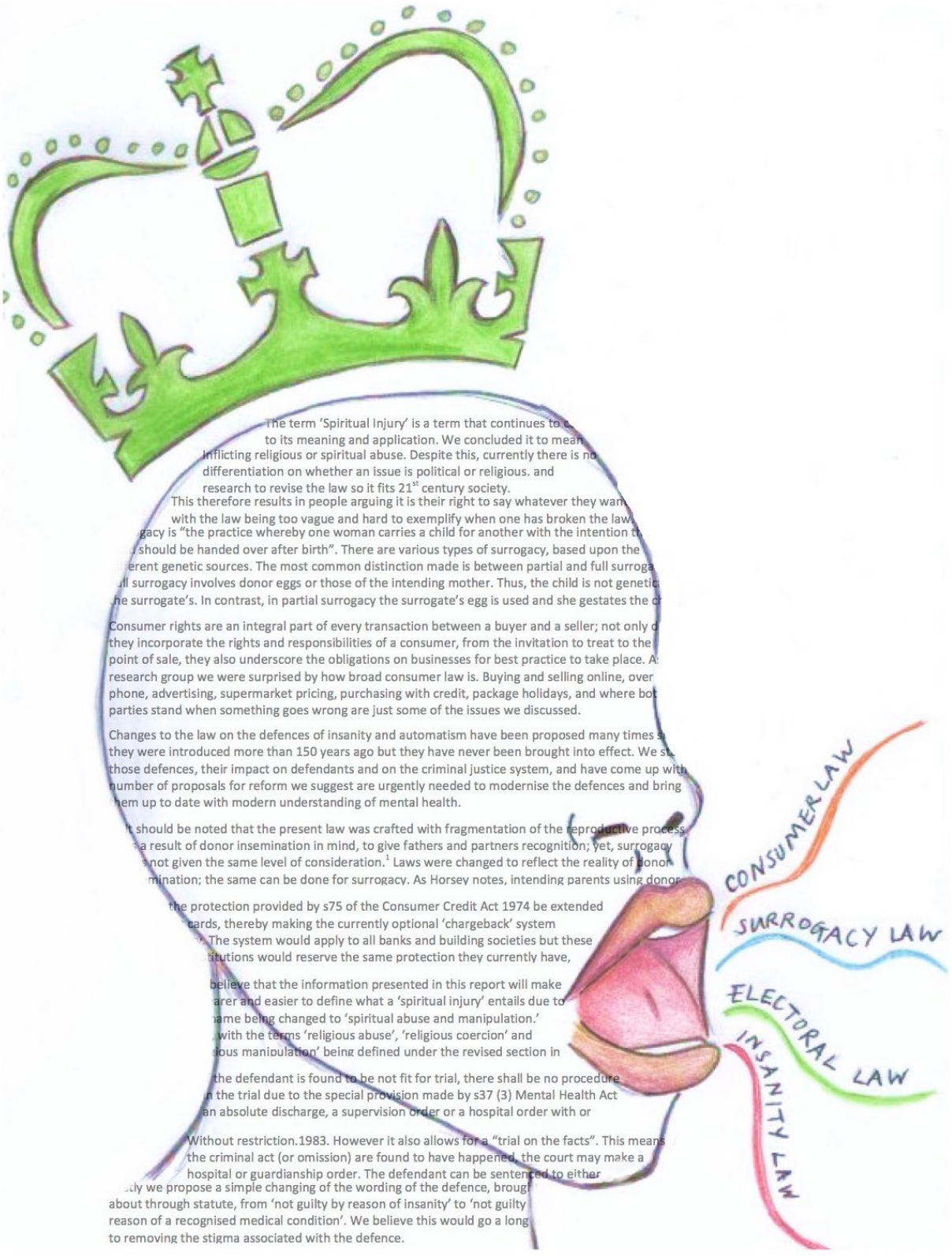
Big Voice London

Model Law Commission Report 2015

Supported by the UK Supreme Court



LexisNexis®

Big Voice London

Edited by Victoria Anderson & Emily Lanham
Published Nov 2014 by LexisNexis

Foreword note by the Big Voice London Directors

For the third year running Big Voice London has organised the country's only Model Law Commission, a project which enables sixth form students from in and around London to mirror the work undertaken by the Law Commission.

Over the course of three months the students explore four distinct areas of law, learning from experts and consulting with their peers, all with the aim of devising a series of reform proposals. This year our students have tackled a range of challenging and controversial topics from the operation of electoral law, to the complex defence of insanity. These young people, all from a wide array of cultures and backgrounds, have risen to the challenge of the Model Law Commission and have provided us with what I hope you will agree is an interesting set of proposals.

Whilst the young people participating in Big Voice London are not yet old enough to vote and are at an age where their opinions can be undervalued by society, our students have once again proven that they are worth listening to. As you will read in this paper their unique perspective, as a new generation of young people growing up in a completely different world from the generation before them, provides an invaluable and insightful contribution to the discussion of current issues.

Our students would not have been able to share these ideas without the generous support provided by experts in their respective fields who give up their time to speak to the groups. These individuals guide our students as they initially get to grips with the current law, the problems and the benefits, and we are extremely grateful for the contribution they have made to the project.

We are also indebted to the eight Big Voice London Group Leaders who volunteer their time to teach the students each week, for three months, all while undertaking other study and work commitments. It is with the help of these volunteers and, of course, the generous sponsors and supporters that we are able to run projects like these all year round and we hope to continue to do so for many more years to come.

It is with great pride that we now present the report of the Model Law Commission 2015; we hope you enjoy reading it.

Victoria Anderson & Emily Lanham, Directors

Our Students

Contents:

Introduction

Big Voice London

At Big Voice London we believe that all young people, from all backgrounds, should have the opportunity to share their thoughts on the legal landscape and, for those who choose to, perhaps one day enter the legal profession themselves. To further this aim, we take students from non-fee paying schools and give them the chance to have an insight into the law through a variety of events such as an annual mooting competition, a summer school, lecture evenings with Middle Temple and our flagship project: the Model Law Commission.

Over the last four years, we have reached hundreds of students from all across London, continuing to grow and develop our events as we go. In 2011 when Big Voice London was founded, it ran as a small youth organisation running out of City Law School. Now, the project has grown into a formal organisation, with a whole host of supporters, sponsors and not to mention dedicated volunteers. We are extremely fortunate to be able to name Cohen Davis Solicitors, Horsey Lightly Solicitors, Carter-Ruck and Lexis Nexis as sponsors of the organisation, in addition to the ongoing support from Linklaters, Middle Temple and the Law Commission. We also extend our appreciation to the UK Supreme Court for their ongoing support of our objectives.

The success of Big Voice London is most clearly exhibited in the achievements of our alumni. At least two students from the past year's cohort have gone on to study law at Oxford University and many more have been motivated and inspired to pursue higher education and careers in law. We have no doubt that as we continue to empower and engage more students through our programme of activities over the coming years that we will be able to share many more stories of our student's achievements, regardless of their background.

Model Law Commission 2015

The Model Law Commission is a three-month long project that provides A-Level students with the chance to simulate the work of the Law Commission. We split our pool of students into four groups, each tasked with the reform of one of the following areas of law: Family Law, Criminal Law, Commercial Law or Public Law. From October to December, the young people undertake a five-stage process: research, formulating recommendations, consulting with their peers, reporting on their proposals and devising their legislation.

Each year, the Model Law Commission begins with a two-day conference, which was for the second year running generously hosted by Middlesex University. It is over the course of these two days, that our students are introduced to their respective topics by experts in the field who come from all over the country to speak to them. The young people then take that information and over the following weeks discuss reform ideas with each other, their Group Leaders and their peers. Finally, in late November, individuals from the Law Commission itself visit our students and advise on the difficulties in reforming the law and how to write a law reform report.

The results of these weeks of hard work are contained within this report. This is a reflection of what these young people believe should be the law governing these particular issues and is written entirely in their own words.

Our Students

When recruiting students, our only requirement is that applicants come from non-fee paying schools, we do not set grade boundaries or have entrance exams, we only ask that students be keen to learn and commit to the project.

All the students that participate in the Model Law Commission apply to this project off their own backs. It is not a school run activity; these are students who want to learn about and have their voices heard in the law. That being said, we rely on the continued co-operation and support of the teachers from schools around London to pass on the message of Big Voice London to their students. This year, the majority of our applicants came from the following schools: St Bonaventure's Sixth Form, St Marylebone Sixth Form, Chobham Academy, Holy Family Catholic School, Robert Clack School and Queensmead School.

With sessions run every week in the evenings after school, this is not a small commitment to undertake alongside studying for all-important A-Level exams. Despite this fact, our call for applications in 2015 received a record response of almost 100 applications, meaning that we were unable to take everyone we wanted. We hope that as we expand, we will be able to provide this valuable opportunity to more ambitious young people.

The Authors/Commissioners

The young people that have contributed to this briefing paper are:

Part One: Property, Family & Trusts – Surrogacy Law

Canan Aksoy

Damilola Shittu

Dana Habbab

Emily Simmons

Joan Ruth Onyebuchi

Karla Brown-Anderson

Paige Michel

Sarwar Ahmed

Sherwin/Alex Holder

Shohaib Malik

Nana Serwah Boateng

Elizabeth John

Part Two: Commercial & Common Law – Consumer Law

Adam James

Alex Ritchie

Austen Dunster

Azize Peraj

Dolapo Ayofemi

Dwayne Thompson

Florence Ayoade

Kara Benjamin

Leah Thomas

Mary Onyerionwu

Masuma Kaniz

Richa Ralmil

Thobiyas Mariyaseelan

Part Three: Public Law – Electoral Law

Areti Protopapa

Ben Oughton

Daniel Tomlin

Matt Sparks

Osman Awad

Shannon Deumaga Happi

Tara Kofi-Adu

Tom Stuart

Part Four: Criminal Law – Insanity Law

Andrea Guano

Chau Nguyen

Eivinas Zdanevicius

Jessica Savery

Leonardo Freire

Michael Abdul

Sahar Ghorishi

Salem Mail

Shadee Lacey

Taylor Hughes

Triumph Efe Ogidi

Waqas Razaq

Yoginni Gopal

Big Voice London Volunteers

Property, Family & Trusts Team: Louise Ketley and Leora Taratula-Lyons

Commercial & Common Law Team: Fiona Bowen and Katherine Gilroy

Public Law Team: Gethin Thomas and Luke Canavan

Criminal Law Team: Tom Worden and Joyce Sun

Acknowledgement

We are extremely grateful to the LexisNexis team for kindly sponsoring this publication and for their continued support of the Big Voice London project. We would also like to thank the Big Voice Management Board for their assistance in bringing the Model Law Commission to life.

Ayath Ullah

Daveena Ogene

Farhan Dawood

Khadejah al Harbi

Nim Njuguna

Steven Barrett

Yair Cohen

Big Voice London, December 2015
www.bigvoicelondon.co.uk
Email: bigvoicelondon@gmail.com

Disclaimer

The work, recommendations and opinions contained in this report are solely those of the student authors listed. The views expressed do not represent those of any other external organisation or individuals, including guest speakers listed in this report and the UK Supreme Court and the Law Commission. Big Voice London is an entirely independent organisation, and while we value the ongoing support and guidance of many organisations all views expressed are our own.

