



The Bar Council

Law Reform Essay Competition 2023: Winner, Graduate Diploma in Law

'Paving the way for modernisation and better clarity of UK surrogacy practice: proposals for reform of current statute' by Iona McNeill

Introduction

Surrogacy¹ has long been used as a means for those unable to conceive, or carry a child 'naturally', to have children and form a family. Regulation of UK surrogacy was introduced via the Surrogacy Arrangements Act (SAA) 1985, and augmented by the Human Fertilisation and Embryology Act (HFEA) 2008.^{2,3}

However ongoing discourse about the inadequacies of existing legislation led to petition for reform, and in early 2023 a Law Commissions' report was produced.⁴ Since its release, little has been published to explore whether its findings might serve to resolve the identified shortcomings of current statute. This essay explores ways in which proposals from the report, suggestions from academics and the judiciary, and practices that have proved effective in the regulation of surrogacy overseas might be adopted, via law reform, to create UK legislation that is fit for purpose: to help those embarking on surrogacy to navigate the emotionally charged experience and to offer robust legal protection to all parties.

The starting point: a brief history of surrogacy

Humans have 'a deep desire to propagate..[it] is part of who we, as people, are'.⁵ However, 1:6 people are affected by infertility and assisted reproduction methods have limited success; in 2021, the UK pregnancy rate following fresh embryo transfer

¹ The practice whereby a 'surrogate mother' carries a child for 'intended parents' on the (pre-conception) agreement that the child be handed over after birth.

² Surrogacy Arrangements Act 1985.

³ Human Fertilisation and Embryology Acts 1990 and 2008.

⁴ Law Commission, *Building Families Through Surrogacy: A New Law* (Law Com No 411, 2023).

⁵ Shauna Gardino and Linda Emanuel, 'Choosing Life When Facing Death' (2010) 156 *Oncofertility* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3086480/>> accessed 27 September 2023.

was 29%.^{6,7} Many couples are unable to conceive and, with growing numbers of single-sex couples and individuals seeking to have children and form a family, surrogacy offers an increasingly sought, humane and ethical route to parenthood. The advent of assisted reproductive capabilities revolutionised fertility treatment but also blurred the boundaries of what it is to parent a child, while modern attitudes have widened the definition of 'family'; all leading to increasing numbers of babies born of surrogacy. There are no official statistics, but 'Brilliant Beginnings', a not-for-profit surrogacy agency, suggests that 500+ children per year are born through surrogacy to UK parents.⁸

Traditional surrogacy⁹ has long been practised. The first documented surrogacy agreement was made between Abraham, his wife Sarah, and her servant Hagar; the Old Testament records that Sarah, unable to conceive, told Abraham to 'go into my slave-girl, it may be that I shall obtain children by her' and that Abraham 'went into Hagar and she conceived'.¹⁰ However even then, problems arose in the surrogacy agreement, and when Sarah, somewhat improbably given her 90 years, gave birth naturally to Isaac, the child born of the surrogacy arrangement was banished to the wilderness, along with Hagar.¹¹ The first successful gestational surrogacy¹² took place in 1985, with year-on-year increases in numbers since, and the Law Commission recognises that 'the impact that the law has on all those affected by surrogacy is significant'.¹³ Clearer legal guidelines for surrogacy practice are therefore needed.

Where are we now? Current UK surrogacy law

The SAA, introduced following the controversial case of Baby Cotton, regulates UK surrogacy.¹⁴ Kim Cotton¹⁵ has suggested that the legislation was 'rushed through...as

⁶ World Health Organisation, '1 in 6 people globally affected by infertility: WHO' (WHO, 4 April 2023) <<https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility>> accessed 27 September 2023.

⁷ Human Fertilisation and Embryology Authority, 'Fertility Treatment 2021: Preliminary Trends and Figures' (2023) Human Fertilisation and Embryology Authority <<https://www.hfea.gov.uk/about-us/publications/research-and-data/fertility-treatment-2021-preliminary-trends-and-figures/>> accessed 27 September 2023.

⁸ Brilliant Beginnings, 'Surrogacy Law Reform: Parliamentary Briefing Paper 2020' (2020) Brilliant Beginnings <[Parliamentary-briefing-paper-2020.pdf \(brilliantbeginnings.co.uk\)](https://brilliantbeginnings.co.uk/Parliamentary-briefing-paper-2020.pdf)> accessed 14 June 2023.

⁹ Traditional surrogacy: the surrogate is genetically related to the child, with artificial insemination used to fertilise one of her own eggs.

