

change the strong desire among some people to resort to surrogacy arrangements, especially in communities where the practice is well-established by cultural tradition. A balanced approach is certainly required. That does not mean that law should encourage the practice. It does mean, however, it should not be quick to punish those who do not necessarily cause the harm that is sometimes too readily said to be caused by surrogacy. (SMH 3 March 1989)

The *Australian Financial Review*, said that 'surrogate motherhood is emerging as one of the most problem-ridden challenges for today's legislators'. The editorial continued:

If enacted, the NSW recommendations would further complicate the hodgepodge of laws on surrogacy in Australia. In Victoria and South Australia, advertising and making payments under surrogacy agreements are illegal but unpaid activities not prohibited.

The Queensland legislation goes far further, prohibiting all forms of surrogacy and providing criminal penalties for all parties, including surrogates, commissioning parents and intermediaries. The Act also purports to apply to anyone normally resident in Queensland who might go interstate to arrange a surrogacy . . . If the law is to deal successfully with the dilemmas created by technological change, it must above all remain realistic. This entails acknowledging that some couples will resort to surrogacy regardless of legal prohibitions, and that there appear to be successful cases in which it can yield great happiness. Equally, some medical practitioners will use their own judgement in assisting in surrogacy arrangements, sometimes against the advice of hospital ethics committees. (AFR 13 March 1989)

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## crimes against the foetus

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Justice M Rivet  
Law Reform Commission of Canada  
February 1989

*criminal law and the foetus.* The Law Reform Commission of Canada's Working Paper 58, *Crimes against the Foetus*, released in February, provides a comprehensive chapter on this topic for inclusion in a new Criminal Code. It was based in part on material produced for the Commission by a working group of four men and four women, drawn from various disciplines such as biology, philosophy, sociology and law.

*protection of the foetus.* The Commission's major recommendation is that the foetus merits criminal law protection, something the current Code fails to achieve adequately. It, therefore, recommends including in the Criminal Code a separate chapter on crimes against the foetus. Included in this new chapter would be a new offence of 'Foetal Destruction or Harm' which would make it a crime to purposely, recklessly or negligently cause death or serious harm to a foetus. (A pregnant woman would only be responsible if she purposely harmed her foetus.) Included also would be exceptions for medical treatment and for lawful abortion.

Medical treatment would be a defence to a crime against the foetus where it did not involve risk of destruction or harm disproportionate to the expected benefits and where it was applied with the mother's consent for therapeutic or diagnostic purposes. In addition, a paper dealing with human experimentation will be published at a later date.

*abortion.* Judge Michele Rivet, Commissioner for the Protection of Life Project, said on release of the Working Paper:

On abortion we offer to our pluralistic society an approach that is both principled and practical. It does not represent, of course, the personal views of the Commissioners but outlines the role for the criminal law in this area. The key to the Commission's approach is to recognize both maternal autonomy and the need to protect the foetus.

The Commission recommends that the foetus be afforded increased protection as it develops and that society should provide a more supportive social and economic environment for women to cope with pregnancy. At the same time, because women's interests must be taken into account along with those of the foetus, the majority of the Commissioners recommend a two-stage approach to abortion. In the first stage, from LMP (the date of the first day of the last menstrual period before pregnancy occurred) to twenty-two weeks, a woman could terminate her pregnancy if medically authorised on the ground that her physical or psychological health was threatened. Thereafter, legal abortions would be more restricted, and termination of pregnancy would be permitted only when necessary to save the woman's life or to protect her against serious physical injury. The emphasis is not on the cause of the pregnancy (eg rape or incest), but on its effect on the woman.

The Commission also recommends that abortion could be lawfully performed at any stage if the foetus suffers from a lethal defect. In other words, if the foetus could not survive even though carried to term, the mother could end her pregnancy, since it would be cruel and pointless to force her to carry the doomed foetus to term.

For an abortion to be lawful it would have to be performed by a qualified practitioner. (In the last stage, two doctors would be required to certify the need for the abortion.) While the procedure would usually be done in a hospital, abortions done outside hospitals would not violate this law as long as doctors performed them in accordance with accepted medical standards and legal requirements.

*alternative approach.* An alternative approach was offered — a three-stage approach. That approach would, in addition to the two stages, recognise a third-stage — an initial thirteen-week period during which abortions would be 'unregulated' and not need justification on the ground of threats to the woman's physical or psychological health.

One of the Commissioners dissented. In his view, fairness and justice requires society to provide expectant mothers with a more supportive environment than that presently existing for continuing their pregnancy, while at the same time demonstrating respect for the lives of unborn children by providing them with full protection from conception to birth. The expectant mother's life, liberty and security of the person should in turn be protected by providing that abortions be permitted to save her life or to protect her against serious and substantial danger to her health where there is no other accepted medical procedure for effectively treating this health risk.

*comments.* The Working Paper contains the tentative views of the Commission and aims to encourage discussion on the important issues surrounding crimes against the foetus. The Canadian Commission would welcome any comments and opinions. They should be addressed to: Secretary, Law Reform Commission of Canada, 130 Albert Street, 7th Floor, Ottawa, Ontario, K1A 0L6.