PROGAR's response to Minister regarding the joint Report of the Law Commission of England and Wales and the Scottish Law Commission into Surrogacy Law Reform 2023 - https://tinyurl.com/ts9cd2du

The British Association of Social Workers (BASW) Project Group on Assisted Reproduction, PROGAR (https://www.basw.co.uk/progar/) has since the 1980s campaigned on matters concerning assisted reproduction, including surrogacy, in the UK and overseas. We have worked variously 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 (BAAF), 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.

PROGAR welcomes many, but not all, of the Law Commissions' (LCs) recommendations. Our focus is not on 'supply and demand' matters, so we have little to say about whether the proposals will increase the supply of UK surrogates as intended – though we are curious about an assumption that there is an untapped pool of potential UK surrogates and are not aware of evidence to back that up. Our interest lies squarely in whether the recommendations carry any adverse lifespan implications for the surrogate-born person, their families and networks and those of the other parties affected, including the surrogate.

Many of our recommendations if accepted would result in their inclusion in the primary legislation that is being proposed. Our experience with the HFEA as a regulator is that it has been hampered over the years by a number of areas not being specified in the primary legislation of the HFE Acts and hence either left to Guidance, which is not enforceable, or otherwise omitted from their inspections. With regard to surrogacy and donor conception, the damage arising from the lack or omission of statutory requirements cannot be undone later as those conceived through these routes have their lifetimes to live with the consequences.

With this as backdrop we start our comments by focussing on selected areas with which we agree, at the same time as identifying under each point where we believe the proposals should go further or otherwise need further scrutiny. In the next section we identify areas that we suggest need rethinking or adding. Our list is not exhaustive and not in order of priority; instead at this stage we have identified particularly key areas and our submission to the Law Commissions consultation sets out our views more fully and can be accessed at: https://tinyurl.com/BASW-PROGAR

- Surrogacy Register to be established (agree) and we welcome the recommendation to allow registration to be retrospective in certain situations. One key concern is:
  - Given the principle that a surrogate-born child has the right to know **all** their parents (and we welcome the LCs' stance throughout against the use of anonymous gamete donors), our strong view is that the Register should include the identity of ID-release donors as well as that of surrogates and known donors. As they stand, the

recommendations introduce a two-tier system whereby a surrogate-born person will be able to access the identity of a known donor and surrogate from the Surrogacy Register but will only be able to access the details of an ID release donor on application to the HFEA Register and hence abide by the 'access' age limits that apply to the HFEA Register even if these differ from the Surrogacy Register (and also see out later point on this under Access to Information). It is our strong view that the right to know **all** parents should mean just that and therefore not differentiate between surrogates, known and ID release donors.

- Regulated Surrogacy Organisations to be introduced for all domestic arrangements wishing to pursue the 'new pathway' (agree). Our key concerns are:
    - There is no requirement for RSOs to have any child welfare expertise and/or include such expertise in their policy making and practice arrangements;
    - There is no *requirement* for minimum levels of contact to be maintained with the parties throughout the treatment, pregnancy and afterwards. As written, the RSOs are only *required* to be involved pre-conception and again at around the time of birth and immediately afterwards, including if the surrogate withdraws her consent and, if not, to provide information to the Surrogacy Register.
- Surrogacy Agreement between the 'surrogacy team' members to be required for all domestic arrangements wishing to pursue the 'new pathway' (agree). We strongly welcome the proposal that the IPs will have no right to enforce the agreement and we agree with the recommendations about the surrogate's right to withdraw consent during pregnancy and up to six weeks post birth (but also see our later section about post birth consent). Our key concerns are:
    - We believe there is an over emphasis on what can be achieved with a pre-conception surrogacy agreement. While we consider it crucial to have such a document at this early stage, it can never amount to 'fully informed consent' as is claimed. The parties are in effect speculating about how they will feel when going through the process and hence are making as well informed choices as they can at that time. It can only ever therefore be a working document and subject to change and, where there is conflict, subject to mediated resolution.
    - Although we welcome the **assessment** requirements for surrogates and IPs prior to an agreement being finalised; and the requirement (as in the HFEA Acts) to take account the welfare of *existing* children as well as the welfare of the child to be born, we do not believe they go far enough:
        - There is no minimum level of implications counselling recommended and this is of concern given the potential complexity of surrogacy arrangements. We also suggest that Recommendation 30 that counsellors should let the RSO know if they have any concerns about any of the parties involved is too vague, makes no reference to the confidentiality agreement that typically exists in counselling relationships, including implications counselling, and is subject to

the counsellor's professional Code of Ethics and runs the risk of blurring the boundaries between counselling and welfare of the child assessments;

