

FAO Surrogacy Team
Law Commission,
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8th October 2019

Dear Sirs,

We write as a coalition of women's organisations to express our deep concern about your consultation on reform of the laws which surround surrogacy, and in particular to express disappointment about the lack of engagement with the women's sector, and the inaccessibility of the consultation process, and to specifically raise concerns about the implications of such reform for potential abuse of women and girls.

About ERAW

The End Violence Against Women Coalition is a UK-wide coalition of more than 85 women's organisations and others working to end violence against women and girls (VAWG) in all its forms, including: sexual violence, domestic violence, forced marriage, sexual exploitation, FGM, stalking and harassment. We campaign for improved national and local government policy and practice in response to all forms of violence against women and girls, and we challenge the wider cultural attitudes that tolerate violence against women and girls and make excuses for it. Our members and trustees include women who are globally renowned for their pioneering work in setting up the first domestic and sexual violence crisis services, for their academic research in this area, and for having successfully campaigned for considerable legislative and policy change in the UK to end and prevent abuse over the last four decades.

Introduction

We were surprised to hear about the consultation from our member NIA, who had discovered late in the day that you were consulting on the laws around surrogacy, and to find that few other women's organisations around us have been aware of it. This is an area of law reform where we would have thought the women's sector, including those with expertise on violence against women and girls, might be an obvious stakeholder, but to the best of our knowledge the sector has been largely unaware that this is taking place.

We are unable to respond to the consultation in the traditional manner as it requires great study and detailed input and we do not have time to answer the 100+ questions having become only

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lately aware. We would however, like to make some observations about the proposals and the nature of the consultation, in the hope that you will reconsider and consult meaningfully with our sector on these important proposed reforms.

Your consultation process

As stated above we were notified about the existence of this consultation by our member NIA and we do not think the consultation has been widely publicised, as an area of law reform that directly impacts women's bodily autonomy we would have liked to see direct engagement with the women's sector.

Notwithstanding the reality that this is a complex issue, we think a consultation document of 502 pages and over 100 questions would fall short of any guidance or standards on a reasonable consultation process. In actuality, in its current form this consultation is outside the possibility of meaningful engagement for many individuals and organisations who would have important views about this issue which you as consulting body need to hear.

The framing of this issue solely from a regulatory perspective, with little more than lip service being paid to the inequalities, potential harms and societal issues which facilitate and arise from surrogacy is at best short sighted and at worst possibly unlawful. We see no evidence that as a public body you have considered your duty to consider equalities in your policy making.

Further we believe that going ahead with the proposed arrangements may open up surrogacy providers, healthcare providers, other statutory services and 'intended parents' to potential legal action, based on equalities and human rights law claims at a later date, if there is not a more thorough examination of inequalities.

Legal Reform of Surrogacy

We are troubled by the proposals for reform broadly because of our great concern, based on our experience in gender based violence, of any buying or selling of the use of a woman's body. We recognise the regulation put forward attempts to regulate surrogacy in a manor similar to how reproductive technologies in general, and egg and sperm donation specifically, are regulated. But, we feel that surrogacy can and must be distinguished from these, as in reality we are talking about the agreed 'use' of a living woman's body to grow and develop a foetus.

We are concerned that regulation of the type outlined creates a more commercial and contractual way of viewing surrogacy which can only be to the detriment of individual women and of women in general.

In particular, the issue of payment for and creation of an, albeit at this stage not for profit, industry around surrogacy does, we believe, potentially create a foundation for a more commercialised process. This is problematic for a number of reasons, and may even become a driver for different forms of violence against women.

1. As organisations working in the Violence Against Women and Girls (VAWG) sector, we have decades of experience and knowledge about the myriad abuses and resultant harms that women suffer because they are women. We would argue that of special relevance here is reproductive abuse, which is an alarmingly common (as many as 1 in 4 women) type of domestic abuse. This is where women are forced/ coerced or tricked (by way of tampering with contraceptives) into pregnancies, kept pregnant, raped, forced to have abortions and denied access to contraceptives and/ or abortion. This is hugely relevant because these abuses will be frequently occurring in a general context of coercive control, and will likely be just one area of a women's life which is being controlled (there may also be for example economic abuse, control of when a woman goes out and who she sees, threats and more). Such abusive men may see an opportunity to make money from their partners in a more liberalised surrogacy framework. Despite the very real risk of coerced surrogacy there has been, as far as we can see, little or no regard in the consultation process to the safeguarding of these vulnerable women and the potential harms they may suffer. Your counselling proposal is unclear. Other areas of healthcare, including for example maternity services, have tried to take steps to ensure they are able to detect and enable disclosure of domestic abuse, FGM and trafficking for example. Surrogacy cannot be approached as though this is not a possible context for it.
2. Currently, if you google 'surrogacy services' as a person in the UK you are met with a number of paid for advertisements offering surrogacy services from women abroad. Whilst there is an obvious limitation and stated intention in your consultation to regulate the domestic context, you should understand that a consequence of greater liberalisation of the process coupled with greater commercialisation domestically, is likely to be the creation of a 2 tier system, those that can 'afford' to bureaucratically and financially will go down this 'regulated' domestic route and those who can't may go down the 'easier' or perceived as easier international route. As well as this there is a strong likelihood that demand will outstrip supply which risks creating a trade in women trafficked for this purpose, as well as coerced surrogacy in vulnerable groups such as migrant women. There are serious questions to be answered about the safeguarding of children born in this international or 'illegal' context (see below). There are also serious concerns about how vulnerable women (potential surrogates) are safeguarded under this regime.

