

**Surrogacy:
Is the law governing surrogacy keeping pace with social change?**

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1. Introduction

The current laws relating to surrogacy arrangements and their consequences are unenforceable, ineffective, and do not adequately protect the surrogate mother, commissioning parents, or the children born as a result of the arrangement.

While the legislation sets out clear requirements for a parental order to be granted, it does not accurately reflect the current practice of surrogacy, both in this country and internationally. The courts have had to find creative alternative interpretations in order to achieve just outcomes, resulting in the legislation being largely ignored, both by the parties involved and by the judiciary when having to decide whether or not to recognise parenthood. This also means that in the absence of litigation, the parties can be left vulnerable and without legal status.

In this submission, we will highlight the various ways in which the current legal system is inadequate, and inappropriate, to deal with the practical reality, showing that the law is outdated, unenforceable, and discriminatory, and fails to provide effective control over surrogacy arrangements.

2. The law is outdated

The Surrogacy Arrangements Act 1985 reflected the societal beliefs about surrogacy at the time, and despite further regulation in 1990 and 2008 concerning the requirements for the transfer of parenthood, the central tenets remain unchanged. The increasing challenges to, and derogations from, the law indicate that it is increasingly out of date and fails to reflect current societal attitudes towards surrogacy arrangements. It does not reflect the realities of modern surrogacy, particularly as it pertains to the global surrogacy industry, and as such, does not protect the rights of children, prospective parents, or indeed the surrogates involved in the practice.

The strongest evidence that the law is outdated is the number of commissioning parents who are now travelling to other jurisdictions to undertake surrogacy arrangements – to such an extent that it is now even included in the UK passport application as a specific category. Although – as will be discussed below – it is unclear just how many foreign surrogacy arrangements take place each year, the General Register Office states that in 2013, 69 of 185 parental orders were made concerning children who were born outside the United Kingdom; while in 2014, this figure was 107 of 258; and in 2015, 156 of 281.

The reasons for individuals and couples seeking surrogacy abroad are varied. While no extensive research has been conducted with regard to this, a small survey by Surrogacy UK indicated that the most common reasons for choosing foreign destinations were certainty, ease of setting up arrangements, the availability of surrogates, and “ethical reasons”.¹ However, this question only received 14 responses, so only gives a bare indication of what might be occurring on a larger scale.

Some analogies might be drawn from a survey in Australia, which has a similar system in place to the United Kingdom. Of the respondents, 114 of the 259 did not even consider uncompensated surrogacy within Australia, with 75% of these respondents expressing a concern that the surrogate might decide to keep the child, and 68% believing that the domestic process was too long and complicated.² The authors of this survey reported: “Respondents were asked to imagine they were considering an overseas compensated surrogacy arrangement and were resident in a state where laws made this a criminal offence. Such laws were a deterrent for only 9% of respondents (23). Of the 114 who actually lived in Australian states with criminalisation laws, 63 (55%) would enter an overseas compensated surrogacy contract, based on a low probability of prosecution, and another 26 (23%)

¹ Surrogacy UK, “Surrogacy in the UK: Mythbusting and reform” (November 2015) 24.

² Sam G Everingham, Martyn A Stafford-Bell and Karin Hammarberg, “Australians’ use of surrogacy” (2014) 201(5) *Medical Journal of Australia* 1, 2.

would move to a state where overseas compensated surrogacy is not criminalized”.³

3. The law is effectively unenforceable

The regulation of surrogacy in England and Wales is achieved through the granting (or refusal) of parental orders, which transfer parenthood from the surrogate mother (and her husband, if relevant) to the commissioning parents.

Once the child is born and the commissioning parents have returned to the United Kingdom, they must seek a parental order under s54 of the Human Fertilisation and Embryology Act. The order may be granted if the requirements of the legislation are met.

