# EXECUTIVE SUMMARY

1. What is surrogacy? | Page 2
2. A history of surrogacy regulation in the UK | Page 3
3. How surrogacy works: the reality and the myths | Page 4
4. Pressure for reform: the courts | Page 5
5. Pressure for reform: international surrogacy | Page 6
6. Summary | Page 6

# CASE STUDIES

Page 7
EXECUTIVE SUMMARY

Our November 2015 Report ‘Surrogacy in the UK: Myth Busting and Reform’ provided an evidence-based set of recommendations for law reform, namely that the UK Government should:

1. Guard the principle of altruistic surrogacy that underpins the current legal system and practice of surrogacy in the UK;
2. Reform the way that legal parenthood is determined following surrogacy arrangements in order to *inter alia* i) allow legal parenthood to be granted to intended parents (IPs) at birth and ii) remove discrimination against single people and those using ‘double donation’ in order to make surrogacy law commensurate with other forms of assisted reproductive technologies;
3. Improve information, guidance and data on surrogacy in order to improve best practice.

Why these reforms?

In 2015 the working group undertook the largest ever survey of surrogates and IPs (434 respondents). The survey results and subsequent report showed that:

- 75% of all respondents agreed that surrogacy law needs to be reformed.
- Surrogates and IPs rejected commercialisation of surrogacy but overwhelmingly supported legal reform, especially around the acquisition of legal parenthood.

- **Surrogates** do not want to be the legal mother at birth
  - Only five per cent of surrogates believed they should be able to change their mind about handing a baby back to its IPs at any time.
  - This *interview* with surrogates at Surrogacy UK from early 2016 is a powerful articulation of why surrogates do not want to be the legal mother at birth.

- **IPs** felt marginalised, frustrated and discriminated against under the current system:
  - 110 (out of 179 who answered) IPs believed legal parenthood should automatically rest with them at birth.
  - Many IPs who did go abroad for surrogacy cited the uncertainty of the current system as a reason for their choice, especially regarding legal parenthood. This is also widely reported anecdotally.

Legal reform must centre on the welfare of surrogate-born children. These children deserve to have:

- A single, consistent identity and the correct succession, inheritance and other legal rights from birth.
- Their (intended) parents - who care for them from birth - able to make early medical decisions on their behalf, and to be treated as parents by hospitals and medical staff.
- Parents who feel confident in their relationship with their child and who are therefore able to be open and honest about their origins.

Our proposed reforms represent a middle ground between either doing nothing (except from improving information), or a more radical reform of the system e.g. moving towards a commercial/contract model.

Our Report as well as further submissions about potential reforms were sent to many key stakeholders, including the Law Commission, which has *recently announced* that it will include a review of ‘outdated’ surrogacy laws in its 13th Programme of Law Reform.
1. What is surrogacy?

Surrogacy is a means of reproduction whereby people unable to have children (the IPs) are helped to do so by a woman who agrees to carry and give birth to a child for them. The IPs may be a heterosexual couple, a same-sex couple or, more rarely, a single person. For heterosexual couples, surrogacy might become necessary due to the female partner being unable to carry a pregnancy (for example because she has had multiple failed IVF attempts, repeated miscarriages, absence of a uterus (for congenital reasons or due to radical hysterectomy e.g. following cancer treatment) or for whom pregnancy might be dangerous. Increasingly surrogacy has also become a form of family building for same sex couples. With the introduction of same sex marriage in 2014 we might expect surrogacy to become an even more common practice as a modern form of family building. Surrogacy might also be used as a way of trans people becoming parents.

Surrogacy takes two main forms, though there are variations of each, as well as variations in terminology:

‘Gestational surrogacy’

The development of IVF in the late 1970s made it possible for IPs to create embryos in a fertility clinic using their own eggs and sperm (or donated gametes where needed), which could then be implanted into another woman. In such a case, the surrogate carries a child that she is not genetically related to. This is also sometimes called ‘full’ or ‘host’ surrogacy.

