

<b>Institution:</b> University of Kent		
<b>Unit of Assessment:</b> 18: Law		
<b>Title of case study:</b> Shaping the Regulation and Law Reform Agenda of Surrogacy in the UK		
<b>Period when the underpinning research was undertaken:</b> 2010–2018		
<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>
Kirsty Horsey	Reader	2005-present
<b>Period when the claimed impact occurred:</b> 2015–2020		
<b>Is this case study continued from a case study submitted in 2014?</b> No		
<b>1. Summary of the impact</b>		
<p>Research conducted by Kirsty Horsey has significantly impacted on the regulation of, and law reform agenda relating to, surrogacy in England and Wales, and on the activities of NGOs lobbying for reform in this area. In particular, it was used by Surrogacy UK (SUK) in its campaign to secure regulatory change and legal reform. The research has generated the following impact:</p> <ol style="list-style-type: none"> <li>1. It led to and informed Department of Health and Social Care (DoH) good practice guidelines for intended parents (IPs), surrogates, and professionals;</li> <li>2. It is reflected in revised guidance on surrogacy published by Children and Family Court Advisory and Support Service (CAFCASS);</li> <li>3. It informed and shaped parliamentary debate and understanding of surrogacy, including the establishment, work, and findings of the All-Party Parliamentary Group (APPG) on Surrogacy;</li> <li>4. It contributed to a change in Government policy, recognising, for the first time, surrogacy as a positive form of family creation and the need for surrogacy law reform;</li> <li>5. It shaped the consultation proposals arising out of the joint Law Commission of England and Wales and Scottish Law Commission review of surrogacy law.</li> </ol>		
<b>2. Underpinning research</b>		
<p>There are no official figures on the prevalence of surrogacy in the UK. However, conservative estimates suggest there are around 250 arrangements a year. These take place within a complex and thoroughly confused regulatory and legal framework, which has remained largely unchanged since the mid-1980s. Horsey's research has consistently argued for the need for a complete review and overhaul of the law to better reflect the intentions of the parties involved, and the lived realities of modern-day surrogacy [R1-R6]. Her research with SUK (the largest non-profit surrogacy organisation in the UK), drawing on her earlier scholarship [R1, R3], involved the largest ever surveys of surrogates, IPs and other interested parties: in 2015, #434 responses, including 111 surrogates and 206 IPs [R2]; in 2018, #510 responses, including 103 surrogates and 209 IPs [R5]. Horsey's research provides a strong evidence base for law reform. Specifically, it argues for:</p> <ol style="list-style-type: none"> <li>1. Explicit Government support of surrogacy as a means of family creation [R2-R4, R6];</li> <li>2. A systematic and transparent root and branch reform of surrogacy law [R2-R5];</li> <li>3. The development of DoH guidance for all parties involved in surrogacy [R2];</li> <li>4. Resistance to the term 'surrogate <i>mother</i>' and 'commissioning couple' [R1-2, R4];</li> <li>5. The reversal of the presumption of legal parenthood [R1-2, R4-6];</li> <li>6. The recognition of lived experience of surrogacy as a 'relationship not a transaction' [R2, R4-R6];</li> <li>7. IPs to be supported to enter surrogacy arrangements in the UK, rather than overseas [R2, R4-R6];</li> <li>8. The removal of the six-month time limit to apply for parental orders [R2, R5];</li> <li>9. 'Double donation', allowing IPs where neither can provide gametes to become legal parents [R2, R5];</li> <li>10. Improved data collection and a review of the prohibition of advertising [R2, R5].</li> </ol>		

A distinctive aspect of Horsey's research is that the legal analysis is informed by the lived experience of surrogacy (through the survey data). As SUK notes: **R2** and **R5** 'elevated the importance of the lived experience of surrogacy in the debate over reform', and 'gave voice' to surrogates and IPs [a].