  - As set out above, there is no requirement for child welfare expertise in any part of the process or in the knowledge and skills set of RSOs (or indeed of counsellors – see previous point);
  - There is an assumption that the existing Welfare of the Child assessment procedures in HFEA clinics are sufficient but PROGAR has been raising our concerns with the HFEA for some time about the lack of robustness with these;
  - While we welcome the requirement for there to be enhanced DBS checks for adults aged 18 and over, it should be noted that minors can also commit crimes against children and this needs to be built into the safeguarding scrutiny process;
  - While we accept that the signatories should be the surrogate and IPs alone, we are not sure that there are sufficient safeguards for existing children that may be affected, for example where the spouse/partner of a surrogate in an ongoing committed relationship does not agree with the proposed arrangement. Indeed unlike in the Verona Principles there is no reference that we could find in the recommendations that the spouse/partner of the surrogate and any existing children should be included in pre-conception assessment and counselling. It is important that they are informed and involved in the process so that the RSO can assess whether any proposed surrogacy arrangement may impact negatively upon the surrogate's existing children as well as the child to be born of the surrogacy arrangement.
  - The LCs decided against recommending a shelf life for surrogacy agreements after which they would need to be renewed. We strongly believe this needs revisiting. Neither is there any mechanism proposed to ensure that the signatories remain the same prior to each treatment being entered (the latter has been an issue at times in HFEA-licensed treatments, for example when a woman changes her partner but does not notify the clinic). This is curious given that the LCs *do* recognise that the latter can happen when a Parental Order is applied for (p266)
  - We could not see any requirement for an ID-release donor to give consent for their gametes to be used in a surrogacy arrangement and we believe there should be.

- <u>Changes to birth registration</u> – on the whole we agree with these, especially the proposal to include the fact that the birth resulted from a surrogacy arrangement on the long certificate. Our concerns/suggestions include:

- We strongly recommend that this also makes clear whether it was a genetic surrogacy arrangement; a gestational (IPs' gametes alone) surrogacy arrangement or a gestational (with donor) surrogacy arrangement – important information for a surrogate-born person.
- On the whole we prefer the alternative model proposed by the LCs rather than their preferred model, reflecting our lack of full consensus about IPs being granted legal parenthood at birth and able to register as such immediately. In this alternative model, it will be important that surrogate-born people are given statutory rights to access the original certificate.
- We find it curious that the LCs say that their preferred model provides an 'accurate birth certificate' (p43 Core Report) and do not understand why.
- We also think it curious that in this model it is the IPs that have to make a declaration that the surrogate has not withdrawn consent rather than such a declaration being provided by the surrogate. We have elsewhere said we believe the surrogate should confirm her consent post birth and anyway believe this would be more in keeping with respecting her autonomy than requiring the IPs to do this.
- There is no recommendation to notate the birth notification from health services to the Registrar where the birth has been the result of surrogacy arrangements (where this is known to the health services). We believe this should happen and would provide an additional check in the system.
- We strongly support the recommendation for a retrospective change to right of access to their original birth certificate for surrogate-born people in England and Wales who have a Parental Order.
- We cannot see why surrogate-born people who are subject to a Parental Order should not have the right of age-related access to their original birth certificate in line with those on the new pathway. Surely the principle is the same?

- <u>Access to information</u> – we agree with the proposed changes that will allow surrogate-born offspring in England and Wales to access both identifying and non-identifying information from the Register and to access their complete parental order file (where this applies), (i) at the age of 16 and 17 unless they lack mental capacity, (ii) prior to 16 if they are Gillick competent and (iii) at age 18 regardless of capacity. And in Scotland access to be (i) for all from age 16 because capacity is assumed; and (ii) below age 16 if they meet a statutory test of capacity. If anything, we think this could go further as it is becoming increasingly clear that withholding information from minors may be open to legal challenge on human rights grounds and the use of commercial DNA testing is anyway leading to changes regardless of the legal framework. As we understand the proposals, however, the age restrictions on access to donor information from the HFEA Register will thwart the intention of extending access to information in surrogacy arrangements at earlier ages (see our earlier point about this under Surrogacy Register). We thus strongly recommend that the age requirements for both Registers are aligned to widen access for all those conceived with the use of donated

gamete(s) rather than those conceived through surrogacy arrangements (with or without donated gamete(s)) alone.

Our concerns include:

- Whilst we welcome the proposal that all applicants should be offered 'counselling' prior to information release, we have concerns that there is nothing proposed about who will meet the costs of this service or who will provide it and who will provide and pay for the very important intermediary services for those who wish to establish contact. This is an issue for those wishing to access information from the HFEA Register where only very limited free professional support is available;

- We are also alarmed that the proposals do not include a *requirement* to collect a 'pen portrait' about either the surrogate or the donor (where one is used) for release to surrogate-born people. Existing research suggests that those wishing to learn more about their 'parents' welcome information about them 'as a person' and not only their height, weight, medical history and so on.

