13th Programme Consultation – PROGAR RESPONSE – 30th September 2016

http://www.lawcom.gov.uk/project/13th-programme-of-law-reform-call-for-ideas/#13th-programme-consultation-questionnaire-3

Who we are:

The British Association of Social Workers (BASW) Project Group on Assisted Reproduction, PROGAR (https://www.basw.co.uk/progar/) has since the 1980s campaigned on matters concerning assisted reproduction, including surrogacy, in the UK and overseas. We have variously worked in partnership with donor-conceived adults, Barnardo's, Children's Society, Donor Conception Network, British Infertility Counselling Association (BICA), British Association for Adoption and Fostering (BAAF), National Association of Guardians ad Litem and Reporting Officers (NAGALRO), Children and Family Court Advisory and Support Service (Cafcass), Children and Families Across Borders (CFAB) and UK DonorLink.

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1. Which of the Law Commission's project suggestions do you wish to comment on?

Surrogacy and birth registration

2. Can you give an example of how the issue highlighted causes problems in practice?

To explain our overall position in relation to surrogacy, PROGAR is not concerned with 'supply and demand' aspects of surrogacy: we neither promote nor condemn the practice. Our focus is on the well-being and human rights of the parties involved, especially the children and the families affected -be they the resulting children and families or those of the surrogate or gamete donor. We believe that children's human rights should be paramount in all surrogacy matters and our responses are made in that light.

We start by addressing the statement in your consultation document that: *'There is potential uncertainty caused by surrogates (and sometimes their husbands) being entered as parent(s) on the birth certificate of a child born as the result of a surrogacy arrangement'.*

We know of no robust evidence to say that any uncertainty caused by the woman giving birth being the legal parent until such time as this is transferred to the intended/commissioning parents is harmful to the child - though we accept that there is research to suggest that some intended/commissioning parents and some surrogates would *prefer* for the former to be legal parents from birth (Horsey et al 2015). PROGAR members with professional experience note that there is often, for parents, an element of uncertainty attached to becoming and being a new family, perhaps especially one formed with the assistance of a third party (e.g. through surrogacy, donor conception or adoption) for a range of reasons. We suggest that this may be allayed at least in part in surrogacy situations if prior mandatory assessment and preparation were required (and we return to this below). There may also be scope for enacting provisional arrangements to be put in place once the child is born and living with the intended/commissioning parents while the decision for transfer is made.

In our view there should therefore be no change to the current legal position that the woman giving birth to the child – regardless of her genetic relationship to the child – should be regarded as the child's legal mother. We do not consider there is a sufficiently compelling reason to overturn the principle of *'mater est quam gestatio demonstrat'* in the case of surrogacy. To do so would place surrogacy at odds with all other legal formulations in the UK for determining the legal relationship between a child and her/his mother. Amongst other things, this principle helps to avoid the risk of child trafficking and, equally crucially, requires the existence of an official trail of parentage that the offspring can then follow regardless of whether or not their 'raising' parents inform them of their origins. It also acknowledges the significance of the act of carrying a pregnancy and giving birth, even where the woman concerned does not intend to raise that child herself. It follows from this that the surrogate – and not the intended/commissioning parents – should register the birth of the child. As you will see below, we support the need for birth registration reform (among other things) but believe that this should be driven by the need to better secure each citizen's human right to identity and to know all their parents, whether genetic (i.e. including the gamete donor where one is used in surrogacy), gestational or legal.

Further, we support the retention of the 6 week "cooling off" period between the birth of the baby and the start of the Parental Order application process. While we are unaware of any rationale for the specific period of 6 weeks, it is consistent with the adoption legislation upon which the legislative framework for Parental Orders is based. We are unaware of any justification for substituting this with a different time period.

The current system also potentially violates children's human rights in other ways. Any move to allow the intended/commissioning parents to register the birth without other

substantial changes would add to this rather than reduce it. Surrogacy instead needs to be brought further into line – though in a proportionate way - with other child and family law where there is third party involvement and any attempts to instead mimic 'traditional' conception births or to understate the difference that attaches to families formed through surrogacy should be resisted in the long term interests of the offspring (Gerrits 2015). In our view, understating the difference is as much of a concern as is overstating the difference.

