**Surrogacy 2.0: What can the law learn from lived experience?**

**Introduction:**

There are many good things about the way surrogacy is practised and regulated in the UK. The majority of surrogacy arrangements are successful, in the sense that those who intended to have children are able to, helped by a woman who agreed to carry the child(ren) for them. The majority of these intended parents (IPs) are able, technically, to become the legal parents of the children they raise. Surrogacy’s successes can also be measured by how few ‘failed’ arrangements are recorded by the main non-profit agencies who operate in surrogacy,[[1]](#footnote-1) as well as in the small number of court disputes that have occurred in the years since surrogacy emerged as a family-forming practice in the late 1970s.[[2]](#footnote-2)

Surrogacy laws in the UK exist in a middle point on a spectrum of regulation worldwide: they are permissive but control aspects of the practice, such as commercialisation, in comparison to some other jurisdictions where there are more extreme legislative positions. Where surrogacy is regulated (it is not everywhere – leading to some other problems), laws globally range from outright bans to totally free markets and comprise almost everything else in between. Because of the way surrogacy is regulated in the UK, surrogacy arrangements have to be defined by at least a degree of altruism. Though money tends to be involved, this usually represents recompense for reasonable expenses incurred by the surrogate. Payments, other than to commercial facilitators or brokers, are not prohibited. Nevertheless, what is ‘reasonable’ is a matter determined between the parties and, unless the money paid was seen to contravene public policy, it does not seem likely that a court would not authorize it.[[3]](#footnote-3) That said, the fact there is financial recompense does not negate the altruistic motive of the women who act as surrogates.[[4]](#footnote-4)

Despite occupying this seemingly happy middle ground, there are indubitably aspects of our laws that are outdated or just plain wrong. The Surrogacy Arrangements Act 1985, which first regulated surrogacy, is over three decades old and even supplementary provisions found in the Human Fertilisation and Embryology (HFE) Act 2008 – only ten years old – are showing their age. Cracks in the system are now clearly showing, as has been increasingly identified over recent years by legal scholars,[[5]](#footnote-5) practitioners,[[6]](#footnote-6) judges,[[7]](#footnote-7) parliamentarians[[8]](#footnote-8) and others.[[9]](#footnote-9) Problematically, the people most affected by these issues are the children born from surrogacy arrangements. Fundamentally, there exists a schism between the principles governing surrogacy and those protecting the welfare interests of children and supporting families.

Various key actors have recognized this problem. In November 2017, the Government laid a remedial order before parliament, designed to address a part of existing surrogacy law relating to single applicants for parental orders, which had been ruled discriminatory and incompatible with human rights.[[10]](#footnote-10) Introducing the remedial order, then Minister Phillip Dunne MP said that the Government had found ‘compelling reasons’ to amend the law.[[11]](#footnote-11) In December 2017 the Law Commission announced that it would include a review of surrogacy in its thirteenth programme of law reform,[[12]](#footnote-12) calling it a ‘matter of concern that there are significant problems with the law’.[[13]](#footnote-13) Also in December 2017, the newly-launched APPG on Surrogacy stated that its mission is:

“to fully review our surrogacy laws, encourage and promote debate on the issues, facilitate further research into how surrogacy is conducted, bring the law into line with modern social realities and to encourage domestic surrogacy in the first instance”.[[14]](#footnote-14)

In February 2018, the Department of Health issued official ‘information for intended parents, surrogates and health professionals about the surrogacy process in England and Wales’, in response to criticisms about a lack of centralized and credible information.[[15]](#footnote-15) In May 2018, the Law Commission confirmed that alongside the Scottish Law Commission it had secured Government funding to go ahead with the review. Professor Nick Hopkins, Law Commissioner for England and Wales, said that the review was necessary because ‘[o]ur society has moved on from when surrogacy laws were first introduced 30 years ago and, now, they are not fit for purpose’.[[16]](#footnote-16) Clearly, there is more than just personal, professional and academic interest in reform, but also evidence of ongoing parliamentary and wider regulatory interest.

Given the growing consensus that reform of surrogacy laws is necessary, this article considers what reform of the law on surrogacy should look like, if lived experience of surrogacy is taken into account, after first considering the schizophrenic nature of the law as it currently stands. One potential explanation for surrogacy law’s stagnation (when compared to the rapid development during the same period of other aspects of assisted reproductive technology and the law that governs it) is the prevalence and persistence of surrogacy myths. Prevailing assumptions about who enters surrogacy arrangements and why, about the chance of success (or failure), about the payments that are made – to name just a few – have long indicated that reforming surrogacy may be somewhat of a poisoned political chalice. Surrogacy arrangements strike at the heart of what family is and what it should be and, although the number of surrogacy arrangements entered per year are small, in relative terms, they are rising. The Law Commission states that

‘it is likely that children born as a result of surrogacy arrangements to UK based intended parents number only in the hundreds rather than thousands each year, the use of such arrangements has significantly increased over the last ten years, and is expected to continue to rise’.[[17]](#footnote-17)

Because of this – alongside the welfare interests of children, there are clearly significant policy implications for any government which re-regulates surrogacy and it will take a brave government to do so.

That said, in the second decade of the twenty-first century, the stagnation of surrogacy law – or perhaps what might be better described as the issues being swept under the carpet[[18]](#footnote-18) – has been revealed. The landscape of surrogacy has changed. Like other areas of medicine, including reproductive services, there has been an expansion of cross border arrangements as other nations have opened their borders and clinics for British people seeking surrogacy.[[19]](#footnote-19) Aside from potential ethical concerns about some international practices, this brings practical problems – including problems acquiring legal parenthood. The ubiquity of the internet, enabling people to find and access information about surrogacy from all over the world (as well as independent surrogacy operators), added to the ease of international communication and travel, has meant that different issues (or different versions of the same issues) have overtaken the law, which remains wedded to principles and norms from a different time. Questions that were once unforeseeable to family lawyers now emerge on an almost continuous basis, meaning that the myths and assumptions about surrogacy – which underpin the existing law – must be challenged and addressed. The big question is how policy and pragmatism can be untangled from the myths and come together to enable a law that allows best practice in surrogacy to thrive.

**The schizophrenia of surrogacy governance:**

The law that governs surrogacy in the UK is schizophrenic in nature. As the law is currently formulated, surrogacy is permitted but discouraged. The Surrogacy Arrangements Act 1985 was passed as a reaction to the 1984 Warnock Report,[[20]](#footnote-20) which came out against surrogacy and wanted to see the practice ‘wither on the vine’.[[21]](#footnote-21) Agreements are recognised but unenforceable.[[22]](#footnote-22) Payments between IPs and surrogates are not illegal, though they supposedly carry a sanction in that those who pay surrogates may not be entitled to a parental order.[[23]](#footnote-23) Payments of a commercial nature are supposedly illegal, as is brokerage of arrangements for money, each carrying potential penalties of a large fine and/or imprisonment.[[24]](#footnote-24) Commercial advertising for surrogates or offering surrogates is also criminalised.[[25]](#footnote-25) This means that commercial agencies, brokers and other intermediaries may not (officially) exist, precluding a Californian model of surrogacy from operating here. However, obviously (and rightly) family lawyers can take payment when they are consulted for advice and non-profit agencies can charge reasonable fees for the information, advice, and matching potentials they offer, in recognition of the value of the operation of such organisations.[[26]](#footnote-26) Additionally, without a flagrant breach of the law, it is hard to see how the prohibitions on commercial operations would be enforced. I am unaware of any prosecution ever having been brought under the Surrogacy Arrangements Act, even though with the rise of social media communications some messages are hard to distinguish from adverts. Similarly, it is now the case that ‘consumer conferences’, where agents, clinics and others ‘show’ the services they have on offer, operate on a regular basis.[[27]](#footnote-27)

