

# Surrogacy in the UK:



## Further evidence for reform

Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform

December 2018



Surrogacy UK  
Information  
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# Author and Contributor Biographies



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**Sarah Jones** is the Chair of Surrogacy UK, and has been a member of the organisation for 16 years. She is a mother of three and is proud to have been a surrogate four times, and is currently embarking on her fifth surrogacy journey. She enjoys a close friendship with all of the families she helped to create.

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Liam Davis, an LLM student at Kent Law School, acted as a research assistant for some of this project and we are very grateful for the work that he did for us.

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**Progress Educational Trust**  
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# FOREWORD

Our last report, ‘Surrogacy in the UK: Myth Busting and Reform’ was published in November 2015. At that time, our group was already convinced that there was a clear need for reform of the outdated laws on surrogacy. Then, the Surrogacy Arrangements Act 1985 was 30 years old and, while much had changed in science and society since that time, very few of these societal changes had been reflected in the law.

In 2008, the revised HFE Act was enacted – but that has already reached its 10<sup>th</sup> anniversary and has not escaped criticism. That legislation extended the categories of people who could become legal parents following surrogacy by allowing same-sex couples in civil partnerships and unmarried couples in ‘enduring family relationships’ to apply. Since the Marriage (Same Sex Couples) Act 2013 in England and Wales and the Marriage and Civil Partnership (Scotland) Act 2014, married same sex couples enjoy the same opportunity in England, Wales and Scotland (but not yet in Northern Ireland). However, despite a clear opportunity to do so, neither the 2008 Act nor the consultations or debates that preceded it considered the adequacy of the law as it related to surrogacy as a whole.

Beginning to emerge around 2008 were new kinds of surrogacy case in the Family Division of the High Court. International (or cross-border) surrogacy was becoming more commonplace, facilitated by the rapid development of the Internet in the early 21<sup>st</sup> Century. Cross-border surrogacy arrangements brought with them new and different issues, particularly as they usually involve commercialised forms of surrogacy. Many of these issues have been rightly managed by our courts in the best interests of the children concerned but, in doing so, the courts have served to highlight the limitations and contradictions of the existing law.

Findings from our 2015 report, as well as the debate this generated and alongside other campaigns for law reform, helped to persuade the Law Commission of England and Wales and the Scottish Law Commission that a full review of the law on surrogacy is necessary. The two Commissions, supported by the government, are currently undertaking a three-year project to this effect. It is our hope that this new report will help to inform their review.

This report seeks to highlight the reality of the practice of surrogacy in the UK in 2018, while recognising the problems that international surrogacy arrangements may bring. We continue to recommend the careful formulation of new legislation on surrogacy which recognises the value of surrogacy as a way of having children and helps to protect and facilitate the principle of altruism that underpins the practice of and the law on surrogacy in the UK, while preventing commercialisation and sharp practice. Our recommendations are premised on the primary assumption that the welfare of the children born through surrogacy is paramount.

“We saw this new report pre-publication and once again support the findings of the Surrogacy UK Working Group on Surrogacy Law Reform”

Mary Warnock, Professor Margaret Brazier and Professor Susan Golombok  
December 2018

# FOREWORD TO THE 2015 REPORT

The UK has regulated surrogacy arrangements for 30 years and many other countries have, in that time, modelled similar laws on ours. Little, however, has changed in the law in that 30 year period, other than to provide a mechanism for the transfer of legal parenthood from surrogates to intended parents from 1990 and to recognise, in 2008, that intended parents may legitimately comprise people other than married heterosexual couples.

In recent years, some aspects of the landscape of surrogacy have changed. The explosion of the internet, bringing easily-accessible information and cheap international travel has, alongside the willingness of other nations to open their borders and clinics for those willing and able to travel to enter surrogacy arrangements, led to an expansion of international surrogacy. For some, this has brought its own problems – for example with immigration or the acquisition of legal parenthood. Such cases, coupled with high-profile media coverage of the rare occasions when surrogacy goes wrong, raise concern about the ethics of some international surrogacy practices and their commercialisation.

However, despite some claims to the contrary, the majority of surrogacy arrangements undertaken by intended parents from the UK are relationships entered into using UK-based surrogates and on an altruistic basis. We also know, from academic studies following families created by surrogacy, that surrogate-born children fare well in supportive environments. This report seeks to highlight the reality of the practice of surrogacy in the UK in 2015, while recognising the problems that international surrogacy arrangements may bring. It recommends the careful formulation of new legislation on surrogacy which recognises the value of surrogacy as a 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. Its recommendations are premised on the primary assumption that the welfare of the children born through surrogacy is paramount.

We support this report and urge the government to reconsider surrogacy, to facilitate further research into how it is conducted and what compensations are paid, to bring the law into line with modern social realities and to discourage those who need to undertake surrogacy from doing so overseas.

Mary Warnock, Professor Margot Brazier and  
Professor Susan Golombok

# EXECUTIVE SUMMARY

- This report examines **the current situation of surrogacy in the UK**, as it is undertaken by intended parents entering into surrogacy arrangements in the UK, as well as by those who travel to overseas commercial surrogacy destinations.
- It concludes that evidence-based **reform of the law on surrogacy is necessary**, in particular in relation to **who is/are regarded as the legal parent(s) of children born through surrogacy**.

In particular, this group recommends the following:

- A root and **branch reform of the current statutory framework** on surrogacy.
- The law should **maintain the underlying principle that surrogacy is provided on an altruistic basis** and that no person or surrogacy organisation should profit from it. There should be **no move towards commercialisation**.
- **IPs should become the legal parents of surrogate-born children at birth**, and should register the birth.
  - If this is not achieved by a reversal of the presumption of motherhood in the context of surrogacy, it should be achieved by pre-conception or pre-birth approval.
- A way of **recognising parenthood acquired overseas** (e.g. if that occurred within a country on a defined list, or similar) should be built into the law.
- **IPs should not be evaluated for their suitability of becoming parents** in an adoption-like framework, but instead the same child protection framework should be in place as for people becoming parents without the need for surrogacy.
- There should be **better definition of what constitutes a 'reasonable expense'**, recognising that the types/amounts of expenses will vary according to individual circumstances.
- **Public funding should be made available for surrogacy-related fertility treatment** in the UK and to pay UK surrogate expenses, in line with the principles that apply to non-surrogacy fertility treatments.
- **Public policy should be put in place to encourage financial protection** schemes for surrogates and IPs to ensure that expenses can always be paid where they are due (e.g. escrow accounts, expenses-related insurance etc.).

- **Surrogacy expenses should not be treated as income** by the Department of Work and Pensions, nor should the recovery of expenses impact any other income-related entitlements.
- **Public education around surrogacy should continue to be improved**, e.g. age-appropriate materials provided in schools to support curriculum teaching on fertility and family types.
- Better collection of **surrogacy-related data is needed to ensure that actual activity can be measured against public policy goals**, e.g. the high percentage of entries in the parental order register where the place of birth is 'not known' is not ideal.
- The **HFEA should provide a full set of surrogacy-specific forms**. There is too much execution risk in 'making do' with the gamete donor forms that are used today, and the forms have importance in establishing legal parenthood.
- Consideration should be given to the question of whether the same HFEA requirements about **recording and knowledge of genetic origins be in place for straight surrogacy** using home insemination as for egg donation.
- Consideration should be given to whether there is a case for more **regulation of 'approved' surrogacy organisations**, so as to give assurance and protection to children, surrogates and IPs. This might mean certain checks/activities are mandated through these approved organisations. However, the cost implications (for families) should be borne in mind when considering this.

We also recommend the following actions for government:

We continue to believe that **surrogacy (as part of broader discussion on fertility and family forms) should be included in schools' sex and relationships education (SRE)**.

The **government should commit funds to ongoing education and training for medical and care professionals** involved with surrogacy, so that all know their rights and obligations and understand best practice when faced with surrogacy arrangements.



# INTRODUCTION

In the three years since the Surrogacy UK Working Group on Surrogacy Law Reform published its first report on surrogacy in the UK,<sup>1</sup> there have been developments in the law, as well as improvements in the way surrogacy is managed and perceived and in the move towards legal reform. This second report of the group is intended as a follow-up to the first report, continuing to survey the landscape of surrogacy as it happens in the UK, to interrogate myths about surrogacy that continue to perpetuate, and to make recommendations for legal reform.

This introduction does not, as in the last report, detail the history and context of the regulation of surrogacy in the UK, but instead features some of the developments that have occurred in the past three years. Some of these, at least in part, came about as a direct result of the recommendations we made in 2015.

Shortly after the 2015 report was published, members of the Working Group met with the Children and Family Court Advisory and Support Service (Cafcass), to discuss the findings of the Report in the context of the information Cafcass provides to parents through surrogacy, especially regarding parental orders.<sup>2</sup> The agency was at that time involved in a campaign to raise awareness about the importance of obtaining a parental order. One thing we advised on was our survey findings about terminology: that surrogates do not view themselves as the mothers of the children they have carried for others, so would prefer not to be called ‘surrogate *mothers*’, and Cafcass publications now reflect that.<sup>3</sup>

Following on from the 2015 report, a conference was held in London to discuss some of the Report’s findings and the need for law reform, as well as potential options for reform.<sup>4</sup> This was well-attended not only by academics but also by lawyers, representatives of non-profit surrogacy organisations, clinical staff, intended parents (IPs), surrogates, policy makers, peers and others. The Human Fertilisation and Embryology Authority (HFEA) and the Law Commission of England and Wales also attended. Baroness Mary Warnock, whose influential 1984 report on human fertilisation and embryology formed the basis of current surrogacy laws,<sup>5</sup> opened the conference, explaining her belief that it was time for the law to be reformed.<sup>6</sup> The proceedings of the conference were written up as academic papers and

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<sup>1</sup> Horsey, K., ‘Surrogacy in the UK: Myth busting and reform’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).

<sup>2</sup> See <https://www.cafcass.gov.uk/grown-ups/parents-and-carers/surrogacy/>.

<sup>3</sup> This terminology has also now been adopted in the latest HFEA *Code of Practice* (9th edition), in place from January 2019 (see draft at <https://www.hfea.gov.uk/media/2609/june-2018-code-of-practice-9th-edition-draft.pdf>, para 9.5), as well as a change from ‘commissioning couple’ to ‘intended parents’.

<sup>4</sup> Funded by a grant awarded to Dr Kirsty Horsey from the Social Sciences Faculty Research Fund at the University of Kent.

<sup>5</sup> *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd. 9314 (HMSO, London) July 1984 (the ‘Warnock Report’).

<sup>6</sup> She also said as much on BBC Radio 4’s *Woman’s Hour* which covered the conference on the same morning it was held (available at <https://www.bbc.co.uk/programmes/b078w92x>).

published in a peer-reviewed special issue of the *Journal of Medical Law and Ethics* (JMLE) in December 2016, which also included a foreword by Baroness Warnock.<sup>7</sup>

Later that month, Sir James Munby, then President of the Family Division of the High Court, made a declaration of incompatibility in a surrogacy case in which a single man had complained that his human rights had been violated by not being able to apply for a parental order to transfer the legal parenthood of his genetic child.<sup>8</sup> The man concerned had previously asked the court to ‘read down’ S54 HFE Act 2008 in accordance with section 3(1) Human Rights Act 1998 so as to enable a parental order to be made on the application of one person.<sup>9</sup> The law as written refers to ‘an application made by two people’ at the start of the criteria listed for a parental order, leaving no room for judicial interpretation.<sup>10</sup> However, in *Re Z (no.2)* Sir James Munby P found the provision incompatible with Article 14 of the European Convention on Human Rights, which prohibits discrimination in the enjoyment of Convention Rights (in this case, the right to respect for private and family life guaranteed in Article 8) on the grounds of a status set out in Article 14, which it was accepted could include a single person in this context.

While the government is not obliged to change the law once a declaration has been issued (there had only been 29 declarations made by 2015 since the Human Rights Act came into force in 2000, of which only 20 had become final),<sup>11</sup> it did agree to do so in this case. As a result, a draft remedial order was laid before parliament in November 2017.<sup>12</sup> This was then scrutinised by the Joint Committee on Human Rights (JCHR), which launched an immediate call for evidence. Laying the order, the then minister Phillip Dunne MP, 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”.<sup>13</sup>

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<sup>7</sup> 2016, volume 3. One paper from the conference was later published elsewhere: Alghrani, A., & Griffiths, D. (2017) ‘Surrogacy Regulation in the UK: the Case for Reform’ 29(2) *Child and Family Law Quarterly*.

<sup>8</sup> *Re Z (no.2)* [2016] EWHC 1191 (Fam). There have been numerous other surrogacy cases in the past three years, raising different issues, a selection of which are discussed in section 4, below.

<sup>9</sup> Sir James Munby P had heard the man’s original case, too, but had ruled (in September 2015) that it was not possible to read down the provision in such a way (*Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73).

<sup>10</sup> At the time of *Re Z*, other aspects of S54 had already been creatively interpreted or ‘read down’ by judges, to give effect to children’s best interests (see sections 4 and 4.1, below). The difference between these and the provision that only ‘two people’ may apply is that there is no room for ambiguity about what that might mean, so it would be a question of intention – and counsel in *Re Z* had been able to point to parts of the legislative debate on S54, specifically Dawn Primarolo, then Minister of State for the Department of Health, saying in response to a proposed amendment that would have allowed parental orders for single people that the government had considered it (Hansard, Public Bill Committee debate, House of Commons 12 June 2008, cols 248-249).

<sup>11</sup> Joint Committee on Human Rights Seventh Report, 4 March 2015.

<sup>12</sup> Department of Health, The Government’s Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017.

<sup>13</sup> Human Fertilisation & Embryology Act 2008: Remedial Order: Written statement - HCWS282.

Despite this positivity, the order has unfortunately been subject to a great deal of delay, caused initially by its clashing with the aftermath of the Brexit referendum in 2016 and the ‘snap’ general election that followed, including the inevitable subsequent ministerial reshuffles. Further delay was caused after responders to the JCHR’s initial call for evidence identified that the new wording proposed by the government would in fact have the capacity to introduce further discrimination, for example in situations where the single applicant was in a relationship.<sup>14</sup> The government responded to this in July 2018, agreeing to amend the draft order so as to remove this new incompatibility based on relationship status.<sup>15</sup> At the time of writing, a second draft version of the order is progressing through the parliamentary process and is expected to become law in late 2018/early 2019, meaning that single applicants with a genetic link to a child they conceived using surrogacy will be able to apply for a parental order. There will also be a window of time in which retrospective applications will be able to be made.

In December 2016, a debate was held in the House of Lords on the need for surrogacy law reform, led by Baroness Liz Barker, who had also attended the May 2016 conference.<sup>16</sup> There was widespread agreement among the peers who spoke in the debate that reform of the law is necessary, and support for many of the recommendations made in our first Report. Responding to the debate on behalf of the government, Lady Chisholm of Owlpen said:

“we all recognise that there are well-founded concerns about the struggle that surrogacy policy and legislation are facing to keep pace with 21st-century attitudes and lifestyles. This legislation is based largely on thinking and debate from the 1980s. We recognise that family structures are now much more diverse than when the policy and legislation were originally developed”.<sup>17</sup>

She gave assurances that the Government lent its full support to review of law by the Law Commission, that there would be guidance written for care professionals and for people looking to be IPs and surrogates, that the remedial order to rectify the position on single applicants for parental orders would be introduced, and that the Government is willing to consider supporting an international agreement on legal parenthood, including surrogacy, to help protect children travelling across international borders. Concluding the debate, she said:

“I can give noble Lords a clear and unequivocal message that this Government recognise the value of surrogacy as a means of helping to create new families for a range of people who might not otherwise be able to have their own children. It is in that spirit of inclusiveness and equality that we look to the future and to surrogacy in the UK being updated for the 21st century. We very much welcome the significant steps that are now beginning to be made in that direction”.<sup>18</sup>

In February 2018, the Department of Health and Social Care published two sets of guidance under the heading ‘Having a child through surrogacy’.<sup>19</sup> This comprised of ‘information for

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<sup>14</sup> Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 (Remedial) Order 2018, para 5.

<sup>15</sup> The Government’s Response to the Joint Committee for Human Rights 2nd 2018 Report: Proposal for a Draft Human Fertilisation & Embryology Act 2008 (Remedial) Order 2018, para 3.7.

<sup>16</sup> Hansard, House of Lords, 14 December 2016, Vol. 777, columns 1316-1332.

<sup>17</sup> *ibid.*, col. 1329.

<sup>18</sup> *ibid.*, col. 1332.

<sup>19</sup> See <https://www.gov.uk/government/publications/having-a-child-through-surrogacy>.

intended parents, surrogates and health professionals about the surrogacy process in England and Wales'.<sup>20</sup> Two of the central recommendations in our 2015 Report were that the 'Department of Health, in consultation with the surrogacy community, should draft and publish a 'legal pathway' document for intended parents and surrogates' and should 'produce guidance for professionals in the field, written in consultation with the surrogacy community for midwives and hospitals, Cafcass and clinics'. We are glad to see that this has happened, and for members of our group to have been involved in drafting both sets of guidance, alongside fertility specialists, those from other non-profit surrogacy organisations, Cafcass, and other organisations. This is a truly collaborative achievement, as well as, as far as we know, being the first time anywhere in the world that a sitting government has produced formal documents endorsing and supporting surrogacy as a means of family creation.



In its 2017 consultation on what it should include in its 13<sup>th</sup> Programme of Reform, the Law Commission of England and Wales asked 'is the law governing surrogacy keeping pace with social change?'<sup>21</sup> It reported that surrogacy had been drawn to its attention by multiple stakeholders and that Jane Ellison MP, the then Under Secretary of State for Health, had indicated the Government's support for the 13<sup>th</sup> Programme consultation including surrogacy. The consultation sought the public's views on the legal issues most in need of reform. According to the Law Commission, it received the largest ever volume of responses with over 1,300 submissions covering 220 different topics. There was much support for the inclusion of surrogacy in the Programme: the Law Commission said that surrogacy was the issue most cited in the consultation, 'with over 340 people and groups saying the law was not fit for

“ the law relating to surrogacy is outdated and unclear, and requires comprehensive reform ”

<sup>20</sup> For surrogates and intended parents the guidance is found in '*The Surrogacy Pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales*', whereas for health professionals, the guidance is found in '*Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales*'.

<sup>21</sup> <https://www.lawcom.gov.uk/surrogacy/> launched July 2016.

purpose'.<sup>22</sup> In its concluding report on the consultation, the Commission proposed including surrogacy in its work for a 2-3 year period of review, saying:

“We take the view that the law relating to surrogacy is outdated and unclear, and requires comprehensive reform. Reform will deliver significant benefits of clarity, modernity and the protection of those who enter into surrogacy arrangements and, most importantly, of the children born as a result of such arrangements”.

The project would go ahead, subject to the requisite funding being obtained from the government. In May 2018, it was announced that the Law Commission of England and Wales and the Scottish Law Commission were to work on a joint 2-3 year review of the laws around surrogacy after funding for it was agreed by Government.<sup>23</sup> A public consultation is expected in spring 2019.

In March 2018, the HFEA included surrogacy for the first time in its published data.<sup>24</sup> The HFEA does not regulate surrogacy (other than regulating and IVF or donor insemination (DI) procedures used in licensed clinical treatment). However it does collect data from clinics where the woman being treated is registered as a surrogate and undergoes IVF or DI. The HFEA has also expanded its regulatory reach into surrogacy in its latest Code of Practice, in place from January 2019,<sup>25</sup> including reviewing its guidance on surrogacy arrangements in respect of determining suitability, implications discussions etc, and creating a new requirement for clinics to have standard operating procedures for surrogacy in place.

In 2017, having followed the debates and other developments in surrogacy, an All-Party Parliamentary Group (APPG) on Surrogacy was set up, chaired by Andrew Percy MP (Conservative).<sup>26</sup> It held its launch in the Houses of Parliament in December 2017, which was attended by interested MPs from most political parties represented in Westminster, as well as numerous surrogates and parents through surrogacy, and their children. The APPG on Surrogacy states its mission as:

“Fully reviewing our surrogacy laws, encouraging and promoting debate on the issues, facilitating further research into how surrogacy is conducted, bringing the law into line with modern social realities, and encouraging domestic surrogacy in the first instance.”

In July 2018, the Chair and other members of the APPG on Surrogacy met with Jackie Doyle-Price, who had been appointed Parliamentary Under Secretary of State at the Department of Health on 14 June 2017. She was very responsive to the APPG’s concerns and committed to ensuring the remedial order for single applicant parental orders would go through, as well as to the Law Commission’s review of surrogacy laws. In November-December 2018, the APPG on Surrogacy held five evidence sessions with invited discussants, including surrogates, parents through surrogacy, prospective parents, surrogacy organisations, Cafcass, academics, solicitors, barristers and the judiciary. It will publish the proceedings and findings of these sessions in early 2019.

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<sup>22</sup> <https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>

<sup>23</sup> *ibid.*

<sup>24</sup> HFEA, ‘Fertility treatment 2014–2016 – Trends and figures’ March 2018, p.43. See section 2.3.

<sup>25</sup> HFEA *Code of Practice* 9th edition, paras 1.3, 1.12, and Section 9.

<sup>26</sup> The SUK Working Group is the APPG’s Secretariat.

All of these developments show that our recommendations in 2015 came at an opportune time. Many of our recommendations helped lead to some of the changes and potential changes outlined above. We are not alone in the belief that the law is outdated, nor in our quest to change the law. In fact, in a straw poll conducted by law firm Howard Kennedy LLP at the annual Fertility Show in London,<sup>27</sup> which was attended by many surrogacy and fertility support organisations, surrogacy lawyers and professionals from the clinical sector, showed that surrogacy laws were one of the biggest concerns. More than 35% of respondents to the poll thought that surrogacy law reform should be a government priority.<sup>28</sup>

In early December 2018, Sir James Munby (then retired from the bench) gave a speech at the Progress Educational Trust annual conference entitled ‘New Science, New Families, Old Law: Is the Human Fertilisation and Embryology Act Fit for Purpose?’.<sup>29</sup> Among a trawl of various aspects of the HFE Act’s modern shortcomings, he discussed significant problems with the provisions of S54 (the criteria that govern who can acquire legal parenthood through a parental order). Among these, he highlighted the requirement that only couples can apply (and that this is being rectified by the remedial order), that the six-month ‘time limit’ for applications has been routinely side-stepped, and the idea that surrogates can only legitimately receive reasonable expenses for being a surrogate. He pointed out that by the time any case comes to court, the judge will be presented by ‘a fait accompli’, and asked ‘How is a judge supposed to assess whether the £10,000 paid, for example, is a genuine expense?’, adding ‘To authorise the payment, however distasteful the need to do so, will usually better promote the child’s welfare than not to’. Concluding on these points, he said that it was time to consider the current restrictions on commercial surrogacy and think about a model of regulation rather than prohibition. He also lent some support to the idea that parenthood could be determined – or at least part of the process could take place – prior to birth, and that consent from the surrogate could be dispensed with in appropriate situations.

Sir James Munby’s comments led to much (mainly online) debate about the merits and disadvantages of legitimising payments for surrogacy, as well as calls for pre-birth determination of parenthood following surrogacy. Additionally, in December the BBC released a series of podcasts exploring surrogacy, produced by Dustin Lance Black, the Oscar-winning screenwriter and activist, himself a father through surrogacy, which compare surrogacy in the UK with the commercial process in the USA. One thing we have seen from these discussions is that people have different understandings of what ‘payment’ or ‘compensation’ to surrogates actually means. These are all certainly things the joint Law Commissions’ review needs to consider. As a group, we continue to believe that the time is right to fully review and reform the law on surrogacy and it is hoped that the information contained in this report will be able to contribute to and inform those ongoing debates.

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<sup>27</sup> Held at Kensington Olympia from 3-4 November 2018.

<sup>28</sup> ‘Clear up opaque surrogacy law, specialists urge’ *The Times*, 6 November 2018.

<sup>29</sup> Published in full in *BioNews* 979 (10 December 2018).

# 1. Surrogacy in the UK: the current position

Surrogacy arrangements in the UK are regulated by the Surrogacy Arrangements Act (SA Act) 1985 and the Human Fertilisation and Embryology Act (HFE Act) 2008.<sup>30</sup> Surrogacy itself is a perfectly legal activity, though aspects of it are not. Under the SA Act commercial surrogacy is illegal, and third parties (such as agencies, brokers or solicitors) are prohibited from charging for surrogacy services, including the negotiation or brokerage of a surrogacy arrangement.<sup>31</sup>

Before going forward, it is important to attempt to define different types of surrogacy arrangement. Not only are there variations in the ways that surrogacy can be performed in a biological or physical sense (e.g. 'straight/traditional' versus 'gestational/IVF/host' surrogacy), but also there are different forms of agreement, in part distinguished by the amount of money a surrogate might receive, and what for. The language used to describe the type of surrogacy being entered into is important.

We have broken down our understanding into three interlinked aspects that determine the type of surrogacy, which are described in more detail in the tables that follow:

- A. Type of Payments
- B. Service Model
- C. Contractual Framework

## A. Types of Surrogacy Payments

Ref	Type of Payments	Summary
A1	Actual costs	Reimbursement of actual costs related to the surrogacy arrangement. <sup>32</sup> Includes petty-cash for incidental payments that might not have associated receipts. This is normally not considered to be 'income' for tax or entitlements purposes.