Straight / traditional surrogacy

Prior to the development of IVF, surrogacy would always have involved the insemination of a woman with the intended father’s sperm, usually via home insemination. In such a case, the surrogate is genetically related to the child she carries. This form of surrogacy may still be considered where the intended mother is not only unable to carry a child, but also clinically infertile. Straight surrogacy does not necessitate the involvement of a clinic and is often preferred over IVF surrogacy for this reason.

2. A history of surrogacy regulation in the UK

Surrogacy has been regulated in the UK since the Surrogacy Arrangements Act 1985, which was enacted as a response to recommendations made in the 1984 Warnock Committee Report. This Act:

- Makes advertising for or as a surrogate illegal.
- Criminalises for-profit surrogacy agencies or brokers.
- Renders all surrogacy arrangements unenforceable.

In addition, The Human Fertilisation and Embryology Act 1990:

- Established that in all forms of (assisted) reproduction, the woman who gives birth ‘and no other woman’ is the legal mother.
- In surrogacy, determines that her husband or partner is the legal father, unless he can demonstrate that he did not consent to her acting as a surrogate.
- Created the ‘parental order’ which, provided certain conditions are met, can enable legal parenthood to be transferred from the birth parents to the intended parents.¹

Most recently, The Human Fertilisation and Embryology Act 2008:

- Amended the provisions on legal parenthood at birth to take account of the fact that the surrogate may be in a civil partnership.
- Extended eligibility for parental orders to unmarried couples (in an ‘enduring family relationship’) and those in civil partnerships (and, since 2014, includes same-sex spouses).

Parental orders

The current law states that a court can grant a parental order to a couple (where the applicants are over

¹ The mechanism was a last-minute amendment to the 1990 Act, and received little Parliamentary debate.
the age of 18) if ALL the following requirements are satisfied:

- The child is carried by someone else following insemination or embryo transfer and at least one of the applicants is genetically related to the child;
- The application is made within six months of the child’s birth;
- The child’s home is with the applicants, one or both of whom must be domiciled in the UK, Channel Islands or Isle of Man;
- The surrogate (and her partner/spouse) give free and unconditional consent to the making of the order, with full understanding, but not before the child is six weeks old (unless the surrogate cannot be found or is incapable of giving consent);
- The court is satisfied that no more than reasonable expenses was paid to the surrogate (though it may retrospectively authorise any payments made in the surrogacy process).

The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 clarify in law that in decisions about the making of a parental order, as in other aspects of family law, the child’s welfare is the paramount consideration.

### 3. How surrogacy works: the reality and the myths

Surrogacy has become increasingly more common as a form of family creation since it was considered in the 1984 Warnock Report. Statistics vary widely, but Government figures show that the number of parental order applications (a proxy for surrogate births) has more than doubled in the last five years, growing by 48% in 2014-16 alone. Lack of data and inconsistency in the way that proxy data is recorded makes it impossible to know exactly how many children have been born by surrogacy to UK parents. What is clear is that growth in surrogacy arrangements is high, with surrogacy now becoming a mainstream form of assisted reproduction. CAFCASS figures show that there were 295 applications for parental orders in 2015-16, a growth rate of 46% since 2013-14.

Payment for surrogacy is not illegal in the UK. Surrogates may receive ‘reasonable expenses’, though these are nowhere defined in law. No surrogate respondents (out of a total of 111) to our survey (as presented in the November 2015 Report) said that they had received more than £15,000 for their expenses from the IPs, with the mean amount being just over £10,500.

Recent studies show that surrogacy results in positive outcomes for parents, children and surrogates. Despite soap-opera and media representations of surrogacy, it is in fact very uncommon for a surrogacy arrangement to break down. In over 30 years of surrogacy regulation, there have been only a handful of reported cases where the surrogate changed her mind about giving the baby to the IPs. Obviously surrogacy works best when all parties are informed about the legal and other aspects of the practice in advance of entering arrangements and have the opportunity to discuss the issues, find the answers to their questions etc. Surrogacy works best as a relationship, not a transaction.

However, the growth of surrogacy and the ultimately positive outcomes reported, have taken place in spite of the current legislation, which was designed to discourage surrogacy. A disjuncture has occurred between the theory of the law and the modern practice of surrogacy that causes real tension in UK courts and for UK citizens. In many cases this results in couples going overseas to pursue (commercial) surrogacy, which can result in problems with immigration, citizenship and legal parenthood and which can often be incredibly costly. An alternative route is to access surrogacy through unregulated social media channels, which can be dangerous in many respects, as recent case law has shown.