Part 1: Property, Family & Trusts

Recommendations on the laws governing the operation of surrogacy arrangements.

Compiled with thanks to:

Anne-Marie Hutchinson OBE, Dawson Cornwell
Colin Rogerson, Dawson Cornwell
Melissa Elsworth, Natalie Gamble Associates
Ruth Cabeza, Field Court Chambers

Introduction

Surrogacy is "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth".[1] There are various types of surrogacy, based upon the different genetic sources. The most common distinction made is between partial and full surrogacy. Full surrogacy involves donor eggs or those of the intending mother. Thus, the child is not genetically the surrogate's. In contrast, in partial surrogacy the surrogate's egg is used and she gestates the child. It is clear from our consultation that societal attitudes have transformed in the time since the Warnock Committee concluded that that legislation should make "transparent society's disapproval of surrogacy as a practice".[2] Our consultation revealed that an overwhelming 86% believed that surrogacy should be allowed and not discouraged or prohibited. This is a vast change from legislation previously aimed at discouraging the practice. This demonstrates the desperate need for modernisation of the law to bring it into the twenty-first century, where surrogacy not only happens but is increasingly bringing children into the world. Last year, Jessica Lee MP claimed that 1,000-2,000 children were born per year to intended parents from the UK.[3] We argue that the current law makes the process unduly difficult.

Methodology

Our approach broadly followed four stages of the Law Commission: pre-consultation, consultation, policy development and reporting. During the pre-consultation phase we analysed the laws governing surrogacy, in particular its flaws. We met with multiple accomplished family lawyers to gain their perspective on the practical application of these laws. We then conducted a detailed survey with 125 respondents to collect the views of the general public for our consultation. Thirdly, we engaged in policy development where we intensely debated proposals. The success of this stage was dependant on our ability to reach a general consensus on each issue. Submitting the report is the final stage of our process.

Executive Summary

From our discussions and the results from the public consultation we have concluded that:

- The intending parents should be able to obtain a pre-birth order for parentage.

1 *Committee of Enquiry into Human Fertilisation and Embryology, Report* (Cmnd 9314, HMSO, London 1984),p.42, para 8.1g

2 *Committee of Enquiry into Human Fertilisation and Embryology, Report* (Cmnd 9314, HMSO, London 1984)

3 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

- Amendments to the Section 54 parental order criteria should be made; in particular, the 6-month time limit and the "two persons who are living as partners in an enduring family relationships" criteria should be removed.
- UK law should enable enforceable contracts between both parties regarding the finances of the surrogacy agreement.
- Commercial surrogacy should be permitted to allow the surrogate to be paid for her labour, however, agencies should remain restricted to operate on a non-profit basis.
- There should be regulations for surrogacy and surrogacy organisations, namely, counselling, psychological screening, health checks and recommendations concerning the surrogate's age and family situation.

Current Law

Parentage

According to current UK law, a woman who gives birth to a child, including the surrogate, is always treated as the mother and has legal rights to the child.[4] The child's legal father will change depending on the circumstances of the child's birth. The surrogate's husband or partner will be the legal father of the child unless:

a. The surrogate is not married or has no partner; or

b. The surrogate's husband or partner did not give permission.[5]

When the surrogate is unmarried, the legal father/second parent will be:

c. The intended father, if he is genetically the father of the child; or

d. When treatment is provided by a licensed clinic, the commissioning mother or non-biological father, if appointed by the surrogate. [6]

Intending parents can gain parenthood, and thus legal rights, to a child by one of two ways; via a parental order as stated under s.54 of the Human Fertilisation and Embryology Act 2008, or via an adoption order as stated under s.46 of the Adoption and Children Act 2002.

It should be noted that the present law was crafted with fragmentation of the reproductive process as a result of donor insemination in mind, to give fathers and partners recognition; yet, surrogacy was not given the same level of consideration.[7] Laws were changed to reflect the reality of donor insemination; the same can be done for surrogacy. As Horsey notes, intending parents using donor insemination have some certainty, as a woman using donor eggs is regarded as the mother and the intending father as the father.[8] Surrogacy contrasts with this, as parenthood has to be acquired and is made a difficult process. It should be noted that this costs not only the intending parents, but the state as well by increasing the court docket. Hence, we conclude that current law is a poor fit to the reality of the arrangement and the majority of cases, where the arrangement works smoothly and the child is left in "legal limbo" prior to the granting of the parental order. As Elsworth and Gamble convincingly argue, "[p]arental orders were perhaps an adequate remedy for a handful of UK surrogacy cases, but they were never a proper structure for managing surrogacy in the thousands."[9]

4 Human Fertilisation and Embryology Act (HFEA) 2008, s.33

5 HFEA 2008, s.35

6 HFEA 2008, ss. 43 and 36

7 Kirsty Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements" (2010) 22(4) CFLQ 449, 451

8 Kirsty Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements" (2010) 22(4) CFLQ 449, 453

9 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157, 158

Such laws also create issues when couples travel abroad for surrogacy, as children can be left stateless due to the mismatch between the laws of other jurisdictions and the UK. This is demonstrated by the case of X and Y.[10] Here twins were born to a Ukrainian surrogate mother. However, the twins were left "marooned stateless and parentless"[11] as the intended parents neither had an extended visa to stay in Ukraine or a parental order to bring their children to the UK, despite the fact that both sides agreed to the surrogacy and one applicant had a genetic link to the children.

Section 54 of the Human Fertilisation and Embryology Act 2008, discusses the ways in which intending parents can gain legal rights to their child via a parental order. We feel this section presents a number of problems, is outdated, and in need of reform:

- Subsection 1 states an application must be "made by two people "[12] thus discriminating against single people wishing to gain legal rights of a child.
- Subsection 2 states "the applicants must be [either] husband and wife, civil partners of each other, or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other",[13] again discriminating against single people wishing to gain legal rights of a child. This is also "inconsistent with the law on adoption and donor insemination". [14]
- Subsection 3 delineates a specific "6 month period" when intending parents "must apply for [a parental] order." The need for removal of the 6 month time limit is demonstrated by the stretching/interpretation of the criteria by the courts. In Re X, the applicants applied for a parental order after the 6 month deadline, seven months after the birth of the child.[15] President Munby concluded that Parliament could not possibly have intended that this deadline act as an absolute bar to applications, especially given the subject matter and consequences for the intending parents. His judgment was strongly worded, concluding that an absolute bar is not only "the very antithesis of sensible; it is almost nonsensical".[16] This makes clear the dangers of this time limit.

Enforceability

Surrogacy contracts, regardless as to where they were agreed, cannot be enforced under UK law: "No surrogacy arrangement is enforceable by or against any of the persons making it".[17]

The current law has created problems for intending parents, as they are offered no protection if the surrogate changes her mind and decides to keep the child. Meanwhile, the same is also true of the surrogate if the intending parents change their minds, as occurred in the case of Baby Gammy.[18] Notably, the Brazier Review's remit specifically excluded consideration of enforceability. Consequently, this review aims to give this area the analysis due.

It can be considered unfair and inequitable that although all parties to the arrangement may rely on the promise and have expectations, the court will not enforce them. As Jackson argues, "surrogacy contracts will seem precarious, and people will be unwilling to risk so much upon such a patently insecure arrangement".[19] Failure to enforce "implies a fundamental and paternalistic mistrust of the decision-making capacity of women in relation to their own bodies and childbirth".[20] Our consultation, revealing that surrogacy is strongly supported amongst the public, corroborates Horsey's view that surrogacy does not need to be deterred. [21]

10 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733

11 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733, para [10]

12 HFEA 2008, s.54(1)

13 HFEA 2008, s.54(2)

14 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157, 158

15 *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, [2015] 2 WLR 745

16 *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, [2015] 2 WLR 745, [55]

17 Surrogacy Arrangements Act 1985, s.1A

Commercialisation

The commercial nature of surrogacy stems from the inclusion of an extra fee, beyond expenses. Commercial surrogacy can also include payments made to third parties, such as agencies, that profit from the services rendered by facilitating surrogacy arrangements. In the UK, to take the law at face value would lead to the conclusion that surrogacy is purely of an altruistic nature. S.2 (1) of the Surrogacy Arrangements Act 1985 makes it an offence for a commercial organisation to offer or agree to negotiate or arrange a surrogacy arrangement on a commercial basis. The surrogate or commissioning parents cannot commit such an offence.[22] However, to grant a parental order the court "must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants", although it can authorise payments. [23]

Whilst in theory the prohibition of commercial surrogacy aims to discourage surrogacy and prevent a surrogate from exploiting intending parents, in practice the proscription of commercial surrogacy and commercial payments has not averted its occurrence. In 1997 the Brazier Committee highlighted that payments as much £15,000 or more were already being made and authorized.[24] Although the Brazier Review concluded that commercial surrogacy should remain outlawed - a framework which the current law follows - payments beyond reasonable expenses to the surrogate mother continue, with payments in the UK as high as $56,750.[25] There is a serious gap between what the law is in theory versus practice.

Numerous cases exist wherein payments beyond reasonable expenses are acknowledged and authorised. In Re X and Y it was accepted that the "sums paid significantly exceeded 'expenses reasonably incurred'" and so unless authorised by the courts would "offend English domestic law".[26] Hedley J in consideration of this still arrived at the conclusion that the payments should be authorised.[27] In the judgment in this case he highlighted the fact that while commercial payments which are not lawful can be authorised by courts "the statute affords no guidance as to the basis, however, of any such approval".[28] In another case a Californian surrogacy arrangement had involved $23000[29], the judgment in this case involved an authorisation of the payment stating that that the participants had acted in good faith.[30] In Re L Hedley J accepted that the payments went beyond reasonable expenses, yet they were still authorised.[31] More recent cases have involved very high amounts; Re W involved a surrogacy arrangement in the US which included a payment of sums totalling $38,500.[32]

18 Kathy Marks, "Baby Gammy: Australian father who abandoned Down syndrome surrogate child now tries to access funds donated for his care" (*Independent, 20 May 2015*) <http://www.independent.co.uk/news/world/australasia/baby-gammy australian-father-who-abandoned-down-syndrome-surrogate-child-now-tries-to-access-funds-10261916.html> accessed 24 November

19 Emily Jackson, Regulating Reproduction: Law, Technology and Autonomy (Hart Publishing, 2001) 308

20 Kirsty Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements" (2010) 22(4) CFLQ 449, 465

21 See Kirsty Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements" (2010) 22(4) CFLQ 449, 465

22 Surrogacy Arrangements Act 1985, s.2(2)

23 HFEA 2008, s.54(8)

24 *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (HMSO, London 1998), para 5.3

25 *J v G* [2013] EWHC 1432 (Fam), (2014) 1 FLR 297

26 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) [18]

27 ibid para [24]

28 ibid para [20]

29 *Re S (Parental Order)* [2009] EWHC 2977 (Fam)

30 *Re S (Parental Order)* [2009] EWHC 2977 (Fam)

31 *Re L (A minor)* [2010] EWHC 3146 (Fam) [7]

32 *Re W (children: surrogacy, parental orders)* [2013] EWHC 3570 (Fam), [2013] All ER (D) 283 (Nov)

In Re C[33] and *CC v DD*,[34] £31,500 and $35,780 were paid to the surrogate mothers respectively. In all these cases the payments were authorised. What this means is that we have the existence of complex and confusing law[35] where judges, through sensible use of their discretion to avoid pungent situations, are in effect changing surrogacy policies.