The problem with this system of ex post facto regulation, however, was set out by Hedley J, when he held that “it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order”.⁴

While initially there was no mention in the legislation of the child’s welfare, as a result of the Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provision) Order 2010, the courts are now required to treat the child’s welfare as the paramount consideration when deciding whether to make a parental order. While the elevation of the child’s welfare to the paramount concern is laudable, it has undermined the ability of the courts to refuse a parental order. As Hedley J emphasised in the case of *Re L (Commercial Surrogacy)*:⁵

The effect of that must be to weight the balance between public policy considerations and welfare ... decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making.⁶

This has been borne out by the jurisprudence of the High Court over the last decade.⁷

To illustrate the futility of the current legal rules, it is worth highlighting some of the key restrictions created by the current legislation – and how they are rendered without effect in practice.

a. Commercialisation of Surrogacy

One of the fundamental principles of the current legislation is the desire to prohibit commercial surrogacy.

But we have seen that, given the ease at which one can cross national borders, couples seeking a child can easily sidestep domestic restrictions, presenting English courts with a *fait accompli*: the presence in the UK of the child whose welfare is paramount and effectively trumps all other considerations. As the High Court made clear in the recent case of *Re PM*: ‘The reality is there is a legal commercial framework which is driven by supply and demand.’⁸ The law so far fails to acknowledge this reality.

³ Ibid, 3.

⁴ At p 743.

⁵ [2010] EWHC 3146 (Fam), [2011] 1 FLR 1423.

⁶ At p 1425.

⁷ For further information on this topic, please see: Claire Fenton-Glynn, “The Regulation and Recognition of Surrogacy in English Law” (2015) 27(1) *Child and Family Law Quarterly* 83.

⁸ *Re PM* [2013] EWHC 2328 (Fam); [2014] 1 FLR 725, at 730.

If we look at the cases that have come before the High Court, despite payments ranging from US\$23,000⁹ and US\$53,000¹⁰ in California, around £3,000 in India,¹¹ and £8,812 in Russia,¹² no application for a parental order has been refused on the grounds of payments contrary to s 54(8).¹³ In *Re X and Y (Foreign Surrogacy)*, Hedley J admitted that '[t]he point of admission to the country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement'.¹⁴ This is because once the child has entered England and Wales, and is being cared for by the commissioning parents, the courts have no choice but to make a parental order to protect his or her best interests.

In her review of surrogacy in 1998, Brazier and her colleagues observed that, despite both a formal restriction of payment to expenses-only and declarations inimical to commercialisation, 'it is clear that in many cases a component of the amount paid to the surrogate mother is a direct payment for services rendered rather than the reimbursement of actual expenses'.¹⁵

This raises two problems. The first is that commercial surrogacy is being practised, both within and outside England and Wales, despite this being prohibited. The law is not being enforced, and commercial agreements are being permitted through the back door. This undermines the rule of law by allowing a practice that the legislature has expressly disallowed.

As Hedley J admitted in *Re X and Y (Foreign Surrogacy)*: '[t]he point of admission to the country is in some ways the final opportunity in reality to prevent the effective implementation of a commercial surrogacy agreement'.¹⁶ However, preventing the child from entering the country is equally problematic. In most cases, the commissioning parents will already be the legally recognised parents in the country of the child's birth, and the biological connection between the commissioning parents and child means that any separation cannot be seen to be in the best interests of the child. When this situation came before the European Court of Human Rights, the Court made clear that states are able to prevent the entry of a child born through surrogacy until requisite checks have been carried out, but it has not had to decide whether an indefinite refusal of entry would violate the Convention.¹⁷

The second problem lies in the fact that payment for services is being hidden. As the Brazier report stated: 'Undefined, expenses can "disguise" an almost limitless and unprovable range of payments. It should perhaps also be noted that it is not reasonable in a common law jurisdiction to expect courts post facto to develop regulation of surrogacy practice when Parliament has not done so itself.'¹⁸ Courts have been set an unachievable task – they are expected to balance the regulation of surrogacy, while also protecting the best interests of children. Sensibly and humanely, they have decided to give preference to the latter. This is also in line with the developing international jurisprudence.¹⁹ The current form of legislative regulation – that is, ex post facto recognition of parenthood – does not allow for such a balance to be achieved.