<sup>30</sup> With arrangements entered into before the 2008 Act came into force being subject to provisions from the HFE Act 1990.

<sup>31</sup> In *JP v LP & Others* [2014] EWHC 595 (Fam), King J found that in drawing up and charging for the making of an agreement, a solicitors had committed a criminal offence under section 2 SA Act 1985.

<sup>32</sup> This would comprise of 'genuine expenses' as recommended in the 1998 Brazier Report ('Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team' Cm 4068 (HMSO, London 1998) (hereafter, the 'Brazier Report'), para 5.24) including: maternity clothing, healthy food, vitamins, domestic help, travel to/from appointments, necessary accommodation, child care, counselling and legal fees, life and disability insurance, all medical expenses and any loss of earnings connected to unpaid leave from work in connection with the pregnancy and/or birth. The Brazier Committee thought that 'additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial reasons'. See also the Department of Health Guidance referred to in notes 19 and 20, above.

		Tend to be linked to not-for-profit service models (see B1/B2) and informal agreements.
A2	Compensating costs	Includes actual costs and an additional sum to 'compensate' the surrogate for her pain, discomfort, inconvenience and risk. Intrinsically linked to matters that have or could arise from the surrogacy arrangement. Freely agreed between parties or fixed/capped in law. Often provided as specific goods/services rather than monetary payments, e.g. gifts, holidays. <sup>33</sup> Is not commercial (see A3)
A3	Commercial	The surrogate's payment after actual costs are deducted is profit and/or enough to be considered the equivalent of a salary. Rates are set either freely in a 'market' for surrogacy or by organisations that represent surrogates. Tend to be linked to profit-driven services model (see B3) and 'enforceable' contracts

## B. Surrogacy Service Models

Typical surrogacy-related activities include:

- Advertising the presence and availability of surrogates, IPs and service providers
- 'Recruitment of surrogates and IPs to groups and organisations
- Screening
- Meeting or matching
- Agreement preparation
- Professional services (i.e. healthcare, legal advice)
- Financial services (i.e. insurance)
- Surrogate invoicing/payment management
- Practical and emotional support and issue resolution/mediation

These activities are usually provided through the following models. These are not mutually exclusive, and a single surrogacy arrangement could include activities provided by all three service models.

Ref	Service Model	Summary
B1	Independent	Surrogates & IP(s) undertake some or all of the surrogacy activities themselves without the support of formal organisations. Often between people who already know each other (e.g. family and friends) or strangers meeting using informal social media groups.

<sup>33</sup> Such items have been judicially authorised in some surrogacy cases in recent years. See e.g. the comments of Ms Justice Russell DBE in *A B and C (UK surrogacy expenses)* [2016] EWFC 33 at [21], where she said of a recuperative holiday that was claimed as part of a surrogate's expenses 'I fail to see how such a period of recuperation could be said to be anything other than a reasonable expense'. See also section 4, below, especially note 106 and surrounding text.



		Peer-to-peer support, often making use of experienced gained previously from organisations (see B2/B3).
B2	Not-for-Profit	<p>Not-for-profit organisations that provide some or all of the surrogacy-related activities as services to surrogates and IP(s).</p> <p>The owners/controllers of the organisations do not profit from the services they provide.</p> <p>Organisations may play a role in advising surrogates what expenses they can claim.</p> <p>Tend to be linked to non-commercial payments (i.e. A1/A2) and informal non-binding agreements.</p>
B3	Profit-driven	<p>Profit-driven organisations that provide some or all of the surrogacy-related activities.</p> <p>The owners/controllers of the organisations profit from the services they provide.</p> <p>Often act as agents for surrogates and describe themselves as such.</p> <p>Tend to be linked to commercial payments (A3) and 'enforceable' contracts.</p> <p>Usually have a role in setting the amount of money that surrogates can earn and how/when they receive payments.</p> <p>Profit generated by charging IP(s) fees over and above incurred costs and/or from referrals to other related organisations such as law firms and fertility clinics.</p>

### C. Types of Contractual Frameworks

Ref	Contractual Framework	Summary
C1	Informal Agreements	<p>Informal agreement between surrogate and IP(s).</p> <p>Legal advice is not required to construct these agreements although it may be sought if desired.</p> <p>Not enforceable, no penalties.</p> <p>May be taken into account in court proceedings.</p> <p>Tend to be linked to non-commercial payments (A1/2) and not-for-profit services model (B1/2).</p>
C2	'Enforceable' contracts	<p>Private contract between surrogate and IP(s).</p> <p>Prepared by lawyers or with the input or advice from lawyers.</p> <p>Different lawyers represent each party.</p> <p>Includes penalties for breach of contract.</p> <p>Contracts are legally enforceable and are usually taken into account in court proceedings.</p> <p>Tend to be linked to commercial payments (A3) and profit-driven services model (B3).</p>

For clarity, within this Report we have chosen to use the terms as outlined below using the table references.

**Altruistic Surrogacy** is normally:

- A1 + some items in A2
- B1 + B2
- C1, possibly with some limited-in-scope C2 if this is legal in the jurisdiction

**Commercial Surrogacy** is normally:

- A1 + A3, maybe with some items in A2
- B1 + B3, possibly with some B2
- C2 if this is legal in the jurisdiction

As indicated above, in the UK, commercial surrogacy is illegal. It is also a criminal offence to advertise for or as a surrogate, and all surrogacy arrangements are deemed wholly unenforceable.

However, commercial models are common in other jurisdictions, and it is not unlawful for IPs from the UK to travel overseas to enter a commercial surrogacy arrangement. Commercial models are usually underpinned by enforceable agreements or contracts and often with the promise that the surrogate will not be recognised as the legal mother. For surrogacy arrangements made in those states in the USA where it is legal, there is also the promise that the resulting child/ren, having been born in the USA, will be eligible for American passports, meaning their travel back to the UK should be a smooth process. The same is true for Canada. The 'certainty' (of coming away with a child) that these models offer is clearly a strong draw for IPs not only from the UK, but from other parts of the world where surrogacy may be difficult to access or illegal. The downsides of such arrangements include the financial cost (especially for surrogacy in the USA and Canada) and the uncertainty regarding the time that needs to be spent in another country before bringing the child/ren home (especially e.g. Ukraine).<sup>34</sup> Additionally, there may be ethical considerations about the morality of surrogacy operating as a business model and in particular in countries where it might be questioned whether the women acting as surrogates truly do so of their own free will or whether the agencies always act in the best interests of the surrogate.

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<sup>34</sup> The Foreign and Commonwealth Office (FCO) guidance on 'Surrogacy Overseas' (last updated June 2014, so somewhat out of date in respect of some destinations) warns that 'the process for getting your child back to the UK can be very long and complicated, and can take several months to complete' and in regard to obtaining British citizenship and/or a passport for (re)entry into the UK that 'you should be prepared for an extended stay overseas once your child is born'.

### **Key Findings:**

- **There are many different permutations of surrogacy, taking into account types of payment, models of service and contractual frameworks.**
- **Altruistic surrogacy remains a legal activity in the UK.**
- **Commercial surrogacy and related services (such as negotiating an agreement for money) are illegal.**
- **Commercial surrogacy is common in overseas surrogacy destinations, where surrogacy is also underpinned by enforceable agreements.**
- **It is not illegal for IPs from the UK to travel to overseas destinations for commercial surrogacy, but these generally cost considerably more than surrogacy in the UK.**

## 2. Comparing data on surrogacy

We showed in our last Report that ‘there is much variability in the data by year and source of information’<sup>35</sup> and one of our recommendations was that a way to collect more reliable data should be found. In this section we consider the latest data we have available.

### 2.1 The Ministry of Justice (MoJ)

The MoJ provided us with updated figures on the number of parental orders made annually sorted by the child(ren)’s birth address being registered as either ‘UK’, ‘foreign’ or ‘not known’. This gives us an indication of not only how many children are born through surrogacy,<sup>36</sup> but also the incidence of overseas surrogacy, as identified by place of birth, for 2011–2018.<sup>37</sup> The data shows that the mean percentage of children registered as born overseas (of those registered with known places of birth) has remained relatively steady at just over 13% for the past four years. There were two years where the proportion of overseas-born children seem to have spiked significantly: 2013 and 2015.

#### 2.1.1 Table showing MoJ data on POs made (counted by child)

Year	UK	Foreign	Not known	Total	Total minus unknown	% of known w/foreign birth address	Cumulative mean (to 1 d.p.)
2011	98	6	17	121	104	5.8	5.8
2012	134	8	48	190	142	5.6	5.7
2013	102	31	29	162	133	23.3	11.6
2014	164	18	61	243	182	9.9	11.2
2015	141	38	152	331	179	21.2	13.2
2016	163	27	217	407	190	14.2	13.3
2017	147	19	166	332	166	11.4	13.1
2018 (Q1&2)	73	13	90	176	86	15.1	13.3
<b>Totals</b>	<b>1022</b>	<b>160</b>	<b>780</b>	<b>1962</b>	<b>1182</b>	<b>13.5</b>	

As can be seen from the table, however, the number and proportion of ‘not known’ places of birth is increasing. In 2017, *half* of the parental orders recorded an unknown place of birth. This is concerning, because it means there is no true indication of what proportion of parental orders are granted to parents whose children were born overseas. Between 2015 and 2017, the number of unknown places of birth exceeded the number of children recorded as born in the UK. The MoJ told us that places of birth are recorded as not known because of ‘incorrect data entry which, if correct, would be its way of ascertaining whether the birth was domestic or overseas’. However, when we asked the MoJ whether it was more likely that data would

<sup>35</sup> Note 1, above, p.18.

<sup>36</sup> Though it is not mandatory to apply for a parental order, so not all surrogacy births will be captured by the data.

<sup>37</sup> Only the first two quarters of 2018 have so far been included in the data, meaning the 2018 figures will alter.

be entered incorrectly for a domestic or overseas birth, we were told that it would be impossible to know. If this is literally data entry into a computer system, it would seem that human error could occur equally frequently in one category as for the other. It would nevertheless be good to be able to have an accurate record of places of birth registered in parental order cases so a system of minimising error or unknowns would be welcomed.

## 2.2 Her Majesty’s Passport Office (HMPO)

HMPO provided us with details of the total number of parental orders made between 2008 and 2017 for children born in the UK and those born outside the UK, from the years 2008-2017 inclusive. This was based on information held by the General Register Office (GRO), which is based on the Parental Order Register which records those parental orders made by a court in England and Wales (but not Scotland). The figures have been compiled using the year of birth for each child.

### 2.2.2 Table showing births recorded in the PO register 2008-2017

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	Total
<b>Born in UK</b>	79	52	94	99	121	134	115	150	164	49	1057
<b>Outside UK</b>	15	10	42	63	72	114	190	171	147	10	834
<b>Total</b>	94	62	136	162	193	248	305	321	311	59	<b>1891</b>

In our 2015 Report, with HMPO data from 2003-2013, we could see that there was a small but increasing proportion of parental orders being recorded for births that took place overseas. We can see now that the proportion of recorded overseas surrogate births later being granted parental orders outstripped births in the UK during 2014 and 2015, though a greater proportion of UK births were then recorded from 2016 onwards (and the number of overseas births declined in 2016).<sup>38</sup> Whatever the proportions, the figures still show that the numbers involved are not massive – a mean of just over 189 babies have been born per year through surrogacy and been granted parental orders, taking into account both births in and outside of the UK. Of course, there is no way of knowing how many people *do not* apply for parental orders.<sup>39</sup>

## 2.3 Children and Family Court Advisory and Support Service (Cafcass) data

Cafcass, the agency responsible for reporting to the court post-birth on whether the making of a parental order would be in the child’s best interests and whether the S54 HFE Act 2008

<sup>38</sup> It should be noted that these numbers might not reflect the number of surrogacy *arrangements* entered into either, as some of the births might have been twin births. Likely also that there would be a higher number of twin births among the overseas arrangements (as no single embryo transfer policies in place).

<sup>39</sup> Note: the HMPO numbers do not correspond with the numbers cited in 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, or the data from the MoJ (table 2.1.1), though the total numbers are similar to the MoJ data and the differences may be reflected in what point in time (birth or granting of parental order) the data reflects.

parental order criteria are met, reported in a study in July 2015 that the number of surrogacy arrangements was generally increasing. Its data indicated a rise from 138 parental order applications in the year April 2011 - March 2012 to 241 applications in April 2014 - March 2015.<sup>40</sup> The dates of recording differ from that in the tables above, partly explaining the difference in numbers, and it should be noted that the data covers *applications* for parental orders, not actual orders entered into the Parental Order Register. There were 189 applications made in 2013/14, the year the report focuses on. When considering the data on multiple births (23.8% twin births and 1.1% triplets),<sup>41</sup> this figure represents 238 children. Over 50% of the applications were recorded as allocated to Cafcass teams in Greater London,<sup>42</sup> with the remainder being spread almost evenly across Cafcass' service areas. 78.8% of applications involved opposite-sex couples with the remaining 21.2% involving same-sex male couples.<sup>43</sup>

The second part of Cafcass' 2015 study looked at 79 (or the 189 total applications recorded) individual case files. This sample showed an almost even split between applications being heard by magistrates compared to those in the High Court (with a much smaller proportion heard by District or Circuit judges). Unsurprisingly, applications heard in the High Court took longer (the mean length of time, at 27 weeks, was just over double that of magistrates' hearings).<sup>44</sup> All international cases were heard in the High Court and all but one of the 'domestic' cases were heard by magistrates, district or circuit judges. In recording the contact between the Parental Order Reporter and the surrogate respondents in this sample, it was seen that 47 surrogates were in the UK, compared to 18 in India and 14 from the USA (and none from elsewhere).<sup>45</sup> 17 (21.5%) of the arrangements were straight surrogacy (none of these were international arrangements, meaning that straight surrogacy represented 36.2% of domestic arrangements).<sup>46</sup>

In 73 of the 79 sample cases, Cafcass was able to see what payments were made (though this could not be broken down to see only payments of expenses/compensation to the surrogate herself, and may therefore include e.g. agency and other costs in the overseas context).<sup>47</sup> The mean sum (taking currency conversion rates into account) was £15,961.66. Disaggregating this by countries gave a mean of £10,694.13 for the UK (highest sum of £23,500), £10,981.31 for India (highest sum of £25,600) and £ 39,875 for the US. The highest cost was seen in a USA arrangement, of around £96,000. In all cases the total sums paid were likely to have been

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<sup>40</sup> Cafcass Study of Parental Order Applications made in 2013/14, July 2015, available at <https://www.cafcass.gov.uk/download/3848/>.

<sup>41</sup> *ibid.*, pp.6-7.

<sup>42</sup> *ibid.*, p.5.

<sup>43</sup> The overall number of adoptions in the same year was 4,835 (total number of children), with 340 of these being recorded as being by same-sex couples (*ibid.*, p.7), compared to 40 parental order applications by same-sex (male) couples, which may include multiple births.

<sup>44</sup> *ibid.*, p.10. High Court proceedings are inevitably longer because of their complexity, the delay in getting documents from other jurisdictions etc. Domestic cases will only be heard in the High Court if they raise a major issue.

<sup>45</sup> *ibid.*, p.13. Though note that other countries may have been represented in the whole sample of 189 applications for the year – that said, it can be surmised that the vast majority of parental order applications made in 2013-14 related to arrangements entered into in the UK, the USA or India (which is now effectively closed to foreigners seeking surrogacy).

<sup>46</sup> *ibid.*, p.15.

<sup>47</sup> *ibid.*, p.17.

higher as, for example, the costs of clinical treatment and/or insurances would not have been included. The majority of the sample indicated that they would keep in touch with the surrogate (69.6%), either 'face-to-face' or with no face to face contact.<sup>48</sup> In the 25 cases (31.6%) within the sample who said they would retain actual face to face contact, 21 were domestic arrangements, suggesting that close relationships had developed during these surrogacy journeys and long-term contact was wished for. 17 of the arrangements in the sample reported that there was no contact with the surrogate maintained: 15 of those were undertaken in India.<sup>49</sup>

Cafcass also provided us with data on parental order applications which it has recorded from the financial years 2014-15 to 2018-19.<sup>50</sup> This shows the total number of applications, those made by applicants of the same gender, and the home country of the female respondents (i.e. surrogates).

### 2.3.1 Table showing total number of applications recorded

Financial Year	Number of applications received	Number of applications with same gender applicants
2014-15	242	69
2015-16	295	66
2016-17	314	78
2017-18	281	93
2018-19 (Apr-Sept 2018)	136	42
<b>Grand Total</b>	<b>1268</b>	<b>348</b>

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<sup>48</sup> *ibid.*, p.19.

<sup>49</sup> *ibid.*, p.20.

<sup>50</sup> Again differently measured from the sources above. Sent with a caveat about the data in that there is a margin of error and that it reflects the accuracy of the information provided. The data was taken from the Cafcass national database (ECMS), which is a live system, continually updated and subject to change when further updates are made.

### 2.3.2 Table showing Cafcass data on PO application respondents by country

Country <sup>51</sup>	2014-15	2015-16	2016-17	2017-18	2018-19 (to 30/9 2018)
Australia	<6	<6	<6		
Canada	<6	<6	<6	13	<6
England	89	112	142	119	64
India	47	50	57	7	<6
Ireland		<6	<6		
New Zealand			<6		
Nigeria	<6	<6	<6	<6	
Non-UK other	6	11	10	25	9
Russia	<6				
Scotland	<6	<6	<6	<6	
South Africa	<6		<6	2	
Spain					
Thailand	12	8	<6	<6	<6
Ukraine	<6	<6	<6	20	19
USA	48	71	71	77	35
Wales		<6	6	6	<6
Unknown	14	11	7	<6	
Information not held	14	18	4	5	3
<b>Total</b>	<b>242</b>	<b>295</b>	<b>314</b>	<b>281</b>	<b>136</b>

In our 2015 Report, the Cafcass data showed that from 2008-9 (when central records began to be collected), the total number of annual parental order applications rose from 63 to 153 in 2012-13, rising to above 200 in 2013-14. The figures therefore show that the incidence of parental order applications has increased in the last 10 years, though has remained fairly steady in the years since 2014-15. The number of applications with same gender applicants has also remained fairly steady in those years, making up around a quarter to a third of all applications.

### 2.4 Other sources of information

The HFEA report referred to in our Introduction states that, in 2016, there were 232 IVF treatment cycles in licensed clinics where the patient was registered as a surrogate (71% of which were frozen embryo cycles), following a 'peak' of 247 in 2015. It also shows that this figure has 'more than doubled' in the past 10 years'.<sup>52</sup> In contrast, the HFEA recorded only six DI cycles where the patient was registered as a surrogate in 2016. This difference is likely to be because no clinical intervention is necessary in DI cycles, (unlike with gestational surrogacy) and many such arrangements take place outside of clinics, on private property, using self-insemination. The median age of patients treated as surrogates in 2016 was less

<sup>51</sup> Recorded according to the address of the female respondent.

<sup>52</sup> *ibid.*, p.44; figure 54.



than 35 years old, with nearly half of those recorded falling into this category. Only 10% of the surrogates were aged over 44 years old.

The three main non-profit surrogacy organisations in the UK – Brilliant Beginnings, Childlessness Overcome Through Surrogacy (COTS) and Surrogacy UK – do not publish data on the number or type of arrangements made via their organisations.<sup>53</sup> However, from their websites and from private communication with these organisations where possible, we have established the following information.

**i. COTS**

COTS is the UK's oldest surrogacy support organisation (established in 1988) and has now recorded 1050 surrogate births, currently averaging 25 births per year. Its running costs are covered by membership fees (it is currently £850 for IPs to join) and donations. The organisation gave us its current information: it has 77 surrogates registered (some having completed journeys), with 17 of these not in an agreement and seven currently pregnant. It has 32 matched IP couples (five of these using straight surrogacy and 27 using gestational surrogacy). There are also 26 IP couples waiting (six for straight surrogacy and 20 for gestational). 14 same-sex male couples are active members, with nine matched and five waiting. Two of the matched same-sex couples are using straight surrogacy.

Both surrogates and IPs are geographically widespread across the country, with no particular geographical 'hot spots' standing out, though a fairly substantial number of IPs are based in London and its surrounding counties. COTS' criteria require health checks, counselling, and DBS checks, as well as for IPs to be able to meet the criteria for a parental order. Surrogates must have had their own children prior to becoming a surrogate and should be between 20-45 years old (with some exceptions made for sibling journeys using the same surrogate). The organisation reports that 'all couples who have applied for a parental order over the years have been granted one without much difficulty'. Although COTS 'had a handful of cases many years ago who went to the USA commercial agencies' it now does not deal with overseas surrogacy at all.

**ii. Surrogacy UK**

SUK was formed in 2002 and by the end of October 2018 had recorded 218 surrogate births.<sup>54</sup> The number of births per year increased from 2013 from a mean average of just under eight births per year until that point: in the six recorded years since (2013-18 inclusive) the mean number of births per year is 24.5. The organisation has 123 active surrogate members and 154 active IP couples.<sup>55</sup> In addition, there is a broader membership of surrogates and IPs who are not actively pursuing a surrogacy journey. SUK seeks to maintain a ratio of 3.5 actively-looking couples for every actively-looking surrogate. The rate at which IPs are able to join as new members is therefore

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<sup>53</sup> Though Surrogacy UK intends to publish monthly metrics on its website from early 2019.

<sup>54</sup> Data in this section is taken from SURROGACY UK – KEY STATS (End October 2018), prepared by the Trustees of SUK unless otherwise stated. All births were in the UK – the organisation does not deal with overseas surrogacy.

<sup>55</sup> SUK's policy is to only accept IP members who can meet the s54 HFE Act 2008 requirements for a parental order to be granted.

determined by the rate at which new surrogates join the organisation and existing surrogates and IP members return from resting to actively-looking. Running costs, including employed staff costs, are covered by membership fees and fundraising. IP membership is £950 (since April 2018); there are no costs for surrogates to join SUK. Currently, the waiting time for IPs looking to join SUK as members is around six months. An average of four new surrogate members per month joined SUK in 2018 and an average of two surrogates per month returned from resting to actively-looking. 80 of the 218 births, as measured by IP location, were in Greater London. The remainder were spread geographically across the UK, including Scotland (11), Wales (2) and Northern Ireland (3).

SUK screens applicants before they join the organisation to ensure that IPs have a biological or medical need for surrogacy; surrogates have no known health impediment to helping someone through surrogacy; everyone understands and is ready for the surrogacy process and the implications of this for them and their friends and families; safeguarding risks are identified and evaluated and that everyone meets the legal requirements of obtaining a parental order. Members are then provided with guidance by experienced, trained members of SUK at key stages of the surrogacy process: joining the organisation; forming a team with a surrogates/IP(s) and preparing a surrogacy agreement. These experienced members also provide support and advice along the way. Surrogacy UK is led by a Board of Trustees, which is advised by an Advisory Board and a newly formed Ethics Committee. All of these positions are occupied by experienced members and external experts who give their time for free. On a day-to-day basis, Surrogacy UK is run by paid operational staff.

The majority of surrogates at SUK (81%) offer only gestational surrogacy, with a further 9.5% offering either gestational or straight surrogacy. Gestational surrogacy (using either the IPs own gametes or donor eggs) is sought by 68% of IPs, with a further 27% seeking either straight or gestational surrogacy with donated eggs. Only 5% of IP couples were seeking only straight surrogacy. Of all 218 recorded births, 33% resulted from straight surrogacy, with the proportion of this being slightly higher (40%) when there were same-sex IPs.<sup>56</sup> 31 births (14%) were sibling journeys. As at the end of October 2018, there were nine IP couples in the process of joining the organisation, with a further 90 couples waiting to join (with an approximate six month waiting time). In addition there were eight single people waiting to join.<sup>57</sup> Same sex male couples made up 20% of the active IP couples. The other 80% of couples were seeking surrogacy for a variety of medical reasons, including unexplained infertility, failed IVF, cancer and MRKH.<sup>58</sup>

### iii. **Brilliant Beginnings**

Brilliant Beginnings, founded in 2013, guides and supports UK IPs 'through professionally-managed surrogacy in the UK and USA'.<sup>59</sup> Unlike the other UK

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<sup>56</sup> Surrogacy UK: Births by IP Sexual Orientation & Surrogacy Type (12 November 2018).

<sup>57</sup> SUK is not accepting single members until the law allows them to apply for a parental order.

<sup>58</sup> Mayer-Rokitansky-Küster-Hausler syndrome, a genetic condition that occurs in females and mainly affects the reproductive system.