People are also free to enter into ‘independent’ or private surrogacy arrangements and may facilitate these through, for example ‘closed’ Facebook groups or similar.[[28]](#footnote-28) It is known from facts found in some of these decided cases that there are people operating within these groups who set up (initially virtual) meetings between prospective surrogates and IPs, and sometimes offer support throughout the resultant arrangements. With or without an intermediary (or broker) helping to organise the arrangement, these agreements are concerning in the abstract (in terms of wondering exactly who is entering them and how they are ‘under’ the law – which, despite its flaws, does offer some protection to the parties, who may potentially be vulnerable to suggestion, persuasion and, at worst, exploitation).[[29]](#footnote-29) They are also troubling in reality, given the details that have emerged in relation to some. Presumably, there are numerous such arrangements that work out perfectly well – it just seems that doing this without the support of an organisation that has knowledge of how things work best in practice, understands the law and can offer advice, for example about who may, and who may not acquire legal parenthood, is potentially risky, and not necessarily in the best interests of the children or other parties.[[30]](#footnote-30)

Despite its title, the bulk of the law relating to the consequences of a surrogacy arrangement (who is to be regarded as the legal parent) is not found in the Surrogacy Arrangements Act, but instead is found in the HFE Act 2008.[[31]](#footnote-31) This is an unwieldy statute which contains standalone sections on parenthood but otherwise acts as an amending Act to its 1990 counterpart which regulates the provision and licensing of all forms of fertility treatments and related research. Everything from donor insemination on licensed premises to preimplantation genetic diagnosis, tissue typing, and even mitochondrial transfer is regulated by the 1990 Act and, as such, it is rightly placed under the auspices of the Department of Health and Social Care. However, as further evidence of the schizophrenic nature of its treatment in law, in politics and in policy, surrogacy (apart from the part of the process requiring IVF or the transfer of donor gametes in a licensed clinic) is largely a matter of family law (and indeed the cases are heard in the family courts), as the bulk of the cases relate to the acquisition of legal parenthood via s.54 HFE Act 2008.

Additional evidence of the schizophrenic nature of the treatment of surrogacy is found in the laws of parenthood themselves, particularly as these do not always seem to mirror the best interests of the children concerned. They are a product of the underlying policy of permissive discouragement and are truly where the cracks in the regulatory system show.[[32]](#footnote-32) Following a surrogacy arrangement – taking place anywhere in the world and with any permutations of gametes used, including donor gametes from third parties, the surrogate ‘and no other woman’ is the mother of the child(ren) she gives birth to.[[33]](#footnote-33) This is true no matter what the law of another country where the child(ren) might be born states, thus leading to potential conflict of laws problems, including cases where children become ‘stateless and parentless’.[[34]](#footnote-34) Various different factors determine who the other legal parent, if there is one, is: if the surrogate is married her husband is the legal father (if she is married to a woman then her spouse becomes the ‘second legal parent’).[[35]](#footnote-35) If the surrogate is unmarried and the intending father is the genetic father, he can be named as the legal father at birth (leading to the complicated situation where a child’s birth certificate shows that her legal father has had a child with a woman who is not his partner and who does not raise her).[[36]](#footnote-36) Provided the S54 criteria are satisfied, legal parenthood can be transferred to the IPs via a parental order.[[37]](#footnote-37) But, given the arbitrariness of some of the requirements written into s.54, the courts have been active in purposively reading the legislation and it is almost as if some requirements no longer really exist, such as the six-month time limit within which an application must be made.[[38]](#footnote-38)

Recent cases highlight many problems with the law on surrogacy – mainly to do with parental order applications. Many are further complicated by the fact surrogacy was undertaken internationally, raising issues about children’s nationality, citizenship or immigration status. Judges have routinely retrospectively authorised payments to surrogates (particularly in overseas arrangements taking place in countries where commercial surrogacy might be more the norm).[[39]](#footnote-39) They have also found ways to circumvent the requirements of the law, where to do so would be in the best interests of the child.[[40]](#footnote-40) They have, for example, extended the time limit in which applications for a parental order can be made. They have been instrumental in granting children ‘stranded’ overseas entry to the UK for the purposes of making a parental order.[[41]](#footnote-41) But the court found itself unable to extend parental orders to a single male applicant, finding there that the letter of the law was clear.[[42]](#footnote-42) This in itself proved controversial and was subject to further challenge. In 2016 it was determined that the provision was incompatible with the claimant father’s rights under Art 14 (discrimination) in conjunction with Art 8 ECHR.[[43]](#footnote-43) The Government confirmed that it would introduce a remedial order under the Human Rights Act 1998 to rectify this part of the law. This was severely delayed by other political developments, including an unexpected general election, but was laid before Parliament in November 2017 by the then Minister of State for Health, Phillip Dunne MP, who said:

‘Surrogacy has an important role to play in our society, helping to create much-wanted families where that might not otherwise be possible. It enables relatives and friends to provide an altruistic gift to people who aren’t able to have a child themselves, and can help people to have their own genetically-related children. The UK Government recognises the value of this in the 21st century where family structures, attitudes and life-styles are much more diverse.[[44]](#footnote-44)

This was certainly a representation of a softening of attitude to surrogacy from Government and is encouraging in relation to the possibility of future reform occurring. Government recognition that surrogacy is an important and valuable means of family formation in the twenty-first century is a step in the right direction. Indeed, this attitudinal change is supported by the Department of Heath guidance issued in February 2018, which confirms, ‘the Government supports surrogacy as part of the range of assisted conception options’ available to people.[[45]](#footnote-45) This kind of backing for a procedure once deemed ‘bizarre and unnatural’ by judges is to be welcomed.[[46]](#footnote-46)

**How should surrogacy law be reformed? Learning from lived experience**

In spring 2015, I was invited to join a working group looking at surrogacy laws by trustees of the non-profit surrogacy organisation Surrogacy UK. They had become interested in looking at the realities of surrogacy following a Westminster Hall debate led by Jessica Lee MP in October 2014,[[47]](#footnote-47) and the subsequent news coverage.[[48]](#footnote-48) In the debate, Jessica Lee cited 1000-2000 children born via surrogacy to IPs from the UK annually,[[49]](#footnote-49) with up to 95% of these being from overseas arrangements. Although we were aware of an increase in overseas surrogacy arrangements,[[50]](#footnote-50) these numbers seemed to be unusually high.[[51]](#footnote-51) They also – despite being merely an estimate – kept being uncritically cited.[[52]](#footnote-52) As a group, we wanted to try to establish a better picture of various things – including what kind of payments were being made, what the relationships between surrogates and IPs/children looked like, and the numbers of IPs going overseas for surrogacy, rather than entering an agreement with a surrogate ‘at home’. We wanted to hear the voice of those actually involved, to interrogate ‘surrogacy myths’ and to consider the need for legal reform. We worked through spring and summer towards producing a report on current practices and perceptions of surrogacy as practised in the UK. A significant part of the work was conducting and analysing a survey of surrogates, their partners, IPs and others involved (e.g. professionally) in surrogacy. Our report ‘Surrogacy in the UK: Myth Busting and Reform’ was published in November 2015.[[53]](#footnote-53) It concluded that the Government needs to provide root and branch reform of surrogacy law and regulation in the UK, following detailed and comprehensive debate on the issues. It made a series of recommendations for reform, all with the underlying aim of protecting the best interests of children born via surrogacy.