Yet, such a change of policy is unavoidable. The most acute problem is that the prohibition is unenforceable. As far back as the Brazier Review it was duly noted that the only way of enforcing said prohibition was through the refusal of a parental order.[36] However this consequence is never resorted to as it would compromise the welfare of the child; this would contradict the court's obligation to prioritise the welfare of the child.[37] As Hedley J stated: "it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order"[38]. This same line of thought was followed in the judgment in *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam) [10]. The reality is the holding of the welfare of the child in such a prominent position has in effect "downgraded" the public policy ban on commercial surrogacy[39].

Regulation

Surrogacy contracts, regardless as to where they were agreed, cannot be enforced under UK law: "No surrogacy arrangement is enforceable by or against any of the persons making it".

Regulation in the UK differs depending on whether it is a full or partial surrogacy. In the case of a full surrogacy, it is covered by the regulations of the Human Fertilisation and Embryology Act 1990 because it involves IVF; the child isn't genetically the surrogate's. The Human Fertilisation and Embryology Act 1990 strictly regulates assisted reproduction, but it was not made with surrogacy specifically in mind. The HFEA 1990 and the Code of Practice set out specific and detailed requirements such as mandatory counselling. Partial surrogacy is not often covered by these requirements. Given the vulnerability of the surrogate and ethical issues, the lack of strict, tailored regulation is problematic; it offers insufficient protection to the parties and leaves to the door open for exploitation

Proposals

1. Parentage

We propose that the post-birth parental order system be reformed to allow for a more efficient response in the majority of surrogacy cases, where there is no disagreement and the baby is handed over to the intended parents. Altering parentage rules with a pre-birth non-binding order would help improve the process and prevent children being left in legal limbo, where the carers of the child lack the legal rights pertaining to parentage.[40]

33 *Re C (a child) (parental order: surrogacy arrangement)* [2013] EWHC 2408 (Fam), [2014] 1 FLR 757

34 *CC v DD* [2014] EWHC 1307 (Fam)

35 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?"

36 *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (HMSO, London 1998), para 4.2

37 *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam) [9]

38 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 [24]

39 International Surrogacy: Payments, Public Policy and Media Hype by Natalie Gamble and Louisa Ghevaert,, Gamble and Ghevaert LLP (2011)

40 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

This would allow the intending parents to be registered as the legal parents when the agreement runs smoothly, but does not bind if there are disputes after the birth; thus, it takes into account the emotional impact of gestation. Moreover, the previous failure to recognise the intending parents as the legal parents without a parental order reflects a disapproval of surrogacy.[41] As noted above, our consultation revealed that this is no longer society's belief: 86% of our respondents thought surrogacy should be allowed, not discouraged or prohibited.

Secondly, if the first proposal is not accepted, we recommend that the criteria contained in section 54[42] (parental orders) should be altered. In particular, we recommend that the six month time restriction[43] and requirement for "two persons who are living as partners in an enduring family relationship"[44] be removed. This would allow intending parents to claim legal rights, regardless of the delay. Such reform also better reflects the reality of the situation and protects the child's welfare.

2. Enforceability

In our consultation, 59% of respondents thought that intending parents should be able to get back any money paid to the surrogate and damages for financial loss, so they are not left in a worse financial position, alongside the emotional turmoil. 36% felt that intending parents should get back any money paid to the surrogate and only a mere 2% no money at all. Evidently, this shows that unenforceability is not a position favoured by the public and could be considered unjust and inequitable due to reliance on the arrangement and expectations.

An enforceable contract could overcome this and enable parties to safely rely on the agreement in line with their expectations through the availability of court remedies. An ethical concern is that a woman cannot fully consent to bear a child for someone else, as she cannot know whether she will want to hand over the child at birth due to the hormonal changes that she is suffering; hence, we do not propose enforcement through specific performance, which could also conflict with the paramountcy of the welfare of the child under the current system. The issue of the child can remain decided on its welfare, whilst the finances can be enforced so that if the surrogate breaches the agreement, she would have to repay to the intending parents any money paid to her. This could also go further so that she also has to repay for any other financial losses that the intending parents suffered as a result of her refusal to stick to the agreement. This approach will offer protection to all parties, preventing exploitation: if the intending parents change their mind and the surrogate is left with the baby, she could claim financial damages from the intending parents, such for the expense of raising a child she had not planned to care for. Meanwhile, if the surrogate changes her mind, as stated above, they can claim for damages from the surrogate to prevent them being out of pocket. This might lead to less intending parents going abroad for surrogacy and more surrogacy taking place within the UK as both parties are now protected.

Furthermore, enforcement of finances is important as it can cover protection to either party in the case of an unfortunate event, for example, if the surrogate miscarries or other events which she could not have prevented. This is demonstrative of how enforceability prevents exploitation, as she would still have to be paid.

3. Commercialisation

We recommend that the law accepts the reality of the nature of surrogacy in the UK as not purely altruistic.[45] In addition to filling the gaps between theory and practice, allowing commercial payments would be very rational in the sense that it would remove the aspect of s.54 that is almost impossible to enforce. The seemingly unenforceable nature of the current law barring commercial payments shows that some revision is in order.

41 Kirsty Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements" (2010) 22(4) CFLQ 449, 453

42 HFEA 2008, s.54

43 HFEA 2008, s54(3)

44 HFEA 2008, s54(2)(c)

45 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

We have carefully weighed opposition to commercial surrogacy. It was noted in the Warnock Report,[46] and even the Brazier Review,[47] that the main rationale for banning commercial payments was the belief that the surrogate and/or the intending parents could be exploited. Conversely it can be argued that limiting payment to surrogates so drastically could in itself be exploitation.[48] This point is also contemplated in the Brazier Review: "Payment for their services does not make people into a mere means: on the contrary lack of payment (as in slavery or breadline wages) may be much more exploitative.... Payment does not of itself necessarily constitute exploitation."[49] This line of thought seems reasonable enough but it is followed with a contrary view that payment can mean exploitation if "it constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict".[50] However it is submitted that effective regulation can counter this potential cost. Furthermore, commercial payments are authorised with the judgment that they do not overbear the will of the surrogate as seen in Re C:

"I am entirely satisfied in this case that the sums which were paid were not disproportionate to the reasonable expenses. They did not overbear the will of the surrogate and were not of such a level to be an affront to public policy. They were payments permitted in the jurisdiction in which they were made, and are not too dissimilar to payments made in similar cases."[51]

In this case a sum of £31,500 had been paid. In a case where some of the sum paid to the surrogate was intended by the surrogate to be used as a deposit for a flat "in a property economy not dissimilar to that then prevailing in this country"[52] the judgment still concluded the applicants acted "in good faith and that no advantage was taken (or sought to be taken) of the surrogate mother who was herself a woman of mature discretion." Case law provides various examples of commercial surrogacy with high- level payments not regarded as exploitative. This supports our belief that commercial payments should not be prohibited.

Furthermore it should be acknowledged that the donors of gametes are allowed under HFEA direction to receive a fee termed "compensation".[53] It could then be argued that forbidding compensation in surrogacy, another form of assisted reproduction is unjust.[54]

There is still the opinion that commercial payment would most definitely lead to exploitation of the surrogate. This is reflected in the results of our consultation which showed 60% of our respondents favoured only reasonable expenses paid to the surrogate and only 35% were of the view that a surrogate should be able to receive payments beyond reasonable expenses, as much as the intending parent see fit. Comments like "human trafficking would occur if commercial payment were allowed" showed a lack of understanding of surrogacy, regulation and its practice. Case law evidences that commercial payments are constantly being made and yet exploitation has never been the consequence of commercial payments. It should be noted that commercial payments are allowed and have carried on without dire consequence in other countries where it can be said there is higher risk of exploitation due to the levels of poverty.[55]

46 *Committee of Enquiry into Human Fertilisation and Embryology, Report* (Cmnd 9314, HMSO, London 1984) para 8.17 and 8.18

47 *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (HMSO, London 1998), para 4.25

48 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

49 *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (HMSO, London 1998), para 4.23, 4.24

50 ibid 4.25

51 *Re C (A Child)* [2013] EWHC 2408 (Fam) [17]

52 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) [18]

53 HFEA Guidance, Chapter 13 - Payment to Donors: <http://www.hfea.gov.uk/docs/8th_Code_of_Practice_Upto102013.pdf> accessed 25 November 2015

54 See Kirsty Horsey and Sally Sheldon, "Still hazy after all these years: the law regulating surrogacy" (2012) 20 Med.L.Rev. 67, 80

55 Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

In considering the existence of profit making agencies that commercial surrogacy can include, we arrived at the conclusion that law on this should remain the same. The group was split on this issue, thus this is a compromise reached. Analysis of commercial surrogacy had seen division within the group with some against the legalisation of commercial payments for moral and ethical reasons. As such a compromise was reached allowing for lift on the ban of commercial payments but preventing third party profit-making. Support for this recommendation can be found in our consultation which saw 67% of its participants opt for agencies organising surrogacy arrangements to be unpaid for their services. Non-profit surrogacy agencies like COTS and Brilliant Beginnings already exist which aim to assist as best as they can with the delicate process of surrogacy. It can be argued that preventing agencies from operating on a paid basis can limit the quality of services they are able to provide leaving agencies with limited resources to act in the words of Macfarlane J as "well meaning amateurs".[56] However, one can counter this with appreciation of the reforms introduced by the Human Fertilisation and Embryology Act 2008, which allow non-profit agencies to obtain payments to recover costs derived from the facilitation of a surrogacy arrangement.[57] A non-profit organisation does not necessarily mean poor services will be rendered.

Reform of the law of surrogacy with respect to an end to the prohibition of commercial payments would be desirable. It would not only clarify the law and fill in the gaps between theory and practice, but would in itself be progress in an area of law seemingly untouched for many years and in need of progression. Our compromise on commercial surrogacy allowing for commercial payment but forbidding profit-making agencies has the benefit of breaking down complex law while carefully appreciating the moral and ethical issues surrounding surrogacy, especially with regards to public opinion. We believe this proposal, should it be the accepted, will initiate positive implications in case law as judges would no longer face the conflict of authorising commercial payments and pave the way for future reforms with respect to commercial surrogacy in the best interest of the public and the state.

