

**British Association of Social Workers (BASW) Project Group on Assisted  
Reproduction, PROGAR**

**BRIEFING PAPER**

**Children at the centre of surrogacy:  
human rights within a lifespan approach  
2018**

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**KEY POINTS**

- Children's human rights should always be paramount in surrogacy policies and arrangements.
- Surrogate-born offspring have the right to an official documented trail to which they have easy right of access (such as through birth registration systems or statutory registers) regarding the details of their conception and their gestational, genetic and legal parents.
- Surrogate-born offspring have the right to know that their gestational, genetic and legal parents were required to engage in assessment and preparation by child welfare professionals prior to their involvement in surrogacy arrangements and that their care following their birth until a Parental Order was made was also subject to oversight.
- Treatment centres should only use gestational surrogates where there are medical reasons for doing so in order to avoid additional later emotional and legal complexities for surrogate-born offspring.
- There is a need to clarify the parental legal status and nationality of surrogate-born children at all stages and remove anomalies but such legal protections should not compromise the full range of their human rights being respected.
- Surrogate-born offspring have the right to there being minimum medical standards in place for those involved during and after surrogacy-related treatment.
- Close attention should be paid to the potential abuse of children's human right to be free from abuse and exploitation through baby selling and trafficking, including through the involvement of commercial agencies and intermediaries.
- The voices of surrogate-born offspring are yet to be heard in sufficient numbers, whether through research or support groups or lobby groups. The dangers of over-claiming from existing research need to be avoided and transferable messages from experiences arising from donor conception and adoption should be heeded.
- There is a need for regulation of surrogacy arrangements, greater international collaboration, and aligning of data collection across relevant agencies not least to enable follow up to ensure that the child's legal parentage is secured.

## WHO WE ARE

The British Association of Social Workers (BASW) Project Group on Assisted Reproduction, PROGAR (<https://www.basw.co.uk/progar/>) has since the 1980s campaigned in the UK and overseas on matters concerning assisted reproduction, including surrogacy. We have variously worked in partnership with donor-conceived adults, Barnardo's, Children's Society, Donor Conception Network, British Infertility Counselling Association (BICA), British Association for Adoption and Fostering (now CoramBAAF), National Association of Guardians ad Litem and Reporting Officers (NAGALRO), Children and Family Court Advisory and Support Service (CAFCASS), Children and Families Across Borders (CFAB) and UK DonorLink.

## OUR CORE VALUES

PROGAR has consistently argued the need for policy and practice to place children (and the adults they will become) centre-stage, use a lifespan perspective and consider what might be most likely to lead to healthy family and adult life where surrogacy arrangements and/or donor conception are the route to family life. Our contribution to the lifting of donor anonymity and the introduction of the Welfare Checklist into the Parental Orders process and our continuing lobby for birth registration reform are just three examples of this.

Our views are informed by a human rights stance. Basic universal rights and freedoms protect every person simply because they are human and can only be restricted in order to protect people and balance the rights of others. Human rights set down in law the rule book for governments on how people should be treated and how power should be exercised. Our view is that children's human rights should be paramount in both surrogacy and any assisted reproduction contexts and this is set out in more detail in BASW's Position Statement on Surrogacy - <https://www.basw.co.uk/resource/?id=5968>.

## LINKS TO HUMAN RIGHTS APPROACHES

Taking a children's human rights approach to surrogacy and drawing on the 1989 UN Convention of the Rights of the Child (to which the UK is a signatory), we have concerns in particular about the push for pre-authorised Parental Orders including changes to legal parentage at birth and the extension of eligibility for Parental Orders to those where neither partner has a genetic relationship to the child. Since restrictions were placed on international adoption, surrogacy is the only formal arena in the UK (and in most other jurisdictions) in which a child is carried through pregnancy by one person then raised by another without any *required* scrutiny or preparation of the adults involved. In addition, this field is hampered by the limited lobby for the thousands of offspring affected or yet to be born, the lack of pressure groups among adult surrogate-born children similar to those that have developed for donor-conceived individuals, and the pitiful absence of research into longer term outcomes for both domestic and cross border arrangements leading to an inappropriate reliance on what is available. Our concerns centre on the fact that calls for legislative change are largely silent on the following matters, which we consider essential to be in place if we are to secure children's human rights and which therefore should take priority:

