The BMA welcomes and supports the suggestion that the Law Commission undertakes a review of the law on surrogacy.

The main issue of concern to the BMA is that many intended parents do not acquire parental responsibility and this can make it more difficult for doctors to obtain consent for medical treatment.

From our perspective, it is problematic that many intended parents who take over as parents of the child after birth never formalise their position and so are not the child’s legal parents and often do not have parental responsibility for the child. Even where the intended parents are aware of the legal situation and planning to apply for a parental order, the application cannot be made until at least six weeks after the birth and takes some time to be granted and so, in this interim period, it is often the case that nobody who is involved in caring for the child has parental responsibility.

In practice what happens, in term of medical treatment, is that doctors either:

- incorrectly assume that the ‘parents’ have parental responsibility; or
- rely on the fact that the intended parents have ‘care of the child’ and can therefore consent under section 2(5) of the Children Act (although there may be some limits to the scope of this power); or
- ask the surrogate mother to give consent (which can be very distressing for the intended parents particularly where these are serious medical decisions); or, where this is not possible,
- act without consent in the child’s best interests.

In reality ways are found around this situation to ensure that children receive the treatment they need but this is not ideal. In addition, although we recognise that the risk to doctors of treating children without consent in these circumstances is small, there may be some cases where this could raise serious legal issues for doctors.

In addition to consent, emotional bonding and attachment are very important issues for new parents and anything that could undermine these processes is problematic and is also a concern for doctors.

More broadly, there is frequently conflict between the requirement on the court to make the welfare of the child their paramount concern and the requirement to follow the law and this needs rectifying. As we have seen from the case law\(^1\), judges are struggling to find ways to get around the restrictions on applications for parental order in order to act in the best interests of the child. The court’s recent declaration of incompatibility with the Human Rights Act, in relation to single applicants, adds weight to the need for legal change.

We considered these issues recently and supported calls for the legal rules on parenthood to be amended to address these concerns. Recognising, however, than many of the restrictions are
underpinned by policy considerations, we do not believe it would be appropriate to address the parenthood provisions of the Act in isolation but this would best be achieved through a thorough and wide-ranging review of the law on surrogacy. This review should take account of the ethical principles, changes that have taken place since the Brazier report was published in 1998, the way that surrogacy has developed in the UK, including the increasing use of international surrogacy arrangements, and the latest research into the psychological wellbeing of all those involved with surrogacy.

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1 See, for example, Re X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam); Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC 3135 (Fam); Re A and B [2015] EWHC 2080 (Fam).