of law as a barrier. ‘If medical advancements can help these people, it is not the role of Parliament to prevent it.’⁵¹ Science was posited as a progressive force, aligned with nature, or perhaps with natural progress, which parliament should not impede. Paradoxically, then, law becomes both the problem *and* the solution as it ushers in a new era of reform.

The knowledge that only very small numbers of people will access surrogacy was constantly balanced against regular statements about the significance of the legislation: ‘This is a very important and personal issue to all of us; one that is very tender to us’.⁵² Infertility was characterised as a personal blight and as a social ‘epidemic’, the devastating impact of which was known to everyone present as a matter of course, and which harmed not only potential parents but their parents and extended family members as well.⁵³ As one MP said, ‘*We all know* the extent and impact of infertility’.⁵⁴

John Dawkins, the architect of the original South Australian Private Member’s Bill, acknowledged on a number of occasions his own experience of infertility:

My youngest child will be 25 this year, but it seems like only yesterday that my wife and I were experiencing considerable trouble in having our second child ... This was before the days of IVF, but

⁵⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, pp 750, and 765 (Peter Watson).

⁵¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, p 27589 (Clover Moore).

⁵² Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, p 922 (Ian Britza).

⁵³ See, for example, Hidding, n 46, at p 74; NSW, *Parliamentary Debates*, Legislative Assembly, 28 October 2010, p 27129 (Alan Ashton).

⁵⁴ Queensland, *Parliamentary Debates*, 9 October 2008, p 3020 (Rosemary Menkens), emphasis added.

we still went through all sorts of tests ... I think that experience ... allows me to understand the trauma that these people go through ... Our situation was very much at the small end compared with the situation which a lot of people I have met have had to deal with over many years.⁵⁵

At a later telling, Dawkins concluded: 'No one understands that until they go through it.'⁵⁶

The widespread experience of infertility in Australia is a consequence of a range of factors, including delayed childbearing, the experience of sexually transmitted illness and other environmental factors that impair fertility, including treatment for and survival of a range of cancers. While there is arguably a significant difference in experience of infertility as a result of these various causes, the use of IVF in all instances has established a common context and discourse of 'treatment'. Increasing medical acceptance of the use of surrogacy in cases of unexplained infertility and recurrent miscarriage has also served to bring surrogacy within the broader umbrella of 'infertility treatment'.⁵⁷ The construction of infertility as a common and readily *curable* ailment was vital to the almost universal legitimisation of surrogacy in the debates. It is through this that law – not infertility, science or finance – is the impediment to the 'human need ... to have and to care for children'.⁵⁸

Nonetheless, the *symbolic* role of sexual reproduction and its relationship with the natural in constructing infertility was a crucial axis of contention in the reforms. In essence, opponents argued that the use of IVF and surrogacy should be mandated for use only in circumstances that would 'repair nature'.⁵⁹ Ultimately, there was heated debate and significant divergence across the various jurisdictions in terms of the final legislative provisions restricting or permitting access to IVF or parentage transfer in surrogacy on the basis of relationship status and sexual orientation.⁶⁰ In

⁵⁵ South Australia, *Parliamentary Debates*, Legislative Council, 13 February 2008, p 1668 (John Dawkins).

⁵⁶ South Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, p 3376 (John Dawkins).

⁵⁷ For example, see Genea (2007); Advisory Committee on Assisted Reproductive Technology (NZ) (2007).

⁵⁸ See Collier, n 47.

⁵⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 2007, p 6912 (Helen Morton).

⁶⁰ In the ACT, access to the surrogacy parentage transfer regime includes heterosexual and same-sex couples, but not single people. In Western Australia, access to IVF treatment and parentage transfer is open to clinically infertile women and heterosexual couples (this expressly excludes age-related infertility), but not to single men or male couples. In South Australia, access to the parentage transfer regime is limited to clinically infertile heterosexual couples only. In Victoria, access to IVF and parentage transfer, and in Queensland, New South Wales and Tasmania to parentage transfer, is not limited by

South Australia, amendments to include same-sex couples were debated and defeated, while the opposite occurred in Queensland, New South Wales and Tasmania, where amendments to *exclude* them were raised and defeated (as were amendments to exclude unmarried women in Western Australia). Such exclusions were claimed to be non-discriminatory because ‘Mother nature discriminates at the moment’.⁶¹ The words of three Queensland opposition MPs ably capture several elements of this construction of the natural:

Children arise from a relationship between a man and a woman. That is how nature intended it ...⁶²

[S]ame sex couples establish their relationship without any natural expectation of children.⁶³

Males do not have wombs.⁶⁴

Without wishing to belabour the point, these MPs were all speaking about legislation that would facilitate reproduction by women who could not have children within their relationship with a man, for reasons including the lack of a womb, eggs and the ability to sustain a pregnancy. Thus the ‘natural’ in this construct is of the feminised social *expectation* of childbearing; the method of reproduction is entirely displaced. A naturalising discourse of maternal desire was also strongly present in the media accounts, in which the ‘dream’ of being a mother was constantly referenced in stories concerning heterosexual couples, as was the experience of wanting to be a mother from earliest childhood.⁶⁵ This reflects Marilyn Strathern’s musings on social or ‘folk’ understandings of the natural and the biological in surrogacy when she asks: ‘Is the desire to have a child as much a biological function as the ability to bear one?’⁶⁶

In a number of states, opponents characterised the legislation as misusing, ‘encumbering’ or ‘contaminating’ a proper ‘cure’ for infertility in order to deliberately create same-sex families.⁶⁷ In Queensland, the

relationship status. Moreover, the legislative criteria of infertility in these latter four states includes both social and clinical infertility. See Millbank (2011).

⁶¹ Tasmania, *Parliamentary Debates*, House of Assembly 12 April, p 85 (Elise Archer).

⁶² Queensland, *Parliamentary Debates*, 11 February 2010, p 268 (Lawrence Springborg).

⁶³ Queensland, *Parliamentary Debates*, 10 February 2010, p 163 (Elizabeth Cunningham); echoed at 186 (Dorothy Pratt).

⁶⁴ Queensland *Parliamentary Debates*, 10 February 2010, p 168 (Alex Douglas) and ‘men cannot conceive and carry children’ at 208 (Jarrod Bleijie).

⁶⁵ For example, see ‘Sister’s Love Puts Impossible Dream Within Grasp’, *Liverpool Leader* 3 September 2008; Miles (2007), p 3; Campbell (2010), p 4.

⁶⁶ Strathern (2003), p 291.

⁶⁷ For example, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, pp 758–59 (Graham Jacobs); Queensland, *Parliamentary Debates*, 10 February 2010, p 169 (Mark Robinson) and p 143 (Lawrence Springborg).

government Bill was repeatedly characterised by the conservative opposition as ‘social engineering’ or a ‘social experiment’,⁶⁸ which formed an ‘attack on our family structure and our society’.⁶⁹ Terms such as ‘commodification’, ‘buying’, ‘designing’ and ‘procuring’ children were utilised almost exclusively in relation to same-sex couples in the parliamentary debates⁷⁰ (a trend paralleled in the press coverage of commercial surrogacy, discussed below). Likewise, the desire to parent was rendered unnatural through a series of dehumanising metaphors: children for gay and lesbian parents were variously described as ‘pets’, ‘trophies’ and ‘toys’.⁷¹ The role of parliament in ‘allowing’ children to be born to same-sex couples was analogised to deliberately disabling children through forcing them to be born blind and deaf⁷² or with arms and legs ‘lopped off’,⁷³ and was also repeatedly equated with the forced removal of Aboriginal children in the Stolen Generations:⁷⁴ ‘This Bill is one more iterative step towards the diminution of the role of natural families, natural parents and natural parenting.’⁷⁵

Yet the meaning of the natural, the (in)fertile and the relationship of heterosexuality to both proved to be quite unstable, and notably gendered. In Western Australia, eligibility rested upon a definition of infertility from pre-existing ART legislation allowing clinically infertile women access to IVF, whether or not they were in a relationship. Thus locating (in)fertility in the woman allows lesbians and single women, but not men, access to IVF for surrogacy in Western Australia. Despite the largely gender-neutral talk of ‘same-sex couples and single people’ it was clear that gay men were the main target of hostility. Indeed, in Queensland several members of the opposition noted that they actually *supported* an element of the government

⁶⁸ For example, see Queensland, *Parliamentary Debates*, 10 February 2010, p 161 (Shane Knuth), pp 169, 171 (Mark Robinson); ‘baby engineering’, p 193 (David Gibson). One government MP countered that the exclusion of same-sex couples was ‘a form of unconscious, mindless eugenics’ because it would ‘legislatively eliminate people from the gene pool’: p 187 (Dean Wells).