4. Regulations

Surrogacy requires further regulation. Surrogacy is a "practice involving social and ethical questions of a different kind and order to other forms of assisted conception".[58] Our pre-consultation and consultation have revealed almost uncontested support for greater regulation of surrogacy to enhance the overall success of the process, reduce litigation and protect the welfare of the child.

After gathering results from our questionnaire, we can see that there were three main regulations that the public were in favour of. 65% responded that the surrogate should receive counselling. Counselling will offer the surrogate a better understanding of what is going to happen as she progresses through the pregnancy. The counsellor will also help the surrogate to overcome personal, social and psychological issues. Another regulation that the public were in favour of was psychological screening. This reflects upon the surrogate's ability to actually undertake the whole process and be able to give the baby away at the end. It also ensures that the surrogate knows what she is getting herself into and makes sure that she is emotionally and mentally prepared for the process. According to our survey results, 75% of the public agreed to having psychological screening. In addition, 90% of the public agreed to having health checks in order to make sure that the surrogate is physically prepared for having a child. We also propose as a recommendation of good practice and not a requirement, that the surrogate should have had her first child and completed her family, in order that she be fully informed of the process of childbirth and not be prevented from completing her family due to complications as a result of the pregnancy.

56 *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814

57 HFEA 2008, s.59

58 *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* Cm 4068 (HMSO, London 1998), para 7.9

Impact Assessment

Our proposals should enhance the welfare of the child. Not only do our proposals significantly reduce occurrences of children being left in legal limbo, but they also prevent court time being wasted when parties are all in agreement, making the process more efficient.[59] This will also positively impact intending parents, as their legal relationship with the child can be recognised sooner and with less hurdles. The proposals allow more freedom for both parties by increasing the certainty and protection through a formal legal agreement. Both the intending parents and the surrogate will benefit from these reforms, through reducing the risk, emotional turmoil and financial loss which would otherwise be evident in the current law. Surrogates will further benefit under the new proposals, as allowing compensation to be paid gives greater recognition to her labour.These proposals will also tackle the issues of stateless children/legal orphans and surrogacy tourism. Although agencies may encounter difficulties in attracting the relevant expertise whilst operating on a non-profit basis, this is an impact of the current law rather than our proposal.

Conclusion

At present, the law does not respond effectively to surrogacy agreements where all parties remain in agreement and is carried out as planned. As such, essential court time is wasted and the child can be left in legal limbo. We recommend that hurdles are crossed prior to birth through a non-binding pre-birth order, which will allow the intending parents to be registered as the legal parents where the agreement goes to plan. This should allow for single parents; the prohibition of this is based on outdated ideas and is out of step with public opinion.

Current legislation is outdated; it fails to accommodate the new modern demands of the public and the move from a nuclear family - or as Donovan calls it, the "cornflakes" ideal-[60] to other family forms. The information presented in this report corresponds well with the public opinion on surrogacy. The proposals aim to prevent the current time-consuming post-birth issues, create an efficient process without the need of court intervention in most cases and, importantly, protect the welfare of the child.

59 See Melissa Elsworth and Natalie Gamble, "Are contracts and pre-birth orders the way forward for UK surrogacy?" [2015] IFL 157

60 K O'Donovan, *Family Law Matters* (Pluto Press, 1993), 30

Part 2: Commercial & Common Law

Recommendations on the laws governing the rights of consumers.

Compiled with thanks to:

Elisabetta Sciallis, UK European Consumer Centre
Kate Wellington, Which?
Paul McGrath, Temple Garden Chambers
Shervin Nahid, Competition and Markets Authority
Thomas Samuels, Gough Square Chambers

Introduction

Consumer: ***n. a person who purchases goods and/or services for personal use.***

Consumer rights are an integral part of every transaction between a buyer and a seller; not only do they incorporate the rights and responsibilities of a consumer, from the invitation to treat to the point of sale, they also underscore the obligations on businesses for best practice to take place. As a research group we were surprised by how broad consumer law is. Buying and selling online, over the phone, advertising, supermarket pricing, purchasing with credit, package holidays, and where both parties stand when something goes wrong are just some of the issues we discussed.

The Consumer Rights Act 2015 came into force on 1 October 2015. As a result the law is clearer and easier to understand, with the hope that consumers can buy, and businesses can sell, with confidence. The Consumer Rights Act 2015 consolidates the Sale of Goods Act, Unfair Terms in Consumer Contracts Regulations and the Supply of Goods and Services Act to create a fairly comprehensive and easily-accessible piece of legislation. This protects the interests of businesses whilst safeguarding consumers from exploitation. However, according to the recent Which? supercomplaint: "with £115 billion spent on groceries and toiletries in 2013, consumers could be collectively losing out to the tune of hundreds of millions of pounds, even if only a very small proportion of offers are misleading."[61] It is therefore imperative that consumers are protected to the fullest extent possible.

To remedy some of the issues we have identified, we propose four main recommendations, namely:

1. Making chargeback mandatory

That the protection provided by s75 of the Consumer Credit Act 1974 be extended to debit cards, thereby making the currently optional 'chargeback' system mandatory. The system would apply to all banks and building societies but these financial institutions would reserve the same protection they currently have, meaning that claims can be rejected, and banks retain their immunity (i.e. there is no joint liability).

2. Supermarkets - unit pricing

That supermarkets be required to make unit prices clearer for consumers to understand and clearly visible to consumers. Units should be signposted with a standardised unit measurement for 'per unit' prices.

61 https://press.which.co.uk/whichpressreleases/which-super-complains-about-misleading-supermarket-pricing-practices/ Accessed: 22 November 2015

3. Supply of terms and conditions

That, when businesses opt to store terms and conditions on their website rather than email or post them to the consumer, the terms and conditions are stored, unchanged, in an accessible format for a period of at least six months.

4. Consumer education

That businesses, with a particular focus on large corporations and financial institutions, work alongside the Government to provide consumers with information concerning their consumer rights and responsibilities. Where possible, it is heavily recommended that consumer and business advocacy groups should assist in the creation of a standardised information pack. It should be provided in a straight-forward, concise and accessible form.

Recommendations and Legislative Proposals

1. Making Chargeback Mandatory

The current law, s75 of the Consumer Credit Act, states that credit providers (namely banks and financial institutions) are jointly and severally liable in the event that a consumer has a claim for breach of contract and/or misrepresentation against a supplier. This protection applies in respect of commercial agreements for items valued between £100 - £30,000.

Recommendation

We recommend that the protection provided under s75 Consumer Credit Act 1974 should be extended to debit card payments. Debit card payments comprise £2.3bn of the £3bn payments made by consumers using credit and/or debit cards[62]. Whilst we acknowledge the wide reaching impact of this legislative reform, it is not viable for only those payments made by credit card to be afforded such protection.

Impact

Many banks already participate in a voluntary 'chargeback' system of their own volition, often as a marketing strategy or as part of their responsible banking policies. We recommend that the statutory protection should be extended to debit card payments in order to provide consumers with certainty rather than this protection being left to a bank's discretion.

Over two thirds of the public consultation agreed that this protection should be extended to PayPal and debit card payments. Notwithstanding, we recommend that this statutory protection should extend solely to debit payments, as PayPal operates an effective private dispute resolution system.

We submit that this recommendation would result in an increase of consumer confidence. In the long-term this will contribute to the UK's economy, encouraging consumers to spend more. We further submit that this will outweigh any short-term economic disadvantage to financial institutions, particularly given that many institutions already provide this remedy on a discretionary basis.

Extending s75 of the Consumer Credit Act 1974

We propose inserting a further section into Chapter 4 of the Consumer Rights Act 2015 as follows, which will have the effect of repealing s.75 of the Consumer Credit Act 1974.

Section 57A

- Any claim against a seller who is in breach of contract or who has misrepresented a contract to a buyer which is financed by credit card, shall be jointly and severally enforceable against the organisation which provided the credit.

62 http://uk.creditcards.com/credit-card-news/uk-britain-credit-debit-card-statistics-international.php#sup2 Accessed: 22 November 2015

- Any claim against a seller who is in breach of contract or who has misrepresented a contract to a buyer which is financed by debit card, shall be jointly and severally enforceable against the debit card provider.
- Credit and debit card providers are obliged to undertake a reasonable investigation into the alleged breach of contract or misrepresentation.
- Customer dissatisfaction shall not give rise to an action under subsections (1) and (2).
- The consumer must have used reasonable endeavours to resolve any dispute with the seller before they can rely on subsections (1) and (2).
- The goods or services the consumer has paid for should be valued between £100 and £30,000 for a claim under this section 57A to arise.
- This section 57A shall only apply to claims made within three months of the relevant transaction.
- This section 57A shall apply to transactions made within England and Wales and transactions for goods and/or services purchased in any manner for delivery to England and Wales from overseas.

2. Supermarkets - unit pricing

The current law states that retailers ought to display in a way which is unambiguous, easily identifiable and clearly legible: the selling price in sterling (inclusive of VAT and all other taxes) and, where appropriate, the unit price.[63] We submit that this is not specific enough and therefore propose that there should be standardised and specific metric measures to avoid confusion for consumers. For many products, the units given in the unit price is fairly consistent across supermarkets, but for others the unit pricing differs from retailer to retailer.

Our public consultation asked "when shopping in a supermarket, do you compare unit prices and rates with other grocery providers?" to which 68% of participants answered occasionally, rarely or never; although 69% stated that they occasionally, often or always felt confused by supermarket pricing.

Consequently, we suggest that the current unit pricing system is not often utilised by consumers because of its inconsistent implementation. We suggest that an effective and consistent system of unit pricing would reduce consumer confusion and we seek to raise the number of people using unit pricing as a method of price comparison.

However, we recognise it would be difficult to put this recommendation into statute, as many different products would need differing units of metric measurement, and this (if it was put into law) would be very difficult to enforce due to the size of supermarkets and the number of products that they have on sale. Our consultations results also suggest that legislating on this issue may not be strictly necessary.

Recommendation

Given the difficulties in legislating we are proposing a best practice recommendation for supermarkets that standardises unit pricing on products. This would include specific recommendations about the units that these unit prices should be in to aid consumers in price comparison.

We also recommend a standard typeface and font size for the unit prices in products of Calibri Body and size 12. This will make unit prices easily recognisable for consumers as they will look the same across all supermarkets.

The cost for supermarkets to implement this recommendation should not be significant, though many unit price labels will have to be altered initially to comply, once the protocol is in place these costs would not continue.

63 Price Marking Order 2004, implementing Directive 98/6/EC

3. Supply of Terms and Conditions

The Consumer Rights Directive 2011 provides that a seller must provide terms and conditions to a consumer in a durable medium, such as paper or email, or any other medium that allows information to be addressed to the recipient, enables the recipient to store the information in a way accessible for future reference for a period of time adequate for the purposes of the information and allows for the unchanged reproduction of the data stored.[64]

We submit that "a period of time adequate for the purposes of the information" is insufficient to protect consumers as, although consumers have access to the supplier's terms at the point of sale, they may not have access to them at the point of problem. As a result a consumer may not have access to the information they need to enforce their rights at the point that they need to do so.