Surrogacy in the UK is made problematic by many pervasive myths and misunderstandings about the practice and the law that applies, as well as practical issues (often driven in part by the myths).²

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² For more detailed coverage of these issues, including ‘surrogacy myths’, see Horsey, K., ‘Surrogacy in the UK: Myth busting and reform’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).
There has been an increasing convergence of opinion amongst the surrogacy community (IPs and surrogates), the architects of the original law, members of the judiciary, legal academics and practitioners, academics in other fields, surrogacy agencies and other interested parties who have been expressing their dissatisfaction with the current situation and call for urgent legal reform.

Baroness Mary Warnock, whose 1984 report forms the basis of the existing law, now agrees that reform is needed. She endorsed the 2015 Report, and later spoke to this effect at a conference organised by a member of this Working Group in May 2016, as well as appearing on BBC Radio 4’s Woman’s Hour and writing a foreword to a special edition of the Journal of Medical Law and Ethics (December 2016) based on the conference proceedings. As part of this, she says:

‘I think the time has come to revise our law on surrogacy. This partly because our attitudes have changed to what used to be referred to as ‘the artificial family’. We are infinitely more relaxed than we were 30 years ago about families ... And, perhaps because we did so firmly stamp on commercialism at the beginning, in many, if not most cases now ... a friendly relation has grown up between the surrogate the aspirant parents, the surrogate sometimes becoming an actual or virtual godmother to the child. And in part for this reason, our law now seems to be unduly protective of the surrogate, too much based upon the assumption that she is open to exploitation, which was certainly the assumption which informed the 1984 report.’

4. Pressure for reform: the courts

Cases before the courts are increasingly undermining the parental order rules. In all cases except for those regarding payments, we see this as a pressure point for reform.

Exceptions to the rules

In recent years there have been numerous occasions where the court has granted a parental order despite some of the statutory conditions not being met. For example, the courts have regularly retrospectively authorised payments that might be thought to fall outside of ‘reasonable expenses’ and have allowed parental orders beyond the six month time limit, because the child’s welfare in making such decisions must be paramount. For example:

- Retrospective authorisation: In Re X & Y (Foreign Surrogacy) [2008], Hedley J said that it ‘is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order. This reasoning has been followed in many cases since.

- Time limit: In X (A Child) (Surrogacy: Time Limit) [2014] Munby P granted an order after the 6-month deadline had passed, referring to the time limit as ‘almost nonsensical’. He asked: ‘Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so’.

Additionally, more recently some courts, in acknowledging that they cannot grant a parental order to the applicants have stayed the application (until after potential reform) on the grounds that adoption (the only other option) is inappropriate and that a parental order better reflects the child’s true identity.

Human rights and other issues

The requirement that only couples can apply for parental orders has been the subject of challenge. In Re Z in September 2015, Munby P did not allow an order for a single male applicant, as the letter

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3 For detailed exposition of these examples, see Horsey, K. ‘Fraying at the edges: UK surrogacy law in 2015’ Medical Law Review April 2016.

4 See e.g. Re L (a minor) [2010]; X and Y (Children) [2011].

5 See also A & B (Children) (Surrogacy: Parental Orders: Time Limits) [2015]; A & B (No 2—Parental Order) [2015]; AB v CD (Surrogacy—Time Limit and Consent) [2015].

6 See e.g. Re X (A Child) (Surrogacy: Time Limit) [2014]; [Fam]Re M (Child) [2017].
of the law appeared clear. Z then claimed that this was discriminatory (Art.14) and violated his right to family life (Art.8). In May 2016 Munby P handed down a ruling affirming this claim, meaning that sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with human rights guaranteed under the European Convention.

The Government has recently laid a remedial order before Parliament which, if passed, will enable single people with a genetic link to a child to apply for a parental order.

Another issue faced by the courts with an apparently unavoidable conclusion is the issue of consent. Though under the law there is the ability to dispense with the surrogate’s consent (to the making of a parental order) if she is incapable of giving it, or cannot be found, there is no opportunity to do this when it is unreasonably withheld (as there is in adoption law).