¹⁰ English Standard Version Bible, Genesis Chapter 16, v 2-4.

¹¹ English Standard Version Bible, Genesis Chapter 10, v 10,14.

¹² Gestational surrogacy: the surrogate is not genetically related to the child, being impregnated with an embryo created by *in-vitro fertilisation* of another woman's egg.

¹³ Law Commission and the Scottish Law Commission, 'Building Families Through Surrogacy: A New Law – Summary Report' (2023) Law Commission <[Law Commission Surrogacy Overview.pdf](https://www.lawcommission.gov.uk/publications/building-families-through-surrogacy-a-new-law-summary-report)> accessed 29 May 2023.

¹⁴ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

a knee jerk reaction to public opinion'.¹⁶ Others have shared these concerns, Freeman suggesting that '[t]here are few better modern examples of morally panicked legislation'.¹⁷ Despite its hurried conception, the Act has served in 'regulat[ing] certain activities in connection with arrangements made with a view to [surrogacy]'.¹⁸ The Act makes surrogacy arrangements legal, with Field recognising that 'all the requisites of a valid contract are present' in the agreements.¹⁹ However s.1A of the Act renders '[s]urrogacy arrangements unenforceable...by or against any of the persons making [them]'.²⁰ This has proved a major obstacle in implementing regulation of surrogacy practice; labelled by Purshouse as one of the 'most problematic aspects' of the legislation, while Horsey criticises it for 'failing to adequately protect...children and families'.^{21,22} Case law demonstrates frequent dispute over unenforceable surrogacy arrangements; the terms of an agreement were 'highly contested' post-birth in the case of *H v S*.²³ Undoubtedly this 'unenforceability clause' is problematic, but some recognise value in s.1A: Field argues against surrogacy agreements being enforceable because some aspects of the practice are so 'visceral and personal that [a change of position] should not be judged by the same yardstick of rational agreement as bargains made in the workplace'.²⁴ Indeed case law demonstrates that the provisions of s.1A can be effective in regulating surrogacy agreements: the judge in the case *Re Z* ruled that, despite having no genetic connection with the birth-mother, it was in the child's best interests to remain with her when the relationship with the intended parents broke down.²⁵

In 2008, the HFEA replaced the 1990 Act, providing updated legislation on the assisted reproduction technologies which are central to modern surrogacy practice, and becoming an integral part of the current statute governing surrogacy. It determines the birth-mother and her partner as legal parents until the intended parents apply for a parental order within six months of the birth, and guides various aspects of surrogacy practice.²⁶ However the legislation presents a dichotomy in the legal stance on whether surrogates should be paid. S.2 of the SAA makes it an

¹⁵ Kim Cotton, described as the UK's first commercial surrogate mother, agreed to carry the baby of an anonymous couple for £6,500.

¹⁶ Kim Cotton, 'Baby Cotton Onwards: UK Surrogacy Law Needs to Keep Pace' (PET – Fertility, Geonomics, Clarity, 26 August 2019) <<https://www.progress.org.uk/baby-cotton-onwards-uk-surrogacy-law-needs-to-keep-pace/>> accessed 05 June 2023.

¹⁷ Michael Freeman, 'Does Surrogacy Have a Future After Brazier?' (1999) 7(1) Med LJ 12.

¹⁸ Surrogacy Arrangements Act 1985.

¹⁹ Martha A. Field *Surrogate Motherhood* (Harvard University Press, 1988) 76, 78-9.

²⁰ Surrogacy Arrangements Act 1985 s.1A.

²¹ Craig Purshouse, 'The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' (2018) 26(4) Med LR 557.

²² K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 Med LR 608.

²³ *H v S (Surrogacy Agreement)* [2015] EWFC 36.

²⁴ Martha A. Field *Surrogate Motherhood* (Harvard University Press, 1988) 76, 78-9.

²⁵ *Re Z* [2016] EWFC 34 [4].