To explain further, we argue that the different forms that family building take (i.e. including through non-traditional routes) can be seen as part of a continuum that requires different responses proportionate to the potential risks to, or needs of, the offspring and/or the State's responsibilities (see for example Scherman et al 2016). At one end of that continuum come families formed without third party assistance where there are no known risks to the health and safety of the children involved. At the other end can be found children born to parents known to pose a serious safeguarding risk (such as through substance abuse and so on) and adoptive families (where there are statutory responsibilities involved). Along the continuum should be placed families formed with the aid of donated gametes and/or surrogacy and further discussion is needed as to where that point should be.

In relation to surrogacy, there is a growing body of evidence regarding the physical significance of the uterine environment – including therefore the surrogate's lifestyle and state of health prior to and during pregnancy – and of epigenetics for the developing foetus (for a review of the literature and discussion see van den Akker 2012). For surrogate-born offspring, throughout their lifecourse there is the potential importance to them of knowing their origins and having access to information about their surrogate (and gamete donor(s) if these were used) on medical, social and psychological grounds and in order to secure their human rights. The *actual* significance of such information to individuals may vary, of course (see for example van den Akker et al 2015) but that does not reduce their right to have it.

We turn next to your queries as to whether Parental Orders need reform, whether regulation should be introduced and whether the conditions for making a parental order are unnecessarily restrictive. In doing so, we argue from our view that children's rights should be paramount in surrogacy matters and that their human rights are not currently adequately secured over their lifetime - in particular in respect of Articles 2, 7, 19, 34, 35, 36 of the UNCRC 1989 - by the fact that the following core aspects are not in place:

- a regulatory system of surrogacy agencies and of medical standards: while regulation of global and domestic arrangements is far from easy, that is not a reason to abdicate them to market forces;

- mandatory assessment and preparation of all parties before any surrogacy arrangements are entered into (in addition to a post birth assessment as now) by child welfare professionals. Research suggests that Parental Order Reporters themselves believe that they are engaged too late in the process at present (Crawshaw et al 2013);

- rigorous maintenance of detailed medical and biographical information about surrogates and donors and provision of good quality information release systems (similar to those required for other children affected by third party involvement, e.g. under the Human Fertilisation & Embryology Acts and adoption legislation): this should be required for both international and domestic arrangements;

- strict controls to prevent exploitation of and discrimination against all parties, including through unchecked commercialism: this should involve a detailed review of what is meant by commercial and not for profit activities;

- a birth registration system that records all the 'parents' of surrogate children, i.e. their genetic, gestational and legal parents. For example even a child conceived with donated gametes through treatment in a UK licensed centre (whether through a UK donor or imported gametes) currently has no way of knowing that they have the right to access the HFEA Register unless their parents advise them of their full origins or they find out accidentally because the original birth certificate will only provide the name of the surrogate (and her husband/civil partner if she was married/civil partnered)[1];

- a robust system to ensure that Parental Orders (POs) are in place following both domestic and international arrangements. There are an unknown number of intended/commissioning parents who do not go on to apply for POs, meaning that the legal parenthood of the children is left insecure. The ramifications of unsecured legal parenthood will often only come to light when there is a breakdown in either the parents' relationship or that between parent(s) and child; or when there is an inheritance issue. For example, in international surrogacy arrangements, there needs to be a system of follow up of all situations in which parents apply to bring a child into the country to ensure that a PO is applied for; at present this is non existent. In domestic situations, thought needs to be given to how surrogate births are notified to the GRO by the attending health professionals or hospital and how to improve safeguards to reduce the risk of hiding the use of a surrogate and so on;

- routinely collected robust data concerning the numbers of children later coming before the family courts who were conceived using donated gamete(s) or embryo and/or where surrogacy arrangements were involved. Anecdotally we are told that these numbers are growing and that in some (but not all) situations, these arise from the lack of openness with the child about their full origins (including about their genetic, gestational and legal parentage) and/or tensions between the parents and/or between parent and child resulting from the use of surrogacy arrangements. Robust data collected by the relevant agencies together with academic research would enable improved understanding of both the frequency and the contributing factors;

[1] We also believe that the birth registration system needs reform to better meet the needs of all donor-conceived individuals by information about genetic, gestational or legal parents being stored and released by the GRO or by the GRO recording that such information is available elsewhere, e.g. the HFEA Register of Information, and advising enquirers of this – see also Crawshaw et al (under review)

- robust long term data about outcomes for surrogate-born children, children of surrogates and surrogates themselves. We are concerned that the extremely small amounts of existing research data include very small sample sizes and a limited range of methodologies (for example multiple choice surveys which do not set out the pros and cons for children of the different options; longitudinal studies which re-recruit at follow up stages to retain sample size). One particular danger is when such findings are then used to make claims about well-being or recommendations for change that are not sufficiently evidenced (Blyth et al 2015);