### 3. References to the research

[R1] K. Horsey (2010), 'Challenging presumptions: legal parenthood and surrogacy arrangements', *Child and Family Law Quarterly* 4, 449-474. Reprinted in a collection of 'key scholarship' on parental rights and responsibilities (ed. S Gilmore, 2017). <https://kar.kent.ac.uk/27619/>

[R2] K. Horsey (2015), *Surrogacy in the UK: Myth-busting and Reform* (Surrogacy UK), 58pp. Extracted in E Jackson, *Medical Law: Text, Cases, and Materials* 5e (OUP, 2019); D. Madden, *Medicine, Ethics and the Law* (Bloomsbury, 2016); endorsed by Baroness Warnock, M. Brazier, and S. Golombok. <https://kar.kent.ac.uk/59740/>

[R3] K. Horsey and K. Neofytou (2015), 'The Fertility Treatment Time Forgot: What Should be Done About Surrogacy in the UK?', in K. Horsey (ed.), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge), pp. 117-135. <https://kar.kent.ac.uk/45752/>.

[R4] K. Horsey (2018), 'Surrogacy 2.0: What can the law learn from lived experience?', *Contemporary Issues in Law*. <https://kar.kent.ac.uk/59741/>

[R5] K. Horsey (2018), *Surrogacy in the UK: Further Evidence for Reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK), 82pp. The report analyses a large body of evidence, academic and policy literature, and case law. It was the product of a six-month drafting process that included the input of five specialist panel members; endorsed by Baroness Warnock, M. Brazier, and S. Golombok. <https://kar.kent.ac.uk/71557/>

[R6] K Horsey (2016), 'Not withered on the vine: The need for surrogacy law reform', *Journal of Medical Law and Ethics* 4(3): 181-196. <https://kar.kent.ac.uk/59744/>

### 4. Impact

In 2015, following a number of hyperbolic judicial and parliamentary interventions, SUK started its 'Campaign for Change' to advocate for legal and regulatory reform and to address ongoing 'myths' about surrogacy practices. It was led by a five-member Working Group on Surrogacy Law Reform (SUKWG). Horsey was the only academic member of this group. Her research [R1, R3-R4, R6] played a key role in shaping the campaign, including conceiving, researching, and writing the group's 2015 and 2018 reports [R2, R5]. SUK states that Horsey's research was: 'instrumental in opening up the possibility of new surrogacy legislation in the UK [...]. We fundamentally believe that without [R2 and R5] the process of law reform, that is now well underway, would have been significantly slower, narrower in scope, and may not have happened at all.' [a]

The ongoing campaign has had several impacts. All but three of the 20 recommendations made in the 2015 and 2018 reports [R2 and R5] have been adopted, partially adopted, or are proposed in the current Law Commissions' consultation on surrogacy law reform [b], and all of the 10 recommendations made by the All-Party Parliamentary Group on Surrogacy mirror those in Horsey's research [R1-R2, R4-R6; h]. The reach of these impacts is demonstrated by their extension to the UK Government, UK Parliament, Government agencies, NGOs, and the Law Commissions, as well as to surrogates, IPs, and medical, legal, and social work professionals. The significance of the campaign lies in the substantial change it has brought to the oversight and regulation of surrogacy in the UK, a change in Government policy relating to surrogacy as a form of family creation, the maintaining of momentum for legal change, and the shaping of many of the current proposals for reform that will potentially benefit hundreds of families a year.

#### 1. Led to, and informed, two sets of Department of Health and Social Care (DoH) good practice guidance for surrogates and IPs, and professionals working in the area

SUK states that Horsey's research 'paved the way' for Government guidance on surrogacy [a]. Horsey's research demonstrated how many of those involved in surrogacy (including surrogates,

IPs and professionals working with them: lawyers, midwives, and hospitals, CAFCASS and fertility clinics) often navigate a complex legal process without consistent and authoritative guidance [R2].