- <u>Access to information rights (with consent) for surrogate's own children and those born to the same surrogate (agree)</u> – but we are concerned that this is not extended to the donor's children (where a donor was used). There is no reason that we could see to exclude them. There should also be a requirement here to inform any applicant of their right to join the HFEA Donor Sibling Link voluntary register, including their right to make such an application even if they were not aware/were unsure if a donor had been used.

- <u>Right to obtain information</u> from age 16 if anyone to whom they intend to marry, enter a civil partnership with, have a sexual relationship with, was carried by the same surrogate as themselves – while we agree with the principle of the right to such information, we consider it does not go far enough. Some surrogate-born people may wish to enter a sexual relationship before the age of 16. There should also be a requirement here to inform any applicant of their right to obtain similar information from the HFEA if a donor was used including their right to make such an application even if they were not aware/were unsure if a donor had been used.

- <u>Requirement retained for a genetic link</u> to at least one of Intended Parents. (agree). We also agree with the recommendation that an IP without a genetic link can apply for a PO in situations where their prior relationship with the other IP has broken down and that it will then be for the court to decide who should be awarded legal parent status. We found the recommendation to cover the situation where an IP dies rather confusing, especially (if we have understood it correctly) the recommendation that an agreement can go ahead if one of the IPs dies before treatment starts but that their name can only go on the birth certificate if they were the genetic parent. Some of our confusion lies with the phrase 'where…. dies less than six weeks after the birth….' as it was unclear to us whether this included during the pregnancy.

- Support for both genetic and gestational surrogacy to continue (agree) – we have had growing concerns at the growth in recent years of gestational surrogacy with the use of a donor, both domestically and internationally. There is no evidence that it is in the interests of surrogate-born people for the IPs to use a donor where one is not required on medical grounds. Our concern is that this introduces an additional complexity into their lifespan experiences as they have to incorporate the meaning to them of another 'parent' and incorporate any contacts with the donor and associated 'siblings' as well as with the surrogate and associated 'siblings'. In addition we are aware of emerging research that even if IPs are open with their child about their use of a surrogate this does not necessarily extend to their use of a donor. So we welcome the LCs' explicit support for genetic surrogacy to continue and would if anything like to see greater support being expressed for it and a requirement to ensure IPs are informed of the potential additional complexity for the surrogate-born person where a donor is used.
- Parental responsibility to be given to IPs regardless of which route to legal parenthood is used (agree). However we are unclear how IPs not using the new pathway will be able to trigger the acquisition of PR given that it is not recommended to be linked to their intention to apply for a Parental Order. There appear to be no safeguards for a child where the IPs then fail to make a PO application, leaving the surrogate (and her spouse/ civil partner if she has one) to be the legal parent and having PR.
- Courts to have the ability to dispense with surrogate's consent in PO applications in certain circumstances (agree).
- Retention of time limit of six months to apply for a PO (where one is required) with courts having the power to dispense with it for late applications (agree)
- Ban retained on commercial surrogacy (agree) – though we have concerns at the lack of attention in the proposals to 'not-for-profit' organisations as this is where the boundaries between altruistic and commercial surrogacy can become blurred
- Introduction of clearer rules around 'allowable' payments but that where these are breached this should not prevent the process continuing, providing that it is in the best interests of the child (agree)
- International surrogacy – we support the recommendations to improve the processes whereby IPs can bring the surrogate-born infant into the UK insofar as we have understood these complex systems. For a child to be in effect 'stranded' overseas is not in their best interests. In addition, any concerns about the context in which the surrogacy arrangements have been made and carried out are best dealt with in the UK. However we also highlight the importance of considering potential inequalities between children born overseas as a result of surrogacy arrangements if the immigration reforms are introduced, and children born overseas outside of surrogacy arrangements, but who have a legitimate claim to live with family in the UK, or indeed children born to British citizens overseas. There can also be delays and hardships suffered by the latter cohorts of children in seeking to enter and remain in the UK, or obtain a British passport if they are eligible for one. These also need addressing.

- Removal of child from the UK as with the previous comment, these measures appear to be well founded but our knowledge in this complex area is limited.

Additional areas where PROGAR would like to see rethinking of the current proposals or where we recommend new proposals

Surrogacy has been little studied and this runs the danger of an over-reliance on and/or unwarranted extrapolation from existing research findings which inevitably have shortcomings. In addition the relative exclusion of consideration of the importance/significance of the donor (where one is used) carries risks, given the now extensive body of research of the implications of using donor conception treatments in the lifespan of those affected, especially the donor-conceived individual. Given that the donor is far less likely to be known to the IPs and so can remain 'in the shadows' this makes it all the more important that policy decision-making (and practice) has them in mind throughout.