⁶⁹ Queensland, *Parliamentary Debates*, 10 February 2010, p 157 (Rosemary Menkens).

⁷⁰ For example, see Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2008, p 4396 (Helen Morton); Queensland, *Parliamentary Debates*, 10 February 2010, p 139 (Lawrence Springborg), p 145 (Ray Hopper) and p 184 (Rob Messenger).

⁷¹ Queensland, *Parliamentary Debates*, 10 February 2010, p 145 (Ray Hopper), p 161 (Shane Knuth), p 193 (David Gibson).

⁷² Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 751 (Peter Abetz).

⁷³ Queensland, *Parliamentary Debates*, 10 February 2010, p 145 (Ray Hopper quoting a submission from the Australian Family Association).

⁷⁴ Queensland, *Parliamentary Debates*, 10 February 2010, p 173 (Rob Messenger); Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2008, pp 917–19 (Tom Stephens). See also WA Legislative Council, 27 November 2008, p 583 (Helen Morton); NSW, *Parliamentary Debates*, Legislative Council, 27 October 2010, p 26924 (Greg Donnelly).

⁷⁵ Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2008, p 4396 (Helen Morton).

Bill that automatically extended parental rights to second female parents in existing and future lesbian-led families formed through ART:⁷⁶

Today single women also access the new fertility programs. It is natural for a woman to conceive ... The desire of a woman to have a child is a very strong one and lesbian couples have found ways [to do so].⁷⁷

Males cannot mother a child – that is, carry a child in their body ...
But lesbian women can.⁷⁸

The naturalisation of maternity, even absent gestation, was critical to this distinction: ‘Two dads cannot give a child a mother’s love.’⁷⁹ This played out in a slightly different way in the Tasmanian debates, as the conservative opposition tried to exclude lesbian and gay couples but was happy to allow access to single women. The implication that men, and most especially male couples, are ‘unnatural’ parents arises from, and plays into, long-standing cultural tropes of gay men as dangerous to children by virtue of predatory, hyper-sexual and paedophilic tendencies.⁸⁰ The relative acceptance of single mothers and lesbian couple parenting in part reflects the fact that women have been less subject to such tropes, but it also arises from the discursive construct of surrogacy as a practice by and *for* women. As one female MP began: ‘Like me, most women would look for a surrogate with whom they could have a partnership of heart ...’⁸¹ Strathern has argued that the presence of the intended mother to receive the child at the end of the arrangement is required to make the process of ‘surrogacy’, or substitution, a complete and intelligible social process that creates a ‘real’ mother.⁸² As noted earlier, the media coverage markedly centred female voices, desires and experiences of ‘motherhood’ while male participants were backgrounded (even though they much more commonly had a genetic link to the child).

Those who favoured non-discriminatory access to surrogacy laws did not contest the idea of the natural; rather, they reframed it by emphatically locating ‘nature’ in the domain of parental love:

The evolutionary process has already occurred – a child has been born; biology has done its job – and if that child is raised by two

⁷⁶ See Springborg, n 62, p 139.

⁷⁷ See Pratt, n 63, pp 185–86.

⁷⁸ See Douglas, n 64, p 168.

⁷⁹ Queensland, *Parliamentary Debates*, 10 February 2010, p 183 (Rob Messenger).

⁸⁰ For example, see Morgan (1996); Henderson (1996).

⁸¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2007, p 1784 (Judy Hughes).

⁸² Strathern (2003), p 294.

loving, responsible and caring parents then that child will be the recipient of the necessary parental ingredients.⁸³

As with the harm of infertility, evidence of loving parenting was most frequently asserted by reference to personal observation:

[W]here there were two female parents or two male parents – as I came across in education ... the main thing was the love for those children because in the end, that made the absolute difference.⁸⁴

Present at that [LGBT] function were couples with children. There was a little child running around, and I knew – you felt it – they were being raised in a loving environment.⁸⁵

Like the Premier and other members, my own experience from having met single mothers, single fathers and gay and lesbian parents tells me [they can raise a child as successfully as heterosexual couples.] All of the evidence strongly suggests that it is a home environment filled with love, care, compassion and respect that is the most important factor in a child's upbringing and wellbeing.⁸⁶

In addition, there was a discursive construction of children born through surrogacy as *more* loved than other children. Proponents of reforms interwove their remarks with references to children born through surrogacy as 'desperately' wanted, planned and painfully striven for, and therefore more likely to be well loved and cared for.

[A]n advantage of surrogacy is that it is always a deliberate act. It is a considered act, and ultimately it is an act of love and an act of creation ... that is a very good start in life ... the surrogate child will be loved, wanted and valued.⁸⁷

The responsible intentional parenting of surrogacy was not infrequently contrasted with the 'genetic lottery' or '3am nightclub tryst' of conventional conception, which could entail children being accidental, unwanted and/or abused.⁸⁸ However, the prominent discourse of caregiving and love was not entirely contiguous with support for social parenting; rather, it uncomfortably coexisted with an underlying genetic essentialism.

⁸³ Queensland, *Parliamentary Debates*, 10 February 2010, p 166 (Lindy Nelson-Carr).

⁸⁴ Tasmania, *Parliamentary Debates*, 12 April 2011, p 66 (Brian Wightman).

⁸⁵ Queensland, *Parliamentary Debates*, 11 February 2010, p 267 (Grace Grace).

⁸⁶ Queensland, *Parliamentary Debates*, 10 February 2010, p 165 (Steve Wettenhall).

⁸⁷ Western Australia, Legislative Assembly, 2 December 2008, p 764 (Martin Whitely).

⁸⁸ For example, see Western Australia, Legislative Assembly, 2 December 2008, p 761 (Andrew Waddell) and p 763 (Paul Papalia).

The Rise of Genetics: 100 Per Cent Our Child

Many scholars have noted an increasing emphasis on genetic relatedness as an artefact of legal, social and medical significance.⁸⁹ In surrogacy, the valorisation of genetic relatedness and a de-emphasis on the gestational relationship are key to the construct of the intended parents as 'real' parents. In both sites of reform dialogue, gestational surrogacy was strongly preferred. However, 'relatedness' encompassed both more *and* less than a dual genetic link with intended parents. Many families in the media coverage involved the use of donor eggs, while in parliamentary debates the valorisation of relatedness was strongly present through an indirect relation: the recurrent motif of the surrogate as sister to the intended mother.

In media coverage, the vast majority of surrogacy arrangements were clearly identifiable as gestational surrogacy.⁹⁰ The claim that intended parents were the 'real' parents based on genetics was common: 'Yasmin was his tummy mummy and I was his *real* mummy.'⁹¹ Such claims are explicable in the sense that most of the intended parents were participating in reform dialogue specifically in order to gain legal status as parents; thus they focused on the 'absurdity' of their genetic tie conflicting with a lack of legal status. Intended parents stated that 'we'd have to adopt our own DNA' and were described as 'legalising the genetic bond', or as 'biological mother and father in legal wait for rights'.⁹²

Numerous media accounts referred to 'our own child', 'our own flesh and blood' and '100% our child genetically'. There was little or no reflection on the importance of social parenting and no acknowledgement of the 'biological' contribution of the birth mother. This accords with Heléna Ragoné's finding in her ethnographic work that couples involved in gestational surrogacy in the United States placed less emphasis on the contribution of the birth mother than those who engaged in genetic surrogacy.⁹³ Yet it is striking that the discourse of genetic essentialism was so prevalent in the Australian media, given that less than half of the arrangements involved *both* intended parents' gametes.⁹⁴ Centring genetic parentage as the basis of 'real' parentage may therefore be undermining to

⁸⁹ For example, see Boyd (2007); Dolgin (2000).

⁹⁰ Of the 69 arrangements, 51 involved gestational surrogacy, five were identified as genetic surrogacy and a further thirteen were unclear.

