

<b>Institution:</b> University of Cambridge		
<b>Unit of Assessment:</b> UoA 18		
<b>Title of case study:</b> Contributing to the re-evaluation of surrogacy laws		
<b>Period when the underpinning research was undertaken:</b> 2015-2019		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Claire Fenton-Glynn	Senior Lecturer	October 2013-August 2014; October 2015-present
Jens M Scherpe:	Professor of Comparative Law	September 2007-present
<b>Period when the claimed impact occurred:</b> August 2016-August 2019 (and ongoing)		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<b>1. Summary of the impact</b> (indicative maximum 100 words)		
<p>Research by Claire Fenton-Glynn and Jens Scherpe has contributed to the re-evaluation of the law of surrogacy in the United Kingdom and has informed interventions of the United Nations on this issue. Through published work as well as direct engagement with leading international policy and professional organisations working in the area of surrogacy over a crucial period in the re-assessment of the law in this area, the researchers were able to highlight the inadequacies of the current law both in the UK and internationally. This led to tangible impacts on policy makers' understandings of the legal issues at stake and thereby to the development of a new legal framework for surrogacy, published by the Law Commissions in 2019, which relied significantly on the Cambridge work. The research also had an identifiable impact on the work of the UN Special Rapporteur on the sale and sexual exploitation of children, and significantly informed Facebook's approach to the advertising of 'exploitative' forms of surrogacy on its platform.</p>		
<b>2. Underpinning research</b> (indicative maximum 500 words)		
<p>In the past two decades there has been a boom in global surrogacy, enabled by technological advances such as IVF, a softening of cultural attitudes, and the trend for having children later in life. In 2012, the industry around surrogacy was worth an estimated USD6bn (GBP4.7bn) a year. With the growth in commercial surrogacy around the world exposing the comparative differences in regulation of surrogacy in different countries, exploitation of vulnerable people including women and children has been a concern. International agreement may be desirable but is likely to be rejected by countries who favour less regulation. Research by Fenton-Glynn and Scherpe at Cambridge over a number of years has sought to analyse the law and practice of surrogacy both in the UK and internationally, recognising how changes over time have led to inadequacies and injustices in the current law. The research is helping legal authorities to recognise the problem and propose legal reform to improve practice.</p> <p>Fenton-Glynn has carried out a systematic analysis and critique of English surrogacy law. The key point of this work is that English law tries to regulate surrogacy arrangements <i>after</i> the child's birth – through either recognising the parenthood of the commissioning couple, or refusing to do so. This, Fenton-Glynn shows, is futile, as the courts are always forced to recognise parenthood 'in the best interests of the child', no matter what violations of law or policy had taken place. She argues that English law needs to regulate surrogacy <i>before</i> birth, in order to have true control over the practice. In addition, through comparative analysis, she is able to place the English law in the context of the global marketplace, and the dangers of the UK</p>		

enacting unduly restrictive laws that will force commissioning parents to go abroad, to more 'surrogacy friendly' countries, to achieve their desire of becoming parents. ([R1], [R2])

Fenton-Glynn's initial work on these themes led to an international comparative project with Scherpe and Kaan (University of Hong Kong) undertaken between 2015 and 2019, with the funding for the first conference provided by the Wyng Foundation. The researchers recognised that since surrogacy is a global phenomenon, which often involves individuals and couples crossing borders to find the most permissive jurisdiction to achieve their desire to become parents, a comprehensive study in the current context would require a comparative analysis capable of informing domestic and international decision-making. The 19 jurisdictions covered in the project were chosen to represent both sides of the practice: both the home countries of the intended parents, and the countries to which they were travelling to undertake surrogacy. While some comparative studies had been undertaken previously, they were more limited in scope. This research included contributions from scholars in jurisdictions globally, and particularly from Asia which are destinations for surrogacy. Moreover, the study looked not only at the laws in place, but the social, cultural and religious background that shaped these. This allowed the researchers to more accurately identify the common core of good practice for law reform, and specifically which factors could be transposed into a jurisdiction seeking to reform their laws, and which might be more suited to a particular social context. The research resulted in *Eastern and Western Perspectives on Surrogacy* ([R5]). In the book, Fenton-Glynn and Scherpe develop a heuristic and novel classification of regulatory approaches to surrogacy – prohibitive, tolerant, regulated and free market – into which jurisdictions can be categorised. This categorisation was expressly relied upon by the UN Special Rapporteur on the Sale of Children in her work in this area.

In addition, Fenton-Glynn and Scherpe co-authored a 35,000 final chapter for the volume, *Surrogacy in a Globalised World*, which identified common themes across regulatory approaches, and analysed the development of the law and practice of surrogacy both chronologically, and geographically, ending with recommendations regarding the regulation of surrogacy ([R3]).

### 3. References to the research (indicative maximum of six references)

[R1] C Fenton-Glynn, 'The Regulation and Recognition of Surrogacy in English Law' (2015) 27(1) *Child and Family Law Quarterly* 83-95. [\[Link\]](#)

[R2] C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Law Review* 59-75. <https://doi.org/10.1093/medlaw/fww044>

[R3] C Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (April 2017- Submission to the Law Commission of England and Wales) accessible at:

[https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge\\_family\\_law\\_submission.pdf](https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf)

[R4] C Fenton-Glynn, 'International Surrogacy before the European Court of Human Rights' (2017) 13(3) *Journal of Private International Law* 546-567.