<sup>59</sup> <https://www.brilliantbeginnings.co.uk/about>

organisations, it offers a fully supported matching service, including for surrogacy in the USA and Canada. Brilliant Beginnings only matches IPs with gestational surrogates, though will signpost those IPs or surrogates looking to do straight surrogacy to other organisations. It requires surrogates to be between 21 and 40 years old, be 'fit and healthy' (specifying a BMI of between 19 and 28), have already had a baby, be a non-smoker, and have a clean criminal record and no involvement with social services. Once a surrogate is registered (and having got to know registered IPs too), Brilliant Beginnings will suggest a one-to-one match, sharing with surrogates the suggested IPs' profiles and preparing a profile for the surrogate too, to be given to the IPs.<sup>60</sup> IPs must provide information about their plans, alongside a DBS certificate and two references. All of BB's services include legal advice provided by its sister organisation NGA Law. In 2018, BB's service for surrogacy in the UK cost £12,500 plus VAT. An initial options review, at which prospective IPs talk through the possibilities and implications of surrogacy, is £500 plus VAT.

Brilliant Beginnings' website says that, together with NGA Law, it has created more than 800 families, though does not specify what percentage are by surrogacy, nor how many of its surrogacy arrangements were overseas. NGA Law's website says that it has 'helped create hundreds of families through surrogacy, assisted reproduction, donor conception, co-parenting and adoption', and that it has 'worked with over 800 UK families created through surrogacy in more than 30 different jurisdictions'. This does not mean that BB (or NGA Law) helped to organise that number of surrogacy arrangements, and it is likely that the figure of 800 includes legal advice given by NGA Law to members of other surrogacy organisations, thus meaning there is some double-counting with the figures discussed above.<sup>61</sup>

### **Independent surrogacy**

British IPs do not have to use any of the organisations discussed above. There is a substantial community of 'independent' surrogates, some of whom affiliate to groups such as Hope Surrogacy Support Service.<sup>62</sup> For obvious reasons, it is difficult to collect data on independent surrogacy,<sup>63</sup> however, Hope shared some of their data with us:<sup>64</sup>

"In 2017 we had 33 surrogate births shared through the Hope group, in 2018 we have 28 babies on the list so far and 15 babies due so far for 2019 but that list will still keep growing! We have on average of 14 new member inquires per a month, this could be member request on the two Facebook groups, messages or emails."

"We have over 650+ members between the two Facebook groups; this does include supportive partners of surrogates as well as both surrogates and IPs. At the moment the split is about 70/30 but we also have IPs that have completed their family as well as surrogates that aren't looking to carry again within those numbers."

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<sup>60</sup> <https://www.brilliantbeginnings.co.uk/surrogates/process>

<sup>61</sup> At the date of publication, Brilliant Beginnings/NGA Law had not yet provided us with further information on these figures.

<sup>62</sup> <https://hopesurrogacysupportservice.co.uk/>.

<sup>63</sup> However c.25% of responses from surrogates to our 2018 survey, the results of which are discussed in section 3, below, were from independent surrogates (a higher proportion than for our 2015 survey).

<sup>64</sup> Information from correspondence 27 November 2018.

“We have many same sex couples [as members], the split changes all the time. I would say it’s about 50/50 at the moment but that does change all the time. We do have single IPs on the groups but have always advised that they wait till the law changes have taken affect before starting a journey so as not to be left in limbo, for the sake of both IPs and surrogate”.

Although Hope is not a surrogacy support organisation in the sense that other non-profit organisations are, it does provide guidance on the entire process and on the legalities of surrogacy on its website. Hope also told us about its ‘rules’:

“We do ask that IPs meet the parental order requirements unless they are single and so therefore soon will meet the PO requirements. We also recommend that all members carry out their own background checks such as DBS, STIDs screening and complete an agreement, we do offer support and advice on how to do all of these.”

In addition, asked to comment on the speculation that it is perhaps more likely that more people enter straight surrogacy arrangements in the independent context, we were told:

“The split between IVF and straight surrogacy changes all the time at the moment it’s probably about 60/40 towards IVF but less than a year ago I would have said 80/20 towards straight, the year before that more in favour of IVF, it just depends on the reason for coming to surrogacy in the first place. I do think more straight / traditional IPs go down the independent route as they are they are looking for ways to reduce the cost and removing the need for IVF can make a big difference, so therefore removing the cost of paying a support service such as COTS or SUK also appeals”.

## **Other organisations**

There are other groups and people who provide information about surrogacy, including overseas surrogacy, some of whom have provided us with information.

The British Surrogacy Centre (BSC) describes itself on its website as being ‘Europe’s first surrogacy agency and the only truly international agency in the world, managing surrogates and egg donor cases in countries around the world!’ It is based in both the UK and the USA and matches IPs with surrogates in the US, mainly in California. Most of BSC’s work is within the US, but the website says it is ‘also currently working with clients from over 25 countries worldwide, including, France, Spain, Germany, China, Japan, Singapore, Australia, New Zealand, and the UK’. It also claims to maintain ‘a current list of surrogates who are screened and ready to start the process right away, both in the USA and UK’ and that they have ‘over 300 babies and more on the way!’<sup>65</sup> In terms of numbers, the website also claims that ‘over the past eight years, we have helped 85 couples and singles with surrogates, both traditional and gestational, and with egg donors, producing 120 babies’. Again, it is not clear how many of those helped were from the UK. It also says that ‘in the past 12 months alone, from the 175 applications from prospective intended parents, the BSC America chose to work with 63.

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<sup>65</sup> The breakdown of how many of these are surrogacy and how many egg donation only is not known. It is also not possible to tell how many of these were UK-based clients.

All of these couples have been matched with surrogates in the USA'.<sup>66</sup> Given the cross-border nature of the organisation's work, the BSC is careful to make potential IPs aware that they need to know the legal situation regarding surrogacy in both their home and destination countries:

"The British Surrogacy Centre of California is Company registered in the State of California where surrogacy and egg donation on a commercial basis is legal. If you are viewing the content of this site in a country where surrogacy is illegal or where commercial surrogacy is illegal then we advise you to leave the site or at the least be aware of the law in your own country".

The website has a full breakdown of the costs that might be involved in undertaking a surrogacy arrangement in the US, including e.g. costs of medical tests that might be required, indications of usual expenses costs for the surrogate, a project management fee of \$10,000 USD and basic surrogate compensation of \$25,000-\$35,000 USD.<sup>67</sup>

Families Through Surrogacy (FTS), an international 'consumer-based non-profit organisation' sent us its report 'International Trends in Utilisation of Surrogacy' from October 2018, a survey of global surrogacy providers. It says that:

"Cross-border surrogacy arrangements are an increasingly common means to family building, particularly amongst gay male singles and couples, as well as infertile heterosexual couples who do not have significant access to other routes to parenthood such as adoption or surrogacy arrangements in their own country due to legal or financial barriers".

The report lists 10 overseas destinations where surrogacy is offered to non-nationals (to varying degrees): the USA, Canada, Greece, Georgia, Kenya, Laos/Thailand,<sup>68</sup> Mexico, Russia and Ukraine.

FTS invited 105 surrogacy agencies to take part in an anonymous survey, asking for 'the number of clients who had engaged for surrogacy arrangements in each of the last two calendar years by source country of intended parents'.<sup>69</sup> It received responses from 32 of these (28%),<sup>70</sup> reporting a total of 4,094 clients from 91 different source countries over the two years. Of these, a total of 148 clients were from the UK, with 34% of these engagements taking place in the USA, 34% in Ukraine, 20% in Canada, 7% in Georgia, 3% in Thailand and 2% in Mexico. The UK had the eighth highest number of people engaging with the clinics who responded, but did not feature in the 'top ten' of nations where clients were engaging in cross-border surrogacy when the numbers were analysed on a per capita basis. According to the report, the nations with the highest actual number of people seeking international

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<sup>66</sup> However, these are exactly the same numbers the BSC had on its older website in 2015 and which we cited in our first Report (p.17), so it is hard to gauge any accurate picture of the numbers of UK IPs being helped by the BSC. Though we tried to contact BSC in our research, we received no response.

<sup>67</sup> <http://www.britishsurrogacycentre.com/surrogacy-costs/>.

<sup>68</sup> While Thailand has officially banned surrogacy for foreigners, the FTS report says that 'a few agencies are circumventing this by using neighbouring Laos for IVF & embryo transfer, meaning Thailand continues to be used by foreigners'.

<sup>69</sup> FTS believes this number represents approximately 70% of the total volume of surrogacy providers globally. The years surveyed were 2016-17. It is not clear whether the number of clients is measured by person or by couple.

<sup>70</sup> Based on the response rate and the incomplete sampling frame, FTS estimates that the numbers in the report represent approximately 14% of all international surrogacy clients annually.

surrogacy are Israel, China and Australia. The UK and France have the highest number of IP clients travelling from European countries, though when the figures are adjusted on a per capita basis, they show Ireland, Norway and Sweden as the highest European user nations of international surrogacy. When asked about waiting times (to be matched with a surrogate or begin a surrogacy journey), FTS told us that it saw average waiting times of six months in the US, eight months in Canada, one month in Ukraine, and six weeks in Georgia and Russia.

An independent surrogacy adviser also gave us numbers for the past three years of people from the UK that he had personally helped who have gone to just one particular clinic in the US for IVF to start their surrogacy process.

2016 – 30 IPs

2017 – 28 IPs

2018 (to date, October) – 38 IPs

Given that these numbers represent only one clinic, it is likely (and in comparison to the FTS figures, above) that there are more IPs starting surrogacy journeys in the USA than this.<sup>71</sup>

## 2.5 Conclusions from the data

The updated data still shows variability, but we can see that the total number of surrogacy arrangements (as indicated by parental order information) has remained relatively steady in the three years since 2015. There has not been an exponential increase in surrogacy, though there was certainly an increase from the early 2010s upon the numbers recorded for the previous decade, perhaps reflecting an increase in the availability of international surrogacy, as well as the work done by non-profit organisations. However, the latest data also shows that the largest number of female parental order respondents annually are in England, but that the proportion of overseas arrangements continues to increase, and the total number of overseas parental order respondents per year is more than the total number from England, Scotland and Wales since 2015. It is still far lower than the estimated numbers uncritically cited in a Parliamentary debate in October 2014.<sup>72</sup> It is also clear that overseas commercial arrangements, especially in the USA, are expensive, including commercial payments to surrogates and agencies, as well as other costs.<sup>73</sup>

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<sup>71</sup> Note these numbers refer to IPs helped, not the number of children born. It is also not possible to tell if this is the number of journeys: most of the IPs are likely to be in couples.

<sup>72</sup> Jessica Lee MP cited an estimated 1,000-2,000 children born to surrogates for UK-based IPs per year, with 'up to 95%' of these being born overseas (Hansard 2014 Col 1WH 14 October).

<sup>73</sup> The costs can be prohibitive: see Jadvá V, Prosser, H, and Gamble, N., (2018) Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making, *Human Fertility*, <https://www.tandfonline.com/doi/full/10.1080/14647273.2018.1540801>

### **Key Findings:**

- **The total number of annual surrogacy arrangements appears to be relatively stable.**
- **Most surrogacy arrangements in the UK are supported by non-profit organisations.**
- **There is also a thriving ‘independent’ surrogacy community in the UK.**
- **It remains a myth that thousands of IPs from the UK are travelling abroad each year for surrogacy.**
- **The proportion of IPs who travel internationally for surrogacy from the UK is small, but increasing.**
- **The cost of overseas commercial surrogacy arrangements is considerably more than undertaking surrogacy in the UK, which is a prohibitive factor for some IPs.**

## 3. Our 2018 survey data

We conducted a new online survey from July-September 2018, asking respondents a number of questions about their experiences of surrogacy. The survey was created using Jisc Online Survey software and respondents were assured that their responses would remain anonymous. It was disseminated widely through direct circulation to members by national surrogacy organisations Surrogacy UK and COTS, as well as via some 'independent' surrogate groups. It was also distributed via the *BioNews* and Families Through Surrogacy websites, by some fertility clinics, the HFEA, the Association of Clinical Embryologists, Stonewall, as well as several patient groups. It was circulated more widely and multiple times via social media, including retweets and reminders by the organisations already mentioned, and by the Law Commission of England and Wales, the Scottish Law Commission, prominent academics and lawyers, infertility nurse networks, Fertility Network UK, the National Infertility Society, the Donor Conception Network, the British Infertility Counselling Association, the Centre for Reproduction Research, the Centre for Parenting Culture Studies, the organisers of National Surrogacy Week, surrogacy activists and support groups, and as far away as Australia and New Zealand.

There were **510 responses** in total, with 498 of these coming from people living in the UK. The breakdown of respondents shows that **103 surrogates**, 8 partners of surrogates, **209 IPs** (27.8% (58) in same-sex couples) and 190 'others' responded. Both the surrogate and IP categories included people actively looking to enter an arrangement, as well as those in an arrangement at the time of the survey, or with a completed journey or journeys. As far as we are aware, this is the largest ever UK survey of surrogates, IPs and other interested parties.<sup>74</sup> There is a great deal of further quantitative and qualitative analysis (including of many free text responses) to undertake, but the major preliminary findings are presented here. The vast majority of the responses from surrogates and IPs related to surrogacy arrangements previously or currently being undertaken in the UK, though 18 (8.6%) of our IP respondents reported using overseas destinations for surrogacy.

### 3.1 What the surrogates said

Of the **103 surrogates** who responded, 101 told us how many times they had been a surrogate. Of these, 56 (55.5%) had completed one or more surrogacy arrangement and 45 (44.6%) were either pregnant or trying to conceive. Four were on a second journey with the same IPs, 13 were on a second journey but for different IPs, and 32 were on at least their third journey. Two women told us they had each given birth to 10 babies through surrogacy, though the majority had had between one and three surrogate babies. 103 surrogates answered a question about their existing children, with 100 of them (97.1%) telling us that they had their own children, and 87 of these telling us that they had completed their own family before acting as a surrogate (with the remaining 13 going on to have more children of their own after surrogacy). The surrogates came from all areas of the UK, including Scotland (5), Wales (4), Northern Ireland (1), though the majority were from England.<sup>75</sup> The areas of the country

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<sup>74</sup> The last biggest was for our 2015 Report, with 434 responses.

<sup>75</sup> One surrogate was from the Channel Islands, technically not part of the UK.



where the highest proportion of surrogate respondents live are the south-east (outside of London, 22) and the Midlands (19), followed by the south-west (15), north-east (13) and north-west (11). Only four came from London.

74 (71.9%) of the 103 surrogates were gestational surrogates; 29 (28.1%) were straight surrogates. Of the gestational surrogates, 41 were implanted with embryos made from both IPs' sperm and egg, while a further 31 were implanted with embryos created using a donor egg.<sup>76</sup> Only two of the straight surrogates had been inseminated with the intended father's sperm in a licensed clinic, with the remainder performing the insemination in non-clinical settings.<sup>77</sup> There were 107 responses to a question asking surrogates how they met their IPs.<sup>78</sup> 94 (92.1%) of the surrogates met their IPs through a surrogacy organisation or online support group or forum: 44 of these cited Surrogacy UK, 24 COTS and one Brilliant Beginnings. Ten had been a surrogate for a friend or family member.

When asked about their motivations, surrogates were able to give free-text responses. All of the surrogates did so, and none of the responses were negative. While these responses require substantially more qualitative analysis, a number of themes can be seen very easily, including the love of being a parent themselves and wanting to help others have a family and experience the same; having easy pregnancies and births; knowing or having known people with fertility problems; having had fertility problems themselves and/or having seen or read something about surrogacy that inspired them. For example, one surrogate said:

'I first decided that I (sic) like to be a surrogate after watching my aunt battle infertility. I then saw a programme on the BBC about surrogacy and knew it was definitely something I (sic) wanted to do'.

Another surrogate said:

'I had my family complete and wanted to help make a couple a family. And I wanted them to enjoy being a parent as much as I do'.

And another said:

'I felt so incredibly lucky to have my 3 children naturally with no problems. I couldn't think of anything more amazing than to give the gift of a baby to someone who is less fortunate'.

### Contact, origins and cost

85 surrogates answered a question asking whether they maintained contact with the children to whom they had given birth. Some of the 103 total surrogates were in the early stages of an arrangement, trying to conceive pregnant on their first surrogacy journey, so the question did not yet apply to them. Of the 85 who responded, 71 (83.5%) said that they did maintain contact, and only four (4.7%) said that they did not. Others said that they maintained contact with some, but not all of the children that they had carried. The level of contact is generally high as indicated by free-text responses, varying from electronic communications only to regular meetings and even joint family holidays, with multiple variations and combinations of

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<sup>76</sup> The two others reported being neither of these options, which might mean that they were a gestational surrogate using both donor sperm and eggs – *meaning the IPs would not be able to obtain a PO* according to the eligibility criteria in S54 HFE Act 2008.

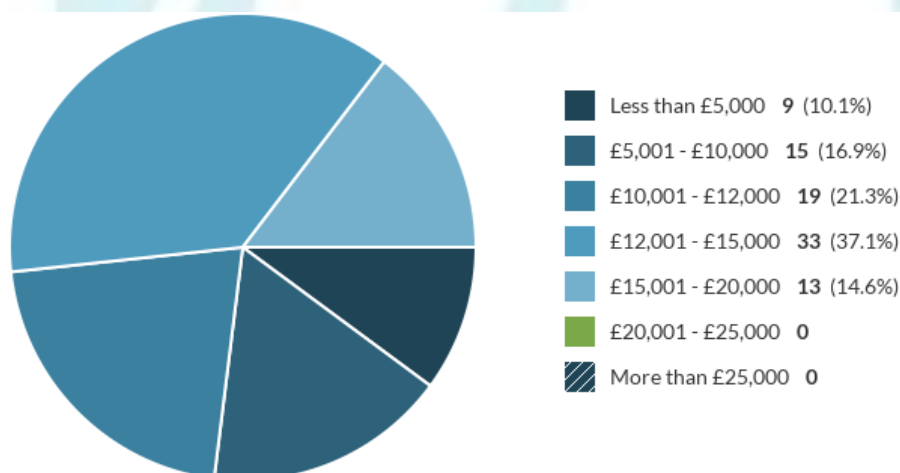
<sup>77</sup> The low proportion of this reflects the HFEA data, as shown in section 2.4, above.

<sup>78</sup> This is higher than the total number of surrogates who responded, suggesting that some had met their IPs in different ways for different surrogacy journeys.

these in between. 97 (94%) of the surrogates said that they knew the IPs they had worked with had told or intended to tell their child about the means of their conception. This indicates that there appears to be a clear desire from IPs to be open and transparent which will ultimately benefit the child(ren).

89 of 100 respondents to a question about payments received some money to cover expenses for their most recent surrogacy journey. None said that they received more than £20,000, with the majority receiving between £12,001 and £15,000, and the next highest group receiving between £10,001 and £12,000. In total these sums were reported by 58.4% of the respondents. In the 2015 survey, 68.2% of surrogates reported receiving between £10,000 and £15,000 for their expenses. There has been an increase in surrogates reporting receiving between £15,001 and £20,000, from 4.7% in 2015 to 14.6% in 2018. The proportion of those reporting receiving less than £10,000 was very similar: 27.1% in 2015 and 27% in 2018. This suggests that the levels of payments to UK surrogates is remaining relatively static, with small increases in higher payments being attributable to rising costs of living, reflected in surrogates' expenses.

**Figure 3.1.1: Money received by surrogates in the UK**



### Legal Parenthood

Of 100 surrogates who responded to a question asking whether the IPs they are working/have worked with will 'definitely' apply for a PO, 94 answered with a clear 'yes'; a further four said they didn't know. One said 'no'.<sup>79</sup>

102 surrogates answered a question asking who should be recognised as the legal parents of a child born to a surrogate at birth. 70 of these (68.6%) said that this should be the IPs, whether genetically related to the child or not. A further 14 (13.7%) said that it should be the IPs when both are genetically related to the child. Two thought that the surrogate and the intended father should be the legal parents, if he provided the sperm, and one thought that the surrogate and the intended *mother* should be legal parents if the intended mother provided the egg. A further two opted for the surrogate alongside either IP, as long as they

<sup>79</sup> The 'other' who responded here stated that she hasn't 'got this far yet'.

were genetically related to the child. Five said the parents should be the two people genetically related to the child and, interestingly, six said that the surrogate and *both* IPs should all be legal parents. Only two surrogates thought that they and their own partner should be the legal parents at birth, as the law currently states. These figures show a similar picture to those in our 2015 survey, with a slight rise in the proportion of surrogates who think the IPs should always be the legal parents at birth, or should be when they are genetically related.

In order of preference, when surrogates were asked *when* and how legal parenthood should be determined, the following results were obtained (all 103 surrogates responded):

At birth (automatically):	53 (51.5%)
Pre-birth order:	17 (16.5%)
At birth (court order):	13 (12.6%)
Pre-conception:	11 (10.7%)
After birth (court order):	5 (4.9%)
After birth (time period):	2 (1.9%)
Other:	2 (1.9%)

This shows a very strong preference among surrogates to have legal parenthood determined at or before birth. 84 (81.6%) said a clear 'no' to a question asking whether surrogates should have the option to change their mind about transferring the baby to the IPs. This proportion has increased since the 2015 survey, where 68.5% of the surrogates who responded said this. One (<1%) said 'yes, at any point', while three (2.9%) said 'until birth' and another two said 'until the child is in the care of the IPs'. 'Other' responses (with explanatory text option) suggested that only where there were 'exceptional circumstances' or the surrogate had 'cause for concern' about the IPs should she be able to change her mind; one said it might be different for straight surrogacy compared to gestational surrogacy. Asked whether they thought that IPs should be able to refuse to parent the child(ren), 97 (94.2%) said no.

#### **Key Findings:**

- **Many UK surrogates do more than one surrogacy journey and most retain long-term contact with the families they helped to create.**
- **The proportion of surrogates receiving less than £10,000 in expenses payments remains the same as in 2015.**
- **There is a small increase in the number of surrogates reporting receiving £15-20,000.**
- **The majority received between £10,001 and £15,000 for their most recent surrogacy journey.**
- **The majority of surrogates do not think that they (and their partners) should be legally recognised as the parent(s) of the child.**
- **There is strong support among surrogates for legal parenthood to be determined at or before birth.**

### 3.2 What the IPs said

Of the **209 IPs** who responded, 187 answered a question about the location of their surrogate. 171 (91.4%) had used or were using a surrogate in the UK, while there were 18 surrogacies reported overseas.<sup>80</sup> These ratios are similar to those for IP respondents in our 2015 survey.

- A) In the **main group**, eight (3.8%) were at the seeking information stage, 42 (20.1%) were trying to find a surrogate, while another 21 (10%) were at the 'initial meetings/matching/getting to know stage. 22 respondents (10.5%) were trying to conceive, and there were 18 arrangements (8.6%) where the surrogate was pregnant. In the completed arrangements, one surrogate still had the child with her (0.5%), 15 IPs had the child with them but had not yet applied for a PO, 10 (4.8%) were in the process or obtaining a PO and 69 (33%) were already the legal parents via a PO.<sup>81</sup>

207 people told us about their personal circumstances. 100 (48.3%) of these respondents described themselves as in a heterosexual couple where the female was unable to carry a child, while a further 40 (19.3%) were heterosexual where the female was unable to conceive or maintain pregnancy. Seven (3.4%) further heterosexual couples reported 'unexplained infertility'. 57 (27.5%) of respondents identified as being from a gay male couple. One was a single man, one a single woman.

The majority (78%) of 191 who answered a question about how the surrogate will or did try to become pregnant on their most recent surrogacy journey reported using gestational surrogacy, with 22% recording straight surrogacy. Breaking this down further, 87 of those using gestational surrogacy were using both IPs egg and sperm (45.5% of the total), while a further 57 (29.8%) were using an embryo created using a donor egg and another five (2.6%) using an embryo created using donor sperm. Only four of the straight surrogacy arrangements used a licensed clinic for the insemination (2.1% of the total), while the remaining 38 (19.9%) represented non-clinical inseminations.

The majority of these respondents were introduced to the surrogate through a surrogacy agency/organisation (56.8%) or online surrogacy support fora (24.4%). Some used friends or family members as surrogates. Just over half of the respondents (107) had not yet had a child via surrogacy, though for 18 of these, the surrogate was pregnant. For those who had children (potentially on more than one surrogacy journey), 74 (35.4% of the total IPs) had one child, 28 (13.4%) had two and two (<1%) had three children. None had more than this. The ages of these children ranged between 12 days and 27 years old.

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<sup>80</sup> Note: IPs may be part of a couple, in which case the information provided could at times relate to the same surrogacy arrangement(s). As we see in the next section, some IPs had undertaken more than one surrogacy journey in different destinations.

<sup>81</sup> The remaining three 'other' responses described either miscarriage or being ineligible for a PO.

### Contact, origins and cost

Of those from this sample who had already had children via surrogacy, 104 answered a question about whether they maintained contact with the surrogate. 94 (90.4%) said that they do maintain contact with the surrogate, while only 10 (9.6%) said they do not. When asked to explain this, the majority of those who maintained contact referred to the surrogate being e.g. a 'part of our extended family' or 'really good friends'.

“ it is important for our son to know the person who carried him and the family who cared for him before he was born. ”

Many mentioned the importance of the child knowing how they were conceived and why. For those that did not maintain contact, reasons given included the surrogate not wishing to remain in contact, relationship breakdown, or the surrogate being overseas and/or not speaking English.