⁹¹ Faggotter (2010).

⁹² Walsh (2009), p 7; Tydd (2007), p 4; Wallace (2008), p 5, respectively.

⁹³ Ragoné (2003), pp 217–18.

⁹⁴ In all, 29 arrangements reported that both intended parents' gametes were involved. In addition to the five genetic surrogacies and thirteen arrangements where it was unclear whether the surrogacy was genetic or gestational, there were eighteen gestational arrangements reporting that a donor egg and the intended father's sperm were used, one in which the intended mother's egg and donor sperm was used, and another three arrangements in which the intended mother's egg had been or would be used, but it was not apparent whether the intended mother had a male partner.

the parental claims of the significant portion of mothers who have utilised donor eggs in the context of surrogacy (and indeed outside it).⁹⁵

Media narratives about the birth mother stress her agency, fortitude and the generosity and magnitude of her contribution; there was constant reference to her ‘incredible gift’, often accompanied in the cases of non-commercial surrogacy by the explanation that it was she who had offered to undertake surrogacy.⁹⁶ However, these characterisations took place within a prevalent erasure of her maternity. In addition to ‘surrogate’ meaning literally a substitute or deputy, the discursive erasure of the birth mother was accomplished through a variety of descriptors and metaphors, such as ‘babysitter’, ‘carrier pigeon’, ‘stand in’ mother and ‘loaned’ womb.⁹⁷ The most common metaphor by far reduced birth mothers to an inanimate vessel: the oven.⁹⁸ (The parliamentary debates also revealed similar terminology, although less frequently used, including: ‘vessel’, ‘vehicle’ and ‘incubator’.⁹⁹) While ‘just the oven’ often came from the mouths of birth mothers themselves, and was clearly a playful reference to common parlance (‘bun in the oven’), it is nonetheless extremely revealing. In this frame, the genetic parents have provided the baby (which is ‘100%’ theirs) and all the birth mother does is ‘cook’ it. This supports Janet Dolgin’s observation that ‘genes’ have replaced ‘blood’ in the ideology of ‘blood’ ties as the core of traditional family.¹⁰⁰ Gestational surrogate mothers are in a very real sense biological or blood relatives, having shared a circulatory system with the child they gestate. Yet ‘biological’ motherhood was used exclusively in the media accounts to mean genetic motherhood.

Interestingly, there was much more focus on social parenting in the parliamentary debates than in the media coverage. Statements such as ‘Families come in all shapes and sizes ... It is impossible to determine who will or will not be a good parent’¹⁰¹ were repeatedly made by MPs speaking in favour of the reforms. In Queensland in particular, government members argued that the legislation reflected family diversity and social change of a positive kind:

I am a 63-year-old woman who has a wealth of life experiences. I was raised in a single-parent household from the age of four years and have experienced a happy marriage for the past 42 years ... Many different family structures exist today. The two-parent family of the 1950s has given way to single parents, de facto, blended and

⁹⁵ See Konrad (2005).

⁹⁶ For example, see Walsh (2009), p 7; Dibben (2009b), p 28.

⁹⁷ Walsh (2009), p 7; Dibben (2008), p 62; Miles (2007), p 3 respectively.

⁹⁸ For example, see Dibben (2008), p 62; Nader (2010), p 10; ‘Surrogate Success: Lisa’s Mother of All Battles’, *Manly Daily*, 12 August 2008; Ambrose (2009), p 31.

⁹⁹ For example, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2007, p 1785 (Judith Hughes) and 10 May 2007, p 2110 (Sue Walker).

¹⁰⁰ Dolgin (2000), p 525.

¹⁰¹ See Grace, n 85, p 266.

same-sex couple families. Society is continually changing and evolving. Our legislation processes and attitudes, by necessity, change with it ... People must make their own choices and do the best they can. I am not going to tell them how they should go about [parenting] but I will do all within my power to support Queensland families – all Queensland families.¹⁰²

As with knowledge of infertility, claims about the value and importance of non-biological parenting were constantly based on personal experience:

[My social father] was the one who was a parent to me. Anybody can be a sperm donor, but to be a parent takes the ability to love, nurture and cherish a child.¹⁰³

One member whose wife had been hospitalised for several weeks after his daughter's birth narrated this incident and his subsequent experience of parenting his newborn at some length, reflecting on both genetic and 'early maternal bonding' claims made by opponents of reform, concluding:

It was not about those early days of bonding; it has been about the lives we have lived ever since ... [Our] relationship is not born out of genetic material; it was born out of shared experience. My daughter is not like me because we share 50 per cent of the same genes but because I raised her ... She is our daughter because we raised her, not because we are genetically related to her.¹⁰⁴

In Western Australia, the attempts of an Aboriginal MP to articulate a broader cultural conception of family was initially mocked:

Mrs C.A. Martin: I am an Aboriginal woman; I have 3000 family members. I know a bit about family. However, a lot of people ...

Mr R.F. Johnson: Three thousand?

Mrs C.A. Martin: Thousands!

Mr R.F. Johnson: It must be an expensive Christmas for you then!

Nonetheless, Carol Martin went on to articulate the significance of extended family in raising children in Aboriginal families, as well as the debilitating impact of diseases such as diabetes on their fertility,¹⁰⁵ in a manner which was clearly influential on other members as the debate continued.

¹⁰² Queensland, *Parliamentary Debates*, 10 February 2010, pp 150–51 (Christine Smith).

¹⁰³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 May 2007, p 1777 (Dianne Guice).

¹⁰⁴ See Waddell, n 88, p 761.

¹⁰⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, pp 767–68.

The parliamentary debates could therefore be characterised as more transformative than the media narratives in the sense that they overtly contributed to a discourse legitimating family diversity and non-normative family formation. In media coverage, the emphasis was rather on the *normality* of the surrogacy families, no matter how unusual their circumstances. This accords with Maggie Kirkman's narrative analysis in her scholarly work, where she interviewed donor conception families and found that parents 'on the whole, wanted their families to be perceived as "normal"', frequently 'accommodating as best they can to the canonical narrative of genetic connection'.¹⁰⁶

Yet the discursive construction of genetics as determinative of the 'real' or 'biological' parents was also clearly influential in the parliamentary sphere. The idea of 'pure' surrogacy entailing the absence of genetic link between birth mother and child, and the presence of it with both intended parents was initially prevalent.¹⁰⁷ In the first parentage transfer regime introduced in Australia (in the ACT in 2004), access was limited to gestational surrogacy in which at least one intended parent had a genetic link.¹⁰⁸ In later reforms, these restrictions waned somewhat.¹⁰⁹ The manner in which these requirements appeared, and were often argued down, illustrates the unexpectedly malleable quality of discourses of genetic relatedness.

In Western Australia, the commitment to 'pure' surrogacy was so pronounced that several members proposed that it should not only be mandatory but *enforceable*, such that the 'real' parents had a guarantee in law that the birth mother could be compelled to relinquish a child who had 'nothing to do with her'.¹¹⁰ This position was also voiced unsuccessfully in the New South Wales debates:

For [a gestational surrogate to] say at the time of birth they want to keep the child is, in my view, no different from kidnapping or baby snatching ... That is no different from snatching a pram outside a shop or going into a nursery in a hospital and stealing a baby out of a crib.¹¹¹

¹⁰⁶ Kirkman (2004), p 15.

¹⁰⁷ See Morton, n 59, p 6915.

¹⁰⁸ Dual genetic-link gestational surrogacy was mandated in the original South Australian Bill (which was further restricted to surrogates related to the intended parents, and did not pass). Statutes Amendment (Surrogacy) Bill 2006 (SA).

¹⁰⁹ In Western Australia, New South Wales and Tasmania, amendments to the Bills to exclude genetic surrogacy and to mandate a genetic link with intended parents were debated but defeated. South Australia ultimately did require a genetic link with at least one intended parent, while the Victorian reforms excluded genetic surrogacy from the use of licensed ART but still permitted access to parentage transfer: see Millbank (2011).

¹¹⁰ Western Australia, *Parliamentary Debates*, Legislative Council, 14 November 2007, p 7060 (Robyn McSweeney). See also contributions by Johnson, Woolard, Hughes, Halligan, Walker, Jacobs, Thomas, Whitely, Doust and Harvey.