5. Pressure for reform: international surrogacy

What evidence there is shows that cross-border surrogacy (where IPs from the UK travel to another country and use a foreign surrogate) is on the increase. The USA has historically proved a popular destination for parents from the UK (and elsewhere), though other destinations have also emerged in the first part of the 21st century, especially the Ukraine, Georgia, Russia and Canada (and until recently India, Thailand, Nepal and Mexico – these have all been popular in previous years but due to ethical and other concerns have closed down operations for foreign IPs). While not self-evidently problematic, cross-border surrogacy is almost always commercial and so may raise questions about potential exploitation (of surrogates, who may come from poor backgrounds and be enticed by potentially life-changing sums of money, or of the IPs by unscrupulous clinics or brokers). It may – and has – raise conflict of laws issues or cause problems with immigration and passport issues for children, including leaving children stateless. There may also be issues regarding the screening and treatment of surrogates and/or the regulation of clinics.

However, we know that people travel for surrogacy for various reasons, including:

i) **Certainty**: there is a shortage of surrogates in the UK. Commercial operations in other countries guarantee both the availability of surrogates and that IPs will come home with a child, and

ii) **Misapprehensions**: because of the way surrogacy is regulated in other jurisdictions, many IPs will obtain a foreign birth certificate which names them as the child’s parents at birth, and will (wrongly) assume that this makes them the legal parents.

6. Summary

Surrogacy works well in the UK, but the law problematises it. This drives some people overseas and encourages others to enter into risky arrangements without proper support, guidance and advice. The law should be reformed to better protect all parties.

➢ **Better surrogacy law in the UK would make it less likely for people to go overseas for surrogacy, where safety risks and the potential for ethical problems are greater.**

Those entering surrogacy arrangements in the UK are able to access good information and support, including counselling and legal advice, should they know where to look. There is clear evidence of good practice in operation. Parties should agree between them before entering arrangements what should happen in as many potential situations as possible.

➢ **All agreements should centre around the best interests of the child(ren) concerned and**
both parents and surrogates should be able to access high-quality information and advice.

Regarding legal parenthood, either the presumption that the woman who gives birth should be reversed in surrogacy, be rebuttable or, if it is deemed necessary to retain court involvement, any order made by a court should be made before birth, coming into effect at birth.

➢ The intended parents should be the legal parents at birth. This would bring certainty and stability to children born via surrogacy. Any disputes should continue to be resolved with the child’s long-term interests as paramount.

There should be better and more centralised data collected about surrogacy. To mirror policy on donor conception, children should be able to get information about surrogates/donors at the age of majority. Longitudinal studies already being conducted show that families created by surrogacy are faring well, and in some cases better than families created by other means.

➢ More empirical data should be collected and longitudinal studies supported so that new and future law can be evidence-based rather than based on assumptions.

CASE STUDIES

Sarah Jones (surrogate and chairperson of SUK)

• Sarah is a Trustee and the chairperson of Surrogacy UK, and has been a member of the organisation for 15 years. She is a mother of three and is proud to have been a surrogate four times – including helping to create siblings for one family! She enjoys a close friendship with the three families she helped to create and is also acting as a known egg donor for SUK members.

Natalie Smith (mum of twin girls born to surrogacy)

• Natalie was born with a condition called MRKH, meaning that she doesn’t have a womb so it was impossible for her to carry a child. Natalie and her husband turned to surrogacy after they got married in 2008. They were lucky to meet Jenny, who offered to help them become a family. Jenny had gone through several years of infertility herself and when her fertility recovered she felt a resolute calling to help people going through a similar battle to become parents. After a successful IVF transfer Natalie and Jonathan became parents to twin girls in 2011. Jenny is godmother to the girls and will always be a part of the Smith family. Natalie is very proud of the values that created her family – friendship, determination, empathy and love. Natalie is trustee of Surrogacy UK and leads the working group on Surrogacy Law Reform.