⁹ *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

¹⁰ *J v G* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.

¹¹ *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2012] EWHC 3147 (Fam), [2012] 1 FLR 1347; *Re A and B (surrogacy: domicile)* [2013] EWHC 426 (Fam); [2014] 1 FLR 169.

¹² *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [2014] 1 FLR 654.

¹³ There have been refusals for other reasons, for example, lack of domicile within the United Kingdom (see *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047).

¹⁴ At p 743.

¹⁵ Brazier et al. (1998) 43.

¹⁶ At 743.

¹⁷ *D v Belgium* (Appl. No. 29176/13) Decision of 11 September 2014.

¹⁸ Brazier, 19.

¹⁹ See, for example, *Mennesson and Labasee v France* (Appl. Nos. 65192/11 and 65941/11) Judgment of 26 June 2014; *Paradiso and Campanelli v Italy* (Appl. No. 25358/12) Judgment of 27 January 2014; German Federal Court: [XII ZB 463/1](#) (10 December 2014).

b. The consent of the surrogate mother

The requirement of an ex post facto examination of the surrogacy arrangement also raises concerns about the consent of the surrogate mother.

One example of this can be seen in the case of *Re D (A Child)*.²⁰ The court was faced with a question about the identity of the legal father of the child, as it was unclear whether the Georgian surrogate mother was married at the time of birth. When the court tried to contact her through an international detective at the address given by the surrogacy agency, although three women at that address claimed to answer to that name, none of them admitted to bearing the child. As a result, the court was forced to cease its enquiries and make the order.

Similarly, in *Re D and L (Minors) (Surrogacy)*,²¹ the court had also tried to contact the surrogate mother at the time of the hearing, this time to gain her consent to the parental order, as her original consent was given less than six weeks after birth. The commissioning parents employed an inquiry agent to locate the surrogate, but this was unsuccessful, as the address that they had been given was the residence of the agent, rather than the mother. The surrogacy clinic, when asked for its assistance, replied with a single piece of paper printed with an “obscene gesture”. As such, the court itself admitted that all documents and evidence provided by the clinic had to be treated with caution.²² In any event, the order was made.

In this way, the courts have been put in an unenviable position. To undertake an ex-post facto examination of whether the mother had her will overborne by payments based simply on documents and no personal interaction is a difficult endeavour. To undertake it in circumstances where the mother cannot be found, and/or it is clear that information about her has been fabricated, is an exercise in futility – and order will be made in any event.

c. The six-month time limit

The difficulty with enforcing the legislation was most forcefully brought home in a case concerning the timing of the application for a parental order. The statutory language in s54(3) of the Human Fertilisation and Embryology Act 2008 is clear – the application “must” be brought within six months. Nevertheless, the Courts have found that this provision cannot, and should not, be followed, if it means that the child is left without legal recognition of his or her relationship with the commissioning parents.

In *Re X (A Child) (Surrogacy: Time Limit)*,²³ the child was over two years old by the time the case came to court, and the commissioning parents claimed that they were ignorant of the need to obtain a parental order, let alone the six month time limit imposed on making an application. Previous cases had described the time limit as “non-extendable”, and stated that the courts did not have the power to grant a parental order after this deadline. However, in *Re X* the President of the Family Division, Sir James Munby, held that this precedent was incorrect, and the courts not only had such a power, but were required to exercise it in the interests of the child’s welfare.

In a ground-breaking judgment, he reasoned:

Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its

²⁰ [2014] EWHC 2121 (Fam).

²¹ [2012] EWHC 2631 (Fam); [2013] 2 FLR 275.

²² At p 286.