Recommendation

We propose that companies, if they do not email or post a copy of their terms of business to the consumer, should maintain a copy of the terms and conditions of the transaction as they were at the time of purchase for no fewer than six months after the purchase of their product/service. This will go beyond what is mandated by the directive and will help clarify the law to consumers. In addition it will reassure them that their terms and conditions will be available for the duration of the period during which the customer does not have to prove a product was faulty to request a repair or replacement.

1. Making Chargeback Mandatory

The current law, s75 of the Consumer Credit Act, states that credit providers (namely banks and financial institutions) are jointly and severally liable in the event that a consumer has a claim for breach of contract and/or misrepresentation against a supplier. This protection applies in respect of commercial agreements for items valued between £100 - £30,000.

Recommendation

We recommend that the protection provided under s75 Consumer Credit Act 1974 should be extended to debit card payments. Debit card payments comprise £2.3bn of the £3bn payments made by consumers using credit and/or debit cards[62]. Whilst we acknowledge the wide reaching impact of this legislative reform, it is not viable for only those payments made by credit card to be afforded such protection.

Impact

We do not think that there are disproportionate costs for the majority of companies, particularly larger ones, in displaying terms and conditions for a long period of time, or emailing consumers, a practice many large businesses currently do. Smaller businesses may experience more substantial costs, however we submit that although there will be a initial investment to set up a system for compliance, after implementation there will not be an excessive burden on companies as they have the choice to send by email. Further consultation should be undertaken to establish a minimum size of business to which this recommendation would apply to ensure that small businesses are not disproportionately affected.

64 2011/83/EU

Provision of Terms and Conditions

We propose inserting a further section into the Consumer Rights Act 2015 as follows:

Section 19A

1. An online seller must provide a copy of their terms and conditions to a consumer in a durable medium:
    a. such as paper or email or any other medium that allows information to be addressed to the recipient; and
    b. which enables the recipient to store the information in a way accessible for future reference for a period of no less than 6 months from the date of purchase; and
    c. which allows for the unchanged reproduction of the data stored.
2. Online sellers can decide in which medium they provide terms and conditions to the consumer.
3. Options for provision include but are not limited to:
    a. email; or
    b. paper; or
    c. display on the seller's website.

4. Consumer Education

Consumer education can be defined as assistance to an individual through guidance and provision of information, that enables individuals to act as confident and informed consumers. Consumers must feel equipped to make purchases and address any issues which may arise. Currently there is no law in place to facilitate consumer education, yet there is a pressing need for increased awareness. 60% of respondents to our public consultation stated they did not feel very well informed or informed at all about their consumer rights.

We do not believe that increased consumer knowledge would be best achieved by placing this obligation on a statutory footing, due to the complexity of issues and the prescriptive legislation that would be required. We recommend that the following is adopted by industry groups, trade associations and financial institutions as best practice.

We recommend that Government and corporations work alongside advocacy groups to produce information that makes clear what a customer's rights are after purchasing goods or services. Our research and consultation has suggested that consumers become aware of their own knowledge, or the lack of it, at the point of problem with a good or service, not at the point of purchase.

We recommend that for products that are at a significant cost, and are viewed by consumers as significant purchases (such as cars or expensive techT) businesses should make more effort to ensure consumers understand their rights. One option would be for sellers to provide a verbal explanation of the consumer's rights at the point of sale. As business policies are routinely covered by sales teams this should add little to the burden of a business selling such products.

The main source of information about a consumer's rights specific to a transaction are the terms and conditions of sale. These can be unclear and incomprehensible to consumers. If best practice is followed terms and conditions ought to create awareness of a consumer's rights. This could be achieved by a company highlighting the key terms to a consumer that they are likely to be concerned with, such as a warranty or right to a refund.

Industry must remain mindful that methods, habits and types of consumption are ever-changing and consequently as is consumer law. Individuals require up-to-date information to be consistently provided across their life as a consumer.

Impact

Whilst there is a cost to external stakeholders (i.e. advocacy groups, businesses, Government) of time and money, their investment will arguably benefit businesses and wider society, as individuals with increased confidence are more ready to act as consumers and contribute to steady economic growth as a result.

From a consumer's perspective a sale may take longer, especially a contractual one if rights are being explained, and this arguably runs the risk of making these rights even more of a procedural annoyance. As such, an education programme detailed in statute may be ill-advised as it would not give businesses and other groups the flexibility to undertake education they think could have the most impact.

Consumers will ultimately be more informed of their rights and as a result, will be able to shop economically and deal with any issues that arise from purchasing a good or service.

Part 3: Public Law

Recommendations on the laws governing the operation of electoral law.

Compiled with thanks to:

Dr Caroline Morris
Professor Bob Watt

For our report on electoral law, we decided to investigate the electoral offences contained in the Representation of the People Act 1983. Finally we looked into the issues around who has the right to vote. We felt the law needed reform and we particularly want to see change in the following:

Spiritual Injury

Introduction

The term 'Spiritual Injury' is a term that continues to confuse as to its meaning and application. We concluded it to mean inflicting religious or spiritual abuse. Despite this, currently there is no differentiation on whether an issue is political or religious. This therefore results in people arguing it is their right to say whatever they want, with the law being too vague and hard to exemplify when one has broken the law. We have conducted a consultation and research to revise the law so it fits 21st century society.

We are proposing that the term 'spiritual injury' to be replaced with three different terms; 'Religious Abuse', 'Religious Manipulation' and 'Religious Coercion' under the heading 'Religious Abuse and Manipulation' as the current name is too ambiguous and does not epitomise what a defendant has done wrong. In addition, a new law should be put in place by the government which would make it tougher on individuals who commit 'religious manipulation and abuse.' 'Religious manipulation and abuse' would cover many aspects regarding religion being used to make a person to vote a certain way or refrain, making it is easier to convict a person without their offence being vague.

What is the Current Law?

M'Naghten Rules

The common law defence of insanity was first set out in the case of M'Naghten [1843] . For the defence to be successful, "it must be clearly proved that at the time of committing of the act, the party accused was acting under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know that it was wrong".

115 Undue influence.

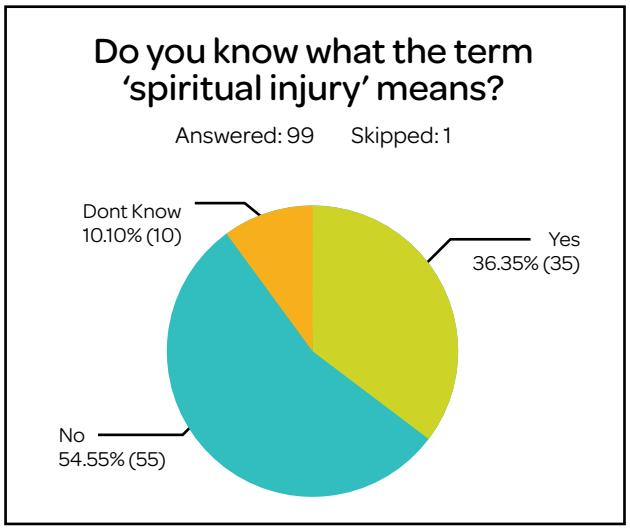
1. A person shall be guilty of a corrupt practice if he is guilty of undue influence.
2. A person shall be guilty of undue influence—
    a. if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting

Proposals

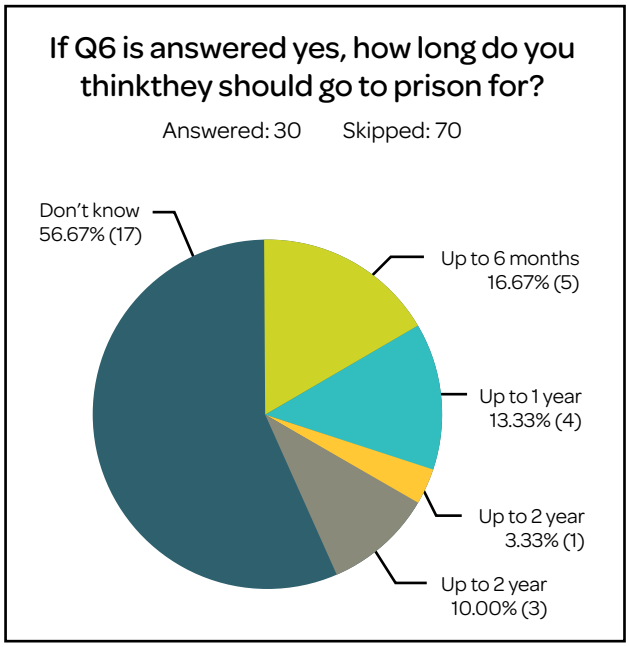
On the basis of our research and findings we propose that the following ought to be incorporated into a revised Representation of the Peoples Act:

1. There must be a clear definition of "spiritual injury"

The current definition is confusing as to its meaning and application. The majority of people in our consultation do not understanding the meaning (54%), therefore we have revised the name to 'Spiritual abuse and manipulation."

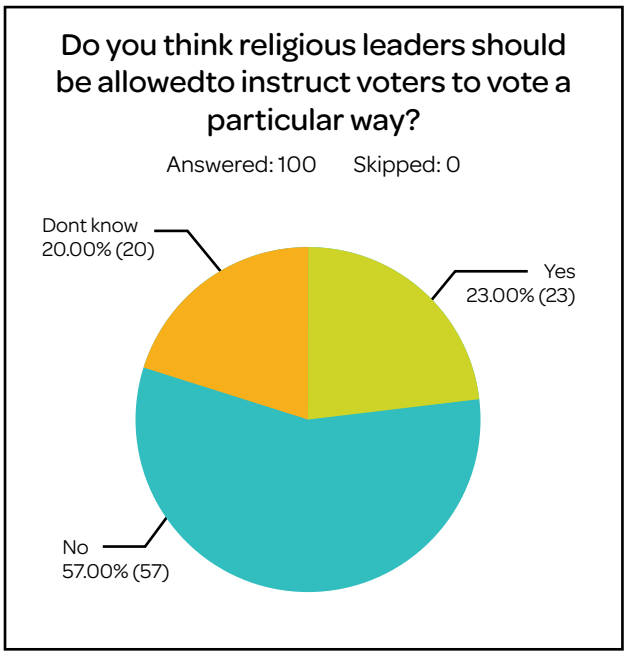


2. Our recommendations are that the law be changed so that people such as former Labour MP Phil Woolas be sentenced for a longer periods of time, such as a minimum of 2 years in jail and up to 5 years if the spiritual injury is of a large scale or the candidate has performed the act before hand. Our findings from the consultation are inconclusive, however the period in which they should be imprisoned is up for debate.