Our research - in which we also considered data from the Parental Order Register, CAFCASS, the passport office and the Ministry of Justice, among other sources - found nothing that could support either the cited number of annual surrogate births or the numbers of children said to be being born overseas. What we did find - as others had before us - was that the *proportion* of overseas arrangements had been increasing year on year. We also discovered that all the data sources we looked at were incomplete, and that each measures things differently – so what we know is that the data actually held by various agencies on surrogacy is patchy and does not (and cannot) tell us the true story. We want to try and get to that truth somehow and are continuing to work on the numbers. One of our recommendations was for data on surrogacy arrangements to be collected in one place, in the same way that data for other kinds of assisted reproduction can be found.[[54]](#footnote-54)

The Working Group also wanted to give a voice to those involved in surrogacy – either as IPs, surrogates or professionals in the field – as well as to interrogate and dispel pervasive ‘surrogacy myths’ that have informed debate in recent years and highlight the urgent need for reform.[[55]](#footnote-55) One of the reasons for doing so was to in some way make it easier or more acceptable for people to enter surrogacy arrangements in the UK – but to do that the entire tone of the law needs to be changed, to remove the impression that our permissive/discouraging rules currently propagates. In so doing, it might be that fewer people would leave the UK to enter into surrogacy arrangements overseas. While in principle travelling for surrogacy is not in itself problematic, when considered in more detail, cross-border surrogacy arrangements, as shown above, bring their own issues. Not only is it usually always commercial in nature – in fact bespoke surrogacy ‘packages’ can be made to coincide with a holiday – what has proved to be a fairly turbulent marketplace in recent years can bring its own dangers.[[56]](#footnote-56) While some destinations have ‘good’ systems for protecting surrogates and IPs, the enforceability of surrogacy contracts available in some leads to concerns about exploitation. Furthermore, such arrangements can be incredibly expensive.[[57]](#footnote-57)

In practical terms, there are questions regarding the acquisition of passports for children and thus their ability to exit the country in which they were born,[[58]](#footnote-58) as well as potential immigration issues when coming into the UK. Also of concern is the potential lack of knowledge among some IPs that a parental order would still be required to secure legal parenthood, even where the parents’ names are entered on the children’s birth certificates, as they would be in many overseas surrogacy destinations.[[59]](#footnote-59) This probably explains some of the disparity between the estimates of how many surrogacy arrangements occur, and the numbers of parental orders applied for. Unless prospective parents know where to find information – and they would need to know where to look and to be able to determine what is good information and what is not – then the assumption that a birth certificate determines parenthood seems perfectly reasonable. For this reason, CAFCASS had an online campaign to help people understand the importance of applying for a parental order and continues to stress the importance of applying.[[60]](#footnote-60) In addition, various groups including the reputable surrogacy agencies and CAFCASS have worked with the Department of Health in the past year to produce centralised guidance on surrogacy arrangements which have now been published.[[61]](#footnote-61) Hopefully, they will be linked to from other agencies and organisations who might be the first ‘hit’ by prospective independent parents searching for information, and will also be used by clinics, counsellors and others.

*The survey*

The other thing that the working group attempted to do was to try to gain more understanding of what kinds of surrogacy arrangements were being entered into by people in the UK, via a lengthy and detailed survey. The working group’s survey ran from June to August 2015.[[62]](#footnote-62) We obtained 434 responses, which as far as we are aware is an unprecedented number responding on surrogacy.[[63]](#footnote-63) Of the 434 respondents, 111 were women who were currently in the process of, or had been surrogates; 206 were IPs (either going through the process or who already had children by surrogacy). Of the IPs, 65 were in gay male couples and 19 had undertaken overseas arrangements. The 112 ‘other’ responses were received from, among others, nine clinicians, nine lawyers, six social workers and 15 academics/researchers. The remainder of the ‘others’ tended to be mainly friends/family of those who had undergone (or were looking to undergo) surrogacy, as well as potential future IPs. Others included clinic workers (including doctors, nurses, counsellors and administrators) and other people who had been affected by infertility in one way or another, but not used surrogacy.

Though we believe that this is the largest survey of its kind, we also know that it is not perfect, particularly as respondents would have been largely self-selecting. There was probably a higher representation by Surrogacy UK members than any others (though the survey was shared through the members of the two main other non-profit agencies, as well as sent out widely via social media (including Facebook groups of ‘independent’ surrogates), mailing lists etc) and, despite the fact that the numbers of people said to be going abroad are based on problematic estimates, as indicated earlier, we expect that our results are missing a proportion of those who went overseas for surrogacy.[[64]](#footnote-64) Only one of the reputable UK surrogate agencies works with couples who go overseas.[[65]](#footnote-65) However, the results do begin to give us a better picture of what exactly is going on in surrogacy. There is lots more analysis to do of the responses, especially the free-text comments and we are hoping to follow up on some of these. What follows is an overview of some of the main things that came out of the survey.

A snapshot of the survey results shows that the majority of surrogates and IPs maintain ongoing relationships[[66]](#footnote-66) and there is a high degree of openness about the process within families (and telling children at a young age). We found an extremely high level of ongoing contact between surrogates and the families they helped to create according to responses from both surrogates and IPs who had undertaken surrogacy in the UK. Our results also showed that the vast majority of IPs either had told or were intending to tell their children how they were conceived, with most saying this would be before the children started school.[[67]](#footnote-67) This is encouraging, as we know from studies looking at children born following egg or sperm donation that not everyone tells, but that children and families tend to fare better psychologically when there is openness. It also confirms studies which have found high levels of openness in surrogacy compared with gamete donation families.[[68]](#footnote-68)

Very few surrogates thought they should be recognised as the legal parent at birth (most thought it should be the IPs).[[69]](#footnote-69) Only four surrogates agreed with this, while 64.9% of surrogates said they thought IPs should be the legal parents even if they were not genetically related (other responses were varied and fell somewhere in between – e.g. based on genetic relationships). In terms of costs, 104 surrogates told us that they received compensation for the expenses they incurred, but over 95% of these received less than £15,000. The average amount of money that surrogates said that they received was £10-15,000.[[70]](#footnote-70) This was mirrored by IPs who used (UK) surrogates, who said that the reimbursements they paid to surrogates ranged from £0 - £25,000, with the mean payment being £10,589.[[71]](#footnote-71) The highest total cost for UK surrogacy was £60,000 (including medical and legal costs).

Nineteen of the 206 intended parent respondents (just over 9%) who had undertaken or were undertaking overseas surrogacy had predominantly (14 of 19, covering 20 surrogacies) done so in the United States. Three had been to India, two to Thailand, and one to Nepal.[[72]](#footnote-72) Fourteen of the 19 were gay male couples, one was a single man, and four were heterosexual couples.[[73]](#footnote-73) As might be expected, here the costs were more disparate, and largely higher. Fourteen had paid more than £60,000 in total, and the sum actually paid to the surrogate ranged from £4,000 - £40,000, with a mean of £17,375.[[74]](#footnote-74)

When asked about legal change, there was an overwhelming view among the survey respondents that surrogacy law needs to be reformed. Of the 434 respondents, 399 answered a general question on law reform, with three-quarters of these saying a definite ‘yes’ to reform and only 3.3% giving a definite ‘no’.[[75]](#footnote-75) Breaking down these responses by type of respondent gave the following figures:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Surrogates** | **Partners** | **IPs (UK)** | **IPs (overseas)** | **Other** |
| No. | % | No. | % | No. | % | No. | % | No. | % |
| **Yes** | 73  | 65.7 | 4 | 80 | 131 | 70.1 | 16 | 84.2 | 76 | 67.9 |
| **No** | 5  | 4.5 | 0 | 0 | 4 | 2.1 | 1 | 5.3 | 3 | 2.7 |
| **Possibly** | 21  | 18.9 | 1  | 20 | 37 | 19.8 | 1 | 5.3 | 9 | 8 |
| **Don’t know** | 10  | 9 | 0 | 0 | 2 | 1.1 | 1 | 5.3 | 4 | 3.6 |
| **No response** | 2  | 1.8 | 0 | 0 | 13 | 7 | 0 | 0 | 20 | 17.9 |
| **Total** | 111 | 5 | 187 | 19 | 112 |

Perhaps not surprisingly, the group with the highest proportion of respondents who supported reform were IPs who had been overseas, suggesting perhaps that legal barriers to successful surrogacy in the UK may push some people abroad. IPs who had been through surrogacy in the UK had the next highest proportion in support of reform. This too is perhaps not surprising given that many of the free text comments in the survey responses indicate that IPs feel poorly treated by the ‘system’ as a whole.[[76]](#footnote-76) Part of our group's recommendations included better information and training on surrogacy for clinics, hospital staff and others.