²³ [2014] EWHC 3135 (Fam).

consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical.²⁴

Having regard to the subject matter, the background, and the potential impact on the parties if the application were to be refused, Munby P found that the court was not only entitled, but in his judgment was *bound*, to adopt a “more liberal and relaxed” approach to the interpretation of the time limit. He indicated that a parental order goes not just to status, but to the identity of the child as a human being, and its impact will extend decades into the future. The court is concerned “not just with the impact on the applicant whose default in meeting the time limit is being scrutinised but also with the impact on the innocent child, whose welfare is the court’s paramount concern”.²⁵

Importantly, however, he found that even if the statute could not be interpreted in this manner, his conclusions could be justified in the alternative by the requirements of Art 8 ECHR. Munby P found that the statute must be read down to ensure that the “essence” of the protected right is not impaired: in this case the child’s right to identity.²⁶

In this way, we can see that the courts have been forced to read down the statute to allow flexibility even in the mandatory provisions of the legislation, in order to achieve justice for the parties involved. Once again, this has undermined the rule of law, as the statutory provisions, as set out by Parliament, are not being enforced, as to enforce them would breach the rights of the children born through surrogacy.

4. The current legal situation is discriminatory

There are various ways in why the current legal situation, as a matter of the practical realities and the application of the law, is discriminatory. They can be set out very briefly:

a. Wealthy commissioning parent(s) are able to circumvent domestic law

As the current law is based on an altruistic and very restricted approach to surrogacy, there is a shortage of surrogate mothers, which is why overseas surrogacy arrangements have become the primary way for couples who wish to have a child through surrogacy. However, this avenue is not open to all couples, as it requires not only knowledge and sound legal advice, which itself comes at a price, but also involves payment of considerable expenses for a number of things, including (but not restricted to) medical expenses, travel, payments to the surrogate and agents etc. Therefore, only couples who can afford embarking on this difficult and expensive path of circumventing the domestic restrictions can avail themselves of international surrogacy. Less wealthy couples with a fertility problem will simply not have that option (on the difficulties and receiving proper legal advice see also 6. below).

b. Discrimination against women with fertility problems

The reasons for wanting to have a child via a surrogacy agreement is usually a fertility problem related to the female partner. However, this fertility problem in many cases relates to gestation etc.,

²⁴ At [55].

²⁵ At [64].

²⁶ See also Claire Fenton-Glynn, “The Difficulty of Enforcing Surrogacy Regulations” (2015) 74(1) *Cambridge Law Journal* 34-37.

rather than the gametes of the female partner. So in many cases the gametes of both the female and the male partner are used for the surrogacy. If a child then is born abroad to an unmarried surrogate the current law enables the man to claim paternity because of his genetic contribution, resulting in many legal rights and duties, not least rights to citizenship and entering the UK – which are required for applying for a Parental Order. The genetic contribution of the female partner has no such consequences, as the mother is deemed to be the woman giving birth to the child. So it does not matter legally whether her gametes or donor gametes were used: the legal position of the female partner is the same. So despite both partners having contributed the same – the gametes – the legal consequences are different based on their gender. This can have grave consequences in case of relationship breakdown before the child comes to the UK, as the man will have more legal rights in relation to the child – the status of parent – than the woman.

c. Discrimination when donor sperm is used

Following on from the previous point, when donor sperm was used because the man had a fertility problem, or the surrogacy is sought by two women, the couple is in a disadvantaged because of the lack of a ‘male genetic link’, and citizenship and/or immigration issued may be more complicated. Again, whether the gametes of a women were used does not matter to the law as legal maternity is solely based on gestation and ignores female genetic contributions. But, to emphasise the point, the law does not ignore male genetic contributions – on the contrary, in certain circumstances it attaches great importance to them.

This can be seen in the jurisprudence of the European Court of Human Rights, where recent cases have focused on the need for legal recognition of biological ties. In *Mennesson and Labassee v France*, the applicants were two French couples, and their children born in the USA as a result of surrogacy arrangements. When they returned to France, the French authorities refused to register the children’s birth certificate on the French Register of Births, on the grounds that recording such entries would give effect to a surrogacy agreement that was null and void under French law, and recognise a practice that the legislature had expressly forbidden.