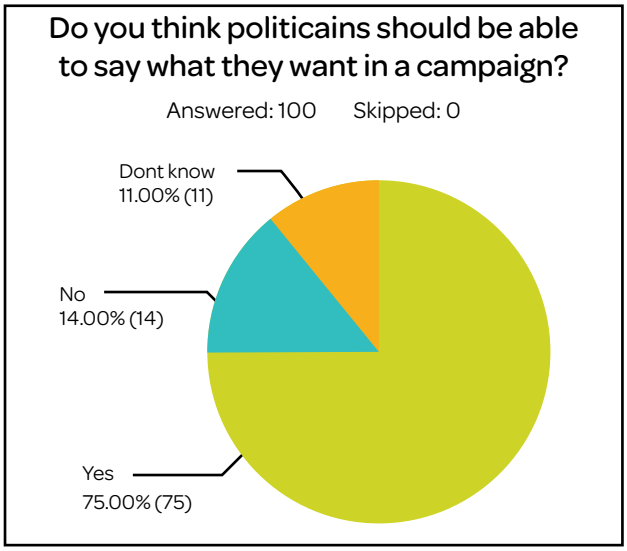


3. Candidates found guilty should have a life time ban from running in any elections.

4. The conviction of religious leaders in a political campaign whether it directly or indirectly makes or prevents people from voting. This view is exemplified by our consultation in which 57% of respondents thought religious leaders should not be instructing voters to vote a particular way. This is clear from the open letter sent by Imams supporting Lutfur Rahman, the Imams coerced the Muslim electorate by saying it was "un-Islamic" to not vote for Mr Rahman and to one person they would "not [be] a good Muslim."



5. There must be leeway for politicians to say what they feel is best for their campaign. As long as it does not break the new law 'religious manipulation and abuse.' Our consultation supports our recommendation with 75% of agreeing.



Conclusion

We believe that the information presented in this report will make it clearer and easier to define what a 'spiritual injury' entails due to the name being changed to 'spiritual abuse and manipulation.' Also, with the terms 'religious abuse', 'religious coercion' and 'religious manipulation' being defined under the revised section in the Representation of the Peoples Act.

In addition, with life time bans being given our democracy will be stronger, with those who break the law being stripped of their right to stand in any election.

As exciting and fun political campaigning can be, there is a line that must be drawn and legislation that makes it easier to understand is better as it benefits society and the whole electorate.

Treating

1. Making Chargeback Mandatory

The law against treating prevents any electoral candidate furthering their cause via unjust means, treating is an offence of its own. Therefore, we are writing about this because we have found evidence from independent cases where candidates have been convicted of treating when in actual fact they were not. Also we believe that the line between what is treating and what is not is very blurred and it needs to be made clearer about the actual definition of treating.

Current Law:

Representation of the People Act 1983

114 Treating

1. A person shall be guilty of a corrupt practice if he is guilty of treating.
2. A person shall be guilty of treating if he corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person–
    a. (a) for the purpose of corruptly influencing that person or any other person to vote or refrain from voting; or
    b. (b) on account of that person or any other person having voted or refrained from voting, or being about to vote or refrain from voting.
3. Every elector or his proxy who corruptly accepts or takes any such meat, drink, entertainment or provision shall also be guilty of treating.

Reforms

We have proposed a list of improvements in areas of this Act that we believe have some flaws. These include:

Too repetitive/long- The overall Act needs to be shortened as there are too many terms that mean the same thing in the Act and this adds unnecessary detail to the Act, it also makes it confusing to interpret and this can lead to some cases having a blurred line between what the Act is saying and what it actually means.

Too dated- Because the Act has not been altered since it was rewritten in 1983 many of the offences cannot be committed in the modern society we live in and many of the words are dated and cannot be applied into today's society.

Section 114 (2) (a) of the Act states that a candidate may be found guilty if his proxy is found guilty of treating on the candidate's behalf. We believe this is a part of the Act that needs to be changed because anyone could simply say they did something on the behalf of someone else without needing proof, therefore we believe that the act should be changed so that there has to be proof of the candidate asking one of his/her proxy to commit the offence of treating on their behalf. If there is no proof found of this then the person who claims to have committed treating on behalf of the candidate should be found guilty of the offence. Because this section of the Act is too repetitive and needs to be more specific.

In conclusion, we agree with the law, however, some aspects of it need to be reformed as it hasn't been changed since the Victorian times. As the law is very important and effective in enforcing a fair election process for all the candidates, being modernized is the only main change to be made to this law in order for it to become up to date to our society.

False Statements as to Candidates

A false statement is defined depending on the context in which it is used. The term 'False statements as to candidates' relates to individuals who make and publish statements that are usually known to be incorrect towards competing candidates which affects the outcome of the results as the information published is used to mislead. A recent example of this was seen during the 2015 general elections when Alistair Carmichael leaked a 'confidential' memo which claimed that Nicola Sturgeon had allegedly told the French Ambassador to the UK, Sylvie Bermann, that she would prefer David Cameron, the leader of the Conservatives, to remain Prime minister as she believed it would enable her to fulfil her quest for Scottish independence. After a thorough inquiry, Mr Carmichael eventually admitted that his claim was in fact an error of judgement and 'the details of the account are not correct'. During this supposed 'scandal' questions circulated as to whether the memo, true or false, was a representation of Mrs Sturgeon's personal conduct or political conduct. Overall this matter highlights the issue that there is no differentiation between personal and public interests. This is essentially a problem as it challenges people's right to freedom of speech as well as affecting the integrity of a person.

Current Legislation

The following outlines the current legislations on false statements as to candidates as of 2015:

106 - False statements as to candidates.

1. A person who, or any director of anybody or association corporate which—

    a. before or during an election,

    b. for the purpose of affecting the return of any candidate at the election, makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice, unless he can show that he had reasonable grounds for believing, and did believe, that statement to be true.

2. A candidate shall not be liable nor shall his election be avoided for any illegal practice under subsection (1) above committed by his agent other than his election agent unless—

    b. it can be shown that the candidate or his election agent has authorised or consented to the committing of the illegal practice by the other agent or has paid for the circulation of the false statement constituting the illegal practice; or

    c. an election court find and report that the election of the candidate was procured or materially assisted in consequence of the making or publishing of such false statements.

3. A person making or publishing any false statement of fact as mentioned above may be restrained by interim or perpetual injunction by the High Court or the county court from any repetition of that false statement or of a false statement of a similar character in relation to the candidate and, for the purpose of granting an interim injunction, prima facie proof of the falsity of the statement shall be sufficient.

Issues with the legislation:

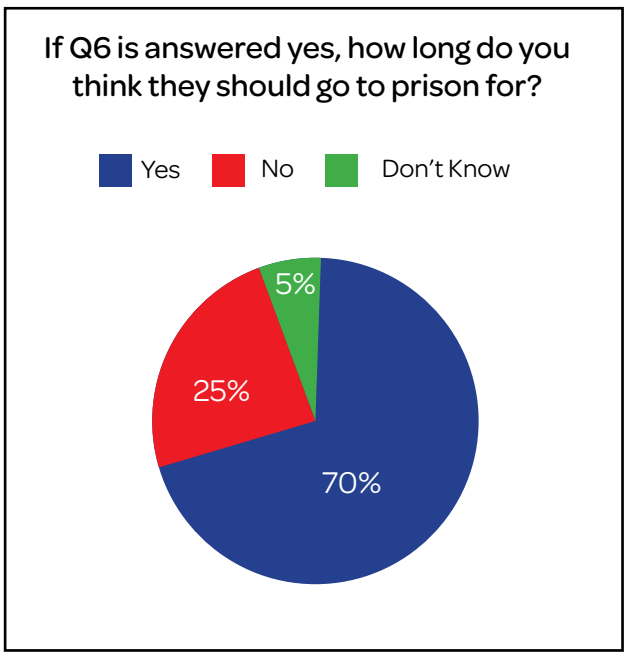
Overall we had three major issues with the legislation of false statements as to candidates:

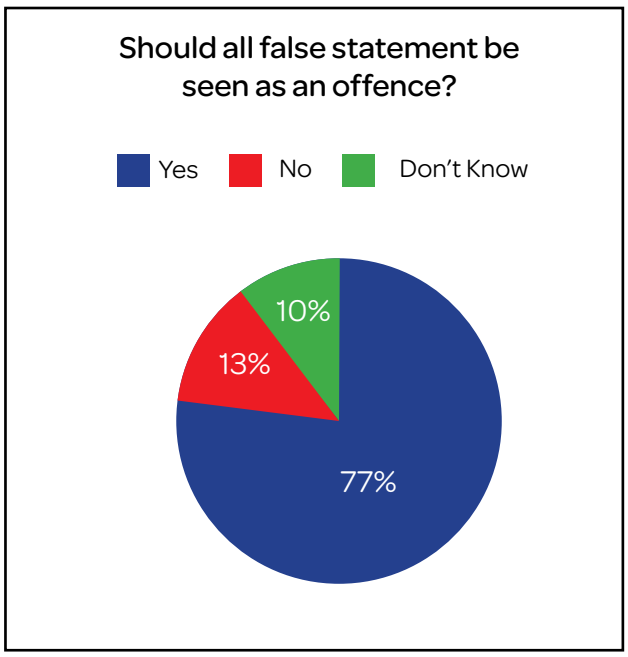
1. The legislation does not specify what falls under 'Political conduct' which therefore makes it difficult to accurately define.
2. The legislation does not consider the outcome of a perpetrator's action in relation to whether it should determine if they are guilty or not.
3. The legislation seems to specifically focus on offences that damage a candidate's personal conduct and character instead of their general character and conduct.

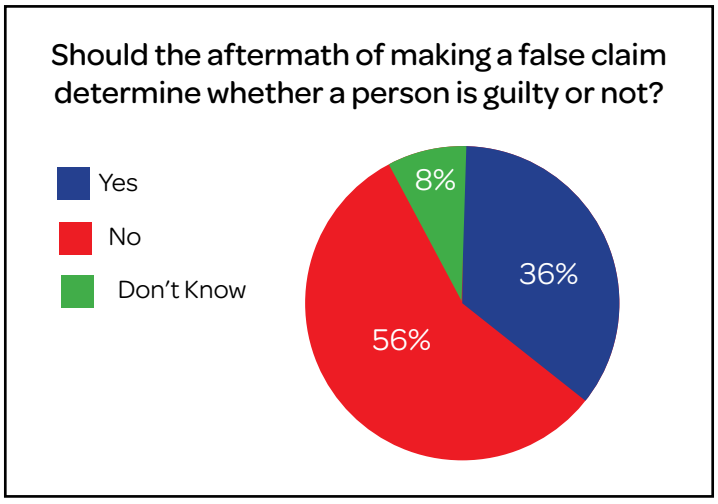
We agreed that these issues were the most important to reform. However we wanted to ensure that our ideas for reforms were in the interest of the public and so carried out a survey.