The key reasons why respondents thought reform is necessary included the outdatedness of the law, a perceived need for increased transparency about the system, a need to discourage people from going overseas for surrogacy and a feeling that the law does not reflect the realities of surrogacy as practised and understood by those who have been through it, particularly in respect of the legal parents of surrogacy-born children.[[77]](#footnote-77) The original Parental Order provisions are now more than 27 years old. Though some modernising tweaks have taken place, for example in terms of extending the categories of people who may apply for parental orders beyond heterosexual married couples,[[78]](#footnote-78) or extending the provision of parental leave and benefits to those who have children through surrogacy,[[79]](#footnote-79) the law does not yet reflect reality nor recognise the correct people as parents from the outset. The vast majority of our surrogate and intended parent respondents either disagreed or strongly disagreed that legal parenthood should rest with the surrogate (and her partner) and should only change upon the application for and granting of a parental order, as is the case now. Most thought that IPs should be recognised as the legal parents at birth.

Illustrating this, across all groups, the majority of respondents agreed with the statement “the current system does not assign parenthood to the correct parties from birth.”[[80]](#footnote-80) There was also very high levels of support for the statements “parental orders should be able to be pre-authorised (e.g. by a court) so they are effective from birth” and “legal parenthood should automatically rest with the IPs at birth”. There was more of an even spread of responses to the statement “surrogates should be allowed to receive payments, not just expenses”.[[81]](#footnote-81) Slightly surprisingly there was majority agreement across all groups surveyed with “surrogacy contracts should be enforceable, except where the best interests of the child are not met”.[[82]](#footnote-82)

Other interesting findings included strong support among all groups for the establishment of a regulatory body which would deal with surrogacy.[[83]](#footnote-83) There was a push in the opposite direction in relation to whether surrogacy agencies should be able to make profits, indicating that a wholly commercialised system was not preferred.[[84]](#footnote-84) However, there was a general feeling of support (not quite as strong) that people should be allowed to advertise for or as a surrogate.[[85]](#footnote-85) There was strong support among all groups that single people should be allowed to become legal parents through surrogacy.[[86]](#footnote-86) There was less - but still fairly strong - support for IPs who needed to use ‘double donation’ (therefore neither would be genetically related to the child) being able to become legal parents.[[87]](#footnote-87)

*Our recommendations*

There is no question that reform is needed. As a result of the data analysed in the report, the case studies and the results generated by the survey, the working group on surrogacy law reform recommended an urgent and full review of the law. The recommendations are premised on the primary assumption that the welfare of children born through surrogacy is paramount – and, crucially, that the law as it exists on paper is currently failing children in this regard, leaving the courts to do a considerable amount of work in papering over the holes, where possible.

More data is obviously needed, preferably in empirical form. Despite what our study has shown, there is a lack of data on the true incidence of surrogacy and/or where and how it takes place in the UK, especially as regards those arrangements made where the parties are not assisted by one of the non-profit organisations.[[88]](#footnote-88) While each of these organisations has its own data for the arrangements they help to facilitate,[[89]](#footnote-89) nothing is collected or published about ‘independently’ entered surrogacy arrangements, yet we know these occur. We also do not know how many IPs who do have a successful surrogacy arrangement, in the UK or overseas, do not then go on to apply for parental orders. We do know that, in past cases, some of the reasons given for not doing so (and then later applying beyond the six month time limit) were unawareness that one would be needed to secure legal parenthood and/or worry about the personal or financial costs of doing so.[[90]](#footnote-90) We also know that various forms of data are recorded differently in different places, depending on who is collecting it and for what purpose. It is highly likely that poor, incomplete or misleading data helps to facilitate and perpetuate surrogacy myths.

Though our survey results and data studies suggest that the proportion of overseas surrogacy is not as high as was cited in 2014, we do concede that overseas arrangements have become more common in the twenty-first century. Overseas surrogacy became easier to arrange in the internet age, especially as it has indubitably become easier to find information about the overseas clinics and surrogacy ‘packages’ available, as well as the legality of such arrangements and, crucially for many, the cost. This increase is indicated by the ‘sudden’ emergence of cases in the courts where either the judiciary had to deal with the new issues raised by these arrangements, particularly with a view to retrospectively authorising payments in order to transfer legal parenthood. The reasons people travel for surrogacy are likely to be many and varied, but some IPs view the ‘certainty’ offered by overseas surrogacy (in the sense that they come home with a baby) coupled with the speed at which an arrangement can usually be made as persuasive factors.[[91]](#footnote-91) This is clearly understandable. Though India generated ethical concerns about the potential exploitation of poor Indian women by wealthier foreigners,[[92]](#footnote-92) it seemed for a time to be becoming the dominant overseas surrogacy destination (given its favourable cost in comparison to US surrogacy). However, a large hole in the international surrogacy marketplace has been created by the closing down this route (and others) as a destination for foreigners seeking surrogacy. This led to alternative destinations emerging, albeit briefly – and often no less concerningly – but many of these have also faded from the scene as their own national concerns have overridden the desire to have foreign visitors undertaking surrogacy within their borders, and more restrictive regulation is proposed and/or passed.[[93]](#footnote-93) That said, there will always be new and emerging destinations offering surrogacy to those willing to travel not only from the UK, but elsewhere where surrogacy is either prohibited,[[94]](#footnote-94) or difficult to access.[[95]](#footnote-95) It is to be hoped that careful new legislation that is both permissive *and facilitative*, rather than discouraging or perpetuating the myths that surrogacy cannot usually be done *well* in the UK, will enable the good practice that we know exists in the UK to flourish.

Our survey findings did not support a move towards commercialised surrogacy but we agree that we should be open and honest about the payments that are being made and what they are for.[[96]](#footnote-96) One good reason, it seems, not to go overseas for surrogacy is that it is generally less expensive to undertake a surrogacy arrangement in the UK. This does not mean it is cheap and using IVF for host/gestational surrogacy also obviously adds more cost than self/home insemination (which can be used in ‘traditional’/partial surrogacy). Many IPs will have also incurred the costs of previous unsuccessful IVF attempts so their total outlay is often very significant. However, as it currently stands, demand for surrogates outstrips supply, at least via the three main non-profit organisations, who had for a period ‘closed their books’ for new intended parent members due to a shortage of surrogates.[[97]](#footnote-97) That said, the voices of those women who have been surrogates in the study survey and elsewhere, who are proud to have done so and many do so on more than one occasion, including ‘repeat’ surrogacies, are seldom heard.[[98]](#footnote-98) This may well contribute to a shortage of surrogates. However, as is the case at present, non-profit support and facilitation organisations are reliant on word of mouth, or women seeking them out having already explored surrogacy, including through popular culture,[[99]](#footnote-99) and who have understood what it entails. There *are* good sources of information and support out there; the danger is they get missed unless people know where to look.

One ‘incentive’ that may increase the number of women that come forward to be, or seek information about becoming surrogates, would be to have laws in place that make the IPs the legal parents at birth. By extension, the same change to the law may make it more likely for IPs to seek a surrogate at home. As illustrated above, the majority of surrogates believe that legal parenthood should *not* rest with them and presumably there is a worry that if ‘something goes wrong’ they would be left with a baby that they did not want. This change could be achieved either by reversing the presumption of motherhood that exists in the legislation, purely for surrogacy,[[100]](#footnote-100) or by some form of pre-approval process, similar to the investigations that happen in any case when an application for a parental order is made, including checks on the applicants by CAFCASS parental order reporters.[[101]](#footnote-101) One thing this would remove is post-birth approval of living and care arrangements (as opposed to health visitor visits), which those who have children naturally, or who come into families as de-facto parents, or even those who have children through other means of assisted conception do not have to undergo. Similarly, those who *do not apply* for a parental order are not assessed in this way, meaning that some surrogate-born children are differently treated in any case.