The Court took a very unsympathetic approach to the claims of the parents, finding that the difficulties they faced in having to produce a foreign birth certificate were not insurmountable, and that they had failed to demonstrate that the failure to obtain recognition of their parentage had hampered the enjoyment of their right to respect for family life.

However, the Court found that the children’s rights had been violated. The Court focused on the right to respect for private life on the part of the child, emphasising that this encompasses the right to establish details of one’s identity, as well as the recognition legal parent-child relationship. Noting the lack of clarity regarding the children’s legal status, the Court observed that they faced uncertainty concerning the possibility of obtaining French nationality, which undermined their identity within French society. It noted that nationality and a right to inheritance were also important elements of a child’s identity, and these had been compromised by the refusal to recognise parenthood. Although the children’s genetic fathers were French, they were unable to obtain French nationality, and they were only able to inherit from the commissioning parents as legatees, rather than as descendants.

As such, the Court considered that their situation was liable to have negative repercussions on the definition of their identity. It found that “[g]iven the importance of biological parentage as part of one’s identity, one cannot claim that it is in the interests of a child to deprive him of a legal relationship of this nature while the biological reality of this link is established, and the child and parent concerned demand full recognition”.²⁷ Thus the biological link with the father was framed as the crucial component in the creation of an interest in private life for the child.

²⁷ At [79].

d. Parental orders are not available to single parents

In the case of *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), the government conceded that s 54(1) and (2) of the HFEA 2008 are incompatible with the rights of the father and child under Art 14 in conjunction with Art 8, in so far as they prevent the father from obtaining a parental order on the sole ground of his status as a single person, as opposed to being part of a couple.

This was accepted by the Court, and a declaration of incompatibility made under s4 of the Human Rights Act. Where a single person can adopt, or receive IVF treatment, there does not appear to be a justification for prohibiting single parents from accessing surrogacy arrangements.

5. The law is not able to control foreign transactions

In providing an ex post facto examination of the surrogacy arrangements, the courts are being asked to undertake a retrospective investigation of an agreement that has taken place outside their jurisdiction, with no real opportunity to examine its contents.

The lack of control over foreign transactions has already shaped the legislative landscapes of other jurisdictions. In 2000, when the Swiss government was proposing the prohibition of IVF and use of donor gametes, the Federal Council argued that the only consequence of such a law would be that couples would travel to neighbouring countries, leaving the Swiss government with little ability to exercise control.²⁸ This is what we have seen in the context of English surrogacy: individuals and couples going abroad resulting in a loss of ability to effectively ensure that exploitation, commodification or abuse is not occurring. It would be more appropriate to regulate domestic surrogacy in a way that gives the legislature and the courts greater control over the practice.

Such a lack of control is not only important for the requirements of the parental order, but is also relevant to the medical and ethical issues surrounding the fertilisation and pregnancy of the surrogate. When judges currently consider parental orders for children born as a result of international surrogacy, they are not given the chance to consider, or regulate, whether the surrogacy has involved medical procedures that are medically and psychologically damaging. Nor do they have the ability to evaluate the quality and safety standards of procedures, or whether there are unprofessional or unethical practices. Courts cannot control whether there has been adequate counselling or social assistance for the surrogate mother, or whether there has been independent advice.²⁹

What we are seeing is that our prohibitive domestic laws are not operating effectively to prevent commercial surrogacy. On the contrary, by suppressing the availability of surrogacy within England, but then waiving through violations of the regulations that occur in international surrogacy arrangements, we are simply exporting our ethical issues, and the problems associated with surrogacy, elsewhere.³⁰ In many ways, while protection English women from exploitation – which is the basis for the prohibition of commercial surrogacy in this country – we are simultaneously outsourcing this exploitation to women who are more vulnerable.³¹

²⁸ Conseil Federal Suisse. Avis du conseil federal. Initiative ‘pour une procreation respectant la dignite humaine’ 2000. <http://www.admin.ch/ch/f/pore/va/20000312/explic/index.html>.