¹¹¹ NSW, *Parliamentary Debates*, Legislative Council, 11 November 2009, p 19253 (Amanda Fazio).

This view of a dual genetic link as trumping – indeed erasing – gestational connection was repeatedly placed within the rhetoric of the child's best interests. For opponents to the reforms, genetic parenting and children's welfare were absolutely conflated.¹¹² This is especially striking given that the forced removal of children from birth mothers was being advocated – a practice universally condemned in the context of both duress adoptions and Aboriginal Stolen Generations in Australia's recent history. After exhaustive debate, Western Australia reached a 'compromise' position: the legislation included a presumption that transfer of parentage was in the child's best interests, and the consent of the birth mother could be overridden if she was not a genetic parent and one of the intended parents was, a provision replicated in the 2011 Tasmanian Bill. This provision was a dramatic departure from the wholly consent-based model of parentage transfer originally drawn from the United Kingdom, and did not reflect the views of intended parents expressed in the media or in the parliamentary inquiries.¹¹³

The UK legislation and research provide an instructive point of comparison to the Australian controversy over genetic surrogacy. The UK parentage transfer provisions have always included both genetic and gestational surrogacy, and genetic surrogacy appears to have been a fairly common form of arrangement in the United Kingdom until quite recently. Research by Susan Golombok and her team that drew upon participants who had used the UK parentage transfer regime in the period 2000–02 found a relatively even split of genetic and gestational surrogacy arrangements.¹¹⁴ Yet in Western Australia, South Australia, New South Wales and Tasmania there were attempts to amend Bills to prohibit genetic surrogacy on the basis that it was more likely to involve difficulty in relinquishment and to generate ongoing grief and identity confusion for both birth mother and child. Although these issues were prominent in the *Re Evelyn* case, as generalised assumptions they are *not* borne out by the psychological or sociological research. Neither the Golombok research nor a number of other qualitative studies of birth mothers undertaken by Olga van den Akker found significant differences along genetic–non-genetic lines in either birth mothers' or intended parents' experiences of the pregnancy, relinquishment of, or subsequent relationship with, the child.¹¹⁵

¹¹² Alison Diduck (2007) argues that this conflation is on the rise in the family law context.

¹¹³ *Human Fertilisation and Embryology Act 1990* (UK), c 37, s 30, since repealed and replaced by *Human Fertilisation and Embryology Act 2008* (UK), c 22, s 54. For example, see Queensland Parliament (2008), pp 17, 18.

¹¹⁴ The Golombok study of 34 birth mothers comprised nineteen genetic and fifteen gestational arrangements: see Jadva et al (2003), p 2197. The overlapping cohort of 42 intended parents comprised 26 genetic and fourteen gestational surrogacies: MacCallum et al (2003), p 1337. Olga van den Akker (1998) suggests that there is a marked contrast in the practice of those pursuing surrogacy through IVF in clinic settings (which are almost exclusively gestational surrogacies) and those engaging in surrogacy conceptions informally (which are often genetic).

¹¹⁵ See Jadva et al (2003); MacCallum et al (2003); van den Akker (1998, 2003, 2005).

Intriguingly, while these amendments restricting genetic surrogacy were all argued down, this was not through reference to the research, but rather through reliance on an idealised archetype of sisters participating in surrogacy. It was repeatedly argued that excluding genetic surrogacy in general would prevent siblings from engaging in it, and thus preclude ‘the best’ or ‘most perfect’ arrangements from taking place.¹¹⁶

As I understand it – from the surrogacy stories that I have read in women’s magazines! – the sibling story seems to be quite a common one. I therefore do not agree with [the amendment] because I think we would in fact lose a lot of very good surrogacies if we were to insist on this amendment. Obviously, when a sibling is involved, there is a genetic relationship in one sense.¹¹⁷

In this dialogue the (undesirable) direct genetic link the birth mother would have with the child was subsumed in favour of the indirect genetic link, or ‘family genetic connection’, that the intended mother would be enabled to have with the child (by virtue of her being a genetic aunt).

Mr Hidding: But as much as it can be, that child is the mother’s child as well as the father’s.

Mr Booth: But the point is that if you have a family situation here where you have a loving sister who is prepared to support her sister in that way ... It is a great way of having a surrogacy and *ending up with very similar genetic character types to your own family*, and presumably most of us like to see some genetic trait.¹¹⁸

Siblings were universally presented as a safe relational environment in which surrogacy could – indeed should – occur. The familial/genetic relationship between birth and intended mother was seen to render surrogacy a family-building or family-enhancing practice, such that it extended and strengthened existing family bonds rather than ‘fragmenting’ parental relationships. In the words of one member, the ‘family connection ... tightened up the relationship and did not bring a total stranger into the fray’.¹¹⁹

¹¹⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 785 (Jim McGinty) and Legislative Council, 27 November 2008, pp 583–84 (Kate Doust) and p 584 (Simon O’Brien); NSW, *Parliamentary Debates*, Legislative Council, 27 October 2010, p 26943 (John Hatzistergos); Tasmania, *Parliamentary Debates*, House of Assembly, 12 April 2011, pp 71 and 87 (David Bartlett) and 14 April 2011, pp 51 and 60 (Kim Booth).

¹¹⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 782 (Alannah MacTiernan).

¹¹⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 14 April 2011, p 61. Emphasis added.

¹¹⁹ Western Australia, *Parliamentary Debates*, Legislative Council, 27 November 2008, p 584 (Kate Doust).

The media accounts likewise presented surrogacy within the context of existing relationships as something that strengthened family bonds and formed comprehensible genetic links: ‘The already close sisters will now have a bond that will unite them forever.’¹²⁰ Yet it is worth noting that, of the arrangements reported in the media, less than half involved a birth mother who was previously known to the parties.¹²¹ Moreover, arrangements with a known birth mother were roughly divided between family and friends.¹²² Within the portion of arrangements involving relatives the paradigm from the parliamentary debates of ‘a sister having children for her sister and, sometimes, a mother having children for her daughter’ was in fact accurate,¹²³ in that most relatives *were* sisters (although there were also two mothers, one aunt and two cousins who acted as birth mothers). Yet relatives actually accounted for less than a quarter of the overall arrangements, and sisters made up only 10 per cent of the total cohort of birth mothers.¹²⁴

Sisters were a constant touchstone in the parliamentary debates. Yet the reliance by parliamentarians – across no less than four jurisdictions – upon genetic surrogacy by siblings as the principal justification for the inclusion of genetic surrogacy appears to have been utterly misplaced. Not one of the surrogacies involving relatives reported in the media – including that of the Kirkmans – involved the birth mother using her own egg. (Indeed, as three of the sisters involved were in fact sisters of the intended *father*, this would have involved consanguinity.) A search of the online content of the most popular Australian women’s magazines, including *New Idea*, *Woman’s Day*, *Women’s Weekly* and *Marie Claire*, reveals many celebrity commercial surrogacy stories, but not one instance of sibling genetic surrogacy.¹²⁵ The apocryphal image of sibling genetic surrogacy may simply be a reflection that the ‘sensible’ surrogacy of the Kirkman sisters was held in mind inaccurately. However I suggest that it indicates an elastic notion of genetic

¹²⁰ Sikora (2008), p 15. See also n 22.

¹²¹ Of 69 arrangements, in 36 the birth mother had been previously *unknown* to the intended parents (of these, 33 were commercial arrangements), and in a further six the previous relationship of the parties was unclear.

¹²² In twelve arrangements, the birth mother was a friend, while fifteen arrangements involved a birth mother who was related to one of the intended parents. In twelve cases, the birth mother was related to the intended mother and in three to the intended father.

¹²³ See Burney, n 2, p 27120.

¹²⁴ Limited UK figures suggest that around a quarter of gestational arrangements through IVF clinics may involve sisters. At the Bourn Hall Clinic in England, over ten years from 1989 to 1998, of 41 IVF surrogacy arrangements, fifteen involved relatives, of whom nine were sisters and five were sisters-in-law to the intended mother: see Brisden (2003), p 103. Tim Appleton, a counsellor who worked with three different UK IVF clinics, reported that, of 143 arrangements in his experience, 43 involved relatives (which included 20 sisters and fifteen sisters-in-law of the intended mother), 28 friends and 72 parties who were previously unknown to each other: Appleton (2003), p 200.