²⁶ Human Fertilisation and Embryology Act, ss.33 and 54.

offence to 'negotiat[e] surrogacy arrangements on a commercial basis', preventing surrogates or their agents from profiting from such agreements.²⁷

Meanwhile s.54(8) of the HFEA 2008 allows the courts discretion over payments made to an international surrogate for 'expenses reasonably occurred'.²⁸ Such inconsistency undermines the Rule of Law as expressed by Dicey.²⁹ The crux of this principle is that the Legislature must create laws which are clearly defined, while arguably the current statutes are inconsistent.³⁰ During the case *Re S*, Hedley J identified that this is a problem for UK courts 'where those who cannot do something lawfully in this country [...] do it perfectly lawfully [overseas] and then seek the retrospective approval of this country'.³¹

There are, then, concerns about the ability of current legislation to effectively govern the situation: Sheldon identifies that the law is 'poorly adapted to the specific realities of the practice of surrogacy'.³² Certainly legislation has not kept pace with changes in societal attitudes towards surrogacy, Errington and Cooke noting that the 'current legal framework surrounding [surrogacy] is unclear' with confusion as to the rights afforded to the involved parties.³³

Sitting on the fence? Detail and impact of the 2023 review

In March 2023, the Law Commission of England and Wales and the Scottish Law Commission published a joint report, 'Building Families Through Surrogacy: A New Law' (the Report), suggesting a new regulatory route for domestic surrogacy.³⁴

The Report does not explicitly discuss the problem of unenforceability of agreements, although it identifies that s.1A of the SAA effects this. It recognises that the legislation does not always reflect the shared intentions of the surrogate and intended parents, but does not propose enforceable contracts as a solution. The Report notes that changes to the parental order process were considered; at present both surrogate and intended parents are in a precarious position until a parental order is obtained, with no guarantee it will be sought or awarded. Intended parents have 'no legally recognised relationship' with the child until they have gone through the court system.³⁵ Meanwhile the surrogate's position is vulnerable as, technically,

²⁷ Surrogacy Arrangements Act 1985, s.2.

²⁸ Human Fertilisation and Embryology Act 2008, s.54(8).

²⁹ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).

³⁰ Trevor Tayleur, *English Legal System and Constitutional Law* (University of Law 2022) 106.

³¹ *Re S* [2009] 2977 (Fam) [7] (Hedley J).

³² K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 Med LR 67.

³³ Harriet Errington and Pippa Cook, 'Legal Considerations Around Surrogacy' (Solicitors Journal, 7 October 2022) <<https://www.solicitorsjournal.com/sjarticle/legal-considerations-around-surrogacy>> accessed 14 June 2023.

³⁴ Above, n. 4.

³⁵ *Ibid*, para 1.16.

intended parents might withdraw from the arrangement, leaving the surrogate to raise the child.³⁶ Ultimately the Report rejected lifting the six month limit for parental order application, stating that to do so would potentially undermine the importance of cementing legal parental rights promptly.^{37,38} Concerns that one party will ‘change its mind’ are, however, identified, with a subsequent significant proposal that intended parents automatically acquire parental responsibility when the child lives with them.³⁹

The complex issue of surrogacy payments is addressed somewhat vaguely in the Report. It states that it does not believe that the terms ‘altruistic and commercial’ surrogacy are ‘useful descriptions’ in relation to current legislation or possible modification.⁴⁰ Consequently, proposals for reform in this area are tentative and suggest amendments to current law rather than advocating radical change, such as commercialisation. The Report does recognise that the ‘law on payments is unclear’ and that there is a need for ‘clarity that does not exist in the current law’.⁴¹ It forwards the progressive opinion that ‘payments should be permitted for costs...incurred during pregnancy’.⁴² The recommendations go on to offer what might lead to effective governance of surrogacy payments, in that they outline what reasonable costs include.⁴³ The Commissions do however uphold the prohibition of paying a surrogate for her gestational services in carrying and birthing a child.⁴⁴

While acknowledging the emotive subject of the Report, its recommendations, although having potential for improving clarity in some areas of current surrogacy legislation, have been received as somewhat conservative.⁴⁵

Where do others stand? How surrogacy is regulated elsewhere

Many nations, including France, Germany, Italy and Sweden, ban surrogacy.⁴⁶ However elsewhere, surrogacy is practised within a defined framework under state legislation. Israel employs a state-appointed committee which assesses the

³⁶ Ibid, para 3.17.

³⁷ Ibid, para 1.17.

³⁸ Ibid.

³⁹ Ibid, para 3.15.

⁴⁰ Ibid, para 5.7.

⁴¹ Ibid, para 5.4.

⁴² Ibid, para 5.8.

⁴³ Ibid, para 5.17.

⁴⁴ Ibid.

⁴⁵ Natalie Gamble and Helen Prosser, ‘Law Commissions’ Proposals Won’t Achieve Surrogacy Modernisation’ (PET Bionews, 17 April 2023) < <https://www.progress.org.uk/law-commissions-proposals-wont-achieve-surrogacy-modernisation/>> accessed 15 October 2023.