- Given the complexity of surrogate-born children's 'parentage', PROGAR argues that their Article 7 (registration, name, nationality, care) human right to 'know' their parents and their Article 2 (non-discrimination) human right for them and their 'parents' to be free of any discrimination extends to *all* their 'parents'. While acknowledging the complexity and contested nature of terminology, we agree with the view expressed in the *Implementation Handbook for the*

*Convention on the Rights of the Child* (Hodgkin & Newell 2007) that, for these purposes, ‘parents’ should include their ‘genetic’ and ‘gestational’<sup>1</sup> parents, their legal parents and the parents who are raising them (sometimes known as ‘social’ parents who may also be their legal and genetic parents and who are often referred to as ‘intended/commissioning’ parents). All are potentially significant to that child in the short and longer term making it important they can both ‘know’ of them *and* that they as well as their ‘parents’ are free from discrimination and treated with dignity and respect. Where the human rights of any of the adults conflict with those of the child, those of the child should be paramount.

- At present, children’s human right to know all their ‘parents’ is not secured in many surrogacy arrangements:
  - Even if ‘intended/commissioning parents’ tell their children of their full origins (and there is nothing in law that *requires* them to do so), few jurisdictions, fertility treatment centres or gamete donor banks keep **registries** and provide services to enable surrogate-born offspring to have access, at any stage in their lifetime, to identifying biological/ gestational, genetic and biographical information about surrogates, donors or previous legal parents. Indeed some commissioning parents are *themselves* never aware of the identity of the surrogate let alone of the donor.
  - The situation is further complicated by **birth registration systems**. In the UK, both donor-conceived individuals conceived in a UK licensed clinic and surrogate-born individuals where there is a Parental Order in place have a statutory right to information held in state records. However information relating to donor conception is held by the HFEA and hence separate to that relating to Parental Orders (held by the Registrar General) and there is no requirement for the Registrar General to inform a surrogate-born offspring who was conceived with the use of a gamete donor approaching the Parental Order Register of the possibility of their donor-related information being held by the HFEA. In other words, gamete donors (or their use) are not recorded in the birth registration system<sup>2</sup> leaving offspring dependent on learning elsewhere of their origins to realise they have a human right to exercise. For those born outside the UK, there are a myriad of approaches to birth registration. Although UK rules on access to information still apply to surrogate-born children on their entering the UK, this is dependant on ‘intended/commissioning parents’ applying for a Parental Order and one being granted.
  - The decision about whether to use **genetic or gestational surrogacy** (where this is not for medical reasons such as where the intended mother has no womb but produces eggs) does not reliably take into account the child’s right to know the identity of the surrogate (and egg donor if used) nor their potential need to make sense of the meaning of two or even three additional ‘parents’ (surrogate and donors) rather than only one (‘surrogate’) as their lives unfold. Gestational surrogacy decisions are typically more influenced by the intended/commissioning parents’ desire (sometimes, perhaps often, influenced by clinic staff and surrogacy agencies) to reduce failure to relinquish the baby by the surrogate (though there is no robust evidence base of which we are aware to indicate genetic surrogates are less likely to relinquish the infant) or achieve ethnic similarity or ‘distance’

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<sup>1</sup> Surrogacy arrangements are of two main types: (i) where the surrogate uses her own eggs, known as genetic surrogacy and (ii) where the child is conceived with the use of eggs from either an egg donor or the intended mother, known as gestational surrogacy. In UK law, a woman who gives birth is automatically the legal parent of that child; there are only a small number of jurisdictions around the world where this is not the case in surrogacy arrangements.

<sup>2</sup> This would not necessarily mean naming them on birth certificates; there are other models available

themselves from the fact of there being another genetic 'parent' to their intended child. Some fertility treatment centres and surrogacy agencies do not make clear that there are different options available and/or that there may be implications for the child in the long term to using a donor.