We received 204 answers to a question on telling children about their origins. The majority of respondents (142/69.6%) said that they did intend to tell their children about how they were conceived and born. A further 56 (27.5%) said that they had already told their child(ren). Five (2.5%) were undecided, and one person (0.5%) said that they did not intend to tell their child. 187 answered a question on the appropriate age to tell. The majority of these (91/48.7%) said this was/would be at birth, with a further 70 (37.4%) said this would be at pre-school age (0-4 years old), 17 (9.1%) said 5-7 years old, five (2.7%) said 8-10, one said 11-13, two said between 14-16 and one said at the age of 18 or older. These figures are encouraging as they show a small shift towards telling at a younger age than our 2015 survey results, and research on donor conception families suggests that openness about the circumstances of conception and birth is important, including telling and 'normalising' at a young age.<sup>82</sup>

In terms of **costs incurred** (192 responses), 13 (6.8%) said they paid (in total) more than £80,000 for the surrogacy process.<sup>83</sup> Another 13 (6.8%) paid less than £10,000 in total. The modal average cost remains the same as our 2015 figures showed: in this survey 47 (24.5%) paid £20,001-£30,000.<sup>84</sup> There were 166 responses to a question asking approximately how much of the total cost was expenses paid to the surrogate. Taking out the responses about overseas surrogacy (which are dealt with in the next section), and the three respondents that said 'unknown' or 'don't know' left 150

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<sup>82</sup> See e.g. Nordqvist, P, and Smart, C., *Relative Strangers* (Palgrave Macmillan, 2014) (esp. pp.87-88); Nuffield Council on Bioethics (2013) *Donor Conception: Ethical Aspects of Information Sharing*. Studies also show that surrogacy families tend to fare well, when compared to other family types (e.g. Golombok, S., *et al*, 'A longitudinal study of families formed through reproductive donation: Parent-adolescent relationships and adolescent adjustment at age 14' (2017) 53(10) *Developmental Psychology* 1966). As surrogacy is more difficult to hide than other forms of assisted conception, it can be surmised that there is likely to be a great deal of openness about surrogacy within families created that way.

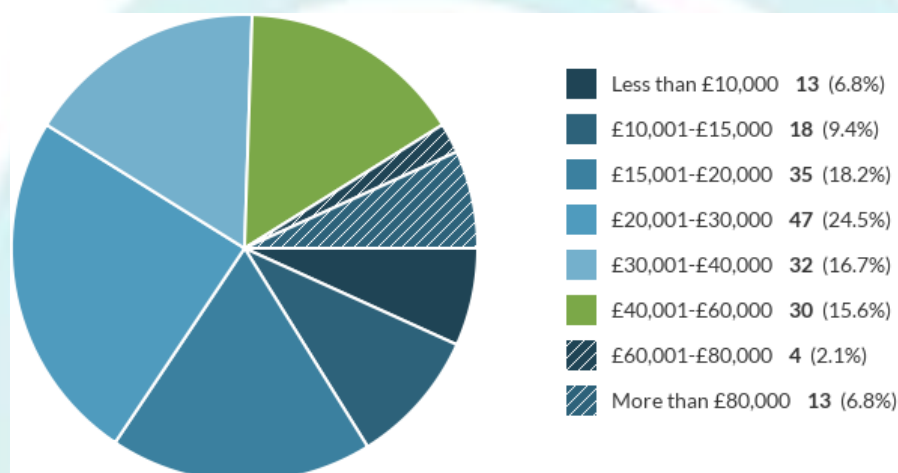
<sup>83</sup> As we will see in the next section, the majority of surrogacy journeys costing in excess of £80,000 were overseas journeys.

<sup>84</sup> Compared to 30.5% in 2015. The new figures show that while the modal average has remained the same, there has been a decrease in the number of arrangements incurring less than £20,000 total costs, and a corresponding increase in the number of arrangements costing over £30,000.

responses, where the sum given (in free text) ranged from £0 to £26,000.<sup>85</sup> The mean average for expenses paid to the surrogate among the respondents was £11,948,<sup>86</sup> a slight increase in the mean of £10,859 we found in 2015.

By comparison, the sum paid for medical/clinical costs ranged from £0 to £80,000, for travel and accommodation from £0 to £15,000 and from £0 to £80,000 for legal advice/fees.

**Figure 3.1.1: Total money paid by IPs from the UK (including overseas arrangements)**



### Legal parenthood

69 IP respondents (33%) were already legal parents of their children, having completed the PO process, while a further 10 (4.8%) had applied but not yet been granted a PO and 15 more (7.2%) had the surrogate-born child(ren) living with them but no legal parenthood.<sup>87</sup> All respondents answered a question about whether they had/would apply for a PO: 90 (43.1%) said they already had applied, 114 (54.5%) said they intended to apply for a PO, while four (1.9%) said they would not and one remained undecided.<sup>88</sup>

178 (85.2%) said a clear ‘no’ to a question asking whether surrogate should have the option to change her mind about transferring the baby to the IPs. One (<1%) said ‘yes, at any point’, while nine (4.3%) said ‘until birth’, another four (1.9%) said ‘until the child is in the care of the IPs’ and another two (1%) said ‘until parenthood is legally transferred’. ‘Other’ responses (with explanatory text option) suggested that this might depend on the type of surrogacy used (gestational or straight), or only where there was serious risk of harm to the child, or the IPs were ‘unfit to bring up a child’ might there be legitimate reason for a surrogate’s refusal. One suggested that the default position could change, given the surrogate ‘the right to appeal’ for ‘a limited

<sup>85</sup> The range was £0 - £25,000 in 2015.

<sup>86</sup> Where a range was provided, the mid-range figure was used (e.g. if respondent put £10-12,000, £11,000 was used in the calculation of the mean).

<sup>87</sup> For one respondent, the child was still in the care of the surrogate.

<sup>88</sup> Of the three who said no, one said ‘it’s too late’ and the other two had not yet had a baby (one miscarriage, one ‘not yet at that stage’).

time after the birth'. Asked whether they thought that IPs should be able to refuse to parent the child(ren), 202 (96.7%) said no.

### Key Findings:

- The modal amount paid in total (for all types of surrogacy arrangement, including both domestic and overseas) remains the same as in 2015, though there is a decline in the number of arrangements costing less than £20,000.
- Both the highest amount and the mean amount of money paid to surrogates in the UK has remained fairly static since 2015.
- The cost of overseas surrogacy appears to be considerably higher than the UK on most occasions.
- The majority of IPs apply for parental orders.
- Over 90% of IPs maintain contact with their surrogate with many maintaining close friendship bonds.

B) In the group (18) who used a **surrogate from overseas**, 12 (66.7%) already had children through an overseas surrogacy arrangement, ranging in age from six months to five years. Two (11.1%) were trying to conceive, another one was at the 'initial meetings stage' with their potential surrogate, two were looking for a surrogate, while for another one, the surrogate was pregnant. Five (27.8%) of these respondents described him/herself as in a heterosexual couple where the female was unable to carry a child, while a further three (16.7%) were heterosexual where the female was unable to conceive or maintain pregnancy. Nine (50%) respondents identified as being from a gay male couple and one was a single man.

The majority (75%) of the 16 respondents who had met a surrogate or had a successful arrangement were introduced to the surrogate through an agency, support group or online forum. Two said they were introduced informally (e.g. 'friend of a friend'), one was introduced by a clinic and one already knew the surrogate. 15 respondents (not those looking for or getting to know a surrogate) told us the method of conception. Four (26.7%) used an embryo created from their own egg and sperm, while 11 (73.3%) used an embryo created with a donor egg and their own sperm (reflecting the proportion of gay/single men in this sample). There was no straight surrogacy.

### Destinations

Of the 16 respondents who had found a surrogate, half (i.e. eight) reported that the surrogate was in the USA: two of these (12.5% of the total) were from California. The other destinations were Ukraine (4), Georgia (2), Greece (1), Thailand/Laos (1) and Nepal (1).<sup>89</sup>

"I've decided to do this as the UK has complicated laws that impact intended parents negatively... ideally I'd like to do the whole process in the UK but I can't "

The most common reasons cited for choosing these destinations (more than one reason could be cited) were 'pre-birth protections and/or contracts' (8), the IPs being legal parents at birth or being named on the birth certificate (5), or the 'availability of

<sup>89</sup> One respondent reported surrogacy journeys in two different destinations.

surrogates' (7). One said that their age would have prevented them undertaking surrogacy in the UK. Three said they would have preferred to undertake surrogacy in the UK, but it had not been feasible. Of the four respondents whose surrogate is/was in Ukraine, two also cited the shorter flight time and lower total cost than the USA. We note that neither Ukraine nor Georgia appeared as surrogacy destinations in the responses to our 2015 survey, while India (3), Thailand (2) and Nepal (1) did then, but do not here.<sup>90</sup>

### **Contact, origins and cost**

Of those from this sample who had already had children via surrogacy, eight (66.7%) maintain contact with the surrogate, while three (25%) do not, one saying this was because the surrogate does not speak English (one did not answer). Of the whole 18 respondents, 17 (94.4%) said they had (5) or will (12) tell their child(ren) that they were conceived using a surrogate. One said that they would not. 14 answered a question on at what point they had/will tell their child(ren): 12 (85.7%) said this was/would be either from birth or at pre-school age (0-4 years old), one said 5-7 years old and one said 8-10.

In terms of **costs incurred** by the 16 who had completed journeys or were in an agreement, nine (56.3%) said they paid (in total) more than £80,000.<sup>91</sup> Four (25%) paid £40,001-£60,000, and two (12.5%) paid £30,001-£40,000. The absence of any lower sums perhaps reflects the change in typical surrogacy destinations in the past three years. There were 12 responses to a question asking approximately how much of the total cost was paid to the surrogate. The sum given (in free text) ranged between £10,000 and £60,000 with the majority of respondents (4/33.3%) saying £30,000 was paid. The mean average for the sums paid to the surrogate among the 12 respondents was £27,375.<sup>92</sup> For just the USA arrangements, the mean was £35,000.<sup>93</sup> The overall mean is £10,000 higher than we reported in 2015, again perhaps reflecting the closure of some of the less expensive commercial surrogacy destinations. By comparison, the mean average sum paid for medical/clinical costs was £35,687, for travel and accommodation £8,068 and for legal advice/fees £19,071.

### **Legal parenthood**

Five respondents of the 12 in this group (41.7%) who already had children were already legal parents via a parental order, while another two had applied for

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<sup>90</sup> In all of these destinations, since the last Report, surrogacy for foreign nationals has been made illegal, which is reflected in these results. Thai agencies have reportedly continued to use clinics and perform procedures in neighbouring Laos (see note 68, above).

<sup>91</sup> 'More than £80,000' was the highest option we offered. However, respondents were then invited to break down some of their costs. Not all did, but through this we can see that five of the USA surrogacies cost in excess of £100,000: two broke down to £105,000+, one to £107,500+, one to £145,000+, one to £160,000+, and one to £180,000+. Of the 'over £80,000' answers, all bar one (Ukraine) was an arrangement in the USA.

<sup>92</sup> One put the cost in Euros, and has been converted using the exchange rate as at close of 10 November 2018 (1 EUR = 0.8845 GBP). One said that they 'don't know' how much the surrogate received, as it was part of a total sum paid to an agency, so that response has been taken out of the mean calculation.

<sup>93</sup> Only five of these respondents were prepared to tell us what they paid to the USA agency they used. From these four, the mean agency fee was £24,500.



one (16.7%). Five others (41.7%) had the surrogate-born child(ren) living with them but no legal parenthood. 16 of the total 18 (50%) said they either had or would apply for a PO, while two (15.8%) said they would not.<sup>94</sup> All 18 respondents said that the surrogate should not be able to refuse to hand the child to the IPs at the end of the arrangement; similarly, all 18 thought the IPs should not be able to refuse care for the child.

#### Key Findings:

- The most common overseas surrogacy destination for UK IPs still appears to be the USA.
- The mean average payment made to surrogates in overseas destinations has increased to £27,590.
- Arrangements in the USA typically cost more than £80,000 in total, with many in excess of £105,000 and even up to £160,000+.
- The mean average sum paid to surrogates in the USA was £35,000.
- The closure of some less expensive overseas surrogacy destinations that were more common before the 2015 Report has pushed up the costs of overseas surrogacy.
- The majority of IPs using overseas surrogacy have or will tell their children about how they were created, with the majority of these doing so either from birth or before four years of age.

### 3.3 Who else responded?

A further 90 people who were **neither surrogates nor IPs** responded to the survey (37% of the total respondents). This proportion is higher than in the 2015 survey, which may be a reflection of the wider dissemination we think that we achieved. These respondents broke down in the following way:

Fertility clinic staff	43 (22.6%)
People with fertility problems	40 (21.1%)
Friends/family of someone involved in surrogacy	24 (12.6%)
Legal professional	18 (9.5%)
Academic/researcher	12 (6.3%)
Clinician	11 (5.8%)
Social worker	4 (2.1%)
Other	38 (20%) <sup>95</sup>

Many of the 'others' were considering surrogacy as a potential option for the future, while many others were friends or family members of either surrogates or people who had already had or would need to have children via surrogacy. Others were involved with surrogacy in

<sup>94</sup> One of these said 'it's too late', and the other said the IPs had chosen not to domicile in the UK.

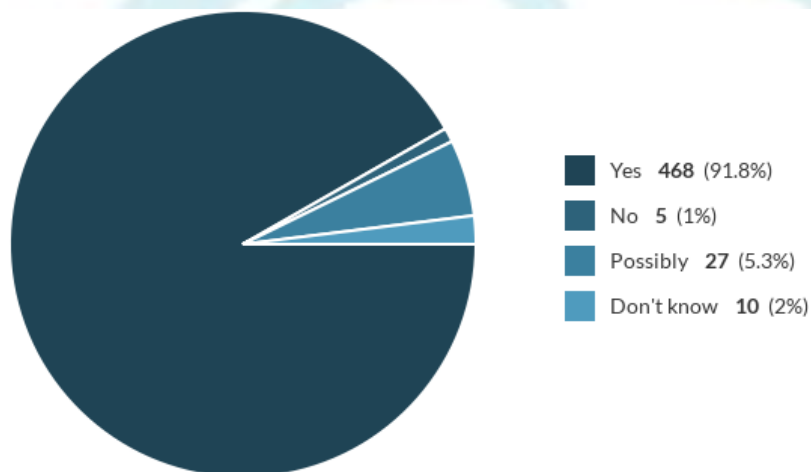
<sup>95</sup> However, it should be noted that from the comments supplied, some of these 'others' were in fact actual or potential IPs or surrogates, while others also would have fallen into the defined categories as outlined above.

different ways (e.g. fertility counsellor, marketing manager of an IVF clinic, midwife) or interested because they had experienced different kinds of fertility treatment (e.g. IVF or DI) or donated eggs. One person self-identified as ‘an activist’, and their responses indicated an anti-surrogacy perspective.

### 3.4 Overall views on legal reform

All respondents answered questions about potential legal reform. There was an overwhelming view (increased from 2015) among the respondents as a whole that surrogacy law needs to be reformed, as shown by the following chart. Among only the surrogate respondents, 95% answered ‘yes’ to this question.

**Figure 3.4.1: Is surrogacy law reform needed?**



Subsequent questions asked for a variety of ranked responses about *why* reform of surrogacy law is required and what specific reforms should be undertaken or which particular aspects of the existing law need reform. When drilling down further into questions about reasons for and forms of reform,<sup>96</sup> the biggest division among respondents was seen regarding the statement ‘the surrogacy process is difficult as agencies/organisations supporting surrogacy cannot operate for-profit’. However, there was very little support *for* surrogacy organisations being able to make profit. Most respondents strongly agreed or agreed that:

- the law is out of date,
- it does not reflect the reality of most surrogacy arrangements,
- the current system should be improved to make surrogacy more transparent,
- the current system should be improved to enable more access to surrogacy,
- the law could do better as a disincentive to go overseas,
- the law does not assign parenthood to the correct parties from birth.

89.2% disagreed or strongly disagreed that surrogacy should be prohibited and 94.4% disagreed or strongly disagreed that surrogacy should be more restricted than it currently is. Only 2.2% agreed or strongly agreed with prohibition, and 1.4% with further restriction. There

<sup>96</sup> Charts representing the responses discussed here can be found in the Appendices to this report.

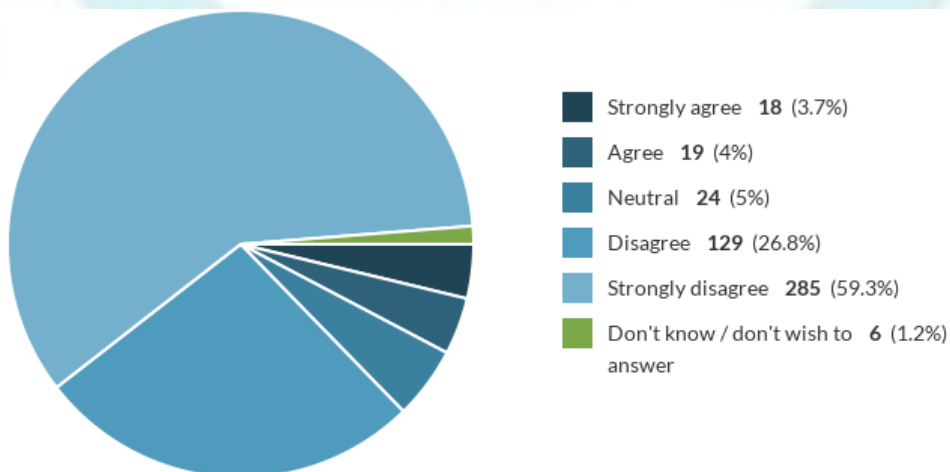
was a lean in favour (generally) of there being some regulatory oversight of UK surrogacy. There were interesting responses regarding what advertising (if any) should be permitted (an almost equal split on individuals being able to advertise for or as a surrogate but a much wider range of opinion regarding organisational advertising).

337 respondents (68.6%) agreed or strongly agreed that surrogates should only be able to be paid reasonable and verified expenses, with greater disagreement or strong disagreement if asked whether surrogates could have ‘payments, not just expenses’. Among the surrogates’ responses to this question (n=98), 70 (71.4%) agreed or strongly agreed that surrogates should only be able to claim expenses. There was very strong disagreement among all respondents against surrogates not being able to receive any money at all. However, 271 (55.9%) respondents agreed or strongly agreed that there should be a monetary cap on the amount surrogates can receive. Asked whether there should be enforceable contracts in surrogacy (defined as either side being able to sue for damages in the event of a breach of contract), 184 (37.6%) strongly agreed and 158 (32.2%) agreed (= 69.8%). We were surprised at the level of support for enforceability in the 2015 Report, which is what led us to define this in terms of breach this time around. The support for this continues to be surprising, but we assume respondents think of enforceability in terms of the surrogate giving the baby to the IPs. The response does mirror responses to questions about whether surrogates should be able to refuse to relinquish the child(ren) they carry or whether IPs should be able to refuse to care for the child(ren), which we have detailed above.

### The law on legal parenthood

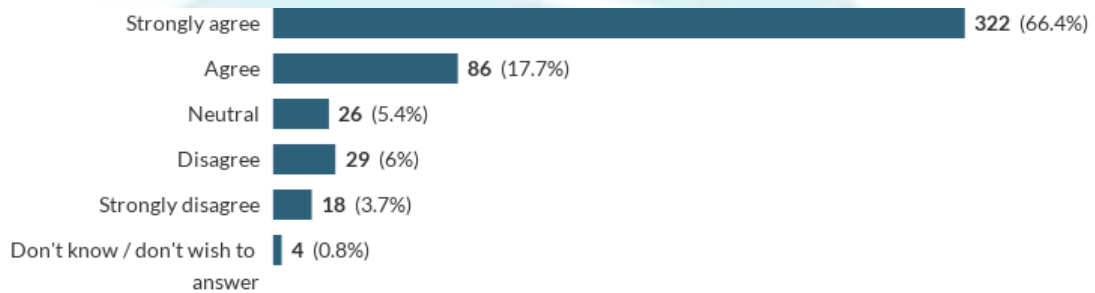
Two of the responses bullet-pointed above appear to relate to legal parenthood (the law does not not reflect the reality of most surrogacy arrangements, or assign parenthood to the correct parties from birth). We had similar findings in the 2015 Report, so sought to interrogate these ideas further. Asking whether legal parenthood should rest with the surrogate (and her partner where applicable), as is the legal position currently, we saw high levels of disagreement.

**Figure 3.4.2. Legal parenthood should rest with the surrogate (and her partner where applicable), as is the case now and should only change after a Parental Order is granted to eligible parties**



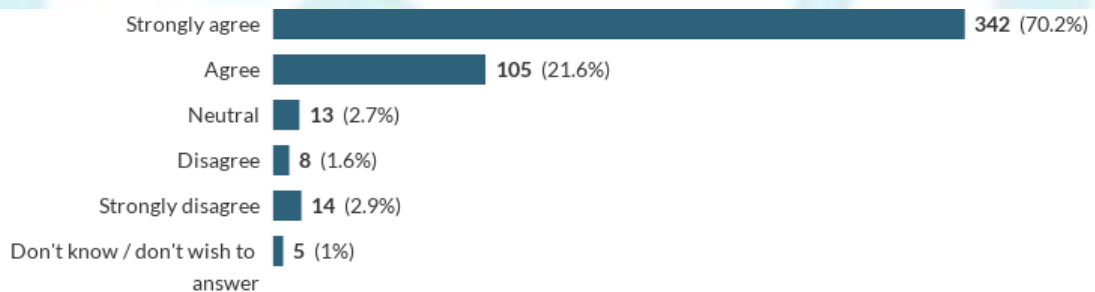
Perhaps most interesting were answers to questions about the timing of the determination of legal parenthood. When asked whether legal parenthood should *automatically* rest with the IPs at birth, the response (from among all survey respondents) was very much in favour (84.1%). There was also very strong support for it being the IPs who register the birth of the child (and not the surrogate, as is currently the case),<sup>97</sup> with 61.2% of those who answered strongly agreeing and a further 20.3% agreeing.

**Figure 3.4.3. Should legal parenthood automatically rest with intended parents at birth?**



Correspondingly (or in the alternative), there was strong support for the pre-authorization of parental orders, so that they become effective from birth.

**Figure 3.4.4 Parental Orders should be able to be pre-authorized (e.g. by a court, with input from Cafcass), so they are effective from birth.**



There was also strong support for single people being able to become legal parents via surrogacy (81.2% either strongly agreed or agreed) and similar support for parenthood for IPs with no genetic link to the child (80.4%).

In the free text discussions about how legal parenthood might be changed, there were lots of (varying) suggestions about ways to have parenthood preauthorized, either by a court order (with support from Cafcass) or via an 'authorised' or 'independent' body. There were also some suggestions, which need further interrogation and research, that different rules or systems should be in place depending on the form of surrogacy used (gestational or straight). This seems to indicate that some respondents might put more weight on the potential genetic

<sup>97</sup> Though we note that currently in England and Wales a genetically-related IP would be able to jointly register the birth and have their name included on the birth certificate if the surrogate was unmarried or not in a civil partnership.

relatedness of the surrogate with respect to legal parenthood than the fact that she carried/gave birth to the child. However, we have not yet analysed who held these views – for example, people who had themselves created families using donor gametes or those that had not.

### Final thoughts

Respondents to the survey were also asked to explain anything they felt problematic about the practice of surrogacy in the UK in free text: 133 gave us an answer to this. The final survey question asked for free text responses covering additional comments on the practice or regulation of surrogacy in the UK, eliciting 91 responses. A great deal of qualitative analysis of these responses is required, however, some general themes were identified and are discussed here.

#### a) Money

“ I don’t believe organisations need to make profit, it’s not about money, it’s about making families ”

A number of responses discussed surrogacy organisations and the need for these to remain non-profit. One suggested that surrogacy organisations ought to be able to access government (or other) grants in order to be able to improve the services they offer. Other

responses highlighted how much the surrogacy process had cost them so far (including previous attempts at IVF and other treatments) – one saying ‘it’s taking every penny we have, and family money, and selling assets’. Many called for more ‘transparency’ about what kinds of expenses could be (or might not be) considered to be ‘reasonable expenses’. There was a small amount of support for surrogates to be able to obtain compensation over and above reasonable expenses. Some suggested that ‘government funding should be available’ for those for whom having their own child was impossible without surrogacy, or that there should be support from the NHS, at least for the clinical aspects such as egg retrieval or IVF. The costs in general were criticised by a number of respondents. For example, one said that because of the costs involved, ‘it seems like IPs are being punished for their situation’, with another commenting that ‘thought should be given to improving access to surrogacy for lower income intended parents’, and another saying that:

“Rich people have a much higher chance of becoming parents. That is a shame.”

#### b) Regulatory body

A number of responses highlighted a desire for there to be a regulatory body with oversight of surrogacy. One suggested that such a body would be able to regulate surrogacy organisations. One highlighted that if such a body were to continue to rely on Cafcass parental order reporters (or similar) then a national training programme would be essential to maintain consistency of standards across the country. Another said that such a regulatory body should have the ‘ability to pre-authorise arrangements that come into force at birth’, while retaining the principle of full bodily autonomy of the surrogate throughout the pregnancy. Another suggested that a regulatory body could lead to more uniform hospital policies being put in place for surrogacy births across the UK, the lack of which was an issue

picked up multiple times in the question on problematic issues in surrogacy practice.<sup>98</sup> One of these respondents said, for example, that:

“Medical professionals... have lacked understanding, empathy and some have been quite insensitive to the situation”.