Survey (Statistics)

In order to accurately weigh people's general opinion on this particular issue, a survey was conducted with questions focusing on the section of 'False statements as to candidates'. 80 respondents took part in the questionnaire: The results are as follows:







Proposals:

We believe our following findings should be incorporated into an updated Representation of the Peoples Act:

1. Personal Conduct vs. Political Conduct:

The People Act 1983 under section 106 which covers 'False statements as to candidates', states that "A person who... makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice...". Our first issue with this section is the focus of personal conduct. It would suggest, therefore, that any false claims made or published against a candidate's political conduct could possibly not be regarded as an offence. However through our findings we have concluded that many people would agree that political conduct is just as significant to ones reputation as is an individual's personal conduct. This is true in the sense that in some cases it would be difficult to distinguish political conduct with personal conduct. In actual fact 70% of the respondents who answered the questionnaire agreed with this statement.

Therefore we propose that:

a. Political conduct should be equally taken into account as is personal conduct when a false statement is made or published.

b. Any false statement, regardless of the type of conduct, which is made or published, should be seen as an offence.

2. Intentions vs. Outcomes:

The section also focuses on the intentions of the perpetrator's/perpetrators' as it stresses that "1) A person who, or any director of anybody or association corporate which—

(b) For the purpose of affecting the return of any candidate at the election

— makes or publishes any false statement of fact in relation to the candidate's personal character or conduct shall be guilty of an illegal practice..." Overall we strongly supported this particular section. Nevertheless it has been agreed that the legalisation should also draw attention to the outcome of a perpetrator's offence. Referring back to our findings it was clear that the majority of the respondents in our survey believed that all those who make or publish a false statement of a candidate during elections should be guilty of an offence regardless of the resulting effect of their action.

Therefore we propose that:

a. Even if there are no major effects of a perpetrator's false claim, if their offence still breaches part (b) of section 106 under false statements as to candidates, they should be found guilty.

b. Therefore the offence of false claims as to candidates should be solely based on the intentions of the perpetrator as they deliberately committed the offence and so should be found guilty of it.

Conclusion

Although the political campaigning process may be a very enthralling yet stressful experience which may push many into very desperate measures; boundaries need to be set and the legislations needs to be updated into an easier and more clarified manuscript. This is to ensure that there is a better understanding of the laws regulating the election campaign. Moreover it will also allow the easier regulation of the behaviour of political parties and people acting on their behalf before and during an election.

Prisoner Voting

Introduction

This section of the report handles the topical issue of prisoner voting. We have analysed the current UK law regarding the issue and have proposed a number of reforms as well as suggestions that we feel take a more fair and democratic approach to the issue than the current "Absolute No" policy.

Current Law

Prisoners serving a custodial sentence do not have the right to vote under UK law. Prisoners on remand are able to vote under the provisions of the Representation of the People Act 2000.

Finally, we wanted to address the issue of who has the right to vote. In our discussions with guest speakers we strongly felt that we needed to discuss the issue of prisoners' right to vote.

In Hirst v United Kingdom, the European Court of Human Rights recently said that national governments cannot "prescribe general, indefinite and automatic deprivation of the right to vote".

Ergo by European ruling countries cannot place blanket bans on prisoner voting.

Our ideas for reform

We propose the following reforms to the current state of law:

1. An individual who has:
    - 4 years or less left on their sentence
    - has been or is being sentenced to a crime in which they serve 4 or less years

will be given the right to vote in the election closest to their release date. We propose these alterations as we feel they are a wholly reasonable approach to the issue. We do not deny that those serving jail time have made a decision which condones the immediate removal of this right but, we feel that by allowing those to vote who will be being released back into society is only fair as they do deserve to have a say in the society into which they are being reinstated.

2. We also propose that the right to or right not to vote is handed down by a judge at the same time as a sentencing. We see this as a potential way of allowing those sentenced who have committed less severe crimes to still be given the right to vote. However, we do see the potential for this addition to the sentence to be exploited by defending barristers, and judges may also not wish to partake in adding such an addition to the traditional sentencing.

3. We propose that there be a separate election for prisoners in which they vote for a minister or parliament to represent them on behalf of the prisoner community. We felt that this may be a reasonable alternative to allowing them to partake in the traditional general election as it still allows the views and opinions of those in prison to be conveyed to Parliament.

Conclusion:

With a prison population of over 85,000, it is simply archaic that these British citizens are refused the right to vote. Britain is the only western European country with a blanket ban on prisoner voting, with only Armenia, Bulgaria, Estonia, Georgia, Hungary and Russia in the Council of Europe imposing similar restrictions. All of these countries are recovering from oppressive leaderships and many still have powerful and quite possibly corrupt governments. As such it is understandable for them to have not yet altered their stance on the matter. However, for the UK to still have a blanket ban is frankly unacceptable.

Moreover voting may make Britons prison population feel like members of society again and if rehabilitation is what the penal system is aiming for, then it seems illogical to deprive prisoners of the vote. Reoffending rates

in the UK are currently sky high and perhaps allowing prisoners to vote would reduce the number of prisoners returning to prison.

Finally, to give prisoners no choice as to the society they are released into is frankly inhumane.

Hopefully by implementing our suggested reforms, these problems would be dealt with. We would also comply with ECHR jurisprudence. Hopefully the reoffending rates would drop also. And finally it is just the right thing to do and as such I would be proud to say I live in a more democratic nation. Cameron, if you really are striving for 'a big society' do the right thing and at least consider our outlined reforms.

Part 4: Criminal Law

Recommendations on the laws governing the operation of insanity law.

Compiled with thanks to:

Anthony Edwards - TV Edwards Solicitors
Carolyn Taylor - TV Edwards Solicitors
David Taylor - Charter Chambers
Georgina Blower - Farringdon Chambers
Julia Krish - Garden Court Chambers

Introduction

Changes to the law on the defences of insanity and automatism have been proposed many times since they were introduced more than 150 years ago but they have never been brought into effect. We studied those defences, their impact on defendants and on the criminal justice system, and have come up with a number of proposals for reform we suggest are urgently needed to modernise the defences and bring them up to date with modern understanding of mental health.

Current Law

M'Naghten Rules

The common law defence of insanity was first set out in the case of M'Naghten [1843][65]. For the defence to be successful, "it must be clearly proved that at the time of committing of the act, the party accused was acting under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know that it was wrong".

Components to the defence:

- Such a defect of reasoning' - that is, a defendant's power of reasoning must be impaired and not temporarily absent
- The defect of reasoning must be caused by a `disease of the mind'
- The `disease' may be organic, such as epilepsy or functional, such as psychotic illness, and may be permanent, transient or intermittent
- `Nature and quality of act he was doing' - i.e he did not know what he was doing
- `He did not know that it was wrong' - i.e legally wrong rather than morally wrong

These became known as the M'Naghten rules. The rules so formulated have been a standard test for criminal liability in relation to mentally disordered defendants in common law jurisdictions ever since. When the test set out by these rules are satisfied, the accused may be found "not guilty by reason of insanity" or "guilty but insane".

65 UKHL J16

Fitness to Plead

The law on insanity also involves "fitness to plead", which is set out in the "Pritchard" test (1836)[66]. According to this test, the accused will be unfit to plead if he is unable to:

- comprehend the course of proceedings on the trial, so as to make a proper defence;
- know that he might challenge any jurors to whom he may object;
- comprehend the evidence; or
- give proper instructions to his legal representatives.

This test indicates that a person can be unfit but sane, and is focused on whether the defendant can understand and reply rationally to allegations, challenge jurors, understand details of the evidence, instruct lawyers and give evidence for themselves if they wish. If the defendant is fit to plead, it doesn't matter that the defendant may act against their own best interest. Loss of memory does not amount to unfitness if otherwise fit at the time of trial.

If the defendant is found to be not fit for trial, there shall be no procedure in the trial due to the special provision made by s37(3) Mental Health Act 1983. However it also allows for a "trial on the facts". This means if the criminal act (or omission) are found to have happened, the court may make a hospital or guardianship order. The defendant can be sentenced to either an absolute discharge, a supervision order or a hospital order with or without restriction.

Defence of Automatism

Automatism is a common law defence that is made out when the defendant has a complete lack of control over his/her actions, and this must not be a result of their own actions. This was illustrated in the early case of *Kay v Butterworth* (1945)[67]. We will examine how automatism compares with the insanity defence further in this report.

Law Commission Report

The Law Commission proposed reform of the law in 1975, followed by a draft bill in 1989; so far, these have both been ignored by successive governments. However, in 2013 the Law Commission has started to undergo review of the law on insanity and have produced a scoping paper. The goal of the review is to put the law of insanity on a statutory footing as well as clarify any common law. Our group agrees with some of these ideas, and will put forth our own proposals for reform.

Problems

Difficulties with the M'Naghten rules:

- 'disease of the mind' is an outdated description of mental health problems
- disposal methods at the time were extremely unfair to defendants
- the wording of the current law stigmatises defendants with mental health problems

a. **The law is outdated and offensive:**

As the law has not been revised since 1843, there are certain problems that have presented themselves. The biggest problem is the wording of the law as it stands. As of right now people with mental disorders are still referred to as "insane" and having a "disease of the mind" according to the law. This is not only offensive but also against the correct medical terms which we now use (i.e. mental disorder/mental illness) and does

66 UKHL J16

67 173 LT 191

not in anyway reflect what doctors or psychiatrists believe or would diagnose a person with. Even though the judges do not use the phrase and apply modern twists, there is no denying that it still comes across in a disrespectful manner to those who do suffer a mental disorder or illness.

a. **The law is outdated and offensive:**

Both internal and external factors apply to the phrase 'disease of the mind', for example, with regards to sleepwalking we know that for some it is completely external to themselves. This disorder is not usually internal as it can be triggered by anything as little as stress. The insanity defence could also be used by those with learning disabilities or epilepsy, however, the term "insane" is just simply inaccurate in describing those disorders. This shows that the wording of the law is too rigid and isn't representative of the wide scope of mental disorders that is presented today . Lord Justice Davis commented in his response to the Law Commission's scoping paper that the distinction between internal and external conditions is "illogical, little short of a disgrace and should be abolished".

c. **Stigma related to the word "insanity":**

We believe the word "insanity" is heavily stigmatised and the defence does not always necessary encourage a lack of discrimination. People tend to view the word with negative connotations, as shown in our survey where 94% of people see the word "insanity" as negative and 88% of people say this would likely affect their decision to use the insanity defence. People tend to not want to associate themselves with the word "insane" for fear of being judged or treated differently. This would therefore affect the number of defences used each year, which as of right now is approximately 30 successful cases per year. This phrase creates a negative image of people with mental disorders and could in fact affect the defendant. This is why we conclude that the phrase and defence should be renamed to make the cases of the court easier to deal with, using up to date wording of defences.

d. **Problems regarding disposal orders:**

Some may see the prospect of being subjected to a hospital order as being the preferable option to a criminal institution, yet many would disagree and would refrain from using the defence because of this reason. Previously, the only disposal methods available to the court was hospital orders, and these could be for indefinite periods of time. Although the problem is less of an issue now with the range of disposals on a special verdict, some still fear the possibility of an indefinite sentence to a hospital and would refuse to use the insanity defence. Accordingly, many defendants who may be able to plead the defence choose instead to plead guilty or to defend themselves on other grounds. Furthermore, current disposal methods are ill-suited for people with mental illnesses and learning difficulties.

e. **Issues with fitness to plead:**

The test for fitness to plead dates from the nineteenth century, which means that it does not correspond with modern developments in psychology and medicine. Therefore, there needs to be reform for the way that the legal test is conducted to better suit the current understanding of psychiatry and to ensure the medical professionals are using the correct legal test. In particular an issue with fitness to plead is that many of the courts do not mention it in their reports, with only one third of psychiatric courts making statements about fitness to plead where it was supported by the legal criteria. In these cases it could mean that those who are not fit to plead are not being properly tested and are still being made to stand trial.

f. **Insanity and Automatism**

Automatism is a defence that can be employed when a defendant has had a complete loss of voluntary control which is unforeseeable and not self-induced and does not result from a psychiatric disorder.