Alan and Al (IPs) with Annie (surrogate)

• Alan and Al: “We met in Shanghai in summer 2010 and had our Civil Partnership in June 2012. Having children had been part of our conversations from an early point – after doing some research online, we felt ourselves drawn to Surrogacy UK – their ethos of surrogacy through friendship, with the emphasis very much on the development of a natural and long-term relationship appealed. This friendliness was only reinforced when we attended our first SUK ‘social’ in November 2013 – the openness, inclusion and warm welcome made us feel that this was the organisation for us. We became full members in March 2014.”

• Annie is a longstanding member of Surrogacy UK. Now a Trustee, she has completed two surrogacy journeys, thereby helping to create two families. An administrator in a local business
in her home town of Rugby, she lives with her partner Steve who, naturally, supports her 100% in her desire to help couples who might otherwise be unable to become a family achieve their dreams.

- Their journey together: “We (Alan and Al) met Annie at a very early stage after joining SUK, in fact when she was pregnant carrying her previous surro-baby. Our friendship therefore developed in a very natural way and we were thrilled when we were told that she wanted to help us. After a number of failed embryo transfers, which demonstrated our closeness and determination as a team to make our dream come true, our daughter Beatrice was born on 1 June this year, further cementing the friendship we share through the joy of Annie having helped us become a family. This joy spreads ever further, to everyone who meets Beatrice and hears our story.”

Leyla & Richard (IPs with a son Zeki born through surrogacy) and Rachael (surrogate)

- **Leyla Hutchings**: “I was diagnosed with a serious medical condition which meant that carrying a child could prove fatal for me. I also had a 50% chance of passing on the condition to my child. We’d been married for five years at this point and had always wanted to raise a family together so we turned to surrogacy. After a somewhat turbulent time, some eight years later, thanks to the selflessness of Rachael Coleman our surrogate, and her family, we were lucky enough to welcome our son Zeki into the world. He has brought us happiness every single day and we are blessed to have him and the Colemans in our lives. We found the parental order technicalities to be a stressful process at what should be a time to enjoy family life and would very much support reforms in the arena of surrogacy law.”

- **Rachael Coleman**: “I always knew that I wanted to be a surrogate and felt that it would be something that I was capable of. After having my own three beautiful children, it just reinforced how lucky I was to have them and my need to bring that joy to others. I joined Surrogacy UK in 2013 which is how I came to meet Leyla and Richard. After a wonderful experience, I gave birth to their son in May 2014. Seeing them now as a family that I had a small part in it is an amazing feeling. We have a great bond with them all and I am incredibly lucky to have had this experience and feel a better person for it.”

Kate Dobb: Mum to twins Rafi and Amina born through sisterly egg donation and altruistic surrogacy

- “At the age of 10 I was diagnosed with stage 4 abdominal Rhabdomyosarcoma, a rare and aggressive childhood cancer. I had two years of intensive treatment including chemotherapy, radiotherapy and surgery. Thankfully, I survived but survival came at a high price - not only had I suffered ovarian failure but my womb was so damaged by the treatment that I was told I would be unlikely to carry a pregnancy to term - heartbreaking news to receive at any time let alone at just 13.

For years I struggled to access any kind of help or fertility counselling. At the time single people were barred from receiving any fertility treatment and I found I was refused access to fertility services and counsellors.

“Once in my 30s and settled with my partner, Nisar, an appointment with an amazing fertility doctor through my “Oncology Late Effects” clinic finally gave us real hope. The specialist had seen many people overcome challenges to become parents and had witnessed very positive experiences of altruistic surrogacy in the UK. He was the first professional to suggest surrogacy, leading us to believe that the lack of reliable knowledge around surrogacy left other healthcare professionals feeling ill equipped to discuss it.”
“My wonderful sister Jennie offered to donate eggs so we could create embryos and we joined Surrogacy UK. We were fortunate to meet our incredible surrogate at a social event just a couple of months later. We instantly clicked and a short time later Mikki offered to help us become a family. Over the next three months our friendship with Mikki and her family grew stronger and stronger. We trusted her completely and felt able to discuss anything about the journey ahead knowing that whatever happened we had made lifelong friends.