#### c) Evaluation of parents

Some responses discussed how IPs seem to be more highly scrutinised than people becoming parents in other ways. A number of respondents felt that the process of becoming parents mirroring that for adoption or being treated as ‘akin to’ adoption was not the correct approach. Some highlighted that the decision to come to surrogacy would not be an easy one and that many IPs would have ‘already experienced extreme heartache’ or that it is not the ‘fault’ of people that they need to use surrogacy. Many highlighted the stress of the journey, at all stages, from deciding to pursue surrogacy, to trying to achieve legal parenthood at the end of a successful arrangement.

“ please avoid any element of evaluating potential parents’ suitability for parenthood – an invasive and judgemental process similar to adoption is completely inappropriate and unnecessary for surrogacy “

#### d) Welfare of the child

“ surrogate babies could feel objectified if a monetary value is put on their existence ”

Many responses made reference to the welfare of the child, though this was often expressed (or seemingly understood) differently. There were a number of references to it being potentially harmful to a child to discover that they were ‘created for profit’, or similar. The idea of there needing to be better records kept about surrogacy births (especially including where donor material was used) was mentioned by some respondents, in the interests of children born from surrogacy (later) being able to establish knowledge about the means of their conception and birth, and genetic heritage. There was agreement among many that the welfare (or ‘rights’) of the child needed to be reflected in the law, but some saw this achieved by recognising the IPs as parents at birth (with or without Cafcass or similar involvement pre-birth) and some by maintaining a welfare assessment post-birth. Some linked the issue of welfare to the time immediately post-birth and connected this to the medical care issue discussed above, such as by highlighting the IPs’ inability to give consent to medical treatment.<sup>99</sup>

#### e) Communication, information and advertising

A number of respondents commented on the ‘no advertising rule’, saying that its strictness makes the process very difficult and helps to embed the idea that surrogacy is somehow ‘wrong’. One said that the existing rules on advertising are ‘breached consistently’ and that they limit the effectiveness of the organisations that support people through surrogacy. Some

<sup>98</sup> Though this may be in time offset by the Department of Health Guidance published in February 2018 (see notes 19 and 20, above).

<sup>99</sup> Some additionally linked this to the welfare of the *surrogate* – these responses were seen not only from IPs and others but also from surrogates themselves.

said that surrogacy organisations should be allowed to advertise for surrogates. However, there were no further suggestions about how the rules might be relaxed or in what way (though see Appendix 2).

Other ideas that emerged in the responses included the teaching of surrogacy as a legitimate and valuable means of family creation in schools (and thus also reasons why people might need it). Some expressed the need to raise awareness of surrogacy more generally within society. Others suggested that, should the system be kept as it is, more information about the desirability of and practical aspects of applying for parental orders needs to be available. One response picked out Scotland in particular in respect of the parental order process, suggesting an even greater need for transparency about the processes and costs involved. One said that ‘addressing the situation after the fact’ was the wrong approach, and suggested that ‘a proper framework which is more frontloaded and more supported at the beginning, rather than just trying to solve all the issues at the end’ would be better. Finally, one response concluded that the UK has an ‘unsafe legal position’ because of the implicit acknowledgement that ‘a surrogate can “change her mind” in a surrogacy arrangement in the UK’, adding that maintaining this ‘will continue to push large numbers of intended parents overseas to avoid the legal position in the UK’.

#### **Key Findings:**

- **There is overwhelming support for legal reform, with nearly 92% in favour of this. This figure is higher than in 2015.**
- **The reasons for this support have changed very little since 2015.**
- **The majority agree that surrogates should only be able to be paid reasonable and verified expenses.**
- **71.4% of surrogates agreed or strongly agreed that surrogates should only be able to claim expenses.**
- **The majority of respondents disagree that the surrogate (and her partner) should be the legal parents of the child(ren) they carry for others.**
- **The majority agree that legal parenthood should either rest automatically with the IPs at birth, or should be subject to a pre-conception or pre-birth process which determines the IPs’ legal parenthood at birth.**

## 4. Important case law since 2015

Prior to our 2015 Report, numerous surrogacy cases in the family courts had illustrated the inadequacies of the existing law, especially in respect of meeting the welfare interests of surrogate-born children.<sup>100</sup> The cases particularly concerned the criteria in S54 HFE Act 2008 (or the earlier HFE Act 1990, S30) that must be met in order for a parental order to be granted to IPs. In many of these judgments the judges, who are bound by the paramountcy of the welfare principle,<sup>101</sup> had been able to ‘read down’ the legislation in order to facilitate the bests interests of the children concerned.

At that time, we knew that retrospective authorisation of payments over and above what might be considered ‘reasonable expenses’, especially in cases where the surrogacy had taken place in another jurisdiction and may have been commercial in nature, was commonplace. As far back as 2008, Hedley J commented that it would be ‘almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order’.<sup>102</sup> We have been left with the position that unless there is a clear abuse of public policy, the court will not refuse to grant a parental order where the welfare of the child demands it.<sup>103</sup> This is a trend that has continued. We are left with a need to manage the tension between the fact that courts routinely retrospectively authorise these payments and the fact that we have a strong ethical principle enshrined in law which limits certain practices, while leaving a ‘safety valve’ that allows and recognises that payments will happen in some cases. We should seek to retain that ethical underpinning in the wording of any new legislation.<sup>104</sup>

Even in domestic surrogacy arrangements, the question of payments has come before the courts. In *A, B and C (UK surrogacy expenses)* [2016],<sup>105</sup> a male same sex couple entered three surrogacy arrangements at the same time, with three different women: all three children were born within six months of each other. These were online arrangements and the court found that there had been some dishonesty about the payments that had been made to the surrogates as their reasonable expenses. The court undertook a detailed discussion of what

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<sup>100</sup> See also Horsey, K, (2016) ‘Fraying at the Edges: UK Surrogacy Law in 2015’ 24(4) *Medical Law Review* 608.

<sup>101</sup> Since the Human Fertilisation and Embryology (Parental Orders) Regulations 2010.

<sup>102</sup> *Re X & Y (Foreign Surrogacy)* [2008] at [24].

<sup>103</sup> Per Hedley J, in *Re L (a minor)* [9]-[12]. In *Re S* [2009] EWHC 2977, Hedley J defined public policy abuses as ‘really relat[ing] to... three things: To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country... The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that... The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate’.

<sup>104</sup> Thus not legislating for payments to surrogacy to be formally allowed as seemingly advocated by Sir James Munby in December 2018 (see note 29, above and ‘Let women be paid to be surrogate mums, says top family judge as he insists it is fine to become a mother in your 60s’, *Mail on Sunday*, 2 December 2018).

<sup>105</sup> [2016] EWFC 33



reasonable expenses, altruistic and commercial surrogacy means, and in what context. Introducing the case, Russell J commented that:

“This is a case which brings into sharp relief the “surrogacy market” referred to by Moylan J in *Re D* [2014] EWHC 2121 and could be considered to provide 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]).”

As well as the payments made and the IPs’ deception involved regarding this, the issue for the court was whether the children’s lifelong welfare needs would be met. The court was concerned whether the IPs’ “decision to enter agreements which meant they had three babies to care for within the space of six months raised questions about whether the applicants had taken appropriate, child-centred decisions about “building their family” (at [9]). However, the applications for POs were supported by children’s guardian, who was ‘more than satisfied that the applicants had demonstrated insight in advance of becoming parents to three infants; they had anticipated the challenges involved and responded appropriately’ (at [11]).

As for the payments made, Russell J had to satisfy herself that these were for expenses reasonably incurred by the surrogates (or, if they were not, to consider retrospectively authorising them if the children’s welfare demanded it), particularly as ‘the fact that the levels of payments were initially concealed from the guardian and the court by the applicants could be said to indicate an awareness that the payments may not entirely represent “reasonable” expenses’ (at [15]). Breaking down what was paid to each woman (none said she received more than £15,000; the lowest sum was £12,477.61), even where this was not specifically accounted for, Russell J found that, in fact, the sums all constituted reasonable expenses.<sup>106</sup> She continued:

“Having heard all three women give evidence I was left in no doubt that each had acted altruistically and had not made any real financial gain out of having the babies for the applicants. Any amount that they may have been left with at the end would have been modest if not insignificant and could not be said to approach a commercial agreement” (at [22]).”

The requirement that IPs must apply for a parental order within six months from the birth of the child(ren) has also been so routinely avoided that it might as well be understood as no longer existing. Sir James Munby, the former President of the Family Division of the High Court, commented in *Re X (A Child) (Surrogacy: Time Limit)* [2014]<sup>107</sup> that the limit was ‘nonsensical’ and observed that it cannot have been Parliament’s intention to bar completely anyone who applied ‘even one day late’ from parenthood (at [55]). Though he also claimed to be laying down no general principle of law, the principle was followed by Theis J in *A & B (No 2 - Parental Order)* [2015] for twins aged three at the time of the application;<sup>108</sup> by Russell J in *A & B (Children) (Surrogacy: Parental orders: time limits)* [2015] for children aged eight and five when the applications were made (though older than this by the time of the

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<sup>106</sup> The sums included lost earnings, medical needs related to the pregnancy and birth, maternity clothing, footwear, travel and fuel costs, a cleaner and home-help, childcare for the surrogates’ own children, takeaway food for the surrogates and their families during the pregnancy and immediately after the birth and a recuperative holiday for one of the women and her family after the birth.

<sup>107</sup> [2014] EWHC 3135 (Fam)

<sup>108</sup> [2015] EWHC 2080 (Fam)

hearing),<sup>109</sup> and by Theis J for children aged 12 and 13 years old in *A & Anor v C & Anor* [2016].<sup>110</sup>

In *KB & RJ v RT (Rev 1)* [2016],<sup>111</sup> a PO application was made in respect of a nearly two-year old boy who had had to remain in India since his birth, because of the impossibility of obtaining a UK passport or entry visa for him. Home Office rules offer a ‘concessionary arrangement’ for surrogate-born who are not British citizens and cannot qualify for entry under the normal ‘Immigration Rules’. Such children may be granted leave to enter the UK for 12 months *if* the IPs can demonstrate that they can meet the requirements for the granting of a PO, as well as meeting as many of the Immigration Rules ‘as they can’.<sup>112</sup> The court therefore had to consider the criteria from S54 HFE Act 2008. Consent to the making of the PO had been given by the Indian surrogate, and it was supported by the guardian, even though she had not been able to see the child in the parental home in the UK. However, the application for a PO had been made out of time. Apparently the IPs had been ‘simply unaware of the need for the order or indeed that such an order could be sought’ (at [28]). Relying on the previous authorities, Pauffley J found that this was no obstacle to the PO being made.<sup>113</sup> Later, upon having been granted entry to the UK with his parents, the PO process was completed and the boy acquired British citizenship.

Since 2015, other issues have proved more contentious and have dominated the discussions in the courts. Some of these are briefly outlined below.

#### 4.1 Single parents

The issue of single applicants being able to access parental orders has been one of the biggest to develop since 2015. In our last Report, we discussed *Re Z*,<sup>114</sup> decided in September 2015. In that case, Munby P, despite clear and unequivocal consent from the American surrogate and support for the order from the Cafcass parental order reporter, refused to grant a single man (the biological father) a PO. His decision was based on the literal wording of S54(4) HFE Act 2008. Munby P felt unable to read down the statute, not least because of the fact that the potential to consider allowing POs for single people had been considered and rejected in the parliamentary debates leading to the 2008 Act.<sup>115</sup>

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<sup>109</sup> [2015] EWHC 911 (Fam)

<sup>110</sup> [2016] EWFC 42. See also *Re B (Foreign Surrogacy)* [2016] EWFC 77.

<sup>111</sup> [2016] EWHC 760 (Fam)

<sup>112</sup> See [24]-[25]. See also *Re X (Foreign Surrogacy: Child's Name)* [2016] EWHC 1068 (Fam) regarding a family's separation from each other and the child's extended stay in Nepal while passport and immigration could be organised (in that case due to an earthquake and a change to the law which made surrogacy illegal in Nepal).

<sup>113</sup> Additionally, S54(4)(a) HFE Act provides that at the time of the application and of the making of the order the child's home must be with the applicant – the IPs were found to have ‘homes’ in both the UK and India, and to be domiciled in the UK, thus the requirement was met. The court also had to retrospectively authorise the payments that had been made. The other issue was that the surrogate (unknown to the IPs) had been married at the time of the arrangement (though subsequently abandoned by her husband), raising the issue of her (ex-)husband's consent. The need for his consent was circumvented.

<sup>114</sup> *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015].

<sup>115</sup> *ibid.*, at [15]-[17]; [36].

However, he also invited the applicant to return with a human rights claim (i.e. an application for declaration of incompatibility), which he did. His claim was that that the law's discrimination against single parents is contrary to the right to private and family life under the Human Rights Act 1998, as well as being discriminatory, given the fact that single men and women in the UK may become legal parents through adoption, IVF or donor conception [check case wording]. In the resulting judgment, Sir James Munby P found in favour of the applicant and ruled that the law is incompatible with the applicant's human rights.<sup>116</sup>

Though there is no absolute obligation for it to do so, such a declaration of incompatibility puts the onus on the government to rectify the human rights breach by changing the law via a remedial order.<sup>117</sup> As indicated in the Introduction to this Report, in November 2017, the government laid such an order before parliament. At the time of writing the second draft of the order has passed scrutiny and is expected to be in force by the end of 2018.

Notwithstanding what has happened as a result of *Re Z*, cases involving single people seeking to become parents through surrogacy have continued to come before the courts. In *Re A (Foreign Surrogacy - Parental Responsibility)* [2016],<sup>118</sup> Theis J granted parental responsibility (PR) to a biological father who had a child through a surrogacy arrangement in Oregon, USA. He had been unable to obtain PR as, despite the surrogate's unmarried status and her consent, he had not been named as the father at the registration of birth. As Theis J explained, 'it is not possible for an unmarried father to acquire parental responsibility by birth registration if the child is born outside the UK' (at [6]). She went on to say that the applicant was unable to apply for a PO, but, if it were available, it

“would provide greater legal security and stability for A, as it would extinguish the parental status and parental responsibility of the Respondent and lead to the issue of a British birth certificate, which arguably better reflects the reality of A's family situation” (at [7]).”

In the absence of single applicants being able to obtain a PO, different ways of securing parental status have also emerged. In *M v F & SM (Human Fertilisation and Embryology Act 2008)* [2017],<sup>119</sup> a couple who had embarked on a surrogacy arrangement together (using both their gametes) split up during the time the surrogate was pregnant. The biological father did not wish to be part of the child's upbringing, but M was unable to succeed on her own in an application for a PO. The child had been made a ward of court and care and control of the child was delegated to M – however, she could not be recognised as his parent. As Keehan J pointed out:

“Unless the law is changed to permit applications for parental orders by a single applicant, the applicant will not be entitled to obtain this transformative order to become A's legal as well as biological parent” (at [3]).

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<sup>116</sup> *Z (A Child) (No 2)* [2016] EWHC 1191 (Fam)

<sup>117</sup> See Ministry of Justice, 'Corporate report: Responding to human rights judgments: 2014 to 2016' Cm 9360, November 2016 (London, HMSO).

<sup>118</sup> [2016] EWFC 70

<sup>119</sup> [2017] EWHC 2176 (Fam)

In a sympathetic solution based on the fact that the declaration of incompatibility had been made in *Re Z* and was due to be rectified<sup>120</sup> Keehan J approved the continuation of the wardship and M's care and control. M's application for a PO would be stayed pending the change in the law.<sup>121</sup>

#### 4.2 Lack of consent from the surrogate

S54 HFE Act 2008 also requires that the surrogate should give her free and unconditional consent to the granting of a PO, unless she cannot be found, or lacks capacity. Though this requirement had been dispensed with in some cases before UK courts prior to 2015 (as well as on the grounds that the granting of the PO applied for would manifestly be in the child(ren)'s best interests),<sup>122</sup> the issue of consent has arisen in various guises since.

In *Re AB (Surrogacy: Consent)* [2016],<sup>123</sup> a surrogate refused to give consent to a PO in respect of twins she had given birth to. The twins were the biological children of the IPs, and had lived with the IPs since birth. The surrogate was making no claim to keep and care for the children and a child arrangements order had already been made relinquishing her parental responsibility and giving it to the IPs. Theis J found that the surrogate's 'rationale for refusing their consent is due to their own feelings of injustice, rather than what is in the children's best interests' (at [8]). Despite various attempts to secure consent, including mediation, it had not been forthcoming, due to the surrogate's perception that 'the applicants did not show sufficient concern for her wellbeing' (at [19]) at a point during the pregnancy when there were concerns about her health. The parental order reporter believed that the surrogate continued to refuse consent 'to demonstrate and have recognised her sense of grievance' (at [28]) and identified that these actions would affect the lifelong wellbeing of the children. Again, however, the provision could not be read down, but Theis J granted an adjournment of the issue in the hope that either the surrogate would change her mind, or on the basis that the legal framework might change after the Law Commission review of it ([14]-[15]). The only alternative would have been for the IPs to apply for an adoption order but, as Theis J identified, such an order would be inappropriate in surrogacy cases and especially where IPs would be 'adopting their own children' (at [31]). She concluded:

"The court can only express the hope that [the surrogate] will be able to rediscover what led her to undertake such a selfless role and see the situation from the view point of these young children. From the perspective of these children's lifelong emotional and psychological welfare parental orders are the only orders that accurately and properly reflect the children's identity as surrogate born children" (at[32])."

In *Z (Surrogacy agreements: Child arrangement orders)* [2016],<sup>124</sup> the issue of consent arose in a different way. An application was made by a male same-sex couple (A and B) to compel the surrogate they had entered into an arrangement with to hand over the baby (Z) to

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<sup>120</sup> Though it should be noted that the remedial order was still some months away from being laid before Parliament, despite the declaration having been made over a year before this case had been heard.

<sup>121</sup> See also *AB v CD & Ors* [2018], section 4.3 below.

<sup>122</sup> See e.g. *D and L (Surrogacy)* [2012]

<sup>123</sup> [2016] EWHC 2643 (Fam)

<sup>124</sup> [2016] EWFC 34

them.<sup>125</sup> This was refused by X, the surrogate, from before the birth because she ‘felt used by the applicants and was made unhappy by their conduct towards her which was unsympathetic, demeaning and demanding’ (at [3]). The arrangement had been made via a Facebook surrogacy site, and X had travelled to a clinic in Cyprus to be implanted with two embryos that the IPs already had in storage there (following a previous surrogacy arrangement; this was to be a sibling for twins the IPs had already had via surrogacy). X had had a miscarriage of one of the two resulting babies. She had learning difficulties and was described by Russell J as ‘a vulnerable young woman in her very early twenties of limited income’ (at [4]).

The circumstances of the case were described by Russell J as an ‘example of the difficulties that arise out of the unregulated market in surrogacy in this jurisdiction’ (at [1]). She also found that ‘the circumstances in which agreement was reached and signed by X is a matter of some concern,’ having been ‘signed by X at a fast-food outlet at or near a railway station after a brief face to face meeting lasting less than two hours’ (at [11]). The situation was complex, involving communications handled by an ‘administrator’ of the Facebook group, some misinformation or misunderstanding about the previous surrogacy arrangement entered by the applicants, and questions about the conduct of the applicants in relation to the surrogate and the way the agreement was entered into. Eventually, Russell J decided that:

“it is in Z’s best interests to remain living with X as she is better placed to meet his emotional needs. She is, quite apparently, more emotionally available and has a greater instinctive understanding of his emotional needs. Over and above this she is the parent who is much more likely and able to be able to treat both the applicants in an open and generous way and to enable Z to develop a good relationship with A, B and his siblings and so to allow him to develop a wider and a more positive sense of his own identity” (at [117]).”

Russell J ordered that Z should continue to live with X and her partner and should have limited contact with his biological father (A) and his father’s partner (B) every two months. X’s partner was granted parental responsibility, however, this was refused for B.

The judgment was later appealed.<sup>126</sup> A and B sought an order that Z should in fact live with them and that B should be granted PR. Though there were other grounds for the appeal, the crux of the argument was that Russell J had ‘failed to address the long term welfare decisions about Z in a holistic way and to carry out a proper balancing exercise when engaging in the welfare analysis of Z’s needs’ (at [14]). However, the Court of Appeal found that Russell J had conducted ‘a proper consideration of the realistic options for Z, in which she weighed and balanced all the relevant factors in relation to A and B on the one hand and X and P on the other, and reached a decision on the basis of what was in Z’s overall best interests’ (at [27]). The appeal was dismissed, with a small alteration giving PR to B.

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<sup>125</sup> Along with a declaration of parentage (with DNA testing to prove paternity of one of the applicants), a child arrangements order and parental responsibility.

<sup>126</sup> Re M (Child) [2017] EWCA Civ 228

### 4.3 New family situations

Some other interesting issues have arisen in surrogacy cases since 2015 about whether the S54 HFE Act criteria are met, particularly in terms of the complexities of family forms being anticipated and completed.

In *H v S (Surrogacy Arrangement)* [2015],<sup>127</sup> a same-sex male couple (H and B) were awarded the care of M, a 15-month old, against the wishes of the legal mother (S). The issue in the case, initially, was whether or not a surrogacy arrangement had ever been entered into. H and B contended that they had entered into such an arrangement, though had also agreed that S would 'continue to play a role in the child's life' (at [1]). S disputed this, claiming that they had agreed that she was to be the child's main carer, and with H (the biological father) they would be 'like two heterosexual parents that have a child and are separated'. S also rejected the idea that there had been any agreement that B might play any role in M's life and actively obstructed both H and B from having regular contact with her. H and B applied to the court for PR and a child arrangements order providing that M would live with them. S made a counter-application for a child arrangements order so that M would continue to live with her. M's guardian told the court that S's perpetuation of negative views about the two men would have negative consequences for M's well-being, cause emotional harm and confusion about her identity. She recommended that M should live with H and B instead of S. Russell J found that the case had to be decided not as a surrogacy case, as that was disputed, but as a decision about M's welfare, as in other disputes about which parent a child should live with. Russell J said the court's function was not 'to decide on the nature of the agreement between H, B and S and then either enforce it or put it in place' but to 'decide what best serves the interests and welfare of this child throughout her childhood' (at [125]). Eventually, she ruled that M should live with H and B, who were best placed to deal with any issues of identity:

"The pregnancy was contrived with the aim of a same-sex couple having a child to form a family assisted by a friend, this was ostensibly acquiesced to by all parties at the time the agreement was entered into and conception took place. Therefore M living with H and B and spending time with S from time to time fortunately coincides with the reality of her conception and accords with M's identity and place within her family" (at [125])."

In a similar case, *H (A Child : Surrogacy Breakdown)* [2017],<sup>128</sup> the Court of Appeal had to consider an appeal from a surrogate (C) and her husband (D) against a finding of Theis J that H, a child born to C, should live with A and B, the same-sex male IPs. In that case, Theis J criticised C and D 'for the way in which they had behaved in the later stages of the pregnancy and immediately after H's birth' (at [16]). She said they 'embarked on a deliberate and calculated course of conduct and ... continued to put obstacles in the way of A and B in seeking to establish a relationship with H'. As a result, she ruled that H should live with A and B:

"because (1) H's identity needs as a child of gay intended parents would be best met by living with a genetic parent, (2) A and B could meet H's day-to-day needs in an attuned way, (3) A and B were best able to promote the relationship with C and D,

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<sup>127</sup> [2015] EWFC 36

<sup>128</sup> [2017] EWCA Civ 1798

having remained positive about their significance despite the difficulties, and (4) C and D were unlikely to significantly change their views about A and B” (at [17]).”

This aspect was not the subject of the appeal. Instead, C and D appealed the decision of Theis J that they should only have contact with H on six occasions per year. They argued that in fettering their contact to this extent, Theis J had ‘effectively made a parental order in all but name’ and had ‘failed to explain why a level of ‘identity contact’ that marginalises C and D is necessary or proportionate’ (at [22]). The Court of Appeal rejected the idea that something akin to a PO had been made, highlighting the fact that a PO is a transformative order leaving the surrogate with no rights and no right of application to a court, as C and D had here. It also rejected other aspects of the appellants’ claim, dismissing the appeal. It also endorsed the words Theis J had used in closing the High Court judgment:

“This case is another example of the complex consequences that can arise from entering into this type of arrangement. Even though C was an experienced surrogate, this case demonstrates the risks involved when parties reach agreement to conceive a child which, if it goes wrong, can cause huge distress to all concerned... This case is another example of the consequences of not having a properly supported and regulated framework to underpin arrangements of this kind” (at [28]).”