What is it about surrogacy that makes us doubt the motivations and parenting abilities of those who undertake it? It might be argued that this kind of investigation is both generated by and helps to facilitate surrogacy myths and therefore that its removal may help in that respect. One reason for this check on the parenting abilities of IPs is the historic weddedness of surrogacy to adoption.[[102]](#footnote-102) But surrogacy is *not* a form of adoption – it is not the state making a decision about the future care of a child that already exists and is faced with unfortunate circumstances that the state becomes responsible or takes responsibility for. If surrogacy is truly to be viewed as a legitimate form of family inception and creation, then the perception that it is like adoption must be challenged. As we heard and keep hearing from women who have been surrogates, they don’t view what they do as giving a baby away, they view it as giving it ‘back’ after having looked after it for a period of time. Many compare it to baby-sitting.[[103]](#footnote-103) Others resort to euphemism: ‘their bun, my oven’, for example. It is only the law that treats surrogacy as a practice where a baby is *taken* from a woman, and this has roots back in the Warnock Report recommendations and Mary Warnock’s own admitted view that, then, she simply could not understand how a woman could want to give away a baby.[[104]](#footnote-104)

**Conclusions**

Our preferred version of new surrogacy laws – ‘surrogacy 2.0’ – should be underpinned by the following principles:

* + Reform must centre on the welfare of children/families;
	+ Existing data on surrogacy arrangements entered both domestically and overseas is inadequate – before reform happens it is important to take time to address this. Reform should also focus on how data is collected post-reform;
	+ Studies should be undertaken looking at why people go overseas for surrogacy, despite the risks and cost.[[105]](#footnote-105) Why is the UK not the first choice for some people and how can we make it so?
	+ We should continue to allow reimbursement payments for surrogates while promoting surrogacy as a relationship and not a transaction;
	+ We should consider ways of recognising IPs as legal parents at birth;
	+ Single people / double donation couples should be able to become parents through surrogacy;[[106]](#footnote-106)
	+ Rules on surrogacy-related advertising and mediation of arrangements should be reviewed in context of non-profit organisations;
	+ State agents involved (DoH, MoJ, Cafcass etc) should produce better, clearer and joined-up guidance for those involved and professionals who work with those going through surrogacy.[[107]](#footnote-107)

Though the working group cannot and does not claim to represent everyone who has been through surrogacy, we have evidence of the voice of a large section of the surrogacy world, particularly the ‘domestic’ side. That is, we have a good – if imperfect – picture of the practice of surrogacy in the UK. It seems, from the sheer number of respondents we obtained, that surrogates and IPs are happy and proud to speak about what they have done and how they have done it and, importantly, want to share their experiences. This is excellent, as it is the voices of those who *do* surrogacy that have been so lacking in the debate – in the UK and elsewhere – for many years.[[108]](#footnote-108) What these people would also prefer, however, is a better legal framework which represents more accurately what happens in surrogacy – their experiences of it and their understanding of it. It is on this basis, combined with the cracks in the existing legal system that have been slowly but consistently being exposed over the last decade or so, that we urged the government to revisit surrogacy, in the best interests of the children and families concerned. We welcome, therefore, the Law Commission’s review of surrogacy laws and will continue to make representations to its enquiry. It is important that any new proposals are fully debated – both in public and (eventually) in parliament – and that the views of the real people whose lives are affected are taken into account. What we are aiming for is the careful formulation of new and comprehensive legislation that recognises the value of surrogacy as a legitimate way of having children and helps to protect and facilitate the altruistic, compensatory nature of surrogacy in the UK, while preventing commercialisation and sharp practice.