A key recommendation of R2 was that there should be official guidance on surrogacy to address these problems, including a Governmental commitment, to support surrogacy as a form of family building. Horsey attended meetings at the DoH with Nicola Blackwood MP [n], Phillip Dunne MP and Jackie Doyle-Price MP, where the need for, and the substance of, this guidance (as well as surrogacy law reform more broadly), was discussed. She later joined a small working group that worked with a senior civil servant to draft the proposed guidance. 'The Surrogacy Pathway' (for IPs and surrogates) and 'Care in Surrogacy' (for professionals) were published by the DoH in February 2018 [c]. The guidance includes an explicit statement that 'the Government supports surrogacy as part of the range of assisted conception options', and reference to the importance of terminology (as recommended in R2). These documents form the first national guidance of its kind in the UK and worldwide. They are also the first time the UK Government explicitly endorsed and supported surrogacy as a means of family creation.

## 2. Changes to Children and Family Court Advisory and Support Service (CAFCASS) guidance relating to surrogacy

CAFCASS represents children in family court cases in England. It is directly involved in the parental order process whereby legal parenthood can be transferred from the surrogate (and her spouse or civil partner, if she has one) to the IPs. CAFCASS figures suggest that it deals with around 200 parental order applications a year, relating to around 250 children. In 2016, Horsey met with CAFCASS to discuss their online information on surrogacy and training materials for employees dealing with surrogacy cases. This led to conceptual shifts in CAFCASS literature, which Horsey drafted. The CAFCASS Parental Order Reporters Fact Sheet (2016) now refers to 'surrogates' and 'intended parents' (rather than surrogate *mothers* and *commissioning* parents). This change in terminology (recommended in R2) reflects a significant shift in institutional understanding towards those using surrogacy (surrogates do not view themselves as the mothers of the children they carry for other couples or individuals, and feel the language of 'motherhood' and 'commissioning' is undermining), and of surrogacy itself as a means of family formation [d].

## 3. Informing and shaping parliamentary debate and the establishment, work and findings of the All-Party Parliamentary Group (APPG) on Surrogacy

Since the late 1990s, comprehensive surrogacy law reform had largely fallen off the political agenda. A key part of SUK's campaign was to initiate and contribute to informed parliamentary debate. Horsey's work included attending meetings and briefings with members of the House of Lords and Commons – including Barker, Deech, Craigavon, Patel, Mackay, Watkins, Bach, King (HL) and Percy, Andrew, Duffield, McMorrin, West, Johnston, Cable (HC) – producing briefings (drawing on R1-R6), drafting parliamentary questions and organising conferences in central London (in 2016 and 2019) to discuss the findings of the SUK 2015 and 2018 Reports [R2 and R5]. These were attended by Baroness Barker and Lord Craigavon, the Human Fertilisation and Embryology Authority (HFEA), the Law Commission and senior DoH civil servants. On the morning of the 2016 conference, Baroness Warnock (the architect of the Surrogacy Arrangements Act 1985), appeared with the Chair of SUK WG on the BBC's Woman's Hour, arguing that the law needed to change.

In December 2016, the House of Lords debated surrogacy law reform for the first time in over 20 years. A briefing written by Horsey, drawing on her research, was circulated to Barker, Craigavon, and others. Barker quoted Horsey in R3, stating that surrogacy had become 'the fertility treatment that time forgot', and said that they were 'very fortunate' to have the SUK 2015 report [e]. Lord Berkeley adopted R2's description of surrogacy as a 'relationship not a transaction' [e]. Viscount Craigavon referred to R2 and the 2016 conference as a 'milestone [...] assist[ing] serious reform taking place on the basis of more accurate information and data' [e]. In total, seven of the nine peers who spoke referred to, or relied on, arguments made in R2 [e]. Barker referred directly to R2 again in a debate in the House of Lords in December 2018, where she stated that her interest had been 'principally' fuelled by 'by the work done by Surrogacy UK in 2016 (sic) when it produced

a report', quoted directly from a briefing written by Horsey in a debate on the 40th anniversary of IVF (drawing on **R2** and **R1**), and referred again to **R2** in a written question in 2020 [**f**, **q**].