- the lack of provision for a court considering a Parental Order application to dispense with the consent of the surrogate to the making of the order. Given that the welfare of the child should be the paramount consideration, it follows that a court should be able to dispense with the consent of the surrogate, as it can in adoption proceedings, if it considers that such consent is being withheld unreasonably and where the making of the Order is demonstrably in the child's best interests. This, of course, would apply to *exceptional circumstances* only and should not become a route for paying inadequate attention to acquiring properly informed consent from surrogates and/or to the risks of surrogates being coerced into participation. We have some sympathy with the argument that poor attention to the rights of surrogates can sometimes combine with, or increase the likelihood of, poor attention to the rights of surrogate-born children (Allan 2015).

Finally we are concerned with the use of gestational surrogacy (i.e. where the surrogate's eggs are not used) where there is no medical or other compelling reason to do so. This adds a potential additional complication for the surrogate-born offspring wishing to exercise their right to know all their 'parents', especially where there is an inadequate or non-existing official trail for them to access, as in the UK.

3. What priority should we give to this issue compared with the other issues we have identified, and any other law reform proposals you have made?

High

4. Please tell us about any court/tribunal cases, legislation or journal articles that relate to the problem we have identified.

We are aware of a growing number of reported cases, especially regarding international surrogacy arrangements, where large amounts of money have changed hands and where there have been disputes about nationality. There are also cases where a single man has sought to acquire a Parental Order (including the recent judgement to which you refer in relation to human rights), where one of the intended/commissioning parents has died before the making of a PO and situations in which the intended/commissioning parents have no genetic link to the child. Finally there have been recent judgements allowing POs to be made outside of the 6 months eligibility window. We leave our legal colleagues to provide documentation of these.

PROGAR draws attention in particular to aspects of these cases where some of the proposed solutions run the risk of creating problems for children over their lifetime. We have covered some of these in our response to Q3. In addition:

(i) there needs to be careful consideration of how best to tackle the issue of financial transactions - simply because POs have been made on 'welfare of the child' grounds does not mean that all restrictions should be lifted as this could open the door to child selling. In addition, we draw attention to the Council of Europe Convention on Human Rights and Biomedicine (2007) statement that "the human body and its parts shall not, as such, give rise to financial gain." The UK has generally adopted this principle with regard to the use of donated gametes and embryos and to surrogacy arrangements even though the UK is not a signatory to the Convention. We see no justification for departing from this general principle; consequently the law should continue to reduce any risk of commercialisation of child procurement. The current restrictions on payment in relation to a surrogacy arrangement were designed with this in mind. Given that there are evidently difficulties with the current 'reasonable expenses' requirement in Parental Order considerations, what we believe is required now is a thorough debate to determine both the nature and level of expenses, loss of time, inconvenience etc. that could be reasonably reimbursed to the surrogate and also the financial relationship between the intended/commissioning parents, any broker/surrogate agency involved and any treatment provider. Further, we believe that a system whereby prospective parents and surrogates have to undergo a level of mandatory assessment and preparation prior to entering surrogacy arrangements as we suggest above (perhaps drawing on and extending the model used by Surrogacy UK) could include scrutiny of the financial arrangements. We understand that Israeli surrogacy law employs such an approach, including the use of social workers experienced in child and family work. This would send a strong message to all parties - including brokers and service providers - that they cannot go ahead unchecked without any come-back.

(ii) there similarly needs to be careful consideration of nationality issues. It appears that some intended/commissioning parents are at best naive or poorly informed and at worst determined to press ahead with surrogacy even when nationality outcomes are unclear. There may be scope for improved publicity and guidance to prospective parents from government agencies and sanctions for any agencies that produce guidance at odds with this. Here again our view is that nationality issues should not be tackled by rubber stamping all practices that exist in international surrogacy arrangements. We believe there is merit in, for example, exploring the feasibility of Cafcass or a similar agency following up all requests to bring infants into the country on the grounds that the intention is to apply for a PO; and better linking of passport applications to the acquisition of a PO. We also suggest that work needs to be undertaken in developing bilateral arrangements wherever possible at the same time as contributing to the deliberations of The Hague Permanent Bureau's Parentage and Surrogacy Project https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy) through UK members with a core remit for children's rights and welfare such as Cafcass;

(iii) the extension of eligibility criteria to include intended/commissioning parents with no genetic link to the child increases the risk of child trafficking. We are aware that this will mean that anyone who pursues surrogacy arrangements in this situation will therefore have to go through adoption procedures to secure legal parentage but consider that this provides firmer safeguards for the offspring.