1. See e.g. Childlessness Overcome Through Surrogacy (COTS), which says that ‘around 98 per cent of arrangements involving COTS members have reached successful conclusions’ (<https://www.surrogacy.org.uk/aboutsurrogacy> accessed 24 January 2018). COTS has operated since 198X. The COTS website also admits that the ‘general public may be forgiven for thinking that a sizable percentage of surrogate arrangements in Britain turn sour, given the level of publicity that surrounds such cases’. Surrogacy UK, established in 2002, says that it has never had ‘a surrogate that has wished to keep the baby, and all [arrangements] have resulted in a parental order being granted’ (<https://www.surrogacyuk.org/press_resources.html> accessed 24 January 2018). [↑](#footnote-ref-1)
2. The information pages of specialist law firm Natalie Gamble Associates describes such disputes as ‘very rare’ (‘Disputes between parents and surrogates’ <http://www.nataliegambleassociates.co.uk/knowledge-centre/disputes-between-parents-and-surrogates> accessed 25 January 2018). It goes on to detail only five cases where there was a dispute between the IPs and the surrogate, spanning the period 2007-2017. [↑](#footnote-ref-2)
3. See Hedley J in *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (at [24]), giving the approach that has been followed in subsequent cases, especially since The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/986) made the welfare of children born from a surrogacy arrangement the paramount consideration of the court. [↑](#footnote-ref-3)
4. Pamela White, ‘“Desperately seeking surrogates”: Thoughts on Canada’s emergence as an international surrogacy destination’, paper given at *Regulating Surrogacy: Problems and Potential Solutions*, University of Kent, 19 November 2017. See also the judgment of Russell J in *A B and C (UK surrogacy expenses)* [2016] EWFC 33, especially at [22]. [↑](#footnote-ref-4)
5. e.g. Kirsty Horsey and Sally Sheldon, (2012) ‘Still Hazy after all these years: The Law Regulating Surrogacy’ 20(1) *Medical Law Review* 67; Kirsty Horsey, ‘Fraying at the edges: UK Surrogacy Law in 2015’ (2016) 24(4) *Medical Law Review* 608; Amel Alghrani and Danielle Griffiths ‘Surrogacy regulation in the UK: the case for reform’ (2017) 29(2) *CFLQ* 165; Alan Brown ‘Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy’ (2018) 30(1) *CFLQ* 23. [↑](#footnote-ref-5)
6. e.g. Helen Prosser and Natalie Gamble, ‘Modern surrogacy practice and the need for reform' (2016) 4(3) *Journal of Medical Law and Ethics* 257; [↑](#footnote-ref-6)
7. Notwithstanding judicial comment to this effect within case law, see also Owen Bowcott, ‘Unregistered surrogate-born children creating 'legal timebomb', judge warns’ *The Guardian* 18 May 2015. [↑](#footnote-ref-7)
8. In 2014 Jessica Lee MP led a Westminster Hall debate on surrogacy (Hansard, 14 Oct 2014: Column 1WH); In December 2016, Baroness Barker led a debate in the House of Lords on surrogacy law reform (Hansard 4 Dec 2016, Volume 777, Col 1317). In December 2017, Andrew Percy MP launched an All Party Parliamentary Group (APPG) on surrogacy law reform (see ‘Inaugural Meeting for the APPG on Surrogacy’ 19 December 2017, <http://www.andrewpercy.org/news/1379-inaugural-meeting-for-the-appg-on-surrogacy> accessed 20 January 2018). [↑](#footnote-ref-8)
9. e.g. Blyth, E., Crawshaw, M, and Fronek,P. (2015) ‘Reform of UK Surrogacy Laws: the need for evidence’, *BioNews* 813. See also Jamie Doward, ‘Childless UK couples forced abroad to find surrogates’ *The Observer* 20 February 2016. [↑](#footnote-ref-9)
10. *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). [↑](#footnote-ref-10)
11. Phillip Dunne, ‘Human Fertilisation & Embryology Act 2008: Remedial Order: Written statement - HCWS282’ 29 November 2017, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-11-29/HCWS282/> accessed 24 January 2018. [↑](#footnote-ref-11)
12. Law Commission, ‘14 new areas of law set for reform’, 14 December 2017 <https://www.lawcom.gov.uk/13th-programme-of-law-reform/> accessed 20 January 2018. [↑](#footnote-ref-12)
13. Law Commission, Thirteenth Programme of Law Reform (Law Com No 377, December 2017), para 2.42. [↑](#footnote-ref-13)
14. APPG on Surrogacy, Statement of Purpose, January 2018 (from private communication). [↑](#footnote-ref-14)
15. Department of Health and Social Care, ‘Having a child through surrogacy’, 28 February 2018 <https://www.gov.uk/government/publications/having-a-child-through-surrogacy> accessed 14 March 2018. [↑](#footnote-ref-15)
16. Law Commission, ‘Surrogacy laws set for reform as Law Commissions get Government backing’ 4 May 2018 <https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/> accessed 4 May 2018. [↑](#footnote-ref-16)
17. Law Commission, note 13 above, para 2.41. [↑](#footnote-ref-17)
18. Kirsty Horsey, ‘Swept under the carpet: Why surrogacy law needs urgent review’ in Priaulx and Wrigley, *Ethics, Law and Society* (vol.5) (Ashgate, 2013). [↑](#footnote-ref-18)
19. See, for interesting insight into Australia’s experience of this, Emily Jackson, Jenni Millbank, Isabel Karpin and Anita Stuhmcke 'Learning from Cross-border Reproduction' (2017) 25(1) *Medical Law Review* 23-46. Note, however, that some of these overseas destinations have since closed their borders and clinics to foreigners seeking surrogacy. [↑](#footnote-ref-19)
20. *Report of the Committee of Inquiry into Human Fertilisation and Embryology* Cm 9314 (1984) (London: HMSO). [↑](#footnote-ref-20)
21. Horsey, K., ‘Not withered on the vine: The need for surrogacy law reform’ (2016) 4(3) *Journal of Medical Law and Ethics* 181. That the formulation of the law was meant to discourage people from entering surrogacy arrangements is discussed in the Brazier Report on surrogacy (*Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (1998) (London: HMSO), para 2.23), and see Brazier, M., ‘Regulating the Reproduction Business?’ (1999) *Medical Law Review* 166, at 180). [↑](#footnote-ref-21)
22. The Human Fertilisation and Embryology (HFE) Act 1990 (s.36) inserted s.1A into the Surrogacy Arrangements Act to this effect. [↑](#footnote-ref-22)
23. HFE Act 2008 s.54(8) – in practice, however, this does not happen, as we have seen. [↑](#footnote-ref-23)
24. Surrogacy Arrangements Act 1985, ss.2 and 4. [↑](#footnote-ref-24)
25. ibid s.3. [↑](#footnote-ref-25)
26. ibid s.2(5A), inserted by s.59(5) HFE Act 2008. [↑](#footnote-ref-26)
27. The Fertility Show, for example, is held at Kensington Olympia every November; the non-profit organisation Families Through Surrogacy runs ‘consumer-based’ conferences in the UK and other countries annually. [↑](#footnote-ref-27)
28. As illustrated by a number of recent cases, including *CW v NT & Anor* [2011] EWHC 33 (Fam), *Z (surrogacy agreements : Child arrangement orders)* [2016] EWFC 34 (decision upheld in *Re M (Child)* [2017] EWCA Civ 228) and  *A B and C (UK surrogacy expenses)* [2016] EWFC 33 (in which Russell J appeared to express her concerns about such arrangements, saying it ‘provide[s] further illustration of the need for better regulation of surrogacy agreements in the United Kingdom recognising the reality that there is an existing market’ (at [1])). [↑](#footnote-ref-28)
29. *Z* (ibid) involved a surrogate described as an emotionally ‘vulnerable young woman’ ([46]) as well as financially and economically vulnerable and open to exploitation ([54]). As Russell J commented, this ‘unregulated form of surrogacy means that there are on the one side vulnerable surrogates, and on the other commissioning parents who are legally unprotected from unpredictable outcomes’ (at [2]). [↑](#footnote-ref-29)
30. The dangers of ‘do-it-yourself’ forms of assisted reproduction have been highlighted by Emily Jackson and it seems that surrogacy is no different (‘The law and DIY assisted conception’ in Horsey, K (ed.), *Revisiting*