For example, if someone is stung by a swarm of bees while driving a car, they cannot be held accountable for their driving. Because the act is not a voluntary act it is not considered to be a crime, so it results in a not guilty verdict. There are some contradictions with the two defences. For example, if a defendant with diabetes has not taken enough sugar and then attacks someone they could currently use the insanity defence and be found 'not guilty by reason of insanity'. But if a defendant with diabetes took too much insulin and they attacked someone, this would be defended as automatism resulting in a complete acquittal.

g. Problems with a jury trial

There can be many issues within having a jury made up of the general public, especially to do with cases of automatism and insanity. The two main problems with this are:

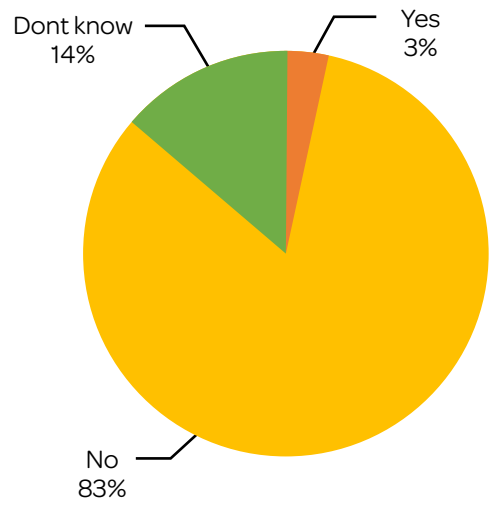
1. People serving on the jury may have very prejudiced and discriminatory views towards people who suffer with mental health issues and may be more likely to convict them.
2. They could lack understanding. This means they may not take into consideration these problems when considering if the defendant is guilty or not.

Due to this they could disregard the effects that this mental health problem impacts on the person's actions resorting to a verdict that is not fair for the defendant. Another main issue to do with lack of understanding is that people may not know the severity to which a person can be affected by such a type of a condition. Therefore, having a jury trial for mentally ill defendants will not be the most appropriate way of deciding their case.

h. Mentally ill defendants cannot properly defend themselves in court

The inability to present themselves in front of a court would lead to the defendant feeling marginalized. We have conducted a survey where we asked the public if they thought a person with a psychiatric condition would be able to defend himself/herself in court and 83% said no, therefore showing the general consensus is that no, mentally ill patients are not to be seen to be able to defend themselves properly in court.

Figure 1: Graph showing percentage of people who think that mentally ill patients can defend themselves in court



Solutions

a. Put the defence of insanity on a statutory footing, thus changing the name and requirements for the defence to be made out

The wording of the Act would change such as if the defence was successful the person would be 'not guilty by recognised medical condition' therefore the defendant is not being likened to any negative stigmas which may in turn cause a defendant to feel offended or be reluctant to use such defence. The term defines the defendant as simply having a recognised medical condition so it is an appropriate name as it is not too deterministic and quite generalised in the sense that it does not specifically attach any label to the defendant or their condition.

b. Have a special mental health tribunal decide mental health cases

We are proposing to have a specialist mental health panel to deal with crimes committed by people suffering from mental health problems. Three psychiatrists will conduct an assessment on the defendant to decide if they should be moved out of the criminal justice system into the jurisdiction of the specialist mental health panel. If the panel rules that the defendant suffers from a recognised medical condition such that they cannot be held responsible for the crime, that person would be taken out of the criminal justice system, would be found 'not guilty by reason of a recognised medical condition' and would receive the appropriate treatment for their condition. If the panel ruled the person did not suffer from a recognised medical condition, or that they did have a condition but it did not absolve them of responsibility for the crime, that defendant would be sent back to the criminal justice system and face a normal jury trial. This mental health panel will also consist of a judge who is experienced in cases regarding mental health. This judge could be from the magistrates court and could be trained to advise specially on mental health cases. Furthermore, they will cost less money than hiring judges from higher courts. The judge in this special panel will have disposal methods available if there is a verdict of not guilty by reason of insanity.

We propose that there should be an assessment to determine if the defendant was not guilty by reason of a recognised mental condition. What the assessment should be will have to be determined by psychologists, in order to conclude if the defendant has psychiatric conditions which would allow them to use an insanity or automatism defence. There should also be a list of registered conditions which will state if they are entitled to use an insanity. Also, it should state which psychiatric conditions should exclude someone completely from the court system. We advise to include a list of questions which the psychologists will ask the defendant in the assessment.

c. Have rehabilitation as a disposal method for the 'not guilty by reason of recognised medical illness' special verdict

Currently, if the defendant is found not guilty by reason of insanity in the Crown Court, the court must make one of the following orders: Hospital Order, Supervision Order or Absolute Discharge. The current cost of hospital treatment is around £160,000 per year while it is only £24,935 per year for the defendant to be held in prison, however there can be a third option.

Putting a defendant with mental health problems in prison may worsen their condition because the environment they are put in will cause them further stress and do nothing to alleviate their condition. They might even cause themselves or other inmates harm if their condition becomes more severe and is not treated properly.

The third option is to create a rehabilitation centre for people with psychiatric conditions. For example, if you are an alcoholic and you risk being dangerous to the people around you or yourself, you are sent to a rehabilitation centre to help cure your addiction. We are proposing treating people with psychiatric problems in specialist centres rather than sending them to prison.

In order to save money we could hold the rehabilitation centres in existing health clinics or hospitals. We propose using volunteers staff as there are many people who will be willing to volunteer for the experience. Mental health nurses might agree to volunteer in the centres, so treatment could cost less money than sending a person to prison or hospital. If a defendant with a psychiatric condition serves a lengthy prison sentence they may be more likely to reoffend. People with psychiatric conditions might not be able to understand what they did wrong, therefore costing more money in the long run. There are many costs to take into account when a crime is committed, not just the £24,935 per year for holding a prisoner but also the police and social costs. Each homicide is estimated to cost £144,239, wounding costs £1,775 and serious wounding costs £14,345. These are just some examples that reflect police costs from the economic and social costs of crime against individuals and households 2003/04 Home Office report.

Impact Assessment

Benefits:

The special panel would be beneficial as a mental health panel would resolve public concern regarding mental health, as the defendant's needs would be taken into account. It would also protect the defendant's right for a fair trial.

The introduction of a special panel could resolve the problem of the social stigma currently attached to the insanity defence..As the general public do not have much knowledge about mental health issues or psychiatric disorders, they often think of those suffering from mental health conditions as dangerous and stigmatise them. However, if we can capture the attention of the public, we can educate them to remove this stigma from society and make life less debilitating for those suffering with a psychiatric condition.

If a mental health panel was to be made for people with psychiatric conditions, it would mean that more defendants who are entitled to use this defence would be able to use it without fear that they may be locked up indefinitely, as with a hospital order. More people may use the defence if they know they will be judged by a mental health panel sensitive to these issues.

Cost:

A disadvantage can be that to create a special panel, the government will have to spend quite a bit of money on the special panel to set it up and hire the necessary magistrates and judges to staff the panel. As the economy is currently in the recovery stage, it would not be wise to spend the money on something that would not benefit a majority of the public and it should be taken into account that these cases are rare.

However, psychiatrists can correctly identify if a person who has a psychiatric condition and this will reduce the amount of money spent on prisons, as those who have psychiatric conditions and go to prison are more likely to reoffend. They will then need to be admitted to a hospital, which should have been done in the first place. It will reduce the amount of people in prison which will again save government money and can be put to better use in hospitals to help these mental health patients recover.

These statistics are a direct reflection of the failure of public mental health systems to provide appropriate care and treatment to individuals with severe mental illnesses:

- More than 70% of the prison population has two or more mental health disorders. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998)
- Male prisoners are 14 times more likely to have two or more disorders than men in general, and female prisoners are 35 times more likely than women in general. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998)
- The suicide rate in prisons is almost 15 times higher than in the general population: in 2002 the rate was 143 per 100,000 compared to 9 per 100,000 in the general population. (The National Service Framework For Mental Health: Five Years On, Department of Health, 2004; Samaritans Information Resource Pack, 2004)

Furthermore having three expert judges will benefit the justice system as Article 6 of the European Convention of Human Rights states "everyone should be entitled to a fair trial".

Other Jurisdictions:

The UK's law on insanity is similarly implemented in other countries around the world. For instance, the penal code of France infers that 'there is no crime or offence when the accused was in a state of madness at the time of the act or in the event of his having been compelled by a force which he was not able to resist'. This is further reiterated in the Swiss law, which also states that 'any person suffering from a mental disease, idiocy or serious impairment of his mental faculties who at the time of committing the act is incapable of appreciating the unlawful nature of his act or acting in accordance with the appreciation may not be punished'.

Unlike the UK, some states in America have the rule that once psychiatrists deem the defendant "well enough" they will be moved to a prison to serve their sentences, which some would argue that this is in need of a reform more than in the UK itself. The guilty but mentally ill verdict is adopted in 7 states such as Alaska, Arizona and Utah. Furthermore, some states have completely abolished the insanity defence such as in Kansas although the majority of the states tend to adopt the Model Penal Code Test and the M'Naghten rule which are both relatively similar to the insanity defence in the UK.

Nevertheless, there is no reason that the UK cannot aim to be progressive and make a head start in reforming this area of law, and perhaps provide a good model for other jurisdictions to follow.

Conclusion

After studying the problems with the current law we suggest there are a number of reforms that could modernise this area of the law and bring it more in line with modern thinking on mental health.

Firstly we propose a simple changing of the wording of the defence, brought about through statute, from 'not guilty by reason of insanity' to 'not guilty by reason of a recognised medical condition'. We believe this would go a long way to removing the stigma associated with the defence.

Secondly we propose taking mentally ill defendants out of the criminal justice system, using a panel of experts to rule on whether they are suffering from a recognised psychiatric condition that prevents them being criminally responsible for their actions. That panel would then decide the appropriate course of treatment.

Thirdly we propose the use of rehabilitation in the community for some defendants who are found not guilty using the new defence. We believe treating people rather than sending them to prison would significantly reduce the reoffending rates and in the long run would save the government money.

Big Voice London is always looking to grow our support from organisations and individuals who share our passion for increasing youth access to the legal system. For more information or to view our other publications, please visit our website at **http://bigvoicelondon.co.uk.**