(iv) although we believe there is merit in the 6 months rule being relaxed *in exceptional circumstances where it is in the child's best interests*, we would be concerned about the introduction of a routine approach to not adhering to the 6 months rule in the majority of cases. This has the merit that legal parenthood is generally secured in the early stages of family life by the parents raising the child.

5. Can you give us any information about how the issue is approached in other legal systems?

Surrogacy is a growing area of concern for many jurisdictions, including where cross border arrangements are involved (see the deliberations of the Permanent Bureau of The Hague Convention on Private International Law (HCCH) Parentage and Surrogacy Project - https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy - referred to above). The literature is growing though primarily from the legal sector (see for example Trimmings and Beaumont 2013). There are also an excellent series of papers available from the International Forum on Intercountry Adoption and Global Surrogacy (2014), in particular Working Papers 596, 597, 600 and 601. It is of note that developing countries are more likely to be grappling with issues raised by being primarily a destination country – a 'supplier' of surrogates and a place where surrogate-born children and their intended parents may become stranded – while the global North is more likely to be grappling with issues raised by its citizens wishing to return with their surrogate-born children and acquire citizenship for them and perhaps legal parenthood regardless of the legal rules (Cheney 2016).

Given the circumstances that brought about the inception of UK surrogacy legislation, the main thrust of UK law in this area has been to discourage the operation of commercial surrogacy arrangements and to ensure legal clarity regarding parent-child relationships following a surrogacy arrangement. UK surrogacy legislation has thus occupied intermediary territory between those jurisdictions, such as the Australian Capital Territory, New South Wales, Queensland and Turkey, that have explicitly sought to criminalise at least some aspects of surrogacy arrangements (Johnson et al., 2014; Gerber and O'Byrne 2015) and Israel, which has pioneered a unique model of state-facilitated surrogacy (Benshushan and Schenker, 1997). However, there has never been public debate concerning the positioning of UK surrogacy legislation, whether it should be primarily a means of limiting or discouraging the practice, a means of preventing or ameliorating potentially negative aspects of surrogacy arrangements, a means of protecting the interests of those involved, especially those most vulnerable parties, or a means of promoting and facilitating surrogacy as a family-building option alongside other models to family-building such as IVF and gamete/embryo donation – or a combination of any of these. Our view is that approaches to surrogacy elsewhere have, on the whole, been similarly reactive but the recent growth in international surrogacy is prompting debate regarding the potential risks to children from poor medical practices, commercialism, adverse surrogate lifestyle factors, exploitation of poor women recruited to be surrogates, lack of adequate documentation through which later tracing can be assured and so on.

One of our concerns is that there is also a strong lobby to policy makers by prospective and actual intended/commissioning parents and by those with a commercial or associated interest around the world. There is no corresponding interest/pressure/support groups of surrogate-born offspring in the same way as exist for donor-conceived offspring and adopted people (the field is too young for that and numbers remain relatively small). The area is also hampered by the lack of good quality and wide ranging research.

6. Within the UK, does the problems occur in any or all of England, Wales, Scotland or Northern Ireland?

All

7. What do you think needs to be done to solve the problem?

It follows from what we said above that we would favour discussion about:

(i) the introduction of a regulatory system of surrogacy agencies and of medical standards: while regulation of global and domestic arrangements is far from easy, that is not a reason to abdicate them to market forces.

(ii) mandatory assessment and preparation of all parties before surrogacy arrangements are entered into;

(iii) scrutiny of the proposed financial arrangements prior to surrogacy arrangements being entered into;

(iv) rigorous keeping of detailed medical and biographical information about surrogates and donors and provision of good quality information release systems - this should be required for both international and domestic arrangements

(v) stricter controls to prevent exploitation of and discrimination against all parties, including through unchecked commercialism - this should involve a detailed review of what is meant by commercial and not for profit activities;

(vi) the introduction of a birth registration system that records and makes available to the offspring details of their genetic, gestational and legal parentage

In addition we are aware that the current restrictions on/criminalisation of surrogacy-related advertising - which we support in relation to commercial activity - has the perverse effect of potentially restricting access to information and support from non-commercial surrogacy agencies. This therefore warrants review.

It may be necessary to take account separately of domestic and international arrangements, i.e. with some shared requirements and some that are specific.