<https://doi.org/10.1080/17441048.2017.1385901>

[R5] JM Scherpe, C Fenton-Glynn and T Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019). ISBN : 1780686528

R1, R2, R4, and R5 have all been peer reviewed and published by presses of international standing.

### 4. Details of the impact (indicative maximum 750 words)

The research led by Fenton-Glynn and Scherpe has directly informed the recent joint recommendations on surrogacy law reform by the Law Commission of England and Wales and Scottish Law Commission, as well as the work of the UN Special Rapporteur on the Sale and

Sexual Exploitation of Children, who in July 2019 published a report on the protection of the rights of children born through surrogacy arrangements.

The research has reached the wider international community of stakeholders, including academics, legal practitioners, judges, law reform bodies and international organisations, as well as, through media coverage, surrogates and intended/surrogate parents.

The regulation of surrogacy is a particularly sensitive issue, and fast progress in this area is not to be expected. The research carried out by Fenton-Glynn and Scherpe has improved public and official understanding of the complex global issues involved in regulating this practice, and clarified the options for policy makers, and directly informed the content of the law reform process in the UK.

#### Impact on the Law Commission of England and Wales

The Law Commission of England and Wales had a close relationship with the research from the beginning. Members of the Law Commission had already accessed work by Fenton-Glynn [R1], [R2] at the initial stage of considering whether to take on a project on surrogacy. They attended the international conference organised by the researchers in Hong Kong in September 2016, on 'Eastern and Western Perspectives on Surrogacy'. A testimonial provided by the, Law Commissioner, Law Commission of England and Wales, reports that this conference was found 'to be very useful in understanding the different ways in which surrogacy might be regulated, and in gaining a much deeper appreciation of its global context' [S3].

Scherpe and Fenton-Glynn subsequently provided a response [R3] to the Law Commission's 13th Programme consultation 'Surrogacy: Is the law governing surrogacy keeping pace with social change?'. The Law Commissioner reports in his testimonial that this response 'helped inform our thinking about the current problems with the way in which the UK law is framed and its interaction with the global practice of surrogacy. Dr Fenton-Glynn's article 'International Surrogacy before the European Court of Human Rights' [R4] was also helpful in this regard.' [S3].

Following the consultation, the Law Commission made the decision to include the issue of surrogacy in its next programme of reform. Representatives from the Law Commission attended all subsequent events in the project including the joint conference with the European Academy of Law (the leading provider for practical training to practitioners in Europe) on Law and Practice of Surrogacy (Cambridge, 2018). In July 2019, the England and Wales Law Commission, in conjunction with the Scottish Law Commission, published their proposals for law reform. The edited collection [R5], as well as individual papers written by Fenton-Glynn, was cited extensively in their joint Consultation Paper, which contains proposals for surrogacy reform in the United Kingdom [S1].

The Law Commissions' proposals for surrogacy reform include the introduction of a new system of laws surrounding surrogacy, based on the assessment of surrogacy arrangements *before*, rather than *after*, birth, building directly on Fenton-Glynn's research. They envisage the removal of the requirement of a genetic link between the intended parents and the child, where medically necessary (in the new pathway, and potentially for all domestic arrangements; genetic link still required for international arrangements). This builds directly on [R3] and [R5]. For international surrogacy arrangements, the Law Commissions recommend provision for recognition of legal parenthood across borders, where appropriate, to help those who have had a surrogate child overseas to bring the baby into the UK. This proposal builds on [R4] and [R5].

According to the Law Commissioner for England and Wales:

*'The book emanating from the conference, Eastern and Western Perspectives on Surrogacy, edited by Professor Scherpe and Dr Fenton-Glynn, proved an invaluable resource when preparing the consultation paper. It provided an overview of approaches to surrogacy across the*

*globe, signposted to further comparative law resources and allowed us to consider surrogacy law in jurisdictions about which it would otherwise have been difficult to access information. The book's classification of approaches to surrogacy (prohibitive, tolerant, regulated and free market) gave us a better understanding both of how UK law is currently understood in a global context, and the likely way in which particular reforms would be perceived. Access to this book directly informed our provisional policies for reform contained in the consultation paper' [S3].*

Immediately following publication of the Law Commissions' consultation in June 2019, Fenton-Glynn and Scherpe organised a further international surrogacy conference – the 'International Surrogacy Forum' – in collaboration with the International Academy of Family Lawyers (IAFL) and American Bar Association (ABA) in 2019, which the Law Commission attended. At this event, and an additional in-depth event immediately after the conference organised by Scherpe and Fenton-Glynn specifically for the Law Commissions, the Law Commissions' proposals were discussed with an international audience. The Law Commissioner writes: '*That conference, in particular, has led to us considering a further means of enforcement of any limitations on the payments that intended parents can make to the woman acting as their surrogate, which had not been raised prior to the publication of our Consultation Paper*' [S3].