²⁹ For example, the Centre for Social Research in India undertook interviews with 100 women serving as surrogate mothers, and 50 couples who had commissioned pregnancies. It found that in 70% of cases the agent who had recruited them was their primary source of information about the procedure (Gina Maranto, ‘The Sorry State of Indian Surrogates’ (6 August 2013) <http://www.geneticsandsociety.org/article.php?id=7071> (accessed 2 September 2014)).

³⁰ For a more detailed discussion of the tension between English law and international surrogacy, see Claire Fenton-Glynn, ‘The Regulation and Recognition of Surrogacy in English Law’ (2015) 27(1) *Child and Family Law Quarterly* 83.

³¹ For further information on this topic, please see: Claire Fenton-Glynn, ‘Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements’ (2016) 24(1) *Medical Law Review* 59.

6. The law leaves children in legal limbo

a. Lack of Statistics

We do not have accurate statistics concerning the number of surrogacy arrangements. There is no requirement that a parental order be obtained once the child returns to this jurisdiction, and as such, it is unclear how many children are living in England and Wales with people who are not legally recognised as their parents in this jurisdiction. It has been frequently stated by commissioning parents when coming before the courts that they were not aware of the need for a parental order, and thought that their recognition as parents in the foreign jurisdiction would automatically be given effect in England.³² As a result, we often have children in England and Wales with an uncertain legal status, being cared for by people who are not his or her legal parents – or at least not recognised as such in this jurisdiction.

Even where we do have “official” statistics, they are internally inconsistent and thus demonstrably unreliable, with government departments unable to agree between themselves as to the number of parental orders made. The Ministry of Justice indicated that in 2013, 162 children were the subject of parental orders, with 240 in 2014.³³ However, the General Register Office reports 185 in 2013, and 258 in 2014.

Even with children born within the United Kingdom, the Ministry of Justice records 102 in 2013 and 163 in 2014, as opposed to the Registrar’s 116 and 151.³⁴

b. Statelessness

Children can also lack status as a result of conflicts of laws between England and Wales and the country of birth. The legal limbo facing children born through surrogacy was seen in *Re X and Y (Foreign Surrogacy)*. In this case, the English commissioning parents travelled to Ukraine, and engaged a married Ukrainian surrogate mother. When the children (twins) were born, the commissioning couple were entered onto the birth certificate as the parents. However, when they tried to obtain passports for the children from the British embassy in order for them to return to England, these were refused on the grounds that the legal parents according to English law were the surrogate mother and her husband, and therefore the children were not British. The commissioning couple were advised to seek assistance from the Ukrainian embassy. The Ukrainian embassy also refused to award the children Ukrainian passports, as under Ukrainian law, the children’s parents were British. As such, the children were stateless.

While this situation was resolved by allowing the children to enter the United Kingdom outside the immigration rules, this is not an adequate solution to the problem. Often unmarried surrogates are chosen so that this issue does not occur – the commissioning father can then gain recognition of his parenthood based on his genetic connection (on which see above), and thus receive a British passport for the child on that basis. However, the legal status of children should not be left to such workaround solutions.

³² See *Re X (Time Limit)*.

³³ Surrogacy UK, 14

³⁴ These figures were provided by the Registrar’s Office to Marilyn Crawshaw.

7. The law does not facilitate professional support for commissioning parents and surrogates

As a result of the restrictive legislation in the United Kingdom, not only do we not facilitate professional support for commissioning parents and surrogates, in many ways, the law actually prevents such support.

This was highlighted in the case of *Re G (Surrogacy: Foreign Domicile)*,³⁵ where the couple in question had brought about a surrogacy arrangement with the assistance of the organisation COTS. The Court held that a parental order could not be granted, as the commissioning parents were Turkish, and not domiciled in the United Kingdom as is required by the legislation. McFarlane J emphasised that the agency's lack of knowledge of "one of the basic requirements needed to obtain a parental order is a matter of some real concern". However, he acknowledged that it was the legislation itself that gave such agencies no alternative.