⁴⁶ Amalia Rigon and Céline Chateau, ‘Regulating International Surrogacy Agreements: State of Play’ (2016) PE 571.368 European Parliament Policy Department C: Citizens’ Rights and Constitutional Affairs <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI\(2016\)571368_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf)> accessed 10 October 2023.

compatibility of the parties involved in surrogacy and supervises the agreement.⁴⁷ Before allowing the conception of a child, the committee must receive proof that both parties have attended prescribed counselling, that the intended mother is unable to conceive, and that the two parties have well-matched approaches to the agreement. Furthermore, mediators are appointed to resolve disputes should they arise. Similarly, Greece requires judicial authorisation of surrogacy agreements to ensure that they comply with legal requirements.⁴⁸ Parties can agree to additional terms as long as the surrogate is not restricted in making decisions that concern her own body or health and payments do not exceed an agreed legal amount.

South African legislation expands on the above models in stipulating that its court has access to expert psychological and physical reports to confirm that the participating parties are fit to consent to the agreement, and approves surrogacy arrangements to ensure that there is sufficient provision for the child.⁴⁹ To avoid exploitation, the surrogate cannot rely on provision of surrogacy services as an occupation.

However, commercial surrogacy is legalised in some places. The California Assembly Bill 1217 (2013) does not limit the amount that a surrogate can be paid.⁵⁰ The Bill sets out a detailed framework for surrogacy: the intended parents and the surrogate must obtain separate legal representation to protect the interest of each party and avoid bias.⁵¹ This representation must be in place before a surrogacy agreement is signed to ensure that terms are not misconstrued.⁵² Furthermore, Californian law permits court issue of pre-birth parental orders that protect intended parents if a surrogate is unwilling to hand over the baby.⁵³

⁴⁷ D Honig, O Nave, R Adam 'Israeli Surrogacy Law in Practice' (2000) 37(2) *Isr J Psychiatry Relat Sci* 115.

⁴⁸ Global Surrogacy, 'Surrogacy in Greece' (Global Surrogacy)

<<https://globalsurrogacy.baby/surrogacy-countries/greece/>> accessed 10 October 2023.

⁴⁹ International Surrogacy Forum, 'South Africa: Introduction and Terminology – Chapter 19 of the Childrens' Act' (International Surrogacy Forum)

<<http://www.internationalsurrogacyforum.com/content/south-africa>> accessed 10 October 2023.

⁵⁰ Carolyn Barber, 'The Business of Renting Wombs is Thriving – and Surrogates don't Always Understand the Risks' (Fortune Well, 17 November 2022)

<<https://fortune.com/well/2022/11/17/business-thriving-surrogates-risks-reproductive-ethics-debate-america-carolyn-barber/>> accessed 10 October 2023.

⁵¹ Made in the USA Surrogacy, 'California Surrogacy Laws' (Made in the USA Surrogacy)

<<https://madeintheusasurrogacy.com/california-surrogacy/surrogacy-laws/>> accessed 10 October 2023.

⁵² Family Tree Surrogacy Centre, 'California Surrogacy Laws' (Family Tree Surrogacy Centre)

<<https://familytreesurrogacy.com/california-surrogacy-laws/#:~:text=California%20Assembly%20Bill%201217%20Surrogacy&text=The%20%E2%80%9CIntended%20Parent%E2%80%9D%20of%20a,representation%20before%20the%20process%20begins>> accessed 10 October 2023.

⁵³ American Surrogacy, 'What You Need to Know About Surrogacy Laws in California' (American Surrogacy) <<https://www.americansurrogacy.com/surrogacy/california-surrogacy-laws>> accessed 10 October 2023.

While 'commercial' surrogacy was legal in India for some years, poor control led to abuse of the practice and legislation introduced in 2022 banned it.⁵⁴ Altruistic surrogacy is now permitted exclusively for Indian citizens, with the new laws aiming to prevent those with financial means, particularly overseas 'surrogacy tourists', from exploiting surrogates.⁵⁵

Improving the pathway: proposals for reform

When launching consultation for the Report, Lady Paton identified the significance of surrogacy in today's society, recognising the need for regulation and the protection of participating parties, and suggesting that current legislation lacks the ability to govern modern surrogacy arrangements.⁵⁶ Russell J commented that 'lack of a properly supported and regulated framework...[has]...led to an increase in these cases before the Family Court'.⁵⁷ Perhaps the volume of such litigation, in itself, indicates the need for reform.

Any proposal for such reform must address three areas for which current legislation does not offer sufficient clarity.