*the Regulation of Human Fertilisation and Embryology* (Routledge, 2015) 31-49. [↑](#footnote-ref-30)
31. Except for children born before 2009, to whom the parenthood provisions of the HFE Act 1990 still apply. [↑](#footnote-ref-31)
32. See Horsey, and Brown, note 5, above. [↑](#footnote-ref-32)
33. S.33(1) HFE Act 2008. [↑](#footnote-ref-33)
34. *Re* *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam). [↑](#footnote-ref-34)
35. SS.35 and 42 HFE Act 2008, respectively. There is obviously discussion to be had about the power of terminology, here, in that there cannot be two ‘mothers’ permitted under the legislation, even when that is the intent, and the familial reality. [↑](#footnote-ref-35)
36. SS. 36 and 37 HFE Act 2008 (‘agreed fatherhood conditions’). [↑](#footnote-ref-36)
37. S.54 HFE Act 2008. [↑](#footnote-ref-37)
38. Among other cases, see *X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam); *A & B (Children) (Surrogacy: Parental Orders: Time Limits)* [2015] EWHC 911 (Fam); *A & B (No 2—Parental Order)* [2015] EWHC 2080 (Fam); *AB v CD (Surrogacy—Time Limit and Consent)* [2015] EWFC 12 (Fam) and *A and B (Children: Surrogacy: Parental Orders: Time limit)* [2015] EWHC 911 (Fam). [↑](#footnote-ref-38)
39. Though because there is no limit on payments, only a notional concept of ‘reasonable expenses’, this has been the practice since the parental order requirements were introduced in the earlier legislation, notable recent examples include *X & Y (Foreign Surrogacy)* [2008] EWHC 3030; *Re L (a minor)* [2010] EWHC 3146 (Fam); *Re IJ (Foreign Surrogacy Agreement Parental Order)* [2011] EWHC 921 (Fam); *A v P* [2011] EWHC 1738 (Fam); *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam); *A B and C (UK surrogacy expenses)* [2016] EWFC 33 (where Russell J questioned the payments made to three different surrogates by the same IPs were all for genuine ‘expenses’ (at [15]). [↑](#footnote-ref-39)
40. In *Re L* [2010] EWHC 3030 (Fam), Hedley J found that the welfare principle must outweigh any other concerns, other than in the clearest cases of abuse of public policy (at [10]). [↑](#footnote-ref-40)
41. See *KB & RJ v RT (Rev 1)* [2016] EWHC 760 (Fam). [↑](#footnote-ref-41)
42. *Z (A Child : Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73. [↑](#footnote-ref-42)
43. Note 10, above. [↑](#footnote-ref-43)
44. Note 11, above. [↑](#footnote-ref-44)
45. Note 15, above; ‘The Surrogacy Pathway’, p.4. [↑](#footnote-ref-45)
46. *A* v *C* [1985] FLR 445, Per Ormrod J at 455. [↑](#footnote-ref-46)
47. Hansard, 14 Oct 2014 <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm141014/halltext/141014h0001.htm> accessed 20 January 2018 [↑](#footnote-ref-47)
48. See e.g. Owen Boycott, ‘Unregistered surrogate-born children creating 'legal timebomb', judge warns’ *The Guardian* 18 May 2015. [↑](#footnote-ref-48)
49. Hansard, ibid, Column 1WH [↑](#footnote-ref-49)
50. Crawshaw, M., Blyth, E., and van den Akker, O. ‘The changing profile of surrogacy in the UK – Implications for national and international policy and practice’ (2012) 32(3) *Journal of Social Welfare and Family Law* 267. [↑](#footnote-ref-50)
51. Though if even approaching anything like true, the point raised by Stephen McPartland MP later in the debate is concerning: ‘we do not have the full figures. There are no official records apart from the parental order register. To put that register into context, an estimated 1,000 children are born through Indian surrogacy each year, but in 2012, the family court granted only 213 parental orders. That suggests that there may be thousands of children in the UK living with adults who are not their legal parents’ (Hansard, note 33, Column 7WH). [↑](#footnote-ref-51)
52. See, for criticism of this, Blyth, E., Crawshaw, M, and Fronek,P., note 9, above. [↑](#footnote-ref-52)
53. <http://www.kent.ac.uk/law/research/projects/current/surrogacy/index.html> endorsed by Lady Mary Warnock, architect of the current law, and Professors Susan Golombok and Margaret Brazier, who were two members of the 1998 Surrogacy Review (note 21, above). [↑](#footnote-ref-53)
54. Interesting in this respect is the recently published Human Fertilisation and Embryology Authority ‘Fertility Treatment 2014–2016: Trends and figures’ (March 2018) <https://www.hfea.gov.uk/media/2563/hfea-fertility-trends-and-figures-2017-v2.pdf> accessed 20 March 2018, which for the first time includes data on surrogacy performed in licensed clinics (pp43-45). [↑](#footnote-ref-54)
55. Such myths were also recognised by Blyth, E., Crawshaw, M, and Fronek,P., note 9, above. [↑](#footnote-ref-55)
56. Some entirely impossible to predict, such as the Nepal earthquake. But it is interesting to note that many of the international surrogacy destinations that gained popularity in the first decade of this century have ‘closed’ to foreign IPs, including India, Thailand, Nepal and Mexico. [↑](#footnote-ref-56)
57. Yotam Ottolengi, celebrity chef and father of two children born via surrogacy in California, said as much when speaking at a London conference on surrogacy in March 2016, acknowledging that for each child, he and his partner had paid costs in excess of £100,000 and ‘probably more’, He recognised, when questioned, that it was ‘OK for him’ but potentially financially crippling for others. This, too, would seem not to fully support the best interests of children. [↑](#footnote-ref-57)
58. Note 38, above. [↑](#footnote-ref-58)
59. Ibid, e.g., especially at [19]. [↑](#footnote-ref-59)
60. Children and Family Court Advisory and Support Service, ‘Surrogacy’ <https://www.cafcass.gov.uk/grown-ups/parents-and-carers/surrogacy/> accessed 20 January 2018. [↑](#footnote-ref-60)
61. Note 15, above. [↑](#footnote-ref-61)
62. Used Bristol Online Survey software. [↑](#footnote-ref-62)
63. E.g. comp to the no of responses in the 1998 Report (note 21, above). [↑](#footnote-ref-63)
64. Apart from the low number (19), another indicator I had of this was the amount of private correspondence I had after the survey closed, particularly from overseas surrogacy users, apologising for missing it, asking if there was still an opportunity to respond and volunteering contact details for future follow-up. An independent ‘facilitator’ of overseas arrangements also came late to the survey. This perhaps is a reflection of the time period, it being summer when many had been on holiday and missed the link to the survey that they were sent. [↑](#footnote-ref-64)
65. In a 2016 paper, they said that their records show that between ‘2009 when Natalie Gamble Associates opened and October 2016, we gave legal advice on 672 surrogacy cases, 211 involving surrogacy in the UK and 461 involving overseas surrogacy’ (note 7 above, at 257). [↑](#footnote-ref-65)
66. Note 53 above, p.20, 22. [↑](#footnote-ref-66)
67. Ibid, p.22. [↑](#footnote-ref-67)
68. Jennifer Readings, Lucy Blake, Polly Casey, Vasanti Jadva, and Susan Golombok, (2011) ‘Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy’ 22(5) *Reproductive Biomedicine Online* 485. [↑](#footnote-ref-68)
69. Ibid, p.21. [↑](#footnote-ref-69)
70. Ibid, p.20. [↑](#footnote-ref-70)
71. Ibid, p.23. [↑](#footnote-ref-71)
72. Ibid, p.24. [↑](#footnote-ref-72)
73. Ibid, p.23. [↑](#footnote-ref-73)
74. Ibid, p.24. [↑](#footnote-ref-74)
75. Ibid, pp.25-6. [↑](#footnote-ref-75)
76. See also Lucas Taylor, ‘Surrogate families made to hand over babies in car parks’ *BioNews* 877, 14 November 2016. [↑](#footnote-ref-76)
77. Note 53 above, pp.26-7. Appendix 2 of the Report breaks these responses down in charts by respondent group (and more categories not mentioned here). [↑](#footnote-ref-77)
78. The HFE Act 2008 amended the provision that limited the availability of parental orders to married heterosexual couples by adding couples in civil partnerships (the Civil Partnership Act was passed in 2004) and in ‘enduring family relationships’. [↑](#footnote-ref-78)
79. *RKA v Secretary of State for Work and Pensions* (2012) highlighted this issue. The Children and Families Act 2014 allowed parents through surrogacy and eligible/intending to apply for a Parental Order the same rights to time off work to care for their new children as those adopting children. [↑](#footnote-ref-79)
80. Surrogates: [104 responses] - 65 strongly agreed, 25 agreed, 3 disagreed and only 2 strongly disagreed – showing that surrogates do not want to be recognised as the legal mother. IPs (UK): [182 responses] - 137 strongly agreed, 29 agreed, 2 disagreed and only 1 strongly disagreed – this is less surprising as IPs obviously want to be legal parents

