Should the UK law on surrogacy be reformed?

Owen Igiehon considers the practice and scale of surrogacy in the UK and welcomes proposals for reform

The Scottish Law Commission and the Law Commission of England and Wales are currently in the process of reviewing legislation concerning surrogacy in the UK. This has come after many years of campaigning for reform by surrogacy agencies in the UK. The Surrogacy Arrangements Act 1985, which constitutes the majority of the legislation on surrogacy in the UK, is now over 30 years old and, in that time, there have been significant advances in both the technology involved, and in public perceptions of this still fairly controversial practice. Surrogacy has become an increasingly popular pathway to starting a family for many people in the Western world, with the NHS estimating that one in seven couples in the UK have difficulties with conceiving in the traditional way. Despite the practice's increasing popularity, the laws on surrogacy in the UK make it a much slower, much less streamlined process than in other Western countries like Canada, or certain states in the US such as California. There is almost no question that the UK law is outdated, as the Law Commissions of England, Wales and Scotland have already realised; however, it is not as clear to see exactly to what extent the law should change, especially with regard to commercial surrogacy. These more contentious issues will be discussed later in this article, but first I will provide some context on the practice of surrogacy, and the scale of its appeal to UK couples.

Surrogacy in the UK

The practice of a woman bearing a child for another couple to raise dates back to ancient times, with an account of a kind of surrogacy arrangement even being recorded in the Bible; in the book of Genesis, a woman called Sara tells her husband to sleep with one of her maidservants, Hagar, and takes the child as her own. Stories like this have historically painted a picture of surrogacy as an exploitative practice, where the surrogate is being taken advantage of. However, in modern times, due to greater social acceptance of the kinds of couples who might seek a surrogate (eg infertile couples, same-sex couples), as well as a number of high-profile celebrities such as Tom Daley, Elton John, Cristiano Ronaldo and Kim Kardashian and Kanye West all having children through surrogacy, in the Western world the practice is no longer as much of a taboo and is widely accepted as a legitimate way to start a family. Surrogacy is rapidly becoming a popular alternative for couples struggling to conceive in the traditional manner; Britain registered more than 400 children born through surrogacy in 2016 (eight times as many as in 2007) ('As demand for surrogacy soars, more countries are trying to ban it', *The Economist*, 13 May 2017), while in 2019, over 400 parental orders were registered.

However, the laws regulating surrogacy in the UK were made in a rather different time. The Surrogacy Arrangements Act 1985 was passed just seven years after the birth of Britain's first 'test tube baby', Louise Brown, in 1978; this was a time when alternative methods of conception were not as mainstream as they are now, the subject of infertility was much more taboo, and the practice of surrogacy was not as well-received by the British public. In fact the Surrogacy Arrangements Act was passed in response to the 'Baby Cotton' scandal in 1984, where Kim Cotton was caught in a legal minefield and a frenzy of media backlash after accepting £6,500 to bear a child for an anonymous American couple, and thus became the first official paid surrogate in Britain. Cotton has spoken on multiple occasions about the furore her actions caused. In an *Independent* article in 2017, she commented, 'The headlines were terrible. "Born to be sold", "No better than prostitution", "Sold for carpets and curtains".' ('UK's first surrogate mother on carrying someone else's baby and how the law must change', Kashmira Gander, 23 March 2017). Following the controversy surrounding her surrogacy arrangement, Cotton set up COTS (Childlessness Overcome Through Surrogacy) in 1988. Cotton has remained a vocal advocate of surrogacy, and an equally vocal critic of the Surrogacy Arrangements Act, which she feels was passed through hastily in the first place, and is now unacceptably outdated.