This informs our views about the need for further discussion about some of the underlying principles used in the LCs' proposals.

Conceptualising surrogacy - The LCs have said that surrogacy is closer to IVF than adoption: we disagree. If one considers routes to parenthood as being on a continuum from natural conception to adoption, surrogacy will sit next to adoption. The fact that surrogacy arrangements are overwhelmingly carried out in a medical context does not, in our view, detract from the similarities with the adoption (i.e. non-medical) context whereby a woman conceives and carries a pregnancy and gives birth and the child is – then or later - raised by someone else. Where adoption is different to surrogacy is that the conception was not achieved with the *intention* that the child would be raised by other parents: sometimes the intention for adoption is arrived at, provisionally, during the pregnancy (in either so-called voluntary relinquishments or through child protection procedures); sometimes the adoption occurs quite some time after birth. Core to the approach to adoption is that prospective adoptive parents will not only undergo an assessment process but also preparation sessions aimed at increasing their potential to cope with the additional demands of adoptive parenting and thereby hopefully better equip them for this route to parenting and family life. We would like to see an adapted version of this as a *requirement* for entering surrogacy arrangements and for it to be informed by child welfare professionals. We believe some surrogacy agencies offer something akin to this but it should be universally *required* especially as these proposals, if enacted, might prompt the emergence of new RSOs;

Legal parenthood - The LCs have said that their recommendation that IPs be allowed to register as the child's legal parents from birth under the new pathway is in the 'best interests' of the child as it will provide legal certainty for the child and reduce stress. Their phrasing suggests that it is the child that is impacted by uncertainty and stress rather than their parents (though of course the impact on parents can manifest in their relationship

with their child). The statement regarding ‘best interests’ is not well evidenced in the LCs report although it is clear from the research they cite (which is sparse as we refer to earlier) that many IPs and some surrogates would prefer IPs having legal parenthood from birth in order to reduce their own uncertainty and stress. No evidence was presented to suggest that the infants themselves are harmed by the delay to transfer of legal parenthood. We remain divided in our views about this, with a majority retaining concerns about removing the link between the person giving birth and legal parenthood and shifting the assigning of legal parenthood to an administrative process rather than a judiciary one. As we argued in our submission, we would have liked to see options included that do not require the severing of this link – for example the surrogate and IPs being registered as legal parents until the point at which it is clear that the surrogate is not going to withdraw consent (currently proposed as at 6 weeks post birth)(see our earlier comments on birth registration). This is especially so given that the shift to legal parenthood at birth will only apply to IPs using the new pathway, potentially a minority of those using surrogacy arrangements. We believe our views better reflect those of the Special Rapporteur and the Verona Principles.

- Surrogate’s post birth consent – We argued in our response to the consultation that we would like to see a requirement for the surrogate to confirm her consent post birth. We believe this would have benefit for the surrogate herself and for the surrogate-born person in later life. We would still like to see this considered. With regard to the existing proposals for a six week period in which the surrogate could withdraw consent, we agree with this timescale but do not consider it appropriate that the surrogate will be required to notify both the IPs and the RSO if she decides to withdraw consent. Given that such a decision may sometimes be caused by her concerns about the IPs, it potentially exposes her to risk and/or undue pressure if she has to deal with the IPs direct. We therefore strongly suggest that she should only be required to notify the RSO (or another third party) and it should then be the responsibility of the RSO to inform the IPs. In addition we have concerns that the LCs say that the RSO will be a neutral party for the purposes of providing support to the surrogate in the event of her withdrawing consent. There will be circumstances where the RSO may have a conflict of interests given their involvement with IPs, or may be perceived to have such a conflict by the surrogate – and may anyway be asked to provide support to the IPs themselves. While such instances may be rare, they are likely to be complex and independent support may be needed for the surrogate and hence its offer should be a requirement. We also believe that such support should be made available free of charge. We believe that our views better meet the Verona Principles recommendation than do those of the LCs.

- Age and other requirements for surrogates – we welcome that a minimum age for surrogates (21) is to be introduced but concerned that there is no recommendation for an upper age or any restriction on the number of surrogate-born infants that a surrogate can give birth. For example it appears to take little account of the increased risk of genetic abnormalities with age. We are also very concerned about the lack of a requirement for a

surrogate to have already given birth before becoming a surrogate. Pregnancy is a major life event. If a surrogate has a difficult pregnancy or birth then this may affect her future decisions about whether to have children of her own. This should not be disregarded.

- Record keeping - We have recently become aware of the insecurity of record-keeping in the UK with some recent proposals being floated to destroy records that we consider to be of heritage importance. We therefore feel reference to records storage should be strengthened: they are of value not only to the person to whom they apply but also to those who come after them, in particular their descendants.