Firstly, while it has been noted that surrogacy agreements are essentially contracts, s.1A of the SAA prevents them from being ruled by Contract Law. Perhaps such legislation seems incongruous with the nurturing aspect of creating families, but argument that surrogates could not enter a contract 'compel[ling] them to surrender the child at birth' is countered by evidence demonstrating that surrogates do not generally 'view themselves as the mother of the child'.⁵⁸ Rather, as Katz emphasises, the surrogate 'consciously enters the agreement and voluntarily consents to give up the child'.⁵⁹ Furthermore, Sloan identifies that agreements are meaningless unless the involved parties have 'some means by which to enforce [them]'.⁶⁰ The parties involved would be given such agency through legal reform rendering surrogacy agreements, made within a rigid framework of guidelines, enforceable.

⁵⁴ G Narayan, HP Mishra, TK Suvvari et al, 'The Surrogacy Regulation Act of 2021: A Right Step Towards an Egalitarian and Inclusive Society?' (2023) 15(4) *Cureus* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10199460/> accessed 10 October 2023.

⁵⁵ Yuri Hibino, 'The Advantages and Disadvantages of of Altruistic and Commercial Surrogacy in India' (2023) 18(8) *Philos Ethics Humait Med* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10327345/#:~:text=Introduction%20of%20the%20altruistic%20surrogacy%20concept%20in%20India&text=To%20reduce%20exploitation%20of%20poor,altruistic%27%20surrogacy%20within%20family%20groups>> accessed 10 October 2023.

⁵⁶ Law Commission, 'Surrogacy Reforms to Improve the Law for All' (Law Commission, 6 June 2019) <<https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/>> accessed 30 July 2023.

⁵⁷ *H v S (Surrogacy Agreement)* [2015] EWFC 36 [2] (Russell J).

⁵⁸ Mimi Arian and others, 'UK Surrogates' Characteristics, Experiences and Views on Surrogacy Law Reform' (2022) 36(1) *International Journal of Law, Policy and the Family* 1.

⁵⁹ Avi Katz, 'Surrogate Motherhood and Baby-selling Laws' (1986) 20(1) *Columbia Journal of Law and Social Problems* 1.

⁶⁰ Irvine Sloan, *The Law of Adoption and Surrogate Parenting* (Oceana Publications, 1998) 74-75.

Reform would be based on models employed by Israel and Greece, requiring both parties to instruct legal representation before presenting a draft agreement to a state-appointed body for approval. This would assess the compatibility of the parties, ascertain the medical reasons for the intended parents seeking surrogacy, the physical and emotional suitability of the surrogate, and confirm that both parties have received appropriate counselling. Agreements would need to satisfy legal requirements, include consideration of 'what-if' scenarios, ensure the surrogate's autonomy to make decisions that concern her body and health during the pregnancy and birth, and be authorised before conception. Mediators would be appointed to resolve any disputes that might arise, with provision for the child agreed in advance of the pregnancy. Such detailed agreement and subsequent approval would involve time and financial costs. However surrogacy is not a 'cheap' undertaking and regulation at this stage could save legal costs later, while ensuring the safety and emotional well-being of all parties, including the child. S.1A would be replaced by recognition of an enforceable contract, drawn up within a prescribed framework and legally approved before conception.

Secondly, while the commercial aspects of surrogacy remain contentious, *Whittington Hospital NHS Trust v XX*⁶¹ overruled the decision in *Briody v St Helen's and Knowsley Area Health Authority*⁶², demonstrating the courts as recognising that carefully regulated commercial surrogacy practices have merit. The ruling in *Whittington* is significant as it shows the Supreme Court as acknowledging that attitudes towards surrogacy have shifted.⁶³ Shalev suggests that apprehension around the topic stems from societal unease in 'distinguish[ing] between the sale of a baby and the sale of reproductive services'.⁶⁴ There is concern that surrogacy commodifies female bodily functions and risks exploiting women when financial interest is involved, although it should be noted that the act of prostitution remains legal in the UK.⁶⁵ It is clear that the status quo, permitting intended parents to pay for surrogacy overseas before obtaining UK parental orders while outlawing commercial surrogacy at home, cannot continue. In the case *Re A, B and C*, Russell J expressed 'the reality that there is an existing market' for commercial surrogacy.⁶⁶ The Report recognises that allowable costs may be met in the provision of surrogacy, but does not go as far as defining them. Greater clarity could be achieved for both parties in surrogacy arrangements via reform that would give due consideration to, and outline reasonable values for, the costs involved; to include not only tangible outlay such as

⁶¹ *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

⁶² *Briody v St Helen's and Knowsley Area Health Authority* [2010] EWCA Civ 1010.

