The Law Commissions’ Consultation on Surrogacy Law

The Law Commission of England and Wales and the Scottish Law Commission are currently running a joint consultation on surrogacy law, which closes on 11 October. They are proposing some radical changes to the law that would introduce commercial surrogacy in the UK and restrict the maternal rights of surrogate mothers. This briefing paper presents some ethical considerations in relation to the proposed change.

We encourage all interested parties to make submissions to the consultation, including those with experience of adoption or the consequences of assisted reproductive technologies, and those with knowledge about human trafficking and the exploitation of women and children. The consultation document and questionnaire are available here: https://www.lawcom.gov.uk/project/surrogacy/

Proposed Changes to the Law

The proposed legal changes on which the Law Commissions are consulting would:

- Facilitate commercial surrogacy in the UK
- Streamline international surrogacy
- Permit the advertising of surrogacy services
- Facilitate surrogacy where neither intended parent would be genetically related to the child (“double donation”)
- Introduce a new pathway in which the surrogate mother would not be, as now, automatically the legal mother until she relinquishes her rights. Instead, the surrogate mother would have a very brief period after the birth to register an objection to the intended parents acquiring legal parenthood, on which a court will then rule.

Ethical Considerations

Surrogacy is always an injustice to the child because it fragments parenthood in a pre-planned way. It intentionally deprives the child of at least one biological parent: the woman who provided the child with intimate, maternal bodily care for nine months (the surrogate may or may not be the genetic mother also). Children should be conceived and gestated in a way that reflects the child’s right to the love and care of parents wholly committed both to each other and to the child they have conceived. Fragmentation is sometimes unavoidable once a child exists – a birth mother may need to raise a child alone if the father cannot co-parent, or may
even need to give the child up for adoption – but fragmentation should not be the aim before pregnancy even begins.

Fragmentation of parenthood in surrogacy is exacerbated by the practice of “double donation” (see above), where the child would be separated from the birth mother and from both genetic parents – again, in an entirely pre-planned way. In this regard, the experiences of those who were donor-conceived have much to tell us about the potential impact of surrogacy and “double donation” on the offspring.¹

It is troubling that the consultation is not concerned about whether surrogacy should be legally permitted or encouraged at all, but starts from the premise that surrogacy is “an accepted form of building a family”.² Despite periodic reference to the best interests of the child, the consultation document is centred very much on the interests or wishes of adults and in particular, the intended parents.

In relation to the surrogate, it is important to stress that during pregnancy she has already been offering genuinely maternal care, and therefore has rights and responsibilities as a birth mother that the law should reflect. Pregnancy is not babysitting; it makes one a mother in an archetypal way. Surrogacy objectifies this process and the human beings involved.

In current UK law, the surrogate mother is the legal mother until she relinquishes the child. The proposed changes move towards making the intended parents the default legal parents, and place the burden on the surrogate mother to object, with only a very short timeframe for an objection to be raised. This is unjust because the surrogate mother – like any other birth mother – regardless of her plans during the pregnancy, needs sufficient time after the birth to decide whether she does indeed want to relinquish the child. Processing her feelings towards the child she has been carrying following the birth (which may have been physically demanding or traumatic) may require more than a few days or weeks. The expectation of almost immediate detachment from her child is not a reasonable expectation and should not be legally endorsed.

There are important human values at stake here. It is in everyone’s interests that pregnancy should be seen by those entering into it as a fully committed, fully parental relationship, not as “just another job”. The draft proposals threaten this value further by introducing and normalising commercial surrogacy, including advertising for women to sell their services and the streamlining of international surrogacy. This would lead to poorer women being paid to gestate and give birth while being more readily deprived of the legal right to keep the child if, by mischance, they should bond with their baby. If international surrogacy is streamlined this

¹ See, for example, Alexina McWhinnie, ed., Who Am I? Experiences of Donor Conception (Leamington Spa: Idreos Educational Trust, 2006).

will also make it more difficult for those born of surrogacy to establish a relationship with their birth mother, especially if they do not even share a language.

**How to Respond**

The Law Commissions have published both a longer and a shorter questionnaire, as well as a shorter summary of the full consultation document, all of which are available via the link given above (see page 1).

- It is not necessary to have “lived experience” of surrogacy or of some relevant form of assisted reproduction (including as a surrogate-born or donor-conceived adult), or to be a parent and/or a person with a fertility problem, to make a submission.
- If you do have a personal experience that informs your view, including an experience of adoption, please state this in your response to the first question in the shorter questionnaire.
- If you choose to respond to the longer questionnaire, be aware that there is no need to answer all the questions in this (or in the shorter) questionnaire. Indeed, it can be difficult do so where the question not only presupposes that surrogacy arrangements should be promoted or enforced by law but concerns specific directions for how preparations for surrogacy should be carried out.
- Even a simple yes/no response to most questions and a few comments made in responding to one or two questions will be well worth while.

The Anscombe Bioethics Centre’s response to the shorter questionnaire is available here: [http://www.bioethics.org.uk/images/user/surrogacysubmission.pdf](http://www.bioethics.org.uk/images/user/surrogacysubmission.pdf)

You may find this helpful, although you should of course use your own words in responding. A wide response to this consultation in more critical vein may prevent the Law Commissions from claiming that the proposals for change are widely accepted by the public.