In *Re B (Foreign Surrogacy)* [2016],<sup>129</sup> there was a question about an application for a PO in respect of a six-year old girl born through surrogacy in India in 2010 in respect of whether she had her home ‘with both of the applicants’. At the time the PO application was made, the applicants lived together, and the child, B, had lived with them. However, since that time, Mr B had moved out of the home, though frequently visited, and B visited him at his flat. Mr and Mrs B also continued to share decision making about B and had holidayed together with her, despite being separated. Theis J found that family life continued and there was no barrier to her making the PO in this respect.<sup>130</sup>

Somewhat similarly, in *AB v CD & Ors* [2018],<sup>131</sup> a case was brought by an intended mother and step-father in respect of twins born in India in 2010. The intended mother (CD) had entered the surrogacy arrangement with her former husband (EF); both were biological parents of the children. The proceedings came about through an application for parental responsibility made by AB, who had subsequently married CD. In the hearing, this had evolved to a) an application for a child arrangements order in respect of CD, b) a joint application to make the children wards of court, c) an application by AB for a child arrangements order that the children live with her, and an order restricting the exercise of her former husband’s parental responsibility,<sup>132</sup> and d) the former husband’s counter-application for a child arrangements order for the children to live with him and an order restricting CD’s parental responsibility.

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<sup>129</sup> [2016] EWFC 77

<sup>130</sup> She had also had to consider the six month time limit for applications and the fact that the consent given by the surrogate in India had been given at birth, not in respect of the PO application itself. See also *Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam), where the relationship status of the IPs was closely examined. There, Russell J, acknowledged that ‘The families in which children live and are brought up are increasingly diverse and often more fluid than in the past; the enactment of the HFEA 2008 came about in recognition of this change’ (at [16]).

<sup>131</sup> [2018] EWHC 1590 (Fam)

<sup>132</sup> There were findings of mental health problems of the former husband, as well as an abusive relationship with AB.

Keehan J noted that AB could not apply for a PO, given the requirements of S54 HFE Act 2008. However, he also commented that ‘whether [AB] will be able to do so in the future depends upon the terms of remedial legislation to be considered by Parliament, in consequence of the President's declaration of incompatibility in *Re Z (A Child) No 2*’ (at [40]). The children were made wards of court and child arrangements orders were made in respect of AB and her husband, all contact with the biological father was severed, and the PR of the surrogate (the legal mother) and her husband (the legal father) was restricted. In conclusion, Keehan J said:

“I find myself extremely frustrated, as no doubt are [AB and CD], that I am prevented, without any obvious good, legal or policy reason from making orders which explicitly recognise them as the legal mother and the legal father of these children. Instead, I am forced, as have other judges before me, to construct a set of orders to secure the welfare of the children which fall very far short of the transformative effect of a parental order” (at [76]).”

In *Re DM and LK* [2016],<sup>133</sup> DM and LK applied for a PO in respect of X, a child born in 2014. Originally, the surrogacy arrangement had been entered into by LK and her former husband. Two embryos created using their gametes had been transferred to the surrogate but had not resulted in a successful pregnancy. The couple later divorced. LK subsequently met DM and they decided to pursue surrogacy together, travelling to the same clinic in Cyprus as had been previously used by LK, and seeking to use the same surrogate. LK reported asking the clinic whether the surrogate should be informed about the fact the embryos created were formed using DM's genetic material, rather than her former husband's. The clinic was said to have told her not to worry. The surrogate was later informed of this change when she was seven months pregnant, and told the parental order reporter that she was ‘upset and shocked’ to learn this. She insisted that a fresh surrogacy arrangement be put in place, which was done. She later gave consent to the making of the PO.

Another issue, however, was that LK and DM maintained separate homes, due to their care of older children from their previous relationships. This the question for the court was again whether the S54 condition that the child's home be with the applicants was met. Also, as they were unmarried, the court had to ‘be satisfied that they are ‘two persons who are living as partners in an enduring family relationship’. Evidence was produced that the couple ‘live together as a couple as much as their respective child and work commitments permit this to happen. Their intention is to live together in the future, when their family circumstances allow. They embarked on the surrogacy process together with the sole intention of raising X together, which they are doing within the context of their larger families’ (at [39]). DM spent time at LK's home (with X) every week and on alternative weekends. This was enough to convince the court that X lived with both applicants and that her lifelong welfare interests would be best served by the granting of the PO.

In *X (A Child : foreign surrogacy)* [2018],<sup>134</sup> a child was born through an overseas surrogacy arrangement. The IPs applied for a PO, there was no dispute among them nor any issue about consent; the issue for the court concerned two of the provisions of S54 HFE Act 2008. First,

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<sup>133</sup> EWHC 270 (Fam)

<sup>134</sup> [2018] EWFC 15



the requirement that the applicants must be in certain forms of defined relationship – here, husband and wife.<sup>135</sup> The couple had in fact been married for many years, but one of them (known to and accepted by the other) was gay – their relationship was ‘platonic, and not romantic’ (at [6]). Sir James Munby P ruled that ‘there can be no question of the marriage being a sham. In short, the marriage is a marriage’ (at [7]), thus satisfying this requirement. The second issue was that ‘the child’s home must be with the applicants’. The IPs had separate homes, however, Sir James Munby P found, relying on previous authorities about separated parents, that ‘when the child is not with both parents, the child’s time is split between them and their homes. The child does not live with anyone else’ (at [9]). This requirement was also met.

#### 4.4 Other issues

Surrogacy has also come to light in case law in other ways. In *XX v Whittington Hospital NHS Trust* [2017],<sup>136</sup> a woman who had been rendered infertile after the hospital trust had negligently failed to detect cancer following two smear tests and two biopsies included a claim for damages to cover the cost of four surrogacy attempts in her compensation claim. She had managed to store 12 of her own eggs prior to her starting chemo radiotherapy and being rendered unable to conceive or carry children. She and her partner decided to try to have children via surrogacy – their preference was to enter a commercial surrogacy arrangement in California, as her partner had a relative there and ‘primarily because surrogacy is lawful and binding there and without the problems of partial illegality facing aspiring parents in the UK’ (at [7]).<sup>137</sup> However, Sir Robert Nelson, despite sympathy for XX, ruled that the costs of Californian surrogacy were irrecoverable, on public policy grounds, as commercial surrogacy arrangements remain illegal in the UK (at [45]-[46]). He found differently in respect of XX being awarded damages to be able to attempt surrogacy in the UK using her own eggs, and awarded her £74,000 (on the assumption that would pay all legal, medical and other costs, and the payment of reasonable expenses to a surrogate in two successful surrogacy arrangements). XX was given leave to appeal the decision in respect of attempting surrogacy in California. This has subsequently been heard by the Court of Appeal. Anne Kavanagh, at Irwin Mitchell solicitors, the firm which represents XX, explained that:

“Her only hope of becoming a mother is by surrogacy, using her own eggs which were harvested just before she started chemo-radiotherapy, as well as using donor eggs. She is asking the Court of Appeal to grant her the costs of that treatment in California where she will have the security of a legally enforceable agreement to protect her as well as the surrogate and the baby in the event of any dispute, something which would not be available to her under English law.

“The expert psychological evidence submitted supports the client’s case that she will struggle to cope with the uncertainty of the UK system particularly given that none of this was her choice. The client seeks the costs of US treatment which would be lawful in the UK but using the Californian system.”<sup>138</sup>

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<sup>135</sup> S54(2)(a).

<sup>136</sup> [2017] EWHC 2318 (QB)

<sup>137</sup> See also [31] – [33] for a detailed account of why XX and her partner preferred California over the UK, including specifically the perceived disadvantages of UK surrogacy.

<sup>138</sup> See <https://www.irwinmitchell.com/newsandmedia/2018/november/woman-left-infertile-following-cancer-diagnosis-delays-seeks-costs-of-us-surrogacy> (Press release 7 November 2018).

At the time of writing, judgment had not been handed down. We await with interest the Court of Appeal's deliberations on the public policy issues in particular, especially as these overlap in the damages claim with other heads of damages successfully claimed, such as psychological harm.

#### **Key Findings:**

- **Retrospective authorisation of payments seen to be above 'reasonable expenses' continues, as do 'out of time' applications, in the best interests of the children concerned.**
- **Some aspects of the PO requirements continue to cause problems for the courts.**
- **Even the remedial order for single parent applicants may not be able to help everyone, especially some of those who later find themselves to be single having started the surrogacy journey as part of a couple.**
- **The courts hearing these cases are doing their best to recognise different kinds of family form and structure within the confines of the PO requirements.**
- **However, this is not always possible, resulting in e.g. use of wardship, section 8 Children Act 1989 orders and judicial criticism of the requirements.**
- **While it is now clear that UK courts can award the cost of attempting to have a child through surrogacy in a damages claim, there is still some question about whether it is contrary to public policy for this to cover commercial overseas surrogacy.**

# 5. The continued case for reform

## 5.1 Surrogacy myths

Myths about surrogacy continue to be perpetuated by inadequate data recording and media and other representations of the practice.<sup>139</sup> The true numbers of those using surrogacy will always be hard to establish, as clinical involvement is not always necessary (e.g. in straight surrogacy with home insemination), nor are other aspects such as seeking legal advice or counselling.<sup>140</sup> There is no body or organisation with total oversight of all aspects of surrogacy. Our data shows a variety of different numbers, depending on who has collected it, how, and for what purpose. However, our research indicates that we can continue to bust many of the myths surrounding surrogacy, including:

- It is **not** the case that surrogates give their babies away or that surrogacy is akin to adoption. The resistance to the language of ‘surrogate mother’ or ‘birth mother’ by surrogates is testament to this.
- It is **not** the case that surrogates want the right to change their mind, or that they exercise this right.
- Some IPs do enter into surrogacy arrangements overseas, but it is **not** the case that thousands of people are doing so each year, nor that this vastly outstrips the number of those doing surrogacy in the UK.
- Surrogacy within the UK is **not** undertaken on a commercial basis. The money that a surrogate receives represents the reasonable expenses she incurs, which has been broadly interpreted including by the courts as including costs that help her maintain and support her own family, as well as such things as recuperative holidays or post-pregnancy clothing. Our survey data and the Cafcass data shows that money paid to surrogates is in line with the reimbursement of reasonable expenses. This finding was true across surrogates that responded from COTS, SUK and independents. Answers did not vary according to affiliation (or lack of) to an organisation.
- It is **not** the case that surrogates in the UK support a move towards payments or commercialisation, either in the form of a) payments above reasonable expenses to surrogates or b) profit making organisations.
- There is **no** evidence to suggest that the number of surrogates will increase if payments above reasonable expenses were allowed.
- The majority of surrogacy arrangements **are** completed smoothly, within the context of a relationship, rather than being a transaction or a service. There is usually **no** need for High Court scrutiny of the parental order requirements in domestic cases. Many surrogacies result in long-term relationships beyond birth.
- There are **not** greater issues relating to the welfare of a child in surrogacy as compared to other forms of assisted conception (or those who can conceive naturally). Therefore there is no need for greater levels of scrutiny or assessment of IPs than other parents.
- The majority of IPs **do** apply for parental orders. However, there is still concern about the small number who do not, i.e. in respect of the number of children living without

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<sup>139</sup> See e.g. <https://www.lbc.co.uk/radio/presenters/iain-dale/tom-daley-dad-uk-surrogacy-law-reform/>

<sup>140</sup> Though counselling is made mandatory in some clinical or organisational contexts.

correctly-recognised legal parents following a surrogacy arrangement. The majority of IPs tell their children about their origins.

- There is a desire from IPS and surrogates for the current legislative framework to be reformed in respect of how legal parenthood is acquired.

Even applying for a parental order – the transformative order that best represents the truth of surrogate-born children’s identities – is not compulsory, so it is likely that there are (and will continue to be) people in the UK who act as *de facto* parents of their surrogate-born children when they are not their legal parents. This may be because they (as a result of the way the arrangement was made) were wholly unaware that such an order is necessary to secure legal parenthood,<sup>141</sup> or were mistakenly under the impression that being named on a foreign birth certificate as parents would be enough. Some may not *want* to apply, for various reasons, while others may be *ineligible* as, despite there being judicial circumventions of some of the requirements in S54 HFE Act 2008, others of these have remained immutable. However, our survey data shows that the majority of IPs have already applied or intend to apply for a PO.

It is also not currently possible to determine exactly how many or what proportion of surrogacy arrangements entered into by IPs from the UK are overseas arrangements. What we can see from various sources of data is that the numbers of overseas arrangements are still relatively small, with the greatest proportion taking place in North America. Once-popular (and troubling) surrogacy destinations such as India, Thailand and Nepal have shown the decline in numbers expected since they closed their borders to international IPs seeking surrogacy. However, other destinations emerge, and Eastern European destinations appear to have taken the place of the previously popular Asian ones. There is some evidence that Indian and Thai surrogacy may be ‘outsourced’ to neighbouring countries, however, and still the concern that some surrogacy ‘markets’ are not what they seem,<sup>142</sup> adding to the perpetuation of myths that surrogacy is some kind of underground practice and/or is morally tainted.

Having reviewed the evidence we have, we can draw the following conclusions comparing undertaking a surrogacy journey in the UK versus doing so overseas.<sup>143</sup>

- IPs are more likely to secure legal parentage of their children in a UK surrogacy journey compared to elsewhere.
- IPs are more likely to tell their children about their origins in a UK surrogacy journey compared to elsewhere.
- Surrogates and IPs are more likely to build and maintain a relationship in a UK surrogacy journey compared to elsewhere.

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<sup>141</sup> As some of the case law regarding ‘out of time’ applications seems to suggest, as well as the perceived need from Cafcass for an educational campaign stressing the importance of POs in 2015-16.

<sup>142</sup> See e.g. Sherratt, S., ‘Cambodian raid finds 33 pregnant surrogates, with trafficking charges brought’ *BioNews* 956 (2 July 2018); Melanie Krause, ‘Cambodia arrests 11 more surrogates, as Australian nurse released’ *BioNews* 976 (19 November 2018).

<sup>143</sup> NB these conclusions are drawn on a very small overseas data set

- It is cheaper to undertake a surrogacy journey in the UK than elsewhere, especially once legal, healthcare, agency, IP travel & living costs, IP unpaid leave and surrogate compensation/profit is included in addition to the expenses that are paid to the surrogate.
- It is not in the interests of new-born British children and their families to be living overseas for a period of time until their paperwork is finalised and/or to be travelling large distances to return to the UK.

The reality is that modern surrogacy, as it is practised in the UK, appears stable. The money paid to surrogates as reasonable expenses (which have been acknowledged to be able to include such things as a recuperative family holiday for the surrogate and her family after the arrangement is complete) does not appear, from the survey responses we received from both surrogates and IPs to have increased very much since 2015. Some increase might reasonably have been expected due to increases in the cost of living more generally. This stability may reflect the fact that the majority of arrangements made in the UK are made with the support of one of the reputable non-profit organisations or with the help of ‘independent’ groups with experience of how expenses should be calculated and what they may include. There is also a considerable amount of case law that is building, which details the types of payments that have been judicially determined to be reasonable expenses in a surrogacy arrangement.

That said, we also know that even when IPs from the UK enter into (commercial) surrogacy arrangements overseas, unless there is an indication that some aspect of the arrangement was an affront to public policy, the court is likely to retrospectively authorise any commercial payments made (including those over and above any money paid to the surrogate herself, which varies considerably by destination and even within them). This is because they are, by the time of the hearing, presented with a *fait accompli* – a completed family. This means it is usually in the best interests of the child(ren) concerned to legitimise the arrangement by awarding the parental order. This is evidently a good thing – the order is, as the law currently stands, the transformative tool that recognises the correct people as the child(ren)’s legal parents, with all the rights and responsibilities that entails. However, we continue to believe that, in an ideal world, the majority of people should be able to undertake surrogacy successfully in the UK. The current framework puts some women off from becoming surrogates, in particular the lack of legal certainty, ambiguity around expenses that can be recovered, the position of the Department for Work and Pensions and its impact on the benefits/entitlements of surrogates. Further, transparency and openness about the procedures and costs involved might encourage more IPs to pursue surrogacy in the UK, rather than entering commercial arrangements overseas, which either cost incredible sums are highly regulated, or are cheaper but potentially raise ethical questions about the recruitment and treatment of women as surrogates. It is likely that the biggest reason for IPs pursuing surrogacy overseas is the uncertainty about being able to achieve their legal status as parents if undertaking surrogacy in the UK, as well as a perception of there being a lack of surrogates, leading to uncertainty about if and when an arrangement can be entered into, and how long it would take. Responses to our survey suggest that if these problems were dealt with, at least some of those who went overseas would not have felt that they had to.

Our up-to-date research continues to show that the majority of surrogacy arrangements undertaken in the UK are relationships and not transactions.<sup>144</sup> Many of these relationships end up resulting in long-term, close friendships. Most arrangements raise no problems and do not trouble the courts when the parental order application is considered: most will be heard in the Magistrates' Court in domestic cases. Surrogates do not regularly 'change their minds': there have been only a handful of disputed surrogacy cases in the last 30 years. As in 2015, our data again showed high levels of long-term contact maintained by surrogates and the families they helped to create. It also continues to show that there are high levels of openness and honesty with children about the means of their creation, and a great deal of pride and positivity about the surrogacy experience.

However, there continue to be aspects of surrogacy – and especially the way that it is regulated – that many people who have been involved in the practice and others who have observed it agree must be changed. The law continues to be viewed as outdated and lacking the ability to truly reflect modern family creation and the lived reality. A process that shows someone other than the IPs as the parent at one point in time is not reflective of the identity of the children or the reality for either surrogates or IPs. There was strong support from both surrogates and IPs for at or pre-birth determination of legal parenthood, with a strong preference for this resting with the IPs from birth onwards. Experience of some surrogacy organisations shows us that some women are deterred from becoming surrogates *because* their name (and their husband or partner's name) will be on the birth certificate.<sup>145</sup> Another deterrent is the potential loss of benefits when the recovery of expenses incurred during the surrogacy is wrongly classed as 'income' by the Department for Work and Pensions. There is little support among surrogates who participated in our research for a move towards commercialisation, or even the professionalisation of surrogates (i.e. payments), though some voices call for increased support for the non-profit organisations to enable them to help more people. Some of the restrictions on advertising were questioned in this respect: being able to advertise a managed, tried and tested form of surrogacy support might help more people negotiate the system within the UK and mean that fewer IPs see the need to go overseas. Similarly, more women may decide to be surrogates if organisations can spell out exactly what that means.

## 5.2 Our view of how reform should look

Aspects of the law as it currently stands are good, though we believe that all the law that relates to surrogacy arrangements should be consolidated in a new purpose-drafted and evidence-based Surrogacy Act that has the lifelong best interests of surrogate-born children and their families at its heart. Whatever else comes from the Law Commission of England and Wales and the Scottish Law Commission's review, we believe that the law should continue to support the underlying principle that surrogacy should be provided on an altruistic basis and that no person or organisation should profit from it. Surrogacy should not be commercial.

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<sup>144</sup> Though as we saw in Part 4, there have been instances where the arrangement looked more transactional (see e.g. *A, B and C (UK surrogacy expenses)* [2016] EWFC 33), though it is interesting to note that the nature of the arrangement(s) was what resulted in this case being carefully examined by the court.

<sup>145</sup> A number of surrogates who responded to our survey also criticised this, despite not having been deterred themselves. Similarly, responses from surrogates' partners also expressed dislike of having ever been the legal parent.

However, we also continue to believe that surrogacy in the UK – its processes and legal and social ramifications – should be made more transparent and be supported as a means of family creation. We believe that this process has begun, with the introduction of the guidance documents about surrogacy from the Department of Health and Social Care and as seen by the language used by ministers when introducing the remedial order for single parent applicants for parental orders. As supportive language like this filters through, we are optimistic that we may be able to look forward to – at the very least – sensible and realistic debates on surrogacy laws in the future, including discussions on how legal parenthood should be determined for surrogate-born children. Additionally, infertility, methods of alleviating it, and methods of creating families for all in society should be included in sex and relationships education in schools.

That said, our research shows that a full review of two particular aspects of the law is especially necessary:

- A) There should be clarification about what ‘reasonable expenses’ are  
Whatever happens with the ability of non-profit surrogacy organisations to advertise their services (which we are not necessarily against in principle), surrogates in the UK should continue to only be able to receive reasonable expenses. There should be no commercial payment of surrogates, which the vast majority of surrogates do not want. That said, what is ‘reasonable’ in terms of expenses is subjective and will vary from arrangement to arrangement. This is inevitable when such things as the surrogate’s lost earnings are taken into account, or the different distances surrogates have to travel to clinics or appointments. We should trust IPs and surrogates to be able to agree between themselves what is reasonable. We should allow surrogacy organisations to be able to help, support and guide people making agreements, without falling foul of the law. There is already a great deal of direction from the courts that shows what has so far been considered to be reasonable expenses, and it would be possible for codified guidance for surrogates and IPs to be drawn up on this, including examples in a non-exhaustive list. There should also be clear guidance as to what types of payments are *not* acceptable. Our survey shows that the guidance and calculators that surrogates and IPs used (often coming from non-profit organisations or shared by independent surrogates with expertise) proved very valuable in helping to establish parameters and a relationship of trust.
  
- B) The law on legal parenthood should be changed  
The majority of our respondents believed that surrogacy arrangements should be enforceable – including surrogates. There was also strong support for the idea that a surrogate must not be able to renege on the agreement to give the child to the IPs after birth, and for the idea that IPs must not be able to refuse to take the child. We take this – as well as the survey data specifically about parenthood – to indicate that surrogates do not want to be regarded as the mothers of the children they give birth to in surrogacy arrangements. In fact, notwithstanding what the law says, they do not view themselves as mothers. The law should reflect this.

The existing law was predicated on the assumption that women acting as surrogates were ‘giving away their babies’, would ‘bond’ to the baby during pregnancy, and regret

their decision to become a surrogate. However, over time, as our understandings of surrogacy have deepened, we see that this is indubitably not the case. The law should reflect the autonomous decisions that women make. Surrogates' motivations are clear: to help someone have children when they cannot do so themselves; to allow others to experience the joy of becoming a family; to express gratification for overcoming their own fertility problems and recognising how being unable to have children would make others feel; to repeat or experience pregnancy without wanting to raise a(nother) child, etc.

It is our position that IPs in surrogacy arrangements should become the legal parents of children born through surrogacy *at birth*. This would better reflect the expectations and preferences of those involved, as well as removing responsibilities from the surrogate (such as the need to give her consent to medical treatment for the infant) and ensuring that the correct inheritance pathway for the child. There are many ways by which this may be achieved (and is achieved in other countries where surrogacy is also legal), each of which we believe should be carefully considered by the law commissions in undertaking their review, so that they can be debated in parliament and in public.

We outline a variety of alternative models of legal parenthood below. For all models, we would recommend that all surrogates and IPs have medical checks to identify any health issues that could impact their suitability for a surrogacy arrangement (e.g. fertility, STIs, physical and mental wellbeing); there should be a safeguarding check to ensure that everyone is over 18 and has freely given their consent to the arrangement; and IPs should be habitually resident in the UK (to reduce the risk of 'surrogacy tourism'):

1	Reversal of the presumption of legal motherhood at birth <sup>146</sup>
	<ul style="list-style-type: none"> <li>➤ S33 HFE Act 2008 currently says: "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child".</li> <li>➤ This could be changed to begin 'Except in cases of surrogacy...', leaving the HFE Act to deal with motherhood in all other situations of assisted conception.</li> <li>➤ For surrogacy, a section could be added to either the 2008 Act or to new legislation (preferably a new Surrogacy Act) stating that the IPs should be recognised as the legal parents at birth.</li> <li>➤ This reflects the intention of the parties (as with other forms of assisted conception).</li> <li>➤ It could have limits imposed, such as a requirement that at least one IP should be genetically related to the child.<sup>147</sup></li> </ul>

<sup>146</sup> See also Horsey, K. (2010) 'Challenging presumptions: legal parenthood and surrogacy arrangements' *Child and Family Law Quarterly* 4: 449.

<sup>147</sup> Though we would support the idea of supporting surrogacy arrangements where there is 'double donation', so as not to discriminate against couples who are – or become – doubly infertile. If deemed necessary to protect against e.g. so-called 'vanity' surrogacy arrangements, then these (even if no others are) could be



	<ul style="list-style-type: none"> <li>➤ The IPs (as with all other models below) would register the birth of the child(ren).</li> <li>➤ Any concerns about the child (raised by the surrogate or anyone else) would be dealt with in the usual way, under the Children Act 1989, applying well-established welfare principles.</li> <li>➤ If the surrogate has concerns about non-payment of agreed expenses then there should be a method by which she should be able to retrieve these.<sup>148</sup> Similarly, if she has incurred more expenses than anticipated then these should be recoverable.</li> </ul>
2	<p>Surrogacy arrangements could be approved <b>before being embarked upon</b>,<sup>149</sup> with the result of pre-approval meaning parenthood for the IPs at birth</p>
	<ul style="list-style-type: none"> <li>➤ The law can determine the pre-approval process. It could be judicially pre-approved (e.g. placed before a magistrate) or by a specialised body/organisation, subject to certain defined parameters or documentation, including any or all of: <ul style="list-style-type: none"> <li>- Written agreement/plan of the parties, detailing all expectations and signed by the surrogate and IPs<sup>150</sup></li> <li>- Medical or other documentation establishing a need for surrogacy</li> <li>- DBS checks</li> <li>- Cafcass (or other body) assessment of IPs as parents and their home as suitable for children.<sup>151</sup></li> </ul> </li> <li>➤ If the surrogate changes her mind, <i>she</i> should have to apply for a parental order or similar to transfer parenthood to her, after birth.</li> <li>➤ If the surrogate has concerns about handing over the child to the IPs, it would be for her to raise these. Any concerns about the child would be dealt with in the usual way, under the Children Act 1989, applying well-established welfare principles.</li> <li>➤ If the surrogate has concerns about non-payment of agreed expenses then there should be a method by which she should be able to retrieve</li> </ul>

required to be pre-approved. However, given that clinical involvement would inevitably be necessary in such a circumstance, a welfare of the child assessment would already have to be undertaken before the couple could proceed.

