

# Fertility advocates protest criminal sanctions in assisted reproduction act

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**D**octors, lawyers, surrogates, counsellors and “intended parents” joined forces in December to lobby the federal government to remove criminal sanctions from the *Assisted Human Reproduction Act*. Under the law, passed in 2004, surrogacy and gamete donation are legal, but paying donors or surrogates is a criminal offence, and can be punished by up to 10 years in prison and \$500 000 in fines. Removing criminal sanctions could lead to the act being repealed, says a health lawyer.

“If you take out the criminal sanctions, the federal government has no jurisdiction,” says Ubaka Ogbogu, an assistant professor at the University of Alberta who

researches health law. In 2007, Quebec challenged multiple provisions of the act, arguing that health is a provincial matter. The Supreme Court responded by striking down much of the law.

The criminal sanctions, however, make it difficult for fertility professionals to do their jobs, say critics. They deter some doctors from helping patients access gamete donation or surrogacy, says Dr. Marjorie Dixon, medical director of Anova Fertility and Reproductive Health, who participated in the lobbying. Specifically, because the law is unclear about when legal reimbursement crosses the line into illegal payment, doctors fret about whether they could be accused of

aiding criminal activity. “Doctors shouldn’t have to worry that helping our patients — doing what we need to do and what we know how to do — could lead to prosecution,” she says.

Dixon says the law can also adversely influence patients. Some go to other jurisdictions, where the law may be clearer but the health care less safe. Others feel pressure to conceal details, some of them medically relevant, from their doctors.

Michelle Flowerday, a Toronto fertility lawyer, calls the current situation “untenable.” She worries that her clients might be withholding important information or negotiating without her knowledge. “Also, it can be difficult to advise my clients on whether a particular reimbursement might amount to a payment in the eyes of a judge,” she says. “If so, by definition, my clients are criminals and I am an accessory after the fact.”

The lobbying effort was spearheaded by Leia Swanberg, the only person ever convicted under the *Assisted Human Reproduction Act*. Swanberg’s company, Canadian Fertility Consulting, facilitates surrogacies across the country, and sister companies deal with egg donation and advice on reproductive services. In 2013, Swanberg pleaded guilty to making flat-fee payments to surrogates and egg donors and was fined \$60 000. “I’d love to have people feel safe about how their child came to be,” she says.

Françoise Baylis, a bioethicist at Dalhousie University, agrees that the lack of clarity is a huge concern. But she argues the law can be clarified without getting rid of the criminal sanctions, and Health Canada is conducting consultations to do exactly that. Baylis thinks the real issue for the protesters, despite what they say,



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It is unclear when legal reimbursement for surrogacy crosses the line into illegal payment.

is that there is a prohibition on payment, which they want overturned. “They use catchy phrases, but if you unpack them, they are not based in reality,” she says. She is referring to one of the campaign’s slogans — “surrogacy is not a crime” — pointing out that it isn’t.

Ogbogu underscores that the biggest hurdle will not be money but uniformity among the provinces. One of the reasons the law adopted criminal sanctions in the first place, he says, was to ensure the fed-

eral government would play a role. If there is a move away from that towards province-by-province regulation, one condition might be that provinces agree on a shared strategy.

Anthony Housefather, Liberal MP for the riding of Mount Royal, who supports the lobbying, has made no secret of his desire to see assisted reproduction decriminalized and even commercialized. He is hopeful the government will put forward the changes itself, but failing that, he

believes a colleague will introduce a private member’s bill on the matter within a year. From his discussions with voters, he’s convinced there is consensus that criminal sanctions should be removed, and “dozens” of MPs are already onboard. And he isn’t troubled by the prospect of the law being lost altogether. “The abortion law was struck down and not replaced,” he says. “It was no tragedy.”

**Alison Motluk**, Toronto, Ont.