“We were overjoyed when Mikki fell pregnant with twins after the first embryo transfer. We were there every step of the way, from scans and appointments right up to the birth and cutting our babies’ cords. Throughout the pregnancy Mikki had told us how much she was looking forward to seeing our faces when we held our babies for the first time. That moment was truly magical for all of us – we were parents at long last and Mikki had fulfilled her dream of helping us become a family.”

Iain & Caroline (IPs with twin daughters born through surrogacy, and Chelle (surrogate)

- **Iain and Caroline:** “we joined SUK after six years of trying to conceive through IVF, after several miscarriages and Caroline giving birth to our still born daughter Evie at 24 weeks we decided to look at other avenues in our overwhelming pursuit to start a family. The emotional and physical stress had taken its toll on us for too long, and we were advised by our clinic to look at other options. After researching two organisations it was clear that SUK’s ethos of ‘Friendship First’ or ‘Surrogacy Through Friendship’ was the path we wanted to take. It fitted with our view of the world.

“We were very lucky to meet Michelle (our Surrogate), Alan and their two children Harvey and Rhiannon. We spent a lot of time with each other’s families and talked about the difficult issues surrounding any future pregnancy which we might have. At 16 weeks Michelle bought us a 3D scan where they confirmed that we would be having two girls! Amazing!

“Since the birth we keep in regular contact with Michelle and her family. They came to Amelie and Charlotte’s Christening and will always be in our lives, our girls will grow up knowing what an amazing thing Michelle did for us. We are so grateful to Michelle for helping us achieve something we could not have done on our own.”

- **Michelle (Chelle):** “After watching a documentary on surrogacy when I was 17 I thought wow! What an amazing thing to do! Pushed to the back of my mind I married and had a family of my own. The thought was resurrected after seeing a friend had egg donated on FB, I thought I could do that... A few google searches later and I found surrogacy and then Surrogacy UK. Why be a surrogate? I think the question for me is why not? I felt I could physically and emotionally grow and give back a child to a couple who couldn’t grow them themselves. If you feel you can do something for someone to make them happy, help them and see their dreams come true, you would right? It seems like a total no brainer to me.

“I completed my first journey as a surrogate in March 2016 giving birth to beautiful twin girls as a gestational surrogate. After the buzz and excitement of doing it once I embarked on the process of helping a second couple become a family.”

- **Chelle made this family have a very merry Christmas, by having their baby in December 2017.**

Nicola Ponting (single intended parent as yet to embark on surrogacy)

- “I am 42, nearly 43, single, but have always known I would love to be a mother. So much so, nearly six years ago, when I was approaching 37 and at a financial cost to myself, I went through
the invasive procedure of freezing my eggs. I did this as I was single at the time and I wanted an element of control over my family planning. Ironically, I hoped I would not need them; I wanted to settle down, get married and have a family naturally but as I had not met the right person for this to happen, I felt it was a sensible decision to make should I need them in the future.

- “Unfortunately three years ago I was diagnosed with an early stage cancer. The NHS was incredible and I was treated very quickly. My operation was a success and I was given the all clear with no further treatment such as chemotherapy or radiotherapy required. Although I am very lucky and feel I have been given a second chance at life, my operation now means I am no longer able to carry my longed for baby so the gift of surrogacy is my only option of using my frozen eggs and having my own biological child. Since my operation I have also gone through two separate IVF cycles, again at a financial cost to myself, to try and create embryos to freeze alongside my frozen eggs giving myself a further chance of becoming a mother.

- “Surrogacy has now become extremely important to me and I would love to move forward with my life, living it how I choose, and undertake a surrogacy journey as a single person. Although, as a single woman, it is not against the law; it is perfectly legal for me to carry out a surrogacy journey, the current law does not allow me to apply for a parental order which would transfer legal parenthood over from the surrogate to myself once a baby is born. Organisations such as Surrogacy UK have a strict policy to only allow people to become members if they are eligible to apply for a parental order. I am therefore prevented from becoming a full member and potentially meeting surrogates who may like to help me.

- “I feel cancer has taken a lot away from me but I want to stay positive and move forward with my life. I am hugely frustrated however that the current law is stopping me; it is completely discriminating against me, and other single people in a similar situation, and preventing me from making decisions and moving forward with my own life.”