Cotton is certainly not the only critic of the current UK law on surrogacy; other leading UK surrogacy agencies such as Surrogacy UK (*surrogacyuk.org*) and Brilliant Beginnings (*brilliantbeginnings.co.uk*) have also called for reform, while there have been countless newspaper articles, especially over the past few years, that have highlighted the flaws and shortcomings of the legislation on surrogacy. Evidently, even the Law Commissions of England, Wales and Scotland have recognised a major issue too, as in October 2019 they completed their consultation on surrogacy reform, during which they partnered with surrogacy

agencies and sought expert opinions in order to put together a proposal for how the law on surrogacy could be reformed to fix the many issues that have been identified.

But before we can discuss the potential changes that may be made to the UK law, we must first understand what the law looks like now, and what issues there are within it.

The current legislation

Under the Surrogacy Arrangements Act 1985, while surrogacy is legal in the UK, commercial surrogacy is illegal; the only payments allowed to be made to a surrogate are reasonable expenses, ie compensation for any expenses that may arise as a direct result of her pregnancy (medical bills, compensation for time missed at work etc). Advertising surrogacy is also illegal unless done on behalf of a non-profit organisation. At the child's birth, the surrogate mother will be recognised as the child's mother, and it will be her name on the birth certificate; if she is married, her spouse will be listed as the second parent, unless they did not give their permission. Parenthood can be transferred to the intended parents via a parental order. An amendment made by section 36 of the Human Fertilisation and Embryology Act 1990 means that surrogacy arrangements are unenforceable by law, which gives the surrogate the right to fight to remain the child's legal parent if she happens to change her mind once the child has been born. Parents of children born through surrogacy overseas are not recognised as the child's legal parents in the UK, even if their names are on the local birth certificate. In the UK, the surrogate is still considered to be the child's mother, and the intended parents must apply for a parental order before they can legally bring their child home (unless consent is given by the surrogate).

The issues

The first major issue with the current legislation is how it handles the transference of parenthood. Under the Human Fertilisation and Embryology Act 2008, s 33(1), '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' in cases involving children born through assisted reproduction. Therefore, the intended parents cannot be considered as the parents of the surrogate child straight away. However, in places such as the surrogacy-friendly states of the United States like California and Illinois, pre and post-natal arrangements can be made to transfer parenthood to the intended parents, making the process much faster and smoother than the use of parental orders in the UK. Parental orders can take up to six months to go through and, during this time, the surrogate children are left in a kind of limbo, with their legal parents waiting to give them away, and their genetic parents unrecognised as their true parents in the eyes of the law.

Parental orders cannot be made in the UK until six weeks after the child has been born, as they cannot be made without the consent of the surrogate, which is considered invalid if given at any point up to six weeks after birth. The child must be living with the intended parents at the time of the application and making of the parental order, which can cause complications if the intended parents have separated before or during the parental order proceedings. This can also make the issue of international surrogacy even more complicated; under UK law, the birth parents of a surrogate child born abroad are considered their legal parents, even if the local birth certificate bears the intended parents' names—this means the intended parents must also procure a parental order in the UK which, due to the long waiting time for the order to go through, can place an added burden on the intended parents and make the living situation of the child very uncertain. Furthermore, if the child is born through sexual intercourse, as opposed to artificial insemination, the intended parents cannot apply for a parental order; in such a situation, they may have no other choice but to assume legal parenthood through adoption, which is an even longer and more drawn-out process.

These laws, combined with the fact that surrogacy arrangements are not enforceable by law, make the process very uncertain and uneasy for both the intended parents, who may have to wait for months on end and jump through various legal hoops to finally be recognised as their children's legal parents, and for the surrogate, who, should the intended parents fail to obtain a parental order within six months of the baby's birth, could end up saddled with legal responsibility for a child they had no intention of keeping.

The law also inconveniences surrogate mothers in other ways. The law prohibits the advertisement and commercialisation of surrogacy (unless done by or on behalf of non-profit surrogacy agencies). The only payments that can be legally made to a surrogate are those that come under the ambiguous and unspecified description of 'reasonable expenses'. These laws governing the commercialisation and advertisement of surrogacy are all deeply flawed. In practice, no one has ever been prosecuted for advertising their services as a surrogate in the UK; as Natalie Gamble comments, 'Just a few clicks on Google will uncover UK prospective parents and surrogates connecting with each other on busy online surrogacy forums and social networking pages' (N Gamble, 'A better framework for United Kingdom surrogacy', in S Golombok et al (eds), *Regulating Reproductive Donation* (Cambridge UP, 2016), 140-162, 141).

