



QUEEN ANNE'S GATE LONDON SW1H 9AT

22 February 1985

Dear Lord Whitelaw,

COMMERCIAL SURROGACY BILL

I have seen the draft of this Bill dated 11 February, Quintin Hailsham's letter of 13 February and your Private Secretary's letter of 15 February. The further discussion in 'H' Committee will provide an opportunity to decide outstanding issues of policy concerning the Bill in more detail, and I thought it might be helpful if in advance of the meeting I outlined the main matters in my field of responsibility on which decisions will be needed. The majority of these are set out with, if I may say so, great clarity in Quintin's letter and I need only, therefore, touch on them briefly.

I fully agree, first, that if a Bill along these lines is introduced we should have to explain very clearly why it draws the surrogate mother and the commissioning parents into the scope of the criminal law while exempting medical services, contrary in both respects to the Warnock recommendations.

Secondly, it is as you know a particular concern of mine to ensure that any extension of the criminal law should be clear and enforceable. This is especially important if one is aiming to curtail the activities of cleverly run organisations which can be expected to be on the look-out for any loophole. In this context, I share the doubts expressed by Quintin about pinning the whole of the Bill to an undertaking, whether express or implied, given by the mother. I think this may be more than a mere question of drafting; it is very difficult to express exactly what one means by a surrogacy arrangement. We must, of course, steer clear of arrangements made after the pregnancy has begun and possibly made for reasons which have nothing to do with surrogacy.

Thirdly, as I believe my officials have indicated to DHSS, I am uneasy about assuming extra-territorial jurisdiction in this field. As of course you know, our criminal law is for the most part territorial in extent. There are a number of exceptions: broadly speaking, these cover certain places (eg British ships or aircraft), certain people (eg Crown Servants), and certain serious offences (eg murder when committed by a British citizen) where there is a connection with this country which gives our courts a proper ground for being involved in what goes on abroad. Where there is no such connection, the only exceptions to the general rule are where a number of countries agree to "pool" jurisdiction on a reciprocal basis. While of course I respect the idea that we should not allow the effectiveness of this Bill to be undermined by operations carried out abroad, we have to face the fact that the proposed offences do not fall easily into any of the categories for which exceptions to the territoriality rule are normally allowed. I am not sure that it is right in principle for our law to seek to penalise, for example, a broadcast from Radio Luxembourg concerning surrogacy arrangements. In any event, however, I am sure that such a provision would be virtually unenforceable.

Similarly, while I appreciate the desire to avoid a situation in which the law can be circumvented simply by arranging for what one might call the "key

/transaction"

The Rt Hon Viscount Whitelaw, CH, MC

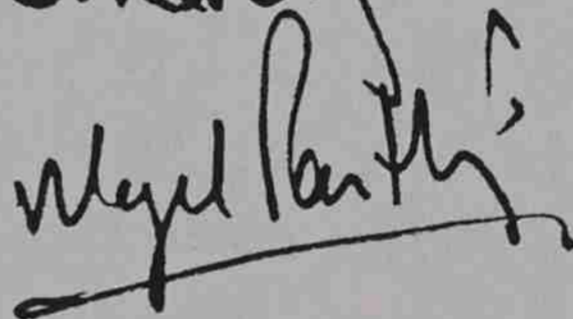


transaction" to take place abroad, I am a little anxious about the proposal to make it an offence triable in this country or to make or receive any payment (anywhere in the world) in pursuance of any arrangement made wholly or partly in the United Kingdom. This would mean that a pair of French people who formed an arrangement in the departure lounge at Heathrow would be liable to penalties under United Kingdom law in respect of payments made in France thereafter. This problem may be somewhat theoretical - which I suppose is only another way of saying that it is doubtful whether such provisions could be enforced - but it does raise the question of principle whether we have any business to be concerned with what French people do (for the most part) in France.

Linked with the question of extra-territoriality, although distinct from it, is the question of advertisements in foreign newspapers which may be read in the UK. The draft Bill, for understandable reasons, would make it an offence knowingly to distribute, as well as to publish, in the UK an advertisement for a surrogacy service. We will have to ask ourselves whether it is reasonable to require W H Smith's to scrap issues of foreign newspapers which they know contain, but cannot readily prevent from containing, prohibited advertisements, notwithstanding that the advertisements may be innocuous in terms of the law of the country where the paper was produced and, indeed, of most countries.

Finally, I think we might usefully discuss whether there would be advantage in requiring the consent of the DPP or of the Attorney General to be given before proceedings for any offence created by the Bill are undertaken. This might provide a basis for assuring other countries' governments, if we decide on a measure of extra-territorial jurisdiction, that it will be used only when the interests of this country are clearly affected; but there may in any event be a case for enabling private prosecutions to be restrained.

I am copying this letter to other members of 'H' Committee, Michael Havers and Sir Robert Armstrong.

Yours sincerely  


Approved by the Home Secretary  
and signed in his absence



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