<sup>148</sup> Though focusing on retrieval of money paid to a surrogate in the hypothetical situation when she refuses to give the IPs the baby, the idea of using unjust enrichment law as proposed by Purshouse, C, and Bracegirdle, K., (in 'The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' (2018) 26(4) *Medical Law Review* 557) may also be useful in this context.

<sup>149</sup> As is the case in Greece, which is interestingly one of the only overseas surrogacy destinations where surrogacy is legal (including for some foreigners) but non-commercial.

<sup>150</sup> It would be preferable for such a document to be able to be facilitated/mediated via a surrogacy organisation or lawyer, despite its individually unenforceable nature. Currently, if such a service was charged for, this would be a criminal offence. We view such a document as akin to the 'memorandum of understanding' proposed by the 1998 Brazier Report.

<sup>151</sup> Though in fact we do not support this as a requirement. Anyone entering a surrogacy agreement with the need for clinical intervention (e.g. IVF or insemination in a clinic) has already had a welfare assessment conducted, considering the welfare of the prospective child. Further, no fertile couple has to undergo such an assessment *before* they have children, and there are already laws in place to protect children *after* they are born (e.g. Children Act 1989; Children and Families Act 2014).

	these. Similarly, if she has incurred more expenses than anticipated then these should be recoverable.
<b>3</b>	<b>Legal parenthood could be approved at a point during the pregnancy, with all parties' agreement, with the result of legal parenthood resting with the IPs from birth</b>
	<ul style="list-style-type: none"> <li>➤ Similar to above, except the law determines at what point during the pregnancy the IPs are able to make the application. In California, for example, IPs usually apply during the third trimester.</li> <li>➤ If the surrogate does not agree to the transfer of parenthood at this point, a 'back-up' parental order model is followed, instigated by an application by the IPs.</li> </ul>
<b>4</b>	<b>Legal parenthood switches to the IPs immediately after birth, subject to a final consent of the surrogate</b>
	<ul style="list-style-type: none"> <li>➤ This could follow some of the other pre-birth requirements as outlined in the models above.</li> <li>➤ Final consent from the surrogate could be a witnessed/signed document in the hospital.<sup>152</sup></li> <li>➤ Or consent could be inferred from the willingness of the surrogate for the IPs to care for the child from birth onwards.</li> <li>➤ If consent is not forthcoming at birth, a 'back-up' parental order model is followed, instigated by an application by the IPs.</li> </ul>
<b>5</b>	<b>Parental orders are retained in some form, with modified requirements</b>
	<ul style="list-style-type: none"> <li>➤ An order could be <b>automatic</b>, if there are no changes to the expected situation post-birth, coming into place at a time determined in legislation (e.g. 6, 10, 12 or 24 etc weeks post-birth) <ul style="list-style-type: none"> <li>- If there are changes or disputes, a 'back-up' parental order model such as we have currently could be an alternative</li> </ul> </li> <li>➤ Orders could be <b>applied for immediately at birth</b>, with the presumption that if there is no objection from the surrogate, they come into force at 6 weeks post-birth (the current period during which a surrogate is unable to give her consent to the making of an order). <ul style="list-style-type: none"> <li>- If there are changes or disputes, a 'back-up' parental order model such as we have currently could be an alternative</li> </ul> </li> </ul>

The law could also be changed to reflect and recognise parenthood granted in other jurisdictions, e.g. by accepting birth certificates from overseas, without the additional requirement to re-prove parenthood in the UK. Whatever reforms are recommended, some consideration of terminology needs to be undertaken. For instance, in a situation where two men have a child together, they should both be able to be named

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<sup>152</sup> This would seem to put too much onus on hospital staff, especially in an already-underfunded NHS. It could, however, be administered by e.g. a representative of a surrogacy organisation, a lawyer or notary, or by Cafcass (or similar organisation).

as 'father' on the birth certificate. There should be no requirement for there to be a mother and a father named, or for such sterile terms as 'parent 1' and 'parent 2'.

**Key Findings:**

- **A full review of the law on surrogacy is necessary and there is support for this among all groups, including surrogates.**
- **Surrogates do not regard themselves as mothers of the children they carry for others.**
- **Surrogacy arrangements generally run smoothly, thus the law should reflect this.**
- **The law on legal parenthood following surrogacy should be changed.**
- **Surrogacy (and other aspects of infertility/assisted conception, including regarding family-building options for same-sex and trans people) should be included in sex and relationships (SRE) curriculums in schools.**

## 6. Our recommendations

In particular, this report recommends the following specific changes:

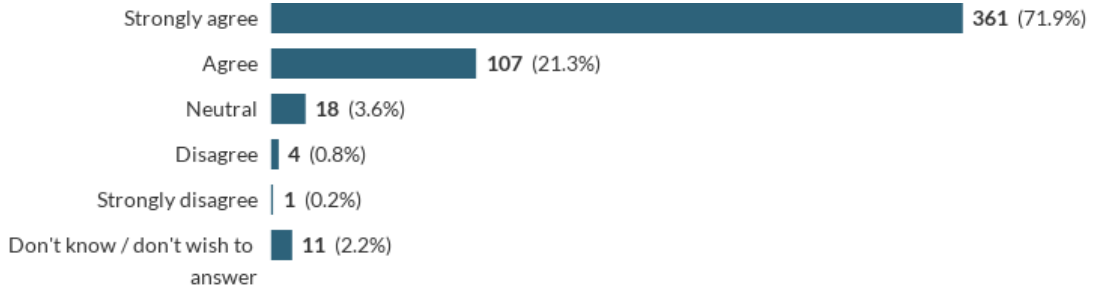
- A root and branch **reform of the current statutory framework** on surrogacy.
- The law should **maintain the underlying principle that surrogacy is provided on an altruistic basis** and that no person or surrogacy organisation should profit from it. There should be **no move towards commercialisation**.
- **IPs should become the legal parents of surrogate-born children at birth**, and should register the birth.
  - If this is not achieved by a reversal of the presumption of motherhood in the context of surrogacy, it should be achieved by pre-conception or pre-birth approval.
- **A way of recognising parenthood acquired overseas** (e.g. if that occurred within a country on a defined list, or similar) **should be built into the law**.
- **IPs should not be evaluated for their suitability of becoming parents** in an adoption-like framework, but instead the same child protection framework should be in place as for people becoming parents without the need for surrogacy.
- There should be **better definition of what constitutes a ‘reasonable expense’**, recognising that the types/amounts of expenses will vary according to individual circumstances.
- **Public funding should be made available for surrogacy-related fertility treatment** in the UK and to pay UK surrogate expenses, in line with the principles that apply to non-surrogacy fertility treatments.
- Public policy should be put in place to **encourage financial protection schemes** for surrogates and IPs to ensure that expenses can always be paid where they are due (e.g. escrow accounts, expenses-related insurance etc.).
- Surrogacy **expenses should not be treated as income** by the Department of Work and Pensions, nor should the recovery of expenses impact any other income-related entitlements.
- **Public education around surrogacy should continue to be improved**, e.g. age-appropriate materials provided in schools to support curriculum teaching on fertility and family types.

- **Better collection of surrogacy-related data is needed to ensure that actual activity can be measured against public policy goals**, e.g. the high percentage of entries in the parental order register where the place of birth is 'not known' is not ideal.
- The **HFEA should provide a full set of surrogacy-specific forms**. There is too much execution risk in 'making do' with the gamete donor forms that are used today, and the forms have importance in establishing legal parenthood.
- Consideration should be given to the question of whether the same HFEA requirements about **recording and knowledge of genetic origins be in place for straight surrogacy** using home insemination as for egg donation.
- Consideration should be given to whether there is a case for more **regulation of 'approved' surrogacy organisations**, so as to give assurance and protection to children, surrogates and IPs. This might mean certain checks/activities are mandated through these approved organisations. However, the cost implications (for families) should be borne in mind when considering this.

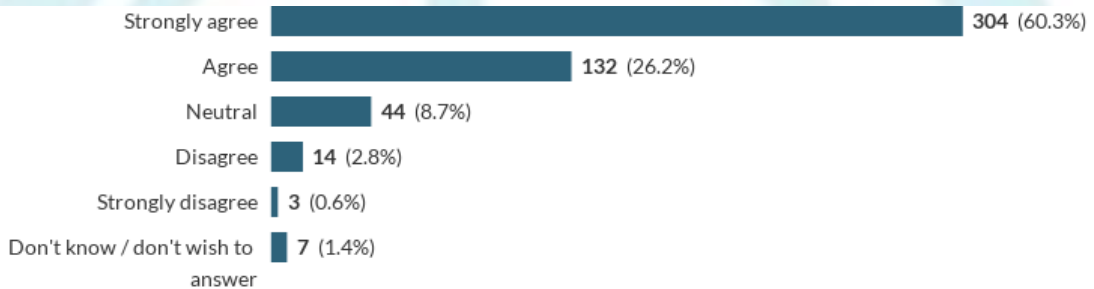
# APPENDIX 1

Question on why reform is necessary (Q67)

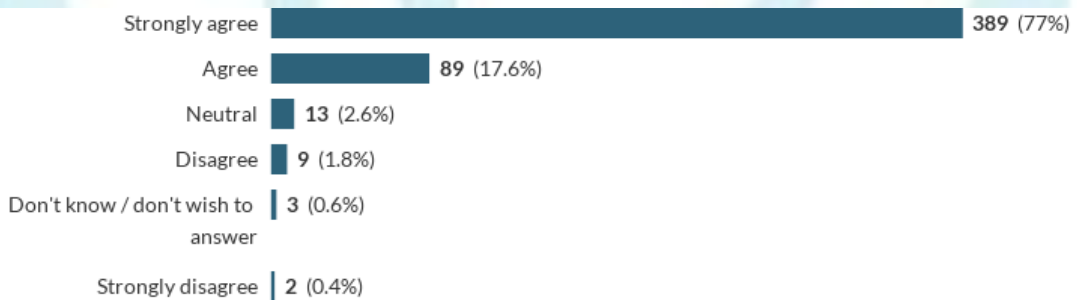
## ***The current law is out of date***



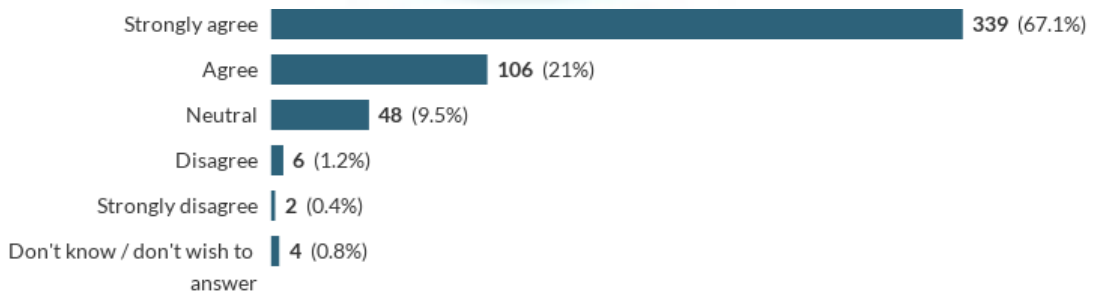
## ***There should be reform so that more people stay in the UK and fewer people go abroad for surrogacy***



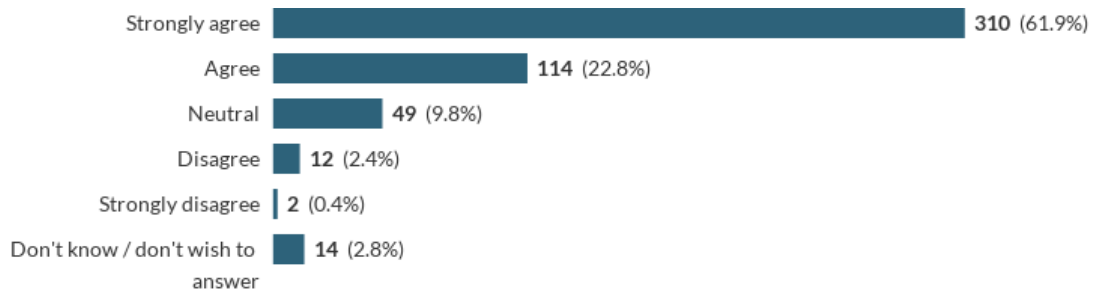
## ***The current system should be improved to make surrogacy easier and more transparent***



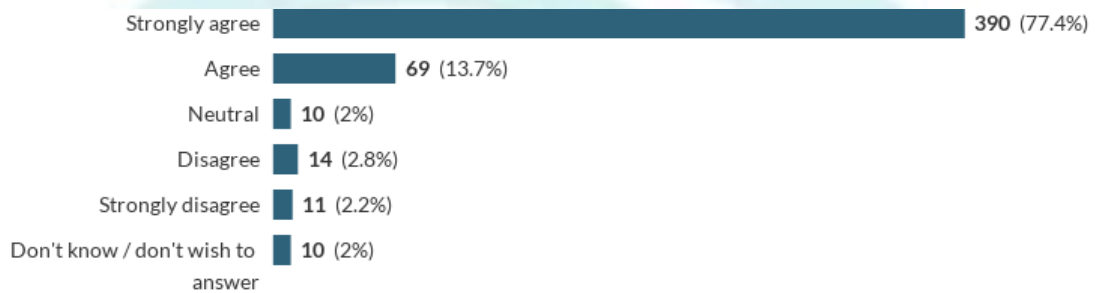
## ***The current system should be improved to enable more people to access surrogacy***



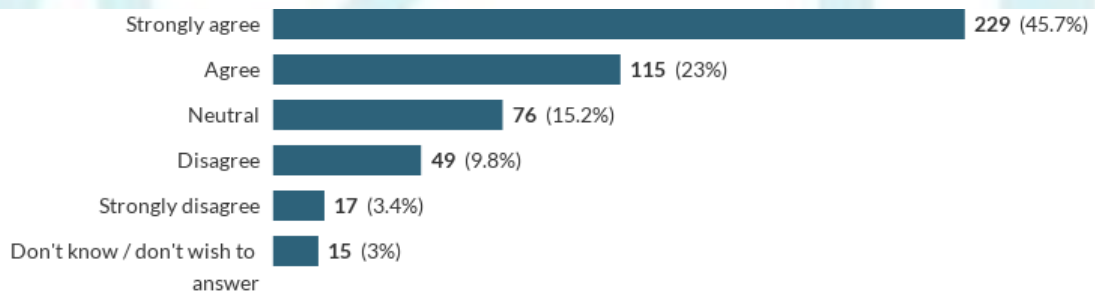
***The current system does not reflect the realities of most surrogacy arrangements***



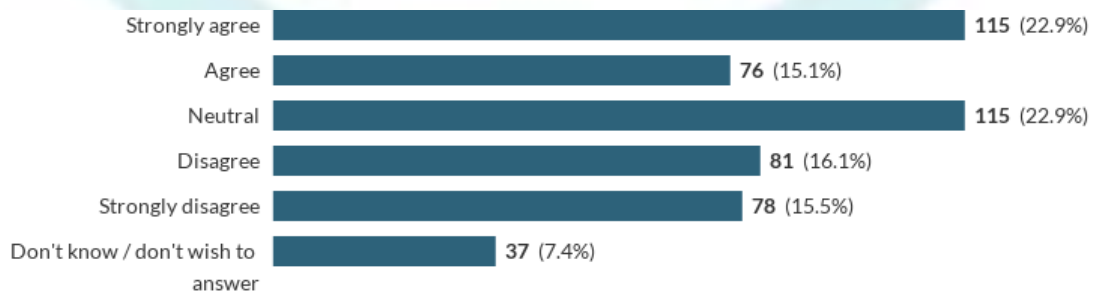
***The current system does not assign parenthood to the correct parties from birth***



***The surrogacy process is difficult as advertising is illegal***



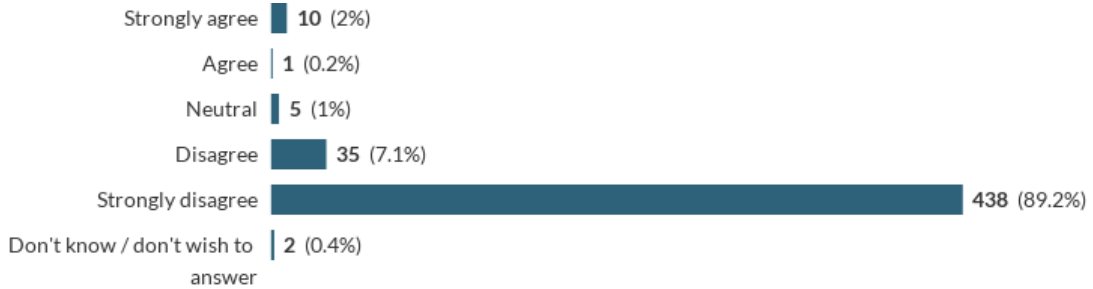
***The surrogacy process is difficult as agencies / organisations supporting surrogacy cannot operate for-profit***



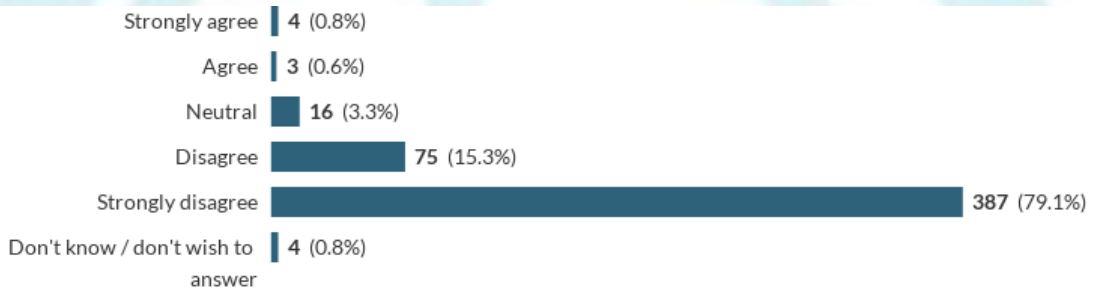
# APPENDIX 2

Question on what reforms should include (Q68)

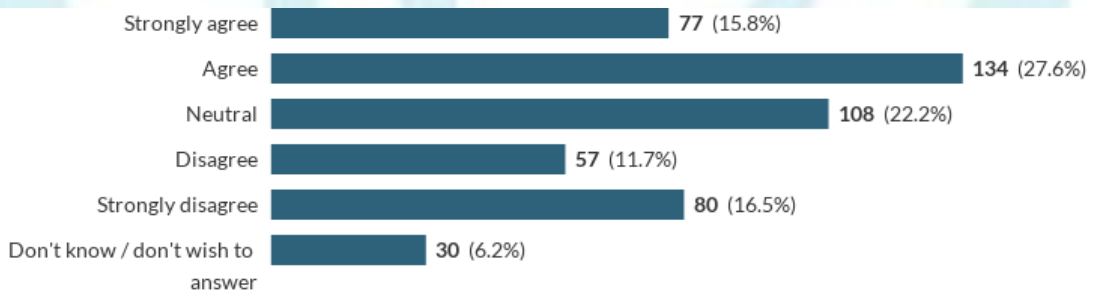
## ***Surrogacy should be prohibited***



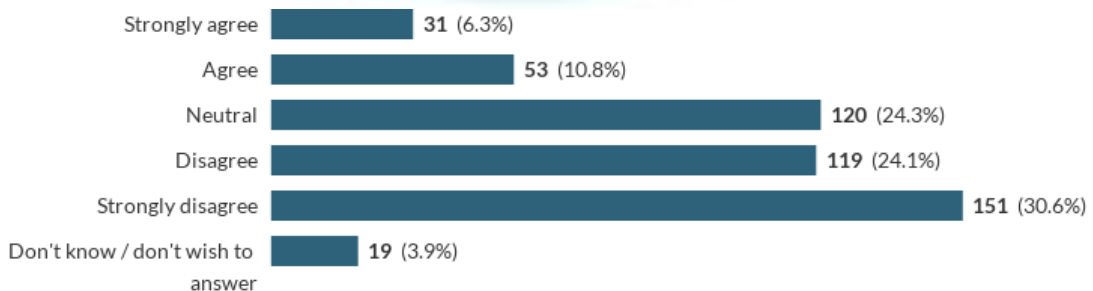
## ***Surrogacy should be even more restricted than it is***



## ***There should be more regulatory oversight of UK surrogacy***

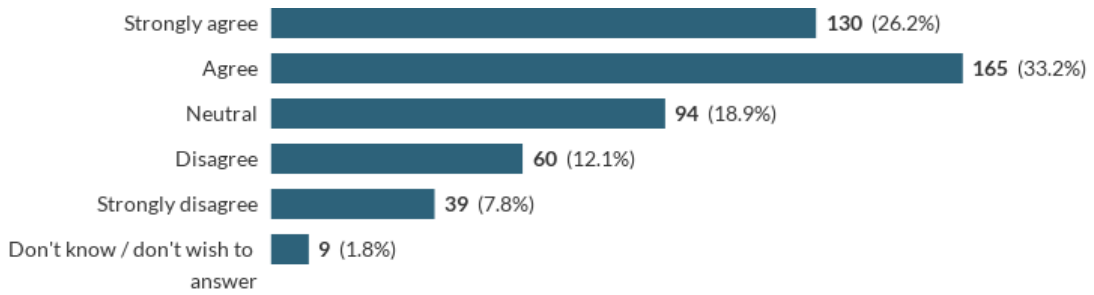


## ***Surrogacy agencies / organisations should be allowed to make profits***

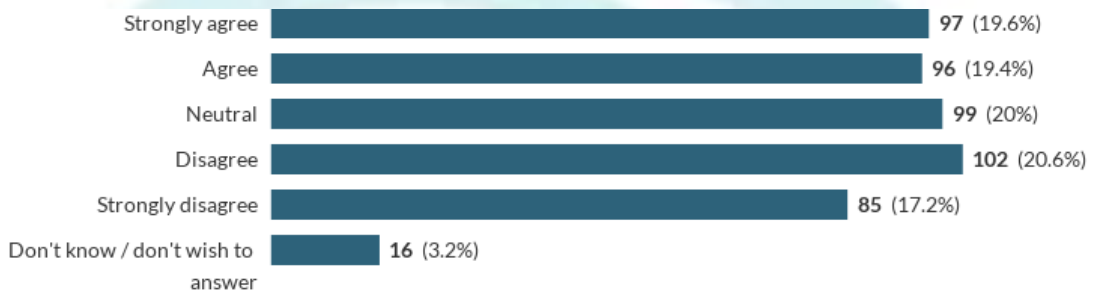




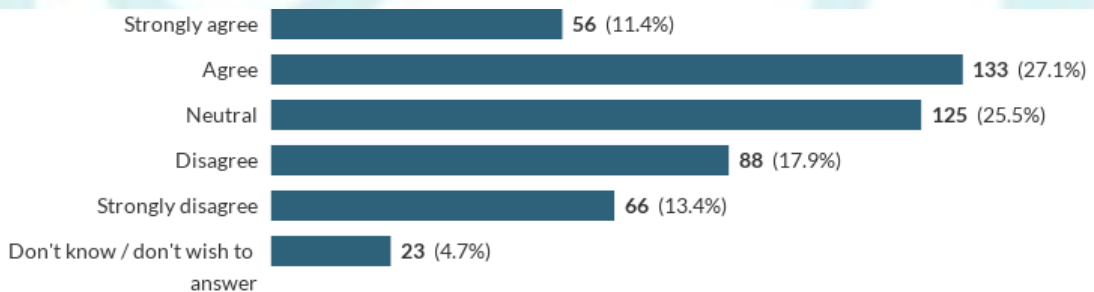
***People should be able to advertise for or as a surrogate through agencies / organisations***



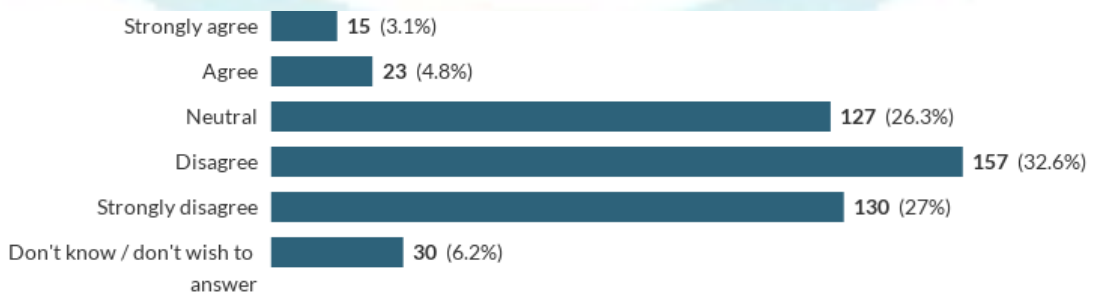
***People should be able to advertise for or as a surrogate in any forum***