Surrogacy law reform was raised in Parliament on at least 15 separate occasions between February 2017 and January 2020. In December 2017, Andrew Percy MP established an APPG on Surrogacy to 'fully review our surrogacy laws, encourage and promote debate on the issues, facilitate further research into how surrogacy is conducted, bring the law into line with modern social realities, and encourage domestic surrogacy in the first instance'. He asked the SUKWG (of which Horsey is part) to be its Secretariat. 21 MPs and three peers have since served on the APPG. Five evidence sessions were held between October 2018 and January 2019 with 45 IPs, surrogates, lawyers, legal and psychology academics, and others (including all of the non-profit surrogacy organisations, CAFCASS, the Law Commission, Stonewall, Julie Bindel, and Tom Daley). Altogether, 16 of the recommendations made in **R2** and **R5** are reflected in the 10 recommendations included in the APPG's Report published in October 2020 [**h**].

#### **4. Contributing to a change in Government policy to recognise, for the first time, surrogacy as a positive form of family creation and the need for surrogacy law reform**

As Percy MP noted in the House of Commons in December 2018: 'Going back decades [...] there has always been something of a nervousness in Government about the language used around surrogacy' [**i**]. SUK states that Horsey's research 'paved the way' for 'a change in policy from the Government, which now formally supports surrogacy as a legitimate form of family building and recognises the need for the law to be reviewed' [**a**]. In March 2016, Jane Ellison MP, then Parliamentary Under-Secretary of State for Health, stated that the Department had no plans to review surrogacy law [**p1**, **p2**]. The momentum created by SUK's campaign, including the publication of the good practice guidance, and repeated parliamentary questions [**p1-p4**], and direct representations to the DoH, including (as of March 2016) 22 that made direct or indirect reference to **R2** [**p1**], contributed to a fundamental shift in Government policy. In December 2016, a group of surrogates wrote to Jeremy Hunt MP and Nicola Blackwood MP, explicitly relying on **R2** to make the case for legal reform: 'We are surrogates who have given birth to 75 surrogate babies between us with 14 babies on the way, and members of Surrogacy UK. We are writing to you about the need for urgent reform of surrogacy law. We support everything that was said in the report "Surrogacy in the UK: Myth-busting and reform"' [**m**].

In February 2016, Percy MP wrote to the then Prime Minister, asking him to 'support wholeheartedly, reform of the law on surrogacy in line with proposals made by the organisation Surrogacy UK in [**R2**]' [**o**]. In May 2016, Ellison MP, stated for the first time that the 'Government recognises the arguments for the need for a review [of surrogacy law]', and had asked the Law Commission to consult on its inclusion in its 13th programme of law reform [**p4**]. On 19 July 2018, Jackie Doyle-Price MP (with whom Horsey had met on 11 July 2018), then the Minister responsible in the DoH (and now a member of the APPG), was the first British Minister to publicly state in the House of Commons the positive role that surrogacy plays in the UK [**g**]. This was reiterated by Lord O'Shaughnessy in the House of Lords in December 2018 [**f**] and Andrea Leadsom, then Leader of the House of Commons, in May 2019 [**j**]. In January 2020, during a House of Commons debate on the Government's policy on surrogacy, Percy MP stated: 'The debate in the 1980s was very different from the debate we have now. We now understand that surrogacy in this country works, and that it is a legitimate and loving way in which families are created'. He identified the DoH good practice guidance (referred to above) as a key component of this. He stated: 'I also want to say a big "thank you" to the Surrogacy UK working group on surrogacy law reform, which has done a brilliant job [...]. A big "thank you" is also due to [...] Dr Kirsty Horsey from Kent University, who led and chaired [sic] the review working party within Surrogacy UK' [**i**]. In February 2020, Progress Educational Trust (a charity committed to informing debate on assisted conception and genetics) commented in its newsletter: 'What is most remarkable in relation to surrogacy is how the support for it among MPs has grown over the years and the level of acceptance. [...] This is thanks in large part to the work of Surrogacy UK [...]. And we can't talk about surrogacy law reform without mentioning [...] Dr Kirsty Horsey's work – particularly her reports – which has been highly influential' [**k**].