¹²⁵ Searchable through: <<http://au.lifestyle.yahoo.com/new-idea>>; <<http://womansday.ninemsn.com.au>>; <<http://aww.ninemsn.com.au>>. One story of sibling gestational surrogacy appeared: Brygel (2009) (concerning the Rushfords, see also n 152).

connection, encompassing non-linear genetic links and broader ideas of ‘relatedness’ within discourses of surrogacy. This elasticity concerning relatedness undercut dominant discourses of genetic determinism and combined with evolving notions of family diversity to allow less restrictive legislation to eventually pass in the majority of Australian jurisdictions.

Money Changes Everything

On the role of payment, the parliamentary debates and the media accounts were utterly divided. The media reports revealed a surprisingly high proportion of families who were prepared to acknowledge commercial surrogacy arrangements. Of the 69 surrogacy arrangements in the media survey, almost half – 33 – involved declared payment to the birth mother beyond expenses. Given the historical condemnation of commercial surrogacy in Australia, it was even more surprising that the reports were generally positive, or neutral, about the fact that money had been paid. Indeed, taken as a whole, the media reports explored a complex array of meanings about payment in surrogacy. Anita Stuhmcke notes that the

dearth of discussion surrounding the criminalisation of commercial surrogacy is remarkable in light of the [24 separate] inquiries held across Australian jurisdictions into surrogacy between 1983 and 2009 ...¹²⁶

‘Commercial’ surrogacy had deliberately been excluded from the scope of reforms. Thus statements about commercial surrogacy tended to be simple expostulations, such as: ‘All of us in this parliament stand very firmly against commercial surrogacy’,¹²⁷ ‘Paid surrogacy is the exploitation of working people’¹²⁸ and, in the opening quote of this article, not ‘part of the Australian culture’. The reform agenda was explicitly framed as being about, and limited to, ‘altruistic’ surrogacy:

My government firmly believes that no one should be able to make a commercial profit from their reproductive capacities, and that is not an issue that we intend to be revisited.¹²⁹

This appears to have been a consciously legitimating discourse that cast all bad practice, exploitation and risk of harm into the realm of the commercial in order to liberalise laws for unpaid surrogacy. An unfortunate product of this strategy was that there was no attempt to unpack what *is* ‘commercial’, no inquiry into the actual costs of surrogacy or exploration of the meaning and role of payment to those involved. The idea that monetary payment acts

¹²⁶ Stuhmcke (2001), p 601.

¹²⁷ Queensland, *Parliamentary Debates* 11 February 2010, p 281 (Cameron Dick).

¹²⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, p 756 (Bill Johnston). Emphasis added.

¹²⁹ Queensland, *Parliamentary Debates*, 14 February 2008, pp 224–25 (Anna Blich).

as an effective proxy for all forms of exploitative practice went totally unquestioned in the parliamentary sphere:

[T]he surrogates about whom I am talking are people who volunteer out of love and their wish that a relative of theirs may have the joy of their own child. I think we need to remember that when we hear some of the stories about *all the terrible things that may have gone wrong in other parts of the world where money has changed hands*.¹³⁰

In fact, only one MP even questioned whether continuing to impose prison sentences for individuals involved in commercial surrogacy was justified, as he argued that the best interests of children may not be well served by having their parents incarcerated as a result of the circumstances of their conception.¹³¹

The contrast with the media approach to commercial surrogacy was stark. Of the 33 cases involving payment, reports could be characterised as falling roughly within four approaches: positive, neutral, contested or negative.¹³² In all, there were twelve reports about surrogacy involving payment to the birth mother which were broadly positive in tone, ten neutral reports, six reports where views about payment were contested and only five that were unequivocally negative.

It is noteworthy that, of the five negative reports, three concerned gay male couples while one related to a single woman. Given that there were only sixteen gay male couples and one single woman in the overall cohort of 69 participant families,¹³³ their over-representation in negative press suggests that it was not paid surrogacy *per se* that was the cause of the negative

¹³⁰ South Australia, *Parliamentary Debates*, Legislative Council, 27 September 2006, p 764 (John Dawkins), emphasis added.

¹³¹ Queensland, *Parliamentary Debates*, 10 February 2010, p 193 (David Gibson).

¹³² These classifications were based on the following criteria. Positive reports included one or more comments from participants about the benefits of payment, contained no quotes from contradictors and the story was told with a generally supportive authorial tone. Neutral reports included details of payment with little or no comment from either participants or the author about this element of the narrative. Contested reports included comments from participants about the benefits of payment but also included quotes from contradictors opposed to surrogacy (usually religious or ethics commentators) and/or queries about the ethics of payment from the author. Negative reports contained few comments from participants about the benefits of payment (and such comments were framed as participants 'defending' their actions), had a greater focus on contradictors and all contained a clear authorial tone of condemnation. Although expressions such as 'rent a womb' and 'buying babies' were occasionally quoted in the contested reports, this language was a key feature of the negative reports, appearing both through quotes from contradictors and as direct descriptors used by the author, in addition to other expressions denoting commodification such as 'baby factory', 'designer baby', 'bought' 'ordered' and 'baby shopping'. For example, see Hellard (2007), p 2; McLean (2008), p 4.

¹³³ There were also eight female intended parents who did not identify their relationship status.

judgment, but rather the fact that it was undertaken by non-normative families. This finding was in keeping with the parliamentary debates, in which much of the opposition concerned the sexuality and marital status of intended parents. The only heterosexual married couple to participate in paid surrogacy and receive negative press involved extreme circumstances: an intended father who was accused of causing the baby's death at the age of fifteen weeks. Payment and death were discursively linked through the titling of the report: 'Cash Baby Tragedy'.¹³⁴

The positive, neutral and contested reports traverse a range of ideas about money, including its meaning to participants personally as well as its role in a structural sense in terms of creating reproductive 'markets' that reflect or generate power imbalances. It is noteworthy that some of the most strongly positive stories involved comment from the birth mother herself on these issues, which was taken to negate her imputed status as exploitee or victim.

All of the acknowledged commercial arrangements took place outside Australia. Of these overseas paid arrangements, twelve had taken place in India and nineteen occurred in the United States, with a further two proposed for the United States. It was clear that payment was more contentious when it took place outside of the developed world. The overwhelming majority of the positive stories concerned paid surrogacy in the United States,¹³⁵ while India featured more prominently in the contested stories. Indeed, it was within the contested stories that discussion of structural power imbalance took place and the role of poverty in generating 'supply' and potentially vitiating the birth mother's genuine consent were examined. So, for example, the statement in the Standing Committee of Attorneys-General discussion paper that overseas surrogacy 'risks the exploitation of poor families for the benefit of rich ones'¹³⁶ was openly critiqued by intended parents. Megan Sainsbury responded:

None of us would ever exploit a person from a Third World country ... India has some of the strictest regulations regarding psychological testing in the world for surrogates and potential parents. They do not accept people who are purely in it for the money or those who want to exploit someone less fortunate than themselves.¹³⁷

Elsewhere, Rodney Cruise echoed the view that screening processes ensured informed consent and added that the assumption that all surrogacy in India entailed exploitation was 'unfair' and 'patronising', as it was based on the notion that 'women in India were less capable than Western women

¹³⁴ Dowsley and Laphome (2007), pp 1, 4.

¹³⁵ Over one-third of the paid arrangements concerned India, but these appeared in only two of the positive stories, while the remaining ten concerned surrogacy in the United States.

¹³⁶ Standing Committee of Attorneys-General, Joint Working Group (2009), pp 4–5.