⁶³ J.R.S Pritchard 'A Market for Babies' (1984) 34(3) *University of Toronto Law Review* 341; <<https://www.scielo.br/j/cpa/a/RKRnMm9PnVP3339w9SDNLPH/?format=pdf&lang=en>> accessed 2 July 2023.

⁶⁴ Carmel Shalev, *Birth Power: The Case for Surrogacy* (Yale University Press 1989) 5.

⁶⁵ City of London Police, 'Sex Worker Safety: Sex Workers and the Law' (City of London Police) <<https://www.cityoflondon.police.uk/advice/advice-and-information/sw/sex-worker-safety/>> accessed 15 October 2023.

⁶⁶ *Re A, B and C* [2016] EWFC 33 [1] (Russell J).

travel costs, but loss of earnings for the surrogate, recognition of impact on family life etc. Such reform must go further than the tentative amendments to current law suggested in the Report. Indeed Gamble suggested in 2020 that UK law might be changing its view of commercial surrogacy as it is 'accepted that the more thoroughly-regulated surrogacy framework it offers in places like California is both legitimate and unavailable in the UK'.⁶⁷ Acknowledgement of and recompense for the real costs of providing surrogacy would obviate the need for 'surrogacy payments' such as those utilised in California. Reform would reframe payments to acknowledge that the surrogate is being paid for reproductive services rather than for the child. Fenton-Glynn suggested that payments, regardless of jurisdiction, be 'put before the court or an independent specialised body, and their details approved before the impregnation'.⁶⁸ Useful reform would incorporate arrangements regarding payment into the agreement recognised by an appropriate body prior to conception, with quantum tables reviewed annually by appointed persons. Such regulation must be approached honestly and disregard the emotive nature of the subject, but would help to alleviate the unregulated market in which the supply of domestic surrogates cannot meet demand, and serve to reduce, rather than risk, exploitation of women. It would eliminate the difficult discrepancy between s.2 of the SAA and s.54(8) of the HFEA.

Thirdly, reform surrounding the issue of parental orders is necessary, particularly to safeguard children born of surrogacy. Current legislation exposes the surrogate and the intended parents to uncertainty should either party renege on their agreement; the surrogate refusing to consent to the parental order, so denying the intended parents a child, or the intended parents declining the responsibility of raising the child, leaving the surrogate to do so. Sadly the child suffers in such a situation, not least over months of indecision and court hearings. The surrogate's refusal to consent to a parental order in the case *Re AB* impacted all parties, Theis J noting that the process caused 'great distress' to the intended parents with the children 'left in legal limbo' and the surrogate and her partner remaining the 'legal parents even though not biologically related...[and having expressly wished] to play no part in the children's lives'.⁶⁹ Implementation, via legal reform, of the Report's proposal that the intended parents 'automatically' acquire parental responsibility where the child is living with them would eliminate much of the lengthy court procedure and anxiety that is currently associated with obtaining parental orders.⁷⁰ The detail of the handover would be included for approval in the pre-conception agreement and would be extended to include pre-birth parental orders, as currently effective under

⁶⁷ Natalie Gamble and Heidi Burrows, 'Is UK Law Changing the Way it Views Commercial Surrogacy Arrangements?: A Review of the Recent Supreme Court Decision in *Whittington Hospital NHS Trust v XX* [2020] UKSC 14' (2020) 206 *The Review* 24.

⁶⁸ Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Med Law Rev* 60.

⁶⁹ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam) [9] (Theis J).

⁷⁰ Above, n. 4, para 3.17.

Californian Surrogacy Law, offering assurance to the intended parents and securing a stable start to life for the infant.

Conclusion

These reforms would guarantee informed oversight of the drafting of surrogacy arrangements by a recognised agency, ensuring that all aspects and potential outcomes of the process are given due consideration prior to entering into an agreement. While this would require greater resources, involvement of regulatory authorities in the surrogacy process at an earlier stage would give greater control over transactions, protecting women from exploitation, while reform legalising payment would allow surrogates realistic compensation for their services. Intended parents would have their hopes and financial input protected and, most importantly, children born of surrogacy would be better safeguarded, particularly by the proposed changes to the award of parental orders. Such modernising reforms would protect the practice within a society that now largely accepts surrogacy.

(3000 words excluding main title and footnotes).