3. There are also some parallels here with prostitution, another area where there have long been arguments about the 'benefits' of enshrining a commercial model in law. Our observations here are in part instructed by our [position on prostitution](#). Inherent in any commercial model where the 'product' or service is a human being are deep inequalities. You recognise in your consultation paper that the 'purchaser' is often in a position of relative power as compared to the purchased. Indeed, you recognise within the consultation that most 'intended parents' are relatively wealthy, powerful and endowed with status as compared to the majority of surrogates, and although officially only expenses are paid, currently it is clear that in practice most surrogates are being paid what could be argued are inducements.

4. There are deep questions to be asked about the contractual arrangement proposed here and the way in which a surrogate's rights to bodily autonomy will be addressed. For example if the commissioning parents do not like an aspect of her behaviour during the pregnancy. There are also important questions to be addressed about breakdown of arrangements; what if the commissioners decide the baby (product) is for some reason not what they hoped for. This is dealt with very scantily in the consultation '.... It ensures that she can never be required to take legal responsibility for the child, and that the intended parents can never "reject" the child. If the intended parents do not want, or are not able, to care for the child – perhaps because of a breakdown in their own relationship, or because the baby is born severely disabled – then the responsibility lies with them as legal parents to make arrangements. For example, it would be a decision for the intended parents to give up the child for adoption. This does have the effect that the care system may have to step in to look after the child, should the intended parents refuse to fulfil their responsibilities, but we do not see this as any different to the situation where natural parents abandon, or are unable to care for, a child.'
This is in our opinion wholly inadequate and does not address in any way the question of how a surrogate may feel in this scenario or what her rights are. We highlight the case of surrogate British '[Jenny](#)' who is now caring for the disabled female twin she carried for intended parents, who accepted the non-disabled male twin but rejected the disabled female one. Jenny and her husband felt they could not possibly allow the female twin to be cared for by parents who didn't want 'a ... dribbling cabbage'!

5. We are in a context socially, where the disparities between rich and poor are growing ever starker with a significant body of evidence to show that those most in poverty and hardest hit by Government austerity measures are women, and in particular women with intersecting inequalities. Whilst we accept that your proposals for reform only suggest possible forms of payment and do not outline a fully commercialised model, we do have

concerns about how legal reform may help to create a context where the purchase of women's bodies becomes more normalised. We think that the ultimate conclusion to this direction of travel will be a properly commercialised surrogacy industry. It has often been said of prostitution that it is 'sex work' and should be viewed as a form of employment/ a means of making an income and therefore an 'option' for women. However, the reality is that most women do not make a genuine free "choice" to enter prostitution; they have a distinct lack of options and they are usually prostituted by others who make a profit from them. This can and does include controlling/abusive partners, boyfriends and husbands who view this as a way of making money. It is not in any way inconceivable that this will also be happening with surrogacy (see above). Where prostitution has been decriminalised and made commercial, countries have seen this thriving 'market' create an environment where trafficking and abuse are incentivised. This must be considered when developing proposals for surrogacy reform.

6. In our assertion certain types of women are more likely to become surrogates in general and particularly under this new regime, they are arguably those who are more vulnerable to exploitation and face multiple disadvantage. They are women who are living in poverty, in particular women who are living in poverty and already have children, as surrogacy would enable them to 'earn money' whilst looking after their children, women in insecure low paid work, BME women, women who are in abusive and controlling relationships, young women and especially women for whom some of these things intersect. In respect of young women, we find the suggestion that a woman of 18, who has never been pregnant before is, under the proposed reforms, considered a suitable possible surrogate appalling. Such a woman is potentially very vulnerable to exploitation in an increasingly commercialised setting and is highly unlikely to be able to understand the material, bodily and practical experiences and consequences ahead. The reality is that inequality will and does underpin arrangements where women's bodies are being purchased, and as such cannot be said to be based on abstract 'free choice'.

We think the 'new pathway' will exacerbate these inequalities and increase the likelihood of coercion. We would endorse some of the comments made by EAW member NIA outlined below:

1. The New Pathway recommends that a pre-conception arrangement be drawn up, with counselling and legal advice, which agrees to automatically assign the child to the commissioning parents on birth.

We oppose this, we share the view of many that this creates a contract and transaction and we reject any suggestion that it is possible to preserve the woman's personhood and bodily integrity and autonomy throughout pregnancy in such a situation. This is especially so given the acknowledged lack of power and wealth of the woman in this situation,

especially if being paid, as the pressure to perform will be exacerbated irrespective of how officially enforceable or not the arrangement is. This is especially so if we are talking, as this proposal does, of a case involving a financially struggling, 18-year-old girl and even possibly first pregnancy. We also are not clear about how any suggestions of accessing counselling and legal advice will be paid for and by whom – is this a cost to the state, to the NHS, to the commissioning parents or to each of the individuals involved, bearing in mind the lack of economic equality between commissioners and surrogate?