¹³⁷ Benson (2009), p 1.

of informed choices'.¹³⁸ Legal scholar Anita Stuhmcke was quoted at length on her position that money and exploitation had been unthinkingly correlated in Australian policy:

[S]imply because an arrangement is commercial, it doesn't mean it's exploitation ... And just because an arrangement isn't commercial doesn't mean somebody isn't being exploited. You can imagine the pressure in families if one person cannot have a child. There is pressure from daughters on their mothers and between sisters. I'm not sure that simply because we call it altruistic surrogacy means it's all loving and there is no exploitation.¹³⁹

For some participants, money signified clarity, in that it contributed to a clear understanding of their respective roles within a well-defined framework that was characterised as responsible and regulated,¹⁴⁰ in addition to being commercial. Thus payment rendered the arrangement 'clear cut' and 'easier'¹⁴¹ for all concerned, as well as 'fairer'. For some, payment was expressed as a moral imperative: 'I would never expect someone to carry a baby for me and not be compensated for pain and suffering. People still die in childbirth.'¹⁴² Intended parents explained that payment made a very partial contribution towards redressing what they would always experience as a profound debt to the birth mother:

It's still a little bit hard for me because we've been given this fantastic gift – and the children are a gift – and what can we give in return? Money doesn't cover it. There's nothing I can give her of equal value and sometimes that's hard.¹⁴³

The discourse around payment in the media was permeated with a notably domesticating tone: money was repeatedly characterised as spent on, or sacrificed from, children's education and family homes.¹⁴⁴ Several stories note that intended parents had mortgaged, or remortgaged, their homes in order to pay for commercial surrogacy. Thus payment represented a *sacrifice* on the part of intended parents rather than an expression of wealth or

¹³⁸ Bruce-Rosser (2008), p 1.

¹³⁹ Overington and Pelly (2009), p 11.

¹⁴⁰ For example, see McDougall (2008), p 1, 4.

¹⁴¹ For example, see 'Surrogate Success: Lisa's Mother of All Battles' *Manly Daily*, 12 August 2008; Ambrose (2009), p 31; Phillips (2009), p 14.

¹⁴² See McDougall (2008), pp 1, 4.

¹⁴³ Sharelle Wormald in Grant (2009). This involved payment of around \$30,000 to the birth mother, out of a total cost of \$130,000.

¹⁴⁴ See also *X & Y (Foreign Surrogacy)* [2008] EWCH 3030, in which the judge 'domesticates' the commercial aspect of the surrogacy agreement by repeatedly characterising the 27,000 Euros as a sum that allowed the birth mother and her husband to put a deposit on a small flat.

exercise of consumer power. Wealth disparities between birth mother and intended parents were usually acknowledged within a narrative frame in which payment transformed the life of the birth mother, through allowing her to provide for her own family in a way she could never have done otherwise. Thus:

Ironically Mark and Allan mortgaged their home to hire a surrogate, while the fee she received enabled her to pay off her own home loan.¹⁴⁵

More commonly, payment was referred to as the means by which an Indian birth mother could provide an education for her children.¹⁴⁶ In this way, payment was discursively shifted from the commercial to the domestic, and the power of money from the structural to the personal.

One of the most dramatic counter-narratives about the role and meaning of payment was presented by Sharelle Wormald, who was born without a uterus. In a series of media reports, Sharelle characterised an horrific accident in her early adulthood as a ‘blessing’ or ‘blessing in disguise’ because her lump sum accident compensation payment enabled her to afford commercial surrogacy in the United States (at a total cost of around \$130,000):

I was a passenger in a head-on car crash ... I heard my back break and I knew what I was in for, I knew what I had done ... You know I’d do the accident again and live with the pain again, cause how do you choose between being pain-free and having your children? You’d pick your kids, without a second thought, I would. I’d pick them again.¹⁴⁷

In this telling, the ‘commercial’ character of money is subsumed within a narrative of bodily suffering (notably a suffering *additional* to that of infertility) in which money is not earned or spent. As such, rather than contaminating or commodifying reproduction, it simply fulfils appropriate maternal longing.

Sharelle was one of several participants in commercial arrangements who maintained a close and ongoing relationship with a birth mother from the United States. These participants stressed that although money was a necessary part of the arrangement, it was not the sole motivation for the birth mother, nor a defining feature of their relationship. This reflects the findings of Heléna Ragoné’s ethnographic study of commercial surrogacy in the United States.¹⁴⁸ Shannon McVey, the birth mother for Sharelle, expressed

¹⁴⁵ Chatfield (2010), p 13.

¹⁴⁶ For example, see Hodge n 138; Nine Network (2009); Ravichandran (2010).

¹⁴⁷ See Nine Network (2007a). See also Metlikovec (2007).

¹⁴⁸ See Ragoné (2003), p 212.

payment as something that was essential but nonetheless unrelated to motivation:

Well the money played a small part, because, you know, we wouldn't be able to do it for free. Because, you know, we sacrificed our family a lot ... My time ... and there was a lot of doctors appointments and stuff ... But basically just knowing that there are families out there that can't have children and I am just so thankful and fortunate that I am able to, and I am glad to be a tool in that, helping that family to grow.¹⁴⁹

Sharelle re-characterised their relationship as a familial one, referring to Shannon as the children's 'Aunty Shanny' (and Shannon's children as cousins of her own), placing a photo of Shannon next to the children's cots,¹⁵⁰ and exchanging visits and gifts.¹⁵¹ Likewise, in a television interview the intended mother of twin boys, Lisa Banfield, and the birth mother, Krisy Prelewicz, minimised the significance of money in their relationship:

Interviewer: What started out as a business deal has evolved into a strong friendship. Of the \$300,000 Lisa and John spent trying to have a baby, Krisy received about \$60,000. But she says it was never about the money.

Krisy Prelewicz: Altruism was the guiding factor in this, definitely, and one of the surrogates broke it down to – I think it was five cents an hour – when they figured payment versus time put out, so it's not about the money. It's very much about helping somebody.

Lisa Banfield: And she offered after the boys were born, we had remaining embryos, she'd do it again without any money, and I got goosebumps just saying that right now. Not because I don't want more children, but because it was just such an amazing thing to do.

Interviewer: Does the offer still stand, Krisy?

Krisy: If we did it immediately.

Lisa: No, we're very happy with our two, aren't we? Aren't we? *I look at Krisy and I don't even look at [husband] John!* You're off the hook, don't worry.

Krisy: Whew! The way it's turned out has been an additional blessing, to have stayed connected this way.¹⁵²

These narratives provide a striking contrast to the rationale given by the New South Wales Minister for Community Services when she introduced a last-minute amendment to criminalise commercial surrogacy even when undertaken overseas. Burney argued that such arrangements, in addition to

¹⁴⁹ Above note 147.

¹⁵⁰ This was also noted in another commercial arrangement: Dibben (2009a).

¹⁵¹ Grant (2009).

¹⁵² Nine Network (2007b), emphasis added.

being inherently exploitative of women and children, deprive children of access to information about their genetic and gestational heritage, and prevent any ability to form a relationship with the birth mother.¹⁵³ The mismatch between policy rationales with at least some of the reported experience underscores the missed opportunity of the various reform inquiries, all of which excluded any investigation into commercial surrogacy. I am not suggesting that the myriad social and legal issues presented by the international practice of commercial surrogacy are by any means easy to resolve, nor that reform models ought to uncritically adopt the perspective of intended parents. Nonetheless, commercial surrogacy presents legal problems of parentage and citizenship for Australian families which this round of reforms has deliberately failed to address.¹⁵⁴

Conclusion

Australian laws on surrogacy have undertaken a dramatic *volte-face* in the space of just 25 years. Surrogacy has come in from the cold; it is no longer an inherently dangerous and exploitative enterprise threatening the stability and naturalness of family life. Instead, it has been reinscribed as a mode of family formation that, while unusual, is an unavoidable artefact of modern life, a legitimate last-resort cure for infertility that will be tolerated as long as it is done *properly*.

The issue of surrogacy, despite touching only a small number of families to date, was considered to be an issue of great policy importance and personal significance in the parliamentary debates. At the same time, parliamentary debates – across no less than seven Australian jurisdictions – evinced very little knowledge of, and arguably even less interest in, the developing scholarly research into the experience of and outcomes from surrogacy. Instead, ideas about surrogacy were drawn largely (and not always accurately) from the media. Anecdote and personal narratives regarding both surrogacy and infertility waxed large in the dialogue across both sites. While this may not represent a particularly well-informed or evidence-based model of law reform, it does provide an illuminating site for analysis of the dynamic role of discourse and narrative in creating and justifying new legal regimes.