8. What is the scale of the problem?

The numbers involved in surrogacy arrangements cannot be ascertained with certainty as (i) record keeping has been identified as often inaccurate and (ii) those who do not apply for POs do not appear in any official lists (Crawshaw et al 2012; Blyth et al 2014; Horsey et al 2015). From figures available from the four nations GROs (see table below), the numbers are small but growing as are the proportions of surrogacy births that take place overseas. The numbers of POs granted where the child was born outside the UK (the best baseline for trying to identify whether international arrangements were involved) has risen from 2% in 2008 to 39% in 2014. It is a concern that the GROs figures are not routinely used in publications or research reports despite these bodies being the keepers of the official data on Parental Orders made.

Year	England/Wales	N. Ireland	Scotland	Total
1995	50	0	2	**52**
1996	37	0	2	**39**
1997	33	0	3	**36**
1998	37	0	2	**39**
1999	36	0	0	**36**

2000	40	1	1	**42**
2001	36	0	0	**36**
2002	44	0	2	**46**
2003	45	1	1	**47**
2004	35	0	4	**39**
2005	39	1	2	**42**
2006	47	0	4	**51**
2007	47	0	4	**51**
2008	73	0	2	**75**
2009	73	0	6	**79**
2010	75	0	8	**83**
2011	133	1	15	**149**
2012	192	2	9	**203**
TOTAL	**1072**	**6**	**67**	**1145**
2013	185	5 (4 born Eng; I NI)	5 all born in UK	195
2014	258	5 (4 born Eng; 1 NI)	9 all born UK	272
2015	281	5 (2 born Eng; 2 born Scotland; 1 born NI)	Not yet available	286 +Scotland's
Current total	1796	21	81 + 2015 figures	1898 + Scotland's figures

9. What would be the benefits of reform? In particular, can you identify any:

- **Economic benefits (costs of the problem that would be saved by reform); or**
- **Other benefits, such as social or environmental benefits?**

This is beyond our capacity to answer save to say that there would potentially be cost savings if less court and associated time were spent on complex surrogacy cases (in connection either with PO applications and in later Family Courts matters). Without the data regarding other professional and agency involvement that might arise from surrogacy – for example in child or adult mental health services – it is impossible to estimate what savings might accrue in those services from legal reform.

Social and long term psychological benefits would likely flow as a result of greater clarity in meeting children's rights, in helping intending/commissioning parents prepare better for this route to family life, and in ensuring that all parties – offspring, intending/commissioning parents and surrogates – have reduced risk of exploitation or coercion.

10. If this area of law is reformed, can you identify what the costs of reform might be?

This is beyond our capacity to answer

11. Does the problem affect certain groups in society, or particular areas of the country, more than others. If so, what are those groups or areas?

Surrogacy affects children who are born as result of surrogacy or who are otherwise affected by surrogacy arrangements (for example the children of surrogates or donors), those who are involuntarily childless (the intended/commissioning parents); those who act as surrogates; those who act as gamete donors - and the extended families and networks. By and large, it would appear that intended/commissioning parents are more likely to be drawn from middle to high income groups while surrogates are more likely to be drawn from low to middle income groups (van den Akker 2005; Allan 2015). Any discussion of surrogacy should include detailed attention to the push-pull effect of this.

12. In your view, why is the Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee or a non-Governmental organisation?

The complexity of the legal aspects, including the international dimension, and the fact that any legal changes to surrogacy arrangements need to align with child and family law and practice, human rights laws and conventions as well as that relating to assisted conception make this especially suitable for the Law Commission to undertake.

13. Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?

We have been in regular contact with the Dept of Health in relation to surrogacy and assisted conception over many years and they attend our meetings. PROGAR also convened a roundtable discussion which included all the key government departments in January 2014 (Blyth et al 2014) and this led to the establishment of a cross governmental working group looking at improving data collection and management. PROGAR has also had regular contact with Cafcass, and a representative of Cafcass attends our meetings. Finally we have been in regular contact with the HFEA throughout and PROGAR is a member of their Professional Stakeholders Group.

14. Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so please give use the details of their investigation on this issue and why you think the Law Commission should also look into the problem

The Department of Health has kept surrogacy under regular review. In 2015 PROGAR was invited to a face to face discussion with civil servants conducting an in-house 'review' which culminated, we believe, in a report to the then Public Health Minister. We have also referred in our response to Q13 that there is now a cross-departmental (government) working group that has been meeting since 2014 to try and improve data collection systems.

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