He stated:

The court's understanding is that surrogacy agencies such as COTS are not covered by any statutory or regulatory umbrella and are, therefore, not required to perform to any recognised standard of competence. I am sufficiently concerned by the information uncovered in these two cases to question whether some form of inspection or authorisation should be required in order to improve the quality of advice that is given to individuals who seek to achieve the birth of a child through surrogacy. Given the importance of the issues involved when the life of a child is created in this manner, it is questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs.³⁶

Subsequently, the Human Fertilisation and Embryology Act 2008 amended these provisions, allowing non-profit agencies to receive "reasonable payment" for work relating to initiating negotiations with a view to making a surrogacy arrangement – for example, making introductions. Nevertheless, this stopped short of providing a system of registration, inspection and regulatory oversight, as was proposed by the Brazier Report in 1998.

It should also be noted that solicitors who charge a fee for formalizing a surrogacy arrangement in this country are contravening section 2 of the Surrogacy Arrangements Act 1985, which prohibits individuals from initiating or taking part in any negotiations with a view to making a surrogacy arrangement on a commercial basis. Section 2 was primarily intended not only to stop surrogate mothers offering their services for commercial gain, but also to prohibit commercial surrogacy agencies and profit-making middlemen. However, it also applies to legal professionals, as a firm of Birmingham solicitors were recently reminded by the High Court, where they had charged a fee for drawing up a surrogacy arrangement.³⁷ In this case, the surrogate mother and commissioning parents had attended a pre-birth consultation at the hospital, and on becoming aware that this was a surrogate birth, the hospital asked the parties to enter into, and provide the hospital with, a copy of a surrogacy agreement.

Unless legal professionals are willing to donate their time and services free of charge, surrogate mothers and commissioning parents are forced to rely on unregulated non-profit agencies for advice, and denied access to legal support prior to the birth.

³⁵ [2008] 1 FLR 1047.

³⁶ At [29].

³⁷ *JP v LP* [2014] EWHC 595.

8. Conclusion

This submission has highlighted the multitude of problems that arise as a result of the current regulation of surrogacy in England and Wales. While surrogate births are relatively small in number, the potential impact on surrogate mothers, commissioning parents, and most importantly, the children involved, is significant.

We can see clearly from a review of the current rules that the system of regulation, relying on ex post-facto consideration of the surrogacy arrangement, and the transfer of parentage after birth, causes significant uncertainty, and does not operate effectively. The requirements for a parental order are consistently and systematically ignored, both by commissioning parents and by courts, undermining the rule of law.

Our domestically restrictive laws concerning surrogacy, and the requirements for a parental order, are unenforceable, and as such do not operate effectively to prevent these practices occurring. Instead, individuals and couples simply leave the jurisdiction to achieve their aim, and return to present the English courts with a *fait accompli*. Currently, the legislation does not reflect the realities of modern attitudes towards surrogacy, and the desire for a child for those parents who require surrogacy appears to be greater than the barriers erected by Parliament.

We believe that there must be a wholesale reform of this area of law, to protect the women, children and families involved in this practice, and to ensure that our laws are up to date, effective, and enforceable. Under the current law, children are left in legal limbo – potentially parentless and stateless; commissioning parents are subject to discrimination and legal uncertainty, and are unable to access appropriate support and advice; and surrogate mothers are not protected from exploitation or unsafe practices, especially when they are living in other jurisdictions.

Over the past eight years, the courts have relied on creative interpretations of the legislation to attempt to achieve justice, but there is a limit to what can be achieved without parliamentary reform. It is imperative that government considers this area, and we believe that the Law Commission would be best-placed to undertake a project in this field, given the complexity of the subject matter, both from a legal and social perspective.