- Lack of access to identifying and non-identifying information about a child's surrogate or donor (where one is used) means that their potential need at some stage in their life-time (including from childhood) to **understand the epigenetic<sup>3</sup>, genetic, social and cultural context of the surrogate and donor** is compromised.
- Article 7 states that children have a human **right to have a nationality** but there can be a struggle to acquire nationality following international arrangements. Sometimes intended/commissioning parents go ahead with international arrangements in the knowledge that this may result in difficulties with nationality for the child or unrealistic hope that any difficulties may be readily overcome. Sometimes they do so because of incomplete information. In the case of couples, this can lead to one partner returning home pending the outcome of lengthy negotiations with the attendant risk to the emotional and general well-being of the child and risks to opportunities to bond and form attachments within the family unit. Even those returning to the UK easily, for example through declaring their intention to apply for a Parental Order, are not followed up so nationality and legal parentage may be left unresolved.
- Rather than seeing the 'solution' as the need for jurisdictions to recognise all cross-border arrangements and/or for legal parentage to be granted to the 'intended/commissioning parents' at or before birth, a children's human rights approach would instead include **mandatory requirements for pre-conception scrutiny and preparation, minimum medical care standards and an official trail of [all] parentage and record keeping including through birth registration systems**. Any changes put in place to deal with nationality issues should not be at the expense of creating other longer term issues for the offspring.
- Children's human rights include being **free from abuse or exploitation** (Articles 19 (protection from violence), 34 (sexual exploitation), 35 (abduction, sale and trafficking) and 36 (other forms of exploitation)). There are also concerns about the risk of exploitation for surrogates and intended/commissioning parents. We believe that the following should be in place in order to lower the risks of exploitation and abuse and heighten safeguards, especially of children:
  - Mandatory scrutiny and preparation procedures by professionals with child welfare expertise tailored to this context should be introduced prior to surrogacy arrangements being entered into and consideration given to how all parties that can best be supported through pregnancy and beyond birth.
  - Legal clarity about the status of surrogate-born children and of those raising them at each stage of the process: at birth, on discharge from hospital/place of birth (where applicable), on entry to the UK (where applicable), until a Parental Order is made, or in the event of no PO being applied for. Unlike any other child being cared for by someone who is not their legal parent there is currently no statutory oversight.
  - Where surrogacy-related requirements are in place - for example HFEA consent procedures as a requirement for conferring legal parenthood, requirements for bringing surrogate-born children into the UK - these should be followed up on. Given that the principle behind these

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<sup>3</sup> The field of epigenetics remains little understood but evidence is growing that there are influences on the child to be born from the woman carrying the pregnancy regardless of whether or not she is genetically related

policies is [presumably] based in the need to safeguard children, lack of follow up cannot be justified.

- Strengthening and clarifying safeguards for children should not be at the expense of lowering children's rights to access full information about their gestational, genetic/biological or legal parents
- Commercial or other interests that encourage agencies and professionals to focus, knowingly or otherwise, on adults' desires to be parents rather than the human rights of children should be banned.
- There should be regulation of surrogacy agencies, brokers or fertility treatment services (both statutory and by relevant professional bodies) in order to ensure minimum standards and, among other matters, reduce the likelihood of children ending up disabled, suffering poor health or being abandoned; of surrogates receiving poor medical care; and of intended parents finding themselves held to ransom.
- There is a need for improved international co-operation between countries' jurisdictions, including through bilateral agreements. Given the global movements of surrogacy arrangements with new markets opening up all the time, monitoring is especially difficult.
- Whether globally or domestically, the boundaries between surrogacy and child selling are arguably porous (even if such instances are small); the potential for child selling shrouded as surrogacy should be included on the radars of international and national child protection agencies.

## **IN CONCLUSION**

PROGAR believes these are the core principles that should inform surrogacy arrangements when considered through a 'children's human rights' lens and that should therefore inform where we put our energies into improving the surrogacy world. While regulation (small 'r') of global and domestic arrangements is far from easy, that is not a reason to abdicate them to market forces. If we are determined to make paramount the human rights of children then we believe the priorities should be: mandatory assessment and preparation of all parties; rigorous keeping of detailed information about surrogates and donors and provision of good quality information release systems; introduction of legal measures to protect children ahead of Parental Orders being made; follow up of intended parents to ensure that Parental Order applications are made; stricter controls on exploitation of and discrimination against all parties, including through unchecked commercialism; radical review of birth registration systems; policing of minimum medical standards; and more extensive research.

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