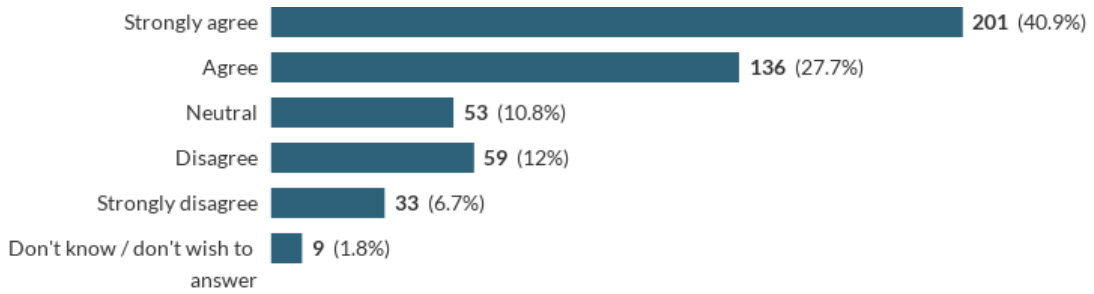
***Agencies / organisations should be able to advertise their services, but individuals should not be able to***



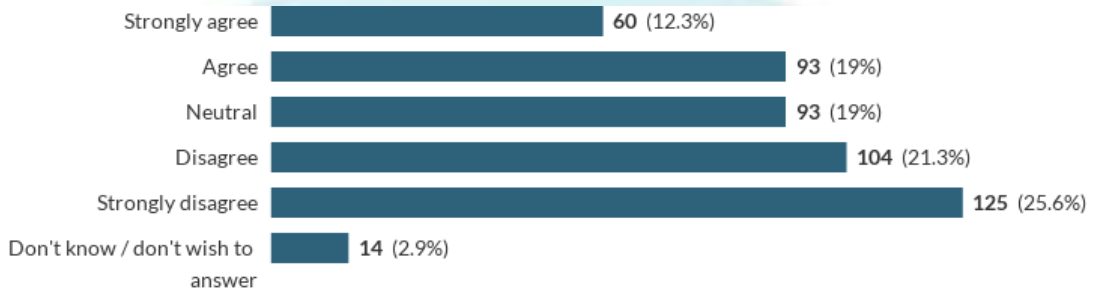
***Individuals should be able to advertise their services, but agencies / organisations should not be able to***



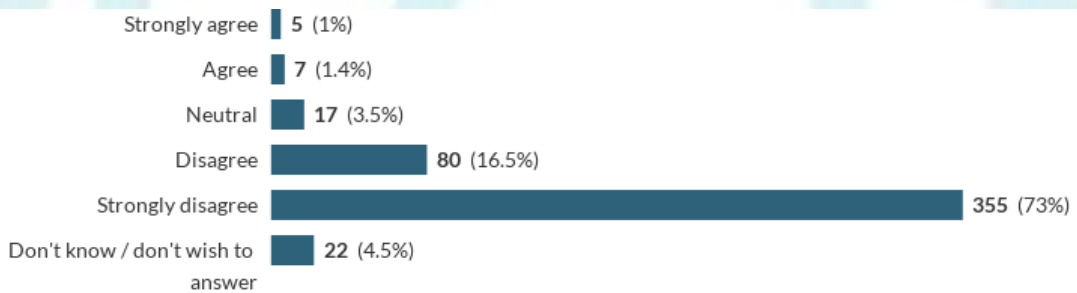
***Surrogates should only be able to claim reasonable and verifiable expenses***



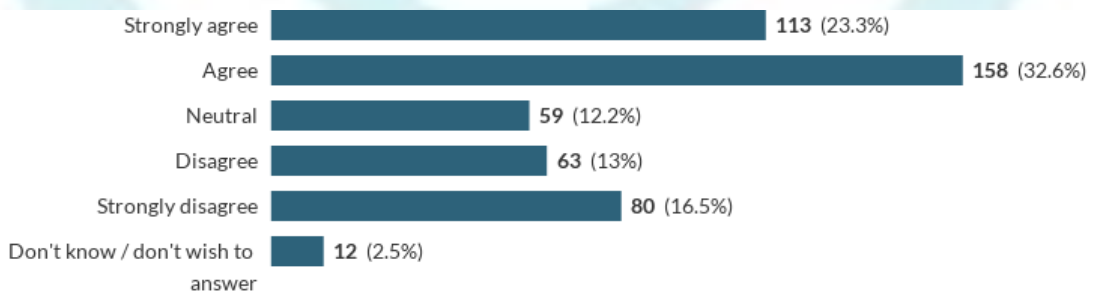
***Surrogates should be allowed to receive payments, not just expenses***



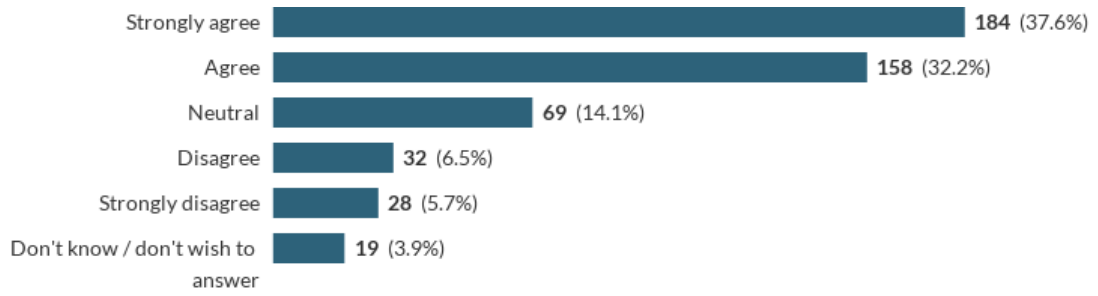
***Surrogates should not be allowed to receive any money at all***



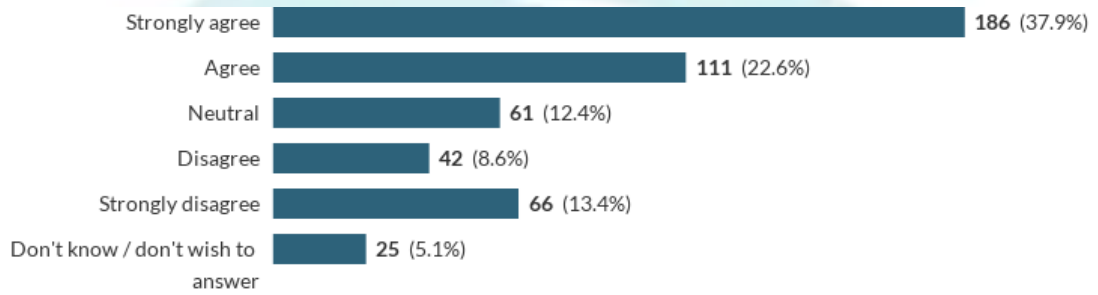
***There should be a cap on the amount surrogates can claim***



***Surrogacy contracts should be enforceable (i.e. either party could claim damages for breach of contract)***



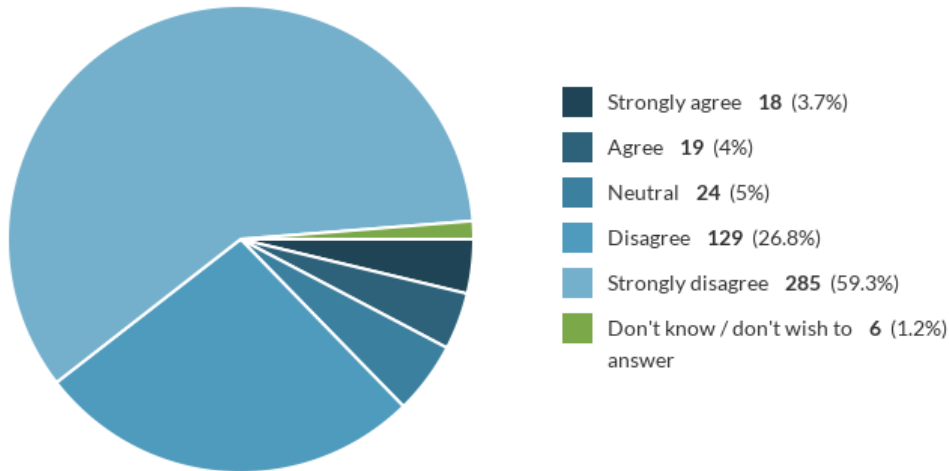
***Birth certificates should state both the genetic parents and legal parents of a child, if different***



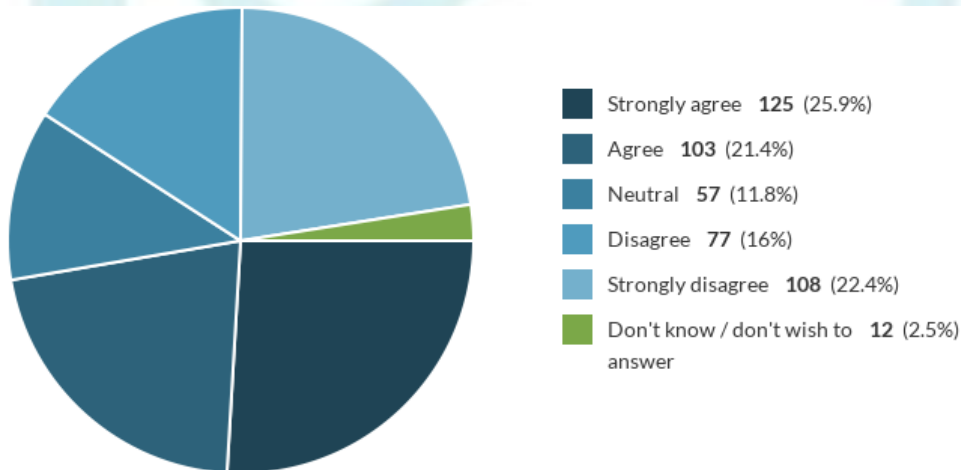
# APPENDIX 3

Question about legal parenthood (Q69)

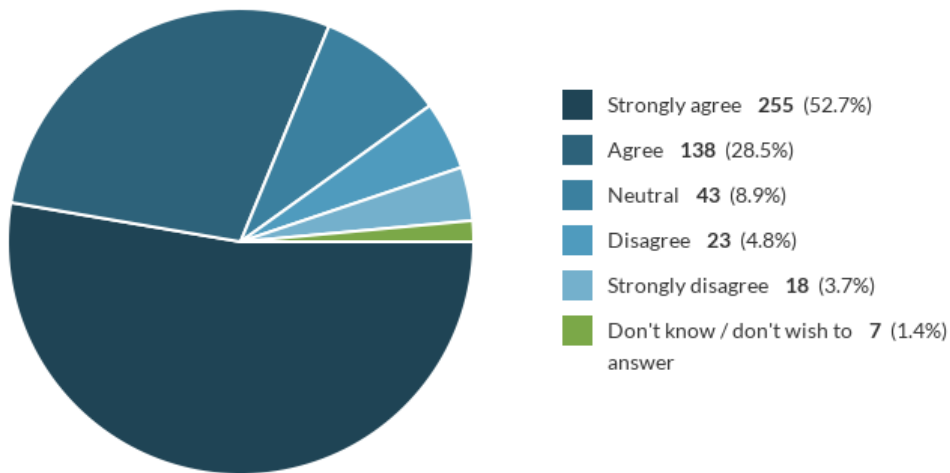
***Legal parenthood should rest with the surrogate (and her partner where applicable), as is the case now and should only change after a Parental Order is granted to eligible parties***



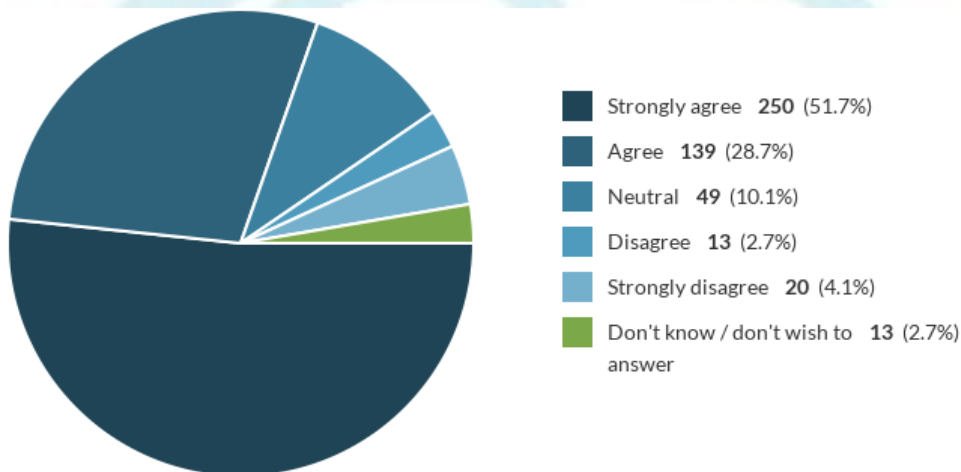
***As above, but intended parents should share parental responsibility from birth (the ability to make decisions for / on behalf of the child)***



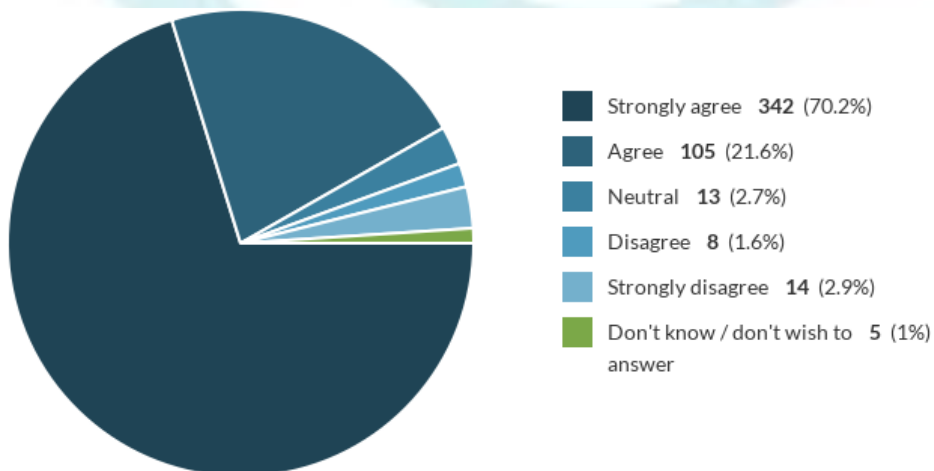
***Single people should be able to become legal parents via surrogacy***



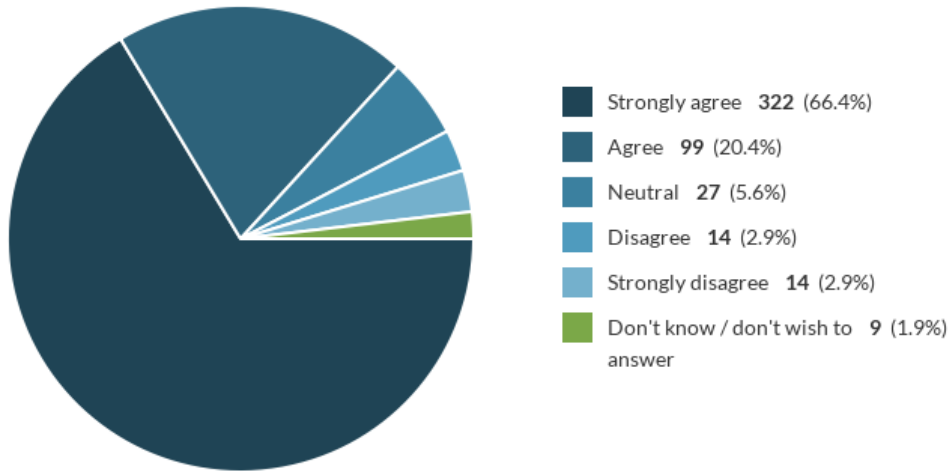
**Intended parent(s) who don't have a genetic link to the child should be able to become legal parents via surrogacy**



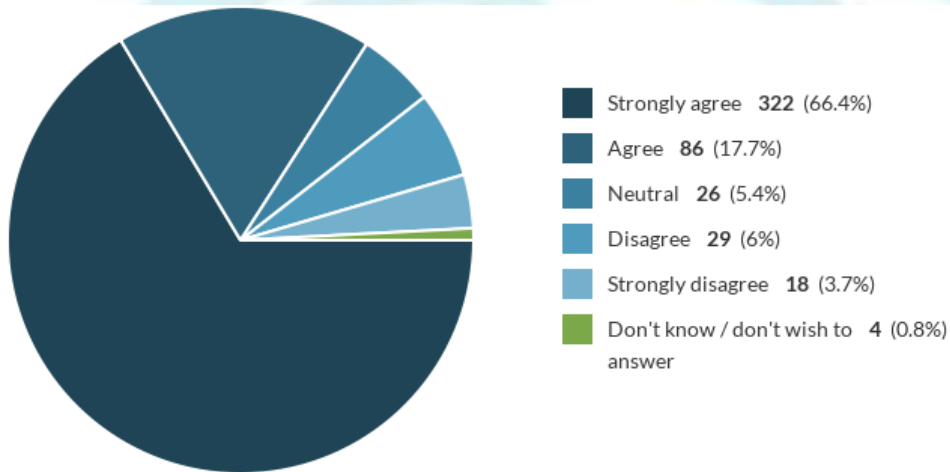
**Parental Orders should be able to be pre-authorized (e.g. by a court, with input from Cafcass), so they are effective from birth**



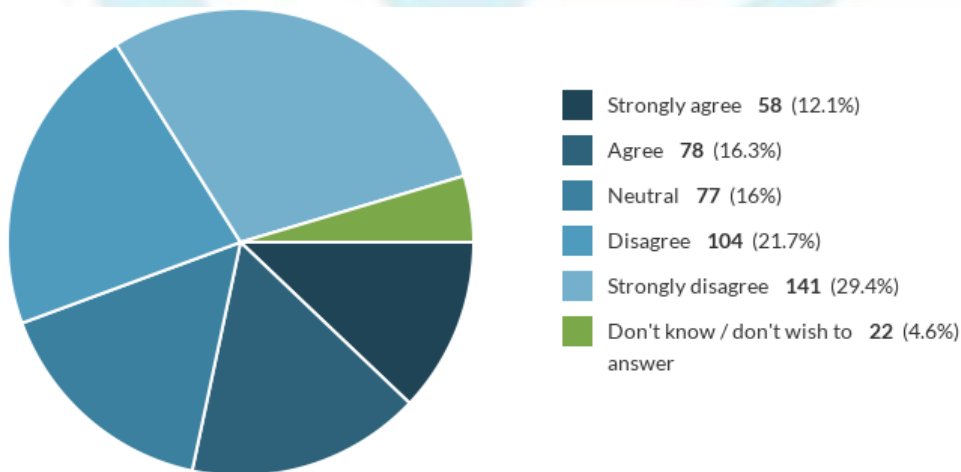
**Parental Orders should be able to be pre-authorized by a regulatory body created specifically for surrogacy, so they are effective from birth**



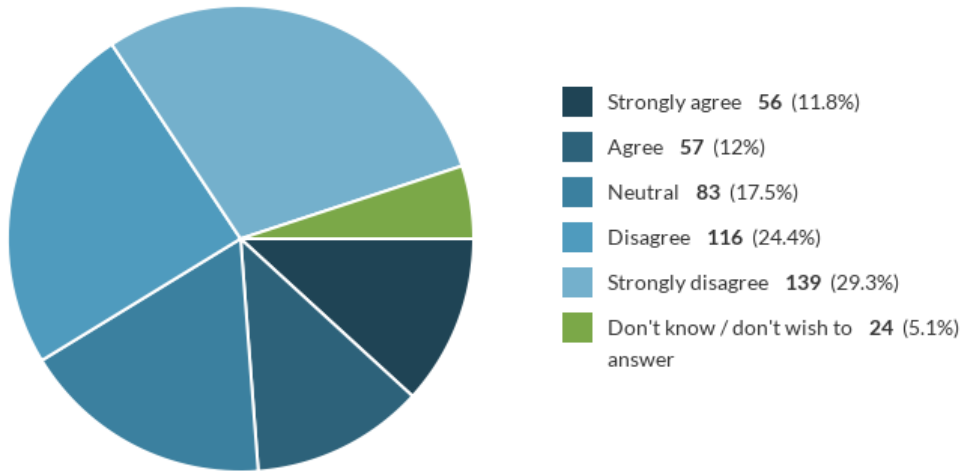
***Legal parenthood should automatically rest with intended parents at birth***



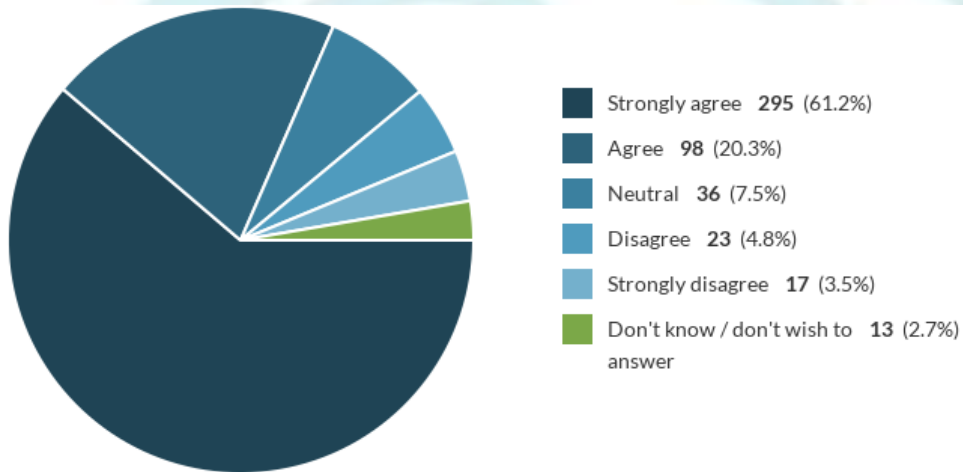
***Legal parenthood should rest with intended parents AND the surrogate at birth, but not the surrogate's spouse or partner***



***Legal parenthood should rest at birth with whoever the genetic parents are (including where the surrogate may be the genetic parent)***



***Intended parents should be the parties who register the birth of the child(ren)***



# APPENDIX 4

## Responses to question on sum paid by IPs to surrogates

### a) In the UK

	FREQUENCY	PERCENT	CUMULATIVE PERCENT
£ -	3	2.0	2.0
£ 200.00	1	0.7	2.7
£ 1,000.00	4	2.7	5.3
£ 2,000.00	1	0.7	6.0
£ 3,000.00	2	1.3	7.3
£ 5,000.00	3	2.0	9.3
£ 6,000.00	2	1.3	10.7
£ 7,000.00	2	1.3	12.0
£ 7,500.00	1	0.7	12.7
£ 8,000.00	8	5.3	18.0
£ 8,800.00	1	0.7	18.7
£ 9,000.00	3	2.0	20.7
£ 10,000.00	21	14.0	34.7
£ 11,000.00	7	4.7	39.3
£ 11,500.00	2	1.3	40.7
£ 12,000.00	20	13.3	54.0
£ 12,500.00	3	2.0	56.0
£ 12,800.00	1	0.7	56.7
£ 13,000.00	11	7.3	64.0
£ 13,500.00	1	0.7	64.7
£ 13,800.00	1	0.7	65.3
£ 14,000.00	4	2.7	68.0
£ 14,500.00	1	0.7	68.7
£ 15,000.00	25	16.7	85.3
£ 15,600.00	1	0.7	86.0
£ 16,000.00	3	2.0	88.0
£ 16,500.00	1	0.7	88.7
£ 17,000.00	2	1.3	90.0
£ 18,000.00	4	2.7	92.7
£ 18,500.00	1	0.7	93.3
£ 20,000.00	7	4.7	98.0
£ 21,000.00	1	0.7	98.7
£ 24,000.00	1	0.7	99.3
£ 26,000.00	1	0.7	100.0
	<b>150</b>	<b>100</b>	



**b) Overseas**

		<b>FREQUENCY</b>	<b>PERCENT</b>	<b>CUMULATIVE PERCENT</b>
£	10,000.00	1	8.33	8.33
£	11,500.00	1	8.33	16.67
£	12,000.00	1	8.33	25.00
£	15,000.00	1	8.33	33.33
£	25,000.00	2	16.67	50.00
£	30,000.00	4	33.33	83.33
£	50,000.00	1	8.33	91.67
£	60,000.00	1	8.33	100.00
		<b>12</b>	<b>100</b>	

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**4pb** Four  
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Buildings

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