Commercial surrogacy is prohibited by law, yet surrogates still earn considerable sums of money, usually around £15,000 but sometimes even more than £20,000, usually as part of 'reasonable expenses', although additional payments made between the intended parents and surrogates alone and without the involvement of a third party are not in fact illegal, and in practice. Again, in practice, no UK court has ever refused a parental order due to payments being made beyond reasonable expenses, as in all matters dealing with surrogacy, the court's primary concern will generally be the best interests of the child. The government's main justification for prohibiting commercial surrogacy is the preservation of an altruistic nature to our country's surrogacy system, as well as concerns that allowing commercial surrogacy could lead to exploitation. However, in the US, where commercial surrogacy is legal in a number of states, surrogates usually receive between $30,000 and $60,000 (roughly £22,000-£44,500), which is not exactly an extraordinary amount more. Furthermore, while commercial surrogacy in Eastern European countries such as Ukraine has undoubtedly contributed to the far from altruistic and often potentially exploitative practice of fertility tourism even despite it being a very lucrative industry, with India's surrogacy industry having once been worth $500m a year ('After Nepal, Indian surrogacy clinics move to Cambodia', Al Jazeera, 28 June 2016). However, many states in the US also permit commercial surrogacy, and do not report the same kinds of issues with exploitation; the problem, therefore, is not the practice of commercial surrogacy, but how well it is regulated, as in the US surrogacy arrangements have much more weight given to them by legislation, and the law is also much clearer about who can pay a surrogate and how much they can be paid.

The very fact that the laws on the advertisement and commercialisation of surrogacy in this country are so often bypassed is a clear sign of the need for reform. The legal framework surrounding these issues fails to achieve its purpose. If the government wishes to ensure surrogacy is practised on an altruistic basis, they must implement more explicit regulations

on what grounds it can and cannot be paid; and in order to minimise any risk of exploitation, there must also be greater legal support of surrogacy arrangements, to ensure that the terms of the agreement are upheld. These changes would make the process much less uncertain for both surrogates and intended parents, as they would now have greater clarity on exactly how much money can be paid to a surrogate and which justifications are included in the term 'reasonable expenses'.

Enacting reform: The Law Commission's current proposals

The Law Commission published its consultation paper on surrogacy in June 2019. It acknowledges the various issues with UK surrogacy laws and proposes multiple potential methods of reform, based on a few over-arching principles. The Law Commission has recognised the need for reform of the parental order system, and so have proposed a new pathway that would allow intended parents (who meet the eligibility criteria: 'Law Commission, Building Families Through Surrogacy: A New Law' (Law Com 244, 2019) ch 12) to become the child's legal parents at birth, while also affording the surrogate a short period of time during which she may choose to change her mind (Ibid, ch 8). To ensure the new pathway is sufficiently regulated, it would be required that the surrogacy agreement must be supervised and counter-signed by a government regulated surrogacy organisation or clinic (Ibid, para 8.7).