## 5. Informing and shaping the Law Commission's consultation proposals on surrogacy law reform

In July 2016, the England and Wales Law Commission (with Government support) consulted the inclusion of surrogacy in its 13th Programme of Law Reform. The SUKWG initiated a SUK letter writing campaign encouraging its members to respond to the consultation. 343 people and groups responded supporting its inclusion, the largest number of responses to the proposed potential projects. In June 2019, at a conference organised by Horsey, a joint England and Wales and Scottish Law Commission consultation was launched, recommending root and branch reform of the law (as recommended in **R2**, **R5**), funded by the Government.

Horsey and the SUKWG were one of a number of stakeholders with whom the Law Commission met before the publication of the Law Commission's 'Building families through surrogacy: a new law' report was published. SUKWG's 2015 report [**R2**] is discussed as part of the 'current context' of the review. Horsey's research is cited 28 times throughout the report. Just over a quarter of the consultation's provisional proposals (#13), and invitations for consultees' views (#17) mirror those made in **R1**, **R2**, and/or **R5**, including to reverse the presumption of legal parenthood, allowing for 'double donation', and greater regulation of 'approved' surrogacy organisations [**b**]. The Law Commission is due to report on the consultation in 2022.

## 5. Sources to corroborate the impact

[a] Testimony from SurrogacyUK, 28 October 2020, pdf.

[b] Law Commission 'Building families through surrogacy: a new law' report question, annotated to demonstrate links to ICS author's research (pp.1-46) and recommendations (pp. 47-50), pdf.

[c] Testimony from MP confirming ICS author's role, pdf.

[d] Correspondence from CAF/CASS confirming meeting with ICS author and subsequent review and changes to terminology used in guidance, training, and factsheets, pdf.

[e] Surrogacy, HC Deb, 14 December 2016: cols 1317, 1318, 1320, 1322, 1324, 1327, 1328, 1329. See pdf for annotations.

[f] Briefing on Surrogacy for 40 years of IVF debate (pdf only), In Vitro Fertilisation: 40<sup>th</sup> Anniversary, HL Deb, 13 September 2018: col. 2432, and HFEAct 2008 (Remedial) Order, HL Deb, 12 December 2018: cols 105GC, 104 GC. See pdf for annotations.

[g] HFEAct 2008 (Remedial) Order, HC Deb, 19 July 2018. See pdf for annotations.

[h] APPG on Surrogacy 'Report on understandings of the law and practice of surrogacy (October 2020), annotated to demonstrate links to ICS author's research (pp. 4-5), pdf.

[i] Surrogacy: Government Policy, HC Deb, 21 January 2020: cols 68WH, 69 WH. See pdf for annotations.

[j] Business of the House, HC Deb, 16 May 2019: col 392. See pdf for annotations.

[k] Progress Report, The Newsletter of the Progress Educational Trust, February 2020, pdf.

[l] Draft HFEAct 2008 (Remedial) Order, Delegated Legislation Committee, 18 December 2018: col. 6. See pdf for annotations.

[m] Letter from surrogates to Secretary of State for Health and Social Care and Parliamentary Under-Secretary of State for Public Health and Innovation calling for law reform (December 2016), pdf.

[n] Letter to Parliamentary Under-Secretary of State for Public Health and Innovation (26 October 2016); emails between Chair of SUK Working Group for Surrogacy Law Reform and Department of Health (31 October 2016), pdf.

[o] Letter to Prime Minister and related emails, pdf.

[p1-p4] DoH written questions on 'Surrogate Motherhood' (3 March 2016, 25 April 2016, 11 May 2016, 25 May 2016), pdf.

[q] Health Professions, DoH written question: 29 January 2020, pdf.