Already the work is influencing legal practice in the UK. For example, [R2] was recently cited by the UK Supreme Court (*Whittington Hospital NHS Trust v. XX* [2020] UKSC 14) [S6 p.6] The case concerned damages for infertility following medical negligence, and the question before the Court was whether compensation could be awarded to cover a commercial surrogacy arrangement in California. Previously, this had not been permitted, on the grounds that such an arrangement would be contrary to UK public policy. However, the Court ruled that it should now be permitted, with Fenton-Glynn's work quoted to demonstrate that English law does not treat commercial surrogacy as an inherent wrong, but more as a contextual issue - depending on the circumstances in which it is carried out.

More generally, by working with the ERA, IAFL and ABA, the project has been able to engage with the wider legal profession – ensuring that the research engages with, and informs, practising barristers and solicitors from all over the world. Thus these events have ensured a wide jurisdictional reach, crossing multiple continents, for the research.

#### Impact on the work of the UN Special Rapporteur on protection of rights of children

At the International Surrogacy Forum in 2019 organised by the researchers, three side meetings were held. The first was organised with the Law Commissions to allow selected individuals from academia, government, stakeholders, the judiciary and practice from multiple jurisdictions to engage in consultation concerning their proposed reforms. The second and third were organised with the UN Special Rapporteur on Sale of Children, who at the time was developing guidelines for the protection of the rights of children involved in surrogacy [S2]. These meetings, which were explicitly referenced in her subsequent report allowed the Special Rapporteur to hear from individuals, stakeholders (including surrogates, intending parents and children born through surrogacy), government representatives, judges and practitioners from multiple jurisdictions and engage in debate on the core issues around the phenomenon of a global surrogacy market.

The subsequent report focused on the protection of the rights of children born through surrogacy arrangements. As well as citing the edited collection on several occasions, the Special Rapporteur explicitly relied on the novel classification of forms of surrogacy regulation developed by the authors in order to analyse the responses received by States to her consultation, and thus develop her proposals [S2, refs on p. 4, 9, 12, 15]. Recommendations in the UN Special Rapporteur's report focus on developing future legal and policy arrangements that prioritise the rights of the child. Building on the Cambridge research, the report acknowledges that with diverging approaches to surrogacy, it is essential to develop a set of minimum safeguards that can be applied regardless of the stance of individual states on surrogacy.

#### Engaging with civil society and the wider public

In addition to engagement with academia, civil society and governmental organisations, the project has also sought to engage with the wider public. The initial Hong Kong conference as well as the first Cambridge conference were open to the public, allowing the participation and engagement with stakeholders outside of academia. Recorded talks from the International Surrogacy Forum in 2019 and other resources were made available online. These resources have had 30,062 views so far (January 2020), by viewers from more than 90 jurisdictions and continue to assist those seeking information on the regulation of surrogacy and raise awareness of the underlying issues. Fenton-Glynn was approached by BBC News website to write a piece for their 'Experts Network' which would help increase understanding of the issues involved in international surrogacy. The piece, entitled: 'Surrogacy: Why the world needs rules for "selling" babies' (26 April 2019) had 433,000 views in the first three days alone. [S5]

#### Engagement with platform companies on content relating to commercial surrogacy

In 2019, Fenton-Glynn provided advice to Facebook concerning the establishment of a policy to prohibit the advertising of 'exploitative' forms of surrogacy from their platform. Facebook was seeking to determine whether and how to action content on its platform relating to commercial surrogacy. The challenges relate to acknowledging legitimate clinics and providers using Facebook to offer information and support around surrogacy, whilst recognising that sometimes arrangements can result in the exploitation of women. Facebook's Stakeholder Engagement Manager relates that consulting Fenton-Glynn '*helped us gain fresh perspectives on these issues and allowed us to scope out the path forward more clearly.*' Fenton-Glynn highlighted the imbalances in bargaining power that frequently exist between people which may lead to exploitation, and distinguished between altruistic and commercial surrogacy would be very difficult to do on the platform. '*While there are no easy answers, your input had impact and significantly contributed to our thinking on this policy development*' [S4].

#### **5. Sources to corroborate the impact** (indicative maximum of 10 references)

[S1] Law Commission of England and Wales and Scottish Law Commission, Building Families through Surrogacy, (June 2019), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf>, Fenton-Glynn Cited on pages 38, 52, 93, 110, 120, 130, 131, 134, 164, 178, 304, 314, 339, 358, 361.

[S2] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (A/74/162, 15 July 2019), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/216/49/pdf/N1921649.pdf?OpenElement>

[S3] Testimonial, Law Commissioner, Law Commission of England and Wales,

[S4] Testimonial, Stakeholder Engagement Manager, Facebook.

[S5] Recorded talks: <https://www.family.law.cam.ac.uk/resources-1> and BBC coverage: <https://www.bbc.co.uk/news/health-47826356>; email from BBC with viewing figures; International Surrogacy Forum 2019 [Statistics](#)

[S6] <https://www.supremecourt.uk/cases/docs/uksc-2019-0013-judgment.pdf>