2. The New Pathway means that there would no longer be a court hearing for a parental order unless the “surrogate” had exercised her right to change her mind/object within the first 4-6 weeks (minus one week) of the birth (being the birth registration period) and taken the necessary steps to lodge her objection. Should she object and there be a hearing, then a range of criteria will be taken into account in making the decision with the welfare of the child paramount.

We reject this absolutely and feel it shows no empathy or respect or understanding with women’s experiences. To expect any woman who has just given birth to make all of these decisions and to proactively take legal steps of this kind is totally unreasonable. To expect her to do so when she may feel very conflicted having always assumed she would be handing over the baby and when finances may have been a key factor and to do so in a really tight timescale is again utterly unreasonable. This is again exacerbated if, as suggested elsewhere in this consultation, the woman/girl is as young as 18, financially struggling and may have never had a child before.

We also feel the criteria referenced for a hearing where a woman does object are likely to be hugely prejudicial to most women in this position. It is a reality that we already have a discriminatory society where women are judged differently to men. Women who “abandon” or are “prepared to abandon” their children or show “a lack of maternal feeling” are particularly judged, as are women who engage in sexual activity for money or who are perceived as greedy for money at all costs. Sadly, all these epithets are, and would be, thrown at women who act as surrogates in the case of a dispute especially where payment is in question. Moreover, as we have said, women surrogates generally, and especially in a paid situation, are financially less well off than most commissioning parents. Often, as the assumption was that the child would be handed over, the woman’s partner is not seen as engaged in the decision and not wanting or expecting to parent. Couples who are prepared to pay for surrogacy are seen as desperate for the child. These factors combined would tend to act against the mother and in favour of the commissioning parents as being best placed to provide appropriately for the child. To include the original agreement about the arrangement as a criterion in the decision-making in a dispute or change of heart is utterly unreasonable and denies the reality of a perfectly reasonable possibility and right to change the mind upon something so momentous as childbirth. Again, this is exacerbated in the case of a financially struggling, 18-year-old girl or first pregnancy/birth.

3. The New Pathway suggests that the only obligation re consent is that the couple sign a declaration to say they have no reason to believe she lacked capacity to consent at any time, and indeed, this proposal also suggests that we dispense with her consent if she can't be found or if there is a lack of clarity as to her capacity to consent. This pathway likewise suggests that if there is a still birth or the baby dies then the registered parents on the death certificate should be the commissioning parents, again unless the surrogate mother exercises her right to object (quickly).

We reject this entirely - to "assume consent" and/or "dispense with consent", even if allegedly on the basis that all parties entering the agreement originally had a shared intention, is shocking and denies a woman's personhood, her right to change her mind and the reality of her birthing experience entirely. The couple, as your paper acknowledges, are not in a position to assess a woman's capacity to consent but also would have a conflict of interest – why would they ever admit there were such a doubt? Moreover, should a woman experience a temporary lack of capacity, it is not appropriate to assume that on resuming capacity her decision would not change from the original intention. There is then the impact of still birth or death of a baby – even on a woman who is intending to act as a surrogate – this cannot be assumed or underestimated and the woman's personhood must allow for her choice in such a situation. To expect her to embark, within a tight timescale, on legal steps to make her objection after such an event is inhuman. As elsewhere, this is the more so if we are talking of a financially struggling, 18-year-old girl or first pregnancy/birth in this situation.

We understand that little or no evidence has been gathered in developing this consultation on the psychological impact on a woman of being a surrogate, once or multiple times. If this is correct it is a terrible oversight and exemplifies the failure to consider these significant proposed reforms from an equalities point of view and according to the public sector equality duty. The psychological harm to women whose children are removed from them because they are deemed incapable of looking after them is well known. The attempts to mitigate potential harm to women with a proposal of counselling (the expense and obligation to provide which is unclear) is inadequate.

We also have concerns about safeguarding the resultant child and vulnerable adult safeguarding some surrogates (see above). We find that in the limited time we have had to examine the proposals, safeguarding as well as equalities considerations do not feature highly enough at all. This is potentially poor and even unlawful policy making that will lead to challenges down the line.

In summary, we have serious concerns about the lack of equalities and potential harm analysis in the consultation and in the proposals, including the failure to meaningfully consult the women's

sector. We fear the direction of travel here is to a commercial model of surrogacy which is deeply troubling for the reasons outlined above, including potential drivers of violence against women and girls. We urge you to fundamentally reconsider the proposals, and go back to a more preliminary stage and framework and then to take input from a wider range of 'stakeholders'. In its current form we believe the proposed reforms would leave multiple public authorities open to legal challenges on human rights and equality grounds.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sarah Green', with a long horizontal flourish extending to the right.

Sarah Green
Director, End Violence Against Women Coalition