Reform dialogues in both the media and parliamentary sites suggest that the legitimisation of surrogacy has taken place as a result of changes to the social experience of fertility and family formation. While the discourse of ‘nature’ and ‘cure’ continue to dominate, understandings of what comprises ‘the natural’ appear to have shifted significantly. The desire to parent and to provide parental love was largely prioritised over the means of reproduction – thus third-party contributions such as donor gametes, pregnancy gestation

¹⁵³ NSW, *Parliamentary Debates*, Legislative Assembly, 10 November 2010, p 27598 (Linda Burney). Extra-territorial prohibitions on commercial surrogacy are now in place in three states and territories, and have received largely critical media comment: for example, see Kwek (2011); Rowlands (2011a; 2011b). See also Stuhmcke (2012).

¹⁵⁴ Discussed in Millbank (2011).

and ART intervention across a variety of familial constellations could still be accommodated within a sense of 'the natural'. Notably, the significance of heterosexuality in parenting remained hotly contested, and revealed that acceptance of surrogacy still pivots on a naturalised social experience of maternal desire: it is a cure for *female* infertility. The use of surrogacy by men without women – particularly gay men – was treated with suspicion and hostility across all of the debates, although gay men ultimately were excluded in only two of the legislative regimes. Likewise, the over-arching frame of genetic essentialism proved to be complex and contradictory. The significance of the parent–child genetic link was a major rationale for surrogacy in the sense that it minimised the role of the birth mother ('100% our child') but it also prompted great contention concerning genetic contribution by others, through genetic surrogacy and donor eggs. Discourses of genetic essentialism were also destabilised by a somewhat elastic notion of genetic 'link', encompassing familial relatedness more broadly rather than direct descent. Thus sisters, cousins and even mothers acting as surrogates were seen to maintain rather than fracture a genetic 'tie'.

The media and parliamentary sites notably diverged on the issue of payment to birth mothers. Parliamentary speakers resolutely opposed 'commercial surrogacy'. By contrast, accounts in the media continued to stress relationality even within the sphere of the surrogacy 'marketplace'. Paid birth mothers were often characterised as part of a new kind of extended family, and the value and meaning of money was notably domesticated through discourses of home, education and bodily suffering in the media accounts. This schism between popular and parliamentary understandings of commercial surrogacy suggests further contest around the issue of criminalising this practice. It is to be hoped that any future reform processes will draw upon the developing body of international research on surrogacy in order to more accurately situate the personal experiences of surrogacy families within a broader evidence base.

References

Secondary Sources

- AAP (2010) 'Qld: Mum Who Used Surrogate Backs New Laws', 10 February 2010.
- Barbara Adam (2002) 'Legal Expert Calls for Nationwide Surrogacy Ban', *AAP*, 24 July.
- Advisory Committee on Assisted Reproductive Technology (NZ) (2007) *Guidelines on Surrogacy Arrangements Involving Providers of Fertility Services at 2(a)(ii)*, [www.acart.health.govt.nz/moh.nsf/pagescm/6797/\\$File/surrogacy-fertility-providers-nov08.pdf](http://www.acart.health.govt.nz/moh.nsf/pagescm/6797/$File/surrogacy-fertility-providers-nov08.pdf).
- Melanie Ambrose (2009) 'Baby Wish Still Alive', *Sunday Times*, 11 October, p 31.
- Tim Appleton (2003) 'Emotional Aspects of Surrogacy: A Case for Effective Counselling and Support', in Rachel Cook et al (eds), *Surrogate Motherhood: International Perspectives*, Hart.
- Stefanie Balogh (2007) 'Surrogate Mum's Baby Heartbreak', *Herald Sun*, 9 April, p 7.

- Evonne Barry (2008) 'Family Fortunes' *Herald Sun*, 12 October 2008, p 78.
- Kate Benson (2009) '\$12 for Booties, \$5 for Bib, \$30,000 for Baby', *Sydney Morning Herald*, 24 January, p 1.
- Pamela Bone (1993) 'The Ties That Bind Babies and Mothers', *The Age*, 23 August, p 11.
- Susan Boyd (2007) 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility' 25 *Windsor Yearbook of Access to Justice* 55.
- Peter Brisden (2003) 'Clinical Aspects of IVF Surrogacy', in Rachel Cook et al (eds), *Surrogate Motherhood: International Perspectives*, Hart.
- Terry Brown (2008) 'Surrogate Alice – One in a Million', *Herald-Sun*, 21 June, p 88.
- Kate Bruce-Rosser (2008) 'Offshore Surrogacy: Ban Sees Gay Men Outsource to India in Desire to Be Parents' *Stonnington Leader*, 1 October, p 1.
- Jackie Brygel (2009) 'Aussie Surrogate Mum: Sarah Jessica did the Right Thing' *Woman's Day*, 6 July, pp 20–21.
- Jim Campbell (2010) 'Couple Hopes for Surrogate Solution', *The Chronicle*, 12 February, p 4.
- Katherine Chatfield (2010) 'Home Sweet Home', *Sunday Telegraph Magazine*, 1 August, p 13.
- Janice Ciccarelli and Linda Beckman (2005) 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' 61 *Journal of Social Issues* 21.
- Rachel Cook, Shelley Day Sclater and Felicity Kaganas (eds) (2003) *Surrogate Motherhood: International Perspectives*, Hart.
- Phillip Coorey (2006) 'And Baby Makes Five: The Senator, His Wife and the Surrogate Mothers', *Sydney Morning Herald*, 7 November, p 1.
- Julie-Anne Davies (1995) 'The "Miracle Baby" Leads a Quiet Life', *Sunday Age* (Melbourne), 5 March, p 6.
- Kay Dibben (2008) 'Surrogacy's Problem Child', *Sunday Mail*, 23 June, p 62.
- Kay Dibben (2009a) 'Mystery woman brought us joy', *Sunday Mail*, 18 January, p 17.
- Kay Dibben (2009b) 'I'll Carry Your Child – Couples Wait for New Law' *Sunday Mail*, 25 January, p 28.
- Alison Diduck (2007) "'If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved": Law, Identity and Parenthood' 19 *Child and Family Law Quarterly* 458.
- Robyn Dixon and Jane Freeman (1998) 'Birth Rights', *Sydney Morning Herald*, 21 May, p 13.
- Janet Dolgin (2000) 'Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family' 32 *Connecticut Law Review* 523.
- Anthony Dowsley and Katie Laphorne (2007) 'Cash Baby Tragedy', *Herald Sun*, 15 February, pp 1, 4.
- Sue Dunlevy (2006) 'I'll Carry Your Baby – Surrogate Mother Volunteered to Help Senator', *Daily Telegraph*, 8 November, p 7.
- Carmel Egan (1998) 'Mum to Keep Friend's Baby' *Daily Telegraph*, 21 May, p 18.
- Norman Fairclough (1992) *Discourse and Social Change*, Polity Press.
- Kerry Faggotter (2010) 'I Changed the Law to Be a Mum!', *That's Life*, www.that'slife.com.au/Article/Mums-Club/Mums-Club2/I-changed-the-law-to-be-a-mum.
- Catherine Fitzpatrick (1998) 'Surrogate Gets Her Baby Back', *West Australian*, 21 May, p 38.
- Matthew Fynes-Clinton (1998) 'Is There a Place for Proper Surrogacy?', *Courier-Mail*, 23 May, p 31.
- Genea (formerly Sydney IVF) 'What is Surrogacy', www.genea.com.au/How-we-can-help/Our-Services/Assisted-Conception/Surrogacy/Surrogacy.
- Susan Golombok et al (2006) 'Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3' 21 *Human Reproduction* 1918.