There is a large focus in the consultation paper on ensuring that the move towards streamlining the parental order process does not infringe on the rights of the surrogate to manage her pregnancy as she wishes. The surrogate will retain the right to object to the transference of legal parenthood (Ibid, para 8.23). The surrogate will retain this right for a fixed period of time, provisionally set at one week less than the relevant time for birth registration (Ibid, para 8.27). Should the surrogate choose not to exercise her right to object, the intended parents will continue to be recognised as the child's legal parents; this means that assuming all goes as planned, the intended parents will be recognised as the child's parents from birth, and the surrogate's name will never at any point be recognised as a legal parent unless she objects (which, especially under the greater regulation proposed by the Law Commission to ensure transparency and full awareness of the consequences of the arrangement, is unlikely to happen very often). This system would be a vast improvement on the existing legal pathways, as it would remove almost all uncertainty for the intended parents by allowing them to be recognised as legal parents immediately, without any additional post-birth paperwork, while still affording the surrogate with a right to object. Also, should the intended parents change their minds, the child will remain their responsibility as they will still have legal parenthood; this is a much better arrangement than the current system, where the surrogate (and her spouse) may end up saddled with the legal responsibility for a child she never had any intention of keeping. In fact, the surrogate's spouse will be left out of the proceedings altogether, allowing the surrogate to make her own independent decisions, while the fact that she would not have to appear at the birth registration of the child means that the surrogate can quite easily wash her hands of any connection to the child or its parents and move on with her life if she chooses to do so (Ibid, para 8.28).

The model under which surrogacy will be regulated is based on the model of adoption agencies, although with a 'lighter touch' than the quite rigid regulation of adoption agencies, as surrogacy organisations do not deal directly with existing children, but instead help intended parents and surrogates make surrogacy agreements (Ibid, paras 9.38-9.44). Existing surrogacy organisations such as Brilliant Beginnings or COTS would take the role of these proposed regulated organisations, while the Human Fertilisation and Embryology Authority would assume the role of regulator (Ibid, paras 9.98-9.99, 9.113-9.116). With regard to regulating the payments made by intended parents to surrogates, the Law Commission proposes that, to avoid the controversial question of whether to define the UK law as permitting or prohibiting commercial surrogacy, as well as to create greater clarity around what can and cannot be paid to a surrogate, the law should identify a number of set categories of payment that the intended parents would be allowed to make (Ibid, para 15.4). The Law Commission proposes the following categories:

- Loss of earnings;
- Loss of welfare entitlement;
- Essential costs of pregnancy;
- Additional costs of pregnancy;
- Costs associated with a surrogate pregnancy;
- Compensation for the pain and inconvenience, medical complications or the death of a surrogate;
- A flat fee for being a surrogate (either subject to negotiation between the two parties, or subject to a cap set by the negotiator; and
- Gifts.

While there is certainly a degree of overlap between these categories, between them they effectively cover the possible motivations for paying a surrogate, although the gifts category in particular does offer a potential for exploitation; the law must make it clear that gifts must be of a modest monetary value and chiefly sentimental in nature.

The Law Commission has also proposed methods to make international surrogacy a more workable option (Ibid, ch 16). While they, quite rightly, consider large scale reform to nationality law for the sole purpose of facilitating surrogacy unnecessary, they have proposed that changes to the rule of always treating the woman who gives birth to a child as the mother could allow the intended parents to be recognised as the child's legal parents, which would make the process of bringing home and awarding citizenship to a child born through surrogacy overseas no more arduous than it is when the child is born through traditional means (Ibid, paras 16.44-16.45).

Cause for optimism

The extent to which the previous UK surrogacy laws were inadequate has meant the Law Commission has had to propose quite radical and extensive reforms; however, the Law Commission has taken a considered approach to the reform process, taking the requisite time and rigour in their consultation so as not to make the same mistake of rushing through a law that does not adequately protect the interests of the surrogates, the intended parents or the children. The Law Commission has worked extensively with respected authorities on the matter, as well as drawing inspiration from positive examples of well-functioning surrogacy laws in places such as Ontario, Canada and California; the proposals for reform that have come out of this consultation are extensive and should be effective. The changes that have been made are drastic, and it remains to be seen how well surrogacy will be regulated under the proposed new system; but these changes nonetheless represent a well-planned, much needed and long overdue update to the UK's surrogacy laws, giving cause to be optimistic that both intended parents and surrogates in the future will be more free to focus on the happy pairing of parents to their children, untroubled by any anxieties caused by legal uncertainty. **NLJ**

Owen Igiehon was awarded the 2019 Westminster School—Neuberger Law Prize.