

Ref. A085/239

PRIME MINISTER
_____Legislation on Commercial Surrogacy

(C(85) 2)

BACKGROUND

A The birth of "Baby Cotton" has highlighted concern about the practice of surrogate motherhood. The commercial aspects of the Cotton case, and in particular the involvement of an agency which made a considerable profit, have given rise to particular concern. There are believed to be a number of other cases where surrogate mothers will give birth over the coming months. The Secretary of State for Social Services feels that, in the light of the public concern the Government should bring in urgent legislation to deal solely with commercial surrogacy arrangements (see para 3(a) of C(85) 2). The issue was discussed by the Home and Social Affairs (H) Committee on 16 January and is now referred to Cabinet for final decision. The Secretary of State has expanded his views on what the legislation ought to contain in his minute to you of 23 January.

B 2. The Secretary of State also recommended that work should be put in train urgently to prepare legislation on all the remaining recommendations of the Warnock Committee for next Session: this was agreed by H.

3. Some members of H Committee felt that the case for outlawing surrogacy agencies was not overwhelming and that more time for public debate was needed. There was also concern about whether proper thought had been given to the coverage of the Bill. Moreover, the Lord Chancellor and the Solicitor General

were strongly of the opinion that it would be unwise to embark
on legislation without thinking through with care the many
implications that would be raised eg the family and legal status
of children resulting from surrogate pregnancies and the
implications of fertilisations which took place overseas or in
vitro.

THE MAIN ISSUES

4. The main issues are:

- a. Should legislation be prepared for introduction in this Session of Parliament to give effect to the recommendation of the Warnock Report about commercial surrogacy agencies?
- b. If so, should the definition of "commercial" be so drawn as to exclude non-profit making agencies and should the position of professionals involved in surrogacy arrangements be clarified?
- c. should a Bill in this Session attempt to deal with other aspects of the problem (eg the position of payments to the mother as now proposed by the Secretary of State)?

Legislation this Session

5. The argument in favour of proceeding rapidly with legislation is that public opinion is demanding it. The arguments against are more varied. They include the argument that first reactions to the Cotton case may not in the longer term be sustained, that public opinion is divided and may in fact be moving towards greater acceptance of surrogacy; that legislation prepared in a hurry could be defective or incomplete; that the number of surrogate births in the near

future is likely to be very small and in any case would not be affected by the new legislation; and that the recommendations of the Warnock Report on this subject raise a large number of considerations which could be best treated in one comprehensive piece of legislation.

Coverage of the Legislation

6. If there is to be legislation this Session, there is a case for considering whether to exclude from it the position of non-profit making agencies and of professionals involved in the process. Depending on how the Bill is framed, a failure to mention the professions might well create unnecessary opposition to the legislation from the British Medical Association and other bodies. Similarly, those sectors of public opinion who view surrogacy as an alternative to adoption might be mollified in their opposition by the exclusion of non-profit making agencies from the criminal provisions. The inclusion of payments to a surrogate mother (as now proposed) would lead to considerable difficulties. Couples who wanted children would still be able to make a commercial arrangement with a surrogate mother and call the payment compensation for loss of earnings and expenses. The whole process could be completed without the involvement of any agency, or indeed any professional assistance.

7. By introducing legislation this Session which dealt only with the commercial agency aspect, the Government would be seen to be doing only part of the work required by the recommendations of the Warnock Committee. It would inevitably come under strong pressure during the passage of the Bill to include other matters, in particular in relation to the children about to be born as a result of arrangements already entered into. Once having set upon this path, it would be very difficult to argue that these aspects of surrogacy also did not require some form of State intervention. The consequences of _____

such pressure for proper drafting of legislation are very difficult to foresee. At the best, the Bill could end up as originally introduced, but after a great deal of time and effort had been spent resisting alternatives; at the worst the Bill could be a collection of ill-chosen provisions which would largely require consideration during the process leading up to the preparation of a comprehensive Warnock Bill in the following Session.

HANDLING

8. You will wish to ask the Lord President to say a brief word on his memorandum and the Secretary of State for Social Services to express the views contained in his minute. The Lord Chancellor has strong views on the advisability of proceeding too quickly with legislation, which are shared by the Home Secretary. The Attorney General may also have a view on this. The Lord Privy Seal may wish to say something about the legislative position in general, and the Paymaster General about the position of the Party.

CONCLUSIONS

9. You will wish Cabinet to reach conclusions on:
- a. whether a Bill to outlaw commercial surrogacy agencies should be introduced in this Session;
 - b. whether exclusion should be made for non-profit making agencies and for professionals involved in the process;

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c. whether such a Bill should contain other provisions relating to the Warnock recommendations on surrogacy particularly payments to surrogate mothers.

REA

ROBERT ARMSTRONG

23 January 1985