- Dwayne Grant (2009) 'The Greatest Gift of All', *Gold Coast Bulletin*, 9 May, pp 12–15.
- Reg Graycar (2000) 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' 24 *Melbourne University Law Review* 737.
- Reg Graycar (2012) 'Family Law Reform in Australia or Frozen Chooks Revisited Again' 13 *Theoretical Inquiries in Law* 241.
- Peta Hellard (2007) 'Gay Couple Buys "Designer" Sons from US', *Sunday Telegraph*, 14 October, p 2.
- Emma Henderson (1996) 'Privacy, Public Morality and Sex in the Decriminalisation Debates' 20 *Melbourne University Law Review* 856.
- Sue Hoban (2008) 'Surrogate Success: Lisa's Mother of All Battles' *Manly Daily*, 12 August, p 15.
- Adele Horin (1998) 'Surrogacy No Case for the Law', *Sydney Morning Herald*, 23 May, p 39.
- Margaret Jacovac (1991) 'Minister Calls for Laws Against Surrogacy', *The Age*, 24 February, p 3.
- Vasanti Jadvia et al (2003) 'Surrogacy: The Experiences of Surrogate Mothers' 18 *Human Reproduction* 2196.
- Alice Kirkman (1995) 'Amazing!' 2(7) ACCESS *National Newsletter* 2.
- Alice Kirkman (2005) 'Take One Egg', *Good Weekend*, 5 March, pp 47–48.
- Linda Kirkman (1993) 'Surrogacy and How We Got It Right', *The Age*, 12 July, p 17.
- Maggie Kirkman (2004) 'Genetic Conception and Relationships in Narratives of Donor-Assisted Conception' 2 *Australian Journal of Emerging Technologies and Society* 2.
- Maggie Kirkman and Alice Kirkman (2002) 'Sister-to-sister Gestational "Surrogacy" 13 Years On: A Narrative of Personhood' 20 *Journal of Reproductive and Infant Psychology* 135.
- Maggie Kirkman and Linda Kirkman (1988) *My Sister's Child*, Penguin.
- Monica Konrad (2005) *Nameless Relations: Anonymity, Melanesia and Reproductive Gift Exchange between British Ova Donors and Recipients*, Berghan.
- Fiona MacCallum et al (2003) 'Surrogacy: The Experience of Commissioning Couples' 18 *Human Reproduction* 1334.
- Anne-Marie McCarthy (1993) 'Alice, 5, Still has Twice the Motherly Love', *The Age*, 8 July, p 2.
- Bruce McDougall (2008) 'Pay Surrogate Mums', *Daily Telegraph*, 2 August, pp 1, 4.
- Tamara McLean (2008) 'Gays Flock to US for Babies', *Herald Sun*, 2 July, p 4.
- Jane Metlikovec (2007) 'Three for the Price of One', *Herald Sun*, 17 February, p 2.
- Janelle Miles (2007) 'Carrying Her Hopes: Surrogacy is the Only Way for CF Patient', *Courier-Mail*, 16 June, p 3.
- Jenni Millbank (2011) 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"' 35 *Melbourne University Law Review* 165.
- Wayne Morgan (1996) 'Still in the Closet: The Heterosexism of Equal Opportunity Law' 1 *Critical inQueeries* 119.
- Katharine Murphy (2006) 'The Senator, the Surrogate and the New Baby', *The Age*, 7 November, p 1.
- Carol Nader (2010) 'Bearing the Ultimate Gift', *The Age*, 8 May, p 10.
- National Bioethics Consultative Committee (1990a) *Surrogacy Report 1*, National Bioethics Consultative Committee.
- National Bioethics Consultative Committee (1990b) *Discussion Paper on Surrogacy 2 – Implementation*, National Bioethics Consultative Committee.
- New South Wales Law Reform Commission (1988) *Artificial Conception: Surrogate Motherhood*, New South Wales Law Reform Commission.

- Nine Network (2007a) 'The Complex World of Surrogacy: Part 2' *Sunday Program*, Nine Network, 18 February,
http://sgp1.paddington.ninemsn.com.au/sunday/feature_stories/article_2130.asp?s=1.
- Nine Network (2007b) 'Special Delivery', *60 Minutes*, Nine Network, 15 April,
<http://sixtyminutes.ninemsn.com.au/webchats/263901/special-delivery-with-lisa-banfield>.
- Nine Network (2009) 'Two Men and Two Babies', *60 Minutes*, Nine Network, 22 May,
<http://sixtyminutes.ninemsn.com.au/stories/816881/two-men-and-two-babies>.
- Caroline Overington and Michael Pelly (2009) 'When Mum is Nana', *The Australian*, 12 August, p 11.
- Parliament of South Australia, Social Development Committee (2007) *Inquiry into Gestational Surrogacy*, Transcript, 30 April, 4 June.
- Yasmine Phillips (2009) 'Laws Make Surrogacy "Close to Impossible"' *The West Australian*, 31 March, p 14.
- Helen Pitt (1988) 'A Battle Yet to Come for IVF Baby', *Sydney Morning Herald*, 9 June.
- Queensland Parliament, Investigation into Altruistic Surrogacy Committee (2008) Public Hearing, Transcript of Proceedings, 7 July 2008.
- Heléna Ragoné (2003) 'Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism', in Rachel Cook et al (eds), *Surrogate Motherhood: International Perspectives*, Hart.
- Nalini Ravichandran (2010) 'Surrogate City: Chennai Emerging as Rent-a-womb Destination', *New Indian Express*, 6 September.
- Helen Rhoades (2010) 'Children's Needs and the "Gender Wars": The Paradox of Parenting Law Reform' *24 Australian Journal of Family Law* 160.
- Robyn Riley (2008) 'Surrogate Laws Make No Sense', *Herald Sun*, 5 August, p 21.
- Letitia Rowlands (2011a) 'Carrying the Dreams of Another', *Daily Telegraph*, 22 January, p 34.
- Letitia Rowlands (2011b) 'Two Couples Who Paid Surrogate Mothers to Carry Their Babies Face the Possibility of Criminal Charges', *Daily Telegraph*, 28 July, p 3.
- Amanda Ruben (1998) 'Mum Admits Surrogate Deal a Big Mistake', *Herald-Sun*, 12 September, p 7.
- Kate Sikora (2008) 'Sisters' Love the Key to Life', *Daily Telegraph*, 30 August, p 15.
- Standing Committee of Attorneys-General Joint Working Group (2009) *Proposal for a National Model to Harmonise Regulation of Surrogacy*, Standing Committee of Attorneys-General Joint Working Group.
- Marilyn Strathern (2003) 'Still Giving Nature a Helping Hand? Surrogacy: A Debate About Technology and Society', in Rachel Cook et al (eds), *Surrogate Motherhood: International Perspectives*, Hart.
- Anita Stuhmcke (2004) 'Looking Backwards, Looking Forwards: Judicial and Legislative Trends in the Regulation of Surrogate Motherhood in the UK and Australia' *18 Australian Journal of Family Law* 13.
- Anita Stuhmcke (2011) 'The Criminal Act of Commercial Surrogacy in Australia: A Call for Review' *19 Journal of Law and Medicine* 601.
- Anita Stuhmcke (2012) 'Extraterritoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty' *29(1) Law in Context* forthcoming.
- Tanya Taylor (1999) 'Wonder Baby Alice's Big Day', *Herald-Sun*, 8 May.
- Brett Thomas and Candace Sutton (1997), '\$100,000 Babies', *Sun Herald*, 20 July, p 1.
- Michele Tydd (2007) 'Baby Liam in a Legal Limbo', *Illawarra Mercury*, 10 March, p 4.
- Jamie Walker (2009) 'Out of Step with This Day and Age', *The Australian*, 22 August, p 3.

- Natasha Wallace (2008) 'Biological Mother and Father in Legal Wait for Rights', *Sydney Morning Herald*, 6 November, p 5.
- Liz Walsh (2009) 'The Gift of Love: In a World of Selfishness, This Remarkable Story Should Restore Your Faith in Human Kindness', *Sunday Mail*, 6 December, p 7.
- Olga van den Akker (1998) 'Functions and Responsibilities of Organizations Dealing with Surrogate Motherhood in the UK' 1 *Human Fertility* 10.
- Olga van den Akker (2003) 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' 21 *Journal of Reproductive and Infant Psychology* 145.
- Olga van den Akker (2005) 'A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy' 26 *Journal of Psychosomatic Obstetrics and Gynaecology* 277.
- Olga van den Akker (2007) 'Psychological Aspects of Surrogate Motherhood' 13 *Human Reproduction Update* 53.

Cases

- JRN & Anor v IEG* [1998] HCATrans 263 (3 August 1998)
- JRN & Anor v IEG* [1998] HCATrans 327 (11 September 1998)
- Re Evelyn* (1998) 23 Fam LR 53
- X & Y (Foreign Surrogacy)* [2008] EWCH 3030

Legislation

- Human Fertilisation and Embryology Act 1990* (UK)
- Human Fertilisation and Embryology Act 2008* (UK)