IPs (overseas): [19 responses] – 13 strongly agreed, three agreed, one disagreed and one strongly disagreed. Others: [110 responses] – 61 strongly, 24 agree, four disagreed and two strongly disagreed – we were not surprised to find more variation here (there were also 11 ‘don’t know / don’t wish to answer’ responses). [↑](#footnote-ref-80)
81. More surrogates disagreed/strongly disagreed than agreed – only 14 strongly agreed. Amongst IPs (UK), only eight strongly agreed but 41 agreed, 39 were neutral, 36 disagreed and 49 strongly disagreed. This pattern was reversed in IPs who went overseas where 15 of the 19 agreed or strongly agreed with the statement. [↑](#footnote-ref-81)
82. From the surrogates - 48 strongly agreed, 36 agreed, five disagreed and six strongly disagreed – indicating that most surrogates would be happy to enter enforceable contracts (the survey did not go into questions of autonomy etc but we hope to include this in the follow up). IPs (UK): 92 strongly agreed, 55 agreed, nine disagreed and only three strongly disagreed. IPs (overseas): 14 strongly agreed, four agreed, one disagreed and one strongly disagreed. Others – 44 strongly agreed, 36 agreed, three disagreed and seven strongly disagreed – perhaps we might have expected more variation here, so this section of responses was surprising. We also recognise that the part of the phrase saying ‘except when the best interests of the child were not met’ may be slightly leading, but it does lead to the conclusion that where best interests of the child(ren) are not in question, enforceability of surrogacy arrangements appears to be a preferred option. [↑](#footnote-ref-82)
83. Appendix 3, p.50. [↑](#footnote-ref-83)
84. Ibid, p.51. [↑](#footnote-ref-84)
85. ibid. [↑](#footnote-ref-85)
86. ibid, p.55. [↑](#footnote-ref-86)
87. ibid. [↑](#footnote-ref-87)
88. This is not a new claim: see e.g. Eric Blyth, ‘“I wanted to be interesting. I wanted to be able to say ‘I’ve done something interesting with my life’”: Interviews with Surrogate Mothers in Britain’, (1994) 12(3) *Journal of Reproductive and Infant Psychology* 189; Crawshaw, M., Blyth, E. & van den Akker, O., (2012) ‘The changing profile of surrogacy in the UK – Implications for national and international policy and practice’, 34(3) *Journal of Social Welfare and Family Law* 267; Horsey and Sheldon, note 5 above; Report, note 53 above. [↑](#footnote-ref-88)
89. E.g. COTS had a ‘1000th birth’ party in September 2016 (see also COTS’ 1000th baby misreported as UK’s 1000th surrogate baby in <http://www.dailymail.co.uk/news/article-3911270/Mother-Britain-s-1-000th-surrogate-child-reveals-struggle-infant-handed-hospital-car-park.html>, accessed 28 January 2018); SUK shares the number of babies born each year to their members and supporters, and via press release (see e.g. ‘Surrogacy UK Celebrates Birth of 150th Baby!’ 8 June 2016, available at <https://www.surrogacyuk.org/press_resources.html>, accessed 28 January 2018). [↑](#footnote-ref-89)
90. See e.g. *A & B (No 2 - Parental Order)* [2015]. [↑](#footnote-ref-90)
91. Working group survey, free text answers. See also the Report, note 53 above, p.24. [↑](#footnote-ref-91)
92. See e.g. Amrita Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (2014: Columbia University Press); Sharmila Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (2015: New York University Press). [↑](#footnote-ref-92)
93. See e.g. Sharmila Rudrappa, ‘India outlawed commercial surrogacy – clinics are finding loopholes’ *The Conversation* 23 October 2017. [↑](#footnote-ref-93)
94. As we have seen from cases reaching the European Court of Human Rights, prohibition does not stop people accessing surrogacy – see eg *Mennesson v France* (Application n. 65192/11, Judgment 26 June 2014); *Labassee v France* (Application n. 65941/11, Judgment 26 June 2014); *Paradiso and Campanelli v Italy* (Application n. 25358/12, Judgment 27 January 2015). [↑](#footnote-ref-94)
95. Jackson et al, note 19 above. FTS adverts for March 2018 tell of new and emerging surrogacy destinations in Russia and Kenya, as well as the relatively newly-established Canadian market (<http://www.familiesthrusurrogacy.com/uk2018/> accessed 27 January 2018). [↑](#footnote-ref-95)
96. Russell J, no X above. [↑](#footnote-ref-96)
97. See e.g. Brilliant Beginnings, ‘UK surrogacy law reform’ at <http://www.brilliantbeginnings.co.uk/campaigning/simplify-surrogacy-law> (accessed 28 January 2018); Prosser and Gamble, note 6 above. [↑](#footnote-ref-97)
98. Sarah T Jones, ‘I have been a surrogate four times – and this is what it's really like’ *The Independent* 18 January 2018; Michael Rose, ‘Surrogate mother calls for 'old-fashioned' laws on births to be changed’, *The Guardian* 18 January 2018. [↑](#footnote-ref-98)
99. In the latest of ‘celebrity’ surrogacy stories, see e.g. ‘Kim Kardashian and Kanye West Welcome Baby Girl via Surrogate’ *Huffington Post* 16 January 2018 or ‘Tom Daley's Husband Dustin Lance Black Hits Back at Criticism over Surrogacy’ *Huffington Post* 23 March 2018; surrogacy has also recently featured as a prominent storyline on Radio 4’S *The Archers* (see Olivia Montuschi, ‘Radio review: Surrogacy in *The Archers’* *BioNews* 935, 29 January 2018. [↑](#footnote-ref-99)
100. K Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' [2010] CFLQ 449. [↑](#footnote-ref-100)
101. This is similar to the Greek model, where parenthood is awarded to the IPs at birth, them having had to submit to the court documentation proving infertility etc. While it is not suggested that the same level of documentation be required, and the Greek model has its flaws in (at least) that same sex couples cannot access parenthood through surrogacy, the principle of the model is sound and worth exploring. See further Horsey, K. and Neofytou, K., (2015) ‘The Fertility Treatment Time Forgot: What should be done about Surrogacy in the UK?’ in Horsey, K. (ed.), (2015) *Revisiting the Regulation of Human Fertilisation and Embryology* (Abingdon: Routledge), 117. [↑](#footnote-ref-101)
102. That the model for parental orders is actually adoption law, because of the transfer of legal parenthood that takes place, was confirmed by the Department of Health *Consultation on a Review of Parental Order Regulations*, September 2009 (paras. 3-7; 11), [http://webarchive.nationalarchives.gov.uk/20100408023603/http://www.dh.gov.uk/prod\_consum\_dh/groups/dh\_digitalassets/documents/digitalasset/dh\_104797.pdf accessed 25 January 2018](http://webarchive.nationalarchives.gov.uk/20100408023603/http%3A//www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_104797.pdf%20accessed%2025%20January%202018). Arguably, this is a historic accident. The original amendment to the HFE Act 1990 which introduced parental orders originated from a case where a couple objected to having to adopt their own genetic children. The amendment’s late introduction as a form of ‘fast-track’ adoption meant the principle of how parenthood should be recognised following surrogacy was never fully debated. [↑](#footnote-ref-102)
103. Sarah T Jones, note 98 above. [↑](#footnote-ref-103)
104. Mary Warnock, ‘Foreword: The need for full reform of the law on surrogacy’ (2016) 3 *JMLE* 1. [↑](#footnote-ref-104)
105. See Jackson et al, note 19 above. [↑](#footnote-ref-105)
106. The first of these will hopefully have taken place by the date of publication. At the time of writing the Joint Committee on Human Rights has reviewed responses submitted regarding the remedial order laid by the Government in November 2017 and the Department of Health has consulted on new Parental Order Regulations. It is to be hoped that nothing stalls the process further and after the second scrutiny period the remedial order becomes law. [↑](#footnote-ref-106)
107. As indicated, the guidance drafted and hosted by the Department of Health (note 15 above) has already been published. [↑](#footnote-ref-107)
108. Though we do know from longitudinal research that surrogacy-created families fare well, if not better, than their comparators: see e.g. Golombok, S., Murray, C., Jadva, V., MacCallum, F. and Lycett, E., (2004) ‘Families created through surrogacy arrangements: Parent-child relationships in the first year of life’ 40 *Developmental Psychology* 400; Golombok, S., MacCallum, F., Murray, C., Lycett, E. and Jadva, V., (2006) ‘Surrogacy families: Parental functioning, parent-child relationships and children’s psychological development at age 2’ 47(2) *Journal of Child Psychology and Psychiatry* 213; Golombok, S., Murray, C., Jadva, V., Lycett, E., MacCallum, F. and Rust, J., (2006) ‘Non-genetic and nongestational parenthood: Consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3’ 21 *Human Reproduction* 1918; Golombok, S., Casey, P., Readings, J., Blake, L., Marks, A. and Jadva, V., (2011) ‘Families created through surrogacy: Mother-child relationships and children’s psychological adjustment at age 7’ 47(6) *Developmental Psychology* 1579; Golombok, S., Blake, L., Casey, P., Roman, G., and Jadva, V., (2013) ‘Children born through reproductive donation: A longitudinal study of child adjustment’ 54 *Journal of Child Psychology and Psychiatry* 653; Jadva, V. and Imrie, S., (2013) ‘Children of surrogate mothers: Psychological well-being, family relationships and experiences of surrogacy’ 29(1) *Human Reproduction* 90; Jadva, V., Imrie, S. and Golombok, S., (2015) ‘Surrogate mothers 10 years on: A longitudinal study of psychological wellbeing and relationships with the parents and child’ 30(2) *Human Reproduction* 373. There have also been published studies showing that motivations and experiences of women who become surrogates are generally positive (e.g. Van den Akker, O., ‘Genetic and gestational surrogate mothers’ experience of surrogacy’ (2003) 21(2) Journal of Reproductive and Infant Psychology 145; Jadva, V., Murray, C., Lycett, E., MacCallum, F. and Golombok, S., (2003) ‘Surrogacy: The experiences of surrogate mothers’ 18(10) Human Reproduction 2196). [↑](#footnote-ref-108)